Trade Union Recognition and the Concepts of 'Workplace' in South Africa and the 'Appropriate Bargaining Unit' in Canada: Some Comparative Insights into Bargaining Constituencies and Protection of Minority Interests

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Abstract

This article identifies challenges surrounding the legal regulation of trade union recognition with specific reference to the concept of 'workplace' as the constituency within which the majority rules. The definition of 'workplace' in the South African Labour Relations Act 66 of 1995 creates the potential for minority interests to be ignored and hinders even majority unions seeking recognition, especially where the workplace is dispersed across different locations. This predicament, and the harsh effect and potential dangers of excluding minority voices in the labour context, has also been recognised by the Constitutional Court. This article considers two factors central to Canada's independently determined 'appropriate bargaining unit': accommodating special or significant minority interests and addressing recognition in the context of multi-location employers. Although the Canadian legal system (like the South African one) favours majority unions, this article seeks to show Canadian law shows greater awareness of the potential unfairness of unqualified or misapplied majoritarianism. It highlights Canada's independently determined bargaining unit as the constituency for majority rule and concludes that this model may offer a more appropriate framework for South Africa.

Keywords: collective bargaining; trade union recognition; workplace; bargaining constituency; appropriate bargaining unit; community of interest; Canada

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Introduction

The policy choices of both voluntarism and majoritarianism—and the 'workplace' constituency to which these two concepts apply—have been identified as factors contributing to the challenges of regulating collective bargaining in South Africa.[1]

In South Africa, the definition of 'workplace' in the Labour Relations Act 66 of 1995 (LRA), besides creating the potential for minority interests to be ignored, might also hinder majority unions seeking to organise and gain recognition from employers, especially if the workplace is dispersed across different locations. The Constitutional Court has also recognised, often in the context of freedom of association, the harsh effect and the potential dangers of excluding minority voices in the labour context.[2] Both the Constitutional Court and academic commentators have repeatedly observed that the prevailing winner-takes-all model emerged during a period characterised by relative stability and growing consolidation within the trade union movement. However, the socio-economic and industrial landscape has since undergone significant transformation, prompting a critical reassessment of the model's continued relevance and suitability.[3] Further factors that contributed to industrial relations conflict in South Africa, particularly in trade union recognition and the deliberate exclusion of minority unions, include, first, that the LRA does not grant statutory recognition for collective

1 Both the legislature and the judiciary have acknowledged that the strict application of the principle of majoritarianism may seriously affect unions seeking recognition from employers (Stephan van Eck and Kamalesh Newaj, 'The Constitutional Court on the Rights of Minority Trade Unions in a Majoritarian Collective Bargaining System' (2020) 10 Constitutional Court Review 331; PAK le Roux, 'Organisational Rights: An Update: Minority Unions and Threshold Agreements' (2018) 27(6) CLL 67, 72; Jan Theron, Shane Godfrey and Emma Fergus, 'Organisational and Collective Bargaining Rights through the Lens of Marikana' (2015) 36(2) ILJ 849, 853). See also Monray Marcellus Botha and Wilhelmina Germishuys, 'The Promotion of Orderly Collective Bargaining and Effective Dispute Resolution, the Dynamic Labour Market and the Powers of the Labour Court (1)' (2017) 80(3) THRHR 351, 365; Tembeka Ngcukaitobi, 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 ILJ 836; Luisa Corazza and Emma Fergus, 'Representativeness and the Legitimacy of Bargaining Agents' in Bob Hepple, Rochelle le Roux and Silvana Sciarra (eds), *Laws against Strikes: The South African Experience in an International and Comparative Perspective* (Juta 2015) 87; Steven Friedman, 'We Have Met the Enemy and He Is Us: COSATU's War against Itself in 2013' in Andrew Levy, Khanya Motshabi and Tokiso Dispute Settlement (Pty) Ltd (eds), *The Dispute Resolution Digest 2014* (Juta 2014) 50; John Brand, 'Organisational Rights and Trade Union Rivalry in South Africa' in Andrew Levy, Khanya Motshabi and Tokiso Dispute Settlement (Pty) Ltd (eds), *The Dispute Resolution Digest 2014* (Juta 2014) 55; Mark Anstey, 'Marikana—And the Push for a New South African Pact' (2013) 37(2) SA J of Labour Relations 133, 138. See ss 21(8A) to 21(8D) of the LRA.

2 *Association of Mineworkers & Construction Union & Others v Royal Bafokeng Platinum Ltd & Others* 2020 (3) SA 1 (CC), (2020) 41 ILJ 555 (CC) para 70.

3 See (n 1). *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC), (2003) 24 ILJ 305 (CC); *Association of Mineworkers & Construction Union & Others v Chamber of Mines of SA & Others* 2017 (3) SA 242 (CC), (2017) 38 ILJ 831 (CC); *Police & Prisons Civil Rights Union v SA Correctional Services Workers Union & Others* 2019 (1) SA 73 (CC), (2018) 39 ILJ 2646 (CC); *Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Ltd* (n 2).

bargaining to any union, not even a majority union, and, secondly, where such a majority union is duly recognised, the LRA allows it, in effect, to bargain for members of a rival union with interests that the majority union does not necessarily represent. Although a detailed analysis of the legal framework and Constitutional Court jurisprudence concerning the structural and policy-related challenges in South Africa's system of trade union recognition could not be accommodated within the scope of this article, references have been made to existing literature where such discussions are explored in depth. Drawing on that literature and jurisprudence as authoritative sources, this article adopted the premise that both academic commentary and judicial decisions clearly illustrate the challenges facing South Africa's labour relations system.

In the context of these specially identified challenges outlined above, this article focuses on the comparative analysis of the Canadian majoritarianism model based on the independently certified bargaining unit. Each of the ten Canadian provinces, along with the federal government, has its own labour relations legislation and a corresponding labour relations board.[4] This structure effectively provides an opportunity to examine eleven distinct approaches and experiences.

This article does not aim to provide a comprehensive discussion of the content and processes of collective bargaining and trade union recognition as regulated in South Africa or across the various Canadian jurisdictions. Instead, it focuses on the Canadian concept of the bargaining unit—distinct from the South African notion of the 'workplace'—which has been selected for its potential to offer insights into addressing the shortcomings of South African regulation. As the discussion below will demonstrate, two key features of the Canadian bargaining unit that are particularly relevant to the South African context are the accommodation of special or significant minority interests and the regulation of trade union recognition in the context of multi-location employers.

4 See Canada Labour Code RSC 1985 c L-2; Alberta Labour Relations Code RSA 2000 c L-1; British Columbia Labour Relations Code RSBC 1996 c 244; Manitoba Labour Relations Act CCSM c L10; New Brunswick Industrial Relations Act RSNB 1973 c I-4; Newfoundland and Labrador Labour Relations Act RSNL 1990 c L-1; Nova Scotia Trade Union Act RSNS 1989 c 475; Ontario Labour Relations Act 1995 SO 1995 c 1 Sch A; Prince Edward Island Labour Act RSPEI 1988 c L-1; Québec Labour Code CQLR c C-27; Saskatchewan Employment Act SS 2013 c S-15.1. Canada also has three northern territories, each with its own territorial government: Northwest Territories, Nunavut, and Yukon each have their own legislation in respect of employment standards and public sector employees, but they lack their own private sector labour relations legislation. To the extent that labour legislation applies to the private sector in these territories, it is Part I of the Canada Labour Code RSC 1985 c L-2. The impact of provincial laws on federal undertakings falling under a federal head of power is limited. To the extent that provinces may have concurrent jurisdiction, their laws, at least in matters relating to collective bargaining, must yield to the federal Code. In this regard, see *Commissionaires Nova Scotia v Crouse* 2012 FCJ No 31 (FCA), 2012 FCA 4 (CanLII), leave to appeal refused 2012 SCCA No 106 (SCC), 2012 CanLII 32782 (SCC).

The article begins by briefly highlighting some of the difficulties experienced in the South African collective bargaining context with specific reference to the concept of 'workplace' as the constituency within which the majority rules. The discussion proceeds with an analysis of the Canadian concept of the 'appropriate bargaining unit'—a notion that contrasts with the South African 'workplace'—as the independently defined constituency within which the principle of majoritarianism is applied. Like South Africa, the Canadian legal system favours majority unions. The article ultimately seeks to show that Canadian law reflects a greater awareness of the potentially unfair or harsh effects of majoritarianism when applied without qualification or to an inappropriate constituency. An examination of the Canadian experience reveals useful insights. The Canadian model has addressed challenges inherent in a majoritarian system. It has also successfully implemented third-party intervention in the regulation of trade union recognition. These aspects of the Canadian approach offer valuable guidance for developing a more appropriate framework for trade union recognition in South Africa.

