University of Alberta

Distinguishing Employees and Independent Contractors for the Purposes of Employment Standards Legislation

by

Lorrie Marie Adams

A thesis submitted to the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree of

Master of Laws

Faculty of Law

Spring 2013

Edmonton, Alberta

Dedication

This thesis is dedicated to my mother, Susan, who, by her example sought to instill respect for the dignity of others in everything she did…a truly beautiful mind. You are greatly missed.

ABSTRACT

Employment standards legislation implicitly acknowledges that the employer and employee relationship is often an unbalanced one in which the individual worker does not always have sufficient bargaining power to negotiate conditions of employment that are not exploitative. This thesis examines the lack of access to employment standards protections for workers who share the same vulnerabilities as employees but who are denied access to these standards because of their status as independent contractors at common law. The author examines evolving workplace practices and the validity of the assumptions about such matters as control and risk that underlie the common law tests. The present practice of superimposing the common law into statutory definitions is examined in light of established principles of statutory interpretation. The purpose of employment standards legislation and role of administrators enforcing employment standards legislation are considered with suggestions for improving decision-making in cases involving ‘independent contractors’.

Acknowledgements

This thesis would not have been possible without the unwavering support of my husband Rick and my two children, Sandy and Olivia.

I would also like to express my heartfelt gratitude to my advisors, Russell Brown and Eric Adams, whose careful guidance and thoughtful advice were invaluable to me throughout this undertaking.

I am also very appreciative of the support of my colleagues at MacEwan University, and in particular to Tom Carter who was my unofficial cheerleader and for whose encouragement and constant support, I am very grateful.

TABLE OF CONTENTS

LIST OF TABLES

TABLES 1.0 - 1.9 SUMMARY OF KEY PROVISIONS SETTING OUT SCOPE OF FEDERAL AND PROVINCIAL EMPLOYMENT STANDARDS

INTRODUCTION

Legislation that regulates employment standards serves a particularly crucial role in the dignity and quality of life of working Canadians. Unless one is a member of a collective bargaining unit, the conditions under which we work are the result of the agreements we individually reach with those who wish to pay for our services. Employment standards legislation implicitly acknowledges that contracts of employment are not like 'typical' business contracts and that the employer and employee relationship is often an unbalanced one in which the individual worker does not always have sufficient bargaining power to negotiate conditions of employment that are not exploitative.[1] By establishing basic working conditions in key areas[2] such as hours of work, breaks, holidays, vacation leave, notice before dismissal, parental leave and minimum wages, employment standards legislation keeps employers in check and functions as a clear boundary between working conditions that meet a minimum standard of 'decency'[3] and what constitutes exploitation by Canadian standards. This thesis is concerned with the lack of access to employment standards protections for workers who share the same vulnerabilities as employees but who are denied access to these standards because of their status as independent contractors.

---

[1] *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491 [*Machtinger* cited to S.C.R.] at para. 31.

[2] Every Canadian province and the Yukon territory, as well as the federal jurisdiction has enacted legislation establishing employment standards for such matters as hours of work, entitlement to breaks, holidays and vacation. While there are some minor variations in the minimum standards from jurisdiction to jurisdiction, these rights are fairly consistent across Canada.

[3] The suggestion that every worker is entitled to "decency" no matter how limited his bargaining power will be a recurring theme in this thesis. Commissioner Harry Arthurs (in his role as Commissioner of the Commission on the Review of Federal Labour Standards) identified the right to decency at work as the fundamental and pre-eminent principle underlying all employment standards legislation: "[l]abour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as 'decent'". Commission on the Review of Federal Labour Standards (Canada), *Fairness at Work : Federal Labour Standards For The 21st Century* (Ottawa: Federal Labour), [*Fairness at Work*] at *x*, 47.

While there is some variance among jurisdictions within Canada, the right to the basic entitlements set out in employment standards legislation is usually extended to every worker who is an 'employee' and most jurisdictions also provide a broad definition for who constitutes an employee. Often, decision makers tasked with enforcing employment standards legislation (whom I shall refer to as *adjudicators* in this thesis),[4] import the common law distinction between employees and independent contractors into these statutory definitions, or at least, turn to the indicia used to make the common law distinction as a basis to deny coverage to independent contractors who seek the protections of employment standards legislation. It is argued in this thesis that there are problems with this methodology.

This thesis examines the suitability of the common law tests as a basis for determining access to the protections of employment standards. One concern raised in this thesis is the fact that growing numbers of Canadians are providing their services to employers within independent contractor relationships rather than employer/employee relationships and some of these workers share many of the same vulnerabilities as their employee counterparts. This thesis also examines some of the basic assumptions about the nature of employment relationships that underlie the common law tests and whether assumptions about such matters as 'control' and 'risk-taking' reflect modern business practices and continue to be valid in today's workplaces. A further question raised in this thesis is whether the superimposition of the common law distinction between employees and independent contractors is correct or even necessary given the wording of the legislation and established principles of statutory interpretation. For these and other reasons that are explored in this

[4] Employment standards legislation is enforced by government appointed administrators who are empowered to make determinations in individual cases in matters regarding the legislation, including whether a worker is an "employee'' and entitled to the protections provided in the legislation. Initial determinations are usually made by "officers" (or similarly titled administrators) whose decisions can often be appealed to more senior administrators or tribunals. In this thesis, I will refer to those who are delegated authority under the legislation to decide if a particular worker is an employee for the purposes of employment standards collectively as *adjudicators*.

thesis, it is argued that the common law distinction between employees and independent contractors should not be the primary focus of inquiry for adjudicators. It is proposed here that adjudicators should apply the legislation using the broad definitions that already exist in the legislation and where the status of the worker is in contention, uncertainty about employee status for the purposes of the legislation should take into account evolving business practices and evaluate the relationship from the perspective of the protective purposes of the legislation. This approach would require adjudicators to explore whether the worker is in need of protection because of vulnerability to the employer in the key areas of vulnerability identified by employment standards legislation (for example, lack of control over hours of work, inability to negotiate breaks and holidays, need of a financial cushion in the event of dismissal, inability to collect pay).

A subtheme throughout this thesis is that in addition to embodying the minimum standard of decency at work, employment standards legislation exists *because Canadians wish to uphold a standard of decency in working conditions for all Canadian workers who are vulnerable and dependent upon a particular employer.* In consequence, in addition to ensuring the protection of individual vulnerable workers in the cases before them, it is argued here that adjudicators must also be ready to address new business or employment practices that threaten to erode these standards. A review of the cases suggests that in many cases there is little downside risk for employers who wish to experiment with avoiding employment standards obligations by miscategorizing a worker as an independent contractor.

I will begin in Part I with an overview of how independent contractors are presently addressed in the administration of employment standards legislation. I will also consider the broader societal problems associated with the present approach and explain how changes underway in Canadian workplaces make reconsideration of our current treatment of independent contractors particularly important. Part II and III will examine the wording of employment standards legislation and consider whether the emphasis adjudicators place on the

common law distinction between employees and independent contractors is supportable in light of established principles of statutory interpretation. This discussion will also review generally the principles of purposive interpretation and consider the application of these principles to employment standards legislation. In Part IV, I examine the purposes of the legislation, proposing that the legislation has both broad policy objectives as well as secondary goals and I suggest how these aims concern not only employees, but also some independent contractors. My concluding remarks are contained in Part V.

PART I – THE CASE FOR REEVALUATING HOW EMPLOYMENT STANDARDS ARE APPLIED TO INDEPENDENT CONTRACTORS

A. THE CURRENT APPROACH

Before embarking on a discussion of the problems with the present approach, it is useful to review how distinctions between employees and independent contractors for the purposes of employment standards legislation are made in Canada. I will begin with a brief discussion of the history of employment standards legislation, its current legislative framework and how jurisdiction over employment standards is determined in Canada. This discussion will also review the specific workplace issues at which the legislation is presently aimed and outline how the legislation is enforced. Finally, the common law tests and the role they play in decisions made by those applying employment standards will be outlined.

It has long been recognized that the contracts through which we derive our livelihood are not like typical contracts. As Dickson C.J. stated in *Reference Re Public Service Employee Relations Act (Alta.)*, "[w]ork is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth

and emotional well being".[5] It is also accepted that this central and uniquely important relationship is quite unlike that between two commercial enterprises.[6] The employment relationship is often an unbalanced one in which vulnerable employees may accede to exploitative or abusive working conditions in order to earn a living.[7] Employment standards legislation is part of the body of statutory workplace law, which, along with human rights, occupational health and safety law and labour relations law, that recognizes these unique features of the employment contract, provides rights to protect employees and imposes standards and obligations on employers.

The rights contained in modern employment standards legislation were adopted in a somewhat piecemeal fashion over the course of a number of decades, starting with rules intended to set maximum hours of work and to ensure work breaks and the payment of wages.[8] Initially the plight of children and women were of particular concern but eventually standards developed to cover all workers.[9] Over time, new protections were gradually enacted, such as minimum wage legislation[10] and vacation entitlements.[11] After World War II, piecemeal legislation was gradually replaced by 'omnibus' legislation that established minimum wages, overtime rules, maximum hours of work, annual vacations with pay, statutory holidays, pregnancy leave, termination notice and severance

---

[5] *Reference Re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313 at 368.
[6] *Machtinger, supra*, note 1 at para. 31.
[7] Geoffrey England, *Individual Employment Law* (Toronto: Irwin Law, 2000) at 80. (England notes that there are of course exceptions, such as highly skilled workers, professionals, managers, entertainers, sports stars, among others who are in short supply in the market place, but he observes "most employees do not fall into these categories" at 80).
[8] See for example, Alberta's *The Factories Act*, 1917, ch. 20.
[9] One of the earliest pieces of legislation in Alberta, for example, was the 1906 *An Act to make Regulations with respect to Coal Mines*, 1906, ch. 25 which provided that boys under the age of 12 and all women and girls were prohibited from working in a coal mine. The Act also established basic safety requirements and rules respecting the payment of wages.
[10] See Alberta's *The Minimum Wage Act,* 1922, ch. 81.
[11] In Alberta for example, the *Hours of Work Act*, 1936, ch. 5. led to employers being required to provide one week paid vacation after one year's employment and up to two weeks paid vacation for longer periods of employment. The Act also imposed restrictions on the employment of pregnant women.

pay.[12] The minimum standards provided for in employment standards legislation cannot be lowered, even by agreement between the employee and employer. Thus, the resulting legislation in place today is an amalgamation that provides a 'floor of rights' by setting minimum workplace conditions in the areas of hours of work, entitlement to rest periods and overtime, minimum wage, entitlement to holidays and annual vacations, rights on termination, layoffs and maternity and parental leave.

Besides providing specific protections in these key areas, another major benefit afforded by the legislation is that it offers workers an inexpensive alternative to suing in court to enforce their workplace rights. Employment standards legislation provides an administrative apparatus that enables a worker, at no cost, to bring a complaint if an employer attempts to impose working conditions that fall below the minimum standards set out in the legislation. Worker complaints are investigated by officers who can order employers to comply with the legislation and order the payment of unpaid earnings. The importance of this feature of employment standards legislation should not be overlooked, as many workers, if forced to sue (particularly for small amounts), would forego their rights because it is too expensive or not worthwhile to bring private litigation.[13] Administrators appointed under the legislation provide assistance to workers and employers to resolve disputes and in instances of noncompliance, can investigate workplace practices and issue orders requiring compliance.

---

[12] Judy Fudge, Eric Tucker & Leah Vosko, "Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada" (2003) 10 C.L.E.L.J. 193, at 209.

[13] For example, section 82 of Alberta's *Employment Standards Code*, R.S.A. 2000, c. E-9 provides that an employee may make a complaint, without cost, to an officer appointed under the legislation, who can investigate and attempt to resolve the dispute by mediating (without charge) between the employer and employee. Officers are also empowered under section 87 to order the payment of unpaid earnings and order that an employer comply with the legislation (ss. 77, 79). The officer can also refer unresolved disputes to the Director of Employment Standards, who can also attempt to settle the dispute and who is also empowered to hear appeals of officer decisions (ss. 86, 87, 88, 89, 94). In some cases, a final right of appeal is available to an umpire (in practice, a judge of the Provincial Court of Alberta but who is not bound by the rules of evidence and who is empowered to determine the procedure to be followed in the appeal, ss. 95-101). There is no appeal of an umpire's decision (s. 107 (3)).

Administrators can even take collection action on the employee's behalf.[14] Providing workers with access to an affordable and easy to use enforcement process is arguably one of the most important aspects employment standards legislation and I will return to this point in Part IV of this thesis.

While all employment standards legislation in Canada addresses the key areas of hours of work, entitlement to rest periods, overtime rules, minimum wage, entitlement to holidays and annual vacations, wrongful termination, layoffs and maternity and parental leave, the precise contents of these entitlements vary somewhat from jurisdiction to jurisdiction because the federal government and each provincial government have enacted distinct legislation.[15] Presumptive jurisdiction over employment standards rests with the provinces by virtue of the

[14] The Alberta legislation even creates a deemed trust for amounts found payable to an employee and the legislation provides that these amounts may be collected as if it were a judgment of the court, ss. 109, 110. The Director of Employment Standards is authorized to collect from directors of corporations and may also make third party demands in the event an employee is not paid as previously ordered or awarded, ss. 112, 114 – 123.

[15] Sections 91 and 92 of *The Constitution Act, 1867* (U.K.), 30 & 31 Vict. c.3 do not expressly reference which level of government has power over employment standards but labour relations have been accepted as presumptively a provincial matter on the basis of the provincial power in section 92 (13) over property and civil rights (see *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 [*Snider*]). As for federal jurisdiction, in *Validity and Applicability of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529, it was held that federal jurisdiction might arise 'directly', such as when the employment relates to a work, undertaking, or business within the legislative authority of Parliament, or when it is an integral part of a federally regulated undertaking (sometimes referred to as *derivative jurisdiction*). A more challenging situation is where a business conducts operations that would fall under provincial jurisdiction *and* federal jurisdiction. In such situations, it is necessary to conduct a close examination of the operations of the business, as was done recently in *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23 [*Tessier*]. According to *Tessier,* federal regulation may be justified when the services provided to a federal undertaking form the exclusive or principal part of the related work's activities or when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be characterized separately from the rest of the related operation. According to *Tessier* if there is not a discrete unit, then even if the work of those employees is vital to the functioning of a federal undertaking, "it will not render federal an operation that is otherwise local if the work represents an insignificant part of the employees" time or is a minor aspect of the essential ongoing nature of the operation", at para. 50.

"property and civil rights" power in section 92 (13) of the *Constitution Act*, 1867. Section 92 (13) has been accepted as conferring presumptive jurisdiction to the provinces for labour relations, and hence employment standards matters.[16] As a result, most Canadian employees, or roughly 92.4%[17] of employees, work in relationships that are regulated by provincial legislation. The remaining 7.6%[18] of Canadian employees fall under the federal jurisdiction and work for the federal government or work in industries that are regulated by the federal government such as banking, telecommunications, or the airlines, for example.[19] These employment relationships are regulated by Part III of the *Canada Labour Code.*[20] Despite the separate legislation in each jurisdiction, employment standards legislation is consistent in most key respects across Canada with mostly subtle variations in terminology and entitlements, as well as in qualifying periods for particular entitlements.

In most Canadian jurisdictions, employment standards legislation is drafted broadly to apply to virtually anyone who is paid to do work. For example, the Alberta legislation, is stated to apply to all 'employees', and defines this term very broadly:

> s. 1 (1) (k) "employee" means an individual employed to do work who receives or is entitled to wages and includes a former employee…[21]

"Wages" is also broadly defined as including "any salary, pay, commission or

---

[16] *Ibid*.
[17] Human Resources and Development Canada*, Profile of Federal Labour Jurisdiction Workplaces: Results from the 2008 Federal Jurisdiction Workplace* (Ottawa: Human Resources and Development Canada, 2010) at 7, online: http://www.hrsdc.gc.ca/eng/labour/employment_standards/publications/pdf/fjws_2008.pdf.
[18] *Ibid.*
[19] Sections 91-95 of *The Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3 reprinted in R.S.C. 1985, App. II, No. 5, sets out the scope of the federal and provincial powers within Canada.
[20] *Canada Labour Code,* R.S.C. 1985, c. L-2.
[21] *Employment Standards Code,* R.S.A. 2000, c. E-9 [AESC].

remuneration for work, however computed…"[22] "Work" is defined to include even those who provide a service:

s. 1. (aa) "work" includes providing a service[23]

This definition is very wide – so wide in fact that it captures nearly every relationship in which an individual is paid to do work for another. If applied literally, this definition, particularly when combined with the prohibition on any agreements to avoid the *legislation* contained in section 4 of the AESC[24] creates a near-presumption of employee status when an individual is paid to do work by another.[25] At the very least, this definition does not, on its face, exclude all workers who provide their services to employers as independent contractors.[26] One might even make the argument that where the worker fits within the statutory definition of employee, an agreement to treat a relationship as an independent contractor relationship violates the standard statutory prohibition on

---

[22] *Ibid.* s. 1(1)(x).
[23] *Ibid.* s. 1(1)(aa).
[24] AESC, *supra* note 21. Section 4 of the AESC states "Any agreement that this Act or a provision of it does not apply, or that the remedies provided by it are not to be available for an employee, is against public policy and void." Other jurisdictions have similar provisions, see *infra* note 25.
[25] The clear intent in each jurisdiction is to make the legislated standards mandatory and unavoidable for employers and employees who might wish to contract for lesser standards. Most jurisdictions have rendered agreements specifying working conditions that fall below the minimum standards void or contrary to public policy (such as section 4 of the AESC, section 5(1) of Ontario's *Employment Standards Act*, S.O. 2000, c. 41 and section 3 of the Newfoundland and Labrador *Labour Standards Act,* R.S.N.L.1990, c. L-2). Other provinces make such agreements ineffective by providing that agreements cannot override the legislation (see for example s. 4(1) of New Brunswick's *Employment Standards Act,* S.N.B. 1982, c. E-7.2). Manitoba's legislation provides that such agreements provide no defence to prosecution under the legislation and that employers may be prosecuted even where an employee has agreed to work in conditions that fall below the statutory minimum standards (see *Employment Standards Code*, C.C.S.M. c. E110, s. 4 (1)).
[26] The legislation of Manitoba and New Brunswick is unique in that it makes specific reference to independent contractors and provides that the legislation does not apply to such workers, see section 2 (3) of the *Employment Standards Code*, C.C.S.M. c. E110 and in New Brunswick, see s. 1 of the *Employment Standards Act,* S.N.B. 1982, c. E-7.2. These jurisdictions provide broad definitions for who constitutes an employee but do not define 'independent contractor' for the purposes of the legislation.

agreements to avoid minimum standards.

Nonetheless, for the most part, those applying employment standards have operated under the assumption that legislators intended to superimpose the common law conception of employment onto the broad wording typically contained in the legislation. For example, the employment standards umpire in *Sunstar Uniforms Inc. v. The Director of Employment Standards*,[27] a case which has subsequently formed the foundation for most Alberta decisions on the issue of independent contractors, noted the definition provided for employee in the AESC certainly "could be broad enough" [28] to cover virtually all relationships of people working together, including independent contractors, but rejected this reading of the legislation, stating:

> The legislature of Alberta in formulating the code must, however, must [sic] be taken to have been aware of the distinction at common law between employees and independent contractors and one would have thought if such distinction was intended to be entirely eliminated for the sake of the legislation and the concept of independent contractor was to be inapplicable, it would have been a very simple matter for the legislation to say so.[29]

Notwithstanding the broad wording and the distinct purposes of employment standards legislation, (which is discussed later in Part II), a perusal of adjudicator decisions from other jurisdictions suggest that the approach in *Sunstar Uniforms* is not unusual.[30] There are variations in the degree of

---

[27] *Sunstar Uniforms Inc. v. The Director of Employment Standards*, March 12, 1998 (Canlii) (A.E.S.U.) [*Sunstar Uniforms*].
[28] *Ibid*.
[29] *Ibid.*
[30] The legislation in Newfoundland and Labrador, the *Labour Standards Act,* R.S.N.L.1990, c. L-2 stands somewhat apart from all other jurisdictions in Canada in that it actually uses language traditionally used in the common law , referring to a 'contract of service' in its definition of an employee. The *Act* states that an *employee* means a natural person who works under a contract of

reliance placed by adjudicators on the common law tests of employment when applying employment standards and also some variation between different Canadian jurisdictions (a point which I will revisit in Part II), but the common law tests remain an important factor in most jurisdictions when addressing the rights of independent contractors under employment standards legislation.

B. THE COMMON LAW TESTS

The common law tests of employment that are often used by adjudicators were developed by the courts and have evolved over the years. Traditionally, when called upon to determine if a worker and employer were in an employment relationship, the courts would focus on the element of control exercised by the employer over the worker, with this approach now commonly referred to as the *control test*. The theory of the control test was that unlike self-employed individuals, employees can be directed by employers in how they carry out their tasks.[31] However, the limitations of the control test soon became apparent, particularly in cases of highly skilled and professional workers who carry out their tasks with little or no control exercised by the employer. Discussing the weaknesses of the control test in *671122 Ontario Ltd. v. Sagaz Industries Inc.*[32] the Supreme Court of Canada noted that sometimes workers possess skills or specialized knowledge far beyond the ability of their employers to direct. The Court also referred approvingly to *Wiebe Door Services Ltd. v. M.N.R,*[33] where it was observed that the detailed specifications and conditions set out in many contracts with independent contractors might even result in an employer

---

service for an employer and then goes on to define a *contract of service* as "a contract … in which an employer… in return for the payment of a wage to an employee, reserves the right of control and direction of the manner and method by which the employee carries out the duties to be performed under the contract…", s. 2.(b)(d).

[31] *Regina v. Walker* (1858), 27 L.J.M.C. 207. The control test was adopted by the Supreme Court of Canada in Court in *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1978] 1 S.C.R. 605.

[32] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983 [*Sagaz*].

[33] *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 [*Wiebe Door*] at 558-59.

exercising *greater* control over its independent contractors than with its employees. The inadequacies of control test led to the development of other tests including the *four-fold test,*[34] the *enterprise test*[35] or *integration test*,[36] among others.[37] The four-fold test put forth by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd. et al.*, which considers (1) the control exercised over the worker; (2) ownership of the tools; (3) the worker's chance for profit, and (4), risk of loss, was considered to be more appropriate in the more "complex conditions of modern industry".[38] The *enterprise test* considers factors such as the degree the employer controls the activities of the worker; whether the employer was in position to reduce the risk of loss arising from the workers activities and whether the employer benefited from the activities of the worker.[39] The *integration test* focuses on whether the worker was performing duties that were an integral part of the employer's business.[40]

In recent years, adjudicators of employment standards and the courts have accepted that the variable and ever changing nature of work relationships is such that there is "no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor"[41] and rather, the totality of the relationship must be taken into account by examining a non-exhaustive list of factors which will always include the amount of control exercised by the employer over the worker but may also include the common law indicia drawn from the previous tests, such as whether the worker provides

---

[34] *Montreal v. Montreal Locomotive Works Ltd. et al.,* [1947] 1 D.L.R. 161 (P.C.) [*Montreal Locomotive*].
[35] Robert Flannigan, "Enterprise control: The Servant-Independent Contractor Distinction" (1987) 37 U.T.L.J. 25.
[36] *Stevenson Jordon & Harrison Ltd. v. MacDonald and Evans,* [1952] 1 T.L.R. 101 (C.A.) [*Stevenson Jordon*]. This test was approved by the Supreme Court of Canada in *Co-Operators Insurance Association v. Kearney*, [1965] S.C.R. 106, another vicarious liability case.
[37] These are not the only common law tests that have been proposed. Other tests include the *specific results test*, the *economic reality test* and the *worker-characterization test*, for example.
[38] *Montreal Locomotive*, *supra* note 34 at 169.
[39] *Supra* note 35.
[40] *Stevenson Jordon, supra* note 36.
[41] *Sagaz*, *supra* note 32 at para. 46.

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.[42] This list, according to *Sagaz*, has no precise ingredients and its contents are open to the discretion of the decision-maker, as is the weight to be given to each factor, but the purpose of the inquiry and central question is "whether the worker has been engaged to provide services is performing them as a person in business on his own account".[43]

An example of the application of this approach by an adjudicator is the decision in *1096043 Alberta Ltd. and E. Davis Developments Ltd. operating as Station 33rd Condominiums and Sandra Miriam Saturley.*[44] In that case, the adjudicator considered whether the complainant sales consultant was entitled to employment standards and composed a list of factors, which in addition to control, included:

> Whether there is a contract indicating a higher independent contractor relationship; whether there is non-exclusivity of services; remuneration, whether remuneration by reference to sales or billings of the worker as a percentage amount; whether the worker is required to submit an invoice for services rendered; whether the worker charges goods and services tax; whether the worker is paid or not for services unless rendered; whether the worker's [sic] responsible for any expenses incurred during the

---

[42] *Sagaz, supra* note 32 at para. 47. *Sagaz* and *Wiebe Door* attribute this formulation to Cooke J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), where at 737-38, Cooke J. stated that "the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'".

