Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada

Judy Fudge, Eric Tucker** & Leah Vosko****

The distinction between employees and independent contractors is crucial in determining the scope of application of labour and employment legislation in Canada, since the self-employed are, for the most part, treated as entrepreneurs who do not require the statutory protections accorded to employees. Yet statistics indicate that most self-employed people resemble employees more than entrepreneurs, in the sense that they are economically dependent on the sale of their labour and are often subject to inferior terms and conditions of work. Using four Canadian jurisdictions as a basis for comparison, the authors demonstrate that there are wide variations in the personal scope of coverage of the common and civil law of employment, collective bargaining, employment standards, human rights and workers' compensation legislation, as well as social wage and income tax legislation. These variations, it is argued, reflect an ad hoc political process of extending or denying coverage to certain groups of employees while attempting to maintain the formal distinction between employees and independent contractors. Furthermore, the development of increasingly elaborate legal tests has not succeeded in eliminating the uncertainty which often attends the determination of a worker's status. In the authors' view, the time has come to consider dissolving the employee-independent contractor distinction, and extending coverage to all workers dependent on the sale of their capacity to work, unless compelling policy reasons exist for a more restrictive approach.

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* Professor, Osgoode Hall Law School, York University.
** Professor, Osgoode Hall Law School, York University.
*** Canada Research Chair, School of Social Sciences, Joseph E. Atkinson Faculty of Liberal and Professional Studies, York University.

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1. INTRODUCTION

Employment is a legal concept that is crucial for determining the legal protection, social recognition, and economic security associated with different forms of work. The legal definition of the term "employee" determines the personal scope of labour protection; it 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 . . ."[1] 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 rigors of competition, and the principles and institutions of commercial law. 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 private and public pensions. And owing to our system of deducting payroll taxes and withholding income tax at source, employment is also a huge source of revenue for the state.

The legal definition or tests of employment have long been the focus of scholarly attention. As a legal concept, employment is elusive; its historical origins are convoluted, and precisely how work is organized and the legal form it takes varies widely. Since the 1950s prominent employment and labour scholars have concluded that the English common law did not have a unified conception of employment or a coherent method for distinguishing between employees and independent contractors.[2]

1 G. England, I. Christie & M. Christie, *Employment Law in Canada*, 3d ed. (Markham, Ontario: Butterworths, 1998), vol. 1, at p. 2.1.

2 O. Kahn-Freund, "Servants and Independent Contractors" (1951), 14 Mod. L. Rev. 504; R. Rideout, "The Contract of Employment" (1966), 19 Curr. Legal Probs. 111; K. Wedderburn, *The Worker and the Law*, 3d ed. (Harmondsworth: Penguin, 1986).

In the 1990s the legal definition of employment began to attract a great deal of attention internationally and in Canada. The changing nature of employment relationships has put the legal tests under considerable stress. Firms attempt to shift the risks of productive activity and employment onto workers by categorizing work relationships as commercial arrangements rather than employment.[3] The legal distinction between employees and independent contractors is even harder to draw now than it was before.

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 Organisation for Economic Co-operation and Development (OECD) 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.[4]

These concerns are particularly relevant in Canada, where there has been a large growth in self-employment. Through the 1980s and 1990s self-employment grew as a share of employment, reaching 16% in 2000. In that year, 34.6% of the self-employed were self-employed employers who hired employees. The majority of the self-employed did not hire employees and thus were categorized as "own account"; they constituted 10.3% of the total workforce in 2000. The income distribution of the self-employed is highly polarized; in 1999, the average annual incomes of employers and the own-account self-

3 U. Beck, *The Brave New World of Work* (Cambridge: Policy Press, 2000); R. Chaykowski & M. Gunderson, "The Implications of Globalization for Labour and Labour Markets," in R. Chaykowski, ed., *Globalization and the Canadian Economy: The Implications for Labour Markets, Society and the State* (Kingston, Ontario: School of Policy Studies, Queen's University, 2001), at p. 79; H. Collins, "Regulating the Employment Relationship for Competitiveness" (2001), 30 Indus. L.J. 17.

4 OECD, "Partial Renaissance of Self-Employment," *OECD Employment Outlook* (Paris: OECD, 2000).

employed were $46,825 and $16,918 respectively.[5] Income differences also prevail by sex. In the same year, 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 tended to be less than those of their counterparts working as self-employed employers but significantly more than their counterparts in own-account self-employment. Men are more likely to be self-employed employers than are women, who make up a larger share of the own-account self-employed. 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, and they report longer working hours than paid employees. However, the self-employed report greater autonomy than employees along the dimensions of control, pace and duration of work.[6]

The self-employed do not make up a homogenous category; instead, they range from the high-income professional who employs others to the child-care provider who employs no one and works out of her home. In Canada, few of the self-employed conform to the

5 Statistics Canada, Survey of Labour and Income Dynamics 1999, Special Run. These figures refer to net income. Income is defined in the Survey as wages, salaries, CPP/QPP, EI, workers' compensation benefits, retirement pensions, other income, investment income, Old Age Security, GIS/SA, social assistance, Child Tax benefits, GST/HST credit and Provincial/Territorial tax credits. 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. This data is discussed in detail in J. Fudge, E. Tucker & L. Vosko, *The Legal Concept of Employment: Marginalizing Workers* (Ottawa: Law Commission of Canada, 2002), Part Two.

