

## LABOUR PROTECTION FOR SELF-EMPLOYED WORKERS

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Early every morning 2,000 men and women, many of whom have recently immigrated to Canada, deliver the Toronto Star to tens of thousands of homes in metropolitan Toronto as their primary source of income. Five days a week, about 6,000 couriers, a significant majority of whom are women, drive across rural and suburban Canada delivering the mail. In Toronto every day, hundreds of women, many who are women of colour and new to Canada, travel to work in private homes to provide personal care for disabled, ill, and elderly people. Across Canada professional editors, most of whom are women, work in their home compiling indexes, making tables, and plying the skills of their trade for a variety of clients. In recent years each of these groups of workers has tried to use the law to obtain collective bargaining rights and they have faced an up-hill battle. In each case the workers' status as self-employed was a contentious legal issue. Many of these workers, although not all, are also denied basic forms of labour protection such as the minimum wage, occupational health and safety laws, and employment insurance because of their self-employed status. Moreover, some of

them may be classified as self-employed for some purposes, such as taxation, at the same time as they are classified as employees for others, such as collective bargaining.<sup>2</sup>

The recent attempts by these four groups of workers to obtain some form of collective representation and bargaining illustrate the problems in accessing labour law faced by a growing share of the employed population – self-employed workers. Self-employed workers have an ambiguous status. Traditionally self-employment is equated with entrepreneurship and legally it is considered to be a form of independent contracting and thus outside the ambit of labour protection and collective bargaining. But the evidence suggests, however, that many of the self-employed, especially those who do not employ other workers, are much more like employees than they are like entrepreneurs. The legal status of self-employed workers is crucial and contentious.

This is because the legal definition of the term "employee" fixes the boundary between "the economic zone in which business entrepreneurs are expected to compete" and the "economic zone in

which workers will be afforded the relatively substantial protections of the labour standards ... and of the common law" (England, Christie, and Christie 1998, 2-1). People who work for pay but who are self-employed are treated for most legal purposes as independent entrepreneurs, who, unlike dependent employees, do not need labour protection. Instead, independent contractors are subject to the rigours of competition and the principles and institutions of commercial law. Workers seeking reasonable notice, minimum wages, the right to refuse unsafe work, statutory holidays, or maternity leave must establish to the satisfaction of an adjudicator that they are employees in order to enjoy these legal rights. Employee status is also a prerequisite, in the overwhelming majority of cases, for the application of collective bargaining legislation. Moreover, it is crucial for a range of other benefits in our society from employment insurance to private and public pensions. And owing to our system of payroll taxes and withholding income tax at source, employment is also a huge source of revenue for the state.

The legal concept of employment is elusive; its historical origins are convoluted and precisely how work is organised and the legal form it takes varies widely. Since the 1950s, prominent labour law scholars have concluded that the English common law does not have a unified

conception of employment nor a coherent method for distinguishing between employees and independent contractors. The changing nature of employment relationships has put the already inadequate legal tests under considerable stress. In the 1990s the legal definition of employment began to attract a great deal of attention internationally and in Canada (Fudge, Tucker & Vosko 2002).

The remarkable growth of self-employment since the early 1980s makes it even more urgent to question whether employment status is the appropriate basis for determining whether labour protection and social benefits ought to apply to specific kinds of workers. Governments and many commentators see self-employment as an important source of entrepreneurship with the potential for long-term employment growth. However, in 2000, the Organisation for Economic Co-operation and Development identified a number of concerns associated with self-employment – concerns about the working conditions, training, security, and income of the self-employed, as well as self-employment as a form of disguised employment (OECD 2000). It noted that several countries have seen growing numbers of self-employed people who work for just one company and whose self-employment status may be little more than a device to reduce total

taxes paid by the firms and the workers involved.

These concerns are particularly relevant in Canada, where there has been a large growth in self-employment. Through the 1980s and 1990s self-employment grew as a share of employment, reaching 16% in 2000 (Fudge, Tucker & Vosko 2002). But the self-employed do not make up a homogenous category; instead, they range from the high-income professional who employs others to the child-care provider who works out of her home and employs no one. Sociologists now recognize a continuum of self-employment that differs in terms of the quality of, and the rewards from, the work and the chances of economic success and security (Hakim 1988; Leighton & Felstead 1992). The range of self-employment covers employees who are who are falsely labelled as self-employed (ILO 2000a; 2000b, 2002; OECD 2000), franchisees, skilled crafts people, independent professionals, and owners of incorporated businesses. At best, some types of self-employment provide autonomy allowing people to realize their potential and align rewards with efforts; at worst, self-employed workers are marginalized (ILO 1990).