[43] Sagaz, *supra* note 32 at para. 47.

[44] *1096043 Alberta Ltd. and E. Davis Developments Ltd. operating as Station 33rd Condominiums and Sandra Miriam Saturley*, 2006 CanLII 46767 (AB ESU). [*Saturley*]. See also *Marmit Plastics Inc. v. Garry Douglas Emmott*, 2000 CanLII 20281 (AB ESU)[*Marmit Plastics Inc.*].

> performance of the work such as payment of rent for use of office space or equipment; whether the worker owns the tools and equipments [sic] required for the job; whether there's an absence or not of any restriction on hours and vacation time; whether vacation and benefits are offered; whether the worker is required to perform the services personally or may subcontract to a third party; the worker's activities are supervised or whether they are not supervised by the hirer; the contract being for a limited or an unlimited period of time. These, I would suggest, would be factors that would point towards independent contractor rather than employee despite the wide definition of employee.[45]

On the basis of these factors, the adjudicator in *Saturley* concluded that the worker was not an employee and therefore not entitled to employment standards protections despite the fact that she was provided an office, desk, a fax machine, a phone, file cabinets and some paper and that she was to be on site Monday to Friday from two to eight p.m. and Saturday and Sunday from noon to five p.m. for a total of 40 hours per week. The factors that apparently persuaded the adjudicator that was not an employee included that she agreed to a contract term allowing the employer to terminate her without cause on 7 days notice, she used her own computer and cell phone (even though a phone was provided), no deductions were made from her pay, her sales activities were not directly supervised, she could earn more by making more sales and minimizing her expenses, she was not reimbursed for her expenses and she could have someone of her own choosing sit in for her during the appointed hours (and had occasionally done so[46]).[47]

---

[45] *Saturley, ibid.*

[46] Recently the Ontario Court of Appeal found that the fact that the worker could hire her own workers to assist her did negate a relationship of employment, see *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916 (CanLII) which is discussed in more detail later in this thesis.

[47] *Saturley, supra* note 44. Additional and factors were also considered by the adjudicator in *Saturley* such that she also used her own heater for use in the office the employer asked her to provide a G.S.T. number (but she didn't

The position put forth here is that there is an alternative approach to making these distinctions that would more effectively achieve the purposes of employment standards legislation. It is argued in this thesis that the efforts of adjudicators are misdirected and should instead focus on the vulnerabilities of the particular worker in question and whether the protective purposes of employment standards legislation are satisfied. It is not being suggested that all past decisions utilizing the common law tests or the 'non-exclusive list/whose business is it' approach to decide if a worker is entitled to employment standards protection are wrongly decided. To the contrary, a satisfactory result was reached in most of the individual cases I reviewed, which is to say that vulnerable workers usually ended up being protected even though there may have been an attempt to clothe the relationship as something other than one between an employer and employee. However, it is argued here that correct decisions are usually reached because, in a vague way, some of the common law criteria for distinguishing employees from independent contractors, *coincidently*, involve examination of *some* of the same criteria that might be relevant in the approach I am recommending – which is to focus on the vulnerabilities of the worker in the relationship. I will expand upon this idea in Part III and IV of this thesis, but for instance, an examination of the common law factor of control exercised over the worker may also shed light on the degree to which the worker is vulnerable to the employer and hence in need of the protections of employment standards legislation. Similarly, common law considerations such as whether the worker has an opportunity to earn a profit or whether the relationship requires exclusivity on the part of the worker, might also be relevant when assessing the vulnerability of the worker relative to the employer and whether the worker is in need of the protections of the legislation. However, whatever factors are considered, they must not be disconnected from the purpose of the inquiry - which is to determine if the worker is in need of the protections of employment standards legislation.

---

because she did not reach the threshold income level to made a G.S.T. number mandatory).

Before discussing an alternative approach, I will outline in the remainder of Part I some of the problems associated with the present approach of applying common law distinctions between employees and independent contractors to determine when a worker should have access to employment standards. I will also explain how changes underway in Canadian workplaces make reconsideration of our current approach particularly important.

C. CHANGING EMPLOYMENT REALITIES AND THE GROWTH OF NON-STANDARD EMPLOYMENT

Employment standards legislation does not operate in a vacuum. Rather, it must fulfill its objectives in a continually changing environment. Here, I will discuss some of the changes in Canadian workplaces and describe how the conception of employment as a relatively stable, full-time, closely controlled and supervised activity conducted at the employer's place of business is becoming increasingly outmoded. I will also review some of the data regarding the growing number of workers who are sometimes described as independent contractors, with particular emphasis on the self-employed who work without paid help.

The issue of minimum employment standards for independent contractors resides within a larger societal issue, namely: the nature of employment in Canada is undergoing significant change. I propose to highlight the changes that are most significant for those applying employment standards as I believe that these changes have important implications for the usefulness of the common law tests of employment presently used by adjudicators to decide if an employment relationship exists. The changes I wish to focus on, many of which are inter-related, are; the increase in non-standard employment; increasing demands for a flexible workforce; increased risk shifting by businesses to workers; decreased reliance by employers on direct supervision of work by employers; decreased emphasis on conducting work at the employer's place of business; increased knowledge-based employment and decreased employment in manufacturing, processing and primary industry. As most of these changes

have already been studied and commented on at length by others,[48] I will only highlight the most significant points here.

Increasing numbers of Canadians are earning their living within 'non-standard' employment relationships. In 2011, only 45%[49] of working age[50] Canadians had permanent jobs, and of these, only half had full-time positions.[51] Looked at another way, only 49.8%[52] of all working Canadians[53] held employee positions

---

[48] For example, see Judy Fudge, "The New Workplace: Surveying the Landscape" (2009) 33 Man. L.J. 131, Morley Gunderson, "Social and Economic Impact of Labour Standards", (Ottawa: HRSDC, 2005) (Paper prepared for Federal Labour Standards Review Commission), Leah F. Vosko, N. Zukewich, N. & C. Cranford, "Precarious Jobs: A new typology of employment" (2003) Vol. 4 No. 10 Perspectives on Labour and Income, online: http://www.labourcouncil.ca/amillionreasons/Precariousjobs.pdf. Harvey Krahn, "Non-standard Work on the Rise" (1995) Perspectives, Winter, Catalogue 75-001E, online: http://www.statcan.gc.ca/studies-etudes/75-001/archive/e-pdf/2459-eng.pdf.

[49] HRSDC calculations based on Statistics Canada, *Labour force survey estimates (LFS), employees by job permanency, North American Industry Classification System (NAICS), sex and age group, annual* (CANSIM Table 282-0080) (Ottawa: Statistics Canada, 2012); and Statistics Canada, *Labour force survey estimates (LFS), by sex and detailed age group, annual* (CANSIM Table 282-0002) (Ottawa: Statistics Canada, 2012), online: Statistics Canada http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=13#M_5.

[50] Defined as any individual 15 years of age or older.

[51] HRSDC calculations based on Statistics Canada, *Labour force survey estimates (LFS), by sex and detailed age group, annual* (CANSIM Table 282-0002) (Ottawa: Statistics Canada, 2012), online: Statistics Canada http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=13#M_5.

[52] My calculation is based on the September 2012 HRSDC Labour Force Survey estimates, uses these following statistics (in 000's):

Total working Canadians	-	17,664
Total with temporary positions	-	2,005
Total self-employed	-	2,649
Total part-time (>30 hrs/wk, 2011 data)	-	3,311
Total full-time (ie 30+ hours/wk) but holding multiple jobs	-	910.8

Statistics Canada, *Labour force survey estimates (LFS)*, (CANSIM Tables 282-0011, 282-0012, 282-0013, 282-0014, 282-0035, 282-0079, 282-0080) (Ottawa: Statistics Canada, 2012) online: Statistics Canada http://www5.statcan.gc.ca/cansim/a03. Retrieved 2012-10-11).

which were full-time, permanent and in which they worked for only one employer. Non-standard employment is employment that does not fit with our conventional notion of traditional employment with traditional employment consisting of full-time employment of an enduring nature, carried out on the employer's premises and often accompanied by extensive statutory and other benefits entitlements.[54] Non-standard employment can be grouped into four broad categories: part-time employment, multiple job holding, temporary employment and self-employment (without paid employees). In 1989, non-standard employment stood at 28% and by 1994, had increased to 33%.[55] In 1989, those employed part-time[56] represented 19% of all employees (compared to 11% in 1976), multiple job-holders comprised 5%, temporary employees comprised 8%, and self-employed paid workers without employees comprised 7% of all workers.[57] By July 2012, part-time employment had decreased slightly to 16.5% but the numbers of self-employed paid workers without employees had risen to 10.5% and those with only temporary employment had increased to 13.6%.[58] While some workers may prefer the flexibility and autonomy that can accompany non-standard employment (such as parents and students, for example), non-standard workers have less job security, earn lower incomes and have few if any benefits and many are employed in such positions involuntarily.[59]

---

[53] Working Canadians includes all working, including full-time, part-time and temporary workers as well as those who are self-employed. Approximately 17,664,000 individuals are working Canadians.

[54] Leah F. Vosko, N. Zukewich, N. & C. Cranford*, supra* note 48.

[55] Krahn, H, *supra* note 48 at 39. This figure incorporates all part-time and temporary, as well as paid self-employed workers without employees and employees working for multiple employers.

[56] This is defined as employment with fewer than 30 hours per week.

[57] Krahn, H, *supra* note 48 at 35-42.

[58] Statistics Canada, *Labour force survey estimates (LFS)*, (CANSIM Tables 282-0011, 282-0012, 282-0013, 282-0035, 282-0079) (Ottawa: Statistics Canada, 2012) online: Statistics Canada http://www5.statcan.gc.ca/cansim/a33?lang=eng&spMode=master&themeID=2621&RT=TABLE.

[59] For example, in 2011, when 19% of the population worked part-time, 26% of women and 29% of male part-time workers were working part-time because of business conditions or because they had been unable to find full-time work.

In 2012, self-employed workers accounted for 15% of the working labour force, or nearly one in six workers,[60] up from 11.7% in 1976.[61] Between 1987 and 2010, self-employment had an annual average growth rate of 2.0 percent, outpacing the 1.3 percent annual average increase in total employment.[62] Self-employment increased most significantly in the recession of the early 1990's and again in the 2008-2009 downturn.[63] Between October 2008 and October 2009, for example, self-employment rose by 3.9% while paid employment fell by 1.6% in the public sector and 4.1% in the private sector.[64]

The self-employed are a diverse group. In order to understand the economic realities of the self-employed, it is necessary to distinguish between those self-employed who are actually operating incorporated businesses such as retail stores, restaurants or other operations from those operating as unincorporated individuals, without paid help. In 2012, 69% of self-employed workers had no paid help and 73% of those without paid help were unincorporated; resulting in about half of Canada's self-employed or about 1.36 million self-employed

---

Statistics Canada, *Labour force survey estimates (LFS)*, (CANSIM Tables 282-0001, 282-0014) (Ottawa: Statistics Canada, 2012) online: Statistics Canada http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labor63b-eng.htm.

[60] In 2011, 2.67 million Canadians described themselves as self-employed, up from 1.5 million in 1983. This figure includes self-employed who have employees. The self-employed with out employees comprise approximately 68% of those workers who consider themselves 'self-employed'. Statistics Canada, *Labour force survey estimates (LFS)*, (CANSIM Table 282-0012) (Ottawa: Statistics Canada, 2012), online: Statistics Canada http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labor64-eng.htm. Industry Canada, *Key Small Business Statistics,* (Ottawa: Industry Canada, 2012), online: Industry Canada http://www.ic.gc.ca/eic/site/061.nsf/eng/02724.html.

[61] Industry Canada, *Self-employment Trends in Canada*, (Ottawa: Industry Canada, 1997), online: Industry Canada http://www.ic.gc.ca/eic/site/061.nsf/eng/rd00246.html.

[62] Industry Canada, *Small Business Quarterly,* vol. 13, no.3, (Ottawa: Industry Canada, 2011)

[63] Sébastien LaRochelle-Côte, "Self-Employment in the Downturn", *Perspectives*, Catalogue no. 75-001-X (March 2010), online: Statistics Canada http://www.statcan.gc.ca/pub/75-001-x/2010103/pdf/11138-eng.pdf

[64] *Ibid.*

Canadians operating unincorporated businesses and without employees.[65] In fact, self-employed workers without paid help represent the fastest growing segment of the self-employed. Between 1981 and 2011, the numbers of self-employed incorporated workers without employees increased by an average of 6.8% each year.[66] The numbers of unincorporated self-employed without employees is also growing, with growth of an average of 2.3% each year since 1980.[67] In contrast, the numbers of self-employed with employees is growing at a much slower rate of only 1.4% per year since 1980.[68] The growth in self-employment is greatest among females: between 1987 and 2010, the number of self-employed females in Canada increased by 82% from 513 300 to 933 500, while the number of self-employed males increased by 46%, from 1 185 800 to 1 736 300.[69]

While many self-employed workers are not 'vulnerable' and are well-paid, self-employment is associated with economic vulnerability, including reduced earnings, longer working hours and reduced preparedness for retirement. The average annual income of the incorporated self-employed is similar to that of paid employees ($57,800).[70] However, the average income of the unincorporated self-employed was 26% lower, or only $44,700, or only 74% of that of employees, despite working on average 1,930 hours per year, compared to 1,770 hours for paid employees.[71] Economists often look at household or family income as a better indicator of financial wellbeing than individual income

---

[65] Statistics Canada, *Labour force survey estimates (LFS)*, (CANSIM Table 282-0012) (Ottawa: Statistics Canada, 2012), online: Statistics Canada http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labor64-eng.html.
[66] Industry Canada, *Key Small Business Statistics*, (Ottawa: Industry Canada, July 2011), Table 11, online: Industry Canada http://www.ic.gc.ca/eic/site/061.nsf/eng/rd02609.html.
[67] *Ibid.*
[68] *Ibid.*
[69] Industry Canada, *Small Business Quarterly*. vol. 13, no. 4, (Ottawa: Industry Canada, February 2012), online: Industry Canada http://www.ic.gc.ca/eic/site/sbrp-rppe.nsf/eng/rd02662_1.html.
[70] Sébastien LaRochelle-Côte & Sharanjit Uppal, "The Financial Well-Being of the Self-Employed", *Perspectives on Income and Labour*, (Ottawa: Statistics Canada, 2011), online: Statistics Canada http://www.statcan.gc.ca/pub/75-001-x/2011004/article/11535-eng.pdf.
[71] *Ibid.*

as income is usually shared within households. The median household market income [72] of the incorporated self-employed was $75,600, that of paid employees was $67,000 and that of the unincorporated self-employed was only $37,900, or 57% of paid employees.[73] Perhaps even more revealing, is that while only 4% of employees worked more than 50 hours per week, 31% of self-employed workers worked in excess of 50 hours per week.[74] Roughly two-thirds of the self-employed who have worked on a contract basis have worked without a written contract.[75] The self-employed are also less likely than employees to be preparing for retirement and many will work later in life than employees.[76] According to one study, 26% of all unincorporated self-employed workers had become self-employed only because they could not find suitable employment and only 13% of unincorporated self-employed women reported that self-employment was chosen because of a desire for work-life balance.[77]

The concern of this thesis is that self-employed workers who work for others as independent contractors do not have statutory rights to overtime pay, maximum working hours, a guarantee of a minimum wage, a right to annual vacations, parental or maternity leave or any other right mandated by employment standards legislation. Such workers also have no access to the inexpensive enforcement apparatus that employment standards legislation makes available to employees so they can enforce their rights. Independent contractors wishing to enforce their rights to be paid or any other rights they have contracted for with their employers must resort to private litigation, with its expense and uncertainty

---

[72] Total household income excluding government transfers.
[73] LaRochelle-Côte & Uppal, *supra* note 63.
[74] Industry Canada, *supra* note 66.
[75] Richard Chaykowski, "Canadian Workers Most in Need of Labour Standards Protection: A Review of the Nature and Extent of Vulnerability In the Canadian Labour Market and Federal Jurisdiction" (Ottawa: 2005, HRSDC) at 22, online: HRSDC http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/research02.pdf
[76] LaRochelle-Côte & Uppal, *supra* note 63.
[77] L.F. Vosko, N. Zukewich, & C. Cranford, "Precarious Jobs: A new typology of employment" (2003) Vol. 4 No. 10 *Perspectives on Labour and Income, the Online Edition*, online: Statistics Canada http://www.statcan.gc.ca/pub/75-001-x/01003/6642-eng.html.

and in this task, they may find themselves at a considerable financial disadvantage as compared to their employer. Also, while this paper is concerned with the access of independent contractors to employment standards, one's status as a self-employed independent contractor as opposed to an employee has other important implications. Most Canadian jurisdictions do not extend collective bargaining rights to independent contractors.[78] The employers of independent contractors are also not required to make contributions to the Canada Pension Plan and Employment Insurance plans as they are with their employees. Being an independent contractor also means limited access to common law employment entitlements such as the common law right to reasonable notice before dismissal.[79]

There are, of course, many self-employed individuals working without employees and providing their labour as independent contractors who are *not* vulnerable and presumably they prefer to work in an unregulated environment. I am not suggesting that all self-employed individuals should be regulated by employment standards or be treated like employees in other respects. Presumably such workers are not the individuals who bring complaints to employment standards seeking the modest awards available under such legislation. However, there are independent contractors who are *not* sophisticated businessmen or professionals, and whose vulnerabilities are indistinguishable from those presently regarded as employees. It is these latter individuals who are the concern of this paper. The available data would suggest that there are significant numbers of 'independent contractors' who are not sophisticated business operators but instead hold relatively low status jobs

[78] In most jurisdictions, collective bargaining rights are also reserved solely for employees, although some jurisdictions extend some rights to 'dependent contractors'. See *Labour Relations Code*, R.S.B.C. 1996, c. 244, section 1, for example.

[79] There is increasing judicial recognition that dependent contractors should be entitled to reasonable notice if terminated without cause. See *McKee v. Reid's Heritage Homes Ltd.* 2009 ONCA 916, (2009), CarswellOnt 8053 and *JKC Enterprises v. Woolworth Canada Inc.*, 2001 ABQB 791, [2001] A.J. No. 1220.

and bring quite modest employment standards claims.[80] In British Columbia, for example, a random sampling of appeal decisions in which independent contractors challenged their status involved an office worker,[81] a telephone surveyor,[82] a car mechanic,[83] a cabinetry installer and shop foreman,[84] a programmer,[85] a tutor working for a tutoring academy[86] and a tile setter working for a tile and marble installation business.[87] Most of the cases involved claims for amounts of less than $5,000, and were for unpaid wages and other pay.[88]

Additionally and perhaps most importantly, the fact that growing numbers of Canadians are providing their labour in an unregulated environment,[89] has implications for all workers, even for those who are presently regarded as employees. Harry Arthurs, in his capacity as Commissioner of the 2006

---

[80] The writer was not able to obtain data regarding the number of workers who challenged their classification as independent contractors but some data is available regarding the number of such challenges that were appealed, usually by employers. In British Columbia for example, according to a Quicklaw search, 331 such appeals were considered by the British Columbia Employment Standards Tribunal over the 12 year period between July 2000 and July 2012. In Alberta, where only employers can appeal the finding that a worker is an employee and a corresponding right is not available to complainants who are found to be contractors, a Canlii search revealed 31 employer appeals in the same 12-year period. These statistics only refer to appeals of initial determinations and presumably the actual numbers of 'independent contractors' seeking the protections of employment standards are much higher than these appeal figures.

[81] *Bay Technology Corporation*, BC EST # D143/01.

[82] *Project Headstart Marketing Ltd.*, BC EST # D164/98.

[83] *City Import Centre 1997 Ltd.*, BC EST #D170/00.

[84] *NICO Industries Inc.*, BC EST # D011/11.

[85] *Cackleberries Entertainment Inc.*, BC EST # D003/11.

[86] *Cheryl Balcilek carrying on business as Trans Academe Tutoring*, BC EST # D002/11.

[87] *Marek Gabinski*, BC EST # D117/10.

[88] For example, in *City Import Centre 1997 Ltd., supra* note 83, the worker sought $1,127.69 for unpaid wages. In *Marek Gabinski, supra* note 87, for the claim was for $4,450 in unpaid wages and other pay. In *Cackleberries Entertainment Inc., supra* note 85, the worker's claim was for $1,487.42 in unpaid wages. In *Nico Industries Inc.*, *supra* note 84, the claim was for $7,797 in unpaid wages.

[89] By this I mean unregulated with respect to minimum labour standards. Of course there may be some regulation that applies to such workers, such as occupational health and safety legislation.

Federal Labour Standards Review Commission suggests that the lack of protection for independent contractors is also important to the long term interests of employees as the poorer working conditions of independent contractors can destabilize and drive down labour standards in an industry as a whole.[90] I will return to this concern when discussing the broader objectives of employment standards legislation in Part IV.

D. EVOLVING BUSINESS PRACTICES

Changing business strategies and human resource practices also call into question the usefulness of the common law tests as a suitable basis for distinguishing employees from independent contractors for the purposes of applying employment standards. The common law tests described earlier in this thesis[91] focus on such matters as the degree of employer control and supervision exercised over the worker, whether the worker is a wage earner or has chance for profit/risk of loss and the degree of integration of the worker into the organization. But do these features of the common law tests take into account changing business practices? Since the 1980's Canadian employers have been faced with increased competition due to globalization. One business strategy has been to 'outsource' non-core functions, with the new 'outsourced job' (occupied by an independent contractor) sometimes indistinguishable from its prior 'in-house' counterpart (occupied by an employee).[92] While often seen as a means for a business to focus on its core activities and reduce costs,

---

[90] *Fairness at Work, supra* note 5, at 63. Professor Arthurs was referring specifically about the results of Professor Garland Chow's study of 'owner-operators' and similar work arrangements in the trucking industry, which comprised the largest concentration of self-employed or contract workers in federally regulated workplaces but the same concern exists with other situations where employees and contractors are performing comparable services.

[91] See earlier discussion of the common law tests, at Part I.

[92] According to a Canadian survey, 12% of Canadian small businesses are actively engaged in outsourcing. Statistics Canada, *The Effect of Organizational Innovation and Technology on Firm Performance Information*, by Wulong Gu and Surendra Gera, The Canadian Economy in Transition Series Research Paper Ottawa (Ottawa: Micro-economic Analysis Division, 2004) at 32, Table 4, "Mean Incidence of Organizational Innovation", online: Statistics Canada http://www.statcan.gc.ca/pub/11-622-m/11-622-m2004007-eng.pdf.

outsourcing might also be seen as essentially a risk-shifting exercise in which an employer externalizes risk by transferring it to workers who were formally employees performing the same function.[93] Not only is business risk taken on by workers who formerly had the common law and statutory protections extended to employees, but employers are correspondingly relieved of the obligations they would have owed such workers.

Employers are also increasingly seeking to 'flexibilize'[94] their labour resources. One way today's businesses improve efficiency and competitiveness is with production methods such as 'just in time' production, or "JIT" borrowed from Japan. The initial focus of JIT was minimizing product inventory by closer alignment of production and inventory with demand fluctuations but this has now been extended to labour inputs as more and more employers seek a "just-in-case" workforce in which workers are retained only when needed to fulfill demand.[95] A survey of Canadian businesses found that 24% of firms were adopting flexible work arrangements in order to improve efficiency and competitiveness.[96] The International Labour Organization (ILO) reports a global trend of increasing "flexibilization and informalization" of production and employment relationships with firms increasingly operating with a smaller core of employees with regular terms of employment and a growing number of

---

[93] In "The Benefits of Outsourcing for Small Businesses" *The New York Times* (1 January 2008), online: The New York Times http://www.nytimes.com/allbusiness/AB5221523_primary.html, the authors explain the numerous business advantages of outsourcing such as cost savings, reduced labour costs, risk shifting, improved efficiency and increased focus on core activities.

[94] By this, I mean they wish to have flexibility both in the numbers of workers they employ (such as the ability to decrease their workforce in periods of low demand) and flexibility to employ workers only for the hours their services are required to meet business requirements. This term has been used by Katherine Stone and others, see for example Katherine Stone, "Flexibilization, Globalization, and Privatization: Three Challenges to Labor Rights in Our Time" (2006) 44:1 O.H.L.J. 77 and also International Labour Organization, "Flexibilizing employment: an overview" by Kim Van Eyck, SEED WORKING PAPER No. 41 (01 April 2003).

[95] Judy Fudge, "Equity Bargaining in the New Economy" (2006) 8 Just Labour 82.

