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Collective Representation and Bargaining for Self-Employed Workers: Final Report

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FINAL REPORT

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Contents

Executive Summary

The purpose of this Report is to identify and discuss feasible models for collective representation and bargain for self-employed contractors in the federal jurisdiction. In this context, self-employed contractors are those workers who would be classified as "independent contractors" under the *Canada Labour Code* (CLC) Part I and, therefore, excluded from CLC collective representation and bargaining provisions. Section I of the Report sets out this research problem and definition. The study employed fieldwork, in the form of interviews and focus group discussions, in each sector of interest to explore and assesses potential models for statutory collective representation and bargaining for self-employed workers in the sectors of interest.

The Part II literature review provides the background for developing the proposed models to be tested through the study fieldwork. It first outlines freedom of association obligations arising from the Canadian *Charter* and key international labour law instruments. It then provides a broad survey of approaches to statutory collective representation and bargaining. Key approaches or model are categorized along a continuum from collective representation to collective bargaining. Collective representation models include: workplace forum, sector committee, information and consultation workplace committee, and protected concerted activity; collective bargaining models include: expanding scope of the CLC, minority unionism, and occupation- or sector- specific collective bargaining statute. In addition, hybrid models, incorporating elements of both collective representation and bargaining are included: wages councils and the "Bernier" model (providing a "gradated" approach starting with individual representation rights, moving to collective representation and finally collective bargaining).

The literature review then briefly addresses research on the capacity and activities of non-union organizations such as workers' centres and professional organizations. It next reviews key theories regarding the propensity of a given group of workers to organizing, and existing studies' findings regarding workers' needs relevant to organizing for workers engaged in high-level contract row, high skill / technology workers, road transportation and arts and media. It concludes by briefly addressing selected ancillary legislation that facilitates collective worker representation and bargaining: amendments to competition and tax law and providing individual level support for self-employed workers' contracts.

The methodology employed for the interviews and focus group discussions is set out in Part III. A total of 31 participants drawn from the four sectors of interest engaged in confidential, semi-structured interviews, follow-up interviews and/or focus group discussions. Due to the ongoing COVID-19 pandemic, fieldwork was conducted by Zoom and some focus group discussions were substituted with follow-up interviews. Initial interview data was utilized to develop an overview of characteristics of each sector relevant to collective representation and bargaining (the results of this are set out in Part IV of the Report) and contributed to developing potential models that were posed to participants in follow-up interviews and focus group discussion. These latter parts of the fieldwork were used to test and refine the proposed models.

Limitations of the study include that fieldwork involved only worker representatives, not employers or self-employed workers themselves; that few non-union organization representatives participated; and, that participants were often uncertain about the meaning of "self-employed" or "independent contractor" and about whether particular work was within federal jurisdiction. Therefore, it is not certain that participants' responses always related to the

situation of self-employed workers in the federal jurisdiction. In addition, the nature of interview and focus group discussion data is that it can reflect individual views and, therefore, may not be fully representative of the organizations or sector.

Part IV provides an overview of each sector of interest with respect to organization of work and of workers. Key features of organization of work by self-employed workers relevant to collective representation and bargaining are identified, including their work location, whether the work and workers are remote, mobile or transitory, and whether these workers are located in contracting out work arrangements. Also considered is the existence an nature of any intersection between self-employed workers and existing certifications or voluntary recognized units and collective agreements, and whether these workers enter into individual contracts even when they are subject to collective agreements in some manner. Finally, key needs of these workers are canvassed.

With respect to organization of workers, this Part examines the degree of unionization or other organization of the sector in general, and of self-employed workers in the sector in particular. Second, it applies two theories of organizing propensity addressed in the literature review, Larry Haiven's "Union Zones" analysis and John Kelly's "Mobilization" theory, to assess the prospects, theoretically, of self-employed workers in the sector organizing. This section also considers the existence and nature of non-union organizations dealing with self-employed workers found to be operating in the sector.

The conclusion to this Part highlights several cross-sector considerations relevant to organizing which came to light during interviews. These include: confusion about application of federal jurisdiction to labour relations and strategic labour relations use of this by actors, the perceived prevalence of misclassification of employees or dependent contractors as independent contractor and factors promoting this phenomenon. Additional considerations are conflict of interest among workers as an impediment to self-employed worker organizing, and, the particular vulnerability of recent immigrants and foreign workers and the implications this has for organizing. Finally, this conclusion briefly observes that non-union organizations do not appear to have significant capacity to engage in collective representation or bargaining on behalf of self-employed workers, and that this reflects some of the weaknesses of workers' centres identified in the literature review.

Part V provides an outline of six potential statutory approaches to facilitate collective representation and bargaining for self-employed workers in the sectors of interest, ranging from collective bargaining, to hybrid, to collective representation. The suitability, benefits, limitations and feasibility of each model is assessed for each sector. These models include:

(1) **CLC Extension Model:** Expanding the scope of application the CLC Part I to include self-employed workers.

(2) **Sectoral Bargaining Model:** Establishing a sectoral bargaining system open to the "most representative" association to bargain a sector-wide minimum standards agreement and operating in parallel with the CLC.

(3) **Bernier model:** Providing a "hybrid" approach, referred to as the Bernier model, under which a worker association may seek certification for one of three forms of workplace representation or bargaining and may, over time, seek to advance along this "gradation".

The three forms are: right to engage in individual representation with respect to individual workplace matters; workplace consultation and information rights; collective bargaining.

(4) **Sectoral Standard-Setting Model:** Establishing as sectoral standard-setting mechanism under which self-employed worker and employer representatives would engage in a minimum standard setting negotiation exercise (as distinct from bargaining) with government representative participation. Agreed standards accepted by government would be incorporated into enforceable regulations.

(5) **Worker Forum Model:** providing for individual workplace-level or sector-level collective representation in the form of voice.

(6) **Protection for Collective Activity Model:** Introducing protection for collective activity through expanding CLC unfair labour practice protection and relevant remedies to apply to self-employed workers and to cover both organizing and non-organizing activity provided it is collective and related to workplace concerns.

(See Tables 3, 4, 5, 6 for summaries)

These potential models are based on the literature review and information and feedback obtained through the fieldwork component of the study.

This Report concludes, in Part VI, with summary recommendations for each sector of interest, based on the analysis set out in Parts IV and V. These recommendations are summarized below.

RECOMMENDATION 1

Extend the scope of application of Part I of the CLC to include SEWs either generally, or for specific sectors. Extension of Part I of the CLC is recommended for the road transportation, broadcast media (at least for SEWs engaged by major broadcasters), and telecommunications sectors. It is not recommended as an effective model to adopt for the technology sector.

Ancillary amendments to Part I of the CLC necessary for this extension model to be effective. First, increasing statutory flexibility to vary or consolidate bargaining units, amending employer, common employer or related employer provisions to designate lead entities as employers or lead and intermediate entities as common employers. Second, amending successorship provisions to include contracting out. These amendments may either be of general application or targeted to sectors particularly affected by contracting out and subcontracting such as the telecommunications and technology sectors. Third, amendments to the certification process to provide unions engaged in organizing with contact information for SEWs and expanding access to electronic certification cards and votes.

RECOMMENDATION 2

A non-majority, exclusive representation, sectoral collective bargaining system, supported by ULP protections, grievance procedure, first contract arbitration and pressure tactics (strikes and lockouts), with sector-wide certification based on the "most representative" standard for an association or union. Certification is valid for a limited number of years, is presumed to renew, with only other unions or associations entitled to challenge renewal. This model is recommended to be adopted for the broadcast media and telecommunications

RECOMMENDATION 3

The Bernier model, provides hybrid, sector-based certification based on majority support for the purposes of one or more of: collective representation (representation for individuals before agencies or tribunal and providing services), consensus-building (joint committees or specified matters which have a duty to participate), or collective bargaining. Certified associations may seek recognition for different purposes over time. This model is recommended to be adopted for the road transportation and technology sectors.

RECOMMENDATION 4

Adopt a sectoral standard-setting system utilizing tripartite representation for SEWs, employers and government, to engage in a hybrid form of collective representation and bargaining to recommend sector-wide minimum standards of work for incorporation into regulations by government. Where insufficient leadership capacity exists among SEWs in a sector, consider including unions active in the sector among SEW representatives. This model is recommended for the road transportation, technology, and telecommunications sectors.

RECOMMENDATION 5

Sector-specific introduction of sectoral worker forums is recommended. Introduction of a worker forum at the sectoral level, to address voluntary sector-wide initiatives and standards, and to discuss and make recommendations to government for incorporation into regulations for sectoral minimum standards is recommended for the road transportation sector and for the technology sector. The technology sector may require assistance with building capacity for forum participation. Worker forums would operate in parallel with, or supplement, any other collective representation or bargaining system

available to these workers. Workplace-level worker forums are not recommended, nor is general introduction of sectoral worker forums.

RECOMMENDATION 6

Protection for collective activity relating to workplace issues engaged in by SEWs is recommended to be incorporated into the CLC. Administered by the Canada Industrial Relations Board, this provision would provide ULP protection and remedies to SEW and would be available to SEW whether or not SEWs were engaged in union organizing.

RECOMMENDATION 7

Institute programmes designed to develop capacity among alternative workers' organizations to engage in collective worker representation.

RECOMMENDATION 8

Prioritize reducing misclassification of workers as non-employees through education and enforcement.

RECOMMENDATION 9

Consider strategies, including education and monitoring to ensure adequate protection of particularly vulnerable worker populations such as recent immigrant SEWs.

RECOMMENDATION 10

Consider whether it is feasible for governments to enter into agreements to assign authority over labour relations to the federal or provincial governments in certain sectors or subsectors, such as road transportation and telecommunications, where division of authority between federal and provincial governments is a significant barrier to collective worker organization.

RECOMMENDATION 11

Consider whether there exists an identifiable sub-group of SEWs who are appropriately excluded from collective representation or bargaining legislation.

RECOMMENDATION 12

Amend the *Competition Act* to explicitly exclude collective activity that would arise from any of the proposed collective bargaining or hybrid model, should one or more of these models be adopted.

RECOMMENDATION 13

Consider adoption of model contracts for SEWs and enforcement of payment due under individual contracts for SEW, similar to the *Freelance isn't Free Act* adopted in New York.

I. INTRODUCTION AND OVERVIEW

The purpose of this report is to identify and discuss feasible models for collective representation or collective bargaining for self-employed contractors in the federal jurisdiction. The road transportation, broadcast media, technology and telecommunications sectors have been identified as of particular interest to this enquiry.

This report uses the term "worker" as a general term, without regard to legal employment classification or status. In this report, the term "self-employed worker" (SEW) is used to refer to those workers who would be classified as "independent contractors" under Part I of the *Canada Labour Code* (CLC). These workers are, therefore, excluded from that statutory collective bargaining system.

Consequently, this report engages with the basic question of what options exist for extending the opportunity for collective representation or bargaining to SEW in these four federal sectors. This research question is addressed through a review of the literature addressing collective representation and bargaining models for SEW, from which preliminary options were developed, in conjunction with information about organization of work and workers in each sector obtained through interviews. The preliminary options were then presented to participants from each sector of interest through interviews and focus group discussions. Utilizing this feedback, six options for collective representation or bargaining models for SEW were developed.

This report includes a literature review, an outline of methodology for the fieldwork, a summary of the results of fieldwork, an outline of the six options for collective representation or bargaining models, and an analysis of each option with respect to each sector of interest. It concludes with summary recommendations based on this analysis.

It became evident in the course of this research that considerable uncertainly exists among workers, unions, employers, and others over the legal classification of workers, including that of independent contractor. A variety of terms are used by these individuals and representatives of these organizations, such as "contractor," "self-employed," and "freelance," which may refer to workers legally classified as independent or dependent contractors or employees, under the CLC. In the parts of this report that relate information obtained through fieldwork, these terms may appear, reflecting the terminology used by the research participants.

II. LITERATURE REVIEW

This literature review canvasses academic and policy literature relevant to options for SEW to access and exercise collective representation and bargaining, with particular focus on the road transport, broadcast media, technology, and telecommunications sectors.

Collective representation options for non-standard workers, including SEW, exist along a continuum from models that involve no collective bargaining at one extreme, to those including full collective bargaining at the other. In the middle are models incorporating a form of collective bargaining, which in this review are termed "sectoral standard-setting" models. This literature review addresses alternatives according to this continuum, with separate treatment of non-union organizations and associations, ancillary legislative changes that may foster collective representation and bargaining for the groups of interest, and a "hybrid" or "gradated" model incorporating both non-bargaining and bargaining.

A. Freedom of Association in International Law and the *Charter of Rights and Freedoms*

Important contextual considerations in addressing the question of collective representation and bargaining for self-employed workers include international standards protecting freedom of association established by the United Nations (UN), its specialized labour agency, the

International Labour Organization (ILO), and the Canadian *Charter of Rights and Freedoms'* section 2(d) guarantee of the freedom of association.

1. International Law Obligations

The primary sources of Canada's international labour law obligations are found in the ILO's constitutions, instruments, and jurisprudence and the UN's human rights covenants.[1] The ILO's *1998 Declaration on Fundamental Principles and Rights at Work* (1998 Declaration) identifies four fundamental rights and freedoms, including "freedom of association and the effective recognition of the right to collective bargaining," and eight core Conventions supporting the four fundamental rights.[2] These include the Freedom of Association and Protection of the Right to Organise Convention (Convention No. 87), which Canada ratified in 1972, and the Right to Organise and Collective Bargaining Convention (Convention No. 98), ratified by Canada in June 2017. The 1998 Declaration was signed by all member states – including Canada – which are obligated to respect, promote, and realize these principles in good faith.

The 1998 Declaration and its eight core Conventions are meant to apply to all workers, and are not restricted to those in employment relationships. This intention has been consistently adopted by the ILO's supervisory bodies, in their application of Convention No. 87, which provides that "the right to organise should be guaranteed without distinction or discrimination of any kind" (Creighton and McCrystal 2015, 722-723, citing ILO General Survey 2012 para. 63).[3] Moreover, no special restrictions on the right to strike apply to the self-employed, and self-

[1] *International Covenant on Civil and Political Rights*, 999 UNTS 171; *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, ratified by Canada in 1976.
[2] International Labour Organization, *1998 Declaration on Fundamental Principles and Rights at Work*, 86th Session (ILO: Geneva, 1998), reaffirmed in ILO, *Declaration on Social Justice for a Fair Globalization,* 97th Session (ILO: Geneva, 2008) and ILO, *Centenary Declaration for the Future of Work,* 108th Session, (ILO: Geneva, 2019).
[3] Police and armed forces are explicitly excluded from both Conventions Nos. 87 and 98, and public servants engaged in administration of the state are excluded from Convention No. 98.

employed workers are also entitled to protection from acts of anti-union discrimination (Vacotto 2013, 128-129).

The Convention No. 98 obligation for governments to promote collective bargaining for all workers and employers, subject only to express exclusions, also applies to self-employed workers. ILO supervisory bodies have relied on this instrument to request that a government develop collective bargaining mechanisms tailored to the particular characteristics of self-employed workers (Vacotto 2013, 129). With respect to which forms of collective bargaining system will satisfy international obligations, Roy J. Adams contends that, while ILO standards permit Wagner-model certification systems, where there exists no certified representative for workers, these standards also require that the employer receive and respond to representations made by unions representing a minority of workers (Adams 2003, 132-133).

Apart from obligations arising from international instruments, Valerio De Stefano argues that, on a conceptual level, if the right to collective bargaining and strike are recognized as human rights, then it is not rational for access to this human right to be contingent on the individual's employment status (De Stefano 2015, 23).

2. *Charter of Rights and Freedoms*

It has become clear that these international labour standards are important sources for interpreting and applying freedoms guaranteed by the *Charter.* The Supreme Court of Canada (SCC) stated in its 2007 *BC Health Services* decision that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."[4] This and subsequent SCC decisions have relied on freedom of association standards established by the ILO Conventions and the UN's human rights

[4] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia,* 2007 SCC 27 (*BC Health Services*) at para. 70.

covenants to interpret and apply the *Charter* freedom of association, and to conclude that this freedom protects the process of meaningful collective bargaining, including protection of the right to strike as a part of that process.[5]

Therefore, recognition by international law that self-employed workers are entitled to fundamental freedom of association and collective bargaining rights enjoyed by employees brings into question whether exclusion of self-employed workers from statutory collective bargaining systems is contrary to the *Charter*.

Also potentially important to this question are recent, significant shifts in the SCC's approach to labour law and the *Charter*. As Michael Lynk points out, the SCC has departed from its earlier, restrictive approach to workplace associational rights and the *Charter*, and no longer regards legislative policy choices about employee exclusions from collective bargaining legislation to be beyond constitutional scrutiny. Consequently, policy choices underpinning statutory exclusions require review to ensure that they satisfy the new *Charter* norms and can withstand the "searching" inquiry that courts will undertake (Lynk 2015, 12-13, referencing the *Mounted Police Association of Ontario v. Canada (AG)* decision). Although this conclusion relates to occupational exclusions, it may be asked whether exclusion from collective bargaining legislation based on employment status would be subject to the same careful inquiry, particularly in light of self-employed workers falling within the scope of core international law freedom of association protections.

The broader application of the *Charter* to the workplace and its adherence to international labour law principles also gives rise to the question of whether the present lack of recognition for minority union representation by Canadian labour law will be found to be *Charter*-adequate.

[5] *Mounted Police Association of Ontario v Canada (AG)*, 2015 SCC 1; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4.

Adams, for instance, is strongly of the view that as minority unionism is required by international law, the *Charter* freedom of association, therefore, also requires recognition of minority unionism (Adams 2015, 368-370).

In sum, the related, contextual considerations of international labour law and the expanded understanding of protection of freedom of association guaranteed by the Canadian *Charter* suggest that exclusion of self-employed workers from statutory collective bargaining, and alternatives to the traditional Wagner model bargaining system must be reconsidered.

B. Approaches to Collective Representation and Bargaining

1. Systems of General Application

a. Expanded Definition of "Employee"

One approach to revisiting categories of workers who fall within the scope of collective bargaining legislation is to expand the definition of "employee" to bring excluded categories of workers within the scope of the legislation. Judy Fudge, Eric Tucker and Leah Vosko (2003) have suggested expanding the definition of "employee" in collective bargaining and other workplace legislation to eliminate the distinction between employees and independent contractors, such that statutory protection applies to all workers who depend on the sale of their capacity to work, unless compelling public policy reasons exist for applying a more exclusive definition. Similarly, other commentators recommend replacing the definition of "employee" in collective bargaining legislation with the broadly defined term "worker," which would encompass a person who works for another in exchange for compensation, whether or not the person is salaried under an employment contract, where the person is required to personally perform the work such that he or she becomes economically dependent on the other person (Bernier, Vallée, and Jobin 2003; Vallée 2005).

Others are sceptical of such inclusive approaches. Lynk (2015, 63-64), in the context of addressing exclusion of independent contractors from the Ontario *Labour Relations Act*, contends that this approach would be unlikely to have meaningful effect because it does not take into account the particular characteristics of independent contractors' work and the mismatch between this and key elements of the general collective bargaining statutory scheme, including features such as majority support requirements for certification, the strike mechanism, and difficulties of achieving a first contract. Similarly, Elizabeth MacPherson (1999, 385) rejects this approach on the basis that it assumes that the general collective bargaining system is suitable for non-standard workers. She identifies the assumption of an ongoing employer-employee relationship and the assumption that a worker will be economically dependent on a single engager/employer, as particular points of disconnect.

However, the inherently bespoke nature of collective bargaining may address some of these concerns. In the context of considering whether to include a category of "autonomous workers" (essentially, dependent contractors) in Part III of the CLC, Harry Arthurs rejected the notion of deeming all autonomous workers to be employees and thus giving them full access to statutory minimum standards and distinguished the situation from that of full inclusion of dependent contractors in Part I of the CLC, on the grounds that it may be "impractical" for them to have full minimum standards coverage. In coming to this conclusion, Arthurs distinguished between collective bargaining and minimum standards legislation, recognizing that under the former "the parties enjoy almost complete discretion to bargain over the norms that will govern their relationship," while under the latter, the norms are statutorily determined, with little opportunity for adjustment (Arthurs 2006, 65).

If Arthurs' distinction between the nature of collective bargaining and minimum standards is accepted, then it may only be specific, technical features of collective bargaining statutes that are a poor fit for non-standard employees and that could be adjusted, rather than the system of collective bargaining itself.

b. Quebec Decrees System

The Quebec decrees system is governed by *An Act Respecting Collective Agreement Decrees* (ACAD).[6] ACAD underwent significant amendments in 1996,[7] removing key elements of the decrees system, such that it is the pre-1996 version of ACAD that is relevant to consider as a possible template for new collective bargaining systems utilizing an extension mechanism (Slinn 2015, 61) and which is addressed here. ACAD may be a suitable model for small workplaces employing non-standard workers (O'Grady 1992, 165-166).

ACAD provides a "juridical extension" mechanism by which certain collective agreement provisions cover workers and employers throughout a defined sector, whether or not the workers were unionized and whether or not they were parties to the collective agreement. Introduced in 1934, ACAD pre-existed Quebec's 1944 *Labour Code,*[8] and initially the two systems existed in parallel. The purpose of ACAD was to protect decent working conditions for workers in particularly vulnerable sectors through eliminating unfair competition, and foster unions and collective bargaining (Bergeron and Veilleux 1996, 136-137). At its zenith in 1959, 120 decrees covered an array of industrial sectors, including 33,000 employers and 250,000 workers (Slinn 2015, 62, citing Quebec n.d.a); however, as of March 2021, only 15 decrees were in force, largely in automotive and building services (Quebec n.d.b.).

[6] Note: this section draws substantially from Slinn (2015, 61-69). Quebec, *An Act Respecting Collective Agreement Decrees*, CQLR c D-2.
[7] Detailed at Slinn (2015, 64).
[8] Quebec, *Collective Labour Agreements Extension Act*, S.Q. 1934, c. 56; Quebec, *Labour Relations Act*, S.Q. 1944, c. 30, now Quebec, *Labour Code*, CQLR c C-27.

Extension under the decrees system was based on a collective agreement negotiated by one or more employee and employer associations. It was not necessary that the employee association be certified, nor was there a requirement for it to demonstrate majority support, and it was not restricted to "employees." That is, the collective agreement forming the basis for an extension could have arisen from non-union collective bargaining, outside of the provincial *Labour Code*, and was not limited to employees. Collective agreements negotiated by professional syndicates, for example, established under the *Professional Syndicates Act*, were eligible to be base agreements. Furthermore, "conditional" collective agreement, which would only take effect if a decree was granted, was also eligible to be a base agreement (Eaton 1994, 324).

Any party to a collective agreement could apply to the Minister of Labour for a "decree," which would have the effect of extending certain terms to workers at all enterprises in an approved industrial sector. This reflects the decrees system's focus on regulating a type of work instead of regulating workers. Key extendable terms included wages, hours of work, working days, vacation, and social benefits.

The Minister had discretion to issue a decree where he or she concluded that the agreement provisions had achieved 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." The geographic area of the sector was dependent on whether the industry competed in a local, regional, national, or international market. In the latter two cases, the sector would then be province-wide (Jalette, Charest, and Vallée 2002, 35). In effect, the "preponderant significance" requirement functioned as a

threshold test for sectoral representation. Where issued, a decree had a specified term, which the Minister could extend, repeal, or amend.

Where a decree is issued, a "parity committee" made up of employer and worker representatives is formed, funded through employer levies, and charged with administering and enforcing the decree. ACAD did not address how renewal agreements under decrees are to be bargained, although parity committees operate as the natural forum for subsequent negotiations (Bernier 1993, 750). An important feature of the decrees system is that, spanning individual workplaces across a sector and regulated by parity committees, it allows benefits and entitlements (such as seniority and vacation entitlements) to also span workplaces. Martine D'Amours and Frédéric Hanin (2018, 446-447) note that, while few decrees provide for this, it is possible to establish compulsory pension plans across a sector, which would provide the best rates, but would be virtually impossible to implement otherwise across a decentralized bargaining structure.

Jean Bernier (2005, 48-49) suggests that – in order to meet the needs of workers who have intermittent employment, or lack continuous connection with a single employer, or who hold multiple jobs – it is necessary to look outside of the enterprise for workplace regulation, such as is provided by an extension system. In his view, the crucial elements of an extension system are that it pursues two objectives: allowing workers to benefit from the same terms and conditions in any enterprise in a sector, and thereby removing competition on the basis of working conditions and benefits.

D'Amours and Hanin (2018, 446) regard one of the key innovations of ACAD to be how it treats subcontracting: establishing joint and several liability of the prime and subcontractor, which has become an important means of reducing outsourcing.

Finally, an often-overlooked aspect of ACAD is that it does not require parties to seek an extension decree. Where the agreement is not extended, or where an extension request is denied, the parties continue to have access to statutory collective bargaining without the requirement of majority support or certification, a parity committee, and an employee claims system is still available (Slinn 2015, 64).

c. Minority Unionism

While commentators may define the term differently, the essence of "minority unionism" is that a "union" (which can include a non-union association) hold some form of representation or bargaining rights as a result of having agreement (typically, through membership) of less than a majority of workers. Therefore, it departs from the Wagner model in not involving certification and not requiring majority support. The most commonly discussed form of minority unionism is "members-only" unionism, under which the union may only bargain on behalf of its members, and, therefore, it also departs from the Wagner model's principle of exclusivity. Other forms of minority unionism produce bargaining rights for all workers in the unit and, therefore, reflect exclusivity. Such bargaining can be mandatory or voluntary.

Several scholars advocate for forms of minority unionism to be adopted into or alongside the Wagner model (see e.g. Adams 2015; Braley-Rattai 2013; Harcourt and Lam 2012; Harcourt, Lam, and Wood 2014). However, critics caution against potential destabilizing and undesirable effects from minority unionism. Legislative and policy concerns include that minority unionism may hamper a union from achieving majority support, and that it could produce labour relations instability if employees were able to switch frequently between collective and individual representation (Fisk and Tashlitsky 2011, 13, 17).

Potential negative effects for employees and unions include disincentivizing unions from seeking majority representation, preventing effective strikes, redirecting union resources to defending against other unions, and the potential for minority unionism to exacerbate existing conflicts among workers (Fisk and Tashlitsky 2011, 13, 18). In addition to introducing "free-rider" problems, it could also open member-employees to employer and peer retaliation or intimidation for seeking to exercise their rights, by making them very visible (Fisk and Tashlitsky 2011, 14; Godard 2003, 461). Moreover, it could encourage right-to-work legislation by emphasizing voice in favour of disassociation (Walchuk 2016, 6, 7). Supporting "permanent minorities" may be one way for employers to "cut their losses" in the face of unionizing, and employers may be able to take advantage of inter-union competition and influence employee choice through encouraging conflict between minority representatives and engage in strategic framing of employees' union options (Fisk and Tashlitsky 2011, 13, 17; Walchuk 2016, 7). However, minority unionism could make it difficult or impossible for employers to impose uniform personnel rules across employees in a category, and may produce different bargained outcomes on similar issues for different groups of workers in the same category (Fisk and Tashlitsky 2011, 15). Notably, critics address only non-exclusive and thus non-mandatory minority bargaining, not minority bargaining under which the union has exclusive bargaining rights.

Adams (2015) offers the most detailed proposal, addressing some critics' concerns and reflecting ILO and *Charter* freedom of association standards. Moreover, Adams' proposal could operate in conjunction with the existing exclusive majoritarian certification system. Minority union certification would be granted for an appropriate bargaining unit to either a single union or a coalition of unions meeting a specified standard of demonstrated support. These would have to

be independent and not employer sponsored or dominated. Adams suggests that an appropriate standard might be a combination of 30% support and a minimum number of members. Certification would be recognition of that union or coalition as the primary bargaining agent for that union, and would bring with it the usual rights and obligations of exclusive bargaining agents, save for exclusive representation rights. Such minority unions could represent their members, including pursuing grievances and strikes, although limitations on these rights arising from both the labour legislation and those negotiated into the collective agreement would apply. The legislation would also need to provide for a decertification process and for displacement of a minority union where another union achieved greater support. Adams contends that a key advantage of this proposal is that it would entail minimal amendments to the existing legislation and procedures, and that requiring minority unions to operate within statutory and collective agreement limits would minimize labour relations disruptions, would not result in the "chaos" of a multiplicity of small unions and units, and would minimize competition from non-independent, employer-sponsored unions (Adams 2015, 394-395).

d. Protected Concerted Activity

The *National Labor Relations Act* (NLRA),[9] the general federal collective bargaining statute in the United States, provides for what is referred to as "protected concerted activity" by way of section 7:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

[9] United States, *National Labor Relations Act,* 29 U.S.C. §§ 151-169.

The effect of this protected concerted activity provision is that, where an employer retaliates against employees for engaging in protected activity through, for instance, termination, suspension, or other penalty, employees can seek recourse under the NLRA (Trotter 2015, 54). Recourse is through the NLRA's unfair labour practice (ULP) procedure and provisions and NLRA remedies are available.

This provision applies to employees whether or not they are unionized, and whether or not they are even contemplating or seeking unionization (Morris 1988, 1677; Rogers and Archer 2017, 144); moreover, the provision can include strike activity (Trotter 2015, 55-56). Although protected concerted activity typically involves more than one employee, individual employees can fall within its protection, such as when an individual is acting or speaking on behalf of co-workers (Trotter 2015, 55). To fall within this provision, the activity must be "concerted" (although employees need not be conscious that they are engaging in concerted activity) and must be for the purpose of mutual aid or protection or for one of the specific section 7 statutory objectives, such as self-organization (Morris 1988, 1701, 1704; Rogers and Archer 2017, 145).

However, important limits exist in how section 7 has been interpreted and applied, including exclusion of certain kinds of strikes, excessively vulgar or "disloyal" activity, and secondary boycotts and picketing (Rogers and Archer 2017, 153-154). Moreover, as the NLRA applies only to employees, self-employed workers cannot access this protection.

Despite its limitations – some due to other NLRA provisions or case law – protected concerted activity has the potential to be an important means of supporting workers seeking to improve terms and conditions of their employment.[10] As currently interpreted, section 7 of the NLRA permits, but does not require, members-only (or "minority union") representation, such

[10] Note that a recent expert report on federal minimum standards addresses protected concerted activity (Employment and Social Development Canada 2019b, Recommendation 25).

that employers are not required to negotiate with such unions (Fisk and Tashlitsky 2011), although Charles Morris (2005) contends that section 7 and the legislative history of the NLRA supports mandatory minority union bargaining.

Recognizing this, Brishen Rogers and Simon Archer (2017, 143) propose that Canadian labour legislation be amended to include protection akin to NLRA section 7 that would apply to all employees. They describe this as a "measured and incremental extension," which would not likely "disturb settled law beyond its intent," but which would strengthen employee voice, better effectuate the *Charter* guarantee of freedom of association, facilitate experimentation with non-union collective representation, "help to balance workplace power dynamics, and allow workers more flexibility in choosing how to advocate for themselves." At the same time, they recognize that the impact of such a change would be difficult to estimate and, in any case, would not solve the other shortcomings of the Wagner model (Rogers and Archer 2017, 143). However, the authors did not provide detailed wording of such a provision or suggestions as to how it would be operationalized. The question of how a concerted protection provision might be incorporated into a Canadian collective bargaining statute will involve considerations about what ancillary amendments would be necessary to statutory definitions and ULP provisions. In addition, the relatively restrictive Canadian approach to work stoppages might be difficult to reconcile with a wide scope of protection for concerted activity by non-unionized workers (Slinn 2021).

2. Occupation- or Sector-Specific Collective Bargaining Systems

a. Artist Collective Bargaining

There is a long history of informal, non-statutory collective representation and bargaining in some parts of the arts and media sector (Cohen 2016). However, in the late 1980s, Quebec enacted the *Act respecting the professional status and conditions of engagement of performing,*

recording and film artists (*Performers' Act*), and in the mid-1990s, the federal jurisdiction brought the *Status of the Artist Act* (SOA) into force.[11] Both statutes provided for sectoral collective bargaining systems for self-employed workers in parts of the arts and media sector. These schemes are based on general collective bargaining legislation, although with some key differences reflecting the particular characteristics and needs of the work and workers in the sector (D'Amours 2013, 4; D'Amours and Arseneault 2015, 15).

The defining characteristics of artists' collective bargaining legislation are shared by the SOA and *Performers' Act.* First, the regimes apply to self-employed, professional artists in specified fields. Recognition is granted to an artists' association on a sectoral basis and a single association will be granted representation for an appropriate sector, which generally has a geographic and field dimension.

Negotiation is subject to a good faith obligation and takes place between a certified artists' association and a producers' association to achieve a sectoral "scale" or "group" agreement, which sets minimum conditions. The agreement applies to all artists within the sector, although they may, individually, negotiate "above scale." Different views have emerged about this defining feature of artists' legislation in Canada. Vosko (2005) regards this feature of the SOA as helpful as it protects artists with less bargaining power while, at the same time, it doesn't deprive others of the opportunity to negotiate better terms if they have the bargaining power to be able to do so (Vosko 2005, 148). In contrast, D'Amours (2013, 5) says that this aspect of the *Performers' Act* may have led to improvements for artists who previously would have worked below the agreement minimum, but means that the majority cannot negotiate above the minimum in circumstances of tight production budgets.

