The Legal Concept of Employment: Marginalizing Workers

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ABSTRACT

The topic of this report is the legal concept of employment because employment is the most important concept for determining the legal protection associated with different forms of paid work. Employment establishes the boundary between the economic zone of commercial relations, entrepreneurship, and competition, on the one hand, and the economic zone of labour protection, economic dependency, and regulation, on the other. This report focuses on how the law distinguishes between employment and self-employment, placing emphasis on own-account self-employment, where the self-employed person does not employ other employees. This case study is selected because it provides an opportunity to examine the normative question of whether labour protection ought to be limited to only certain forms of paid work. Moreover, the dramatic growth of self-employment since the 1980s in Canada raises important questions about the operation of labour markets, whether self-employment is coterminous with entrepreneurship, and the adequacy of prevailing legal tests of employment status for determining the personal scope of labour protection and social benefits.

Employing a multi-disciplinary approach to examine the distinction between employees and the self-employed, the report is divided in four parts. Part One canvasses the sociological, legal, and statistical bases for the distinction. Part Two provides a portrait of the self-employed in Canada, drawing on public-use micro-data from Statistics Canada, and places it in an international context. Shifting to legal analysis, Part Three evaluates the legal history of the scope of employment and challenges the conventional legal narrative that assumes the distinction between employment (a contract of service) and independent contracting (a contract for services) is a deeply embedded and long-standing one. Building upon this revised account, Part Four provides an overview of the different legal definitions of “employee” operating in the

various regimes of employment regulation across Canada, including social insurance and revenue-raising regimes. Part Five addresses the appropriate personal scope of labour protection in light of the conceptual, statistical, historical, and legal analyses, and provides recommendations for law reform. The report concludes that it is necessary to abandon the distinction between employees and independent contractors for the purpose of determining the personal scope of labour protection and that such laws will have to be redesigned in order to accommodate different forms of paid work.

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EXECUTIVE SUMMARY

The topic of this report is the legal concept of employment because employment is the most important concept for determining the legal protection associated with different forms of paid work. Employment establishes the boundary between the economic zone of commercial relations, entrepreneurship, and competition, on the one hand, and the economic zone of labour protection, economic dependency, and regulation, on the other. This report focuses on how the law distinguishes between employment and self-employment, placing emphasis on own-account self-employment, where the self-employed person does not employ other employees. This case study is selected because it provides an opportunity to examine the normative question of whether labour protection ought to be limited to only certain forms of paid work. Moreover, the dramatic growth of self-employment since the 1980s in Canada raises important questions about the operation of labour markets, whether self-employment is coterminous with entrepreneurship, and the adequacy of prevailing legal tests of employment status for determining the personal scope of labour protection and social benefits.

Employing a multi-disciplinary approach to examine the distinction between employees and the self-employed, the report is divided in four parts. Part One canvasses the sociological, legal, and statistical bases for the distinction. Sociological research reveals that although the category of self-employment is heterogeneous, for most of the self-employed the connection between self-employment and entrepreneurship, ownership, and autonomy is weak. For many people self-employment is likely to be precarious in terms of pay, benefits, and security. Legal tests used to distinguish between employees and self-employed persons are becoming increasingly vague and difficult to apply as courts and administrative decision makers move to open-ended, multi-factor tests that provide little guidance as to their application. At the

statistical level, the distinction between employment and self-employment is based on the mode of remuneration. The problem is that this definition is difficult to operationalize and does not correspond to legal definitions.

Part Two provides a portrait of the self-employed in Canada, drawing on public-use micro-data from Statistics Canada, and places it in an international context. In Canada self-employment was a significant source of job growth in the 1990s and has been increasing more rapidly among women than men. In 2000 the self-employed represented 16% of all workers. Much of the growth has been in the service sector. The majority of the self-employed do not employ their own employees, and women are more likely than men to be located at the bottom of the self-employed hierarchy. The self-employed are also much more likely to work part-time than employees and to have lower incomes. There is sharp income polarization among the self-employed, with 25% having incomes of $20,000 or less in 2000. Moreover, many of the self-employed depend on spouses for access to benefits. A significant number of self-employed closely resemble employees in that many of them work on their clients' premises or on premises supplied by clients and are dependent on former employers as clients.

Part Three evaluates the legal history of the scope of employment and challenges the conventional legal narrative that assumes the distinction between employment and independent contracting (self-employment) is a long-standing and deeply embedded one. It finds that the legal definition of employee owes much more to statute than to contract and the common law, and that decisions about the personal scope of labour law were often made in the context of broader public policies and in consideration of third-party interests. These factors, in conjunction with the wide array of contractual relations that were entered into for the performance of work (often with a view to limiting employer liability), help to explain why

historically no clear and coherent test for distinguishing between employees and self-employed emerged.

Building upon this revised account, Part Four provides an overview of the different approaches adopted by legislators, administrators, and adjudicators who have the responsibility for determining the personal scope of labour law. In some areas, most notably human rights and occupational safety, the salience of the distinction has been lessened either by expressly extending coverage to persons not classified as employees or by deeming such persons to be employees. In others, employment status has remained as the basis for coverage, but the test for determining who has that status has been altered to allow the category to expand (or contract) to fit the class of persons who are perceived either to need or deserve the benefit of labour law or social protection. Where this later strategy has been pursued, as for example in the common law determination of employment status for the purpose of vicarious liability, adjudicators have moved away from the presence or absence of direct subordination to the consideration of an open-ended list of factors that, in principle, should be identified and weighed pursuant to a purposive analysis of the context in which the question has arisen. Despite these efforts, the difficulty of using the categories of "employee," "dependent contractor," and "independent contractor" persists in a world in which the actual differences between these groups are diminishing. Moreover, the purposive approach to determining the scope of labour law transforms the legal category "employee" into a cipher whose meaning is to be determined on the basis of the view of the decision maker of the appropriate class of persons who should receive the benefit of the law.

Part Five addresses the appropriate personal scope of labour protection in light of the conceptual, statistical, historical, and legal analyses, and provides recommendations for law reform. It proceeds by identifying a range of work relationships or contracts, identifying the

dimensions of legal regulation and their instrumental goals and normative concerns, and providing normative, economic, and institutional justifications for recommending a specific scope of coverage in a particular context. Its general recommendation is that it is necessary to abandon the distinction between employees and independent contractors for the purpose of determining the personal scope of labour protection, but that labour protection laws will need to be re-designed in order to accommodate the varied conditions under which different forms of paid work are performed. Specific recommendations are offered in relation to the different dimensions of labour regulation.

TABLE OF CONTENTS

LIST OF FIGURES, CHARTS AND TABLES

Introduction: The Significance of the Legal Concept of Employment

Employment is a legal concept that is crucial for determining the legal protection, social recognition, and economic security associated with different forms of work. As a legal category employment is highly selective; unless paid work fits into the narrow aperture of employment it is virtually unregulated. According to a prominent legal text on the contemporary contract of employment in Canada, the test for employee fixes the boundary between "the economic zone in which business entrepreneurs are expected to compete" and the "economic zone in which workers will be afforded the relatively substantial protections of the labour standards ... and of the common law" (England, Christie, and Christie 1998, 2-1). Workers seeking reasonable notice, minimum wages, the right to refuse unsafe work, statutory holidays, or maternity leave must establish to the satisfaction of an adjudicator that they are employees in order to enjoy these legal rights. Employee status is also a prerequisite, in the overwhelming majority of cases, for the application of collective bargaining legislation. Moreover, it is crucial for a range of other benefits in our society from employment insurance to pensions. And owing to our system of payroll taxes and withholding income tax at source, employment is also a huge source of revenue for the state.

This report focuses on how the law distinguishes between employment and self-employment, especially self-employment of the own-account variety, that is, where the self-employed person does not employ other employees (Economic Council of Canada 1990). This focus has been selected for a number of reasons. First, the legal distinction between employment and self-employment allows us to identify and evaluate the basis for limiting labour protection to only certain forms of paid work. This question is particularly important in light of the commitment that the International Labour Organization (ILO) made in its 1998 Declaration on

Fundamental Principals and Rights at Work to the equality of treatment of different forms of work (ILO 1998a). The goal of providing opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security, and human dignity is truly momentous, for as Amartya Sen (2000, 119) remarked, it applies to all workers, not just workers in the organized sector or wage employment, but also to homeworkers and the self-employed. From a normative perspective the policy challenge is to extend effective legal and social protection to self-employed workers (ILO 2000a, b; 2002).

Second, the remarkable growth of self-employment since the early 1980s calls into question models of how capitalist labour markets operate, theories about entrepreneurship, understandings about the nature of self-employment, official measures of self-employment, and the adequacy of the legal tests of employment status for determining the personal scope of labour protection and social benefits. While self-employment is seen as an important source of growth of entrepreneurship, bringing with it the potential for longer term employment growth, in 2000 the Organization for Economic Co-operation and Development (OECD) also identified a number of concerns associated with its growth – concerns about the working conditions, training, security, and income of the self-employed, as well as self employment as a form of disguised employment (OECD 2000). The changing nature of self-employment as well as the diversity of the people who make up the self-employed and the nature of their employment poses a number of challenges for public policy.

The report employs a multi-disciplinary approach to analyze the distinction between employment and self-employment. Its focus is on how the law uses employment status to determine the personal scope of labour protection and social benefits. The rationale for distinguishing between employment and self-employment will be examined in the first part, which canvasses the sociological, legal, and statistical bases for the distinction. The second

part provides a portrait of the self-employed in Canada drawing upon available statistical data. It begins by situating the Canadian context in larger international trends, following with a detailed examination of the demographic features of self-employed workers in Canada combined with an exploration of different dimensions of their paid work. This portrait will be used as a basis for assessing whether or not there are good legal, social, or economic reasons for continuing to distinguish between employment and own-account self-employment in a range of legal contexts.

Following the statistical analysis, the report turns to how the law distinguishes employment (the contract of service), on the one hand, from independent contracting (a contract for services), on the other. Part Three critically evaluates the conventional narrative that assumes the salience of the distinction between employment and self-employment and views the emergence of the contract of employment and employment and labour regulation as a shift from status to contract and back to status. Building upon a revised account of the history of the legal concept of employment in common law jurisdictions, Part Four provides an overview of the different legal definitions that are used today in Canada in various employment- and labour-regulatory regimes as well as for social wage and revenue purposes. The report concludes by proposing a range of law reform solutions to the problem of determining the personal scope of employment and labour law protection and social benefits.

While our focus is on how the law distinguishes between employment and other forms of work, the provenance of the legal definition of employee and its contemporary application are influenced by specific understandings of the role and nature of self-employment. For this reason it is crucial to examine the conceptual, historical, and statistical dimensions of self-employment. Legal definitions and normative aspirations operate on the basis of social understandings of familiar terms that refer to social categories, which have economic, legal,

moral, and ideological significance. This report takes the law seriously, probing the origins of the legal concept of employment and examining its contemporary definition and application in a range of different legal contexts. But it also attempts to reveal how legal conceptions of employment are influenced by social understandings of the meaning of self-employment.

Part One: Contested Categories: Defining Employees and the Self-Employed

I. Conceptual Confusion

A contemporary sociologist pointed out that "the meaning and measure of self-employment is somewhat of an enigma" (Aronson 1991, xi). Despite the long usage of the term (Linder 1992) there is no generally accepted definition. Most frequently self-employment is simply contrasted with employment, which in turn is not precisely defined. In part, the complexity of defining the terms "employment" and "self-employment" arises from the fact that their definitions depend upon the context in which they are being used. Angela Dale identified three important contexts in which the self-employed may be distinguished from employees – the sociological, legal, and statistical (1991). She also pointed out that not only is there debate in each of these literatures about how to define these terms, the predominant definitions in the different contexts are not perfectly congruent, although they overlap.

This part provides a brief overview of how employees and the self-employed are conceptualized in the sociological, legal, and statistical literatures in order to identify the rationale for drawing the distinction in a particular way and to trace the overlap in the different definitions. Despite the fact that the majority of sociologists would now agree that "it is probably

inappropriate to attempt to model self employment as a single aggregate" (Meager et al. 1994), an ideal type of self-employment, marked by autonomy and control, continues to inform the legal and statistical definitions.

A. Sociology: Distinguishing between Employees and the Self-Employed

For many sociologists seeking to describe and understand the structure of societies, class is a key component. Both Marx and Weber regarded the ownership of means of production as crucial for understanding the nature of power and authority relationships between labour and capital (Curran and Burrows 1986; Dale 1986, 450; Elias 2000, XII). Different classes are distinguished in terms of the ownership of the means of production, autonomy of work, and expropriation of the labour power of others. Sociologists have identified three classes in capitalist societies:

1. employers (the bourgeoisie) who buy the labour power of other and thus assume some authority or control over them;
2. self-employed without employees (petit bourgeoisie) who do not sell their labour nor buy the labour of others;
3. employees (proletarians) who sell their labour power to employers and thus place themselves under their authority and control (Goldthorpe1980; Wright et al. 1982).

As an ideal type, self-employment is linked to ownership, autonomy, and control over production, clearly distinguishing crafts-people, independent professionals, and small business proprietors from waged workers (Eardey and Corden 1996, 13). Historically self-employment has been associated with independence and contrasted with the dependent status of employees (Bercussen 1996; Fraser and Gordon 1997). Two key elements defining the self-

employed are their ownership of the means of their own production and self-direction or autonomy in the work (Dale 1986).

However, this ideal type is becoming increasingly distant from the reality of self-employment. Researchers in Britain, where self-employment grew remarkably during the 1980s, were among the first to identify the changing nature of self-employment. They recorded a rise in consultants, professionals, and contractors, especially in the service sector, and a decline in small business owners who employed other workers (Dale 1986; Eardley and Corden 1996; Hakim 1986; Leighton and Felstead 1992). They also discovered that a sizeable portion of the self-employed included homeworkers and labour-only contractors, as well as franchisees, freelancers, and outworkers. The employment situations of these workers differ dramatically from the ideal type of the self-employed since they do not own much by way of means of production, exercise little control over production, and do not accumulate capital (Brodie, Stanworth and Wotubra 2002; Bryson and White 1996a; Dale 1986, 1991; Eardley and Corden 1996; Felstead 1991, Lorinc 1995; Stanworth and Stanworth 1997). Studies indicate that changes in contractual relationships, specifically, the growth of "market-mediated" work arrangements and networks of firms, relate directly to the rise in self-employment; the nature of the contracts for the provision of labour are changing such that commercial, as distinct from employment, contracts are becoming commonplace (Abraham 1990, 85; Engblom 2000; Jurik 1998, 7). For many of the new recruits into the ranks of the self-employed the link between self-employment and entrepreneurship is no longer obvious.

Moreover, research by Wallace Clement (1986) on fishers in Canada demonstrated that even the paradigmatic form of self-employment, the petit bourgeoisie, is perfectly compatible with a great deal of subordination. His detailed report of the property relations in the fisheries illustrated how large capital can shift considerable risk and the supervision of labour on to direct

producers. Like Clement, Rainbird (1991) also focused on the social relations of production of the self-employed in relation to larger capital, although she examined a range of self-employment and small business formation in the UK. Concentrating on self-employed who contribute both labour and capital to the production process, she found that

> the majority of the self-employed earn a subsistence living only, although there is some scope for them to appropriate surplus value and accumulate capital of their own by virtue of their ownership of capital, self-exploitation and employment of labour (Rainbird 1991, 214).

These findings led her to conclude that much of self-employment could be classified as disguised wage labour. In a similar vein, Linder (1992) argued that the self-employed should not be conceived of as a class separate from employers and employees, but rather should be conceptualized as a hybrid class more closely resembling wage workers than entrepreneurs.

Sociologists now recognize a continuum of self-employment that differs in terms of the quality of, and the rewards from, the work and the chances of economic success and security (Hakim 1988; Leighton and Felstead 1992). Self-employment ranges from disguised employees (ILO 2000 a, b, 2002; OECD 2000) and franchisees through skilled crafts people and independent professionals to the owners of incorporated businesses. At best, some types of self-employment provide autonomy allowing people to realize their potential and align rewards with efforts; at worst, self-employed workers are marginal (ILO 1990). The range within the ranks of the self-employed is explained by a combination of structure, agency, and practice. The concept of “social location” has been developed to specify the ways in which political and economic conditions interact with class, ethnicity, culture, and sexual orientation to shape the meanings and strategies of working men and women (Jurik 1998; Lamphere, Zacilla, Gonsalves, Evan 1993). This framework helps to explain not only why self-employment is very

different for men and women across countries, but also why the type and proportion of self-employment differs between countries (OECD 2000).

Sociological research on the self-employed suggests that the conception of self-employment that links being self-employed inextricably with entrepreneurship, ownership, and autonomy has more to do with ideology than reality. Self-employment is heterogeneous and much of it is likely to be precarious in terms of pay, benefits, and security. But despite this social reality, the ideal of self-employment continues to influence the legal norm of employment and thus is still used to justify excluding self-employed workers from labour protection and many social benefits

B. The Legal Definition of Employee

The legal status of being an employee is the gateway to most employment-related protection at common law and under legislation, the statutory regimes of collective bargaining, and a range of social benefits from employment insurance to pensions. The legal definition of the term "employee' determines the personal scope of labour protection (Benjamin 2002; Davies and Freeland 2000; ILO 2003). People who work for pay but who are self-employed are treated for most legal purposes as independent entrepreneurs, who, unlike dependent employees, do not need labour protection. Instead, independent contractors are subject to the rigours of competition and the principles and institutions of commercial law.

In the conventional legal narrative, what distinguishes an employee from an independent contractor who also performs personal services is the degree of control exercised by the purchaser over the labour of the person performing the service. The importance of control, understood as authority to direct the labour process, is attributed both to the historical legacy of

master and servant law with its emphasis on subordination and the nature of early production processes in which masters could directly supervise workers (Carter et al. 2002). Moreover, the common law's emphasis on control is compatible with the view of classical economists such as Adam Smith, who regarded the key distinction between employees and independent contractors to be the fact that the former relinquish to the employer the complete disposition over their activities except for agreed upon limits (Linder 1992, 13). Similarly, the predominant legal understanding of the employment relationship as primarily contractual (England, Christie and Christie 1998; Langille 2002) reinforces the classical view of employment status as freely chosen and the terms of the bargain as the outcome of negotiation.

In assessing the conventional legal story, it is important to bear in mind the caution of Otto Kahn-Freund (1972, 116-7) the comparative labour law scholar, that "to mistake the conceptual apparatus of the law for the image of society may produce a distorted view of the employment relationship." The origins of the legal concept of employee are much more tangled than the conventional story suggests. Recent research shows not only that the definition of employee owes much more to statute than to contract and the common law, but also that often the distinction between dependent workers and independent entrepreneurs was not particularly important or relevant. Little wonder that a prominent legal scholar complained that the cornerstone of labour law, the contract of employment, was built upon a "core of rubble" (Hepple 1986 quoting Rideout 1966, 111). Moreover, according to Simon Deakin (1997), the emergence of the control test as the key to the resolution of legal disputes over employment status in the UK was an ideological innovation to limit the extension of social legislation.

Despite new historical research on the origins of the legal concept of employment and well-established critical commentary on the conventional legal story, control continues to be critical to the determination of employment status and contract continues to be regarded as the

cornerstone of employment law. According to a recent Canadian labour law text, "the test of control is of great importance today when deciding whether or not a contract of employment exists." However, it goes on to acknowledge, "the notion of control is an elusive one" (Cart er et al. 2002, 166). The contours of the legal definition of employee are difficult to draw (Davidov 2002 a, b). In a case decided in 2001, the Supreme Court of Canada acknowledged that

> there is no one conclusive test, which can be universally applied to determine whether a person is an employee or an independent contractor. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker' activity will be a factor. However, other factors to consider include whether the workers provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her task.[1]

Although the central legal task continues to be distinguishing between dependent employees and the independent self-employed, the question is whether this distinction should continue to be central to determining the scope of labour protection. Since 1944 the ILO has called for efforts to be made to ensure that the self-employed enjoy the same level of protection as other categories of workers regarding social security and has recently re-affirmed this position (ILO 2000a, b, 2002). What is the normative basis for distinguishing between the self-employed and employees for the purpose of legal protection and social benefits? In fact, as Part Four will demonstrate, in some areas of the law, notably workers' compensation and occupational health and safety, the distinction is breaking down. The need to examine the normative basis for determining the scope of labour protection is particularly urgent, given the increase in the number of people whose legal and contractual status is that of self-employment but whose actual work status is very far from that of the small business owner (Eardley and Corden 1996, 14).

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1 *67122 Ontario* v. *Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983.

Even if the distinction between dependent employees and independent entrepreneurs continues to be accepted as the boundary between labour protection and commercial regulation it would still be necessary to consider whether the criteria that historically have been used to determine the scope of labour protection are still useful (ILO 2003). Currently the legal determination of employment status is extremely complex and very uncertain. There are a variety of different legal tests that can be applied, a multitude of factors to consider, and a range of different legal contexts in which the question of status is raised (Davidov 2002 a, b). Although some legal commentators have urged adjudicators to use the flexibility of the legal tests to develop a purposive approach to the question of whether a person should be treated as an employee (Davidov 2002 b; Langille and Davidov 1999), this "attempt to infuse a measure of rationality, orderliness and predictability into the law" (Carter et al. 2002, 87) has been, as will be discussed in greater detail in Part Four, more of an ideal than a reality. Frequently the purpose of the legal determination of employee status "disappears in the hodge-podge of tests and facts in each case" (Carter et al. 2002, 166).

Not only is the rationale for making the distinction between employees and independent contractors the basis for determining the scope of labour protection less persuasive now than before, the current legal tests are under considerable stress on account of the changing nature of employment relationships. According to Hugh Collins (2001, 31) "the advent of the flexible employment contract presents an even greater challenge to legal classification and the determination of the proper scope of labour standards than the earlier difficulties provoked by vertical disintegration." Firms attempt to shift the risks of productive activity and employment onto workers by categorizing work relationships as commercial arrangements rather than employment (Beck 2000; Chaykowski and Gunderson 2001, 39; Deakin and Wilkinson 1991, 125; Beck 2000). False categorization (otherwise known as disguised employment or false self-

employment) is just one problem that comes with relying on a legal definition that is out of tempo with the reality of employment relations.

C. Defining Self-Employment: Statistical Approaches

At a statistical level, employment and self-employment are distinguished by their mode of remuneration, employees receiving wages and the self-employed enjoying profits (Elias 2000; ILO 1990; Loufti 1991; OECD 2000). In broad terms, self-employment can be considered to be the residual category of gainful employment not remunerated by a wage or salary (OECD 1992, 155). The distinction between employment and self-employment is also supposed to capture both the greater risk and autonomy associated with self-employment (Elias 2000 XII). However, the use of the criterion mode of remuneration is not a very precise measure of these features. As the preceding discussion of the sociological literature emphasizes and the statistical portrait of self-employment in Canada reinforces, attempts to give a generic character to the self-employed mystify a broad spectrum of socio-economic positions (Bögenhold and Staber 1991, 225).

The statistical measure of self-employment is also supposed to correspond with the legal definition. In fact, Statistics Canada (1997, 1) goes so far as to state that "in practice, the distinction between self-employment and employee status coincides with rules set out by government bodies such as Revenue Canada and Human Resources Development Canada regarding income tax liability, eligibility for regular employment insurance benefits and applicability of labour legislation." While there is some overlap between the legal and statistical definitions, inconsistent legal determinations of employment status both within and between legal regimes as well as the problem of disguised employment means that the fit between the definitions is not as close as Statistics Canada claims. In Britain, several researchers have

commented on the gap between the legal and statistical definitions (Dale 1986, 1991; Eardley and Corden 1996; Hakim 1989).

The problems with the existing statistical measures of self-employment are well known. For this reason, the ILO (1990) stated, "ideally self-employment might be defined more positively according pre-selected criteria, such as the economic criteria of 'risk' (to capital involved in the business), 'control' and 'responsibility'." However, as Alex Bryson and Michael White (1996b, 11) observe "it is actually very difficult to express in operational terms a definition of self-employment meaningful in labour market terms as distinct from employment which corresponds to 'formal' definitions used by authorities, and individuals' perception of what it is to be self-employed."

But despite the concerns about using mode of remuneration as the basis for distinguishing between paid employees and the self-employed, it underpins the International Classification of Status in Employment (Elias 2000, XI) as well as the majority of Statistics Canada's survey instruments. On the basis of these definitions, in Canada and elsewhere, total employment is divided into two broad groupings: paid employees and the self-employed. The Labour Force Survey is the principal survey used to capture total employment in Canada and, hence, newer surveys conform to its definitions of self-employment and paid employment. As Figure I.1 illustrates, within this survey, the category "paid employees" includes both public employees and private employees. The self-employed, in contrast, are divided into three broad categories: working owners of incorporated businesses, farm, or professional practice (Manser and Picot 1999, 3.3; Statistics Canada 1997, 5);[2] working owners of unincorporated businesses

[2] In contrast to the dominant mode of classification in Canada, countries such as the U.S., the UK, Australia, France and Germany (and for the purposes of National Accounts in Canada), the incorporated self-employed are included in the paid worker category. The rationale is that the incomes of those with incorporated businesses comes from both wages and profits even though they share the risk associated with business ownership. Under this classification system, self-employed operators of incorporated

and self-employed that do not have a business; and unpaid family workers, including persons who work without pay on a farm or in a business or professional practice owned and operated by another family member living in the same dwelling. Analysts normally subdivide the two categories working owners of incorporated and working owners of unincorporated businesses by those with and without paid help, known typically as *employers* and *own-account self-employed*. In 2000, paid employees made up 84% of total employment while the self-employed constituted 16.2%. Among the self-employed, incorporated employers represent 3.6% of total employment, unincorporated employers represent 2%, incorporated own account represent 2%, unincorporated own account represent 8.3% and unpaid family workers represent 0.3%.

