Windsor Yearbook of Access to Justice
Recueil annuel de Windsor d'accès à la justice

Bargaining Sectoral Standards: Towards Canadian Fair Pay Agreement Legislation

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Volume 39, 2023

URI: https://id.erudit.org/iderudit/1107936ar
DOI: https://doi.org/10.22329/wyaj.v39.8297

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Publisher(s)

Faculty of Law, University of Windsor

ISSN

2561-5017 (digital)

Explore this journal

Cite this article

Slinn, S. & Rowlinson, M. (2023). Bargaining Sectoral Standards: Towards Canadian Fair Pay Agreement Legislation. *Windsor Yearbook of Access to Justice / Recueil annuel de Windsor d'accès à la justice*, *39*, 78–101. https://doi.org/10.22329/wyaj.v39.8297

Article abstract

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Sara Slinn
Mark Rowlinson[*]

In response to the need for more inclusive collective bargaining legislation to combat inequality and improve conditions in the workplace, this paper considers the recently introduced New Zealand Fair Pay Agreement [FPA] sectoral bargaining framework and offers a preliminary series of ideas and proposals setting out how an FPA model for bargaining sectoral standards could work in Canada. It is intended as the beginning of a more detailed discussion on the development of an FPA regime culminating in model legislation that could be adapted to different Canadian jurisdictions. Guided by principles of accountability, integration, and inclusivity, this proposal is intended to apply to all workers in an employment relationship – including dependent contractors and gig and platform workers. The proposed system is to be structured as a new, stand-alone statute, drawing upon existing institutions administering collective bargaining legislation, incorporating some familiar collective bargaining concepts: good faith bargaining, dues check-off, and unfair labour practice protection. It is intended to preserve existing collective bargaining arrangements by excluding specified sectors with existing high union density or existing sectoral bargaining. However, it is also intended to offer a new, sectoral bargaining option based on industry or occupation sectors, producing FPA "sector agreements" containing minimum standards applying to all employees and employers in the sector. This proposed framework would operate in parallel and in conjunction with the existing enterprise-level collective bargaining system.

En réaction à la nécessité de se doter d'une loi plus inclusive sur la négociation collective pour lutter contre les inégalités et améliorer les conditions de travail, les auteurs examinent le cadre de négociation sectorielle récemment adopté en Nouvelle-Zélande sous le régime de la Fair Pay Agreement (FPA). Ils présentent un ensemble préliminaire d'idées et de propositions sur la façon dont un modèle fondé sur la FPA pourrait fonctionner au Canada pour l'établissement de normes de négociation sectorielle. Ils exposent également les fondements d'une analyse détaillée sur l'élaboration d'un régime d'entente menant à une loi type adaptable à différentes juridictions canadiennes.
Axée sur les principes de la responsabilité, de l'intégration et de l'inclusion, cette proposition s'appliquerait à tous les travailleurs engagés dans une relation d'emploi, y compris les entrepreneurs dépendants, les travailleurs à la demande et les travailleurs des plateformes. Le système proposé serait structuré comme une nouvelle loi distincte, s'inspirerait de l'expérience d'institutions existantes qui appliquent des lois sur la négociation collective et intégrerait certains concepts familiers en matière de négociation collective : négociation de bonne foi, précompte des cotisations et protection contre les

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pratiques de travail inéquitables. Il viserait à préserver les arrangements existants en matière de négociation collective en excluant certains secteurs dans lesquels le taux de syndicalisation est élevé ou la négociation sectorielle est déjà en place. Cependant, il offrirait aussi une nouvelle option de négociation sectorielle fondée sur les secteurs industriels ou professionnels, de manière à générer des « ententes sectorielles » du type de la FPA qui énonceraient des normes minimales applicables à tous les employeurs et employés du secteur concerné. Ce cadre proposé fonctionnerait en parallèle et de concert avec l'actuel système de négociation collective au niveau de l'entreprise.

I. INTRODUCTION

Over the last 30 years, it has become increasingly clear that Canada's current model for establishing labour standards and collective bargaining, which developed during and immediately after the Second World War, has not sufficiently adapted to our present labour market. Increasingly, Canadian workers, particularly in the private sector, lack access to collective representation, or to any meaningful participation in deciding the conditions under which they work.

Declining incidence of collective bargaining in the private sector is not a new problem in Canada. Union density has been falling since the early 1980s as the result of a variety of factors, including globalization of production, fracturing of the workplace through contracting out, and changing organization of work such as the growth of gig work.[1]

In recognition of these long-term trends there have been numerous proposals in several Canadian jurisdictions, since at least the early 1990s, aimed at introducing some form of broader-based, sectoral bargaining into the existing system of Canadian labour relations.[2] Most recently, the two-year labour and employment legislation reform process in Ontario known as the Changing Workplaces Review considered several different sectoral bargaining proposals.[3]

Compelling evidence exists that centralized bargaining structures offer significant benefits to workers, including higher levels of collective agreement coverage, greater worker voice, better labour standards and labour market integration for vulnerable workers, improved productivity, reduced unemployment, higher employment, and reduced income inequality.[4]

At the same time, we have seen the growth of non-standard employment arrangements, leaving growing numbers of workers in increasingly precarious employment relationships that are often excluded entirely from minimum standards and collective bargaining regimes. The recent COVID-19 pandemic has brought

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1 See Gregor Murray, "Union Renewal: What Can We Learn from Three Decades of Research?" (2017) 23:1 Transfer 9; Pradeep Kumar & Christopher Schenk, "Union Renewal and Organizational Change: A Review of the Literature" in Pradeep Kumar & Christopher Schenk, eds, *Paths to Union Renewal: Canadian Experiences* (Toronto: Broadview Press, 2006) 29; John Godard, "Do Labour Laws Matter? The Decline and Convergence Thesis Revisited" (2003) 43:3 Industrial Relations 458.

2 For a review of sectoral bargaining proposals in Canada over the last three decades, see: Sara J Slinn, "Broader-Based & Sectoral Bargaining in Collective Bargaining Law Reform: A Historical Review" (2020) 85 Labour / Le Travail 13 [Slinn, "Bargaining Historical Review"].

3 Ontario, Ministry of Labour, *The Changing Workplaces Review: An Agenda for Workplace Rights*, by C Michael Mitchell & John C Murray, Final Report (Toronto: Ontario Ministry of Labour, 23 May 2017) [Mitchell & Murray, "CWR Final Report"].

4 Jelle Visser, Susan Hayter & Rosina Gammarano "Trends in Collective Bargaining Coverage: Stability, Erosion or Decline?" (2017) INWORK Issue Brief No 1 (UN, International Labour Organisation) [UN, "Issue Brief"]; OECD, *OECD Employment Outlook 2018*, (OECD Publishing: Paris, 2018), Ch 3 [OECD, "Employment Outlook"]); Matthew Dimick, "Productive Unionism" (2014) 4:2 UC Irvine L Rev 679 at 681-702 [Dimick, "Productive Unionism"].

home to the public the importance of the work these precarious and underrepresented workers do and the substandard conditions under which they often work. Declining union density and growing precarity have led to increasing activism aimed at improving and broadening minimum standards legislation.

Recently, increasing attention is being paid to a new model for bargaining minimum sectoral standards: the New Zealand fair pay agreements legislative initiative. After a lengthy consultation process which began in 2018, the New Zealand *Fair Pay Agreements Act* [NZ Act] was introduced on March 29, 2022, received Royal Assent on 1 November 2022 and the Fair Pay Agreement system came into effect on 1 December 2022.[5]

The form of sectoral bargaining set out in the NZ Act, based on "fair pay agreements" [FPA], is attractive because it combines enhanced access to collective bargaining with the concept of implementing broad sectoral standards for workers across the economy through collective bargaining. In essence, an FPA is a sector-wide collective agreement negotiated by an employers' association and a union council. This is not a new concept internationally, as countries such as Australia, the Netherlands, Finland, Spain, Sweden, and Belgium already have some form of industry-wide minimum standards.

