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NEW WINE INTO OLD BOTTLES?: UPDATING LEGAL FORMS TO REFLECT CHANGING EMPLOYMENT NORMS

JUDY FUDGE†

"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."¹

"Viewing labour as a commodity is incompatible with such a perspective."²

"Employment is of central importance in our society."³

Introduction

Where do these assertions come from? While they are all compatible with Karl Marx's understanding of the significance of work for human beings and employment for society, they were not culled from The Communist Manifesto.⁴ Nor are they from the workers' premier international advocate, the International Labour Organization (ILO), although the middle one appears to be a crib of the ILO's 1919 founding slogan "labour is not a commodity."⁵ These quotations are Canadian in origin but were not made by the traditional partisans of working people. They were uttered by the Supreme Court of Canada.

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¹ Reference Re Public Service Employees Relations Act (Alberta), [1987] 1 S.C.R. 313 at 368 [hereinafter PSERA Reference].


The first quotation is from the 1987 dissenting judgment of Chief Justice Brian Dickson in the lead decision of what has become known as the right to strike. The second has its origin in his majority decision in *Slaight Communications Inc. v. Davidson*, a 1989 case dealing with an individual employment relationship. The third is from the 1992 case of *Machtinger v. HOJ Industries Ltd.*, and is a quotation from the judgment of Mr. Justice Iacobucci, who has taken up the late Chief Justice's mantle in the area of employment law. As Mr. Justice Iacobucci said last year in *Rizzo v. Rizzo Shoes Ltd.*, the majority of the Supreme Court of Canada has "recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual."

The Supreme Court has come to appreciate the crucial role employment plays in liberal democracies. Although this may be changing, it remains the predominant means of organizing the use of labour for remuneration in contemporary Canadian society. The legal status of being an “employee” is the gateway to most employment-related protections at common law and under legislation. A person seeking reasonable notice, minimum wages, statutory holidays, or maternity leave must establish to an adjudicator’s satisfaction that they are an employee, in order to enjoy these legal rights. Employee status is also a prerequisite, in the overwhelming majority of cases, for the application of collective bargaining legislation. Moreover, it is crucial for a range of other benefits in our society, from employment insurance to pensions. Owing to our system of payroll taxes and withholding income tax at source, employment is also a huge source of revenue for the state.

My focus is on the divergence within employment between its social and legal senses. While there has always been a gap between what we recognize for everyday, non-technical purposes as “employment” and what the law has been prepared to accept, the gap is growing. I shall argue, in part, that this gap is getting wider not only because of the shortcomings in the legal definition of the employment relationship, but also because of an inadequate and outmoded conceptualization of the employment relationship as contractual in nature. By invoking both the historical antecedents of the legal category of employment and contemporary employment-related legislation, and by using examples of the changing nature of employment, I will illustrate how the legal understanding of employment as primarily a contractual relationship between two juridical equals is flawed. Not only does the legal definition fail to capture a wide range of employment-like situations, it creates an incentive to structure work relations to avoid legal rights and obligations. In short, because we have conceptualized the employment relationship so

poorly at law, we invite shams and waste precious time, talent, and energy in applying what were always inadequate definitions to a world of work that is being revolutionized. I will conclude by offering some suggestions for updating the legal form of employment.

**The Social and Legal Meanings of Employment**

It is important to consider how we define employment in an ordinary or social sense. The 9th edition of the *Concise Oxford Dictionary* defines “employment” as “the act of employing or the state of being employed.” To “employ” is defined as to “use the services (of a person) in return for payment,” and “employee” is defined as “a person employed for wages or salary.” In its ordinary sense, we tend to regard any form of paid work as employment. But, as Tony Hickling notes:

[w]hilst in its etymological or dictionary sense employment is a broad concept, employee in the context of labour relations legislation was initially confined by judicial interpretation to persons who at common law would have been regarded as employed under a contract of service, as distinct from independent contractors who were engaged under a contract for services.

To get a sense of the meaning of employment in legal terms, it is useful to begin with a legal dictionary. The *Dictionary of Canadian Law* defines “employment” as “the performance of service under an express or implied contract of service.” This definition is of some help, for it indicates that employment is contractual in nature. But employment is not any type of contract, it is a contract of service. This subtlety only makes sense in the context of the common law, in which a key legal task has been distinguishing between a contract for services and a contract of service. The former is considered to be a commercial contract in which the person performing work is an independent contractor, while the latter involves an employee in an employment relationship with an employer. This distinction is significant at common law, because only employees are entitled to reasonable notice to end the contract, and only employees are under an obligation to obey and act in good faith towards the party with whom they have contracted. The preposition, thus, whether it is “of” or “for,” has important legal implications. But, as any student of English

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10 During the first half of the 20th century the courts main job was to distinguish between a contract of service, which was employment, and a contract for services, which
grammar knows, prepositions are notoriously idiomatic. There is often no logic to their use. What may make sense for one or two cases cannot be generalized meaningfully, as there are simply too many exceptions. The same is true for the difference between a contract for services and contract of service.

Little additional help in defining employment is provided by the Dictionary of Canadian Law. It simply states that a "contract of employment is a contract by which an employee agrees to provide services for an employer." The definition provided in Black's Legal Dictionary is no better. To its credit, however, the Oxford Dictionary of Law begins to offer a definition that is not completely circular. An "employee" is "a person who works under the direction or control of another in return for wage or salary."