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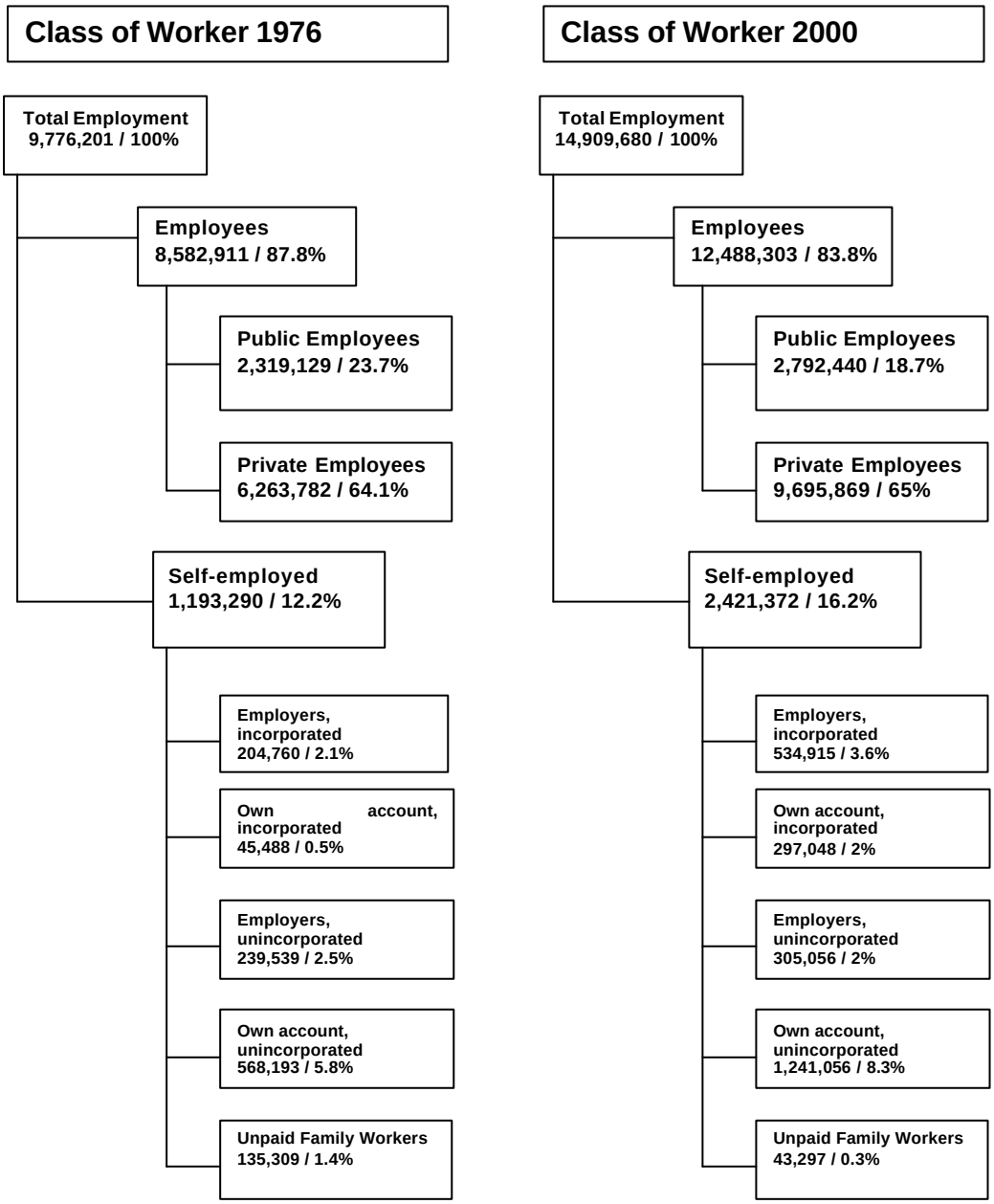
businesses form an integral part of the paid worker category and the residual category of self-employment refers *only* to the self-employed that are unincorporated. These different definitions make it difficult to compare patterns and trends in self-employment cross-nationally. Yet, using Canada's Labour Force Survey, it is possible to adopt a classification system mirroring those in the U.S., the UK, Australia, France and Germany.

Figure I.1



Source: LFS Public Use Microdata

Source: LFS Public Use Microdata Run

Part Two: The Changing Nature of Self-Employment

I. International Developments

A. Trends

Self-employment has been a significant source of job growth in many OECD countries since the mid-1970s. In the last two economic cycles (1979-1990 and 1990-1997), it grew faster than paid employment in 15 out of 24 OECD countries. This growth contrasts sharply with the early 1970s when self-employment fell in a majority of OECD countries. But despite the growth in self-employment across the OECD, the differences between countries are profound. Self-employment as a share of total employment varies across the OECD – in 1997, from 5% in Norway to almost 30% in Mexico and Greece. At 16% Canada has a relatively high proportion of self-employed (OECD 2000, 157).

The growth of self-employment as a share of employment in OECD countries has generated an international and interdisciplinary debate over its significance and its causes. Many commentators emphasize the positive features of self-employment, especially its relationship with entrepreneurship, suggesting that the growth of employer self-employment, in particular, leads to job growth, more autonomy, and higher incomes (Loufti 1991). By contrast, other commentators stress the diversity within the ranks of the self-employed, pointing out that for many self-employed entrepreneurship and self-employment do not coincide (Bögenhold and Staber 1993, 471; Bögenhold and Staber 1991, 224; Dale 1991; Felstead 1991; Rainbird 1991). A large proportion of the self-employed are in very precarious economic situations, receiving low remuneration and enjoying little in the way of employment security or employment-related

benefits (Dale 1991,44). The OECD (2000, 187) noted that several countries, including Canada, "have seen growing numbers of self-employed people who work for just one company, and whose self-employment status may be little more than a device to reduce total taxes paid by the firms and the workers involved."

It is important to distinguish between different types of self-employment when examining the international trends. Self-employed people can be employers who hire other paid employees or they can be own account, which means that they do not hire anyone else. Generally, countries with high proportions of employers among the self-employed population have experienced greater job growth than those with high proportions of own-account self-employment. In the 1990s, however, employer self-employment only rose in about half of OECD countries. In Canada and Germany, the two OECD countries where self-employment grew most, employer self-employment fell sharply (OECD 2000, 159).

Flow analysis, examining changes from one employment status to another, provides insights into the characteristics of self-employment since it illustrates patterns of inflow into self-employment over time and comparisons of the degree of stability in various states of self-employment. In its *Employment Outlook, 2000* the OECD found that very few own-account self-employed workers become employers and very few unemployed people turn to self-employment as a means of labour market re-entry. These findings indicate the importance of paying attention to different types of self-employment and suggest that self-employment is not necessarily linked to entrepreneurship (Lin, Yates and Picot 1999b; OECD 2000, 166).[3]

[3] In the European Union, there is also no apparent correlation between inflows from unemployment to self-employment and the level of the unemployment rate, disproving the hypothesis that people tend to move into self-employment in greater numbers during recessions due to tight labour markets. In Canada, however, there is a small negative correlation between the unemployment rate and self-employment entries (OECD 2000).

Not only is it possible to use the statistics to distinguish between the self-employed in terms of whether or not they hire paid employees, it is also possible and, indeed, useful to use them to distinguish four broad categories of self-employed persons: professionals, skilled crafts-people, petit bourgeoisie, and disguised employees (ILO 1990). Since the 1970s, there has been a change in the nature of self-employment away from the petit bourgeoisie who owned small shops and restaurants to consultants, professionals, and contractors (Eardley and Corden 1996; Jurik 1998). By industry, over the 1990s, the sectors contributing most to the rise in self-employment across OECD countries were finance, insurance real estate, renting and business, and services including community, social, and personal services. By occupation, across the OECD, professionals contributed significantly to self-employment growth (OECD 2000, 162). Recently the OECD observed that the borders between self-employment and paid employment are blurring (OECD 1992, 155).

Reflecting the feminization of the labour force, the proportion of the self-employed that are women grew markedly in the post-1979 period, outstripping growth rates for men in a majority of countries. Yet it was primarily in the 1980s that the growth rate in female self-employment forged ahead of women in total non-agricultural employment. Across the OECD, the proportion of self-employed people tends to increase with age and in most countries, "both the better-educated and the less-educated have above-average probabilities of being self-employed" (OECD 2000, 159).

There is a wide range of income and working conditions across the self-employed. Relative to the earnings of employees, the income distributions of the self-employed tend to be less equal than paid employees in most OECD countries, including Canada (Robson 1997, 502). The working conditions of many self-employed workers are also inferior to paid employees. Specifically, the self-employed are less likely to have access to training, earn

overtime pay or receive maternity, parental or sick leave, (OECD 2000, 170) and they report longer working hours than paid employees (Delage 2002; HRDC 1998; OECD 1992, 2000, 170). But despite what would be characterized as low income and poor working conditions, self-employed people across the OECD report greater autonomy than employees along the dimensions of control, pace, and duration of work (OECD 1992, 156; OECD 2000, 169).

B. Reasons for Growth

Analysts offer a range of theories for what the OECD characterizes as a "partial renaissance" in self-employment, including new opportunities for entrepreneurship, unemployment, changes in industrial organization, and efforts to avoid regulation. Studies on the determinants of self-employment tend to focus either on "pull factors", such as the desire for flexibility and independence by workers, or "push factors", including downsizing and subcontracting (Moore and Muller 2002). Some researchers argue that technological changes and shifting employment norms promote an "entrepreneurial culture" and "entrepreneurial goals", defined as the desire to "grow your own business" and work autonomously, amongst a large segment of the employed population. From the "pull" vantage point, self-employment is viewed as an especially viable option for those people with financial resources and work experience in small organizations (OECD 1992; Delage 2002). At the same time, the "push" strand of research posits a connection between high rates of unemployment and the growth of self-employment, suggesting that the particularly rapid growth of self-employment is a symptom of labour market deficiencies. Dieter Bögenhold and Udo Staber argue, for example, that while individual motives to become self-employed are diverse, self-employed persons at the fringes of the economy are resorting to self-employment because of persisting labour market problems, including high unemployment. They observe:

> what is remarkable about recent developments is that the resurgence of self-employment [began] in all countries at the same time. The revival of self-employment roughly coincides with a period of economic stress beginning in the mid-1970s, characterized by slow economic growth (relative to post-World War II standards), rising levels of unemployment and part-time employment, and the spread of various forms of contingent and substandard employment (Bögenhold and Staber 1991, 227.).

However, flow analysis of employment states reveals that the absence of a significant correlation between the unemployment rate and inflows into self-employment fails to support the "unemployment push" hypothesis (OECD 2000, 166). Moreover, recent research has failed to find any evidence that strict employment-protection legislation leads to a growth in self-employment (Robson 2000). Analyzing the Canadian data, researchers found it to be weakly consistent with the push hypothesis, but emphasized the heterogeneity of circumstances surrounding self-employment (Moore and Mueller 2002).

To counter overly simplistic arguments about the relationship between self-employment and entrepreneurship, on the one hand, and between self-employment and unemployment, and employment protection legislation, on the other, it is important to attend to the diversity or heterogeneity of forms of self-employment and to use data that looks at changes in employment status. There is no generic category of self-employment and this militates against any single, simple explanation of self-employment growth. As Nigel Meager notes (1991, 66)

> There is not such thing as a "typical" self-employed person. The self-employed may include, for example, everyone from highly skilled professional workers such as doctors, lawyers and accountants, to entrepreneurial small business owners, to taxi-drivers, and many low-skilled workers in a variety of trades and occupations. Such people may have little in common other than the fact of their self-employment, and the influences of government policies and of economic and structural forces are likely to be very different between these different "segments" of self-employment.

The overall policy framework and institutions in a national economy extend a decisive influence on the extent of self-employment, its quality, and its prospects for growth.

II. Self-Employment in Canada

In 2000 both the ILO (2000a, 7) and the OECD (2000, 163, 177) suggested that the borders between paid employment and self-employment are becoming more blurred and pointed to the growth of "false" self-employment (disguised employment). This Part provides a textured description of the structure and patterns of growth of self-employment in Canada and a detailed portrait of the self-employed to determine whether these trends hold true for Canada.

The two main axes of differentiation among the self-employed captured in the statistics are employer status and incorporation status. The significance of the distinction between the own-account and employer self-employed is the presence or absence of paid help. Incorporation status is important for two reasons. First, it tends to indicate a degree of planning and business acumen that is associated with entrepreneurship. Second, the incorporated self-employed fall into the category of paid workers in Canada's national account system since their incomes come from both wages and profits and since incorporation protects individuals from a range of business risks (Statistics Canada 1997, 5). As Figure I.1 demonstrates, the over-whelming majority of own-account self-employed persons are unincorporated (85%) and most employers are unincorporated (60%). Among the self-employed, those who are own account, a majority of whom are unincorporated, are most likely to experience low income and economic insecurity.

The ensuing discussion focuses principally on the own-account/employer distinction, subdividing, where appropriate, the own account and employers by whether or not they are incorporated. Limited attention is devoted to unpaid family workers, who represent just 0.3% of total employment and the majority of whom are confined to one industry – agriculture (Statistics Canada Labour Force Survey Public Use Microdata 2001, Custom Tabulation). Agriculture is

excluded in the industry and occupational analysis since including it risks masking important trends in other categories given the high rates of self-employment in this sector, especially unpaid family work[4] and the majority of the self-employed in agriculture engage in self-employment because it is the only option for conducting a family business (Cohen 1997, 106).

A. Patterns and Structure, 1976-2000*

Self-employment is a significant source of job growth in Canada. It grew at a faster rate than paid employment between 1979 and 1990, a period in which average annual growth rates in self-employment and paid employment were 4.1% and 2.0% respectively (OECD 2000, 157). This trend continued into the 1990s such that the number of business owners in their main job grew by 25% (to 2.3 million) while the number of employees increased by only 1% (133,000) between 1989 and 1996 (Statistics Canada 1997, 1). The growth in self-employment began to level off in 1998. Thus, in 2000 the self-employed represented 16% of all workers, down from a high of 19% in 1998 but up from 11% in 1976 (Chart II.1). While self-employment accounts for a significant proportion of total employment, women and men have been affected differently by this trend. Whereas nearly 14% percent of men were self-employed in 1976, this was the case for just 6% of women. By 2000, 19% of men and 12% of women were self-employed.

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[4] In 2000, only 33% of those in agriculture were employees while 15% were employers, 46% were own account, and 6% were unpaid family workers (Statistics Canada Labour Force Survey Public Use Microdata 2001, Custom Tabulation).

* Sources for charts as follows: Charts II.1, II.3, II.4, II.5 – Statistics Canada Labour Force Historical Review CD-ROM 2001; Charts II.2 & II.6 – Statistics Canada Labour Force Survey Public Use Microdata 2001, Custom Tabulation; Chart II.7 – Statistics Canada Survey of Self-Employment Public Use Microdata 2002, Custom Tabulation; Charts II.8 & II. 9 – Delage 2002, appendix table B.7, p. 81 and appendix table B.11, p. 83, respectively. Notes on all charts: PE refers to "paid employees"; SEE refers to "self-employed employers"; OASE refers to "own-account self-employed". Data do not include unpaid family workers.

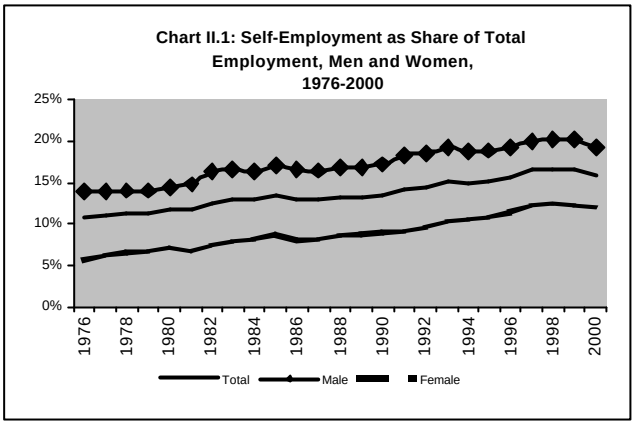


Chart II.1: Self-Employment as Share of Total Employment, Men and Women, 1976-2000
25%
20%
15%
10%
5%
0%
1976
1978
1980
1982
1984
1986
1988
1990
1992
1994
1996
1998
2000
Total
Male
Female

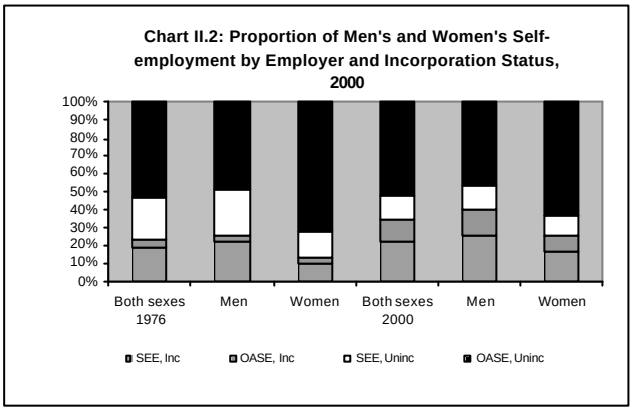


Chart II.2: Proportion of Men's and Women's Self-employment by Employer and Incorporation Status, 2000
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Both sexes 1976
Men
Women
Both sexes 2000
Men
Women
SEE, Inc
OASE, Inc
SEE, Uninc
OASE, Uninc

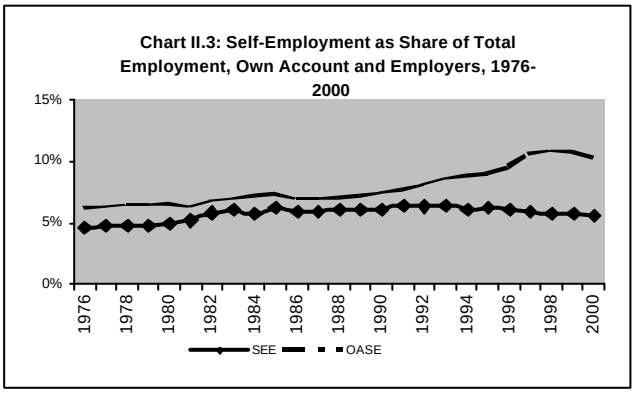
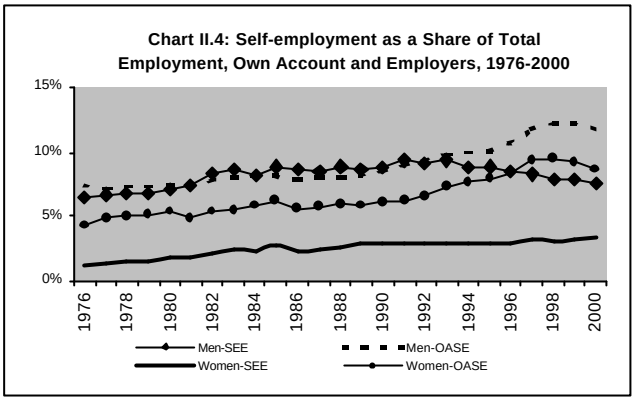
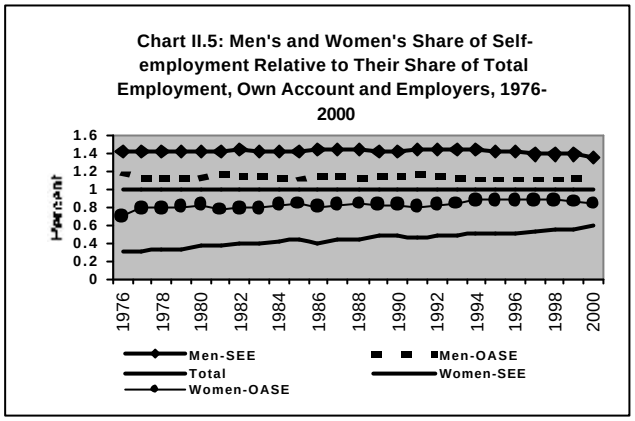


Chart II.3: Self-Employment as Share of Total Employment, Own Account and Employers, 1976-2000
15%
10%
5%
0%
1976
1978
1980
1982
1984
1986
1988
1990
1992
1994
1996
1998
2000
SEE
OASE



The majority of the increase in self-employment in the 1990s was in the own account category, which grew from 6% to 10% of total employment between 1976 and 2000 (Chart II.3). In contrast, the employer category grew from 5% to 6% of total employment yet it declined every year from 1995 to 2000 (Chart II.3). About 35 of every 100 business owners had employees in 2000, down from 45% in 1989 (Chart II.3). Chart II.4 shows that own-account self-employment has grown dramatically for both sexes – from 4% to nearly 9% of total female employment and from 7% to 12% of total male employment between 1976 and 2000. The sharp upward trend in own-account self-employment affected women and men in the 1990s but sex differences remain apparent among employers – the proportion of female employers has grown steadily since 1976 (rising to 3% of total female employment in 2000) while the proportion of male employers rose to a high of 10% of total male employment in the mid-1990s but declined to 8% in 2000 (Chart II.4). Women have made gains in self-employment, yet women's rising employment rates exaggerate these gains. When men's and women's shares of self-employment relative to their share of total employment are compared, women are still under-represented in self-employment. Only women in the own-account category are nearing their representation in the employed population (Chart II.5). Like their counterparts in paid employment, self-employed women are also confined to a very limited number of industries and occupations. Evidence

indicates that women use self-employment as a way to accommodate the demands of balancing the need for remuneration with family, especially child care, responsibiliti es (Arai 2000; Hughes 1999; Vosko 2002).



Much of the recent growth in self-employment has come from various service industries. In the last 25 years, men in own-account and employer self-employment have shifted to services, reflecting expansion in this sector, while the concentration of women employers has declined in services and increased in construction and manufacturing. In 1976, nearly 80% of women employers were in three industries – retail trade, personal services, and community services – while men were spread more evenly across industries with significant proportions in construction and manufacturing. At the same time, trade, accommodation/food services, and other services remain critical industries for women employers, with health and social assistance and finance, insurance, and real estate growing in importance. The intense concentration among own-account self-employed women in the mid-1970s, 63% of whom were in personal services in 1976, has also changed. Although 20% of own-account women were in other services and 9% were in retail trade in 2000, the distribution of own-account self-employed women across industries has widened. Yet men are still spread across a much broader set of

industries. Like their employer counterparts, own-account men have experienced a shift towards services while own-account women are gradually becoming more evenly distributed across industries, albeit at a slower pace than their employer counterparts (Statistics Canada Labour Force Survey Public Use Microdata 2001, Custom Tabulation).

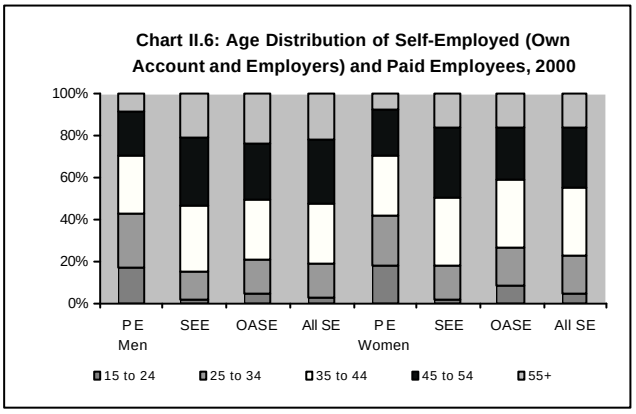
Trends by occupation mirror what has happened regarding industry. In 2000, the largest segment of the self-employed were in managerial/professional occupations (42%), followed by service occupations (25%), blue-collar occupations (21%), and occupations unique to the primary sector, which includes forestry, logging, mining, fishing, and trapping (12%). Compared to paid employees, a higher proportion of the self-employed are in managerial/professional occupations and a lower percentage are in service occupations. By sex, fully 92% of the self-employed in blue collar occupations and 84% in occupations unique to primary are men. The only occupational grouping where women constitute a larger share (56%) of the self-employed than men is services. Women in self-employment are concentrated in two groups of occupations: management/professional occupations and services. It is not surprising, therefore, that own-account self-employment, which is much more common among women than men and where incorporation is relatively uncommon, is most prevalent in service occupations, where fully 72% of the self-employed work (Delage 2002, A. 1 - A.3).

Occupational patterns among the self-employed reflect continuity and change. While women employers remain concentrated in sales, service, and clerical occupations, the importance of these occupations has fallen for all self-employed women and paid employees. Still, a striking continuity is that own-account women remain concentrated in a few areas – 21% of own-account women are child- and home-support workers (versus 0.8% of men) and women's share of this occupational group was 95% compared to 5% for men in 2000 (Statistics Canada Labour Force Survey Public Use Microdata 2001, Custom Tabulation).

B. A Portrait of the Self-Employed and Self-Employment

1. Characteristics of the Self-Employed

Self-employment is more prevalent among men than women even though the rate of growth has been stronger for women over the last two decades. Men's and women's occupational and industrial distribution differ significantly in both employer and own-account self-employment. Self-employment differs along a range of dimensions, and tends to be polarized in terms of its distribution, quality, and rewards.



Both self-employed men and women, especially employers, tend to be older than paid employees.[5] The likelihood of being self-employed increases with age, a result of the absence of mandatory retirement policies for the self-employed (there is a high incidence of self-employment after age 64) as well as the capital requirements and the risks associated with self-

[5] For example, 17% of men in paid employment in 2000 were aged 15-24 while just 1% of men employers and 4% of men in the own account category fell in this age group. In contrast, 58% of men in paid employment versus 85% of men employers and 79% of those in the own account category were over 35 years of age. Similar trends apply to women, although a higher percentage of women than men in the own account category fall in the youngest age group (Chart II.6).

employment. Relative to their percentage of total employment, the proportion of young workers who are self-employed is small.[6]

The incidence of self-employment, for both sexes, is higher among those with either very high or very low levels of education. Based on 2000 figures, 5 % of employers and 6% of the own-account self-employed have 0-8 years of education as compared with 3% of paid employees; on the flipside, 12% of employers and 8% of the own-account self-employed versus 6% of paid employees have graduate degrees (Statistics Canada Labour Force Survey Public Use Microdata 2001, Custom Tabulation). According to Benjamin Tal (2000, 16), "among the more educated self-employed, the number of women has been rising much faster than the number of men. Since 1989, the number of [own-account] women with a university degree rose by an annual average of 10%, significantly higher than the 3.5% for men." The high p ercentage of the self-employed with graduate degrees reflects the growing resort to self-employment among professionals. Consistent with this trend, fully 85% of incorporated employers and 65% of the unincorporated own-account self-employed in health occupations have university degrees. In contrast, 28% of incorporated employers and 40% of the unincorporated own-account self-employed in occupations unique to primary have some secondary education or less (Statistics Canada Labour Force Survey Public Use Microdata 2001, Custom Tabulation).

