Women and Homework:
The Canadian Legislative Framework

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PREFACE

Good public policy depends on good policy research. In recognition of this, Status of Women Canada instituted the Policy Research Fund in 1996. It supports independent policy research on issues linked to the public policy agenda and in need of gender-based analysis. Our objective is to enhance public debate on gender equality issues and to enable individuals, organizations, policy makers and policy analysts to participate more effectively in the development of policy.

The focus of the research may be on long-term, emerging policy issues or short-term, urgent policy issues that require an analysis of their gender implications. Funding is awarded through an open, competitive call for proposals. A non-governmental, external committee plays a key role in identifying policy research priorities, selecting research proposals for funding and evaluating the final report.

This paper emanated from a call for proposals in April 1997 to study the gender dimensions of the relationship between the changing role of the state and the changing nature of women's paid and unpaid work and their vulnerability to poverty. Researchers were asked to identify policy gaps and new policy questions or trends, to propose frameworks for the evaluation, analysis and critique of existing policies, and to develop pragmatic alternatives to existing policies or new policy options.

Seven research projects were funded by Status of Women Canada on this issue. They examine Canadian legislation surrounding women who work at home for pay, work and Aboriginal women, the social vs. the economic gain associated with the social economy, women in the garment industry, disability-related policies, restructuring and regulatory competition in the call centre industry and the relationship between unpaid work and macro-economic policies. A complete list of the research projects is included at the end of this report.

We thank all the researchers for their contribution to the public policy debate.

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Author's Note: The information in this report is up to date to October 1, 1999. Some interesting legislative developments which occurred after that date have been included.

EXECUTIVE SUMMARY

Does Canadian labour legislation adequately protect homeworkers? In answer to this question, this report examines the legal situation of homeworkers—industrial homeworkers, clerical homeworkers and home teleworkers. The definition of "homework" used for this purpose is any form of remunerated work carried out in a private residence, with the exception of caregivers, self-employed workers and workers in the agricultural sector.

Some laws, whether explicitly, by omission or by their interpretation, partially or totally exclude the home as a workplace and homeworkers from the benefit of the law. This report, therefore, presents an analysis of Canadian labour and employment insurance legislation to verify the hypothesis that Canadian labour laws and regulations are generally not adapted to the reality of homework and homeworkers. Another important objective of the report is to propose legislative amendments and other changes that would better answer the needs of homeworkers, particularly those of women homeworkers.

The report first presents an overview of homework in Canada and elsewhere, gleaned from the literature, to provide insight into its changing nature. Next, a description and an analysis of the International Labour Organization's standard-setting activity in the area of homework gives us a reference point against which to compare the Canadian legislative framework. A brief discussion of the issue of self-employment follows, because the rights of homeworkers depend on their employment status, and the difference between employees and independent contractors working from home is often hard to determine. The question of whether or not workers can be obliged by their employer to use their home as a workplace, particularly on a full-time basis, is also examined.

The legislative framework surrounding specific aspects of labour legislation, in several Canadian jurisdictions, is analyzed in detail, with the goal of determining whether the current legislation protects people, particularly women, working from home. The study covers four legislative areas (minimum employment standards, workers' compensation and occupational health and safety, unionization and collective bargaining, and employment insurance) in five jurisdictions (federal, New Brunswick, Quebec, Ontario and British Columbia). A reading of each of the acts and relevant regulations establishes the impact of the definitions of such terms as "worker," "employer," "establishment" and "homeworker" on the protection of homeworkers. The specific conditions applying to homeworkers, if they exist in the legislation, are also examined, as are the omissions or the special or inequitable treatment in the legislation with regard to homeworkers.

Given that the reading of a statute does not necessarily provide conclusive information about its actual application, it was necessary to validate the preliminary results obtained from the legal analysis through consultation with those actively involved in the application of the legislation (advocacy groups, government agencies, legal practitioners). In the field of workers' compensation in Quebec, Ontario and British Columbia, as well as in the area of

employment insurance, the validation of the results was facilitated by a selective analysis of case law. Each section on specific legislation ends with a series of recommendations.

The report concludes with a summary of the authors' findings and proposals, and recommendations for future research, in the hope that it will have generated some ideas on how homeworkers can be better protected in a changing labour market, where standards often lag behind new realities. The study reveals that when home is the workplace, workers often find themselves in a legal limbo—many ambiguities could be avoided if policy makers addressed the issue of homework as it is practised today. In some cases, it was found that homeworkers' legal protection is being inadvertently denied while in others it is expressly pre-empted. The capacity of homeworkers to organize to advance their collective interests has also been limited by existing collective bargaining models. Confusion—on the part of homeworkers, their employers and government agencies mandated to implement labour legislation—as to whether or not a homeworker is an independent contractor also renders the application of the laws and the exercise of homeworkers' rights more complicated. The gendered nature of homework also needs to be taken into consideration when designing policy, since laws which are considered "gender-neutral" can, and do, adversely affect women. The boundary between women's "private" and "professional" lives gets blurred when they work at home.

In conclusion, policy makers are invited to address the new realities of homework by adopting clear standards that better protect workers and enable both workers and employers to better understand their rights and obligations.

INTRODUCTION

Working at home is often touted as a way to reconcile work and family responsibilities, decrease urban air pollution from gas emissions, reduce workers' stress and increase workers' autonomy. Homework also evokes the image of the residential industrial worker, isolated from co-workers, working long hours for low wages. Homeworkers can be found in a wide variety of fields and occupations.[1] The conditions under which homeworkers live and work in Canada vary tremendously, and it is impossible to provide one portrait of their reality.