I will come back to the criterion of control for distinguishing employment from other contractual relationships later in my talk, but I first want to concentrate on the contractual nature of employment. According to Geoffrey England, the principal author of the comprehensive text, Employment Law in Canada: "[t]he cornerstone of the individual employment relationship in Canadian employment law is the contract of employment." This makes the common law and judges pre-eminent in defining the nature of employment. Moreover, the common law definition of employment has a tendency to colonize statutory definitions and regimes. Madam Justice L'Heureux-Dubé made this very clear in her dissenting judgment in Pointe Claire v. Quebec, a 1997 decision of the Supreme Court of Canada, in which she quoted with approval the following passage from the 4th edition of Labour Law and Industrial Relations in Canada:

The term contract of employment denotes an essential concept in labour law. There must be a relationship recognized by law to be one of contract between an employer and an employee before any of the incidents of labour law will be applicable. This is so whether the labour law sought to be applied relates to the making, administering or enforcing of agreements between employers and

11 Dictionary of Canadian Law, supra note 9.

12 Black's defines an employment contract as "agreement between an employer and an employee in which the terms and conditions of one's employment are provided." Black's Legal Dictionary, 5th ed. (St. Paul: West Publishing, 1979) s.v. "employment contract."


trade unions, or to the exercise of rights and imposition of obligations arising out of long established rules of custom or the common law in respect of working conditions, or to the rights arising under legislation dealing with working conditions. It is so, even though some of the legislation...refers to 'workers' rather than 'employees' in describing its scope and it is so when a statute defines "employee" for its own limited purposes. The interpretation of such statutory provisions has been to require the establishment of a contract of employment whatever the terminology used to describe the persons covered by them, unless there is a specific legislative direction to the contrary.  

It is possible that the common law has become the touchstone, since so many statutes provide definitions of employee and employer that are little better than those contained in the legal dictionaries. For example, The Employment Standards Act of British Columbia states:

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.  

The problem with this definition is that it fails to provide any criteria distinguishing employees from other people, such as independent contractors or agents, who perform work. Little wonder adjudicators resort to the common law as their starting position. More troubling are those occasions in which the statute ostensibly provides a different and broader definition than that provided by the common law, yet the decision-maker still defers to the contractual definition of employment at common law.  

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17 This occurred in a well known case involving the Employment Standard Act in Ontario entitled Re Becker Milk and the Director of Employment Standards of The Ontario Ministry of Labour et al [hereinafter Re Becker Milk]. The statutory definition was much broader than the common law definition of employee. Despite the clear wording
In addition to promoting the hegemony or supremacy of the common law and the courts in the sphere of employment, another implication of the contractual understanding of employment has been "to subject the formation of the employment relationship to the free play of the forces of supply and demand in the labour market; contract principles, after all, were specifically designed by 19th century English courts to give full rein to such forces in the commercial sphere." Employment is conceived of as a product of consensual bargaining between legal equals, but this conception of employment is grounded more in ideology than it is in reality.

Historically, the legal concept of employment is infused with neo-feudal master and servant law. The duties of good faith, fidelity, and obedience owed by an employee to his or her employer smack of the legal subordination associated with master and servant law. That this is so is not surprising; the modern employment relationship is the legal progeny of the grafting of contract principles onto master and servant law. In fact, as recently as 1994, writing for the majority in King v. Mayne Nickless Transport, Madam Justice Southin of the British Columbia Court of Appeal consistently referred to the master and servant relationship when dealing with a fairly typical contemporary employment law issue.

While text writers such as Geoffrey England claim that such nomenclature is outmoded, pedigree or precedent is important for understanding the nature of common law concepts. In historical terms, the contract of employment is of quite recent, origin and its immediate forebear is status.

The origins of the contract of employment in the status relation of master and servant help to account for some of the implied duties in the contract of employment that distinguish it from other forms of contract. While the general principles of contract apply to the employment relationship, a number of robust implied duties give employment its...
distinctive legal flavour.\textsuperscript{22} Traditionally, there has been a dearth of express terms in employment contracts. In most instances, oral agreements and short letters of appointment have sufficed to establish an employment relationship. This has given the courts free reign to create for the parties, by means of implied terms, rights and obligations of their own choosing. While judges have often relied on the fiction of the unstated intention of the parties to fill in the gaps in particular employment contracts, essentially the courts have fashioned a status of their own making for employers and employees under the contract of employment. The terms, as construed by the judges, reflect both the historical origins of the employment relationship at law and judicial perception of the appropriate balance of rights and obligations in the employment relationship, given prevailing economic and social conditions.\textsuperscript{23}

It has also often been argued that collective bargaining law, employment standards legislation, and human rights codes have revolutionized the employment relationship. Over 30 years ago, in 1967, Harry Arthurs wrote: "Today the Canadian worker lives increasingly in a world of rights and duties created not by his individual contractual act, but by a process of public and private legislation."\textsuperscript{24} He argued that while the employment relationship had changed from status to contract in the 19th century, during the 20th century it has changed back to status.