Immigrants, especially immigrant men, have high rates of self-employment. In 1999, for example, 20% of men in the employer category and 19% of those in the own-account category were born abroad. While data for immigrant women employers are unavailable, that year 20% of women in the own-account category were born abroad (Statistics Canada Survey of Labour and Income Dynamics Public Use Microdata 2001, Custom Tabulation). The increasing likelihood of

[6] Self-employment entry and exit rates are also high among people aged 15-24; as paid work opportunities increased in the late 1990s, more young people chose to switch from being self-employed to becoming employees (up 5.5% between 1999 and 2000 alone) (Tal 2000, 6).

immigrants to turn to self-employment is a recent labour market trend, which researchers have attributed to the declining success of recent immigrants in the paid workforce (Frenette 2002, 13).

Somewhat similar trends apply to members of visible minority groups, although they are less sharp. In 1999, 13% of self-employed people were members of visible-minority groups, fully 16% of self-employed men and 9% of self-employed women. When the self-employed category is broken down, data show that own-account self-employment is more common than employer self-employment among members of visible-minority groups; this is especially true of visible-minority women, 69% of whom fall into the own-account category (Statistics Canada Survey of Labour and Income Dynamics Public Use Microdata 2001, Custom Tabulation).

2. The Nature of Self-Employment: Hours, Income, Work Arrangements, and Benefits

Two aspects of self-employment affecting job quality are the extent to which self-employment is pursued on a part- or full-time basis, voluntarily or involuntarily, or in conjunction with other forms of employment and hours of work. In the 1990s, alongside women's increasing participation in self-employment and paid work more generally, there was a rise in part-time self-employment, especially among the own-account self-employed, such that one in four workers in this category worked part time by 2000 (Statistics Canada Labour Survey Public Use Microdata 2001, Custom Tabulation). In 2000, fully 42% of women and 16% of men in the own-account category were part time, rates almost double those of women and men in paid employment.[7] Much of part-time self-employment is involuntary; 24% of those working part time report wanting more hours (Tal 2000, 19). Multiple jobholding is also growing amongst the self-employed. In

[7]Men's rates of part-time own account self-employment have grown since 1976 while women's have declined. Part-time work is much less common among employers such that women employers have lower rates than their counterparts in own account self-employment and paid work (Statistics Canada Labour Force Survey Public Use Microdata 2001, Custom Tabulation).

1976, 2.6% of women employers and 2.6% of women in the own-account category were multiple jobholders. By 2000, the figures changed to 6.1% and 7.6% respectively (Statistics Canada Labour Force Survey Public Use Microdata 2001, Custom Tabulation).

Despite the desire for more hours of work among the part-time self-employed and the high rates of multiple jobholding among the self-employed, workers who are self-employed in their main job spend more hours per week working for pay than paid employees. The self-employed work on average 45 hours per week while employees work on average 37 hours. Among the full-time self-employed, the average work week is 49 hours. Men employers work the longest average weekly hours (50 hours), followed by men in the own-account category (43 hours), women employers (42 hours) and, finally, women in the own-account grouping (31 hours) (Delage 2002, B. 1 and B. 2). Analysts often claim that the self-employed "see their business as an integral part of their life and will reject the use of the term 'time at work'"; however, insecurity, income variation, and other risks associated with self-employment help to explain why the self-employed spend 20% more time spent at work per week than paid employees (Tal 2000, 10).

There are concerns about the reliability of income data for the self-employed because of the belief that under-reporting of income is prevalent (MacKinnon 1999; Miras, Smith and Karoliff 1994). But even with this caveat, income data tell an important story. The most significant income differences among the self-employed are evident by type of self-employment – in 1999, the average annual incomes of employers and the own-account self-employed were $46,825 and $16,918 respectively.[8] Income differences also prevail by sex – in the same year,

[8] Obtained from the Survey of Labour and Income Dynamics (SLID), the data in this paragraph refer to net income. Income is defined as wages and salaries + CPP/QPP Benefits + EI Benefits + Workers' Compensation Benefits + Retirement Pensions + Other Income + Investment Income + Old Age Security and GIS/SA + Social Assistance + Child Tax Benefits + GST/HST Credit + Prov/Terr Tax Credits.

women and men employers had average annual incomes of $39,920 and $49,470 respectively and women and men in the own-account category had average annual incomes of $13,032 and $19,769 respectively. The comparable figures for all female and male paid employees were $26,015 and $40,183 respectively, indicating that the average annual incomes of men and women in paid employment tend to be less than those of their counterparts working as self-employed employers but significantly more than their counterparts in own-account self-employment. When income is examined by immigration status, sex, and type of employment, among the own-account self-employed, where insecurity is most pronounced, the average annual incomes of men born in Canada are highest ($20,188) followed by men born abroad ($18,476), women born in Canada ($12,918), and women born abroad ($11,929).

When income is examined by visible minority status, sex, and type of employment, among the unincorporated own-account self-employed the average annual incomes of non-visible minority men are highest ($23,882) followed by visible minority men ($19, 941), visible minority women ($15,641), and non-visible minority women ($15,314). Similar findings emerge when income is examined by mother tongue. In 1999, men in unincorporated own-account self-employment whose mother tongues were English, French, and "other" had average annual incomes of $24,719, $24,187, and only $18,748 respectively, while their female counterparts had incomes of $15,482, $14,504, and $15,934. Broadly speaking, the average annual incomes of the self-employed (both the own-account self-employed and self-employed employers) differ less between immigrants and non-immigrants, visible minorities and non-visible minorities, and language groups, than those of paid employees. Consistent with other work on nonstandard, atypical, or contingent employment, there is greater *equality* -- by

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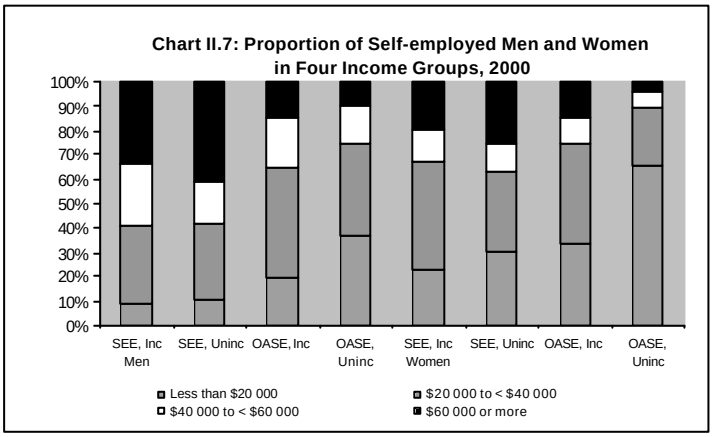
Data on earnings are not available for the self-employed. Statisticians routinely argue that, for the self-employed, income is a better indicator of economic status than earnings since they derive a range of benefits from their employment status invisible in earnings data (Statistics Canada Survey of Labour and Income Dynamics 1999, Special Run).

language group, immigration status, and visible/non-visible minority status – in nonstandard or precarious jobs than in standard employment situations. Still, along all three axes of differentiation, men's and women's incomes differ significantly, and differences are sharpest among men and women in unincorporated own-account self-employment.

The income data also reveal polarization: based on 2000 figures, 25% of the self-employed have incomes of $20,000 or less and 22% have incomes above $60,000 (Delage 2002, B. 4). The largest percent of self-employed women (47%) have incomes of $20,000 or less, while self-employed men are much more evenly distributed across income groups (Statistics Canada Survey of Self-Employment Public Use Microdata 2001, Custom Tabulation). This polarization reflects earnings differences between employers and the own-account self-employed. A sizeable proportion of the own-account self-employed have incomes under $20,000 (35%) but only a small percentage have incomes greater than $90,000 (around 3%). In contrast, 18% of employers have incomes over $90,000 (Delage 2002, A. 4).



The significance of incorporation status is also apparent with respect to income. Low income is most evident among the unincorporated own-account self-employed and high income

is most evident among unincorporated employers, followed by incorporated employers. When sex is factored in, 60% of unincorporated own-account self-employed women had incomes less than $20,000, a finding magnified by the fact that a majority of self-employed women fall into this category (62%). Unincorporated own-account self-employed men also have relatively low incomes – the largest group (36%) have incomes of $20,000--$40,000. In sharp contrast, the largest group of men incorporated employers (32%) earn over $60,000 and the largest group of women (40%) earn $20,000-$40,000. As Chart II.7 illustrates, the unincorporated own-account self-employed, especially women, are in the poorest income situation while incorporated and unincorporated employers (men and women) have higher incomes.

Instability in the extended benefits package, which includes hospital, dental, and vision coverage for example, as well as the source of benefits, is also a common feature of self-employment. Many self-employed people must either purchase, or acquire through a spouse, extended benefits that paid employees normally obtain through their employer. Since the self-employed tend to be older than paid employees, the likelihood of living alone is fairly small for the self-employed; in 1996, 75% of business owners lived with a spouse, making access to spousal benefits possible for many self-employed people, especially the 35% whose spouses are paid employees (Statistics Canada 1997, 15-16). Analysts speculate that self-employment is more common among couples than singles because a spouse with steady paid employment provides economic support for household members. Data from the Survey of Self-Employment substantiate this hypothesis for women, many of whom obtain their benefits from a spouse. Yet, based on 1996 figures, 25% of the self-employed have a spouse who is self-employed, 78% of whom are partners in the same business (Statistics Canada 1997, 15-16). In such instances, spousal coverage is not an option. Where one spouse is an employee, especially where the employee spouse is a man, self-employment may be a household strategy designed to give women “care-giving flexibility”. For men and women, independence, freedom, and the ability to

be one's own boss is the foremost reason for becoming self-employed, yet 42% of men and only 24% of women specify this reason. The other main reasons that women and men commonly cite indicate that control over time is key to women's participation in self-employment – 23% of women refer either to flexible hours or "balancing work and family" as their main reason for becoming self-employed. Spouses in business together may gain control over time at the expense of security in compensation (Delage 2002, 27).[9]

Paid employees have higher levels of benefits coverage than the self-employed. In the case of extended health coverage, 58% of paid employees are entitled to these benefits versus 42% of the self-employed. Unincorporated own-account men and women are worst off in this respect.[10] Paid employees are also more likely to have dental coverage – 54% of paid workers as compared with 35% of self-employed. Unincorporated employers of both sexes fare the worst when it comes to dental coverage – only 27% of men and 31% of women in this category have access to this type of coverage.[11]

It is impossible to compare the retirement preparation of paid employees and the self-employed since paid employees automatically pay into a government-administered pension scheme (CPP/QPP) while the self-employed tend to rely on registered retirement savings plans (RRSPs). A higher percent of the self-employed have RRSP coverage than paid employees; however, coverage rates vary among the self-employed. In contrast to the 52% of paid employees with either an employer-sponsored pension plan or a group RRSP other than

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[9] Katherine Marshall has also found that dual earner couples with paid employment averaged 74 hours of combined weekly work in 1998 but couples that co-owned a business averaged 87 hours (Marshall 1999, 9-13). See also Arai (2000) for similar findings.

[10] When age is factored in, the youngest group of self-employed is the least likely to have extended health coverage (Delage 2002, F.4).

[11] The source for the figures reported on benefits coverage for paid workers in the proceeding paragraph is the Survey of Work Arrangements and the source for the self-employed is the Survey of Self-Employment as it is impossible to obtain comparable data from one survey.

CPP/QPP, fully 85% of incorporated male employers have RRSPs while only 57% of men and 58% of women in the unincorporated own-account category have RRSPs. It is also difficult to assess the retirement preparation rates of the self-employed and paid employees since there is no data on the level of retirement savings of these distinct groups. There is some evidence, however, that the level of retirement preparation of the self-employed, which includes RRSPs and other assets, is inferior to employees; asset diversification is low among the self-employed such that many hold two or fewer types of assets (fully 51% of women) and only 15% have public pensions.[12]

The self-employed are often depicted as choosing flexibility and autonomy over security, yet data on the desirability of extended benefits as well as access to income insurance, such as Employment Insurance, calls the accuracy of this picture into question. In 2000, 40% of the self-employed (36% of employers and 43% of the own-account self-employed) reported a desire for income insurance (Delage 2002, E. 5). The self-employed with short job tenure desire income insurance most and the self-employed in service and blue-collar work are especially interested in it. Among those who want income insurance, 81% report security and stress as their main reasons for being interested in such programs (Delage 2002, E. 6). Among those that do not want it, the reasons for lack of interest in rank order are: "low probability of using it," "don't believe in it," "insufficient earnings to pay for it" and, finally, "probably won't help enough."

A majority of the self-employed without a spouse desire income insurance, a notable finding given that spousal coverage is a principal source of income insurance coverage for the

[12] While no comparable figures for paid employees are available, only 43% of the self-employed hold disability insurance. The proportion of those covered also varies by sex. 43% of men and only 29% of women have this type of insurance. There is a strong correlation between the ages of children and having this type of coverage for men yet there is no correlation for women (Delage 2002, F.7).

self-employed with access to such coverage, especially among women.[13] Fully 77% of self-employed women and only 44% of men with extended benefits obtain them through a spouse[14] and twice as many men (14%) as women (7%) acquire benefits through an association.[15] Men's higher rates of benefits through an association reflect the higher percentage of self-employed men in professional and managerial occupations, in the employer category, and in higher income earning groups.

C. Blurred Categories

Analysts increasingly recognize the overlap between paid employees and the self-employed, prompting organizations like the OECD and the ILO to call on countries to scrutinize the growth of "nominal" or "disguised" self-employment and devise policies designed to extend social protections and benefits to this segment of the self-employed. Such scrutiny is particularly apt in the Canadian context, since the greatest growth in self-employment since 1976 has been in the unincorporated own-account category, where the overlap with paid employees is most apparent.

Moreover, the statistical problem of blurred categories is not limited to the overlap between paid employees and the unincorporated own account self-employed. It extends to common distinctions between employers and the own-account self-employed.

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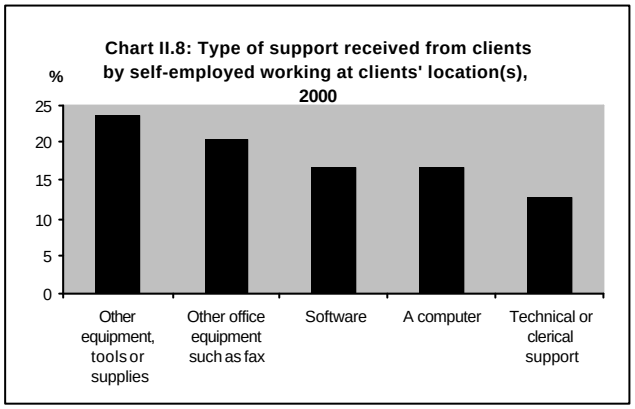
[13] Data also show that, by occupation, the self-employed in service and blue-collar occupations are most interested in income insurance and that a majority of the 'involuntary' and discourages self-employed desire coverage (Delage 2002, E.5).

[14] For example, 73% of self-employed women with dental insurance rely on a spouse for coverage. Spousal dental plans are also a key source of coverage among the own account self-employed, 69% of whom have coverage through their spouse's plan (Delage 2002, F.2).

[15] The incidence of a formal requirement to belong to a professional association increases with income, reaching almost 50% for those earning incomes over $60,000. Membership in an association yields many benefits for the self-employed; among those belonging to associations, 63% have access to training, 54% to group rates for health insurance, 45% to dental insurance and 45% to disability insurance (Delage 2002, F.9 and H.3).

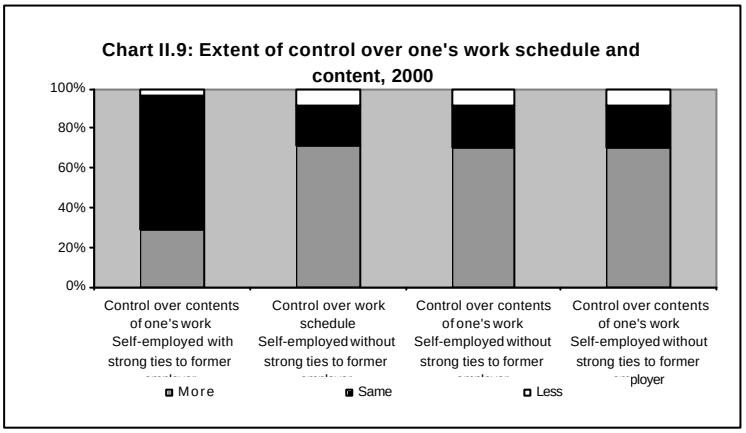
Data show that the distinction between self-employed who are own account and employers is more porous than conventionally understood. Those self-employed with paid help in a given reference year are classified as employers while self-employed who do not hire others are considered own account. Based on this definition, in 2000, 46% of the self-employed in Canada were employers. Yet, when the same group was asked whether they had paid help during a particular reference week, only 38% fell into this category. The difference between these figures points to significant movement between own-account and employer self-employed (Delage 2002, 12).



The absence of a clear distinction between paid employees and self-employed individuals is apparent from an examination of the work arrangements of the self-employed. In 2000, a considerable proportion of the self-employed worked in either client locations (20%) or locations supplied by clients (4%); fully 30% of the own-account self-employed worked in such situations (Delage 2002, Appendix B. 6). Furthermore, 37% of the self-employed (35% of men and 46% of women) received support from their clients; 24% (20% of men and 37% of women) received equipment, tools or supplies from their clients; and another 21% received support in

the form of other office equipment such as a fax or photocopier. The day-to-day business operations of many self-employed mirror those of paid employees.

Data on the proportion of the self-employed with a former employer as a client, and on the importance of the revenue obtained from this client, illustrate the difficulty in distinguishing between the self-employed and paid employees. In 2000, 15% of the self-employed (18% of the own-account self-employed) reported that their last employer was one of their clients of whom 51% obtain more than half of their annual revenue from work done for their last employer. [16]



The Survey of Self-Employment makes it possible to distinguish between two groups of self-employed, those deriving 50% or more of their present income from a former employer and those drawing less than 50% from a former employer. Regarding control over work, in 2000 the majority of the self-employed with strong ties to former employers reported the same degree of control over the content of their work that they had as employees (67%) and only 48% reported having greater control over their work schedule. In contrast, those with weak or no ties to their

[16] These findings support a recent report by Lowe and Schellenberg (2001, Table 4.2), which found that 41% of the self-employed (51% in the own-account category) had fewer than 5 clients in 2000.

former employer reported having more control over their work schedule and the work itself; among the self-employed as a whole, 72% reported having more control over their work schedule (77% of the own-account self-employed and 66% of employers) than in the past and 70% reported having more control over the content of their work. Along these indicators, too, those self-employed with strong ties to their former employer resemble paid employees. While control over work schedule improves for some former employees,[17] the level of control over work remains the same for the majority.

The data reveal that on a number of dimensions many own-account self-employed, some of whom occasionally employ others (and, hence, fall into the employer category), resemble paid employees. This finding is particularly important, since the own-account self-employed are by far the majority (65.9%) of the self-employed in Canada (see Figure V.2 i*nfra* at pp.102-2). The data indicates that the distinction between employment and self-employment is not a good basis for drawing the boundary between employment and commercial law.

Part Three: Legal History of the Scope of Employment Law

> In order to assess the future of the contract of employment it is necessary to understand its past (Deakin 2002, 194-5).

Until recently there was a consensus about the historical development of the employment relationship and its legal regulation. The story began with the rise of the master

[17] Some self-employed people trade-off security for time/schedule flexibility. The desire for time/schedule flexibility is particularly evident among the own account self-employed, 10% of who cite flexible hours as their main reason for becoming self-employed (versus 4% of employers) (Delage, 2002, 27).

and servant regime in the aftermath of the Black Death in the fourteenth century and its demise in the early nineteenth century when, in response to the industrial revolution and the creation of a capitalist labour market, the contract of employment regime became firmly established. This transformation was characterized as a shift from status to contract. In place of a regime that legally subordinated servants to masters, sometimes compelled workers to provide service, stipulated the terms and conditions of work, subjected workers to criminal sanctions for their breach, and prohibited combinations of workers for the purpose of improving their conditions, emerged one in which juridical equals voluntarily entered into contracts that established the terms of their relationship, were not subject to criminal penalties for breach of contract, and permitted workers' freedom of association. In the conventional narrative, the contract of employment, or the contract of service, was sharply distinguished from a contract for services, which was akin to a commercial contract in which one party agreed to provide a service to another. Unlike the contract of service, the contract for services preserved the independence of the service provider. The ubiquity of the contract of employment, both as an institutional feature of labour markets and as a legal concept, went unchallenged until the advent of the welfare state, which was accompanied by the incremental growth of statutory regulation. Once again law imposed employment status in the absence of contract and stipulated many terms of the employment relationship, thereby reducing the scope for freedom of contract. According to the conventional story, this resulted in a shift back to status from contract (England, Christie and Christie 1998, 1-1; Simitis 2000).

Recent scholarship in several common law jurisdictions has convincingly demonstrated that the conventional view is no longer tenable. It is now well established that master and servant law was not simply a feudal anachronism but that it played a vital role in the construction and operation of capitalist labour markets. In England, the early work of Daphne Simon (1954) and Brian Napier (1975) and the more recent and comprehensive work of Doug

Hay (2000) and Robert Steinfeld (2001) have demonstrated that penal sanctions were widely used to hold servants to their contractual obligations unt il late in the nineteenth century. On the basis of his extensive examination of local records, Hay (2000, 263) concludes that between 1750 and 1850 employers increased their use of the compulsory features of master and servant law and that the law grew mo re punitive and one-sided (Simon 1954, 160; Napier 1975; Steinfeld 2001). Recent Australian scholarship has reached a similar conclusion about the extended role of master and servant law there. For example, Adrian Merritt's (1982b, 62) report of master and servant acts in New South Wales leads her to conclude that it "provided a method of statutory intervention into the work relationships of nascent industrial capitalism that produced the patterns of employment current today and the law attached thereto."

The master and servant regime in the United States differed from that of England and Australia in one significant way: the absence of criminal sanctions against employees for simple breaches of contract. However, as Steinfeld (2001) has forcefully arg ued, the availability of severe pecuniary penalties provided American employers with an effective means of compelling contract performance by workers. Moreover, Chris Tomlins (1993, 268-70) found that despite efforts to represent employment relations in the voluntarist language of contract, the judiciary assumed that they were hierarchical, modelled on the English paradigm. According to Karen Orren (1991), American employment law remained quintessentially feudal until the twentieth century (Steinfeld 2001; Tomlins 1993, 268). A similar situation existed in Canada. Paul Craven (1981, 175; 1999, 142) has established that coercive master and servant law operated through the first three-quarters of the nineteenth century and that, even after repeal of criminal sanctions, many provincial statutes continued to provide for fines and, in some instances, imprisonment for employee breaches of contract.

This body of research demonstrates that, contrary to the conventional story, for most of the nineteenth century the employment relationship was not legally conceptualized in purely contractual terms. Contract may have been the principal gateway into the master and servant relation, but the law fixed many of its incidents in a manner that conferred upon servants a distinct and subordinate status. Moreover, legal decision making about work relationships and, of particular importance for the purposes of this Report, their classification was mostly performed within the context of a status-based statutory regime, not the common law. The relationship, therefore, was not viewed simply as a bilateral one, of no interest to anyone other than the particular parties, but rather as one overlaid with a strong public interest. As a result, political and policy considerations were often explicit in determinations regarding the scope of master and servant laws.

Hay (2000, 230) notes that in late eighteenth century England, the term servant "was ambiguous in both legal and demotic usage," a state of affairs that was heightened by the fact that master and servant cases were largely decided by local magistrates entrusted with summary jurisdiction. The increasing harshness of the regime, however, made the question of its coverage increasingly contentious, leading to greater involvement by high court judges and Parliament. Steinfeld (2001) closely examined these judicial and legislative developments. He found that in the early nineteenth century high court judges adopted an expansive view of the application of master and servant law, including labourers who hired others to assist them. In the 1820s, however, the courts began to adopt a narrower view, based on an understanding of the service relation as one that entailed the legal subordination of one person to another. The key was not control but whether the service provider remained free to accept work from more than one master. In applying this test, the courts exempted task and piece workers from master and servant law. Unhappy employers waged a successful campaign to expand the boundaries of master and servant law. Legislation was passed in 1843 and by the 1850s high court judges

had adopted an expansive view, including both skilled artisans and "butty colliers" (miners who contracted with the mine owner and then subcontracted with other colliers who performed the bulk of the work). According to Steinfeld (2001, 125), by the 1860s the courts had become quite casual about the boundaries of master and servant law, including nearly all manual workers within its ambit.

Steinfeld (2001, 143, 159) suggests this change was in part the outcome of a process of legal systematization, and abstraction was beginning to produce a more generalized notion of contract in which older distinctions between different types of service seemed anomalous. As well, he notes that some of these cases were decided under the *Truck Act* of 1831, which was designed to protect workers against wage deductions for debts owed to the employer. Thus an expansive reading of covered groups was, in these cases, beneficial to workers, even though it also had the effect of making them subject to penal sanction under master and servant law. Simon Deakin, however, takes a different view. He notes that a subsequent high court decision found that the truck acts did not apply to butty colliers and were not *in pari material* with master and servant acts. As a result, workers could be subject to criminal sanctions for breach of contract, but not entitled to statutory wage protection. According to Deakin (2001, 21), "the courts at this time had no consistent conception of the contract of employment as a legal institution…. Instead, the classification of work relationships was determined above all by the different species of regulatory legislation that operated on the service relationship."