6 B. Delage, *Results from the Survey of Self-Employment in Canada* (Hull: Human Resources Development Canada, 2002), at http://dsp-psd.communications.gc.ca/collection.RH 64-12-2001C.pdf; Human Resources Development Canada, *Own Account Self-Employment in Canada: Lessons Learned* (Ottawa: HRDC Evaluation and Data Development Strategy, 1998); OECD, "Recent Developments in Self-Employment," in *OECD Employment Outlook* (Paris: OECD, 1992), at p. 156; OEDC, *supra*, note 4, at pp. 169-170.

ideal of entrepreneurship that is marked by ownership, control over production, and autonomy; 65.4% are own account and economically dependent upon the sale of their labour. The majority of the self-employed in Canada resemble employees more than they do entrepreneurs. However, the problem is that both own-account and employer self-employed are classified for legal purposes as independent contractors.

A careful consideration of how the legal distinction between employment and self-employment is drawn 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 of Fundamental Principles and Rights at Work to the equality of treatment of different forms of work.[7] 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 remarked, it applies to all workers, not just workers in the organized sector or wage employment, but also to homeworkers and the self-employed.[8] From a normative perspective the ILO has identified the policy challenge as being to extend effective legal and social protection to self-employed workers.[9]

The purpose of this article is to examine the significance of the legal distinction between employment and independent contracting in determining the personal scope of legislation. Instead of focusing exclusively on how adjudicators develop and apply legal tests in the context of labour protection legislation, the examination here extends to legislative and administrative techniques that grant rights and protections to persons not classified as employees by deeming them to

7 ILO, *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up* (Geneva: ILO, 1998).

8 A. Sen, "Work and Rights" (2000), 139 Int'l Lab. Rev. 119.

9 ILO, *Income Security and Social Protection in a Changing World: World Labour Report 2000* (Geneva: ILO, 2000); ILO, *Meeting of Experts on Workers in Situations Needing Protection (The Employment Relationship: Scope) Basic Technical Document* (Geneva: ILO, 2000); ILO, *Decent Work in the Informal Economy* (Geneva: ILO, 2002).

be employees.[10] Moreover, the article extends its inquiry beyond labour protection legislation to examine the personal scope of social wage, and income tax legislation and law in four jurisdictions, British Columbia, Ontario, Quebec and the federal. The goal is thus to provide an indication of the variation in the personal scope of employment legislation and the different techniques for determining coverage in different jurisdictions and policy contexts. In doing so, the article provides a basis for evaluating the capacity of adjudicators to adopt a purposive interpretation in determining the personal scope of a legal regime and for assessing the continuing legal significance of the distinction between employees and independent contractors. It begins with the common and civil law, since courts and tribunals historically have invoked their concepts and methods when interpreting statutes.

2. THE PERSONAL SCOPE OF EMPLOYMENT- AND LABOUR-RELATED LAW AND LEGISLATION

(a) Common Law and Civil Law

(i) *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 of independent contractors. They have also held that an implied term of contracts of indefinite hiring is that such contracts can be terminated only by reasonable notice, absent cause or a binding contractual provision, but they have not generally implied a right to notice in contracts for service. Having made this distinction for these 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.

10 Recent work that considers the scope of labour protection in Canada includes G. Davidov, "The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection" (2002), 52 U.T.L.J. 356; and B. Langille & G. Davidov, "Beyond Employees and Independent Contractors: A View from Canada" (1999), 21 Comp. Lab. L. & Pol'y J. 6.

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.[11]

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 the case most frequently cited for this approach, *Yewens v. Noakes*, was a tax case.[12] In the context of another Canadian tax case, *Montreal v. Montreal Locomotive Works*, the Privy Council pronounced that a more complicated test was necessary to deal with the "more complex conditions of modern industry."[13] To meet the challenge, it articulated the fourfold test that considers control, ownership of the tools, chance of profit, and risk of loss. 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 to which the work performed is an integral part of the employer's business.[14] These tests, along with a few others, sometimes singularly and sometimes in combination, have gained widespread acceptance in Canadian courts.[15]

The development of new legal tests for determining employee status has tended to widen its scope, as the emphasis has shifted from

11 *Carter v. Bell & Sons*, [1936] 2 D.L.R. 438 (Ont. C.A.); *Marbry v. Avrecan Int'l Inc.* (1999), 171 D.L.R. (4th) 436 (B.C.C.A.).

12 (1880), 6 Q.B.D. 530. See also *Dallontania v. McCormick* (1913), 14 D.L.R. 613 (Ont. C.A.); R. Flanagan, "Enterprise Control: The Servant-Independent Contractor Distinction" (1987), 37 U.T.L.J. 25, at pp. 37-39.