It should be borne in mind that the number of workers—women and men—who work some or all of the time at home is increasing: 9.1 percent of workers did all or part of their work at home in 1995, compared with 5.8 percent in 1991.[2] Women represent three quarters of those whose only workplace is the home.[3] Statistics show that women are in fact more likely to work at home than men, are more concentrated in a limited number of activities and occupations and, on the whole, receive lower remuneration than male homeworkers.[4] Contrary to what one might expect, caring for children is not a predominant reason for working at home: only 11 percent of people who work exclusively at home do so for this reason (Lipsett and Reesor 1997: 24). When asked what employers could do to help people balance work and family, women are more likely to cite more flexible work hours, increased family leave and on-site day care, rather than working at home, as appropriate measures.[5] More often, employees work at home because it is a requirement of their job and they have no choice.[6]

Whether people work at home by choice, or not, does not alter the legal questions posed concerning the application of labour laws and related social security schemes to their situation. When home is the workplace, a host of questions and problems arise regarding the application of these laws. Does a homeworker have a right to overtime pay if the employer cannot directly control the hours worked? What happens when a homeworker has an accident at home during working hours? Does an employer have to provide home teleworkers with ergonomically adapted computer equipment and furniture? Can an employee refuse to work at home? How does a union reach homeworkers for organizing purposes? Does the fact that someone works at home change the application of the laws and affect workers' legal protection?

One important, preliminary, question regarding the application of these laws is whether a person working at home is self-employed or not. The number of people who declare themselves to be their "own boss" is steadily rising, from 10 percent of the labour force in 1991 to 13 percent in 1996. The number of women "own account" workers increased by 62 percent (compared to 29 percent for men) during the same period (Statistics Canada 1998a). While our research does not examine the many legal aspects of self-employment in any great detail, it is important to remember that this parallel phenomenon has a considerable impact on homeworkers, since they often do not know what their true status is and whether they are covered by labour laws and certain social security schemes. This uncertainty can be

exacerbated by legislative inconsistencies. Many homeworkers often assume that since they work at home, they must be self-employed; this is not the case.

The overall objective of our research is to determine the adequacy of Canadian labour legislation with respect to the protection of homeworkers. We have chosen not to examine the legal situation of just one category of homeworkers, such as industrial homeworkers or home teleworkers, but rather to concentrate *on the home as the workplace*. For the purposes of our research, "homework" is any form of remunerated work carried out in a private residence, with the exception of caregivers,[7] independent contractors (self-employed workers)[8] and workers in the agricultural and related sectors. This definition, therefore, closely resembles that developed by the International Labour Organization in the *Convention No. 177 Concerning Home Work*, adopted in 1996,[9] but which Canada has not ratified. The emphasis is, therefore, placed on the place of work, since in some laws the definitions of "establishment," "workplace" and other analogous terms lead to an interpretation of the law that partially or totally excludes the home as a workplace and homeworkers from the benefit of the law.

More specifically, the goals of our research are:

- Analyze Canadian labour and employment insurance legislation to verify the hypothesis that Canadian labour laws and regulations are not adapted to the reality of homework.

- Compare Canadian labour legislation with the recently adopted International Labour Organization *Convention No. 177 Concerning Home Work* and *Home Work Recommendation No. 184* (both adopted in June 1996).

- Propose legislative amendments that would better answer the needs of homeworkers, particularly those of women.

Methodology

This research was undertaken using a three-step methodology. First, a review of the literature on homework was done, looking at much of the available literature in both English and French. The situation of homeworkers in Canada and elsewhere, related legal issues in Canadian law and legal issues arising in some other countries, particularly in the European Union and in the United States, were examined.

Next, a study of the legislative and regulatory framework governing four legislative fields in five jurisdictions was done, with the goal of determining whether the current legislative provisions are sufficiently broad to provide equal protection for women working from home. The legislation analyzed covers the following areas in five jurisdictions (federal, New Brunswick, Quebec, Ontario and British Columbia): minimum employment standards, workers' compensation, occupational health and safety, unionization and industrial relations, and employment insurance. In any given jurisdiction, these fields may be governed by one or several acts. In most cases, broad regulatory powers have also given rise to an abundance of

regulations.[10] The three larger provinces were chosen because the incidence of homework has been comparatively well documented in these jurisdictions, and the laws under scrutiny can potentially affect a large number of homeworkers. Depending on the purpose of the legislation, these provinces have all adopted some specific provisions on homework. It was decided to include New Brunswick as well because of the possible increase of home telework due to the modernization of the province's telecommunications system and the development of the call centre industry.[11] Federal labour legislation was also studied, since several new provisions have recently been introduced which could prove interesting in the case of new forms of homework, specifically with regard to organizing and collective bargaining.

A systematic reading and analysis of each of the acts and relevant regulations was undertaken to establish the following aspects:

- the definitions of worker, employer, establishment, workplace, outworker and homeworker, if these last definitions exist in the legislation;
- the application of these definitions throughout the legal instruments and the impact of this application on homeworkers;
- the specific conditions applying to homeworkers, if they exist; and,
- a reading of the omissions or the special or inequitable treatment in the instruments with regard to homeworkers.

Finally, given that the reading of a statute does not necessarily provide conclusive information about its actual application, it was necessary to validate the preliminary results gleaned from the traditional legal analysis of laws and regulations through consultation with those actively involved in the application of the legislation. Depending on the issue, these people might include representatives from advocacy groups for workers' rights or unions, government officials responsible for the implementation of the legislation, or legal practitioners specializing in the particular field. It was determined that, in some cases, the validation of the results could be facilitated by a selective analysis of case law. Given the limitations on resources and time, it would have been impossible to do a systematic analysis of all the case law in each of the fields studied in all jurisdictions. Case law analysis was, therefore, done in the field of workers' compensation in Quebec, Ontario and British Columbia, as well as in the field of employment insurance. Some other relevant case law was also taken into consideration to illustrate particular aspects of the legislation.