The scope of English master and servant law remained contentious through the 1860s and beyond. Higher status workers, such as professionals, managers, clerks, and agents, were never subjected to master and servant law and this position was entrenched in the 1867 *Master and Servant Act*. Even after the repeal of the master and servant acts in 1875, the *Employers and Workmen Act* continued to empower magistrates to supervise the terms of service for lower

status workers, while specifically excluding higher status workers. These higher-status workers, then, were the first employees whose relations were principally governed by the common law contract of employment rather than by regulatory legislation (Deakin 1998, 214-5).

In Australia, both Merritt (1982b) and Michael Quinlan (forthcoming 15) found that nineteenth-century master and servant statutes encompassed a broad segment of the workforce, bringing under their sway skilled workers and workers employed through gang and butty systems. Indeed, according to Quinlan no attempt was made to distinguish between hired servants and independent contractors and some statutes were specifically extended to cover groups of workers traditionally thought of as independent. The result was a narrowing of the class of independent workers free from the coercion of master and servant law.

The ambit of master and servant law in the United States was, at least initially, more a matter of common law than was the case in England and Australia. Tomlins (1993, 280) found that in the first half of the nineteenth century, courts faced with claims by masters against third parties for enticement of servants extended master and servant law's catchment area from the domestic sphere to business relations involving the exercise of authority by a superior over a subordinate. In the second half of the nineteenth century the focus of litigation shifted to the employer's vicarious liability to third parties for the negligence of servants. Here the courts resorted to a control test as a way of limiting vicarious liability of employers for only those actors who they were realistically in a position to supervise, potentially excluding skilled craft workers from the ambit of the master-servant relation (Linder 1989a, 133; Carlson 2001, 301).

Early cases in Ontario on the ambit of master and servant law focused on whether the performance of work by one family member for another in a domestic setting implied the existence of an employment relationship (generally it did not). The first local master and servant

act was passed in 1847 and it applied to “servants and labourers”. Doubt about whether the statute applied to skilled craftsmen was removed by an amendment in 1855 that specifically included them. Thereafter magistrates gave the Act a very broad interpretation, applying it to railway contractors and others who clearly had their own businesses. Although magistrates soon heeded objections to this extension of jurisdiction to independent contractors, the domain of Ontario master and servant law remained imprecise (Craven 1981,176-7, 196-7; Webber 1995, 137).

In sum, although employment was increasingly being conceptualized in law as a contractual relationship, through most of the nineteenth century the continued operation of master and servant statutes emphasized its hierarchical and status dimension, and provided the context for most decision-making about its scope. No clear distinction between employees and independent contractors emerged, either at common law or, for that matter, within statutory master and servant regimes.

The de-criminalization of master and servant law in the last quarter of nineteenth century and the growing importance of vicarious liability created a space for the conceptual triumph of contractualism and the development of a “pure” and unambiguous common law test for distinguishing between employees and independent contractors. For a number of reasons, however, this did not occur. First, labour markets never enjoyed a period of *laissez-faire.* By the time master and servant laws were being repealed, other regulatory legislation was being enacted and decisions had to be made about its scope of operation. In England, for example, Deakin argues that early social legislation of the late-nineteenth century continued to rely on status-based distinctions between different classes of workers. It was only in the early twentieth century that the legislation began to use the concept of the contract of service as a way of defining the class of people covered and this required the courts to distinguish between different

kinds of contracts. To distinguish between contracts of service and contracts for services, courts adopted the control test. Deakin, however, rejects the view that judges were simply resorting to a well-established common law test; rather, they were introducing a doctrinal innovation that enabled them to restrict the application of social legislation that they found repugnant. The effect was to exclude low-status casual and seasonal workers on the one hand and high-status professionals on the other, thus emphasizing older, status -based distinctions. Deakin (1998, 219-22) argues that a more unitary conception of employment only became firmly rooted in the *National Insurance Act 1946* which established two principle classes of contributors, employees under a contract of service and persons employed on their own account. In the face of this new scheme courts found the control test to be inappropriate and began developing other approaches, including the "integration" and "business reality" tests.

Nineteenth century protective legislation in Canada also tended to focus more on distinctions between different categories of employee than on the distinction between employees and independent contractors. For example, the 1884 *Ontario Factories Act* did not define employee or worker, made different provisions for children, young girls, women, and adult men employed in factories, provided less protection to people employed in manufacturing in private houses, and excluded from coverage "mechanics, artisans or labourers" working only at repairing machinery in factories.[18] The 1886 *Workmen's Compensation for Injuries Act* defined "workman" but did so in a way that, on the one hand, adopted an older convention of listing categories of workers (for example, specifically including labourers and servants in husbandry engaged in manual labour and specifically excluding domestics and menial servants) while, on the other, specifying that included workers also had to be under "a contract with an

[18] S.O. 1884, c. 39, s. 2, 21 & 23. Howe and Mitchell (1999, 119) reach a similar conclusion in respect of early Australian legislation.

employer".[19] The legislation, however, did not assume the existence of a clear common law meaning of the phrase and so it further specified that the contract had to be "a contract of service or contract personally to execute any work or labour." There was no reported case law interpreting this phrase (Risk 1983, 436).

By the early twentieth century, legislators, judges, and commentators expressed the view that employment was purely contractual. For example, in 1919, a Canadian legal writer, Walter Lear (1919, 5) noted: "The relation of master and servant to-day is simply that of employer and employed, and rests wholly upon contract, expressed or implied, and with but few exceptions may be treated the same as any other contract…." This claim, however, was clearly exaggerated because at the time protective legislation was becoming more pervasive, not less, and decisions about its scope of application could only pretend to be applying a timeless common law test. This point has been particularly well made in the American context where the judiciary initially took an expansive view of the scope of labour legislation, but a combination of legislative amendment and judicial reinterpretation led to the adoption of a narrow control test that excluded many workers who were economically dependent on the entities that hired them (Linder 1989a, 173-232; Carlson 2001, 314-34).

A second factor impeding the development of a coherent common law test, even in the common law context of vicarious liability, was that, notwithstanding the legal conceptualization of the employment relationship as contractual, its definition still bore the markings of its birth in master and servant law, reinforcing the notion of legal subordination as its essential characteristic. For example, Deakin (2001, 130) has noted that the nineteenth-century case most frequently cited for the origin of the control test, *Yewens* v. *Noakes*[20] was not concerned

[19] S.O. 1886, c. 28, ss 1(3).

[20] (1880) 6 Q.B.D. 530.

with the distinction between employees and independent contractors, but rather with the definition of a live-in servant under tax legislation. The legal continuity between the master and servant and contract of employment regimes can also be seen in the first Supreme Court of Canada case to consider the meaning of the term "employee". In *Kearney* v. *Oakes* a railway contractor argued he was an employee and therefore entitled by statute to be given one month's notice of an action against him. Patterson J., speaking for the majority, held that:

> The word [employee] as used in the statute means, in my opinion, "servant" and nothing more. It is, perhaps, inserted to save the feelings of those servants who do not like to be called servants, or by way of concession to the tendency of the day to understand the word servant as expressive only of service of lower or quasi menial grade.[21]

Not only was the common law control test derivative, but it also failed to provide a basis for consistently distinguishing between contracts of service and contracts for service, even in the context of vicarious liability. In Canada, where much of the vicarious liability litigation arose out of the construction and operation of railways, the judiciary eventually accepted that railways were neither liable for the negligent acts of contractors nor contractor's servants (Abbott 1896, 30). However, as the context of litigation shifted away from vicarious liability for business contractors to vicarious liability for the acts of individuals providing service, the control test came to be perceived as unsatisfactory, both because it could not provide a clear basis for distinguishing between the diversity of service relations in existence and because the basis on which it limited liability was not seen to be an entirely acceptable way of allocating risks and costs (Stevens 1939, 188).

In sum, the historical evidence is quite clear; the conception of the employment relation as purely contractual is not only recent, but also an ideological construct that obscures its

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[21] *Kearney* v. *Oakes* (1890), 18 S.C.R. 148 at 173 rev'g (1887) 20 N.S.R. 30.

hierarchical essence. Moreover, decisions about the personal scope of employment law were largely made within the context of regulatory legislation that was often more concerned about distinctions between different classes of workers than the distinction between employees and independent contractors. As well, in the master and servant regime, as well as in the context of common law, vicarious liability, broader public purposes, and third-party interests were always implicated. The variety of interests in conjunction with the wide array of contractual relationships that were entered into for the performance of work (often with a view toward limiting liability) helps explain why no clear and coherent legal test for drawing the distinction between employee and independent contractor emerged. The next part considers how decision makers in a variety of settings have attempted to grapple with this confused legacy.

Part Four: Legal Definitions: The Personal Scope of Employment and Labour Law and Legislation

I. Introduction

The salience of the legal distinction between employees and independent contractors, as well as the definition and scope of these terms, has varied considerably over the past two hundred years. However, by the end of World War II the distinction became the basis for establishing the personal scope of labour protection and social benefit laws, as well employer liabilities and tax obligations. But instead of providing meaningful definitions of the terms "employee" and "employer," specific statutes, such as collective bargaining legislation for example, simply used terms that were familiar in the common law. Thus, when disputes arose over whether or not a particular person was an employee for the purpose of a particular statute,

courts and tribunals invoked the common law tests to determine employee status (England, Christie and Christie 1998, 2.1). But this strategy did not resolve the problem of determining the personal scope of employment and labour legislation; the common law did not have a unified conception of employment nor a coherent method for distinguishing between employees and independent contractors (Kahn-Freund 1951; Rideout 1966; Wedderburn 1986).

The problem of applying the distinction to the range of actually existing contractual relationships for the performance of work grew, especially when some arrangements were entered into precisely for the purpose of evading the rights and obligations associated with employment. However, the contracting parties' characterization of their relationship is not determinative of their legal status; it is simply one of the factors that a decision maker may consider when determining employment status for legal purposes.[22] Courts, administrative decision-makers, and legislators responded to the problem of the personal scope of employment-related legislation in two principal ways: 1) lessening the salience of the distinction by granting rights and protections to persons not classified as employees (or by deeming them to be employees) and 2) changing the test used to determine who is an employee to allow the category to expand or contract to fit the class of persons who are perceived to need or deserve the benefit of labour law protection. The first strategy typically involved some form of legislative or administrative action, whereas the second often could be achieved through the adjudicative process.

The development of new legal tests for determining employee status has tended to widen its scope, as the emphasis has shifted from direct subordination to include economic dependence as the basis for extending labour protection to working people (England, Christie

[22] Concerns about the inequality in the contracting parties' bargaining power and the possibility that they might collude in order to avoid public obligations are justifications for not allowing the parties' self-characterization to determine their legal status (England, Christie and Christie 1998, 2.15, 2.17; Supiot 2001).

and Christie 1998, 2.17; Supiot 1999). However, it has not simplified the adjudicative process. A variety of different legal tests of employee status are applied in different legal contexts in which decision-makers consider dozens of factors. In Canada, some scholars suggest that statutory context, or the purpose for drawing the distinction, provides a principled and coherent basis for determining employment status (Carter et al. 2002, 87; Davidov 2002 a, b; England, Christie and Christie 1998, 2.2; Langille and Davidov 1999).

This part examines the relationship between the personal scope of employment -related legislation and law and employee status in four jurisdictions, British Columbia, Ontario, Quebec, and the federal, averting to other jurisdictions that have an innovative or distinctive approach to the issue in a particular legal context. The goal is to provide an indication of the variation in the personal scope of employment legislation and the different techniques for determining coverage both in different jurisdictions and policy contexts. It begins with the common and civil law, since courts and tribunals historically have invoked its concepts and methods when interpreting statutes.

II. Common Law and Civil Law

A. Common Law

The common law has drawn a distinction between employees and independent contractors for two principal reasons: vicarious liability and wrongful dismissal. Courts have held employers to be vicariously liable to third parties for the negligence of employees but not for independent contractors. In a similar vein, they have held that an implied term of contracts of indefinite hiring is that such contracts can only be terminated by reasonable notice absent cause or binding contractual provision, but they have not generally implied a right to notice in

contracts for service. Having made this distinction for these two purposes, courts soon had to grapple with the reality that contracts for the performance of work assumed a range of forms and that it was no easy task to draw the line in the "appropriate" place.

In the context of implied rights to notice, the Ontario Court of Appeal held in 1936 that the legal categories of employee and independent contractor did not completely occupy the broader field of contractual relations for the performance of work. There were, in addition, cases of an "intermediate nature" where the relation of master and servant did not exist but where a notice requirement might be implied. Since then jurisprudence has been developed to identify those cases of non-employment where a right to notice of termination is implied, taking into account factors such as permanency, exclusivity, investment, risk, and business integration.[23]

More generally, however, the courts have focused their attention on the test for distinguishing between employees and independent contractors, rather than on limiting the significance of the distinction itself. In the early twentieth century courts looked primarily at the issue of control over the manner of doing the work, although as was noted in Part Three, the case most frequently cited for this approach, *Yewens* v. *Noakes*, was a tax case.[24] In the context of another Canadian tax case the Privy Council pronounced that a more complicated test was necessary to deal with the "more complex conditions of modern industry." To meet the challenge, it articulated the fourfold test that looked at control, ownership of the tools, chance of profit, and risk of loss.[25] Another approach to the problem was developed by Lord Denning five years later and became known as the "organization test." The focus of this inquiry is the extent

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[23] *Carter* v. *Bell & Sons* [1936] 2 D.L.R. 438; *Marbry* v. *Avrecan International Inc.* (1999), 171 D.L.R. (4th) 436 (BCCA).

[24] *Dallontania* v. *McCormick* (1913), 14 D.L.R. 613 (Ont. C.A.); Atiyah1967, 40-9; Flanagan 1987, 37-9.

[25] *Montreal* v. *Montreal Locomotive Works, Ltd.* [1947] 1 D.L.R. 161 at 169.

to which the work performed is an integral part of the employer's business.[26] These tests, along with a few others, sometimes singularly and sometimes in combination, have gained widespread acceptance in Canadian courts (England, Christie and Christie 1998, Chapter 2).

But the development of new tests has not solved the problem of determining the scope of employment-related rights and obligations. Recently the Supreme Court of Canada, having reviewed the jurisprudence in the context of determining employment status for the purpose of vicarious liability, concluded: "there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor."[27] Instead, after articulating a multi-factor test, it continued: "It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case."[28] In short, the Supreme Court's approach in *Sagaz Industries* will give judges a great deal of scope to tailor the boundaries of the category of employee to fit their view of the justice and merits of the case. To assist them, the Court also articulated a set of policy justifications for vicarious liability. Whether the Supreme Court of Canada's purposive, or policy-based, approach to determining employment status will generate greater certainty than the earlier tests remains to be seen.

B. Quebec Civil Law

Unlike the rest of Canada, Quebec civil law is code-based. Until January 1, 1994 the *Civil Code of Lower Canada* (C.C.L.C.) was in force, when the *Civil Code of Quebec* (C.C.Q.) replaced it. The C.C.L.C. did not use the term employment, but rather spoke of the "lease and

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26 *Stevenson Jordan and Harrison, Ltd. v. Macdonald and Evans*, [1952] 1 T.L.R. 101 (C.A.) at 111.

27 *671122 Ontario Limited* v. *Sagaz Industries Canada Inc.,* [2001] 2 S.C.R. 983 at para. 46.

28 Ibid. at para. 48.

hire of work" as "a contract by which the lessor undertakes to do something for the lessee for a price."[29] The *Code* distinguished three different types of work that might be leased: personal services of workmen, servants and others; work by carriers; and builders and others who undertake work by estimate or contract. In the last case, the undertaking party was expected to "either furnish labour and skill, or also furnish materials."[30] Although the distinction between the first group and third group of workers was not well-developed in the C.C.L.C., or in the codes of other legal systems based on Roman law (Kahn-Freund 1977, 514-6), Quebec courts built-up its significance, primarily in the early twentieth century in the context of workers' compensation and vicarious liability cases. As a result, the distinction between employees and independent contractors is as deeply embedded in Quebec as it is in common law jurisdictions. Moreover, courts in Quebec, like those in common law jurisdictions, also recognize intermediate categories of persons who are neither employees nor independent contractors but who are entitled to reasonable notice of termination (Audet and Bonhomme 1990, 5).

The Quebec courts initially identified the key distinction between employees and independent contractors as that of subordination and control. In *Quebec Asbestos Corp.* v. *Couture,* the Supreme Court of Canada held that under Quebec law, "[t]he contract of lease and hire of work may be distinguished from the 'contrat d'enterprise' principally by the subordinate character of the employee in the former contract."[31] Later Quebec courts also took into account the fourfold test developed in *Montreal v. Montreal Locomotive Works*, even though the judgement in that case made no reference to the C.C.L.C. Despite the use of the fourfold test, the factor of legal subordination remained predominant.[32]

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29 *Civil Code of Lower Canada*, Title VII, Chapter 2, of the Lease and Hire of Work, Article 1665a.

30 C.C.L.C. Article 1683.

31 [1929] 3 D.L.R. 601 at 603.

32 *Wolf* v. *Canada*, [2002] F.C.J. No. 375, online: QL, at paras. 44-48. Also see Audet and Bonhomme 1990.

The emphasis on subordination was further embedded in the *Civil Code of Quebec* when it replaced the C.C.L.C. in 1994. Article 2085 defines a contract of employment as one in which "the employee undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of…the employer." This is contrasted with a contract of enterprise or for services in which the provider of the service is able to "choose the means of performing the contract and no relationship of subordination exists between the contractor or provider of services and the client in respect of such performance". [33]

The language of the C.C.Q. clearly makes subordination the most significant element (Gagnon 1999, 51). However, to determine whether legal subordination is present in marginal cases, courts interpreting the C.C.Q. may consider economic subordination, although economic subordination alone does not allow the court to characterize a contract as one of employment. This approach to the interpretation of subordination allows other factors to be brought in. The uncertain state of the law can be seen in the recent decision of the Federal Court of Appeal in *Wolf* v. *Canada*.[34] Although the case dealt with whether a worker was an employee or independent contractor for the purpose of determining liability for income tax, the three Quebec judges agreed that employment status was to be determined according to the C.C.Q. They also agreed that while the provisions of the C.C.Q. were much more detailed than the C.C.L.C., it did not substantially alter the previous state of the law in Quebec. According to Décary J.A., "what fundamentally distinguishes a contract for services from a contract of employment is the absence in former of a 'relationship of subordination' between the provider of the services and the client…and the presence in the latter of the right of the employer to 'direct and control' the employee…. " [35] Yet, despite their unanimity on the centrality of subordination, the judges

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33 C.C.Q. Article 2099.

34 *Wolf* v. *Canada*, [2002] F.C.J. No. 375, online: QL.

35 Ibid, at para. 112.

differed over the legal tests to determine its presence. Desjardins J.A. took the view that the distinction between contracts of employment and contracts for services under the C.C.Q. could be considered in light of the tests developed in both civil and common law. On that basis, she endorsed the approach of the Supreme Court of Canada in *Sagaz Industries*, although in her application of it she failed to discuss the purpose of the taxing statute. [36] Décary J.A. appeared to be less amenable to letting the common law influence the civil code and in particular insisted that: "The test, therefore, is whether, looking at the total relationship of the parties, there is control on the one hand and subordination on the other." He then added: "I say, with great respect, that courts, in their propensity to create artificial legal categories, have sometimes overlooked the very factor which is the essence of a contractual relationship, i.e. the intention of the parties."[37] The third judge, Noël J.A., thought that none of the tests was conclusive so that the intent of the parties should prevail.[38]

In sum, the distinction between employees and independent contractors is as salient under the civil law of Quebec as it is under the common law of Canada and as difficult to draw. The most important difference between the two systems is that in Quebec, at least among some judges, greater emphasis is placed on the test of control and subordination than on a more open-ended factor test in which the weight to be given to any particular factor is left unspecified. It is far from clear, however, whether this difference in approach has any appreciable impact on the outcome of cases.

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36 Ibid. at paras. 49-94.

37 Ibid. at para. 117.

38 Ibid. at paras. 122-4.

III. Collective Bargaining Law

Across Canada and Quebec labour tribunals administer collective bargaining legislation, which provides a mechanism for unions to obtain the exclusive right to represent groups of workers and bargain terms and conditions of employment on their behalf, protects workers who seek to exercise their right to join or participate in a trade union, and regulates the conduct of employers and unions when it comes to labour relations disputes. The goal of this legislation is to provide workers with countervailing power through a scheme that promotes collective representation and it is designed to foster industrial peace (Fudge and Tucker 2001).

By contrast, the *Competition Act* forbids entrepreneurs from combining to restrict competition. Competition is the guiding principle of commercial policy and law. But "combinations or activities of workmen or employees for their own reasonable protection" are exempted from the *Competition Act*, as are arrangements pertaining to collective bargaining over terms and conditions of employment.[39] Employment status removes workers and their organizations from the ambit of laws designed to ensure that markets are competitive. Thus, when determining the personal scope of collective bargaining legislation it is also necessary to consider its implications under competition law (Andras 1952; Arthurs 1965; Backhouse 1976; Labour and Employment Law Casebook Group 1998).

The Federal Wartime Labour Relations Regulations, 1944 initiated the practice of confining the scope of the legal protection for collective bargaining to employees without defining the term.[40] Some of the early labour tribunals in Canada, likely influenced by American jurisprudence, emphasized economic dependence for determining employee status (Arthurs

[39] *Competition Act,* R.S.C. 1985, c. C-34 as amended, s.4(1)(a).

[40] The statutes identified specific groups of employees, such as managers, who would be excluded from the definition of employee for the purposes of the statute.

1965, 93). The important question was whether a group of workers would benefit from collective bargaining legislation, not whether they were employees at common law. This approach changed as a result of a decision of the Nova Scotia Court of Appeal that overruled a labour tribunal and held that in the absence of a statutory definition the meaning of the term employee should be "determined by the general law."[41] Applying the common law test, the Court found that the fishers who owned their own boats were partners not employees for the purposes of collective bargaining law. This case established the precedent of invoking the common law tests of employee status to determine the personal scope of collective bargaining law, which had the effect of narrowing the scope of collective bargaining law (Arthurs 1965).

Initially the majority of labour tribunals resolved challenges to the employment status of workers who sought the benefits of collective bargaining legislation by invoking the common law control test. Ontario led the way in adopting the "fourfold test" which was generally regarded as an improvement by labour law scholars who were critical of the control test (Arthurs 1965, 95; Young 1964, 75-7). The fourfold test placed greater emphasis on the economic reality of the relationship, an important consideration in the context of collective bargaining legislation that was designed to enable the economically dependent to exercise countervailing power. However, it did not help those workers, who Harry Arthurs (1965, 89) described as "'dependent' economically, although legally 'contractors'; according to him, "self-employed truck drivers, peddlers, and taxicab operators, farmers, fishermen, and service station lessees personify the dependent contractor."

[41] *Re Lunenberg Sea Products,* [1947] 3 D.L.R. 195 (N.S.C.A.).

In an influential article published in 1965, Arthurs approached the question of personal scope of collective bargaining legislation from the perspective of competition policy. He argued that a dependent contractor

> who sells services doubly disrupts the labour market. On the one hand, he competes with organized employees for viable work; on the other hand, his attempts to organize for collective action, lacking statutory sanction, are often characterized by economic force and legal reprisals.[42]

As part of the solution to labour market unrest caused by dependent contractors, Arthurs (1965, 114-5) recommended that collective bargaining legislation be extended to them. The report of the influential Task Force on Labour Relations, which had been appointed in 1966 by the federal government to report industrial relations in the context of rising labour unrest, focussed attention once again on the plight of the economically dependent self-employed and advocated the extension of collective bargaining legislation to them (Task Force on Labour Relations 1969, 140).[43] Both Arthurs and the Task Force recommended that competition law be amended specifically to exclude collective bargaining by dependent contractors.

Between 1972 and 1977, seven jurisdictions modified their collective bargaining legislation to extend the definition of employee to include dependent contractors (Bendel 1982, 376). British Columbia and Ontario adopted a broad definition.[44] By contrast the definition in the federal *Canada Labour Code* was (but no longer remains) narrow, limited by industry (joint-

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[42] Arthurs (1965, 115) noted that dependent contractors in the product market like farmers and fishers "present even more institutional problems."

[43] The solution the Task Force proposed was that the federal labour tribunal be given the discretion to recognize groups of these workers as bargaining agents within a specified market and that upon such recognition they be exempted from competition law in the same way as unions representing groups of employees are.

[44] *British Columbia Labour Relations Code*, R.S.B.C. 1996, c. 244, s.1(1); Ontario *Labour Relations Act,* S.O. 1995, C.1, Sched. A.

venture fishers) and occupation (owner-operators of trucks).[45] However, the actual extent to which the statutory definition of dependent contractor expanded the personal scope of collective bargaining law depended upon how the labour tribunals interpreted and applied it.[46] Labour tribunals across the country have developed lists of factors to assist them in distinguishing dependent from independent contractors (Adams 1995, 6-3 – 6-5; Langille and Davidov 1999, 27-28).[47]

Another technique of extending the personal scope of collective bargaining legislation is to give the labour tribunal the authority to designate workers as employees for the purpose of collective bargaining. Manitoba and Saskatchewan have opted for this solution.[48] The statutes in both jurisdictions state that the concept of employee is not relevant to determining the scope of collective bargaining legislation and that the important question is whether collective bargaining is appropriate. This technique of expanding the coverage of collective bargaining legislation has the advantage of making it clear that the decision to cover a particular group of workers is a policy question and not a matter of adjudicating between competing legal

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45 The narrow definition was in Canada Labour Code, R.S.C. 1985, c. L - 2, s. 3(1). Now the definition of dependent contractor is wider, see Canada Labour Code, R.S., c. L - 1, s. 3(1).

46 Despite the similarity in the statutory definitions in the British Columbia and Ontario legislation, the approaches initially taken by the labour tribunals in the two jurisdictions was quite different; British Columbia was much broader. Now their approaches are quite similar (Adams 1995, 6-4).

47 For example, in *C.L.C., Local 1689* v. *Algonquin Tavern* (1981), 3 C.L.R.B.R. 327 (1981), the Ontario Labour Relations Board listed eleven factors, including evidence of entrepreneurial activity and economic mobility, to be considered.

