Part-time, Casual and Other Atypical Workers: A Legal View

Geoffrey England
# Table of Contents

1. Introduction .......................................................................................................................... 1

2. Part-time Workers .................................................................................................................. 4
   - Legal Status At Common Law .......................................................................................... 5
   - Treatment Under Employment Standards Legislation ...................................................... 8
   - Treatment Under Collective Bargaining Legislation ....................................................... 9

3. Casual Workers ...................................................................................................................... 14
   - Legal Status At Common Law and Under Employment Standards and Collective Bargaining Legislation ........................................................................................................... 14
   - Treatment Under Employment Standards Legislation ...................................................... 15
   - Treatment Under Collective Bargaining Legislation ....................................................... 19

4. Workers Hired Under Fixed Term Contracts ....................................................................... 21
   - Legal Status At Common Law and Under Employment Standards and Collective Bargaining Legislation ........................................................................................................... 21
   - Treatment Under Employment Standards Legislation ...................................................... 21
   - Treatment Under Collective Bargaining Legislation ....................................................... 22

5. Employees Working Under Triangular Working Relationships ......................................... 23

6. Homeworkers ....................................................................................................................... 32
   - Legal Status At Common Law and Under Employment Standards and Collective Bargaining Legislation ........................................................................................................... 33
   - Treatment Under Employment Standards Legislation ...................................................... 33
   - Treatment Under Collective Bargaining Legislation ....................................................... 34

7. Workers Hired Under Government Assistance Programs ................................................ 36

8. A General Approach for Justifying the Unequal Legal Treatment of Atypical Employees .... 39

9. Conclusion ............................................................................................................................. 56

Notes ........................................................................................................................................... 60
1 Introduction

Most academic labour lawyers in Canada are used to focusing their attention on the "traditional" employment relationship in which workers are more or less permanently employed by a single employer and regularly work forty or so hours per week. This paper focusses attention on the "Baker Street irregulars" of the labour market, to use a Sherlockian analogy. These are workers who do not fit the mould of the "traditional" employment relationship. Firstly, there are "part-time" workers whose identifying characteristic is that they normally work fewer hours per week than full-time employees. This category includes part-time workers whether or not they are engaged on the same, ongoing basis as "traditional" employees or on a short-term, "casual" basis. Frequently the latter will be the case. Secondly, there are "casual" workers whose identifying characteristic is that the duration of their employment is shorter than that of the "traditional" employee. They may be hired, for instance, in order to meet a short-term seasonal or business demand for increased labour. Frequently they will work less hours per week than the "traditional" employee, thereby straddling the "part-time" category, but this will not necessarily be so. Thirdly, there are workers hired under fixed term contracts whose identifying characteristic is that their contracts expressly or impliedly provide for automatic termination upon the expiry of a certain period or upon the occurrence of a specified event, such as the completion of a project. Frequently this sort of contractual arrangement will govern "casual" work. Fourthly, there are workers who are involved in a triangular employment relationship. Their identifying characteristic is that they are supplied by one "employer", often an employment agency, to perform services for another user "employer". Frequently, the duration of employment of these workers with the user will be short term, thereby straddling the "casual" category, and the number of hours they work per week will be less than that of the "traditional" employee so as to bring them within the "part-time" category as well. Fifthly, there are homeworkers whose identifying characteristic is that they perform the substantial majority of their duties in their private residence. Lastly, there are workers whose employer pays them in whole or in part from a government subsidy under federal or provincial job creation programs. It must be emphasized that all the above-mentioned categories of atypical employment relationships may overlap so that the individual worker may find himself within more than one
category at the same time: I have separated them in this way primarily in order to facilitate exposition.

This paper will show that atypical workers thusly defined are afforded substantially inferior treatment under Canadian labour law than their "traditional" employee counterparts. Their legal position will be examined under the common law contract of employment, the "floor of rights" employment standards legislation and the collective bargaining legislation. In terms of the substantive outcomes produced under these legal regimes, the evidence at present suggests that most atypical workers are likely to enjoy significantly less beneficial terms and conditions of employment than "traditional" employees. For example, with respect to "part-time" workers, the recently published report of the Commission of Inquiry into Part-time Work in Canada 1 discovered that non-unionized part-time workers are generally paid less for performing work of equal value than traditional employees; that they are generally not covered by the same fringe benefits; that the fringe benefits which do apply to them are hardly ever pro-rated to take account of the reduced number of hours they work but are simply fixed at an arbitrarily selected and less favourable level; and they have less job security, inferior seniority protection and less career development opportunities with regard to training and promotion. 2 The Commission found that unionized part-time workers fare somewhat better than non-organized part-time workers. 3 They are still treated less favourably, however, than the organized full-timers alongside whom they work. 4 Moreover, in comparison with full-time workers they are very poorly organized. For example, in 1981 only 15% of all part-time jobs were organized compared with 35.2% of all full-time jobs, the density of organization being greater among permanent part-time workers than among temporary ones. 5 Although the Commission's findings relate specifically to "part-time" work, it must be remembered that this category of atypical work frequently overlaps with the other above-mentioned categories so that these findings are probably representative of a significantly greater proportion of atypical work as a whole.

The legal regimes governing atypical employment relationships - the common law contract of employment, the employment standards legislation and the collective bargaining legislation - must ultimately be evaluated according to the substantive results which they have produced. 6 The regime of the employment contract treats atypical work exactly the same as general contract law treats the exchange of any commodity, namely as a form of "free" market exchange between "equal" power wielders. The legal rules of the employment contract, however, disguise what is in real life a situation of overpowering market superiority on the part of the employers over their employees: the legal assumption of "free" exchange in practice is a myth. 8 It is precisely this legal machinery which has produced the inferior terms and conditions enjoyed by non-organized atypical workers.

The regime of the employment standards legislation, which is supposed to redress the substantive injustices produced under the individual employment contract has failed to do so in
the case of atypical workers: they have not been placed on an equivalent footing under the legislation as traditional employees. As will be seen, many atypical workers may either be completely excluded from the legislation or be excluded from particular benefits provided under it. Furthermore, they may not qualify for certain benefits because the absence of an ongoing, regular employment relationship may prevent them from accruing the requisite seniority. Moreover, the reduced number of hours worked during a given period may disentitle them from the same benefits available to traditional employees. In many provinces the legislation does not establish a system for pro-rating the seniority and hours of work of atypical employees so as to provide them with at least some proportion of the benefits in question. In addition, nowhere is it a legislated requirement that employers provide the same fringe benefits on a pro-rated basis to atypical workers, nor pay them the same wage for work of equal value under their employment contracts and collective agreements.

As well, collective bargaining has failed to build significantly on the statutory "floor of rights" in the case of atypical workers. This is doubtlessly due in part to the failure of the collective bargaining legislation to place atypical workers on the same footing under it as traditional employees. In many jurisdictions atypical workers are excluded altogether from the legislation. Even where they are covered, the bargaining unit structure established for them by the labour relations boards in many provinces is generally acknowledged as being responsible in part for their not being able to attain equivalent negotiated benefits as traditional employees.  

It will be argued that much of the differential legal treatment of atypical workers outlined above is unjustifiable and runs the risk of being declared unlawful as violating the Charter of Rights and Freedoms and possibly also the human rights legislation. It is beyond the scope of this paper to undertake the Herculean task of examining the arguments for and against the justification of each and every instance of discrimination against atypical workers. Instead, a general approach will be offered to the question of whether given instances of unequal treatment can be justified. Before doing that, however, it is necessary to describe in greater detail the main kinds of legal discrimination which atypical workers are currently subjected to.
Part-time Workers

Part-time work has become a significant feature of the Canadian labour market in the last twenty or so years. In 1983, 1,651,000 persons accounting for 15.38% of the total labour force were engaged in "part-time" employment, defined by Statistics Canada as work involving 30 or less hours per week.\(^1\) This compares with 988,000 part-timers representing 10.64% of the labour force in 1975. Part-time work is the fastest growing segment of the labour force, accounting for almost 50% of the total increase in employment between the years in question.\(^2\) Moreover, in 1983 28.53 % of part-time workers reported as their reason for taking the job that only part-time work was available, compared with 11.03% in 1975. Hence, the indications are that part-time work is a permanent feature in the labour market.\(^3\) In addition, the vast majority of part-time employees are female, accounting for 71.23% of the total part-time labour force in 1983, with the largest concentration of part-time work being in the service sector, Canada’s largest employment industry. In 1983, 1,435,000 service employees representing 19.07% of the total labour force were engaged on a part-time basis. This compares with 847,000 part-timers representing 13.87% of the total labour force in that industry in 1975. Moreover, trade union organization among part-time workers is substantially less than among full-time workers. For example, in 1981 only 15 % of all part-time jobs were organized compared with 35.2% of all full-time jobs, the density of union organization being greater among permanent part-time workers than among temporary ones.\(^4\)

As was mentioned earlier,\(^5\) the Wallace Commission found that in the non-organized sector pay and benefits were substantially less favourable for part-time workers doing the same work as full-timers, and the more so if the part-timers were also female. In the unionized sector part-timers are treated somewhat better, but nevertheless are not on the same footing as their full-time colleagues.\(^6\) It is uncommon for collective agreements to apply all of their provisions to part-timers. For example, in 1985, as many as 86.9% of all collective agreements in industries employing 500 or more employees (excluding construction) failed to contain any seniority provision for part-time workers. Where seniority provisions did exist, only 0.8% of agreements applied seniority to promotions and 3% to layoffs. In the same year, a mere 3.3% of agreements contained health and welfare benefits for part-timers, 6.7% contained sick leave benefits, 1.1% contained pension benefits, 4.2% contained pro-rated vacation benefits and 1.5% contained pro-rated paid statutory holidays. The Wallace Commission was unable to attribute this substantial inferiority in terms and conditions of employment "conclusively" to the part-time status per se of the organized and non-organized workers in question because the requisite empirical studies
had not been completed, although it "expected" that this would be the explanation. Let us examine the legal regimes for part-time work which have enabled this situation to arise.

**Legal Status At Common Law**

At the outset it is necessary to appreciate why it is important to determine the legal status of part-time workers at common law. Canadian labour law draws a crucial distinction between, on the one hand, workers who are engaged under a contract of employment (or service) and, on the other hand, those who are engaged under a contract for services. Only the former have "employee" status for the purposes of the common law; the status of the latter is simply that of a party to a commercial contract. The main advantage of having "employee" status at common law is that it entitles the worker under his employment contract to "reasonable" notice of termination, or wages in lieu thereof. It is this expectation which forms the basis of the common law action for wrongful dismissal. In contrast, an independent contractor is, in the absence of a provision to the contrary in his agreement, presumably engaged on the basis of a "hiring at will". Another advantage is that the employer of "employees" is in some circumstances impliedly bound to provide actual working opportunities. Thus "employees" who are paid on a piece rate or a commission basis are entitled to reasonable working opportunities." So too are "employees" who contract for the opportunity of self-publicity, such as actors, or for the opportunity to improve their work skills. As well, an "employee" is probably entitled to pay during temporary periods of absence from work through illness, in the absence of an express provision or a reliable practice to the contrary. Furthermore, the employer impliedly contracts to provide the "employee" with a reasonably safe working environment, whereas the equivalent duty owed to the independent contractor is based in the tort of negligence. Although there are theoretical differences between contract and tort actions with respect to the measure of damages, the conflict of laws rules, the limitation periods and the applicability of the tort doctrine of res ipse loquitur, these have little practical impact because workers' compensation legislation has largely made redundant the "employee's" common law damages action for injuries at work, replacing it with a relatively comprehensive system of no-fault compensation. Lastly, the doctrine of vicarious liability applies only to "employees". This doctrine makes the employer liable for torts committed by its employees in the course of their employment. In contrast, the independent contractor would be personally liable for his own torts. It is theoretically possible for an employer (or more likely its insurance company) to recover the damages it has paid out to the victim from the employee on the basis that the latter's tort breaches an implied contractual promise to work in a non-negligent manner, but in practice this is rarely done.

The test for determining "employee" status at common law is whether, as a matter of economic reality, the worker can be said to be carrying on a business of his own or carrying on his superior's business. Regard is had to a wide range of indicia, such as ownership of
equipment and tools, the power of dismissal, the wage payment system, the power to control
the manner in which the job is done in appropriate cases and the worker’s entitlement to sub-
delegate the performance of the job to persons whom he himself hires. The courts have not
accorded any special significance to the part-time nature of the job, nor indeed to any of the
other "atypical" job characteristics mentioned earlier. The number of hours worked per week,
therefore, is relevant to the overall issue of whether the worker is in business for himself, but is
not determinative in and of itself. Plainly, it is not uncommon for persons to work less than the
regular hours but still be economically dependent on their employer.

Part-time employees, as with all other atypicals, are not treated any differently under
the law of the employment contract than full-time employees. The parties are formally "free" to
bargain their own terms and conditions through the traditional contract law process of offer,
counter-offer and acceptance. The courts will apply the parties’ terms as they stand, as with
any commercial contract, and normally they will not strike down provisions which they
consider to be unreasonable, save in the exceptional cases of infants’ contracts, unconscion-
ability and covenants restricting unduly competition in the labour market. This contractual
machinery, of course, establishes only a formal veneer of legal equality: in reality, employers
can utilize it so as to bring to bear on employees the full weight of their dominance in the
market place and produce substantive outcomes that are decidedly unequal. It is this legal
machinery which has occasioned the unequal treatment of non-organized part-time employees
described in the Wallace Report: they simply do not have sufficient bargaining power to win
equality in the market place. As we shall see later, the unequal treatment of non-organized
part-timers under the regime of the employment contract is extremely difficult to justify.

The courts have not formulated any "implied" terms specifically for part-time
employees. It is well recognized that the implied terms for the most part represent judicial
policy on what the reciprocal obligations of employers and employees ought to be,
notwithstanding that they are typically couched in the terminology of the unexpressed
intention of the parties. A key implied term is the length of notice of termination to which an
employee is entitled. Because the courts have traditionally held that the length of notice
should increase with, inter alia, the employee’s length of service and the availability of suitable
alternative work for the employee in question in the labour market, it is probable that most
part-time employees will be awarded lesser notice periods than their full-time counterparts.
Labour turnover is relatively high among part-time workers. For instance, in 1981 less than
33% of part-time jobs lasted a full year. Consequently, it will be difficult for many part-time
employees to build up the seniority that goes with lengthier notice periods. This will be
especially difficult for those part-timers who work on a "casual" basis involving repeated,
periodic re-engagements under fresh employment contracts. Furthermore, since part-time
work is the fastest growing segment of the labour force there are likely to be greater
opportunities for securing alternative part-time employment than full-time employment so that
shorter notice periods should be expected for part-time employees. Of course, if alternative work is more readily available for the part-timer than the full-timer, then a shorter notice period for the former is justifiable. Similarly, for those who are prepared to accept seniority as a fair measure for distributing benefits, it is presumably justifiable to award shorter notice periods to the less senior part-timer than to the more senior full-timer. I am assuming, however, that seniority is defined in terms of a real world association between an employer and an employee, not in terms of an uninterrupted contractual nexus. As I shall suggest later, the latter definition precludes the "casual" worker from accruing seniority for the purpose of securing benefits to which he is morally entitled.

Legal Status Under Employment Standards and Collective Bargaining Legislation

In Canada, it is common for statutes to provide certain minimum "floor of rights" employment standards protections for all workers which cannot be undercut by private contractual arrangements but which may be built upon. Separate statutory regimes are generally established for civil servants employed by the various governments and governmental boards, agencies and commissions. In addition, collective bargaining is extensively regulated by legislation. The right of workers to unionize without fear of reprisal by employers or competing unions, the right of unions to obtain certification for collective bargaining purposes, and the right to strike (and in some cases to picket) are guaranteed by statute. Again, separate statutory schemes are often provided for civil servants. The vast majority of such legislation applies only to "employees."

The statutes do not contain comprehensive definitions of "employee"; with the result that the adjudicative agencies charged with administering the legislation have considerable leeway in fashioning their own tests. The usual approach is to interpret "employee" according to the policy goals which the legislation in question is designed to achieve. Thus, in the context of employment standards legislation, which is designed to ameliorate the unfair substantive outcomes of unequal bargaining relationships, "employee" is generally construed as encompassing workers in a position of economic subordination to their employer. In the context of collective bargaining legislation, the word is also construed as encompassing workers who are in a position of economic subordination to their employer. However, care is taken to ensure that the economically dependent worker is not at the same time an entrepreneur who is in business for himself: otherwise, permitting collective organization among businessmen would be repugnant with the anti-combines legislation prohibiting monopolies. It follows that a person can be an "employee" under one statute, such as the employment standards legislation, without being an "employee" under a statute with a different purpose, such as income tax legislation. Insofar as the common law text also looks to economic dependency, it is
sometimes applied as part of the statutory test. Not surprisingly, the mere fact that less than regular hours per week are worked is not determinative. For instance, it has been held that part-timers who have other jobs, the income from which substantially exceeds that of the job in question, may nevertheless be "employees" under collective bargaining legislation. Economic dependency is tested only in respect to the nature of the work relationship during the period when work is being carried out. Otherwise, a regular "employee" who wins a large fortune from gambling would stand to lose his status!

**Treatment Under Employment Standards Legislation**

Depending on the jurisdiction, part-time employees may be treated differently than regular employees in respect to several employment benefits. Firstly, they may be denied absolutely certain benefits. Thus in New Brunswick and Prince Edward Island part-timers who work less than 24 hours per week are not entitled to vacation benefits. In New Brunswick, part-timers who work less than 5 hours per week are not entitled to a "weekly rest" period, unlike in Quebec and Newfoundland where they are. In Manitoba, part-time employees who work in a private family home for less than 24 hours per week are excluded from the employment standards legislation. In Ontario, part-time "nannies" who work less than 24 hours per week are excluded from the Domestic and Nannies Regulation which establishes minimum safeguards in respect to wages, deductions for room and board and free time for these workers. In British Columbia, part-time instructors in public educational institutions are excluded from the hours of work and overtime provisions in the legislation. In Newfoundland, only persons employed "on a full-time basis" are covered by the Civil Service Act which establishes minimum terms and conditions of employment for civil servants in that province. Part-time civil servants are, therefore, subject to unilateral employer regulation. In Saskatchewan, part-time employees as defined in the Public Service Act are deemed to be included in the unclassified" branch of the civil service and as such are excluded from virtually all of the legislated employment standards. These include access to a grievance procedure in cases of discharge, discipline and layoff; hiring on the basis of merit, fitness and seniority instead of by unilateral employer regulation; and minimum protections governing wages, hours of work, promotion, layoff and recall, termination pay, seniority and leaves of absence for various purposes. Moreover, in Saskatchewan previous service as a part-time civil servant does not count towards the seniority of a "classified" civil servant, whereas it does count if the "unclassified" employee was not a part-timer. Similarly, in Ontario part-time civil servants, defined as those working less than 24 hours per week, are deemed to be in the "unclassified" civil service and as such are disentitled to the basic protections available to full timers. Unlike Saskatchewan, however, the Ontario legislation does at least specify that some benefits will apply to them, albeit the relatively less important ones of holidays, vacations, medical insurance and leaves of absence.
for the purpose of sickness, jury duty and bereavement. In particular, the crucial provision
for the neutral adjudication of dismissal grievances does not apply to them.

Secondly, the legislation may provide that certain benefits apply to part-time employees
but less advantageously than with full-time employees. For example, in some provinces
entitlement to annual vacation leave depends on the employee working a defined proportion
of "regular working hours" in a year. Therefore, part-time workers may not work sufficient
hours to claim a leave, although they may be able to claim wages in lieu which are pro-rated
according to the actual hours they have worked. True, this may not be disastrous if the
employee has only one part-time job so that he has ample free time anyway. However, some
employees may be forced to take two or more part-time jobs in order to live decently so that
they will need a yearly rest from their labours. As well, the federal Labour Adjustment Benefits
Regulations, which provide compensation for permanently laid off employees in designated
industries, operate to the disadvantage of part-timers. Only employees with ten years of
employment in the industry are covered and, in order for a year's service to count, at least 1,000
hours must have been worked in it. Furthermore, the amount of compensation depends on
average weekly earnings. In some jurisdictions, part-timers may be deprived of statutory
holidays by virtue of their not been assigned sufficient hours of work in order to qualify. Thus
in New Brunswick, the employee must work on at least 15 days during the 30 calendar days
preceding the holiday in order to qualify for it. Other examples of differential treatment
include Saskatchewan, where there is a special minimum wage for part-timers. In Ontario,
part-time employees in the catering industry are subject to different overtime provisions.
In the federal civil service, special employment standards exist for part-timers who work less than
15 hours per week and they are less advantageous in terms of leaves of absences and
termination pay than those applying to full-timers. In Ontario, where separate regulation also
exists for part-time civil servants, the latter have inferior sick leave provisions in that they have
to earn each 1 1/4 days leave with each month they work, unlike full-timers who are entitled to
unearned sick leave. In addition, vacation entitlements are earned at the flat rate of 1 1/4 days
per month worked in the case of part-timers, whereas full-timers accrue proportionately
greater entitlements with years of "continuous service".