[11] Quebec, *Act respecting the professional status and conditions of engagement of performing, recording and film artists*, L.R.Q., S-32.1; Canada, *Status of the Artist Act*, S.C. 1992, c. 33 (in force 1995).

Grievance procedures and compulsory dues check-off are available. “Pressure tactics” and “concerted action” are available to parties in disputes, and dispute resolution mechanisms exist. However, *Performers’ Act* associations seldom employ pressure tactics due to their precarious positions, leading to reduced bargaining power (L’Allier, Boutin, and Sasseville 2010, 29). Finally, both regimes provide protection from liability under competition law for acting in combination.

Three key differences between the two statutes are that the SOA certification procedure requires that the applicant demonstrate that it is the “most representative” artists’ association in that sector. In contrast, the *Performers’ Act* requires demonstration of majority support in the sector, although the tribunal that administers the *Act* has significant scope in how to determine this. As such, the SOA can be regarded as a form of exclusive, minority unionism. Negotiations under the *Performers’ Act* are voluntary, unlike the SOA mandatory bargaining. SOA certifications are valid for three years and may be renewed, while under the Quebec legislation certifications are valid until withdrawn or displaced. Both statutes provide first contract arbitration.

Both of the federal and Quebec acts have been criticized as applying to overly narrow fields of artists’ endeavours (Bernier 2006, 33), as having a lack of clarity in definition of “producer,” and as being difficult to identify the producer in the case of subcontracting (L’Allier, Boutin, and Sasseville 2010, 24-26) or where there are intermediaries, such as in broadcasting (Choko 2015, 45).

A key weakness of both regimes is that producers are not obligated to form associations, and few have chosen to do so. As a result, artists’ associations tend to have to negotiate with individual producers; this is time consuming and expensive for associations and it exacerbates

associations' limited resources (Department of Canadian Heritage 2002; L'Allier, Boutin, and Sasseville 2010, 32; MacPherson 1999, 370, 372-373; Vosko 2005, 153). Moreover, some artists' associations do not have sufficient resources to exercise their full statutory rights (MacPherson 1999, 372).

Criticisms of the SOA include concern that the legislation may conflict with other legislation in the areas of intellectual property, competition, and labour law, as well as whether copyright matters can be negotiated (MacPherson 1999, 373; Vosko 2005, 148). In addition, the SOA has been criticized insofar as its scope of application covers too narrow a range of artistic fields, with most artistic work occurring outside the federal jurisdiction. As well, not only may the requirement to demonstrate "professional" status be difficult to achieve but it may lead to two-tiers among artists (D'Amours and Deshaies 2012, 10; Vosko 2005, 148).

A survey study concluded that the SOA has not substantially improved the working conditions or socio-economic position of artists (Department of Canadian Heritage 2002). Survey respondents indicated that direct measures – such as income averaging, tax exemptions, and access to social benefit programs – were of greater importance to them than access to collective bargaining. The study concluded that artists regarded the SOA as not, by itself, sufficient to improve their socio-economic position. One factor that may have influenced these findings was that, at the time, a decade after the Act's introduction, few of the smaller associations had reached agreements (Department of Canadian Heritage 2002). The SOA at that time did not have a first contract arbitration provision, and this report's recommendation to include such a provision was later adopted (Slinn 2015, 77).

The *Performers' Act* is regarded as having undeniably benefited artists (D'Amours 2013, 5). One area of improvement it that it has permitted negotiation of a range of benefits, including

benefits jointly contributed to by artists and producers (Bernier 2006, 33). However, concerns exist over a lack of bridges between group plans, and that benefit schemes are not well calibrated to the situation of multi-role artists who may end up contributing to more than one plan but achieve minimum levels of entitlements under each as they don't make sufficient qualifying contributions to any one plan, and that work outside the sector is ineligible for plan contributions, thereby disadvantaging artists with extra-sectoral work (D'Amours and Deshaies 2012, 45; D'Amours 2013, 5). Further concerns are that group benefit plans that are established or managed by smaller associations will be more vulnerable to changes in costs (Vallée 2005, 36), and that it is neither fair nor practical to have plans with solely artist contributions in the absence of requiring minimum employer contributions (D'Amours and Deshaies 2012, 44).

Other criticisms of the *Performers' Act* include that it requires that agreements consider integration of emerging artists and the special economic conditions of small businesses. Artists' associations contend that this holds down negotiated rates, and suggest that a better approach would be to exempt emerging artists or small businesses from the agreement minimum (L'Allier, Boutin, and Sasseville 2010).

Further, exclusion of artists from minimum standards legislation, due to their self-employed status, means that they must rely on their bargaining power to negotiate all gains. However, bargaining power varies significantly among associations, such that group agreement minimum terms also vary significantly (D'Amours and Arseneault 2015, 15).[12]

A further burden on associations, at least in the Quebec regime, is requiring that an agreement be negotiated and administered for each production even where productions may be very short lived, operating for only days or weeks (L'Allier, Boutin, and Sasseville 2010, 29).

[12] Although L'Allier, Boutin, and Sasseville (2010, 20-24) indicate that there has been some ambiguity in application of minimum standards legislation and the *Performers' Act* over whether the latter does not, in fact, apply to employees. In some cases, artists have been subject to both statutes, which can cause difficulty.

Regarded as models for artists' collective bargaining in other countries (Gruber 2018), the federal SOA and Quebec's *Performers' Act* are also regarded as having potential application to other types of workers. D'Amours (2013, 1) notes that the creative economy has characteristics that are becoming widespread in the labour world, especially the multiplication of forms of employment that deviate from the norms of regular employment (full time for a single employer). Therefore, artists' statutes are a possible model for adapting unionism to the reality of atypical workers. The *Performers' Act* was the basis for the three-tiered Bernier model for collective representation and bargaining for self-employed workers, developed and recommended in the Bernier Report (Bernier, Vallée, and Jobin 2003)

MacPherson (1999) had been optimistic about the prospects for applying a modified SOA model to own-account, self-employed workers in sectors beyond arts and media. However, Macpherson (2015) has more recently expressed doubt that the SOA model could be successfully applied to groups of vulnerable workers. Distinctive characteristics of the arts and media sector are well aligned with the SOA, but they might not be suitable to other industries – those that lack the craft-based and strong sense of occupational identity existing among artists. These characteristics are key to the SOA; therefore, it may be difficult to successfully apply this model to other industries, especially those involving vulnerable workers where there is an absence of established worker associations, sectoral organization, or where there is no strong sense of worker occupational identity.

b. Transportation

A background study – involving a survey, interviews, and a focus group – undertaken as part of the 2006 Federal Labour Standards Commission review of Part III of the CLC, made several recommendations regarding CLC Part III enforcement, improved driver education and

information, and expansion of existing CLC Part III trucking-sector specific regulations to deal with compensation methods and carriers' regulatory obligations. Also recommended was to provide group buying services akin to those provided to US drivers by the Owner Operator and Independent Drivers Association, perhaps through the Owner Operators Business Association of Canada (Chow 2006; Chow and Weston 2008).

However, the study recommended against extending Part III of the CLC to presently excluded categories of drivers. In part, this was because certain types of drivers were already covered by provincial schemes and doing so would not address drivers' "root problems," and doing so would disrupt the relationship between carrier and owner-operator and would cause unspecified operational difficulties (Chow 2006, 16, 25; Chow and Weston 2008, 46).

i. Quebec: Road Transportation

In Quebec in the late 1990s, freight trucker disruption, arising from deregulation and fuel price increases, led to joint demands from industry participants for an industry forum. An expert committee recommendation amending the *Labour Code* to provide collective bargaining for some subsectors was not adopted for the freight trucking industry. However, in 2000 a General Trucking Industry Stakeholder Forum was established and was subsequently incorporated into the Quebec *Transport Act*[13] (Vallée 2005, 38).

The *Transport Act* Stakeholder Forum applies to self-employed drivers, specifically establishing a "'freight mover' status for long-term owners or lessees of a single tractor truck whose principal business activity consists in driving that tractor truck, whether the vehicle belongs to the individual, a partnership, or a corporation that he/she controls." A maximum of five groups may represent these "freight movers" at the Forum, provided that they include at least 10% of those appearing on the Quebec Transport Commission's list. The Forum is a

[13] Quebec, *Transport Act,* CQLR c T-12 as amended by the *Act to amend the Transport Act*, S.Q., 2000, c. 35.

consultative body (Vallée 2005, 36). A president, four work-provider representatives, and three trucker association representatives recognized by the Commission participate in the Forum (Lagacé and Robin-Brisebois 2004, 23).

By the mid-2000s, the Forum had achieved three outcomes: adoption of a standard contract for use between work providers and freight providers; establishment of a mediation and arbitration centre to resolve disputes arising from the standard contract; and creation of a costing information office that freight movers can use to estimate their costs for purposes of setting their rates. These initiatives are voluntary and were established by consensus at the Forum (Vallée 2005, 36). Freight mover groups have reported that the standard contract is rarely used (Lagacé and Robin-Brisebois 2004, 24). Under this regime, freight mover groups can also offer their members group or individual services, provide information, and engage in promotion (Vallée 2005, 36).

ii. Australia: Road Transportation

The innovative but short-lived federal Australian *Road Safety Remuneration Act* 2012 (*RSR Act*) regime (abolished in 2016) established a statutory collective bargaining regime covering drivers, employers, hirers, and supply chain participants in the road transport industry. The Act operated in parallel to the general collective bargaining regime (the *Fair Work Act* (FWA)), and was designed to promote safety and fairness in the road transport industry. The *RSR Act* also included a code of conduct for bargaining in order to foster effective and efficient collective bargaining (Rawling and Kaine 2012, 49). In Australia, the federal government has jurisdiction over most road transportation and labour and employment matters, although the federal labour and employment legislation, the FWA, applies only to employees within the meaning of the

legislation, and has been applied so as to exclude owner-operator and contract drivers (Thornthwaite and O'Neill 2016, 54).

In contrast with regulatory schemes separating laws addressing terms and conditions of work from those addressing occupational health and safety, the *RSR Act* sought to implement a different regulatory strategy: using the commercial dominance of business controllers in the road transport supply chain and "regulating the entire road transport supply chain could potentially achieve an integrated improvement in the overall work situation of road transport workers instead of separate outcomes in relation to pay and industrial conditions, on the one hand, and occupational health and safety, on the other hand" (Rawling and Kaine 2012, 5). This solution was strongly influenced by findings that "the commercial decisions of parties at or near the apex of the supply chain determine the parameters within which matters such as driver remuneration, pick-up and delivery schedules and working hours are determined. In turn, those matters, including low rates of pay and how pay is set, operate to force, encourage or permit road transport workers to engage in the hazardous work practices which lead to poor safety outcomes not only for drivers but for the road-travelling public" (Rawling and Kaine 2012, 3).

The *RSR Act* established a Tribunal that was an analogue to the FWA Commission (Thornthwaite and O'Neill 2016, 58) to make binding orders setting pay and conditions for road transport drivers, to approve collective agreements in the industry, and to address disputes. The Tribunal's key responsibilities included making road safety remuneration orders; approving road transport collective agreements; addressing certain disputes relating to drivers, employers, hirers, and supply chain participants; and conducting research into pay, working conditions, and related matters that might affect road safety (Thornthwaite and O'Neill 2016, 56). Tribunal orders were to have regard for, among other things, safety and fair treatment of road transport drivers, and the

order's likely effect on business viability (Rawling et al. 2017, 19). The Tribunal issued two orders, in 2012 and 2016, before it was abolished.

Strengths of this regime included its code of bargaining conduct, a mechanism for enforcing collective agreements, provision of a "safety net" of minimum terms against which agreements were negotiated, and potential for an active enforcement role for trade unions (Rawling and Kaine 2012, 49).

Unfortunately, the Tribunal had little opportunity to demonstrate its potential before being abolished. It was controversial and criticized by employer groups as being anti-competitive, increasing prices of transported goods, imposing unnecessary administrative burdens, and in regard to safety being overly focused on methods and quantum of remuneration (Thornthwaite and O'Neill 2016, 57). Notably, the government decision to abolish the Tribunal was strongly influenced by two commissioned reports by consulting firms, which found no evidence of connection between pay and safety and found that the Tribunal was damaging to the economy (Thornthwaite and O'Neill 2016, 57).

iii. Quebec: Taxi

In 2001, Quebec adopted the *Act respecting transportation services by taxi*, which applies to taxi drivers holding chauffeur licenses.[14] The legislation provides for recognition of professional associations of these drivers, and specifies that the purposes of the associations include collective and individual representation of drivers; promotion of drivers' interests by promoting taxi use; improving human resources practices and benefits; and providing information and training in the industry, including having a role in regulating ethics and discipline. Drivers participate regardless to their employment status and regardless of whether they own their vehicles. The legislation creates a stakeholder forum akin to that found in Quebec's trucking industry, which

[14] Quebec, *Act respecting transportation services by taxi,* S.Q., S-6.01.

associations participate in and which is for the purpose of promoting joint business action (Vallée 2005, 37).

This regime is characterized as essentially a professional association (Coiquaud 2007, 85), and the divergence of interests it includes and its prioritization of regulation of commercial activity over its secondary purpose of regulating owner-driver relationships are regarded as weaknesses, making it unlikely to result in improved conditions for drivers and an inadequate substitute for unionization (Coiquaud 2007, 85; Vallée 2005, 37, citing Bernier, Vallée, and Jobin 2003, 559). In response to perceived ineffectiveness of the association, a partnership of unions subsequently formed a non-statutory, non-union organization for professional drivers to offer members funding, legal services, group insurance, and discounts (Coiquaud 2007, 84-85; Vallée 2005, 37-38).[15]

iv. Seattle: Ride-Hail Collective Bargaining

At the municipal level, Seattle has employed administrative rule-making to introduce an ordinance passed by its City Council establishing a collective bargaining system for taxi, flat-rate vehicle and transportation network company drivers.[16] The legislation presumes that these workers are independent contractors. Where a "qualified driver representative," such as a union or non-profit organization, seeks recognition as an "exclusive driver representative," the "driver coordinator" (the employer company) must provide names and contact information for the relevant drivers in order for the representative to seek support among qualifying drivers. To become authorized, the representative must demonstrate majority support among the qualifying drivers by way of "card check." "Qualifying drivers" would be based on the contract

[15] The United Steelworkers joined with the Fédération des travailleurs et travailleuses du Québec to create Regroupement professionnel des chauffeurs de taxi métallos.

[16] Seattle, Wash., Ordinance 124968 ¶ I (December 23, 2015) (codified at SEATTLE, WASH., MUN. CODE §§ 6.310.110, 6.310.735 (2017)).

commencement date and the number of trips over a set period. This "exclusive driver representative" is then authorized to engage in collective bargaining for these drivers, with the parties being subject to good faith bargaining, over a number of mandatory subjects. Bargained agreements are subject to approval by the Department of Finance and Administrative Services. Where bargaining does not produce an agreement within 90 days, either party may apply for interest arbitration for a maximum two-year agreement. Unfair practice protections are provided. Remedies are by private right of action, in addition to monetary penalties of $10,000 a day for continuing violations. The scope of bargaining was significantly reduced, with payment removed from the list of bargaining subjects, when the ordinance was amended in 2019 as a result of anti-trust concerns (Brown 2020, 557; Seattle City Council Insight 2020).

Recently, the lengthy legal dispute over the legitimacy of the Seattle ordinance, largely based on anti-trust and pre-emption issues, was dismissed at the parties' request. Drivers will now be covered by a new "Fare Share" ordinance providing minimum wage, additional driver protections, and establishment of a Driver Resolution Center to provide advocacy for drivers and an arbitration procedure for driver deactivations (Seattle City Council Insight 2020). At the time of this writing, no organization has yet sought to become an exclusive driver representative. It appears that the focus of the Drivers Union (an association of Uber and Lyft drivers in Seattle, affiliated with Teamsters Local Union 117) is now focusing its efforts on the Fare Share system.

v. California: Independent Contractors of Hosting Platforms

In 2016, a short-lived California state bill sought to amend the state labour code to establish a form of minority union collective bargaining system for independent contractors of hosting platforms.[17] Notable features of the bill were that it did not require majority worker support, utilize civil enforcement, or require platforms to provide written explanations for termination or

[17] California, Assembly Bill 1727, 2015-2016 Reg. Sess.

adverse treatment. Independent contractors were able to negotiate with a platform, which would be required to bargain in good faith with any group of 10 or more workers. Anti-retaliation provisions could be enforced by way of court actions, and all civil remedies, including reinstatement and equitable remedies, such as injunctions, were available. Moreover, treble damages were available where wilful violation of certain provisions was found. Independent contractors could engage in "group activities," such as withholding work, boycotts, or criticisms of platforms. Finally, where an employer terminated or took adverse action against an independent contractor who had engaged in any activities protected by the bill, that employer was required to provide a detailed written statement of the reasons for the action, including all facts substantiating the reasons.

Although described as an improvement on US labour law for these workers (Sunshine 2016, 247-248), the bill was ultimately withdrawn and has not been reintroduced.

c. Home Child-Care and Family-Type Resources

Two statutory regimes established in Quebec – one for home child-care providers introduced in 2009 and a second for intermediate resources and family-type resource providers (IFTR) introduced in 2014 – merit mention as cautionary examples of alternative collective bargaining schemes for particular groups of workers. These statutes were imposed after lengthy legal disputes regarding employment status, which culminated in findings that the relevant workers were "employees."

Both statutes deem affected workers to be self-employed instead of employees, and the home child-care system established a sectoral-based bargaining system, while the IFTR legislation provides for representation units based on the public institution with which the workers are connected. These two regimes are largely based on the Quebec *Labour Code*, but are

notable for departures from that structure. First, both impose a restricted scope of bargainable matters. Second, bargaining is substantially hindered by the lack of access to statutory protections (for example, minimum employment standards, occupational health and safety legislation, and pay equity legislation), which results from the workers' deemed self-employed status. Moreover, child-care workers are explicitly excluded from the early childcare centre pension plan. Consequently, these workers must bargain for basic protections afforded to employees, which makes bargaining more difficult and shifts social risk to these workers (Bernstein 2012, 224-226; Rolland 2017, 121-122).

In addition, the IFTR scheme prohibits strikes and permits only pressure tactics that do not or are not likely to compromise the health of the user, effectively eliminating all pressure tactics; in the case of bargaining breakdown for IFTR workers, the parties can jointly request arbitration. This is subject to approval by the Ministry of Families and requires that the parties agree in advance on the limits of the arbitrator's decision (Rolland 2017, 125).

Several of these departures from the general bargaining scheme have been the subject of successful complaints to the ILO Committee on Freedom of Association, which centred on the deemed self-employment status, and an ongoing *Charter* challenge to provisions of the IFTR statute, limiting the scope of bargaining, strike prohibition, and the arbitration mechanism.[18]

These features of these regimes have been the subject of widespread criticism (see e.g. Bernstein 2012; Coiquaud 2007; D'Amours and Arseneault 2015; Rolland 2017; Vallée 2005). Anne-Julie Rolland (2017, 126) criticizes the schemes as having created a second class of workers. Stéphanie Bernstein (2012, 228) contends that the child-care statute has reinforced the

[18] International Labour Office, 340th Report of the Committee on Freedom of Association, Committee on Freedom of Association, GB.295/8/1, 295th Sess, Cases Nos 2314 and 2333 at 373; *CSN et al. v. Procurer General du Quebec (Justice),* Quebec Superior Court File no 200-17-021889-159 before the Superior Court of Quebec. Commenced in 2015. As at March 2021, this matter is proceeding to hearing.

existing gender segregation in this sector and raises the concern that this regime may increase the divide between child care and more privileged workers.

Nonetheless, these regimes are regarded as having led to some improved working conditions for these workers, including greater compensation, access to group insurance and retirement plans, and additional training following the creation of a joint training and professional development committee (Rolland 2017, 122).

3. Non-Bargaining and Sectoral Standard-Setting Systems

a. Wages Councils

Unacceptable wage and working conditions resulting from unfair labour price competition prompted adoption of statutory systems for tripartite sectoral minimum standard setting in the early 20th century. Three of these – the British Wages Council system, Ontario's 1934 *Industrial Standards Act* (ISA), and the 1938 federal United States' *Fair Labor Standards Act* (FLSA) – offer an example of the range of possible structures for such regimes.[19] At the same time, these three examples "all had roots in combatting sweated labour, characterized by fragmented and scattered workplaces and unacceptable remuneration and conditions of work, where – partly due to the characteristics of the work, workers and employers in these sectors – no voluntary collective negotiations could take root" (Slinn 2019, 1).

Sectoral standard-setting regimes can be understood as occupying a space or a "hybrid" between statutory wage regulation and voluntary collective bargaining (Howell 2005). Each of the above examples of such regimes had a broad scope of application, which included contractors, provided for a tripartite (worker, employer, government or "public" representation) to formulate recommendations for sector-wide minimum standards. They varied significantly in

[19] Great Britain, *Trade Boards Act* 1909, 8 Edw. 7-9 Edw. 7, c. 22, s. 3; Ontario, *Industrial Standards Act*, 1935, S.O. 117, c. 28; United States, *Fair Labor Standards Act*, 29 U.S.C.A. § 201-219 (1938). For a description of the ISA system, see Slinn (2015, Section 7.2).

the scope of matters covered and in the enforcement authority and mechanisms available to the boards or councils (Slinn 2019).

Notably, some of these regimes included transitional mechanisms intended to assist the parties to evolve their relationship to voluntary collective bargaining independent of the statutory standard-setting process, such as joint industrial councils under the British system and, to a lesser degree, the ISA "advisory committee" (Slinn 2019).

These three regimes reflect, to various degrees, different conceptions of fairness, including the idea of "bargaining fairness" to provide greater equality of bargaining power by establishing a public bargaining forum in the form of a wage board, and "competitive fairness" which seeks to limit labour cost competition to ensure fair competition in labour markets (Harris 2000, 22, 69).

Sectoral standard-setting mechanisms have gained recent attention as a potential policy response to lack of collective bargaining access for vulnerable workers and to poor working conditions. In particular, Kate Andrias (2016) has advocated for return to this system in the US, as embodied in the FLSA as it was originally enacted. More generally, it may be relevant to consider whether sectoral standard-setting systems are a means of providing access to freedom of association to workers, including the self-employed, who otherwise lack effective access to collective bargaining (Slinn 2019, 16).

b. Sector Committees

The Arthurs Report, relating to Part I of the CLC, and the Changing Workplaces Review (CWR) final report, on Ontario's *Labour Relations* and *Employment Standards Acts* (ESA), each recommended adoption of a form of employer-employee consultation relating to sector-specific minimum standard; however, neither has been adopted. The Arthurs Report recommended, as

part of a "sectoral model" approach to minimum standards, adopting "Sector Conferences" (Arthurs 2006, Recommendations 7.13 to 7.16).[20] Prior to introducing new regulations for employers in specific sectors or "classes of employees," the Minister of Labour would convene a conference of relevant interested parties with a Minister-appointed chair, who would ultimately make a non-binding report to the Minister. Arthurs (2006, 126) noted:

> At least some employer groups seem well disposed to the sectoral approach. For example, the Canadian Trucking Alliance proposed a special "Trucking Industry Part III." However, even though the sectoral approach has been used in Quebec for decades, was a crucial feature of Ontario's now-repealed *Industrial Standards Act* and has been proposed and implemented in the labour standards legislation of other jurisdictions, it would be fair to say that it is neither widely understood nor universally accepted. Unions, in particular, seem concerned that sectoral conferences would be dominated by employers, especially in sectors without a significant union presence.

The recommendation of the CWR was similar. Recognizing that private sector collective bargaining was less central to regulating conditions of work and, therefore, minimum standards legislation was increasingly important to ensure acceptable working conditions, the CWR special advisors recommended amending the ESA to establish sectoral committees and sub-committees regarding reviewing or introducing exemptions, and when sector-specific regulations are considered. Sectoral committees would provide a consultation process involving representatives of employers, employees, and government (Mitchell and Murray 2017, 148, Recommendation 76, Chapter 6.2). The sectoral committee process would be intended to be a non-binding, transparent process aimed at consensus and considering legitimate interests and concerns of participants and providing directly affected parties with a voice (Mitchell and Murray 2017, 148).

[20] The Arthurs Report identified and addressed four models of "regulated flexibility": the ministerial, sectoral, workplace, and consensual flexibility models. Of note is that the Canadian Trucking Alliance proposed to the Arthurs Commission that a separate division of the CLC Part III be specific to the trucking industry (Arthurs 2006, 126).

c. Works Councils

Works councils are enterprise-level bodies that are composed of elected non-managerial workers. Works councils systems provide rights for a degree of consultation information and participation regarding employers' decisions. In the United Kingdom, the relevant regulations for works councils uses the term "employee," and Ruth Dukes (2012, 83) suggests, therefore, that this likely excludes many kinds of atypical workers.

Common in Europe, and a long-standing part of some countries' systems, and the subject of EU Directives on informing and consulting with employees in all member states, leading to recent domestic implementing legislation in other European states, works councils have developed and operated in labour relations systems that are very different than predominates in North America. A recent study of the 2006 introduction of works councils in Poland, pursuant to a Directive, transforming the labour relations from a "single-channel" (union representation only) to a "dual-channel" (sometimes called "twin-track") model including works councils, found that this new form had difficulty taking root. It concluded that introducing this new workplace body would requires "profound changes" in laws, and the attitudes of unions and works council participants (Skorupińska 2018, 177).

While works councils play a limited collective role in and of themselves, Rafael Gomez (2016, 91, 96) argues that such information and consultation bodies could be adopted in Canada by amending occupational health and safety legislation to expand the role of occupational health and safety committees. These could play a role as a first step towards building collective representation and bargaining, and could be included as part of a hybrid form of staged collective representation and bargaining. However, and as Gomez acknowledges, others regard works councils as a poor fit for the Canadian collective bargaining system, particularly given its focus

on local level negotiations and the commensurate lack of multi-tier bargaining structures (Thompson 2015, 4).

4. The Hybrid or Gradated Approach: The Bernier Model

The concept of a hybrid workplace regulation scheme providing successive levels, stages, graduations or gradations (as it has variously been labelled) of collective voice, representation and bargaining at the enterprise or sectoral level, is a long-standing one (Slinn 2019, 15). It is also notable that some forms of the Anglo-American sectoral standard-setting systems established in the early 20th century were designed with the intention of leading to independent collective bargaining once the parties had developed sufficient experience and capability through the standard-setting process; and some, such as British wages councils and Ontario's ISA, also incorporated mechanisms such as the bridging "joint industrial council" structure to permit and assist parties to transition to independent collective bargaining outside the standard-setting regime (Slinn 2019). In this respect, some sectoral standard-setting systems can also be regarded as "hybrid" or "gradated" systems.

A 2003 report by Jean Bernier, Guylaine Vallée, and Carol Jobin addressing vulnerable workers in Quebec outlined the most detailed-as-yet proposal for a hybrid, or gradated model. The Bernier model was based in part on the Quebec sectoral artists' collective bargaining legislation, the *Performers' Act*, and was designed to apply to "non-salaried workers" (Bernier 2006, 53).

Under the Bernier model, certification would be for one of three gradations: individual and collective representation not including collective bargaining (such as intervening on behalf of a worker or workers at a tribunal); collective consultation; and full collective bargaining (Bernier, Vallée, and Jobin 2003). Workers could subsequently seek certification for higher

gradations if should they choose to do so. Vallée (2005, 39-40) notes that this three-tier approach, providing three potential representation objectives, takes into account the "the heterogeneous nature of the needs and expectations of the people grouped under the term 'self employed worker.'" Vallée explains (2005, 41):

> The Bernier Report believes that these three objectives or types of certification would encourage the gradual development of representation for non-salaried workers, in a sequence that harkens back to the historical evolution of representation of salaried workers (Bernier, Vallée and Jobin, 2003: p. 532). For example, an association could first obtain certification for collective representation purposes allowing it to play a useful role in its environment and develop its presence and expertise there. This association could then apply to have this certification amended to add either the consensus-building or collective bargaining objective.

This model was proposed in conjunction with the broader recommendation that the term "worker" replace that of "employee" as the threshold for access to the legislation. A "worker" would include any person working for another in exchange for compensation, whether or not the person is salaried under an employment contract, where that person must personally perform the work such that he or she becomes economically dependent on the other person (Bernier, Vallée, and Jobin 2003). Therefore, the Bernier model was intended to apply to all "workers," including self-employed workers and employees. (See Section V.D., below, for a detailed explanation of the Bernier model).

This model has been recommended as a means to improve access to social protections for vulnerable workers in the provincial jurisdiction (Vallée 2005, 41) and for self-employed workers in the federal jurisdiction to bargain minimum conditions in individual contracts and access contributory benefit programs (Bernier 2006, 52-53). However, the Bernier model has not yet been adopted. In part, this may be because the model was initially proposed as a possible amendment to the general collective bargaining legislation rather than operating as a parallel regime, and would, therefore, involve significant changes to that existing legislation.

5. Non-Union Organizations and Associations

a. Workers' Centres

Workers' centres are civil society organizations, often non-profits, engaging in "community unionism," serving non-unionized workers and the broader working-class community (Vosko et al. 2013, 2), and focusing on three types of activities: social services, advocacy, and organizing, making workers' centres "a hybrid and unique form of social service agency, labor market intermediary, and social movement organization" (Cordero-Guzmán, Izvănariu, and Narro 2013, 110). It is also important to recognize what workers' centres do not do. They don't participate in collective bargaining, they don't participate in the day-to-day or long-term employer-employee relationship, and they don't seek to advance workers' terms and conditions of work through contracts in particular workplaces. It is uncommon for them to collect membership fees, and their membership often changes (Fine 2006, 219-223; Griffith 2015, 335). Canadian workers' centres with specific target clientele tend to provide work-related training (Vosko et al. 2013, 7-9). In these respects, workers' centres differ significantly from unions.

A substantial literature addresses the question of whether NLRA restrictions on labour organizations apply to workers' centres. Where workers' centres satisfy the NLRA definition of "labor organization," the types of secondary boycott activity – which some workers' centres commonly employ in the course of their campaigns – in which they can engage is limited. Certain activities could lead to complaints of violation of employees' protected and concerted activities, and would open them up to significant organizational and reporting requirements (Griffith 2015, 334). As a result, the scope and type of collective representation and bargaining activities in which workers' centres in the US are willing to engage may be significantly constrained.

In contrast with Canada, where it appears that fewer than a dozen workers' centres have been identified in the literature (see e.g. Rogers and Archer 2017; Vosko et al. 2013), in the US, the number of workers' centres has grown rapidly since their beginnings in the 1970s. In 2018, Vincent Narro and Janice Fine (2018, 69) reported that there were over 266.

A significant weakness of workers' centres lies in their funding. A detailed study of over 100 US workers' centres' funding from 2008 to 2014 concluded that, while they have diverse funding sources, they all suffered financial instability. The study concluded that their funding strategies are unstable and unsustainable (Gates et al. 2018).[21] A study of public-interest legal organizations working to enforce employment laws concluded that "funding sources exert a significant and often problematic influence on the sort of employment law litigation in which an organization engages" (Jolls 2007, 143).[22] Furthermore, the study concluded that the organizations' focus on attracting and maintaining funding negatively affected their abilities to meet the needs of the employees they service (Jolls 2007, 143). This raises the question of whether workers' centre activities might be similarly affected by the nature of their funding.

In what appears to be the only information on this issue regarding Canadian workers' centres, a case study of the Winnipeg Workers' Organizing and Resource Centre (WORC) pilot project also raised concerns about funding (Bickerton and Stearns 2002). WORC was created by the Canadian Union of Postal Workers (CUPW) leadership and community activists, and CUPW was its sole source of funding. This assessment emphasized that WORC "remains precarious because it has not generated financial support to enable it to become less reliant on funding received from the National Executive Board of the CUPW" and expressed doubt that CUPW

[21] The authors did note that their sample likely overrepresented larger, more stable workers' centres. Additional limitations were also identified (Gates et al. 2018, 41). The authors note that in the US unions are ineligible for many government grants since they do not qualify as eligible organizations under the tax regime (Gates et al. 2018, 53).

[22] This study doesn't specifically address workers' centres or use that terminology, although they likely fall within this second organizational category.

would make WORC permanent, unless it obtained diverse funding sources (Bickerton and Stearns 2002, 56-57).

i. Intersection with Protected Concerted Activity

Although the NLRA could protect employees from employer retaliation for workers' centre organizing activities, and any "person" can file an ULP complaint under the NLRA, including a workers' centre filing on a worker's behalf, and the limited information available suggests that where workers' centres have pursued NLRA remedies, the employees have had considerable success, workers' centres do not tend to employ NLRA options (Griffith 2015, 332, 335, 337). Kati Griffith (2015, 348-349) explored why this might be and offers some explanations: lack of knowledge about NLRA protections, lack of experience with NLRB procedures, aversion due to immigration status issues, concerns about potentially exposing workers' centres to "labor organization" restrictions, the difficulty of unclear NLRA independent contractor exclusions, and the possibility that workers' centres prefer the protections offered for retaliation by other statutes.