48 Manitoba *Labour Relations Act*, R.S.M. 1987, c.L-10, s.1.The different approach adopted in the Saskatchewan collective bargaining statute illustrates how significant the specific terms of the statutory discretion and the institutional orientation of the tribunal are for determining the success of this technique in expanding coverage. The Saskatchewan Board interpreted s. 2(f) (iii) of *Trade Union Act*, R.S.S. 1978, c.T-17 (as amended), which includes within the definition of employee "any person designated by the board as an employee for the purposes of this Act notwithstanding that for the purpose of determining whether or not the person to whom he provides services is vicariously liable for his acts or omissions, he may be held to be an independent contractor" as calling for the four-fold text as traditionally applied*; R.W.D.S.U*. v. *Sherwood Cooperative Association*, [1988] 88 C.L.L.C. 16,052. The Saskatchewan *Trade Union Act* was amended to provide that "employee" includes "a person engaged by another to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining"; Saskatchewan *Trade Union Act*, R.S.S. 1978, c.T-17 (as amended). According to Langille and Davidov (1999, 27) this subsection was enacted in 1972 (c.137, s.2), repealed in 1983 (c.81, s.3) and reinstated in 1994 (c.47, s.3).

categories, but it is not clear that these differences in approach yield significantly different results. Indeed, even in those jurisdictions that did not enact dependent contractor or deeming provisions, the development of civil and common law tests of employee status has combined with the increased emphasis on a purposive interpretation of key statutory terms to expand the personal scope of collective bargaining legislation (Bendel 1982). In Quebec the term employee has been broadly interpreted by the labour tribunal to include workers who in other jurisdictions would be considered dependent contractors (Bendel 1982, 390-1; Bernstein, Lippel and Lamarche 2001, 130). In the federal jurisdiction where the definition of dependent contractor was limited to specific industries the labour tribunal declared that the definition of employee was wide enough to encompass dependent contractors in other industries.[49]

The development of a broader conception of employment that emphasizes economic dependence may explain why collective bargaining by dependent contractors has not attracted any attention under competition law. Despite the fact that neither the competition legislation nor the *Criminal Code* were amended to exempt dependent contractors who engaged in collective bargaining, there have been no legal proceedings alleging anti-competitive behaviour by them (Backhouse 1976; Labour and Employment Law Casebook Group 1998, 210).

Economic dependence and control are the key factors distinguishing workers who are granted access to collective bargaining legislation from workers who are not (Davidov 2002 a, b; Langille and Davidov 1999, 28). People who have made a considerable capital investment in the equipment used to perform their work, who provide services to several different firms, and who hire others on a limited basis to help them perform their work have been considered to be either employees or dependent contractors. Such diverse groups as owner-drivers of dump

[49] Adams 1995, 6-9; *Societe Radio-Canada* (1982), 1 C.L.R.B.R. (2d) 29 (Can.).

trucks, driver-salesmen employed by dairies, oil-burner servicemen, freelance journalists, homecare workers, and house parents working for welfare agencies are now entitled to the protection of collective bargaining legislation (Carter et al. 2002, 252). However, where a labour tribunal will draw the line between employees, dependent contractors, and entrepreneurs in a particular case is hard to predict. One important question is whether the degree of economic dependence on a particular employer is enough to keep a dependent contractor in the legal category of employee.[50] Another controversial question is whether contractors who hire other workers should be considered to be dependent contractors.[51]

Several jurisdictions provide special rules to deal with potential conflicts of interest over representation and bargaining structure between traditional employees and dependent contractors. The legislation in Ontario specifically provides that dependent contractors be placed in a bargaining unit of their own unless a majority indicate their preference for being assigned to a unit composed of other employees. In British Columbia and the federal jurisdiction dependent contractors are included in units with employees.[52] According to a group of labour law scholars,

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50 In British Columbia the labour tribunal has attempted to quantify the degree of economic dependence necessary for coverage under collective bargaining legislation, setting the receipt of eighty per cent of income from "the employer" as the bright line for determining employee status. Adams 1995, 6-7; *Ridge Gravel & Paving Ltd and Teamsters, Local 213* (1988), 88 C.L.L.C. 16,040 (B.C.I.R.C.), application for reconsideration refused, 89 C.L.L.C. 16,030 (B.C.I.R.C.) . In Ontario the Board jurisprudence is very clear that economic dependence is to be interpreted in relation to a particular employer and not on an industry (Sack, Mitchell and Price 1997, para. 285).

51 The British Columbia tribunal is more inclined than its Ontario counterpart to find in favour of such status. The federal tribunal is also willing to attribute dependent contractor status in situations in which the worker occasionally employs other workers as assistants (Langille and Davidov 1999, 28; Adams 1995, 6-7;Labour and Employment Law Casebook Group 1998, 218.) Langille and Davidov also note that simply because a person occasionally hires another person to assist with the work does not mean that the first person is not an employee for the purposes of the common law definition (Langille and Davidov 1999, 28, footnote 65 referring to *Head* v. *Inter Tan Canada Inc*., [1991] 38 C.C.E.L. (2d) 159 (Ont. Gen. Div.)).

52 However, the distinction between dependent contractors and employees is still relevant in British Columbia as the tribunal has refused to exercise its discretion to amalgamate dependent contractors into existing units of employees. See the following discussions of dependent contractors and bargaining units (Bendel 1982, 401; Labour and Employment Law Casebook Group 1998, 218).

> including dependent contractors with other employees for collective bargaining purposes may have the effect of eliminating any economic advantage to the employer of continuing the dependent contractor arrangement whereas the provision of separate bargaining units for dependent contractors may serve to entrench the dependent contractor arrangements. As Canadian firms increasingly contract out many of their core functions, this difference of approach assumes greater significance (Labour and Employment Law Casebook Group 1998, 218-9).

The problem is that the line between employees and independent contractors is as slippery as ever and now a new one must be drawn between dependent and independent contractors (Bendel 1982, 400; Langille and Davidov 1999, 29).

IV. Employment Standards Legislation

Employment or labour standards legislation imposes minimum terms and conditions of employment in most sectors and for the majority of workers. Its origins can be found in early protective legislation such as factory acts that imposed maximum hours of work for women and children in the 1880s and the statutes that imposed minimum wages for women at the end of World War I. After World War II, sex-specific protective legislation was gradually replaced by omnibus statutes that imposed minimum wages and over-time rates, maximum hours of work, annual vacations with pay, statutory holidays, and pregnancy and parental leave as well as termination notice and severance pay. Employment standards legislation recognizes the inequality in the employment relationship and that labour is more than a commodity. According to the Supreme Court of Canada such legislation should be given a large and liberal interpretation in order to better achieve its purposes.[53]

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[53] *Rizzo* v. *Rizzo Shoes Ltd.*, [1998] S.C.R. 27 at para. 24; *Machtinger* v. *HOJ Industries Inc.*, [1992] 1 S.C.R. 986.

Although all of the employment standards statutes provide a definition of "employee" most of them are not very helpful.[54] Thus adjudicators have invoked the common law to give meaning to the term and they have applied a variety of different tests (England, Christie and Christie 1998, 2.1). Unlike collective bargaining, these tests were never supplemented with a statutory definition of dependent contractor or the power to designate. In Ontario an adjudicator rejected the argument that for the purposes of employment standards the definition of employee includes dependent contractors on the ground that employment standards were not appropriate for dependent contractors (Parry 2002, 1-24). In British Columbia the provincial government ignored the 1994 recommendation of a ministerial commission to amend the legislation to include dependent contractors (Thompson 1995, 31).

However, it is not clear to what extent the absence of a dependent contractor definition has limited the personal scope of employment standards legislation. Increasingly adjudicators emphasize the statutory purpose of employment standards legislation to extend protection to economically dependent workers who would not fit the traditional definition of employee.[55] They have also taken to listing the range of factors that should be considered in determining employee status (England, Christie and Christie 1998, Chapter 2; Parry 2002, 1-21 – 1-24).

The Quebec *Labour Standards Act's* definition of employee is the broadest as it includes "a worker who is a party to a contract" who "undertakes to furnish, for the carrying out of the

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[54] Several jurisdictions issue non-binding interpretive guidelines. In British Columbia, for example, the guideline provides a chart describing the differences between employees and independent contractors and examples of independent contractors. British Columbia Ministry of Labour, *British Columbia Employment Standards Act and Regulations Interpretation Guidelines Manual Part I, Introductory Provisions, E.S.A., Section 1, Definitions:* http://www.labour.gov.bc.ca/esb/igm/sections/sect_001.htm (Last modified Nov. 99).

[55] For a discussion of the Ontario jurisprudence see Parry (2000,1-21 – 1-24). For a recent decision upholding a purposive approach to the definition of "employee" under Part III of the *Canada Labour Code* see *Dynamex Canada Inc.* v. *Mamona*, [2002] F.C.J. No. 534 (Fed. Ct.) online QL. The Federal Court accepted the purposive approach of the referee and upheld the finding of employee status under the *Canada Labour Code* despite the fact that for purposes of income tax the couriers who owned their own vehicles and occasionally employed helpers were considered to be independent contractors.

contract, the material, equipment, raw materials or merchandise chosen by that person and to use them in the manner indicated by him."[56] This provision has been interpreted to include a worker who deducted expenses related to the job for income tax purposes as though an independent contractor and occasionally hired assistants.[57] However, a similar result was also reached by an adjudicator who applied the common law tests in light of the purposes of Part III of the *Canada Labour Code*, which does not define the term "employee"[58] Thus, it appears that the personal scope of employment standards legislation is expanding to include workers in a position of economic dependence regardless of the precise definition in the statute or their employment status for tax purposes.

V. Human Rights and Equity Legislation

Human rights legislation prohibits discrimination against individuals on grounds such as sex, race, religion, disability, and age. Human rights or anti-discrimination statutes were first enacted after World War II, and by 1970 every jurisdiction in Canada had legislation that prohibited discrimination on a range of grounds relating to human dignity in a range of situations. Generally human rights statutes prohibit discrimination in the provision of services, the terms of contracts, accommodation, and employment. Thus, prohibiting discrimination in employment is simply one dimension of the broader goal of human rights legislation, which is to prohibit discrimination broadly, whether it is in the labour market, the realm of commerce, or public services.

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56 *Labour Standards Act*, R.S.Q. 1977, c. 45 (as amended) art. 1(10).

57 Bernstein, Lippel and Lamarche 2001; Quebec Department of Labour Online Policy Manual, "interpretation", Commission des Normes du Travail Homepage: www.cnt.qc.ca (last modified July 30, 1999); England, Christie and Christie 1998, 20; and *Couture-Thibault et Pharmajan*, [1984] TA 326.

58 See *Dynamex Canada* v. *Mamona*, supra note 55.

Prohibiting discrimination in employment is a crucial dimension of anti-discrimination legislation. Not only is employment crucial to people's livelihood and well being, employees are vulnerable to exploitation by employers. Human rights statutes have a number of provisions dealing specifically with employment, and they range from matters dealing with hiring, such as advertising and employment agencies, to issues such as sexual harassment and vicarious liability. The actual wording of the prohibitions against discrimination in employment varies from jurisdiction to jurisdiction (Tarnopolsky, Pentney and Gardner 2001, 12-8 – 12-9).

Some statutes provide definitions of the terms "employee" and "employment". For example, British Columbia defines "employment" as including "the relationship of master and servant, master and apprentice, and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal; and 'employ' has a corresponding meaning."[59] The fair practices ordinances in the Northwest Territories and the Yukon define an employee as "any person who is in receipt of, or entitled to, compensation for labour or services performed for another, but does not include an independent contractor" (Tarnopolsky, Pentney and Gardner, 2001, 12-11). By contrast, the federal human rights legislation broadly defines "employment" as including "a contractual relationship with an individual for the provision of services personally by the individual." This definition includes personal services performed by individuals regardless of whether they are employees or independent contractors.[60] Moreover, the definitions in Nova Scotia and Prince Edward Island apply to contracts for services and thus do not distinguish between employees and independent contractors (Tarnopolsky, Pentney and Gardner 2001, 12-11). Ontario, along with several other jurisdictions, does not define either employee or employment in its statute. However, as the leading text on human rights law notes, "although at least half of all the complaints considered by human rights commissions concern

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59 *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210, s.1.

60 *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 25.

employment, there are very few adjudications that have attempted to define these terms" (Tarnopolsky, Pentney and Gardner 2001, 12-11).

While the distinction between employees and independent contractors is a problem "shared in both the anti-discrimination and labour relations fields" (Tarnopolsky, Pentney and Gardiner 2001, 12-13), it is not obvious why it should be a problem for human rights codes, or, if it is, that it ought to be solved in the same way in both fields. Unlike labour relations legislation, human rights protections apply to both employment and commercial relations; refusing to provide people with services or to contract with them on the basis of their race, religion, or sex is prohibited regardless of whether or not the relationship is one of employment or commerce. Employment status should be (and is) irrelevant to the personal scope of human rights. However, it is relevant in determining specific obligations in situations in which people are vulnerable to other people exercising power over them. Employment is a paradigmatic situation in which people are vulnerable.

The few decisions in which employment status has been at issue have adopted an expansive interpretation of employee based on the purpose of human rights legislation. In British Columbia a board of inquiry referred to the extended definition of employee in the statute (it included a principal and agent) and the purpose of the legislation in order to emphasize economic dependence as the critical factor determining employee status. Although developed by expert human rights tribunals in the context of taxi companies and their relations with owner-drivers, the test of economic dependence has been used in other sectors and by the courts (Tarnopolsky, Pentney and Gardner 2001, 12-15 – 12-19). The cases illustrate not only that an expansive definition of employee has been adopted, but also that adjudicators have been able to justify this interpretation in light of the policy of human rights legislation (Tarnopolsky, Pentney and Gardner 2001, 12-19 - 12-20). By endorsing a liberal interpretation that "implies

any arrangement in which one person agrees to execute work for another", the courts have indicated their willingness not to be bound by traditional distinctions between employees and independent contractors in providing human rights protections.[61] The public policy goal of protecting human dignity and guaranteeing that people are treated equally tra nscends the traditional rationales for distinguishing between employees and independent contractors.

Human rights statutes provide prohibitions against discrimination generally, whereas pay and employment equity legislation provide specific rights and obligations only with respect to employment. Pay equity legislation provides mechanisms for women workers to claim that they are entitled to wages equal to men who perform work of equal value. This legislation can be proactive, imposing positive obligations on employers, or complaints-based. Only Ontario and Quebec place statutory obligations on private sector employers to achieve pay equity. The goal of employment equity is to ensure that groups of people who have historically been disadvantaged in employment are represented throughout the hierarchy of a firm in proportion to the group's representation in the labour market generally. The only employment equity statute in Canada is in the federal jurisdiction, and it addresses the issue of the representat ion of four historically disadvantaged groups in employment.[62] Pay and employment equity developed much later than human rights legislation, beginning in the late 1970s, and it is much more controversial (Fudge 1995, 2002).

Pay and employment equity legis lation apply only to employees. The *Ontario Pay Equity Act*[63] does not define the term "employee". However, the Quebec statute defines "employee" in

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61 *Cormier* v. *Alta. Human Rights Commission*. (1984), 6. C.C.E.L. 60 (A lta. Q.B.); *Pannu* v. *Prestige Cab Ltd.* (1986), 8 C.H.R. R.D/3911 (Alta. C.A.*); Canadian Pacific Ltd*. v. *Canada (Human Rights Commission)* (1990), 16 C.H.R.R. D/470 (F.C.A.).

62 *Employment Equity Act*, S.C. 1995, C. 44.

63 R.S.O. 1990, c.P-7.

terms of control by an employer and specifically excludes independent contractors who are in business on their own account and who work for several parties or who work only intermittently.[64] There has been little litigation over the personal scope of pay and equity legislation. This is not surprising given the nature of the legislation and its limited scope of application. Pay equity legislation only tends to be effective if employees are unionized, so the question of whether a worker is an employee is unlikely to arise in the context of pay equity litigation because it has already been resolved for the purposes of collective bargaining (Fudge and McDermott 1991). By contrast, the definition of "employer" is crucial, contentious, and much litigated (Fudge 1991).

The question of the personal scope of employment equity legislation has rarely been raised. Since the *Employment Equity Act* provides a reporting and monitoring procedure for employers rather than a complaint mechanism for employees the issue of employment status is unlikely to arise. The personal scope of pay and employment legislation simply reflects where the line has been drawn under collective bargaining and employment law.

VI. Occupational Health and Safety

Occupational health and safety laws impose a duty on employers not to expose workers to unsafe and unhealthy working conditions and gives workers rights to be informed of hazards, to participate in their management, and to refuse unsafe work. These laws have grown from a patchwork of statutes protecting workers in specific industries to omnibus laws applicable to most workers. There is, however, considerable variation among jurisdictions in the treatment of independent contractors. To determine the extent of protection, three questions need to be

[64] *Pay Equity Act*, S.Q., c.E-12.001, ss.8,9.

answered: 1) do employers owe duties to independent contractors; 2) are independent contractors protected in other ways; and 3) how is the distinction between independent contractors and employees drawn.

Ontario provides the greatest protection to independent contractors. Its definition of employer includes a person who contracts for the servi ces of workers and its definition of worker includes a person who performs work for money. According to the Ontario Court of Appeal this wording means that employers owe the same duty to provide a safe work environment to independent contractors that they owe to employees.[65] The distinction between employees and independent contractors, however, is not irrelevant. Self-employed persons are required to comply with some of the statutory obligations imposed on employers, such as the duty to use prescribed protective devices, and may be prosecuted for failing to do so, even though compliance may cause economic hardship.[66] As well, a tribunal has held that independent contractors are not workers for the purposes of participatory rights such as joint health and safety committees because that section of the act refers to workplaces where workers are "employed." According to this view, participatory rights that are more akin to those associated with collective bargaining than to public rights to protection are to be enjoyed by a narrower segment of the class of workers. The adjudicator adopted the control test and on that basis found that a group of taxi drivers were self-employed.[67]

The situation of independent contractors in British Columbia is similar to Ontario, although the result is achieved by somewhat different and more circuitous means. Part 3 of the

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65 *Occupational Health and Safety Act*, R.S.O. 1990, c. O-1 (as amended), s. 1(1); *R. Wyssen* (1992) 10 O.R. (3d) 193.

66 *OHSA*, ibid, s. 4; *Hutton,* [1997] O.O.H.S.A.D. No. 280 online: QL.

67 *526093 Ontario Inc. (c.o.b. Taxi Taxi),* [2000] O.L.R.B. Rep. May/June 562, para. 15.

Workers' Compensation Act[68] deals with occupational health and safety. Its definition of employer and worker contemplates that employers only owe duties to workers who are employees. Section 115 of the Act stipulates that employers owe duties to their own workers as well as any other workers present at the workplace. However, given these definitions, "other workers" may have to be some other employers' employees. A more promising basis for finding statutory protection for independent contractors is section 119, which imposes a duty on owners (who are broadly defined) to maintain workplaces "in a manner that ensures the health and safety of persons at or near the workplace." If that were all, independent contractors would be poorly protected. However, the *Occupational Health and Safety Regulation*[69] contemplates much broader application. Section 2.1 stipulates that the regulation applies to employers, workers and "all other persons working in or contributing to production of any industry" covered by the *Workers' Compensation Act*. As well, section 2.2 establishes a general requirement that all work be carried out "without undue risk of injury or occupational disease to any person." As a result, it appears that employers are under a duty to provide a safe work environment for independent contractors at least in circumstances where the work was being carried out in an area under the employers' control. It is also arguable that independent contractors are required to comply with the regulation insofar as it applies to their work. None of these provisions, however, appear to provide independent contractors with rights to participate in the employer's internal responsibility system, again mirroring the situation in Ontario. There is no case law on these points however.

Other jurisdictions provide considerably less protection to independent contractors. In the federal jurisdiction, most employers' obligations arise only in the context of traditional employment relations. However, employers are under a duty to ensure that every person

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[68] R.S.B.C. 1996, c.492.

[69] B.C. Reg. 296/97 (as amended).

granted access to their workplace is familiar with and uses all prescribed safety materials, equipment, devices, and clothing and that their activities do not endanger the health and safety of employees.[70] Unlike Ontario, employers do not owe statutory health and safety obligations to independent contractors working outside their workplace and there is no duty on self-employed persons to comply with the requirements of the act. Clearly, then, much hinges on the distinction between employees and independent contractors. The two decisions on point both involve truckers and, although they differ in their outcome, they both use a multi-factor test that weighs control, ownership, chance of profit, and risk of loss to determine employment status. [71]

Quebec's legislation provides even more limited protection to independent contractors. Its definition of employer and worker contemplates a contract of service as the basis for imposing employer duties.[72] As a result, the Act does not impose duties on employers to safeguard independent contractors. It does, however, require self-employed persons who carry out work in a workplace where there are workers to abide by the obligations imposed on workers under the Act and to abide by the obligations imposed on employers in respect of products, processes, equipment, materials, and dangerous substances.[73] In such a regime, much depends on how the individual is classified. Notwithstanding the absence of a specific statutory provision, tribunals have taken the view that dependent contractors will be considered to be workers provided they meet the criteria of economic dependence (Bernstein, Lippel and Lamarch 2001, 77-79).

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70 *Canada Labour Code*, R.S. 1985, c. L-2, s. 125(1)(w)(y).

71 *Clarke Road Transport Inc. and King,* [2000] C.L.C.R.S.O.D. No. 10 (independent contractor); *Brymag Enterprises Inc. and Phillips,* [1999] C.L.C.R.S.O.D. No. 2 (employee).

72 *An Act respecting occupational health and safety* R.S.Q. c. S-2.1, s. 1.

73 Ibid. s. 7.

In sum, although there has been significant movement in some jurisdictions towards abolishing or limiting the salience of the distinction between employees and independent contractors for occupational health and safety purposes, a great deal of variation remains in the treatment of independent contractors under provincial health and safety schemes, as well as in the legal test used to distinguish between independent contractors and employees. Even where independent contractors are given the benefit of direct protections, they are excluded from the right to have and to participate in joint health and safety committees. However, in the absence of statutory duties, employers may nevertheless owe a common law duty of care to independent contractors, especially where the work is performed on the employer's premises. [74]

VII. Workers' Compensation Legislation

Workers' compensation is a statutory scheme designed to provide economic benefits to workers who suffer disabling or fatal work-related injuries and illnesses (Ison 1989). The general governing principles are the same in all Canadian jurisdictions: covered workers who are injured on the job are entitled to compensation regardless of fault out of a state-administered fund generated from assessments levied on the payroll of covered employers. [75] In exchange for the right to compensation, workers lost their right to sue their employers for damages.

The key question is who is a covered worker? The general principle is that a covered worker is an individual who is either hired under a contract of employment or deemed in law to

[74] The precise circumstances in which this duty might arise, and its scope, are outside the ambit of this analysis.

[75] This report will not address the question of employer coverage, although it is obviously a crucial one. In some jurisdictions, employees and independent contractors employed in non-covered industries can opt for workers' compensation.

be a worker. The distinction between employees and independent contractors, however, is an important one because coverage of employees is mandatory with premiums paid by the employer while individual operators are only deemed to be workers if they apply for insurance and pay the applicable premium themselves. In general, all jurisdictions use a multi-factor test of employment status that asks whether in reality the individual can be said to be running a separate enterprise. Each jurisdiction, however, has its own particular rules both for drawing the distinction and, in some cases, for making exceptions.

In Ontario, leaving aside some outworkers and casuals who are completely excluded, the *Workplace Safety and Insurance Act* establishes three basic categories: 1) workers for whom coverage is mandatory; 2) independent operators and others for whom coverage is optional but who must pay their own premiums; and 3) employers who must pay premiums for their employees.[76] Administrators and adjudicators have struggled to find an appropriate test to distinguish between workers and independent operators. An influential 1989 decision identified the problem and proposed a solution:

> The vast spectrum of service relationships lying between a contract of service ("worker") and a contract for service ("independent operator") must still be divided into only two areas. Accordingly, it is necessary to have a flexible and highly adaptable test, which will cover the myriad relationships encompassed in this "employment" spectrum from a workers' compensation perspective.[77]

The panel adopted the "business reality" test involving a non-exhaustive list of eleven factors that it hoped would lead to decisions in accordance with the real merits and justice of the case.[78] The board's policy manual currently refers to the "organizational test" and directs adjudicators to

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[76] *Workplace Safety and Insurance Act, 1997*, S.O. 1997 c. 16, Sch. A (as amended), ss. 2, 11 and 12; Gilbert and Liversidge (2001) at 4-5.

[77] *Stork Diaper* (1989), 14 W.C.A.T.R. 207 at para. 54.

[78] Ibid. paras. 62-4.

consider the degree of control, the opportunity to make a profit or suffer a loss, and other applicable criteria. It then goes on to provide more specific criteria for assessing each factor. For some industries, such as construction, logging, taxi cab, and trucking, in which the distinction is very difficult to draw, the board has developed industry-specific questionnaires.[79] Even with these tests and questionnaires, the board still finds the distinction problematic and has raised the matter in a recent consultation paper on coverage (Ontario Workplace Safety and Insurance Board 2002). Because of the way the Workplace Safety and Insurance Board records its data, it cannot accurately estimate the number of independent operators who have opted for coverage.

The British Columbia scheme also distinguishes between workers under a contract of service for whom coverage is compulsory and independent operators who may be deemed to be workers if they opt in and pay their own premiums. It also uses a multi-factor test, but applies it in a way that is sensitive to policy objectives and wary of shamming.[80] Where ambiguity remains after the application of the test, in certain circumstances the board may classify the individual as a "labour contractor." Labour contractors may register as employers, but if they do not they, and any help they employ, are considered workers of the prime contractor or firm for whom they are contracting.[81] As well, special fishing industry regulations effectively deem all commercial fishers to be workers and commercial fish buyers to be their employers for assessment purposes.[82]

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79 Ontario, Workplace Safety and Insurance Board, *Operational Policy Manual*, 01-02-03

80 "For full effect to be given to the principle of compulsory coverage contained in the Act…the prohibition of contractual avoidance must be applicable [to contracts that describe] the parties as independent contractors in circumstances in which the relationship is, in substance, one of employment." *Re the Employment Relationship* (1973-4), 1-2 Workmen's Compensation Reporter Decision No. 32 at 128-9.