**Treatment Under Collective Bargaining Legislation**

The collective bargaining legislation generally encompasses part-time employees with three
exceptions. The Ontario Crown Employees Collective Bargaining Act, which regulates collective
labour relations in the civil service, does not cover persons who are not ordinarily required to
work at least one third of the normal working time spent on similar work by others, unless
those persons work on a regular and continuing basis. The effect is to limit collective bargain-
ing rights to regular part-timers. Under the equivalent legislation in the federal jurisdiction and
New Brunswick part-time civil servants, who are defined the same as in Ontario, are excluded from the statute’s coverage with no exception being made for regular part-time work.\textsuperscript{55} Assuming that part-timers are within the coverage of the legislation, an important issue is whether they should be included in the same bargaining units as regular employees or be separated into bargaining units of their own. The advantages of the former approach are generally viewed as being threefold. First, it supports the traditional policy against undue unit fragmentation, with the concomitant risks of competitive bargaining, duplication of labour relations services, greater disruption from industrial strife and inflexibility in manning decisions due to conflicting seniority lists.\textsuperscript{56} Secondly, a separate part-time unit might not have sufficient bargaining power to achieve a reasonable collective agreement, if any. Thirdly, from the perspective of the full-timers, they can expect to protect themselves more effectively against the dangers of a competitive part-time labour pool by bargaining on behalf of those employees rather than see them have their own unit, whether it be unionized or not. Part-timers can be utilized by employers to undermine the union’s collectively negotiated rates and to erode the union’s strength in a strike or lockout.\textsuperscript{57} A common bargaining unit would also enable full-timers to use their seniority to bid on part-time jobs.

Nevertheless, full-timers can still seek to protect themselves against part-timers who are excluded from their bargaining unit by negotiating clauses about part-timers in their collective agreement, for example, limiting their number and the conditions under which they can be hired or fixing their wage rates.\textsuperscript{58} It is often a fine line between bargaining about part-timers and bargaining on behalf of them. If the facts disclose that the union is bargaining on behalf of part-timers then the parties may have unwittingly encompassed them within their bargaining unit by voluntary recognition. For example, in Endel Vesik\textsuperscript{59} the collective agreement contained a number of articles designed to protect the full-time unit against the use of part-time labour. Part-timers could not be hired before 5:00 p.m. on any day; they could only be hired as a “supplement” to the main workforce; they could not be hired so as to result in full-timers being deprived of their normal hours of work; and full-timers, including those on layoff, were to be used in preference to part-timers. The Ontario Labour Relations Board held that if the collective agreement had stopped at that point the part-timers would not have been brought within the full-time unit: the above-mentioned articles constituted a fairly comprehensive attempt to bargain about part-timers. However, the collective agreement also provided that part-timers would receive the same minimum wage as full-timers and would have union dues checked off their wages. The Board held that because these additional articles did not confer any greater degree of protection on full-timers than was already provided by the other articles restricting the use of part-time labour, the parties must have intended that the union bargain on behalf of the part-timers. Accordingly, the parties had incorporated them within the full-time unit by voluntary recognition. It must be noted that the recognition article in this collective agreement referred simply to “employees”: had it indicated clearly that only full-time
employees were to be covered by the unions' bargaining rights it is unlikely that the negotiation of the dues check-off and minimum rates articles for part-timers would have overridden such express language. Moreover, the part-timers were non-organized in this case: it would be unlawful for a union to bargain about part-timers if they were represented in collective bargaining by a union of their own with their own bargaining unit. It must also be emphasized that a union of full-timers which wishes to bargain part-timers into their unit, or wishes to bargain them out of a pre-existing all employee unit cannot push to impasse in negotiations on such demands: to do so would violate the duty to bargain in good faith.

On the other hand, there are dangers with including part-timers and full-timers under a single bargaining unit. The main danger for the part-timers is that their particular interests may be submerged in a full-time unit in which they comprise a minority. Although the union is under a duty to represent the interests of all employees in good faith, non-arbitrarily and without discrimination, this has been held not to preclude the negotiation of less favourable terms and conditions for a minority group such as part-timers if that is in the interest of the unit as a whole. The labour relations boards seem most reluctant to police the substantive fairness of collective agreement articles governing part-time employees. This reflects the boards' general disinclination to interfere with market forces as the preferred determinant of collective bargaining outcomes and to usurp the union members' "democratic right" to pursue bargaining goals of their own choosing.

Thus in Vesik the Ontario Labour Relations Board suggested that the union would not breach its duty if it refused to demand in negotiations a "just cause" provision governing the discharge of part-timers "... because the full-time portion of the unit did not think it necessary or, even if demanded, the whole bargaining unit would not be willing to support it in the face of employer resistance or trade its acceptance for some other demand." It is difficult to imagine a more fundamental protection than discharge for cause. Indeed, the Canadian Government has ratified Convention No. 97 of the International Labour Organisation which obliges signatory states to legislate unjust discharge protections into their domestic labour laws. Three jurisdictions presently have such legislation in place and a fourth is seriously considering it. Public and para-public bodies exercising statutory powers are bound to act "fairly" when dismissing their employees. The Charter itself under section 7 requires that no individual can be deprived of his "security of the person ... except in accordance with the principles of substantive justice:" If "security of the person" is construed as encompassing economic security, a plausible interpretation, then discharge would have to satisfy some standard of "cause". In light of the foregoing it is difficult to escape the conclusion that protection against unjust discharge is now very close to being recognized in our society as a moral right on a par with our other basic civil liberties, if indeed it has not already acquired that status. The position taken by the Ontario Labour Relations Board in Vesnik is surely indefensible. The union ought to be obliged, under its duty of fair representation, to place unjust discharge protection for
part-time employees on the negotiating table and it ought to be required to bargain meaningfully in order to try to win it, provided of course that the part-timers want the protection. As well, if one accepts the principle that I argue in favour of later in this paper, namely that part-timers ought to receive equal pay for work of equal value and ought to be entitled to the same pro-rated fringe benefits as full-timers, then the union ought to be obliged to place these demands on the bargaining table and make meaningful efforts to win them.

Nevertheless, part-timers may sometimes prefer that unions do not seek to secure their protection against unjust discharge and their equal treatment across the whole spectrum of employment benefits. The bargaining demands of part-timers will often (but not always) be short term ones such as wage increases or convenient work scheduling rather than longer term ones such as seniority, pensions, insurance benefits, job security and career advancement protections. If part-timers elect voluntarily not to pursue certain demands, the union should obviously not be found in breach of its duty by not pursuing them in negotiations. However, if the part-timers notify the union that they want it to bargain for unjust discharge protection and for equal treatment in respect to specified benefits, it seems to me that the union should be required to place such demands on the table and make meaningful attempts to win them. Although this approach would reduce considerably the danger of part-timers’ interests being submerged in a full-time unit, it would not provide an ideal solution because the union would still have to make the tough choices of which demands to drop at the eleventh hour and the interests of the majority of full-timers would presumably still be afforded paramountcy over those of the minority part-timers. The ultimate solution, of course, would be to entrench as legislated employment standards equal treatment for part-timers along the lines suggested later, as well as unjust discharge protection, thereby removing these protections altogether from the vagaries of the bargaining process.

Conversely, there are also dangers for full-timers with having part-timer workers in their bargaining unit. The relative lack of attachment to the job of some (but not all) part-timers will often be reflected in a disinclination to strike for their own and for the full-timers demands. Furthermore, the fear on the part of part-time employees that full-timers may not support their interests, and indeed may be opposed outright to their very existence, could induce part-timers to oppose unionization in the plant. This could result in there being insufficient support to achieve certification for the full-timers in a combined bargaining unit.

In most jurisdictions, the balance between the foregoing interests has been struck by including part-timers in full-time units only so long as they are regularly employed and there is otherwise no manifest divergence of interest between the two groups. Regularity of employment is stressed because it is presumed to disclose a community of interest with respect to the groups’ bargaining demands. Accordingly, under this approach, the higher the rate of labour turnover among part-timers compared with full-timers, the greater is the likelihood of their being placed in their own unit.
In Ontario and New Brunswick, however, part-timers are automatically placed in separate units at the request of either the employer or the union concerned, irrespective of the regularity of their employment. Part-time status is determined solely by whether the employee works less than 24 hours per week during four or more of the weeks in a seven week period immediately prior to the date of application for certification. The Ontario Labour Relations Board, however, has intimated recently that it might consider lowering this to 20 hours per week in light of the fact that the regular working week is now 40 hours rather than 48 hours as it was when the Board’s practice originated. An exception is made where only one part-timer is employed who has indicated his support for unionization and who would otherwise be denied the opportunity of any collective bargaining if he were excluded from the full-time unit. Where only one part-timer is hired at the date of applying for certification but there is a history of hiring more than one part-timer, the Ontario Board generally creates separate units. As stated earlier, the parties can agree in subsequent negotiations to expand the full-time unit to include part-timers, although it is unlawful for either side to push to impasse on such a demand. Notwithstanding the latter element of flexibility, the Ontario approach has been criticized as failing to recognize that a sufficient community of interest can exist between the two groups on the basis of regularity of employment in order for effective collective bargaining to take place in a common unit. As well, the Ontario approach has been criticized as relegating part-timers to the status of "second class" industrial citizens without sufficient bargaining power, standing alone, to improve significantly their lot.

It is possible that the determination of bargaining unit structure for part-timers could raise Charter issues. For instance, if a labour relations board were to refuse to certify a common bargaining unit where both full- and part-time groups wanted it, arguably both groups could claim that their section 2(d) "freedom of association" had been violated and the board would have to justify its decision under section 1. If the part-time group wanted a common unit and the full-timers were indifferent on the matter, the board could again face a section 2(d) complaint on the part of the part-timers. However, if the board were to certify a common unit in the face of opposition from the full-time group, the latter might argue that their "freedom of association" had been violated in the sense that section 2(d) possibly entails a corollary freedom to dissociate with those whom you do not want to associate with. If the part-timers wished to join the full unit and the full-timers were opposed to it, this could give rise to a classic example of Charter "rights" colliding. The balancing of the competing policy interests in the above scenarios would indeed be a delicate one! At present, however, none of the scenarios have been tested before the labour boards or courts. Once part-time employees have acquired bargaining rights they enjoy the same protections under the legislation as full-time employees.
Casual Workers

Canadian statistics agencies do not distinguish between, on the one hand "casual" workers as defined in this paper and, on the other hand, full-time or regular part-time workers. Nor did the Wallace Commission formally identify a separate "casual" category in its data collection. Despite the dearth of statistics, it is probably safe to assume that a significant proportion of part-time workers will also fall within the "casual" category. After all, the Wallace Commission found that one of the major attractions of part-time work is that it allows employers to cover intermittent "peak" periods.¹ Although it is not necessarily indicative of the practice of employers in general, the British Columbia Health Association reported to the Commission that 82% of the total part-time staff employed in hospitals throughout that province were casuals, with regular and casual part-timers representing 22% of the entire workforce.² According to the Wallace Commission, casual part-timers fare even worse than regular part-timers with respect to their terms and conditions of employment.³ The Commission found that those relatively rare employers which do afford equal treatment to regular part-timers generally exclude casual part-timers from fringe benefits without paying compensating cash in lieu. In addition, it is not uncommon to have full-time employees hired on a casual basis, for example in seasonal work such as agriculture. The plight of the migrant seasonal agricultural workers is notorious and needs no repeating here.⁴ However, the range of occupations within the casual category is vast, embracing the symphony violinist at one extreme and the fruit picker at the other. We will examine the legal regimes governing casual workers next.

Legal Status At Common Law and Under Employment Standards and Collective Bargaining Legislation

As was seen earlier, economic subordination is central to the determination of "employee" status for common law and statutory purposes. The mere fact that a person is hired for short term, intermittent periods does not necessarily mean that he will be held to be in business for himself and therefore not be an "employee". Nor is it necessarily determinative that the worker is free to elect to come to work when he wishes, rather than at the employer's dictate, as is the case with many casual workers.⁵ The worker will more likely be considered an entrepreneur, however, if he sells his services in the market generally rather than to a single, or very limited number of employers.⁶ Conversely, the more frequent a re-engagement is with a particular employer and
the longer its duration, the more likely it is that the worker will be regarded as being integrated within that employer's business. Thus strippers who worked for dozens of different taverns during the year, rarely returning to any particular tavern within at least six months, were held not to be "employees" under the Ontario Labour Relations Act. On the other hand, "freelance" technicians in the movie industry who were hired by different companies on a "project" basis were held to be "employees" under the same statute because they were economically dependent on and closely controlled by each company, rather like employees in the construction industry.  

In some jurisdictions the collective bargaining legislation is extended to "dependent contractors" who are defined so as to encompass persons who would not otherwise be "employees". It has been argued persuasively that the standard "employee" test was always sufficiently flexible to encompass such persons in any case and that the "dependent contractor" provisions are therefore superfluous. In the context of casual contractors, such as "freelance" feature journalists and owner operators in trucking, the "dependent contractor" test has been applied in a similar way as the "employee" test so that "dependency" has been held to exist where the contractor works for a limited number of different employers, each one of whom he is economically subordinate to. The same result would probably follow in that scenario under the general "employee" test.

**Treatment Under Employment Standards Legislation**

It is uncommon for casual employees to be specifically excluded from the legislation, except in the civil services of Saskatchewan, Quebec, British Columbia and Newfoundland. This is achieved in Newfoundland by defining "civil servants" as persons who work "on a full-time basis". In British Columbia, the legislation excludes employees hired for a period of less than 60 days. In Saskatchewan, "casual" employees, namely those engaged to perform "work of a casual or emergent nature where the duration of the employment will not exceed a period of 26 working days in a period of 2 months", are part of the "unclassified" civil service and as such are subject to unilateral employer regulation. In addition, casual workers will often be employed in particular industries which are excluded from the coverage of the legislation, such as agriculture. Even if those industries are not completely excluded from the legislation, specific benefits might not apply to them, as in Nova Scotia where agricultural workers are excluded from holiday and vacation entitlements and from unjust discharge protection. In Ontario, agricultural workers are excluded from the minimum wage, hours of work, overtime and vacation and holiday provisions of the Employment Standards Act. There is, however, a Regulation covering employees employed on a "farm to harvest fruit, vegetables or tobacco for marketing or storage" which entitles them to a vacation and a public holiday if they have 13
weeks seniority, as well as establishing maximum deductions for meals and accommodations and a minimum wage.\textsuperscript{17}

Even where casual employees are covered by the employment standards legislation, it is not uncommon for them to be exempted from specific benefits under it. Thus the protections available to workers in mass redundancies, which may include advance notice, severance pay and joint planning measures to cushion the blow of layoff, do not apply to defined casual employees in the federal jurisdiction, Nova Scotia, Quebec and Manitoba.\textsuperscript{18} In Newfoundland, this exclusion relates only to persons employed "for seasonal production work in a fish plant to supplement the regular work force peak production periods."\textsuperscript{19}

Furthermore, in several provinces entitlement to a minimum notice period, or wages in lieu thereof, in cases of individual termination of employment is unavailable to employees who are hired to perform a specific task or for a fixed duration, thereby encompassing many casual workers.\textsuperscript{20} The common law rights of such workers are deemed to afford them equivalent protection as the legislation. In addition, in New Brunswick this benefit is inapplicable to layoff or termination resulting from "normal seasonal reduction, closure or supervision of an operation".\textsuperscript{21} In Alberta, the benefit does not apply to persons employed on a "seasonal" basis.\textsuperscript{22} In Prince Edward Island, it is denied to summer students and employees hired in tourist establishments which operate for less than six months in a year.\textsuperscript{23}

In addition, entitlement to federal government relocation allowances, which are designed to assist unemployed persons to relocate, depends on the job to which they are moving offering "good prospects for continuing employment".\textsuperscript{24} In particular, part-time and seasonal employment only qualifies if it is "permanent" in nature.\textsuperscript{25}

Casual employees, particularly in the civil service, may also be entitled to less beneficial benefits than regular workers. In the federal civil service, for instance, "casuals"\textsuperscript{26} are not entitled to vacations, extra pay when acting in a higher position nor to leaves of absence, whereas "seasonals"\textsuperscript{27} are governed by different leave and vacation provisions. In the British Columbia civil service, only "regular" employees can pursue their grievances to the level of chairman of the Public Service, with the terminal step for "non-regulars" being the head of the agency or ministry in which he works.\textsuperscript{28} Indeed, "non-regular" civil servants in that province are disqualified from most of the benefits enjoyed by regulars, especially as regards leaves of absence.

A major disadvantage of casual status is that it often prejudices the employee in terms of accrual of seniority for the purposes of important statutory benefits. Normally, entitlement to the minimum period of notice of termination of employment (or wages in lieu thereof) depends on the accrual of a defined period of continuous employment during which the contractual nexus between the worker and his employer must persist.\textsuperscript{29} Moreover, the quantum of notice generally increases with the length of uninterrupted service. Insofar as the
layoff of a casual employee involves the termination of his employment contract, rather than its suspension until work recommences, his accrued seniority is lost and he must begin to requalify from scratch. Depending on the jurisdiction, eligibility for other statutory benefits may also require such uninterrupted service, including vacation, bereavement, sickness, maternity, and paternity leaves; protections against unjust discharge; rights to holidays; and severance payments. As well, the amount of benefits may increase with greater seniority. The dimension of the problem is indicated by the data on tenure duration for part-time workers. In 1983, 295,000 part-timers, representing 17.87% of the national part-time labour force, were employed for a period between 1 and 3 months; 174,000, representing 10.54%, for a period between 4 and 6 months; and 188,000, representing 11.39% for a period between 7 and 12 months.

In response, the legislation in some provinces deems successive periods of employment with the same employer to be continuous, so long as the hiatus between periods does not exceed specified amounts. This acknowledges the reality of an on-going relationship between the parties. The longest permissible hiatus is 3 months in Alberta, in contrast with 5 consecutive days in the federal civil service. The maximum in Saskatchewan is 14 consecutive days in the case of minimum notice of termination, but this increases to 182 days in the case of vacation leave. In Ontario and Nova Scotia the maximum is 13 weeks. In Newfoundland special provision is made to preserve the continuity of "seasonal workers" provided that they work for at least 5 months in each season. In the federal jurisdiction, absences will rupture continuity unless they are "permitted" or "condoned" by the employer or unless they occur as a result of a "layoff". The latter must be of less than 3 months duration, except where the employer notifies the employee on or before the layoff of a fixed date within 6 months’ time upon which he can resume work. One drawback with these provisions preserving continuity of employment is that they are often not made applicable to all the statutory benefits which hinge on continuous employment. Thus in the federal jurisdiction, the provision only applies to the minimum notice period, severance pay and maternity provisions, thereby excluding unjust discharge and group termination protections and sickness, vacation and bereavement leaves. In Nova Scotia, it applies to the minimum notice period, severance pay and unjust discharge and group termination protections, but not to maternity leave. In Saskatchewan, there are no provisions for maternity, paternity and bereavement leaves. In Newfoundland the provisions apply only to the individual and group termination protections, thereby excluding vacation and maternity leaves. There is a unique provision in the federal jurisdiction for employees in "multi-employer employment", most of whom would be within the "casual" under the definition adopted herein. A "multi-employer" industry is defined as being one in which, by custom, some or all of the workers would "in the usual course of a working month be ordinarily employed by more than one employer". Longshoring and "freelance" broadcasting are examples. The Governor in Council is empowered to issue regulations in order to ensure
that "as far as practicable" employees in those industries will be guaranteed substantially the same employment benefits as regular employees under the statute. At present, one regulation has been introduced establishing equivalent holiday payments for longshoremen.

Due to the intermittent nature of their work, casual employees may also suffer by not qualifying for holiday benefits which depend on a minimum amount of work being performed during a defined period preceding the date of the holiday. Ontario is typical in requiring that the employee must have earned wages on at least 12 days during the 4 weeks preceding the holiday. In contrast, in Alberta the employee need only have worked for 30 days during the preceding 12 months. Not working on as many days as the regular employee will also penalize the casual worker in respect to the amount of vacation to which he is entitled since that generally increases with time worked. It may also prejudice his interests under the federal Labour Adjustment Benefits Act which provides compensation for persons permanently laid off in certain designated industries. Employees can only qualify if they have accrued at least ten "years of employment" with any employer in any designated industry within the 15 years preceding the layoff. In order for a "year of employment" to count, the employee must have been paid for at least 1,000 hours of work during it. The administrator of the scheme, however, is empowered to reduce the qualifying period in cases of "severe financial hardship".