Nonetheless, in advocating for adoption of a provision analogous to the NLRA's section 7 protected concerted activity in Canadian labour legislation, Rogers and Archer (2017, 168) suggest that this would support workers' centres' organizing efforts and could help build foundations for subsequent unionization campaigns.

b. Professional or Service Organizations

A study of Canadian freelancer organizations in the arts, which can be regarded as a form of workers' centre, found that these organizations focused on two key issues: improving wages and working conditions, and political action on cultural issues (Kates and Springer 1983, 238). While these organizations were successful as, essentially, professional service providers of information and individual benefits to members, and in political advocacy, Joanne Kates and Jane Springer

(1983, 241, 243) found they had little interest in putting energy into workplace concerns and collective bargaining. As a result, the authors were sceptical that there was much prospect of unionization in this sector.

The authors identified two main causes for the freelancer organizations' lack of interest in workplace issues and collective bargaining (Kates and Springer 1983, 242-243). First, government grants were the source of most of the organizations' funding. The criteria to qualify for these grants significantly influenced the structure of the organizations and their activities, influencing them to engage in service activities. Second, the marginal profitability of the publishing industry meant that it was difficult to bargain with or pressure producers, and doing so might jeopardize authors' ability to publish.

A further example of an informal workers' organization that is entirely sector specific occurred in the Quebec trucking industry in a manner more akin to a professional association than a workers' centre. In 2010, individual drivers self-organized into an informal collective, l'Association des routiers professionnels du Québec (ARPQ). Described as a mix between collective and individual representation, drivers are able to join regardless of their employee status (employer, self-employed, employee) (Gagnon, Beaudry, and Carette 2016, 77, 81). ARPQ's key goal is not to govern employer-employee relationships, but to promote a strong occupational and professional identity among drivers and to have drivers' voices heard at government consultation tables, and in this goal, ARPQ has been successful (Gagnon, Beaudry, and Carette 2016, 79-80).

ARPQ members pay mandatory monthly dues, and ARPQ's main functions include: intervening with any agencies or government to defend and promote workers' rights in the trucking industry; negotiating service agreements relating to training needs; and, providing

individualized services to members including health and medical benefit plans, vehicle insurance, legal and accounting services, vehicle purchase financing, discount tire account access, and hotel room discounts (Gagnon, Beaudry, and Carette 2016, 77). It does not represent members in dealings with employers and does not negotiate salary (Gagnon, Beaudry, and Carette 2016, 78).

Notably, ARPQ wanted to maintain distance from the union movement, and the organization's representatives indicated that they did not support conflict, or use of industrial pressure tactics, instead preferring representation and targeted political action (Gagnon, Beaudry, and Carette 2016, 78-81). Mélanie Gagnon, Catherine Beaudry, and Ann-Gabrielle Carette (2016, 81) characterize this organization as a complement rather than a substitute for union activity, one that can operate in parallel with union representation, and one that represents an entire profession without limitation by employment status.

C. Propensity to Organize

A variety of theories explaining workers' decisions to organize have emerged across different disciplines. Hoyt Wheeler and John McClendon (1991) organized theoretical explanations for unionization decisions into three categories of models: those that are dissonance-based, utility-based rational choice, or based on individuals' political views. Dissonance-based models focus on dissonance between individuals' expectations and experiences of work catalyzing unionization. Utility-based or rational-choice models understand the unionization choice as fundamentally a rational cost-benefit calculation, with such calculations affected by an individual's assessment of union instrumentality. Political or ideological-belief-based models focus on individuals' political views, including recognition of the importance of social solidarity among employees as a trigger for unionization.

1. Haiven's Union Zone Model

Larry Haiven's (2006) "Union Zone" model, primarily reflecting elements of utility- and dissonance-based approaches, conceptualizes the challenges and opportunities for collective representation of different kinds of unorganized workers. The foundation of this model is the assumption that "deployers" (a term referring to the party strategic decisions about the work to be done by workers) and workers must negotiate, with the concept of negotiation being broader than that of collective bargaining.

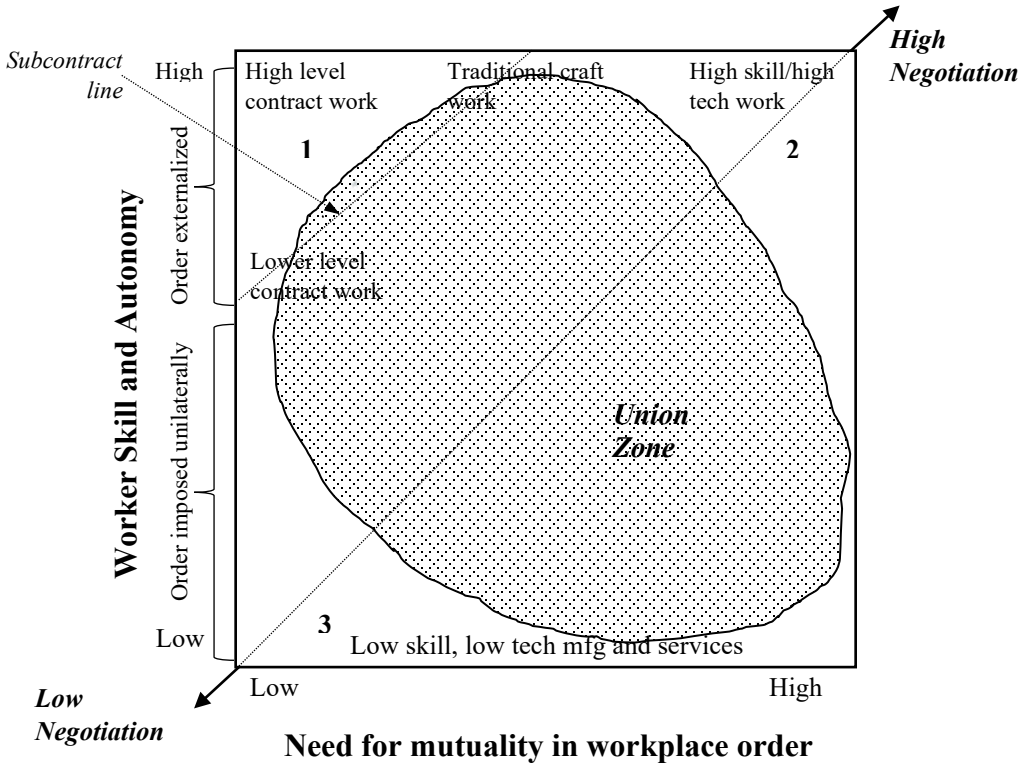
A two-dimensional "matrix of negotiation" is key to this model (see Fig. 1, below). The vertical axis reflects worker skill and autonomy; the horizontal axis reflects the need for mutuality in the workplace – that is, the degree to which the deployer must rely on workers to participate in coordinating work. The diagonal negotiation vector ranges from the bottom left corner, with low skill and autonomy and low mutuality, where the need for negotiation is low to the top right corner, with high skill and autonomy and high mutuality, where the need for negotiation is greatest. Negotiation can occur over both individual and common issues, with the latter better suited to collective bargaining (Haiven 2006, 92). Turning to the negotiation vector, which rises diagonally through the matrix, workers' need for unionization increases along this vector. However, it is at the upper middle of the matrix, rather than the upper right, that Haiven locates workers' greatest need for unionization. It is in this region that the issues in dispute between worker and deployer are most common and most conducive to collective negotiation, i.e., to collective bargaining (Haiven 2006, 92). Overlaid on this matrix is the "union one," which is the region, Haiven suggests, where unionization is typically found (see Fig. 1, below).

Within this matrix (and separate from the union zone), Haiven identifies different "zones," representing different groups of workers with different degrees of skill and autonomy

and of need for mutuality in ordering the workplace (the two axes), and at different points on the negotiation vector. For example, "Zone 1," "high level contract work" is located at the upper left. These workers have some degree of individual negotiating power, but little cohesion, are often independent-minded, and may prefer the tax advantages of being non-employees, so collective action is uncommon (Haiven 2006, 89). "Zone 2" includes high-skill technological work, including telecommunications technicians or computer program designers, and is found at the upper right corner. In this zone, negotiation issues are more individualized, and workers have more individual bargaining power, and thus less perceived need for collective bargaining (Haiven 2006, 90, 92).

Haiven identifies the following three additive factors determining how disposed a situation is to union organizing. The first factor is the degree to which workers need and want unionization. Overall, for Zone 1 and Zone 2, Haiven notes that unionization is likely where unions can meet workers' needs that deployers cannot or will not meet, and that a common desire among high-skilled workers is professional development; moreover, both Zone 1 and Zone 2 workers will be concerned with intellectual property rights. The second factor is the degree to which the deployer is prepared to resist unionization. Resistance may be lower where the union's functions would benefit the employer, such as having the union in effect filtering worker issues and concerns. Finally, also important is how much unions need and want to organize these workers, which will essentially be a "cost benefit equation" (Haiven 2006, 92, 93, 96, 97).

Figure 1: The Union Zone Model



Source: Haiven (2006).

a. High-Level Contract Work

Haiven's Union Zone Model, outlined previously, was applied by the author to Zone 1, high-skilled independent contractors, concluding that there would be significant potential for unionization among such workers, despite some impediments. Although individualistic, these workers have common needs and, in particular, seek assistance in finding markets for their work and attaining benefits, which are needs not often provided by deployers. Deployers may resist unionization, as they have chosen to contract out these workers to avoid dealing with their needs and concerns. Meanwhile, unions may find Zone 1 workers difficult to organize to meet their cost-benefit analysis (Haiven 2006, 95, 97). Overall, unionization of Zone 1 workers will require

them to overcome their lack of cohesion and will require a union prepared to invest significant resources to organize these workers (Haiven 2006, 94). Notably, in the film and video arts industry, unions have established a "career building" system, in addition to lobbying government for funding and policy changes, thereby making unions "invaluable" to the industry (Haiven 2006, 101).

b. High-Skill/High-Tech Workers

Haiven also applied the Union Zone Model to Zone 2, high-skill/high-tech workers, concluding that they, too, have significant potential for unionization. These workers have common needs, despite their individualistic nature and precarious work, although individual interests may be greater. These workers' highly individualized bargaining power may make it difficult for them to recognize their collective power. Deployers will tend to resist unionization as they prefer individual, rather than collective, negotiations with these workers. It may be difficult for unions to represent these workers, as it is generally not feasible for unions to engage in individual bargaining or to pursue individual benefits, as these workers may prefer (Haiven 2006, 94, 95, 97).

2. Kelly's Mobilization Theory

Commonly applied in industrial relations research is John Kelly's (1998) Mobilization Theory, which itself combines the approaches of several earlier scholars. This theory identifies four determinants that must be present for collective action to occur. First, individual workers' interests must be framed, as a collective, against those of a group in power, such as the employer. These interests must be motivated by a sense of injustice – not mere dissatisfaction – and a sense that the status quo is illegitimate, and that this injustice is attributable to the group in power. Thus, workers feel a sense of entitlement to their demands and their affiliation or identity shifts

to the worker group rather than the management group. Generally, worker-leaders trigger this interest framing. The second requirement is for a sufficient degree of organization among the worker group, such that it becomes capable of undertaking collective action. This includes the degree and quality of communication and interaction within the group. The third requirement is the mobilization phase, which can take place after the first two conditions are satisfied. At this stage, workers take control over resources required for collective action. The mobilization phase can take place if there is sufficient leadership and social interaction or peer pressure, and if members' cost-benefit assessments favour mobilizing. Finally, there must be an opportunity to undertake collective action, considering the costs of doing so (e.g., employer retaliation); such opportunities, channels, or forums for worker groups to pursue their claims include protective labour legislation.

D. Fissured Workplaces

David Weil (2014) has identified subcontracting as a key form of workplace fissuring. Traditional subcontracting, involving contracting for specialized services beyond the core of the businesses' activities, is distinguished from the newer phenomenon of "fissured subcontracting," in which businesses' core activities are the subject of subcontracting (Weil 2014, 121). In subcontracting structures, the lead business is "orbited" by successive levels of business enterprises, and relationships among tiers are determined by contracts between the businesses, designed to ensure contractors deliver the outcomes central to the lead's core operations.

Subcontracting tends to arise where a large pool of potential contractors exists and where, therefore, contractors are willing to agree to unfavourable terms. Although workplace fissuring primarily affects workers in low wage industries, these arrangements are increasingly affecting

mid-level and highly skilled workers, such as telecommunications industry workers and journalists (Weil 2014).

A range of subcontracting structures exists. Subcontractors may be directly engaged by the lead businesses, tiers of subcontractors may be established below the lead business, or an intermediary business may be utilized, which is located between the lead business and subcontractors (Weil 2014, 94, 121). Intermediaries, which can include staffing agencies, are used where there is a need to manage and coordinate subcontractors, manage information, or where there exists a risk of collusion among subcontractors (Weil 2014, 121). Under fissured subcontracting structures, the lower tiers tend to be very competitive, with minimal barriers to entry, though they are vulnerable to changing demand, and are highly price sensitive (Weil 2014, 100).

Workplace fissuring, and subcontracting in particular, is widely recognized in the literature as an impediment to both unionization and collective bargaining, and as significantly increasing incentives for businesses to avoid workplace standards (Altreiter, Fibich and Flecker 2015; Franco 2019; Ontario 2016; Weil 2014; Wills 2009). Different forms of fissuring are associated with different organizing challenges and have been found to lead unions to pursue different organizing strategies in response to each form of fissuring (Franco 2019).

In circumstances of direct contracting of work with no intermediary, where the workers are treated as legal independent contractors, Lucas Franco (2019) concludes that this severs the relationship between the lead employer and independent contractors. Contract workers may see each other as competitors, although where contract workers have multiple sources of income, they may have greater tolerance for risk (Franco 2019, 43). Union response to this form of

fissuring has been to pursue worker mobilization through association and pursuit of legal reform (Franco 2019, 41).

In contrast, in the context of multiple tiers of subcontracting, although the lead business generally has a significant degree of control over subcontracting firms, this form of fissuring splits responsibility for workers among lead and direct employers (Franco 2019, 41). Workers are more dispersed under subcontracting and, therefore, it is more difficult for unions to identify, locate, determine the appropriate bargaining unit, and organize these workers (Ontario 2016, 85). It is also associated with establishing clear hierarchies among different groups of workers (Franco 2019, 41). These features of subcontracting pose challenges to organizing and bargaining. Nonetheless, the link that remains between the lead business and the intermediary firm employing the subcontracted workers offers opportunities for unions to pressure the lead business (Franco 2019 42). Moreover, where subcontracted workers work alongside unionized employees of the lead business, this can highlight the "union difference" to these workers, which may encourage organizing. As Franco explains: "When a worker is face-to-face with the stark differences in wages and benefits, one would expect greater agitation" (Franco 2019, 42).

In response to tiered subcontracting structures, unions have pursued organizing through responsible contractor policies, joint labour-management training, and unionizing each subcontracting business separately (Franco 2019, 86).

In terms of the effects of fissuring on collective bargaining, direct contractors are often treated as legal independent contractors and thus excluded from collective bargaining regimes (Franco 2019). In the context of layers of subcontracting, spatial and perhaps also "emotional" separation from the lead business, which determines working conditions, hampers meaningful

collective bargaining (Wills 2009, 445). In addition, the threat of subcontracting and outsourcing pressures unions to engage in concession bargaining (Altreiter, Fibich and Flecker 2015, 81).

Academic literature and recent labour law reviews have suggested several approaches to counteract the negative effects of fissuring on employees subject to general collective bargaining legislation. These proposals focus on subcontracting and retendering of contracts (or "contract-flipping") in particular. First, Hila Shamir (2016, 247, 250-251) advocates for multi-employer or sector-wide collective agreements to counter the instability and reduced worker bargaining power caused by subcontracting, as a change in subcontractor (such as through contract-flipping) would have no effect on bargaining rights or coverage. Sector-wide bargaining would also remove the difficulty that exists for identifying the bargaining unit when subcontracting is involved.

Next, several approaches focus on amending three features of general collective bargaining statutes: related or common employer provisions, true employer determinations, and successorship provisions. Common or related employer provisions, such as the CLC, s. 35(1) can give rise to common or related employer declarations directing that the relevant employers be treated as a single employer. These are discretionary remedies intended to preserve bargaining rights (Adams 2006, 6.580). Unions may utilize a common employer application instead of a certification application to protect bargaining units from being eroded as a result of the employer's new corporate entity but will not be permitted to use it to extend bargaining rights (Adams 2006, 6.550-6.560). This limitation has led to denial of declarations sought in circumstances of subcontracting (Adams 2006, 6.580). A second limitation relevant to subcontracting by federal lead enterprises is that, for a common or related employer declaration

to be available, the relevant enterprises must all fall under the same labour relations jurisdiction (Adams 2006, 6.580).

Utilizing related or common employer (or to use a concept developed in the US: "joint" employer) provisions to extend responsibility and liability to both lead companies and subcontractors may ameliorate collective representation and bargaining problems caused by subcontracting arrangements. However, Shamir cautions that without finding the lead company to be workers' "*de jure* employer" in these arrangements, the obligations of lead companies towards workers will remain limited to protecting minimum rights and will not extend to create independent duties, such as being a party to collective bargaining (Shamir 2016, 247-248).

The recent CWR of Ontario labour legislation did not recommend adopting a more comprehensive approach to common and related employers on the basis that it would be controversial and likely unclear in application, instead recommending targeting discrete, problematic forms of fissured workplaces such as franchises and temporary help agencies (Ontario 2017, 373). These are addressed below.

In circumstances where more than one entity is potentially the employer, labour boards determine the "true employer" on a case-by-case basis (Ontario 2016, 65). Shamir suggests that one way to ensure stability between contracting parties in subcontracting arrangements would be to assign collective bargaining responsibility to the lead business rather than to the subcontractor (Shamir 2016, 248-249).

The triangular relationship created by temporary help agencies as intermediaries is recognized as a distinct case and source of significant vulnerability and precarity for employees, and a significant source of delay and uncertainty, which can interfere with unionization (Ontario

2017, 375-376). The SCC has also recognized the legislative gap that exists in these circumstances with respect to identifying the real employer.[23]

In light of this, the CWR recommended that workers assigned by temporary help agencies to work for the agency's client, or assigned by other suppliers of labour to work for a person, be deemed to be employees of the client or of the person for whom the work is to be done (Ontario 2017, 380).

Successorship provisions are generally not applied to subcontracting or retendering, either under the CLC or other Canadian collective bargaining statutes, as it typically is not found to constitute a sale of a business (Adams 2006, 8.290). Responding to these limitations, some labour law reviews have recommended, and several jurisdictions have adopted (sometimes only briefly), provisions extending successorship protection to these situations (Adams 2006, 8.310; British Columbia 2018, 20; Ontario 2017, 413).[24] The CLC offers successor rights to successive contracts for service, but it only applies to pre-board security screening services in specified industries.[25]

E. Facilitative Ancillary Legislation

Meaningful collective representation or bargaining for self-employed workers may also require additional supportive legislative changes. These include, perhaps most prominently, adjustments to competition law, and tax and benefit law. It may also include consideration of additional supports for individual, rather than collective, worker rights, such as introducing model contract systems for freelancers.

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[23] *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 SCR 1015 (SCC) at para. 63.
[24] See e.g. British Columbia, *Labour Relations Code Amendment Act, 2019*, S.B.C. 2019, c. 28, s. 10, amending of British Columbia, *Labour Relations Code,* RSBC 1996, c 244, s. 35.
[25] CLC, s. 47.3(1). Although s. 47.3(1)(b) allows for this provision to be extended to other services designated by regulation, no additional services have been so designated at this time.

1. Competition Law

The importance of excluding collective worker activity from competition law as a necessary ancillary support mechanism is repeatedly emphasized in the literature, with regard not only to media and arts sector workers (Rubiano 2013), but also to non-standard workers more generally and self-employed workers in particular (De Stefano 2015, 20-24; Vallée 2005, 43). Competition law is also identified as an impediment to the operation of non-union collective worker organizations and collective activities (Garden 2017; Harris and Krueger 2015, 15; Rogers and Archer 2017).

As noted earlier in this report, competition law issues have arisen with respect to self-employed artists in Canada and have impeded implementation of collective bargaining legislation for self-employed workers in the US. Therefore, it is important to ensure that any new collective representation or bargaining system for self-employed workers clearly falls within the exempt category of labour activities in the *Competition Act*.[26]

2. Reducing Tax System Incentives for Misclassification

Several countries have made recommendations or attempted to reduce incentives for employee misclassification through reducing differences in tax treatment between employees and self-employed workers and, in some cases, making availability of social benefits more equal between employees and self-employed. The Organisation for Economic Co-Operation and Development has recognized reducing incentives for worker misclassification through addressing differentials in tax and social contribution treatments as a potential policy direction (OECD 2019, 20-25), and Seth Harris (2018, 31) identifies avoidance of regulatory arbitrage as an important goal of, and selection criterion for, policies addressing misclassification.

[26] Canada, *Competition Act*, R.S.C., 1985, c. C-34.

A recent study of seven European countries and the US investigated differences in tax treatment across employment forms, focusing on "tax arbitrage opportunities" created by such differences. Among the study's conclusions are that cost advantages to both firms and to workers, of the self-employed form of work, may arise directly from the tax system, and that this outcome holds across the wage spectrum (Milanez and Bratta 2019, 14). Consequently, such tax differentials may have significant labour market effects, and may bring into question the degree to which labour market changes are promoted by the tax system (Milanez and Bratta 2019, 66).

3. Individual Contract Support

A further form of facilitative ancillary legislation is exemplified by New York City's *Freelance Isn't Free Act*.[27] The Act applies to "freelance workers" who are independent contractors, though certain occupations and work arrangements are excluded. It requires that all agreements for freelance work of a value of at least $800 (in a single contract or a series of contracts over a specified period) be written; and that contracts include parties' contact information, itemization and value of services, the rate and method of compensation, and the date on which compensation will be due (or within 30 days after completion of services, where no date is specified). Freelancers cannot be required to accept less than the amount owed in exchange for timely payment. These contracts may not waive any protections under the Act and the government has published a model contract. Retaliation for exercising rights under the Act is prohibited, and complaints regarding failure to provide written contracts, failure to pay, or retaliation can be filed in civil court. A specified municipal office also provides a "navigation" program, providing resources to assist with complaints. In addition, if the relevant municipal department concludes that there is reasonable cause to believe that a hirer is engaged in a pattern or practice of

[27] New York City. "Chapter 10: Freelance Workers." Title 20. *New York City Administrative Code*. https://nycadministrativecode.readthedocs.io/en/latest/c21/#chapter-10-freelance-workers.

violations of the Act, the city may bring a civil claim against the hirer on its own behalf, which may result in civil penalties up to $25,000. If the hirer fails to respond to a notice of complaint, a rebuttable presumption of violation is created.

F. Conclusion on the Literature Review

As detailed in this literature review, international labour law principles and judicial interpretation of the *Charter's* guarantee of the freedom of association suggest that the current exclusion of self-employed workers from general Canadian statutory collective bargaining systems, such as found in Part I of the CLC, may no longer be justifiable.

Examination of existing literature reveals an array of existing and proposed approaches to providing access to collective representation and bargaining, including some approaches tailored to non-standard workers, such as the self-employed. Key collective representation options for workers can be plotted along a continuum from those models involving collective representation but no bargaining, to those offering a hybrid of representation and bargaining, to those models involving full collective bargaining. This is represented in Table 1, below.

This literature review also focused on two theoretical approaches to assessing workers' likelihood of organizing collectively: Haiven's Union Zone Model and Kelly's Mobilization Theory. Earlier studies examining working conditions, needs of workers, and organizing in some of the sectors of interest to this report, including applications of these theoretical models, have been reviewed. These studies are useful for identifying key considerations, motivations, and impediments to collective representation and bargaining in these sectors.

Finally, existing studies indicate that facilitative ancillary legislation may be necessary or desirable to help effectuate collective representation and bargaining rights.

Table 1: Collective Representation: Representation-Only, Hybrid, and Bargaining-Only Models

Collective Representation	Hybrid	Collective Bargaining
Forum Sector committee Protected concerted activity Information and consultation workplace committee	Wages council Bernier model	Expanded scope of CLC application Minority unionism Occupation- or sector-specific collective bargaining legislation

III. METHODOLOGY

The fieldwork component of this study proceeded in two stages. The first stage involved semi-structured interviews with representatives of organizations, which are publicly known to represent, or to have sought to represent, self-employed workers in the federal jurisdiction in the road transportation, broadcast media, technology, or telecommunications sectors. Participants included representatives of unions and alternative workers' organizations (AWOs). The latter category of organization included: union branches, union-affiliated organizations, and non-union organizations such as workers' centres and professional associations, some of which catered exclusively to self-employed or freelance workers.

Relevant organizations and representatives were identified based on their public profiles in the relevant sector, as a result of being previously known to the researcher, through "desk research," including internet searches, or through the "snowball" technique in which other participants or relevant organizations recommend other organizations or participants. Participants were recruited by email invitation.

A total of 21 stage-one interviews were conducted. Six participants were interviewed for the road transportation sector, nine for the broadcast media sector, three for telecommunications, and seven for technology. In addition, two stage-one interviews were conducted with representatives from non-sector-specific organizations. One was a non-union organization, and the second was a union affiliated organization. Each interview was approximately one hour in duration.

The purpose of the first stage of the study was to ascertain, for each sector of interest:

- the organization of work and location and prevalence of self-employed workers,
- the capacity of different organizations to engage in collective representation and bargaining for self-employed workers,

- the needs of self-employed workers,
- barriers to collective representation and bargaining for self-employed workers, and
- ideas and suggestions for development of new models of collective representation and bargaining for self-employed workers.

Interview data was used to inform the design of the possible options for collective self-employed worker representation and bargaining in the federal jurisdiction, for each sector of interest. This information was then utilized in the next stage of data collection.

The second stage of the fieldwork involved a total of ten follow-up interviews or focus group discussions with one or more representatives for each sector of interest. In most cases, stage-two participants were drawn from among those representatives who participated in stage-one interviews. Due to the ongoing public health restrictions arising from the COVID-19 pandemic, most stage two data collection proceeded by way of follow-up interview rather than by focus group, each of which was one to two hours in duration. One focus group discussion, each involving two participants, was held for each of the broadcast media, technology, and road transportation sectors. Three follow-up interviews were held in the telecommunications sector, and one for the road transportation sector. No representative of a non-sector-specific AWO participated in a follow-up interview or focus group discussion. The total number of participants in this study, including both stage-one and stage-two interviews and focus group discussions, broken down by organization type and sector, is set out in Table 2, below.

The purpose of the second stage of the fieldwork was to engage in in-depth discussions with informants about the strengths and weaknesses, feasibility, and implementation of promising collective representation and bargaining options for self-employed workers in the relevant sector.

Due to the ongoing public health restrictions arising from COVID-19 pandemic, all interviews and focus group discussions were held via Zoom, using a password and “locked”

meeting function. All interviews and focus group discussions were performed by the researcher. Interviews and focus group discussions were digitally audio-recorded using a digital recorder. The researcher and authorized research assistants transcribed or made notes of interviews and focus group discussions. Audio recordings were promptly transcribed and digital recordings were destroyed after transcription. Confidentiality was protected for all interview data, which was stored on a secure York University network and destroyed at the conclusion of the study. To preserve anonymity, information drawn from interviews or focus group discussions is referenced in this report as an "Interview" with a random four-digit number assigned to each participant.

This study has several limitations. First, ideally a worker representation study would engage all of the three actors relevant to the phenomenon of collective worker action: workers, employers, and potential or existing representatives. As this study engages with the third actor exclusively, the information presented in this report and its conclusions must be understood in light of this limitation.

Second, despite significant efforts to identify, contact, and recruit AWOs, relatively few participated compared to unions and their branches or affiliates (see Table 2, below). In particular, although several workers' centres exist in Canada, only one responded to requests to participate in this study. It might be speculated that this is due both to the overall small number of such organizations and their limited resources, which may not extend to participating in external research activities. As a result, the study data and conclusions may not fully reflect the views and experiences of non-union AWOs or their representatives.

Third, although this study focuses on self-employed workers in the federal jurisdiction, interview and focus group participants were frequently uncertain about which jurisdiction workers fell within, or whether workers met the legal definition of "independent contractor" and,

therefore, the meaning of "self employed" that is of primary interest to this study. Consequently, it was not possible to ensure that participants' responses related specifically to self-employed workers in the federal jurisdiction.

A final limitation is that, as this study is based on interviews and focus group discussions, much of the information gathered reflects the experiences and views of individual participants and the organizations they represent. As such, and although efforts were made to be representative in terms of obtaining interviews from a cross-section of each sector, type of organization and region, study data and results may not fully reflect the situation of self-employed workers across the sectors of interest in Canada.

Table 2: Study Participants by Organization Type and Sector

Sector:	**Union**	**Non-Standard Representation Organizations:**		**Total**
		Union Branch or Affiliated with Union	**Non-Union Organization**	
Broadcast Media	4	3	2	**9**
Road Transportation	5	1	0	**6**
Technology	5	1	2	**8**
Telecommunications	6	0	0	**6**
Non-Sector-Specific	0	1	1	**2**
TOTAL NUMBER OF PARTICIPANTS	**20**	**6**	**5**	**31**
Note: Some participants engaged in both a stage-two interview or focus group and a stage-one interview.				

IV. SECTOR OVERVIEWS

This section addresses each of the four sectors of interest in this report (road transportation, broadcast media, technology, and telecommunications) drawing primarily from participant interviews and focus group discussions. For each sector, the organization of work and of workers is outlined as it relates to collective representation and bargaining. Haiven's Union Zone Model and Kelly's Mobilization Theory are then applied to assess the prospects for collective organizing in the sector, including consideration of workers' needs and the existing state of organizing. See Table 3 in the conclusion to this section, for a summary.

A. Road Transportation

1. Organization of Work

Road transportation in the federal jurisdiction falls into three general categories: long-distance trucking (or "freight"), day-drivers (or "delivery," such as courier delivery), and airport taxi. The last of these is not addressed in this report as it is not feasible to include this distinct subsector, which is a relatively small part of federal road transportation activity.

Since the mid-1980s, this industry has been undergoing simultaneous economic deregulation and changes in trade patterns, in addition to rising fuel prices, tighter border security, and increasing occupational safety regulation (Chow 2006, 3, 23; Gagnon, Beaudry, and Carette 2016, 73-74). Competition created by deregulation has been reported to have led to two tiers of carriers in the industry: while carriers in the first tier tend to meet or exceed CLC standards and have few complaints about these standards, second tier carriers have poorer compliance. As second tier carriers are difficult to locate, complaints against them are also difficult to pursue (Chow 2006, 24). Echoing this earlier research, interviewees emphasized the effect of deregulation on the freight subsector, putting significant pressure on owner-operators,

increasing competition in the industry, and leading to proliferation of small, lower cost "fly-by-night" companies (Interview 1776; Interview 5052; Interview 8482).

Weil (2014, 160) identifies logistics, including road transportation providers, as the core of a primary form of workplace fissuring: supply chain operations. A central element of this is road transportation providers' treatment of delivery drivers. Weil (2014, 161) outlined the situation of these drivers in the United States: drivers are treated as independent contractors, paid by piece rate (that is, per delivery), they may be required to purchase their own trucks and be responsible for all vehicle and delivery expenses, while also often being required to display the company logo on their vehicles. Weil described the growing use of subcontracting and temporary help agency work in this sector in the US as "fissuring on top of fissuring" (Weil 2014, 162).

In both the freight and delivery subsectors, driving services at a given company may be provided by owner-operators only, drivers only, or both. Drivers may be hired by companies or by owner-operators, in which case the driver typically leases the vehicle from the owner-operator (Canadian Trucking Alliance 2019, 3; Interview 1776; Interview 8482, Interview 8525). Interviewees report that neither owner-operators nor drivers tend to have multiple engagers, instead working for a single company or owner-operator, as the case may be (Interview 1776; Interview 8482; Interview 9302). In the freight subsector, remuneration is typically on the basis of mileage, while in the delivery subsector, payment may be on an hourly basis or, increasingly, piece rate (Interview 5052).

Owner-operators and drivers have individual contracts with their engagers – whether those engagers are companies or owner-operators. These contracts address matters such as licensing, to whom services will be provided, and, in the case of delivery drivers, delivery requirements (Interview 1776; Interview 5052). Individual contracts exist whether or not a

collective agreement applies, and are independent of any collective agreement; although, in some instances, collective agreements may set out the terms of these contracts or provide that they are to be considered to be extensions to the agreements. Interviewees indicate that in most cases unions are not involved in negotiating, and rarely see, these individual contracts, and their key concern is simply that these contracts do not conflict with the relevant collective agreements (Interview 1776; Interview 8482).