Structure of the Report

This report is divided into eight sections. An overview of homework in Canada and elsewhere, gleaned from the literature, provides insight into its changing nature. Next, a description and an analysis of the International Labour Organization's (ILO's) standard-setting activity in the area of homework gives us a reference point against which to compare the Canadian legislative framework. A brief discussion of the issue of self-employment follows, in order to attempt to distinguish the homeworker who may be covered by protective legislation because of employment status, from the person who is an independent

contractor working from home. The question of whether or not workers can be obliged by their employer to use their home as a workplace, particularly on a full-time basis, is also examined. The legislative framework surrounding minimum employment standards, workers' compensation and occupational health and safety, organizing and collective bargaining, and employment insurance, in all the jurisdictions, is then analyzed in detail. Each section on specific legislation ends with a series of recommendations for discussion. We conclude with a summary of our findings and recommendations for future research, with the hope that this study will have generated some ideas on how homeworkers can be better protected in a changing labour market, where standards often lag behind new realities.

Endnotes

[1] Of those whose sole workplace is the home, excluding the agricultural sector, 22 percent work in community services, 18 percent in manufacturing, 14 percent in personal services, 11 percent in retail trade, and seven percent in finance, insurance and real estate (Lipsett and Reesor 1997: 23). The predominant occupation of these workers is clerical work (38 percent).

[2] Lipsett and Reesor (1997: 19). These figures exclude people who declared themselves to be self-employed. These percentages provide a general picture of the growing phenomenon of homework. As the authors of this survey point out, some changes need to be made to the questionnaire to get a more accurate picture.

[3] Lipsett and Reesor (1997: 20-22). These figures do not include self-employed homeworkers. See also Pérusse (1998). This study looked at workers' principal employment and did not look at secondary jobs. It included all categories of workers, including managerial and professional personnel who perform part of their work at home (Nadwodny 1996).

[4] Statistics Canada (1998a); Lipsett and Reesor (1997: 25) note that women who worked full time at home received an average of $11.64 an hour, compared to $14.71 for male homeworkers.

[5] Lee et al. (1992) cited in Conference Board of Canada (1994: 14). Interestingly, employed fathers who were surveyed said working at home would be the best way of balancing work and family. Women ranked homework fifth.

[6] Lipsett and Reesor (1997: 24). Over 30 percent of employees surveyed who worked 100 percent of their time at home cited this as the reason. Another 41 percent said that home was their usual place of work, and 17.5 percent worked from home out of personal choice.

[7] The term "caregiver" refers to sitters, companions and domestic workers, who work in the residence of their employer. This category of employees has a special status in most provincial legislation and should be the subject of a separate study.

[8] The status of semi-independent contractors will, however, be the subject of analysis. While we do not include self-employed workers in our definition of homework, it is nevertheless

important to examine criteria that differentiate the self-employed from salaried workers in order to establish whether specific legislation applies.

[9] *Convention No. 177 Concerning Home Work*, art. 1:

> (a) the term [home work] means work carried out by a person, to be referred to as a homeworker, (i) in his or her home or in other premises of his or her choice, other than the workplace of the employer; (ii) for remuneration; (iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used, unless this person has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions; b) persons with employee status do not become homeworkers within the meaning of this Convention simply by occasionally performing their work as employees at home, rather than at their usual workplace; c) the term [employer] means a person, natural or legal, who, either directly or through an intermediary, whether or not intermediaries are provided for in national legislation, gives out home work in pursuance of his or her business activity.

While Convention No. 177 excludes independent contractors from its purview, it does not exclude caregivers or agricultural workers. See Chapter 2.

[10] See Appendix B for acts and regulations examined.

[11] While home telework in the call centre industry is not yet widespread in the province, the development of "virtual" call centres appears to be the next step. The possibility of working at home in this industry was initially envisaged by the government as part of its economic development strategy. In 1993, the Premier of New Brunswick stated that "modern technologies such as 'telecommuting' (working from home using new technologies) will be explored in order to allow rural New Brunswickers to enjoy their unique way of life, while fully participating in the province's economic and educational development." In June 1999, a Chicago company announced the arrival in New Brunswick of the "first" "virtual" call centre in North America, allowing some 500 employees to work at home or in small groups in rural areas. As the present premier pointed out, "virtual" call centres are the "next generation" of the industry. See New Brunswick (1999); McKenna (1993). Sources from the Ministry of Economic Development and Tourism, the Ministry of Labour and the New Brunswick Federation of Labour interviewed in New Brunswick in June 1999 confirmed that homework was not yet a major issue in the industry. See also Buchanan and McFarland (1997); Insight Canada Research (1995); New Brunswick (1997).

1. HOMEWORK: AN OVERVIEW

Although the purpose of our study is not to do an exhaustive, interdisciplinary literature review on homework, we considered it necessary to examine part of the existing literature to determine some of the main issues raised by this type of work. An attempt to arrive at a "diagnosis" of the situation is of particular relevance for policy making. While we conducted our research and talked to different people—friends, colleagues, or those interviewed or consulted for the purpose of the project—it was immediately apparent that the word "homework" spontaneously brought to mind a wide range of activities, which did not necessarily coincide with our definition of the term, as described in the Introduction. "Homework" most often evoked an image of the residential garment[1] workshop with mostly immigrant women working long hours for miserable pay.[2] Although this is obviously a very real and important reality where homework is concerned, it is not the only reality; many different kinds of work are done at home.

Another image that comes to mind for some people is the domestic worker working in someone else's home or domestic work done by women in their own homes. Although this type of work is not contemplated in the definition of homework, the relationship between women's roles at home and homework, and the inseparability of the two, appears to be deeply ingrained. One constant when homework is referred to is that it is seen as women's work, particularly in the case of industrial homework. The gendered nature of homework must evidently be taken into consideration when analyzing policy, since laws are considered "gender-neutral"[3] and a traditional, or literal, legal analysis would not necessarily bring to light many important gender issues surrounding homework that may potentially be remedied by adequate policy.