The Concept of 'Workplace' in the South African Labour Law Context

In South Africa, the controversy surrounding the legal regulation of trade union recognition and the related concept of representativeness, more specifically with reference to the workplace constituency within which it applies, has led to a number of Constitutional Court judgments.[5] The legislative yardstick selected to measure trade union representativeness is derived from the interpretation of the term 'workplace', which is defined in the LRA as:

> the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.[6]

It follows that the principle of majoritarianism as it applies in the LRA, is linked directly to the definition of 'workplace' in the LRA. There are two features of the definition of 'workplace' that are immediately apparent—its focus on employees as a collective and the relative immateriality of location.[7] Both these features, according to

5 *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another* (n 3); *Association of Mineworkers & Construction Union & Others v Chamber of Mines of SA & Others* (n 3); *Police & Prisons Civil Rights Union v SA Correctional Services Workers Union & Others* (n 3); *Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Ltd* (n 2).

6 LRA s 213. For the interpretation of s 213 'workplace', see *Abanqobi Workers Union obo Members v IR Voigts (Pty) Ltd* [2019] 9 BALR 942 (CCMA); *National Construction Building and Allied Workers Union obo Shardrack v Solid Doors (Pty) Ltd* [2019] 9 BALR 991 (CCMA); *National Union of Metalworkers of South Africa obo Members/Telkom (Open Serve)* [2019] 12 BALR 1347 (CCMA); *Southern African Clothing and Textile Workers' Union/Steinhoff Doors and Building Material t/a Steinbuild* [2019] 1 BALR 90 (CCMA).

7 *Association of Mineworkers & Construction Union v Chamber of Mines of SA* (n 3) para 24.

the Constitutional Court,[8] signal that the 'workplace' concept has a special statutory meaning and that '[t]he key is whether an operation is independent—not where it is located.'[9] If there are two or more operations that are 'independent of one another by reason of their size, function or organisation,' then 'the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.'[10]

However, the LRA does not specify the size, operation or function that is required for a place to qualify as an independent workplace.[11] And the extremely wide range of enterprise structures makes it hard not only to imagine every single interpretation that would be appropriate in all cases, but also to predetermine the issue in legislation.[12] To these difficulties may be added the consideration that the LRA promotes majoritarianism, sectoral bargaining and non-proliferation of unions in the workplace.[13] Not surprisingly, the greatest difficulty in defining a 'workplace' arises in relation to employers that operate at different sites or have different divisions.

The Constitutional Court has recognised both the harsh effect of employer insistence on majority representation as a requirement for recognition and the potential for labour unrest where minority interests are ignored.[14] These judgments considered whether the principle of majoritarianism and the extension of collective agreements, in different contexts, provide sufficient justification for the limitation they place on fundamental collective bargaining rights, including the constitutional right to freedom of association of minority unions seeking recognition from employers. These judgments show that the preference afforded to the majority union may have controversial consequences, whose severity, including the possible impact on individual employees' right to freedom of

8 ibid.

9 ibid para 27.

10 ibid para 28.

11 *Specialty Stores v SA Commercial Catering and Allied Workers Union & Another* (1997) 18 ILJ 992 (LC), [1997] 8 BLLR 1099. If different places of business are not shown to be 'independent' from one another, they cannot be separate workplaces. The judgment has since been overturned by the LAC but on grounds unrelated to these discussed here.

12 Clive Thompson, 'Collective Bargaining' in Halton Cheadle and others, *Current Labour Law* (Juta 1997) 1, 3 notes that the drafters 'battled with this notion'. He confirms there that a 'workplace' encompasses all the different places of work of an employer unless some of them are independent in the sense specified in the definition and that this decision 'not to confine a workplace as defined to a single geographical site has spawned a subset of very problematic boundary disputes as employers, unions and rival unions contend for interpretations that suit their typically divergent interests.' Thompson states: 'If a legislative change is in the offing, a rethink on a workplace and the discretion of the adjudicator in applying the definition would also perhaps be in order' ('Collective Bargaining' in *Current Labour Law* (1997) 6).

13 See, e.g., LRA ss 1, 14, 16, 18, 21(8)(a), 23(1)(d), 25, 26 and 32.

14 *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & Another* (n 3); *Association of Mineworkers & Construction Union & Others v Chamber of Mines of SA & Others* (n 3); *Police & Prisons Civil Rights Union v SA Correctional Services Workers Union & Others* (n 3); *Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Ltd* (n 2).

association, depends significantly on the constituency within which the majority applies.

The importance of the defined constituency (the 'workplace') within which the principle of majoritarianism applies may be illustrated by the following example:

> A company employs 1 000 manual workers, all of whom are members of union A, 100 artisans, all of whom are members of union B, and 50 secretarial and managerial staff. The company and union A reach an agreement on wage and salary scales, including those applicable to artisans – which union A is anxious to keep down so that its members get more of the cake. The agreement is extended to all employees. Even without an express provision to that effect, union B may not call a strike over wages for that period, despite the fact that the strike could cripple the company and would, in all probability, result in a better deal for its members.[15]

The simplified example above illustrates the unfairness that may follow if union B represents all the artisans, but union A is allowed to bargain on their behalf. This outcome could violate the rights of the union B members, who will thus soon realise that they would be better off if they joined union A.[16]

Section 23(1)(d) of the LRA provides for the extension of a collective agreement to make it binding on all employees in the workplace, including those who are not members of the registered trade union(s) party to the agreement.

The purpose behind section 23 of the LRA—to promote orderly collective bargaining and better terms and conditions through increased bargaining power—is attained for the 1 000 manual workers but not for the artisans. This very issue hampered orderly collective bargaining and prompted the labour unrest in Marikana, where the rock drill operators' position resembled the artisans' in the example above.[17] This challenge raises the question of whether it is really necessary to force a specific category of employees that are members of a union to be represented in wage negotiations, or any other

15 J Grogan, 'Poor Relations: Minority Unions under the New LRA' (1996) 13(2) Employment Law 27.

16 ibid. Although constitutional rights are not absolute, any limitations imposed on them must be justifiable. See discussion below, see also *Association of Mineworkers & Construction Union v Chamber of Mines of SA* (n 3) para 54–55.

17 *Association of Mineworkers & Construction Union v Chamber of Mines of SA* (n 3) paras 51, 42 ('At the core of AMCU's challenge is the statute's application of the principle of majoritarianism. The challenge is freighted with history and burdened by recent clashes between unions in many workplaces, including in the mining industry.') This refers to the tragic events that followed a recognition dispute at the Lonmin platinum mines in the Marikana area of South Africa. On 16 August 2012, the South African Police Service opened fire on striking mineworkers, resulting in the deaths of 34 miners and serious injuries to 78 others. For a detailed account of these events, see the Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, North West Province, published as GN 699 in GG 38978 of 25-06-2015.

workplace process, by a union they specifically chose not to join. The extent of the limitation placed on the rights of employees who belong to the minority union when weighed up proportionally to its purpose, to promote orderly collective bargaining, leads to the strongest argument against the constitutionality of section 23(1)(d) of the LRA when applied to the workplace as a whole. Significantly, after finding the limitation imposed by section 23(1)(d) to be justified—in the collective bargaining context—in *Chamber of Mines*, the Constitutional Court held: **'Perhaps a different definition of "workplace" might have worked equally well, or maybe even better, or been fairer to smaller or emergent unions.'**[18]

It seems clear that less restrictive means to achieve the same purpose would be to have section 23(1)(d) apply to the bargaining unit consisting of a specific category of employees rather than to the workplace.[19]

Given the LRA's clear promotion of centralised bargaining, the scarcity of cases on the interpretation of the concept of a 'workplace' in the LRA is not surprising. Before the Constitutional Court decision in *Chamber of Mines*,[20] some judgments and arbitration awards had applied a flexible approach to the workplace definition.[21] The Labour Appeal Court (LAC) has pointed out that the term 'workplace' in the LRA may mean different things in different legal contexts,[22] for example, when dealing with organisational rights[23] as opposed to the extension of collective agreements,[24] picketing[25] and workplace forums.[26] In this regard, the LAC noted that section 213

18 ibid para 51.

19 Constitution of the Republic of South Africa, 1996 s 36(1)(e). See PAK le Roux, 'Collective Agreements: Their Role and Status' (2003) 12 CLL 90, 97.

20 *Association of Mineworkers & Construction Union v Chamber of Mines of SA* (n 3).