The range within the ranks of the self-employed is explained by a combination of broader social forces and institutions as well as individual choices. The concept of "social location" has been developed to

specify the ways in which political and economic conditions interact with class, ethnicity, culture, and sexual orientation to shape the meanings and strategies of working men and women (Jurik 1998; Lamphere, Zacilla, Gonsalves & Evan 1993). This framework helps to explain not only why self-employment is very different for men and women across countries, but also why self-employment differs between countries (OECD 2000).

For the purpose of official statistic gathering, employment and self-employment are distinguished by their mode of remuneration, employees receiving wages and the self-employed enjoying profits (Elias 2000; ILO 1990; Loufti 1991; OECD 2000). The distinction between employment and self-employment is also supposed to capture both the greater risk and autonomy associated with self-employment (Elias 2000, XII). However, especially if self-employment is simply a form of disguised employment in many instances, this distinction does not capture the difference between entrepreneurship and economic dependence. But, despite the limitations in the statistical measures, the official Canadian data illustrate the wide variety of self-employment.

One crucial distinction among the self-employed is whether or not they hire other employees. Self-employed people can be employers who employ other workers or they can be

own account, which means that they do not hire anyone else. The bulk of the increase in self-employment in Canada during the 1990s was in the own-account category, which grew from 6% to 10% of total employment between 1976 and 2000.<sup>3</sup> Own-account self-employment has grown dramatically for both men and women – from 4% to nearly 9% of total female employment and from 7% to 12% of total male employment between 1976 and 2000. When men's and women's shares of self-employment relative to their shares of total employment are compared, women are still under-represented in self-employment. Only women in the own-account category are nearing their representation in the employed population. Like their counterparts in wage and salary employment, self-employed women are also confined to a very limited number of industries and occupations such as service, sales, and clerical work.

Immigrants are generally as likely as the people born in Canada to choose self-employment upon entry into Canada, except for the cohort arriving between 1991 and 1995, who were 30% more likely to enter self-employment than those born in Canada (Frenette 2002). One explanation of this shift to self-employment by recent immigrants has to do with the fact that immigrants experience an increasingly difficult time in the paid workforce. Frenette suggests that immigrants from non-English

speaking countries, who are a rising portion of immigrants, may face difficulties integrating into paid jobs and thus may end up in self-employment (Frenette 2002, 13). Other studies indicate that immigrant workers are increasingly people of colour who face systemic discrimination in obtaining paid employment (Galabuzi 2001; Jackson 2002). In 1999, 19% of men and 20% of women in the own-account category were born abroad. Moreover, in 1999, 13% of self-employed people were members of visible-minority groups (the term used by Statistics Canada), fully 16% of self-employed men and 9% of self-employed women. When the self-employed category is broken down, data show that own-account self-employment is more common than employer self-employment among members of visible-minority groups; this is especially true of visible-minority women, 69% of whom fall into the own-account category.<sup>4</sup>

The most significant income differences among the self-employed are evident by type of self-employment – in 1999, the average annual incomes of employers and the own-account self-employed were \$46,825 and \$16,918 respectively. Income differences also prevail by sex – in 1999, women and men employers had average annual incomes of \$39,920 and \$49,470 respectively and women and men in the own-account category had average annual incomes of

\$13,032 and \$19,769 respectively.<sup>5</sup> The comparable figures for all female and male wage and salary employees were \$26,015 and \$40,183 respectively, indicating that the average annual incomes of men and women in wage and salary employment tend to be less than those of their counterparts working as self-employed employers but significantly more than their counterparts in own-account self-employment. When income is examined by immigration status, sex, and type of employment, among the own-account self-employed, where insecurity is most pronounced, the average annual incomes of men born in Canada are highest (\$20,188), followed by men born abroad (\$18,476), women born in Canada (\$12,918), and women born abroad (\$11,929).

The self-employed give a number of reasons for becoming self-employed. While independence, freedom, and the ability to be "one's own boss" is the foremost reason given by men (42%), women are equally as likely to choose self-employment to balance work and family obligations (23%) as they are for independence and freedom (23%). Evidence indicates that women use self-employment as a way to accommodate the demands of balancing the need for remuneration with family, especially childcare, responsibilities (Arai 2000; Hughes 1999; Vosko 2002).