By looking first at the nature and characteristics of homework, we can determine, in part, why homework continues to be a significant reality, yet is seen to be outside the mainstream. The evolution of the forms of homework contemplated for the purpose of the project is then briefly described. Some gender issues surrounding homework, which are many and complex, are also examined. Finally, an overview of some of the legal questions raised in the literature provides the backdrop for an analysis of Canadian legislation with respect to homework.

The Nature and Characteristics of Homework

As one author (Leach 1998) has stated: "Mainstream labour theorists have been hitherto relatively oblivious to forms of work like homework, or at most have considered them to be 'marginal' or aberrant." However, homework is on the rise in many countries, including Canada. It can be argued that waged homework is not a new or "atypical" form of employment, nor is it industrially or geographically specific: it has always been a feature of the market economy, particularly for women.[4] One author (Faricellia Dangler 1994: 160) remarks:

> The recurrence of conditions that support [homework's] use and the persistent use of female labor for homework operations across time, geographical space, and industries testify to the permanence of its status as a production option for capitalist enterprise. These factors lend support to the view that homework is a structural feature of capitalism that derives from the confluence of women's contradictory role as laborers in the sphere of paid production and unpaid workers in the sphere of reproduction.

The history of homework in Europe begins with the pre-industrial era, continues through to rural home-based production during the rise of industrialization, then to the transfer of industrial work to the home. It ends with the present era of technological change where home telework and homework in the service sector generally is on the rise, but has not replaced homework in the industrial sector.[5] In the United States, the history is somewhat different as homework emerged at the same time as industrialization, particularly in the textile industry (Boris 1994: 10).

The durability of homework can be attributed to several characteristics of today's economy (Lipsig-Mummé 1983; Ray 1992). On an international level, industrial production is being reorganized with companies in developed countries that cannot, or decide not to, relocate to developing countries having recourse to subcontracting and homework to reduce production costs. In developed countries, there has been a dramatic shift from the industrial sector to the service sector, with the former declining and the latter expanding rapidly. The development of the service sector has become characterized by the decentralization of its activities, including the emergence of new forms of homework. Advances in telecommunications and computer technology have served to facilitate this decentralization. Homework is thus becoming increasingly prevalent in the service sector (Schneider de Villegas 1990: 4; Lipsig-Mummé 1983). Some authors predict that telework will eventually replace industrial homework as the main form of this work, especially in countries with a high level of technological development (Lallement 1990a; Di Martino and Wirth 1990).

The differing positions on the positive and negative aspects of homework for workers can be summarized as follows (Iverson 1988; de Freitas Armstrong 1997; Huws 1993). The positive aspects for workers might include flexible schedules, a familiar working environment, freedom to come and go, being able to care for children in the home and a reduction of some of the expenses related to working, such as clothing, transportation and day care. The negative aspects include isolation, non-enforcement of labour standards, lack of access to training and a lack of separation—on both the physical and psychological levels—between home and work. Homework has also been described as imposing an obligation of results and not of means on workers, thereby reducing labour costs for employers since they only pay for the final result and not the process itself (Ray 1996a; Vega Ruiz 1992; Pinsonneault and Boisvert 1996). It has also been seen to be an attempt on the part of companies to lower wages and overhead costs, permit production flexibility and increase union avoidance, in the context of economic restructuring (Faricellia Dangler 1994; Leach 1998; Schneider de Villegas 1990).

Homework also serves as a survival strategy in the absence of employment in the regulated, formal sector in many developing countries (Tipple 1993). It is often presented as a means of entering the work force for certain categories of workers with more limited employment opportunities, such as women with small children and people with disabilities.[6] The introduction of homework in some places as a rural economic development strategy, whereby women, principally, do homework for large companies solicited by local authorities to encourage job creation, has also been documented.[7]

Women and Homework

According to the International Labour Office (ILO 1989: 7): "Home work is women's work almost by definition. For this reason it is often wrongly confused with housework or domestic service. Women's involvement in home work is due not only to their family responsibilities, which tie them to the home, but also to their weaker position in the labour market." The increase in homework can, in part, be attributed to women's search for a better way to reconcile professional life and family responsibilities. At the same time, the development of this phenomenon can jeopardize women's equality in the workplace through indirect discrimination that makes it difficult for women homeworkers to receive promotions and improve their opportunities in the work force (Ray 1996a). Homework, especially when the worker has no opportunity of communicating with colleagues through telecommunications or other networks, isolates women, and can perpetuate exploitative working conditions.[8] While more attention is being paid to the inherent inequality of women in the work force in many respects, homework can be seen as the "final frontier" where women's paid labour has yet to be fully recognized and given an adequate legislative framework (Ocran 1997: 148; Boris 1994: 365).

Women's homework blurs the division between the work and domestic spheres and between paid and unpaid work. As one author (Leach 1998: 114) has remarked:

> Women's work in the home (paid and unpaid) and out of it takes on different and more ambiguous meanings than does the work of men, wherever it is performed. All work carried out by women in the home, whether paid or not, tends to be symbolically treated as if it were domestic labour. This serves to render women inherently flexible workers, who can take on a wide range of work forms both inside the home or outside of it.

This marginalizes them from the rest of the work force, as opposed to skilled male homeworkers who do not experience this erasing of boundaries to the same degree (Oldfield 1990; Lallement 1990a; Allen 1989).

It has also been argued that legislators, in the United States for example, designed legislation around the assumption that homework was women's work and that policy must take into account women's roles as, first, care providers in the home and, second, workers (Faricellia Dangler 1994: 131). Homework was seen, as it still is by many, as a way of reconciling these two conflicting roles. Some workers see homework as a compromise between the need to work and the lack of affordable child care.[9] At the same time, other workers doing essentially

the same work are found to prefer working at home, even if affordable day care is available (Fitzpatrick 1998: 14). As the authors of an American study (Presser and Mamberger 1993) on women homeworkers have pointed out, little research has distinguished between full-time and part-time homeworkers, which they see as an important element in understanding the relationship between women's homework and family responsibilities.