21 See, e.g., *SA Commercial Catering & Allied Workers Union v Speciality Stores Ltd* (1998) 19 ILJ 557 (LAC) para 29: 'The possibility of different determinations of a workplace, in different contexts, is one contemplated and accepted in terms of the Act itself.' See also *OCGAWU v Volkswagen of SA (Pty) Ltd* [2002] 1 BALR 60 (CCMA), where it was found that, given the qualifying phrase 'unless the context indicates otherwise', a bargaining unit within an organisation may be considered a 'workplace' for the purposes of organisational rights. A similarly flexible approach to the statutory definition was illustrated in *NUMSA v Feltex Foam* [1997] 6 BLLR 798 (CCMA). However, there were also decisions like the arbitration award in *Woolworths (Pty) Ltd* [1999] 7 BALR 813 (CCMA). See further JV du Plessis and MA Fouché, *A Practical Guide to Labour Law* (LexisNexis 2024) 279–282.

22 *SA Commercial Catering & Allied Workers Union v Speciality Stores Ltd* (n 21) para 29: 'As pointed out by Thompson in "Collective bargaining" in *Current Labour Law* (1997) 4, the context of determining a proper workplace in terms of the Act in a lock-out dispute may well be different from the context for determining a workplace in an organisational rights dispute. The possibility of different determinations of a workplace, in different contexts, is one contemplated and accepted in terms of the Act itself.'

23 LRA s 21.

24 LRA s 23(1)(d).

25 LRA s 69.

26 LRA s 79 and *SA Commercial Catering & Allied Workers Union v Speciality Stores Ltd* (n 21) para 29. See also Thompson (n **Error! Bookmark not defined.**) 4.

defines 'workplace' subject to context, allowing its meaning to vary depending on the legal issue at hand.[27] From this, it follows that '[t]he possibility of different determinations of a workplace, in different contexts is a possibility contemplated and accepted in terms of the LRA itself.'[28]

In *Chamber of Mines*, the Constitutional Court acknowledged that for collective bargaining to be orderly and productive, some form of majority rule must apply.[29] The Court was asked to determine whether separate mines operated by mining houses constituted separate workplaces. It emphasised that the definition of 'workplace' focuses on employees as a collective. The Court affirmed that the default position is that multi-location operations form a single workplace, and that geographic separation—referred to as 'locational multiplicity'—is not determinative of what constitutes a workplace.[30]

The Court clarified that different workplaces may only be recognised where they are independent by virtue of their size, function or organisation.[31] However, it did not engage in a detailed analysis of the functional organisation of the employers in question, instead relying on the reasoning of the LAC in its earlier judgment.[32]

As a result, the LAC's decision in *Association of Mineworkers and Construction Union & Others v Chamber of Mines of SA acting in its own name & on behalf of Harmony*

27 Some judges and arbitrators have emphasised that the same interpretation of workplace 'must be applied throughout the statute, unless the court is satisfied that the defined meaning does not fit in the context and that another meaning is to be given to the word.' The Constitutional Court has since expressly confirmed that the same interpretation of workplace must be applied throughout the statute (*Association of Mineworkers & Construction Union v Chamber of Mines of SA* (n 3) para 35 footnote 33). For an argument to the contrary, see Stefan van Eck, 'In the Name of "Workplace and Majoritarianism": Thou Shalt Not Strike—*Association of Mineworkers & Construction Union & Others v Chamber of Mines & Others* (2017) 38 ILJ 831 (CC) and *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & another* (2003) 24 ILJ 305 (CC)' (2017) 38 ILJ 1496, 1505.

28 *SA Commercial Catering & Allied Workers Union v Speciality Stores Ltd* (n 21) para 29 (obiter). See also *United Association of SA & Another v BHP Billiton Energy Coal SA Ltd & Another* (2013) 34 ILJ 2118 (LC) paras 51–52; Van Eck ibid.

29 *Association of Mineworkers & Construction Union & Others v Chamber of Mines of SA & Others* (n 3) para 10.

30 *Association of Mineworkers & Construction Union & Others v Chamber of Mines of SA & Others* (n 3) para 24–27.

31 *Association of Mineworkers & Construction Union & Others v Chamber of Mines of SA & Others* (n 3) para 28.

32 *Association of Mineworkers & Construction Union & Others v Chamber of Mines of SA & Others* (n 3) para 30–38. *Association of Mineworkers & Construction Union v Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co (Pty) Ltd* [2016] ZALAC 11; (2016) 37 ILJ 1333 (LAC); [2016] 9 BLLR 872 (LAC) (*Chamber of Mines (LAC)*).

Gold Mining Co (Pty) Ltd remains a key reference for the functional analysis required in such determinations.[33]

In *Chamber of Mines* (LAC), the Court held that an employer's geographically separate operations collectively constituted a single workplace. The existence of a recognition agreement or union representation in some bargaining units was deemed irrelevant to this determination.[34]

This approach highlights the challenges faced by minority trade unions and special interest employee groups in large, multi-site enterprises. As the size of the workplace increases, the relative level of representation required for statutory recognition becomes more difficult to achieve. Moreover, the current definition of 'workplace' may not reflect the practical realities of union organisation, which often develops incrementally and geographically.[35] It also fails to account for the position of smaller or geographically static special interest groups within the broader workplace.[36]

It is therefore unsurprising that, having upheld the limitation imposed by section 23(1)(d) of the LRA within this broad conception of the workplace, the Constitutional Court remarked: 'Perhaps a different definition of "workplace" might have worked equally well, or maybe even better, or been fairer to smaller or emergent unions.'

Since the Constitutional Court acknowledges that a different definition of workplace may very well be fairer to minority unions, it might be worth considering a different application or an amended definition.[37] A starting point might be to consider how far the term 'workplace'—and its implication on majoritarianism—could be reconciled with all the dimensions of freedom of association and still achieve the purpose of the term 'workplace'. The analysis of the Canadian experience presented below highlights its approach to the challenges of a majoritarian model. Central to this approach is the independently determined bargaining unit to which the model applies. This framework may offer valuable insights for improving the regulation of trade union recognition in South Africa.

The Canadian Concept of 'Appropriate Bargaining Unit'

The collective bargaining models of Canada and South Africa are comparable because both follow a majoritarian approach. This shared foundation gives rise to similar

33 Wilhelmina Germishuys-Burchell and Christoph Garbers, 'Minority Unions and Special Interest Groups in the Workplace' (2025) 46 ILJ 722.

34 ibid 733.

35 ibid.

36 ibid.

37 In *Association of Mineworkers & Construction Union v Chamber of Mines of SA* (n 3), the Constitutional Court considered the definition of a 'workplace' with reference to its impact on the right to collective bargaining and the right to strike in support of a demand for a wage increase after a wage agreement had been reached with the majority union party and extended to the workplace.

challenges, particularly regarding the accommodation of minority interests. However, the respective experiences of these jurisdictions also reveal divergent approaches to addressing such challenges, offering valuable comparative insights.

At the outset, it should be mentioned that in Canada, labour law falls within the jurisdiction of the provinces, except to the extent that federal law is necessary to govern federal works and undertakings.[38] Federal law and each of the ten Canadian provinces has its own labour relations legislation and provincial labour relations board.[39] This structure in effect provides the opportunity to consider eleven varying approaches and experiences. The comparative discussion in this article will point out not only the commonalities in the legal regulation of specific aspects of collective bargaining across Canadian jurisdictions but also the slightly different approaches that different jurisdictions follow to address similar challenges.

In Canada, a trade union supported by the majority[40] of employees in the 'appropriate bargaining unit' may gain recognition through the process of certification by the labour relations board, an independent body responsible for labour relations in each jurisdiction.[41] This recognition would entitle such a majority union to a bundle of rights aimed at promoting collective employee voice, including the right to bargain collectively.[42] The labour relations board responsible for labour relations in each jurisdiction is empowered to determine a specific unit of employees that would be

38 Section 2 of the Canada Labour Code RSC 1985 c L-2 defines federal works and undertakings.

39 See (n 4).

40 There are two ways in which a trade union may show that it has sufficient support to apply for recognition or certification, both inseparable from representativeness. In some jurisdictions, this involves providing evidence of membership in good standing (in this regard, see Newfoundland and Labrador Labour Relations Act RSNL 1990 c L-1 ss 36, 38, 47; New Brunswick Industrial Relations Act RSNB 1973 c I-4 ss 10, 13–14; Prince Edward Island Labour Act RSPEI 1988 c L-1 ss 12–14; Quebec Labour Code CQLR c C-27 s 28). The relevant documentation is submitted to the tribunal concerned, and if the union can demonstrate the required level of support among employees forming part of what the tribunal regards as an appropriate bargaining unit, the tribunal is authorised to certify the union (in this regard, see, e.g., New Brunswick Industrial Relations Act RSNB 1973 c I-4 s 14(3); Manitoba Labour Relations Act CCSM c L10 s 40(1)). Certification according to this 'card based' approach depends on demonstrating membership of the requisite percentage of employees required by legislation. A range below the requisite percentage, which would allow for a vote where the requisite percentage cannot be met, is often provided for. The second way in which a trade union may show that it has sufficient support to apply for certification is by representation vote (in this regard, see Alberta Labour Relations Code RSA 2000 c L-1 ss 32–34; British Columbia Labour Relations Code RSBC 1996 c 244 ss 18, 24–25; Manitoba Labour Relations Act CCSM c L10 s 40; Nova Scotia Trade Union Act RSNS 1989 c 475 ss 23, 25; Labour Relations Act 1995 SO 1995 c 1 ss 8–10; Saskatchewan Employment Act SS 2013 c S-15.1 ss 6–9, 6–12, 6–13).