Moreover, in Canada, sectoral labour relations already exist. There is *de facto* sectoral bargaining in the health and education sectors in many provinces and statutory sectoral bargaining in these sectors or across the public sector in other provinces. Similarly, sectoral bargaining legislation is common in the construction sector. A limited example of bargained sectoral standards in the private sector, outside of the construction industry, can be found in the Quebec decree system, which applies to a small number of sectors in the Quebec economy.[6] In addition, until its repeal in the early 2000s, the Ontario *Industrial Standards Act* provided for tripartite negotiation of sectoral minimum standards.[7]

The history and scope of sectoral bargaining and other sector-based systems in Canada are worth reviewing and considering in connection with implementing new proposals. These systems have themselves been evaluated, and they may hold useful suggestions for their improvement or adaptation to other sectors.[8] Future research could consider the Canadian historical experience with sectoral workplace regulation, including important features such as collectively governed systems for training and skills development, and systems for the collective provision of pension and health and welfare benefits at low cost and with broad coverage of the labour force – both acute problems in current labour markets today. However, the scope of this paper is limited to describing how the FPA model set out in the NZ Act could be adapted and implemented in Canada.

This paper considers the recently introduced New Zealand *Fair Pay Agreement Act* and offers a preliminary series of ideas and proposals setting out how an FPA model for bargaining sectoral standards could work in Canada. It is intended as the beginning of a more detailed discussion on the development of an FPA regime, culminating, we hope, in model legislation that could be adapted to different Canadian jurisdictions.

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5 *Fair Pay Agreements Act* (NZ), 2022/115-1. At the time of this writing, five applications pursuant to the NZ Act are being assessed (including applications from the hospitality, supermarket and grocery store, security guard/officer, early childhood education, and commercial cleaner sectors), two other applications have been withdrawn or declined, and one approval to initiate bargaining and bargaining side formation has been granted for a unit of bus and coach drivers and cleaners. New Zealand, Ministry of Business Innovation and Employment, "Fair Pay Agreements Dashboard", online: <https://www.mbie.govt.nz/business-and-employment/employment-and-skills/fair-pay-agreements/fpa-dashboard>.

6 *Act respecting collective agreement decrees*, CQLR c D-2.

7 *Industrial Standards Act*, RSO 1990, c I.6.

8 For e.g., see Slinn "Bargaining Historical Review," *supra* note 2; Ontario, Changing Workplaces Review, *Collective Bargaining*, by Sara Slinn (Toronto: Ontario Ministry of Labour, Changing Workplaces Review, 2015), online: <https://digitalcommons.osgoode.yorku.ca/reports/178/>; and Ontario, *Report of Committee of Inquiry into the Industrial Standards Act* (Toronto, 1963) [Ontario, "Laskin Report"].

In developing this proposal, we are guided by the following basic principles of accountability, integration, and inclusivity:

a. Standards must be bargained by a democratically accountable bargaining agent on behalf of workers in a sector, and by a representative organization of employers on behalf of all employers in the sector.

b. This new regime should not interfere with existing collective bargaining regimes; it should serve as a floor from which traditionally certified unions can bargain a full collective agreement and potentially superior collective agreement terms.

c. This new regime should apply to all workers in an employment relationship – including dependent contractors and gig and platform workers, however defined.

In addition, this proposal strives to minimize the development of new institutions or institutional change to the degree possible. We believe these are appropriate guiding principles for developing a sectoral bargaining system. We provide a brief rationale for the selection of these principles.

The principle of democratically accountable organizations of workers and organizations or councils of representative employers is one that is already widely recognized in Canadian labour markets and regulation. It is also consistent with constitutional foundations and the purpose of labour market regulation in Canadian social democracy.

The principle of integration with existing labour relations regulation has both empirical and practical rationales. Empirically, there is evidence that the combination of a sectoral "floor" of standards, subject to individual bargaining with an employer, results in better labour market and productivity outcomes for both workers and employers.[9] The practical rationale is that integration will greatly facilitate the implementation of a sectoral system, particularly where there already exists *de facto* sectoral bargaining within the current system, as noted above, or where some employers in a sector already collectively bargain. We also note that at least one Canadian system already contains a similar form of integrated legislation – the federal *Status of the Artist Act*.[10] This new regime is intended to promote negotiated sector-wide standards to allow for taking key employment terms and conditions out of competition across various sectors of the economy.

The principle of inclusiveness incorporates both inclusiveness in the sense of including all workplaces and all workers within a sector, with the goal of reorienting the terms of competition within a labour or product market away from key terms and conditions of work. This principle responds to one of the labour market conditions that gives rise to the need for a sectoral solution: the continuing trend towards fragmentation or "fissuring" of the workplace and the organization of work, the growing incidence of employee misclassification, and new work arrangements such as "gig work". An FPA is intended to cover

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[9] See UN, "Issue Brief" and OECD, "Employment Outlook", *supra* note 4; see also Dimick, "Productive Unionism", *supra* note 4; Matthew Dimick, "Labor Law, New Governance, and the Ghent System" (2012) 90:2 NCL Rev 319.

[10] *Status of the Artist Act*, SC 1992, c 33. This federal *Act* operates in parallel with the *Canada Labour Code* (RSC 1985, c L-2) collective bargaining and minimum standards regimes.

all persons performing paid work in an employment or employment-like working relationship.[11] Indeed, in some sectors, sectorally negotiated norms were developed to address exactly these conditions.[12]

Our proposal is consistent with a form of "organized decentralization" that the Organisation for Economic Co-Operation and Development [OECD] recognizes as achieving a desirable balance between collective bargaining coverage and flexibility and, therefore, avoids or minimizes potential negative effects on productivity while not reducing the number of workers represented.[13] This proposal incorporates flexibility by establishing sectoral agreements as minimum standards that permit individual enterprises to establish their own wage and working condition agreements, provided that the minimum standard is respected. The OECD identifies this "favourability principle" as a means of providing flexibility at the sub-sector level.[14]

As detailed below, what we propose is a system providing for sectoral bargaining of a suite of sector-wide minimum workplace standards, which will operate in parallel with existing collective bargaining and minimum standards legislation, and which will support and complement – not compete with – existing and future collective bargaining rights. This proposal is summarized at Table 2 at the end of this paper.

II. THE CANADIAN FPA MODEL

The following section outlines the main contours of our proposal for a sectoral bargaining model incorporating key features of the NZ Act, modified to fit into the Canadian labour relations and legal landscape, and which respects the guiding principles set out above. This Canadian FPA model could then be further adapted to suit particular Canadian jurisdictions.

A. Structure of the Legislation

Like the NZ Act, we propose that a new Canadian FPA regime should start with a new statute – not amendments to existing labour statutes such as minimum standards or labour relations legislation. However, the new statute would likely require "housekeeping" amendments to existing workplace legislation to ensure that the new sectoral bargaining regime works seamlessly with, and does not undermine, our current collective bargaining or minimum standards systems. Again, in keeping with the principle of integration, the intent behind the FPA is not to displace existing workplace law or labour relations, but to extend a system for collective bargaining to sectors that, for a variety of reasons, are unable to access collective bargaining under existing laws.

We also propose that this new regime utilizes existing institutions that presently administer labour relations statutes. For example, we propose that applications to initiate the negotiation of an FPA be filed with existing labour boards. We also propose that labour boards have jurisdiction to determine the appropriate unit that would be covered by the FPA, as well as any initial or ongoing disputes about

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11 Several proposals exist for how to expand the definition of "employee" to ensure that gig workers and other misclassified workers are included. One widely discussed option is employing a new "ABC" test for "employee," which has been proposed in the U.S. and Canada. See for example Mandryk et al, "ABCs of Gig Work" (4 May 2021), online (blog): *Unsolicited: The Blog* <https://goldblattpartners.com/unsolicited-blog/the-abcs-of-gig-work/≥

12 Marcus Klee, "Fighting the Sweatshop in Depression Ontario: Capital, Labour and the Industrial Standards Act" (2000) 45 Labour/Le Travailleur 13.

13 The OECD identifies three elements characterizing "organized decentralization": a reasonable representativeness criterion; a meaningful test of public interest; and, well-defined procedures for exemptions and opt-outs (OECD, "Employment Outlook," *supra* note 4 at Chapter 3). Each of these is incorporated into our proposal.

14 OECD, "Employment Outlook," *supra* note 4 at Chapter 3.

inclusions or exclusions from the unit. The labour board would also have jurisdiction to restructure or consolidate sectoral units.

As set out in more detail below, our proposal also involves the active involvement of government labour ministries to oversee and resource negotiation of the FPAs and their conclusion. We also envisage that a tribunal (either the labour board or a division thereof) would be needed to resolve disputes connected to the bargaining process (for example, we propose a good faith bargaining requirement) and the ultimate process by which the sectoral agreement is concluded, which, as set out below, would involve mandatory interest arbitration.

B. Application to Categories of Workers

The NZ Act defines "employee" as having the same meaning as that found in New Zealand's *Employment Relations Act 2000.*[15] That definition includes anyone "employed by an employer to do any work for hire or reward under a contract of service." The definition also notes that the relevant authority must "determine the real nature of the relationship" between employer and employee. As such, the definition likely includes dependent contractors.