[96] Gu & Gera, *supra* note 92 at 32, see Table 4, "Mean Incidence of Organizational Innovation".

periphery non-standard workers (which the ILO defines to include contracted entrepreneur-type workers).[97] The ILO has identified a 'rights gap' with respect to many non-standard workers because of lack of regulation of such relationships.[98] In Canada, this demand among employers for increased flexibility has also placed pressures on legislators to relax employment standards to allow employers greater flexibility (such as in the area of overtime rules, for example) for businesses.[99]

Another important change in the general economic milieu is that new jobs in Canada are increasingly likely to be knowledge-based[100] and less likely to be in the manufacturing and processing sector in which the 'traditional' conception of employment was the norm. Between 1998 and 2007, employment in processing, manufacturing and utilities decreased by nearly 10% and employment in primary industry decreased by approximately 15%.[101] In 1971, only 14% of Canada's workers were employed in high-knowledge occupations and by 2001, this figure had climbed to 25% of Canadian workers.[102] Presently, virtually all job creation

---

[97] See International Labour Organization, *Decent work and the informal economy*, *International Labour Conference, 90th Session, 2002,* UN Doc. ISBN 92-2-112429-0 ISSN 0074-6681, at 2, 3, 5, 35, 39, 40, 44.

[98] *Ibid.*

[99] For example, sweeping changes to employment standards to give businesses greater flexibility have been enacted in British Columbia. David Fairey explains that most of the changes were not favourable to workers but that the changes were made because the labour climate in British Columbia was perceived as hindering investment in the province. Ontario legislated changes for the same reason in 2000 and 2001, extending the maximum hours of work from 48 to sixty per week and allowing for averaging of overtime entitlements over a period of up to four weeks, see David Fairey, "New 'Flexible' Employment Standards Regulation in British Columbia" (2007) 21 J.L. & Soc. Pol'y 91 at 94.

[100] There is some debate about who constitutes a 'knowledge worker' but the term generally refers to jobs in which the main capital provided by the worker is his knowledge. See Statistics Canada, *Knowledge workers in Canada's economy, 1971-2001,* by John Baldwin & Desmond Beckstead (Ottawa: Statistics Canada, 2003), online: Statistics Canada http://publications.gc.ca/collections/Collection/Statcan/11-624-M/11-624-MIE2003004.pdf.

[101] Baldwin & Beckstead, *supra* note 100 at 5.

[102] Statistics Canada, *Study: Knowledge workers in Canada's workforce, The Daily,* (Ottawa: Statistics Canada, 2003), online: Statistics Canada http://www.statcan.gc.ca/daily-quotidien/031030/dq031030a-eng.htm. See also

in Canada is in knowledge-based occupations, which includes professional, technical and managerial occupations.[103] Knowledge-based jobs tend to require higher education and often involve non-routine, problem solving activity. Such workers often possess skills or specialized knowledge far beyond the ability of their employers to direct. Not surprisingly, the increase in knowledge-based employment has been accompanied by an increasingly educated and specialized workforce. In 1971, only 7.1% of all Canadian workers had university level degrees[104] and by 2011, 26% of all employed Canadians possessed bachelor or graduate level degrees.[105] Highly educated workers tend to be concentrated in knowledge-based occupations and at least 51% of knowledge workers have completed a university degree.[106] What can adjudicators take from this? More and more Canadian workers are highly skilled and possess specialized knowledge and therefore it is to be expected that the control exercised by employers on a day-to-day basis over such workers might be quite minimal in many cases. Despite these new realities, the degree of 'control' exercised by the employer over the worker remains a central focus of adjudicators when distinguishing employees from independent contractors.

Arguably technology is also changing the way employers 'control' their workers, with control in the traditional sense of direct supervision also becoming a less prominent feature in today's workplaces. The internet, enhanced communication tools and improved information management, in combination with knowledge-based employment, have changed how businesses operate and interface with their employees and have also made it possible for workers to

---

Baldwin & Beckstead, *supra* note 100.

[103] Statistics Canada, *Knowledge workers on the move*, *Perspectives,* by John Zhao, Doug Drew & T.Scott Murray (Ottawa: Statistics Canada, 2000), online: Statistics Canada http://www.statcan.gc.ca/studies-etudes/75-001/archive/e-pdf/5072-eng.pdf. 780,000 knowledge-based jobs were created between 1989 and 1998 while new jobs in most other occupation areas declined over that same period. See also Baldwin & Beckstead, *supra* note 100 at 5.

[104] Baldwin & Beckstead, *supra* note 100 at 5-6.

[105] Statistics Canada, *Labour force survey estimates (LFS)*, (CANSIM Table 282-0004) (Ottawa: Statistics Canada, 2012), online: Statistics Canada http://www5.statcan.gc.ca/cansim/a26.

[106] Gu & Gera, *supra* note 92 at 11.

perform many functions remotely, such as in their homes. Recent data shows that Canadian businesses are investing heavily in information and communication technology with investment growth in this area greater than in other capital services since the mid-1990s. In 2001, roughly 57% of Canadian workers used computers to carry out their main jobs, a figure which has likely increased since that time.[107] Information technology has also enabled businesses to monitor worker performance and productivity by means other than direct supervision. Human resource management systems (HRMS) or human resource information systems can also help businesses manage human capital by merging basic human resources activities such as workplace performance management, with information technology. In addition to these changes, businesses (and researchers) are increasingly exploring workplace innovations to improve job satisfaction and firm productivity and these innovations include decentralizing decision making and increasing the decision-making authority and discretion extended to employees.[108] In the end result, the close real-time supervision that was a feature of employment in a factory setting is less and less a feature of today's workplaces, with today's workers generally enjoying a greater degree of real-time autonomy and less direct supervision than previous generations of workers.

One factor adjudicators frequently consider when distinguishing between employees and independent contractors is whether the worker has any opportunity for profit or bears any risk of loss, with wage earning seen as consistent with employment and evidence of risk taking seen as suggestive of self-employment. However, this distinction appears to have less and less validity as today's workers are increasingly expected to share business risk with their employers. Incentive-based pay for employees is not a new idea and

---

[107] Statistics Canada, *Working with computers, Perspectives on Labour and Income Vol. 2 No. 5* (Ottawa: Statistics Canada, 2001), online: Statistics Canada http://www.statcan.gc.ca/pub/75-001-x/00501/5724-eng.html.

[108] Sandra E. Black & Lisa M. Lynch, "What's Driving The New Economy?: The Benefits of Workplace Innovation" (2004) 114: 493 The Economic Journal F97–F116. Black and Lynch credit workplace innovations introduced in the 1990's, such as re-engineering, teams, incentive pay and improved employee voice as a major factors in turning around productivity growth in the USA.

commission-based pay has always been a feature of certain occupations, particularly in sales of large goods. Performance-based pay is intended to give employees incentives and can be very effective in improving productivity.[109] However, performance-based pay is moving into other areas and is one of the key "high-performance work practices" (HPWP) that businesses have implemented in attempts to improve productivity.[110] In one survey, 31% of Canadian firms reported having adopted individual incentive systems for compensation, 8% had adopted group gain sharing incentives and 8% had profit sharing plans and in total, 65% had adopted some form of performance-based pay.[111] This is a considerable change from the early 1980's for example, when a New York Stock Exchange survey found that only 4% of US employers surveyed used profit-sharing.[112] By 1993, 60% of establishments surveyed in the USA had adopted profit and gain sharing plans.[113] Today's employees are increasingly expected to assume business risk as a feature of their employment and the trend toward performance-based pay and risk assumption by employees has further blurred the traditional distinction between employees and independent contractors. The common law tests (which emphasize the presence or absence of financial risk), may not adequately take into account current workplace realities.

To summarize, the basic assumptions made about the nature of employment relationships as opposed to independent contractor relationships are

---

[109] Gu & Gera, *supra* note 92 found that individual incentive systems increased productivity by about 19%, productivity/quality gain sharing and other group incentives, 29% and profit sharing, 23%.

[110] Peter Cappelli & David Neumark, "Do 'High-Performance' Work Practices Improve Establishment-Level Outcomes?" (2001) 54:2 Ind. & Labor Relations Rev. 737. According to Cappelli and Neumark, "the incidence of transformational work practices based on principles of employee involvement appears to have been essentially zero as of the late 1970s and very low as of the early 1980s. Through the mid-1980s, innovations such as job rotation, gain-sharing, and teamwork existed in only a small handful of firms, with no evidence that they were widespread within those firms. The introduction of these practices expanded considerably in the early 1990s, however", at 753.

[111] Gu & Gera, *supra* note 92.

[112] Cappelli & Neumark, *supra* note 110 at 768.

[113] *Ibid.*

increasingly inaccurate. Workers are still 'controlled', but increasingly this is accomplished by less obvious means such as results-based compensation and performance monitoring with information technology rather as direct 'real-time' supervision. The modern employment relationship is such that adjudicators can no longer rely on the presence or absence of direct supervision as a reliable indicator of the true nature of the relationship. Adjudicators must also be cognizant that incentive and performance-based pay, as well as risk-sharing with workers are increasingly common features of the modern employment relationship and thus increasingly less reliable indicators of an independent contractor relationship.

E. ADDITIONAL WEAKNESSES OF THE PRESENT APPROACH

I have shown that the present approach may not reach all vulnerable workers, particularly some independent contractors, and that the numbers of 'self-employed' workers (and hence unprotected workers) is increasing. I have also shown how the common law indicia may fail to adequately take into account changing Canadian business practices of utilizing and managing labour resources. I will now outline some additional weaknesses of the current approach, many of which might be answered or at least ameliorated by the approach I suggest in this thesis.

1. *Unpredictability and traps for the unwary*

A principal role of law is to provide society with order and predictability. Predictability allows us to order our affairs, to assess risk in order to make decisions, to invest and enter into long-term obligations. Put simply, predictability is good for business. Business law textbooks offering advice to readers about the differences between hiring employees versus independent contractors will often preface the advice offered on this topic with a disclaimer, usually to the effect that the differences between an employee relationship and an independent contractor relationship may be difficult to discern, followed by

warnings to the unwary businessperson of the serious consequences of a miscategorization.[114]

Employers and workers are not always certain where the line is drawn between employees and independent contractors. Disputes are costly and time consuming and the consequences can be considerable. Where the status of a worker is challenged and the 'independent contractor' is subsequently determined to be an employee (usually after the relationship has terminated), an employer may be liable (retroactively) for overtime pay, holiday pay, vacation owed and dismissal pay. There may be implications for tax withholdings and contributions to employment insurance and Canada Pension Plan schemes. As for the newly re-categorized employee, less sophisticated claimants might be surprised when required to pay additional taxes after business deductions (which perhaps highlights the vulnerability of some of these workers).[115]

2. *The 'list' approach is formulistic, subject to manipulation and sham contractor arrangements, and tends to obscure the real reason for the inquiry*

Returning to our standard business textbook, the reader is then offered suggestions or 'tips' on how to avoid having an independent contractor deemed an employee, for example, by taking care not to allow the worker to use the employer's tools, not giving the worker a company nametag or business cards, allowing the worker to set their own work schedule etc.[116] This highlights a

---

[114] Mitchell McInnes, Ian R. Kerr & J. Anthony VanDuzer, for example, in *Managing the Law: The Legal Aspects of Doing Business,* 3d ed. (Toronto: Pearson Education, 2011) warn readers "[g]iven the variety of factors that judges take into account, it is difficult to ensure that a particular worker will be considered an independent contractor rather than an employee". The authors then go on to offer "a number of tips for companies that want to set up independent-contractor relationships", at 645.

[115] For example, the complainant in, *Telsco Security Systems Inc. v. Wong,* 2006 CanLII 37748 (AB ESU) [*Telsco Security Systems Inc*], was surprised when her employer designated her as a contractor but did not make source deductions for tax.

problem with the common law, 'list of indicia approach'. It encourages a formulistic rather than principled approach to employee and independent contractor relationships. The list approach suggests to employers that relatively meaningless considerations like business cards and ownership of tools, are the important considerations, overlooking or underemphasizing the vulnerabilities at which employment standards law is aimed, such as whether the relationship is exploitative, or has resulted in economic vulnerability that might make its regulation by employment standards protections necessary.

The list approach also makes it easy for adjudicators to get mired in the details and miss the point that the purpose of their inquiry is to determine if the worker should have access to basic workplace rights. For example, in an Alberta decision, *Marmit Plastics Inc. v. Garry Douglas Emmott* [117] the adjudicator accepted the evidence put forth by the employer that the complainant, a travelling salesman, was required to pay for his own gas and automobile maintenance, lent support for the employer's position that the complainant was an entrepreneur and not an employee. This approach is understandable because the common law tests emphasize that entrepreneurs, unlike employees, tend to assume 'risk of loss' and supply their own equipment and tools. However, there are problems with this reasoning. Many employees incur expenses doing their jobs for which their employers do not compensate them. Also, many employees are paid solely by commission, take chances and assume risk every day, but this fact does not make them any less an employee and in fact the Alberta Employment Standards Code expressly contemplates that some employees will be paid by commissions instead of wages.[118] More importantly, merely considering a list of factors, without consideration of how each factor relates to the purposes of employment standards legislation, can lead to absurd results. Another interpretation of the salesman's situation in *Marmit Plastics* is that the employer's requirement that he pay for his own gas and supply a vehicle to fulfill his tasks as a travelling salesman, was further

[117] *Marmit Plastics Inc. v. Garry Douglas Emmott*, 2000 CanLII 20281 (AB ESU) [*Marmit Plastics*].
[118] See Alta. Reg. 14/97, section 2 (1)(b)(i).

evidence of the worker's *vulnerability* and *added* support for his case for protection by the legislation. The adjudicator overturned the finding of the employment standards officer who had found that Emmott was an employee and was owed unpaid wages of $3171. Emmott was also denied the modest sum ($432) he sought as pay in lieu for dismissal after having worked for the employer for six months.

3. *The current approach leads to inconsistent results*

The present approach of applying the common law indicia leads to decisions that are sometimes hard to reconcile with one another. In this thesis, I argue this is in part due to the fact that the tests lack a solid grounding in the purposes of employment standards legislation and because adjudicators do not consistently take into account the purposes of the legislation when applying the common law tests. For example, it is difficult to reconcile *Marmit Plastics* with the decision *R. v. Pereira.*[119] In *Pereira,* the appellant was charged under the *Employment Standards Act*[120] (the predecessor to Alberta's present *Employment Standards Code*) with employing individuals under the age of 15 without the approval of the director of employment standards. Pereira argued that the youth he engaged to sell chocolate bars door-to-door were not employees but independent contractors and therefore the *Act* did not apply. Like Emmott, the travelling salesman in *Marmit Plastics,* the youths in *Pereira* could work as little or as much as they wished and were selling the employer's product at a price suggested by the employer and in a sales region designated by the employer. They could sell at a lower price but like Emmott, they would earn less. Unlike Emmott, their sales were not subject to the approval of the employer. Their only earnings were the commissions they earned based on the number of sales they made. The youths in *Pereira* also bore the risk such for dishonoured cheques and broken bars. Emmott's risk was minimal because he only needed to make sufficient sales to cover his automobile related expenses. Pereira would provide transportation to different neighborhoods, but sellers, all of whom were under

[119] *R. v. Pereira*, (1988) A.R. 196, 59 Alta. L.R. (2d) 341 (ABQB) [*Pereira*].
[120] R.S.A. 1980, c. E-10.1.

the legal driving age, were free to decline these opportunities. The youth could also sell even when not being transported by Pereira.

Justice Andrekson, in *Pereira,* declared that the meaning and scope of the terms 'employee' and 'employed' "must not be 'disembodied'" from the *Act* and must be ascertained from both the statutory provisions and from the objects of the *Act*. He determined that Alberta's employment standards legislation was both protective and social legislation and also noted that the *Act* expressly provided that any agreement purporting to deprive a person of the protection of the *Act* was contrary to public policy, with non-compliance constituting an offence subject to penal sections. He concluded that the business belonged to Pereira and not to the sellers, and that they were employees for the purposes of employment standards legislation. Apart from their difference in age, the situation of Emmott and the youth was not all that different and the outcomes are difficult to reconcile. Where the decisions appear to stand apart however is that in *Pereira*, the court was clearly focused on the protective purposes and mandatory nature of the legislation as well as the broad non-exclusive definition of employee set out in the *Act*.

4. *Two classes of worker are created – one that is entitled to basic rights and another that is not*

Another failing of the common law approach is that it makes it possible for employers to create two classes of worker, even among workers performing similar functions within the same organization. By diligently following the 'list' approach, an employer can usually craft a position as that of an employee or an independent contractor to serve the employer's interests. But if we are considering access to basic fundamental employment rights (such as minimum wage etc.), this leads to absurd results, particularly if the worker categorized as a 'contractor' is actually more economically vulnerable and disadvantaged (and in need of protection) than the employee? The common law approach does not take this into account.

For example, It is apparent from a reading of *Marmit Plastics* that the company already had an existing sales force before it hired Emmott, Emmott had been a salesman for Marmit's competitor and when the competitor become defunct, Marmit approached Emmott about working for them as an independent contractor. Unfortunately, the adjudicator does not mention the nature of the relationship of those workers with Marmit. Clearly this would have been an important avenue to explore. If the features of Emmott's position were identical to those of the other members of Marmit's salesforce, with the exception that Marmit had designated the other workers as employees, then the implication would be that an employer has unfettered discretion to decide as to which workers it must meet the statutory minimum employment standards and to which workers it does not. This does not appear to be a reasonable basis for distributing fundamental workplace rights. We would be accepting Marmit's classification of its relationship with its worker – and in the process, permitting the employer to decree, despite identical job descriptions, who in its organization is entitled to such rights as parental leave and notice upon termination and who is not.

This possibility arises because the common law tests are not sensitive to the vulnerabilities of workers and the needs of particular workers for protection by minimum employment standards. A focused examination by adjudicators of the vulnerability and need of protection of the particular contract workers would not entirely avoid this problem but it would at least ensure that workers in need of protection were not denied basic protections based on designations imposed by the employer and would serve as a principled basis for the imposition of minimum employment standards in a workplace relationship.

F. INTERNATIONAL OBLIGATIONS

Lack of access to employment protections for independent contractors also has implications in terms of Canada's international obligations and there is increasing acceptance that international obligations should inform the

interpretation of domestic law.[121] The International Labour Organization (ILO), in its report, *Decent work and the informal economy*[122] maintains that fundamental principles and rights at work apply to *all workers;* there should not be a lower level of application of core labour standards for informal workers, which includes 'own-account' workers.[123] In *Decent work,* the ILO clarified that "it is untrue that ILO standards are only for those in the formal economy where there is a clear employer-employee relationship".[124] The report maintains that contracted workers whose employers will not hire under more secure arrangements as

---

[121] See the Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27 *(Health Services v. BC*) where the Court accepted that Canada's international obligations should inform interpretation of the contents of the *Canadian Charter of Rights and Freedoms*, 2(*d*) (freedom of association) and that the *Charter* should be presumed to provide at least the same level of protection as the international human rights documents which Canada has ratified, at paras. 69-79.

[122] International Labour Organization, *Decent work and the informal economy*, ILO, 90th Sess., UN Doc. ISBN 92-2-112429-0 ISSN 0074-6681, 2002 [*Decent work*], online: International Labour Organization http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/rep-vi.pdf.

[123] *Ibid.* at 40:

> Since the fundamental principles and rights at work and the fundamental Conventions apply to all workers, there should not be a two-tiered system or separate regulatory framework for formal and informal workers…although there may be a need for different modalities and mechanisms for guaranteeing them in the less regulated, less formal parts of the economy. It might be possible to have separate systems of business registration, taxation or subscription to formal social security schemes for informal enterprises so as to adjust to their actual compliance capacity. But *there should not be a lower level of application of core labour standards for informal workers.*

See also *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, 86th Sess., Geneva, 18 June 1998 (Annex revised 15 June 2010) that sets out the four fundamental principles and rights at work adopted by that organization. A Declaration commits member states (such as Canada) to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions. There are four categories: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

[124] *Decent work, ibid.* at 45.

workers should not be subject to a lower level of application of core labour standards than those of formal workers.[125] In the related Resolution adopting the recommendations set out in *Decent work*,[126] the General Conference of the International Labour Organization, meeting in its 90th Session, 2002, resolved that governments must ensure that labour legislation affords appropriate protection for all workers and that governments need to review how employment relationships have been evolving and to identify and adequately protect all workers.[127] It was recognized that some people in the informal economy earn incomes that are higher than those of workers in the formal economy,[128] however:

> …most own-account workers are as insecure and vulnerable as wage workers and move from one situation to the other. Because they lack protection, rights and representation, these workers often remain trapped in poverty.[129]

The Resolutions also targeted the need for informal workers to have access to cost-effective dispute resolution and contract enforcement mechanisms.[130]

PART II - WHAT DOES THE LEGISLATION SAY ABOUT WHO IS ENTITLED TO EMPLOYMENT STANDARDS PROTECTION?

In all Canadian jurisdictions, the common law tests of employment usually form the focal point of analysis for adjudicators when deciding if a particular worker is an employee and hence entitled to jurisdiction's minimum employment

---

[125] *Ibid.*
[126] ILO: Report of the Committee on the Informal Economy, Resolution and conclusions concerning decent work and the informal economy, adopted on 19 June 2002, ILC, 90th Session, Geneva, 2002, online: ILO http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25.pdf.
[127] *Ibid*. Conclusion #22.
[128] *Ibid.* Conclusion #10.
[129] *Ibid.* Conclusion #4.
[130] *Ibid.* Conclusion #30.

standards. The reliance on the common law tests would be more understandable if employment standards legislation did not provide definitions for "employee" and related key terms such as "employer", "wage", "work", but with the exception of the federal jurisdiction, the legislation in every province includes its own definition of "employee" and "employer" and sometimes other related terms such as "work" and "wages". Having said this, the legislation of many jurisdictions also has certain tautological characteristics[131] that have clearly frustrated adjudicators and have likely contributed to the reliance on common law for guidance. In this part of my thesis, I argue that the degree of emphasis placed on the common law distinction between employees and independent contractors and the related common law tests are inconsistent with established principles of statutory interpretation.[132]

As there is some variation among the jurisdictions regarding the degree of reliance by adjudicators on the common law tests when deciding independent contractor-type cases, I have selected several jurisdictions: Alberta, British Columbia, Ontario, Manitoba, New Brunswick, Newfoundland and Saskatchewan for discussion as they provide a representative picture of the various legislative approaches used in Canada.

Before examining this legislation in greater detail, it is useful to review the applicable principles regarding the role and effect of legislated definitions and the principles governing the relationship of common law and statutory law. What is the legal effect of a statutory definition, such as the definitions provided for key terms such as 'employee' and 'employer' in the employment standards legislation of most jurisdictions? In her text on statutory interpretation, Ruth

---

[131] As can be seen in Tables 1.0 -1.9 (*Summary of Key Provisions Setting Out Scope of Federal and Provincial Employment Standards*) at page 90 of this thesis, there is a tendency to refer to "employees" as including individuals who do work for payment from "employers" and to then refer to employers as including those who have to pay employees, and so forth. See Saskatchewan's *Labour Standards Act*, R.S.S. 1978, c. L-1, s. 2 (d)(e) for example.

[132] Some jurisdictions are, in my view, doing a better job than others in arriving at the appropriate weight given to be given to the common law, as will be discussed in more detail in this part of my thesis.