41 A union may obtain recognition by way of a government issued certification order. In all Canadian jurisdictions, procedures are prescribed by which a trade union may apply to be recognised as the bargaining agent for a specifically designated unit of employees. See Wesley B Rayner and others, *Canadian Collective Bargaining Law: Principles and Practice* (3rd edn, LexisNexis Canada 2017) 277.

42 David J Doorey 'Reflecting Back on the Future of Labour Law' (2021) 71 Univ Toronto LJ 165, 167.

appropriate for collective bargaining in the circumstances.[43] As mentioned, the discussion below considers different perspectives on the determination of the 'appropriate bargaining unit' and the importance of specific factors taken into account in this determination by the labour relations boards across the different jurisdictions in Canada.

At the federal level, the Canada Labour Code defines 'bargaining unit' as a unit: determined by the Board to be appropriate for collective bargaining, or to which a collective agreement applies.[44] The Labour Code furthermore empowers the Canada Industrial Relations Board (CIRB) to include any employees in or exclude any employees from the unit proposed by the trade union when the CIRB determines the appropriateness of a unit proposed by the union for collective bargaining.[45] Once determined, the bargaining unit serves both as an electoral constituency for union certification and decertification and as a basis for collective bargaining.[46]

The determination by the relevant labour relations board is of immense practical importance, not only for the immediate parties but for the structure and performance of the collective bargaining system as a whole. The parameters of a bargaining unit affect the relationship and the power balance between the parties, the scope and effectiveness of collective bargaining for dealing with different matters, and, to some extent, even the substantive issues covered in the collective agreement.[47] In fact, the purpose of the concept 'appropriate bargaining unit' has been described as 'an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to

43 See Canada Labour Code RSC 1985 c L-2 s 27; Alberta Labour Relations Code RSA 2000 c L-1 s 34–35; British Columbia Labour Relations Code RSBC 1996 c 244 s 22; Manitoba Labour Relations Act CCSM c L10 s 39; New Brunswick Industrial Relations Act RSNB 1973 c I-4 s 13; Newfoundland and Labrador Labour Relations Act RSNL 1990 c L-1 s 38; Nova Scotia Trade Union Act RSNS 1989 c 475 ss 27–28; Labour Relations Act 1995 SO 1995 c 1 Sch A s 9; Prince Edward Island Labour Act RSPEI 1988 c L-1 s 12; Québec Labour Code CQLR c C-27 s 32; Saskatchewan Employment Act SS 2013 c S-15.1 ss 6–11. Northwest Territories, Nunavut and Yukon each have their own legislation in respect of employment standards and public sector employees, but they lack their own private sector labour relations legislation. To the extent that labour legislation applies to the private sector in these territories, it is Part I of the Canada Labour Code RSC 1985 c L-2.

44 Canada Labour Code RSC 1985 c L-2 s 3(1).

45 Canada Labour Code RSC 1985 c L-2 s 27(2).

46 A collective agreement reached usually covers all employees in the bargaining unit. See The Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials, and Commentary* (9th edn, Irwin Law 2018) 480. See also Alexander Colvin, 'Rethinking Bargaining Unit Determination: Labor Law and the Structure of Collective Representation in a Changing Workplace' (1998) 15 Hofstra Labor and Employment LJ 419, 421 and 452; Samuel Estreicher, 'Labor Law Reform in a World of Competitive Product Markets' (1993) 69(1) Chicago-Kent LR 3, 10–11.

47 *International Brotherhood of Electrical Workers Local Union 1687 v Kidd Creek Mines Ltd* 1984 CanLII 937 (ON LRB) para 50.

encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship.'[48]

The discretion of the labour relations board in question to determine the parameters of the 'appropriate bargaining unit' during the initial organising phase provides it with an opportunity to avoid subsequent labour relations problems.[49] In *International Brotherhood of Electrical Workers Local Union 1687 v Kidd Creek Mines Ltd*,[50] the Ontario Labour Relations Board (OLRB) stated as follows: '[T]he shape of the bargaining unit can profoundly influence the potential for industrial peace or collective bargaining discord. The more disparate are the interests enclosed within the unit, the more difficult it may be for the union to effectively represent the collectivity. Insufficient attention to these special interests generates internal strife.'[51]

Significantly placed employees, though few in number, can wield substantial bargaining power, affecting outcomes whether they bargain individually or as part of a larger group.[52] As demonstrated above, this observation has also been affirmed in the South African context. On a tactical level, a trade union may want a certain segment of employees among which it does not enjoy majority support to be excluded from the bargaining unit, but an employer for the same reason may argue that this segment should be included.[53] Although the specific labour relations board may consider the parties' wishes, these are not determinative, as the ultimate decision about an appropriate bargaining unit remains with the board, which will not allow those wishes to violate fundamental policy considerations (discussed below).[54] The labour relations board must resolve such conflicts by referring to the appropriate bargaining unit. One such conflict that may arise is between labour policy that seeks to avoid undue fragmentation of the workforce, on the one hand, and the exercise of organisational rights, on the other.[55]

In British Columbia, for example, the labour relations board considers an agreement between the parties a relevant, but not determinative, factor.[56] To the extent that a board

48 *Canadian Union of Public Employees v Hospital for Sick Children* 1985 CanLII 899 (ON LRB) para 17; *Metroland Printing Publishing and Distributing Ltd* 2003 OLRD No 514 para 16.

49 *International Brotherhood of Electrical Workers Local Union 1687 v Kidd Creek Mines Ltd* (n 47) para 50; *Canadian Union of Public Employees v Hospital for Sick Children* (n 48) para 17.

50 1984 CanLII 937 (ON LRB); see (n 47).

51 *International Brotherhood of Electrical Workers Local Union 1687 v Kidd Creek Mines Ltd* (n 47) para 50. Citing *Service Employees Union Local 204 v Bestview Holdings Limited* 1983 CanLII 755 (ON LRB) para 28, the OLRB also mentioned the dangers at the other extreme.

52 See The Labour Law Casebook Group (n 46) 481.

53 Rayner and others (n 41) 295.

54 See *Service Employees International Union Local 204 v Humber/Northwestern/York-Finch Hospital* 1997 OLRD No 3437 (OLRB) para 14 with reference to *National Union of Public Service Employees v Brockville General Hospital* 1957 OLRD No 6 (OLRB).

55 *International Brotherhood of Electrical Workers Local Union 1687 v Kidd Creek Mines Ltd* (n 47) para 50. See also *Service Employees Union Local 204 v Bestview Holdings Limited* (n 51) para 28.

56 *Insurance Corp of British Columbia (Re)* 1974 BCLRBD No 63 (BCLRB) para VI. See also *Canada Post Corp v Public Service Alliance of Canada (PSAC)* 1993 CLRB No 993 para II.

may override the parties' wishes when it determines the appropriate bargaining unit, two statutory principles conflict: the labour relations board's statutory authority to determine the appropriate bargaining unit, and the employee's right to representation by their trade union of choice. Although the latter is important, the necessity for determining some bargaining unit has been recognised, for without a voting constituency, the principle of majority rule cannot apply.[57]

Most jurisdictions provide their labour relations boards with little relevant statutory guidance.[58] In Ontario, for example, legislation requires only that the unit comprise more than one employee.[59] And it has been argued that case law seems to illustrate that the labour boards tend to favour certification.[60] Furthermore, since the labour boards must determine an appropriate bargaining unit and not the most appropriate,[61] they exercise a wide discretion which has rarely been overruled on judicial review.[62]

Some jurisdictions' legislation considers specific categories of employees as appropriate bargaining units. So, for instance, earlier Ontarian legislation specified four distinct categories of employees: craft units, professional units, dependent contractors and security guards.[63] Professional units consisted of employees in the practice of architecture, dentistry, engineering, land surveying and law, and these units would be considered appropriate where each of the employees in the specific unit were members of the same profession. However, the relevant labour relations board would also be

57 See also *Association of Mineworkers & Construction Union v Chamber of Mines of SA* (n 3) para 10.

58 Nova Scotia gives some statutory guidance. See Trade Union Act RSNS 1989 c 475 s 19. See also *Highland View Regional Hospital v NSNU Highland View Regional Hospital Local* 1982 NSJ No 419 (NSCA). Alberta requires that certification for firefighters be granted on the basis that all firefighters of an employer be included in one unit. See Labour Relations Code RSA 2000 c L-1 ss 33 and 35.