Legal academics long have recognized that pure contract principles are not appropriate for regulating the employment relationship. Increasingly, Canadian courts have come to accept this proposition. In the 1997 majority judgment in \textit{Wallace v. United Grain Growers}, Mr. Justice Iacobucci wrote that "[t]he contract of employment has many characteristics that set it apart from the ordinary commercial contract."\textsuperscript{25}

One important feature that distinguishes employment from other contracts is the inequality of bargaining power that pervades the employment relationship. In 1980 Katherine Swinton, a former law professor who now is a member of the Ontario General Court, wrote that:

\begin{thebibliography}{99}
\bibitem{23} England, \textit{supra note 14} at §1.13.
\bibitem{25} [1997] 3 S.C.R.701 at §91 [Hereinafter \textit{Wallace}].
\end{thebibliography}
the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigmatic 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.26

This view has been approved in several majority decisions of the Supreme Court of Canada.27 Moreover, in Wallace Mr. Justice Iacobucci went on to assert that, "this power imbalance is not limited to the employment contract itself. Rather, it informs virtually all facets of the employment relationship."28

Owing to a recognition of this inequality in power in the labour market, the parties’ self-characterization of their relationship is not determinative of their legal rights and obligations. It is simply a factor to be considered. A provision in a contract that states the contract is for services such that the person performing the work is an independent contractor will not determine the legal status of the parties. Instead, that question is one of law to be determined by the adjudicator.29 In resolving it, most decision-makers refer to basic common law tests to determine whether or not an employment contract exists. The test for “employee” fixes the boundary between “the economic zone in which business entrepreneurs are expected to compete” and the “economic zone in which workers will be afforded the relatively substantial protections of the labour standards...and of the common law.”30

There are two problems with this method for distributing employment-related rights and attributing employment-related duties. The first is that the tests for determining whether a person performing work is an employee or not were developed for a specific and limited norm of employment—a norm that is increasingly out of step with reality.


27 Swinton’s statement was quoted by Iacobucci J. with approval in Machtinger supra note 3. In Slaight Communications v. Davidson, supra note 2, Dickson C.J. writing for the majority of the Supreme Court of Canada had occasion to comment on the nature of the employment relationship. At pp.1051-2 he quoted with approval from P. Davies & M. Freedland, Kahn-Freund’s Labour and the Law, 3rd ed. (London: Stevens & Sons, 1983) at 18: “But the relationship between an employer and an isolated employee or worker is typically a relationship between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination...”

28 Wallace, supra note 25 at §92.

29 Ball, supra note 10 at §3:10.1.

30 England, supra note 14 at §2.1.
The second problem with the tests is that they do not provide a principled basis for distinguishing between those people who should be entitled to employment-related rights and those who should not.

The Erosion of the Standard Employment Relationship

The traditional tests for employee status, which I shall identify and discuss shortly, were developed at a time when the standard employment relationship was numerically and normatively dominant. The standard employment relationship is best characterized as a continuous, full-time employment relationship, where the worker has one employer and normally works on the employer's premises or under their supervision. Its essential elements include an indeterminate employment contract, adequate social benefits that complete the social wage, the existence of a single employer, reasonable hours, and employment frequently, but not necessarily, in a unionized sector. A high level of compensatory social policies, such as pensions, unemployment insurance, and extended medical coverage, are associated with the standard employment relationship. Together with the standard employment contract they have historically "incorporated a degree of regularity and durability in employment relationships, protected workers from socially unacceptable practices and working conditions, established rights and obligations, and provided a core of social stability to underpin economic growth."  

Corporate restructuring, beginning in the late 1970s and accelerating throughout the 1980s, has resulted in an erosion of the standard employment relationship and a large and expanding gap between the social norms of work and the legal form of employment. The most prominent example of corporate restructuring has been the shift from vertically integrated manufacturing firms—typified by General Motors, in which parts were produced and assembled by the firm, while such

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33 Precarious Jobs, ibid. at 1.
ancillary services as cleaning and security were performed in-house—to a multiplicity of contractual relations with suppliers, contractors, marketing specialists, and other forms of highly integrated networks within a sector. Vertical disintegration has gone hand-in-hand with downsizing, subcontracting, and franchising.\footnote{G. Adams, “Towards a New Vitality: Reflections on 20 Years of Collective Bargaining Regulation” (1991) 23 Ottawa Law Review 139; C. Schenk, “Fifty Years after PC 1003: The Need For New Directions” in C. Gonick, P. Phillips & J. Vorst. Labour Gains, Labour Pains: 50 Years of PC 1003 (Winnipeg: Society for Socialist Studies/Fernwood Publishing, 1995) 193.} The net result of these forms of corporate restructuring has been growth in the small business sector. Since the late 1970s, small businesses have been the key contributors to net job growth in Canada. Between 1979 and 1989, for example, businesses with fewer than 100 employees created just under 90 per cent of all growth in employment in Canada,\footnote{Canada, Minstry of Industry & Ministry of Finance, Growing Small Businesses (Ottawa: Industry Canada, 1994) at 3 (Ministers J. Manley (Industry) & P. Martin (Finance)).} and this figure does not include the profound increase in self-employment. In 1991 slightly more than half of all Canadians working in the private sector were either self-employed or working in businesses with fewer than 100 employees. There has also been a shift in the share of employment provided from large to smaller businesses. Between 1983 and 1991, the share of employment in large firms (over 500 employees) declined significantly from 40.1 per cent to 36.4 per cent. The offsetting increase was mainly in small- to mid-sized firms as the share of employment in firms with under 100 employees rose from 44.8 per cent to 47.8 per cent.\footnote{Canada, Statistics Canada Analytical Studies Branch, “Job Creation by Company Size Class: Concentration and Persistence of Job Gains and Losses in Canadian Companies” (Research Paper Series, No. 93) by G. Picot & R. Dupuy (Ottawa: Ministry of Supply and Services, 1996) at 15.}