Lastly, there is some degree of governmental supervision of seasonal work in many provinces which helps to reduce the potential for abuse. For example, in New Brunswick there is an Advisory Committee on Seasonal Employment, composed of representatives of employers, labour and government which is charged with advising the provincial Minister of Labour on all aspects of seasonal employment, including the legislative protections available to employees. In addition, the federal government monitors seasonal employment in agriculture in two ways; firstly, under the Canadian Farm Labour Pools system and, secondly, under the Seasonal Agricultural Workers Program.

Canadian Farm Labour Pools are employment referral centres operated in farming communities by independent contractors in close co-operation with local Canada Employment Centres. In 1983, there were 65 C.F.L.P.s throughout Canada and they placed 215,406 persons in employment in agriculture. Local Agricultural Manpower Boards act in an advisory capacity to the Pools, establishing guidelines on wage rates, and living and working conditions for persons hired through the Pools. Thus the Pools can seek to ensure that farms which hire labour through them comply with the guidelines. As well, the federal government under its Seasonal Agricultural Workers Program can seek to ensure that farms which hire labour through it - in this instance, imported foreign labour - establish fair terms and conditions of employment for the workers. The plight of these domestic and foreign farm labourers who follow seasonal crop rotations, either as independents or as part of gangs supplied by employment agencies, became notorious in the 1960s and prompted the introduction of the
above reforms. Of course, it is still possible for workers to obtain seasonal employment on farms without going through these government monitored agencies, in which case the potential for abuse will continue to exist. As we shall see later, British Columbia is the only province which has legislated safeguards specifically against employment supply agencies which employ their own employees and contract out their services to farms for seasonal work.

**Treatment Under Collective Bargaining Legislation**

It is uncommon for casual employees to be specifically excluded from the legislation, except in the civil service. In the Ontario civil service, for instance, there are three categories of exclusion which will encompass many casual workers. The first is students employed during their regular vacation or engaged on a cooperative educational training program. The second is persons employed "on a project of a non-recurring kind or on a temporary work assignment". The third is persons not ordinarily required to work more than one-third of the normal period for performing similar work, unless the work is performed on a continuing and regular basis.

The legislation for civil servants in New Brunswick and the federal jurisdiction also contains the latter category of exclusion, but without the exception in favour of continuing employment. In the federal civil service and New Brunswick the exclusion also encompasses civil servants employed on a "casual or temporary basis, unless ... so employed for a period of six months or more". The British Columbia legislation exempts civil servants employed for less than 60 days. In Nova Scotia, the excluded groups are persons employed on a "casual basis for less than 12 continuous months" and those employed "on a temporary or summer employment basis", unless they have been so employed for a "continuous period" of 6 months or more. In Quebec, the exclusion relates to a "position or office of a casual nature' and this is defined so as to encompass two groups. Firstly, there are "casual workers" whose employment duration is less than 3 months and "casual functionaries" whose employment duration is less than 4 months. Secondly, there are casual positions which "... fill the purpose to execute a specific and casual work such as the issuance of registration certificates, the construction and repairing of a bridge, a road or another work etc ...". In Quebec, the terms and conditions for these excluded casuais are determined at the discretion of the relevant department head "... bearing in mind the conditions applicable in specific cases to the regular employees of the administrative unity to which such incumbent is assigned". The Supreme Court of Canada has held, *obiter*, that this phrase does not oblige the department head to establish identical terms and conditions for casuals; rather, he is only "... required to take these conditions into consideration and base himself on them". Thus, only Manitoba, Alberta, Prince Edward Island and Saskatchewan include casual civil servants within the legislation.

Outside the civil service, casual employees are only ousted from the legislation insofar as they may be engaged in exempted occupations, such as domestic work in private
homes in Ontario and New Brunswick, certain agricultural work in Alberta, Ontario, and New Brunswick, and hunting and trapping in Ontario. 67

It is uncommon for labour relations boards to identify as a formal category "casual" employees and separate them into their own bargaining units. In most jurisdictions, the regular employee unit is presumed to be appropriate for casual workers. 68 In Ontario, for instance, short-term and seasonal employees are placed in the regular unit, assuming that they work the requisite 24 hours per week, irrespective of the intermittent nature of employment. 69 Quebec also follows this approach with the result that, in one case, casual employees who worked in a flower selling business only at the peak times of Christmas, Easter, St. Valentine’s Day and Mother’s Day were placed in the regular unit. 70 The rationale is that casual workers would otherwise have inadequate bargaining power to make union organization meaningful for them. However, the Quebec Labour Court has stated that it will segregate the two groups in two situations: where there is a clear divergence of interest between them other than the irregularity of work; or where the casuals are opposed to unionization and would block the regular employees from winning recognition if they shared the same unit. 71

On the other hand, the Canada Labour Relations Board, whilst not recognizing a formal category of "casual" worker, looks to regularity of employment and will create a separate unit for casual employees who work so intermittently and spasmodically for an employer that they are unlikely to share similar bargaining goals with the regular workforce. 72 The approach in British Columbia is similar. Although the British Columbia Labour Relations Board emphasizes that community of interest is the sole yardstick, the irregular nature of casual work will often indicate the absence thereof and will result in the creation of separate units. 73

If the casual worker is a "dependent contractor" rather than an "employee" under the legislation, the bargaining structure may differ. In Ontario, the Labour Relations Board is required to create a separate bargaining unit for "dependent contractors", unless a majority of the contractors decide that they wish to be included in the full-time unit. 74 In British Columbia, the Labour Relations Board has the discretion to include "dependent contractors" in a regular unit if a majority of them so wish provided that "reasonable procedures have been developed to integrate ... [them] ... into the bargaining unit". 75 As with part-time workers, casual employees enjoy the same legal protections under the collective bargaining legislation as regular employees.
Workers Hired Under Fixed Term Contracts

Canadian statistics agencies do not identify these workers as a separate group so that it is impossible to ascertain the incidence of fixed term contracts or how the workers hired under them fare with respect to their terms and conditions of employment. Given the nature of "casual" work outlined earlier, it is probably safe to assume that a significant number of casual workers will be engaged under this sort of contractual arrangement. However, the category is by no means limited to casual work. Again, it will embrace a broad range of occupations, from the movie actor engaged for the duration of the project to the typist working on a contract research job.

Legal Status At Common Law and Under Employment Standards and Collective Bargaining Legislation

Hiring for the performance of a particular task (but less so for a fixed term) may suggest that the relationship is one of independent contractor, although this is not conclusive. Accordingly, these workers can enjoy "employee" status under the legislation and at common law. The major disadvantage for them at common law is that non-renewal of their employment upon expiry of the term or completion of the task cannot found an action in wrongful dismissal because the employment contract will have ended automatically pursuant to its own terms, not by unilateral act of the employer.\(^1\) This perhaps explains the reluctance of courts to find such contracts in the absence of crystal clear language to the contrary.\(^2\)

Treatment Under Employment Standards Legislation

In most provinces, persons employed under such contracts are expressly excluded from the minimum notice of termination provision, presumably because they know in advance when their hiring will end and if the employer terminates them beforehand this will constitute breach of contract for which damages are recoverable at common law.\(^3\) So too with the provisions for additional notice periods and severance payments in mass termination situations.\(^4\) The exceptions are in the federal jurisdiction and Prince Edward Island in the case of the minimum notice period provisions, and in Newfoundland, Ontario and the federal jurisdiction in the case of the mass termination provisions.\(^5\) Conceivably, these
statutory protections could sometimes be more beneficial to the employee than his common law rights.

There are two major drawbacks for the worker with this sort of contractual arrangement. The first is that non-renewal will not constitute "discharge" for the purpose of statutory unjust discharge protections in the provinces having them. The contract of employment will have expired automatically pursuant to its own terms so that termination is deemed not to have been occasioned by an act of the employer. Secondly, if the employee is re-engaged after the expiry of the contract this must technically be under a new contract so that his period of continuous employment will not run from his original hiring date. In British Columbia and Ontario, the legislation provides that if employment continues for three months or more after the contract ends, then the worker's seniority counts from his original hiring date for the purpose of the minimum notice period provisions. Otherwise, the employee’s seniority will be preserved only insofar as he may fall within the general provisions preserving continuity in those provinces which have them.

**Treatment Under Collective Bargaining Legislation**

There is no significance to this sort of contract under the legislation. Once a collective agreement is in force the courts have held that the individual contract of employment disappears. Thus the employee's seniority and protection against unjust discharge will depend on what the collective parties negotiate in their agreement, not on the niceties of common law form. Furthermore, since most collective agreements contain either "bridging" provisions or retroactivity provisions to regulate relationships during a bargaining hiatus between agreements, the employment contract has relatively minor significance in collective labour law. Labour boards normally include these "contract employees" in the regular bargaining unit, being unwilling to infer from the fixed period of employment that the bargaining interests of these employees are sufficiently divergent from those of regular employees to warrant the cost of fragmenting the bargaining unit structure.
Employees Working Under Triangular Working Relationships

The most common example is where the worker's services are supplied to a user by an employment referral agency. Typically, the agency charges the user a fee for assigning the worker to it. The nature of the employment with the user is normally "casual"; the worker may be used to fill gaps caused by leaves of absence among the permanent staff, to meet seasonal changes in demand or to perform specific "specialized" projects of a short-term duration. As well, the agency generally assumes the responsibilities and obligations of the "employer" under the labour relations, workers' compensation and unemployment insurance legislation, in return for which the user pays a fee normally 40% to 60% above the going hourly rate payable to non-agency supplied casual workers. Often, employers who think that they might eventually need full-time help hire an agency supplied worker initially so that they can evaluate his performance without becoming embroiled in any legal commitment to him which might arise, for instance, if he were entitled to reasonable notice of termination as an "employee". Three key legal issues with agency supplied workers. The first is whether the legal status of the agency supplied worker is sui generis, precluding him from being an "employee" of either the agency or the user. Assuming that the worker is capable of being an "employee", the second issue is how to identify who is the employer for labour relations purposes, the user or the agency. The third issue is how to control the potential for abuse of workers on the part of the agency arising from the Tatters' superior knowledge of the labour market.

Before exploring these in detail, it should be noted that not all triangular working relationships occur in the context of employment referral agencies. For example, there have been cases where employer A has rented specialized equipment to employer B, along with the services of one of its regular employees to operate it, and the issue is whether A or B is vicariously liable as "employer" for torts committed by the operator in the course of his employment. Because unilateral assignment of the employment contract is impermissible under common law, the answer must depend on the general principles of law governing the formation and termination of employment contracts, and in most instances, it will be difficult to conclude that the operator has become the regular "employee" of B. Nevertheless, the courts have held that a regular employee of A can become a "deemed employee" of B for the purpose of affixing the latter with vicarious liability provided that B is using his services and exercises
a high degree of control over him. However, the exception only applies for the purpose of vicarious liability, the courts taking the view that it is sound policy to make B vicariously liable in these circumstances. Where vicarious liability is not in issue the usual tests outlined earlier for determining "employee" status must be applied to the relationship between the worker and each possible employer in order to determine which organization employs him.

To return to employment agency work, it was noted earlier that a crucial threshold issue is whether the legal status of the worker is *sui generis* so as to prevent him from becoming an "employee" of either the agency or the user. In *Construction Industry Training Board v. Labour Force Ltd.*, the English Divisional Court suggested that construction laborers hired by an agency and supplied to contractors in the industry were neither "employees" of the agency or the contractors, nor did they have a contract for services with either party; rather, "... where A contracts with B to render services exclusively to C, the contract is not a contract for services ... [or of service] ... but a contract *sui generis*, a different type of contract from either of the familiar two." This decision can arguably be restricted to its facts - the unique status of labour - only subcontracting (the "lump") is a notorious feature of the British construction industry - and to the purpose for which the inquiry was made, namely to decide whether the agency was liable to pay a training levy imposed on "employers" in the construction industry. As yet there have been no reported instances where Canadian courts have taken this approach.

The danger with applying the bald proposition enunciated by the Divisional Court is that *all* agency supplied workers would be excluded automatically from the protection of the employment standards and collective bargaining legislation, irrespective of whether it would be harmonious with the policy goals of the legislation to encompass them within it. Moreover, they would be denied automatically the benefits of being considered an "employee" at common law (such as they are), irrespective of their being in a position of economic dependency upon and controlled by one or other of the agency or the user. It is submitted that the preferable approach to determining the status of these workers at common law and under the legislation is to apply the usual tests of ascertaining which employer (if any) the worker is economically dependent upon and controlled by and which employer (if any) ought to be recognized in order to effectuate the policy goals of the legislation. Each case will then turn on its own facts. In some instances the worker will properly be regarded as an independent entrepreneur, selling his services through the medium of an agency, rather than as an employee. Indicia of entrepreneurial status would include the worker obtaining a significant proportion of his work by marketing personally his services to various clients, especially if he truly "bargains" a rate for each job; by utilizing various agencies instead of a single one in order to obtain the majority of his work; and by relying on agency supplied work spasmodically rather than continuously. In many instances, however, the worker will be economically dependent upon and controlled by either the user or the agency, and it will make for sound policy at common
law or under the legislation to make him an "employee" of one or the other. For example, if
the agency controls effectively the workers' opportunities to secure job placements then he
may be said to be economically dependent on the agency, and therefore an "employee" of the
agency even though the latter may exercise a miniscule degree of supervision over his job
performance while on assignment to users. On the other hand, if the worker becomes fully
integrated within the organization of the user, as may occur with long-term placements, he
will become an "employee" of the user even though the agency may continue to process the
administrative aspects of his employment. The approach of the English Divisional Court in
Labour Force Ltd. is too mechanistic and inflexible to reflect the reality that a substantial
number of agency supply workers better fit the mould of "employee" rather than
entrepreneur. Hopefully, Canadian courts will not adopt it. The thorny question to be
addressed next, assuming that the worker is capable of being an "employee", is whether the
user or the agency is his employer for labour relations purposes.

This issue is of crucial importance to the employee. As regards the benefits provided
by the "floor of rights" legislation, these vest exclusively against the individual's "employer",
although there are some exceptions such as the duties under health and safety and human
rights legislation. Accordingly, if the worker is held to be "employed" by the user, and
assuming that he is assigned to several different users throughout the year, he may not be
able to accrue sufficient hours of work and continuity of employment with any one user to
qualify for the same statutory benefits that traditional employees would enjoy after an
equivalent period of work. In this regard, agency supply workers share the same
disadvantages as casual workers described earlier. It is submitted that the employment
standards legislation should be amended to "deem" the agency to be the employer for the
purpose of the benefits thereunder. This would not only guarantee the employee equivalent
benefits as a traditional worker but also would be economically convenient because the
agency could easily pass on the cost to its users who in turn could pass it on to society as a
whole through the price of their product or service. An exception should be made, however,
for the agency supply worker who has become a regular and on-going employee of the user.
After all, he will be more akin to a permanent employee than a casual and there is no reason
why the mere fact of his having been placed through an agency should absolve the user from
the obligations under the employment standards legislation.

In addition, it is submitted that there ought to be an employment standard requiring the
agency to guarantee that its employees will receive equal pay in comparison with a user's
employees for work of equal value in the establishments of users to which they are assigned.
Not only would this reflect the moral "rightness" of treating people equally in similar
circumstances but also it would discourage the practice of employers attempting to undercut
the collective agreement rate in their own establishments by hiring agency workers at reduced
rates: the agency would simply reflect the extra cost in its fee to the user. If the user becomes the
direct "employer" of the individual it should be bound by a similar duty as well: the mere fact that the employee is placed through an agency should not justify his unequal treatment. At present, no such employment standard has been enacted in Canada.

As regards collective labour relations, the statutory right to obtain recognition through certification applies only to "employees" of the "employer" named in the application. If the workers are held to be "employees" of the agency, this would make it almost impossible for them to obtain collective bargaining rights because of the difficulties with organizing a workforce which is geographically dispersed and which rarely congregates en masse to share work experiences and formulate common responses. Therefore, there is little reason to "deem" the agency to be the employer for the purpose of the collective bargaining legislation.

In the unlikely event that the workers are employed by a unionized agency and assigned to a non-unionized user, the agency should be compelled to make it a term of the contract with the user that the latter observe those collective agreement articles which guarantee the individual's personal dignity in everyday workplace relationships, for example, articles regulating discrimination, sexual harassment, the kinds of order that the employee is entitled to disobey, hours of work, and the right to participate in the grievance procedure or otherwise engage in union activities in the workplace. Although one would expect a union to make the above demand a bargaining priority, there is no guarantee that it will be won and without it the protections of the collective agreement would become virtually meaningless for employees who spend all of their working lives on assignment with other organizations. Of course, it would be an unfair labour practice for a user to penalize an employee of the agency because of his union activities: the legislation does not require that the "employer" actually employ the individual whom he penalizes, unlike in some countries such as Britain.\(^\text{13}\)

In the more likely scenario of workers being employed by a non-organized agency and placed with a unionized user, it is submitted that the legislation ought to extend the appropriate terms of the users' collective agreement to the agency workers. The primary justification for this reform is the moral "rightness" of the principle that individuals who perform similar work in the same establishment should receive equal wages and equal protection against abusive treatment in the workplace by management. Otherwise, a negative psychological impact could conceivably result for the agency worker who perceives himself as being a second class citizen in the working community. There is no reason why the users' pursuit of profitability should override the agency employees' expectation that he be treated with equivalent dignity and respect as the permanent employee of the user alongside whom works. If users could prove that the cost of this reform would cause such extraordinary economic harm that the survival of the enterprise itself would be imminently threatened, a justification on utilitarian grounds might arguably be made out, but such instances would doubtlessly be rare. On the contrary, in so far as equal treatment would result in increased productivity among the agency
workers, the user would conceivably benefit from it in many cases. Plainly, some terms will be inappropriate for extension such as those regulating promotion and career advancement, layoff, seniority, pensions and medical and long-term disability insurance. Nevertheless, those terms which impact immediately on daily working relationships and which are central to ensuring that the individual is treated with fairness and dignity in the workplace should apply equally to agency employees, eg. wages, hours of work, health and safety protections, restrictions on the kinds of orders that management can issue, prohibitions against discrimination and sexual harassment and the grievance procedure. It must be remembered, of course, that under my scheme the agency would remain the employer for the purpose of the substantive benefits under the employment standards legislation. True, there will be disagreement over what should comprise the appropriate articles for extension. For instance, it might be inadvisable to exempt agency employees from paying union dues, or part thereof, in order to avoid ill-feeling among the users’ employees that the agency workers are obtaining the fruits of collective bargaining without having to pay a price. Furthermore, it is debatable whether the union’s duty of fair representation, which presently is owed only to "employees" of the employer with whom it has bargaining rights, ought to be extended to agency employees and, if so, what obligations that ought to entail for the union. Despite these difficulties, it is suggested that the moral case for equal treatment of agency and user employees in the daily life of the workplace remains compelling, at least in the absence of a possible utilitarian argument that a significant majority of users would face disproportionately severe economic harm were equal treatment to be implemented. This would be a tough onus to discharge.

In addition, the enactment of the above reform would discourage unionized firms from hiring agency employees as a means of deliberately undercutting the collective agreement rate or, in some instances, of undermining the union’s strength with a view to eradicating it altogether. This would buttress the statutory unfair labour practices which currently offer some safeguards against those dangers. The ambit of those unfair labour practices was considered recently by the Ontario Labour Relations Board in Service Employees International Union Local 204 and Kennedy Lodge Inc et al. The Board stated that there will be a rebuttable presumption of an illegitimate motive for the purpose of finding an unfair labour practice under sections 64 and 66 of the Labour Relations Act if an employer utilizes agency employees on its premises to perform the "core functions", as distinct from the "peripheral functions" of its business. The Board emphasized that the user’s objective of saving money by avoiding collective agreement obligations will not in itself constitute a legitimate motive. It follows that the reform suggested above would go beyond buttressing the present unfair labour practices: its effect would be to discourage the hiring of agency employees even where their engagement would be lawful under the labour relations statute.
In *Kennedy Lodge*, the Board envisaged employers as having a wide leeway to hire agency employees: the utilization of their services is legitimate so long as the employers’ motive is not *willfully* and *deliberately* to undermine the collective agreement or weaken the unions’ position. Thus the Board stated that where "... for purposes of economy or efficiency ... work that had been performed by members of the bargaining unit is performed by the employees of a genuine arm’s length sub-contractor, under the direction of the sub-contractors’ organization and utilizing the resources of that organization, it would be difficult to find ... [unlawful conduct]". The Boards’ concern with protecting the interest of the user to pursue the goal of profitability is reflected in its’ disinclination to construe “illegitimate motive” under the section 66 unfair labour practice as including those consequences which the employer can *foresee* as being likely to occur as a result of its actions. In the latter sense, the user could be said to "intend" to undermine the collective agreement and the union’s strength by hiring cheap agency employees. Of course, the Board was really making a policy choice - the language of the statute does not *compell* the result arrived at. Similarly, the Boards’ conclusion that the hiring of cheap agency employees does not constitute an unfair labour practice under an *impact* based construction of section 64 of the Labour Relations Act was also a pure policy choice, not dictated by the language of the section. The choice facing the Board was between the unions’ collective security and the users’ profitability and the latter was accorded paramountcy. True, the interest of the agency employees in receiving equal treatment was quite properly not before the Board, falling as it does outside the purview of the anti-union unfair labour practices. In contrast, the reform suggested herein would accord paramountcy to the agency employee’s interest in receiving equal treatment in the daily life of the workplace. Therefore, it would go beyond the present mischief of the anti-union unfair labour practices.