13 [1947] 1 D.L.R. 161 (P.C.), at p. 169.

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

15 England, Christie & Christie, *supra*, note 1, chap. 2.

direct subordination to include economic dependence as the basis for extending labour protection to working people.[16] However, it has not simplified the adjudicative process. Nor has it rendered control irrelevant; control continues to be a factor in determining employment status, but what is meant by control depends upon the nature of the work. 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.[17]

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.
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> . . .
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> 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's activities will always be a factor. However, other factors to consider include whether the worker 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 tasks.[18]

After articulating a multi-factor test, the Court 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."[19] The approach adopted in *Sagaz Industries* gives judges a great deal of scope to tailor the boundaries of the category of

16 *Ibid.*, at p. 2.17.

17 D. Carter, G. England, B. Etherington & G. Trudeau, *Labour Law in Canada* (Hague: Kluwer, 2002), at p. 87; Davidov, *supra*, note 10; England, Christie & Christie, *supra*, note 1, at p. 2.2; Langille & Davidov, *supra*, note 10.

18 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, at paras. 46-47.

19 *Ibid.*, at para. 48.

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 purposive, or policy-based, approach to determining employment status will generate greater certainty than the earlier tests remains to be seen.

(ii) *Quebec Civil Law*

Unlike that of the rest of Canada, the civil law of Quebec is code-based. The *Civil Code of Lower Canada* (C.C.L.C.) was in force until January 1, 1994, 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 hire of work" as "a contract by which the lessor undertakes to do something for the lessee for a price."[20] The *Code* distinguished three different types of work that might be leased: personal services of workmen, servants and others; work by carriers; and work by 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."[21] 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, 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.[22]

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

20 Title VII, Chapter 2, art. 1665a, "Of the Lease and Hire of Work."

21 Art. 1683 C.C.L.C.

22 G. Audet & R. Bonhomme, *Wrongful Dismissal in Quebec* (Montreal: Y. Blais, 1990), at p. 5.

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."[23] Later, Quebec courts also took into account the fourfold test developed in *Montreal v. Montreal Locomotive Works*, even though the judgment 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.[24]

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 to 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."[25]

The language of the C.C.Q. clearly makes subordination the most significant element.[26] 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*.[27] 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

23 (1928), [1929] 3 D.L.R. 601 (S.C.C.), at p. 603.
24 *Wolf v. Canada*, [2002] 4 F.C. 396 (C.A.), at paras. 44-48. See also Audet & Bonhomme, *supra*, note 22.
25 Art. 2099 C.C.Q.
26 R. Gagnon, *Le Droit du Travail du Québec*, 4th ed. (Cowansville, Quebec: Y. Blais, 1999), at p. 51.
27 *Wolf v. Canada*, *supra*, note 24.

C.C.Q. in its provisions was much more detailed than the C.C.L.C., it did not substantially alter 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 the 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 . . ."[28] Yet, despite their unanimity on the centrality of subordination, the judges 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.[29] Décary J.A. appeared to be less amenable to letting the common law influence the civil code, and in particular insisted: "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 the 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."[30] The third judge, Noël J.A., thought that as none of the tests was conclusive, the intent of the parties should prevail.[31]

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 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.

28 *Ibid.*, at para. 112.
29 *Ibid.*, at paras. 49-94.
30 *Ibid.*, at para. 117.
31 *Ibid.*, at paras. 122-124.

(b) 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 to 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 thereby to foster industrial peace.

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.[32] 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.[33]

The federal Wartime Labour Relations Regulations, 1944 initiated a practice of confining the scope of the legal protection for collective bargaining to employees without defining the term.[34] Some of the early labour tribunals in Canada, likely influenced by American jurisprudence, emphasized economic dependence in determining employee status.[35] The important question was whether a group of workers would benefit from collective bargaining legislation, not

32 *Competition Act*, R.S.C. 1985, c. C-34, s. 4(1)(a).

33 A. Andras, "Labour and Combines" (1952), 30 Can. Bar Rev. 592; H. Arthurs, "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965), 16 U.T.L.J. 89; C. Backhouse, "Labour Unions and Anti-Combines Policy" (1976), 14 Osgoode Hall L.J. 113; Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials and Commentary* (Kingston: IRC Press, 1998).

34 The statutes identified specific groups of employees, such as managers, who were excluded from the definition of employee for the purposes of the statute.

35 Arthurs, *supra*, note 33, at p. 93.

whether they were employees at common law. This approach changed when the Nova Scotia Court of Appeal, overruling a labour tribunal, held that in the absence of a statutory definition the meaning of the term employee should be "determined by the general law."[36] Fishers who owned their own boats were found to be 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 its scope.