59 Labour Relations Act SO 1995 c 1 Sch A s 9(1). See *Universal Constructors & Engineers Ltd v New Brunswick (Labour Relations Board)* 1960 NBJ No 15 (NBCA) para 34; *United Brotherhood of Carpenters and Joiners of America Local 1386 v Bransen Construction Ltd* 2002 NBJ No 114 (NBCA) paras 62–64; *CJA 27 Locals v British Columbia (Labour Relations Board)* 1988 BCJ No 919 (BCSC).

60 *Egg Films Incorporated v Labour Board et al* 2014 CanLII 56698 (SCC).

61 See, e.g., *Newfoundland and Labrador Credit Union Ltd v Construction General Labourers Rock and Tunnel Workers (Local 1208)* 1995 CanLII 9895 (NL CA). See also *Canada Labour Relations Board v Transair Ltd* [1977] 1 SCR 722, 724 and 739.

62 For case law in support of this conclusion, see, e.g., *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v Prince Rupert Grain Ltd* 1996 CanLII 210 (SCC), [1996] SCJ No 72 (QL); *University of Regina v CUPE Local 1975* 1979 SJ No 539 (Sask CA); *Canada Labour Relations Board v Transair Ltd* (n 61); *Westburne Industrial Enterprises Ltd v Labour Relations Board* 1973 CanLII 1695 (BC CA); *Labour Relations Board of Saskatchewan v The Queen et al* 1969 CanLII 104 (SCC), [1969] SCR 898, (1969) 7 DLR (3d) 1.

63 Labour Relations Act RSO 1990 c L.2 (repealed since 10 November 1995).

empowered to include these professionals, *provided that the majority of them were in support thereof*, within a bigger bargaining unit along with other employees.[64]

Initially, both labour legislation and labour relations board policy across Canadian jurisdictions clearly distinguished between craft unions and industrial unions and readily allowed the certification of specialised craft units.[65] Although this difference is still recognised, a stricter approach to craft unit certification has emerged in response to fragmentation that has since become a greater concern.[66] Ontarian legislation still regards a craft unit as an appropriate bargaining unit and provides that the OLRB may include as part of such a unit those employees who are, according to trade union practice, commonly associated with the craft group in their work and bargaining.[67] And Ontarian legislation also requires employees in a craft unit to be clearly distinguishable from other employees on the basis of craft or technical skill. For such a unit to be certified, the applicant must prove that it has been a common practice for those specific employees to bargain separately, or that there is a history of separate bargaining in the specific industry concerned.[68] This requirement has been strictly applied.[69]

However, the OLRB need not establish a craft unit where the craft employees already form part of another bargaining unit. Where the craft employees are represented by a different bargaining agent already recognised,[70] the OLRB would be reluctant to exercise its discretion to sever a craft unit from an already existing unit. In this regard, labour relations boards concentrate on ensuring that different groups of employees that form part of the same bargaining unit receive equal representation from the bargaining agent.[71] In *Blanche River Health v Ontario Nurses' Association*,[72] for example, the OLRB accepted the argument that the group of paramedical employees, although previously in the larger 'all-employee' unit, should be placed in their own bargaining

64 See, e.g., Labour Relations Act SO 1995 c 1 Sch A s 9(4); Labour Relations Act SO 1995 c 1 s 1(3)(a); British Columbia Labour Relations Code RSBC 1996 c 244 s 21(1); Canada Labour Code RSC 1985 c L-2 s 27(3), (4). Different rules still govern security guards. For more detail in this regard, see Labour Relations Act SO 1995 c 1 Sch A s 14(3); Rayner and others (n 41) 296; Labour Relations Act SO 1995 c 1 Sch A s 14(3) and 14(5). Under the Canada Labour Code, a private constable cannot be in a unit with other employees (Canada Labour Code RSC 1985 c L-2 ss 27(6) and 26).

65 Rayner and others (n 41) 297.

66 ibid.

67 Labour Relations Act SO 1995 c 1 Sch A s 14(5).

68 Labour Relations Act SO 1995 c 1 Sch A s 9(3). See *UWC v Scarborough Public Utilities Commission* 1982 OLRB Rep June 929 (OLRB); *K Mart Canada Ltd* 1981 OLRB Rep September 1250.

69 *York University* 1971 OLRB Rep March 126 (OLRB); *Orangeroof Canada Ltd* 1974 OLRB Rep November 761 (OLRB).

70 Labour Relations Act SO 1995 c 1 Sch A s 9(3). See also s 21(2) of the Labour Relations Code RSBC 1996 c 244.

71 *Blanche River Health v Ontario Nurses' Association* 2021 CanLII 70128 (ON LRB) para 39.

72 2021 CanLII 70128 (ON LRB); see (n 71).

unit to ensure that they receive fair, targeted, effective representation.[73] These considerations were also applied to office and clerical employees comprising a significant, but minority, proportion of a workforce's employee complement.[74] In this case, given the disparity between the number of office and clerical employees and the number of service employees, the OLRB accepted that the interests of the office and clerical employees may be submerged by the interests of the larger group of service employees if they were in one unit.[75] This aspect of Canadian labour law, particularly in light of the challenges faced by minority interest groups in South Africa—as reflected in Constitutional Court jurisprudence—suggests that such an approach may also hold value for the South African context.

However, severances would seldom be granted where the labour relations board in question is satisfied that different groups of employees that form part of the same bargaining unit receive equal representation from the bargaining agent.[76]

In the absence of detailed statutory regulation, labour boards across jurisdictions have developed common factors that are considered in determining the appropriate bargaining unit. These factors are employee community of interest; the nature of the business and the employer's organisation; bargaining history; fragmentation; and potential changes in the composition of the bargaining unit. Each of these factors is considered below, with specific attention to their potential relevance in addressing current challenges within the South African context.

Community of Interest

Community of interest as it relates to working conditions is the single most important factor for consideration to determine what an appropriate bargaining unit would be.[77] Although skills and interests would fall within the scope of community of interest, these terms should be interpreted within the context of the particular negotiating group of employees concerned. Where different groups of employees have divergent needs and interests, it is likely that different bargaining units would be appropriate.[78] However, separate bargaining units may not necessarily be justified because of the subject of the work when conditions of employment, job classifications, pay rates and job security are common to all groups of employees.[79] Because the fundamental purpose of collective

73 *Blanche River Health v Ontario Nurses' Association* (n 71) para 35.

74 ibid. See also *Penetanguishene General Hospital Inc v Canadian Union of Public Employees and its Local 3157* 1999 CanLII 19989 (ON LRB) para 25.

75 *Penetanguishene General Hospital Inc v Canadian Union of Public Employees and its Local 3157,* ibid.

76 See, e.g., *Blanche River Health v Ontario Nurses' Association* (n 71) para 39. See also Rayner and others (n 41) 298 with reference to *University of Guelph* 1975 OLRB Rep April 327 (OLRB); *CUOE v Sheraton Brock Hotel* 1961 61 CLLC 16,205 (OLRB).

77 Rayner and others (n 41) 296.

78 *Canadian Museum of Civilization v PSAC* 1992 CLRBD No 928 (CLRB).