The foregoing assumes that the worker supplied by the non-organized agency remains the "employee" of the latter and does not become the "employee" of the unionized user. It may occur, however, that the agency worker is integrated within the users’ organization to such a high degree that he becomes an “employee” of the user itself under the recognition clause in the collective agreement. If so, he becomes entitled to the protections of the agreement. A good illustration of the approach of arbitrators and labour boards in this regard is *K-Mart Canada Ltd.*, where a trade union alleged that temporary workers "contracted in' by an agency to the company were employees of the company and therefore within the coverage of the collective agreement. Under the arrangement between the parties, the agency was notified by K-Mart every morning of how many workers it would need and the agency transported the required complement to the companies’ premises. K-Mart had the choice of sending back anyone it did not like and at any time could notify the agency that a particular worker was to be considered as "fired". The degree of on the job control by K-Mart was substantial. The agency workers were assigned tasks, scheduled working hours, and disciplined in the same way as regular employees. The agency handled the administrative burden of paying remuneration, from
which they made the statutory deductions, and the agency then billed the company for the hours worked at a rate negotiated between the two organizations. The agency workers perceived themselves as being employees of K-Mart, even to the extent of filing grievances against the company as if they were regular employees. Indeed, the agency workers were retained throughout the year on a de facto regular basis.

In holding that the agency workers were "employees" of K-Mart, the Ontario Labour Relations Board stated that seven criteria were especially relevant in making the determination. The first is who exercises effective direction and control over the workers. The Board considered that "considerable significance" should be given to this factor. Here, the degree of control exercised by K-Mart was substantial. The second is who bears the burden of remuneration. Here, the agency carried out the administrative task of paying, but the economic burden ultimately fell on the company. The third, fourth and fifth criteria are who has authority, respectively, to hire, discipline and fire the workers. Here, the de facto decision-making was done by K-Mart. The sixth is who is perceived to be the employer by the workers themselves. Here, it was K-Mart. The seventh is whether it is the agency who intends to create a bona fide employment relationship with the workers or whether that is the company’s motive. Here, the Board considered that K-Mart intended to be the real employer. The Board's decision was doubtlessly influenced by the fact that K-Mart had increased its use of agency workers by over 600% since union organization began in the store, indicating a true intention on the company’s part to use the agency’s services as a device to undermine the union’s position. A "mischief" application of the test clearly underlies the Board’s decision in this case, as it does in so many other cases in this area. Lastly, the Board emphasized that it gives little weight to private contractual arrangements between the organizations as to who is to be considered the employer, nor to who is the administrative paymaster. Indeed, labour relations boards have stressed time and again that, in respect to the application of all of the foregoing criteria, what counts is not the de jure formalities in contractual documents but what occurs as a matter of reality.

An important underlying feature of the K-Mart Canada decision, therefore is the way the Board applied the definition of "employee" in order to discourage the user company from hiring the agency workers deliberately to break the union. The latter goal is plainly repugnant with the policy of the statute. The Board has subsequently stated in Kennedy Lodge that where a user company integrates agency workers so deeply within its organization that they become "employees" of the user, which is precisely what occurred in K-Mart Canada, the inference can "readily" be drawn that the user was motivated by an illegitimate, anti-union purpose in hiring them so as to establish an unfair labour practice on its' part. Thus, the user will get the worst of both worlds: its "cheap" labour will be entitled to the full protections of the collective agreement and it will be guilty of an unfair labour practice as well!
The third important issue concerning employment agencies is how to avoid the danger of agencies exploiting their superior knowledge of the labour market to abuse individual workers who utilize their services. Convention No. 96 of the International Labour Organization, promulgated in 1949, gave signatory states the choice between either providing in their domestic legislation "for the progressive abolition of fee-charging employment agencies conducted with a view to profit"25 and their replacement by public employment services or, if they elect to retain fee-charging employment agencies, ensuring that their operation is "supervised"26 by the state authorities. In particular, the agency has to be licensed every year27 and its fees must be "approved or fixed"28 by state authorities. Most Canadian provinces29 have followed the route of enacting controls on the agencies activities rather than outlawing them altogether. The typical statutory response requires that employment agencies be licensed as a condition precedent to operating30 and prohibits them from charging the employee a fee, except in Ontario where a limited amount may be charged.31 Although the details of the various schemes differ, the common feature is that it is made an offence to violate the legislation and, in jurisdictions where licensing is mandatory, the license may be revoked which is probably the more potent sanction. Another common feature is that the definitions of "employment agency" appear to preclude the application of the legislation to agencies which supply workers who are "employees" of the agency itself.32 The terminology in Manitoba, however, may encompass the latter situation on a literal interpretation33 but this does not appear to be the underlying goal of the legislation. Indeed, Convention No. 96 itself is restricted to agencies which do not employ the workers whom they supply.34

It is submitted that there should be specific safeguards imposed on agencies which supply their own "employees" on a casual basis to users, over and above their general obligations under the labour relations legislation. The potential for abuse obviously exists, the classic example being the plight of seasonal farm laborers who follow crop rotations and who, in many instances, are contracted out by unscrupulous agencies.35 As was seen earlier,36 some protections are already in place for this group of persons, notably under the Canada Farms Labour Pool system and the Seasonal Agricultural Workers Program. There is no requirement, however, that farms obtain their labour exclusively through those channels, nor are there equivalent protections for other occupations in which seasonal work is common.

At present, the only province with legislation specifically regulating agencies which supply workers employed by themselves is British Columbia in the case of "farm labour contractors".37 These are defined as employers "whose employees do work in connection with the planting, cultivating or harvesting of any horticultural or agricultural product for or under the direction of another person."38 In order to operate, a "farm labour contractor" must obtain a license which requires that he satisfy the Director or Employment Standards in respect to, inter alia, his "character, competency and responsibility"39 and his knowledge of his legal obligations under the Employment Standards Act.40 In addition, he must disclose the identity of all other
parties having a financial interest in his operations, give evidence as to his previous experience and competency as a "farm labour contractor" and describe the "method by which he proposes to conduct his operations".\textsuperscript{41} The license is subject to revocation for breach of the Act or for misrepresentation.\textsuperscript{42} So too if the conditions under which it was granted have changed, or if the contractor violates any enactment relating to the health and safety of his employees.\textsuperscript{43} The obligations imposed on a "farm labour contractor" include making available for inspection by his employees or his clients a statement of his employees' wage rates; displaying "prominently" at the worksite and on all vehicles used for transporting employees the wages he is paying them; maintaining a payroll list for inspection by his clients; and paying his employees a defined wage for the day if he transports them to a worksite but is unable to provide them with actual work.\textsuperscript{44} As well, he must pay his employees' wages within 72 hours of each "pay period".\textsuperscript{45} In the event that a client enters into an arrangement with a contractor whom he knows to be unlicensed, the client is deemed to be the employer of the employees and the above-mentioned obligations will fall on him.\textsuperscript{46} No other province has followed the British Columbia approach as yet. In two jurisdictions, Ontario and the federal jurisdiction, trade unions who refer persons to employment through their hiring halls are subject to a specific statutory duty of "fair" referral.\textsuperscript{47} It is perhaps a telling omission that protection of equivalent breadth has not been universally enacted for employment agencies.

Lastly, it may be that workers in this category will find themselves being transferred regularly between several companies who, although they are separate corporate entities, may have a close relationship for labour relations purposes. Assuming that the worker becomes an "employee" of each company to whom he is assigned, his "continuity of employment" for the purpose of benefits under the employment standards legislation will be disrupted. The typical response of legislators is illustrated by section 12(1) of the Ontario Employment Standards Act which provides;

Where ... associated or related activities, businesses, trades or undertakings are ... carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination thereof, under common control or direction, and a person is or was an employee of such corporation, individuals, firms, syndicates or associations, or any combination thereof, an employment standards officer may treat the corporations, individuals, firms, syndicates or associations as one employer for the purposes of this Act.

Similar provisions commonly exist under collective bargaining legislation. Their purpose is not only to ensure that employers cannot escape their obligations under a collective agreement or the statute by transferring employees to related organizations, but also to avoid the difficulties that result from being unable to decide who the real employer is when companies in close relationships regularly shift workers back and forth.\textsuperscript{48}
Homeworkers

The incidence of workers who are employed in their own private residences is increasing throughout North America. For example, in the U.S.A. it is expected that the number of homeworkers will increase from approximately 5 million in 1984 to some 15 million by 1990.\textsuperscript{1}

The most recent evidence on the incidence of homeworking in Canada is provided in the 1981 census. Although the census did not collate aggregated data for the labour market as a whole it did provide evidence of homeworking in the major population centres. It recorded, for example, that there were 2,150 homeworkers in Halifax, 17,532 in Montreal, 43,465 in Toronto, 7,510 in Winnipeg and 22,200 in Vancouver, with the proportion of males to females being roughly equal. Homeworking was common at the turn of the century among blue-collar workers, especially in the garment industry. Today, the main growth area is in computerized work such as data processing, financial analyzing, programming, and general clerical and writing functions that can be performed on word processing machines. These tasks can easily be performed at home by the worker communicating with his employer via computer; hence the expression "telecommuting" which is often used to refer to this kind of work. Homework may encompass a broad spectrum of occupations, however, ranging from professionals such as accountants and chiropractors, entrepreneurs such as craft hobbyists who market their products, and direct salespersons marketing products such as toys and cosmetics. A number of factors have contributed to the growth of homeworking. The major impetus is the recent explosion of computerization which not only makes a decentralized labour force a viable option but also has exposed a severe shortage of data analysts and programmers in the labour market.

In addition, homework offers the individual the attractions of being "free" to set his own work schedule and of being able to devote more time to child care. Moreover, it offers retirees and the disabled an opportunity to earn some money without having to face the rigours of a traditional work setting.

Despite the apparent attraction that homework offers in terms of freedom the reality will often be that the individual has merely swapped the geographical location where he is being exploited; the fact of his exploitation itself will not have changed and his "freedom" may be illusory. The degree of supervision of computer operators, for example, is potentially extraordinarily high: they can be monitored continuously immediately their computer logs on. For other homeworkers, supervision can take the form of frequent phone calls and regular visits by a supervisor, but the ultimate test lies in the number of units the worker produces. Hence, piecework commonly\textsuperscript{2} becomes the norm for homeworkers, not only for payment purposes but
also as the method of performance evaluation, a classic recipe for abuse. In addition, the atomized and dispersed character of the workforce makes it easier for employers to win the better deal in individual bargaining because each worker will have difficulty knowing how other homeworkers are being treated. This will also give the employer the upper hand when it comes to resolving the day-to-day "grievances" that necessarily and periodically arise in any employment relationship: the "grievor" may not know whether other homeworkers are being treated in the same way, whether his treatment really is unjust and what possible avenues of recourse he might have. Thus, the potential for abuse of homeworking is real.

Legal Status At Common Law and Under Employment Standards and Collective Bargaining Legislation

There is no formally recognized status of "homeworker" at common law or under legislation so that the usual test for "employee" status will apply. There is no reason why the fact that work is performed at home should ipso facto be determinative either way. \(^3\) For example, economic subordination, and therefore, "employee" status, will surely be present if the employer effectively controls the worker's earning opportunities by providing him with materials and a market for his product or service, and by furnishing him with equipment and paying him by the "piece", especially if a minimum target must be achieved. Sufficient "control" would surely be present if the employer makes frequent phone checks, and pays regular visits every week or so to the worker, as well as evaluates his work through the normal quality maintenance system. The homeworkers' "freedom" will often exist only as regards to choosing the hours when the job is to be done: in reality he may be compelled to produce a target volume within a fixed time, in a pre-determined manner and on the employer's financial terms. This scenario would clearly constitute an employment relationship. On the other hand, the homeworker will more likely be in business for himself if he sets his own prices, markets his own product or service, sells to various outlets and arranges his own supplies because these are all indicia of entrepreneurship. Moreover, the policy objectives of the employment standards and collective bargaining legislation are consistent with economically dependent "homeworkers" falling within their coverage. The potential for unfair exploitation is obviously present, irrespective of the geographic location of the workplace or of the worker being able to select the hours during which he wishes to be exploited.

Treatment Under Employment Standards Legislation

Specific regulation of homework exists in only three provinces. In Manitoba, \(^4\) an employer wishing to hire a homeworker must first register with the Minister of Labour who is empowered to impose such conditions on the work as he sees fit where "he believes it
necessary or advisable to do so to secure conformity to the intent and purpose of ... [the Act] ... insofar as remuneration is concerned." The employer must keep for inspection records of the name and address of the homeworkers, "full" particulars of the amount and nature of the work which they are performing, and all wages paid to them and any deductions made therefrom. In Ontario there is a similar registration requirement with the Director of Employment Standards, except that the Director's discretion to impose conditions on the work is wider than in Manitoba in that it is not restricted to remuneration related matters. In Ontario, the Director is expressly empowered to revoke an employer's registration for non-compliance with any of its terms, for breach of any statute or for commission of a nuisance under the public health legislation. These powers are arguably implicit in Manitoba. Whereas homeworkers are not excluded from any of the statutory protections in Manitoba, in Ontario they are exempted from the provisions relating to hours of work, overtime, holidays and health and safety. In Ontario, however, the Director could arguably use his broad discretion to protect the homeworker against more egregious abuses in those areas. In British Columbia, the Employment Standards Branch of the Ministry of Labour takes the view that homeworking falls outside the coverage of the employment standards legislation. Although the language of the statute does not necessarily compel this conclusion - it is arguable that homeworkers are excluded only from the provisions respecting hours of work, overtime, work breaks and minimum daily pay - it appears to be shared by the government as well. Thus, there is presently a bill before parliament to amend the statute which will empower the Lieutenant-Governor in Council to extend the wage protection or other provisions of the Act to homeworkers.

In other jurisdictions, homeworkers appear to be covered by all of the provisions of the employment legislation, even including the legislation governing health and safety in the workplace. The dearth of regulation dealing with the unique problems raised by homework, for example in connection with health and safety, is doubtlessly explained by the relatively recent expansion of the phenomenon in the economy.

**Treatment Under Collective Bargaining Legislation**

The legislation does not deal specifically with any aspects of homeworking. Assuming that homeworkers do become unionized - no easy matter in view of their geographic dispersal and their lack of community with fellowhomeworkers - one controversial issue is the determination of the appropriate bargaining unit. Where homeworkers are employed in addition to regular employees to perform substantially similar work, it is possible that labour relations boards would depart from their usual policy against fragmentation on the basis of a lack of community interest between the two groups. Homeworkers would probably be less concerned with issues relating to the physical work.
environment, scheduling of work, work assignment, transfer, promotion, and "bumping" into regular positions, although they would presumably share the regular employees' concern with remuneration and economic fringe benefits. This difference, along with their physical isolation from the rest of the workforce, could conceivably result in their being placed in separate bargaining units. If the homeworkers are not enthusiastic about unionization and would prevent certification from being achieved by regular employees, the chances of their being separated are even stronger, given the labour relations boards' policy of tailoring bargaining units in order to facilitate union growth. If homeworkers do wish to unionize, the latter policy would probably result in their bargaining units being structured so as to make recognition easier to win. Accordingly, notwithstanding that an employer may hire homeworkers throughout a province, the appropriate unit would probably be all employees within a given township (or an even smaller area in the larger urban centres), instead of a regional or a province-wide unit. As unionization spreads among homeworkers the labour relations boards could consolidate the bargaining units into a larger structure, if the parties were unwilling to do so by agreement. It may very well be, however, that the practical difficulties of organizing homeworkers prove to be so insuperable that direct statutory regulation becomes the only feasible alternative to unilateral employer regulation for them. One possibility is to devise a system of legislated extension of the terms of collective agreements to non-organized homeworkers. For example, once unionization spreads among homeworkers to a reasonably significant degree within a given trade or industry within a defined area, be it provincial, regional or local, the appropriate terms of existing collective agreements could become compulsorily incorporated in the employment contracts of all homeworkers within that area who work in the same trade or industry. Obviously, a mean average for substantive benefits would have to be determined from the various collective agreements in force and some terms would be inappropriate for incorporation in each and every situation. The grievance and arbitration procedures would have to be incorporated; so too would the union dues check-off, given that union personnel would presumably have to administer the "extended" grievance procedures. True, there would be difficulties in formulating such a scheme but it would at least approximate more closely to collective bargaining than direct statutory regulation, and it might encourage greater full-scale union organization among homeworkers as they see firsthand what benefits "collective bargaining" can bring.
Workers Hired Under Government Assistance

The practice of federal and provincial governments of providing employers with financial assistance if they hire workers has become more common in the last few years of relatively high unemployment. For example, in British Columbia between 1982 and 1983 the provincial government subsidized the creation of 1,078 apprenticeships under its Critical Skills Shortage Program; 2,192 trainee jobs under its Industrial Training Program; 2,007 temporary winter jobs under its Winter Employment Stimulation Program; and 8,423 temporary summer jobs under its Summer Job Creation Program. In addition, the federal government assisted the province in funding 1,081 jobs for persons whose employment insurance entitlement had expired or who were in receipt of income assistance under the Canada-British Columbia Employment Development program; 5,415 jobs for recipients of unemployment insurance in the forestry industry under the Employment Bridging Assistance program; 3,323 community improvement jobs for employment insurance recipients; and 580 apprenticeships under the Federal-Provincial Stimulated Work Experience Program for Unemployed Apprentices. As well, the province provided subsidies for the creation of jobs for women in traditionally male occupations and for handicapped persons. Similar job creation schemes exist in the other provinces. As regards the legal status of subsidized workers, the source of their employer’s remuneration will not ipso facto deprive the individual of “employee” status at common law or under the legislation. In Ontario, for instance, one school board claimed that summer students whose wages were partially funded by the government were not “employees” under the labour relations legislation and therefore could not unionize. The Labour Relations Board held they were “employees” of the school board, because it exercised a high degree of control over their hiring, discipline, job performance and work scheduling, and the Board emphasized that the source of their wage was immaterial to their status. The Board stated as follows:

[W]e are satisfied that the government programs which support the employer in this case must be taken to contemplate the potential participation of employees in the process and benefits of the system of collective bargaining that is protected and promoted by statute both federally and provincially. It would require clear and unequivocal language of the legislature or cogent evidence to the contrary to lead us to any other conclusion.
Provided that the government subsidy comprises a portion of the wage, rather than the full amount, there is nothing to prevent the employer from being induced through collective bargaining to increase its share.\(^5\) Even if the subsidy program fixes a maximum wage, this will not necessarily be determinative against "employee" status. Thus in one case where the earnings ceiling was described as being the "locally prevailing wage rate for each occupation", the British Columbia Labour Relations Board held that the workers were nonetheless "employees".\(^6\) By analogy, it would be bizarre indeed if the enactment of government incomes policies establishing maximum permissible wage increases were to deprive the thousands of affected employees of the bargaining rights they may have enjoyed for decades!

In addition, given the protective policy of the employment standards legislation, the same result would surely follow under it. In two jurisdictions, however, the employment standards legislation expressly excludes certain "employees" falling within this category. In British Columbia, the exemption applies to those receiving income assistance for the low paid under the provincial Guaranteed Available Income For Needs Act, as well as under certain other provincial assistance programs.\(^7\) In Nova Scotia, the exemption applies to persons engaged under the federal Unemployment Insurance Job Creation Program "or any substantially similar program".\(^8\) The rationale for these exclusions is presumably that employers would not have the financial resources to hire the individuals concerned if they had to provide the statutory benefits so that the individuals are better off receiving inferior benefits than not having employment at all. Nevertheless, the exclusions do constitute unequal legal treatment resulting in the creation of yet another "minority" group within society that will have to be justified under section 1 of the Charter, as we shall see. Furthermore, because some of the programs are designed specifically for females and young persons, there may be an issue of systemic discrimination on the grounds of race and sex under the provincial human rights legislation as well as under section 15 of the Charter which will again have to be justified.