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.[37] 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 whom Harry Arthurs described as " 'dependent' economically, although legally 'contractors' "; according to him, "[s]elf-employed truck drivers, peddlers, and taxicab operators, farmers, fishermen, and service station lessees personify the dependent contractor."[38]

In an influential article published in 1965, Arthurs approached the question of the 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 available work; on the other hand, his attempts to organize for collective action, lacking statutory sanction, are often characterized by economic force and legal reprisals."[39] As part of the solution to labour market unrest caused by dependent contractors, Arthurs recom-

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

37 Arthurs, *supra*, note 33, at p. 93.

38 *Ibid.*, at p. 89.

39 *Ibid.*, at p. 114. Arthurs notes that the concept of dependent contractors in the product market, like farmers and fishers, "presents even more institutional problems."

mended that collective bargaining legislation be extended to them.[40] The report of the influential Task Force on Labour Relations, which had been appointed in 1966 by the federal government to report on industrial relations in the context of rising labour unrest, focused attention once again on the plight of the economically dependent self-employed and advocated the extension of collective bargaining legislation to them.[41] 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.[42] British Columbia and Ontario adopted a broad definition.[43] By contrast the definition in the federal *Canada Labour Code* was (but no longer remains) narrow, limited by industry (joint-venture fishers) and occupation (owner-operators of trucks).[44] However, the actual extent to which the statutory definition of dependent contractor expanded the personal scope of collective bargaining law depended upon how labour tribunals interpreted and applied it. Labour tribunals across the country have developed lists of factors to assist them in distinguishing dependent from independent contractors.[45]

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

40 *Ibid.*, at pp. 114-115.

41 *Canadian Labour Relations: Report of the Task Force on Labour Relations* (Ottawa: Office of the Privy Council, 1969), at p. 140.

42 M. Bendel, "The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law" (1982), 32 U.T.L.J. 374.

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

44 Section 107 of the predecessor *Canada Labour Code*, R.S.C. 1970, as am. S.C. 1972, c. 18, s. 1, contained the narrow definition. The wider definition of dependent contractor, adopted in S.C. 1983-84, c. 39, s. 21(1), remains in the current *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 3(1).

45 For example, in *Algonquin Tavern and C.L.C., Local 1689*, [1981] 3 Can. L.R.B.R. 337, the Ontario Labour Relations Board listed eleven factors to be considered, including evidence of entrepreneurial activity and economic mobility; G. Adams, *Canadian Labour Law*, 2d ed. (Aurora, Ontario: Canada Law Book, 1995), at pp. 6-3 to 6-5; Langille & Davidov, *supra*, note 10, at pp. 27-28.

bargaining. Manitoba and Saskatchewan have opted for this solution.[46] 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 categories, but it is not obvious 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.[47] 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.[48] In the federal jurisdiction, when 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.[50]

46 Manitoba *Labour Relations Act*, R.S.M. 1987, c. L-10, s. 1; Saskatchewan *Trade Union Act*, R.S.S. 1978, c. T-17, s. 2(f)(iii).

47 Bendel, *supra*, note 42.

48 *Ibid.*, at pp. 390-391; S. Bernstein, K. Lippel & L. Lamarche, *Women and Homework: The Canadian Legislative Framework* (Ottawa: Status of Women Canada, 2001), at p. 130.

49 Adams, *supra*, note 45, at p. 6-9; *Société Radio-Canada* (1982), 1 Can. L.R.B.R. (N.S.) 29 (C.L.R.B.).

50 Backhouse, *supra*, note 33; Labour Law Casebook Group, *supra*, note 33, at p. 210.

Economic dependence and control are the key factors distinguishing workers who are granted access to collective bargaining legislation from workers who are not.[51] 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 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.[52] 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. Another controversial question is whether contractors who hire other workers should be considered to be dependent contractors.

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.[53] As Canadian firms increasingly contract out many of their core functions, this difference of approach assumes greater significance.[54] Not only is the line between employees and independent contractors as slippery as

51 Davidov, *supra*, note 10; Langille & Davidov, *supra*, note 10, at p. 28.

52 Carter *et al.*, *supra*, note 17, at p. 252.

53 See the discussions of dependent contractors and bargaining units by Bendel, *supra*, note 42, at p. 401; Labour Law Casebook Group, *supra*, note 33, at p. 218.

54 Labour Law Casebook Group, *supra*, note 33, at pp. 218-219.

ever, now a new one must be drawn between dependent and independent contractors.[55]

(c) 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 established maximum hours of work for women and children in the 1880s and 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 established minimum wages and overtime 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 of 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 purpose, which is to protect employees from the superior bargaining power of employers.[56]

Although all of the employment standards statutes provide a definition of "employee" most of them are not very helpful. Thus, adjudicators have invoked the common law to give meaning to the term, applying a variety of different tests.[57] Unlike in the collective bargaining context, these tests were never supplemented with a statutory definition of dependent contractor or the power to designate.