Sullivan, one of Canada's leading experts in statutory interpretation and legislative drafting, observes that sometimes words have technical meanings because of their conventional use by lawyers and judges.[133] However, she goes on to state:

> When a word is defined by statute, the binding character of the stipulated meaning depends not on shared linguistic convention among lawyers and judges, but on legislative sovereignty. The legislature dictates that for the purpose of interpreting certain legislation the defined term is to be given the stipulated meaning. This meaning may closely resemble the conventional meaning of the defined term or it may effect a significant departure (although too much of a departure would violate current drafting standards). In either case, interpreters are bound to apply the meaning stipulated by the law-maker, which may or may not incorporate conventional meaning.[134]

Sullivan explains that definitions may be exhaustive or non-exhaustive, with exhaustive definitions normally preceded by the verb "means" and therefore displacing other meanings in ordinary or technical usage.[135] Non-exhaustive definitions, in contrast, presuppose rather than displace other meanings and may for example, expand or narrow the ordinary meaning or illustrate with examples or clarify borderline situations.[136] Such definitions are usually preceded by the verb 'includes' or 'excludes'.[137]

Employment standards legislation in Canada reflects a variety of approaches to defining key terms such as 'employee', as can be seen in Tables 1.0 - 1.0(*Summary of Key Provisions Setting Out Scope of Federal and Provincial*

---

[133] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ontario: LexisNexis Canada Inc., 2008).
[134] *Ibid.* at 61-62.
[135] *Ibid.*
[136] *Sullivan, supra* note 133 at 62-63.
[137] *Ibid.*

Employment Standards) at page 8 of this thesis. The federal legislation provides no definition of employee and only a tautological definition of employer to "mean" any person who employs employees.[138] Other jurisdictions have provided more helpful definitions. As was discussed previously, Alberta's legislation[139] incorporates a broad definition of employee, providing that an employee for the purposes of the Code "means an individual employed to do work who receives or is entitled to wages and includes a former employee" and also provides wide definitions for the related terms "wages" and "work", with work even including "providing a service".[140] As was commented on previously in this thesis, although the wording is seemingly imperative and broad, the umpire in *Sunstar Uniforms*[141] (a case which has subsequently formed the foundation for many subsequent Alberta umpire decisions[142]), imposed the common law distinction between employees and independent contractors into the statutory definition, reasoning that 'the legislature of Alberta must be taken to have been aware of the distinction at common law between employees and independent contractors'.[143] The importation of the common law would appear to

---

[138] *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 166.
[139] AESC*, supra* note 13, s. 1 (1)(k).
[140] *Ibid.* s. 1 (x) (aa).
[141] *Supra* note 27.
[142] The adjudicator's statements in *Sunstar Uniforms* are referred to approvingly in *Marmit Plastics Inc. v. Emmott,* 2000 CanLII 20281 (AB ESU), *supra* note 117, *994841 Alberta Ltd. v. Troy*, 2005 CanLII 51534 (AB ESU), and*1096043 Alberta Ltd. and E. Davis Developments Ltd. operating as Station 33rd Condominiums and Sandra Miriam Saturley*, 2006 CanLII 46767 (AB ESU) [*Saturley*].
[143] *Sunstar Uniforms, supra* note 27. The adjudicator also rejected the broader formulation of an employment relationship used by MacDonald J. in *Cormier v. Human Rights Commission* (1984), 33 Alta. L.R. (2d) 359. 6 C.C.E.L. 17 (ABQB) [*Cormier*] on the basis that a narrower interpretation was to be preferred because of the different purposes and objectives of the *Individual Rights Protection Act Individual's Rights Protection Act*, R.S.A. 1980, c. I-2. [IRPA], the predecessor to the *Alberta Human Rights Act,* R.S.A. 2000, c. A-25.5. In *Cormier,* McDonald J. had reviewed the common law indicia of employment and also how 'employee' had been defined for the purposes of other remedial legislation. He acknowledged the definitions contained in the IRPA were ambiguous but held it would be inappropriate to impose the common law definition of employee used to determine vicarious liability unless the IRPA performed the same social function and had the same policy objectives. McDonald J. observed that the common law meaning of employee was

directly contradict *Yellow Cab Ltd. v. Alberta (Labour Relations Board)*[144] where the Supreme Court of Canada the overturned the Alberta Labour Relationship Board's decision that Yellow Cab Ltd. was an employer within the meaning of the *Alberta Labour Act*.[145] According to the Court, the Board was in error because the definition in the legislation was exhaustive and therefore precluded the Board from adopting common law principles when defining "employer". In discussing the definition of 'employer', Ritchie J. in *Yellow Cab Ltd.* said:

> It is significant that the Act employs the word "means" in this definition and not the word "includes" and it follows, in my view, that the definition is to be construed as being exhaustive and that, insofar as the board adopted common law principles defining "employer" which were at variance with the language of the section, there was an error in law.[146]

In British Columbia, the situation is somewhat different as employment standards legislation provides a non-exhaustive definition for 'employee' and the definition uses the verb "includes" instead of "excludes" or "means" and thus appears intended to expand the common law meaning of 'employee' rather than replace or limit it.[147] The B.C. definition for example, clarifies that the term 'employee' 'includes…a person an employer allows, directly or indirectly, to perform work normally performed by an employee'.[148] The British Columbia Employment Standards Tribunal has been reluctant to substitute or

---

established for vicarious liability purposes and might even be of no assistance when deciding who might be employees for the purposes of IRPA**,** *Cormier* at para. 47.

[144] [1980] S.C.J. No. 100, [1980] 2 S.C.R. 761 at para. 12.

[145] S.A. 1973, c.33.

[146] *Ibid.*

[147] Section 1 (1) of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [BCESA] states that "'employee' includes (a) a person, including a deceased person, receiving or entitled to wages for work performed for another, (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee, (c) a person being trained by an employer for the employer's business, (d) a person on leave from an employer, and (e) a person who has a right of recall".

[148] *Ibid.*

superimpose the common law distinction upon this definition. This is not to say that the common law is entirely ignored when evaluating the status of a worker, but the definition in the legislation is treated as paramount over the common law and the common law principles are treated as offering assistance, but subordinate to the statutory definition.[149]

A recent example of this was the recent decision in *Re North Delta Real Hot Yoga Ltd. (c.o.b. Bikram Yoga Delta).*[150] The appellant employer argued that the complainant yoga instructor did not meet the common law tests and was chastised for failing to recognize or refusing to acknowledge that "the 'law' relating to an individual's status under the *Act* is not determined by common law principles, but by an application of the provisions of the *Act".*[151] This approach also likely explains why there are many employer appeals (most of which are unsuccessful) as compared the number of appeals brought to umpires in Alberta.[152]

In some cases however, despite acknowledging that the definition in the legislation is paramount, (rather than the common law), the common law distinction often then goes on to form the main basis for the decision. For example, in *Re Kelsey Trigg*,[153] the tribunal found that the employer was not an employer within the meaning of the BCESA even though the worker (who worked for the employer as a vice-president and project manager) appeared to

---

[149] In some cases however, despite acknowledging that the definition in the legislation must be applied (rather than the common law), the common law distinction then goes on to form the main basis for the decision. See for example *Re Jane Welch (operating as Windy Willows Farms)* BC EST # D161/05, where the tribunal reasoned that despite the legislation's expansive definitions, that because the legislation *did not specifically abolish* the concept of independent contractor it was still necessary to apply the common law tests to decide if the worker in question might be an independent contractor and thus not an employee.

[150] BC EST No. D026/12, [2012] B.C.E.S.T.D. No. 26. [*North Delta Real Hot Yoga Ltd.*]. See also *Christopher Sin* BC EST #D015/96.
[151] *Ibid* at para 56.
[152] See footnote 80. The B.C. tribunal hears approximately 10 times more appeals each year than are heard in Alberta.
[153] BC EST # D040/03.

meet the statutory definition of employee that was worded as "including" a person entitled to be paid by an employer and individuals performing work normally done by an employee. In that case, part of the claimant's compensation was to be based on bonuses if the employer was financially successful. The tribunal considered the common law factors and in particular, the degree of financial risks assumed by the worker appeared to convince the tribunal that the claimant was an independent contractor.[154]

The Ontario *Employment Standards Act*, like the B.C. legislation, also uses a non-exhaustive definition for 'employee'. As in B.C., 'employee' is defined as 'including' and thus expanding or clarifying the term rather than narrowing the term.[155] However, some Ontario adjudicators have gone further than B.C adjudicators, finding that the purpose of employment standards legislation and not the common law tests, must inform the determination of whether an employment relationship is in existence for the purposes of the legislation. In the oft-quoted 1977 decision, *Majestic Maintenance Services Limited,*[156] Referee Burkett considered that the common law tests were not appropriate for interpreting the scope of the legislation, as it was apparent that the legislation was designed to expand upon and enhance the protections of the common law. According to Referee Burkett, "the Act implicitly recognizes the inherent inequalities which may exist in a modern industrial society and redresses the inequality between the individual and his employer to the extent that the employer is required by statute to comply with the minimum standards".[157] Referee Burkett instead proposed what has come to be known as the 'statutory

---

[154] The tribunal also considered other common law factors such as ownership of the tools and control but did not appear to be persuaded by the fact that she used the employer's office and computer and was relatively unsupervised and could not delegate her work.

[155] Section 1 (1) of the Ontario legislation states "'employee' includes,(a) a person, including an officer of a corporation, who performs work for an employer for wages, (b) a person who supplies services to an employer for wages, (c) a person who receives training from a person who is an employer, as set out in subsection (2), or (d) a person who is a homeworker, and includes a person who was an employee", see *Employment Standards Act*, S.O. 2000, c. 41.

[156] *Majestic Maintenance Services Limited,* E.S.C. 479A, February 8, 1977.

[157] *Ibid.*

purpose test', in which the existence of an employment relationship is assessed by reference to the purpose of the statute, which according to Referee Burkett, was intended to provide certain benefits to persons who by reason of their economic dependence or lack of bargaining power might otherwise have to work on terms falling below the basic minimums established in the legislation. However, the common law has not been completely displaced, as seen in *Belgoma Transportation Limited o/a Checker Cab*,[158] a later decision that is also frequently relied upon by Ontario adjudicators. In that decision, Referee Gray expressed the view that the common law can and, perhaps, should be considered in determining whether an individual is an employee under the legislation. However, he considered the weight to be given to particular factors must be determined by the purpose of the legislation.[159] A review of more recent Ontario adjudicator decisions suggests the approach presently being taken is not significantly different than in other jurisdictions: the protective purposes of the legislation are acknowledged but the decision and analysis that follows is usually based on an application of the common law tests.[160]

Some jurisdictions have taken the step of expressly excluding independent contractors from coverage under their employment standards legislation but have then provided little guidance for how independent contractors are to be distinguished from employees. In Manitoba, the *Employment Standards Code*[161] directly addresses the issue of independent contractors, stating in section 2 (3) that "[f]or greater certainty, this Code does not apply to an independent contractor". While the Manitoba legislation does not define the

---

[158] *Belgoma Transportation Limited o/a Checker Cab*, April 8, 1991 (E.S.C. 2838) at 21.

[159] The statutory purpose test in *Majestic Maintenance Services Limited* continues to inform many Ontario employment standards determinations as does *Belgoma Transportation Limited o/a Checker Cab*. See also *Re Eiler* [1994] O.E.S.A.D. No. 165, Decision No. ESC 95-73 and *Global Courier & Messenger Services Ltd. v. Sandeep Brar*, [2006] O.E.S.A.D. No. 326. *Seventy-Five Hundred Taxi Inc*. [2011] O.E.S.A.D.No. 925 and *Brouillette v. H & R Transport Ltd*., [2010] C.L.A.D. No. 315 are more recent examples of this approach.

[160] See for example *6701141 Canada Ltd. (c.o.b. Pizza Hut)* [2012] O.E.S.A.D. No. 1016.

[161] *The Employment Standards Code*, C.C.S.M. c. E110 [MESC].

term, 'independent contractor', it does define 'employee' quite broadly, (although not very clearly), to *mean* "an individual who is employed by an employer to do work, and includes a former employee but does not include a director of a corporation in relation to that corporation".[162] The Manitoba legislation then defines 'work' in a broad but somewhat circular fashion to *mean* "skilled or unskilled manual, clerical, domestic, professional or technical labour performed or services provided by an employee."[163] Similarly, New Brunswick's *Employment Standards Act,*[164] makes it clear that the term 'employee' does not include independent contractors, stating that employee "means a person who performs work for or supplies services to an employer for wages, but does not include an independent contractor".[165] Given that the Manitoba and New Brunswick legislation do not define 'independent contractor', perhaps this provides adjudicators in these jurisdictions a window through which to import common law principles. Manitoba and New Brunswick both provide exhaustive and thus arguably binding definitions of who constitutes an employee and these definitions are quite broad, leaving open the argument that if a worker fits within that definition, the worker is an employee and therefore cannot be an independent contractor (which the legislators chose to leave undefined).[166]

The recent Ontario Court of Appeal decision in *McKee*[167] also leaves open a further and somewhat tantalizing possibility. In that case, the court suggested that there is an 'intermediate' category of worker – the 'dependent contractor'. According to the Court, this relationship might arise where the worker is dependent on the employer because of financial dependence or exclusivity imposed by the employer. The Manitoba and New Brunswick legislation do

---

[162] *Ibid.* s. 1 (1).
[163] *Ibid.*
[164] *Employment Standards Act,* S.N.B. 1982, c. E-7.2 [NBESA].
[165] *Ibid.* at s.1.
[166] I am arguing here that by using the language "employee *means*…", the legislation has provided a definition which is to be construed as being exhaustive.
[167] *Supra* note 46.

not define 'independent contractor' but it would seem an argument may now be made that this term might exclude a 'dependent contractor' relationship.

The Newfoundland and Labrador, *Labour Standards Act*[168] definition for employee uses the common law language of 'contract of service',[169] a term which it then defines to *mean* a contract in which the employer "reserves the right of control and direction of the manner and method by which the employee carries out the duties to be performed under the contract".[170] Saskatchewan prefaces its definitions with the exhaustive "employer means…" and bases employer status on two possibilities – that the worker is either directed and controlled by the employer or the person is paid by the employer for work.[171] Quebec provides that employee *means* a person who "works for an employer and who is entitled to a wage" (wage is defined broadly) but then states that employee *includes* a worker who is under a contract and "undertakes to do specific work" for a person "in accordance with the methods and means of that person". An employee also *includes* a person who, in a contract, "undertakes to furnish, for the carrying out of the contract, the material, equipment, raw materials or merchandise chosen by that person" and who is to "use them in the manner indicated" by that person.[172]

---

[168] *Labour Standards Act,* R.S.N.L.1990, c. L-2.

[169] 2 (d) "employee" means a natural person who works under a contract of service for an employer;

[170] See Tables 1.0 -1.9 (*Summary of Key Provisions Setting Out Scope of Federal and Provincial Employment Standards*) at page 90 of this thesis.

[171] *Labour Standards Act*, R.S.S. 1978, c. L-1. See section 2(d) which defines 'employee' to mean "a person of any age who is in receipt of or entitled to any remuneration for labour or services performed for an employer." Section 2 (e) defines 'employer' to mean "any person that employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who either:
(i) has control or direction of one or more employees; or
(ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees."

[172] *An Act respecting labour standards*, R.S.Q. c. N-1.1, s. 1 (1). This is not a complete description of the definition, see Tabled 1.0 -1.9 (*Summary of Key Provisions Setting Out Scope of Federal and Provincial Employment Standards*) at page 90 of this thesis.

To summarize, adjudicators in all the provinces have sound justification for *not* strictly imposing the common law distinction between employees and contractors into employment standards legislation. In some provinces, such as Alberta, there is a basis to argue that the common law has been completely supplanted by the exhaustive definition contained in the legislation. Other provinces, notably Ontario and British Columbia, have a basis on which to treat any common law notions as subordinate to the definitions provided by their legislatures. Even in provinces that have expressly excluded independent contractors from coverage under the legislation (Manitoba and New Brunswick), the legislation leaves 'independent contractor' undefined but defines 'employee' in such a broad and seemingly mandatory fashion (ie. "employee means…"), that a worker who meets the definition of employee is arguably entitled to the protection of the act and thus is not an independent contractor. Furthermore, the *McKee*[173] decision leaves open an argument the legislation only expressly excludes 'independent contractors' but not 'dependent contractors'. In the provinces which refer to notions of control or base employer status on obligation to pay for work then these definitions must be applied. However, the provinces that refer to the idea of control do not incorporate other common law means of distinguishing between employees and contractors, such as ownership of tools, chance of profit and risk of loss. Adjudicators should be attentive to whether the legislated definitions are intended to be exhaustive (as indicated by use of the verb *means*) and where this is the case, then arguably this precludes imposition by adjudicators of additional distinctions, such as the common law distinctions. Even in provinces that have adopted the non-exclusive language "employee includes….", then according to established principles of statutory interpretation, while the statutory definition may not supplant the common law definitions, the statute does at least *expand* existing common law definitions.[174]

[173] *McKee, supra* note 46.
[174] *Sullivan, supra* note 133 at 61-63.

PART III THE ROLE OF STATUTORY PURPOSE IN APPLYING EMPLOYMENT STANDARDS LEGISLATION

In Part II of this thesis, I argued that the reliance and in some cases, importation and wholesale adoption of the common law distinction between employees and independent contractors by adjudicators in some jurisdictions may be problematic in light of established principles of statutory interpretation. I also suggest that in jurisdictions where the common law distinction has not been displaced by the legislation, that the legislation can at least be interpreted as intending to expand on existing common law definitions. In Part III, I contend that the common law tests and 'non-exhaustive' list of factors that form the basis for the common law distinction, are themselves poor tools for interpreting employment standards legislation. Rather, the focus of adjudicators would be more appropriately directed at ensuring that the social policies and objectives of the legislation are taken into account in every case. A purpose-focused approach would offer possibilities for minimizing the shortcomings and limitations that are associated with the current approach and which were considered in Part I of this thesis. In the following discussion, I will begin with some general suggestions to adjudicators regarding their approach to interpreting and applying employment standards legislation. This discussion will be followed by consideration of the possible purpose or purposes of employment standards legislation in Canada.

A. INTERPRETING AND APPLYING EMPLOYMENT STANDARDS LEGISLATION

In the following discussion, four arguments are advanced. The first is that it is appropriate for adjudicators to emphasize the object or purpose of employment standards when rendering their decisions. The second is that it is appropriate for adjudicators to take into account that many workers will not challenge their employer's designation of their status as independent contractors and therefore it is critical that decisions send the appropriate message to employers. The third argument is that employment standards legislation should be interpreted in the

context of workplace as it exists today and not as conditions might have existed in the past. Finally, it is argued that adjudicators have been unnecessarily timid about their role and responsibilities.

1. The importance of legislative purpose in interpreting employment standards legislation

In *Re Rizzo & Rizzo Shoes Ltd* (*Rizzo Shoes*),[175] the Supreme Court of Canada formally adopted the 'modern principle' of statutory interpretation as its preferred approach. The modern principle, initially formulated by Elmer Driedger, is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[176] The modern principle directs courts to apply legislation in a manner that not only interprets words in their ordinary sense and contextually, but also in a manner that considers the object or purpose of the legislation and aim of the legislators in enacting the legislation.

One of the underpinnings of Driedger's modern principle is the mischief rule.[177] The mischief rule (which is sometimes referred to as the purposive approach[178]) is based on the premise that legislation must be interpreted in a manner that will achieve its objectives. The mischief rule or purposive approach is emphasized in the Interpretation Acts of every Canadian jurisdiction. For example, section 10 of Alberta's *Interpretation Act*[179] directs that "[a]n enactment shall be construed as being remedial" and "shall be given the fair, large and liberal

---

[175] *Re Rizzo & Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 [*Rizzo Shoes*]. In *Rizzo Shoes*, the issue was whether the bankruptcy of the employer had amounted dismissal for the purposes of section 40 of Ontario's *Employment Standards Act*, R.S.O. 1980, c. 137, thereby triggering an obligation (through the bankruptcy receiver) to pay termination pay.
[176] *Ibid*, at para. 21, quoting Elmer Driedger in *The Construction of Statutes,* 2d ed. (Toronto: Butterworths, 1983) at 87.
[177] Ruth Sullivan, *supra* note 133.
[178] See for example Geoff Hall *supra* note 180 at 43.
[179] R.S.A. 2000, c. I-8.

construction and interpretation that best ensures the attainment of its objects." As Geoff Hall comments, "[a] strong case" can be made that an interpretation which is driven by the object or purpose of the statute as derived by adoption of a broad construction of the text, has "greater democratic legitimacy than does any other approach to statutory interpretation for the simple reason that it has been expressly chosen as the favoured mode of interpretation by many Canadian legislatures".[180]

The mischief or purposive approach is reflected in the Supreme Court of Canada's decision in the employment standards case, *Machtinger.*[181] In *Machtinger,* the Court not only applied this approach, but also discussed the unique purpose of employment standards legislation. In that case, a car dealer entered into contracts with two employees that provided the employer could terminate employment without cause on two weeks' notice; which was lower than the minimum notice period set out in the Ontario *Employment Standards Act*.[182] Section 3 of the Ontario *Employment Standards Act* prohibited any contracting out of the legislation and provided that any contracting out or waiver was null and void. While there was no issue that the provisions in the contracts were void, the Court had to determine whether the effect of section 3 was that the offending terms should be substituted by the statutory minimum notice or pay in lieu of notice provision or whether the workers were entitled to the more generous common law notice. Iacobucci J. reasoned that because the illegal term was void, it could not serve as evidence of the parties' intention. He then went on to consider the purpose of the legislation. According to the majority in *Machtinger*, the harm which employment standards seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers. Iacobucci J. observed that employment contracts rarely result from an exercise of free bargaining power in the way that other contracts might and that on the whole, individuals lack both the bargaining power and the information to achieve more

[180] Geoff R. Hall, "Statutory Interpretation in the Supreme Court of Canada: The Triumph of a Common Law Methodology" (1998) 21 Advocates' Q. 38 at 44.
[181] *Machtinger, supra* note 1.
[182] *Employment Standards Act*, R.S.O. 1980, c. 137.

favourable contract provisions than those offered by the employer.[183] According to *Machtinger*, the purpose of employment standards legislation is to protect employees by requiring employers to comply with certain reasonable, fair and uniform minimum standards.[184] Iacobucci J. also commented on the specific purpose of the notice provisions contained in the legislation, finding that one of the purposes of the legislation was to ensure that employees who are discharged are discharged fairly and that the legislation accomplished this by setting out what the provincial legislature deemed to be fair minimum notice periods.[185]

2. Decision-making should encourage employers to comply with statutory minimum standards

In *Heydon's Case,* (which is associated with mischief rule that in part underlies the modern principle),[186] it was suggested that the purpose of statutory law is to correct a deficiency or defect in the common law. By extension, according to Lord Coke, the role of judges is to interpret legislation in a manner that will suppress the mischief to which the legislation is directed:

> …The true reason of the remedy; and the office of all Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief, and *pro commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*[187]

---

[183] *Machtinger, supra* note 1 at para. 31.
[184] *Ibid.*
[185] *Ibid.* at para. 36.
[186] *Heydon's Case* (1584), 3 Co. Rep. 7a, 76 E.R. 637 [*Heydon's Case*].
[187] *Ibid*. *Heydon's Case,* as quoted by Ruth Sullivan, *supra* note 134, at 256. In a modern statement to this effect, in *Covert v. Nova Scotia (Minister of Finance)*, [1980] S.C.J. No. 101, [1980] 2 S.C.R. 774 at 807 (S.C.C.), in a case involving a complex scheme which included the creation of several corporations to avoid Nova Scotia's succession duties legislation, Dickson J. (as he then was) rejected the notion that the court "must uncritically and supinely accept the form of the transaction, blind as to what is actually happening". Instead, "[t]he correct

The suggestions of Lord Coke as to the role of decision-makers take on particular importance in the context of employment standards. The mischief rule of statutory interpretation requires adjudicators to be vigilant to the 'subtle inventions and evasions' developing in the marketplace to circumvent or avoid minimum employment standards and also requires adjudicators to consider the effect their decisions will have on the continuance of the mischief.

In *Machtinger,* the Supreme Court of Canada drew attention to this important aspect of decision-making in the context of employment standards legislation. The court emphasized that employment standards legislation must be interpreted in a manner that encourages employers to comply with their obligations.[188] The Court found that merely ordering the recalcitrant employer to comply with the statutory minimum notice period was not the correct approach. Instead, the Court decided that the employees were entitled to the more generous common law notice. In reaching this conclusion, the Court specifically emphasized the importance of sending the appropriate message to employers, noting at para. 33:

> If the only sanction which employers potentially face for failure to comply with the minimum notice periods prescribed by the Act is an order that they minimally comply with the Act, employers will have little incentive to make contracts with their employees that comply with the Act.

The Court explained its logic in taking this approach, noting that employers are often able to rely on the fact that many workers will not challenge the employer's

---

approach, applicable to statutory construction generally, is to construe the legislation with reasonable regard to its object and purpose and to give it such interpretation as best ensures the attainment of such object and purpose".

[188] According to *Machtinger*, "an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not", *supra* note 1 at para. 32.

noncompliance with the legislation.[189] The Court also observed that many individual employees may be unaware of their statutory and common law rights[190] With these factors in mind, the Court considered that its decision would have a deterrent effect and considered this appropriate in light of the objectives of employment standards legislation:

> Employers will have an incentive to comply with the Act to avoid the potentially longer notice periods required by the common law, and in consequence more employees are likely to receive the benefit of the minimum notice requirements.[191]

The point Iacobucci J. makes is that adjudicators who wish to distinguish employees from independent contractors must take into account not only those complainants in the cases before them, but must also attempt to protect the vulnerable workers who do not complain about their status as contractors or who are unaware of their statutory and common law rights.

Iaocobucci J.'s approach makes particular sense with protective legislation that relies primarily on a complaint driven process for its enforcement.[192] For both budgetary and practical reasons, governments do not have the resources to supervise employers or examine every independent contractor relationship. However, the legislation does give adjudicators tools to reach those who are suffering in silence. The Alberta legislation for example, provides adjudicators

---

[189] *Machtinger, supra* note 1 at para. 33.
[190] *Ibid.* at para 32.

[192] The actual number of employers not meeting the minimum standards can only be guessed at but in 2005, for example, the Ontario ministry administering the OESA found employer violations in over 11,000 claims. When one considers employment standards are enforced through a complaint driven process and that many workers do not complain when their rights are being violated, out of fear of retributions, the number of actual violations is probably considerably higher. For example, in 2004, Ontario's Auditor General found that 90% of complaints were filed by individuals no longer working for the employer against whom they filed claims. See Kent Elson, "Taking Workers' Rights Seriously: Private Prosecutions of Employment Standards Violations", (2008) 26 Windsor Y.B. Access Just. 329 at 332.

with a powerful deterrence tool: on top of ordering payment of whatever monies should have been paid to the worker, corporations can be fined up to $100,000, and individuals up to $50,000 for an offence under the AESC.[193] It is considered an offence in the Alberta legislation for an employer to fail to provide any entitlement under the AESC or to require an employee to work hours that exceed those permitted under the legislation.