As regards the collective bargaining legislation, subsidized employees fall within its scope in all provinces except for Alberta. In Alberta, section 2 of the 1985 Student and Temporary Employment Act\(^9\) provides,

Notwithstanding ... [the provinces public and private sector collective bargaining legislation] ... the terms and conditions of employment of a person who is employed by an employer under a temporary job creation program or a job training program shall not be contained in a collective agreement as defined under ... [that legislation]. ...\(^10\)

The Lieutenant Governor is empowered to issue regulations designating the affected programs.\(^11\) Again, the policy of the statute is to encourage employers to hire more temporary and student labour by enabling them to undercut collective agreement rates.\(^12\) Instead of directly excluding the employees concerned from the coverage of the collective bargaining legislation, the government adopted the rather unusual phraseology in section 2 apparently in
order to forestall possible Charter claims that the employees' "freedom of association" under section 2(d) is being violated. Even if this somewhat restricted interpretation is given to section 2(d) - it would surely be illogical to grant the individual a constitutional guarantee of union membership at the same time as denying him the right to enjoy the very benefit which such membership is designed to achieve - it may nonetheless be possible to challenge the statute under section 15, as will be shown later. If so, the exclusion will have to be justified under section 1.

A contentious issue with subsidized employees who are unionized is the scope of the appropriate bargaining unit. The main arguments in favour of their inclusion within regular employee units are: firstly, that the union would be better able to prevent their being used to undermine the regular negotiated rate if it represented them; secondly, that the regular employees would be able to use their seniority to bid on the subsidized positions; and thirdly, in view of the relatively high labour turnover resulting from short-term subsidies, those employees would have greater bargaining power within the regular unit. On the other hand, if the projected duration of the subsidized positions is considerably shorter than the normal duration of regular jobs, thereby creating a clear divergence of bargaining interests between the groups, separate units would probably be established as with any irregular employees, notwithstanding the boards' general aversion to fragmentation. Short of this, however, the parties should be able to formulate their own negotiated solutions to the problems created by subsidized workers. For example, the collective agreement might exempt subsidized jobs from certain sensitive provisions, such as seniority in relation to regular jobs; it might provide lesser remuneration for them in recognition of the employer's limited ability to pay; or it might even exclude them from the entire agreement, excepting, perhaps, the union security and seniority provisions. Certainly, these obstacles cannot be regarded as being insurmountable so as to warrant the conclusion that collective bargaining is unworkable for this group of atypical employees.

Next, we will examine whether the foregoing legal discrimination against atypical workers is justifiable, having particular regard to the Charter of Rights and Freedoms and the human rights legislation.
A General Approach for Justifying the Unequal Legal Treatment of Atypical Employees

This issue forces us to wrestle with what is surely the burning question of the age, namely what constitutes an ethically acceptable system of distributive justice. In Canada today, the question fails to be answered under the rubric of two statutory regimes, the Charter of Rights and Freedoms and the human rights legislation. As will be seen, the differential legal treatment of atypical workers outlined above runs the risk of being declared unlawful under both of those statutory regimes. At the least, the aforesaid legislation will require compelling policy justifications to be adduced in order to support such differential treatment.

As regards the Charter, a key provision is section 15 which guarantees that every individual "... is equal before and under the law without discrimination and, in particular, without discrimination based on ... sex ... [or] ... age". Assuming that this prohibition relates to discrimination under the law in general - this will require construing the specified grounds as "for the avoidance of doubt" instances of proscribed discrimination, not as limiting the proscription against discrimination per se - then the differential treatment accorded to atypical workers under the employment standards and collective bargaining legislation will certainly have to be justified under the section 1 formula of "... subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Even if section 15 is construed as applying only to discrimination on the specified grounds, it is still possible that so-called "disparate impact", or "systematic" discrimination on a specified ground might be established. For example, in 1983 of the 1,651,000 persons who were employed on a part-time basis throughout the economy, 71.23% were female and were concentrated in the service industry. Accordingly the problem of differential treatment for part-time workers can also be viewed as a problem for female part-time workers: the service industry, it would be argued, resembles the archetypical "female ghetto". Again, the discriminatory treatment of these atypical workers would have to be justified under section 1. Similarly, government wage subsidy programs designed to create jobs for women and young persons and which treat them less favorably under the collective bargaining or employment standards legislation could potentially be challenged as discriminating
"systematically" on the proscribed grounds under section 15 and would, therefore, have to be justified under section 1.

Assuming that section 15 is construed as encompassing discrimination in general, the section affords atypical workers potentially their greatest measure of protection because each and every term in an employment contract or a collective agreement which discriminates against them could possibly be susceptible to review. This will be the case if the coverage of the Charter is not limited exclusively to direct legislation and regulation by traditionally recognized "state organs" such as crown corporations, municipalities and other statutory based employing agencies but is extended to any contractual relationship which the courts, acting as "state organs" will enforce. Under this expansive interpretation of "state action", the Charter will apply to what at first blush appears to be quintessentially "private" contracts of employment and collective agreements. At this juncture, however, there are few indications that the "state action" doctrine will be given this broad meaning. If the coverage of the Charter is limited to the traditionally recognized "state organs", the possibility for atypical workers of challenging discriminatory terms in their employment contracts and collective agreements under the human rights legislation will become especially important.

As regards the human rights legislation, it is possible that the establishment of inferior terms and conditions of employment for atypical workers in employment contracts and collective agreements could be challenged on the ground of sex or age based "systemic" discrimination. At present, the human rights legislation in some jurisdictions expressly provides for systemic discrimination. Elsewhere, there has been some doubt whether the general prohibition against discrimination on the proscribed grounds encompasses systemic discrimination but a recent decision of the Supreme Court of Canada appears to have answered in the affirmative. Accordingly, the unequal treatment would have to be justified as a "bona fide occupational qualification", which is not an easy onus for employers to discharge. Moreover, it is presumptively unlawful in all jurisdictions for employers not to pay men and women equal wages for "work of equal value" or (more commonly) for "similar work", depending on the statutory formulation. Employers can generally escape liability by proving that the difference in pay is based on "any other factor than sex" and is one which "normally justifies" the difference. Again, the onus of justification is a heavy one to discharge.

As well, the guarantee of "freedom of association" under section 2(d) of the Charter will provide a possible avenue for challenging the exclusion of atypical workers from the coverage of the collective bargaining legislation. At this juncture, it remains uncertain exactly which collective bargaining related activities will be encompassed by "freedom of association". At one extreme is the view that the section involves only the right to create an organization and has nothing to do with how organizations pursue their goals or what goals can lawfully be pursued.

13 The disadvantage of interpreting the phrase more broadly than that is that the courts
potentially would be forced to review the substantive fairness of an organization’s goals and its means of achieving them: should Chapter 2 of the Lethbridge Hell’s Angels be constitutionally entitled to ride their motorcycles in packs on city highways; should striking Lethbridge city workers be constitutionally entitled to picket “secondary” parties who have dealings with the City? Although one can empathize with the courts disinclination to make those tough policy decisions “up front”, nevertheless it seems a fruitless exercise to protect the freedom of persons to create an organization without at the same time protecting the freedom to pursue the raison d’être of that organization. After all, in a pluralistic society the Charter must surely be concerned with protecting collective group rights as well as those pertaining peculiarly to the individual. Therefore, it is submitted that "freedom of association" ought to be interpreted as including at the least the right to participate in the basic institutions of collective bargaining established under the labour relations legislation. At present, however, it is by no means clear that the sub-section will be interpreted in this way. If it is, the exclusion of atypical workers from the collective bargaining legislation will have to be justified under section 1. Less obviously, perhaps, the practice of many labour relations boards of placing certain categories of atypical workers, such as part-timers, in separate bargaining units from traditional employees may be susceptible to challenge under section 2(d) of the Charter. Arguably, it is a violation of the atypical workers’ freedom to associate with the traditional employees to place them in a separate unit against their wishes. Conversely, the traditional employees might argue that it violates their freedom to associate were they to be compelled against their wishes to bargain in the same unit as atypical workers. This would be a classic scenario of Charter rights colliding, as will often occur.

The starting point with examining how the differential legal treatment of atypical workers ought to be handled under the Charter is the necessity of recognizing that there is a political dimension to work which brings it squarely within the constitutional domain. True, the Charter as a constitutional document speaks to the totality of the individual’s civil rights within society as a whole; it is not concerned exclusively, nor even primarily with the world of work. Nevertheless, employment rights and civil rights are so inextricably intertwined that the Charter must unavoidably and properly have a profound impact on industrial relations.

Firstly, the Charter enshrines in section 15 society’s acknowledgement of the universal moral “rightness” of treating people equally in similar circumstances under a system of rules: this principle should govern in the context of work no less than in any other sphere of our social life. The principle is generally accepted for its “deontological” value, i.e. it is regarded as being intrinsically valid because it accords with an ultimate moral imperative rather than because the consequences of adhering to it are judged to be good. In contrast, an ethical system which evaluates the rightness of conduct by reference to the goodness or badness of its consequences is a "teleological" system. Although it is beyond the scope of this essay to undertake the Herculean task of reviewing the philosophical evolution of the principle of equality, two
leading derivations of it might be mentioned. Perhaps the best known is the writing of St. Paul which currently comprises part of the Christian ethical system: 18 "[t]here is neither Jew nor Greek; there is neither slave nor free; there is neither male nor female; for you are all one in Christ Jesus". The second, especially apt in the context at hand, is the so-called "generalization principle": forming part of Kant's 19 theory of the "categorical imperative": to the effect that all persons in the same situation ought to be covered by the same rule, without exception, so that what is right or wrong for one is right or wrong for all. Accordingly, the principle of equality demands that if atypical and traditional workers perform substantially similar job functions, contribute substantially similar value to the organization and share substantially similar human needs they ought presumptively to receive the same benefits. I say "presumptively" because of the possibility that instances of unequal treatment may be justified under section 1 of the Charter; this will be discussed later.

To some, the principle of equality as it operates within our present system of economic organization is not accepted on deontological grounds but rather on teleological grounds. Most Marxists, for instance, would argue that the principle is merely part and parcel of the "rule of law" which in our capitalistic society serves to strengthen the position of the ruling class through the process of "legal fetishism". 20 That process sees the role of law as being to legitimate, if not reify the social and economic institutions it regulates so that challenges to those institutions by those who suffer under them are diverted into the "legal form" and dissipate without posing a serious threat to the fundamentals of our system. According to this theory, the fact that all workers are being oppressed and subjected to substantive injustices under our system is merely veiled by the principle of equality which, along with the other attributes of the "rule of law": would convey the impression that justice is being done. After all, the argument goes, how can individuals justifiably be aggrieved when they have been dealt with according to the principle of equality, the quintessence of what is "fair", "equitable" and "just plain right", and the more so when that principle has been elevated to the status of a bulwark of our constitutional law. Therefore, Marxists would argue that in the context of industrial relations, section 15 has been enacted on teleological grounds for its derivative value in institutionalizing class conflict between workers and employers. If this view is correct, we can presumably expect section 15- and the remainder of the Charter for that matter- to be applied by the courts in favour of working people only insofar as is necessary to permit our current system of work organization to adjust smoothly, without fundamental upheavals, to the stresses it creates for itself. Be that as it may, the key threshold question under section 15 is whether there is in fact any "discrimination" between atypical and traditional groups: can it be argued that because atypical work is atypical rather than traditional, there is insufficient similarity of circumstances between the two groups to warrant their being treated equally in the first place? This issue could become important not only under section 15 of the Charter but also under the human rights legislation. Those statutes require the presence of
"discrimination" before the issue arises of whether there is justification for it: absent an initial finding of "discrimination" there is nothing to justify. It is vital, therefore, to understand from the outset what is meant by words such as "discrimination" and "inequality".

It is submitted that those words do not require the presence of substantially similar circumstances and nothing more; rather, they connote that there must be no moral justification for treating people differently on the ground of the dissimilarities that exist between them. For example, we would surely say that it is "discrimination" to pay A ten dollars an hour for sweeping the floor and B five dollars an hour for the same work, notwithstanding that B has red hair and A has brown. The hair colour is a different circumstance, but we would not accept it as an ethically valid reason for the differential wage rate. However, if B could not sweep half as fast as a result of having a wooden leg the position would arguably be different and there would be no "discrimination". Labour relations boards and arbitrators have long recognized that the presence of differential circumstances will only preclude a finding of "discrimination" if the dissimilarities in question are thought to justify the unequal treatment. In Charter terminology, the effect is akin to incorporating the section 1 issue of "justification" within the initial determination of whether there is "discrimination" under section 15. So too in the case of the human rights legislation: there will be no "discrimination" to justify as a "bona fide occupational requirement" unless the differences between the comparison groups are held to be unjustifiable in the first place. Accordingly, the fundamental moral choices of what are to count as valid factors for comparison cannot be evaded: the fact that B is less productive in the economic sense of that word would doubtlessly be accepted as a valid ground for treating him differently by those who prefer the ethical values of our present capitalistic system of economic organization.

One potential danger with adopting this interpretation of "discrimination" concerns the burden of proof. The human rights legislation and section 1 of the Charter typically places the burden of proving "justification" on government or the employer (as the case may be) and the standard of proof is onerous. Given that the employee as claimant must prove the existence of "discrimination", and insofar as "discrimination" subsumes the "justification" issue, the employee could end up with having to prove an absence of "justification". This would be undesirable. Not only do the statutes plainly envisage the government or the employer (as the case may be) as having to discharge that onus - primarily because the facts and rationales are within their "peculiar knowledge" - but also the claimant would be in the unusual position of having to prove a negative.

There is one way of avoiding this danger. When an issue of "justification" arises at the initial stage of determining whether "discrimination" has occurred, the employee should only be required to make out a plausible case that the circumstances applying to his life situation justify his being treated the same as the comparison group. Thus the atypical worker should only have to prove that he is doing substantially similar work as the traditional employee in
order to establish "discrimination", and the onus should then shift to the employer or the
government (as the case may be) to justify the unequal treatment. It remains to be seen whether
the courts adopt this approach.

The second, and perhaps less obvious aspect of the Charter is its tacit recognition that
the individual is entitled to a certain minimum degree of employment protection in order that
he can be free to pursue the kind of lifestyle which we believe he is morally entitled to enjoy.
The broader, civil rights which an individual enjoys, as well as his freedom to carry through his
personal life-plan, depend to a large extent on his employment rights. A job provides the
means of securing the necessities for living: it establishes an individuals' status and prestige;
and it provides him with his main outlet for exercising his creative skills and for social
intercourse with other people. The enactment of employment standards, collective bargaining
and human rights legislation governing the workplace expresses the reality that a person's
political status within society as a whole depends on his being liberated from the dehumanizing
forces of an unrestrained labour market: but for these protections the other civil liberties in the
Charter become illusory. These employment benefits, therefore, should be regarded as essential
prerequisites for the enjoyment of a meaningful life within the community. Thus, statutory
guarantees such as minimum wages and leaves of absence, protections against arbitrary
treatment on the part of employers and the freedom to participate in bilateral rulemaking in the
workplace through collective bargaining assume a political dimension transcending their
immediate employment context: without those guarantees the individual would be unable to
participate within society in a manner that we deem him to be morally entitled to. Accordingly,
if the state denies atypical workers some or all of these employment benefits, it is ultimately
accorded them an inferior political status: traditional employees are guaranteed the freedom to
pursue a particular kind of social existence by virtue of having statutory protections of their
employment benefits but atypical workers must endure an inferior kind of social existence by
virtue of their receiving less favourable statutory protections. It is precisely this kind of political
inequality that section 15 of the Charter is aimed at. Put simply, the Charter message is that the
state presumptively cannot secure the "good" of the majority by means of subjecting the minority
to inferior treatment. It follows that simply because employers find it more advantageous to
hire, for example, part-time workers rather than full-timers - the former are generally more
productive, they are cheaper because of their inferior wages and fringe benefits, they can be
used to fill short-term needs for labour in fluctuating businesses and they can be used to work
the unusual operating hours in some businesses such as banking and retail stores - this will
not presumptively justify the unequal legal treatment of part-timers, even if it can be
demonstrated that employers pass on the benefit to society at large.

Therefore, the unequal legal treatment of atypical workers on the part of the state is
presumptively unconstitutional. I say presumptively because section 1 of the Charter does
envisage some scope for permissible unequal treatment and this will be examined later. At this
juncture, suffice it to conclude that in order to bring our present labour laws into line with the requirements of the Charter the following reforms, presumptively, should be enacted. Firstly, employers bound by the Charter should be required to pay equal wages to all employees in the same establishment who perform work of equal value. Secondly, these employers should be required to make all fringe benefits available to atypical workers, on a pro-rated basis to take account of their irregular and/or reduced number of hours worked where appropriate, unless the individual freely and without duress elects to waive fringe benefits in exchange for extra wages of a commensurate value. The danger of coercion by employers would obviously have to be guarded against carefully. Thirdly, statutory fringe benefits that depend on hours worked during specified periods, such as the right to statutory holidays, and on continuity of employment should have to take account of the reduced hours worked by atypical employees and the irregular nature of the work relationship. Fourthly, governments should have to make collective bargaining rights available to atypical employees.

Assuming that the Charter may not apply to a particular instance of discrimination - suppose, for example, that a private sector employment contract entitles a part-timer to less pay than a full-timer for work of equal value and the Charter is held not to apply to this "private" contractual relationship - the question remains whether unequal treatment is justifiable as a simple matter of social policy rather than constitutional law. In my submission it is not. I suggest that the measures outlined above for bringing the treatment of typical workers into line with the requirements of our constitutional law ought presumptively to be enacted as irreducible employment standards for atypical workers throughout the economy.

This submission rests on the view that the Charter, notwithstanding that it may formally be restricted to the "state action" context, nevertheless reflects those fundamental moral values which society as a whole acknowledges as being appropriate for the conduct of all forms of social intercourse. Put another way, the ethical standards enshrined in the Charter have become incorporated as part of what Professor Dunlop has termed the "common ideology", or "shared understandings", underpinning our industrial relations system and providing it with coherence, stability and a sense of moral direction. I suggested above that these employment standards "presumptively" ought to be enacted because it may still be possible to justify not enacting them in exceptional cases where other competing interests come into play, just as it may be possible to justify abridgements of protected Charter "freedoms" under section 1. This issue will be addressed next.

It is almost trite, but nonetheless important to observe that section 1 makes it impossible to predict with any certainty just how much moral weight is to be ascribed to the protected "freedoms". At best we can safely conclude that sections 15 and 2(d) are not envisaged as being "trumps", overriding all other competing interests. However, exactly which competing policies will override the protected "freedoms" remains largely a matter for
speculation. The necessity for having some sort of "saving provision" akin to section 1 is obvious in situations where two or more protected "freedoms" collide and a choice has to be made which one is to be accorded supremacy. As was seen earlier, this could arise if part-time or other atypical employees claim under section 2(d) that they are entitled to "associate" under the rubric of the full-time bargaining unit and the full-timers counter that they are entitled to "associate" in a bargaining unit of their own. Possibly, the principle of result utility would be applied in this scenario and the full-timers might have to share a bargaining unit with the atypical group; a labour board might conceivably conclude that the resulting "happiness" of an all employee unit for the employer, the atypicals themselves and the public at large outweighs the resulting "unhappiness" of the full-timers. This hypothetical scenario has yet to be litigated. It is clear, however, that section 1 was clearly envisaged by the legislative draftsmen as applying in far broader circumstances than the situation where protected "freedoms" collide.

The section appears to inject a predominantly teleological thrust into the Charter: the protected "freedoms" must give away when the consequences of upholding them become disproportionately onerous, notwithstanding that their ethical validity is generally acknowledged on deontological grounds. Canada's attempt to make the uneasy bedfellows of teleological and deontological ethical codes co-exist within the same document is perhaps only to be expected in our pluralist society whose hallmark is the making of compromises. Be that as it may, the result is that there may conceivably be circumstances where the burden of equalizing the legal treatment of atypical workers disproportionately outweighs the moral claim to equality of those workers. For example, if a provincial government could demonstrate that the economic cost of equalizing terms and conditions of employment for part-time and casual staff would compel it to terminate a significant proportion of its existing social programs or institute substantial redundancies in the civil service, it is arguable that those consequences should outweigh the atypical employees' claim to equality. So too if an employer could demonstrate that the economic burden of treating atypicals equally would drive it into bankruptcy so that all jobs would be lost. Such is the stuff of which utilitarian justifications are made.

The response of the courts at present is to accept utilitarian justifications in principle under section 1, but to require that they be founded on very compelling evidence and argumentation: the courts have emphasized that justifying the abridgement of protected "freedoms" is no easy matter. Firstly, the burden of proof rests with the state. Secondly, alleged justifications must be proved on the basis of cogent and compelling evidence and argument, not on unsubstantial assertions. Thirdly, the courts are careful to ensure that the extent of any abridgement on protected "freedoms" be kept to a minimum. Hence, the policy goal allegedly justifying the abridgement must be incapable of being achieved by any other reasonably practicable measures which would not involve an abridgement, or which would involve a less
substantial abridgement. Fourthly, the courts must ultimately accept that the policy goal in question, notwithstanding that it may be desirable, is nonetheless not worthy of being pursued because of the concomitant abridgement of the individual's "freedoms". Therefore, the onus of justifying particular instances of different legal treatment for atypical workers will be a heavy one.