Types of Homework

Homeworkers are not a homogenous group and are located along a broad spectrum of workers and occupations, from the often undeclared, garment pieceworker to the highly qualified, well-paid teleworker.[10] There appears, however, to be a certain polarization in the literature regarding the forms of homework contemplated: at one end is badly regulated and remunerated industrial homework, and at the other, the new wave of high-tech, comparatively well-paid home telework. Less attention has been paid to more precarious and badly paid types of home telework, such as telemarketing. Other forms of homework, such as data entry and clerical work (which has been done at home since the 1940s), have also received relatively little attention.[11] The 1990s has seen the emergence of an important body of literature on teleworking (or telecommuting), a subject that seems to have elicited little interest before, and can be mostly attributed to the rapid technological changes taking place, generating the expansion of this form of homework.

Industrial homework, specifically in the garment sector, which has traditionally been occupied by women—often immigrant and visible minority women—and the focus of the union movement, is relatively well documented in North America from historical, political and sociological perspectives.[12] Homeworking in the Ontario (Ng et al. 1999; Cameron and Mak 1991; Borowy and Yuen 1993) and British Columbia (Ocran 1997; Fitzpatrick 1998; Ocran et al. 1993) garment sectors has been the object of a considerable amount of research. The broader-ranging implications of the transformation of the industry, from both a national and an international perspective, have also been analyzed (Yanz et al. 1999; ILO 1990b:7). Economic restructuring and the increasing globalization of the industry, where national boundaries are of diminishing importance in a market controlled by major retailers, has had a profound effect on the Canadian garment industry. Once a sector providing thousands of in-plant jobs (many of them unionized), it is now rapidly changing and rife with subcontracting to smaller enterprises, homework and undeclared work.

> The end product of restructuring in the Canadian industry is a pyramid-shaped system of production that begins with the retailer at the top. The retailer contracts out to a jobber, who subcontracts to a small factory where the cutting and possibly some sewing is done. The majority of the sewing is subcontracted to smaller workshops, which, in order to meet the production deadline, often subcontract the remaining sewing to homeworkers. At each level in the pyramid, additional contractors receive a cut of the price paid by the retailer, so the workers are left with a smaller and smaller share. The result is an industry in which labour rights violations are the norm, where piece rates fall well below

> the minimum wage, where employment is precarious, and where sweatshop conditions are spreading (Yanz et al. 1999: 13).

The situation of garment homeworkers in Quebec has also been the object of study, and the conclusions coincide in large part with the studies done in other provinces (Ordre professionnel 1997; Grant and Rose 1985). One major factor that emerges is that this sector is dominated by immigrant women and women living in rural areas. An issue particular to Quebec is the use of the decree system to control and regulate homework in the garment industry. (See Chapter 7.)

Alternative forms of organizing garment homeworkers have also been the subject of some discussion, most notably surrounding the Toronto Homeworkers' Association, set up in collaboration with the International Ladies Garment Workers Union (ILGWU) (Dagg 1995). The perceived need for such associations results from the severe working conditions of many homeworkers and the limitations on unionizing them, imposed by labour legislation and the workers' isolation. These associations form part of a growing international movement to organize homeworkers.[13]

Much of the literature on homework in the United States, particularly in the manufacturing sector, brings to the forefront the historical debate on the issue of the prohibition of homework and the advent of the deregulation of this sector in the 1980s, spearheaded by political conservatives (Boris 1996; Iverson 1988; Cahan 1989; Faricellia Dangler 1994). Several categories of homework, particularly in the garment sector, were banned with the adoption of provisions to this effect in the *Fair Labor Standards Act* in 1942. The debate came to a head in the 1980s with the lifting of the ban in the garment sector, and when proponents of the right to work at home confronted those in the labour movement who were opposed to permitting homework, particularly in industrial sectors. This debate was intimately entwined with more general debates on the place of women in the work force and the regulatory role of the state.

> The deregulation campaign reflected national tension over the issue of mothers and paid labor as well as ideological disagreements over the role of the state in the economy, the relationship between family and wage earning, and the feminist challenge to the sex segmentation of social life. Deregulators emphasized the lack of freedom under homework rules; for defenders of the bans, homeworkers became victims of the marketplace rather than the state (Boris 1994: 339).

The union movement in the United States had traditionally opposed the liberalization of homework since unionization thereafter becomes more difficult, as does the enforcement of labour legislation.[14] In Canada, policy makers have, on the whole, opted to regulate, rather than ban, industrial homework.[15]

Telework has received increasing attention in the last 10 years, from many perspectives.[16] The main characteristics of telework are that the worker does not work in the employer's

establishment, and has little or no personal contact with colleagues, although he/she can sometimes communicate with them through information and communications technologies (Di Martino and Wirth 1990). Not all forms of telework come under the category of homework, since telework can also include work in satellite offices, work in community telework centres rented and shared by teleworkers, and "portable" work, such as that of sales representatives. A distinction is also made between telework done by highly qualified professionals (knowledge-based work), who are often men (Di Martino and Wirth 1990), and homework using telecommunications technology that is often performed in less than ideal conditions and badly paid (Steering Committee 1997: 205-206; Pinsonneault and Boisvert 1996).

Telework could be said to represent the new age of homework. It is often cited as providing advantages for society as a whole, for employers and for workers.[17] Reductions in air pollution, traffic and infrastructure costs (such as the building and maintenance of roads) through an increase in telework are seen as beneficial for society. Lower rental and other overhead costs, higher productivity, lower absenteeism and greater organizational flexibility are the potential benefits for employers; employees can take advantage of reduced transportation time, reduced work-related costs (transportation, clothes, meals, etc.), a more agreeable working environment, and can more easily reconcile their family life and work. Employers, however, note that telework does have inconveniences: management difficulties, uncertainty about the security and confidentiality of information being transferred through telecommunications networks, and problems with regard to employee supervision and evaluation. Employees encounter different problems: isolation, reduced chances of promotion and a tendency to work beyond their normal working hours. These last factors of dissatisfaction are similar to those found with other forms of homework, as are the potential benefits for both employers and workers.