This shift in employment from larger to smaller firms helps to account for the deterioration in the conditions pertaining to the standard employment relationship and its erosion as the norm of employment. Jobs created in small firms tend to be less stable and durable, pay lower wages, and provide fewer fringe benefits than those created in large firms.\footnote{R. Morisette, “Are Jobs in Large Firms Better Jobs?” (1991) 3 Perspectives on Labour and Income in Canada 40; Picot & Dupuy, ibid.} Under Canadian collective bargaining law, on account of the certification procedures and the cost of servicing small units, it is difficult...
to unionize small firms. Compared to small firms in the 1980s, an hour worked in a large firm was five times more likely to be unionized and five times more likely to be covered by a pension plan. Many forms of legal regulation designed to improve the terms and conditions of employment, such as severance pay and pay equity, for example, simply do not apply to small firms.

The second aspect of firm behaviour that helps to account for the erosion of the standard employment relationship and the proliferation of non-standard work is the adoption of a core-worker/contingent-worker strategy by private sector firms faced with increasingly competitive market pressures and public sector firms confronted with a cash crisis. Employers have opted for greater use of subcontractors, casual employees, temporary-help agencies, and part-time workers, as well as having transformed employees into independent contractors. Although non-standard work has tended to predominate in the service sector, its incidence has risen significantly in all major industry groups. While researchers have discovered that the desire for flexibility was the predominant reason given by employers for using non-standard workers, they noted that the need to control labour costs was the second most important reason offered. A significant part of the savings in labour costs by private sector firms that used on-call, temporary, and part-time employees in the 1980s and 1990s was attributed to having not to pay full

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social insurance contributions, such as Canada Pension Plan, for these workers.\footnote{Osberg, supra note 41 at 78.}

**The Proliferation of Non-standard Employment Relationships**

In contrast to standard employment relationships, non-standard forms of work are more easily defined by what they are not rather than by what they are. In 1990, the Economic Council of Canada defined non-standard forms of work as "those which differ from the traditional model of a full-time, full-year job."\footnote{Canada, Economic Council of Canada, Good Jobs, Bad Jobs: Employment in the Service Economy (Ottawa: Ministry of Supply and Services, 1990) at 11.} While non-standard forms of employment, which range from part-time, temporary, and contract work to self-employment, differ in many respects, they often entail an absence of income security. Historically, non-standard workers have endured a lower level of social benefits and entitlements than standard workers, have been covered by an inferior set of labour laws than their counterparts in a standard employment relationship, and have been subjected to atypical employment contracts.\footnote{J. Fudge, Labour Law’s Little Sister: Employment Standards legislation and the Feminization of Employment (Ottawa: Canadian Centre for Policy Alternatives, 1991); J. Fudge & L. Vosko, “Labour Law Challenges for the New Millennium,” in R. Chaykowski, ed., Social and Labour Policy in the New Millennium, [forthcoming] [on file with the author].}

From the mid-1970s to the late 1990s, Canadians have witnessed particularly rapid growth in some forms of non-standard employment relations, such as temporary-help work and self-employment, and more steady growth in others, such as part-time work. From 1976 to 1994, the proportion of workers employed part-time climbed from 11 percent to 17 percent, with 15-24 year olds experiencing the brunt of this trend and women continuing to dominate in this type of employment.\footnote{Canada, Statistics Canada, “Non-standard work on the rise” (1995) Winter Perspectives on Labour and Income by H. Krahn (Ottawa: Ministry of Supply and Services, 1995) 35.} Corresponding with the growth in part-time work, multiple job holding also increased. This phenomenon is particularly prevalent in the service and primary sectors and common among young women, 8.8 percent of whom held more than one job in 1997.\footnote{Fudge & Vosko in Chaykowski, supra note 47.} The rise in multiple job holding is illustrative of the decline of the relatively high level of remuneration and benefits associated with standard work, since multiple job holders are...
subject to lower earnings and fewer job benefits such as pension, health and dental plans, and union coverage, than workers relying on a single job. In 1997 only 83 percent of multiple job holders versus 89 percent of single job holders held a permanent job—another trend that is indicative of the decline of the standard employment relationship.

While self-employment decreased over the long-term, a "renaissance" was also said to have occurred in the 1980s and 1990s, with women and immigrants joining the ranks of the self-employed in greater numbers. Historically, men have dominated the self-employed workforce; however, women's share of self-employment has grown substantially in recent decades, especially between 1980 and 1990. As recently as 1981, women constituted just 26 percent of the independently self-employed and 17 percent of self-employed employers. By 1991, these proportions increased to 34 percent and 24 percent respectively. The growth of self-employment among women is largely confined to the category of independent (or own account) self-employment and to sectors with relatively low wages, such as child-care and sales. As well, 11 percent of immigrant workers versus 8 percent of Canadian-born workers were self-employed in 1991, and both immigrant men and women are more likely to be self-employed than their Canadian-born counterparts. In contrast to part-time work and multiple job holding, however, self-employment continued to be the preserve of older workers in the 1990s.