Given that the principle of utility may be brought into play under section 1, it is important to dispel one threshold myth. Contrary to what some economists would have us believe, applying the principle of utility is not a value free, scientifically "pure" exercise that produces mathematically "right" answers: the fundamental moral judgments and policy alternatives must still be wrestled with under section 1. For example, the determinations of what constitutes a "good" or a "bad" consequence and how far into the future the possible consequences of a given action must be projected for the purpose of weighing the balance of utility require moral judgments to be made. In one sense, it could be argued that all the Charter achieves is to entrench the kind of policymaking process that has always typified our pluralist society, namely that the "legitimate" interests are identified, evaluated and then adjusted by the "state" without there being any supreme moral "rights" that will be "trumps". The view that the Charter is merely the same old mix differently stirred, however, is unduly pessimistic. At the least, the effect of section 1 is that the "state" is now compelled to justify, before independent adjudicative tribunals, the policy adjustments it has selected whereas previously many decisions would escape equivalent scrutiny under the usual political safeguards. Consequently, it will now be more difficult for the "state" to discriminate against minority groups such as atypical workers: unsubstantiated assertions of economic exigency, unfounded statistical claims, rhetorical appeals to an unseen "common good", shoddy rationalizations, and plain and simple political "brush offs" will presumably no longer suffice in the face of section 1. The foregoing assumes, of course, that individuals or minority groups can afford to litigate to secure their constitutional rights. The assumption may well be questionable, but that is another kettle of fish.

Perhaps the most common argument against equalizing legal treatment for atypical workers is that the increased costs of hiring them would force employers either to pass on substantial and possibly inflationary price increases to consumers, ultimately damaging to the "public interest", or to eradicate the atypical work altogether, with the undesirable result of denying that work option to those who prefer it over traditional work, or of denying them any employment at all. One rejoinder is that it smacks of a rather extreme form of result utilitarianism to say that inferior legal treatment of part-timers is justifiable simply because employers, and therefore society as a whole benefit from it. If this bald principle is held to justify the inferior legal treatment of groups of atypical workers it would presumably justify, as well, the inferior legal treatment of any other minority group - immigrants, Jews, blacks, etc. - provided that we assess the resulting "happiness" of the majority as exceeding the resulting unhappiness for the...
minority group. It is surely this very kind of argument that the Charter and other human rights legislation is aimed at forestalling. True, section 1 of the Charter does assume that the ethical values it entrenches as our guaranteed "freedoms" are subject to some degree of encroachment on utilitarian grounds, but they would be hollow guarantees if the mere fact of an encroachment being more profitable or more cost efficient were accepted as justification for it: one would expect at the least that the economic harm to the majority resulting from protecting the "freedom" in the particular circumstances must be very substantial indeed. After all, the sheer centrality of the guaranteed "freedoms", being as they are at the very heart of the Charter, surely sounds a clarion call that they are to be accorded paramountcy save in the most exceptional circumstances. It is in recognition of this presumptive supremacy of the guaranteed "freedoms" that the courts have imposed such a tough onus on governments to satisfy the section provisio. Thus, it surely would not suffice under section 1 that employers and consumers in general obtain some degree of economic benefit from the inferior legal treatment of atypical workers: that market forces happen to produce a given result is surely not ipso facto justification for it.

To hold otherwise would be repugnant with a growing consensus in our society that the primary goal of work should be to enhance the humanity of the person who performs it, not to permit others to exploit a market advantage for their own economic aggrandizement. This moral imperative has been expressed in several ways. To Kant, for instance, it would seem to flow from the requirement that a moral agent be treated as an end in himself, not as a means to someone else's end. To Marx, it would flow from the imperative "[from each according to his ability, to each according to his needs" In the Christian ethical system its sense is perhaps most dramatically captured in "Encyclical Laborem Exercens", In fact there is no doubt that human work has an ethical value of its own which clearly and directly remains linked to the fact that the one who carries it out is a person, a conscious and free subject, that is to say a subject that decides about himself ... Nevertheless, the danger of treating work as a special kind of "merchandise", or as an impersonal "force" needed for production ... always exists, especially when the way of looking at the question of economics is marked by the premises of materialistic economism. ... In all cases of this sort ... there is a confusion or even a reversal of the order laid down from the beginning by the Book of Genesis: man is treated as an instrument of production, whereas he - he alone independently of the work he does - ought to be treated as the effective subject of work and its true maker and creator.

True, we have not at this juncture acknowledged the absolute supremacy of this imperative over all other competing interests; nor is that likely to be acknowledged in judicial deliberations under section 1 of the Charter. Rather, the prevailing consensus seems to have settled at or about a Rawlsian point which would justify the unequal treatment of minority groups so long as the burden imposed on them is not excessively onerous and is one which they
themselves might reasonably be expected to agree with as being necessary to the functioning of a fair society.\textsuperscript{49} This is a far cry from the resulting utilitarians plea that justification be based solely on the vicissitudes of unrestrained market forces, alluded to earlier.

Accordingly, in order to justify particular instances of inferior treatment it must surely be demonstrably proved that severe and substantial economic dislocation to others would result from treating atypical and traditional employees equally. Indeed, it is strongly arguable that since employers and consumers benefit considerably from most forms of atypical work\textsuperscript{41} they should be expected to pay a greater price for it. After all, it hardly seems fair to penalize the individual for engaging in a form of employment which is central to the functioning of the system in which he finds himself and from which society as a whole benefits. Thus, if part-time job-sharing is to be touted as an ideal "solution"\textsuperscript{42} to our current unemployment problem it can hardly be on the basis of the participants being treated less advantageously than traditional employees. If job-sharing is deemed to be in the public interest, employers and society should bear the cost of securing equality for the participants: otherwise, it just becomes another guise for employers to make a profit out of cheap labour. In sum, it is suggested that there will have to be hard evidence of severe and substantial economic dislocation resulting from equalizing the treatment of atypical and traditional workers in order to justify the inequalities described in this paper. Some examples of how such an inquiry might proceed will be given shortly.

A second argument commonly put forward to justify the inferior legal treatment of many atypical workers is that the inferiority is offset by the advantages for the employee of increased leisure time and convenient working hours, which advantages make atypical work an attractive option in the first place. Added to this is the frequent assertion that many atypical workers, especially part-timers, do not need equivalent benefits because they are only working for "pin money". One rejoinder is that the increased leisure time rationale is a red herring: what counts is how the worker is treated \textit{while he is at work}, not how much free time he has on his hands away from work. Nobody would argue, for instance, that traditional workers employed in industries which are susceptible to relatively frequent layoffs should receive inferior treatment under our labour laws akin to that presently sustained by part-time workers by virtue only of their having increased leisure opportunities! What happens is that periods of layoff are normally taken into account in assessing the quantum of fringe benefits on a pro-rated basis, but the employee remains entitled to be covered by all the benefits and he is paid the full rate while he is working. For example, in the case of part-timers, whereas most of them do prefer that option because of the leisure opportunities and the convenient hours,\textsuperscript{43} for many individuals part-time work is the only employment option available and therefore cannot be regarded as a voluntary choice. Furthermore, even though many individuals do choose voluntarily atypical work, they are not \textit{volens} to the inferior treatment that this entails. Indeed, a major complaint of career part-timers to the Wallace Commission was the inadequate and
unequal protections they receive with respect to dismissal, layoffs, seniority, promotion and career advancement. In addition, the Wallace Commission emphasized that part-time work is not merely "pin money" for luxuries but provides the sole means of securing the economic essentials for the majority of part-time workers. The same can doubtlessly be said for a substantial proportion of casual workers, homeworkers, agency workers, and those hired under government subsidy programs.

With regard to the arguments for and against justifying the exclusion of atypical workers from the coverage of the collective bargaining legislation, the starting point must take account of the substantial moral weight that is attributed to collective bargaining in Canada. Collective bargaining is generally welcomed for its quality of infusing into the workplace the potential for bilateral job regulation between workers and management, irrespective of the substantive outcomes the process produces. There is a growing consensus in our society that persons who stand to be substantially affected by decisions of our political and economic institutions ought to have a voice in the making of those decisions. To many, collective bargaining is viewed as a form of "industrial democracy", akin to "political democracy" and is regarded as being intrinsically meritorious on that ground. This represents a typically deontological justification for the institution. In contrast, Marxists assert that collective bargaining ultimately worsens the human condition in industry: it serves to "institutionalize" the conflict caused by employers' oppression of the working class, relieving some of the symptoms of that oppression but only at the price of diverting workers' attention from the "bottom-line" task of curing the disease. Marxists would assert that bilateral job regulation through collective bargaining is embraced by Canadian policymakers on teleological, not deontological grounds, the preservation of our system of economic organization in more or less its current form being judged to represent the greater "good". Whether collective bargaining is accepted by policymakers on deontological or on teleological grounds, the result is that the institution assumes a quality that transcends the world of work and makes it a bulwark of our present political system. This alone, quite apart from the substantial moral commitment to the process of joint rule making which presently exists in our society, means that collective bargaining should not be cast aside lightly in an inquiry under section 1 of the Charter.

One common argument in favour of excluding atypical workers from the coverage of the collective bargaining legislation is that because they are often unable to win decent terms and conditions through collective bargaining, it follows that the process must be an inappropriate method of job regulation for them. In order for a given province to substantiate this assertion under section 1, a minimum requirement must surely be that evidence be adduced to show that a substantial majority of equivalent atypical employees in other provinces who are entitled to participate in collective bargaining have failed to improve significantly over the terms and conditions of employment enjoyed by their non-organized counterparts. To the best of this author's knowledge such evidence does not exist. Instead, an
educated guess would be that atypical workers who participate in collective bargaining generally fare better than their non-organized counterparts notwithstanding that they may have failed to achieve equality with traditional employees. This has already been demonstrated in the case of part-time workers\textsuperscript{51}; to this extent collective bargaining has \textit{proved} itself to be a workable institution for them. Furthermore, if labour boards were more disposed to place part-timers and full-timers in common bargaining units the outcomes in bargaining for part-timers might be expected to improve,\textsuperscript{52} especially if the Wallace Commission’s recommendations of equal pay for work of equal value and equal fringe benefit coverage were to be enacted as irreducible employment standards. The latter reforms would reduce significantly the part-timers’ fear of being "traded-off" by the full-time majority and, conversely, the fear among full-timers that part-timers are being utilized to undercut their rates. Also, insofar as more attractive terms and conditions of employment would likely reduce labour turnover among part-time employees, the reforms would result in a greater long-term attachment to the company among part-timers more closely resembling that of full-timers. The enhanced solidarity between the two groups would likely result in collective bargaining producing better outcomes for both of them. In sum, the difficulties of establishing that collective bargaining is an inappropriate institution of job regulation for most atypical workers so as to warrant denying them the right to participate in it under the legislation are virtually insurmountable.

The foregoing is offered as a general approach to the question of whether given instances of unequal treatment of atypical workers can be justified under section 1 of the Charter. As stated earlier, it is beyond the scope of this paper to apply the approach to each and every instance of discrimination of atypical workers; that would be a Herculean task. Instead, let us apply the general approach to the cases of part-time, casual and government subsidized employees by way of illustration.

Firstly, let us take the example of part-time workers. The Wallace Commission collated hard evidence about this group. As was shown above,\textsuperscript{53} that evidence plainly does not support the contention that collective bargaining is unworkable for this group so as to justify their exclusion from the coverage of the collective bargaining legislation. Nor does it support the assertion that the enactment of the equality measures described earlier for these workers would result in a disproportionately excessive burden for employers or society as a whole such as to justify not enacting them. Significantly, 76\% of employers notified the Wallace Commission that they would not change their hiring practices regarding part-timers were all of the Commission’s recommendations on equal treatment to be implemented.\textsuperscript{54} Indeed, given that a significant cost factor with employing part-time workers is their relatively high rate of turnover, and assuming that one possible reason for this is the relatively unattractive terms and conditions of part-time employment, the enactment of equal treatment could conceivably \textit{reduce} employers’ labour costs. Similarly, a recent economic analysis of the effect of implementing equality measures in
Britain for part-timers similar to those recommended by the Wallace Commission concluded that the resulting increase in labour costs to employers in that country would not be so excessive as to decrease the supply of part-time jobs and cause increased unemployment among that group. The finding of the Wallace Commission that the overwhelming majority of employers would not change their hiring policies with regard to part-timers if the Commission’s recommendations were enacted lends support to the conclusion that the position in Canada would be the same. The methodology of the Wallace Commission illustrates how given instances of unequal treatment of atypical workers should have to be justified. In formulating its recommendation that part-timers should be entitled to participate on a pro-rated basis in the same fringe benefit plans as full-timers, the Commission undertook a careful cost-benefit analysis. It calculated that the economic cost to employers would not be unacceptably high, except in the case of the following groups of part-time workers whom it therefore recommended should be exempt from participating in fringe benefit schemes: persons working less than 8 hours per week; persons who have worked for their employer for less than one calendar year; persons who are lawfully excluded from benefit plans because they are aged below 25; and persons who work for an employer "... who in the opinion of Labour Canada would find it administratively impractical to pro-rate fringe benefits." Instead, these excluded groups would be entitled to commensurate cash in lieu. The Commission also recommended that casual part-timers who work on a seasonal or part year basis should be given the choice of participating in the plans or receiving cash in lieu. Lastly, and again on the basis of its costing calculations, the Commission recommended that its recommendation regarding fringe benefit coverage for part-timers should be implemented in stages over a four year period, with more senior part-timers receiving their protections first and less senior ones receiving theirs last. On the other hand, with regard to its other major recommendation that part-timers be entitled to equal wages for work for equal value, the Commission found no economic justification for not enacting it immediately "across the board" to all part-timers, including those working casually. This approach of thorough costing should be required in all cases in order to justify retaining inequalities on the ground of disproportionate economic cost: speculation and assertion should never suffice when the right to equality is at stake.

Secondly, let us apply the same method of analysis to justifying the inferior treatment of casual workers. It will be remembered that the initial presumption should be that discriminatory treatment which deprives casual workers of equivalent benefits that traditional workers enjoy for performing similar work is ethically indefensible, unless it can be justified by some other compelling policy interest such as disproportionate cost. It is submitted that it would be most difficult to justify denying casuals equal pay for work of equal value on the basis of excessive cost. An argument for excluding some groups of casual workers from participating in fringe benefits schemes could be made out on the basis of the undue administrative costs that this would entail for employers resulting from the transitory nature of...
some casual work. We saw above, the Wallace Commission’s recommendations on what those groups should be in the context of part-time casual work. Even then, the Commission recommended that the excluded part-time casuals should receive additional wages to offset the value of the lost fringe benefits. Not all casual work, however, is of this transitory nature: many casual workers will have an on-going relationship with the same employer, returning time and again when the “peak” period comes around. It would be much more difficult to justify excluding the latter kind of "regular"casuals from pro-rated fringe benefit coverage.

It might be argued that employers can legitimately exclude casuals from the leave of absence provisions available to permanent employees on the ground that the intermittent nature of casual work guarantees that the worker will have regular rest periods between jobs in any event. Plainly, this need not necessarily be so because many individuals will be compelled out of economic necessity to secure employment immediately after each and every casual job ends, perhaps in another casual position. One possible solution would be to require employers to pay casuals an additional wage to offset their exclusion from leaves of absence provisions, thereby enabling them to amass sufficient funds to finance for themselves a spell out of work. However, this could cause friction with those permanent workers who might prefer the extra cash in lieu of leaves of absence. It could also be argued that it is legitimate to exempt casuals from job termination protections in statutes and private contracts such as severance pay, notice of layoff and other measures designed to cushion the blow of layoff for the individual and assist him to find other work. After all, the argument goes, the casual worker will anticipate losing his job in any case and consequently will have taken equivalent self-help measures in advance. Moreover, he will not have "earned" the right to be protected by virtue of his lack of seniority with the company, unlike permanent workers. It is suggested, however, that these justifications are not clear cut. As to the latter, and even assuming that seniority is an ethically valid criterion for distributing benefits, the fact remains that the "regular"casual worker described above will often have accumulated substantial real-world as opposed to contract based seniority with an employer which ought to be taken into account, yet infrequently is. As to the former, if the intent of the employment benefits in question is to satisfy an individual’s human needs, then this obviously need not turn on the fortuity of whether a job is casual or permanent: many casual workers may simply be unable to set in place equivalent protections for themselves. Of course, once need fulfillment becomes acknowledged as a legitimate goal, employers typically respond that the cost should be borne by the state, not the employers. I find this point difficult to rebut, at least where the employer has not been able to derive any offsetting additional benefit from the casual workers’ labour. The point would certainly be a thorny one for the courts to resolve were it to arise under the Charter.

Nevertheless, it is submitted that the labour legislation should not define seniority for the purpose of the accrual of and/or entitlement to employment benefits in terms of an
uninterrupted contractual nexus because this penalizes the "regular" casual who enjoys an on-going, real world relationship with the firm. As was seen earlier, the legislation in some provinces currently does not provide for continuity of seniority in this situation, or, if it does, the continuity provisions do not apply to all employment benefits.

Lastly, it is submitted that it is unjustifiable to exclude casual workers from the coverage of the collective bargaining legislation. The same arguments can be made here as were made earlier in the context of excluding part-time workers from the legislation. Collective bargaining has been proven to be a workable method of job regulation for casu als in those jurisdictions which do not exclude them. True, organized casuals may not have succeeded in winning equality with permanent workers across the board, but at least they have fared better than their non-organized counterparts. Moreover, there is no evidence that severe and substantial economic cost has resulted for employers in provinces where casuals can engage in collective bargaining. Again, the enactment of the equality measures suggested above as irreducible labour standards for casual workers would likely make collective bargaining even more meaningful for them.

Thirdly, let us apply the same method of analysis to justifying the unequal legal treatment of government subsidized employees. It will be remembered that these individuals are excluded from the coverage of the employment standards legislation in Nova Scotia and British Columbia and that in Alberta they are denied the fruits of collective bargaining, albeit without being expressly exempted from the coverage of the legislation. The rationale is that employers in these provinces would not have the financial resources to hire these persons if they had to provide the statutory benefits or pay the collective agreement rate so that the individuals are better off receiving inferior benefits and having some work rather than not being employed at all. With regard to the coverage of the employment standards legislation, the governments concerned would be required to adduce hard evidence to substantiate the case that a substantial majority of employers would not hire these workers were they covered by the "floor of rights" statutes, and this would be no easy matter. There is no evidence, for example, that this has actually occurred in provinces which do include these workers within the scope of the legislation. Even if such evidence did exist, it is arguable that the governments concerned nonetheless ought to provide an extra amount of subsidy to cover the additional cost because this constitutes a reasonably practicable alternative to denying the individual’s "right" to equal treatment, although there will presumably be some point at which the burden of the government becomes disproportionately severe. With regard to the exclusion from the fruits of the collective bargaining legislation, the Alberta government would have to discharge a similar onus. At present there is no indication in other provinces where these employees are allowed to participate fully in collective bargaining that a significant number of employers have been compelled to refrain from hiring them because they are covered by collective agreements. Yet it is precisely this kind of hard evidence, not speculative assertion, that is
required in order to justify an abridgement of protected rights under section 1 of the Charter. Unfortunately, the rather terse parliamentary debates suggests that the Alberta government was basing the exclusion on mere speculation.⁶⁹
Conclusion

We have seen that atypical workers are subjected to a broad range of inferior treatment, compared with traditional employees, under the three major legal regimes governing work relations, namely the individual employment contract, the employment standards legislation and the collective bargaining legislation. We have also seen that atypical workers play a key role in our labour market: employers, and ultimately society as a whole obtain major benefits from atypical work. Moreover, the importance of this role is increasing as the incidence of atypical work continues to expand in the economy. Therefore, the unfortunate but all too commonplace picture that emerges is one of the majorities yet again taking a cheap ride on the back of a minority group. The justifications normally offered for this situation have a typically utilitarian ring: to equalize treatment for these workers would involve too great an economic burden on their employers, and therefore on society as a whole, and would result in the eradication by employers of atypical work to the ultimate detriment of those who obtain the advantages from engaging in it in the first place.