81 The full complexity of these arrangements is explored in Decision #98-0563, B.C. Workers' Compensation Appeal Division, 7 April 1998 (H. Morton).

82 B.C. Workers' Compensation Board, "Fishing Industry and Workers Compensation" (Briefing Paper for the Royal Commission on Workers' Compensation in British Columbia, 27 March 1997).

The Quebec scheme differs from those of Ontario and British Columbia in that while the act distinguishes between employees and independent contractors it specifically deems independent contractors to be workers if they perform work for a person who has employees performing similar work provided that they do not work for several persons simultaneously, serially on short-term contracts, or intermittently. The case law drawing these distinctions is contradictory, making it difficult to arrive at clear conclusions about the approach taken by the tribunals that determine these matters.[83] Workers in federally regulated industries are governed by the provincial legislation in force where they are employed. Federal crown employees, however, come under the *Government Employees Compensation Act*. The definition of a federal crown employee may be narrower than that of a worker. As a result, some individuals working for the federal government who might otherwise have been automatically covered will only obtain coverage if they opt to apply and pay their own premiums.[84]

VIII. Canada and Quebec Pension Plans

The *Canada Pension Plan* (CPP) and the *Quebec Pension Plan* (QPP) are statutory schemes designed to ensure that Canadians retire in security and with dignity. Both are contributory earnings-related programs that provide income to people in retirement and are designed to supplement the Old Age Security Pension (OAS), a universal entitlement financed federally through general revenue, and private employer-sponsored pension plans. The CPP and QPP are financed by employer and employee contributions that cover the costs of benefits and administration.

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83 Bernstein, Lippel and Lamarche 2001, 77-9; *An Act Respecting Industrial Accidents and Occupational Diseases*, R.S.Q., c.A-3.001, s. 9.

84 *Succession Phillippe Lalonde et Ministère du Développement des resources humaines Canada* (1996) CALP 1591, but see Ontario WCAT Decision 579/91.

Under the CPP/QPP, coverage is extended to working persons and contributions are mandatory. However, an important distinction is drawn between employees and independent contractors or the self-employed in relation to contribution formulas. Most important, self-employed persons are required to pay contributions at the full rate[85] while employees are only required to pay half with the other half paid by the employer(s) (CCH Canada 2002, para. 600).[86]

Where there is doubt as to whether an employment relationship exists, Human Resource Development Canada normally instructs a worker or an employer to make application for a ruling on worker status to the Canada Customs and Revenue Agency or a party goes directly to the Canada Customs and Revenue Agency. In deciding such cases, the Agency uses a multi-factor test that emphasizes the dimension of control, but also considers supplemental factors related to the ownership of tools, chance of profit, risk of loss, and integration. Workers are required to fill out a questionnaire designed to provide the Agency with the information that it needs to apply the test. As well, workers are asked to state the reasons why they believe they are employees or self-employed.

If a worker or an employer is dissatisfied with the ruling of the Canada Customs and Revenue Agency, either party may pursue the matter further through the tax court. The 1987 Federal Court of Appeal decision in *Wiebe Door Services Ltd.* v. *M.N.R.* is the most influential case in determining the status of the worker under CPP/QPP and Employment Insurance (EI). This case involved the assessment of CPP/QPP and Unemployment Insurance (now EI) contributions against Wiebe Door Services Ltd. for door installers and repairers it treated as

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85 In 2002, the full contribution rate is 9.4% and is paid on eligible earnings after other considerations.

86 Moreover, unlike earnings derived from paid employment, contributory self-employment earnings do not include earnings made before 18 years of age, after 70 years of age or when a retirement pension becomes payable, or if a disability pension is available (CCH Canada 2002, para. 602).

independent contractors.[87] After several levels of review through the Canada Customs and Review Agency, the Tax Court held that the workers were employees on the basis of the integration test (CCH Canada 2002, para. 527). Interpreting the integration test from the employer's perspective, it found that Wiebe Door Services would be out of business without these independent contractors and therefore they were employees (CCH Canada 2002, para. 527). On appeal, the Federal Court of Appeal held that the Tax Court had erred in law in its use of the integration test.[88] It declared that there is only one test – the fourfold test and that the key question is "whose business is it?"[89] More important, as Joanne Magee (1997, 588) observes: "Wiebe Door established the principle that there was no series of individual 'magic' tests that could be substituted for an examination of 'the total relationship' of the parties to determine 'whose business is it?'"

Wiebe Door remains the leading authority for determining worker status under CPP/QPP and EI. Since the Federal Court of Appeal heard the case, however, there have been several important cases where the Pension Appeals Board has applied a more expansive understanding of the category "employee."[90] However, these decisions, which involve beauty technicians, a legal researcher for a law firm, and a secretary for the Ministry of Education were all rendered in the early 1990s and may not be considered persuasive. [91]

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87 *Wiebe Door Services Ltd.* v. *Minister of National Revenue*, [1987] D.T.C. 5025 (F.C.A).

88 In this proceeding, the Court referred to fourfold test set out by Lord Wright in *Montreal* v. *Montreal Locomotive Works Ltd.*,[1947]1 D.L.R. 161and the integration test set out by Lord Denning in *Stevenson Jordan and Harrison, Ltd.* v. *MacDonald and Evans*., [1952]1 T.L.R. 101 (C.A.).

89 Since the resolution of this question depends on the facts in the particular case the Federal Court of Appeal sent the case back to the Tax Court for a decision regarding the installers' status.

90 If the Pensions Appeal Board was approached initially to determine the question of status it proceeds with the appeals process normally on the basis of the decision rendered by the Minister of National Revenue.

91 *Shehnaz Motani* v. *MNR*, [1993] Pension Appeals Board, Appeal CP CC 364-E; See also: *Cram* v. *Minister of National Health and Welfare,* [1992] Pension Appeals Board, Appeal CP CC 726; *Ontario Ltd. o/a Forma Cosmetics* v. *MNR,* [1990] Pension Appeals Board, Appeal CP CC 652.

IX. Employment Insurance

Employment Insurance (EI) is a contributory earnings-related social wage program intended to provide unemployed people with income benefits (EI Part I) and active re-employment benefits (EI Part II). It provides income support and employment assistance designed to reinforce work effort.[92] Under EI, coverage is extended to all those with "insurable employment" in Canada. Contributions, called premiums, are mandatory; they cover both the costs of benefits and administration and are normally shared between the employee and the employer. In 2002, the EI premium was 2.2% of the annual insurable earnings to a maximum annual premium of $858.00, which reflected the maximum insurable earnings of $39,000. Owing partly to the wide range of possible inclusions and exclusions, however, the definition of insurable employment is complex. Insurable employment is defined as:

> employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece.[93]

Cases involving the issue of employment status for the purposes of levying CPP/QPP and EI contributions are frequently raised together and often resolved at the same time in the Tax Court.[94] However, the question of employment status also arises in relation to determining eligibility to receive benefits and these disputes are resolved by a different set of agencies and tribunals. Where worker status is in question, the *Employment Insurance Act* instructs the EI

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92 *Employment Insurance Act*, 1996, S.C. 1996, c. 23.

93 Ibid, 5(1) (a).

94 In 1996 the Minister of National Revenue was granted greater authority to determine the scope of coverage for the purpose of levying contributions. By contrast, questions, including employee status, relating to whether a claimant is eligible to receive benefits are determined by the Board of Referees and Umpire. In disputes involving employee status for the purpose of levying contributions and determining eligibility for benefits, Human Resources Development Canada normally obtains a Canada Customs and Revenue Agency ruling and then refers the matter back to the Board. *Canada (A. G.)* v. *Haberman*, [2002] 4 F.C. D35.

Commission to refer the matter to the Canada Customs and Revenue Agency and to defer judgment until a decision of the Minister of National Revenue or, in the case of an appeal, a decision of the Tax Court is received.[95] *Wiebe Doors* is followed with the result that the fourfold test dominates in determinations of worker status under EI. Determinations of worker status under EI thus follow a similar logic to CPP/QPP, although coverage is narrower and the Canada Customs and Revenue Agency and the Tax Court play more cent ral roles.

In contrast to CPP/QPP, self-employed workers are excluded as a group from coverage under EI. However, because this wholesale exclusion produces politically unacceptable outcomes, the *Employment Insurance Act* allows the Commission to include, by regulation, certain forms of employment (including those forms covering "persons in business"[96]) that are not governed by a contract of service.[97] In setting the terms for making regulations designed to extend EI coverage to excluded categories of work ers, for example, the Act notes that the Governor in Council may make regulations for including in insurable employment:

> employment that is not under contract of service if it appears to the Commission that the terms and conditions of service of, and the nature of the work performed by, persons employed in that employment are *similar to* the terms and conditions of service of, and the nature of the work performed by, *persons employed under a contract of service*.[98]

At the same time, the Act lists excluded ty pes of employment, including casual employment,[99] and allows for exclusions from the definition of "insurable employment" if it appears that the

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95 *Employment Insurance Act*, 1996, s.90(1)(a), 131(1)(a).

96 *Employment Insurance Act*, 1996, s. 5(5).

97 Ibid. s. 5 (1)(d), 5(4)(c).

98 Ibid, s. 5 (4)(c) (emphasis added).

99 Ibid, s. 5(2)(a).

nature of the work performed is similar to that performed by persons in employment that is not insurable.[100]

Under EI, therefore, most insurable employment is employment carried out under a contract of service. Yet EI coverage is extended by regulation to some groups of workers engaged under a contract for services. These powers have been exercised to create a separate scheme for self-employed fishers. These workers are treated as a special case on account of the character of their occupation and the heavy reliance in specific regions of Canada on fishing as a source of livelihood (Schrank 1998).[101] In practice, EI deems self-employed fishers to be engaged in insurable employment so long as they participate in making a catch, do not fish for sport, and hold a specified interest in an asset used in fishing (Canada Customs and Revenue Agency 2002, 8). It also identifies certain persons or entities as employers for the purpose of making contributions.[102] Fishers' EI is financed by self-employed fishers and designated employers, each of whom is responsible for half of the full contribution.[103]

Barbers, hairdressers, and manicurists who are not employees and taxi drivers and other drivers of passenger-carrying vehicles who are not employees, nor own or operate the

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100 Ibid, s. 6.

101 Special regulations for fishers were devised as a result of a case in which the Federal Court of Appeal held that a regulation establishing a different qualifying period for fishers was invalid as it did not authorize the creation of a separate EI scheme for fishers. The decision resulted in a special amendment to the then *Unemployment Insurance Act*, which enabled the scheme established for fishers to differ from that contained in the Act. *Silk* v. *Umpire (Unemployment Insurance Act),* [1982] 1 F.C. 795 (C.A.); upheld *Canada (A.G.) v. Silk,* [1983] 1 S.C.R. 335. *Employment Insurance Act*, 1996, s.153(1),(2); SOR/96-445; SOR/01-74.

102 These entities include: the buyer of the catch; the head fisher, where s/he is a member of a crew who makes a catch and where s/he is the recipient of the gross returns from the catch's sale; the agent who sells the crew's catch and to whom the gross returns from the catch are paid; and, the common agent, who may or may not be a crew member and must pay EI premiums but can recover them from the buyers. Canada Customs and Revenue Agency 2002, 6.

103 Under this scheme, qualifying requirements are organized on the basis of earnings rather than hours SOR/96-445; SOR/01-74, s. 5(1)-(6).

business nor own more than 50 percent of the vehicle but who are provided with facilities and services from the business operator, are also special cases in the EI Regulations.[104] In such cases, the workers are not under a contract of service yet they are deemed to be engaged in insurable employment. The Federal Court of Appeal has justified the regulation including the earnings of drivers of passenger vehicles in the category of insurable employment, created at the request of the taxi industry**,** on the basis that it helps to protect these drivers against "the risk of unavailability of work and involuntary idleness."[105] Unlike under CPP/QPP, in each of these cases, contributions are split between the owner or operator of the business and the self-employed person.

X. Income Tax

Taxes are the most important source of state revenue (Hogg, Magee and Cook 1999, 37). Taxes on income comprise the largest proportion of tax imposed and revenue collected as well as the most progressive (redistributive) tax instrument in Canada. Important tax consequences hinge on the determination of employment status. Employees and independ ent contractors are treated very differently not only for the purpose of levying payroll taxes such as CPP/QPP and EI, but also for determining liability for income tax (Gaucher 1999; Magee 1997).[106]

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104 SOR/96-332, s.6(d)(e).

105 *Canada (A.G.)* v. *Skyline Cabs (1982) Ltd.* (1986), 45 Alta.L.R. (2nd) 296 (F.C.A.).

106 A worker's status in important for these tax-related purposes: 1) determining the nature and amount of expenses the worker is entitled to deduct from income for the purposes of income tax liability; 2) establishing the timing of income recognition and the deferral of tax for the worker for income tax l iability; 3) deciding whether benefits received by the worker are subject to income tax; 4) requiring payroll deductions and remittances by workers and the firms that purchase their services for the purposes of CPP/QPP and EI as well as income tax; and 5) determining goods and service tax obligations of workers and firms.

Since most questions relating to a worker's employment status for tax, CPP/QPP, and EI purposes are resolved by the same agencies and courts applying the same legal tests, the answers tend to be the same.[107] Moreover, given that these questions typically arise in the context of determining liability for tax, the interests of the different parties involved tend to be the same in the different contexts. Firms have an incentive to characterize workers as independent contractors for both payroll and income tax purposes, albeit the incentive is much weaker, and mostly administrative, with respect to income tax. Workers share the firms' interest in avoiding taxes, while the state has an interest in treating workers as employees since payroll taxes are a growing source of revenue and business expenses claimed by independent contractors are hard to police. But what distinguishes the determination of employment status for the purpose of income tax from either CPP/QPP or EI is that with respect to income tax, workers never have an incentive to claim employee status. By contrast, under EI, for example, one of the advantages of being an employee is that an employer is required to make contributions to a scheme that provides benefits to employees who are unemployed. There is no similar incentive under income tax for workers to claim employee status; to the contrary, tax consultants tout self-employment as "the last great tax shelter" (Cestnick 2002).

Section 248 of the *Income Tax Act* defines the term "employment " as "the position of an individual in the service of some other person ... and 'servant' or 'employee' means a person holding such a position...."[108] This definition is treated as referring to the common and civil law distinctions between contracts of service and contracts for service and the common law tests are used to determine employment status. These tests have evolved from simple control to the *Wiebe Door* "four-in-one test," which is a variation on the classic fourfold test (control,

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[107] For a thorough discussion of the tax implications of worker status and the difference procedures in the different areas of tax see Gaucher (1999).

[108] R.C.S. 1985, c.1 (5th Supp.) as amended.

ownership of tools, chance of profit, and risk of loss) combined with an admonishment to consider all of the facts in order to determine the true nature of the relationship (Gaucher 1999, 50-62; Magee 1997, 584, 587-89). The Tax Court of Canada has accepted *Wiebe Door* as the leading authority in determining employment status for tax purposes, but it provides little guidance on how to evaluate the factors (Gaucher 1999, 62-63, 71).

To assist taxpayers in determining issues of categorization that have tax implications, Revenue Canada issues interpretation bulletins and pamphlets. While these interpretation bulletins are not binding, they guide taxpayers through the self-reporting system and indicate how Revenue Canada officials are likely to administer the *Income Tax Act*. Although Revenue Canada has not issued a bulletin dedicated to the specific question of determining a worker's employment status, this question is discussed in two bulletins, one dealing with business deductions by personal service businesses and the other dealing with performing artists. [109] In each bulletin Revenue Canada lists a number of factors that indicate employee status and these factors reflect those developed in other legal contexts. However, commentators have noted that Revenue Canada's bulletins tend to emphasize control (Gaucher 1999, 66-7; Magee 1997, 603). A pamphlet designed to assist individuals in determining whether they are employees or independent contractors is also provided by Revenue Canada. It sets out the *Wiebe Door* test and lists the factors to consider.[110]

While the taxpayer makes the initial determination of employment status, Revenue Canada officials have the power to dispute that categorization. Ultimately the courts resolve

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109 Interpretation Bulletin IT-73R5, "The Small Business Deduction," February 5, 1997; Interpretation Bulletin IT-525R, "Performing Artists," August 17, 1995; Gaucher (1999, 66).

110 The pamphlet has been criticized for not only mis-stating the legal tests (the integration test is used in the pamphlet as a tie-breaker for determining employment status contrary to the federal Court of Appeal's reasoning in *Wiebe Door*), but for its simplistic checklist approach to evaluating the factors considered in determining employment status (Gaucher 1999, 69-71).

disputes over the interpretation and application of the *Income Tax Act*. Courts have adopted a number of different interpretive approaches to tax statutes. However, adjudicators tend to interpret taxing statutes so as to impose liability on taxpayers only if the wording of the statute clearly requires it (Arnold 2001, 2). This approach contrasts with a remedial interpretive approach that is designed to give a broad and generous interpretation to the terms of a statute in order to achieve the public policy goals of the legislature in enacting the statute.

The courts' approach to the interpretation of taxing statutes helps to explain why workers are classified as independent contractors for tax purposes at the same time as they are classified as employees for the purposes of employment and labour law despite the fact that the same tests are invoked and similar factors are considered in both legal contexts.[111] A recent case by the Federal Court of Appeal, *Wolf* v. *Canada,*[112] not only illustrates the problem of uncertainty that results from this form of adjudicative process, it also highlights the extent to which courts are prepared to defer to individual choice without regard to public policy.

At issue *Wolf* v. *Canada* was whether a mechanical engineer who was hired as a consultant by the large airplane manufacturer Bombardier was an employee or independent contractor for the purposes of income tax. Emphasizing the factor of control, the Tax Court upheld Revenue Canada's decision to disallow certain business deductions claimed by the taxpayer on the ground that he was an employee and not an independent contractor. The three-member appeal court unanimously upheld the taxpayer's appeal of his status, and ordered the case to be referred back to the Minister for reconsideration and reassessment on the basis of its

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111 See for example the following cases in which the employment status of the worker differs for tax and employment standards; *Dynamex Canada Inc.* v. *Mamona*, [2002] F.C.J. no. 534 (Fed. Ct.) online QL.; and *Thomson Canada (c.o.b. Winnipeg Free Press)* v. *Canada,* [2001] T.C.J. No. 374 (Tax Ct.) online: QL.

112 *Wolf* v. *Canada*, [2002] F.C.J. No. 375, online: QL.

reasons. Although each judge wrote a separate opinion and applied a different version of the legal test of employee status, the underlying rationale for the decision was the same.

As was discussed in Section I, a great deal of space in two of the three judgements was devoted to determining the appropriate test of employment status under the *Civil Code of Quebec* since the general law of the province is the basis for determining employment status under the *Income Tax Act*.[113] Although the judges agreed on the contours of the test under the *Civil Code*, they differed over their treatment of *Sagaz Industries*[114] and the influence of the common law. However, they all agreed that the worker and the firm's choice of employment status should determine the issue of employment status. According to Decary J, "we are dealing here with a type of worker who chooses to offer his services as an independent contractor rather than as an employee and with a type of enterprise that chooses to hire independent contractors rather than employees. The worker deliberately sacrifices security for freedom."[115] Invoking the freedom of taxpayers to organize their affairs in such lawful way as they wish, the Federal Court of Appeal explicitly stated that the parties' intention should determine the taxpayer's employment status in this case. [116]

It is unlikely that *Wolf* will have much direct impact on the legal tests of employment status in tax law. Not only is the legal reasoning confused, the case deals primarily with the *Civil Code*, which limits its influence. However, *Wolf* is significant because it illustrates the extent to which the application of the legal tests depends upon the courts' prior assessment of the significance of the legal context. According to tax scholar Vern Krishna (1995, 192-3),

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113 Section I, B.

114 *671122 Ontario Limited* v. *Sagaz Industries Canada Inc.,* [2001] 2 S.C.R. 983.

115 *Wolf* v. *Canada*, [2002] F.C.J. No. 375, para. 22 online: QL. In a similar vein Desjardins J.A. accepted the taxpayers characterization of his employment as non-standard, "which emphasizes higher profit coupled with higher risk, mobility and independence" (para. 91).

116 Ibid, para. 119; para.124.

> Although not openly acknowledged, there is a difference in judicial attitudes in characterizing employment relationships in tax law and other employment related areas. In employment law, there is a trend to characterizing workers as employees to enable them to derive the benefits of legislation intended to protect the economically dependent and vulnerable. In tax law, the advantage lies with the independent contractor and, hence, one may be inclined to view the relationship from a different perspective.

The fact that adjudicators adopt a policy perspective or purposive approach to the interpretation of key concepts is not particularly troubling. In fact, according to the Supreme Court of Canada in *Sagaz Industries,* this is precisely what adjudicators should do in determining employment status. The problem is that the case law demonstrates that adjudicators, and in particular judges, are not very good at identifying the purpose of statutes or discussing the policy implications of different interpretations. Noticeable by its absence from *Wolf* is any discussion by the Federal Court of Appeal about the purpose of income taxation and the reasons why employees are treated differently from independent contractors for tax purposes.

XI. Conclusion

In response to the mid-twentieth-century development of collective bargaining, minimum standards, and social wage legislation the distinction between employees and independent contractors took on greater legal significance. While for much of the second half of the twentieth century linking the personal scope of employment and labour legislation to the concept of employee covered the majority of people who performed work for remuneration, it was never entirely satisfactory. Moreover, using the concept of employment to delineate the scope of labour protection and the social wage has become increasingly problematic in the face of the massive growth of self-employment, especially of the own-account variety, in Canada during the 1990s. As the portrait of the self-employed presented in Part Two indicates much of the growth

in self-employment has been of a kind that involves little scope for entrepreneurial activity. Consequently, the number of workers located at the margin of the employee/independent contractor distinction has increased, creating even greater difficulties for decision makers required by law to slot workers into categories whose conceptual and sociological foundations are rapidly eroding.

Despite some well-intentioned efforts to respond to the difficulty of imposing legal categories on an increasingly heterogeneous group of workers, legislators and adjudicators have been unable to resolve satisfactorily the difficulties they face. In some areas of the law, efforts have been made to reduce the salience of the distinction between employees and independent contractors by extending coverage to persons who were not traditionally categorized as employees. Many jurisdictions in Canada have extended the personal scope of collective bargaining law to dependent contractors, workers who are not legally subordinated but who are economically dependent. A couple of Canadian jurisdictions have gone so far as to make the distinction between employees and independent contractors irrelevant. This strategy has been adopted for legal regimes in which the distinction has little significance, such as human rights legislation and occupational health and safety standards. However, the more common strategy has been to maintain the distinction between employees and independent contractors but to extend coverage through legislation or regulation to workers who would otherwise fall outside of the definition of employee or to deny it to workers who would otherwise fall inside the definition.

While this piecemeal approach has benefited particular groups of workers for specific purposes (for example, fishers in British Columbia for the purposes of workers' compensation), it has significant limitations. The most obvious is that the processes of inclusion and exclusion are *ad hoc* and dependent on contingent circumstances. For example, while most provinces

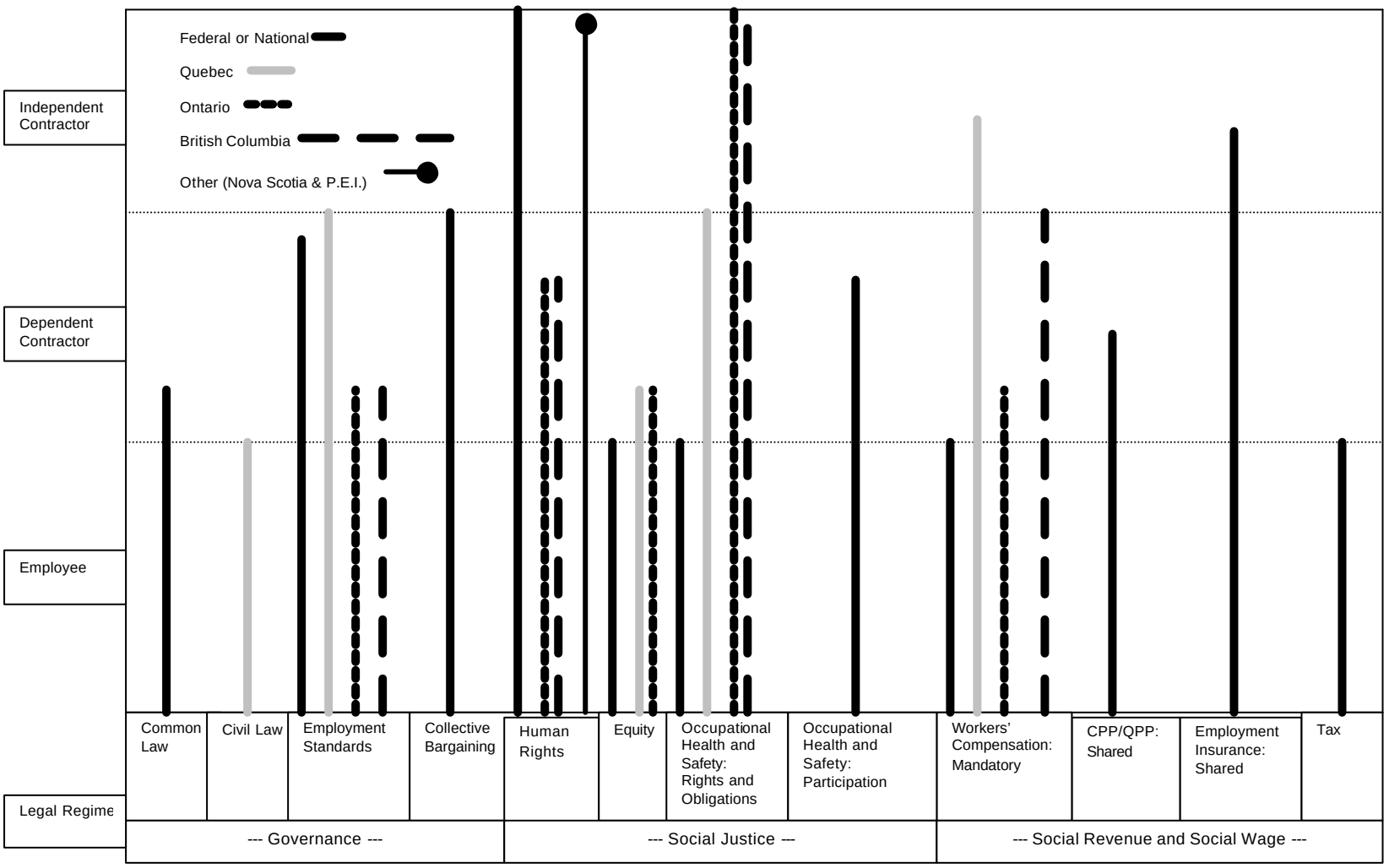
amended their collective bargaining legislation to include dependent contractors in response to industrial strife in a number of industries where the use of contract workers was undermining stable collective bargaining relationships, they did not also give these workers the benefit of minimum standards legislation, notwithstanding that they were persons in an economically dependent position that made them more like employees than independent contractors. Presumably, a major reason for this inaction was the absence of the kind of political pressure that was being brought to reduce industrial conflict. Similarly, the extension of employment insurance to east coast fishers came about both because of their depressed condition and because of the politics of federalism (Schrank 1998; Clement 1986, 56-7). A second problem with this kind of *ad hoc* incrementalism is that it creates new legal categories such as "dependent contractors" whose rights may be different from those of both traditional employees and independent contractors. As a result, the boundaries of such categories must be defined at two margins. While this approach may allow adjudicators to make the legislation more inclusive in at least some of its dimensions, it creates additional difficulties in drawing lines. In short, a process of adding-on new categories of employees inevitably depends on *ad hoc* political, executive, and administrative decisions, rather than on a more principled consideration of the appropriate scope of coverage. Thus, this technique for determining the personal scope of labour law is unlikely to diminish and, indeed, may increase the burden on adjudicators of applying legal definitions to complicated and ambiguous facts.