Despite these powers, it appears such penalties are rarely imposed when an employer is found to have mischaracterized the relationship and thereby avoided its responsibilities.[194] In the Alberta cases reviewed, the usual approach was to simply order that the missing entitlements be paid retroactively to the complainant. In effect, (at least in Alberta), there is no real downside risk for employers who wish to experiment with skirting their employer obligations. Even in *671693 Alberta Ltd. (A.K. Gill Transport)*[195] where it was found that the employer had fraudulently altered records in addition to having mischaracterized the relationship as a contractor relationship, no penalty was imposed. Penalties have powerful deterrent utility that is not being utilized in Alberta.[196] In British Columbia, recent cases indicate that modest administrative penalties ($500-$1000) are occasionally being imposed on employers who mischaracterize employees as independent contractors[197] but this is not a consistent approach.[198] Recent Ontario decisions suggest that penalties are not being

---

[193] AESC, ss. 128, 129, 132.
[194] See for example *Stixx Construction Ltd. (CRIBB-ITT Foundations) v. Geue*, 2007 CanLII 40468 (AB ESU), *Telsco Security Systems Inc. v. Wong*, 2006 CanLII 37748 (AB ESU*), MacKinnon v. McDougall*, 2002 CanLII 45616 (AB ESU) . The only consequence to the employer in these cases was that the employer had to retroactively pay the vacation, overtime or other statutory entitlement to the complainant.
[195] *671693 Alberta Ltd. (A.K. Gill Transport),* 2007 CanLII 54258 (AB ESU).
[196] Other than the occasional 'officer fee', no penalties were imposed in any of the Alberta adjudicator (umpire) decisions reviewed for this thesis.
[197] See for example the recent decision in *Re North Delta Real Hot Yoga Ltd.* (c.o.b. Bikram Yoga Delta), [2012] B.C.E.S.T.D. No. 26, a $1,500 administrative penalty was upheld, *State of the Art Bookkeeping/Accounting Ltd.* 2009 BC EST # RD090/09 (a $1000 penalty was upheld) and *Mickey Transport Ltd.* 2010 BC EST # D012/10 (a $1000 penalty was upheld).
[198] See *Knight Piesold Ltd*. 1999 BCEST #D093/99, *Bay Technology Corporation* 2001 BC EST # D143/01.

imposed on employers who have mischaracterized employee relationships despite that the legislation provides for fines of up to $50,000 for contravention of the legislation.[199] The failure to penalize employers who skirt the legislation sends the wrong message and does little to encourage employers to correctly characterize their relationships with employees.

3. Employment standards legislation must be interpreted in a manner that takes into account evolving employment practices

The Supreme Court of Canada in *Machtinger* addressed the central importance of 'work' in society.[200] Quoting from the Court's earlier decision in *Reference re Public Service Employee Relations Act (Alberta),*[201] Iacobucci J. in the majority judgment, stated:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.[202]

Earlier in this thesis, the evolving nature of employment in Canada was discussed, in particular, the increasing numbers of workers who work in positions that do not fit within the traditional notion of employment as a closely controlled activity that is carried out for one employer, on a full-time basis and at the employer's place of business. The fact that employment realities for

---

[199] *Employment Standards Act*, S.O. 2000, c. 41 at section 132. See P&L Corporation_Ltd., [2012]*O.E.S.A.D. No.DOC* and *Heritage Construction Group Ltd.* [2011] O.E.S.A.D. No. 782. The Ontario decisions refer to minor administrative fees being included in orders of payment but no penalties or fines were awarded in the recent cases that were reviewed.
[200] *Machtinger, supra* note 1.
[201] [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, 51 Alta. L.R. (2d) 97, [1987] 3 W.W.R. 577, 78 A.R. 1.
[202] *Machtinger, supra* note 1 at para. 30.

Canadians are changing is itself an important consideration for adjudicators when interpreting employment standards. Driedger's modern principle states that the words in legislation are to be interpreted in their entire context.[203] As Ruth Sullivan explains, the entire context of a statute includes its external context. While this is most often taken to be the mischief or state of affairs existing when the legislation was conceived, it also includes the context in which the legislation presently operates:

> In my view, the courts do well to examine contemporary as well as historical context. When legislation is enacted with an eye to regulating an activity for the indefinite future, an interpreter can fairly presume that the legislature intended its rules to be adapted to evolving circumstances, circumstances the legislature could not have predicted with any degree of certainly, in an appropriate way.[204]

This seems particularly sensible in the context of legislation intended to regulate a relationship of such central importance in the lives in most individuals. Unfortunately, when adjudicators determine who is entitled to protection under the legislation by applying the common law tests of employment, they are using a benchmark that has increasingly less relevance to the jobs held by many Canadians. Further, businesses are increasingly seeking greater organizational flexibility and this means more flexible workforces and increasing blurring of what were traditionally distinct concepts of employee and independent contractor. It is incongruous with the modern principle of statutory interpretation to continue to interpret the centerpiece legislation regulating the working life of Canadians without acknowledging and taking into account these changes.

---

[203] Driedger, *supra* note 176 at 107-108, 158 as cited by Ruth Sullivan, *infra* note 204 at 115.
[204] Ruth Sullivan, "Statutory Interpretation in Canada: The Legacy of Elmer Driedger," in T. Gotsis (ed.), *Statutory Interpretation: Principles and pragmatism for a new age.* (Judicial Commission of New South Wales, 2007) 105 at 122.

4. Adjudicators of employment standards have been unnecessarily timid about exercising their discretion when faced with gaps in the legislation

The Supreme Court of Canada has commented on the unique position of tribunals as experts in their respective spheres, noting they have special powers and functions because of the purposes of the legislation they are tasked with implementing. The Court has observed that tribunals of labour relations, for example, may be called upon to consider social, political and economic considerations, not merely legalistic ones that a court might be limited from considering. [205] It is precisely because of the need for contemporary perspective, flexibility and responsiveness, that the enforcement of employment standards has been placed in the hands of public administrators and adjudicators.[206]

A useful case in point is *Pointe-Claire (Ville) c. S.E.P.B., Local 57,*[207] where the Supreme Court of Canada upheld the Quebec Labour Court's adaptation of the legislation to fit the existing labour market. In *Pointe-Claire*, the Labour Court of Quebec found that a 'temp' worker supplied by a personnel agency was actually employed by two employers at the same time and could thus be a member of the bargaining unit of the union. Although Quebec labour legislation[208] did not contemplate relationships other than bipartite relationships, the Supreme Court of Canada upheld the tribunal's decision. According to Lamer C. J. (as he then was) 'it was natural that labour legislation designed to govern bipartite relations must be adjusted in some way' by 'a highly specialized tribunal that has

---

[205] *Pointe-Claire (Ville) c. S.E.P.B., Local 57,* [1997] 1 S.C.R. 1015, S.C.J. No. 1015, (SCC) affirming [1995], R.J.Q. 1671 (C.A.); affirming (5 novembre 1993), C.S. Montréal, n° 500-05-005556-939 (C.S. Qué.) [*Pointe-Claire*]. See also *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at para.183 and *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at 235-36.

[206] Adjudicators have considerable scope for discretion when applying employment standards, a fact that is reflected by privative clauses. See for example, section 107 of the AESC.

[207] *Supra* note 205.

[208] The Quebec Labour Code, s. 1 (k) and (l).

significant labour law expertise' to interpret 'terse statutory provisions' and 'legislative gaps'.[209] The Court also held that the Labour Court was justified in its decision in that case because the ultimate objective of the *Labour Code* which was to promote bargaining between the employer and the union in order to determine the employees' working conditions.[210] Lamer J. found there was no patently unreasonable error in the Labour Court's actions that would justify overriding the privative clause that protected its decision.

As with the Quebec Labour Court, adjudicators of employment standards should expect that from time to time, they might be called upon to make 'thoughtful and careful adjustments' for 'legislative gaps when necessary'. Adjudicators should not be afraid (particularly in the face of such broadly worded legislation), to develop and apply a purpose-built test or to at least modify or even reject the common law tests of employment in favour of a purpose-based approach. This is not a particularly novel or radical suggestion. For example, notwithstanding the human rights legislation prohibits discrimination against 'employees', the courts have not limited the application of human rights in the workplace to relationships that conform to the common law definition of an employment relationship – reasoning that the broader social and protective objectives of such legislation extend beyond the narrower purposes of vicarious liability and thus the common law formulation of employment was inadequate and overly limiting to be applied in the context of that legislation.[211]

Future changes in the employment environment are inevitable. If employment standards adjudicators are to develop their own 'employment standards purpose-built approach' for distinguishing employees and independent contractors, then care must be taken. Adjudicators must ensure that they do not unnecessarily constrain themselves as has been done (although not

---

[209] *Pointe-Claire, supra* note 205 at paras. 62 - 63. See also *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at para.183 and *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at 235-36.
[210] *Pointe-Claire, supra* note 205 at para. 58-63.
[211] *Cormier, supra* note 143.

irremediably) by superimposing the common law tests into employment standards legislation.

B. PURPOSE AND THE COMMON LAW TESTS

When adjudicators turn to the common law distinction between employees and independent contractors, it is important to remember that the distinction and the tests for making the distinction were themselves devised with a particular purpose in mind. Brian Langille and Guy Davidov,[212] have raised the point that a common misapprehension of adjudicators when applying common law tests, is to assume that there *is* a 'common law definition of employee', as if to say there is a 'non-purposive' approach to define an employee. As they point out, a definition developed for the common law is just as purposive (or should have been) as any that is developed for the purposes of a statute.

When we trace the origins of the common law tests borrowed by adjudicators, most were developed to assist in deciding when it is appropriate to hold an employer vicariously liable for a tort committed by someone he has retained to perform services.[213] For example, the control test traces its origins to the mid-nineteenth century vicarious liability case *Regina v. Walker*.[214] The organization or business integration test formulated by Lord Denning in *Stevenson Jordon & Harrison Ltd. v. MacDonald and Evans*[215] was also developed in the context of a pleading of vicarious liability. In that case, the question was whether the employer should be held vicariously liable for the breach of copyright committed by a worker whose duties consisted partly of work for the employer and partly of

---

[212] Brian Langille & Guy Davidov, "Beyond Employees and Independent Contractors: A View from Canada" (1999) 21 Comp. Lab. L. and Pol'y J. 7 at 14.

[213] For example, the organization or business integration test formulated by Lord Denning in *Stevenson Jordon & Harrison Ltd. v. MacDonald and Evans* [1952] 1 T.L.R. 101, *supra* note 36, was developed in the context of vicarious liability. This test was approved by the Supreme Court of Canada in *Co-Operators Insurance Association v. Kearney*, [1965] S.C.R. 106, another vicarious liability case.

[214] *Supra* note 31.

[215] *Supra* note 36.

working for himself. The degree of control exercised by the employer over the worker has featured prominently in cases involving vicarious liability. The policy reasons for the focus on 'control' is explained by Major J. in *671122 Ontario Ltd. v. Sagaz Industries Inc*.:[216]

> …If the employer does not control the activities of the worker, the policy justifications underlying vicarious liability will not be satisfied…Explained another way, the main policy concerns justifying vicarious liability are to provide a just and practical remedy to the plaintiff's harm and to encourage the deterrence of future harm (Bazley, *supra,* at para. 29). Vicarious liability is fair in principle because the hazards of the business should be borne by the business itself; thus, it does not make sense to anchor liability on an employer for acts of an independent contractor, someone who is in business on his or her own account. In addition, the employer does not have the same control over an independent contractor as over an employee to reduce accidents and intentional wrongs by efficient organization and supervision....[217]

The need to compensate the victims of torts and the need to encourage the deterrence of further harm do not explain why control might be relevant to the purposes of employment standards legislation. The point is this: if common law indicators are to be used as a basis for deciding who is entitled to the protections of employment standards, their usefulness must be explicable having regard to the purposes of employment standards legislation.

A test based on the 'intention of the parties' is also poorly suited for application to employment standards. In taxation cases, the intention of the parties has been a factor (along with other common law factors) taken into account when determining whether a worker is an 'own-account' worker or an employee. This

---

[216] *Supra* note 32.
[217] *Sagaz, supra* note 32 at paras. 34-35.

seems appropriate in the context of taxation.[218] However, employment standards are intended to protect vulnerable individuals who are in a position of unequal bargaining power.[219] Because of this inherent power imbalance, the purported intention on the part of the worker provides an unsuitable consideration for employment standards legislation. Moreover, employment standards are similar to laws prohibiting workplace discrimination, in that agreements to avoid such basic rights offend the universality of such rights.

The more recently developed 'enterprise test' was also proposed within the context of vicarious liability, and one can see in this description of the test by Major J. in *Sagaz,* how this test reflects the risk-allocating and loss-internalizing policy objectives inherent in the doctrine of vicarious liability:

> Flannigan, *supra*, sets out the "enterprise test" at p. 30 which provides that the employer should be vicariously liable because (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it.[220]

The enterprise test provides a fair and logical basis upon which to impose vicarious liability. Businesses benefit from the activities of their workers and therefore businesses should bear the true cost and risks associated with their activities.

Extending the logic of the enterprise test, the regime of employment standards might be seen as a 'cost' of using the labour of others to advance your business. Taking this further, perhaps business practices such as outsourcing non-core

---

[218] See *Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87 (CanLii), which suggests that where the parties understand their relationship to be one of an independent contractor, this will prevail provided other aspects of the relationship are also consistent with that understanding.

[219] See discussion of *Machtinger,* at p. 50 of this thesis.

[220] *Sagaz, supra* note 32 at para. 45.

functions might be seen as a means by which employers unfairly externalize risks and costs they should more properly bear. For example, if a retail enterprise regularly requires the labour of individuals to clean the store, the the fact that janitorial services are not a 'core' activity of the business does not make it any less a cost necessary for the success of the business. If costs should be borne by the enterprise benefiting from the activity, then the retail business should not be able to offload these costs to others, and least of all to the workers whom employment standards legislation is in place to protect.

PART IV FOCUSSING ON THE PURPOSES OF EMPLOYMENT STANDARDS LEGISLATION

Assuming an analysis of what is meant by "employee" is to be undertaken with the purposes of employment standards legislation firmly in mind, then what are the purposes of employment standards legislation and how can our understanding of these purposes inform our decision-making in cases involving workers whose status as employees is in question?

When decision-makers refer to the purpose of employment standards legislation, they usually use very broad concepts such as the purpose of the legislation is 'protective' or the legislation is 'remedial', or 'benefit conferring' I argue here that application of the legislation to today's changing workplaces and increasingly complex work arrangements requires a more focused and specific approach. I propose here that employment standards legislation has broad social policy aims, which I will refer to as *primary* objectives, but additionally, specific aspects of the legislation (such as the wrongful dismissal rights) have particular objectives that I will refer to as *secondary* objectives.

But before discussing these objectives, it is necessary to address a mischaracterization of the purpose of employment standards legislation that is occasionally reflected in adjudicator decisions – namely, the view the purpose (or one of the purposes) of employment standards legislation is to preserve the risk-taking spirit of entrepreneurship by ensuring that only some workers are

afforded protection (employees) and that others are not (entrepreneurs). This is particularly important as the line between employment and entrepreneurship becomes increasingly blurred. Yet this appears to be the conclusion of the adjudicator in *Sunstar Uniforms* when he stated that the legislation was 'not designed to shield entrepreneurs'.[221] This is an oversimplification and misstatement of the purpose of employment standards legislation. More importantly, this simplification offers adjudicators a way to avoid addressing the real concern of employment standards – which is the protection of vulnerable workers from exploitation.

In one sense, it is true that we are all entrepreneurs in that we profit from selling our labour - however, what distinguishes relationships that should be subject to employment standards from those that are not covered is that the former are relationships in which the worker is working in conditions that fall below the minimum standards of decency because of *vulnerability* to the particular employer. Entrepreneurship *may and often will* be accompanied by lack of vulnerability of the worker in relation to the employer; after all, entrepreneurs sometimes take on obligations that others might not because they believe they can profit from doing so. The legislation, however, is intended to protect individuals who lack sufficient power to negotiate decent working conditions with those who have power to impose indecent conditions upon them. If the employer is in a position to require the worker to work in conditions that fall below the standard of decency set out in the legislation, then that worker ought to be able to be protected by employment standards legislation.

Further, if one looks at the wording of employment standards legislation, the language of entrepreneurship is absent.[222] The closest reference is found in those provinces that define employment relationships, to include situations

---

[221] *Sunstar Uniforms Inc. v. The Director of Employment Standards*, March 12, 199*8,* (AB ESU). Similar sentiments have been expressed in other decisions, see for example*1096043 Alberta Ltd. and E. Davis Developments Ltd. operating as Station 33rd Condominiums and Sandra Miriam Saturley*, 2006 CanLII 46767 (AB ESU) (*Saturley*).

[222] See Tables 1.0 -1.9 (*Summary of Key Provisions Setting Out Scope of Federal and Provincial Employment Standards*) at page 90 of this thesis.

where the employer exercises "control and direction" [223] or "control or direction"[224] over the worker. The language of control or direction makes sense within the broader context of employment standards legislation which is concerned about setting limits where one party is in a position to impose on another such things as particular working hours, rules regarding overtime, rules about vacations and holidays and the like. However, it is a considerable leap to equate an *absence* of control or direction with entrepreneurship or to state that the purpose of employment standards is to provide protection to 'non-entrepreneurs' only.[225]

A. PRIMARY OBJECTIVES OF EMPLOYMENT STANDARDS LEGISLATION

The policy aims or justifications for the existence of employment standards have been discussed previously by many others[226] and do not require extensive review here, therefore I will briefly describe some of these ideas followed by my own views.

The obvious clearest expressions of legislative purpose are those that appear within the legislation itself. Alberta and British Columbia are the only jurisdictions that have exercised this legislative option. The British Columbia *Employment Standards Act*,[227] states:

---

[223] See section 2 (b) *Labour Standards Act ,*R.S.N.L.1990, c. L-2.
[224] See for example section 1 (1) of *The Employment Standards Code*, C.C.S.M. c. E110 and also section 1 (1) of the *Employment Standards Act*, (R.S.B.C. 1996), c. 113. Both Manitoba and B.C. also provide that employment occurs when there is a responsibility to pay wages.
[225] Similarly, in the provinces that expressly exclude independent contractors from coverage, the operative word is 'independent', not 'entrepreneur'.
[226] See for example Harry Arthurs in *Fairness at Work*, *supra* note 3 at 47-55 who explores the purposes of employment standards in great depth, suggesting that in addition to a broad purpose of ensuring decency, that employment standards reflect 11 additional strategic and operational principles. See also Iacobucci J. in *Machtinger, supra* note 1 and Geoffrey England, *Individual Employment Law* (Toronto: Irwin Law, 2000).
[227] R.S.B.C. 1996, c. 113, s. 2 [BCESC].

2. The purposes of this Act are as follows:

(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
(b) to promote the fair treatment of employees and employers;
(c) to encourage open communication between employers and employees;
(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
(e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
(f) to contribute in assisting employees to meet work and family responsibilities.

In 1988, amendments to Alberta *Employment Standards Code* included the addition of a preamble stating:

> RECOGNIZING that a mutually effective relationship between employees and employers is critical to the capacity of Albertans to prosper in the competitive world-wide market economy of which Alberta is a part;
>
> ACKNOWLEDGING that it is fitting that the worth and dignity of all Albertans be recognized by the Legislature of Alberta through legislation that encourages fair and equitable resolution of matters arising over terms and conditions of employment;
>
> REALIZING that the employee-employer relationship is based on a common interest in the success of the employing organization, best recognized through open and honest communication between affected parties;

> RECOGNIZING that employees and employers are best able to manage their affairs when statutory rights and responsibilities are clearly established and understood; and
>
> RECOGNIZING that legislation is an appropriate means of establishing minimum standards for terms and conditions of employment;
>
> HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows…[228]

The references to the importance of a mutually effective relationship[229] and to efficiency and productivity[230] in our market economy[231] are perhaps a nod to the more the troubled episodes in the history of labour relations in Canada.[232] Not surprisingly, we see reference to ideas such as 'fairness' and 'dignity', particularly in the British Columbia legislation.

Guy Davidov[233] has written numerous articles on labour and employment law.[234] He suggests that minimum employment standards (such as minimum wage laws) reflect the idea that human beings are entitled to *dignity* and employment standards are part of the bundle of laws that exist to establish minimum

---

[228] R.S.A. 2000, c. E-9.
[229] *Ibid*.
[230] BCESC, *supra* note 227 at s. 2 (e).
[231] *Supra* note 228.
[232] Canada's labour history includes a number of periods of radicalism and strife, most recently in the 1960's when the public sector became unionized and the 1970's when the Canadian economy experienced high inflation and unemployment.
[233] Faculty of Law, Hebrew University of Jerusalem.
[234] See Brian Langille & Guy Davidov in "Beyond Employees and Independent Contractors: A View from Canada" (1999) 21 Comp. Lab. L. and Pol'y J. 7 14 and also Davidov, G. "The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*"* (2002) 52 U.T.L.J. 357, Guy Davidov,"Re-Matching Labour Laws with Their Purpose" Guy Davidov and Brian Langille (eds.) *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) at 179.

conditions to protect the dignity of workers in the employment relationship.[235] As Davidov explains, this view is grounded in a belief that humans are not 'things' and that labour cannot be bought and sold like a commodity but must be regulated to ensure respect for our dignity as human beings.[236]

Harry Arthurs, in his role as Commissioner of a federal commission appointed in 2004 to review federal employment standards legislation,[237] suggested that the fundamental principle underlying the existence of employment standards legislation is that of 'decency' which includes the necessity to protect those most vulnerable. Decency, he states is the idea that no matter how limited his bargaining power, a worker should receive a wage that is sufficient to live on; to be free from coercion, discrimination, indignity or unwarranted danger in the workplace and that a worker should not be required to work so many hours that he or she is effectively denied a personal or civic life.[238] Arthurs further suggests that if Canadians do not consider that certain kinds of working conditions are decent when experienced by employees, they are unlikely to consider those same conditions decent when experienced by others.[239]

Both Davidov and Harry Arthurs provide valid *justifications* for employment standards legislation. The statements of the Supreme Court of Canada in *Machtinger* further round out this picture, by explaining why the imposition of minimum employment standards legislation is *necessary*:

> …The harm which the Act seeks to remedy is that individual employees, and in particular non- unionized employees, are often in an unequal bargaining position in relation to their employers. As stated by Swinton, supra, at p. 363:

---

[235] Guy Davidov, "A Purposive Interpretation of the National Minimum Wage Act" (2009) 72:4 Mod. L.Rev. 581.
[236] *Ibid.*
[237] See *Fairness at Work*, *supra* note 3.
[238] *Ibid.* at *x.*
[239] *Fairness at Work*, *supra* note 3 at 61.

> … the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.[240]

It is argued here that there is one further primary objective. Employment standards legislation is not just a modest attempt to correct deficiencies in the common law. The broad language of the legislation[241] and its overall scheme[242], as well as the severe penalties and provisions that render agreements to circumvent it void, make it clear that employment standards legislation is nothing less than attempt to regulate an entire area of human activity: the employment of others. Essentially, employment standards legislation exists because Canadians have decided that economic activity should be constrained by minimum standards of decency in working conditions. In other words, economic activity must confine itself to the minimum standards of decency articulated in employment standards legislation. As the significant sanctions [243] for non-compliance make clear, economic activity that is conducted outside these standards is prohibited and agreements between workers and businesses that attempt to operate outside of the minimum standards are expressly rendered void.[244] If economic activity of businesses cannot be conducted in conditions

---

[240] *Machtinger, supra* note 1 at paras. 32-33.
[241] Such as the broad definitions of 'employee' and 'employer' seen in most jurisdictions and which were reviewed earlier.
[242] The legislation provides a code of conduct for employers in a wide range of areas - from hours of work to the employer's obligations upon termination.
[243] As discussed previously, the Alberta legislation for example, provides adjudicators with a powerful deterrence tool: on top of ordering payment of whatever monies should have been paid to the worker, corporations can be fined up to $100,000, and individuals up to $50,000 for an offence under the AESC. AESC*,* ss. 128, 129, 132.
[244] See for example, AESC, s. 4.

that satisfy the minimum requirements of decency, then Canada's legislatures are saying it has no business being conducted at all.

Seen this way, the responsibility of those enforcing employment standards is not only a responsibility to the individual complainants who come before them, but to Canadian society as a whole, which relies on adjudicators to keep businesses in check and scrutinize new business practices that might have the effect of avoiding or eroding minimum standards. Adjudicators have been given powerful tools to fulfill this role. Unfortunately, as has been discussed previously, these tools are rarely utilized.[245] A business calculating the 'cost' of breaching the legislation might reasonably conclude that it makes economic sense to skirt the legislation by improperly designating an employee as an independent contractor. If the worker does complain and the arrangement is deemed to be an employment relationship, the typical outcome is relatively minor - the employer is simply ordered to comply with the legislation.

To summarize, the primary purposes of employment standards are threefold. First, employment standards seek to counteract the unequal bargaining position many individual workers find themselves in relative to their employers. Secondly, the legislation establishes minimum standards of decency for working conditions and provides workers with a means to challenge working conditions that fall below the standards of decency. Lastly, employment standards legislation regulates business activities involving the employment of others by ensuring such activity is constrained by the standards of decency that we have set out in our legislation.