The rewards of self-employment are mixed, and depend upon the

type of self-employment, which in turn is influenced by the individual's social location. Own-account self-employment, in which women, especially women of colour predominate, is insecure and poorly paid. Moreover, generally the self-employed are less likely to have access to training, earn overtime pay or receive maternity, parental or sick leave, and they report longer working hours than paid employees. But the self-employed also report greater autonomy than employees along dimensions of control, pace, and duration of work (Delage 2002).

The absence of a clear distinction between wage and salary employees and self-employed individuals is apparent from an examination of the work arrangements of the self-employed. In 2000, fully 30% of the own-account self-employed worked in client locations or locations supplied by clients (Delage 2002, Appendix B. 6). Furthermore, 37% of the self-employed (35% of men and 46% of women) received support from their clients; 24% (20% of men and 37% of women) received equipment, tools, or supplies from their clients. Moreover, in 2000, 15% of the self-employed (18% of the own-account self-employed) reported that their last employer was one of their clients, of whom 51% obtained more than half of their annual revenue from work done for their last employer.<sup>6</sup> The day-to-day business operations of many self-employed mirror those of paid employees.

In Canada few of the self-employed conform to the ideal of entrepreneurship that is marked by ownership, control over production, and autonomy; 65.4% are own account and economically dependent upon the sale of their labour. However, the problem is that both own-account and employer self-employed are classified for legal purposes as independent contractors.

Moreover, the wide variety in self-employment has increased the difficulty in determining whether a particular labour-related statute applies to a group of workers. Public policy has recognized the need to provide specific groups of self-employed workers with some of the legal rights and benefits available to employees. Although the distinction between employees and independent contractors remains crucial, different legal tests are applied, extended definitions of "employee" have been added to statutes, and there have been some ad hoc extensions and exclusions that affect particular groups of workers (Fudge, Tucker & Vosko 2003).

The result is that the scope of application of employment and labour legislation differs from jurisdiction to jurisdiction as well as across different kinds of labour legislation. While there are some general patterns, for example, laws and policies that are designed to promote social justice such as human rights and occupational

health and safety legislation have the broadest coverage and income tax legislation has the narrowest, the scope of coverage for schemes that regulate the terms and conditions of employment and social wages varies widely (Fudge, Tucker & Vosko 2002).

Adjudicators in various settings have attempted to grapple with the challenge posed by the need to draw categorical distinctions in a world in which "most labour market boundaries and categories are heuristic rather than descriptive – conceptual rather than material" (Purcell 2000, 1). In general, adjudicators evince a keen awareness of this difficulty and in response have adopted increasingly elaborate factor tests that emphasize aspects of control, subordination, economic dependency, and integration into another's business. They have also asserted that the number of factors is not closed and the weight to be given to any given factor is not fixed. In an attempt to produce greater coherence and certainty in the determination of employment status, some adjudicators have held that the application of the factors should be guided by an explicit discussion of the purpose of the legislation that is under consideration.

While this technique is marginally better than alternative legal approaches that depend upon fitting workers into fixed legal categories, leaving the problem to be resolved through adjudication is a

poor solution for at least three reasons. First, the purposive approach to interpreting definitions does not resolve the problem of determining the scope of legislation; it simply changes the nature of the inquiry. The crucial question according to this approach is not whether an individual is an employee or an independent contractor, but, rather, whether this is the kind of individual to whom the legislation ought to apply. Second, this approach assumes that adjudicators are the appropriate personnel to identify the purposes of a legislative scheme and, on that basis, define the class of people covered by it. This assumption is extremely problematic given the diversity of administrative decision-making processes, appointment procedures, and qualifications of adjudicators, let alone the scope for judicial oversight and control. Finally, the purposive approach to the application of definitions that determine the scope of coverage is a deeming process thinly disguised as adjudication. The effect of using adjudication to determine the scope of legislation is that it creates conditions of uncertainty so that many workers do not know whether or not they are covered by legislation and they have to bear the burden of finding out. Adjudication, in essence, operates as a system of after-the-fact decision-making that in reality will leave the status of a large number of workers highly unpredictable,

notwithstanding that the abstract character of the test may produce an illusion of consistency (Davies 1999, 167).