Adjudicators in various settings have attempted to grapple with the challenge posed by the need to draw categorical distinctions in a world in which "most labour market boundaries and categories are heuristic rather than descriptive – conceptual rather than material" (Purcell 2000, 1). In general, adjudicators evince a keen awareness of this difficulty and in response have adopted increasingly elaborate factor tests that emphasize aspects of control, subordination, economic dependency, and integration into another's business. They have also

asserted that the number of factors is not closed and the weight to be given to any given factor is not fixed. In an attempt to produce greater coherence and certainty in the determination of employment status, some adjudicators have held that the application of the factors should be guided by an explicit discussion of the purpose of the legislation that is under consideration. While this technique is marginally better than alternative legal approaches that depend upon fitting workers into fixed legal categories, leaving the problem to be resolved through adjudication is a poor solution for at least three reasons. First, the purposive approach makes little sense conceptually. Indeed, it explodes the conceptual category of "employee" that it is intended to make workable by admitting that it is a cipher whose meaning is to be supplied by adjudicators based on their view of the appropriate class of persons who should be covered by the legislation. In effect, the purposive approach to the application of definitions that determine the scope of coverage is a deeming process thinly disguised as adjudication. It also undermines the conceptual category of employee by making its meanings and boundaries vary depending on the context with the result that the general question, "Are you an employee" cannot be answered without first clarifying the purposes for which the query is being posed. Since the important question under a purposive approach is "should the legislation apply to a person who performs this kind of work" the question of whether or not the person is an employee is irrelevant. Second, this approach assumes that adjudicators are the appropriate personnel to identify the purposes of a legislative scheme and, on that basis, define the class of people covered by it. This assumption is extremely problematic given the diversity of administrative decision-making processes, appointment procedures, and qualifications of adjudicators, let alone the scope for judicial oversight and control. Finally, adjudication, in essence, operates as a system of *ex post* decision-making that in reality will leave the status of a large number of workers highly unpredictable, notwithstanding that the abstract character of the test may produce an illusion of consistency (Davies 1999, 167).

The determination of the personal scope of employment and labour legislation in Canada is very complex (Langille 2002, 138-9); although the distinction between employees and independent contractors remains crucial, different tests are applied, extended definitions of "employee" have been added, and there has been some *ad hoc* extensions and exclusions that affect particular groups of workers. As the diagram below indicates, the personal scope of employment and labour legislation differs from jurisdiction to jurisdiction as well as across different legal regimes. Given the transformation in employment relations in the latter part of the twentieth century and the changing nature of self-employment, the current situation not only encourages litigation, it invites the manipulation of contractual arrangements to avoid the incidence of legal regulation. It is time to revise the basis for determining the personal scope of employment and labour legislation.

Figure IV.1 - Scope of Coverage



Part Five: Reforming the Personal Scope of Employment and Labour Regulation

Many legal scholars have concluded that the traditional concept of employee does not provide a satisfactory basis for delineating the personal scope of labour and employment law nor for determining eligibility for social wage programs (Benjamin 2002; Brooks 1988; Carlson 2001; Davidov 2002 a, b; Davies 1999; Davies and Freedland 2000a; Freedland 1995; Hyde 2000; Linder 1992; Stewart 2002; Supiot 2001). At the national level there have been a number of attempts to expand the scope of certain aspects of labour protection to economically dependent workers (Benjamin 2002; Davies and Freedland 2000a; Comparative Labour Law and Policy Journal 1999) and an expert report (called the Supiot Report after Alain Supiot the main author) issued by the European Commission has endorsed such an expansion throughout the European Union (European Commission 1999; Supiot 2001). The personal scope of employment and labour protection will be discussed at the ILO's 2003 conference (ILO 2003), despite the 1998 defeat of the ILO's proposed Convention on Contract Labour, which would have extended some elements of labour protection to dependent workers.[117] There is widespread agreement that the traditional legal categories - "employee", "independent contractors", "contract of service", and "contract for services" - no longer fit with the economic and social reality of work relations. The challenge, according to Patricia Leighton (2000, 288), is

> to develop a legal approach which equates with work realities and which is rooted in robust empirical data, so as to ensure the genuine self-employed/entrepreneur is correctly, consistently and convincingly categorized.

[117] ILO, Committee on Contract Labour: Report V (2B) Addendum (International Labour Conference, 86th Session, Geneva, June 1998); Governing Body decisions, March 2001 (GB.280/205), Art.3 (b) and the report submitted to the Governing Body (GB.280/2) available at www.ilo.org). For discussions of the draft Convention see Benjamin 2002, 81; Davidov 2002 a, 103, note 13, 107; Vosko 1997).

The conventional solution to the problem of determining the personal scope of employment and labour legislation has been either to develop a new, more inclusive test to determine whether or not a worker is an employee or to adopt a new, more extensive definition (Davidov 2002 a, b; Stewart 2002). These techniques have been adopted in a piecemeal manner across Canada in a variety of specific legal regimes and the problems with them are identified at the end of Part Four. Another solution, which is gaining ground in Europe (Davies and Freedland 2000a; Supiot 2001), is to develop a new concept to determine the personal scope of employment and labour legislation. In Britain, the concept "worker", which broadly corresponds to the civil law notion of "parasubordination" and the Canadian term "dependent contactor", is an attempt to shift the boundary of labour protection to encompass those apparently self-employed workers who are not genuinely in business of their own account (Deakin 2002, 191). While this solution does not obviate the immediate need to draw distinctions between dependent workers and independent contractors, it is a step towards limiting the significance of the distinctions between different types of workers for the purpose of legal regulation. Commenting on the concept "worker", Deakin (2002, 191) speculates that

> the longer-term implication of its use may be to dissolve entirely the traditional boundary between employees and the self-employed, leaving only independent entrepreneurs (those with business assets and the opportunity to capture residual profits) outside employment law. However, what is of particular interest is that the response has not taken the form of a de-socialization of the employment relationship. On the contrary, it is an attempt to extend the logic of social protection to certain forms of self-employment.

The statistical portrait of the self-employed in Canada suggests the time already has come to consider dissolving the distinction between employees and the self-employed for the purposes of labour protection. Few of the self-employed resemble entrepreneurs since the overwhelming majority of them lack many, if not all, of the distinctive features of entrepreneurship – ownership, autonomy, or control over production. The majority of the self-employed much more closely resemble employees than they do entrepreneurs, although for legal purposes many would be

classified as independent contractors and, as such, they would be denied the legal protection available to employees (see Part Two, Charts II.8 and II.9). But, as the data reveal, not all independent contractors are entrepreneurs and many independent contractors are dependent on selling their labour. The statistical portrait of the self-employed in Canada suggests that instead of trying to rehabilitate the legal distinction between independent contractors and employees as a basis for drawing the boundary between commercial and labour law, the distinction should be abolished. To the extent that there are relevant differences in the conditions under and arrangements by which employees and contractors sell their labour, these should be taken into account in the design of labour law, not its application.

Most legal scholars recognize that determining the scope of employment and labour regulation should begin with a consideration of the rationale for a particular regulatory regime and the range of work contracts to which it should apply (Carlson 2001; Davidov 2002 a, b; Davies and Freedland 2000a; Engblom 2001; Hyde 2000; Langille 2002; Linder 1992; Maltby and Yamada 1997; Perritt 1988). The process for determining the personal scope of regulation involves identifying the range of work relationships or contracts, establishing the normative goals of the regulatory regime, and assessing the variety of work contracts against the normative goals of different regimes. The first two steps involve developing typologies for classifying different work contracts and regulatory regimes. The third step is evaluative, providing normative and economic justifications for recommending a specific scope of application in a particular context. There are also some ancillary, more technical questions that relate to reducing uncertainty and the opportunity for shams and to how specific regulatory regimes have been institutionalized.

I. Typology of Work Relations

In response to the now commonplace observation that contracts for the performance of work take on a variety of forms, scholars have attempted to construct new typologies of work relations that move beyond the employee/self-employed dichotomy (Davidov 2002 a, b; Davies and Freedland 2000a; Englbom 2001; Supiot 2001). These typologies capture some of the principal dimensions, especially autonomy/subordination and economic independence/dependence, of these complex relationships. Given the range and diversity of work relations, it is inevitable that any typology, no matter how sophisticated, will involve a degree of arbitrariness. However, the purpose of a typology is to identify key features of work relations that correspond reasonably well with social reality and that relate to the purposes of employment and labour legislation.

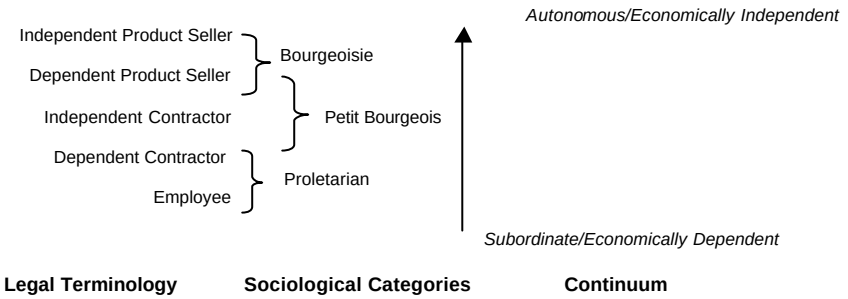
One typology of work and employment relations that has gained a foothold in attempts to address the problem of delineating labour law's domain is that of Paul Davies and Mark Freedland (2000a, 35; Engblom 2001). Emphasizing the traditional dimensions of subordination and economic dependence, they identified four categories of work contracts or relations: 1) employees traditionally conceived; 2) employee-like workers who perform work personally and are highly dependent economically on one or more employers; 3) people who perform work personally but who run an identifiable business of their own; and 4) people who have contracted to produce a result that may or may not involve personal work on their part. This typology is a useful starting point because it captures positions that are already identified to some extent in law and provides a reference point that allows for a comparison between different views about the appropriate extension of the personal scope of employment and labour law. However, it is important to recognize that these "conventional" legal categories are problematic because they represent arbitrary points on a spectrum that, as the prior discussion of legal tests

demonstrated, adjudicators have found enormously difficult to apply in a consistent, predictable, and appropriate manner. Moreover, there are some cases in which an employee may be less economically dependent or subordinate than a so-called independent contractor (for example, an "in-house" company lawyer compared to a small contractor who runs a home renovation business). Thus, while the categories provide a useful heuristic, extreme caution is called for in making them legally salient for the purposes of determining the appropriate scope of labour law. Moreover, the question of category definition will have to be revisited once the normative, economic, and institutional justifications for delimiting the scope of labour law have been considered.

The typology presented below differs from Davies and Freedland's typology in three respects. First, the terminology used to identify the different categories of work relations reflects terms that are commonly used in Canadian law and policy. The term dependent contractor covers what Davies and Freedland call employee-like workers; persons who perform work personally but are in business on their own account are referred to as independent contractors, and product sellers is used instead of the term "non-personal work". Second, in order to indicate the relational nature of employment and to capture some of the diversity of employers, their fourth category, product sellers, has been subdivided into dependent and independent product sellers. Third, the categories in Davies and Freedland's typology are contrasted with the traditional sociological categories that emphasize the ownership of the means of production for understanding the nature of power and authority relations between labour and capital. As discussed in Part One, proletarians are workers who do not own sufficient means to enable them to produce independently and so are dependent on the sale of their labour power for their survival. The bourgeoisie own sufficient means to employ proletarians, over whom they exercise control. In between is a group of petit bourgeois who are partially dependent on the sale of their labour power but also own some or all of the means of production and may hire a

few workers. The absence of economic dependence on the performance of work (sale of labour) would lead to the categorization of an individual as a product seller, not an independent contractor. Most independent contractors, who would be classified as petit bourgeo is in classical sociological terms, do not illustrate the distinctive traits of entrepreneurship – autonomy and ownership -- and thus are more akin to proletarians than they are to the bourgeoisie.

Figure V.1 Typologies of Work Relations



How does this typology measure up against the social reality of work relations? This assessment is complicated by the fact that the existing statistical definitions and data are based on the distinction between employment and self-employment and do not specifically address the distinctive features of entrepreneurship. However, despite this limitation it is still useful to estimate the size of the different categories since such estimates provide some indication of the number of people who will be affected by different extensions of labour law's domain. [118] Drawing upon the data discussed in the portrait of the self-employed provided in Part One

[118] Researchers in England attempted to obtain more precise information on employment status through a survey that was specifically designed to determine legal classification. They found that approximately 80 % of respondents were clearly dependent workers (combining the categories of employee and dependent contractor), while 7.4 % were own-account workers (combining the categories of independent contractor and product seller). However, they were unable conclusively to identify the status of 12 percent of respondents (Burchell, Deakin and Honey, 1999). Recent studies in Germany indicate that the size of the category of dependent workers would be very large (Wank 200

Figure I.1, in Canada 83.8 % of the work force are dependent workers (employees and dependent contractors) and 5.6 % are bourgeoisie or petit bourgeois (self-employed employers who include independent contractors as well as dependent and independent product sellers). The difficulty is classifying the 10.3 % of the workforce in Canada who are self-employed on their own account.[119] The crucial question is whether this group of self-employed are entrepreneurs.

Although there is no simple method for identifying the universe of entrepreneurs within the broader class of the self-employed in Canada, there are several measures that can be used to approximate entrepreneurship. These measures, which are employer status and income, provide some indication of the proportion of employed people who would be excluded if labour protection were extended to all independent contractors who are not entrepreneurs. If self-employed employers were considered to be entrepreneurs, according to Figure V.2-I, only 34.6% of the self-employed would be excluded from labour protection. This group amounts to 5.6% of the total number of people employed in Canada. If all the self-employed with annual incomes of over $90,000 a year were considered to be entrepreneurs and thus excluded from labour protection, only 10.0% of the self-employed would be excluded, which amounts to only 1.6% of all the people employed (see Figure V.2-II). As the measure of entrepreneurial status is made more rigourous to include both income and employer status, the size of the excluded group shrinks (see Figure V.2-III) to 6.1% of the self-employed and only 1.0% of all employed people. But, as the final pie charts indicate (Figures V.2-IV and V.2-V), only a very small proportion of employed people, whether they are self-employed, employers, or employees, have annual incomes that exceed $90,000 a year.

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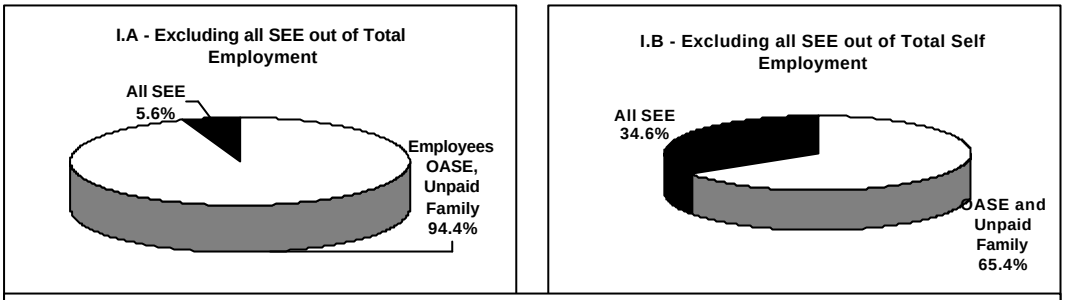
[119] The percentage of unpaid family workers is 0.3%.

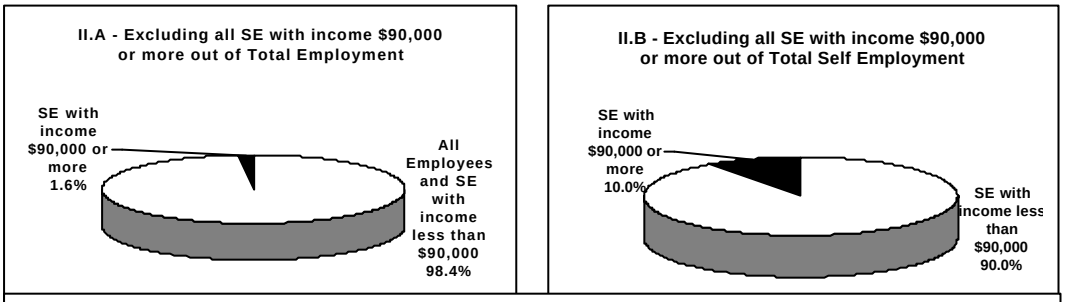
Figure V.2*
Five Measures of the Size of the Canadian Entrepreneurial Workforce, 2000

I – All Self-Employed Employers



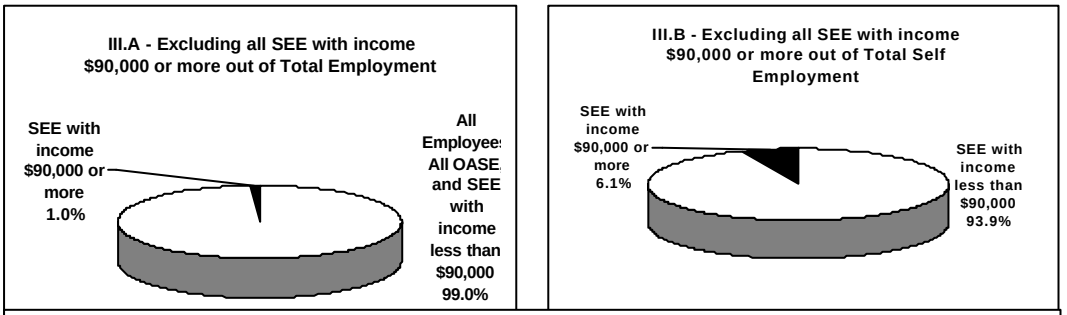
Based on Scenario I, 5.6% of the total labour force would be excluded and 34.6% of all self-employed would be excluded.

II – All Self-Employed with Income of $90,000 or More



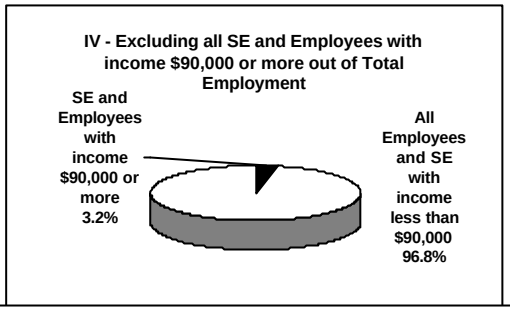
Based on Scenario II, 1.6% of the total labour force would be excluded and 10% of all self-employed would be excluded.

III – All Self-Employed Employers with Income of $90,000 or More



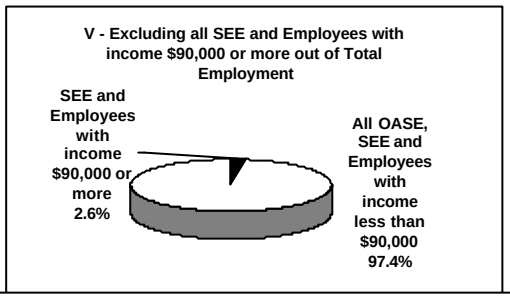
Based on Scenario III, 1% of the total labour force would be excluded and 6.1% of all self-employed would be excluded.

IV – All Self-Employed and Employees with Income of $90,000 or More



Based on Scenario IV, 3.2% of the total labour force would be excluded.

V – All Self-Employed Employers and Employees with Income of $90,000 or More



Based on Scenario V, 2.6% of the total labour force would be excluded.

- Source: Statistics Canada Labour Force Survey Public Use Microdata 2002, Custom Tabulation and Delage 2002 appendix table B.4 p. 80.

II. Dimensions of Legal Regulation

Just as it is no longer sensible to speak of employees or employers as unified categories, so too it must be recognized that labour regulation occurs at different levels and is multi-dimensional, serving a variety of instrumental goals and responding to different normative concerns. Freedland (1995, 24) identifies two levels at which norm making or contracting takes places within work relationships. The executory level is concerned with the basic exchange of services for remuneration, while the relational level is more focused on security of expectations. For workers these are expectations about income and employment security and occupational health and safety, while for employers they centre on how to insure that workers' activities will help achieve their goals. With a view to creating categories that reflect current socio-legal practice and that have common characteristics in respect of their extension to categories of workers, some scholars have attempted to identify these dimensions (Davidov 2002 a, 67-82; Engblom 2001). Samuel Engblom (2001, 217-20) has suggested that labour law plays at least three roles: the protection of human rights; the promotion of social justice in regard to workers' economic dependence and subordination to managerial authority; and as an instrument of economic policy to increase the total amount of and change the character of goods and services produced.

Drawing on these ideas, it is useful to identify three dimensions of labour regulation (see Table V.1 below). First, there is a social justice dimension, which includes human rights concerns (for example, anti-discrimination law and pay and employment equity) and occupational health and safety regulation. These laws operate at the relational level of contracting and have been grouped together because they primarily respond to widely held social norms to the partial exclusion (at least normatively and rhetorically if not practically) of economic concerns. While Engblom (2001) includes under the rubric of social justice concerns

matters related to economic unfairness and the democratic deficit in work relations, this view is not widely accepted in the North American context. For this reason it is necessary to discuss regulations designed to address economic unfairness and the democratic deficit in relation to other norms as well as in relation to social justice (Davidov 2002 a, b). Thus these concerns have been placed under the rubric of economic exchange and governance, which includes employment standards and certain common law duties such as implied notice upon termination, as well as collective bargaining. However, because this grouping operates at both the executory and relational levels of contracting, its components might require separate treatment. For example, maternity and parental leave and payment provisions contained in minimum standards and employment insurance laws are crucial if women are to enjoy equality in a market economy, and so should be and, in part, are recognized as having an important human rights dimension. In contrast, collective bargaining, at least in the North American context, operates much more at the relational level of contracting and is influenced by diverse norms, including instrumental goals of economic policy (Glasbeek 1987). The third dimension of labour regulation encompasses social wage and social revenue, including employment insurance, public pensions, workers' compensation, and income tax. Although historically under-developed in the North American context, social wages and revenue are vital both to workers' well being and to the operation of labour markets, since they provide a baseline on which labour-market exchange occurs. Operating at the relational level of contracting, this dimension of labour regulation is very much influenced by often competing claims of social justice and economic policy considerations.

Table V.1
Dimensions of Labour Regulation

Dimensions of Labour Regulation	Components
Social Justice	Human Rights (anti-discrimination law; pay & employment equity) Occupational Health and Safety
Economic Terms And Governance	Employment Standards Collective Bargaining Common Law (Notice)
Social Wage and Social Revenue	Employment Insurance Public Pensions Workers' Compensation Income Tax

Having identified types of contracts for the performance of work and dimensions of labour regulation, there is now the more difficult challenge of making recommendations about the appropriate extension of each dimension to labour regulation to the different types of contracts. However, before proceeding to these recommendations, it will be useful to first map the current situation in Canada in relation to the conventional typology of work relations despite the difficulties with these categories noted in Part Four. This table (V.2) can also be compared with Figure IV.1, which depicts the personal scope of labour regulation in Canada.

Table V.2
Personal Scope of Labour Regulation - Present

Work Relation	Dimensions of Labour Regulation		
	Social Justice	Economic Terms And Governance	Social Wage and Social Revenue
Independent Product Sellers	Part	-	-
Dependent Product Sellers	Part	-	-
Independent Contractors	Part	-	-
Dependent Contractors	+	Part	Part
Employees	+	+	+

III. Recommendations

The starting point for our recommendations is that all dimensions of labour regulation should be extended to all workers, defined as persons economically dependent on the sale of their capacity to work, unless there is a compelling reason for not doing so. If this definition were applied to the data on self-employment presented in Part Two, most independent contractors would be included within the personal scope of labour protection. The only group that should be excluded are people who are not dependent upon the sale of their capacity to work. However, such an extension of the personal scope of labour law will require institutional redesign that takes into account the different social and economic relations of different groups of workers. As a result, some of the existing distinctions between different employment statuses will have to be retained for the purpose of designing different regimes of labour protection even though the distinctions are irrelevant for the purposes of determining the scope of labour law protection.