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 do not fit the

55 Bendel, *supra*, note 42, at p. 400; Langille & Davidov, *supra*, note 10, at p. 29.

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

57 England, Christie & Christie, *supra*, note 1, at p. 2.1.

traditional definition of employee.[58] They have also taken to listing the range of factors that should be considered in determining employee status.[59]

The definition of employee in Quebec's *Act Respecting Labour Standards* is broadest, as it includes "a worker who is a party to a contract" with a person, and who "undertakes to furnish, for the carrying out of the contract, the material, equipment, raw materials or merchandise chosen by that person and to use them in the manner indicated by him."[60] 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 who occasionally hired assistants.[61] 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.

(d) 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

58 For a discussion of the Ontario jurisprudence, see R. Parry, *Employment Standards Handbook*, 3d ed. (Aurora, Ontario: Canada Law Book, 2002), at pp. 1-21 to 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 (QL). The Federal Court, Trial Division accepted the purposive approach adopted by the referee and upheld the finding of employee status in respect of courier drivers. This was so despite the fact that, for purposes of income tax, couriers who owned their own vehicles and occasionally employed helpers were considered to be independent contractors.

59 England, Christie & Christie, *supra*, note 1, chap. 2; Parry, *supra*, note 58, at 1, pp. 1-21 to 1-24.

60 R.S.Q. c. N-1.1, s. 1(10).

61 Bernstein, Lippel & Lamarche, *supra*, note 48; Quebec Department of Labour, Online Policy Manual, "interpretation," Commission des Normes du Travail, online at www.cnt.qc.ca; *Couture-Thibault et Pharmajan*, [1984] T.A. 326.

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 in the labour market, the realm of commerce, or the provision of public services.

Prohibiting discrimination in employment is a crucial dimension of anti-discrimination legislation. Human rights statutes have a number of provisions dealing specifically with employment, ranging from issues related to hiring, such as advertising and employment agencies, to sexual harassment and vicarious liability. The actual wording of the prohibition against discrimination in employment varies from jurisdiction to jurisdiction.

Some statutes provide a definition 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."[62] By contrast, 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.[63] Ontario, along with several other jurisdictions, does not define either employee or employment in its statute. Moreover, as the leading text on human rights law notes, "[a]lthough at least half of all complaints considered by the human rights commissions concern employment, there are very few adjudications that have attempted to define these terms."[64]

While the distinction between employees and independent contractors is a problem "shared in both the anti-discrimination and labour relations fields,"[65] it is not obvious why it should be a problem in the case of human rights codes or, if it is, that it ought to be solved

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

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

64 W. Tarnopolsky, W. Pentney & J. Gardner, *Discrimination and the Law*, rev. ed. (Scarborough, Ontario: Carswell, 2001), vol. 2, at p. 12-11.

65 *Ibid.*, at p. 12-13.

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 in several jurisdictions 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 who exercise 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. 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. By endorsing a liberal interpretation that implies any arrangement " 'in which one person agrees to execute any work or labour 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.[66] The public policy goal of protecting human dignity and guaranteeing that people are treated equally transcends the traditional rationales for distinguishing between employees and independent contractors.

Human rights statutes prohibit discrimination generally, whereas pay and employment equity legislation provide specific rights and obligations only with respect to employment. Pay equity legislation provides mechanisms by which women workers can assert a claim to wages equal to those of 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

66 *Cormier v. Alberta Human Rights Commission* (1984), 6 C.C.E.L. 60 (Alta. Q.B.), at p. 86; *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.).

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 representation of four historically disadvantaged groups in employment.[67]

Only persons who are employees are entitled to benefit from pay and employment equity legislation. The Ontario *Pay Equity Act*[68] does not define the term "employee." However, the Quebec statute defines "employee" in 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 only intermittently.[69] There has been little litigation over the personal scope of pay and employment equity legislation. This is not surprising, given the nature of the legislation and its limited scope of application. The personal scope of pay and employment equity legislation simply reflects where the line has been drawn under collective bargaining and employment law.

(e) 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 give 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.

Ontario provides the greatest protection to independent contractors. Its definition of employer includes a person who contracts for the services 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 as to

67 *Employment Equity Act*, S.C. 1995, c. 44.
68 R.S.O. 1990, c. P.7.
69 *Pay Equity Act*, S.Q., c. E-12.001, ss. 8, 9.

employees.[70] However, the distinction between employees and independent contractors 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 they may be prosecuted for failing to do so, even though compliance may cause economic hardship.[71] As well, a tribunal has held that independent contractors are not workers for the purpose 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.[72]

The situation of independent contractors in British Columbia is similar, although the result is achieved by somewhat different and more circuitous means.[73] Other jurisdictions provide considerably less protection to independent contractors. In the federal jurisdiction, most employer obligations arise only in the context of traditional employment relations. However, employers are under a duty to ensure that every person granted access to their workplace is familiar with and uses all prescribed safety materials, equipment, devices and clothing, and that his or her activities do not endanger the health and safety of employees.[74] In contrast to the Ontario legislation, 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

70 *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 1(1); *R. v. Wyssen* (1992), 10 O.R. (3d) 193 (C.A.).