The NZ Act also includes a specific provision that is designed to address misclassification.[16] Section 22 states that an employer must not engage a person as an independent contractor if the real nature of the relationship is an employment relationship. The section contains a specific penalty if an employer is found to misclassify an employee to avoid coverage by an FPA.[17]

Our proposed Canadian FPA regime would also be of broad application. As noted above, one of our guiding principles is that this new regime should apply to all workers in an employment relationship, including dependent contractors as well as gig and platform workers who are dependent contractors. In our proposal, we would use the term "employee" to refer to all of these eligible categories of workers.
To operationalize this, we propose to apply what is known as the "ABC test," which has been adopted for determining employment status in many jurisdictions across the United States. It provides that a worker is an employee *unless* the hiring entity can establish that:

A) the worker is free from its control, both factually and under the terms of the contract for performing the work;
B) the worker performs work outside the usual course of its business; and
C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The ABC test also typically contains a business-to-business exemption recognizing that *bona fide* business relationships are not employment relationships. We also propose including this exemption. This inclusive approach, including incorporation of the ABC test, may reduce unnecessary disputes over misclassification and reduce incentives for employers to fissure work and workplaces.

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15 *Fair Pay Agreements Act* (NZ), *supra* note 5, s 5(1); *Employment Relations Act 2000* (NZ), 2000/24, s 6.

16 *Ibid*, s 22.

17 A New Zealand Cabinet document recommendation which preceded this Bill proposed that the Fair Play Agreements legislation apply initially to employees only, with contractors to be incorporated into the regime at some point in the future. See: NZ, Ministry of Business, Innovation and Employment, Cabinet Paper: *Fair Pay Agreements: Approval to Draft* (7 May 2021), online (pdf): *Ministry of Business, Innovation and Employment* <https://www.mbie.govt.nz/dmsdocument/14297-fair-pay-agreements-approval-to-draft-proactiverelease-pdf>.

C. Applying for Sectoral Bargaining

Under our proposal, the first step towards the achievement of a sectoral agreement would be an application to initiate the bargaining process for a specified sector. The process for applying for sectoral bargaining under this system is different, and less onerous, than the mandatory vote or card-based certification requirement in typical Canadian labour relations systems. It requires that a sector be defined and satisfy a threshold representation test by demonstrating a specified minimum amount of employee support in the sector.

1. Defining the Sector

Like the NZ Act, we propose that, under a Canadian FPA regime, each application must define the covered workforce by *industry* or *occupation.*[18] Under an industry application, the initiating union would be required to describe the industry and each occupation in the industry that the agreement proposes to cover. Under an occupational application, the initiating union would be required to describe the occupation, including a description of the work to which the agreement would apply.

Under the NZ Act, an occupation-based agreement must apply to all employees in the occupation, while an industry-based agreement must apply to all employees in the industry. There is no room for exclusions. The coverage of the proposed FPA must be specific, with sufficient clarity that all employees and employers are able to determine whether they are covered by the FPA.[19] In line with the principle of inclusivity, and consistent with a sectoral approach, we also propose that no exclusions be available from sectors, although we propose incorporating a managerial exclusion requirement operating in the same manner as managerial exclusions in existing Canadian collective bargaining legislation. Therefore, worker exclusions would be limited to managerial exclusions.

However, unlike the proposed NZ Act,[20] which provides only for nation-wide FPA bargaining units, we propose that sector descriptions in applications would also include a geographic dimension which reflects the particular industry or occupation. We propose that there be a preference for sectors with larger geographic scope, which could include provincial, regional, municipal or even a smaller geographic areas if it could be justified.[21] The key considerations for the authority assessing the application would be whether the proposed unit is one that would be reasonably capable of bargaining on a sectoral basis.

Nonetheless, we do not believe that every sector of the economy should be covered by this legislation. Therefore, we propose limited sector exclusions. Specifically, we propose that, in keeping with the principle of integration, certain Canadian sectors that already have high union density or some form of sectoral bargaining should be excluded from this new regime. We propose that the public service and much of the public sector – where union density exceeds 70 percent, and where sectoral bargaining may already be statutorily provided – should not be covered by the proposed FPA legislation. We would also propose that the construction sector, which is relatively highly unionized and where statutory sectoral bargaining already exists in some parts – also be excluded.[22] The purpose of these exclusions is not to

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18 *Fair Pay Agreements Act* (NZ), *supra* note 5, s 32.

19 *Ibid*.

20 There is no geographic scope provision in the New Zealand legislation – an FPA applies to the entire country.

21 As most collective bargaining in Canada falls under provincial rather than federal jurisdiction, in most cases the largest possible geographic scope for a sector would be province-wide. This would not rule out a nation-wide sector in an appropriate case where that collective bargaining falls under federal jurisdiction.

22 We recognize that statutory sectoral bargaining is not available to all segments of the construction industry (for instance the Ontario *Labour Relations Act* provides for sectoral bargaining in the industrial, commercial and institutional sector of the construction industry. However, we recommend excluding the entire construction sector rather than certain

disadvantage these groups of workers, but rather to ensure that new sectoral bargaining regime does not in any way undermine the collective agreements and collective bargaining arrangements that already exist in highly unionized sectors.

2. Threshold to Trigger Bargaining Process

Perhaps the most striking aspect of the NZ Act is the means by which the right to negotiate an FPA is triggered. Under this Act, an applicant union must satisfy a "representation test" by demonstrating the support of at least 1,000 employees within the proposed unit (the proposed sector) or 10 percent of the proposed unit.[23] Once the application is received, the Ministry of Labour (in New Zealand, it is an authority established under the Ministry of Business, Innovation and Employment - the "Authority"), or equivalent body, is responsible for assessing the application and the level of support, and can provide an opportunity for submissions from affected parties, after notice is provided. Notably, although the Act does not specify the necessary form of evidence of support, it does provide that employee membership in the applicant union is not sufficient evidence of support for the purpose of the representation test.[24]

Existing collective bargaining regimes in Canada typically require a majority, or a very significant percentage, of workers in a bargaining unit to support certification of a union to engage in statutory collectively bargaining. However, in many countries, workers can engage in collective bargaining without demonstrating majority support, or even the support of a substantial proportion of the workers in a workplace. In this sense, internationally, Canada is an outlier in maintaining its insistence on majoritarian support for collective bargaining.

We propose that the threshold representation test under the Canadian FPA model requires a lower percentage or number of workers to trigger the collective bargaining process, precisely because existing labour relations systems are inaccessible to workers in sectors such as fast food or home care. The purpose of this lower threshold representation test is the same as under the mainstream Canadian collective bargaining system: to demonstrate that there exists material and adequate support from the employees to trigger collective bargaining, and for the bargaining of an agreement. Evidence of support could be in the form of signed membership cards, including electronic membership cards. We also propose that the Application would be received and adjudicated by existing Canadian Labour Relations Boards.

Further, we propose that the threshold test for representation under the Canadian FPA model be slightly lower than that provided in the NZ Act: that the union must demonstrate the support of either 500 employees or 10 percent of the proposed unit to initiate bargaining of a sectoral agreement, whichever is less. We propose this slightly lower threshold for two reasons. First, Canadian labour markets are spread across much larger geographical regions than in New Zealand (and regulated primarily by provincial laws). A lower threshold will, we believe, provide an opportunity for access to collective bargaining while still ensuring that adequate support exists among relevant workers. Second, an applicant union must also

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subsectors because of the likelihood that the FPA model coming into conflict with existing sector agreements, including by exerting downward pressure on these agreements, and thereby eliciting opposition from the industry.

[23] *Fair Pay Agreements Act* (NZ), *supra* note 5, s 28. The one approved application that exists at the time of this writing applied pursuant to the Section 28(1) representation test. The Initiating Union claimed support from 1,132 employees for which it provided contact information, as required by section 31 of the *Act*. The authorities verified the Union's claimed support by utilizing the contact information to take a random sample of the employees (NZ, Ministry of Business, Innovation and Employment, "Public Notice of Approval of Application to Initiate Bargaining for a Proposed Fair Pay Agreement" (27 March 2023), online (pdf) <https://www.mbie.govt.nz/dmsdocument/26281-fpa01-003-2022-public-notice-of-approval-bus-transport-industry-pdf>).