Unlike self-employment, temporary employment, which grew in the late 1980s and early 1990s, was especially common among young people, who in 1995 represented 32 percent of all temporary workers. Working through temporary-help agencies grew especially rapidly in the 1980s, as the temporary-help industry expanded into sectors and occupations

50 As Sussman notes: "lower hourly wages are associated with higher moonlighting [multiple job holding] rates. Specifically, workers who earned less than $10.00 per hour in the main job had the highest moonlighting rate (6%) in 1997, while those who earned $20.00 or more per hour had the lowest (4%)." D. Sussman, "Moonlighting: A Growing Way of Life" (1998) Perspectives on Labour and Income 24 at 28.

51 Men not only predominate in the higher income categories of self-employment, for example, where employees are hired, they tend to earn more in each category. Fudge & Vosko, supra note 47 at 29.


ranging from health care to public sector work and trucking. The spread of the temporary employment relationship—a triangular employment relationship involving a worker, an agency, and a client firm—also attests to the decline of the standard employment relationship, since this employment relationship contravenes all its core features. Still, despite the high-level of insecurity associated with temporary-help work, and the absence of continuity in this type of non-standard employment relationship, temporary-help workers have surprisingly high average job tenures. This is more indicative of the changes in firm behaviour, such as the growing response to sub-contracts, than the changing nature of employment. In other words, the growth of this form of non-standard employment signals the erosion of benefits and entitlements among workers, as well as the ineffectiveness of minimum standards legislation, and more than a decline in the duration or continuity of employment. The combination of growth of multiple job holding, (which is particularly prevalent among self-employed, part-time workers, and temporary-help workers), rising income polarization, and high rates of overtime among certain workers entails the erosion of the terms and conditions of the standard employment contract.

The erosion of the standard employment relationship and proliferation of non-standard employment has been the most significant recent labour market trend. In 1997, Human Resources Development Canada (HRDC) reported that the growth of non-standard employment was so extensive in the 1980s and 1990s that only 33 percent of Canadian workers were said to hold "normal jobs." Its increase coincides with growing polarization in earnings among Canadians, which some argue is affecting labour market poverty, especially among the young and the old.


Canada, Statistics Canada Analytic Studies Branch, Earning Dynamics and Inequality Among Canadian Men, 1976-1992: Evidence from Longitudinal Tax Records (Research Papers Series, 130) by M. Baker & G. Solon, (Ottawa; Statistics Canada, 1999); Canada, Statistics Canada What is Happening to Earnings Inequality and Youth Wages
workers, especially those who already had low earnings, bore the brunt of this trend, as evidenced by the widening gap between the highest and the lowest earning men.\textsuperscript{59} As Denis Morissette notes: "[b]etween 1981 and 1988, the real hourly wages of men in the bottom earnings quintile remained virtually the same, while those of men in the top quintile increased by almost 4 percent. \textit{At the same time, the average number of hours worked by men in bottom quintile fell by almost two hours per week (to 30.9 hours) while those in the top quintile rose by on most 2.5 hours (to 45.0 hours).}\textsuperscript{60} This development reveals a relationship between the growing polarization in wages and recent trends in overtime, where full-time and professional workers are working more overtime, though largely unpaid, than their low-wage counterparts in part-time employment or other non-standard employment relationships, who are more prone to moonlight than attain overtime in their main job.\textsuperscript{61}

The farther a particular form of employment deviates from the standard full-time, full-year, single employer type of job, the less likely the person performing the work will be entitled to basic employment-related rights. The new norms of work simply do not fit into the old legal form of employment. Firms may well need to use non-standard

\textit{in the 1990s?} (Cat. 11F0019MPGE No. 116) by G. Picot (Ottawa: Ministry of Supply and Services, 1998).

\textsuperscript{59} At first glance, the declining earnings of young men, alongside the media discourse that suggests that women are catching up in the "earnings race" imply that women's rising labour force participation has meant to greater access to better jobs. For one of a number of articles featured in the \textit{Globe and Mail} see M. MacKinnon, "Women Gaining Ground in the Workforce" \textit{Globe and Mail} (19 April 1999) B1-B4. Recent studies on the earnings of women, however, suggest a more nuanced conclusion. A study by Katherine Scott and Clarence Lochhead in 1997 found women's gains in the economy to be "restricted largely to members of the baby boom generation" or those 40 to 54 years of age. For example, 11.3 percent fewer women in this age category earned lower than $24,000 in 1994 than in 1984 but only 0.5 percent fewer women aged 18 to 24 years and 0.6 percent fewer women aged 25 to 39 years earned less than $24,000 in 1994 than in 1984 (Table 8). These figures indicate a convergence of earnings between men in women under age 25, largely attributable to declining wages among young men: "in 1994, there was a 4.5 percent difference in concentration of young men and women in the lowest wage decile (below $24,000), a decline of 12.1 percent in one decade" (Canada, Canada Council on Social Development, "Are Women Catching up in the Earnings Race?" (Paper No. 3) by K. Scott and C. Lochhead, (Ottawa: Ministry of Supply and Services, 1997) at 2. Still, the wages of older men in higher income deciles stabilized in this period and sharp gender differences in earnings remained in all age groups.