79 *University of Manitoba Faculty Assn v University of Manitoba* 1986 MLBD No 46 (MLRB); *Foreign Correspondents' Assn v CWSG Local 213* 1994 CLRBD No 1056 (CLRB).

bargaining is to determine terms and conditions of employment, it is important that a strong community of interest must exist among employees in a bargaining unit.[80] While such community may be present in a plant setting, different groups of employees such as those engaged in clerical, technical and production work may possibly have disparate needs and interests.[81]

Depending on concerns over fragmentation (discussed below), approaches to employees working at the same location may reveal some differences. The OLRB, for example, used to distinguish between production and office and technical and clerical employees and, though it could certify one unit for all employees, it rarely did.[82] The OLRB formerly tended to distinguish between part-time and full-time employees as groups that did not share the same community of interest.[83] This seems to have been the approach until the 1992 amendments to the Ontario Labour Relations Act 1995 (OLRA). These provisions, which have themselves since been repealed, placed part-time and full-time employees in the same bargaining unit, unless fewer than 55 per cent of employees in either of the groups were trade union members. Where this was the case, separate bargaining units were considered appropriate.[84] Although these provisions deeming a unit of full-time and part-time employees appropriate have resulted in a trend towards larger or more comprehensive bargaining units, the transitional provisions of the OLRA make it possible for either the union or the employer to apply for a declaration that bargaining units combined under the 1992 amendments are not appropriate.[85] This possibility does not mean that (in this case) the OLRB would assume different interests, but where different interests are found to exist, separate bargaining units would be declared.[86] Where this declaration is made without an order to the contrary, the two new units will be represented by the same trade union. Consequently, any previous collective agreements will be regarded as two separate agreements between the trade union and each unit.[87]

As regards casual employees, the Canada Labour Relations Board (the CLRB, before it was renamed the CIRB), for example, included them in a unit where their numbers were relatively few in comparison to the total number of employees in the unit, in order to ensure that the casual employees did not dominate the group.[88] Casual employees have also qualified for inclusion where they shared a community of interest with the other employees in the unit and *where the majority of casual employees desired to be*

80 Rayner and others (n 41) 299.
81 *Co-operators Insurance Assn of Guelph* 1971 OLRB Rep July 443.
82 *USWA v Canada Iron Foundries Ltd* 1956 OLRD No 1 (OLRB).
83 *HREU Local 75 v Toronto Airport Hilton* 1980 OLRB Rep September 1330 (OLRB); see also *Canadian Union of Public Employees (CUPE) v Dalhousie (Town)* 1990 NBJ No 105 (NBCA).
84 Labour Relations Act 1995 SO 1995 c 1 s 6(2.1) and 6(2.2).
85 Labour Relations Act 1995 SO 1995 c 1 s 2(1), (2), (3) and (5).
86 *Caressant Care Nursing Home of Canada v Canadian Union of Public Employees Local 2225.09* 1996 CanLII 11192 (ON LRB) para 41.
87 Labour Relations Act 1995 SO 1995 c 1 s 2(4), (5), (6).
88 *Bank of Montreal v USWA* 1987 CLRBD No 621 (CLRB).

represented by the union.[89] And casual employees have been included in applications for the review of existing certifications so that they could not affect the right of the other employees to bargain collectively.[90]

The trend towards larger, more comprehensive units is most apparent in British Columbia. There the operative principle is for the labour relations board to prefer a single unit for all employees of the same employer,[91] unless there is a subgroup of employees with an exceptionally distinct community of interest[92] or there is evidence of a history of difficulty in organising all employees as a single group.[93] In general, the starting point for the determination of a bargaining unit is the OLRB's decision in *Canadian Union of Public Employees v Hospital for Sick Children*.[94] The test has two parts: 'sufficient community of interest' and 'serious labour relations problems for the employer.'[95] The assessment of level of 'community of interest' sufficient to permit a single bargaining unit has evolved.[96] As Doorey states: 'Collective bargaining has proven time and again to be an adaptable institution.'[97]

Bargaining History

A history of collective bargaining may be found to present positive evidence about the viability of a specific bargaining unit.[98] This conclusion seems also to be evident from the continued recognition of craft units in certain jurisdictions.[99] Although labour boards tend to honour rather than vary existing bargaining relationships, they may, where

89 ibid.
90 ibid.
91 *Insurance Corp of British Columbia and CUPE* 1974 1 (CLRBR) para V.
92 See also *Insurance Corp of British Colombia and CUPE* 1974 1 (CLRBR) para VI.
93 *Woodward Stores (Vancouver) Ltd (Re)* 1974 BCLRBD No 127 (BCLRB) para V. See also *Insurance Corp of British Columbia (Re)* (n 56) para IV; *Island Medical Laboratories Ltd (Re)* 1993 BCLRBD No 329 para 4.
94 *Canadian Union of Public Employees v Hospital for Sick Children* (n 48). See also *Metroland Printing Publishing and Distributing Ltd* (n 48) para 16.
95 *Canadian Union of Public Employees v Hospital for Sick Children* (n 48) para 17. See also *Metroland Printing Publishing and Distributing Ltd* (n 48) para 16.
96 *National Automobile, Aerospace and Agricultural Implement Workers Union of Canada v Active Mold Plastic Products Ltd* 1994 CanLII 9940 (ON LRB) paras 29–30. See also *United Steelworkers of America v Burns International Security Services Limited* 1994 CanLII 9898 (ON LRB) para 29; *Energy and Paperworkers Union of Canada Local 87-M Southern Ontario Newspaper Guild v Metroland Printing Publishing and Distributing Ltd* 2003 CanLII 33962 (ON LRB) para 21.
97 David J Doorey, 'The Stubborn Persistence of the Lawyer Exemption in Canadian Collective Bargaining Legislation' (2022) 45(1) Dalhousie LJ 65, 82; Alfred W Blumrosen, 'Legal Protection for Critical Job Interests: Union-Management Authority versus Employee Autonomy' (1959) 13(4) Rutgers LR 631, 631–632.
98 Rayner and others (n 41) 301.
99 ibid.

through their discretionary power of reconsideration they deem it appropriate, decide to combine units to avoid fragmentation.[100]

The Board in British Columbia may rule that units be combined only if it finds the separate units to be inappropriate for collective bargaining and if it is of the view that one of the parties may be severely prejudiced if bargaining were to continue in the separate units.[101]

As mentioned, Ontarian legislation since repealed permitted the OLRB to combine bargaining units on the application of the trade union or employer if the employees in the separate units belonged to the same trade union.[102] Before it could make such an order, the OLRB was required to consider whether the combination of units might facilitate viable and stable collective bargaining and reduce fragmentation or whether it was likely to result in greater labour relations challenges.[103] Since the repeal of the Ontarian legislation that provided for the combination of units into larger and more inclusive units, transitional provisions enacted as part of the OLRA made it possible for applications to separate units combined under the 1992 provisions and to restore them to the units that had existed before their combination into a single unit.[104] However, provision is also made for an employer and a trade union to agree that a unit combined under the previous Ontarian legislation remains as such.[105] It has been argued that regard for bargaining history in the form of a specified craft unit protects this unit not only from amalgamation into a larger unit but also against fragmentation by the further carving out of even smaller units.[106]

The Nature of the Business and the Employer's Organisation

The nature of the employer's business and/or the employer's organisation are both factors that must be considered in determining the appropriate bargaining unit.[107]

Although there is a historical presumption in Canada that it would be appropriate that a bargaining unit be confined to one location,[108] it has also been highlighted that such a presumption must be considered along with other relevant factors, such as community of interest and bargaining history. Rapid growth in part-time and casual work and the shift away from the traditional manufacturing sector to the expanding service, trade and

100 *Canadian Union of Public Employees Local 41 v Alberta (Board of Industrial Relations)* 1978 AJ No 632 (ASC).
101 *J Lamberton Maritime Services Ltd (Re)* 1990 BCLRBD No 100 (BCLRB).
102 Rayner and others (n 41) 301.
103 Labour Relations Act SO 1995 c 1 Sch A s 7(1), (2) and (3).
104 Labour Relations Act SO 1995 c 1 Sch A s 2(6).
105 Labour Relations Act SO 1995 c 1 Sch A s 2(3) and 2(6). See also Labour Relations Act SO 1995 c 1 Sch A s 7(4); Rayner and others (n 41) 301.
106 Rayner and others (n 41) 301.
107 ibid.
108 *SEIU Local 204 v K-Mart Canada Ltd* 1981 OLRB Rep September 1250.

financial sectors along with the physical location and the size of workplaces, have combined to make it increasingly difficult for employees to organise.[109] However, there may also be circumstances in which the manner in which an employer's business is organised provides greater support for one more comprehensive unit. This would be the case where there is a commonality of interest across locations (for example, commonality in wage scales), chains of command, integrated operational practices and organising structure.[110] In certain industries falling under federal jurisdiction, such as interprovincial transportation and shipping, it has sometimes been found that the appropriate unit would be a single unit comprising all employees.[111]

Fragmentation

Fragmentation occurs when two or more bargaining units are established for employees working at the same location or where employees of the same employer work at different locations and the different locations are regarded as separate bargaining units, as opposed to a single unit covering all locations.[112]

The trend across Canadian jurisdictions has been in favour of larger, more comprehensive bargaining units.[113] In leading this trend, the British Columbia Board has pointed out advantages associated with larger bargaining units, including administrative efficiency and convenience in bargaining, that it is also more likely to achieve a common framework of employment conditions and promote stability in labour relations.[114] However, it has also recognised that larger bargaining units may have the disadvantage of weakening the community of interest and that it might be more difficult for trade unions to organise where a larger bargaining unit may cover several locations.[115] While the British Columbia Board has led the advance in favour of more comprehensive units and has expressed its concern about fragmentation,[116] it has also been willing to certify smaller units where insistence on a larger unit would effectively

109 ibid.