[24] *Ibid,* ss 28(3). However, s 31(1) does set out what the evidence provided in support of an application must show. Note that s 31(1) evidence requirements also apply to the "public interest test" addressed below.

be an "eligible union" under the NZ Act, meaning that it has at least one existing member in the proposed unit and has a constitution allowing the union to represent collective interests of employees in the proposed unit, whether or not they are union members.[25] We propose adopting the existing Canadian collective bargaining approach to the definition of a trade union.

The NZ Act also includes an alternative "public interest test," which would allow the initiation of bargaining without the mandated employee support.[26] As part of the assessment for the "public interest test" under this Act, the Authority must be satisfied that the workers in the industry or occupation experience low pay. They must also meet one of the following criteria: low bargaining power, a lack of pay progression, or are not adequately paid considering factors such as working long or unsocial hours or contractual uncertainty.[27]

We also propose including in the Canadian FPA model a public interest test for FPA representation applications that do not have the required employee support. Similar to the NZ Act, such a test would also require that low pay, poor working conditions, and/or precarity or low bargaining power be present in the sector.

D. Bargaining the FPA: Procedure

1. Bargaining Agents and Participation in Bargaining

Under the NZ Act, once the FPA application has been approved, both the employee and the employer sides have three months to organize themselves before the initiation of bargaining.[28] The legislation contemplates that any union can apply to be part of the employee side, provided that the union represents at least one member who will be covered by the proposed FPA. For a union to become part of the employee side bargaining group, its application must be approved by the Ministry of Business, Innovation and Employment.[29] On the employer side, an employer association must form in order to bargain, and an employer can apply to be part of the association, or an employer can be deemed to be part of the employer if the employer has employees covered by the FPA.[30] Hence, FPAs under the NZ Act would effectively be bargained by union councils and employer councils.

For the Canadian FPA model, we propose that FPA bargaining would also take place between a union council and an employer council. Generally, the union council would be composed of the union or unions certified under the FPA regime and any union that has bargaining rights in the sector under the relevant, existing collective bargaining legislation, whether at the time the sector certification was issued or later. An employer council would generally consist of all or some representative employers in the sector. We anticipate that both union councils and employer councils will seek to determine among themselves the rights of membership and participation in the council, and which unions and employers will act as representatives for the purpose of bargaining procedures, among other things. One option to consider is whether weighted voting would be appropriate to apply within councils, such that different council members may have votes with greater or lesser weight.

Government resources and support are likely to play a key role in assisting union and employer councils to form and prepare themselves for bargaining, particularly in the initial stages of implementing the FPA

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25 *Ibid*, s 5(1).
26 *Ibid*, ss 27, 29.
27 *Ibid,* s 29(1).
28 *Ibid,* ss 38, 46, although s 46 provides an exception to this in some circumstances for formation of the employer bargaining side.
29 *Ibid*, ss 47-50.
30 *Ibid*, ss 43-46.

framework. The labour relations board would have the authority to determine the composition of each council and to resolve any disputes about composition or constitutional arrangements.

2. Communication with Employees and Notice of Bargaining

The New Zealand model incorporates substantial notice and communication requirements, largely based on the notice and communication rights found in the New Zealand *Employment Relations Act* 2000, including significant opportunities for unions to meet with and communicate with workers. These apply when FPA bargaining is initiated and when the applicant union has satisfied one of the representation tests.

Under the New Zealand model, the initiating union or unions must notify affected employers and unions when an FPA is initiated.[31] Meanwhile, the Ministry is required to publish a notice of initiation of bargaining as soon as it is reasonably practicable to do so.[32] Further, all employers whose employees are covered by the proposed FPA must notify all affected employees of the initiation of bargaining.[33]
Then, any employer that has been notified of the successful initiation of an FPA must provide contact information for all covered employees to the bargaining representative, except where the employee objects.[34]

The NZ Act provides that all employees covered by the FPA may attend up to two paid meetings of up to two hours each, in their workplace, relating to the proposed FPA.[35] Employees may attend a third meeting if the proposed FPA has been voted on and not ratified by the employees.

Further, under the NZ Act, a representative of the employee bargaining agent is entitled to access workplaces to meet with one of more employees to discuss bargaining or other matters related to the FPA. These meetings are over and above the two full workplace meetings set out in the Act.[36]
We believe that similar communication, notification, and workplace access provisions would work in Canada. One of the significant barriers for unions and groups of employees in seeking collective bargaining rights in sectors that are hard to organize – like fast food or home care – is timely access to worker contact information and the opportunity to actually contact them. This is exacerbated where labour forces have high turnover rates or are geographically decentralized.

Accordingly, we propose that the Ministry of Labour, or an equivalent body, would be responsible for giving notice of the representation decision and communicating with sector employees. Communications will include notification of the certification and negotiation processes. A combination of forms and notices are to be utilized, including public notices, notices posted in the workplace and through workplace communication channels, and notice to individual employees.

We propose that, post-certification, employers would be required to provide contact information for employees in the sector for the purpose of allowing the representative union to consult with employees about bargaining. We also propose that the employee bargaining agent should have the right to meet with employees covered by the FPA, and that employees should have the right to at least two paid meetings with the employee bargaining council in each affected workplace to discuss the FPA.

The communication and workplace consultation rights found in the NZ Act far exceed similar rights found in any Canadian labour relations legislation. Therefore, the question arises as to whether it is feasible

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31 *Ibid*, s 39.
32 *Ibid*, s 37.
33 *Ibid*, s 40.
34 *Ibid*, s 42.
35 *Ibid*, ss 83-86.
36 *Ibid*, ss 88-92.

to require employers to provide rights to their employees, and to the FPA bargaining agent, that are far more substantial than the rights they are required to provide in the context of a regular unionization campaign and collective bargaining under existing Canadian collective bargaining legislation. We think the rights set out in the NZ Act are sensible and practical, particularly since the scope of the FPA will necessarily involve many workers who were not involved in the organizing campaign. However, realistically, such rights could only be implemented in Canada, in our view, if similar provisions were also added to the existing collective bargaining legislation in the same jurisdiction. Communication and consultation rights and restrictions in the labour context have long been contentious in Canada. This suggests that Canadian legislatures would not likely implement similar provisions as are found in the NZ Act.

3. Bargaining Resources and Supports

Under the NZ Act, both the employee and the employer side are eligible for mediation services and bargaining support services from the government.[37]

As noted briefly above, our proposal would also emphasize an array of government supports for bargaining that would be available from the earliest stage of negotiation. See section I below, addressing "Union Member Payments"). The purpose of these supports is to foster constructive and viable negotiations and bargaining relationships. Supports would include providing research support to bargaining parties, including wage data, government assistance for bargaining parties to identify and communicate with employers and employees in the sector, and with the potential for additional support to be provided in appropriate circumstances.

An additional form of support would be the provision for mediation services by the Ministry of Labour or an equivalent body to assist with bargaining and, later, for interpretation and application of the agreement. In the case of first sector agreement bargaining, intensive mediation services would be available at the request of one or both bargaining parties.

Finally, adequate support for administering and enforcing sector agreements is necessary, whether these are drawn from the system actors, government, or a combination.[38]

4. Good Faith Bargaining

The NZ Act has a broad obligation that all parties must act in good faith.[39] This, of course, includes unions and employers. Both unions and employers have an obligation to act in good faith both towards each other, but also towards the other unions and employers involved in the FPA process. In other words, parties must act in good faith both towards bargaining parties on the other side, and parties on the same side.[40] As with other violations of the Act, the penalty for violating the broad obligation to act in good faith is a fine ranging from $10,000 to $40,000, depending on the circumstances.[41] Further, the obligation applies both during bargaining and after the FPA is implemented.

We propose that a duty to bargain in good faith would apply to negotiations, as in the New Zealand model. The duty of good faith is already embedded in Canadian labour relations laws and is familiar to all

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37 *Fair Pay Agreements Act* (NZ), *supra* note 5, ss 219-226.

38 For example, a review of the Ontario *Industrial Standards Act ("ISA")* found that reliance on underfunded government inspectors significantly weakened the ISA system's capacity for inspections and enforcement (see Ontario, Laskin Report, *supra* note 8). Contrast this with the Quebec decrees system, under which Parity Committees composed of employer and employee representatives, charged with administering the decree, are funded through employer levies.

39 *Fair Pay Agreements Act* (NZ), *supra* note 5, ss 17-21.

40 *Ibid*, ss 18-19.

41 *Ibid*, s 21.

stakeholders. Included in the duty should be the duty to make reasonable efforts to reach an agreement. Although Canadian remedies for the duty to bargain in good faith are often criticized as insufficient, we regard the presence of an express duty as sending a message to the parties that bargaining is to be taken seriously.