\textsuperscript{60} D. Morissette, "Declining Earnings Of Young Men" (1997) Autumn \textit{Canadian Social Trends} 8, 9 [emphasis added].

employment in order to meet the demands of global competition. There is nothing inherently objectionable with this practice. The problem arises, however, when firms utilize non-standard jobs to avoid legislation and common law obligations and simply to shift the risks of employment onto employees. On account of their greater economic power, firms are able to do this. Such practices are not designed to increase efficiency and productivity but simply place some of the costs on to working people and/or the state. In 1994, in British Columbia, for example, the Thompson Commission on the reform of the employment standards legislation reported that it received numerous submissions that employers classify persons as “self-employed” to evade coverage of employment protection and social welfare legislation.62

The Inadequacy of the Legal Tests of Employment

The proliferation of social norms of work that fall outside a legal form of employment exacerbates the second problem: the inadequacy of the existing legal tests of employment. Here, the problem is with the legal category itself. It has never served as a good template for determining whether people who work for a living are, or should be, entitled to specific legal rights and subject to particular duties. The growth in non-standard employment simply makes this deeper problem clear.

For there to be such a thing as an employment contract, it must be susceptible of definition. Of course, those of us who study, practice, teach, and decide labour and employment law cases proceed as if there is a definition. We are familiar with how contracts for services are distinguished from contracts of service and that employees are different from independent contractors, agents, and partners. We can identify clear factual differences between many situations where contracts are assigned to these categories. But simply because we can see factual differences between different ways of organizing work does not make those contracts legally different entities. To do this, we would have to be able to provide a legal definition of an employment contract that distinguishes it from an independent work contract. The problem is that we can’t.

According to Adrian Brooks, “[a] ‘definition’ of something, to be worthy of the name, must be both inclusive and exclusive, must state elements which will be present in all instances of that something, and which will not be present in other things.”63 One way of doing this is to provide a group of criteria that will always be found in a thing of that

62 Thompson, supra note 42 at 31-3.

nature and not in other things. For example, we have not properly defined a cat if we say that it is an animal with four legs, fur, and a tail. Many animals, including dogs, fit this description, and some breeds of cat have neither hair nor tails. Definitions of employment contracts fail in much the same way: "They neither include all contracts which have been judicially accepted as employment contracts, nor do they exclude all contracts judicially proclaimed 'independent.'"  

Over the years, different tests, or lists of criteria, have been used by the courts to determine whether someone who is performing work for another person is an employee or an independent contractor. The classic test at common law has been control, which refers to the personal subordination of one person to another at the place of work. This test reflects the status origins of employment in the domain of master and servant, but it has long been regarded as insufficiently attentive to features of the modern employment relationship. It does not capture a wide range of situations that are classified as employment, including those of many sales people, skilled craftspeople, technicians, and professionals, where personal supervision is absent or the work is performed off the employer's premises. Even more importantly, the control test is not a principled manner for determining what rights and duties should apply to different ways of organizing work. As Marc Linder remarks:

> the virtue of the test is its relative transparency and facilitation of bright lines. Its drawback lies in the absence of any demonstrated relevance to the way the control test is utilized. For example, there is no reason why protection against the insecurity of unemployment, or against the unilateral domination inherent in atomized individual bargaining vis à vis adhesion contracts, should be confined to workers who are closely supervised by their employers, as opposed to those with more work-place autonomy.  

A number of other tests have been developed either to supplement or replace the control test for identifying employment contracts. These tests—the integration test, the fourfold test and the all factor test, to name a few—emphasize economic, as opposed to personal, subordination as the key feature of an employment relationship. Back in 1967, Harry Arthurs urged that the definition of employment be recast to reflect more precisely what it had become: "a legal conclusion flowing from economic

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64 Ibid.


Since then, this approach was adopted across Canada in collective bargaining legislation. The definition of "employee" was extended to include the concept "dependent contractor." While it is clear that the legislative intent of this manoeuvre was to catch those workers who fell between employment and independent contracting and who more closely resembled the former, this concept begs the preliminary question: how do we distinguish employment from independent contracting in terms of economic dependence? The problem with tests of employment that focus on economic dependence is that they do not provide a principled or coherent distinction between independent contractors, on the one hand, and employees, on the other.

Employment contracts are impossible to define. That is why it is so difficult to distinguish between employees, independent contractors, and the entire and expanding range of hybrids that inhabit the world of work. It also explains why predicting the outcome in a particular dispute is so difficult. Employment is a legal relationship, and it is distinguished from a range of other relations at law in terms of the rights and obligations that are recognized between, and imposed upon, the relevant parties. Some of these rights and obligations operate by virtue of the common law, such as reasonable notice or statutory regulation—most often some form of minimum standards legislation. Most collective bargaining statutes only apply to situations in which an employment relationship exists. Moreover, the legal relationship of employment is often required for access to certain forms of income replacement schemes and is the basis for much of the state's taxation mechanisms. Consider, for example, the significance of the employment relationship in determining entitlement to workers' compensation and employment insurance benefits, on the one hand, and liability for income and payroll taxes, on the other. Much hinges, both for the parties and for the public, on whether or not the legal concept of employment is sufficiently broad to capture newer forms of work arrangements, especially the growing numbers of the self-employed. While the existence of a contract of employment is commonly perceived as a unifying concept in Canadian employment and labour law, it is only to the extent that the same terms—employee and employer—are used.

67 Arthurs, supra note 24 at 790.

68 Harry Arthurs urged the implementation of this concept back in 1965 (H.W. Arthurs, "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965) 16 U.T.L.J. 89) and it was subsequently introduced in collective bargaining legislation in many jurisdictions. For a discussion of the concept and its different statutory instantiations see G. Adams, Canadian labour Law, 2nd ed. (Aurora: Canada Law Book, 1993) at §6.70ff.