71 *Occupational Health and Safety Act*, *ibid.*, s. 4; *Hutton*, [1997] O.O.H.S.A.D. No. 280 (QL) (Ont. L.R.B.).

72 *526093 Ontario Inc. (c.o.b. Taxi Taxi)*, [2000] O.L.R.B. Rep. May/June 562, at para. 15.

73 *Workers' Compensation Act*, R.S.B.C. 1996, c. 492; B.C. Reg. 296/97.

74 *Canada Labour Code*, R.S.C. 1985, c. L-2, ss. 125(1)(w), (y).

multi-factor test that weighs control, ownership, chance of profit and risk of loss to determine employment status.[75]

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.[76] 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.[77] 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 criterion of economic dependence.[78]

In sum, although there has been significant movement in some jurisdictions towards abolishing or limiting 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.[79]

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

76 *An Act Respecting Occupational Health and Safety*, R.S.Q. c. S-2.1, s. 1.

77 *Ibid.*, s. 7.

78 Bernstein, Lippel & Lamarche, *supra*, note 48, at pp. 77-79.

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

(f) 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. The 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. In exchange for the right to compensation, workers lose 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 is deemed in law to be a worker. The distinction between employees and independent contractors, however, is an important one because coverage of employees is mandatory, the employer being required to pay premiums, while individual operators are deemed to be workers only 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 rules 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.[80] 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.[81]

80 *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sch. A, ss. 2, 11 and 12; D. Gilbert & L. Liversidge, *Workers' Compensation in Ontario: A Guide to the Workplace Safety and Insurance Act*, 3d ed. (Aurora, Ontario: Canada Law Book, 2001), at pp. 4-5.

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.[82] The board's policy manual currently refers to the "organizational test" and directs adjudicators to 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, taxicab, and trucking, in which the distinction is very difficult to draw, the board has developed industry-specific questionnaires.[83]

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.[84] Where ambiguity remains after 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.[85] 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.[86]

81 *Decision No. 921/89* (1990), 14 W.C.A.T.R. 207, at p. 222.

82 *Ibid.*, at pp. 223-225.

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

84 "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* (1974), 1 W.C.R. 127, Decision No. 32 (B.C.W.C.B.), at pp. 128-129.

85 The full complexity of these arrangements is explored in *Decision #98-0563*, unreported, April 7, 1998 (B.C.W.C.A.D.).

86 B.C. Workers' Compensation Board, "Fishing Industry and Workers Compensation" (Briefing Paper for the Royal Commission on Workers' Compensation in British Columbia, March 27, 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 caselaw drawing these distinctions is contradictory, making it difficult to arrive at clear conclusions about the approach taken by the tribunals that determine these matters.[87] Workers in federally regulated industries are governed by the provincial legislation in force where they are employed.

(g) 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.

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, while employees are only required to pay half; the other half is paid by the employer(s).

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; a party can also go to the Agency directly. In deciding such cases, the Agency uses a

87 Bernstein, Lippel & Lamarche, *supra*, note 48, at pp. 77-79; *An Act Respecting Industrial Accidents and Occupational Diseases*, R.S.Q. c. A-3.001, s. 9.

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 either employees or self-employed.

If a worker or an employer is dissatisfied with the ruling of the Canada Customs and Revenue Agency, either party can pursue the matter further in the Tax Court of Canada. In determining the status of workers under CPP/QPP and the Employment Insurance program (EI), the most influential case is *Wiebe Door Services Ltd. v. Minister of National Revenue*, a 1987 decision of the Federal Court of Appeal. This case involved the assessment of CPP/QPP and Unemployment Insurance (now EI) contributions against the company in respect of door installers and repairers whom it treated as independent contractors.[88] The Federal Court of Appeal held that there is only one test of employment status — the fourfold test — and that the key question is, "whose business is it?"[89]

(h) 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).[90] Under EI, coverage is extended to all persons having "insurable employment" in Canada. Contributions, called premiums, are mandatory; they cover the costs of both benefits and administration, and are normally shared between the employee and the employer.

Cases involving the issue of employment status for the purpose of levying CPP/QPP and EI contributions are frequently heard and resolved together in the Tax Court. However, the question of

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

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

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

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 Commission to refer the matter to the Canada Customs and Revenue Agency and to defer judgment until a decision by the Minister of National Revenue or, in the case of an appeal, the Tax Court has been received.[91] In such cases, the applicable authority is *Wiebe Door Services*, 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.

Under EI most insurable employment is employment carried out under a contract of service.[92] 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. 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. The scheme also identifies certain persons or entities as employers for the purpose of making contributions.[93] Fishers' EI is financed by self-employed fishers and designated employers, each of whom is responsible for half of the full contribution.[94]

There are a handful of occupations — barbers, hairdressers, manicurists, taxi drivers, and other drivers of passenger-carrying

91 *Ibid.*, ss. 90(1)(a), 131(1)(a).

92 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, or otherwise" (*ibid.*, s. 5(1)(a)).