> *"It used to be that everybody basically was a company driver employed by a company with benefits, pension plan. But, three, four years ago the companies decided that they wanted to go in a different route because employees are too expensive … and they started to hire contractors, owner-operators, to perform the work, so they don't have to pay for the truck, they don't have to pay for [anything]. There's a contract, they pay them so much for so many deliveries, and that's it." (Interview 5052)*

> *"The employers who are affiliated with the [federal and provincial trucking associations] – those employers are playing by the rules. Those employers are doing what they're supposed to be doing: paying their employees properly, all the taxes, everything that goes with it. And unfortunately, when they go to pick contracts, they're being undercut by other "bad actors," as they call it, that are not adherent to the same rules and therefore, they're getting cut out of work." (Interview 1776)*

With respect to the delivery subsector, participants point to the rise of e-commerce and the attendant growth of courier deliveries, as emphasizing the "service" rather than "transportation" nature of the industry, in which "nobody wants to pay" drivers (Interview 5052; Interview 8482). The resulting cost pressures on companies have led to significant replacement of employee company drivers with independent contractors (Interview 5052).

> *"Whenever you buy something, it always says 'free shipping,' and somebody has to pay for the shipping and they have to find a way to give that cost to somebody else." (Interview 5052)*

Interviewees emphasized the widespread misclassification of workers in the sector, resulting from, they say, application of what is called the "Driver Inc." model to avoid tax and

social benefit costs of employment to drivers and carriers (Interview 8482; Interview 9302). There appear to be incentives for both carriers and drivers for misclassification of dependent contractors and employees as independent contractors, in both the freight and delivery subsectors. Under this label, commercial vehicle operators – who do not own, lease, or operate their own vehicles – incorporate and are then paid by the carrier without source deductions. Reports suggest that a tight labour market for drivers has led to pressure on firms to use the Driver Inc. model as a recruitment tool (Canadian Trucking Alliance 2018a).

The Canadian Trucking Alliance (CTA), an employer organization, recently launched a campaign urging compliance and enforcement of tax law against the Driver Inc. model (Canadian Trucking Alliance 2018a, 2018b, 2019). Unions have joined the CTA in objecting to the Driver Inc. model and are seeking to reclassify these drivers as "employees" (Interview 1776). Participants indicated that many employers object to the Driver Inc. model, as it allows companies to illegitimately undercut law-abiding carriers that "play by the rules" (Interview 8482, Interview 8525). This is consistent with earlier research that found law-abiding companies as well as "rogue" companies in this sector (Chow 2006; Chow and Weston 2008).

Key concerns of road transportation workers, as reported by the interviewees, centre on lack of access to minimum standards of work and certain social benefits, reflecting findings of earlier studies about work in this sector (Chow 2006; Chow and Weston 2008). In particular, hours of work and time off, paid sick days, health benefits, and employment insurance were identified as concerns (Interview 1776; Interview 5052; Interview 7221; Interview 8482). Earlier research also identified key concerns for these workers as including: significant education and training needs with respect to business and money management skills and managing relationships with carriers and employers, difficulties in contracting with and getting paid by

carriers, and concerns about work-life balance and hours of work (Chow 2006, 4, 12-15; Chow and Weston 2008, 46-48; Coiquaud 2009).[28]

2. Organization of Workers

Road transportation is a substantially organized sector, involving several large, well-established unions that utilize both formal certification and voluntary recognition to organize workers in the federal jurisdiction (Interview 5052). The CLC explicitly defines certain owner-operators as dependent contractors and, therefore, eligible to unionize.[29]

Participants identified several collective bargaining configurations in this sector. First, in circumstances where the company has engaged only drivers – no owner-operators – some driver bargaining units exist. This is more likely to occur in the delivery subsector, but an interviewee reported that it is uncommon in the freight subsector. However, the interviewee was aware of some driver units at courier companies established in circumstances where the companies had agreed not to challenge drivers' employee status. In these cases, multiple enterprises were owned by the same company and the interviewee speculated that the employer's agreement stemmed from a desire to forestall a common or single employer application (Interview 5052).

Second, in circumstances where both owner-operators and drivers are working at a company, it is uncommon for owner-operators and drivers to both be unionized or to be in the same bargaining unit (Interview 1776; Interview 8482). In the freight subsector, unions generally seek a mixed unit only when they know that the unit involves owner-operators who each own multiple trucks (Interview 1776; Interview 8482). An interviewee in the delivery subsector indicated that mixed units are not found in that subsector and it would be too difficult for a union to represent both groups in a common bargaining unit (Interview 5052). It is more common that

[28] Although note that the Coiquaud (2009) study did not include self-employed drivers.
[29] CLC, s. 3(1)(a).

only the owner-operators will be organized and that their drivers will be non-unionized and engaged through the Driver Inc. model (Interview 8525).

One instance of a delivery subsector voluntary recognition agreement covering both owner-operators and drivers was identified by an interviewee. This collective agreement incorporates drivers' individual agreements, and a separate section of the agreement deals with drivers' terms of engagement. The company has not challenged the drivers' employee status and, in the interviewee's opinion, "The employer would rather it stays that way … [I]t's less complicated. It's one contract for everybody and it's less work. Also, I think the relationship has been very good … so why rock the boat?" (Interview 5052).

Third, in some cases where owner-operators are organized, collective agreements commonly provide that owner-operators will be responsible for paying initiation fees and dues for any drivers they hire. Collective agreements may also include provisions relating to drivers, such as rates of pay and expenses, or health and welfare benefits, but only if the union has the bargaining power to achieve this, and some collective agreements provide that both owner-operator and driver individual agreements are extensions of the collective agreements (Interview 1776; Interview 8482).

In the freight subsector, it appears that it is mostly owner-operators who are organized, with drivers often unorganized (Interview 8482). In the delivery subsector, it is apparently not uncommon for there to be certifications where there is a real question about the status of bargaining unit members, but the company chooses not to make an issue of it. Reasons for this apparently vary, including that the parties have a good relationship, that the employer finds it easier to have all workers under a single agreement, and that the employer does not want to prompt a common employer application (Interview 5052).

"There could be a case to be made that the [delivery] drivers [are not employees]. But some people have decided that's not the case that's going to be made … . Nobody wants to pick the fight I think. The company doesn't want to pick the fight and the unions don't want to pick the fight either." (Interview 5052)

Although there is significant union presence in the road transportation sector, several AWOs exist that engage with SEWs. The non-sector-specific, non-union workers' centre that participated in this study reported that few of the workers it assists are SEWs, and the only workers it had assisted in the federal jurisdiction were truck drivers and mechanics (Interview 9446). It is a non-profit organization that relies on funding from government, union, professional legal associations, individual donors, and modest annual membership fees of $50 per month or less. Its services are not limited to members. This workers' centre has paid staff but also relies on volunteers and pro bono legal assistance. It provides legal information, advice, and representation. Services focus on statutory minimum standards, human rights, small claims cases for breach of employment contracts, and employment insurance matters. On occasion, this workers' centre will review employment contracts for workers, particularly migrant workers, but it doesn't assist in contract negotiation. This workers' centre does not address labour law and offers no collective representation or bargaining (Interview 9946).

Another non-union organization which is active in this sector is a small, non-profit organization affiliated with a union and which provides individual services to self-employed truckers. It receives funding from the union and from members' annual dues, which are in the range of $400 per year. It assists drivers with some workplace-related matters, such as contesting driving violations, obtaining discounts and privileges with suppliers, and providing political

voice and lobbying. It does not provide training or education, nor does it participate in the province's General Trucking Industry Stakeholder Forum (Interview 5052; Interview 9946).

One interviewee also reported the existence of a small, local, non-union driver collective that had succeeded in negotiating with carriers in the area to set rates and distribution of work, on behalf of SEW drivers and owner operators (Interview 0915). However, other interviewees were not aware of the existence of similar, non-union organizations. Some companies do provide certain licensing and training services to drivers for a fee, and trucking associations offer services, discounts, training and information, and lobbying representation, though are primarily aimed at carriers.

Two other potentially representative bodies exist in the road transport sector. ARPQ (described in the literature review, above) is not regarded by unions as representative of owner-operator views, as it has only about 50 members, among the tens of thousands of owner-operators in Quebec (Interview 8525). Similarly, while Quebec's Trucking Industry Stakeholder Forum (also described in the literature review) provides opportunity for representation for owner-operators, an interviewee reports that no owner-operators actually participate in the Forum (Interview 8525).

3. Prospects for Collective Organizing

With respect to Haiven's Union Zone Model, SEWs (as well as workers overall) in this sector would likely be described as displaying moderate to high skill and autonomy, and there would likely be a low need for mutuality in the workplace, thus placing them at a relatively high point along the negotiation vector. As such, these workers would likely fall either just outside or just within the "union zone" (close to the "lower-level contract work" zone indicated in Fig. 1, above), indicating reasonable prospects for organizing these workers.

Several impediments to organizing, including of SEWs, exist in this sector. First, the prevalence of subcontracting, whereby owner-operators hire drivers, is a key impediment to organizing. Even where drivers may genuinely be employees, their employers may be the owner-operators rather than the companies for which the services are ultimately provided (Interview 5052). Owner-operators commonly hire only one or a few drivers, so organizing drivers of a given owner-operator would not generally be feasible. In the case of contract drivers working under contracts of service for owner-operators, where the work ultimately may be done for third-party companies, an earlier study reported confusion among these drivers about which party – the owner-operators or the companies – are their employers (Chow 2006, 18).

Second, workers in this sector, including some owner-operators, engage in this work as supplementary income and, therefore, are not interested in unionization. Respondents indicate that this includes both long-haul truck drivers and, increasingly, courier drivers who are interested in doing piecemeal driving work (Interview 1776). However, several union interviewees indicated that motivations for those owner-operators who are interested in unionizing would likely centre on difficulties negotiating rates with companies, desire for health and welfare benefits at the better rates available through unions, and dissatisfaction with unfair work dispatching (Interview 1776).

"Some of them [just say] 'Gimme a baseball cap and a chain on my wallet. And don't give me any hours of operation, let me drive all day that's what I want to do. I don't care about the money' …. Starving artist, starving truck driver." (Interview 1776)

"The owner-operators have always been like the cowboys of the industry. But I think the gig economy [courier – delivery] ones … it's just supplemental income that that person that's driving home from their job that's finished at 3 o'clock in the afternoon and they can pick up 15, 20 pieces at Amazon. That's supplemental income. We'll always have a hard time trying to organize those 'cause they don't care. They're just picking up a couple bucks on the way home." (Interview 8482)

"You will get a lot of individuals that just say 'nope.' Especially the owner-operators. A lot of them they have the mentality that they can do their own deal. 'I'm a small independent businessman. I can negotiate just as good as you can Mr. Union. I don't need your help. Thank you very much.'" (Interview 1776)

Third, workers in this sector are often diffuse and transient. In the courier delivery subsector, drivers typically go to a set location daily to pick up vehicles. In the trucking subsector, however, drivers may not be at the central terminal for several days in a row (Interview 1776; Interview 8482). Moreover, in the freight subsector, interviewees suggested that a substantial proportion of workers are transient – particularly hired drivers – which would make certification difficult (Interview 1251). This has posed difficulty for unionization, including in terms of organizers being able to "find" employees in person to sign union cards, though most acutely in provincial jurisdictions with vote- rather than card-based certification (Interview 1776; Interview 8482). Geographic dispersion and isolation of road transportation workers also encourages individualism over collectivity (Gagnon, Beaudry, and Carette 2016, 75).

Fourth, misclassification also operates as a barrier to unionization for affected workers either because they believe that they are not eligible to unionize as they believe themselves to be true SEWs (that is, independent contractors) or, as reported in the transportation sector context, workers view unionization as jeopardizing the financial advantages they perceive they receive from independent contractor status (Interview 8482). Interviewees were strongly of the view that there is only a small group of "true independent contractors" in this sector, which is obscured by widespread misclassification (Interview 1776; Interview 8482; Interview 9302). Some participants regarded these SEWs as unorganizable because these workers have no interest in unionizing (Interview 1251; Interview 8496). For instance, some owner-operators regard

themselves as small business people and "have the mentality that they can do their own deal" and feel that they don't need a union to negotiate for them (Interview 8482).

Fifth, employer retaliation for organizing is also an impediment to collective activity. Participants indicated that some employers are determined not to permit unionization and will retaliate against workers, including terminations (Interview 1776). Moreover, union interviewees report that few workers are willing to bring complaints or to take action in response to perceived employer retaliation (Interview 8496). In particular, undocumented workers (that is, those lacking immigration status to legally engage in work) were reported by both union interviewees and a non-union organization to be a substantial phenomenon in this sector and particularly vulnerable to employer retaliation and co-worker pressure (Interview 1251; Interview 9946).

"They lie, cheat, steal, and burn down anything they can just not to have the union in the certain part of their company. It makes no sense." (Interview 8482)

Sixth, inflation of the size of the proposed unit was also reported to be a common union avoidance tactic (Interview 8482). Participants identified the length of time taken by the labour board's ULP processes as a key difficulty, such that terminated workers will "all have been on their third or fourth job by the time you get a settlement" (Interview 1776). However, participants suggested that use of electronic card-signing and representation votes and more readily accessible remedial certification might help ameliorate the difficulties of mobile and diffuse workers and reduce the threat of employer retaliation (Interview 8482).

At the same time, however, there exists strong occupational identity and solidarity and a sense of belonging among drivers, and in spite of the isolation, there is a high degree of communication and mutual aid among truckers (Gagnon, Beaudry, and Carette 2016, 75). Notably, a 2006 survey of owner-operators in the federal jurisdiction found fewer than 5% were

members of independent organizations representing owner-operators' interests (Chow and Weston 2008, 49).

Although there is both union and AWO presence in this sector, SEWs would likely be assessed as existing at a very early stage of mobilization, according to Kelly's Mobilization Theory. There was little indication, from the interviews conducted, that these workers have even embarked upon stage one of mobilization: collective framing of interests.

As described above, the existing AWOs serving SEWs in this sector are not engaged in collective bargaining or representation. Instead, they focus on individual representation and assistance. Overall, however, the presence of significant, long-established unions in this sector, with unionized workers engaged in work that is likely largely indistinguishable from that of SEWs, suggests that – despite the relatively low need for mutuality in these workplaces, and the apparent absence of mobilization of organizing of these workers – there is a substantial existing basis out of which collective representation and bargaining for these workers could develop should they choose to engage in it.

B. Broadcast Media

1. Organization of Work

The broadcast media sector includes a wide array of occupations, including writers, journalists, on-air talent, craft workers, directors, and producers. The organization of work differs substantially among different segments of the sector. Moreover, in recent years, large firms have taken over smaller operations on both the production and distribution sides (Interview 1297).

Earlier research has found that work in arts and media is intermittent and frequently of short duration, with fluctuating remuneration and heavy reliance on grants and prizes (Neil 2010, 3, 5). Artists, some of whom operate in the broadcast media sector, may work for several

employers at the same time, in multiple roles and activities, are often dependent on many intermediaries, such as agents or promoters, and may also engage in supplemental work outside the industry (D'Amours 2013; Neil 2010, 2-3).

SEWs appear to be found in three general configurations in this sector. The first configuration is where the contractor works solely or predominantly for an engager, performing similar work as, and often alongside, workers the engager classifies as "employees." The employees may or may not be unionized. Among large broadcasters, this may be the arrangement most SEWs are working within. At major broadcasting operations, some SEWs work on a one-off task basis, others do essentially the same work as "temporary" employees or full-time employees, sometimes working regular hours in the workplace alongside full-time employees (Interview 1610; Interview 5147). The second configuration is where a contractor has more than one engager, and regularly works for the same group of engagers. Third, contractors work with multiple engagers simultaneously, although participants reported this to be an uncommon work arrangement (Interview 1244; Interview 8746).

Within this sector, the term "freelance" is generally applied to all these types of work arrangements, whether or not the worker legally satisfies the definition of "independent contractor." Sometimes work is measured and compensated on the basis of time; in other cases, it measured and compensated is on the basis of "deliverables" (Interview 1297; Interview 1610; Interview 5147). Even those freelancers covered by collective agreements have individual contracts (Interview 1610; Interview 5147; Interview 6370). In the documentary-making context, for example, directors are independent producers who have their own independent production companies are responsible for arranging financing, and will hire other workers including other directors (some of whom belong to guilds or unions) and will enter into licence agreements with

broadcasters (Interview 1297). Alternatively, filmmakers could be hired directly as "freelancers" by producers, such as the National Film Board, and the productions may be done in-house or as co-productions with independent producers (Interview 1297).

Arts workers must often spend considerable time preparing to earn income through rehearsal or training and this is heightened in fields with rapid technological change (Neil 2010, 6). Further, even though artists may have made substantial investments in the work in terms of preparation, study, training, or creation, they often bear a high degree of risk that the product will be successful. Compensation may depend in whole or in part of whether the product sells. This risk is exacerbated by the importance of novelty in the industry, and constant entrants to the labour market (D'Amours 2013, 2; Neil 2010, 2-3). These features of arts work are also likely applicable to some workers in the broadcast media sector.

Interviewees were strongly of the view that, at least in some subsectors, few genuine SEWs, independent contractors exist, and that misclassification of employees or dependent contractors as independent contractors occurs routinely (Interview 5147; Interview 8146).

Misclassification in this sector appears to be primarily driven by employers' cost and flexibility concerns, although some workers also prefer the perceived income tax advantages of being treated as independent contractors (Interview 1610; Interview 6515; Interview 8146). Previous studies of arts workers report that a significant concern for artists is to maintain independent contractor status in order to obtain the tax benefits of self-employment, although artists report that it can be difficult to maintain this status (Neil 2010, 4).

"[The broadcaster will] have me lie every year. I have to fill out [a questionnaire] that the government wants about are you a contractor or are you an employee? And they ask questions like: Do you go into the office? Do you use the office equipment? And

they lie, they actually fill it out for me and put in wrong answers and I'm not allowed to change it. I'm just supposed to sign it and send it in." (Interview 1610)

"[W]here you get into it is [the question of]: are you a freelancer or are you really an employee? And I think that's where [the company] is really fudging things and has been for a long time. And … it's not a pay issue … it's just at what point are you basically an employee that is being exploited with no benefits, no nothing, no protections?" (Interview 1610)

Key workplace concerns of self-employed workers in this sector include lack of benefits, lack of access to minimum labour standards, and ensuring payment for contracts (Interview 1401).

Workers in the arts generally operate in a "buyers' market" and have pressure to accept exploitative contracts (D'Amours 2013; Legault and D'Amours 2011). Information obtained through interviews in the present study suggest this also holds true for the broader, federal broadcast media sector, as interviewees identified exploitative contract terms as concerns. Interviewees reported concerns about common contract terms, including non-disclosure requirements applying to salary and other information (Interview 6515); requirements for workers to indemnify the engager for any loss due to the worker's product (such as a defamation claim resulting from a media story); and requirements to provide proof of significant insurance coverage, even prior to commencement of the contract (Interview 6370).

Because of the nature of their work product, which can produce ongoing economic returns, arts and media workers are concerned about ownership of intellectual property and contract practices that may reduce revenues on their products, such as engagers providing little payment for subsequent use of works (D'Amours 2013; Neil 2010, 3, 28). In the present study, interviewees expressed concerns about intellectual property provisions requiring workers to give

up moral rights or copyright, or that provide very little compensation for rebroadcast or reuse of work (Interview 5147; Interview 6370).

Finally, many freelancers in this sector hope to progress to longer-term temporary and perhaps full-time work, yet broadcasters are seen as determined to retain the ability to hire and fire at will (Interview 1610). Skill upgrading is also a concern for some of these self-employed workers (Interview 6370).

"[Broadcasters are] not willing to compromise on anything around [security] protections because they want the ability to hire and fire at will. And I don't think that's fair. I think the government should step in and help them with that because that allows them to keep people on the hook for years and years and years." (Interview 1610)

"Most people who are freelancing for [this broadcaster] are trying to get a full-time job …, they're trying to get in with [this broadcaster], taking any possible … contract or freelance gig that they can get." (Interview 1610)

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2. Organization of Workers

Several large unions have established presences in this sector, and the large broadcasters are highly organized. Some of these collective agreements include specific provisions for SEWs, which are adaptations or subsets of provisions applicable to employee bargaining unit members. Some of these unions have established special branches dedicated to "freelancers." Additionally, some voluntary recognition agreements include SEWs in their scope of coverage (Interview 1610; Interview 5147; Interview 6370; Interview 6515). At the same time, there has been a proliferation of independent production companies, some of which may fall under federal jurisdiction, and which are largely unorganized (Interview 6515).

In addition to major unions, several AWOs have emerged in this sector, including union branches, union-affiliated organizations, and some independent, non-union organizations. Many have some relationship with major unions, receiving financial and other support, such that they are not entirely independent and need not rely entirely on members' dues.

Union branches, and some of the union-affiliated organizations, are involved in collective bargaining. Existing organizations provide assistance with negotiating and enforcing individual contracts, although sometimes this is done informally (Interview 1610; Interview 5147; Interview 6370). They also provide varying amounts of professional development and training opportunities (Interview 6370). Several independent non-union organizations also exist, which include self-employed broadcast media workers in their membership, particularly relating to writing and filmmaking.[30] These organizations tend to operate as policy, lobby, or professional associations, funded primary by members' dues. Lobbying by at least some of these organizations includes lobbying public and private broadcasters to provide space on their schedule for their members' work and to adequately fund members' work (Interview 1297). Leverage for such lobbying comes from goodwill among the parties and the firms' mandate obligation or recognition of the cultural value of Canadian content. However, an interviewee regards this leverage as weakening as larger firms come to dominate the sector and profitability and shareholder value is becoming more important to the firms (Interview 1297).

3. Prospects for Collective Organizing

Applying Haiven's Union Zone Model to this sector, these workers would likely be found to occupy a range of zones. These workers likely have a medium to high level of skill and

[30] These include: DOC National and its regional branches, Canadian Media Producers Association, Directors Guild of Canada, Association de realisaeteurs et realisatrices du Canada, Association de la production mediatique, Association de producteurs francophones du Canada, Quebec Anglophone Producers Association, Visual Researchers Society of Canada, and L'Alliance québécoise des techniciens et techniciennes de l'image et du son.

autonomy. There is likely low to medium requirement for mutuality in ordering of this work. While there will be exceptions, collective issues and bargaining power likely dominate individual issues and bargaining power, such that these workers will typically fall on the lower to mid-range of the negotiation vector. Haiven noted that, in addition to lobbying government about funding and arts policy, unions in the film and video arts industry have established a "career building" system that makes unions "invaluable" to the industry (Haiven 2006, 101). This observation may also apply to the wider broadcast media sector. Consequently, it is probable that many self-employed workers in this sector fall into Haiven's Zone 1 of high-level contract work, located outside of the Union Zone. Others will likely fall into the "traditional craft work" region, if the work requires greater coordination, or "lower-level contract work" if the workers exercise moderate, rather than high, level skill and autonomy. These latter two groups are located closer to, or just within, the Union Zone.

Overall, Haiven's model suggests that SEWs in this sector will be difficult to organize, primarily due to the autonomy they exercise and the relatively low degree of workplace mutuality that is likely required.

Past research on workers in the arts and media sector, and the interviews undertaken in this study largely affirm the above theoretical assessment of prospects for organizing. Previous research has found that both the nature of work and the attitudes and self-perception of arts and media workers can be impediments to collective representation or bargaining. Although arts workers have strong occupational and sector-specific identities (MacPherson 1999), they often work in isolation, without opportunity to build community, and the work can be intensely competitive within a small market for the same work (Kates and Springer 1983, 243). In addition, many of these workers are dedicated to their art and do the work for that reason (Neil

2010, 2-3); others subscribe to what Kates and Springer label a "myth of professionalism," prompting a "dedication that supersedes financial gain" (Kates and Springer 1983, 248). Kates and Springer (1983, 246, 248) found that freelance journalists' sense of being economically marginal, while at the same time having the sense of being of the same social class as their managers or employers and thus equals, along with internalization of anti-union, pro-capitalist values, were all barrier to worker organizing.

In the present study, interviewees reported that key impediments to organizing include a heterogeneous workforce with significant differences in individual bargaining power and an individualistic culture (Interview 5147; Interview 6515). Further challenges include significant turnover of workers, often very short-term contracts, and competition for longer-term contracts and full-time employment (Interview 5147). In subsectors, such as film and television production, this is exacerbated by the transitory nature of the engagers (Interview 6515). As a result, the numerous, small, independent production companies are also difficult to organize (Interview 6515).

"It's very much an individualist culture at a lot of these places because of the independent contractors. … So, it's tough, it's a tough crowd to bring together." (Interview 6515)

"[T]hose [workers] that do have a disproportionate amount of power in their negotiations don't really have interest or interaction with the people who don't have a lot of power so that sort of collective power is lacking in a way." (Interview 5147)

More generally, interviewees from throughout this sector reported fear of retaliation, including blacklisting, as a significant and widespread barrier to organizing. Concerns about employer retaliation, particularly in the form of non-renewal of contracts and, at broadcast

organizations, concerns about jeopardizing prospects for obtaining longer-term temporary (rather than "gig") contracts or regular employment at that organization (Interview 1610). Fear of employer retaliation is reported as an impediment to unionizing but also to raising complaints or workplace issues more generally (Interview 1401; Interview 1610; Interview 6515). Finally, some interviewees emphatically identified misclassification of dependent contractors and employees as self-employed, independent contractors as a key organizing problem in the sector (Interview 1610; Interview 6370; Interview 6515).

"[T]here is a culture of blacklisting anybody who speaks out about these issues." (Interview 6515)

"There's a … sense [of] don't speak out because if you're a freelancer you have zero protections." (Interview 1610)

"[O]ur members often fear retaliation for just being outspoken about workplace issues or politics, like on their private social media." (Interview 1401)

Nonetheless, Kelly's Mobilization Theory suggests that SEWs in this sector have achieved a high level of collective mobilization, evidenced by formation of active, well-organized representative organizations. Thus, they have reached stage three, the mobilization phase. It is likely that the lack of access to statutory collective representation and bargaining frameworks prevents these workers from fully realizing the final stage: the opportunity to undertake collective action.

However, alternative worker organizations represent a substantial proportion of represented SEWs in this sector. Therefore, it is important to consider the mobilizing capacity of these AWOs. These organizations face significant limitations. They report struggling with lack of resources and the related issue of lack of dedicated staff. This affects both independent and

union-affiliated or branch organizations. Where these organizations charged membership dues, the rates were often very low, in the order of $150 per year, limited by the low incomes of their members. Given the small size of many of these organizations, the dues income is insufficient to support the organization (Interview 6370). Interviewees report that few had resources sufficient to ensure adequate service provision, and representatives ended up providing uncompensated time to representation work (Interview 1401; Interview 6370). Even in the cases of union affiliations and branches, interviewees indicated that lack of resources and funding was an issue, and that these organizations receive less support from the union than do regular members (Interview 1610; Interview 5147; Interview 6370).

"[Representatives for the union and its major branches] get some level of compensation. The [self-employed worker branch] doesn't get the same level of compensation, despite the fact that we don't have a full-time salary to carry us over and all free work we do for the union. So that's part of why we're a little bit more disorganized." (Interview 5147)

Significant tensions have arisen between these organizations and the union in some cases, arising from perceptions by the union or its members that the cost of supporting these organizations is too great (Interview 5147; Interview 6370). In other cases, the affiliated organization reports satisfaction with the level of support it receives relative to what it contributes to the union (Interview 1401).

"Is [union support for freelancers] a loss leader? I think it really depends on how much you're spending on these freelancers versus the kind of goodwill and support that you're giving to them." (Interview 6370)

"My gut instinct is probably we're getting a lot more from [the affiliated union] than we're paying them." (Interview 1401)

Lack of bargaining power was identified as an issue both in cases where the branch or affiliate organization's members were included in a union's collective agreement and where they were not. In the first case, the organization may have greater voice and bargaining power due to its relationship with the union and inclusion in the agreement. At the same time, interviewees recognized a conflict of interest between the union's full-time members and the SEWs at the bargaining table, and suggested that the union did not prioritize SEW concerns in bargaining or in terms of collective agreement enforcement (Interview 1610; Interview 5147).

"[W]e are actively fighting against ourselves in the union when we're trying to get better raises, better benefits for the freelancers because the members of the [main union], they have an interest in keeping us getting paid less because it's better for their budget." (Interview 5147)

"[Y]ou can say we have a bargaining unit and have bargaining power, but … nobody listens to us, we're the lowest on the, I know you're not supposed to say 'totem pole' any more, but we are." (Interview 1610)

"I think that the fact that we're part of the larger union makes [the broadcaster] more open to negotiate …. [O]n our own I don't think we would have that bargaining power." (Interview 5147)

In the second case, those branches or affiliates that seek to negotiate on their own report that they lack sufficient bargaining power to negotiate effectively (Interview 6370).

"[B]asically because we don't have collective agreements with anybody, we don't have any … we don't have a stick to wave. Well, we have a stick to wave, but we don't have one to hit people with. And we can't go on strike." (Interview 6370)

C. Technology

1. Organization of Work

The technology sector includes a wide array of occupations and variety of workplaces and arrangements. While the difference between federal and provincial jurisdiction in the sector was not clear to several interviewees, one union representative was of the view that, overall, independent contractors in technology are probably predominantly found in the provincial jurisdiction (Interview 8172). Self-employed technology workers in the federal jurisdiction are likely engaged by the federal government, banks, shipping companies, and trucking companies (Interview 0338; Interview 8172). Moreover, one interviewee indicated that some start-up companies, though they may appear to be independent, are owned by banks (Interview 0338).

"A lot of start-ups are 100% owned by banks … things that look like start-ups really aren't start-ups here" (Interview 0338).

Misclassification, per se, was not raised as a significant issue by most interviewees, although many – particularly those from non-union organizations – were unclear about different categories of workers. However, several interviewees reported that companies seek to have workers at "arm's length" to avoid an employee relationship, by utilizing contract work, temporary work, work with third-party vendors, or obtaining workers through agencies (Interview 3720; Interview 4245).

"[M]isclassification across the media and games and tech industry seems rampant …" (Interview 0616)

Interviewees reported significant heterogeneity among technology workers: some are in high demand and able to command high compensation and advantageous working conditions, while others are not. Video game developers appear to be a significant component of the latter category (Interview 0616; Interview 7294).

An interviewee reported that video game developers – including coders, writers, and artists – typically work on short-term contracts for small- to medium-sized employers, and that they tend to work in the workplace rather than remotely. The interviewee also indicated that the workers believe these to be independent contractor arrangements (Interview 7294). Agency work appears to be prevalent outside the gaming subsector, with some in-demand workers engaged with multiple agencies, and some workers hired as corporations by agencies to work for other companies (Interview 3720; Interview 8172).

"I think the degree to which … the tech companies are able to force people to be competing against each other for a very small pot of money is a critical part of the way the contracting is set up." (Interview 0338)

"I think the companies would like that terminology [of 'independent contractor'], but it's more of a weapon to avoid legal responsibility." (Interview 0338)

"The industry as a whole is trying to keep workers, as much as possible, from being full employees. So as much as they can they do things like contract work, temporary work, work with third-party vendors that employ people at discounted rates. I think it's sort of a movement within the industry." (Interview 4245)

"[Y]ou have this two-tiered workforce. We basically have full-time employees and then you have this mishmash of people that are independent contractors listed as 'temporary employees,' always under the gun and ready to be dismissed, and then working for vendor companies where they're not as well compensated despite doing the same work, and a lot of it is side-by-side full-time employees." (Interview 4245)

Apparently common among subsectors is the negative treatment and perception of SEW contractors as "probationary" within companies, and as having not yet proven themselves to employers, and who are treated as "second-class citizens" with less advantageous working conditions, such as not receiving training or development or access to workplace activities. At the same time, in other subsectors, highly-skilled SEWs engaged through agencies are seen as a threat to employment by regular, full-time employees (Interview 0338; Interview 8172).

"I think [being an independent contractor] it's a thing that people are forced into, and they see themselves as the temporarily impoverished…." (Interview 0338)

"There is no advantage seen to it [being a contractor], the perspective is like 'you just haven't proven yourself, and you aren't good enough for full-time employment.' And you have all of the responsibilities, but less privilege and less pay. And not just less privilege – you're not even allowed some of the perks." (Interview 0338)

An earlier study, albeit of computer specialists who had employee status, found that these workers' needs included: job security, including tools to foster mobility; protection from contracting out; relief from excessive work demands, including excessive hours; information about job security and the state of the industry; legal assistance for employment-related claims; professional development; and, assistance with more sophisticated or specialized aspects of individual contracts of engagement (Haiven 2006, 105). Several of these concerns were also raised by interviewees in the present study as being relevant to SEWs.

Some interests and concerns were common among different types of technology workers. Others were specific to, or more acute for, video game developers. Non-payment of contracts was described as one of the biggest, most immediate, problems for self-employed workers (Interview 6850; Interview 8172). Concerns were also raised about unclear terms of work in contracts, although it was also suggested that this may be more of a concern with smaller, less

sophisticated engagers (Interview 6850). More generally, expanding scope of work (or "scope creep") in contracts was identified as an issue (Interview 6850; Interview 7294; Interview 8172).

Compensation levels and disparity among workers are concerns, particularly in the games subsector (Interview 0338; Interview 0616; Interview 6850). According to one interviewee, disparities in parts of this sector relate to the international (and predominantly US) nature of some companies, where the same company pays workers in Canada significantly less than it does its workers in the US (Interview 0338).