One additional remedy that could be contemplated would be to provide that a breach of the duty to bargain in good faith could lead to the expedited referral of outstanding matters to interest arbitration. Another possible remedy would be to expand the range of issues that can be decided by the interest arbitrator or arbitration panel in the event that bad faith bargaining is found.

E. Bargaining the FPA: Content

1. Mandatory to Agree and Discuss Provisions

The proposed NZ Act provides that certain matters will be "mandatory to agree" while others will be "mandatory to discuss" in bargaining, although parties may include any other matter in bargaining provided that it is lawful and is employment related.

Sections 123 and 124 of the NZ Act set out the "mandatory to agree" items, which include the term, coverage, hours of work, wage rates (including overtime rates), governance arrangements, and a process to amend the agreement.[42] Section 125 sets out the topics the parties must discuss but are not obligated to agree upon. These include health and safety provisions, flexible working arrangements, and layoff arrangements.[43]

Further, the parties may bargain any other terms in the agreement so long as the provisions relate to "the employment of covered employees," and the parties may not extend the scope of the FPA or bargain a provision that violates any New Zealand law.[44]

This division of required terms to bargain and discuss is not a feature of most labour relations legislation in Canada (while it is present in other jurisdictions, like the U.S.). Our proposal generally adopts the New Zealand approach. It is of assistance to the collective bargaining parties, and it is necessary to a functioning sectoral agreement, that certain minimum terms of employment be negotiated and set in an FPA. However, the matters that we suggest fall into each of the two bargaining categories differ somewhat from the NZ Act (see Table 1, below.) We propose that "mandatory to agree" topics should include wages, wage rate adjustment mechanisms, pension contribution inclusion in base wages, hours and overtime, agreement coverage, term of the agreement, and governance arrangements. However, we also propose that benefits, holidays and vacation, and scheduling be included in this category since they are so closely related to other mandatory issues. Experience with sectoral systems already existing in Canada also supports these inclusions: indeed, pension and benefit plans tend to be centralized multi-employer or sectoral arrangements that are related to collective bargaining and funded through bargained contributions. Moreover, access to these benefits is typically among the top priorities for precarious workers.[45]

As in the NZ Act, we propose that "mandatory to discuss" topics include redundancy, leaves, objectives of the agreement, skills and training, health and safety, and flexible work. A key consideration here is to recognize unions' key role in negotiation and benefit delivery.

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42 *Ibid*, s 123-124.

43 *Ibid*, s 125.

44 *Ibid*, s 126.

45 Both union and employers have recognized this. For example, Uber's proposals in several jurisdictions that one of its drivers' key demands is access to a collective benefits program. See: Simon Archer & Joshua Mandryk, "The Uber portable benefits pig-in-a-poke" (30 March 2022), online (blog): *Unsolicited: The Blog* <https://goldblattpartners.com/unsolicited-blog/the-uber-portable-benefits-pig-in-a-poke/>.

Table 1: Mandatory to Agree and Mandatory to Discuss Topics of Bargaining

Mandatory to Agree	Mandatory to Discuss
Wages	Redundancy
Wage rate adjustment mechanism	Objectives of the agreement
Whether pension contributions are included in base wage rates	Skills and training
Ordinary hours, overtime, overtime rates	Health and safety
Scheduling	Flexible work
Benefits	
Holidays and vacation time	
Coverage	
Term of agreement	
Governance (e.g., ongoing responsibilities of bargaining parties)	

The NZ Act provides that FPAs may only include "employment-related" terms, presumably out of concern over possible conflict with competition legislation.[46] While we also propose that the parties may agree to discuss any other lawful employment-related terms, we regard limiting the scope of bargaining to employment-related matters as a matter of practicality that will help support effective bargaining, rather than a necessary response to concerns about potential conflict with competition regulation. Nonetheless, we also suggest that, as has been done in the case of other collective bargaining legislation, this legislation include an explicit exclusion from application of the *Competition Act*.[47]

2. Permitted Differences in the FPA

The NZ Act provides latitude for bargaining parties to agree on specified exemptions from certain FPA terms and differential terms within an agreement. Specifically, the legislation provides that an FPA may include regional variations with respect to terms such as wages, hours of work, overtime, and leave provisions.[48]

The legislation also permits a minimum entitlement provision that applies differently to an employee or class of employees based on skill or qualifications, provided these do not violate human rights or minimum standards laws.[49]

We agree with the NZ Act that an FPA should be permitted to provide for different entitlements for different classifications of workers. We would not, however, propose that Canadian FPAs be permitted to have regional differences. Instead, unlike the NZ Act, we would propose that FPAs could have a geographic scope such that they apply in less than the entire jurisdiction (that is, less than an entire province or the entire country).

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46 *Ibid*.

47 See for example, *Status of the Artist Act*, *supra* note 10; *Competition Act,* RSC 1985, c C-34. Although existing "carve outs" from competition legislation apply to collective bargaining – including sectoral collective bargaining – and exclude associations of employees or "workmen" as well as groups of employers, where their activities and agreements are made in furtherance of protecting their interests as employees, workmen, or employers, an amendment to the *Competition Act* expressly acknowledging sectoral regimes may assist for greater certainty.

48 *Fair Pay Agreements Act* (NZ), *supra* note 5, ss 135-136.

49 *Ibid,* ss 137-138.

We accept that, in some sectoral bargaining systems, unions may regard allowing sectoral agreements to derogate from statutory minimum standards to be an important bargaining tool.[50] However, we do not regard this as a constructive element in establishing sectoral bargaining in the private sector in Canada. Therefore, as in the NZ Act, we propose that FPA terms must respect human rights and minimum standards legislation and cannot contract out of them.

3. FPA Term and Renewal

The NZ Act does not mandate a particular term for an FPA but does specify that an FPA must apply for a period of not less than three years and not more than five years.[51]

The Act includes extensive provisions setting out the process for varying an FPA, which may be done at any time prior to the expiry of the FPA.[52] The NZ Act also includes a process for the renewal of an FPA, which involves filing an application to renew the agreement within a particular timeframe before the expiry of the agreement, similar to the process for renewing a collective agreement under existing Canadian collective bargaining legislation.[53]

While sectoral agreements that continue by default unless a specific triggering event occurs may offer stability, including by eliminating the possibility of the loss of sector standards where the agreement lapses, fixed-term agreements have the benefit of producing regular renegotiation of terms without requiring a triggering even and without re-establishing representativeness.[54]

For a Canadian FPA model, we believe that certainty is necessary regarding the term of the agreement. Much as collective agreements under Canadian law must have terms of at least one year, we would propose that an initial FPA must have a three-year term. This will provide predictability and consistency across each sector of the economy. The shorter initial term is also designed to foster engagement in bargaining and to allow for a degree of experimentation in the first agreement. Bargaining would be expected to be an iterative process. Reflecting this, we propose that renewal agreements would have maximum five-year terms, although the parties could agree to shorter terms, provided that it is not for a period of less than three years.

F. Conclusion and Ratification of the FPA

Under the NZ Act, once the parties have reached an agreement, they must submit the proposed FPA to the government for a compliance assessment.[55] No FPA may be entered unless the government Authority is satisfied that the FPA meets the requirement of the FPA legislation and complies with minimum standards legislation and all other employment laws.[56]

Once the Authority has approved the proposed FPA, the parties then have 40 days to ratify the agreement.[57] All employees and employers who are to be covered by the FPA are to be contacted and

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50 Clean Slate for Worker Power, "Principles of Sectoral Bargaining: A Reference Guide for Designing Federal, State, and Local Laws in the U.S." (May 2021), online (pdf): *Harvard Law School* <https://uploads-ssl.webflow.com/5fa42ded15984eaa002a7ef2/608c62c74dc0547710cec088_Clean%20Slate_Sectoral%20Bargaining_May%202021.pdf>.

51 *Fair Pay Agreements Act* (NZ), *supra* note 5, s 123.

52 *Ibid*, ss 177-195.

53 *Ibid,* ss 196-210.

54 Clean Slate for Worker Power, *supra* note 50 at 15.

55 *Fair Pay Agreements Act* (NZ), *supra* note 5, ss 143-150.

56 *Ibid,* s 144.

57 *Ibid,* s 153.

provided with a copy of the agreement as well as a plain language summary of the agreement.[58] The Act contains detailed sections setting out the voting information that must be provided to each employer and employee.