93 These entities include the buyer of the catch; the head fisher, where s/he is a member of a crew who make 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.

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

vehicles — that are also treated as special cases by the EI Regulations.[95] Although not under a contract of service, these workers are deemed to be engaged in insurable employment. 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.

(i) Income Tax

Taxes are the most important source of state revenue.[96] 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 independent contractors are treated very differently, not only for the purpose of levying payroll taxes such as CPP/QP and EI, but also for determining liability for income tax.[97]

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. Moreover, because these questions typically arise in the context of determining liability for tax, the interests of the parties tend to be the same in 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 firms'

95 SOR/96-332, ss. 6(d), (e).

96 P. Hogg, J. Magee & T. Cook, *Principles of Canadian Income Tax Law* (Toronto: Carswell, 1999), at p. 37.

97 A. Gaucher, "A Worker's Status as Employee or Independent Contractor" (1999), 33 Tax Conference 1; J. Magee, "Whose Business Is It? Employee versus Independent Contractors," in W. Crawford & R. Beam, eds., 45 Personal Tax Planning 584. A worker's status is important for a number of tax-related purposes: (1) determining the nature and amount of expenses the worker is entitled to deduct from income for the purpose of income tax liability; (2) establishing the timing of income recognition and the deferral of tax; (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 in respect of CPP/QPP and EI, as well as income tax; and (5) determining the goods and service tax obligations of workers and firms.

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95 SOR/96-332, ss. 6(d), (e).

96 P. Hogg, J. Magee & T. Cook, *Principles of Canadian Income Tax Law* (Toronto: Carswell, 1999), at p. 37.

97 A. Gaucher, "A Worker's Status as Employee or Independent Contractor" (1999), 33 Tax Conference 1; J. Magee, "Whose Business Is It? Employee versus Independent Contractors," in W. Crawford & R. Beam, eds., 45 Personal Tax Planning 584. A worker's status is important for a number of tax-related purposes: (1) determining the nature and amount of expenses the worker is entitled to deduct from income for the purpose of income tax liability; (2) establishing the timing of income recognition and the deferral of tax; (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 in respect of CPP/QPP and EI, as well as income tax; and (5) determining the goods and service tax obligations of workers and firms.

This rationale was most clearly expressed by Décary J.A.: "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 . . ."[105] 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.[106]

It is unlikely that *Wolf* will have much impact on the legal tests of employment status in tax law since the case deals primarily with the definition in the *Civil Code of Quebec*. 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 legal context. Tax scholar Vern Krishna has written:

> 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.[107]

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*,[108] this is precisely what adjudicators should do in determining employment status. The problem is that adjudicators, and in particular judges, have not demonstrated that they have good skills 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

105 *Ibid.*, at para. 118. 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 . . ." (at para. 94).

106 *Ibid.*, at paras. 119, 124.

107 V. Krishna, *Fundamentals of Canadian Income Tax*, 5th ed. (Scarborough Ontario: Carswell, 1995), at pp. 192-193.

108 *Supra*, note 18.

income taxation, and the reasons why employees are treated differently from independent contractors for tax purposes.

3. CONCLUSION: ABOLISHING THE DISTINCTION BETWEEN EMPLOYEES AND INDEPENDENT CONTRACTORS

The determination of the personal scope of employment and labour legislation in Canada is very complex. Although the distinction between employees and independent contractors remains crucial, different tests are applied, extended definitions of "employee" have been added, and there have been some *ad hoc* extensions and exclusions that affect particular groups of workers. The personal scope of employment and labour legislation differs from jurisdiction to jurisdiction as well as across different legal regimes. While there are some general patterns — for example, legal regimes that are designed to promote social justice, such as human rights and occupational health and safety legislation, have the broadest coverage, and income tax legislation has the narrowest — the scope of coverage in economic governance regimes that regulate the terms and conditions of employment and in social wage regimes varies widely. However, it is obvious that the traditional distinction between employees and independent contractors does not serve as the boundary defining the personal scope of labour protection, social wage or revenue legislation.

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 determining the personal scope of employment- and labour-related legislation. 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. Rarely is collective bargaining legislation extended to independent contractors; however, both Quebec and the federal jurisdiction have enacted a form of collective bargaining legislation for

artists who are independent contractors.[109] A couple of Canadian jurisdictions have gone so far as to make the distinction between employees and independent contractors irrelevant for social justice purposes. 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 while extending coverage through legislation or regulation to workers who would otherwise fall outside of the definition of employee or denying it to workers who would otherwise fall inside the definition.

Although this piecemeal approach has benefited particular groups of workers in specific ways (for example, making workers' compensation available to fishers in British Columbia), it has significant limitations. The most obvious is that the processes of inclusion and exclusion are *ad hoc* and dependent on factors that have little to do with public policy and more to do with political power. 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 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.[110] 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.

109 E. MacPherson, "Collective Bargaining for Independent Contractors: Is the *Status of the Artist Act* a Model for Other Industrial Sectors?" (1999), 7 C.L.E.L.J. 355.