The legal battles fought by the Toronto Star carriers, rural route mail couriers, personal home care workers, and freelance editors are emblematic of the problems with the current approach to determining whether a particular worker is covered by the range of different types of labour legislation. The carriers waited twenty-six months from the time that they voted to unionize until the Ontario Labour Relations Board told their union, the Canadian Energy and Paperworkers, that the newspaper carriers were employees – only to discover that in the meantime the Toronto Star had decided to contract out the carriers' work. For fifteen years, rural route mail couriers, both alone and with the help of the Canadian Union of Postal Workers (CUPW), have launched challenges under the Canadian Charter of Rights and Freedoms and complaints under the labour-side agreement of the North American Free Trade Agreement to strike-down the provision in the postal legislation that deems them to be entrepreneurs and not employees. At the end of July 2003, after CUPW made the employment status of these workers a key issue in its negotiations with Canada Post, they won employment status, union representation, and a collective agreement. The unions seeking to represent personal home care

workers have had to establish not only that the workers are employees, but that they are not domestic workers, since domestic workers are not entitled to the protection provided by collective bargaining legislation. Freelance editors have confronted a range of legal hurdles in attempting to establish their status as artists in order to take advantage of special legislation that provides minimum terms and conditions for artistic production. These workers and their representatives have spent hundreds of thousands of dollars and many years in front of tribunals challenging their legal status in order to obtain basic labour protection.

Given the transformation in employment relations in the latter part of the twentieth century and the changing nature of self-employment, the current legal situation not only encourages litigation, but it invites the manipulation of contractual arrangements to avoid the incidence of legal regulation. There is widespread agreement that the traditional legal categories - "employee", "independent contractors", "contract of service", and "contract for services" - no longer fit with the economic and social reality of work relations. Revitalizing the legal definition of employee through the development of better tests fails to address the deeper problem, which is the mistaken assumption that the legal status of self-employment -

independent contracting - corresponds to economic independence and autonomy. A close examination of self-employment in Canada suggests that distinction between employees and the self-employed should be dissolved for the purpose of labour protection and social wage legislation, such as unemployment insurance or public pensions. The majority of the self-employed much more closely resemble employees than they do entrepreneurs, although for legal purposes many would be classified as independent contractors and, as such, they would be denied the legal protection available to employees.

It is time to revise the basis for determining the scope of application of labour, social wage, and tax legislation. The key question ought to be "to whom should this law apply" not "is that person an employee?" However, this question should not be answered by adjudicators as they confront the complexity of particular cases, but rather it should be addressed at the outset by policy makers. Most legal scholars recognise that determining the scope of employment and labour legislation should begin with a consideration of the rationale for a particular piece of legislation and the range of work contracts to which it should apply. Whether someone is working under a contract of service or a contract for services is not a good basis for determining the scope

of labour protection, social insurance, or tax legislation.

Instead of attempting to draw a new line between employment and independent contracting for the purpose of determining the scope of labour protection and social insurance, the significant distinction is that between entrepreneurs and workers whose only asset is their human capital. It is this distinction that needs to be put into effect. All workers who depend on the sale of their capacity to work should be covered by labour protection and social insurance legislation, unless there are compelling public policy reasons for a narrower definition. This recommendation conforms to the International Labour Organisation's goal of developing a policy framework for decent work, a central element of which is "a universal 'floor of rights' – a set of minimum rights to which everyone is entitled, regardless of status in employment" (Egger 2002, 166). The technical challenge is to develop mechanisms and institutions for making labour protection effective for the self-employed. The political challenge is to extend labour protection, which includes minimum standards, collective bargaining, and social insurance, to all people who work for a living.

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#### **NOTES**

1. Judy Fudge teaches employment and labour law and is a long-time member of the Employment Standards Work Group. She is also a researcher with ACE.
2. These examples are drawn from four case studies that four members (Cynthia Cranford, Judy Fudge, Eric Tucker and Leah Vosko) of the Alliance on Contingent Employment (ACE) are working on.
3. In contrast, the employer category grew from 5% to 6% of total employment yet it declined every year from 1995 to 2000. These data are drawn from a study by Fudge, Tucker and Vosko (2002) and is based on data obtained from Statistics Canada.
4. Statistics Canada Survey of Labour and Income Dynamics Public Use Microdata 2001, Custom Tabulation
5. Obtained from the Survey of Labour and Income Dynamics (SLID), the data in this paragraph refer to net income. Income is defined as wages and salaries + CPP/QPP Benefits + EI Benefits + Workers' Compensation Benefits + Retirement Pensions + Other Income + Investment Income + Old Age Security and GIS/SA + Social Assistance + Child Tax Benefits + GST/HST Credit + Prov/Terr Tax Credits.
6. These findings support a recent report by Lowe and Schellenberg (2001, Table 4.2), which found that 41% of the self-employed (51% in the own account category) had fewer than 5 clients in 2000.

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