110 Rayner and others (n 41) 302.

111 *Trade of Locomotive Engineers v Canadian Pacific Ltd* 1976 CLRBD No 59 (CLRB). See also *ATU Local 1374 v Greyhound Lines of Canada Ltd* 1990 CLRBD No 829 (CLRB).

112 See Rayner and others (n 41) 303. See Gary Svirsky, 'The Division of Labour: An Examination of Certification Requirements' (1998) 36(3) Osgoode Hall LJ 567 for an argument that certification can be understood as a tool for fragmenting the potential power of labour's unity.

113 See, e.g., *Metro Transit Operating Co (Re)* 1981 BCLRBD No 77 (BCLRB); *Island Medical Laboratories Ltd (Re)* (n 93); *LIUNA Local 1059 v Sifton Properties Ltd* 1993 OLRB Rep October 1010 (OLRB); *Service Employees Union Local 204 v Bestview Holdings Limited* (n 51) para 28, where the board also noted that 'the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.'

114 *Insurance Corp of British Columbia (Re)* (n 56) para V; *Trade of Locomotive Engineers v Canadian Pacific Ltd* (n 111) para V.

115 See *Englehart & District Hospital Inc v PNFO* 1993 OLRB Rep September 827 paras 51 and 84, where the strong community of interest of a registered or graduate nursing assistants only unit overcame concern about fragmentation. See also *Insurance Corp of British Columbia (Re)* (n 56) para II: 'The dividing line is based on a combination of both function and location.'

116 See, e.g., *British Columbia Ferry Corp (Re)* 1977 BCLRBD No 24 (BCLRB).

deny employees the right to organise.[117] Significantly, the composition of a bargaining unit was not necessarily determined by prior board decisions but rather as a question of fact according to the evidence and arguments in each application.[118] Indeed, there may be fundamental differences from one industry to the next. In one sector, where rival unionism is widespread, the appropriate bargaining unit may differ significantly in size and content from units in a sector dominated by a single trade union.[119]

The CLRB, though also favouring more comprehensive units as appropriate units for collective bargaining, has similarly recognised the practical difficulties in organising employees at different locations. It has placed much weight on employees' ability to organise in determining bargaining units[120] and has noted that excessively large units in unorganised industries could prevent collective bargaining from ever beginning, undermining the legislature's intent to promote it.[121] Where this would be the case, the CLRB has in the past rejected the employer's proposed employer-wide unit and accepted the union's single-branch unit. Such an approach may be seen in the banking industry, where, for example, branch units were certified but branch certification later turned out not to be sufficiently effective. The CLRB began to certify a cluster of branches within a geographical area, while single-branch units, where appropriate, remained.[122] In the airline industry, where specialised communities of interest seem to be presumed, the CLRB has also demarcated smaller bargaining units.[123]

The OLRB has not been so quick in adopting the comprehensive unit where an employer has more than one location.[124] While the OLRB relies on the usual criteria to determine the appropriate unit, including the concern about undue fragmentation,[125] the OLRB has noted that there is no presumption in favour of the comprehensive unit and that several factors, including the number of locations, the organising pattern of the trade union, the lack of interchange between workers and local control of management, may point away from a larger unit designation.[126]

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117 *Woodward Stores (Vancouver) Ltd (Re)* (n 93). See also Colvin (n 46) 488–489.

118 *Bank of Nova Scotia (Port Dover Branch) (Re)* 1977 CLRBD No 91 (CLRB).

119 Ridgway M Hall, Jr, 'The Appropriate Bargaining Unit: Striking a Balance between Stable Labor Relations and Employee Free Choice' (1967) 18(2) Western Reserve LR 479, 539.

120 *Canadian Imperial Bank of Commerce (Re)* 1977 CLRBD No 90 (CLRB) para IV. See also *Canadian Union of Public Employees v Hospital for Sick Children* (n 48) para 17. In *Canadian Union of Bank Employees v Canada Trustco Mortgage Co* 1977 OLRB Rep June 330 (OLRB), the Board expressed its concern about the effect of comprehensive units on organisational rights.

121 See *Canadian Imperial Bank of Commerce (Re)* (n 120).

122 For an example in another industry, see *Hudson's Bay Co (The)* 1993 OLRB Rep October 1042 (OLRB), where the board amalgamated seven branches of a department store into one unit.

123 *Airwest Airlines Ltd (Re)* 1980 CLRBD No 288 (CLRB).

124 See *Retail Clerks International Assn v Canada Safeway Ltd* 1972 OLRB Rep March 262 (OLRB).

125 *Ponderosa Steak House (A Division of Foodex Systems Ltd) v HREU Local 743* 1975 OLRB Rep January 7 (OLRB). For pronouncements by the Ontario Board about its concern over fragmentation, see *The Niagara Parks Commission* 1995 OLRBD No 923 (OLRB) paras 43–44.

126 *SEIU Local 204 v K-Mart Canada Ltd* (n 108).

Changes in the Bargaining Unit

This factor may be considered in respect of either contemplated changes in the bargaining unit or in respect of changes once they have occurred. The contemplated change would have to be considered at the stage of application for certification.[127] Changes that have occurred later may have to be considered in an application for the Board to review a previous bargaining unit determination.[128]

In circumstances where it is contemplated that there might be a change to the size of the bargaining unit after certification, an individual's right to choose or reject trade union membership may be affected.[129] Should there be a contemplated increase in the size of the bargaining unit at the time of application for certification, the labour board in question would have to balance the right of present employees to be represented by a union for the purpose of collective bargaining with the rights of unknown future employees to select a bargaining agent.[130] To do this, the CLRB may apply the 'build-up' principle, which allows it to dismiss applications for certification where the workforce is likely to rise significantly in the near future.[131] In brief, this principle will apply when the employees presently at work do not constitute a substantial and representative segment of the total proposed workforce, when it is realistic that the proposed build-up will occur in a reasonably short period and when the build-up does not depend on factors beyond the employer's control.[132] If the build-up principle applies, the application for certification may be denied or delayed until the build-up is complete.[133] This principle, as applied by the Saskatchewan Labour Relations Board, was upheld by the Supreme Court of Canada (SCC) in *Labour Relations Board of Saskatchewan v The Queen et al.*[134] In this case, the SCC confirmed that a labour relations board, when determining whether or not it considers a proposed unit of employees to be appropriate for collective bargaining, not only can, but should, consider any factors which may be relevant, including the nature of the employer's business, the fact that the business was at its inception, and the fact that it was expected to increase its labour force enormously within a year.[135] However, the build-up principle has been

127 Rayner and others (n 41) 307–308.

128 A detailed consideration of these changes to be considered when a bargaining unit determination is reconsidered or reviewed falls beyond the scope of this study.

129 See Rayner and others (n 41) 307–308.

130 *Labour Relations Board of Saskatchewan v The Queen et al* (n 62). See also *United Food and Commercial Workers Local 1400 v K-Bro Linen Systems Inc* 2015 CanLII 43773 (SK LRB) para 40.

131 *Construction Workers Union, Local 151 v Saskatchewan Labour Relations Board and Technical Workforce Inc* 2017 SKQB 197 (CanLII).

132 See the Alberta Labour Relations Board in *UFCW Local 401 v Premium Horticulture Ltd* 2002 ALRBD No 35 (ALRB). See also *Teamsters Local 362 v Ecolab Ltd* 1991 Alta LRB Rep 678 (ALRB); *Rocky Mountain Ski Inc (Re)* 1994 Alta LRB Rep 475 (ALRB).

133 *CUOE v Pet-Pak Containers* 1997 OLRBD No 945 (OLRB).

134 *Labour Relations Board of Saskatchewan v The Queen et al* (n 62).

135 ibid.

applied with great caution,[136] and as a general rule, it does not apply to the construction industry where workforces typically fluctuate regularly and unforeseeably.[137] Only rarely has the build-up principle been applied in the construction industry by any jurisdiction in Canada.[138] A union seeking to represent employees in the construction industry is more likely to acquire certification through support in an unrepresentatively small start-up portion of the workforce.[139]

Comments

As pointed out in the introduction, a detailed analysis of the legal framework and Constitutional Court jurisprudence concerning the structural and policy-related challenges in South Africa's system of trade union recognition could not be accommodated within the scope of this article. References have been made to existing literature where such discussions are explored in depth. Relying on that body of scholarship and jurisprudence as authoritative sources, this article proceeded from the premise that both academic commentary and judicial decisions clearly underscore the difficulties confronting South Africa's labour relations system. These include challenges arising from the majoritarian model and the definition of the South African 'workplace' as the constituency within which majority rule applies. Furthermore, the Constitutional Court raised concerns regarding the exclusion of minority interests and the potential for labour unrest. Moreover, as pointed out above, the Constitutional Court has also suggested that a more inclusive interpretation of 'workplace' may be warranted. As previously noted, the prevailing winner-takes-all model originated during a period of relative stability and increasing consolidation within the trade union movement. However, the socio-economic and industrial context has since changed significantly, necessitating a critical reassessment of the model's ongoing relevance and appropriateness. These changes, along with the challenges pointed out above lend support to the argument that certain adaptations—drawing on the Canadian experience—may be both timely and advantageous for South Africa. Through a comparative analysis of Canadian labour law, the article illustrated how the concept of the 'appropriate bargaining unit'—certified by an independent third party—offers a

136 See, e.g., *United Food and Commercial Workers, Local 1400 v K-Bro Linen Systems Inc*. See also *Paddlewheel Riverboats Ltd v Manitoba Food & Commercial Workers Local 832* 1989 MLBD No 22 (Man LB); *UFCW v Cobi Foods Inc* 1987 OLRB Rep June 815.