110 W. Schrank, "Benefiting Fishermen: Origins of Fishermen's Unemployment Insurance in Canada, 1935-1957" (1998), 33 Journal of Canadian Studies 61; W. Clement, *The Struggle to Organize: Resistance in Canada's Fishery* (Toronto: McClelland and Stewart, 1986), at pp. 56-57.

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."[111] 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 that 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 does not resolve the problem of determining the scope of legislation; it simply changes the nature of the inquiry. The crucial question according to this approach is not whether an individual is an employee or an independent contractor, but rather whether this is the kind of individual to whom the legislation ought to apply. Second, this approach assumes that adjudicators

111 K. Purcell, "Changing Boundaries in Employment and Organizations," in K. Purcell, ed., *Changing Boundaries in Employment* (Bristol: Bristol University Press, 2000) 1, at p. 1.

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.[112] Finally, the purposive approach to the application of definitions that determine the scope of coverage is a deeming process thinly disguised as adjudication. The effect of using adjudication to determine the scope of legislation is that it creates conditions of uncertainty so that many workers do not know whether or not they are covered by legislation and they have to bear the burden of finding out. Adjudication, in essence, operates as a system of *ex post facto* 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.[113]

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. Recently Brian Langille has noted that "developments in the economy have forced us to question . . . the contract of employment's continued availability and viability as a platform for delivering" a "substantive conception" of human freedom.[114] Revitalizing the legal definition of employee through the

112 In a recent decision overturning a finding by the Appeal Tribunal of the New Brunswick Workplace Health, Safety and Compensation Commission that drivers for a delivery service were employees under the *Workers' Compensation Act*, the majority of New Brunswick Court of Appeal did not even consider the purpose of the workers' compensation legislation, so intent was it on the question of common law characterization: see *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)* (2001), 201 D.L.R. (4th) 450 (N.B.C.A.). The Supreme Court of Canada has denied leave to appeal: [2001] S.C.C.A. No. 425 (QL). Thanks to Debra Parkes for bringing this case to our attention.

113 P. Davies, "Wage Employment and Self-Employment: A Common Law View," in *Report to the 6th European Congress for Labour Law and Social Security*, September 13-17, 1999, 165, at p. 167.

114 B. Langille, "Labour Policy in Canada — New Platform, New Paradigm" (2002), 28 Can. Pub. Pol'y 133, at p. 140.

development of better tests fails to address the deeper problem, which is the mistaken assumption that the legal status of self-employment — independent contracting — corresponds to economic independence and autonomy.[115] A close examination of self-employment in Canada suggests that the time has come to consider dissolving the distinction between employees and the self-employed for the purpose of labour protection and social wage legislation. 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.[116] But, as the data reveal, not all independent contractors are entrepreneurs, for many of them are dependent upon selling their labour. According to the report of experts appointed by the European Union to consider changes in work and the future of labour law,

> . . . it is advisable to prevent a gulf from forming between employees protected under contract and persons working under other kinds of arrangements that afford less protection. One of the historical functions of labour law has been to ensure social cohesion. It will only be able to continue to fulfil that function if it is able to accommodate new developments in the way that work is organized in contemporary society and does not revert to covering just the situations it was originally intended to address, which are becoming less typical.[117]

The economic rationale for taking an expansive approach to the personal scope of labour regulation is tied to the goal of economic activity — improving living standards. According to economist Joseph Stiglitz, "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

115 Taking a contrasting position, Andrew Stewart proposes an interesting new legal definition of "employee" to replace the traditional common law definition. He assumes (mistakenly, we would argue) that employees can be distinguished from independent contractors who are correctly identified as entrepreneurs. Stewart also addresses a number of related conceptual and definitional issues. A. Stewart, "Redefining Employment? Meeting the Challenge of Contract and Agency Labour" (2002), 15 Austl. J. Lab. L. 235.

116 See text accompanying notes 5 and 6, *supra*.

117 A. Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001), at pp. 22-23.

workers' welfare, trusting that the market will make all the correct trade-offs."[118] 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 downward pressure on wages and working conditions, and may not lead to compensating improvements in living standards. Thus, expanding the personal scope of labour protection is also an important element of economic policy.

For these reasons, it is time to collapse the legal distinction between employees and independent contractors and to revise the basis for determining the personal scope of labour, social wage and tax legislation. Instead of attempting to draw a new line between employment and independent contracting, the starting-point should be 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."[119] The technical challenge is to develop mechanisms and institutions for making labour protection effective for all people who work for a living. To the extent that there are relevant differences in the arrangements and conditions under which employees and contractors sell their labour, these differences should be taken into account in the design of labour protection and social wage legislation, not in its application.

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118 J. Stiglitz, "Employment, Social Justice and Societal Well-being" (2002), 141 Int'l Lab. Rev. 9, at p. 20.

119 P. Egger, "Towards a Policy Framework for Decent Work" (2002), 141 Int'l Lab. Rev. 161, at p. 166.