Another important consideration flows from the fact that employment standards legislation is our attempt to create a comprehensive scheme to address inherent inequalities and uphold a standard of decent working conditions. It is significant that the power to fulfill this objective has been delegated to administrators

[245] As discussed previously, modest penalties (usually not more than $1,000) are being applied in British Columbia. Adjudicator decisions from Alberta and Ontario suggest that employers are not being penalized for improperly designating employees as independent contractors.

(including adjudicators and other appeal bodies) who are expected to interpret and enforce the legislation. In order to fully and completely fulfill this purpose of the legislation, those who administer it must be attentive, first, to the potential of new business practices to drive down working conditions generally and secondly, to the message being sent to employers about acceptable practices through their decisions. It is important that adjudicators see themselves as more than merely technicians and that they consider the wider implications of their decisions on business practices generally. With respect to the practice of hiring workers as independent contractors instead of as employees, decision-makers must be mindful of how this practice might undermine respect for basic workplace rights and drive down working conditions for Canadians generally.

B. SECONDARY PURPOSES OF EMPLOYMENT STANDARDS LEGISLATION

As Ruth Sullivan observes, statements of purpose and preambles often recite only the primary objects of the legislation which are apt to be obvious anyway.[246] Statements of purpose and preambles usually fail to mention secondary purposes which leads to an incomplete appreciation of the significance of a statute because, as Sullivan states "[i]n its broadest sense, legislative purpose refers not only to the material goals the legislature hoped to achieve but also to the reasons underlying each feature of the implementing scheme". [247] Consequently, an analysis of whether a worker should be regarded as an employee for the purposes of employment standards legislation is incomplete without consideration of the particular policy objectives that underlie the specific rights mandated in the legislation. These specific rights, such as the right to maximum hours and the right to notice before dismissal are among the specific ingredients that Canadians have decided constitute the minimum of decency in work relationships characterized by unequal bargaining power.

[246] Sullivan, *supra* note 133 at 271.
[247] Sullivan, *supra* note 133 at 264.

Focusing on minimum standards also help us understand how vulnerability and unequal bargaining power might manifest themselves, because the minimum standards in key areas provides a useful yardstick for employers and adjudicators to assess how the actual conditions in the relationship 'measure up'. Working conditions that fall below these standards may signal vulnerability of the worker and indicate that closer evaluation of the relationship is necessary. In other words, by examining the specific policy concerns that underlie the various mechanisms and rights set out in employment standards legislation, we are better positioned to evaluate the situation at hand.

In the following discussion, I argue there are two important secondary objectives of employment standards: first, to is to provide workers with practical and affordable means to collect their pay and enforce other rights. The other secondary objective is to create specific rights and secondly, to create minimum standards in several key areas.

1. Access to an affordable mechanism for enforcing rights

Employment standards legislation is usually associated with both limits, such as limits on working hours and with rights, such as the right to premium pay for overtime and notice before dismissal. However, what is easily overlooked is that employment standards also help workers *get paid* for their work. The acts invariably set up an affordable and accessible alternative to suing - workers may lodge complaints to government administrators who are in turn empowered to investigate, to make orders requiring employers to comply, and to enforce those orders on behalf of the worker. All of this is free. The enforcement procedure is arguably one of the legislation's most effective and meaningful features for workers.

A complaint and enforcement apparatus contained in the legislation is necessary because, compared to their employers, many workers simply lack the financial and other resources to collect their pay or enforce other rights. The enforcement apparatus is also important because very often the amounts at

stake do not justify bringing litigation, which is costly and time-consuming. If workers had no option other than litigation to force employers to pay outstanding wages and other entitlements, it is doubtless that many would simply prefer to let the employer 'get away' with shirking its obligations – clearly an unsatisfactory outcome of legislation intended to address power imbalances in worker and employer relationships.

Interestingly, the claims brought by workers who are designated as independent contractors follow the same pattern. The claims of independent contractors are not usually for parental leave or other significant entitlements (many of which impose qualifying periods that independent contractors do not meet). Instead, they are to collect wages or other pay which was owed by the employer. And when we look at them, we see they are modest claims of individuals of modest means. For example, in Alberta, the adjudicator cases reviewed which were brought by independent contractors over the last 12 years involved a janitor seeking $574 for unpaid wages and vacation pay[248]; a travelling shed salesman seeking $3604 for unpaid wages and commissions and one week pay in lieu of notice[249]; an unspecified wage earner claiming for $449[250]; a woman hired by a developer to sit in a construction trailer and sell condominium units seeking $2295 for unpaid wages [251]; a physiotherapist seeking vacation and termination pay of $5,996 [252]; a worker who carried out various mechanical services including some welding suing for $764 for unpaid wages, overtime pay and vacation pay[253]; an individual working for a plumbing company seeking $1,582 for unpaid wages and other pay[254]; a stucco worker seeking $2,145[255], a tenant engaged to carry out management and maintenance activities in an apartment

[248] *Gateway West Management Corporation v. Bogojevic,* 2004 CanLII 55149 (ABESU).
[249] *Marmit, Plastics Inc. v. Emmott*, 2000 Canlii 20281 (ABESU).
[250] *Van Go Artisans Inc. v. Ramey,* 2001 Canlii 25654 (ABUSU).
[251] *1096043 Alberta Ltd. and E. Davis Developments Ltd, operating as Station 33rd Condominiums v. Sandra Miriam Saturley*, 2006 CanIII 46767 (ABESU).
[252] *McKnight Village Physical Therapy 1992 Inc. v. Inglis*, 2002 CanLii 45600 (ABESU).
[253] *MacKinnon v. McDougall*, 2002 CanLii 45616 (ABESU).
[254] *Pete the Plumber Ltd. v. Johanson*, 2002 CanLII 45619 (ABESU).
[255] *Red Deer Stucco & Construction Ltd. v. Flohr*, 2004 CanLII 55174 (ABESU).

building seeking $2,090[256], three individuals involved in construction (amount sought not specified in two case and another involving unpaid wages of $4,605)[257], a long-time employee who was re-designated a trainer seeking missing pay of $2,970[258] and a truck driver seeking an unexplained shortfall in his commission from an employer who refused to provide any documentation regarding his pay.[259]

For the reasons stated above, the importance of a free enforcement mechanism cannot be underestimated. These examples show that a lack of resources and financial or economic vulnerability that precludes litigation are not the exclusive domain of those we think of as employees and these problems appear to be the main impetus for workers who were designated independent contractors to turn to employment standards legislation.

2. Rights and minimum standards

As explained earlier,[260] the rights we see in modern legislation were adopted in a somewhat piecemeal fashion over the course of a number of decades, starting with rules intended to provide maximum hours and to ensure work breaks and the payment of wages. The resulting legislation in place today across Canada is typically an amalgamation that addresses 6 key areas: hours of work, rest periods and overtime, minimum wage, holidays and annual vacations, termination rights and maternity and parental leave.[261] I argue here that each of these aspects of the legislation has particular policy objectives behind it and I will also demonstrate how each right or standard is relevant to many workers who are treated as independent contractors.

---

[256] *994841 Alberta Ltd. v. Troy*, 2005 CanLII 51534 (ABESU).
[257] *Cook v. Peresky*, 2005 CanLII 51563 (*ABESU), Q Design & Construction Ltd. v. Gates, 2005 CanLII 51539 (ABESU) and Stixx Construction Ltd. v. Geue, 2007 CanLII 40468* (ABESU).
[258] *Telsco Security Systems Inc. v. Wong*, 2006, CanLII 37748 (ABESU).
[259] *671693 Alberta Ltd. (A.K. Gill Transport),* 2007 CanLII 54258 (ABESU).
[260] See discussion in Part I of this thesis.
[261] The legislation also addresses layoffs, employment of minors and some jurisdictions provide bereavement leave and other entitlements that are not reviewed here.

However, before I begin, a preliminary matter should be addressed. It is essential that adjudicators determine what rights and obligations are actually at stake in each case. It is important that adjudicators not assume that finding a worker is an employee will create insurmountable administrative or practical problems. Many occupations are exempted from substantial portions of the legislation and therefore issues such as control or lack of control by the employer over hours of work, and right to holidays and vacations might be irrelevant. In Alberta, for instance, travelling salespersons, information system professionals and persons employed by a builder of residential homes to sell those homes, are among the many occupations that are exempted from the hours of work, overtime, overtime pay and record keeping requirements of the legislation.[262] Travelling salespersons are exempted from vacations and vacation pay and, along with manufactured home salespersons and many other salespersons, are also exempt from holiday and holiday pay provisions.[263] A number of Alberta occupations are even exempted from minimum wage requirements.[264]

A further consideration is that many employment standards entitlements, such as vacation and parental leave will not be available to the complainant simply because of the significant qualifying periods for such rights to apply. In addition, often, by the time the matter reaches an arbitrator, the relationship has already ended and many matters such as breaks, holidays and overtime may be moot. Finally, it must be remembered that in many cases the worker is only trying to collect his or her pay.

---

[262] Alta. Reg. 14/97, s. 2. For example, an automobile, recreational vehicle truck or bus salesperson, a manufactured home salesperson, a farm machinery salesperson, a heavy duty construction equipment or road construction equipment salesperson, a person employed by a person who builds residential homes to sell those homes, authorized to trade in real estate as a real estate broker under the *Real Estate Act*, a salesman registered under the *Securities Act,* and many other occupations, are exempted from the legislation's hours of work, rest periods, overtime and record keeping requirements.
[263] *Ibid*. s. 3.
[264] *Ibid.* ss. 7-13.

a. Hours of Work, Rest Periods and Overtime

Excessive hours of work were the first target for early reformers, and present day limitations on the hours of work have their origins in the "eight-hour day movement, which began in the industrial revolution in Britain during the early 1800's.[265] The first restrictions on hours of work applied only to children and were later extended to women and finally to all workers.[266] Two of the ILO's earliest conventions were the 1919 "Hours of Work (Industry) Convention, 1919, No. 1", and the "Hours of Work (Commerce and Offices) Convention, 1930, No. 20", which together, sought to establish a maximum 8 hour workday and 48 hour work week.

Today's legislation limits the hours that can be worked in a day and a week and also provides for daily and weekly rest periods as well as rights relating to overtime.[267] Most jurisdictions in Canada do not permit workers to refuse overtime, with the exception being the Yukon. Quebec and Saskatchewan allow for limited rights to refuse overtime but all jurisdictions require employers to provide premium pay for overtime worked.[268]

---

[265] See the *Factories Act of 1833* (3 & 4 Will. IV) c. 103. This statute applied to the textile industry. The *Act* limited the working hours of children aged 9-13 to 8 hours per day and prohibited those aged 14-18 from working more than 12 hours per day. The statute also mandated one-hour lunch breaks and a minimum of two hours of education each day for children aged 9-13. The *Factories Act 1847* (10 & 11 Vict c. 29) limited women and all children under the age of 18 to working less than 10 hours per day.

[266] In Alberta, for example, *The Factories Act*, 1917, ch. 20. prohibited the employment of children (defined to be under the age of 15) in any factory, shop or office, provided for maximum working hours in a dayshift and nightshift, and prohibited working more than two shifts in one day. A one-hour break was to be provided between 11:00 and 2:00.

[267] For example, in Alberta, ½ hour rests are required at five-hour intervals, the maximum workday is 12 hours and the standard (before overtime) work week in Alberta is 44 hours per week (AESC, ss. 16, 18, 21.). Federal legislation provides for an 8-hour day and 40-hour standard week and limits work to 48 hours per week (see *Labour Code*, R.S., 1985, c. L-2, ss. 169 to 171). Most jurisdictions also permit modified work schedules such as compressed workweeks and averaging agreements under certain conditions.

[268] For example, section 8 (5) of Yukon's *Employment Standards Act*, R.S.Y. 2002, c. 72 allows workers to refuse overtime with 'just cause'.

There is now a considerable body of evidence suggesting that working excessive hours contributes to a variety of health concerns, including significantly increased risk of depression and coronary disease.[269] It has also been found that balance between work and family life reduces stress and strengthens the parent child relationship. Other evidence shows direct and indirect costs associated with workers experiencing high work-life conflict, as a result of lost productivity, absenteeism, missed deadlines.[270] And finally, there is evidence that fatigue resulting from long work hours and inadequate rest may contribute significantly to workplace accidents and injuries.[271]

Obviously these effects are not limited to employees and in fact statistics suggest that unincorporated self-employed individuals work considerably longer

---

[269] For example, the Whitehall Studies, which have studied over 10,000 civil servants since 1985. In January 2012, researchers found that workers who work more than 11 hours each day are 2 times more likely to become depressed: Marianna Virtanen, Stephen A. Stansfeld, Rebecca Fuhrer, Jane E. Ferrie, Mika Kivimäki, "Overtime Work as a Predictor of Major Depressive Episode: A 5-Year Follow-Up of the Whitehall II Study" (2012) PLoS ONE 7(1): e30719. doi:10.1371/journal.pone.0030719. In 2010, one study found that those who work over 10 hours a day have a 60% higher incidence of coronary disease and also Marianna Virtanen, Jane E. Ferrie, Archana Singh-Manoux, Martin J. Shipley, Jussi Vahtera, Michael G.Marmota and Mika Kivima, "Overtime work and incident coronary heart disease: the Whitehall II prospective cohort study" (2010) Eur. Heart J. published online May 11, 2010. online: European Society of Cardiology http://eurheartj.oxfordjournals.org/content/early/2010/05/04/eurheartj.ehq124.abstract/.

[270] In Canada, it is estimated that these costs may be between $4.5 and $10 billion per year, see L. Duxbury & C. Higgins, Work-Life Conflict in Canada in the New Millennium: A Status Report (Report Two) (Ottawa: Health Canada, 2003) at xvi, online: Health Canada http://www.hc-sc.gc.ca/pphb-dgspsp/publicat/work-travail/report2/index.html.

[271] A study of 10, 793 Americans between 1987 and 2000 showed that jobs requiring overtime were associated with a 61% higher injury rate than jobs not requiring overtime. After adjusting to allow for relative risk, the study also found that working at least 12 hours per day was associated with a 37% increased hazard rate and working at least 60 hours per week was associated with a 23% increased hazard rate, see A Dembe, J. Erickson, R. Deblos & S. Banks "The impact of overtime and long work hours on occupational injuries and illnesses: new evidence from the United States" (2005) 62:9 *Occup. Environ. Med.* 588.

hours (and yet earn less pay) than employees. As was discussed earlier,[272] the average income of the unincorporated self-employed was 26% lower, or only $44,700, or only 74% of that of employees, despite working on average 1,930 hours per year, compared to 1,770 hours for paid employees.[273] Work/life balance and the right to work in conditions that are not deleterious to one's health are important policy objectives and the fact these protections are mandated in employment standards legislation is a considerable achievement. When adjudicators are called upon to determine whether a worker is an employee for the purposes of employment standards, it is important that one of their considerations is the potential for their decisions to not only diminish this achievement, but to deprive a subset of workers who may be particularly vulnerable to excessive work hours.

A further consideration for adjudicators assessing independent contractor complaints is that by setting out precise standards in our legislation, our policy makers have identified excessive working hours as one of the ways that vulnerability and unequal bargaining power might manifest themselves in the employment relationship. Accordingly, when the ostensible independent contractor provides evidence that his or her working conditions deviate significantly from these standards, adjudicators should explore the reasons for the situation. Where the working conditions are the product of unequal bargaining power and worker vulnerability, this should be an indicator that the relationship may be one that ought to be regulated by employment standards.

b. Minimum Wage

Davidov argues that minimum wage laws are best understood as 'tools for redistributing resources and ensuring respect for human dignity'.[274] He points out that minimum wage laws have not been shown to be particularly effective as tools for reducing overall poverty and nor are they intended to be major instruments of economic policy in structuring wages as minimum wage actually

[272] See discussion in Part I.
[273] Sébastien LaRochelle-Côte & Sharanjit Uppal, *supra* note 70.
[274] Davidov, *supra* note 235.

only impacts an insignificant number of workers.[275] He argues that *redistribution of wealth* is a justified goal of minimum wage legislation in that a minimum wage shifts wealth from the most well-off to the lowest paid with the result that workers are better off.[276] He adds: minimum wage laws serve to further human dignity because they acknowledge workers as human beings whose *time has value*.[277]

The 2006 Commission on the Review of Federal Labour Standards, also searched for possible justifications for continuing with a federal minimum wage law[278] even though it affected only 1/10th of 1% of Canadians.[279] The Commission concluded that just as "we reject most forms of child labour on ethical grounds, whatever their economic attractions, we recoil from the notion that in an affluent society like ours good, hard-working people should have to live in abject poverty".[280] The Commission pointed to the fact that all Canadian

---

[275] The wages of most workers are determined by the market which usually results in wages being above minimum wage. In Canada, about 4.6% of workers in all jobs are directly impacted by minimum wage, see Morley Gunderson, "Minimum Wages in Canada: Theory, Evidence and Policy" (Ottawa: HRSDC, 2005) at 46, online: HRSDC http://www.rhdcc.gc.ca/eng/labour/employment_standards/fls/pdf/research11.pdf.

[276] Davidov, *supra* note 235.

[277] *Ibid.*

[278] Possible justifications for a federal minimum wage law were examined by economist Morley Gunderson for the Commission, but which were found to be less convincing rationales included:

1) Alleviating poverty
2) Reduce wage inequality
3) Put a floor below which transactions are not allowed to occur
4) Eliminate low-wage jobs and encourage movement up the value-added chain
5) Provide an incentive to leave income maintenance programs
6) Increase aggregate demand with associated multiplier effects
7) Help pay for rising tuition fees
8) Protect the unprotected who have little individual or collective bargaining power
9) Protect the protected by reducing low-wage competition
10) Reduce the need for unions, and
11) Provide a model for emulation by others

(see Gunderson, *supra* note 275 and *Fairness at Work*, *supra* note 3).

[279] Gunderson, *supra* note 275.

[280] *Fairness at Work*, *supra* note 3 at 269.

jurisdictions have minimum wage legislation as evidence of broad support for this viewpoint.[281]

If it is accepted that human dignity is the most sound rationale for minimum wage laws, then there can be no exceptions to minimum wage laws for those offering their labour in a commercial,[282] arms-length relationship[283] and that all workers are entitled to at least the minimum wage.[284]

What about the enterprising businessperson who might be prepared to assume losses or take risks (such as no earnings or very low earnings), in the hopes of achieving long-term gains? This is an acceptable practice for a businessperson negotiating from a position of equal bargaining power, however, those tasked with maintaining decency in working conditions are obliged to satisfy themselves that working conditions falling below the standard of decency are not the result of an unfair arrangement in which the employer is exploiting a vulnerable worker.

c. Wrongful Dismissal

What is the purpose of requiring notice in the event of wrongful dismissal? Perhaps the answer to this question can be found by looking at how wrongful dismissal damages are calculated. As Justice Côté noted in *Soost v. Merrill*

---

[281] *Ibid*.
[282] There are many non-commercial situations in which people should of course be free to 'donate' their labour, such as by volunteering their labour should they wish.
[283] There are also situations where people should be free to provide their labour below minimum wage such as among family members or in situations where services are being 'donated' .
[284] There are exceptions built into the legislation in most jurisdictions. In Alberta, for example, a number of occupations are exempted from the minimum wage requirement such as real estate brokers, securities sales persons, insurance sales persons paid entirely by commission, students engaged in certain programs, extras in a film or video production, and farm employees (see Alta. Reg.14/97, s. 7). The Alberta regulations also provide that there are other categories of employees, identified in the Regulation, who are subject to different minimum wage arrangements. (see Alta.Reg. 14/97, s. 8).

Lynch Canada Inc.,[285] in an indefinite hiring, employees do not have an indefinite right to keep their job and therefore it is incorrect to treat dismissal without cause as a breach of contract. At common law, the only right of a worker is the right to *reasonable pay or notice in lieu* (absent just cause).[286] In common law lawsuits, Canadian courts turn to the '*Bardal* factors' to decide how much notice constitutes 'reasonable' notice.[287] According to *Bardal v. Globe & Mail Ltd.,*[288] reasonableness must be determined in each case by considering the character of the employment, the length of service, the age of the employee and the availability of similar employment suited to the qualifications of the employee.[289]

The calculation process is considerably simpler in employment standards legislation, as the legislation takes into account only the length of service of the employee.[290] The two approaches often yield very different results, with employment standards in most jurisdictions offering no more than 8 weeks notice for employees[291] and many jurisdictions requiring as little as one week of

---

[285] *Soost v. Merrill Lynch Canada Inc.*, 2010 ABCA [*Soost*] additional *reasons in Soost v. Merrill Lynch Canada Inc.*, 2010 ABCA 355, [2011] 4 W.W.R. 676, 490 A.R. 406, leave to appeal denied, S*oost v. Merrill Lynch Canada Inc.*, [2010] SCCA No. 399, reversing in part *Soost v. Merrill Lynch Canada Inc.,* 2009 ABQB 591. Soost had been a top performing financial consultant/stock broker whose employer unsuccessfully argued he was validly terminated for breaching company and industry policy. At trial he was awarded $1.6M (on top of one year's notice damages of $600,000) for the detrimental affect on his reputation in the industry and loss in ability to keep and attract clients. The award for reputation damages was reversed on appeal to the Alberta Court of Appeal.

[286] *Ibid.*
[287] *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) [*Bardal*].
[288] *Ibid.*
[289] *Bardal, supra* note 287 at 145.
[290] See for example AESC, *supra* note 13, section 54.
[291] The legislation in Ontario and the federal legislation also provide for additional 'severance pay' on top of the notice or pay in lieu of notice requirement. The Ontario severance pay applies to certain large industries and is intended to compensate for loss of seniority and job-related benefits and also recognizes an employee's long service (see *Employment Standards Act*, S.O. 2000, c 41, ss. 63, 64.).

notice when the employment relationship ends within one year.[292] However, in the common law, reasonable notice might be as much as 24 months in the case of an older executive with a long service record. So, clearly statutory notice periods were not necessarily designed to constitute '*reasonable*' notice, at least as reasonable notice is being formulated in the common law, particularly with senior employees. If not to provide 'reasonable notice', then what is the aim of statutory notice periods? It is contended here that in conjunction with the free complaint process provided by employment standards legislation, one of the key purposes of employment standards dismissal laws is to provide a modest but *accessible alternative* to the expensive and complex process of suing in court.[293] Often, workers in shorter term and less senior positions find that it is not worthwhile to sue. Also, the worker may not have the resources to fund a lawsuit. The legislation allows the cost of seeking notice or payment in lieu to be shouldered or subsidized in part by the government through its sponsorship of a free and uncomplicated process. Seen this way, statutory notice periods ensure that employers cannot terminate without cause and pay nothing because the employee is not in a position to take legal action. Employment standards legislation's notice periods make notice or payment in lieu mandatory and enforceable by the state, and not just the worker, in effect, 'keeping employers in line' (albeit not to the same standard as the common law has determined would be appropriate).

But what is the rationale for requiring notice at all, either under the statute or at common law? If it is not truly a breach of contract to dismiss an indefinite term employee as stated in *Soost*,[294] what is the policy basis for the common law

---

[292] In Alberta and many other jurisdictions, employers may terminate without notice during the first three months of employment, which operate as a sort of probation period.

[293] Of course bringing a civil lawsuit is still an option for the complainant so employment standards are not so much a replacement for a civil lawsuit as a supplement. See *Elsegood v Cambridge Spring Service (2001) Ltd.,* 2011 ONCA 831. Employment standards legislation also provides that an employee's rights to a civil remedy remain intact. For example, Alberta's *AESC supra* note 13, section 3.(1) which provides "Nothing in this Act affects… any civil remedy of an employee".