The pros and cons of home telework have increasingly been the object of discussion on an international level[18] and in Europe.[19] For example, a recent study (Huws et al. 1996) on home teleworking among *self-employed* translators in selected European countries concluded that this type of teleworking could potentially enhance equality of opportunity in the work force for women by bringing men closer to the domestic sphere and by increasing job opportunities and lifestyle choices for women. The authors of this study are, nevertheless, guarded about any generalization of this conclusion because of the study's limits. In Canada, a national forum was recently held on the impact of information technologies on work, which included considerable discussion of telework from a tripartite perspective (HRDC 1997). Labour spokespersons noted during the forum the need to ensure adequate protection for home teleworkers, especially with regard to health and safety, the application of employment standards and access to unionization.

Another area where home telework is to be found is in order taking, for example, in the fast-food industry.[20] Other forms of telework are predicted to expand with the development of "virtual" call centres wherein workers take in-bound and out-bound calls at home for corporations' back-office operations such as reservations, technical advice, dispatching and other services.[21]

One aspect of teleworking in the home is the potential for increased control on the part of employers because of advances in information technology (Ray 1992). One problem in the case of other forms of homework, especially for the application of labour laws, has been demonstrating the actual supervision of work done at home in order to prove, for example, that an employee–employer relationship exists or to determine the number of hours worked to be able to calculate wages and overtime. But, telework can potentially increase the verification of time worked and how work is done. The use of electronic surveillance of homeworkers, which in some cases allows for extremely detailed, even minute-by-minute, performance evaluation of individual workers, also raises questions regarding management rights and workers' right to privacy.[22]

The transfer of women's clerical work to the home has been the subject of less scrutiny, although its occurrence in Canada has been documented to a certain degree.[23] There are similarities between industrial homework and clerical homework, such as claim processing for insurance companies and typing, with regard to working conditions, especially the long hours and low pay.[24] As well, clerical homework is primarily done by women, as is industrial homework.

The use of home telework (and, by implication, homework in general) as a means of integrating people with disabilities into the work force has also been the subject of some discussion.[25] While potentially an interesting avenue to encourage equal employment opportunities for many people with disabilities, it is also pointed out that home telework should not be seen as a panacea, or as an all-encompassing employment solution for those with a disability. The maintenance of the right to work on-site is, therefore, also stressed (AVISE 1996: 280).

Legal Questions Surrounding Homework

Historically, there has been a debate over the prohibition versus the regulation of homework, especially in the industrial sector. Now there appears to be an international move toward regulating homework, or regulating it more effectively, on the part of workers' organizations, governments and, in certain countries, employers' organizations (Schneider de Villegas 1990). The abolitionist approach manifested itself on an international level at the 1939 International Labour Conference of American States in Havana, when a resolution was adopted to ban industrial homework. The ILO Tripartite Technical Committee on the Clothing Industry reiterated this position as recently as 1964. In the late 1970s and the 1980s, the ILO changed its approach and began studying and promoting the parity of working conditions between homeworkers and on-site workers. (See Chapter 2.) Although regulations do exist in many countries, and have existed for many years, the lack of enforcement of these regulations remains the main obstacle to ensuring adequate legal protection for homeworkers.[26] Another question, linked to the problem of the non-enforcement of existing standards, is whether or not strict regulation of homework may have the undesired effect of rendering many already isolated workers even more vulnerable by pushing their work further into the underground economy.[27]

One of the more prevalent current legal questions on an international level is, therefore, the need to adopt specific legislation to cover this type of work and to review existing regulation (Vega Ruiz 1992). While homeworkers are not necessarily excluded from the application of all labour laws, existing standards are often considered ill adapted to their situation. One problem is the qualification of the subordinate relationship between employer and worker, the existence of which is generally necessary for the application of protective labour and social security legislation. Working conditions for homeworkers often do not reflect the standards provided for in national laws. Many homeworkers work on a piece-rate basis, but there is a lack of legal parameters on how remuneration should be calculated. They are also often excluded from provisions on working time and the payment of overtime because of the "unverifiable" nature of the number of hours worked.

The issue of homework, from a legal perspective, has been studied to a certain degree on an international level and in the European and American contexts.[28] There are, however, few legislative studies on homework that take into consideration the distinctive characteristics of Canadian labour legislation and legal culture. Two exceptions are the literature on the regulation of the garment industry in Quebec and Ontario (Ordre professionnel 1997; Grant and Rose 1985; ILGWU and INTERCEDE 1993). There has also been some study of the legal questions surrounding homework in British Columbia (Ocran et al. 1993; McGrady and Jamieson 1996-97; Roper 1996-97; McGrady and Steeves 1989). Existing specific regulation of industrial homework has been found to be lacking in many respects, especially with regard to enforcement.