The FPA is considered ratified by the employees if more than half of the employees who vote, vote in favour of the agreement. On the employer side, employer votes are weighted in accordance with the number of employees they have who are to be covered by the FPA. However, small employers (fewer than 21 employees) are given more weight in terms of their vote. Employer ratification is obtained where a majority of these weighted employer votes are in favour of ratifying the agreement.[59]

We also propose that, in Canada, negotiated sector agreements would be required to be ratified by employees and by employers. We further propose that it should be clear that the vote can be conducted electronically and that there be government facilitated distribution of information to affected employees and employees about the agreement in advance of the ratification vote.

Employee ratification of agreements is an important aspect of worker participation in collective bargaining, workplace democracy, and it contributes to the legitimacy of sector agreements. Although sectors may include large numbers of employees, we believe that use of electronic ratification voting will allow these large elections with potentially widely distributed employees to be feasible. Large bargaining units existing under current collective bargaining statutes – including those with employees dispersed among multiple worksites – have successfully held electronic ratification votes.

Employer ratification of sector agreements is also important. We would leave the question as to whether and how to provide a weighted vote to smaller employers, as has been done in New Zealand, to the employer community. We would also grant the labour board the power to resolve disputes among employers.

G. Dispute Resolution – Interest Arbitration of the FPA

Under the NZ Act, parties may apply to the Employment Relations Authority to fix the terms of the proposed FPA. However, they may only apply if they have exhausted all other alternatives for reaching an agreement; the parties have used their best endeavours to identify reasonable alternatives to agree to a proposed FPA; a bargaining side has breached the duty to deal with each other in good faith and the breach was deliberate, serious, and sustained or involved behaviour that undermined the bargaining process; or the proposed FPA has been put to ratification twice and has been rejected both times.[60]

Under the NZ Act, strikes and lockouts are expressly prohibited as dispute resolution mechanisms for bargaining a proposed agreement or proposed variation of an existing agreement, unless the strike or lockout would otherwise be legal – presumably in the context of regular collective bargaining for employees who might also be covered by an FPA.[61]

Under the Act, the Authority is to appoint a three-person panel to resolve the FPA. That panel has the power to fix any and all terms that must be in the FPA (mandatory terms). The panel also has the power to fix "mandatory to discuss" items if *one* party requests that the Authority settle the term. Finally, the Authority may settle additional terms that are neither mandatory to include or discuss, if both parties request that the Authority do so.[62]

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58 *Ibid,* s 152.
59 *Ibid,* s 156.
60 *Ibid,* s 234.
61 *Ibid,* s 24. Note that this provision does not explicitly refer to proposed renewal or proposed replacement agreements.
62 *Ibid,* s 235.

The NZ Act sets out a range of factors that the Authority will consider in setting the terms of the FPA.[63] However, there are certain limitations on what the Authority may decide. In particular, the panel may not fix union member payments (to cover membership dues in a union) unless both sides agree.[64] Once the terms of the FPA are determined by the panel, the FPA does not need to be ratified by either side.

The process set out in the NZ Act is quite similar to a number of mandatory interest arbitration models that exist in Canada. Like the NZ Act, we propose that arbitration could only be triggered after the parties had bargained and failed to reach an agreement, with the assistance of mediation. Arbitration, in our view, should be a last resort, and should involve a sole arbitrator, unless the parties themselves agree to a three-.person arbitration panel. Like the NZ Act, we also propose that strikes and lockouts would be prohibited as a means to resolve the terms of the FPA.

Also, as under the NZ Act, we propose that the interest arbitrator would have to determine all outstanding mandatory items and could determine "mandatory to discuss" items upon the request of one party. Any other matters could only be determined upon the consent of both parties.

With respect to the factors to be considered by the arbitrator, Canada has well established jurisprudence setting out the factors that should be addressed by interest arbitrators. As such, we do not believe that a list of factors in the legislation would be necessary. However, if the legislation did include factors, they should be based on Canadian labour relations reality and jurisprudence and provide latitude to the arbitrator to consider such other matters as the arbitrator judges to be reasonable.

H. Ongoing Representation Issues: Coverage and Consolidation

The NZ Act sets out a fairly complicated approach to dealing with potential overlap in coverage of employees between two FPAs, which aims to avoid duplication of coverage in part by providing for consolidation of bargaining parties and FPAs.[65]

1. Overlapping Coverage

Where overlap in coverage exists between an existing FPA and an FPA that is proposed, in addition to providing notice to the initiator and relevant employee and employer bargaining parties, the Authority will review the terms of the proposed and existing FPA to determine which provides better terms overall for the employees subject to the overlap in coverage, which will then be the FPA which applies to those employees.[66]

Similarly, in circumstances of initiation of bargaining for an industry-based FPA with coverage that would overlap with an occupation covered by an existing industry-based FPA, the NZ Act provides that the proposed agreement will be validated not as a stand-alone agreement, but as a schedule to the existing FPA, and it may not alter the first agreement.[67]

Our proposal prefers to avoid overlap. However, where it occurs, then our proposal adopts the approach set out in the NZ Act, on the basis that it supports collective bargaining and prevents decline in sector standards.

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63 *Ibid,* s 236.
64 *Ibid,* s 237.
65 *Ibid,* ss 112-122.
66 *Ibid,* ss 111-114, 166, 167.
67 *Ibid,* ss 121-122.

2. Consolidation

The NZ Act provides for consolidating bargaining of two proposed FPAs in circumstances where they have overlapping coverage of an occupation group (this applies to proposed FPAs, proposed renewals, or proposed replacements).[68] Consolidation is automatic in some circumstances. Coverage of a consolidated FPA is the coverage of the first FPA extended to include that of the second, unless all bargaining parties agree otherwise.

In contrast with the New Zealand approach, which appears to limit consolidation to circumstances where overlap arises among existing or proposed FPAs, our proposed approach would provide greater scope for consolidation and accretion of agreements and bargaining parties. In part, this reflects established practices in Canadian collective bargaining regimes such as the variance and consolidation provisions found in the *Canada Labour Code* and the British Columbia *Labour Relations Code*, which give labour boards the authority to exercise discretion in making such decisions, and which allows the parties to seek post-recognition amendments of bargaining rights in circumstances beyond those of potential overlapping scope of units.[69]

Under our approach, the proposed model would include a mechanism to permit accretion to and consolidation of sectoral units. In addition to determining initial coverage and representation, the labour board would have the authority to hear and decide applications and disputes about accretion and consolidation of sectoral bargaining units, as well as status challenges. The labour board's discretion and decision-making would be guided by a determination of bargaining "appropriateness," the broader objectives of the legislation, and, in cases where a union sought accretion or consolidation of units, a presumption in favour of granting the application.

I. Union Member Payments

The NZ Act does not contain any provision providing for the mandatory payment or collection of union dues from employees covered by an FPA. In fact, the legislation makes it very clear that no employee who is covered by an FPA has any obligation to join a union, nor can the FPA contain any provision requiring an employee to join a union.[70] Further, the NZ Act makes it very clear that the terms of an FPA may not provide any preference, whether in terms and conditions of employment or in terms of hiring, to employees who are union members except in respect of so-called "union member payments."[71]

Section 13(4) of the Act provides that, where an employee is covered by an FPA and is a union member, the parties may negotiate a regular payment from the employer to employees, over and above their wages, that is the equivalent of employees' union membership fees.

Unions play a number of significant roles in our proposed Canadian FPA model: organizing workers, acting as bargaining representatives, administering sector agreements, participating in dispute resolution, and potentially pursuing enforcement of sector agreements. Unions must be adequately resourced to be able to discharge these responsibilities. Moreover, since implementation of the Rand Formula in Canada, it has generally been the case that employees covered by a collective agreement are required to pay union dues, whether or not they are members of the union.

Therefore, if the Canadian FPA model did not include mandatory union dues it would represent a substantial departure from the Canadian labour relations regime. However, we do not believe that mandatory dues for all employees covered by FPAs is a realistic or viable option, given that it is quite

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68 *Ibid,* ss 115-120.

69 *Canada Labour Code,* RSC, 1985, c L-2, s 18.1; *Labour Relations Code*, RSBC 1996, c 244, s 142.

70 *Fair Pay Agreements Act* (NZ), *supra* note 5, s 10.

71 *Ibid,* s 13.

likely that a substantial majority of the workers covered by FPAs will not be members of any union, and may not have even been approached to become members of any union. Therefore, we propose to follow the example of the NZ Act in which there would be no automatic dues check-off provision in FPAs.