[294] *Soost, supra* note 285.

obligation to give reasonable notice and the legislation's requirement of notice or pay in lieu of notice before dismissal? It turns out that the idea that an employer should have to give notice if it wants to terminate a worker without justification has very long history, with the origins of this concept dating to the 1500's.[295] The obligation to provide reasonable notice has been an accepted part of the English common law since the mid-1800's and has been recognized in Canada since at least 1936.[296]

The Supreme Court of Canada has discussed the purpose of statutory notice periods in *Machtinger*[297] and *Rizzo Shoes*[298]*.* In *Machtinger,* Iacobucci J. offered a somewhat vague rationale for the statutory notice provisions. In that case, one of the issues before the Court was whether it was possible for employees to effectively contract out of their rights to the statutory notice period. Two employees (both car salesmen) had signed contracts for indefinite periods. One of the contracts allowed the employer to terminate without cause on two week's notice and the other allowed termination without any notice whatsoever. Iacobucci J. suggested that the legislated notice periods were in place to ensure that employees are "discharged fairly".[299] Somewhat more helpfully, in *Rizzo Shoes*, the Court observed that the notice provisions are "broadly premised upon the need to protect employees".[300] The specific purpose of the statutory notice, according to the Court in *Rizzo Shoes*, was to 'provide employees with an opportunity to take preparatory measures and seek alternative employment' and to '' employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment.[301]

---

[295] Iacobucci J. reviews the history of the implied term of reasonable notice in employment contracts in *Machtinger*, *supra* note 1, see paras. 19-22.
[296] *Carter v. Bell & Sons (Canada) Ltd*., [1936] O.R. 290, [1936] 2 D.L.R. 438 (C.A.). See also Iacobucci J. in *Machtinger*, *supra,* paras. 19-22.
[297] *Machtinger, supra* note 1.
[298] *Rizzo Shoes, supra* note 175.
[299] *Ibid.* at para. 36.
[300] *Ibid.* at para. 25.
[301] *Ibid.* The 'cushion' rationale has also been suggested by Geoffrey England in a paper prepared for the federal government, where he suggests that the notice provisions in the Canada *Labour Code* are intended to provide an unjustly

An obligation for employers to provide a 'cushion' seems fair, particularly when seen as cost-shifting mechanism. Businesses need the services of employees to carry out their functions. Relationships of employment can create 'dependency' (a 'cost'), and therefore it makes sense that businesses be required to internalize this cost.[302]

Do these ideas also make sense in contractor relationships? The idea that economically dependent contractors should be entitled to notice before termination has gained traction in recent case law.[303] In *McKee v. Reid's Heritage Homes Ltd.*,[304] the Ontario Court of Appeal accepted that an intermediate category of worker, the 'dependent contractor', exists in the continuum between employment and independent contractor relationships. In *McKee*, the defendant constructed residential homes and had engaged the plaintiff to sell the homes for an agreed fee per home. The contract contained an exclusivity clause and required the plaintiff to make a pre-determined minimum number of sales, which she always did. The relationship continued for a number of years and the plaintiff eventually established her own corporation and hired employees to assist with the selling. Despite her corporation[305] and

---

dismissed employee with a 'modest cushion' to help weather the storm of unemployment until he or she finds replacement work, see Geoffrey England, "Report to the Task Force on Part 111 of the Canada *Labour Code* regarding the termination of employment provisions of the Canada *Labour Code*" (Ottawa: HRSDC, 2006) online: HRSDC http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/research13.pdf

[302] Or, perhaps the 'cushion' employers are required to give employees might be viewed as tool of redistribution – requiring employers to 'share' some of the gains with workers who have devoted significant time and effort to the enterprise.

[303] *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916 (CanLII) [*McKee*]. See also *Smith v. Centra Windows Ltd.*, 2009 BCSC 606 .

[304] *Ibid*.

[305] This result might be precluded in some provinces where the legislation specifically state an employee is an individual as opposed to a person. See Tables 1.0 -1.9(*Summary of Key Provisions Setting Out Scope of Federal and Provincial Employment Standards*) at page 90 of this thesis.

the fact that she had employees of her own[306], McKee was found to be an employee and entitled to statutory and common law notice. Of particular importance was that the Court also accepted the existence of an intermediate 'dependent contractor' relationship that arises where a contractor works exclusively for the employer and/or is economically dependent on the employer. According to the Court, such relationships also create an obligation to provide reasonable notice before termination. The Ontario Court of Appeal's decision is an important development because it recognizes that a contractor may be vulnerable and economically dependent in the same way as an employee. It is also significant because it signals that even contractors are entitled to fair treatment, notwithstanding their non-employee status.

In summary, there is increasing acceptance that contractors might also require a 'cushion' and that the rationale behind the requirement of notice before termination may be just as valid for some contractors as it is for employees. The protection of dignity would also seem to be another factor here. As has been noted by Davidov, human labour is not merely a 'product'.[307] In addition to devoting significant portions of our lives to our 'jobs', workers often derive much of their identity from their jobs and suffer a corresponding loss when a job is terminated without justification. It seems reasonable that the greater the worker's commitment to the organization (such as might be represented by length of service), the greater the affront to dignity arising from dismissal without cause. A contractor who is economically dependent on an employer may be in just as much need as an employee of opportunity to take preparatory measures and seek alternative employment and may also experience loss of dignity in much the same way as an employee.

---

[306] Contrast the approach in *McKee* with the Alberta decision in *Saturley*, *supra* note 44 where the adjudicator held that the fact that the complainant could hire someone in her stead to sit in the trailer during the hours required by the builder was further support of her status being that of an independent contractor.
[307] *Davidov*, *supra* note 235.

d. Holidays and Annual Vacations

Entitlement to an annual vacation has long been considered a feature of work life in Canada and has obvious implications for quality of life. There is also evidence that vacations are 'good' for us, and reduce mortality, possibly because they offer periods of relief from stress and threats and provide opportunity for restorative behaviours.[308] Employment standards legislation in each Canadian jurisdiction provides for annual vacations for eligible employees,[309] as well as, up to 10 paid general holidays each year[310] however, vacation allowances in Canada lag behind those of many OECD nations.[311] Canadians consider vacations important. In 2006, the Commission on the Review of Federal Labour Standards found that most Canadians would like to receive additional vacation leave and 22% would even consider taking a lower salary if necessary to gain this concession.[312]

---

[308] The 20-year Farmingham Study found an association between infrequent vacations and coronary disease. These results were confirmed in a 2001 study that found that more frequent annual vacations were associated with a significant reduction in the risk of death during a 9-year period. The study authors offer possible reasons for this: vacations may reduce stress by removing potential stress and providing a period of 'signaled safety' and vacations may provide a unique opportunity for restorative behaviours such as social contact and physical activity, see Brooks Gump & Karen Matthews, "Are Vacations Good for Your Health? The 9-Year Mortality Experience After the Multiple Risk Factor Intervention Trial" (2001) 62:5 Psychosomatic Medicine 608.

[309] Generally vacations are not available until one year of service has been completed. In Alberta, for example, employees are entitled to two weeks after each of the first four years of employment with pay, and three weeks after five consecutive years of employment with pay, AESC*, supra* note 13, Part 2, Division 6.

[310] Alberta legislation, for example, provides that if employed for 30 days in the previous 12 months, employees may be eligible for nine general holidays, AESC, *supra* note 13, Part 2, Division 5.

[311] *Fairness at Work*, *supra* note 3 at 162. Australia, for example, provides for 4 weeks annual paid vacation and 7 paid holidays. Austria, Sweden and New Zealand even require employers to pay employees a premium rate during vacations. The United States does not mandate annual paid vacations or paid holidays. See Rebecca Ray and John Schmitt, "No-Vacation Nation" (Washington D.C.: Center for Economic and Policy Research, 2007) online: Center for Economic and Policy Research http://www.scribd.com/doc/70107/NoVacation-Nation.

[312] *Fairness at Work*, *supra* note 3 at 162.

As with some other employment standards rights, the obligation of employers to provide *paid* vacations to their workers might be seen as a redistribution of wealth from employers to their workers. Following this reasoning, the qualification periods represent the point at which the time investment of the worker justifies this redistribution of wealth.

The issue of rights to vacations will often be irrelevant in employment standards complaints involving contractors because of the minimum qualifying periods built into the legislation. However in lengthy contractor relationships where the conditions imposed by the employer have the effect of negating any ability for a contractor to take holidays, adjudicators should take care to ensure that the inability of the worker to take vacations is not due to vulnerability of the worker and corresponding exploitation by the employer.

e. Parental/Maternity Leave

Canadian employment standards legislation provides for both maternity leave and parental leave. For example, in Alberta, an eligible employee can take up to 52 consecutive weeks of unpaid leave during which her job will be protected, (with the 52 weeks comprised of 15 weeks of maternity leave and 37 weeks of parental leave which may be taken by either parent).[313] The crucial feature of the legislation is job protection, and particularly job protection for females who might otherwise lose their positions or seniority as a consequence of pregnancy. Maternity and parental benefits contained in employment standards legislation play a crucial role in addressing sex differences between male and female workers and the economic impact of pregnancy and child-rearing on female workers (although fathers can of course also utilize parental leave).

As with vacation leave, the lengthy qualifying period for this right will often

[313] Under Alberta legislation, these rights apply to employees who have been with the employer for 52 consecutive weeks, whether full-time or part-time, AESC, *supra* note 13, Part 2, Division 7.

render the issue moot in the case of independent contractors. Parental and maternity leave rights in employment standards also present a unique problem in the context of independent contractor relationships because they require the employer to 'hold' a job for the worker, which may not be feasible or reasonable. Independent contractors are often retained because they have the 'time availability' that the project requires or they are retained because the employer does not have the time and resources to train an employee to carry out the task. As such, it may be that human rights legislation is a more suitable lens through which to evaluate contractor relationships and that the test of "undue hardship" used in that legislation provides a more appropriate measure for decency appropriate to an independent contractor relationship.[314]

PART V - CLOSING REMARKS

In this paper I have attempted to develop our understanding of the purpose and effect of Canadian employment standards legislation by tracing three main themes

First, I have argued that the fundamental principle underlying the existence of employment standards legislation is that of 'decency' – no individual should be required to work in conditions that fall below the minimum standards of decency because of vulnerability to his or her employer. Employment standards seek to counteract the unequal bargaining position many individual workers find themselves in relative to their employers by establishing minimum standards of decency and providing workers with an effective and affordable means to challenge working conditions that fall below the standards of decency.

[314] However, in the rare cases where independent contractor relationships extend over long periods of time, a refusal of the employer to accommodate pregnancy will have to be evaluated carefully by the adjudicator and may give rise to concerns that the worker is vulnerable and is being denied basic decency.

Secondly, I have shown that some independent contractors share the same vulnerabilities as employees and are in need of and entitled to the benefits of employment standards legislation. Clearly not all independent contractors are vulnerable and in need of employment standards legislation, but some independent contractors share the same vulnerabilities as employees and they too, should have access to the statutory minimum rights and standards. minimum standard of decency contained in the legislation.

Third, this thesis has explored whether there might be more effective methods for adjudicators to determine whether a worker should have access to the protections of employment standards legislation than the current approach of relying on the common law tests. I have argued that the application of the common law tests is not mandated by the legislation and reflects a conception of employment that is increasingly outdated. Most importantly, the common law tests are not sensitive to the vulnerabilities of some workers, yet it is these vulnerabilities that are the concern of employment standards legislation. It is my position that a more sound approach is to consider whether the worker in question shares the same vulnerabilities *vis-à-vis* the employer that we associate with employees and their employers.

Consideration of the above necessarily leads to a final word about the role of adjudicators, the public administrators charged with the interpretation and enforcement of Canada's employment standards. The importance of their position cannot be understated. If employment standards represent our attempt to create a comprehensive scheme to uphold a standard of decent working conditions, then it is essential that adjudicators recognize that their responsibility is not only to the individual complainants who come before them, but to Canadian society as a whole. Canada's employment environment is undergoing change and we rely on adjudicators to keep businesses in check and scrutinize new business practices that threaten to erode or attempt to avoid minimum standards of decency. Adjusters will have to respond with a contemporary perspective, flexibility and responsiveness in the enforcement of legislated standards, all of which, it is argued here, is both permissible and necessary.

TABLE 1.0 SUMMARY OF KEY PROVISIONS SETTING OUT THE SCOPE OF FEDERAL AND PROVINCIAL EMPLOYMENT STANDARDS

JURISDICTION (FEDERAL)	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
Canada (federal) *Canada Labour Code*, R.S.C. 1985, c. L-2.	**Not expressly stated in Part III (**STANDARD HOURS, WAGES, VACATIONS AND HOLIDAYS)	**167.** (1) This Part applies (*a*) to employment in or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut; (*b*) to and in respect of employees who are employed in or in connection with any federal work, undertaking or business described in paragraph (*a*); (*c*) to and in respect of any employers of the employees described in paragraph (*b*); (*d*) to and in respect of any corporation established to perform any function or duty on behalf	**Not defined in Part III.**	**166. "wages"** includes every form of remuneration for work performed but does not include tips and other gratuities;	**166.** "employer" means any person who employs one or more employees;

JURISDICTION (FEDERAL)	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
		of the Government of Canada … (*e*) to or in respect of any Canadian carrier, … Non-application of Division I to certain employees (2) Division I does not apply to or in respect of employees who (*a*) are managers or superintendents or exercise management functions; or (*b*) are members of such professions as may be designated by regulation as professions to which Division I does not apply. Non-application of Division XIV to managers (3) Division XIV does not apply to or in respect of employees who are managers.			

TABLE 1.1 SUMMARY OF KEY PROVISIONS SETTING OUT THE SCOPE OF FEDERAL AND PROVINCIAL EMPLOYMENT STANDARDS (ALBERTA)

ALBERTA	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
Alberta *Employment Standards Code,* R.S.A. 2000, c. E-9.	RECOGNIZING that a mutually effective relationship between employees and employers is critical to the capacity of Albertans to prosper in the competitive world-wide market economy of which Alberta is a part; ACKNOWLEDGING that it is fitting that the worth and dignity of all Albertans be recognized by the Legislature of Alberta through legislation that encourages fair and equitable resolution of matters arising over terms and conditions of employment; REALIZING that the employee-employer relationship is based on a	**2(1)** This Act applies to all employers and employees, including the Crown in right of Alberta and its employees, except as otherwise provided in this section.	1.(1)(k) "employee" means an individual employed to do work who receives or is entitled to wages and includes a former employee;	1. (1)(x) "wages" includes salary, pay, money paid for time off instead of overtime pay, commission or remuneration for work, however calculated, but does not include (i) overtime pay, vacation pay, general holiday pay and termination pay (ii) a payment made as a gift or bonus that is dependent on the discretion of an employer and that is not related to hours of work, production or efficiency (iii) expenses or an allowance provided instead of expenses, or (iv) tips or other gratuities;	1.(1)(l) "employer" means a person who employs an employee and includes a former employer

ALBERTA	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
	common interest in the success of the employing organization, best recognized through open and honest communication between affected parties; RECOGNIZING that employees and employers are best able to manage their affairs when statutory rights and responsibilities are clearly established and understood; and RECOGNIZING that legislation is an appropriate means of establishing minimum standards for terms and conditions of employment; HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:			1. (1) ((aa) "work" includes providing a service;	

TABLE 1.2 SUMMARY OF KEY PROVISIONS SETTING OUT THE SCOPE OF FEDERAL AND PROVINCIAL EMPLOYMENT STANDARDS (BRITISH COLUMBIA)

BRITISH COLUMBIA	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
British Columbia *Employment Standards Act*, (R.S.B.C. 1996), c. 113	**Purposes of this Act** **2** The purposes of this Act are as follows: (g) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment; (h) to promote the fair treatment of employees and employers; (i) to encourage open communication between employers and employees; (j) to provide fair and efficient procedures for resolving disputes over the	**3** (1) Subject to this section, this Act applies to all employees other than those excluded by regulation.	**1 (1) "employee"** includes (a) a person, including a deceased person, receiving or entitled to wages for work performed for another, (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee, (c) a person being trained by an employer for the employer's business, (d) a person on leave from an employer, and (e) a person who has a right of recall;	1.(1)**"wages"** includes (a) salaries, commissions or money, paid or payable by an employer to an employee for work, (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency, (c… (d) … (e) … but does not include (f) … (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency, (h) – (j)…	**1.(1)"employer"** includes a person (a) who has or had control or direction of an employee, or (b) who is or was responsible, directly or indirectly, for the employment of an employee;

BRITISH COLUMBIA	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
	application and interpretation of this Act; (k) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia; (l) to contribute in assisting employees to meet work and family responsibilities.			**"work"** means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.	

TABLE 1.3 SUMMARY OF KEY PROVISIONS SETTING OUT THE SCOPE OF FEDERAL AND PROVINCIAL EMPLOYMENT STANDARDS (MANITOBA)

MANITOBA	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
Manitoba *The Employment Standards Code*, C.C.S.M. c. E110	Not expressly stated.	2(1) Except as otherwise provided in this Code, this Code applies to all employers and employees, including the Crown, and an agency of the Crown, and its employees. 2(3) For greater certainty, this Code does not apply to an independent contractor.	**1. (1) "employee"** means an individual who is employed by an employer to do work, and includes a former employee but does not include a director of a corporation in relation to that corporation	1. (1) **work"** means skilled or unskilled manual, clerical, domestic, professional or technical labour performed or services provided by an employee;	**(1) "employment"** means the engagement of an employee by an employer for the performance of work by the employee under an agreement in which the employee agrees to perform work for the employer for consideration that consists of or includes wages paid to the employee by the employer; **1.(1)"employer"** means a person that employs an employee in any employment or business, and

MANITOBA	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
					includes (a) a person that has control or direction of, or is directly or indirectly responsible for, the employment of an employee or the payment of wages to an employee, (b) a former employer, (c) a receiver of the business of an employer, and (d) two or more employers declared to be a single employer under section 134;

TABLE 1.4 SUMMARY OF KEY PROVISIONS SETTING OUT THE SCOPE OF FEDERAL AND PROVINCIAL EMPLOYMENT STANDARDS (NEWFOUNDLAND & LABRADOR)

NEWFOUNDLAND AND LABRADOR	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
Newfoundland and Labrador *Labour Standards Act,* R.S.N.L.1990, c. L-2.	Not expressly stated. Subtitle of Act: *AN ACT TO PROVIDE UNIFORM MINIMUM STANDARDS OF CONDITIONS OF EMPLOYMENT IN THE PROVINCE*	Not expressly stated.	2. (d) "employee" means a natural person who works under a contract of service for an employer; 2. (b) "contract of service" means a contract, whether or not in writing, in which an employer, either expressly or by implication, in return for the payment of a wage to an employee, reserves the right of control and direction of the manner and method by which the employee carries out the duties to be performed under the contract, but does not include a contract entered into by an employee qualified in or training for qualification in and working for an employer in the practice of	2. (i) "wage" means remuneration, salary, commission or return in a form permitted by this Act, or combination of forms, for work or services performed by an employee for an employer under a contract of service and, if the context so admits, includes payments provided for in this Act for vacation pay and holiday pay, but does not include tips and gratuities	2. (e) "employer" means a person who is a party to a contract of service with an employee;

NEWFOUNDLAND AND LABRADOR	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
			(i) accountancy, architecture, law, medicine, pharmacy, professional engineering, surveying, teaching, veterinary science, and (ii) other professions and occupations that may be prescribed;		

TABLE 1.5 SUMMARY OF KEY PROVISIONS SETTING OUT THE SCOPE OF FEDERAL AND PROVINCIAL EMPLOYMENT STANDARDS (NEW BRUNSWICK)

NEW BRUNSWICK	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
New Brunswick *Employment Standards Act,* S.N.B. 1982, c. E-7.2	Not stated.	2. Except where exempted under this Act or the regulations, all employers and employees …are bound by this Act, … 4. (1)Subject to subsection (2), this Act applies notwithstanding any agreement to the contrary between an employer and an employee. 8. (1) An employer may apply to the Director (a) in response to a complaint filed under this Act; (b) in response to a proceeding initiated by the Director under this Act; or (c) at any other time; to be exempted from any provision of this Act, and the Director may grant an exemption if the employer	1. "employee" means a person who performs work for or supplies services to an employer for wages, but does not include an independent contractor;	1. "wages" includes salary, commissions and compensation in any form for work or services measured by time, piece or otherwise, but does not include public holiday pay, pay in lieu of public holidays, vacation pay, pay in lieu of vacation, gratuities or honoraria.	1. "employer" means a person, firm, corporation, agent, manager, representative, contractor or sub-contractor having control or direction of or being responsible, directly or indirectly, for the employment of one or more persons and includes employer as defined in the *Public Service Labour Relations Act*, but does not include a person having control or direction of or

NEW BRUNSWICK	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
		can show to his satisfaction that, in addition to any other requirement that may be established in this Act, *(d)* the employer suffers a special hardship in complying with the provision that is not suffered by other employers; and*(e)* the employee receives other benefits or advantages that can be viewed as reasonable compensation for the sacrifice of the benefit, advantage, privilege or protection offered by the provision in respect of which the exemption is sought; or that the employment contract in question was entered into voluntarily and without force or coercion between persons having a close family relationship.			being responsible, directly or indirectly, for the employment of persons in or about his private home;

TABLE 1.5 SUMMARY OF KEY PROVISIONS SETTING OUT THE SCOPE OF FEDERAL AND PROVINCIAL EMPLOYMENT STANDARDS (NOVA SCOTIA)

NOVA SCOTIA	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
Nova Scotia *Labour Standards Code*, R.S.N.S. 1989, c. 246	Not expressly stated.	4 (1) Subject to exceptions expressly provided for by other provisions of this Act, this Act applies to all matters within the legislative jurisdiction of the Province including Her Majesty in right of the Province and the employees of Her Majesty. (2) The Governor in Council may by regulation expressly exempt the following persons from application of this Act or any Section or Sections of this Act: (a) members of named professions; (b) those who are engaged in classes of work designated in the regulations. 6.This Act applies notwithstanding any other law or any custom, contract	2. (d) "employee" means a person employed to do work and includes a deceased employee but does not include a teacher employed by Her Majesty, the Minister of Education, a school board as defined in clause (c) of Section 2 of the Education Act, or other employer, to teach, supervise or administer in a public school, a school established or maintained under the Education Act or in a school system;	2. (u) "wage" or "wages" includes salaries, commissions and compensation in any form for work or services measured by time, piece or otherwise, and includes compensation under Sections 37, 40, 41, 46, 50, 57, 58, 72 and 74, but does not include vacation pay and pay in lieu of vacation under Sections 32, 33 or 34 or gratuities.	2. (e) "employer" means a person, firm, corporation, agent, manager, representative, contractor or subcontractor having control or direction of or being responsible, directly or indirectly, for the employment of any employee;

NOVA SCOTIA	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
		or arrangement, whether made before, on or after the first day of February, 1973, but nothing in this Act affects the rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to him than his rights or benefits under this Act.			