In some parts of the sector, particularly video games, overwork and extreme work hours were identified as problems, as was lack of time off (Interview 6850; Interview 7294; Interview 8172). Lack of benefits and paid sick days were identified as significant ongoing concerns, although this may be concentrated in some parts of the sector (Interview 0616; Interview 7294; Interview 8172). Exclusion from statutory minimum standards protection in whole for SEWs, and in part even for employees in some provincial jurisdictions, was identified as a concern. Interviewees were sceptical of the justifications given for exemptions for technology workers, and suggest that employers overapply these exclusions (Interview 0616; Interview 6850; Interview 8172).

"[M]ost game employers just treat it like all game workers are excluded under the IT exclusion … somehow that's been expanded to everyone who sets foot in a game or tech workplace." (Interview 0616)

"[L]ack of sick days is a big one. Lack of paid sick days that is. The other thing … is the EI system and the inability of contract workers to contribute to or collect EI. … [T]hat group of workers tends to have more gaps in employment than lots of others do as they move from contract to contract. And so, they've got no support in between." (Interview 8172)

Non-disclosure and intellectual property provisions in contracts were identified as recurring problems for workers across this sector. The former impedes workers from getting new employment or advancing in their careers because non-disclosure limitations mean they are unable to sufficiently describe their experience to potential employers (Interview 6850; Interview 7294).

"One of the larger issues … is with non-disclosure agreements …. You're going to run into [these provisions] basically every time. I think it's impossible to get a job in the games industry without signing an NDA." (Interview 7294)

Across the sector, equity concerns were reported to be of significant importance, although the types of concerns differed somewhat among subsectors. Concerns about sexual harassment, discrimination, and sexism, as well as more general equitable processes in the workplace relating to promotions and access to training were raised by participants from across the sector (Interview 0616; Interview 6850). In the video games subsector, equity in distribution of work was also a concern (Interview 4245). Elsewhere in the sector, equity concerns extended to broader social concerns relating to the impact of their work on society, democracy, and the working conditions of other workers (Interview 6850). Some workers are also concerned about their work being used for military or surveillance purposes. This appears to be a significant motivation for some of the collective action taken by technology workers in the US in recent years, and the cross-border flow of workers and influence of non-union technology worker organizations is related to this concern arising in Canada (Interview 0338).

"[F]or the most part, these are fairly well-paid jobs with benefits and pension, and they have a lot of the main issues covered. But what I've heard from workers is, in a

way, not very unique in that it's issues of equity in the workplace, both in terms of pay equity between the highest and lowest paid workers, and then equity in terms of a welcoming, safe work environment for everybody, where people regardless of gender and race have the opportunity to advance and feel respected at work. And then having a voice for how the work is done, I think, is another big thing for tech workers. They know what it takes to get this work done, they know how to do it well, and they want a say in how that's arranged." (Interview 0616)

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2. Organization of Workers

There appears to be relatively little union presence in the technology sector, and interviews did not reveal any union representation of SEWs in this sector. The representation that does exist appears to be through recently emerging, small, volunteer-based, non-union organizations that do not engage in individual or collective bargaining, and which are in the early stages of development. At most, they offer a forum for information exchange among workers in the sector (Interview 0338; Interview 0616; Interview 6850; Interview 7294). In short, the technology sector appears to be effectively unorganized at this time.

"I have to say the number one issue for these workers is benefits. It's not collective voice. Collective voice is a luxury. Benefits are a necessity. And so, the whole system of employer-paid benefits is what's broken down. And that's broken down because we've taken large companies that were providing benefits and just contracted it out to hundreds of small employers who many of them actually would like to be able to provide benefits, but they simply can't. The systems in the marketplace aren't there. And the costs as individual employers are prohibitive." (Interview 8172)

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3. Prospects for Collective Organizing

With regard to Haiven's Union Zone Model, workers across the technology sector would likely be regarded as having high skill and autonomy. Although the need for mutuality in workplace ordering of work may vary among different parts of the sector, in general it is likely relatively high. The degree of negotiation also probably varies among subsectors. While some workers fall

within the highest region of the negotiation vector, reflecting high individual bargaining power and concerns, other groups may be located closer to the middle of the vector, reflecting lower individual and relatively greater collective negotiation interests and power. The former group is likely composed of elite, very high-skilled, contractors, which would fall within Haiven's Zone 2, while the latter would likely include less high-skilled workers, or those in the games sector, and may fall closer to, or within, the "union zone."

Haiven describes Zone 2 workers as sharing common needs, despite their individualistic nature and precarious work, although individual interests may be greater. Their highly individualized bargaining power may impede recognition of these workers' collective power. Deployers likely prefer individual over collective, negotiations with these workers, so will tend to resist unionization. Haiven predicts that unions may have difficulty representing these workers, given that these workers may prefer to engage in individual bargaining or to pursue individual benefits (Haiven 2006, 94, 95, 97).

Haiven also examined the situation of computer specialists as an example of Zone 2 workers (Haiven 2006); some of his observations may be relevant to this report, although the Zone 2 workers he considered had legal employment status. Although unions have sought to organize these workers, they have tended to resist, and those unions that have engaged in some form of organizing often utilized "unconventional methods" or "open source unionism," whereby unions provide services and support to groups of workers long before organizing or unionization is feasible, and which is controversial among unions (Haiven 2006, 105-107). Nonetheless, Enda Brophy concludes, in a study of technology workers, that their "notorious aversion to collective organizing has begun to crumble" (Brophy 2006, 633).

Overall, application of the Union Zone Model suggests that organizing may be more possible among some subsectors of the technology sector than others, and that very high-skill workers may not be readily organizable.

Impediments to organizing workers in this sector include structural impediments relating to the number and often small size of companies, an often dispersed and mobile workforce, and the often-international nature of employers (Interview 0338; Interview 8172). The two-tier nature of much of the industry – with a split between employees and agency workers – was identified as an impediment to organizing, in part because contractors generally seek to become employees. The sense of competition between employees and elite SEWs, noted above, was reported to have led to failure of a significant union initiative to establish an association dedicated to self-employed technology workers (Interview 8172). Therefore, internal divisions among workers in this sector may be a significant impediment to organizing.

"[A two-tiered workforce] enforces a division in the workers, rather than all of them being able to work together towards an organized wall-to-wall workplace, because it puts more risk on the independent contractors." (Interview 0616)

"[T]here isn't a lot of class consciousness in the tech industry." (Interview 6850)

Many workers are highly careerist and one interviewee indicated that these workers would not want to threaten their advancement by organizing (Interview 8172). Moreover, in some parts of the sector, the strong US orientation of many workers is a difficulty, as many see employment in Canada as a short-term stepping-stone in their careers (Interview 6850).

Finally, concern about retaliation was identified as a problem across the sector. This was reported to include non-renewal of contracts, termination, and even "blacklisting" (Interview 0616; Interview 7294; Interview 8172).

"[T]he vast majority [of self-employed technology workers] would never consider filing a grievance. It's just not what they do … they're looking for career advancement. They're looking to build careers. And so, they're unlikely to negatively impact that possibility by being seen as someone who's hiring an outsider to fight their battle inside." (Interview 8172)

"I think there's a really big fear of … blacklisting, and also there's so many people who want jobs in the industry, so just a sort of like culture of disposability, maybe." (Interview 7294)

"And maybe one step beyond [retaliation is] the fear of blacklisting from the industry more broadly too." (Interview 0616)

Turning to Kelly's Mobilization Theory, it is evident that organizing is at a very nascent stage in this sector. This is supported by previous research and information obtained in the present study. A series of earlier studies applied Kelly's Mobilization Theory to video game developers, primarily in North America and Europe (Legault and Weststar 2015; Weststar and Legault 2017; Weststar and Legault 2019). The first of these studies found that video game developers had not achieved any of the four determinants under Mobilization Theory (Legault and Weststar 2015). With regard to the first determinant, while an "in-group" had formed, the oppositional group was not always the employer but often workers, partly reflecting a need to have close ties with employers. In terms of the second determinant, organization, although social media and online communication platforms existed, reliance on volunteers significantly limited groups' organizational capacity, and lack of legal support limited activities to public peer pressure. The third determinant, mobilization, was unlikely, given developers' assessment of few

benefits and significant risks, in the context of high individual bargaining power in a favourable labour market and weak worker attachment to any given workplace due to high mobility. In terms of the fourth determinant, opportunity, Legault and Weststar assessed this as lacking due to fear of employer reprisal, fear of potentially encouraging outsourcing in the industry, and a strong sense of meritocracy, and rejection of common union ideology and approaches (Legault and Weststar 2015, 212-219). The authors noted, however, that these groups of workers did engage in alternative mechanisms, distinct from Kelly's notion of full mobilization, such as unionization (Legault and Weststar 2015, 219).

Weststar and Legault (2019) subsequently revisited this issue, considering recent developments, and concluded that video game developers had progressed towards greater mobilization and along Mobilization Theory stages. Noting that in the intervening period explicitly pro-union organizations had developed and had undertaken direct action, issues were being reframed as collective rather than individual concerns, such that the first determinant had been achieved. As organizational structure has also continued to develop, interest groups remained local, engaging in "localized and disjointed" interventions. Further, in terms of mobilization, new leaders may be emerging, pointing to organizations such as Game Workers United, pointing to growth towards mobilization. However, lack of legal supports, and the ill-fit of Wagner labour relations systems, continued to mean that the fourth determinant was not achieved (Weststar and Legault 2019). However, Weststar and Legault suggested that these workers continue to build ties with unions that hold sectoral bargaining rights, such as entertainment unions (SAG-AFTRA), and that these unions might employ political and other resources to obtain a sectoral unionization solution for these workers (Weststar and Legault 2019, 858).

In the present study, interview and focus group discussions suggest that workers in the technology sector have clearly identified a number of widespread concerns, and many of these can be characterized as being of common rather than individual interest. Interviews also suggest that there is a sense of injustice against employers relating to these concerns. Some non-union groups have formed, and some are starting to establish links with established unions. Therefore, it appears that the first stage of mobilization has been reached.

However, the nature of these non-union groups, their philosophical orientation, and the limited degree of organization and stability of these groups, as reported by interviewees, suggest that they have not yet reached the second stage of mobilization: achieving a sufficient degree of organization such that they are able to engage in collective action. The few non-union organizations that exist in Canada that engage with technology workers' workplace concerns share a similar genesis, and similar values and approaches. Specifically, they are rooted international technology worker organizations, which are active in the US and which practice "solidarity unionism," which focuses on direct action, eschews industrial unionism, and does not necessarily regard certification or collective bargaining as a goal.

Reflecting this solidarity unionism orientation, these organizations rely on volunteers rather than formal membership or dues, and they may be reluctant to engage with the mainstream labour movement (Interview 0338; Interview 0616; Interview 6850).

"[We are] sort of antagonistic towards dues paying …. [T]he way I've seen it presented is like 'Well, if you're paying dues then' … it separates the membership from the people who are doing stuff with the dues." (Interview 6850)

"100% volunteer. In fact, very opposed to taking money. … Because once you're dependent, then their constraints and concerns over what impacts their money flow starts to impact your decisions, and that needs to not happen." (Interview 0338)

"[O]nce people start getting paid by an organization, it's just a much deeper influence in values that come along with that." (Interview 0338)

"It seems like a bunch of contradictory ideas are floating around about how we might relate to existing unions or what our internal structure should look like or what we're turning into. And the concern seems to be importing some arguments about ways that unions can become … kind of bureaucratized or unaccountable to rank and file or something like that." (Interview 6850)

Nonetheless, some of these non-union organizations have sought some support from unions (such as meeting space), have discussed greater involvement with unions, or have entered into an entered into an agreement with a major Canadian union for assistance with resources (Interview 0338; Interview 6850). In addition, a major North American union has recently established a branch dedicated to technology workers; however, it is only in the early stages of connecting with workers in this sector.

"[T]here isn't enough meat on the bones of the social organization to make [contemplating unionizing under existing labour legislation] that interesting or meaningful." (Interview 6850).

"[T]he notion of collective bargaining is entirely foreign to them. It doesn't enter into their thinking at all. They're simply thinking about the way their lives are now and the way they've always been. And they've always been one contract to the next with no power and if you don't like it you leave. They don't like you; they fire you. You get paid, you don't get paid. That sort of thing. So, the notion of bringing them around to a union is not top of mind for them." (Interview 8172)

Overall, it appears that worker organizing in this sector, including SEW organizing, is currently at a very early stage and faces significant impediments such that unionization may be beyond the organizing capabilities of the existing non-union organizations at this time. Nonetheless, it also appears that some unions are informed about this sector and willing to assist workers, including assisting with organizing. Therefore, if unions either directly organize

workers, or AWOs develop greater capacity and stability – including possibly continuing to develop relationships with unions – then unionization of workers in parts of this sector may be possible.

D. Telecommunications

1. Organization of Work

The telecommunications sector includes internet, telephone, and mobile cellular networks, and is characterized by having a relatively small number of large companies (referred to here as "providers"). The number of jobs in this sector has remained fairly stable over the last decade, both in employment and self-employment (Fellows and Khanal 2018, 14). According to an interviewee, the volume of work and number of jobs in the sector remains the same, for the most part, but "it's just a question of *where* it is" – meaning whether the work is at a provider or a small operator, and whether the work is done by employees or self-employed workers (Interview 0915). Overall, however, the proportion of total jobs made up by self-employment appears to be small in this sector (Fellows and Khanal 2018, 15; Statistics Canada 2019, Table 36-10-0489-01), consisting of independent contractors or subcontractors doing work for providers (Fellows and Khanal 2018, 14).

> *"There's a saying in telco that goes 'working in the telecommunications industry is always a balloon, so if you squeeze the balloon at the bottom, it'll become bigger at the top. If you squeeze the top, the bottom will get bigger. But no matter what, the volume of work is always there, it's just a question of where it is.' … But ultimately there still is, more than likely, and still to this day, the same 4,000 people working for the phone company in [the region], they're just not working at the phone company anymore." (Interview 0915)*

In the United States, Weil has traced the use of multi-layered subcontracting in the cable media industry, and how this has resulted in what were previously employees being transformed

into independent contractors (Weil 2014, 101). A fissured organizational form labelled the "turfer model of subcontracting" has been found to be prevalent in the cable media and cellular industry in the US (Weil 2014, 96, 109). This involves major cell carries as the lead business, and then contract with intermediaries called "turfers," which are large companies operating as lead contractors, and which operate as project managers or general contractors rather than performing the work (Weil 2014, 109, 119). The turfers enter into contracts with one or more tiers of smaller contractors to provide the actual work. At each tier, the subcontracting involves bidding and detailed contracts regulating the terms of work (Weil 2014, 94-95).

This description accords with interviewees' reports that SEWs in this sector are often former employees of providers and are predominantly found in two configurations. The first configuration is where large telecommunications companies engage smaller operations to provide services. These smaller operations may, in turn, engage SEWs or employees. The second configuration is where large telecommunications companies directly engage SEWs. The interviewees indicated that the former is likely more prevalent than the latter (Interview 0915; Interview 1690). While some of the smaller contractor enterprises have relationships with multiple providers, more commonly they are engaged by a single provider, including through an exclusive contract (Interview 0915; Interview 1690).

Contract work was reported to be concentrated among engineers and technicians (installation and maintenance work) (Interview 0915). Self-employed engineers tend to work full-time on a particular project until it is completed, and this may be for a period of months. In contrast, self-employed technicians tend to work more regularly: a set number of hours per week (Interview 0915). SEWs are paid by the job or unit of completed work, while employees tend to be given salary or hourly compensation (Interview 0915; Interview 1690).

"They're [new contractors] popping up all over the place. Can't even keep track of them." (Interview 1690)

"They could depart [retire] on Friday and re-appear on Monday as Jimmy Contracting Outfit as a consultant. … They even, themselves, have subcontractors within." (Interview 0915)

Interviewees attribute growth of contractor companies and attendant growth of self-employment to deregulation of the sector, which commenced in the 1990s (Interview 1690). Contractor companies present their workers as SEWs (independent contractors), and these workers believe themselves to be SEWs (Interview 0915; Interview 1690).

"[I]t's mostly for large contracting companies, the Teluses, the Shaws, they'll pick one large provider and then that one large contracting provider will divvy up the work. They call it the turn-key example, and basically they take a chunk of work, give it to like a Ledcor Group, and then that Ledcor will divvy up the work how it sees fit. Typically, that's when you get all of these different multi-layer contractor pieces, and if you ask the individual contractor where they get their work from, quite often they don't really know. It's 'I don't know, but somehow I get work' … and it's not necessarily a completely independent situation where they're working on their own. They're very much dependent on the large contractor for vehicle, training, and the work itself." (Interview 2356)

"It's large contractors, and then they'll divvy it out, they'll pick their favourite people that used to be employees, and those employees will then open their little companies and they'll hire a bunch of people underneath them. They take a percentage of what those people make, and … they will use the same vehicles … they're essentially working for the company but they're called 'independent contractors.' Even though they're very dependent on that company." (Interview 3415)

"[One large contractor] has admitted that they don't see themselves as a provider anymore of anything other than labour. So, they're just going out there and picking up all these subcontractors and then providing them to the telecom provider. The shell game just keeps getting one layer deeper …" (Interview 4226)

Self-employment in this sector appears to be driven both by preferences of the companies (both providers and contractor companies) and the workers. Companies seek flexibility and cost savings (Interview 1212; Interview 1690; Interview 2356; Interview 3415). Large telecommunications companies have a core set of employees they want to retain long-term, and a periphery of contractors that come and go with the volume of work (Interview 0915). Meanwhile, contractor companies seek to keep labour costs down in order to maintain their contracts with providers (Interview 1690). At the same time, interviewees report that workers value the ability to work longer hours, and therefore earn more as SEWs than would be legally possible as employees due to statutory limits to hours of work which apply to employees (Interview 1690).

"It's the employers that are driving it. They do not want to pay what they pay their regular employees, for a certain form of work that they would rather give to the contractors." (Interview 0915)

"The advantage [of independent contractor status] that workers see is the opportunity to work as many hours as they want to. I think that's the biggest advantage. …. We started talking about unionizing. The retaliation from the employer, from people who were anti-union was, 'You know, we'll lose the ability to do piecemeal work and will get paid hourly and we'll only be able to work eight hours per day and not work 12 hours a day or work whatever [you] want.' Being an independent contractor, being able to be your own boss and work your own hours allows you to do that. Work 10, 12 hours a day. Make more money. That's what we see." (Interview 1690)

Although interviewees did not identify misclassification of employee status as an issue per se, they did describe contracting outfits and those working for them as typically dependent on a single telecommunications provider and regarded them as not being genuine independent contractors (Interview 0915; Interview 1212; Interview 1690; Interview 2356; Interview 3415). This dependency takes a very concrete form. Whether included as a contract term or existing as a

practice, interviewees reported that workers are commonly required to work exclusively for a given contractor, and lengthy "cooling off" periods between working for different engagers is also common (Interview 2356; Interview 3415; Interview 4226). Non-disclosure provisions in contracts were reported to exist but were not described as prevalent (Interview 4226).

"[O]ne might call it a pyramid scheme in that regard, where there's typically a head of the pyramid and they're working under that person and they have to remain with that person until they're either ready to quit or they want to wait three to six months to go to another contractor." (Interview 2356)

"It's that cooling off period that really keeps them at bay … they describe it as basically being trapped: you either suck it up and put up with it, or face three to six months of not working." (Interview 3415)

SEWs concerns apparently centre on lack of benefits and extended health care, uncertainties about volume and regularity of work, and deteriorating remuneration and compensation for expenses (Interview 0915; Interview 1212).

"I think it's enticing at first to be paid piece rate. But once they realize that they're expected to work seven days a week or six days a week without overtime, I think a lot of the employees don't realize the level of burnout they're going to be subjected to. … So, there's going to be bad jobs that take more time that are measured out by the easy work. But as soon as the work gets too easy, then they start cutting down the rates of the easy work." (Interview 4226)

"It's a … transient workforce and a lot of people view these jobs, now, as very low paying, not very reliable, career-type opportunities that they used to be. The wages and the working conditions have been lowered so much by the deregulation and then the contracting out." (Interview 1212)

"[T]here's always somebody out there that's being, I find, a little bit more exploitive than the next guy. … It'd be valuable if they could, society-wise, achieve the same level and form of guarantees at the very least." (Interview 0915)

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2. Organization of Workers

The federal telecommunications sector is reported to be highly unionized with a few, well-established unions (Interview 0915). However, unionization is reported to be concentrated in the large providers, while the contracting companies, which can range in size from five to 250 workers, tend not to be unionized (Interview 0915; Interview 1690; Interview 4226). It is uncommon, if it exists at all, for collective agreements in this sector to include provisions covering independent contractors, other than provisions seeking to limit contracting out or requiring contractors to be unionized (Interview 0915; Interview 2356). No non-union organizations providing collective representation or bargaining to telecommunications workers in the federal sector were able to be identified in the course of this study. Nonetheless, interviewees reported that union organizers are currently actively seeking to organize SEWs in this sector (Interview 1690; Interview 4226). Interviewees regarded SEWs engaged by contractor companies as not being genuine independent contractors, consistently reporting that these workers generally work for a single subcontractor, contractor, or provider. Consequently, union interviewees have organized, and continue to seek to organize, these workers (Interview 1212; Interview 1690; Interview 2356; Interview 3415). While in some regions it appears that unions have sought – with little reported success – to bring SEWs into existing bargaining units at providers or prime contractors (Interview 1212; Interview 1690), it appears that this is not a common organizing approach in other regions (Interview 2356; Interview 3415).

3. Prospects for Collective Organizing

Applying Haiven's Union Zone Model, it is likely that SEWs in this sector exhibit moderate (technicians) or high (engineers) degrees of skill and autonomy, and that there is a moderately high to high need for mutuality in workplace order. With respect to mutuality, an interviewee

emphasized that work in this sector is highly coordinated (Interview 0915). Therefore, some of these workers (technicians) would likely fall well within the "union zone" and close to the peak of the negotiation vector. Engineers may fall within Zone 2, and possibly outside of the "union zone," if their perception of individual bargaining power and interests outweighs common concerns.

Several impediments to organizing SEWs exist in this sector. First, there appears to be significant uncertainty about the legal status of these contractors (dependent or independent contractor), and about whether small operators and those they engage fall within federal or provincial jurisdiction (Interview 0915). While some interviewees reported that telecommunications companies commonly raise employee status challenges to certification applications, others did not identify status issues as a key impediment to organizing (Interview 1690; Interview 3415).

In contrast, the question of whether federal or provincial jurisdiction applies to contractor companies in this sector appears to be a recurring and significant issue. A significant volume of litigation surrounds federal-provincial jurisdictional questions relating to collective bargaining rights in the telecommunications sector and in recent years numerous cases have arisen involving contractor companies providing telecommunications services to large providers. Many of these cases involved years of litigation and reconsiderations and appeals, with several reaching the SCC just in the last few years (see Adams 2006, para. 3.420).[31] The relevant legal test is flexible and therefore difficult to predict in its result. In some instances, these contractors have been

[31] See e.g. recent decisions finding federal jurisdiction: *XL Digital Services Inc c SCEP*, 2011 FCA 179; *Telecon Inc v International Brotherhood of Electrical Workers, Local Union No 213*, 2019 FCA 244 (leave to appeal to Supreme Court of Canada refused, 2020 CarswellNat 1465). See e.g. recent decisions finding provincial jurisdiction: *Ramkey Communications Inc. v. L.I.U.N.A., Ontario Provincial District Council* (2017), 300 C.L.R.B.R. (2d) 33, (O.L.R.B.), reconsideration / rehearing refused (2017), 300 C.L.R.B.R. (2d) 141 (O.L.R.B.), application for judicial review allowed, 2018 ONSC 4791(Ont. Div. Ct.), (application for leave to appeal to Supreme Court of Canada refused, 2020 CarswellOnt 6326).

found to fall within the federal jurisdiction for labour relations purposes; in other cases, they fall within the provincial jurisdiction.

This creates real uncertainty for contractors, their workers, and unions. Jurisdictional uncertainty was regarded by several interviewees as a significant impediment to organizing (Interview 1690; Interview 1212; Interview 2356; Interview 3415). Many interviewees reported that employers exploit this uncertainty by making strategic jurisdictional challenges, regardless of where certification applications were filed, in order to defeat the certification application through delay, to undermine workers' trust in the union, or to seek regulation by a more favourable collective bargaining or minimum standards regime (Interview 1212; Interview 1690; Interview 2356; Interview 3415). While some interviewees reported commonly filing certification applications with both the provincial and federal labour board (Interview 1690), others do not take this approach, (Interview 2356; Interview 3415).

"[S]elf-employed employees in that federal sector or industry exist in the layers of contracting-out that exist within the company. I do not know for sure any longer if they truly belong to the federal sector, or to provincial." (Interview 0915)

"[Different court and board decisions on jurisdictions] creates uncertainty with the workers. They don't trust what we're telling them. They don't think that it's a possibility for them to be unionized. So this is beside the whole independent discussion. … You start, when you go in there as an organizer, and you think that you understand the process of how they become unionized – you hope you do – and it starts to play out and it gets bogged down at whether the provincial or the federal board you, start to lose support and you lose the campaign. [This] is what happens." (Interview 1212)

A second impediment to organizing SEWs in this sector involves the disappearance or reconfiguration of contractor companies. Contractors appear to be highly cost-sensitive and an interviewee reported that it had been his experience that if unionization and a collective

agreement increased costs beyond a certain threshold, then the contractor would simply close down. While off-shoring of work is also a possibility, it was not reported to be a primary concern (Interview 0915). Engaging in further subcontracting out of work has also emerged as a union-avoidance strategy by prime contractors (Interview 2356; Interview 3415).

"[F]or me to go in and organize them and fight for them for a collective agreement that sets their wages, there will be a breaking point where I won't be able to succeed any further, a limit of what I can do without tearing apart they very thing that they are, which is ultimately not a full-price phone company or telecom …. Because the financial comes from the company that hires them, because they can guarantee a certain cost element, if ever I exceed that cost, then their existence is gone." (Interview 0915)

"[I]f [a prime contractor knows] that we're around trying to organize, then this sub-of a sub- of a sub-model seems appealing because you can avoid a union by having all these layers and making it impossible to organize. And really driving everything down to the bottom, in my opinion, as far as working conditions." (Interview 2356)

"It's a very difficult industry to organize in because of the transient workforce and a lot of people view these jobs, now, as very low paying, not very reliable, career-type opportunities that they used to be." (Interview 1212)

A third impediment to organizing SEWs in this sector involves fear of retaliation. The fear of employer retaliation, particularly the fear of being terminated during the organizing process, and the particular vulnerability of workers in the early stages of organizing prior to contacting a union (and therefore prior to applicability of existing CLC ULP provisions) was identified by a union interviewee as a significant impediment to unionizing in this sector (Interview 0915; Interview 1212).

"[I]t's more about their working conditions, their wages. The amount of times that we've actually been able to get a certification to the board is few and far between, if

we even get that far. The retaliation by the employer, the claiming that they're independent contractors." (Interview 1690)

"[W]hat will happen is the owner of the contracting company will come in and say 'if we unionize and we lose this contract, then you lose your job.' That's it, it's done. Dead in the water. There's no further campaign after that." (Interview 1212)

SEWs in this sector appear to be dispersed among a significant number of small operators; some interviewees regarded it as a difficulty (Interview 2356), while others described it as a challenge – but not an insurmountable one – for a union or other organization to locate and contact these workers (Interview 0915; Interview 1212; Interview 1690).

"No. I don't think it would be impossibly difficult. Difficult, yes. [G]iven the social media presence that's out there these days. I think we could find them. And some of our organizers already know where they are. So, impossible, no. Slightly difficult, yes." (Interview 1690)

"[T]he longer [certification] took, the more fearful the employees were because it started to get more and more difficult. If you're a construction worker or a utility worker, routine is your friend. You want to go to work every day. You want things to be ok. You want to get along with your co-workers. You don't want there to be any drama. Well, if there's an organizing campaign going on, it's very dramatic. So the length of time that the campaign takes is a huge factor in being successful in the campaign. If the employer decides to drag it out by filing appeal, appeal, appeal … the board will take a month and another month and another month. That time is just like a jail sentence for these guys. Very often or not, because of how dramatic and difficult campaigns can be in the workplace our supporters often leave. Especially if they're one of the main supporters. They just leave. They've had enough. I don't want to do this anymore. It's too dramatic, it's too difficult for me, and they go. They go somewhere else." (Interview 1690)

"There's nothing enforcing or forcing that employer to play by the rules, not ULPs, and negotiating in good faith, then they won't do it. … The biggest problem is there's no enforcement. You don't ever hear about a heavy fine being levied against an employer for not following the collective bargaining process. Or, an unfair labour practice has been filed against this employer and here is this massive fine. The resolution to that is usually wages lost and go away, right? That's what the resolution usually is." (Interview 1212)

Turning to Kelly's Mobilization Theory, it is not apparent from the information obtained in this study that SEWs, as a distinct group in this sector have achieved even stage one mobilization: framing of interests in a collective manner. This study was unable to locate any SEW organizations. This accords with an interviewee's expressed concern over the apparent lack of workplace organizing leadership among SEWs in this sector (Interview 0915). Nonetheless, unions have achieved some very limited organization of these workers.

E. Conclusion and Summary of Sector Overviews

Commonalities and differences among the sectors of interest in regard to the organization of work, organization of workers, and the need for, capacity for, and impediments to collective organization for SEWs emerged through the stage one interviews. These characteristics are relevant to whether collective representation or bargaining is appropriate and to which collective representation or bargaining models may be appropriate to consider for SEWs in each sector. Detailed above and summarized below, these features are summarized in Table 3, below.

1. Road Transportation

The federal road transportation sector is composed of two distinct subsectors (freight and delivery). Subcontracting is common in this sector, includes direct subcontracting to owner-operators and individual drivers, and subcontracting through an intermediary (commonly an owner-operator hiring one or more SEW or employee drivers). Certain owner-operators, although otherwise appearing to be independent contractors, are considered to be dependent contractors under the CLC.[32] SEWs engage in the same work as, and often alongside, employees in this sector.

[32] CLC, s. 3(1)(a).

Owner-operators and drivers work under individual service contracts that exist in parallel with any existing collective agreement. Collective agreements may regulate, to some degree, individual contracts. Occasionally, collective agreements address individual contracts between unionized owner-operators and their hired drivers, even where the hired driver is outside the bargaining unit. In some instances, what appear to be self-employed workers have unionized and the employer apparently has chosen for strategic reasons not to challenge the workers' status.

SEWs' concerns centre on lack of access to minimum standards of work and social benefits, assistance with challenging driving violations, and assistance with individual contracts.

Exercising moderate to high skill and autonomy, with a relatively low need for workplace mutuality, these workers would likely be located near the lower-level contract work area in Haiven's Union Zone. This is likely either outside, or just within, the "union zone." Several impediments to organizing include: confusion about the identity of the employer, the supplementary nature of this work for some workers, a dispersed and often transient workforce with a sense of independence, reports of significant misclassification of drivers pursuant to the "Driver Inc." model, employer retaliation, and union avoidance tactics. At the same time workers in this sector have a strong occupational identity and sense of solidarity, and a high degree of communication and mutual aid.

There is a significant union presence in this sector. A few AWOs have emerged but these appear to have limited capacity or orientation towards collective activities. They generally assist individuals and engage in lobbying efforts. SEWs are likely at a very early stage of mobilization, not yet appearing to have formulated a collective framing of interests.

Overall, there are reasonable prospects for SEWs in this sector to engage in collective representation or bargaining, should they choose to do so, largely due to the existence of long-established unions in the sector.

2. Broadcast Media

The broadcast media sector is heterogeneous, including numerous different occupations. SEWs may do short-term, intermittent work predominantly for one engager or may work for multiple engagers simultaneously or in series. Direct subcontracting predominates and SEWs operate under individual contracts for each engagement. Workplace concerns focus on minimum standards, social benefits, exploitative contract terms and ensuring payment for contracts. There is a strong union presence in this sector and major broadcasters tend to be unionized. In a few instances, collective agreements include provisions covering SEWs and individual contracts.

Haiven's Union Zone Model suggests that the high degree of autonomy of SEWs in this sector, and the moderate requirement for workplace mutuality, means that these workers may be difficult to organize. These workers likely either fall within the high-level contract work area (Zone 1), which is outside the union zone, or traditional or lower-level craft work (Zone 2), which is within or near the union zone. Impediments to organizing include: a heterogeneous workforce, short-term and high turnover in work, competition among SEWs, tension between self-employed and employed workers in the same workplace, individualistic culture, misclassification, and fear of employer retaliation.

Nonetheless, SEWs in broadcast media have achieved a high level of collective mobilization (Stage 3). This reflects the strong union presence in the sector as a whole and the development of several AWOs, which are sophisticated, have a strong collective orientation, and are often associated with established unions, but are significantly limited by lack of resources.

Overall, there is significant potential for SEWs in the broadcast sector to engage in statutory collective representation or bargaining, should they be given the opportunity to do so.

3. Technology

The technology sector includes an array of occupations, although video game developers appear to be a distinct subsector. Direct subcontracting of SEWs in this sector is common, although in some subsectors elite, high-skilled SEWs are commonly subcontracted through agencies, as intermediaries, and may have relationships with multiple agencies simultaneously. Apart from the elite agency workers, SEWs are subject to negative perceptions and treatment in the workplace, and treated as second-tier workers.