This kind of "justification" has been put forward for many years in the context of employment protection measures for traditional workers as well. There, the argument is that "private" sector employers must be free to exploit the best advantage they can from labour because this enables them to obtain the optimum amount of profits and, after all, such profits ultimately benefit society as a whole, given that the "private" sector must assume the role of wealth generator for the entire economy. In recent years we have seen these hoary chestnuts re-appear with added vigor in Britain, the U.S.A. and several Canadian jurisdictions. This line of argument has always been weak. Why, for instance, must the "private sector" (whatever that may be defined as) necessarily and exclusively play its self-assumed role? Where, for instance, is the hard evidence that fair employment protections for workers must inevitably result in economic costs that will cause disastrous disruptions to society as a whole? Even if significant economic costs were to ensue, why must it necessarily be assumed that the majority of people in society are not prepared to accept those costs as the price for securing a decent life for working people? And, even if the majority is not prepared to accept voluntarily that price, are the principles of utility and/or majoritarianism sufficient ethical justification for allowing the interests of the majority to override those of the minority? The foregoing is not to suggest that unjust employment practices are confined to the "private sector": the rapid growth in trade union organization in the public sector over the last twenty years certainly belies that. It is
unfortunate, however, that so many of our public sector employers have chosen to adopt the
euphemistically titled "efficiency" model of the "private" sector when it comes to handling their
labour relations: the guilt must be shared equally by employers in both sectors.

In the context of traditional employees, we have long recognized that these workers in
both sectors are entitled to "fair" employment protections: hence, the enactment of modern
collective bargaining and employment standards legislation. True, many would argue that the
present level of these protections is insufficient to guarantee working people a decent life.
Moreover, some would even argue that the protections themselves reflect a disguised
utilitarian ethic - they have been put in place by the ruling class to defuse the revolutionary
potential of the oppressed - rather than as a *bona fide* recognition that valid, deontological
justifications exist for securing working people a decent lifestyle.3 Whatever may be the
underlying motive for enacting the statutory protections, we have nevertheless deemed them
to be necessary in order to produce the sort of society we want for working people to live in.

Despite our acknowledgement of the needs of traditional employees, we have largely
ignored the plight of atypical workers. It was not until the late 1970s that a widespread public
recognition of equal treatment as a fundamental human right, a "civil liberty", began to emerge.
This was primarily due to the growing influence in that period of the so-called "rights theory"4
philosophers who argued that the individual is morally entitled to certain irreducible personal
protections, notwithstanding competing arguments based on economic cost or the principle of
result-utility. The high-water mark in Canada for this school of thought was the enactment of
the Charter of Rights and Freedoms in 1982, although the "rights theory" can also be viewed as
underlying the expansion in the legislated "floor of rights" protections that occurred
throughout this period. As we have seen, however, the Charter is not deontologically "pure"
because section 1 does envisage its protected "rights" being overridden on teleologically related
grounds, albeit in relatively exceptional circumstances. This attempt to make the uneasy
bedfellows of deontological and teleological values co-exist in the same document is perhaps
only to be expected in our pluralist system whose very power-house is the quest for
compromises.

This notion that the individual has an ethical claim to equal treatment, as well as to the
economic security and human dignity that the employment standards and human rights
legislation guarantee for him, has spotlighted vividly the plight of atypical workers, as
evidenced by the recent Wallace Commission. The inferior legal treatment of these individuals
described herein under the legislation must now pass the relatively rigorous acid test of
justification under section 1 of the Charter. In addition, and depending upon how broadly the
courts are prepared to extend the "state action" doctrine in order to expand the ambit of the
Charter, inferior terms and conditions of employment for atypicals contained in employment
contracts and collective agreements - perhaps even those between so-called "private sector"
parties - will have to be justified. Furthermore, insofar as contract terms may give rise to
claims of "systematic" discrimination on the grounds of sex or age, they may have to be justified under the human rights legislation as well. This essay has not sought to tackle the Herculean task of attempting to justify each and every instance of inferior legal treatment under the aforesaid legislation. Rather, it has indicated those major areas of inequality which are most likely to be placed in issue and has suggested a general format which the debate on their justification might usefully adopt. It remains to be seen what responses the courts and the legislators will formulate.

In sum, this essay has suggested that the following reforms should be made to our present labour laws, not only because some of them are probably required anyway by virtue of our human rights and constitutional law, but also a matter of "fair" public policy.

Firstly, employers should be compelled to pay equal wages to all their employees in the same establishment who perform work of equal value.

Secondly, employers should be required to make all fringe benefits available to all employees, on a pro-rated basis to account for reduced or irregular working hours where appropriate, unless the employee freely and without duress elects to waive his fringe benefit coverage in exchange for additional wages of commensurate value. An exception should be provided for employers who can prove to the satisfaction of the provincial Minister of Labour that it would cause them a disproportionately excessive administrative cost to extend fringe benefit coverage to particular groups of atypical workers.

Thirdly, statutory fringe benefits that depend on hours worked during specified periods, such as the right to statutory holidays, and on the presence of an uninterrupted contractual nexus between the individual and his employer, should take account of the reduced hours worked by atypical employees and the irregular nature of their employment relationships, where these are factors.

Fourthly, governments should make collective bargaining rights available to all atypical employees and labour boards should be less readily disposed towards placing atypical employees in separate, powerless bargaining units, at least unless a clear divergence of community of interest plainly makes a single unit unworkable.

Fifthly, employees supplied by an employment referral agency should be deemed to be "employees" of the agency for the purpose of benefits provided under the employment standards legislation, except where it can be demonstrated that the worker is integrated into the organization of the user to such a degree that he has become an "employee" of the user. For the purpose of the collective bargaining legislation, the usual statutory test should be applied in order to determine whether the agency or the user is the "employer". Furthermore, it should be made an employment standard that the agency guarantees its employees equal pay for work of equal value relative to employees of a user to which the agency employees are assigned. As well, unionized agencies should have to make it a term of their commercial contract with non-unionized users that the latter will observe the collective agreement
provisions which guarantee the individual’s "personal dignity" in the workplace. Where non-unionized agency employees are assigned to an organized user, the legislation ought to extend the appropriate "personal dignity" provisions defined earlier in the user’s collective agreement to the agency employees. In addition, added safeguards should be imposed on agencies which supply persons whom they themselves employ to users, at least as stringent as those currently in place for agencies referring non-employees’ to users. In that regard, the British Columbia scheme for regulating the activities of farm labour contractors is a useful model.

Sixthly, the practice of homeworking should be monitored closely by provincial governments, as it presently is in Manitoba and Ontario, and homeworkers who satisfy the statutory requirement of “employee” status should be covered by the employment standards and collective bargaining legislation. As well, consideration should be given to devising a scheme for the legislated extension of the terms of collective agreements to non-unionized homeworkers because of the almost insurmountable practical difficulties unions have in organizing them.

It remains to be seen what responses legislators will formulate to resolve the inequalities and difficulties facing atypical employees in the workplace. Hopefully, the workers’ solace will not lay exclusively in the words of Camus, "No talk of despair is to conquer it".
Notes

The author is Professor of Labour Relations at the School of Management, University of Lethbridge. This paper was written while he was a Visiting Professor at Queens University. Mr. England wishes to thank Ian McKenna and Don Carter for their invaluable comments on an earlier draft of this paper.

NOTES TO CHAPTER 1

3. Ibid., at p. 22.
4. Ibid.
5. Ibid., at p. 75.
6. It defined "part-time" work as employment involving less than thirty hours per week.
7. In his book, Liberalism and The Limits of Justice (New York: Cambridge University Press, 1982), Professor M.J. Sandel makes the point that the ultimate litmus-test of "justice" is the "fairness" of the outcomes of procedure, not just the "fairness" of the procedural machinery itself, although the latter should certainly be striven for as well.
9. For example, this is the conclusion of Professor W. Weeks in 'Collective bargaining and part-time work in Ontario' (1978), 33 Relations Industrielles 80. See also the recommendation of the Wallace Commission Report (at p. 147) that part-timers and full-timers share the same bargaining unit.

NOTES TO CHAPTER 2

1. The data on part-time employees is, unless otherwise stated, derived from Labour Force Annual Averages 1975-83 (Ottawa: Statistics Canada, 1984) and from the author's calculations based thereon.
3. Canada's largest union, the Canadian Union of Public Employees, reports that the employers with whom it deals in health care are "in many cases" converting permanent, full-time positions into part-time or casual ones. Ibid., at p. 5.
7. The Current Industrial Relations Scene in Canada 1985, p. 354. The data that follow is derived from this source.
10. The courts are beginning to recognize a half-way house, "intermediate" status between "employee" and "independent contractor" in which they will imply a requirement of reasonable notice of termination. See E. Molle, Butterworth's Wrongful Dismissal Practice Manual (Toronto: Butterworths, loose-leaf), chap. 1, para. 1.06, and W.D. Harriss, Wrongful Dismissal (Don Mills: DeBoo, loose-leaf), chap. 2, para. 2.1-2.6 wherein the authorities are reviewed.
14 This is the conclusion reached by Christie, Employment Law in Canada, at p. 247, but quaere the effect in Canada of Mears v. Safecor Security Ltd., [1982]1 R.L.R. 183 (C.A.).
15 See Christie, Employment Law in Canada, p. 240.
16 On workers' compensation schemes, see T.G. Ison, Workers' Compensation in Canada (Toronto: Butterworths, 1983).
20 See generally Christie, Employment Law in Canada, pp. 21-24.
21 The jurisprudence is reviewed in Christie, Employment Law in Canada, pp. 343-50.
22 Wallace Commission Report, p. 22.
23 This is the finding of the Wallace Commission Report, pp. 17-18.
24 My greatest complaints with seniority are that it ignores need as a criterion for distributing benefits as well as downplays the quality of an individual's contribution to the enterprise. Seniority is almost certainly too well-entrenched in our labour relations system, however, for it to be cast aside in this, or in most other contexts.
25 Infra, pp. 18-19.
26 Hence the expression "floor or rights". Of course, many workers have insufficient bargaining power to exceed the statutory minima in their contracts. As Professor Langille has poignantly observed, "one man's floor is another man's ceiling".
27 There are, however, exceptions. For example, the duties imposed under the health and safety legislation are generally owed to non-employee "workers" who are on-site, e.g. Alberta Occupational Health and Safety Act, R.S.A. 1976, c.40 as am., ss. 1(e), (m), (n); 2 27. Similarly, the phraseology"... no employer ... shall discriminate against any person with regard to employment or any term or condition of employment" which is commonly found in human rights legislation has been held to protect non-employee workers as well as "employees", e.g. Cormier v. Alberta Human Rights Commission (1985), 85 C.L.L.C. 17,003 (Q.B.D.).
28 The Saskatchewan Labour Standards Act, R.S.S. 1978, c.L-1 as am., s. 2(d) is typical, defining "employee" as meaning "a person of any age who is in receipt of or entitled to any remuneration for labour or services performed for an employer". The most narrow definitions are those in the Alberta Labour Relations Act, R.S.A. 1980, c.L-1.1 as am., s.1(1)(k) and the Alberta Employment Standards Act, R.S.A. 1980, s.E-10.1 as am., s.1(1)(c), following the restrictive interpretation in Yellow Cab Ltd. v. Alberta Board of Industrial Relations et al. (1980), 80 C.L.L.C. 14,066 (S.C.C.).
30 See Societe Radio-Canada, at pp. 222-23.
31 Societe Radio-Canada, at pp. 293-40.
32 New Brunswick Employment Standards Act, S.N.B. 1982, c.E-72, s.24(4); Prince Edward Island Labour Act, R.S.P.E.I. 1974, c.L-1 as am., s.64(1).
33 Employment Standards Act, s.17(1)(b).
34 Newfoundland Labour Standards Act, S.N. 1977, c.52, s.22; An Act Respecting Labour Standards, S.Q. 1979, c.45 as am., s.78.
35 Manitoba Employment Standards Act, R.S.M. 1979, c.E110 as am., s.2(1)(g)(ii).
36 Domestic and Nannies Regulation, R.R.O. 1980, reg. 283 as am., s.2(a).
37 British Columbia Employment Standards Act, S.B.C. 1980, c.10 as am. and Employment Standards Act Regulation, B.C. Reg. 37/81 as am., s.9(d).
38 Newfoundland Civil Service Act, R.S.N. 1979, c.41 as am., s.2(a).
39 Saskatchewan Public Service Act, R.S.S. 1978, c.p-42 as am., s.9(j) and General Regulations, Sask. Reg. 234/74, Part II. Section 2(j) defines “part time” as meaning a person employed for irregular hours of duty or for specific intermittent periods, or both, during a day, week or month and whose services are not required for the normal work day, week or month as the case may be.
41 Ontario Public Service Act, R.S.O. 1980, c.418 and Regulation, R.R.O. 1980, reg. 881, ss.6(1) and 6(7).
42 Regulation, R.R.O. 1980, reg. 881, Parts VII and VIII.
43 Regulation, R.R.O. 1980, reg. 881, s.42.
44 E.g. Nova Scotia Labour Standards Code, S.N.S. 1972, c.10 as am., ss.30(1) and 31; Newfoundland Labour Standards Act, S.N. 1977, c.52 ss.8(1) and 9; Manitoba Vacations with Pay Act, R.S.M. 1970, c.120 as am., ss.5(3), 5(4) and 11(2).
45 S.O.R./65-410 as am., ss.13(b) and 13(9). The Commission has jurisdiction under s.13(2) to reduce the qualifying period in cases of "severe hardship".
46 Employment Standards Act, s.18(1). The same applies under the Ontario Employment Standards Act, s.26(1)(b).
47 Labour Standards Act, s.15.
48 Employment Standards Act, s.17(3).
49 Public Service Part-Time Employment Regulation, C.R.C. 1978, c.135 1, s.2(2).
50 Public Service Terms and Conditions of Employment Regulation, S.O.R. /67-118 as am., ss.86(b) and 98. See also ss.95, 96, 97, and 99.
51 Public Service Part-Time Employment Regulation, s.4.
52 Ontario Regulation, R.R.O. 1980, reg. 881, ss.65(1) and 106(i).
53 Ontario Regulation, R.R.O., reg. 881, ss.64(3) and 97(1).
57 The traditional union fears in this regard are catalogued by the Wallace Commission Report, pp. 93-94. The consensus among Canadian trade unions as reported by the Wallace Commission is to favour part-time work so long as it is voluntary and not being used to supplant full-time positions and receives the same wage and benefits (prorated) as full-time work (at p. 100).
60 E.g. Ontario Labour Relations Act, R.S.O. 1980, c.228 as am., s.67(2).
62 This duty of "fair representation" exists in legislation in some provinces e.g., Ontario Labour Relations Act, s.68 and at common law in others, e.g. Nova Scotia, on the basis of Fisher v. Pemberton (1970), 8 D.L.R. (3d) 521 (B.C.S.C.).
66 Canada Labour Code, R.S.C. 1970, c.L-1 as am., s.61.5; Nova Scotia Labour Standards Code, S.N.S. 1972, c.10 (L1-1) as am., s.67A; An Act Respecting Labour Standards, s.4. 1979, c.45 as am., s.124. Manitoba is currently considering implementing an equivalent scheme for non-organized workers, and has recently enacted s.69.1 of the Labour Relations Act which imposes a term in all collective agreements requiring that employers show "just cause" for discharge and discipline.
68 This interpretation has been argued forcefully by John D. Whyte, "The Charter: initial experience, emerging issues and future action" (1983), 13 Man. L.I. 455, at p. 472ff.
69 Against this assertion is the fact that labour relations boards have not been prepared to require unions to proceed to arbitration on all discharge grievances under the duty of fair representation (e.g. Brenda Haley (No. 2), [1981]2 Can.L.R.B.R. 121 (C.L.R.B.) despite strong arguments to the contrary from Paul Weiler, Reconcilable Differences (Toronto: Carswell, 1980), pp. 137-39 and from B.L. Adell of Queen’s University Faculty of Law in his unpublished 1980 paper "Collective agreements and individual rights", p. 14. Arbitrators may be prepared to find an implicit restriction of "cause" on the employer’s "reserved right" to dismiss, but only on the basis of protecting the collective agreement’s seniority provisions, not (as yet) on the basis of an overwhelming public morality to that effect, e.g. Air B.C. (1985), 19 L.A.C. (3d) 209 (Williams). Section 69.1 of the Manitoba Labour Relations Act is unique in requiring all collective agreements to contain a "just cause" provision on dismissal and discipline.
70 Thus the Wallace Commission reported that many employees opt for part-time work as their chosen career and are consequently very concerned with the lack of protections available to them in terms of job security, seniority and career progress (see pp. 89-92 of the Report). Hence the Commission recommended that the federal government encourage employers and unions to work towards single seniority lists for part-timers and full-timers, to offer part-time work opportunities in all levels and occupations of the organization and to provide part-timers with access to training programs, promotional opportunities, job security and seniority comparable to their full-time counterparts (p. 31 of the Report).

71 Infra, p. 47.

72 Although labour turnover is high among part-time workers - for example, in 1981 less than 33% of part-time jobs lasted a full year - the Wallace Commission attributed this not to the intrinsic nature of part-time work but to the fact that a large percentage of young persons occupy part-time positions (Report, p. 22). As was indicated in footnote 70, supra, many people prefer part-time work as a career route.


77 Board of Education for the Borough of Scarborough, at p. 1718.


79 The authorities are cited in footnotes 57 and 61, supra.

80 W. Weeks, "Collective bargaining and part-time work in Ontario" (1978), 33 Relations Industrielles 80. Single units for all employees were also recommended by the Wallace Commission Report, p. 147.

81 On this, see infra, p. 48.

NOTES TO CHAPTER 3

2 Report, p. 126.
5 For example, in Market Investigations Ltd. v. Minister of Social Security, [1969] 2 W.L.R. 1 (Ch.D), Cooke, J. held that a female who was engaged to conduct market survey interviews for the company for short periods of time was an "employee" notwithstanding that she was free to work when she liked and could perform similar work for other organizations. The court found that there was sufficient control - the company retained the right to dismiss for poor work performance and specified who was to be interviewed, the questions to be asked and the order of asking them. However, the court emphasized the paramountcy of the "entrepreneurial" test by testing that this worker did not provide her own tools, did not risk her own capital and did not depend on how she managed her work in order to make a monetary profit.
7 Ibid.
9 E.g. Ontario Labour Relations Act, ss.1(1)(h) and (i); British Columbia Labour Code, R.S.B.C. 1979, c.212 as am., s.1(1)(b).
12 Civil Service Act, s.2(a).
13 British Columbia Regulation 508/79, O.C. 2809/79, s.3.
14 Public Service Act, ss.2(b) and 9(j).
15 Alberta Employment Standards Act, s.2(c); Manitoba Employment Standards Act, s.2(1)(g)(ii); New Brunswick Employment Standards Act, ss.5 and 39(1). See generally I. Christie and K. Neilson, "The agricultural labourer in Canada: a legal viewpoint" (1975), 2 Dal. L.J. 330.
16 Nova Scotia Regulation, O.C. No. 76-1203 as am., ss.2(3). Most provinces exclude agricultural workers from at least some statutory benefits or provide them with different benefits in certain areas: see Christie and Neilson, "The agricultural labourer in Canada".
17 Fruit, Vegetable and Tobacco Harvesters Regulation, R.R.O., reg. 284 as am.
18 Canada Labour Code, R.S.C. 1970, c.L-1 as am., s.60.2(a) and Regulation C.R.C. 1978, c.986 as am., s.28, but note the Minister’s discretion under s.60.3(a) to waive the exclusion if he deems it to be “unduly prejudicial to the interests” of the "employees" or “class of employees” concerned; An Act Respecting Manpower Vocational Training and Qualifications, R.S.Q. 1977, c.F-5 as ant, s.45 and Regulation Respecting the Notice of Collective Dismissal, R.R.Q. 1981, c.F-5, r.1, s.1(a) and (b)(ii); Nova Scotia Labour Standards Code, s.68(3)(a) and (b); Manitoba Employment Standards Act, s.35(ii)(a), but note that no regulations have as yet been made to trigger this exclusion.
19 Labour Standards Act, s.53 and Labour Standards Regulations, Reg. 1983 N., Reg. 308/82, s.14(h).
20 E.g. Ontario Employment Standards Act, s.40(3)(a); British Columbia Labour Code, s.43(c)(i) and (ii); Alberta Employment Standards Act, s.54(1); Manitoba Employment Standards Act, s.35(8) and (9); New Brunswick Employment Standards Act, s.31(3)(a) and (b); Newfoundland Employment Standards Act, s.49(1)(d); Quebec Act Respecting Labour Standards, s.82.
21 New Brunswick Employment Standards Act, s.31(3)(e).
22 Alberta Employment Standards Act, s.54(m).
24 Federal Manpower Mobility Regulations, S.O.R./80-112 as am., s.9.
25 Ibid.
26 Public Service Terms and Conditions of Employment Regulations, ss.93 and 94.
27 Public Service Terms and Conditions of Employment Regulations, ss.101-103.
28 Public Service Act Regulations, s.6(d)(i) and (c)(ii).
29 E.g. Alberta Labour Relations Act, s.53(2).
30 This will normally be the case where there is no reasonable expectation of work recommencing for the individual. Where an individual has regularly and consistently been rehired in the past, however, it is arguable that implied promises to rehire could be founded on this custom and practice so as to establish an on-going contractual nexus. See eg. Airfix Footwear Ltd. v. Cope, [1978] 1 C.R. 1210, esp. p. 1215 (E.A.T.); Ford v. Warwickshire County Council, [1983] 1 R.L.R. 126 (H.L.).
31 Prince Edward Island Labour Act, s.64(2); Quebec Act Respecting Labour Standards, s.67.
32 Canada Labour Code, s.59.6(2); Saskatchewan Employment Standards Act, s.29.3(2).
33 Canada Labour Code, s.61.4(a).
34 Canada Labour Code, s.59.2(a); Newfoundland Labour Relations Act, s.40(1); Prince Edward Island Labour Act, s.67.1 (a); Ontario Employment Standards Act, s.36(1); Saskatchewan Employment Standards Act, s.23(1)(a). An uninterrupted qualifying period does seem to be required under the Nova Scotia Labour Standards Code, s.56(2) and the Quebec Regulations Respecting Labour Standards, R.R.Q. 1981, c.N-1.1, r.3, s.15. The qualifying period does not appear to have to be with the same employer under the Alberta Employment Standards Act, s.59(1) and the Manitoba Employment
Standards Act, s.34(1)(a), although the months of employment must be "consecutive". There is no qualifying period under the British Columbia Labour Code, s.51 and the New Brunswick Employment Standards Act, s.43.