TABLE 1.6 SUMMARY OF KEY PROVISIONS SETTING OUT THE SCOPE OF FEDERAL AND PROVINCIAL EMPLOYMENT STANDARDS (ONTARIO)

ONTARIO	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
Ontario *Employment Standards Act*, S.O. 2000, c. 41	Not expressly stated.	3. (1) Subject to subsections (2) to (5), the employment standards set out in this Act apply with respect to an employee and his or her employer if, (a) the employee's work is to be performed in Ontario; or (b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.	1. (1) "employee" includes, (a) a person, including an officer of a corporation, who performs work for an employer for wages, (b) a person who supplies services to an employer for wages, (c) a person who receives training from a person who is an employer, as set out in subsection (2), or (d) a person who is a homeworker, and includes a person who was an employee; "homeworker" means an individual who performs work for compensation in premises occupied by the individual primarily as residential quarters but does not include an independent contractor;	1. (1) "wages" means, (a) monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied, (b) any payment required to be made by an employer to an employee under this Act, and (c) any allowances for room or board …, but does not include, (d) tips and other gratuities, (e) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and	1. (1) "employer" includes, (a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and (b) any persons treated as one employer under section 4, and includes a person who was an

ONTARIO	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
				that are not related to hours, production or efficiency, (f) expenses and travelling allowances, or (g) subject to subsections 60 (3) or 62 (2), employer contributions to a benefit plan and payments to which an employee is entitled from a benefit plan;	employer;

TABLE 1.7 SUMMARY OF KEY PROVISIONS SETTING OUT THE SCOPE OF FEDERAL AND PROVINCIAL EMPLOYMENT STANDARDS (PRINCE EDWARD ISLAND)

PRINCE EDWARD ISLAND	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
Prince Edward Island *Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2	1.1 The purposes of this Act are as follows: (a) to ensure that employees receive at least basic conditions and benefits of employment; (b) to promote positive relationships and open communications between employers and employees; (c) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of Prince Edward Island; (d) to contribute in assisting employees to meet work and family responsibilities;	2. (1) Except as otherwise expressly provided by this Act or the regulations, this Act and the regulations apply to all employers and employees. (2) Notwithstanding subsection (1), only those provisions of this Act relating to the payment and protection of pay apply to the following employees: (a) salespersons whose income is derived primarily from commission on sales; and (b) farm labourers. (3) Notwithstanding subsection (1), the provisions of sections 5 and 15 do not apply to (a) persons employed for the sole purpose of protecting and caring for children, handicapped or aged persons in private homes; and (b) employees of a non-profit organization who are required by the terms of their	1. (c) "employee" means a person who performs any work for or supplies any services to an employer for pay, and includes (i) a person who is on leave from an employer, (ii) a person who is being trained by an employer to perform work for or supply services to the employer, or (iii) a person who was an employee; (b) "contract of service" means a contract, whether or not in writing, in which an employer, either	1. (m) "pay" means, unless the context indicates otherwise, all compensation due or paid to an employee for work done for or services supplied to an employer and includes vacation pay, pay in lieu of vacation, gratuities and benefits;	1. (d) "employer" means a person, firm or corporation, agent, manager, representative, contractor or sub-contractor having control or direction of or being responsible, directly or indirectly, for the employment of an employee and includes a person who was an employer;

PRINCE EDWARD ISLAND	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
	(e) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act. 2009,c.5,s.3.	employment to live-in at a facility operated by the organization. (4) Notwithstanding subsection (1), only the following provisions of this Act apply to employees whose terms and conditions of work are established by a collective agreement pursuant to the Labour Act.	expressly or by implication, in return for the payment of pay to an employee, reserves the right of control and direction of the manner and method by which the employee carries out the duties to be performed under the contract;		

TABLE 1.8 SUMMARY OF KEY PROVISIONS SETTING OUT THE SCOPE OF FEDERAL AND PROVINCIAL EMPLOYMENT STANDARDS (QUÉBEC)

QUÉBEC	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
Quebec *An Act respecting labour standards*, R.S.Q. c. N-1.1	Purpose is not expressly stated. **The *Act* permits one to challenge to a change in status from employee to contractor:** **86.1.** An employee is entitled to retain the status of employee where the changes made by the employer to the mode of operation of the enterprise do not change that status into that of a contractor without employee status. Where the employee is in disagreement with the employer regarding the consequences of the changes on the status of the employee, the employee may file a	**2.** This Act applies to the employee regardless of where he works. It also applies (1) to the employee who performs work both in Québec and outside Québec…; (2) to the employee domiciled or resident in Québec who performs work outside Québec for an employer contemplated in paragraph 1; (3) *(paragraph repealed).* This Act is binding on the State. **3.** This Act does not apply (1) *(paragraph repealed)*;	**1. (10**) "employee" means a person who works for an employer and who is entitled to a wage; this word also includes a worker who is a party to a contract, under which he or she (i) undertakes to perform specified work for a person within the scope and in accordance with the methods and means determined by that person; (ii) 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 or her; and	1**. (9)** "wages" means a remuneration in currency and benefits having a pecuniary value due for the work or services performed by an employee; ***note: "work" is not defined in the Act.***	**1. (7)** "employer" means any person who has work done by an employee;

QUÉBEC	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
	complaint in writing with the Commission des normes du travail. On receipt of the complaint, the Commission shall make an inquiry and the first paragraph of section 102 and sections 103, 104 and 106 to 110 shall apply, with the necessary modifications. If the Commission refuses to take action following a complaint, the employee may, within 30 days of the Commission's decision under section 107 or 107.1, make a written request to the Commission for the referral of the complaint to the Commission des relations du travail.	(2) to an employee whose exclusive duty is to take care of or provide care to a child or to a sick, handicapped or aged (3) to an employee governed by the Act respecting labour relations, vocational training and workforce management in the construction industry… (4) to the employee contemplated in subparagraphs i, ii and iii of paragraph 10 of section 1 if the Government, by regulation pursuant to another Act, establishes the remuneration of that employee or the tariff that is applicable to him; (5) to a student who works during the school year in an establishment selected by an	(iii) keeps, as remuneration, the amount remaining to him or her from the sum he has received in conformity with the contract, after deducting the expenses entailed in the performance of that contract;		

QUÉBEC	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
		educational institution pursuant to a job induction program approved by the Ministère de l'Éducation, du Loisir et du Sport; (6) to senior managerial personnel, except the standards prescribed by the second paragraph of section 79.1, sections 79.7 to 79.16, sections 81.1 to 81.20 and, where they relate to any of those standards, the second, third and fourth paragraphs of section 74, paragraph 6 of section 89, Division IX of Chapter IV, Divisions I, II and II.1 of Chapter V, and Chapter VII. **3.1**. Notwithstanding section 3, Divisions V.2 and VI.1 of Chapter IV, sections 122.1 and 123.1 and Division II.1 of Chapter V apply to all employees and to all			

QUÉBEC	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
		employers. Subparagraph 7 of the first paragraph of section 122 and, where they relate to a recourse under that subparagraph, the other sections of Division II of Chapter V also apply to all employees and to all employers.			

TABLE 1.9 SUMMARY OF KEY PROVISIONS SETTING OUT THE SCOPE OF FEDERAL AND PROVINCIAL EMPLOYMENT STANDARDS (SASKATCHEWAN)

SASKATCHEWAN	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
Saskatchewan *Labour Standards Act*, R.S.S. 1978, c. L-1	Not expressly stated.	4(1) Subject to subsections (1.1), (2), (3) and (4) and to the regulations, the provisions of this Act apply to the Crown in right of Saskatchewan and to every employee employed in the Province of Saskatchewan and to the employer of every such employee. (1.1) Without limiting the generality of subsection (1) but subject to the exemptions prescribed in the regulations, this Act applies to employees who work at home. (2) Part I of this Act does not apply to an employee who performs services that are entirely of a managerial character. (3) Subject to subsection (3.1), this Act does not apply to an employee employed primarily in farming,	2. (d) "employee" means a person of any age who is in receipt of or entitled to any remuneration for labour or services performed for an employer;	2. (r) "wages" means all wages, salaries, pay, commission and any compensation for labour or personal services, whether measured by time, piece or otherwise, to which an employee is entitled;	2. (e) "employer" means any person that employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who either: (i) has control or direction of one or more employees; or (ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or

SASKATCHEWAN	STATEMENT OF PURPOSE/OTHER REMARKS	SCOPE OF COVERAGE	"EMPLOYEE"	OTHER DEFINITIONS	"EMPLOYER"
		ranching or market gardening. (3.1) For the purposes of subsection (3), the following are deemed not to be within the meaning (a) (b) of farming, ranching or market gardening: the operation of egg hatcheries, greenhouses and nurseries; bush clearing operations; (c)commercial hog operations. (4)…			the receipt of wages by, one or more employees;

BIBLIOGRAPHY

Legislation

Alberta Human Rights Act, R.S.A. 2000, c. A-25.5.

Alberta's *The Factories Act*, 1917, ch. 20.

An Act respecting labour standards, R.S.Q. c. N-1.1.

An Act to make Regulations with respect to Coal Mines, 1906, ch. 25.

Canada Labour Code, R.S.C. 1985, c. L-2.

Employment Standards Act, R.S.B.C. 1996, c. 113.

Employment Standards Act, R.S.O. 1980, c. 137.

Employment Standards Act, R.S.Y. 2002, c. 72.

Employment Standards Act, S.N.B. 1982, c. E-7.2.

Employment Standards Act, S.O. 2000, c. 41.

Employment Standards Code, C.C.S.M. c. E110.

Employment Standards Code, R.S.A. 2000, c. E-9 and Alta. Reg. 14/97.

Factories Act of 1833 (3 & 4 Will. IV) c. 103.

Factories Act 1847 (10 & 11 Vict c. 29).

Hours of Work Act, 1936, ch. 5.

Individual Rights Protection Act Individual's Rights Protection Act, R.S.A. 1980, c. I-2.

Interpretation Act, R.S.A. 2000, c. I-8.

Labour Code, R.S., 1985, c. L-2.

Labour Relations Code, R.S.B.C. 1996, c. 244.

Labour Standards Act, R.S.S. 1978, c. L-1.

Labour Standards Act, R.S.N.L.1990, c. L-2.

Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313.

Labour Standards Act, R.S.S. 1978, c. L-1.

The Constitution Act, 1867 (U.K.), 30 & 31 Vict., c.3 reprinted in R.S.C. 1985, App. II, No. 5.

The Factories Act, 1917, ch. 20.

The Minimum Wage Act, 1922, ch. 81.

Validity and Applicability of the Industrial Relations and Disputes Investigation Act, [1955] S.C.R. 529.

Jurisprudence

671122 Ontario Ltd. v. Sagaz Industries Canada Inc., 2001 SCC 59, [2001] 2 S.C.R. 983.

671693 Alberta Ltd. (A.K. Gill Transport), 2007 CanLII 54258 (AB ESU).

994841 Alberta Ltd. v. Troy, 2005 CanLII 51534.

1096043 Alberta Ltd. and E. Davis Developments Ltd. operating as Station 33rd Condominiums and Sandra Miriam Saturley, 2006 CanLII 46767.

6701141 Canada Ltd. (c.o.b. Pizza Hut) [2012] O.E.S.A.D. No. 1016.

Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.).

Bay Technology Corporation, BC EST # D143/01.

Belgoma Transportation Limited o/a Checker Cab, April 8, 1991 (E.S.C. 2838).

Brouillette v. H & R Transport Ltd., [2010] C.L.A.D. No. 315.

Cackleberries Entertainment Inc., BC EST # D003/11.

Carter v. Bell & Sons (Canada) Ltd., [1936] O.R. 290, [1936] 2 D.L.R. 438 (C.A.).

Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227.

Cheryl Balcilek carrying on business as Trans Academe Tutoring, BC EST # D002/11.

City Import Centre 1997 Ltd., BC EST #D170/00.

Cook v. Peresky, 2005 CanLII 51563.

Co-Operators Insurance Association v. Kearney, [1965] S.C.R. 106.

Cormier v. Human Rights Commission (1984), 33 Alta. L.R. (2d) 359. 6 C.C.E.L. 17.

Covert v. Nova Scotia (Minister of Finance), [1980] S.C.J. No. 101, [1980] 2 S.C.R. 774 at 807.

Elsegood v Cambridge Spring Service (2001) Ltd., 2011 ONCA 831.

Gateway West Management Corporation v. Bogojevic, 2004 CanLII 55149.

Global Courier & Messenger Services Ltd. v. Sandeep Brar, [2006] O.E.S.A.D. No. 326.

Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 S.C.R. 391, 2007 SCC 27.

Heritage Construction Group Ltd. [2011] O.E.S.A.D. No. 782.

Heydon's Case (1584), 3 Co. Rep. 7a, 76 E.R. 637.

Hôpital Notre-Dame de l'Espérance v. Laurent, [1978] 1 S.C.R. 605.

JKC Enterprises v. Woolworth Canada Inc., 2001 ABQB 791, [2001] A.J. No. 1220.

Knight Piesold Ltd. 1999 BCEST #D093/99.

Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491.

MacKinnon v. McDougall, 2002 CanLII 45616.

Majestic Maintenance Services Limited, E.S.C. 479A, February 8, 1977.

Marmit Plastics Inc. v. Garry Douglas Emmott, 2000 CanLII 20281.

Marek Gabinski, BC EST # D117/10.

Market Investigations, Ltd. v. Minister of Social Security, [1968] 3 All E.R. 732.

McKee v. Reid's Heritage Homes Ltd. 2009 ONCA 916, (2009), CarswellOnt 8053.

McKnight Village Physical Therapy 1992 Inc. v. Inglis, 2002 CanLii 45600.

Mickey Transport Ltd. 2010 BC EST # D012/10.

Montreal v. Montreal Locomotive Works Ltd. et al., [1947] 1 D.L.R. 161 (P.C.).

NICO Industries Inc., BC EST # D011/11.

P&L Corporation_Ltd., [2012]*O.E.S.A.D. No.DOC.*

Pete the Plumber Ltd. v. Johanson, 2002 CanLII 45619.

Pointe-Claire (Ville) c. S.E.P.B., Local 57, [1997] 1 S.C.R. 1015, S.C.J. No. 1015, (SCC).

Project Headstart Marketing Ltd., BC EST # D164/98.

Q Design & Construction Ltd. v. Gates, 2005 CanLII 51539.

R. v. Pereira, (1988) A.R. 196, 59 Alta. L.R. (2d) 341 (ABQB).

Red Deer Stucco & Construction Ltd. v. Flohr, 2004 CanLII 55174.

Reference Re Public Service Employee Relations Act (Alta.), 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313.

Regina v. Walker (1858), 27 L.J.M.C. 207.

Re Eiler [1994] O.E.S.A.D. No. 165, Decision No. ESC 95-73.

Re Jane Welch (operating as Windy Willows Farms) BC EST # D161/05

Re North Delta Real Hot Yoga Ltd. (c.o.b. Bikram Yoga Delta), BC EST No. D026/12, [2012] B.C.E.S.T.D. No. 26.

Re Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2.

Royal Winnipeg Ballet v. M.N.R., 2006 FCA 87 (CanLii).

Seventy-Five Hundred Taxi Inc. [2011] O.E.S.A.D.No. 925.

Smith v. Centra Windows Ltd., 2009 BCSC 606.

Soost v. Merrill Lynch Canada Inc., 2010 ABCA 251.

Stevenson Jordon & Harrison Ltd. v. MacDonald and Evans, [1952] 1 T.L.R. 101.

State of the Art Bookkeeping/Accounting Ltd. 2009 BC EST # RD090/09.

Sunstar Uniforms Inc. v. The Director of Employment Standards, March 12, 1998 (Canlii) (A.E.S.U.).

Telsco Security Systems Inc. v. Wong, 2006 CanLII 37748 (AB ESU).

Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail), 2012 SCC 23.

Toronto Electric Commissioners v. Snider, [1925] A.C. 396.

Stixx Construction Ltd. (CRIBB-ITT Foundations) v. Geue, 2007 CanLII 40468.

Van Go Artisans Inc. v. Ramey, 2001 Canlii 25654.

Wiebe Door Services Ltd. v. M.N.R., [1986] 3 F.C. 553.

Yellow Cab Ltd. v. Alberta (Labour Relations Board) [1980] S.C.J. No. 100, [1980] 2 S.C.R. 761.

Secondary Resources

Sandra E. Black & Lisa M. Lynch, "What's Driving The New Economy?: The Benefits of Workplace Innovation" (2004) 114: 493 The Economic Journal F97–F116.

Peter Cappelli & David Neumark, "Do 'High-Performance' Work Practices Improve Establishment-Level Outcomes?" (2001) 54:2 Ind. & Labor Relations Rev. 737.

Commission on the Review of Federal Labour Standards (Canada), *Fairness at Work : Federal Labour Standards For The 21st Century* (Ottawa: Federal Labour).

Richard Chaykowski, "Canadian Workers Most in Need of Labour Standards Protection: A Review of the Nature and Extent of Vulnerability In the Canadian Labour Market and Federal Jurisdiction" (Ottawa: 2005, HRDC) at 22, online: HRDC http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/research02.pdf

Guy Davidov, "A Purposive Interpretation of the National Minimum Wage Act" (2009) 72:4 Mod. L.Rev. 581.

Guy Davidov,"Re-Matching Labour Laws with Their Purpose" Guy Davidov and Brian Langille (eds.) *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) at 179.

Davidov, G. "The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*"* (2002) 52 U.T.L.J. 357.

A Dembe, J. Erickson, R. Deblos & S. Banks "The impact of overtime and long work hours on occupational injuries and illnesses: new evidence from the United States" (2005) 62:9 *Occup. Environ. Med.* 588.

Elmer Driedger, *The Construction of Statutes,* 2d ed. (Toronto: Butterworths, 1983).

L. Duxbury & C. Higgins, Work-Life Conflict in Canada in the New Millennium: A Status Report (Report Two) (Ottawa: Health Canada, 2003) at xvi, online: Health Canada http://www.hc-sc.gc.ca/pphb-dgspsp/publicat/work-travail/report2/index.html.

Kent Elson, “Taking Workers’ Rights Seriously: Private Prosecutions of Employment Standards Violations”, (2008) 26 Windsor Y.B. Access Just. 329.

Geoffrey England, *Individual Employment Law* (Toronto: Irwin Law, 2000).

Geoffrey England, “Report to the Task Force on Part 111 of the Canada *Labour Code* regarding the termination of employment provisions of the Canada *Labour Code*” (Ottawa: HRSDC, 2006) online: HRSDC http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/research13.pdf.

David Fairey, “New 'Flexible' Employment Standards Regulation in British Columbia” (2007) 21 J.L. & Soc. Pol’y 91.

Robert Flannigan, “Enterprise control: The Servant-Independent Contractor Distinction” (1987) 37 U.T.L.J. 25.

Judy Fudge, “Equity Bargaining in the New Economy” (2006) 8 Just Labour 82.

Judy Fudge, “The New Workplace: Surveying the Landscape” (2009) 33 Man. L.J. 131.

Judy Fudge, Eric Tucker & Leah Vosko, “Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada” (2003) 10 C.L.E.L.J. 193.

Brooks Gump & Karen Matthews, “Are Vacations Good for Your Health? The 9-Year Mortality Experience After the Multiple Risk Factor Intervention Trial” (2001) 62:5 Psychosomatic Medicine 608.

Morley Gunderson, “Minimum Wages in Canada: Theory, Evidence and Policy” (Ottawa: HRDC, 2005) at 46, online: HRDC http://www.rhdcc.gc.ca/eng/labour/employment_standards/fls/pdf/research11.pdf.

Morley Gunderson, “Social and Economic Impact of Labour Standards”, (Ottawa: HRSDC, 2005) (Paper prepared for Federal Labour Standards Review Commission).

Geoff R. Hall, “Statutory Interpretation in the Supreme Court of Canada: The Triumph of a Common Law Methodology” (1998) 21 Advocates’ Q. 38.

Human Resources and Development Canada, *Profile of Federal Labour Jurisdiction Workplaces: Results from the 2008 Federal Jurisdiction Workplace* (Ottawa: Human Resources and Development Canada, 2010) at 7, online: http://www.hrsdc.gc.ca/eng/labour/employment_standards/publications/pdf/fjws_2008.pdf.

Industry Canada, *Key Small Business Statistics*, (Ottawa: Industry Canada, July 2011), Table 11, online: Industry Canada http://www.ic.gc.ca/eic/site/061.nsf/eng/rd02609.html.

Industry Canada, *Key Small Business Statistics,* (Ottawa: Industry Canada, 2012), online: Industry Canada http://www.ic.gc.ca/eic/site/061.nsf/eng/02724.html.

Industry Canada, *Self-employment Trends in Canada*, (Ottawa: Industry Canada, 1997), online: Industry Canada http://www.ic.gc.ca/eic/site/061.nsf/eng/rd00246.html.

Industry Canada, *Small Business Quarterly,* vol. 13, no.3, (Ottawa: Industry Canada, 2011).

Industry Canada, *Small Business Quarterly*. vol. 13, no. 4, (Ottawa: Industry Canada, February 2012), online: Industry Canada http://www.ic.gc.ca/eic/site/sbrp-rppe.nsf/eng/rd02662_1.html.

International Labour Organization, *Decent work and the informal economy*, ILO, 90th Sess., UN Doc. ISBN 92-2-112429-0 ISSN 0074-6681, 2002 [*Decent work*], online: International Labour Organization http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/rep-vi.pdf.

International Labour Organization, "Flexibilizing employment: an overview" by Kim Van Eyck, SEED WORKING PAPER No. 41 (01 April 2003).

ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 86th Sess., Geneva, 18 June 1998 (Annex revised 15 June 2010).

ILO: Report of the Committee on the Informal Economy, Resolution and conclusions concerning decent work and the informal economy, adopted on 19 June 2002, ILC, 90th Session, Geneva, 2002, online: ILO http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25.pdf.

Harvey Krahn, "Non-standard Work on the Rise" (1995) Perspectives, Winter, Catalogue 75-001E, online: http://www.statcan.gc.ca/studies-etudes/75-001/archive/e-pdf/2459-eng.pdf.

Brian Langille & Guy Davidov, "Beyond Employees and Independent Contractors: A View from Canada" (1999) 21 Comp. Lab. L. and Pol'y J.

Sébastien LaRochelle-Côte, "Self-Employment in the Downturn", *Perspectives*, Catalogue no. 75-001-X (March 2010), online: Statistics Canada http://www.statcan.gc.ca/pub/75-001-x/2010103/pdf/11138-eng.pdf.

Sébastien LaRochelle-Côte & Sharanjit Uppal, "The Financial Well-Being of the Self-Employed", *Perspectives on Income and Labour*, (Ottawa: Statistics Canada, 2011), online: Statistics Canada http://www.statcan.gc.ca/pub/75-001-x/2011004/article/11535-eng.pdf.

Mitchell McInnes, Ian R. Kerr & J. Anthony VanDuzer, *Managing the Law: The Legal Aspects of Doing Business,* 3d ed. (Toronto: Pearson Education, 2011).

Rebecca Ray and John Schmitt, "No-Vacation Nation" (Washington D.C.: Center for Economic and Policy Research, 2007) online: Center for Economic and Policy Research http://www.scribd.com/doc/70107/NoVacation-Nation.

Statistics Canada, *Knowledge workers in Canada's economy, 1971-2001,* by John Baldwin & Desmond Beckstead (Ottawa: Statistics Canada, 2003), online: Statistics Canada http://publications.gc.ca/collections/Collection/Statcan/11-624-M/11-624-MIE2003004.pdf.

Statistics Canada, *Study: Knowledge workers in Canada's workforce, The Daily,* (Ottawa: Statistics Canada, 2003), online: Statistics Canada http://www.statcan.gc.ca/daily-quotidien/031030/dq031030a-eng.htm.

Statistics Canada, *Knowledge workers on the move*, *Perspectives,* by John Zhao, Doug Drew & T.Scott Murray (Ottawa: Statistics Canada, 2000), online: Statistics Canada http://www.statcan.gc.ca/studies-etudes/75-001/archive/e-pdf/5072-eng.pdf.

Statistics Canada, *Labour force survey estimates (LFS), by sex and detailed age group, annual* (CANSIM Table 282-0002) (Ottawa: Statistics Canada, 2012), online: Statistics Canada http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=13#M_5.

Statistics Canada, *Labour force survey estimates (LFS)*, (CANSIM Tables 282-0001, 282-0014) (Ottawa: Statistics Canada, 2012) online: Statistics Canada http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labor63b-eng.htm.

Statistics Canada, *Labour force survey estimates (LFS)*, (CANSIM Table 282-0004) (Ottawa: Statistics Canada, 2012), online: Statistics Canada http://www5.statcan.gc.ca/cansim/a26.

Statistics Canada, *Labour force survey estimates (LFS)*, (CANSIM Tables 282-0011, 282-0012, 282-0013, 282-0035, 282-0079) (Ottawa: Statistics Canada, 2012) online: Statistics Canada http://www5.statcan.gc.ca/cansim/a33?lang=eng&spMode=master&themeID=2621&RT=TABLE.

Statistics Canada, *Labour force survey estimates (LFS)*, (CANSIM Tables 282-0011, 282-0012, 282-0013, 282-0014, 282-0035, 282-0079, 282-0080) (Ottawa: Statistics Canada, 2012) online: Statistics Canada http://www5.statcan.gc.ca/cansim/a03. Retrieved 2012-10-11).

Statistics Canada, *Labour force survey estimates (LFS)*, (CANSIM Table 282-0012) (Ottawa: Statistics Canada, 2012), online: Statistics Canada http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labor64-eng.htm.

Statistics Canada, *Labour force survey estimates (LFS), employees by job permanency, North American Industry Classification System (NAICS), sex and age group, annual* (CANSIM Table 282-0080) (Ottawa: Statistics Canada, 2012).

Statistics Canada, *The Effect of Organizational Innovation and Technology on Firm Performance Information*, by Wulong Gu and Surendra Gera, The Canadian Economy in Transition Series Research Paper Ottawa (Ottawa: Micro-economic Analysis Division, 2004) at 32, Table 4, "Mean Incidence of Organizational Innovation", online: Statistics Canada http://www.statcan.gc.ca/pub/11-622-m/11-622-m2004007-eng.pdf.

Statistics Canada, *Working with computers, Perspectives on Labour and Income Vol. 2 No. 5* (Ottawa: Statistics Canada, 2001), online: Statistics Canada http://www.statcan.gc.ca/pub/75-001-x/00501/5724-eng.html.

Katherine Stone, "Flexibilization, Globalization, and Privatization: Three Challenges to Labor Rights in Our Time" (2006) 44:1 O.H.L.J. 77.

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ontario: LexisNexis Canada Inc., 2008).

Ruth Sullivan, "Statutory Interpretation in Canada: The Legacy of Elmer Driedger," in T. Gotsis (ed.), *Statutory Interpretation: Principles and pragmatism for a new age.* (Judicial Commission of New South Wales, 2007) 105.

The New York Times, "The Benefits of Outsourcing for Small Businesses" *The New York Times* (1 January 2008), online: The New York Times http://www.nytimes.com/allbusiness/AB5221523_primary.html.

Marianna Virtanen, Stephen A. Stansfeld, Rebecca Fuhrer, Jane E. Ferrie, Mika Kivimäki, "Overtime Work as a Predictor of Major Depressive Episode: A 5-Year Follow-Up of the Whitehall II Study" (2012) PLoS ONE 7(1): e30719.doi:10.1371/journal.pone.0030719.

Marianna Virtanen, Jane E. Ferrie, Archana Singh-Manoux, Martin J. Shipley, Jussi Vahtera, Michael G.Marmota and Mika Kivima, "Overtime work and incident coronary heart disease: the Whitehall II prospective cohort study" (2010) Eur. Heart J. published online May 11, 2010. online: European Society of Cardiology http://eurheartj.oxfordjournals.org/content/early/2010/05/04/eurheartj.ehq124.abstract/.

Leah F. Vosko, N. Zukewich, N. & C. Cranford, "Precarious Jobs: A new typology of employment" (2003) Vol. 4 No. 10 Perspectives on Labour and Income, online: http://www.labourcouncil.ca/amillionreasons/Precariousjobs.pdf.

L.F. Vosko, N. Zukewich, & C. Cranford, "Precarious Jobs: A new typology of employment" (2003) Vol. 4 No. 10 *Perspectives on Labour and Income, the Online Edition*, online: Statistics Canada http://www.statcan.gc.ca/pub/75-001-x/01003/6642-eng.html.