69 Linder, supra note 65 at 175.
According to Hickling, "it is a snare and delusion to assume that, because the words 'employer,' 'employee' or 'employment' are common to all the statutes and the common law, that they mean the same thing or have the same coverage."70

Courts and other legal decision-makers have adopted a functional approach to identifying an employment relationship.71 Whether or not a particular person is an employee depends upon the statutory context and goals in light of which the decision must be made. It is a conclusion about whether or not the relationship should be covered by a statute rather than a criterion of whether the statute applies. Lord Wedderburn's description of the approach of British Courts sums it up best: "At this point we can see that the semantic tests [of an employment contract] are less important than the social policy pursued by the court in respect of each issue...Most courts now appear to use this 'elephant test' for the employee: an animal too difficult to define but easy to recognize when you see it."72

Under a functional approach, the crucial issue is whether this is the type of work-relationship to which a piece of legislation ought to apply. This means that decision-makers should pay more attention to the purpose of legislation and less to the form of contract. For this reason, Brooks suggests that the distinction between employees and independent contractors be abandoned. He recommends that there be only one category of contract: "contracts for the performance of work."73 If it is necessary to define eligibility for work-related entitlements or benefits more narrowly in a specific piece of legislation, such definitions should explicitly describe whom the legislation is designed to benefit.

In Canada, we have adopted the opposite, and less efficient, approach. Most employment-related legislation simply refers to an employee. This means that most adjudication involves semantic tests to determine whether or not there is an employment contract. While many decision-makers have adopted a functional approach to determining whether statutory or common law rights and obligations apply to a particular relationship, this approach tends to be tacit and secondary, not explicit

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70 Hickling, supra note 66.

71 England, supra note 14 at §§2.3-2.7.

72 K.W. Wedderburn, The Worker and the Law, 3rd ed. (London: Sweet & Maxwell, 1986) 116. Similarly, Lord Denning observed that "[i]t is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies"; Stevenson, Jordan and Harrison Ltd. v. MacDonald and Evans, [1952] 1 T.L.R. 110 (C.A.), quoted in Hickling, supra note 66 at 10.

73 Brooks, supra note 63 at 49, 53-4.
There are some statutes in which the distinction between employee and independent contractor, for determining entitlement, does not matter. Both the federal Employment Insurance Act and British Columbia's Workers' Compensation Act, for example, explicitly provide coverage for independent contractors. The problem with this technique, however, is that it reaffirms the common law definition as the default position.

With respect to determining work-related rights and obligations, there are several advantages to adopting a broad category of contracts for the performance of work, and to abandoning the distinction between employees and independent contractors. First, it would create an inhibition against arrangements that are solely designed to escape legal obligations, because the duties would be imposed whether or not there was a contract of service or a contract for services. Second, it would reduce the need for time-consuming and expensive litigation over whether an individual is an employee or independent contractor. Third, it would bring employment and labour legislation better in line with the new realities of the workplace. Fourth, it would promote desirable forms of flexibility in work arrangements. Fifth, and finally, it would promote horizontal equity because, in theory, it should treat individuals who are in substantially the same position equally, in terms of entitlement to work-related benefits.

Identifying the Employer

The corollary to the problem of identifying the parties to an employment relationship is identification of the employer. This is simple when there are only two parties involved; however, new work arrangements do not fit easily within binary or bilateral employment models. There are a wide range of situations involving, for example, temporary-help agencies, service contracting, franchising, subcontracting, labour contractors, and integrated chains of production and distribution, in which the legal issue of attributing liability for employment obligations amongst two or more potential employers arises. The typical resolution is to invoke the legal

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74 According to Geoffrey England, since employment-related legislation is not designed to shield entrepreneurs running their own businesses against the risk of failure, as part of the overall statutory purpose test the courts and other decision-makes must ask the fundamental question of whether the worker is an entrepreneur. This is why the courts have developed tests and use them when a statutory definition is provided. England supra note 14 at §2-6.

75 Hickling, supra note 66 at 26; Employment Insurance Act, S.C. 1996, c.23, ss. 5(1)(a), 5(4)(c); Workers' Compensation Act, R.S.B.C. 1996, c. 23, s. 3.

76 Becker, supra note 41 at 1534ff; Hickling, ibid. at 28-9.
tests of employment to determine which of the multiple entities should be considered the (sole) employer for the purposes of a specific legal obligation. The problem with this *ad hoc* approach is that the legal determination of which of the entities is the employer will depend upon the legal test that is applied.

There has been some modification of the standard binary model of the employment contract. In limited circumstances, the law is prepared to recognize multiple employers. In the 1987 decision in *Sinclair v. Dover Engineering Services*, Mr. Justice Woods of the British Columbia Supreme Court rejected the argument that there could only be one employer in a complex inter-corporate relationship. He wrote: "I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship...The old fashioned notion that no man can serve two masters fails to recognize the realities of modern day business, accounting and tax considerations."77 Although the British Columbia Court of Appeal, in affirming the lower court's decision, was not as willing as the trial court to impose joint and several liability for employment obligations on a string of potential employers, Mr. Justice Wallace stated: "[i]t must be kept in mind that one may be employed by a number of companies at different times for different purposes, or even at the same time."78 At common law, the courts have recognized that affiliated corporations, although separate legal persons, can share the functions and responsibilities of an employer and have imposed joint and several liability.79 More commonly, it takes special legislation to trump privity and impose joint liability.