Our starting position is justified on normative, economic, and institutional grounds. The normative rationales are fairness and social justice. Fairness requires that similarly situated individuals be treated equally. In this context, people who are dependent on the sale of their labour *prima facie* should be treated similarly regardless of the legal form that the transaction takes. The social justice argument is that all workers *prima facie* should be protected against harms and risks that are broadly seen by society as unacceptable. Moreover, as the expert report for the European Commission noted, the current restrictive approach to labour protection may have discriminatory impacts upon women, exposing them to unacceptable risks:

> It may be particularly detrimental to women to restrict the scope of application of labour law and its main guarantees to the field of subordinate employment and the traditional contractual form of such employment, namely the employment contract, without taking account of work performed for others that is channelled

> through other kinds of legal or contractual relations: known as independent, autonomous, or self-employment or similar. The continued identification of labour law with the regulation of the prototype of labour relations associated with the industrial model that gave rise to such relations – which, moreover, was never fully representative even of all dependent or subordinate work – limits the protection afforded to a smaller and smaller core of workers and leads to even greater segmentation of the labour market (Supiot 2001, 180-1).

The economic rationale for an expansive approach to the personal scope of labour regulation is not only a matter of efficiency, but is tied to the goal of economic activity – improving living standards. According to economist Joseph Stiglitz (2002, 20), "if improving living standards is the objective of economics, then improving the welfare of workers becomes an end in itself; and only if one believes that the market leads to efficient outcomes can one feel confident in not paying explicit attention to workers' welfare, trusting that the market will make all the correct trade-offs." Stiglitz has identified a number of information imperfections that distort the labour market. Maintaining the distinction between employees and independent contractors may also produce distortions. Differences in treatment of workers on the basis of differences in the contractual form of their work relationship will induce the stronger party – typically the purchaser of labour – to create less regulated commercial relationships over more regulated employment relationships. This process will create a downward pressure on wages and working conditions and may not lead to compensating improvements in the living standards. Thus, expanding the personal scope of labour protection is an important element of economic policy .

The institutional rationale for extending labour regulation to all contracts for the performance of work is that drawing and policing boundaries between different categories of workers has proven to be extremely difficult. For example, as seen in Part Four, even where the personal scope of labour regulation was extended to dependent contractors, as in the case of collective bargaining, the boundary between dependent and independent contractors has

proven to be a source of considerable difficulty for labour boards vested with the responsibility for patrolling it. The elimination of distinctions between different categories of workers would lessen the administrative burden, and reduce the uncertainty that inevitably arises in regimes where these distinctions are salient. Boundary problems, however, would not disappear even if the distinction among categories of workers were abolished, for it would still be necessary to distinguish between workers and product sellers. Tests based on the amount of business capital, income, and/or the number of workers under contract would distinguish between workers who depend on selling their services in order to survive and entrepreneurs who invest capital and hire workers. Such tests also have the advantage of being administratively feasible, although they are not immune to manipulation through shams and other attempts to avoid regulation.

As indicated, however, this broad approach to the personal scope of labour regulation merely represents a starting point. There may be compelling normative and economic arguments for altering the personal scope of various dimensions of labour law, either to narrow it to only some categories of workers, or to extend it to persons who are not workers (for example, dependent product sellers) according to our preliminary definition. There is also the practical problem of institutionalizing the principle that all people who perform services for remuneration should be covered by labour protection. In Canada the regimes of labour regulation are, by and large, designed for traditional employees. Until new forms of labour protection can be devised that do not hinge on a traditional employment relationship, it may be necessary, in some circumstances, to retain for the time being the distinction between independent contractors and employees. However, the starting premise is that the distinction between independent contractors and employees is neither a principled nor practical basis for determining the scope of labour protection.

The following sections consider in more detail arguments specific to the different dimensions of labour regulation and identify the kinds of modifications that would have to be made if the domain of labour regulation were extended beyond its present boundaries. It also identifies some of the problems with institutionalizing recommendations that address the issue of personal scope without also exploring issues relating to the delivery of benefits and the design of instruments. However, no attempt is made to provide a highly detailed set of recommendations in respect of those modifications.

A. Social Justice

As demonstrated in Part Four, because of the normative foundation on which the social justice dimension of labour regulation rests, it has been extended most broadly, particularly in respect of anti-discrimination law. There is no normative or economic justification for permitting discrimination against any worker who provides service personally, regardless of the contractual arrangement under which the service is provided or the form of remuneration stipulated (Davidov 2002 a, 31; Davies and Freedland 2000a; Maltby and Yamada 1997; Perritt 1988). Moreover, this is also a situation where it is appropriate to extend labour regulation into the realm of transactions between product sellers for it is no more acceptable for an auto manufacturing company, for example, to refuse to purchase auto parts from a black-owned business than it is for it to refuse to contract with a black independent or dependent contractor or to refuse to hire a black employee (Davies and Freedland 2000a).

With respect to pay and employment equity, the normative case for extending their application to all workers is also compelling. There is no reason why independent contract work performed predominantly by women should not be as well paid as independent contract work of equal value performed predominantly by men. Nor for that matter is there a compelling

normative argument for not requiring firms to review their contracting systems to remove barriers adversely affecting groups of contractors and product sellers that have historically been disadvantaged and to set targets so that these groups obtain a proportionate share of the value of work and product contracts. However, current pay and employment equity regulations and statutes are extremely complex and they tend to be designed to accommodate the existing institutions and practices of collective bargaining. Detailed studies are required to determine what institutional and administrative arrangements would need to be made in order for the pay and employment equity regimes to operate effectively outside of the traditional employment relation.

The case of occupational health and safety regulation is also complicated because it combines direct regulation with participatory rights for workers. As shown in Part Four, many jurisdictions already impose duties on employers to protect all workers with whom they contract, regardless of whether they are employees, dependent or independent contractors. All Canadian jurisdictions should adopt this approach since there is no reason why independent contractors should be exposed to hazards to which employees cannot be exposed. Moreover, independent contractors should be under a duty to obey occupational health and safety laws as they apply to their work (Davies and Freedland 2000a; Perritt 1988). There is no justification for allowing self-exploitation of a kind that is unacceptable in the employment context. This position already been taken in several jurisdictions in Canada.

Similarly, some participatory rights, such as the right to know about hazardous conditions present at the workplace should, and already do, apply to all workers. The right to refuse unsafe work should also be extended to all workers, including independent contractors; however, some modifications may be necessary to suit the particular circumstances of independent contractors. Where the hazardous condition that causes the work refusal is one

that is created by the employer, there is no normative or economic justification to require independent contractors to face the loss of their contracts because they reasonably believe that its performance would endanger themselves or other workers. The procedures created to resolve work refusals by employees would also be suitable in these circumstances for independent contractors. However, where the hazard is created by an independent contractor or is inherent in the work that was contracted (and was known to be so), the work clearly should stop but cancellation of the contract might be permitted or, indeed, required. Finally, rights to representation on joint health and safety committees should be extended to independent contractors in circumstances where the duration of the contract with a particular employer exceeds some minimum (for example, three months). Again, there is no normative reason why independent contractors should not be able to participate in the internal responsibility system of the employer; the only issue is one of administrative and institutional practicality.

Finally, it is worth considering whether occupational health and safety regu lation should be extended to both dependent and independent product sellers. The law applies to them as employers in relation to their own workers; the question here is whether it should extend to their contractual relations with other product sellers. In fact, there are some ways in which the law already regulates these relationships. For example, right to know laws require importers and manufacturers to label hazardous products and to provide material safety data sheets to purchasers in order to insure that information is transmitted with the product and reaches its end users. As well, when it comes to contracted-in services, the law draws no distinction between independent contractors and product sellers; when one firm contracts for services from anot her firm there is overlapping responsibility between the two firms for the health and safety of the workers of the contracted-in firm performing the work. This overlapping responsibility creates an incentive for contracting-in firms to exercise due diligence in regard to the occupational health and safety practices of the firms and individuals with whom they contract. In this same

spirit, it has been suggested (Gunningham 1998, 228) that bidders on government contracts over a certain value should be required to certify that they have a safety management system. Consideration should be given to other ways of intervening in supply chains to improve health and safety performance. Specifically, the possibility of placing firms under a general duty to contract with firms that operate in compliance with applicable occupational health and safety laws, subject to a defence of due diligence should be investigated. Further study should be undertaken to develop more specific proposals to implement this approach.

B. Economic Terms and Governance

Employment and labour regulation that is directed at economic terms and the governance of work relations balances the goal of social welfare for working people and promoting efficiency in the labour market (Davies and Freedland 1999, 233). However, it is important not to assume that these goals are either uniformly consistent or inconsistent; both economic theory and empirical data suggest that the relationship between them is much more complex (Addison and Siebert 1997; Deakin and Wilkinson 2000; Kitson, Martin and Wilkinson 2001). But as Davies and Freedland (1999, 247) acknowledge

> it is unlikely that real progress will be made in refining the debate about the personal scope of employment law until ways can be devised of interrelating, on the one hand, the functional needs for the sort of regulation offered by particular aspects of employment law, with, on the other hand, the complex incentive structure and allocation of risks which are embodied in particular work arrangements.

Currently, minimum standards legislation generally applies only to traditional employees, although through adjudication its personal scope has sometimes been extended to dependent contractors. At the very least, minimum standards should be expressly extended by legislation to dependent contractors. However, the normative case for extending minimum standards to all

workers who are economically dependent on the sale of their labour (that is, all but product sellers) is a strong one. If we do not allow competition between traditional employees and, perhaps, dependent contractors to produce economic terms and conditions that fall below socially acceptable levels, why should we allow such outcomes among independent contractors, especially in a context where the boundary between the two groups is particularly elusive and our data show that a majority of independent contractors do not possess the distinctive features of entrepreneurship – ownership, autonomy, or control over production.

Numerous difficulties, however, may arise in the application of the principle that all people who personally perform work for remuneration should be covered by minimum standards legislation.[120] For example, the difference in control exercised by the employer may make the comparison unworkable. In the case of traditional employees and dependent contractors, the control exercised by the employer over the performance of work makes it possible to speak meaningfully about a minimum wage for a specified period of time. However, in the case of independent contractors who have been engaged to complete a task for a price, the lack of control exercised by the employer makes it impossible to calculate a minimum wage since the effort level is largely within the control of the independent contractor. A second but related concern is that while an employee is paid only wages, the price paid to an independent contractor includes, in addition to remuneration for the contractor's labour, the cost of the contractor's own employees, the supplies and materials used by the contractor, and the use of the contractor's capital. A third concern is that because independent contractors are, almost by definition, unlikely to be dependent on a particular employer but rather to be hired by numerous employers, problems are likely to arise in respect of such matters as hours of work and overtime provisions. These concerns suggest that it is important to consider the type of standard when

[120] Unlike Davidov (2002 a, 159-165) we do not consider the difficulties in extending employment standards to independent contractors to be a sufficient reason for excluding such workers from employment protection. Instead, we regard these difficulties as a good reason for modifying the delivery of employment standards.

determining the specific scope of protection. Income and hours of work thresholds are likely more appropriate than employment status for establishing the scope of specific standards.

In addition to these difficulties, it is also necessary to accommodate the great variation in the way different economic and industrial sectors are organized. For this reason, much of the regulation directed at economic terms and governance structures should be specific to a sector. For example, the construction, garment, and trucking industries have distinctive contractual relations and employment structures and a history of distinctive regulation (ILGWU and Intercede 1993). It may also be the case that labour principles will be brought to the design of special protective laws for independent contractors (Davies and Freedland 2000a, 43-4). In sum, because an extension of minimum standards to independent contractors raises serious concerns and design problems, further study should be undertaken to investigate these problems, determine their magnitude, and explore possible solutions.

Finally, there are good reasons for the partial extension of minimum standards legislation to product sellers. First, all product sellers should be jointly and severally liable for the failure of the parties with whom they contract to adhere to minimum standards, subject to a due diligence defence. This approach would parallel the previous recommendation with respect to occupational health and safety regulation. There is ample evidence that chains of sub-contracting often produce situations in which workers are employed at the bottom end of the chain by transient or insolvent entities that do not adhere to minimum standards and are effectively immune from enforcement actions (Becker 1996; Collins 1990; ILGWU and Intercede 1993). In the absence of some element of common management or control, employees cannot hold contracting entities higher up on the chain jointly and severally liable as related employers

under employment standards legislation.[121] This recommendation would help protect employees against the harmful effects of these kinds of arrangements. Second, there are some settings, such as the fishing industry, where product purchasers have organized production in a manner that has off-loaded risks to small producers, in a context where those producers lack the economic leverage to protect themselves against exploitive conditions. In these circumstances, it is appropriate to specifically designate these dependent product sellers as workers even though they would fall outside the category of "workers" because of the amount of capital they own or the number of workers they hire. Alternatively, specialized minimum standards regimes could be created for particular groups of dependent producers geared to the particular conditions in the industry.

In general, collective bargaining schemes have already been extended to dependent contractors. The question that needs to be addressed is whether they should be further extended to all workers, including independent contractors and, in special cases, dependent product sellers. The ILO's Convention concerning Freedom of Association and Protection of the Right to Organize (Convention 87 of 1948) guarantees the right of "workers and employers, without distinction whatsoever" to establish and join organizations of their own choosing without state authorization (Benjamin 2002, 80). According to the Freedom of Association Committee of the ILO's governing body, self-employed workers in general should enjoy the right to organize and the existence of an employment contract should not determine whether a person is covered by the right (ILO 1996, 51). Therefore, the starting position should be that this dimension of labour regulation covers all people who perform work personally unless there are strong normative, economic, or institutional reasons for excluding them. The most obvious concern is that collective bargaining collides with competition law in that it allows combinations among

[121] *Lian J. Crew Group Inc.* (2001) 54 O.R. (3d) 239 (Superior Ct.).

sellers of labour power that are not normally permitted to product sellers. The reason for this different treatment is that labour is not an ordinary commodity since it cannot be separated from the workers who sell it and that individual workers commonly lack adequate bargaining power to negotiate socially adequate economic terms or obtain a voice in workplace governance. However, as Pietro Ichino (2001, 191) notes "the legal distinction between the (unlawful) restriction of competition in goods and services market and the (lawful) restriction of competition in labour market is only theoretically clear-cut."

Independent contractors do not fit neatly into the justifications for collective bargaining (Davidov 2002 a, chapter 2). While they are dependent on the sale of their labour power, although they may not be economically dependent on any particular employer, it is an open question as to whether or not they lack adequate bargaining power as individuals to obtain socially adequate outcomes. Moreover, some independent contractors may be competing with employees, while others may not. The statistical portrait of the self-employed provided in Part Two indicates that independent contractors are a diverse group - some do very well (such as independent professionals like lawyers and accountants), while others struggle to make ends meet. This concern about over-inclusiveness can be met by making provision for the exclusion of groups for whom it is determined that collective bargaining is both unnecessary and unduly interferes with other public policy objectives, as it currently done in collective bargaining statutes (for instance, the exclusion of professionals in Ontario). Another technique would be to draw upon competition law concepts such as product differentiation and barriers to entry in order to distinguish between independent contractors who should be covered by labour law and those who are more appropriately placed in the commercial realm (Perritt 1988, 1040-41). A second concern is that the wholesale exclusion of product sellers may exclude groups, like fishers, who should be given access to collective bargaining because of their economically dependent

condition. To meet this concern about under-inclusiveness, provision should be made to allow dependent product sellers to be designated as workers for the purposes of collective bargaining.

Merely giving independent contractors and designated dependent product sellers access to collective bargaining, however, might not accomplish very much, given the high likelihood that they work for multiple employers under fixed- and short-term contracts. The basic collective bargaining scheme is not suited for these conditions (Fudge and Tucker 2001). Therefore, alternative models, such as those developed for some sectors of the construction industry (ILGWU and Intercede 1993) and for artists and performers (Fudge and Vosko 2001; Langille and Davidov 1999; MacPherson 1999) will need to be examined. Further study should be undertaken to investigate the characteristics of independent contractors and dependent product sellers with a view to developing appropriate collective bargaining mechanisms.

C. Social Wage and Social Revenue

According to the ILO (2000a, 18) "social protection is not only morally indispensable but also economically viable. An efficient economy and an effective system of social protection are both essential for the attainment of income security and a stable society." It also declared "extending personal coverage is probably the greatest challenge facing social protection systems" (ILO 2000a,14).

Unlike other dimensions of labour law that aim specifically to regulate the conditions under which work is performed, social wage and social revenue are fundamentally mechanisms for providing for the economic welfare of citizens. It is an historic choice to link access to and funding for these benefits to the employment relation (Fudge and Vosko 2001b; Langille 2002).

A system of universal entitlements would protect the economic welfare of all citizens, regardless of their attachment to the labour market.

The Supiot report to the European Commission addressed the issue of extending social protection at the same time as it acknowledged the need to attend to economic issues (Supiot 2001, chapter 2). It argued for a reconsideration of the notion of security along three lines (Deakin 2002, 189; Supiot 2001). The first involves focusing on the concept of labour market status (referred to as '"statut professionel" in the report), which emphasizes labour market participation over an individual's life cycle rather than employment status per se. The second concentrates on an extended concept of work in place of the narrow notion of "employment" as the basis for access to social rights and protections. The third introduces the idea of "social drawing rights" which individuals can use to achieve security with flexibility in conditions of uncertainty. These proposals suggest a basis for reconsidering the scope of social protection that would loosen or de-link altogether entitlement from labour force participation and employment status.

However, within the confines of the social wage regime that is built around labour force participation, our starting point is that all workers should be protected against the risk of loss of the ability to sell their capacity to work, whether due to lack of available buyers, injury, sickness, or old age regardless of whether they have a contract of employment. In short, employment insurance, public pensions, and workers' compensation should be available to all workers, regardless of the type of income they receive in return for the provision of service.

Several jurisdictions already allow self-employed workers voluntarily to self-insure, as in the case of workers' compensation. At the very least, this opportunity should be provided to all self-employed workers for all social protection schemes. Indeed, this has been the formal

position of the ILO since 1944 when it adopted the Income Security Recommendation, 1944 (No. 67), which called for the insurance of self-employed persons “against the contingencies of invalidity, old age and death under the same conditions as employed persons as soon as the collection of their contributions can be organized (ILO 2000a, 197-8).” As well it recommended that consideration be given to insuring them against loss of income due to sickness and maternity.

But even this arrangement fails adequately to address the underlying inequity that arises by the requirement that self-employed persons pay the full premium personally, while persons who are classified as employees have their employers pay all or part of their contributions, depending on the scheme. There is no reason why workers should have to demonstrate that their income was earned under a contract of employment or under conditions of economic dependency on or subordination to a particular employer in order gain the benefit of their contributions.

IV. List of Recommendations

The recommendations listed below address the question of the personal scope of labour protection from the perspective of labour law policy and labour law institutions. The recommendations do not address technical questions relating to drafting specific definitions nor questions relating to statutory interpretation.

A. General Recommendations

1. Extend the personal scope of labour law to all workers, defined as persons dependent on the sale of their labour, unless a compelling reason can be provided for the exclusion of a well-defined sub-group.

2. Relevant distinctions between different groups of workers (such as the nature of their relationship to the entity that purchases their service) should be taken into account in the design of instruments that provide labour protection to all workers, regardless of the type of income they receive in return for the provision of service.

3. It may be appropriate in some cases to extend the scope of labour law to contracts between product sellers for the purpose of protecting dependent product sellers and workers.

B. Specific Recommendations

1. Social Justice

a) Anti-Discrimination Law

4. Extend anti-discrimination law to all contracts for the performance of work and to the purchase of goods and services by contractors and product sellers.

b) Pay and Employment Equity

5. Investigate the design of a pay equity scheme that applies to all work cont racts.

6. Investigate the design of a scheme that would extend the principles of employment equity (for instance, system reviews and targets) to all work and product contracts.

c) Occupational Health and Safety

7. Impose on employers the duty to provide healthy and safe working conditions for all workers with whom they contract.

8. Impose on contractors the duty to obey applicable health and safety laws in the performance of their work.

9. Investigate the design of occupational health and safety laws that extend to all workers the right to know about hazards and to be trained in minimizing such hazards, the right to participate in the design and implementation of safe and healthy work systems, and the right to refuse unsafe work.

10. Investigate the design of an occupational health and safety law that imposes a duty on product sellers to contract only with other product sellers who comply with occupational health and safety laws, subject to a due diligence defence.

2. Economic Terms and Governance

a) Minimum Standards

11. Extend the scope of minimum standards to dependent contractors as defined under current collective bargaining law.

12. Investigate the design of a minimum standards law that applies to all workers. Consider sectoral-specific regulation to capture the distinctive features of employment relations in certain industries.

13. Provide for the administrative designation of some groups of dependent product sellers as workers covered by all or part of minimum standards laws, including the power administratively to designate their employer.

14. Investigate the design of a law that would make product sellers jointly and severally liable to workers of other product sellers in the production chain for money owed under minimum standards law.

b) Collective Bargaining

15. Investigate the design of a collective bargaining scheme suitable for all workers, including so-called independent contractors, who have multiple employers. Consider sectoral-specific regulation for certain distinctive industries.

16. Provide for the administrative exclusion of groups of workers where a strong case can be made that, based on their individual bargaining power, collective bargaining is both unnecessary and would unduly interfere with other public policy objectives (for example, competition concerns).

17. Provide for the administrative designation of some groups of dependent product sellers as workers covered by collective bargaining law, including the power to designate their employer.

c) Common Law

18. Provide an implied right to notice of termination for all workers under contracts of indefinite duration.

3. Social Wage and Social Revenue

19. Investigate the design of a system of universal entitlements that would protect the economic welfare of all citizens, regardless of their attachment to the labour market, funded from general revenue.

20. While social protection programs remain constructed around labour force participation, investigate the design of a system that covers all workers and that does not require workers not employed under a contract of employment to make greater contributions than employed workers.

Part Six: Conclusion

This report has examined the use of the legal concept of employment for determining the personal scope of labour protection. The focus has been on the distinction between employment and self-employment, and several disciplinary lenses have been brought to the analysis. The report demonstrated that although there is some overlap between the conceptual, legal, and statistical definitions of these terms, they are not coterminous. In particular, there are large gaps between the sociological concept of entrepreneurship, the legal category of independent contractor, and the statistical measure of self-employment. The statistical portrait of the self-employed in OECD countries in general, and Canada in particular, reveals that the self-employed do not constitute a homogeneous category. In Canada few of the self-employed conform to the ideal type of entrepreneurship as most are economically dependent upon the sale of their labour. Thus, it is not accurate to assume that all of the self-employed are entrepreneurs. In fact, the majority of the self-employed in Canada resemble employees more than they do entrepreneurs.

Despite the social and economic situation of the majority of self-employed in Canada, most of them are treated for legal purposes as independent entrepreneurs. Although the legal distinction between employment and independent contracting was neither straightforward nor well established historically, it has come to be the touchstone of the scope of labour protection. The complex history of the legal concept of employee may help to account for the diversity in the contemporary landscape of the scope of labour protection. Currently the legal determination of employment status is extremely complex and very uncertain and increasingly it is out of tempo with the reality of employment relations.

The key question ought to be "to whom should labour law apply" not "is that person an employee?" Whether someone is working under a contract of service or a contract for services is not a good basis for determining the scope of labour protection. Even though most independent contractors are not under the control of, nor economically dependent upon, a particular employer, most lack many, if not all, of the distinctive features of entrepreneurship – ownership, autonomy, or control over production. Instead of attempting to draw a new line between employment and independent contracting for the purpose of determining the scope of labour protection, we recommend that all workers dependent on the sale of their capacity to work be covered, unless there are compelling public policy reasons for a narrower definition. This recommendation conforms to the ILO's goal of developing a policy framework for decent work, a central element of which is "a universal 'floor of rights' – a set of minimum rights to which everyone is entitled, regardless of status in employment" (Egger 2002, 166). The technical challenge is to develop mechanisms and institutions for making labour protection effective for all people who work for a living.

APPENDIX I

Methodological Note to Part Two (Section II)

The data presented in Part Two, Section II are drawn principally from three survey instruments – Statistics Canada's Labour Force Survey Public Use Microdata 2001; Statistics Canada's Survey of Self-Employed Microdata 2002 and Statistics Canada's Survey of Labour and Income Dynamics Microdata 1999 – as well as Statistics Canada's Labour Force Historical Review CD-Rom 2001.

Until 2000, the two most comprehensive survey instruments on the nature of self-employment in Canada and the demographic and job characteristics of the self-employed were the Labour Force Survey and the Survey of Work Arrangements. The Labour Force Survey is a longstanding survey, conducted regularly by Statistics Canada, which gathers data on issues ranging from occupational and industrial distribution to income level, unionization, hours etc. The Survey of Work Arrangements, in contrast, is a Survey whose focus is "work arrangements" such as work schedule, location of work, shift work, etc. Despite its comprehensiveness, Statistics Canada has only conducted this survey twice – in 1989 and 1995. Given the popularity of the Survey of Work Arrangements, in the mid-1990s, Statistics Canada, in conjunction with Human Resources and Development Canada, decided to develop more focused survey instruments aimed at examining, in greater depth, the fastest growing non-standard forms of employment, beginning with self-employment. To this end, it created the Survey of Self-Employment and put it in the field in 2000. The Survey of Self-Employment takes the Survey of Work Arrangements as its baseline, yet it contains more detailed questions on the provision of benefits, the work process (for example, control, scheduling and support from

clients) and “work-family” balance in response to common criticisms leveled at the Survey of Work Arrangements.

Given the different merits of these surveys, this report draws on the Labour Force Survey Public Use Microdata 2001 to develop a portrait of self-employment over time, as it remains the main source for time series data, and the Survey of Self-Employment for its data on the nature of self-employment in the present period. In a few instances, the report also draws on data from the Survey of Labour and Income Dynamics, a panel survey first conducted in 1993, whose cross-sectional data is limited but contains basic questions on immigration status as well as visible minority status absent in the other two surveys. While the public use microdata from the surveys used in producing this report is complementary, the resulting portrait necessarily contains several gaps. Regarding the demographics of the self-employed, since neither leading survey includes questions on visible minority status or immigration status, it is impossible to examine a range of dimensions of job quality, work-arrangements and income level by race, ethnicity, language and immigration status. Furthermore, neither survey asks questions about the number of clients that the self-employed work with, preventing analysts from cross-tabulating number of clients with income level. Consequently, while the Survey of Self-Employment goes a considerable way towards enabling analysts to paint a portrait of the dynamics of self-employment in the current period, the data are limited. As noted in Part Six, the misfit between the legal and statistical form is striking, inhibiting the collection of data that would be useful in developing legal arguments and policy recommendations.

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