That labour law in Canada is ill adapted to "atypical" work, that is, work that does not fit into the permanent, full-time, on-site mold, is not contested. The determination of criteria to establish whether and how these workers, and in this case homeworkers, are covered by protective legislation has essentially been left to the courts and specialized tribunals (Gagnon 1992: 422). This situation is not unique to Canada, however, due to the inherently ambiguous legal nature of homework (ILO 1990b: 38). Most proposals for legislative reform in Canada concern sector-based standards for industrial homework[29] or standards to address specifically the problems encountered by industrial homeworkers and, to a much more limited extent, standards targeting home telework.[30] One Quebec author (Dagenais 1998a) has developed a framework that could address the situation of homeworkers, as well as dependent and independent contractors, based on the principle of parity with " typical " workers and the right to fair and reasonable conditions of work as prescribed by article 46 of the Quebec *Charter of Rights and Freedoms*. She extends this principle to access to social programs, such as employment insurance and paid maternity leave, as well. Another related question is the voluntary nature of homework, and the freedom of workers to refuse to convert part of their home into a workplace.[31]

The literature thus constantly reminds us of the blurred boundary between self-employment and waged subordinate homework, especially in an ideological context where entrepreneurship is highly valued and running one's own business is a sought-after goal (Leach 1993). This ambiguity is transferred into the legal sphere, where one of the dominant issues with regard to homeworkers is their "employee" status and the application of existing labour and social security laws to their situation.[32] It is also argued that the very tests used to determine "employee" status

contain an inherent bias against the home as workplace and put women homeworkers at a disadvantage, which makes it necessary to revaluate and redefine these tests with the particular situation of the homeworker in mind.[33]

Enforcement problems with regard to homework legislation have been documented and commented on frequently.[34] These problems stem from the lack of financial and human resources necessary to inspect workplaces and detect and follow up on violations, as well as the invisibility of work done in the home. Recent research in Canada involving interviews with homeworkers reveals that these industrial homeworkers rarely, if ever, receive all the wages and other entitlements provided for in labour and social security laws (Ng et al. 1999; Fitzpatrick 1998).

The target of most legislative action in North America has been industrial homework. This leaves homeworkers doing other forms of homework—in the service sector and telework, for example—without any specific protection, even though they may encounter similar problems because their workplace is the home, and not because of the type of work performed. The legislation adopted to protect industrial homeworkers has been perceived by some to be ineffective since it "has succeeded in minimizing the homework problem by institutionalizing a split between legal and illegal homework operations and, in effect, limiting regulation to a relatively small number of industries" (Faricellia Dangler 1994: 158). International trends in homework, however, demonstrate that the types of work being done at home are becoming increasingly diverse, both in the industrial and service sectors (ILO 1990b: 11-12).

There has been little research on the occupational health and safety aspect of homework.[35] One Australian study (Mayhew and Quinlan 1998), in which 100 homeworkers in the textile, clothing and footwear industry were interviewed, revealed that over one quarter of homeworkers had been injured and required to stop working during the year, compared to 10 percent of factory-based workers. In addition, close to 80 percent of homeworkers reported chronic injuries, compared to just over one third of factory-based workers. These injuries could be attributed primarily to overuse, related in large part to the piecework payment system. A high percentage of homeworkers had also been exposed to occupational violence, mostly on the part of their employers or "middlemen." Another finding of this study was that the vast majority of the homeworkers interviewed did not have any information on health and safety and workers' compensation legislation, underlining the isolation of these workers.

A recent smaller study of the working conditions of garment homeworkers in the Toronto area confirms that back strain is the principal occupational health problem.[36] Repetitive strain injuries, allergy to fabric dust and psychological pressure to meet work and family demands are other common complaints. This study also found that most of the workers interviewed did not inform their employers of their health problems, believing that nothing would come of mentioning them. The occupational health and safety of home teleworkers in the Canadian federal public service is also emerging as an important issue for the unions in this sector, especially with regard to the question of an employer's obligation to provide ergonomic

furniture and other equipment, and the potential use of home telework as reasonable accommodation for workers who are injured or have a disability, as well as for those with multiple chemical sensitivities.[37]

The question of the impact of municipal zoning on homework, although outside the scope of this study, is also raised in some of the literature.[38] The main issues raised concern noise and air pollution in residential neighbourhoods, the use of hazardous materials, increase in traffic for pick-up and delivery, as well as the effect this zoning can have on the development of home telework.

What emerges is a portrait of the evolution of homework that shadows the transformation of work in general. The traditional forms of homework in the industrial sector still exist, continue to be female-dominated and, generally, offer poor remuneration and difficult working conditions. If anything, these workers appear to be even more marginalized with the restructuring of the economy. Advances in information technology have facilitated the emergence of new forms of homework, and the traditional perception of the workplace as being outside the home, or the "private sphere," is slowly being erased. Most women homeworkers continue to occupy the least well-paid jobs, and attempt to reconcile family life with work at home. The gendered aspect of homework mirrors, to a large extent, the general position of women in the work force. But homework is no longer as homogeneous as before, and generalizations are more difficult to make on homework as a whole, especially with the development of telework in certain sectors, which in some cases offers better working conditions.

The legal questions surrounding all forms of homework are, however, remarkably similar. The use of home as a workplace calls into question the existing legal framework for employee–employer relations. The confusion over the employee status of homeworkers is exacerbated by this framework, which is essentially based on workers being under the direct control of an employer. This employee status is a necessary precondition for the application of the legal framework to protect workers and give them access to social security programs such as employment insurance. Enforcement of existing standards on working conditions becomes more illusory as the worker is "invisible" in the home. This invisibility and isolation can have serious repercussions on the organization of homeworkers, again calling into question the legal framework for unionization and collective bargaining. A re-examination of the existing legal framework has been put forward as a necessary undertaking for all forms of homework, with a view to ensuring that these workers' realities are taken into account.

Endnotes

[1] The terms "garment" and "textile" are used interchangeably throughout this study, although they each refer to specific types of industrial work.

[2] On immigrant homeworkers and the "racialized" discourses surrounding homeworkers, see Ocran (1997: 152ff). See also Canadian Centre for Policy Alternatives (1992: 38-40).

[3] The term “gender-neutral” could be considered misleading since laws, while appearing neutral, may in fact have an adverse impact on women. For a discussion of this issue, see Conaghan (1986).

[4] For a historical perspective of the economic role of women’s homework see Boris (1996).

[5] Lallement (1990b). For a history of the evolution of women’s homework in the United States, see Boris (1994).

[6] Schneider de Villegas (1990); Di Martino and Wirth (1990). On the rise of telework in France as a new form of employment for workers with disabilities, see Lallement (1990a: 96-97).