137 See *Carpenters Local 1325 and Boilermakers Local 146 v JV Driver Installations Ltd* 2003 Alta ALRBR 282 (ALRB); *Carpenters Local 2103 v AV Concrete Forming Systems Ltd* 1988 Alta LRB Rep 23 (ALRB); *Rocky Mountain Ski Inc (Re)* (n 132); *UFCW Local 401 v Premium Horticulture Ltd* (n 132).

138 *Communications, Energy and Paperworkers Union of Canada v JVD Mill Services Inc* 2011 CanLII 2589 (SK LRB) para 134. See also *Construction Workers Union, CLAC Local 151 v Saskatchewan Labour Relations Board* 2020 SKQB 137 (CanLII) paras 65, 68.

139 *PPF Local 488 and IBEW Local 424 v Firestone Energy Corp et al* 2009 ALRBD 134 (ALRB) para 220; U*nited Brotherhood of Carpenters and Joiners of America Local Union No 1325 v Keenan, Hopkins, Suder & Stowell Contractors Inc* 2010 CanLII 37280 (AB LRB) para 12. See also *Rocky Mountain Ski Inc (Re)* (n 132).

more adaptable and context-sensitive approach to collective bargaining. The Canadian model's emphasis on minority representation and its accommodation of multi-location employers provide valuable insights for South Africa, particularly in the wake of post-Marikana reforms and the imperative to avert similar crises.

As discussed in relation to Canadian law—and particularly the application of majoritarianism—it has been shown that the independent determination of an 'appropriate bargaining unit' plays a crucial role in shaping the structure and effectiveness of collective bargaining. Canadian law views this determination as 'an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship.'[140] In addressing South Africa's difficulties in defining a 'workplace'—particularly where employers operate across multiple sites or divisions—the Canadian legal presumption that a bargaining unit should be confined to a single location may offer a valuable solution. However, as discussed above, this presumption is not applied in isolation. It must be considered alongside other relevant factors, such as the community of interest and bargaining history.

As shown above, an examination of Canadian labour law highlights the importance of considering the challenges involved in organising employees with differing interests into a single bargaining unit. It also underscores the value of taking into account any historical difficulties in collective bargaining to help prevent future labour relations problems. Adopting a similar approach in South Africa could assist in addressing issues linked to labour unrest, particularly where minority interests have previously been overlooked. This approach could be particularly beneficial in the South African context, especially in industries such as mining, where overly diverse bargaining units have been shown to contribute to internal conflict and undermine industrial peace.

In this regard, it may be contended that revising South Africa's definition of 'workplace' to incorporate elements of the Canadian 'appropriate bargaining unit' could significantly improve the regulation of trade union recognition. Such reform would more accurately reflect the realities of the contemporary labour environment and foster a more equitable and effective collective bargaining framework. In this regard, the following proposal merits attention:

Insertion of a new paragraph (c) into section 213 of the LRA, amending the definition of 'workplace' to reflect certain elements of the 'appropriate bargaining unit' found in the Canadian collective bargaining model.

140 *Canadian Union of Public Employees v Hospital for Sick Children* 1985 CanLII 899 (ON LRB) para 17; *Metroland Printing Publishing and Distributing Ltd* 2003 OLRD No 514 para 16.

Without dictating exactly what such a definition should entail, it is submitted that it should include at least the following requirements:

- that such a 'bargaining unit' should be determined by an independent body, such as the CCMA;
- that it should be, what such an independent body regards as, a unit of employees that would be appropriate for collective bargaining, or for the purposes of exercising the organisational right(s) in question, as the case may be; and
- that the independent body, when determining the appropriate unit, must consider the relevant factors including, but not limited to:
    - the community of interest among the employees in the proposed unit in such matters as work location, hours of work, working conditions and methods of remuneration;[141]
    - significant minority interests;
    - potential for labour unrest and/or labour relations problems;
    - bargaining history (for example, evidence of a history of difficulty in organising employees into a single group);
    - the consequences of the fragmentation of bargaining units for collective bargaining;
    - the ability of a trade union to organise;
    - the nature of the employer's business and operation; and
    - changes in the bargaining unit.

Conclusion

This article began by outlining how the policy choices of voluntarism and majoritarianism, along with the decision to anchor the system in the 'workplace' constituency, have been identified as contributing factors to the challenges currently facing South Africa's labour relations environment. References were made to the concerns expressed by the South African Constitutional Court about the potential for labour unrest where minority interests are ignored. Of further significance is that the Constitutional Court has raised the possibility of a workplace definition adapted to be 'fairer'[142] to minority unions.

A consideration of the Canadian experience showed that its approach to challenges associated with a majoritarian model, and the success with which the Canadian model has implemented third-party intervention in a system of regulation of trade union recognition, may offer some insights for the more appropriate regulation of trade union recognition in South Africa. As demonstrated, the Canadian legal system—like that of South Africa—strongly supports majority unions. However, it also reflects a clear

141 Trade Union Act RSNS 1989 c 475 s 25(14).

142 See also *Association of Mineworkers & Construction Union v Chamber of Mines of SA* (n 3) para 51.

awareness of the potentially unfair or overly harsh consequences of applying majoritarianism either unconditionally or within an inappropriate constituency.

Canadian law was considered with reference to the independently certified 'bargaining unit', as opposed to the South African 'workplace'. An analysis of the determination of the 'appropriate bargaining unit' as the constituency within which the principle of majoritarianism applies was shown to depend on two particular factors that are also relevant to South Africa. The first of these is how best to accommodate special or significant minority interests in a majoritarian system, with the primary concern always being that all employees included in the same bargaining unit receive equal representation. Put differently, the Canadian model accepts that a union representing a specific interest group should not be allowed to bargain on behalf of other interest groups. The second factor considered in determining the 'appropriate bargaining unit' is how best to address union recognition in the context of multi-location employers. In such cases, there is a historical presumption in favour of defining the bargaining unit as confined to a single location. As pointed out, these two factors—minority interests and multi-location workplaces—contribute to the challenges facing the South African labour relations context. Attention to these factors might have gone a long way in preventing the disastrous events at Marikana. In fact, the very goal of the post-Marikana legislative amendments seems to have been to address these challenges. In this regard, when determining the appropriate bargaining unit, an independent third party is obliged to take into account relevant factors and the specific facts and circumstances of the case in question. This may include, for example, a history of particular difficulty in organising all employees in a single group. There is also a clear recognition that the appropriate bargaining unit may differ significantly from one case to another.

A consistent theme throughout this article—and one particularly relevant to the South African context—is the Canadian legal system's recognition that there is no 'one-size-fits-all' or default bargaining unit suitable for all contexts and circumstances. This flexible approach underscores the importance of tailoring bargaining units to the specific dynamics of each workplace. Reality, as it plays out in South Africa, seems to send out the same message. Where this is not given effect to, the Canadian courts have pointed out that 'a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required.'[143] In the South African context, positive governmental action might start with the realisation that the 'workplace' with its 'one-size-fits-all'[144] definition and its limiting effect on the right to freedom of association is no longer appropriate. In this regard, it is submitted that proposed amendments to the South African definition of 'workplace'—to reflect elements of the 'appropriate

143 *Dunmore v Ontario (Attorney General)* 2001 SCC 94, [2001] 3 SCR 1016 (SCC) para 23. See also the minority judgment by Dickson CJ in *Reference re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313, (1987) 38 DLR (4th) 161.

144 David J Doorey, 'Clean Slate and the Wagner Model: Comparative Labor Law and a New Plurality' (2020) 24(1) Employee Rights and Employment Policy J 95, 106.

bargaining unit' found in the Canadian collective bargaining model—could meaningfully contribute to addressing the specific challenges currently facing South Africa.

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