Under most employment standards and labour relations legislation in Canada, there is authority for the imposition of joint and several liability upon two or more separate legal entities, where the entities are carried under common control or direction.80 However, these provisions have a restricted application. Similarly, successor provisions in both employment standards and collective bargaining statutes have a narrow scope. In most cases, it is necessary to establish a legal relation between the seller of the business and its purchaser in order for the latter to be liable for the employment obligations accrued by the former.81 What this means, in the vast majority of cases, is that service contracting falls

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outside the scope of successor provisions. The effect is that workers employed by contractors who provide cleaning, security, janitorial, and/or cafeteria services to buildings, for example, may be rotating through a number of different employment contracts and with different contractors each time the service contract is tendered. This means many of these workers would never accumulate the service that is typically required for such employment-related rights as notice and vacations.82

The increasing use by firms of workers provided through temporary-help or staffing agencies exemplifies the growing problem of identifying which of a number of related firms is the employer for a range of employment-related obligations. In Canada, who is the employer of a temporary-help agency worker depends upon the context in which the question is put, the jurisdiction in which the question is posed, the legal test invoked, and the factual circumstances involved.

The problems of defining who employs temporary workers also creates a high degree of uncertainty regarding legal liability of client firms for workers provided through temporary-help agencies. According to Chief Justice Lamer, writing for the majority in Pointe Claire, this is because:

The tripartite relationship does not fit very easily into the classic pattern of bilateral relationships....The traditional characteristics of an employer are shared by two separate entities—the personnel agency and its client—that both have a certain relationship with the temporary employee.83

In that case the Chief Justice affirmed the Quebec Labour Court’s decision to include a temporary clerical worker, provided through a personnel agency, in the bargaining unit of the client municipality, noting that current labour legislation allows an employee to have two distinct employers for a single job—one for the purposes of collective bargaining legislation and the other for the purpose of labour standards.84 He also stressed the need for legislation to provide a coherent framework that would cover tripartite employment situations. Explicit attribution of both primary and secondary responsibility between the temporary agency and

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82 To address this problem the Ontario Employment Standards Act, R.S.O. 1990, c. E14, s.13.1 provides for continuity of employment service between contractors in the building service industry and imposes responsibility on the successor contractor for termination-related benefits in the event that the successor does not hire the preceding contractor’s employees, see England, supra note 14 at §§3.23-3.24.

83 Pointe Claire, supra note 15 at §§1015, 1055.

84 Ibid. at §1055. Madam Justice L’Heureux-Dubé, ibid. at §§1079, 1081, disagreed with the conclusion of the Chief Justice that the Labour Court’s decision was reasonable. She not only stated that the labour Court used the wrong definitional test, but that the consequences (that there would be two different employers) was “absurd.”
the client firm over a range of employment related issues would reduce legal uncertainty for all parties in this triangular employment relationship and minimize the economic instability of the temporary worker.85

The prevailing legal norm of employment, which is premised on a stable contract of employment between a single employer and its employees engaged in labour at a fixed location, is anachronistic. As Craig Becker, an American commentator, has recently pointed out: "contemporary labor [sic] law is marked by a disjunction between theories of rights and duties based on privity of contract between employer and employee and new forms of work relations that disrupt this model of employment by increasingly interposing intermediate employers between the entities of labor [sic] and capital."86 In fact, the current model and tests of employment are not only ineffective in regulating the new forms of work, they may promote their deployment by firms which seek to escape their employment-related obligations. The need to identify the employer would disappear if adjudicators, policy makers, and legislators were prepared to create joint and several liability for the welfare of workers. It is time to take a concept that is well known in tort law and extend it to a relationship that has never been well served by the pure principles of contract. There are a number of examples in the U.S. and Canada where joint and several liability have been imposed on firms in the garment industry, which, although not direct employers, exercises a great deal of indirect control over workers’ (especially homeworkers) conditions, through their position in an integrated chain of production and distribution.87 This provides employees with entitlements and places the responsibility upon those who are conducting the integrated business to ensure employment-related responsibilities are met.

‘Canadian employment law is at a crossroads.’88 Nonstandard jobs are proliferating and our old legal forms and norms are simply not capable of coping with them. The question is whether adjudicators, policy makers and legislators are prepared to meet this challenge. No one would deny that the judiciary has a prominent role to play in adapting and updating the concepts and doctrines of the common law to fit changing work relations. However, Chief Justice Lamer has recently declared that when a court comes across a legislative gap, through which a particular


86 Becker, supra note 41 at 1534ff.

87 Ibid. 1533-61.

88 England, supra note 14 at §1.1.
nonstandard employment relationship falls, the court cannot “encroach upon an area where it does not belong.” But the problem with this advice is that it presumes that it is possible for a court not to take a position. This is simply impossible. By default, the judicial conception of the employment contract is the bedrock upon which statutory rights and obligations rest. It establishes the legal form of what is recognized as employment in the first place. Not only do we need new bottles for the new wine, the old bottles threaten to spill the more mature vintages as well. It is time to update the legal form of employment to reflect changing employment norms.

89 Pointe Claire, supra note 15 at §63.