Nonetheless, we consider it necessary for unions to have access to a source of financial support. Instead of mandatory dues payable by all employees under an FPA, we propose that the statute provide that member fees are payable by those employees who choose to join the union by signing a membership card. An employee could join the union either at the time of application for sectoral bargaining or thereafter. Once an FPA is reached, membership dues would be covered by a negotiated wage increase in the FPA in the form of a "union member payment." We further propose that the "union member payments" from employers would be included in the FPA if requested by the employee side bargaining group, similarly to the common Canadian collective bargaining legislation provision for a dues check-off provision. The amount of the payment would equivalent to the dues of the particular union that the employee decided to join.

In return for union membership, employees would receive the right to representation by the union in respect to any violations of the FPA, and all other rights and obligations that come with union membership. These additional union services would be available only to employees covered by an FPA who are also union members. Typically, in Canada, union membership has flowed from certification and then collective agreement coverage. Our proposal is a departure from this model. Employees covered by an FPA could choose to be union members or not. Moreover, if the FPA was bargained by many unions acting as a council, the employees would be able to choose membership from among several different unions. In short, employees covered by an FPA should be able to join the union of their choice as individuals.

J. Duty of Fair Representation

The NZ Act does not include a duty of fair representation provision. Our proposal includes substantial and detailed requirements for engagement and information provision during bargaining, robust good faith obligations, ratification, and employees can individually seek enforcement of the sector agreement. Therefore, while it is a departure from the Canadian labour relations norm, we do not regard a separate duty of fair representation to be a necessary part of our proposal, either.

K. Freedoms and Unfair Labour Practice Protections

The NZ Act outlines an array of prohibited conduct to protect employees, employers, unions, and employer associations, using the term "undue influence."[72] We also regard unfair labour practice ("ULP") protections to be necessary to ensure freedom of association, the opportunity to organize, and bargaining under this proposed system.

We propose that the type of ULP protections commonly found in Canadian collective bargaining legislation be included in this statute. In particular:

- Prohibit employers, employer associations, or persons acting on their behalf from participating in or interfering with the formation, administration, or representation rights of a union, or from contributing to a trade union.
- Prohibit employees, unions, or persons acting on their behalf from participating in or interfering with the formation or administration of an employers' organization.

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[72] *Ibid,* s 16.

- Employers, employer associations, or persons acting on their behalf may not discriminate against or refuse to employ employees because they were or are members of a union.
- Employers or employer associations are prohibited from altering employment conditions to prevent employees or potential employees from becoming a member of a union.
- Employers or employer associations are prohibited from threatening or penalizing employees for becoming or refraining from becoming members of a union.
- Unions, employers, or any other person are prohibited from engaging in coercion, intimidation, or undue influence designed to compel or prevent membership in union or employer associations.

Unilateral employer changes to terms or conditions of work during certification or for a period during bargaining when no agreement is in operation and without labour board permission are commonly prohibited ULPs. These prohibitions are referred to as statutory "freezes" under Canadian collective bargaining law. Departing from the NZ Act in this respect, we propose that a freeze apply during the organizing period up to the point where the FPA application is approved, and bargaining can begin. We regard this as an important protection for employees' free choice about collective representation. However, in light of the availability of interest arbitration for bargaining dispute resolution in this model, we do not propose including a statutory bargaining freeze during bargaining.

The labour board should have jurisdiction over ULP complaints and, as with other violations of the statute, we propose that the labour board have similar authority as it exercises under collective bargaining legislation to decide and remedy these ULPs.

In addition to these ULP prohibitions, we propose including general statements of employee and employer freedoms, which also commonly appear in Canadian bargaining legislation: the freedom of all employees to join the trade union of their own choice and to participate in its lawful activities, and similar freedom for employers with respect to employers' associations.[73]

More generally, the labour board would be responsible for receiving and adjudicating complaints of violation of the legislation itself, which could be brought by employer representatives or unions, but not by individual employees.

L. Enforcement and Remedies

The NZ Act provides a system of modest financial penalties for non-compliance, which in most cases is to be administered by the Authority, although in some circumstances, courts have jurisdiction. Unless otherwise ordered, penalties are paid into a Crown Bank account and not to any particular person.[74] The Act does not appear to provide for remedies other than financial penalties.

Actions for recovery of penalties for breach of an FPA under the NZ Act may be brought by a covered employee, covered employer or a bargaining party affected by the breach, while any other breach of the legislation may be brought by a person in relation to whom the breach is alleged to have occurred.[75]

We regard it as important that agreements be statutorily enforced. We do not regard negotiated enforcement to be desirable. In this respect, our proposal accords with the NZ Act. We also regard it as important that employees covered by a sector agreement be able to seek enforcement of the sector agreement on an individual basis if they choose to do so, and that union and employer parties to the agreement are not the only possible complainants.

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73 See e.g. *Labour Relations Act, 1995*, SO 1995, c 1, Sched A, ss 5-6.

74 *Fair Pay Agreements Act* (NZ), *supra* note 5, ss 211-218.

75 *Ibid,* s 216.

Therefore, for the Canadian model we propose that complaints of violation of sector agreements may be brought either by employees or by the union on behalf of employees. In addition, unions could file group or policy complaints. Employers may also bring complaints of non-compliance by unions or by other employers in order to discourage employers from seeking to undercut or avoid sector agreements.

It is with respect to jurisdiction and the types of penalties and remedies available for violation of sector agreements and the legislation that we depart from the NZ Act and, to some extent, from the tradition of collective agreement arbitration in our proposal for a Canadian FPA model. While we recognize that the Canadian collective bargaining system traditionally utilizes private labour arbitration to adjudicate complaints of collective agreement violations, we do not regard it to be desirable for individual employee complaints to be received or administered by an arbitrator. Private rights arbitration is expensive, and, in many cases, not very expeditious. Therefore, similar to the existing approach to complaints under the Ontario *Employment Standards Act*, we propose that complaints of violations of sector agreements are to be filed with the Ministry of Labour or equivalent body, and decisions would be made by an administrative officer, which could then be appealed to the labour board.[76]

While statutory financial penalty provisions applicable to violation of the legislation, but not collective agreement violation, are commonly found in Canadian collective bargaining legislation, complainants rarely seek these penalties.[77] Financial penalties, in the form of punitive damages, are uncommon in arbitration awards for collective agreement violations and no statutory financial penalties exist for such violations. Instead, the Canadian collective bargaining system focuses on compensatory remedies and proactive enforcement mechanisms, such as those administered by the Ministry of Labour and the Employment Standards Branch.

We prefer to adopt a similar focus on compensatory remedies and proactive enforcement for statutory and sector agreement violations, as we regard these as more constructive and practical approaches in the Canadian context. Therefore, an array of remedies would be available for sector agreement violations and for violations of the legislation. In addition to remedies commonly available for breach of collective agreements or legislation under existing collective bargaining legislation, remedies would include financial penalties for repeated or serious violations, costs awarded to the complainant or union, unannounced inspections of employers, and publication of identities of serious violators. The purpose of these latter remedies is to deter "bad actors" from undermining sector agreements.

M. Relationship to Existing Collective Agreements

The NZ Act explicitly states that the existence of a union certification or a collective agreement is not a bar to the initiation and negotiation of an FPA. Further, and more importantly, the existence of an FPA is not a "genuine reason" to hinder the negotiation and conclusion of a collective agreement.[78]

As introduced, the NZ Act also provided that, where employees are covered by both an FPA and a collective agreement, whenever there are overlapping provisions, the employee would get the benefit of the "more favourable" provision.[79] In other words, an FPA would operate as a floor from which a union may negotiate better provisions in a collective agreement for their members. This is similar to the way in

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76 *Employment Standards Act, 2000*, SO 2000, c 41, Part XXII.

77 Ontario, "CWR Final Report," *supra* note 3 at 123-134, 388-394; Ontario, Ministry of Labour, *The Changing Workplaces Review: An Agenda for Workplace Rights*, by C. Michael Mitchell & John C. Murray, Interim Report (Toronto: Ontario Ministry of Labour, 27 July 2016) at 15, 27, 34-35, 51.

78 *Fair Pay Agreements Act* (NZ), *supra* note 5, s 176.

79 *Fair Pay Agreements Bill*, s 163(3) online: New Zealand Parliamentary Counsel Office <https://www.legislation.govt.nz/bill/government/2022/0115/46.0/LMS655984.html>.

which minimum standards legislation operates in Canada. Therefore, under the initial Bill, the FPA system was designed to coexist with and complement the existing collective bargaining system. However, this provision was not included in the NZ Act as passed. Nonetheless, we propose a similar approach in Canada to that which was contained in the original Bill. FPA legislation will not replace unions and unions will continue to be free to organize under existing collective bargaining legislation.