SEWs are concerned about job security, minimum standards, working conditions and especially work hours, protection from exploitative contract terms, contract payment, and compensation. Distinct from other sectors was the significant interest in equity (both workplace equity and broader social concerns) and protection from harassment.

There is little union presence in this sector, although a few volunteer-based AWOs have emerged. These have little capacity for collective organizing at present, though some are developing associations with media unions. They demonstrate a strong commitment to a "solidarity unionism" approach, which is at odds with traditional unionism and organizing.

SEWs in this sector are generally highly skilled and highly autonomous. The need for workplace mutuality likely varies within the sector, although it is likely relatively high. Individual bargaining power varies significantly as does the relative importance of collective and individual interests. Elite, very highly skilled SEWs likely fall outside or near the union zone (Zone 2); moderately skilled SEWs in the sector are likely located near or inside the union zone.

Haiven's Union Zone Model suggests that collective organizing is more feasible among some subsectors, and that the most highly skilled workers may not be inclined to collective activity.

Key impediments to organizing include: the prevalence of small companies and workplaces, a dispersed and mobile workforce, disparate treatment of SEWs, competition between employees and SEWs, individual careerist orientation of workers, fear of employer retaliation, and the nature and limited capacity of AWOs in the sector.

With the exception of the video game developer subsector, which may have progressed to framing collective interests (Stage 1), SEWs in this sector do not appear to have achieved more than a minimal degree of mobilization.

Overall, collective organization of SEWs in this sector is at a very early stage. Collective organizing of this sector will be a significant challenge. Organization of SEWs in parts of this sector may be possible. This will likely depend on media unions either directly organizing these workers, assisting the AWOs that have emerged to organize SEWs, or AWOs developing greater collective organizing capacity. However, it may be that these workers would prefer to engage in collective voice rather than collective representation or bargaining.

4. Telecommunications

The telecommunications sector is dominated by a few large providers and, in some regions, large intermediaries. Subcontracting is prevalent, appears concentrated among engineers and technicians, and includes direct, tiered, and intermediated forms. Tiered subcontracting by providers is common, with or without an intermediary business managing the subcontracting. Self-employed workers are located at the bottom of these contracting chains. In these sectors, non-intermediary contractors are often small enterprises or individuals.

SEW concerns appear to focus on minimum standards, social benefits, exploitative distribution of work, and compensation.

SEWs in this sector likely have moderate or high degrees of skill and autonomy, with a moderate to high need for workplace mutuality. Higher skilled workers may fall outside or just within the "union zone" (Zone 2), while moderately skilled workers, such as technicians, may fall within the "union zone." Therefore, Haiven's Union Zone Model suggests that there is a reasonable prospect to collectively organize these SEWs.

Impediments to unionizing include: the workforce is dispersed among many small subcontracting firms, uncertainty about employee status, uncertainty about federal or provincial jurisdiction, price-sensitivity of subcontracting businesses, ability of small subcontracting businesses to shut down or relocate, and fear of employer retaliation.

Major providers in the telecommunications sector are highly unionized, although intermediaries and subcontractors tend not to be. No AWOs appear to be active in this sector. Overall, self-employed workers in this sector appear to be in the early stages of mobilization, and have not yet achieved the first stage of mobilization: collective framing of interests.

Overall, however, given the apparent interest and capacity unions in the sector have to organizer these SEWs, there is some prospect for collective representation and bargaining for these workers.

Table 3: Sector Overview of Organization of Work & Relevant Form of Collective Organizing

	Organization of Work		Type of Collective Organizing Reflecting SEW Needs
Sector	**Structure**	**Fissuring Form**	
Road Transportation	Distinct sub-sectors. Individual service contracts and collective agreements SEWs and employees mostly indistinguishable	Direct Intermediary (owner-operator with hired drivers)	Representation and bargaining
Broadcast Media	Distinct sub-sectors. Individual service contracts and collective agreements SEW and employees work side by side, indistinguishable	Direct	Representation and bargaining
Technology	Distinct sub-sectors SEWs and employees may work side by side but treated differently	Direct Intermediary (staffing agency intermediary)	Voice and representation
Telecommunications	Large, regional, media providers and intermediaries; small subcontractor businesses	Direct Intermediary Tiered	Representation and bargaining

Table 4: Sector Overview of Current & Potential Collective Organizing

	Organization of Workers	Prospects for Organizing			
Sector		**Capacity**	**Key Impediments**	**Union Zone** *	**Mobilization Stage** **
Road Transportation	Generally unionized sector SEW largely unorganized Some SEW covered by collective agreements Some individual service contracts governed by collective agreements	Unions Few AWOs with limited collective capacity or orientation.	Misclassification Sub-contracting (owner-operator system) Vulnerable immigrant segments of workforce	Lower-level contract work, in or near union zone	Early stage (pre-Stage 1)
Broadcast Media	Generally unionized sector Some SEW covered by collective agreements	Unions Several AWOs with reasonable collective capacity.	Fear of reprisal Misclassification Conflict of interest between employees and self-employed workers.	High level contract work, outside union zone (Zone 1). "Traditional craft work" or "lower-level craft work" near or within union zone	Mobilization (Stage 3)
Technology	Generally unorganized sector	AWO very limited capacity. Radical AWOs may not be oriented to collective bargaining. Few AWOs emerged. Some AWO-union relationships emerging	Fear of reprisal Lack of AWO organizational capacity. Agency employers Diffuse, mobile, transitory workforce. Conflict of interest between employees and self-employed workers.	High-skill/high-tech work, outside or near union zone (Zone 2)	Early stage (pre-Stage 1) Framed collective interests (Stage 1)
Telecommunications	Major providers generally unionized Intermediaries and subcontractors typically not unionized SEW largely unorganized	Unions No AWOs	Fear of reprisal Sub-contracting Misclassification Jurisdictional uncertainty Diffuse, mobile, transitory	High-skill/high-tech work, outside or just within union zone (Zone 2) Moderate skill work within the union zone	Early stage (pre-Stage 1)

	Organization of Workers	Prospects for Organizing			
Sector		**Capacity**	**Key Impediments**	**Union Zone** *	**Mobilization Stage** **
			workforce in segments. Vulnerable immigrant segments of workforce		

Notes: * "Union Zone" refers to Haiven's Union Zone Model, see Section II.C.1 and Fig. 1, above.

** "Mobilization Stage" refers to stages identified in Kelly's Mobilization Theory, see Section II.C.2, above.

V. OUTLINE AND ASSESSMENT OF POTENTIAL MODELS

This Part outlines and assesses six potential models offering statutory collective representation or bargaining opportunities for SEWs, who are presently excluded from access to Part I of the CLC on the basis of their non-employee status, in the four sectors of interest in the federal jurisdiction. These models range from collective representation to collective bargaining and include two hybrid approaches.

These models were developed based on the literature review, above, and input from fieldwork. Preliminary models were introduced to participants from each of the sectors of interest in follow-up interviews and focus groups, for comment and feedback. Interview and focus group discussion participants provided input on the desirability, feasibility and applicability of each model for each of the sectors of interest. This information was utilized to consider general and sector-specific modifications, producing the six models presented here. See Tables 5 and 6, below, for summaries of proposed models and of assessments and recommendations regarding each proposed model.

A. Principles for Assessing Models

In developing and assessing models for SEW collective representation and bargaining, this report accepts as a starting point that international labour law principles and the *Charter* guarantee of freedom of association provide that SEWs have a right to access collective bargaining. In addition, the following principles guided the design and assessment of these models. First, that disruption to the existing CLC collective bargaining system should be minimized. This included considering whether SEWs in a given sector should be integrated into Part I of the CLC or whether a separate collective representation or bargaining system operating in parallel with the existing CLC system would be more appropriate. Second, avoiding, or at least not fostering,

regulatory arbitrage (Harris 2018, 29). Third, seeking horizontal equity in the sense that similarly situated workers should be treated similarly. This principle of fairness also discourages regulatory arbitrage (Harris 2018, 29).

The models presented here seek to be responsive to the needs of SEWs in the sectors of interest, as revealed through the fieldwork in this study and to be appropriate to the capacity for organizing of SEWs in the sector. Each model is also assessed with respect to its suitability and feasibility for application to each sector of interest. These assessments consider how the features of each model intersect with the organization of work, collective representation or bargaining capacity, and needs of SEWs. Consideration is also given to how introduction of each model would intersect with the existing collective bargaining system in each sector.

Whether there exists a subset of SEWs who are not appropriate to include in a collective representation or bargaining system and, if so, how to identify and define that group, are questions which are beyond the scope of this report. However, these are important question which merit separate treatment.

Table 5: Proposed Collective Representation and Bargaining Models

Model	Category	Bargaining Level	Location in Existing Labour Relations System	Elements
CLC Part I Extension	Bargaining	Workplace	Integrated	Extend scope of application of Part I, CLC to include independent contractors. Ancillary amendments (targeted or general): • Bargaining unit composition • Common employer designation or designating lead organization as true employer in tiered subcontracting, agency structures. • Electronic union membership card signing • Employee contact lists available to unions during organizing • Increase access to electronic certification votes
Sectoral Bargaining	Bargaining	Sectoral	Parallel	• Sectoral certification of "most representative" association or union • Representation rights for limited period with presumed renewal. • ULP, grievance procedure, first contract arbitration, pressure tactics available • Administered by Canada Industrial Relations Board
Bernier Model	Hybrid	Sectoral	Parallel	• Hybrid, sector-based certification based on majority support for the purposes of one or more of: collective representation (representation for individuals before agencies or tribunal and providing services), consensus-building (joint committees or specified matters which have a duty to participate), or collective bargaining. • Certified associations may seek recognition for different purposes over time.
Sectoral Standard-Setting	Representation	Sectoral	Parallel Supplementary	• Tripartite representation for SEWs, employers and government • Hybrid form of collective representation and bargaining to recommend sector-wide minimum standards of work for incorporation into regulations by government.
Protection for Collective Activity	Representation	Workplace	Integrated Parallel Supplementary	• Protection for collective activity relating to workplace issues. • Administered by the Canada Industrial Relations Board through ULP protection and remedies. • No requirement for commencement of union organizing.
Worker Forum	Representation (voice)	Workplace or Sectoral	Parallel Supplementary to gradated hybrid model	Individual workplace level: • Information and consultation rights Sectoral level: • Voluntary sector-wide initiatives • Potential for recommendation to government for incorporation into regulations of sectoral minimum standards

Table 6: Collective Representation and Bargaining Models - Assessment and Recommendations

Model	Nature	Suitability	Benefits	Limitations & Feasibility	Sector Recommendation
CLC Part I extension	Collective bargaining	SEW do similar work alongside employees Could address contracting out / fissuring and agency work.	Permits CLC certification of SEW. May reflect *Charter* and International Law obligations.	Discerning boundaries of scope of application may difficult. Does not address other practical impediments to organizing self-employed. Same limitations as existing CLC	Road transportation Broadcast media Telecommunication
Sectoral bargaining system	Collective bargaining	Capacity to provide representatives, although not capable of collective bargaining Contracting out or agency work	Improves accessibility to representation for workers in small, dispersed, or mobile working situations. Does not require applicant to demonstrate majority support. Collective minimum standards serves a heterogenous group of workers. May reflect *Charter* and International Law obligations.	Requires leadership and representatives Most feasible in sectors or subsectors with little or no established union presence to avoid conflicting certifications. May require employer councils or associations where multiple employers or multiple small employers exist.	Recommend: Broadcast media Telecommunications Consider: Road Transportation Technology
Bernier Model	Hybrid	Minimal level of mobilization Interest in developing collective representation and bargaining capacity Contracting out or agency work	May assist workers and their organizations to mobilize to become capable of collective bargaining. Responsive to workers' desired level and form of collective activity. May reflect *Charter* and International Law obligations	Potentially complicated to integrate with CLC. Requires leadership and representatives Level 1 of model is best suited to place-based workers with longer-term commitment to workplace	Road transportation Technology
Sectoral Standard-Setting System	Hybrid	Lack capacity for collective bargaining Minimum standards important	Responsive to workers' desired level and form of collective activity. Improves accessibility to	Requires leadership and representatives	Road Transportation Technology Telecommunications

Model	Nature	Suitability	Benefits	Limitations & Feasibility	Sector Recommendation
		Contracting out or agency work	representation for workers in small, dispersed, or mobile working situations. Collective minimum standards serves a heterogenous group of workers. Opportunity to develop mobilizing capacity May reflect *Charter* and International Law obligations		
Worker Forum	Collective representation (voice)	Voice mechanism desired	Opportunity to develop mobilizing capacity	Unlikely to satisfy *Charter* and International Law obligations Requires leadership and representatives	Road transportation Technology
Protection for Collective Activity	Collective representation		Supports direct action as well as organizing activities. Can provide support to voluntary recognition. May reflect *Charter* and International Law obligations.	Effectiveness may be limited by CLC and labour board's remedies and processes. May deter but cannot prevent retaliation. Policy and legislative decisions needed regarding how to integrate it with the remainder of the CLC.	All sectors

B. *Canada Labour Code,* Part I Extension Model

1. Outline

The first model proposes incorporating SEWs into Part I of the CLC by expanding the scope of the legislation to include SEWs. Ancillary amendments addressing different forms of fissuring and the certification procedure could also be considered for adoption.

Presently Part I of the CLC recognizes three categories of workers: employees, dependent contractors, and independent contractors. The category of independent contractors, which includes SEWs, is excluded from the scope of the legislation.[33] SEWs could be incorporated expanding the scope of application of the legislation to include independent contractors.[34]

Incorporating SEWs could be approached in several different ways with respect to how bargaining units are defined. Units could be mixed (including all types of workers), separate units containing only SEWs could be an option if preferred by these workers, or the default could be a separate SEW unit unless the Board is satisfied that a mixed unit is appropriate.[35] Mixed units would likely be appropriate in cases where SEWs and employees work side-by-side doing the same or similar work, while separate units would be more appropriate where that is not the case.

This model could be most readily applied in circumstances where the organization of work for SEWs involves an ongoing relationship with the employer as a direct engager, rather

[33] CLC, s. 3(1). The CLC definition of "employee" provides that it includes dependent contractors, and "dependent contractor" is subject to a detailed definition which, in part, explicitly addresses owner-operators in the road transportation sector.

[34] Similar recommendations have been made by Fudge, Tucker and Vosko (2003) and Bernier, Vallée, and Jobin (2003). See discussion at Section I.B.1 of the literature review. Not addressed here are the questions of whether a sub-set of SEW exists which is not appropriate to include in a collective bargaining system and, if so, how to identify and define that group. These issues merit separate treatment.

[35] The CLC does not make special provision for dependent contractor bargaining unit appropriateness. Other collective bargaining legislation does. For instance, the Ontario, *Labour Relations Act*, 1995, SO 1995, c 1, Sch A, s. 9(5), provides that a unit containing only dependent contractors shall be deemed appropriate, but dependent contractors may be included in a unit with non-dependent contractor employees if the Board is satisfied that a majority of dependent contractors wish to be included in the bargaining unit.

than a transitory relationship or where the SEW is simultaneously working for multiple engagers or in circumstances of multi-tier subcontracting. This model would be least disruptive of established bargaining rights where there is no pre-established bargaining unit of employees doing similar work as SEWs.

Several limitations exist to this approach, particularly for units composed solely of SEWs. First, SEWs would have to have achieved a fairly high level of mobilization and capacity for organizing to succeed in organizing separate SEW units.

Second, the exclusion of SEWs from statutory minimum standards legislation may pose a significant challenge to SEW units as these workers would have to utilize their bargaining power to negotiate to achieve even minimum terms that non-SEW units would not need to negotiate. As noted in the literature review, this is one recognized weakness of the SOA and *Performers' Act* regimes (D'Amours and Arseneault 2015, 15).

Third, expanding the scope of the CLC Part I would raise the question of how to deal with existing bargaining units and bargaining rights, particularly in circumstances where employees and SEWs engage in same or similar work in the workplace. In these circumstances, certification of additional units may produce undesirable proliferation of units, potentially leading to industrial instability. In such cases, it may be preferable to incorporate SEWs into existing bargaining units and providing more flexible statutory authority to review bargaining units to vary the scope of or consolidate existing units to incorporate SEWs where it is would be appropriate and promote constructive labour relations to do so.[36]

Including SEWs in general collective bargaining legislation has been criticized as potentially ineffective because features of such legislation are a poor fit for characteristics of the

[36] CLC, s. 18.1.

organization of work for many SEWs (see e.g. Lynk 2015, 63-64). To address these concerns, ancillary amendments addressing certain forms of work organization and the certification process may be in order.

Fissured organization of work is a well-recognized challenge to general collective bargaining systems, including Part I of the CLC. This challenge will also apply to SEWs under this proposed model. While such legislation may be reasonably feasible to apply to direct contracting structures, it will be more difficult to apply to circumstances where intermediaries or tiered sub-contracting are utilized. As revealed in the fieldwork for this study, SEWs are commonly located in complex fissured structures in some sectors of interest. In sectors where subcontracting or agency work are common, this fissured organization of work may make it difficult for SEWs to have effective access to certification and bargaining.

These statutory shortcomings could be mitigated by amendments to employer, common or related employer and successorship provisions of the CLC which could be provided either as general application or targeted to sectors particularly vulnerable to subcontracting such as telecommunications and technology. First, providing that the lead organization will be designated the true employer, or providing that lead and intermediary organizations will be treated as common employers, in circumstances involving subcontracting through intermediaries, tiered subcontracting or agency contracting would facilitate access to collective bargaining for SEWs. Second, expansion of CLC successorship provisions to include contracting out would facilitate access to collective bargaining for SEW in sectors where contracting out, including tiered subcontracting and contract-flipping, is common.

A further benefit from ancillary amendments addressing fissured organization of work for SEWs is that reduced fragmentation would also reduce uncertainty about the appropriate

regulatory jurisdiction which is an issue identified by participants as a significant problem and impediment to organizing in highly subcontracted sectors such as telecommunications. In that sector, while lead employers are generally under federal jurisdiction, there is significant uncertainty and difference in legal decisions about whether intermediaries and subcontracting organization.

Finally, ancillary amendments to the certification process may be contemplated to address a key impediment to organizing commonly faced by SEWs: dispersed workers which make it difficult to find workers to organize, to sign cards or to vote. These potential amendments include providing unions engaged in organizing with contact information for SEWs and expanding access to electronic certification cards and votes.

2. Assessment

a. Road Transportation

Overall, participants in the road transportation sector regarded incorporating SEWs into the CLC to be feasible and were of the view that doing so would not require significant adaptations for SEWs, although some indicated that it may be helpful to treat key subsectors (freight and delivery) differently (Interview 8496).

The CLC extension model, including greater scope of application of common employer and designated employer provisions, would be well-suited to organization of work in the road transportation sector, which is characterized by direct and intermediary forms of contracting for SEWs. Owner-operators of trucks are common, and some engage drivers who may, themselves, be SEWs. Moreover, owner-operators, SEWs and employees often work side-by-side, doing the same or similar work. The CLC already recognizes some owner-operators as dependent contractors and, therefore, capable of accessing this statutory regime. Study participants also

report that some collective agreements regulate individual service contracts for SEWs hired by owner-operators, even though those drivers are not in the bargaining unit.

Bargaining unit structure would not likely be a significant difficulty, nor would it likely disrupt existing bargaining rights. With respect to the freight subsector, some union participant considered that it would be possible for owner-operators and hired drivers to be located in either separate or mixed units (Interview 1251; Interview 1776). However, another participant regarded it as too difficult to provide common representation for these two groups (Interview 5052). Alternatively, a participant suggested that it would be possible to have dependent contractor owner-operators treated as employers for their hired drivers under the CLC (Interview 1251). Varying existing units to incorporate SEWs may be appropriate in some cases.

This sector is substantially organized, with a well-established union presence, suggesting that CLC certification and bargaining would be feasible for these SEWs. The dispersed nature of the workforce and possibly short-term nature of contract work suggests that employee contact lists, electronic card-signing and greater access to electronic certification votes may be important to effective access to CLC collective bargaining in this sector.

In sum, the CLC extension model appears to be feasible for the road transportation sector.

b. Broadcast Media

Incorporating self-employed contractors into the CLC was the option preferred by participants representing SEWs primarily engaged with a single, large broadcast companies (Interview 1244; Interview 8746).

The nature and organization of work for large broadcasters in this sector suggests that it would be feasible to incorporate SEWs into the CLC collective bargaining regime. It appears that the predominant form of SEW contracting by major broadcasters is direct contracting and

participants reported that SEWs are doing the same or similar work alongside employees. Although not common, some SEWs and the terms of their individual service contracts as well as some other terms and conditions of their work, are regulated by a collective agreement negotiated by a unit of employees certified under the CLC.

Whether to locate these workers in separate bargaining units or in mixed units alongside employees was identified by participants as a difficult question (Interview 1244). Interviewees thought that locating SEWs in separate units would "not serve them well", and that these units might not have sufficient bargaining power to engage in strikes (Interview 8746). However, the participant also raised the concern that in mixed units, SEWs might be treated as the employees' "poor cousins" (Interview 1244). This concern likely reflects the experience, noted earlier in this report, of some participants representing organizations or union branches of SEWs where these workers were included in the collective agreement covering employees at the same broadcaster and their view that the SEW interests were given lesser priority in bargaining.

It appears that there is a mix of long-term or recurring SEW contracts and short-term or intermittent contracts. The CLC extension model may be better suited for the former situation as it more closely reflects an employment relationship. However, it may be that parties are able to negotiate appropriate provision to address short-term or intermittent engagements.

Given the relatively high degree of unionization existing at large broadcasters and the relatively advanced stage of mobilization and development of non-union SEW organizations, application of the CLC extension model is likely feasible for this sector. If mixed units are found to be desirable, it might be necessary to consider whether permitting variance of existing units to include SEWs would be beneficial.

"So I think part of where the federal government could start with those federally regulated companies, is…that [those] who are unionized could mandate those unions to include freelancers in the collective agreement. Or have a separate agreement." (Interview 6370)

"…let's say broadcaster ABC opened up…tomorrow and had a fixed number of employees going forward, the certification rules as they exist now would be okay. The problem becomes when ... the broadcaster is the kind of broadcaster that does a number of short-term projects where they're not going to have a long-term employee base (Interview 6515)

The CLC extension model appears to be feasible for the broadcast media sector, at least in circumstances where the engager is a major broadcast company and in cases of long-term or serial contracts for SEWs.

c. Technology

Incorporation of self-employed technology workers into the CLC was regarded by participants as feasible, although the Wagner model was seen to have significant limitations for this sector given the large number of often small workplaces. In this regard, a sectoral bargaining model was regarded as more suitable by the participant (Interview 1620).

Several features of work organization in this sector suggest that SEWs could readily be incorporated into the CLC collective bargaining system. SEWs appear to engage in the same or similar work as employees and often work side by side with them in the same workplace and it appears that, at least in the video game subsector, direct contracting is common. However, other features of work in this sector suggest that this would not be a feasible approach. First, although SEWs and employees may work together, participants reported differential, negative, treatment of SEWs. Second, SEWs appear to commonly work on short-term, intermittent contracts and the SEW workforce may be somewhat diffuse and transitory.

An important consideration identified by some participants is the prevalence of agencies as intermediaries – at least outside of the video game subsector – and, thus, the question of whether the agency or the client should be treated as the employer. This issue is relevant to both the option of incorporating SEWs into the CLC and the sectoral bargaining option (Interview 3720; Interview 1620).

One participant was undecided about which entity should be the employer for statutory collective bargaining purposes. On the one hand, the union would prefer to deal with the client as the immediate employer, and the participant noted that from a labour relations perspective unions do not support the role of agencies. However, as agencies operate essentially as hiring halls for this sector, treating agencies as the employer would facilitate organizing as there would likely be a larger concentration of SEWs at an agency than at any given employer. This might ameliorate impediments to organizing caused by smaller workplaces (Interview 1620). One feature of agencies, as reported by this participant, is that the prospect of increased costs is unlikely to prompt them to resist unionization. Rather, they would treat it as a cost to pass on to the client firm (Interview 1620). Therefore, should the CLC extension model be applied to this sector, it would be important to consider amending the common or true employer provisions to address agency engagements.

"[W]e've been talking almost as if contractors, independent contractors are contracting with employers. And in most cases, they're not. In most cases they're contracting with agencies that are brokering their services to the employers" (Interview 8172).

In terms of bargaining unit composition under the CLC, a union participant with significant experience and knowledge of this sector considered that while separate units for

SEWs would be desirable, such units would face challenges. First, there may not be sufficient numbers of these workers at a workplace for such a unit to be economically viable for a union to represent. Moreover, in cases where SEWs are on short-term contracts, there would be a lot of movement in and out of the unit. Not only would this be difficult for a union to manage, but it would invite employer manipulation of contracts to weaken the unit (Interview 1620). Therefore, consideration should be given to whether greater scope for variance of existing bargaining units to include SEWs under the CLC.

Should this model be applied to this sector, employee contact lists, electronic union membership cards and greater scope for electronic certification votes would likely be of assistance.

Perhaps the most significant impediments to extending the CLC to SEWs in this sector arise from the strong preferences expressed by participants for workplace voice rather than more substantial forms of collective representation or collective bargaining. At the same time there is a dearth of existing unionization in this sector and a limited degree of mobilization achieved by SEWs and their organizations, suggesting a lack of capacity for unionizing at this point. These factors suggest that it would not be feasible to apply the CLC extension model to this sector, nor would it respond to SEWs' preferences.

In sum, the CLC extension model is not likely feasible and is not recommended for the technology sector.

d. Telecommunications

Inclusion of SEWs in the telecommunications sector under the CLC appears to be feasible. One participant expressed the view that some contractor workers would be inclined to certify (Interview 0915). One participant emphasized that SEWs and smaller enterprises are "always"

heavily dependent on one or a few major telecommunications companies for work – at least until they are well established (Interview 0915). Nonetheless, a union participant indicated that rather that certifying the large provider as the employer, it would be more feasible to certify the smaller company which directly engages the SEWs (Interview 0915). As noted previously, there are some impediments to organizing these workers, but they were not regarded by a union participant as insurmountable (Interview 0915).

Key difficulties with respect to the CLC extension model centre on the fact that SEWs in this sector appear to be located in numerous small enterprises. First these may disappear or move in the face of unionization if that may result in higher costs, given the apparent cost-sensitivity of contracting in this sector (Interview 0915). Second, it may not be feasible for unions to seek to organize numerous small units among many small enterprises, and this would be exacerbated if, indeed, these enterprises are likely to move or close to avoid unionization. In addition, the above-noted concerns over whether there would be sufficient self-leadership among these workers may be an impediment (Interview 0915). Also, as previously noted, a union participant did not foresee undue difficulty in identifying, locating or contacting SEWs despite apparently being predominantly located in numerous small outfits (Interview 0915).

Telecommunications is a significantly unionized sector and, although SEW mobilization is in early stages, organizing under the CLC regime appears feasible with the support of established unions in the sector.

RECOMMENDATION 1

> Extend the scope of application of Part I of the CLC to include SEWs either generally, or for specific sectors. Extension of Part I of the CLC is recommended for the road transportation, broadcast media (at least for SEWs engaged by major broadcasters), and telecommunications sectors. It is not recommended as an effective model to adopt for the technology sector.
>
> Ancillary amendments to Part I of the CLC necessary for this extension model to be effective. First, increasing statutory flexibility to vary or consolidate bargaining units,

amending employer, common employer or related employer provisions to designate lead entities as employers or lead and intermediate entities as common employers. Second, amending successorship provisions to include contracting out. These amendments may either be of general application or targeted to sectors particularly affected by contracting out and subcontracting such as the telecommunications and technology sectors. Third, amendments to the certification process to provide unions engaged in organizing with contact information for SEWs and expanding access to electronic certification cards and votes.

C. Sectoral Bargaining Model

1. Outline

The second potential model is a sectoral bargaining system, incorporating non-majority, exclusive representation, drawing on features from artists' collective bargaining legislation in the federal jurisdiction and Quebec, and the Quebec Decrees system. This model would permit an association to seek to be formally recognized as the exclusive bargaining representative for workers in a sector. Sectors would be defined on occupational and geographic dimensions and could encompass a single employer or multiple employers. To be formally recognized, the applicant association must satisfy the tribunal that it is the "most representative" association for the proposed sector, and the tribunal must be satisfied that the sector is appropriate for bargaining. As such, this system provides for a type of minority unionism. Representation rights would be granted for a limited period, such as three years, and be presumed to renew. As under the SOA, only other associations would be able, as a matter of right, to challenge representation applications or renewal.

Also as is the case with existing artists' legislation in the federal jurisdiction and Quebec, ULP provisions, pressure tactics, first contract arbitration would be available. Bargained sectoral agreements would establish sector-wide minimum and would be enforceable through grievance arbitration. One clear weakness of existing Canadian artists' legislation is the lack of mandatory

employer bargaining associations or councils. Where more than one employer is present in a recognized sector, it may be preferable to require employers to participate in an association or council.

This model would also be more readily applicable to those sectors where bargaining sectors can be readily identified. Where there exists substantial unionization of employees in a sector, one drawback of this model is that it may be undesirable to have two different collective bargaining systems operating in the same sector: the CLC for employees and the sectoral bargaining model for SEWs.

As this is a sectoral approach, it would be particularly suitable in circumstances where contracting out through intermediaries, tiered subcontracting and agency work is common. This is because the question of which entity is the employer for a particular group of SEWs would not be relevant: certification, collective bargaining and resulting collective agreements would apply to all employers and SEWs in the relevant sector. This model would also facilitate organizing in sectors where SEWs are dispersed, mobile, or transient because the "most representative" standard for certification does not rely so critically on locating and obtaining union membership cards from individual SEWs or on individual SEWs being able to participate in a representation vote. Also for these reasons, this approach to determining certification would also facilitate organizing of sectors at a relatively low stage of mobilization. Nonetheless, the sectoral bargaining model would require that SEWs in the sector have sufficient leadership capacity to engage in collective bargaining.

2. Assessment

a. Road Transportation

Sectoral collective bargaining may be a useful approach in the road transportation sector, given the apparently often short-term nature of SEW engagements, apparently often transient and highly mobile workforce. However, significant unionization exists among employees and dependent-contractor owner-operators, with some collective agreements regulating SEW individual service agreements. Therefore, it may be difficult to apply a separate collective bargaining model for SEWs. While a sectoral approach may help facilitate organizing of SEWs in this sector, who appear to have achieved only an early stage of mobilization, it may be the case that these workers do not want collective bargaining.

Nonetheless, the prospect of a sectoral bargaining model was generally well received by union participants in the road transportation sector (no non-union participants participated in follow-up interviews), with some indicating that such an approach is needed for the sector, including for employees, although others regarded it as suitable only for some subsectors (Interview 8496; Interview 1251).

For the delivery subsector, particularly those engaged in "gig" work, a sectoral approach was regarded as both desirable and feasible (Interview 8496). For the long-haul freight subsector, however, one union participant regarded a sectoral bargaining system as not feasible. The concerns were that owner-operators would resist such a system, would not ratify agreements, and would not give a strike mandate. Moreover, it might "water down" existing collective agreements reached under the CLC, some of which regulate SEWs. The resulting "siloing" from CLC collective agreements was regarded as problematic (Interview 1251).

An additional impediment is that a few, large unions dominate this sector, and participants suggest that significant conflict exists among them (Interview 5052, Interview 8482; Interview 1776), which raises the question of whether unions in this sector would be able to cooperate in a sectoral structure or operate in a council. That said, union representatives do participate in the Quebec trucking industry stakeholders' forum, although that is directed at informing government regulation in the industry and, therefore, may not engage the competing interests of the different unions. Notably apparently although owner-operators can have representatives participate in this forum (under the "freight mover" category) none actually participates, although they do participate in a similar Federal forum relating to the Ministry of Transportation struck to address COVID issues (Interview 8525). Nonetheless, participants were fairly positive about the sectoral bargaining model.

> *"I think it's a good idea and I think … it would be a disservice not to try it just because of that small portion [the small number of true independent contractors]. It's a bucket full of people and … those people they need help for sure." (Interview 8496)*

While one participant noted unions may have some difficulty working in a council of unions, he did not consider it to be an insurmountable hurdle. This participant suggested that implementing a council and incorporating existing certifications (if the structure contemplates including unionized workers such as by replacing regulation of the sector by the CLC with a new sector-based model) would address some difficulties of union protectionism (Interview 8496).

b. Broadcast Media

A sectoral collective bargaining model may be appropriate for the broadcast media sector, given the apparent prevalence of short-term, intermittent work by SEWs; some degree of simultaneous work by SEWs for multiple engagers; and, the relatively advanced stage of mobilization of

SEWs and their organizations in this sector. However, employee unionization is widespread in this sector and it be undesirable to have two different collective bargaining systems operating in a single sector.

In general, the sectoral bargaining model was supported by broadcast media participants. It was most enthusiastically supported by participants from organizations representing SEWs who typically worked for more than one engager rather than working primarily for a single engager. With respect to SEWs primarily engaged at a single large broadcast organization, a concern was raised about separating SEWs into a distinct statutory regime from other workers in the workplace who would be subject to the CLC and who are already highly unionized (Interview 1244; Interview 8746).