35 Saskatchewan Employment Standards Act, s.29.1(1)(a). Section 29.2(1) of that Act provides for adoption leave which also depends on "continuous service". In contrast, adoption leave under s.56A of the Nova Scotia Labour Standards Code does not depend on qualifying seniority.

36 Canada Labour Code, s.61.5(13); Nova Scotia Trade Union Act, s.67A(1); Quebec Act Respecting Labour Standards, s.125.

37 Quebec Act Respecting Labour Standards, s.65.

38 Canada Labour Code, s.61(1); Nova Scotia Labour Standards Code, s.68(1). Payments under s.40a.(1) of the Ontario Employment Standards Act do not appear to depend on qualifying seniority.


40 Alberta Employment Standards Act, s.52.

41 Public Service Terms and Conditions of Employment Regulations, s.3(f).

42 Saskatchewan Labour Standards Act, s.30(1)(3) and Regulations, S. Reg. 317/77 as am., s.14.


44 Newfoundland Employment Standards Act, s.51.

45 Canada Labour Standards Regulations, C.R.C. 1978, c.986 as am., s.29.

46 Canada Labour Standards Regulations, s.30(1)(c) and (d).

47 Newfoundland Labour Standards Act, s.51.

48 Canada Labour Code, ss.58 and 59 and Labour Standards Regulations, s.19.

49 Ontario Employment Standards Act, s.26(1)(b).

50 Alberta Employment Standards Act, s.42(a).

51 E.g., Ontario Employment Standards Act, s.31.

52 S.C. 1980-1982, c.89 as am.

53 The Committee is established under the Seasonal Employment Act, S.N.B. 1959, c.12 as am.


55 In 1983, 4,564 foreign workers were brought into Canada from Mexico and the Caribbean to fill seasonal positions in agriculture under this Program. See ibid.

56 See the authorities cited in footnote 15, supra.

57 Infra, p. 32.

58 Crown Employees Collective Bargaining Act, R.S.O. 1980, c.108, s.1(1)(f)(v), (vi) and (vii).

59 Canada Public Service Staff Relations Act, R.S.C. 1970, c.P-35 as am., s.2(d); New Brunswick Public Service Labour Relations Act, R.S.N.B. 1973, p. 25, s.1(d).

60 New Brunswick Public Service Labour Relations Act, s.1(e); Canada Public Service Staff Relations Act, s.2(f).

61 British Columbia Public Service Labour Relations Act, R.S.B.C. 1979, c.346, s.1(1)(j).


63 Civil Service Act, R.S.Q. 1977, c.F-3, s.3 and Order-in-Council No. 1714, October 5, 1966, s.2(A)(a) and (b).

64 Secton 2(A)(a).

65 Section 2(A)(b).


67 Ontario Labour Relations Act, s.2(a) and (b); Alberta Labour Relations Act, s.2(2)(e); New Brunswick Industrial Relations Act, R.S.N.B. 1973, c.1-4 as am., ss.1(1)(e) and 1(5)(a). In some provinces separate collective bargaining legislation is established for teachers and defined casuals may be excluded from it. In Ontario, "occasional" teachers who are excluded from the collective bargaining regime established by the School Boards and Teachers Collective Negotiations Act, R.S.O. 1980, c.464 by virtue of section 230(1) of the Education Act, R.S.O. 1980, c.129 have nevertheless been held to fall under the Labour Relations Act: see Board of Education for the City of Toronto, [1983] O.L.R.B. Reg. Feb. 273; Florence M. Casey, [1981] O.L.R.B. Rep. Jan. 113.

68 See Edoco Healey Technical Products Ltd., [1980] 1 Can.L.R.B.R. 570 (B.C.L.R.B.) wherein the leading cases are reviewed.
NOTES TO CHAPTER 4


3 E.G. Alberta Employment Standards Act, s.54(c). In Saskatchewan, there must be a "discharge" under s.43(1) of the Labour Standards Act, thereby precluding the section from applying where the term/task is completed, but not where termination arises before then.

4 Nova Scotia Standards Code, s.68; Manitoba Employment Standards Act, s.35.1; New Brunswick Employment Standards Act, s.32, but this applies only to task contracts.

5 Ontario Employment Standards Act, s.40a; semblé, Canada Labour Code, s.60(4); Newfoundland Employment Standards Act, ss.53-54.

6 Eskasoni School Board et al. v. MacIsaac et al. (1986), 86 C.L.L.C. 14,042 (F.C.A.); Christopher v. C. K.X.M. - F.M. Ltd., at p. 8, a decision of adjudicator Lucas, Sept. 4, 1981 under s.61.5 of the Canada Labour Code. See also section 1(c) of the Nova Scotia Labour Standards Code which incorporates the effect of that decision. The same applies for the Quebec Act Respecting Labour Standards, s.125.

7 British Columbia Employment Standards Act, s.47; Ontario Employment Standards Regulations, s.16(1).

8 Supra, pp. 18-19.


10 In limited circumstances the contract of employment may become the vehicle for enforcing terms of an expired collective agreement which have become incorporated into it. On the legal difficulties arising from this "incorporation theory" see G. England, B. Hansen and G. North, "Recent developments in labour law in Nova Scotia" (1978), 4 Dal.L.J. 391, pp. 437-44.

11 Elizabeth Fry Society of Ottawa, pp. 315-16.

NOTES TO CHAPTER 5

1 For example, in Ontario between 1983-84 there were 801 employment agencies registered with the Ministry of Labour, Annual Report 1983-84 (in Ontario, as with most other provinces, agencies must be registered in order to do business).

2 "Skills on call: the part-time payoff", p. 29.
3 According to one Toronto employment agency, approximately 44% of temporary workers succeed in finding permanent work through this route - "Skills on call: the part-time payoff"; p. 29.


7 [1970] 3 All E.R. 220 (Div. Ct.).

8 Ibid., at p. 225 per Cooke J.

9 See e.g. G. de N. Clark, “Industrial law and the labour only sub-contract” (1967), 30 Mod. L. Rev. 6.

10 See the examples in Chapter 2, footnote 29, supra, and accompanying text.

11 Supra, pp. 17-19.

12 A good example of this situation is K-Mart Canada Ltd. (1983), 83 C.L.L.C. 16,037 (O.L.R.B.).

13 Thus the typical Canadian formula of the unfair labour practice is that "... no employer ... shall ... discriminate against any person in regard to employment ..." (Alberta Labour Relations Act, s.137(3)(a)(i), emphasis added). In contrast, in Britain the individual is protected only with respect to acts of "his" employer (Employment Protection (Consolidation Act) 1978, c.44 as am., s.23(1)).


15 On these terms see ibid., p.206 and p.208.

16 Ibid., at p.205 and pp.207-208.

17 Ibid., at p. 208.

18 Ibid.

19 The agency workers were employed on an ongoing, regular basis with K-Mart. So too in McCosham Van Lines Ltd. and Temp. Corp. Ltd., [1979] 1 Can.L.R.B.R. 498 (C.L.R.B.), where the agency workers were also held to be employees of the client company. In Templest Services, [1974] O.L.R.B. Rep. Sept. 606, the lack of continuity with the client employer contributed to the opposite finding.

20 A comprehensive review of the arbitral authorities on point is provided in Kennedy Lodge, pp. 190-95.


22 A mischief application also seems to underlie the decision in the Welland County Board of Education, [1972] O.L.R.B. Rep. Oct. 884, wherein the workers would probably not have been able to achieve union recognition had they been employees of the agency.


24 Supra, at p. 208. See also the Board’s important statement on the legality of subcontracting at p. 206.

25 Article 2, para. 1.

26 Article 10(a).

27 Article 10(b).

28 Article 10(c).


30 Alberta Employment Agencies Act, s.3; British Columbia Employment Standards Act, s.72; Manitoba Employment Agencies Act, s.4(1); Ontario Employment Agencies Act, s.2. In the period 1983-84, 801 employment agencies were registered in Ontario (Ontario Ministry of Labour, Annual Report 1983-84, p. 53).

31 E.g. Alberta Employment Agencies Act, s.7. The fee chargeable in Ontario is regulated by Employment Agencies Regulations, ss.11-14.

32 E.g. Ontario Employment Agencies Act, s.1(a).

33 Manitoba Employment Agencies Act, s.2(a).

34 This follows from the definition of "fee-charging employment agency" in Article 1, para. 1(a).

35 On this, see the authorities cited in Chapter 3, footnote 4, supra.

36 Supra, p. 19.
37 British Columbia Labour Standards Act, s.60. Between 1982-83, 44 such licences were issued (British Columbia, Ministry of Labour, Annual Report 1982-83).
38 Section 60. However, persons who are "solely employed in silviculture or spraying and pruning fruit trees" are exempt pursuant to the Employment Standards Regulations, s.11.
39 Section 62(2)(b).
40 Section 62(2)(d).
41 Section 62(2)(a).
42 Section 70(1)(a) and (b).
43 Sections 70(1)(c) and 70(2).
44 Sections 64(c) and (d), 65 and 66.
45 Section 69.
46 Section 68.
47 Ontario Labour Relations Act, s.69; Canada Labour Code, s.161.1.
48 Useful reviews of the "common employer" sections can be found in Dominion Stores Ltd. (1984), 8 C.L.R.B.R. (N.S.) 203 (O.L.R.B.) and in J. H. Normick Inc (Kirkland Lake Division), [1980] 1 Can.L.R.B.R. 287 (O.L.R.B.).

NOTES TO CHAPTER 6

2 Newsweek, January 9, 1984, p. 86.
3 Thus homeworkers have been held to enjoy "employee" status at common law in Britain e.g. Nethermere (St. Neot's) Ltd. v. Taverna, [1984] 1 C.R. 612 (C.A.).
4 Manitoba Employment Standards Act, s.6.
5 Section 6(2).
6 Ontario Employment Standards Act, s.16.
7 Ontario Employment Standards Regulations, ss.4(f), 6(e), 7(d).
8 Ontario Occupational Health and Safety Act, R.S.O. 1980, c.321, s.3(1).
9 The Ontario Employment Standards Act, s.3(a) empowers the Director to issue a permit "on such terms and conditions as he considers advisable".
10 Telephone conversation of the author with a departmental official. This view is based on the definition of "work" in s.l.
11 Thus the word "work" in s.l is not plugged into the words "employee" or "employer" in order to make "work" a condition precedent to having the status of "employee" or "employer". However, "work" is an essential prerequisite for some rights under the Act, being a required component of ss.28, 30, 34 and 35 which deal with hours of work, overtime, work breaks and minimum daily pay respectively.
12 Bill 42, Miscellaneous Statutes Amendment Act (No. 2), 1985.
13 For instance, only the Ontario Occupational Health and Safety Act appears to exclude homeworkers under s.3(1).
14 It may occur that an employer transforms some or all of the positions in an already unionized plant into homework, in which case the collective agreement will continue to apply to the homeworking "employees" so long as they remain within the ambit of its recognition clause.
16 The only scheme for extending collective agreements currently existing in Canada is the Quebec Collective Agreement Decrees Act, R.S.Q. 1977, c.D-2 as am. Under s.6 an extension order will only be granted by the Minister "... if he deems that the provisions of the agreement have acquired a preponderant significance and importance for the establishing of labour". Similarly, under the now defunct extension scheme in s.8 of the British Terms and Conditions of Employment Act 1959, 7 and 8 Eliz. 2, c.26 the collective agreement (or agreements) sought to be extended had to "... cover a significant number of establishments within the field of operation". In the context of homeworkers, the relatively low density of union organization would probably require reducing considerably this hurdle.
17 For example, if the increased labour costs would cause severe economic harm to "smaller" employers which could result in their being driven out of business and in the creation of a monopoly within the trade, a specific exception to that effect could be built into the statute.
NOTES TO CHAPTER 7


4 Ibid., at p. 217. See also Elizabeth Fry Society of Ottawa, pp. 309-10.


6 Kelowna Centennial Museum Association, at p. 291.

7 British Columbia Employment Standards Regulations, B.C. Reg. 37/81 as am., s.81(1)(e) and (f).

8 Nova Scotia Labour Standards Code Regulations, Q.C. No. 76-1203, s.2(9).

9 S.A. 1985, c.5-235.

10 Section 2.

11 Section 3.

12 This rationale was expressed by the Rt. Hon. Mr. Young, Minister of Labour, in Alberta Hansard, May 21, 1985, p. 1089.

13 This is evident from the remarks of Mr. Young in the Legislature, ibid.

14 See Chap. 8, footnote 1 and accompanying text.

15 In Elizabeth Fry Society of Ottawa, the Ontario Labour Relations Board separated a group of Youth Corps employees into their own bargaining unit on this ground, at pp. 310-12.

16 See the possibilities in Kelowna Centennial Museum Association.

NOTES TO CHAPTER 8


4 Discussed supra, pp. 39-40.

5 The issue of which areas of society the Charter might apply to - direct legislation and regulation exclusively; intermediate "state" bodies; or all contracts which the courts potentially can enforce - is canvassed in the elegant paper by Professor John D. Whyte of Queen’s University Faculty of Law "The Charter of Rights and discrimination in the private sector” (1985, as yet unpublished). A comprehensive list of the existing commentary and caselaw on the ambit of the Charter can be found in Re Health Labour Relations Association (1985), 18 L.A.C. (3d) 369 at pp.376-86 (Dorsey). Some collective agreement arbitrators have held that the Charter does not apply to the employment related decisions of employers in the private sector: Lornex Mining Corp. Ltd. (1983), 14 L.A.C. (3d) 169 (Chertkow); Nanaimo Times Ltd., unreported decision of Greyell, May 25, 1984 (B.C.). One arbitrator has held that the Charter applies to government only when acting qua government, not when acting in its private capacity in making commercial contracts or in administering day to day labour relations: Algonquin College (1985), 19 L.A.C. (3d) 81 (Brent). This latter distinction, known in French administrative law, creates a minefield of legal uncertainties. In contrast, in Simon Fraser University (1985), 18 L.A.C. (3d) 361 (Bird), the Charter was held to apply to a university which derived its powers to discipline the workforce from an empowering statute. The broadest formulation is that of Mr. Dorsey in Health Labour Relations Association, to the effect that the Charter "...is intended to stand four-square as the guarantor of fundamental rights and freedoms in all corridors of our Canadian society", at p. 385.


7 See e.g. Reference re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act (1985), 85 C.L.L.C. 14,027, esp. paras. 12,151 and 12,164 (Alta. C.A.); Bhindi and London v. B.C. Projectionists,
Philosophers have long recognized that "equality" is an essential facet of "justice", notwithstanding that disagreement exists on precisely what "equality" means. A useful overview of the history of "equality" in political thought is contained in S.A. Lakoff, *Equality in Political Philosophy* (Cambridge, MA: Harvard University Press, 1964). The "weak" sense of "equality" I rely on, namely that the same circumstances justify the same treatment, is surely non-controversial. There is, of course, much more to "equality" than that. Rather, as one commentator has correctly suggested, "Every strongly held theory of conception of equality is at once a psychology, an ethic, a theory of social relations and a vision of the good society" - J.H. Schaar, "Equality of opportunity and beyond" in *Equality*, ed. by J.R. Pennock and J.W. Chapman (New York: Atherton Press, 1967), p. 228.

In contrast, the British courts have held that even "marginal advantages" to the efficiency of an employer's organization will justify mere "technical" violations of the Sex Discrimination Act 1975, c.75: Kidd v. D.R.G. (U.K.) Ltd., [1985] 1 C.R. 405 (E.A.T.).
35 Supra, note 28 and accompanying text.
36 The moral point is put as follows by P. Hollenbach, "Modern Catholic teachings concerning justice", at p. 219:
"Commutative justice is the form of justice which demands fidelity to agreements, contracts or promises. ... The obligation ... is one of fidelity to freely formed mutual bonds and of fairness in exchange. ... It ... implies that if contracts or agreements are to be just, they must be genuinely free. This latter condition of commutative justice is used extensively throughout the tradition to argue that wage agreements cannot be in accord with commutative justice when the worker is compelled to accept an insufficient wage simply because the alternative is no wage at all. Commutative justice, then, is an expression in the sphere of private interaction of both the genuine dignity of all persons and the need for a mutuality based on equality in their relationships and agreements:'
37 Supra, note 19.
38 Interestingly, this imperative has been recognized as a legitimate component of the Christian morality of work:
39 At pp. 22 and 24-25. See also R.R. Roach, ibid., who concludes that the paramount task of social justice in our day is probably "... to change our economy to one built on the principle of organizing production in order to meet social needs" (at p. 204) and the quotation in footnote 36, supra.
40 This seems to me to be the underlying message in J. Rawls, A Theory of Justice (Don Mills: Clarendon Press (Oxford University Press). 1972).
41 The benefits are described in the Wallace Commission Report, pp. 33, 35, 122-24.
42 The Wallace Commission recommended job sharing as a useful response to Canada’s unemployment problem in chapter 7 of its Report. Of course, capitalists and managers are rarely equally as enthusiastic about sharing their capital and power with working people!
43 The Wallace Commission found that almost 73% of the people holding part-time jobs did not want an increase in the number of hours worked per week - Report, p. 22.
44 Ibid., at p. 88.
45 Ibid., at p. 22.
47 Again, this is comprised within the Christian ethical system: D. Hollenbach, "Modern Catholic teachings concerning justice", at p. 224. To Kant, in Foundations of the Metaphysics of Morals, the theory of "categorical imperative" requires that rules, in order to be morally valid, must be acceptable to each and every moral agent who is to be bound by them.
50 This lesson is revealed most strikingly in the essay by Hyman.
51 Wallace Commission Report, p. 22.
52 See the authorities referred to in Chapter 1, footnote 9, supra.
53 Supra, p. 2.
54 Wallace Commission Report, at p. 171.
57 Ibid.
58 Ibid.
59 Thus the Wallace Commission did not recommend that casual part-timers be excluded from the equal pay requirement even though it considered that some casuals ought to be excluded from fringe benefit coverage (Report, pp. 30; 160-61). Of course, there are no additional administrative costs with simply having to increase the size of a paycheck.
60 Supra, footnote 56 and accompanying text.
61 At p. 161.
62 Thus the Wallace Commission recommended that seasonal workers who work regularly each year for the same employer ought to be entitled to participate in fringe benefit plans on a pro-rated basis (Report, p. 30).

63 See Chapter 2, footnote 24, supra, and accompanying text.

64 The recognition of this reality seems to underlay the Wallace Commission’s recommendation that seasonal workers who return regularly each year to the same employer be entitled to accumulate seniority for their months of employment for the purposes of salary increments, layoffs and recalls (Report, p. 30).

65 Supra, pp. 18-19.

66 Supra, p. 53.

67 Supra, p. 47.

68 Supra, pp. 38-39.

69 Supra, Chapter 7, footnotes 12 and 13 and text.

NOTES TO CHAPTER 9

1 It has been commonplace for many years for the popular media and employers to lambaste legislative measures designed to enhance and strengthen collective bargaining in the name of economic “doomsdayisms”. The hard evidence, however, is that employers obtain significant economic advantage from that institution - see the findings in R.B. Freeman and J.L. Medoff, *What Do Unions Do?* (New York: Basic Books, 1984).

2 The answer for those who, like myself, acknowledge the validity of certain external moral absolutes is a resounding “no”.

3 For what it is worth, my personal view is that those moral values can be found in the message of "Encyclical Laborem Exercens".

4 One of the most influential works in this regard is J. Rawls, *A Theory of Justice*. 