As noted above, there is evidence that an "integration" approach – rather than one system displacing another system – has more positive outcomes for workers and employers as a whole. In addition, this approach is currently employed in Canada, where labour relations and employment standards laws are already integrated. Similarly, it must be clear that the FPA should not interfere in regular collective bargaining, and the FPA should be considered a sectoral standard from which unions can only bargain better terms and conditions in collective agreements and cannot derogate from existing employment standards.

N. Political and Transitional Considerations

One of the widely recognized issues associated with a transition to a new workplace regulatory framework is establishing support for that system from the stakeholders affected by it: most directly, the "buy in" from employers, unions, and workers who will be subject to the system.

This makes common sense: stakeholders who are used to and invested in an existing system of workplace regulation, however imperfect or increasingly inadequate, may be resistant to the changes and adaptation that will be required to implement a new system. We have mentioned some of these issues in the preceding discussion, and have suggested some solutions: for example, adequate state support for both unions and employer councils to prepare for and engage in sectoral standard setting exercises. Indeed, one of the lessons from a review of the history of sectoral workplace regulation in Canada is that it is most often adopted when both employers and workers see the new system as a solution to limits of the existing one.

Thus far, the evidence in New Zealand suggests that this model may generate less resistance from employers than might be expected. Under an FPA, wages and other core labour standards are taken out of competition across an entire sector or industry. However, the fact that sectoral bargaining levels the playing field in respect of labour standards does not mean that employers will not resist – especially if they are not given adequate supports for bargaining the sectoral standard.

Similarly, experience in the U.S. and Canada shows that, where sectoral reforms are proposed, existing union stakeholders may view the new system with scepticism or opposition, particularly where there is already sufficient access to collective bargaining. For the same reason, the principle of integration is intended to facilitate the implementation of the new FPA model and stakeholder participation in it. Initial reports on experience from New Zealand indicate that existing trade unions have supported the introduction of the system and view it as an opportunity to organize economic sectors that have very low union density.

III. CONCLUSION

The proposal outlined here is for a democratically accountable, participatory, and inclusive framework for sectoral standard-setting and bargaining. As such, it is a departure from the traditional Canadian model of exclusivity and majoritarianism. This proposal reflects neither of those two principles.

While this proposal is a departure, there is ample evidence that the traditional Canadian model is ill-suited to addressing the many new challenges posed by contemporary work, and there is significant evidence and support for a sectoral approach to workplace representation. So far, efforts to modify our existing

labour relations model to insert a sectoral component have not gained traction, in part because past proposals have been too complicated, and unlikely to actually achieve broad based sectoral bargaining that would cover the economy with sufficient breadth to take wages and key employment conditions out of competition.

We suggest that the proposal outlined here addresses these key weaknesses: it is not overly complicated, it remains rooted in key established labour relations practices, and it is designed to be integrated with existing workplace regulation and representation, while also providing flexibility for employers, employees, and their representatives.

Since the Second World War, labour law reform in Canada has largely been incremental. Over the last several decades, jurisdictions have wavered between improving worker access to collective bargaining and then retrenching back to limit access to unionization. In the meantime, union density in the Canadian private sector has been falling for the last 40 years – both in jurisdictions with more favourable labour laws and in those without. As a result of this declining union density, there has been increasing energy and activism towards improving minimum standards legislation as a vehicle to improve the working conditions for all workers – especially those that have virtually no access to collective bargaining in our current system.

Declining union density in the private sector was one of the key rationales for the NZ Act upon which our proposal is modelled. The fact that our proposal is closely modelled on a piece of legislation presently before the legislature in New Zealand provides a useful policy laboratory for a Canadian FPA model. It is also worth noting that the New Zealand model has attracted substantial attention in countries such as Great Britain and Australia.

To some, the prospect of introducing a sectoral FPA system in Canada may seem unrealistic. However, it is worth noting that the New Zealand approach started out as a paragraph in the New Zealand Labour Party's electoral platform.[80] Once elected, the Labour Party struck a commission, chaired by an employer representative, which ultimately proposed the FPA model. A detailed policy proposal followed, and now the legislation is on the precipice of becoming law.

Canada, like New Zealand, is confronted with a real crisis in private sector labour market regulation. Increasingly, workers simply do not have access to any collective representation, and they have no ability to bargain decent working conditions. Canadian policy makers need good policy ideas to address this problem, and, like their New Zealand counterparts, they need the courage to implement those ideas. We hope that this paper can contribute to the development of Canadian policy in this important area.

[80] NZ, the Labour Party, "Workplace Relations & Safety", online: New Zealand Labour Party <https://www.labour.org.nz/workplacerelations>.

Table 2: Summary: CANADIAN FAIR PAY AGREEMENT (FPA) LEGISLATION

Guiding Principles of Accountability, Integration, and Inclusivity

- Sector standards bargained by a democratically accountable bargaining agent for workers and a representative employer organization.
- Co-exists with existing collective bargaining regimes and serves as a floor for collective bargaining under existing regimes.
- Applies to all workers in an employment relationship – including dependent contractors and gig and platform workers.

How is this New System to be Structured?

- New, stand-alone statute, drawing upon existing institutions administering collective bargaining legislation (e.g., labour boards, ministries of labour)
- Incorporating some familiar collective bargaining concepts: good faith bargaining, dues check-off, and unfair labour practice protection.
- Explicit exclusion from application of the *Competition Act*.

Who Does it Apply to?

- Broad application to workers, operationalized by the "ABC test", subject to managerial exclusions.
- Preserves existing collective bargaining arrangements by excluding specified sectors with existing high union density or existing sectoral bargaining (e.g., construction sector, public service, and public sector where union density exceeds 70%).

How Does it Operate?

Step 1: Application to Initiate Sectoral Bargaining

- A union applies to represent a specified sector (a defined industry or occupation within a geographic area).
- Applicant demonstrates support of either 500 employees or 10 percent of the proposed unit, whichever is less, to initiate bargaining of a sectoral agreement, through signed membership cards, including electronic cards.
- An alternative, "Public Interest" test for representation would be available requiring demonstration of low pay, poor working conditions, precarity or low bargaining power in the proposed sector.

Step 2: Bargaining the FPA Sector Agreement

- Bargaining occurs between a union council and an employer council, with the labour relations board having authority to determine council composition and resolve disputes.
- Union councils would be composed of the union(s) with FPA certification and any union that has bargaining rights in the sector under existing collective bargaining legislation, whether at the time the sector certification was issued or later.
- Employer council would generally consist of all or some representative employers in the sector.
- Ratification required by employees and by employers, with potential for weighted vote for smaller employers.
- Government supports for bargaining, including: research support to bargaining parties, communication resources, mediation services, including intensive mediation for bargaining a first sector agreement.

What Does a FPA Sector Agreement Include?

- Certain matters will be "mandatory to agree" while others will be "mandatory to discuss" in bargaining, although parties may include any other matter in bargaining that is lawful and is employment related.
- Bargaining parties may agree to:
  - Minimum entitlement provisions applying differently to an employee or class of employees based on skill or qualifications, provided these do not violate human rights or minimum standards laws.
  - Initial mandatory three-year term, with renewal term between three and five years.

How are Sector Bargaining Disputes Resolved?

- Third-party interest arbitration with the assistance of third-party mediation would be available to resolve sector bargaining disputes.
- Work stoppages would not be permitted once interest arbitration is engaged.

Union Membership & Dues

- Employees choosing to join the union pay member fees, and an employee may join at any time.
- Where an FPA sector agreement is reached, membership dues are included in a negotiated wage increase in the form of a "union member payment." Like the dues check-off right under existing collective bargaining legislation, this provision would be included in a sector agreement if requested by the union.
- Only union members have a right to representation by the union in respect to any violations of the FPA sector agreement, in addition to all other rights and obligations that come with union membership. Non-members may, individually, seek to enforce their rights under a sector agreement, but the union has no obligation to represent non-union members in enforcing sector agreements.

FPA Sector Agreements, Existing Collective Agreements & Future Certifications

- Existing certifications and collective agreements are not a bar to negotiation of an FPA sector agreement, and vice versa.
- Where an employee is covered by both an FPA sector agreement and a collective agreement under existing collective bargaining legislation, then, where there is an overlap in provisions, the employee receives the benefit of the more favourable provision.
- Therefore, the FPA sector agreement operates as a sector-wide standard floor from which unions certified under existing legislation may collectively bargain.