Participants did not consider there to be a significant problem with the prospect of a union or association council as the sector is already highly unionized and jurisdictions are generally well defined, although some smaller unions or associations might be edged out (Interview 1244; Interview 8746). However, they did raise the question of the identity of employer representatives if an employer association or council was to be the sectoral bargaining party (Interview 1244; Interview 8746). Homogeneity of employers, particularly with respect to the size and nature of employer, might be addressed as part of determining appropriateness of a bargaining sector.

"[Broadcasters] not willing to compromise on anything around [security] protections because they want the ability to hire and fire at will. And I don't think that's fair. I think the government should step in and help them with that because that allows them to keep people on the hook for years and years and years." (Interview 1610)

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c. Technology

In some respects the technology sector may be suitable for a sectoral bargaining model: SEWs appear to engage in intermittent, short term contracts; they are apparently found in smaller workplaces; these workers appear to be relatively diffuse, mobile and transitory; and technology workers are in only the early stage of mobilization. There is little pre-existing unionization in the sector so there would not be the potential difficulty of multiple collective bargaining systems operating in the sector. However, it may be that SEWs in this sector do not seek collective bargaining, preferring lesser forms of collective representation, such as collective voice. Moreover it may be the case there is not yet sufficient leadership capacity among SEWs in this sector to effectively engage in collective bargaining even at the sectoral level.

Technology sector participants regarded a sectoral collective bargaining model as more likely to advance the rights and benefits of these SEWs than other models. One of the key advantages of this option over the CLC extension model option would be that sectoral units would likely be larger than CLC bargaining units of SEWs. As a result, there would be more scope for innovation, particularly in the areas of benefits and pension plans, which are only feasible for a larger group (Interview 1620). The "most representative" standard for certification was regarded as helpful given the mobile workforce which may be difficult to locate or contact, particularly given the apparently large proportion of smaller workplaces in the sector (Interview 1620). One participant expected that it would be a significant hurdle to get employers to enter into a centralized agreement, but did not regard this as insurmountable (Interview 1620).

d. Telecommunications

The key benefit of a sectoral collective bargaining model to this sector is that it would overcome the significant organizing barrier that is posed by the widespread fissuring in this sector. Direct

contracting, contracting through intermediaries and tiered-subcontracting appears to characterize the organization of work in telecommunications. While SEWs in this sector do not yet appear to be mobilized, the well-established union presence may provide sufficient mobilizing and leadership support for sectoral bargaining to succeed. The key drawback to applying this model to the telecommunications sector is that, at least among the major carriers, it is a substantially unionized sector. Therefore, introducing a sectoral model for SEWs would result in two collective bargaining systems operating in the sector.

Anything's better than what we have now …. I'd welcome this with open arms (Interview 1212).

The sectoral bargaining model was the potential model that received the strongest interest and support from participants in the telecommunications sector. Key strengths of this model identified by participants include that it would offer a clear minimum standard for employers across a sector (Interview 1212), a grievance process to enforce bargained standards, and formal recognition of the scope of the bargaining unit and representation rights by a labour board to give legitimacy to the certification and appropriateness of the sector (Interview 0915).

"It would be a little bit of a foreign one for what I'm used to … but it's something that could work. Ultimately all you need to do is recruit people that want to be part of this." (Interview 0915)

Interviewees had several suggestions or observations about implementation of a sectoral bargaining model. One participant suggested that smaller sectors, such as the Greater Toronto Area, rather than province-wide or national, sectors would be more feasible for representative associations to organize and service (Interview 1690). Another participant suggested that it

would be most feasible to base a sector on the constellation of small contractor enterprises around a single large telecommunications provider, instead of including multiple large providers and smaller enterprises in a sector. In his view, the latter configuration would be too complex, requiring the union or association to manage numerous relationships (Interview 0915). Sector definitions would likely be largely the applicant's decision, within the bounds of the requirements for appropriateness. If sectors are defined, in part, on the basis of occupation, there may be some difficulty in clearly distinguishing whether particular workers meet that definition as, unlike in construction, many workers in this sector are not working under a trade licence or qualification (Interview 1212).

The most significant difficulty with a sectoral approach to sectoral collective bargaining in this sector likely arises from the question of whether a particular contractor company falls within federal or provincial jurisdiction. This could lead to undesirable gaps in coverage of sectors and could add uncertainty where disputes arise over jurisdiction (Interview 1212).

With respect to dues payment under a sectoral bargaining model, while collection of dues or membership fees from workers might be a challenge if individual workers are difficult to locate or identify (Interview 0915), this potential difficulty would be solved if dues are paid at source by the employer (Interview 1212). Notably the SOA, which is the basis for this sectoral bargaining proposal, provides for dues check-off by producers.[37]

RECOMMENDATION 2

> A non-majority, exclusive representation, sectoral collective bargaining system, supported by ULP protections, grievance procedure, first contract arbitration and pressure tactics (strikes and lockouts), with sector-wide certification based on the "most representative" standard for an association or union. Certification is valid for a limited number of years, is presumed to renew, with only other unions or associations entitled to challenge renewal. This model is recommended to be adopted for the broadcast media

[37] SOA, s. 44.

and telecommunications sectors, and is recommended to be considered for the road transportation and technology sectors.

D. Bernier Model

1. Outline

The Bernier model is a hybrid, sector-based model that was designed to apply to both SEWs and employees (Bernier, Vallée, and Jobin 2003). The designers of this model proposed it in conjunction with the broader recommendation that the term "worker" replace that of "employee" as the threshold for access to the legislation. A "worker" would include any person working for another in exchange for compensation, whether or not the person is salaried under an employment contract, where that person must personally perform the work such that he or she becomes economically dependent on the other person (Bernier, Vallée, and Jobin 2003). Therefore, the Bernier model was intended to apply to all "workers", including SEWs and employees.

The Bernier model offers "recognition" or "certification" of an association or group of associations for SEW, based on majority support in an "appropriate field of activity." This was meant to reflect a sector, field, profession, or type of activity, including a geographic or market dimension, and was meant to ensure sufficient common interests to permit the collective activity. Sectors would be approved prior to certification (Bernier, Vallée, and Jobin 2003, 532-533; Vallée 2005, 38).

Certification would be for one or more of the three following purposes (Bernier, Vallée, and Jobin 2003, English Synopsis, R. 45.3; Bernier 2006, 56):

1) **Collective representation:** representation for workers in a given sector, collectively and individually, whenever it is in the workers' interest to do so. This includes intervening with an agency or tribunal to defend the interests of individual workers, and to provide services, including establishing and

administering contributory benefit plans.

2) **Consensus-building:** providing authority to represent the interests of workers in a given sector for the purpose of working jointly with other partners in that sector on specified matters. This would involve creating joint committees with an obligation to participate applying to the relevant parties. Joint objectives could include developing a standard contract or overseeing contracting practices in the sector.

3) **Collective bargaining:** providing the right to negotiate collective agreements with parties in the field of activity, with a duty to bargain in good faith when a bargaining notice is given by the recognized association. An association of clients may also be recognized as a representative of its members for bargaining purposes. Dispute resolution measures, such as conciliation and first agreement arbitration, would be included. These collective agreements would cover working conditions, employment conditions, or minimal operating terms.

Therefore, this model includes options for individual representation, collective consultation and full collective bargaining and workers can progress through these "gradations", or stages, or enter or remain at any given stage. An association may seek certification for a higher gradation should it choose to do so and if it is able to obtain majority support. The third gradation may be contemplated as integration with the regular CLC collective bargaining system should it be extended to permit access by SEWs.

This model also permits certified associations to charge fees to all workers in its field of activity and includes an obligation to fairly and equitably represent workers within the field of activity with the degree of obligation varying with the gradation; a duty to bargain in good faith; and, dispute resolution mechanisms, including mediation-arbitration, conciliation, and first contract arbitration for the bargaining gradation. Bernier (2006, 53) noted that this model may be more accessible to relatively homogeneous groups of workers with easily identified employers, and in this regard suggested that it might be appropriate for specialists, such as freelance and

computer workers, because the clients of these workers are more easily identifiable than for some other types of SEWs.

Because the Bernier model is a sectoral approach, it is suitable for situations where the organization of work is fissured, including various forms of contracting-out, including agency work. As pointed out by Vallée (2005, 39-41) this three-tier "gradated" approach caters to different needs of different groups of SEWs by taking into account the "the heterogeneous nature of the needs and expectations of the people grouped under the term 'self employed worker,'" and encourages development of collective bargaining capacity.

Note that the hybrid Bernier model was not presented to participants for feedback, due to its complexity and the limited time available for secondary interviews and focus group discussions. However, this option is, essentially, a combination of limited individual representation, individual consultation and information such as would be offered by the workplace forum model and expanded scope of application of the CLC model. The Bernier model, in its essence, is a staged progression through several of the models that were posed to participants. Therefore, it is included in this section and in this report's final recommendations.

2. Assessment

The broadcast media and telecommunication sectors are not likely appropriate sectors for application of the Bernier model. It appears that workers in the former sector are seeking effective access to collective bargaining and have already developed significant mobilization and collective capacity. Therefore, a staged or gradated system such as this would not likely be of significant benefit to SEWs in broadcast media. In the telecommunications sector, this system would not likely meet the apparent needs of SEWs, which appear to be focused on basic

standards and which would be better met by a collective bargaining model such as CLC extension or sectoral bargaining.

In contrast, the Bernier model may be suitable for the road transportation and technology sectors. In the road transportation sector the AWOs that have developed to support SEWs engage significantly in the types of activities contemplated at the first and second gradations: collective representation and consensus-building.

With respect to the technology sector, the Bernier model may be responsive to both the apparent preference of SEWs for workplace voice and representation rather than bargaining, and to the nascent stage of mobilization and limited capacity for leadership among SEWs. This model may help these workers develop greater capacity for collective representation such that, if it is their preference, they can later seek more substantial stages of collective representation or even collective bargaining.

RECOMMENDATION 3

> The Bernier model, provides hybrid, sector-based certification based on majority support for the purposes of one or more of: collective representation (representation for individuals before agencies or tribunal and providing services), consensus-building (joint committees or specified matters which have a duty to participate), or collective bargaining. Certified associations may seek recognition for different purposes over time. This model is recommended to be adopted for the road transportation and technology sectors.

E. Sectoral Standard-Setting Model

1. Outline

The proposed sectoral standard-setting model draws from the tradition of UK wages councils, and is a hybrid form of collective representation and bargaining mechanism that could be utilized to establish sector-wide minimum standards through tripartite negotiation. Government would

receive recommendations of this tripartite body and, where it approves of the recommendation, would incorporate them into regulations enforceable in the same manner as existing statutory minimum standards. Representatives of SEWs, employers and government would participate. As such, it would require that the workers in the sector have achieved a sufficient level of mobilization and organization to be able to provide representatives. Resulting standards, if accepted by government, would be incorporated into regulations and enforceable through an administrative system similar to labour standards enforcement.

A sectoral standard-setting mechanism would be most suitable in circumstances where minimum working standards are a key concern, but workers do not have the mobilization or leadership capacity to unionize or to engage in collective bargaining. Engagement with a sectoral standard-setting model may help SEWs to develop leadership capacity. It would also be suitable where existing statutory minimum standards regimes may not be appropriate – perhaps due to the particular features of the sector – even were they to be extended to these SEWs. This option would also be suitable for sectors where contracting out or use of agencies is common as it does not rely on a specific worker-employer relationship. Like other sectoral approaches, this model would facilitate organization of workers who are otherwise challenged due to being dispersed, highly mobile and often transitory.

This model could operate in parallel with other labour relations system or could be introduce in conjunction with another proposed model.

2. Assessment

a. Road Transportation

The sectoral standard-setting model may be appropriate for the road transportation sector, given that these SEWs are generally dispersed, mobile and some appear to engage in short-term work

arrangements. It may also be responsive to the form of collective activity that these SEWs may prefer. It seems that SEWs in this sector may be concerned about minimum standards, but may not wish to engage in collective bargaining.

In the road transportation sector participants were generally positive about a sectoral standard-setting option, although preferring that it operate in parallel with statutory access to collective bargaining for SEWs (Interview 8496; Interview 1251). Interviewees regarded such a mechanism as potentially useful to reduce undercutting of rates and conditions, and to effectively achieve minimum standards in the sector (although noting that if what are effectively minimum standards are available to SEWs they should also be available to employees). They also regarded it as a possible setting in which to negotiate a "model" or "standard" contract for the individual driver-carrier contracts in the case of unorganized drivers but considered standard individual contracts not to be feasible for unionized workers (Interview 8496; Interview 1251). However, participants were sceptical that SEWs would be able to engage in the necessary self-leadership to muster effective representatives. Interviewees suggested that, instead, a single union or a council of unions represent workers at such a body (Interview 8496; Interview 1251).

b. Broadcast Media

Broadcast media participants did not express strong views on the sectoral standard-setting option. This was somewhat unexpected as stage one participants identified minimum working standards as a key concern. As with other sectors, participants raised questions about the identity of employer representatives if an employer association or council was to be the sectoral bargaining party (Interview 1244; Interview 8746).

Given that SEWs in this sector are already highly mobilized, with several active AWOs established, it may be that a full collective bargaining, rather than a hybrid model such as this, is better suited to the broadcast media sector.

c. Technology

Given the minimal degree of mobilization or leadership capacity among SEWs in this sector, the apparent preference of these workers to engage in non-traditional forms of collective workplace organizing, and the apparent concern about achieving minimum working standards, the sectoral standard-setting model may be appropriate for the technology sector.

The primary challenge for a sectoral standard-setting or workplace forum model option for the technology sector was identified by participants as who would represent these workers. Interviewees were sceptical that self-employed contractors would take leadership to participate in such systems at either the individual workplace or sectoral level, due to the generally unorganized nature of this sector, workers' individualistic orientation, and fear of retaliation. They suggested that an outside organization, such as a union or union-affiliated organization, would be necessary to provide spokespeople and representatives (Interview 1620). As this sector has a strong culture of individual contracts, one participant regarded outcomes of sectoral standard-setting such as a model contract or statutorily-determined contract terms to not be feasible for this sector (Interview 1620).

d. Telecommunications

Telecommunications may be a suitable sector for implementing the sectoral standard-setting model. It appears that SEWs in this sector are very precarious due, in large part, to the widespread use of various forms of contracting out and appear to have little individual power to

negotiate terms of work. While SEWs do not appear to be mobilized, this is a highly unionized sector, so existing unions may be able to provide the necessary leadership.

Some participants from this sector did not regard a sectoral approach as feasible for this sector (Interview 0915, Interview 1690), although some considered it to be useful, provided that practical concerns could be addressed (Interview 1212).

People in this day and age are always talking about their rights, and their workplace. But most of them don't know what their rights are, or how to go about filing them (Interview 1690).

Participant concerns about this model centred on the following. First, it is not certain that SEWs would be able to muster the significant amount of leadership drawn from their ranks which would be necessary (Interview 0915). However, a participant suggested that one or more unions could participate as SEW representatives, though unions may have difficulty working together (Interview 0915). Similarly, concern was expressed that SEWs would lack sufficient knowledge or understanding of the model to be able to effectively navigate the system (Interview 1690).

Fear of employer retaliation was identified as a likely impediment for worker forum options. This gave rise to questions about the related issues of enforcement of sectoral standards and protection from employer retaliation. Fear of retaliation may discourage workers from participating in a workplace level forum or seeking to enforce sectoral rights. One participant suggested that, based on his observations of the operation of existing minimum standards legislation, it would be unlikely that a worker would file a complaint except in circumstances where the worker had already been terminated (Interview 1690).

> *If you're an employee working for a telecom company, and you're not getting paid your overtime, you're just going to lump it. You're not going to file that complaint. Because the employer will find out about it. They'll bring a board officer in. They'll do an investigation, and then they'll know who it is, okay, and then he's gone. He's fired (Interview 1212).*

In the view of one participant, it would be necessary for there to be an advocate for the workers in order to provide sufficient protection for workers from employer retaliation (Interview 1212).

> *Most workers are so afraid of being blackballed or ostracized by the industry - especially in a small community … If you file a complaint against an employer in a place like [that], you're not working anywhere in [the region]. Forget about it. It's just not happening. He'll tell every other employer in the area…. Those small areas, I mean everybody knows everybody. They're so afraid of upsetting the employer because that employer will tell the other few employers that are in that area that guy is a troublemaker, he tried to unionize. He filed labour standards. Don't hire him. Then they have to leave the [region]. So, they won't (Interview 1212).*

RECOMMENDATION 4

> Adopt a sectoral standard-setting system utilizing tripartite representation for SEWs, employers and government, to engage in a hybrid form of collective representation and bargaining to recommend sector-wide minimum standards of work for incorporation into regulations by government. Where insufficient leadership capacity exists among SEWs in a sector, consider including unions active in the sector among SEW representatives. This model is recommended for the road transportation, technology, and telecommunications sectors.

F. Worker Forum

1. Outline

The worker forum model offers a lesser form of collective representation: workplace voice. Drawing on the concepts of works councils and joint workplace committees, a worker

forum could operate at either the individual workplace-level or at the sector-level. At the individual workplace-level, worker forums could involve information sharing and consultation with workers by the employer. If established at the sector-level, a worker forum could address joint, voluntary initiatives such as developing model contracts or voluntary sectoral standards. A sector-level forum could also jointly address sector-specific issues with government, and government could consider incorporating agreed-upon issues into regulations to create enforceable sector-wide standards.

The worker forum model could be adopted either as a stand-alone mechanism or it could be incorporated into a gradated structure such as the Bernier model. A worker forum may be appropriate in circumstances where workers desire collective voice, short of collective representation or bargaining or where workers desire some form of collective representation but have not yet developed sufficient mobilizing capacity on their own to support collective representation or bargaining. A worker forum could help SEW develop mobilizing capacity. However, in order to function, a worker forum would require that the workers had achieved a minimal level of mobilization and capacity for self-leadership. Individual-level workplace forums would be a significant challenge in circumstances where no common workplace exists, or where SEWs are frequently physically remote from the workplace.

If worker forums were to be available exclusively to SEWs, this would be more feasible in circumstances where SEWs are a group that is clearly distinguishable from the employees in that workplace or sector. In contrast, if worker forums are to include both SEWs and employees in the workplace or sector, consideration would need to be given to how this would be integrated with the CLC system and any collective agreements that may exist.

Participation in a worker forum, particularly at the individual workplace-level, may expose these workers to employer retaliation. Therefore, consideration may need to be given to either incorporating protection from retaliation for these workers into the worker forum model or adopting it in conjunction with an approach such as the protection for concerted activity model addressed below.

A final limitation of this model is that because it only provides worker voice, which is a limited form of collective representation short of collective bargaining, it is unlikely to satisfy *Charter* or international labour law standards for freedom of association for SEWs.

2. Assessment

Participants' responses to this model were mixed, with overall limited support, except to some degree in the road transportation and technology sectors. These assessments are detailed below.

a. Road Transportation

Road transportation sector participants were somewhat positive about a worker forum at the sectoral level, although preferring that it operate in parallel with statutory access to collective bargaining for SEWs rather than as a stand-alone system (Interview 1251; Interview 8496). The key concern was that SEWs would lack sufficient self-leadership or sufficient time to participate in a worker forum (Interview 1251; Interview 7221; Interview 8496). Participants suggested that perhaps a council of unions or a peak labour organization might be appropriate to represent SEWs at a forum, given the experience and resources these organizations would be able to draw upon (Interview 1251; Interview 8496).

> *"Truck drivers don't have time to be at these meetings. We've tried…. We've tried to have an association for the truck drivers…. It didn't work out. We had about 35 of them that showed that they were interested, but the timing, the days, no…. 'I'm just going to keep driving.' But we tried, we failed with that. Miserably." (Interview 7221)*

Participants indicated that, at a sector-level, a forum to establish a model contract for self-employed drivers would be particularly useful (Interview 1251; Interview 8496).

b. Broadcast Media

Broadcast media participants were not receptive to the worker forum option. Similar objections were raised with respect to employer and worker representatives as were raised with respect to the sectoral standard-setting option (Interview 1244; Interview 8746).

c. Technology

Technology sector participants regarded a sector-level worker forum as potentially valuable for providing information and consultation with respect to professional development and certification, rather than other workplace terms or conditions (Interview 1620). As noted earlier in this report, participants from this sector indicated that SEWs in this sector have a significant interest in workplace voice, though not necessarily in collective representation or bargaining at this point.

> *"[T]here isn't enough meat on the bones of the social organization to make that interesting or meaningful. … [I]n the absence of this more meaningful kind of organization connection in the tech industry amongst workers in a workplace or between workplaces. Yeah, without that I don't know how to answer that question." (Interview 6850)*

The key concern about feasibility of a worker forum model in this sector was the same as was expressed by participants about the sectoral standards option: who would represent the SEWs, and scepticism that there would be adequate leadership given the generally unorganized

nature of this sector, the workers' individualistic orientation, and fear of employer retaliation (Interview 1620; Interview 6850). Consequently, this model was not regarded as feasible at the individual workplace or sectoral levels for this sector.

d. Telecommunications

Most participants in the telecommunications sector did not consider a worker forum model to be a useful option for this sector (Interview 0915; Interview 1690). Concerns raised were similar to those raised about the sectoral standards system model: lack of leadership and lack of capacity among SEWs to navigate the system (Interview 0915; Interview 1690). Fear of employer retaliation was also identified as a likely impediment to the individual workplace-level forum option. Finally, one participant anticipated that the opportunity for in-person meetings would be important for an individual workplace-level forum to be effective, suggesting that this would be possible only if there was a regular workplace or reporting location for these SEWs (Interview 1212).

RECOMMENDATION 5

> Sector-specific introduction of sectoral worker forums is recommended. Introduction of a worker forum at the sectoral level, to address voluntary sector-wide initiatives and standards, and to discuss and make recommendations to government for incorporation into regulations for sectoral minimum standards is recommended for the road transportation sector and for the technology sector. The technology sector may require assistance with building capacity for forum participation. Worker forums would operate in parallel with, or supplement, any other collective representation or bargaining system available to these workers. Workplace-level worker forums are not recommended, nor is general introduction of sectoral worker forums.

G. Protection for Collective Activity

1. Outline

The final model is to provide statutory protection for SEWs from employer retaliation for collective activity relating to workplace issues. This model offers support for collective

representation by extending CLC ULP protection to the pre-organizing period and provides individual SEWs access to ULP remedies. Modeled on the NLRA section 7 protected concerted activity provision, this option would be available to workers whether or not they were engaging in union organizing or even contemplating certification. Individual workers, or a representative, could bring a claim to the Canada Industrial Relations Board and the protection would be effectuated by ULP provisions and remedies.

This model would be most suitable where workers intend to engage in concerted activity prior to or separate from, or instead of, union organizing. It would likely be most feasible to incorporate this protection into the CLC rather than as stand-alone legislation, with explicit language ensuring that this provision covers SEWs. This option could also be could be considered in conjunction with each of the other options outlined above, including the worker forum option, which does not involve collective bargaining, but a form of collective workplace voice. The key benefit of this model is that while it would offer SEWs an opportunity to engage in more effective collective self-representation by reducing fear of employer retaliation, it could also supplement and foster collective representation and bargaining under other models for SEWs.

As noted in the literature review, legislators and policymakers may wish to consider whether all collective activity, or activity short of what would be considered a strike under the CLC be included within the scope of the protection. In light of the cross-sector, significant concerns raised about fear of employer retaliation as a barrier to collective organizing, it may be that increasing ULP protections, enforcement and remedies for all workers, and ensure that protection from retaliation is a supplement to any other option adopted.

2. Assessment

Overall, participants across the sectors of interest regarded the protected collective activity model positively, although concerns were raised about whether SEWs and their organizations would have the capacity to effectuate these rights, in addition to more general scepticism about the effectiveness and availability of CLC ULP remedies. Notably, union representative participants did not appear to regard protected collective activity as a threat or concern to unions or existing collective bargaining rights.

a. Road Transportation

In the road transport section, participants regarded greater protection from employer retaliation as helpful to facilitate organizing, indicating that many employers are willing to undertake significant costs to avoid unionization, and that they believe they can get away with ULPs (Interview 8496; Interview 1251). These concerns may be heightened with respect to particularly vulnerable SEWs, such as the apparently substantial group of undocumented workers reported to exist in this sector by both union and non-union participants (Interview 1251; Interview 8496; Interview 9946). Further, some participants reported that they regarded existing CLC ULP protections to be ineffective due to the length of time for remedies to be awarded, and because penalties are lacking. In addition to penalties, these participants identified an award of costs as being helpful to make ULP provisions more effective (Interview 8496; Interview 1251).

b. Broadcast Media

Broadcast media participants regarded wider protection from employer retaliation, including protection for collective activity occurring outside of, and prior to, formal organizing activity, as highly desirable. Participants emphasized the need for immediate, tangible remedies, such as fines, in order for such protection to be truly meaningful (Interview 1244).

"…it sounds like a good thing. But my concern is that often, these kinds of rights are provided in lieu of providing ones that are more protective. So I would be concerned about people thinking that that right is enough of a right, and then short-shrifting in other areas. My concern would be the ability to enforce that. What's a workers' ability to enforce that without a union?" (Interview 8146)

c. Technology

Given the very preliminary stages of organizing found in the technology sector, and the "solidarity unionism" orientation of some existing organizations which may disincline them towards formal unionization, it may be of significant importance to these workers to have statutory protection for collective action available to individuals that applies separate from and outside of union organizing. The protection for collective activity model was generally met with support by participants, although one union organizer with significant experience in the US was critical of NLRA s.7, characterizing it as too slow and lacking sufficient remedies (Interview 4245).

"Obviously protected concerted activity would be nice to have. Though that's probably a bit too much to ask for." (Interview 0338).

"I think the actual legal process itself serves less of a role than the feeling that you are on the right side of the law….I think it emboldens people, and perhaps that dampens the company's behaviour." (Interview 0338).

"[When] you're in that underground kind of stage of organizing in the workplace and talking to coworkers under so, so much threat of blacklisting…it doesn't feel like the labour law [applies]— technically you can't be fired for organizing in the workplace, but until you go public with that sort of certification it's very, very hard to defend yourself on that basis. So, I think that's a huge impediment we face." (Interview 7294)

"It's not useful, because it's a right but it's not a right that's bound by very strong teeth. I've been a union organizer for almost thirteen years, I've never had a campaign where an employer didn't violate section 7 [of the NLRA] in some way. It's like, they can fire workers for organizing, they do it all the time. And the worst thing that happens to them is like months later, a year later, two years later, a worker gets

their job back in back pay, which is great, but the campaign is dead. Section 7, there's no teeth to it, it's just a statement" (Interview 4245).

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d. Telecommunications

Views on the utility of introducing protection for concerted activity were mixed among participations from the telecommunications sector. One participant indicated that such protection would not be of significant benefit as, in his view, and in contrast with his impression of other sectors, little concerted activity occurs prior to or outside of organizing in telecommunications. Moreover, during organizing, his union emphasizes to workers the importance of signing a membership card as early as possible in order for the union to be able to establish that organizing had commenced, should an ULP to respond to employer retaliation be necessary (Telecommunication Interviewee 2356).

In contrast, another participant considered a protection for collective activity provision to be potentially useful protection for workers across the sector and regardless of employee status, given employees' fear of employer retaliation – and particularly termination – during the early stages of organizing prior to contacting a union (Interview 0915).

RECOMMENDATION 6

> Protection for collective activity relating to workplace issues engaged in by SEWs is recommended to be incorporated into the CLC. Administered by the Canada Industrial Relations Board, this provision would provide ULP protection and remedies to SEW and would be available to SEW whether or not SEWs were engaged in union organizing.

H. Cross-Sector Considerations

In the course of the fieldwork for this study, several concerns emerged as significant and distinct issues, which often spanned sectors, meriting consideration and recommendations separate from those focusing on options for collective representation or bargaining structures for SEWs. These are addressed in this section. These include: limitations of AWOs, systematic employee misclassification, problems relating to vulnerable immigrant populations, and difficulties surrounding federal and provincial labour relations jurisdiction.

1. Alternative Workers' Organizations

The capacity of AWOs for collective representation or bargaining, and their orientation to these forms of collective activity, is a consideration that may inform the choice of appropriate model for a sector. Interviews undertaken in this study reveal that the presence of AWOs for SEWs varies from apparently non-existent in the telecommunications sector, to a minor presence in the road transportation and technology sectors, to fairly common in the broadcast media sector.

However, the shortcomings of AWOs, such as identified in the section of the literature review addressing studies of workers' centres in Part I of this report, are reflected in the information about AWOs provided by participants in this study.

In the sectors of interest, it appears that only union branches and affiliates engage in any degree of collective representation or bargaining. Some of these affiliations are less substantial than others, in the latter case consisting only of some financial and other assistance. In these cases, the organization did not engage in any collective representation or bargaining function. In all cases, AWOs suffered from a lack of resources, which hampered their ability to function. While they also vary in the types of support they provide, they most commonly provide individual rather than collective representation or assistance, and some operate more as

professional or occupational associations, focusing on resources, discounts, training, and lobbying. Other AWOs, particularly non-union organizations, are grassroots organizations that are ambivalent, and in some cases opposed, to traditional collective representation.

Therefore, it is not likely realistic to anticipate that such AWOs, at this stage, will have the capacity (even if they have the inclination) to play a substantial representative role in a statutory collective representation or bargaining system, without significant capacity building and greater resources.

RECOMMENDATION 7

> Institute programmes designed to develop capacity among alternative workers' organizations to engage in collective worker representation.

2. Misclassification

Respondents from multiple sectors emphatically identified misclassification of "dependent contractors" and "employees" as "self-employed, independent contractors" as among the largest organizing problem facing these sectors. Actual or perceived disparate, and more favourable, treatment of independent contractors compared to employees by tax and social contribution systems create incentives for employers and workers to misclassify workers as independent contractors. Exclusion of independent contractors from minimum labour standards and collective bargaining legislation provides further incentives for some employers to misclassify workers.

"I have seen with my own eyes lots of companies, big, little, and in between who give people a choice [of whether to identify as an employee or an independent contractor]. That's how scammy the independent contractor thing is. So, there's a sort of expectation and assumption that you're an independent contractor even though you actually may be covered by the union but no one's telling you that." (Interview 6515)

Respondents in the transportation, broadcast media, and telecommunications sectors communicated strongly that they did not believe that there was a substantial proportion of workers in the sector who were genuinely self-employed, independent contractors, that there is a significant amount of misclassification, and that it is primarily driven by employer and/or worker avoidance of tax, minimum labour standards, and social benefit obligations. This issue was not raised by participants from the technology sector, although this may reflect the relatively nascent stage of unionization and collective bargaining in that sector, such that employee status issues were not of key concern to respondents, rather than reflecting the prevalence of misclassification existing in that sector.

If the understanding of the extent of misclassification of workers as non-employees across the sectors of interest held by this study's participants is accurate, then it may be that a much smaller proportion of workers in this sector is really excluded from the CLC on the basis of status. Consequently, addressing misclassification will significantly reduce the number of workers who understand themselves to be excluded from access to statutory workplace protections, including collective bargaining legislation.

RECOMMENDATION 8

> Prioritize reducing misclassification of workers as non-employees through education and enforcement.

3. Particularly Vulnerable Populations: Immigrant Workers

"Temporary foreign workers are extremely reluctant to file any form of complaint … 95 percent of the time workers fear doing so because they know that it could result in them losing their job and losing their ability to stay in Canada. So, they don't. They don't complain." (Interview 9946)

The particular vulnerability of new Canadians and temporary foreign workers to workplace exploitation, and their reluctance to pursue complaints or enforcement of workplace rights, was highlighted by participants in relation to the road transportation and telecommunications sectors (Interview 2356; Interview 3415; Interview 9946). Notably, the examples of workplace mistreatment offered by these participants occurred in contexts where workers were engaged by contractors, such as drivers engaged by owner-operators, or telecommunications workers engaged by small contractors to large providers.

"We've seen very egregious violations of contracts that involve people in the trucking industry. … [C]ases where the log books were completely wrong, that someone was working 12-14 hours a day doing trucking and getting paid for only a few hours because the log book information [input by the owner-operator] was not accurate and they're being paid based on that." (Interview 9946)

"[One telecommunications contractor is] a real estate guy on the side. He bought eight or nine houses, he brought a bunch of [new Canadians who work for him] in, rents out these rooms to these guys, two per room. So, they're paying him rent, he's making money off work that they do, and so he's got that protection there, and he's told them quite frankly, 'if you guys ever talk to a union, you're gone, you're out of my house.' There's a lot of fear …. And some of them are told that they'll be deported." (Interview 2356)

RECOMMENDATION 9

Consider strategies, including education and monitoring to ensure adequate protection of particularly vulnerable worker populations such as recent immigrant SEWs.

4. Federal and Provincial Jurisdiction

The constitutional division of powers between the federal and provincial governments assigns primary responsibility for labour relations to provincial governments. Provinces have presumptive constitutional jurisdiction over labour relations matters within their boundaries.

Federal jurisdiction over labour relations arises either directly (where the employment relates to a work, undertaking, or business within Parliament's legislative authority) or through derivative jurisdiction (where the work is an integral part of a federally regulated undertaking).[38] The test for derivative jurisdiction is "flexible,"[39] and "the required relationship to a federal undertaking in order to trigger federal labour law jurisdiction [is] a matter of degree" (Adams 2006, para. 3.200). Where the relationship changes over time, jurisdiction may also change.

This narrow constitutional authority significantly limits the federal role in labour relations and social programs and is a powerful decentralizing force. Commentators disagree about whether this benefits or hampers Canadian labour relations. Some regard it as a positive feature: a source of flexibility and innovation (Carter 1992; Weiler 1977). Harry Arthurs characterizes it as "anachronistic and impractical," and says that it "flies in the face of contemporary economic realities," "forecloses the development of national industrial, labour market and training strategies," "reinforce[s] the strong atomistic tendencies of North American industrial relations systems," and "tempts [provinces] to engage in regulatory competition in which they seek to attract investment by reducing labour standards or curbing union rights" (2007, 52-54).

For sectors such as interprovincial or international road transportation or telecommunications, although these matters fall within federal legislative authority, complexity and uncertainty may still arise regarding jurisdiction. This is particularly true in these sectors because of the prevalence of contracting and subcontracting. While the primary enterprise may fall within federal jurisdiction, the contracting enterprise or subsequent layers of subcontractors

[38] *Central Western Railway Corp. v. U.T.U.*, [1990] 3 S.C.R. 1112 (S.C.C.), at 1124-1125; *Tessier ltée c Québec (Commission des lésions professionnelles)*, 2012 SCC 23 at paras. 17-18.
[39] *Westcoast Energy Inc. v. Canada (National Energy Board), [1998] 1 S.C.R. 322* (S.C.C.) at para. 128; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.) at para. 111.

may fall under provincial labour relations jurisdiction. Perhaps not surprisingly, this uncertainty produces a significant volume of litigation surrounding federal-provincial jurisdictional questions relating to collective bargaining rights.

The question of federal or provincial jurisdiction leads to practical impediments to collective representation and bargaining access in affected sectors. In this study, participants in the road transportation and telecommunications sectors reported that there is commonly confusion about which jurisdiction applies to a particular group of workers. This provides opportunities for employers to engage in regulatory arbitrage and delay by meeting certification applications with challenges to jurisdiction, leading some unions or locals to routinely file applications at both the federal and provincial labour boards (Interview 1212; Interview 8482). Interviewees also report that employers and unions will seek to proceed under whichever jurisdiction they regard as providing the more favourable regulatory environment (Interview 1212; Interview 8482).

These negative effects are exacerbated by the significant use of contracting out to enterprises and individuals, which characterizes some federal sectors. Consequently, uncertainty about and opportunities for challenging jurisdiction appear to be a significant barrier to collective representation and bargaining for some workers and would likely be a significant impediment to unionizing for SEWs. While uncommon, it is not unknown for Canadian federal and provincial governments have entered into agreements to assign authority over certain matters to either the federal or provincial government.[40] To address the uncertainty, opportunities for regulatory arbitrage, delay, and resulting fragmentation which pose significant barriers to collective organizing and bargaining of SEWs, particularly in the road transportation and

[40] See for e.g. the *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3. Until it's repeal in 2014 (2014, c. 13, s. 28) s.152 assigned jurisdiction over "social legislation", including the CLC, to the province of Newfoundland and Labrador (Adams 2006, 2.130).

telecommunications sectors, Canadian governments may wish to contemplate entering into agreements to assign labour relations authority to either federal or provincial governments, for these sectors, or certain subsectors of these.

RECOMMENDATION 10

> Consider whether it is feasible for governments to enter into agreements to assign authority over labour relations to the federal or provincial governments in certain sectors or subsectors, such as road transportation and telecommunications, where division of authority between federal and provincial governments is a significant barrier to collective worker organization.

VI. CONCLUSION

In summary, based on information gathered through field work including first stage interviews, follow-up interviews and focus groups with representatives of workers in the road transportation, broadcast, technology and telecommunications sectors in the federal jurisdiction, six potential options for collective representation and bargaining of SEWs in these sectors were assessed.

These include: (1) expanding the scope of application of the CLC to include self-employed independent contractors; (2) introducing a form of sectoral bargaining, including minority representation, exclusive bargaining, to operate in parallel with the CLC; (3) a hybrid Bernier model; (4) negotiation of minimum standards on sectoral basis; (5) introducing a worker forum to provide information and consultation; and, (6) introducing protection from employer retaliation for collective activity outside of union organizing. The study fieldwork made it apparent that there is not likely to be a one-size fits all solution to the question of SEW collective bargaining structures among these sectors. Not addressed in this report is whether there exists an identifiable sub-group of SEWs who are appropriately excluded from collective representation or bargaining legislation in the sectors of interest. The analysis and rationale for these recommendations are contained in the previous sections of this report.

RECOMMENDATION 11

> Consider whether there exists an identifiable sub-group of SEWs who are appropriately excluded from collective representation or bargaining legislation.

Next, in the course of the fieldwork it became apparent that ancillary reforms would be desirable, if not necessary. First, it is apparent that the potential for conflict with competition law exists with respect to collective bargaining by some groups of SEWs. Therefore, it would be important to ensure that any collective bargaining or hybrid model that is adopted is explicitly included within the labour exception under the *Competition Act.*

RECOMMENDATION 12

> Amend the *Competition Act* to explicitly exclude collective activity that would arise from any of the proposed collective bargaining or hybrid model, should one or more of these models be adopted.

Further, in the road transport and broadcast sectors, it became apparent early in the fieldwork that issues surrounding individual contract-making and enforcement were prevalent and serious. In follow-up interviews and focus groups, participants in these sectors were in favour of supportive measures to help ensure non-exploitative contract terms, and enforcement of payment due under individual contracts. Therefore, measures similar to New York's *Freelance isn't Free Act* may be useful ancillary reforms.

RECOMMENDATION 13

> Consider adoption of model contracts for SEWs and enforcement of payment due under individual contracts for SEW, similar to the *Freelance isn't Free Act* adopted in New York.

VII. SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1

Extend the scope of application of Part I of the CLC to include SEWs either generally, or for specific sectors. Extension of Part I of the CLC is recommended for the road transportation, broadcast media (at least for SEWs engaged by major broadcasters), and telecommunications sectors. It is not recommended as an effective model to adopt for the technology sector.

Ancillary amendments to Part I of the CLC necessary for this extension model to be effective. First, increasing statutory flexibility to vary or consolidate bargaining units, amending employer, common employer or related employer provisions to designate lead entities as employers or lead and intermediate entities as common employers. Second, amending successorship provisions to include contracting out. These amendments may either be of general application or targeted to sectors particularly affected by contracting out and subcontracting such as the telecommunications and technology sectors. Third, amendments to the certification process to provide unions engaged in organizing with contact information for SEWs and expanding access to electronic certification cards and votes.

RECOMMENDATION 2

A non-majority, exclusive representation, sectoral collective bargaining system, supported by ULP protections, grievance procedure, first contract arbitration and pressure tactics (strikes and lockouts), with sector-wide certification based on the "most representative" standard for an association or union. Certification is valid for a limited number of years, is presumed to renew, with only other unions or associations entitled to challenge renewal. This model is recommended to be adopted for the broadcast media and telecommunications

RECOMMENDATION 3

The Bernier model, provides hybrid, sector-based certification based on majority support for the purposes of one or more of: collective representation (representation for individuals before agencies or tribunal and providing services), consensus-building (joint committees or specified matters which have a duty to participate), or collective bargaining. Certified associations may seek recognition for different purposes over time. This model is recommended to be adopted for the road transportation and technology sectors.

RECOMMENDATION 4

Adopt a sectoral standard-setting system utilizing tripartite representation for SEWs, employers and government, to engage in a hybrid form of collective representation and bargaining to recommend sector-wide minimum standards of work for incorporation into regulations by government. Where insufficient leadership capacity exists among SEWs in a sector, consider including unions active in the sector among SEW representatives. This

model is recommended for the road transportation, technology, and telecommunications sectors.

RECOMMENDATION 5

Sector-specific introduction of sectoral worker forums is recommended. Introduction of a worker forum at the sectoral level, to address voluntary sector-wide initiatives and standards, and to discuss and make recommendations to government for incorporation into regulations for sectoral minimum standards is recommended for the road transportation sector and for the technology sector. The technology sector may require assistance with building capacity for forum participation. Worker forums would operate in parallel with, or supplement, any other collective representation or bargaining system available to these workers. Workplace-level worker forums are not recommended, nor is general introduction of sectoral worker forums.

RECOMMENDATION 6

Protection for collective activity relating to workplace issues engaged in by SEWs is recommended to be incorporated into the CLC. Administered by the Canada Industrial Relations Board, this provision would provide ULP protection and remedies to SEW and would be available to SEW whether or not SEWs were engaged in union organizing.

RECOMMENDATION 7

Institute programmes designed to develop capacity among alternative workers' organizations to engage in collective worker representation.

RECOMMENDATION 8

Prioritize reducing misclassification of workers as non-employees through education and enforcement.

RECOMMENDATION 9

Consider strategies, including education and monitoring to ensure adequate protection of particularly vulnerable worker populations such as recent immigrant SEWs.

RECOMMENDATION 10

Consider whether it is feasible for governments to enter into agreements to assign authority over labour relations to the federal or provincial governments in certain sectors or subsectors, such as road transportation and telecommunications, where division of authority between federal and provincial governments is a significant barrier to collective worker organization.

RECOMMENDATION 11

Consider whether there exists an identifiable sub-group of SEWs who are appropriately excluded from collective representation or bargaining legislation.

RECOMMENDATION 12

Amend the *Competition Act* to explicitly exclude collective activity that would arise from any of the proposed collective bargaining or hybrid model, should one or more of these models be adopted.

RECOMMENDATION 13

Consider adoption of model contracts for SEWs and enforcement of payment due under individual contracts for SEW, similar to the *Freelance isn't Free Act* adopted in New York.

References

Adams, George W. 2006. *Canadian Labour Law,* 2nd ed. Toronto, ON: Carswell.

Adams, Roy J. 2003. "The Revolutionary Potential of *Dunmore*." *Canadian Labour & Employment Law Journal* 10, no. 3: 117-34.

———. 2015. "Bringing Canada's Wagner Act Regime into Compliance with International Human Rights Law and the *Charter*." *Canadian Labour & Employment Law Journal* 19, no. 2: 365-98.

Altreiter, Carina, Theresa Fibich, and Jörg Flecker. 2015. "Capital and Labour on the Move: The Dynamics of Double Transnational Mobility." In *The Outsourcing Challenge Organizing Workers Across Fragmented Production Networks*, edited by Jan Drahokoupil, 6787. European Trade Union Institute.

Andrias, Kate. 2016. "The New Labor Law." *Yale Law Journal* 162, no. 1: 2-100.

Arthurs, Harry W. 2006. *Fairness at Work: Federal Labour Standards for the 21st Century.* Gatineau, QC: Human Resources and Skills Development Canada.

———. 2007. "Labour and the 'Real' Constitution." *Les Cahiers de droit* 48, no. 1-2: 43-64.

Bergeron, Jean-Guy, and Diane Veilleux. 1996. "Quebec Collective Agreement Decrees Act: A Unique Model of Collective Bargaining." *Queen's Law Journal* 22, no. 1: 135-65.

Bernier, Jean. 1993. "Juridical Extension in Quebec: A New Challenge Unique in North America." *Relations Industrielles/Industrial Relations* 48, no. 4: 745-61.

———. 2005. "Le champ d'application des normes fédérales du travail et les situations de travail non traditionnel." Federal Labour Standards Review Commission, Quebec City, QC.

———. 2006. "Social Protection for the Non-Standard Workers Outside the Employment Relationship." Federal Labour Standards Review Commission, Quebec City, QC.

Bernier, Jean, Guylaine Vallée, and Carol Jobin. 2003. "*Les besoins de protection sociale des personnes en situation de travail non traditionnelle* (Final Report from the expert committee responsible for examining the social protection needs of persons in non-traditional work situations)." Government of Quebec, Quebec City, QC.

Bernstein, Stéphanie. 2012. "Sector-Based Collective Bargaining Regimes and Gender Segregation: A Case Study of Self-Employed Home Childcare Workers in Quebec." In *Challenging the Legal Boundaries of Work Regulation*, edited by Judy Fudge, Shae McCrystal, and Kamala Sankaran, 213-29. London: Bloomsbury Publishing.

Bickerton, Geoff, and Catherine Stearns. 2002. “The Struggle Continues in Winnipeg: The Workers Organizing and Resource Centre.” *Just Labour* 1 (Winter): 50-57.Braley-Rattai, Alison. 2013. “Harnessing the Possibilities of Minority Unionism in Canada.” *Labor Studies Journal* 38, no. 4: 321-40.

British Columbia. 2018. “Recommendations for Amendments to the Labour Relations Code.” Victoria, BC. https://engage.gov.bc.ca/app/uploads/sites/121/2018/10/Labour-Relations-Code-Review-Panel-Report-1.pdf.

Brophy, Enda. 2006. “System Error: Labour Precarity and Collective Organizing at Microsoft.” *Canadian Journal of Communication* 31, no. 3: 619-38.

Brown, Ronald C. 2020. “Ride-Hailing Drivers as Autonomous Independent Contractors: Let Them Bargain!” *Washington International Law Journal* 29, no. 3: 533-74.

Canadian Trucking Alliance. 2018a, February. “CTA Comments Canada Labour Code Review.” https://www.bctrucking.com/sites/default/files/canada_labour_code_submission_cta2.pdf

———. 2018b, August 2. “CTA: Driver Inc. Is a Tax Mirage.” http://cantruck.ca/cta-driver-inc-is-a-tax-mirage/.

———. 2019. “Call to Action: Carrier Letter Regarding Driver Inc.” http://cantruck.ca/wp-content/uploads/2019/12/Call-to-Action-Carrier-Letter-Driver-Inc_public.pdf.

Carter, Donald D. 1992. “Labour Law Reform: Radical Departure of Natural Evolution?” *IRC Press Current Issues Series.* Industrial Relations Centre, Queen’s University, Kingston, ON.

Choko, Maude. 2015. “The Impact of New Technologies on the Effectiveness of the Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists in Québec, Canada.” *Asia Pacific Journal of Arts and Cultural Management* 12, no. 1: 37-47.

Chow, Garland. 2006. *Labour Standard Issues in the Inter-Provincial Canadian Trucking Industry.* Commission on the Review of the Federal Labour Standards.

Chow, Garland, and Rob Weston. 2008. “The Status of Owner-Operators under the *Canada Labour Code*: Is Change Needed?” *Transportation Journal* 47, no. 4: 42-50.

Cohen, Nicole S. 2016. *Writers’ Rights: Freelance Journalism in a Digital Age.* Montreal, QC: McGill-Queen’s Press.

Coiquaud, Urwana. 2007. “La loi et l’accès à la syndicalisation de certains travailleurs non salariés vulnérables: une relation pathologique?” *Les Cahiers de droit* 48, no. 1-2: 65-92.

———. 2009. “Le difficile encadrement juridique des travailleurs autonomes en situation précaire: le cas des chauffeurs locataires de taxi.” *Relations Industrielles/Industrial Relations* 64, no. 1: 95-111.

Cordero-Guzmán, Héctor R., Pamela A. Izvănariu, and Victor Narro. 2013. “The Development of Sectoral Worker Center Networks.” *The Annals of the American Academy of Political and Social Science* 647, no. 1: 103-23.

Creighton, Breen, and Shae McCrystal. 2015. “Who Is a ‘Worker’ in International Law?” *Comparative Labor Law and Policy Journal* 37, no. 3: 691-726.

D’Amours, Martine 2013. "Travail et représentation collective dans l’économie de la création : le cas des artistes interprètes." *Vie economique* 4, no. 4: 1-8.

D’Amours, Martine, and Alexandre Arseneault. 2015. “*Nouvelles formes d’emploi, représentation collective et régimes alternatifs de rapports collectifs de travail.*” ARUC-Innovations, travail et emploi, Université Laval. https://www.cms.fss.ulaval.ca/upload/rlt/fichiers/71281-cahier_ct-2014-008_damours-complet_final_juin_2015.pdf.

D’Amours, Martine, and Marie-Hélène Deshaies. 2012. “La protection sociale des artistes et autres groupes de travailleurs indépendants: analyse de modèles internationaux.” Quebec City, QC: Ministère de la Culture et des Communications du Québec.

D’Amours, Martine, and Frédéric Hanin. 2018. “Sectoral Regulation in Subcontracting Relationships: The Impact of Collective Agreement Decrees on Employment Conditions.” *Canadian Labour & Employment Law Journal* 21, no. 2: 433-59.

Department of Canadian Heritage. 2002. *Evaluation of the Provisions and Operations of the Status of the Artist Act: Volume I, Final Report.* http://www.publications.gc.ca/site/eng/303283/publication.html.

De Stefano, Valerio. 2015. “Non-Standard Workers and Freedom of Association: A Critical Analysis of Restrictions to Collective Rights from a Human Rights Perspective.” Working Paper 123/2015, Centre for the Study of European Labour Law, University of Catania.

Dukes, Ruth. 2012. *Systems of Employee Representation at the Enterprise UK Report.* Japan Institute for Labour Policy and Training. https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.11_u.k..pdf.

Eaton, Jonathan B. 1994. “Labour Law Reform for the New Workplace: Bill 40 and Beyond.” LLM Dissertation, University of Toronto.

Employment and Social Development Canada. 2019a, January. "Federal Labour Standards Protections for Workers in Non-Standard Work." Issue Paper, Secretariat to the Expert Panel on Model Federal Labour Standards. https://www.canada.ca/content/dam/esdc-edsc/documents/services/reports/SPAWID-SPLR-IssuePaper-Non-StandardWork-FINAL-EN.pdf.

———. 2019b, June. *Report of the Expert Panel on Model Federal Labour Standards*. https://www.canada.ca/content/dam/canada/employment-social-development/services/labour-standards/reports/expert-panel-final/expert-panel-final-report-20190826.pdf.

Fellows, G. Kent, and Mukesh Khanal. 2018. "The Economics of Telecommunications in Canada: A Backgrounder." SPP Research Paper 11, no. 32, University of Calgary School of Public Policy Publications: 1-27. https://www.policyschool.ca/wp-content/uploads/2018/12/Telecommunications-Fellows-Khanal.pdf.

Fine, Janice. 2006. *Worker Centers: Organizing Communities at the Edge of the Dream.* Ithaca, NY: Cornell University Press.

Fisk, Catherine, and Xenia Tashlitsky. 2011. "Imagine a World Where Employers Are Required to Bargain with Minority Unions." *ABA Journal of Labor and Employment Law* 27, no. 1 (Fall): 1-22.

Franco, Lucas Albert. 2019. "Organizing the Fissured Workplace: The Fight to Cultivate Collective Worker Power in an Era of Nonstandard Work." Ph.D. Dissertation, University of Minnesota.

Fudge, Judy, Eric Tucker, and Leah Vosko. 2002. "The Legal Concept of Employment: Marginalizing Workers." Report for the Law Commission of Canada. https://digitalcommons.osgoode.yorku.ca/reports/127.

Fudge, Judy, Eric Tucker, and Leah Vosko. 2003. "Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada." *Canadian Labour & Employment Law Journal* 10, no. 2: 193-230.

Gagnon, Mélanie, Catherine Beaudry, and Ann-Gabrielle Carette. 2016. "L'organisation collective pour l'obtention d'une voix au chapitre: illustration d'une forme de représentation complémentaire au syndicalisme." *Revue multidisciplinaire sur l'emploi, le syndicalisme et le travail* 10, no. 2: 66-84.

Garden, Charlotte. 2017. "The Seattle Solution: Collective Bargaining by For-Hire Drivers & Prospects for Pro-Labor Federalism." *Harvard Law and Policy Review* 12, no. 1: 1-21.

Gates, Leslie, Kati L. Griffith, Jonathan Kim, Zane Mokhiber, Joseph C. Bazler, and Austin Case. 2018. "Sizing up Worker Center Income (2008-2014): A Study of Revenue Size,

Stability, and Streams." In *No One Size Fits All: Worker Organization, Policy, and Movement in a New Economic Age,* edited by Janice Fine, Linda Burnham, Kati Griffith, Minsun Ji, Victor Narro, and Steven Pitts, 39-66. Champaign, IL: Labour and Employment Relations Association.

Godard, John. 2003. "Labour Unions, Workplace Rights and Canadian Public Policy." *Canadian Public Policy/Analyse de Politiques* 29, no. 4: 449-67.

Gomez, Rafael. 2016. "Employee Voice and Representation in the New World of Work: Issues and Options for Ontario." Toronto, ON: Ontario Ministry of Labour. https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Gomez-8-Voice%20.pdf.

Griffith, Kati L. 2015. "Worker Centers and Labor Law Protections: Why Aren't They Having Their Cake?" *Berkeley Journal of Employment and Labor Law* 36, no. 2: 331-49.

Gruber, Marc. 2018. "Challenges and opportunities for decent work in the culture and media sectors." Working Paper No. 324: International Labour Organization. https://www.ilo.org/sector/Resources/publications/WCMS_661953/lang--en/index.htm.

Haiven, Larry. 2006. "Expanding the Union Zone: Union Renewal through Alternative Forms of Worker Organization." *Labor Studies Journal* 31, no. 3: 85-116.

Harcourt, Mark, and Helen Lam. 2012. "Collaboration between Unions in a Multi-Union, Non-Exclusive Bargaining Regime: What Can Canada Learn from New Zealand?" *International Journal of Employment Studies* 20, no. 2: 5-31.

Harcourt, Mark, Helen Lam, and Geoffrey Wood. 2014. "US Union Revival, Minority Unionism and Inter-Union Conflict." *Journal of Industrial Relations* 56, no. 5 (November): 653-71.

Harris, Seth D. 2000. "Conceptions of Fairness and the Fair Labor Standards Act." *Hofstra Labor and Employment Law Journal* 18, no. 1: 19-166.

Harris, Seth D. (2018). "Workers, Protections, and Benefits in the U.S. Gig Economy." *Global Law Review*, available at SSRN: https://ssrn.com/abstract=3198170.

Harris, Seth D., and Alan B. Krueger. 2015. "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker.'" Discussion Paper 2015-10, Hamilton Project, Brookings Washington, DC. https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

Howell, Chris. 2005. *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000.* Princeton, NJ: Princeton University Press.

Jalette, Patrice, Jean Charest, and Guylaine Vallée. 2002. "Globalisation and Labour Regulation: The Case of the Quebec Clothing Industry." *Employment Relations Record* 2, no. 2: 33-46.

Jolls, Christine. 2007. "The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws." In *Emerging Labor Market Institutions for the Twenty-First Century*, edited by Richard B. Freeman, Joni Hersch, and Lawrence Mishel, 141-76. Chicago, IL: University of Chicago Press.

Kates, Joanne, and Jane Springer. 1983. "Organizing Freelancers in the Arts." In *Union Sisters: Women in the Labour Movement*, edited by Linda Briskin, and Lynda Yanz, 238-56. Toronto, ON: Women's Educational Press.

Kelly, John E. 1998. *Rethinking Industrial Relations: Mobilisation, Collectivism and Long Waves*. New York, NY: Routledge.

Lagacé, Chantale, and Alexis Robin-Brisebois. 2004. *Travail indépendant et rapports collectifs de travail: étude de six regroupements de travailleurs indépendants*. Montreal, QC: INRS Urbanisation, Culture et Société.

L'Allier, Jean-Paul, Denis Boutin, and André Sasseville. 2010. *Comité L'Allier sur la démarche de réflexion avec les associations concernées par l'application des lois sur le statut des artistes.* Rapport présenté à Madame Christine St-Pierre Ministre de la Culture, des Communications et de la Condition féminine. Montreal, QC: Culture et Communications Québec.

Legault, Marie-Josée, and Martine D'Amours. 2011. "Représentation collective et citoyenneté au travail en contexte de projet." *Relations Industrielles/Industrial Relations* 66, no. 4: 655-77.

Legault, Marie-Josée, and Johanna Weststar. 2015. "The Capacity for Mobilization in Project-Based Cultural Work: A Case of the Video Game Industry." *Canadian Journal of Communication* 40, no. 2: 203-21.

Lynk, Michael. 2015. *A Review of the Employee Occupational Exclusions under the Ontario Labour Relations Act, 1995*. Prepared for the Ontario Ministry of Labour to Support the Changing Workplaces Review of 2015, Ontario: Queen's Printer for Ontario. https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Lynk-11-Exclusions%20Under%20LRA.pdf.

MacPherson, Elizabeth. 1999. "Collective Bargaining for Independent Contractors: Is the *Status of the Artist Act* a Model for Other Industrial Sectors?" *Canadian Labour & Employment Law Journal* 7: 355-89.

———. 2015, September. “Status of the Artist Act: A Model for Other Sectors?” Presentation at the CLPE Conference on Re-Imagining Forms and Approaches to Workplace Representation. Toronto, ON.

McAlevey, Jane. 2016. *No Shortcuts: Organizing for Power in the New Gilded Age*. New York, NY: Oxford University Press.

Milanez, Anna, and Barbara Bratta. 2019. “Taxation and the Future of Work: How Tax Systems Influence Choice of Employment Form.” *OECD Taxation Working Papers* (Paris), no. 4: 1-126. https://doi.org/10.1787/20f7164a-en.

Mitchell, C. Michael, and John C. Murray. 2017. *The Changing Workplaces Review: An Agenda for Workplace Rights – Final Report*. Toronto, ON: Ontario Ministry of Labour.

Morris, Charles J. 1988. “NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct.” *University of Pennsylvania Law Review* 137, no. 5: 1673-754.

———. 2005. *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*. Ithaca, NY: ILR Press.

Narro, Victor, and Janice Fine. 2018. “Labour Unions/Worker Center Relationships, Joint Efforts, Experiences.” In *No One Size Fits All: Worker Organization, Policy, and Movement in a New Economic Age,* edited by Janice Fine, Linda Burnham, Kati Griffith, Minsun Ji, Victor Narro, and Steven Pitts, 67-90. Champaign, IL: Labour and Employment Relations Association.

Neil, Garry. 2010. “Status of the Artist in Canada: An Update on the 30th Anniversary of the UNESCO *Recommendation Concerning the Status of the Artist.*” Paper presented at the Canada Conference of the Arts.

OECD. 2019. Policy Responses to New Forms of Work. Paris: OECD Publishing. https://doi.org/10.1787/0763f1b7-en.

O’Grady, John. 1992. “Beyond the *Wagner Act,* What Then?” In *Getting on Track: Social Democratic Strategies for Ontario,* edited by Daniel Drache, 153-69. Montreal, QC: McGill-Queen’s University Press.

Ontario, Ministry of Labour. 2016. Changing Workplaces Review – Special Advisors’ Interim Report. Toronto, ON. https://www.labour.gov.on.ca/english/about/cwr_interim/index.php.

———. 2017. The Changing Workplaces Review: An Agenda for Workplace Rights – Final Report. Toronto, ON. https://www.ontario.ca/document/changing-workplaces-review-final-report.

Quebec, Ministry of Labour, Employment and Social Solidarity. n.d.a. "Évolution du Nombre de Decréts, D'employeurs et de Salariés Assujettis 1935-2010."

———. n.d.b. "Décrets de convention collective." https://www.travail.gouv.qc.ca/fileadmin/fichiers/Documents/decrets_cc/representation.pdf Online: retrieved 1 March 2021.

Rawling, Michael J., and Sarah J. Kaine. 2012. "Regulating Supply Chains to Provide a Safe Rate for Road Transport Workers." *Australian Journal of Labour Law LEXIS* 57.

Rawling, Michael J., Nicole Shepherd, Richard Johnstone, and Igor Nossar. 2017. "Australian Supply Chain Regulation Project: Draft Report on Road Transport Sector Regulation." University of Technology Sydney.

Rogers, Brishen, and Simon Archer. 2017. "Protecting Concerted Action Outside the Union Context." *Canadian Labour & Employment Law Journal* 20, no. 1: 141-73.

Rolland, Anne-Julie. 2017. "Recent Developments in Unionizing the Precarious Workforce: The Exemption Regimes of Care Workers and Farm Workers in Quebec." *Canadian Labour & Employment Law Journal* 20, no. 1: 107-40.

Rubiano, Camilo. 2013. "Collective Bargaining and Competition Law: A Comparative Study on the Media, Arts and Entertainment Sectors." International Federation of Musicians. https://www.fim-musicians.org/wp-content/uploads/fim_study_competition.pdf.

Seattle City Council Insight. 2020, April 10. "Legal Challenge to Seattle's Uber Drivers Collective Bargaining Ordinance Ends." https://sccinsight.com/2020/04/10/legal-challenge-to-seattles-uber-drivers-collective-bargaining-ordinance-ends/.

Shamir, Hila. 2016. "Unionizing Subcontracted Labor." *Theoretical Inquiries in Law* 17, no. 1: 229-55.

Skorupińska, Katarzyna. 2018. "The Failure of a New Form of Employee Representation: Polish Works Councils in Comparative Perspective." *European Journal of Industrial Relations* 24, no. 2: 163-78.

Slinn, Sara J. 2015. *Collective Bargaining*. Prepared for the Ontario Ministry of Labour to Support the Changing Workplaces Review of 2015. Ontario: Queen's Printer for Ontario.

———. 2019, June 23-25. "Wage Boards for the 21st Century: Revisiting Sectoral Standard-Setting Mechanisms for the Workplace." Paper presented at the Labour Law Research Network Conference, Valparaíso, Chile. https://digitalcommons.osgoode.yorku.ca/conference_papers/8.

———. 2021. “Protected Concerted Activity and Non-Unionized Employee Strikes: Worker Rights in Canada in the Time of COVID-19.” *Osgoode Hall Law Journal* 57*,* no. 3: 605-35.

Statistics Canada. 2019. “Labour Statistics Consistent with the System of National Accounts (SNA), by Job Category and Industry.” Table 36-10-0489-01. https://doi.org/10.25318/3610048901-eng.

Sunshine, Naomi B. 2016. “Labor Rights for Platform Workers: A Response to *Social Change’s* 2016 Symposium.” *NYU Review of Law & Social Change* 41: 241-50.

Thompson, Mark. 2015, September 24. “Labour Law Reform: A Taurus or a Tesla?” Presentation at the Roundtable on Re-Imagining Forms and Approaches to Workplace Representation, Osgoode Hall Law School, York University, Toronto, ON.

Thornthwaite, Louise, and Sharron O’Neill. 2016. *Evaluating Approaches to Regulating WHS in the Australian Road Freight Transport Industry: Final Report to the Transport Education, Audit and Compliance Health Organisation Ltd (TEACHO)*. Sydney: MacQuarie University.

Trotter, Richard. 2015. “Protected Concerted Activity Under Section 7 of the National Labor Relations Act: A New Frontier for Non-Union Employees to Organize to Improve Terms of Employment without a Union.” *Journal of Management Policy and Practice* 16, no. 1: 54-61.

Vacotto, Beatriz. 2013. “Precarious Work and the Exercise of Freedom of Association and Collective Bargaining: Current ILO Jurisprudence.” *International Journal of Labour Research* 5, no. 1: 117-31.

Vallée, Guylaine. 2005. *Towards Enhancing the Employment Conditions of Vulnerable Workers: A Public Policy Perspective.* Ottawa, ON: Canadian Policy Research Networks.

Vosko, Leah. 2005. “The Precarious Status of the Artist: Freelance Editors’ Struggle for Collective Bargaining Rights.” In *Self-Employed Workers Organize: Law, Policy, and Unions,* edited by Cynthia J. Cranford, Judy Fudge, Eric Tucker, and Leah F. Vosko, 136-70. Montreal, QC: McGill-Queen’s University Press.

Vosko, Leah, Mark Thomas, Angela Hick, and Jennifer Jihye Chun. 2013. “Organizing Precariously-employed Workers in Canada.” Unpublished working paper.

Walchuk, Brad. 2016. “The Pitfalls of Embracing Minority Unionism.” *Journal of Workplace Rights* 6, no. 3 (September): 1-12.

Weil, David. 2014. *The Fissured Workplace*. Boston, MA: Harvard University Press.

Weiler, Paul C. 1977. “The Virtues of Federalism in Canadian Labour Law.” Paper published at the 25th Annual Conference of the Industrial Relations Centre, McGill University, 58-72.

Weststar, Johanna, and Marie-Josée Legault. 2017. “Why Might a Videogame Developer Join a Union?” *Labor Studies Journal* 42, no. 4: 295-321.

———. 2019. “Building Momentum for Collectivity in the Digital Game Community.” *Television & New Media* 20, no. 8 (December): 848-61.

Wheeler, Hoyt N., and John A. McClendon. 1991. “The Individual Decision to Unionize.” In *The State of the Unions*, edited by George Strauss, Daniel G. Gallagher, and Jack Fiorito, 47-83. Madison, WI: Industrial Relations Research Association.

Wills, Jane. 2009. “Subcontracted Employment and Its Challenge to Labor.” *Labour Studies Journal* 34, no. 4: 441-60.