[7] See, for example, Gringeri (1996).

[8] See, for example, Schneider de Villegas (1990); Oldfield (1990). Most of the literature consulted pointed to isolation as one of the main problems with homeworking, even with teleworking, if there is no feasible means by which the homeworker can communicate with colleagues.

[9] See, for example, Ng et al. (1999). In this study, the lack of affordable child care was the primary reason given for working at home. See also Allen and Wolkowitz (1987: 72ff).

[10] See, for example, Gurstein (1995).

[11] For a detailed history of the rise of home clerical work in the United States among “middle-class” women in the postwar period, as well as the emergence of homework using telecommunications technologies, such as telemarketing, and computers, see Boris (1994). See also Christensen (1989) and Simonson (1988).

[12] See for example, Boris (1994); Boris and Daniels (1989); Christensen (1988); Faricellia Dangler (1994); Leach (1998); Boris and Prügl (1996); Ocran (1997); Leach (1993).

[13] For an international overview on homeworkers’ associations, see Huws (1995); Tate (1996).

[14] For an overview of labour’s position on homework in the United States until the late 1980s, see du Rivage and Jacobs (1989).

[15] For a summary history of the regulation of homework in Canada, see Oldfield (1990).

[16] See for example, ILO (1990c) (types of telework and examples of telework situations from a selection of countries, telework and rural and local development, employment for those with a disability, pilot projects); Gurstein (1995) (urban planning perspective); NUTEK (1997) (on telework with respect to the spatial organization of work, the organization of work and family, and European policies on teleworking); Huws et al. (1990) (on telework in the context of office automation in Britain).

[17] See, for example, Pinsonneault (1996); St-Onge and Lagassé (1996). St-Onge and Lagassé interviewed a relatively small number of teleworkers in Quebec.

[18] See for example, Di Martino and Wirth (1990).

[19] See for example, Ray (1996a); Breton (1994); Huws (1993).

[20] For an account of a well-publicized case concerning home-based order taking for a pizza chain, see Canadian Centre for Policy Alternatives (1992: 15-16).

[21] See, for example, Insight Canada Research (1995).

[22] Bryant (1995). Electronic surveillance can take varied forms, such as keystroke counting, listening in on telephone conversations to monitor the quality of client services, telephone call accounting (gathering information about the duration and destination of calls), reading of electronic mail, etc.

[23] See for example, Oldfield (1990). For an analysis of the legal protection of clerical homeworkers in the United States, see Simonson (1988). See also Lipsig-Mummé (1983) (international perspective); Lallement (1990b) (Europe).

[24] Chamot (1988) (text refers to the situation in the United States).

[25] See for example, AVISE (1996); Boucher and Fougeyrollas (1998).

[26] See, for example, Vega Ruiz (1996: 22).

[27] Schneider de Villegas (1990: 470). See also Ordre professionnel (1997).

[28] See for example, Vega Ruiz (1996); Blanpain (1997); Ray (1996b); European Commission (1995); Christensen (1988).

[29] See for example, ILGWU and INTERCEDE (1993). See also MacDonald (1998).

[30] See, for example, Task Force on the Review of Canada Labour Code (Sims 1996) for an analysis and policy recommendations to address the difficulties encountered by off-site workers in exercising their union rights.

[31] Ray (1996b). See also McGrady and Jamieson (1996-97).

[32] For an international and comparative overview of this issue, see Vega Ruiz (1996). For an analysis of French legislation with respect to telework, see Ray (1996b); Breton (1994).

[33] Prügl (1996). See also Hunter (1992).

[34] See for example, Ocran (1997); Faricellia Dangler (1994) (United States); ILGWU and INTERCEDE (1993).

[35] For a legislative overview of existing legislation in various countries, see Vega Ruiz (1996: 23ff).

[36] Ng et al. (1999). See also Cameron and Mak (1991); Borowy and Yuen (1993).

[37] Borowy and Johnson (1995). For an analysis of the use of home telework as a reasonable accomodation in American law, see Ludgate (1997).

[38] See for example, Gurstein (1995); McGrady and Steeves (1989); Butler (1988) (text refers to the situation in the United States); ILO (1990c).

2. HOMEWORK IN CONTEXT: INTERNATIONAL STANDARD SETTING AND HOMEWORKERS

The 1996 International Labour Organization *Home Work Convention* and *Home Work Recommendation*

In 1996, the International Labour Conference adopted the *Home Work Convention* (No. 177) and the *Home Work Recommendation* (No. 184),[1] after several years of expert meetings and consultations with governments, employers' and workers' associations.[2] To date, only two countries, Finland and Ireland, have ratified the Convention, which came into force in April 2000.[3] It is, however, the fruit of extensive study of, and debate over, the situation of homeworkers worldwide and represents a desire on the part of the members of the International Labour Organization to ensure equitable working conditions for people who work at home. This is clear from the Preamble to the Convention.

> Recalling that many international labour Conventions and Recommendations laying down standards of general application concerning working conditions are applicable to homeworkers, and,
>
> Noting that the particular conditions characterizing home work make it desirable to improve the application of those Conventions and Recommendations to homeworkers, and to supplement them by standards which take into account the special characteristics of home work.

While Canada has not ratified the Convention, it voted for the adoption of both the Convention and the Recommendation. Once a convention is adopted, member states must take steps for it to be ratified, as well as report to the ILO on the reasons for non-ratification and on the measures taken in domestic law to ensure that the principles set out in the individual conventions are implemented internally (ILO 1994). While recommendations are not ratified and are not binding on states, they nevertheless provide important guidelines for policy makers at the national level. Conventions, on the other hand, are binding treaties in international law: "ILO Conventions are designed as minimum standards of social protection, as flexible instruments adapted to particular circumstances of individual countries. But the position in law is unambiguous. They are treaty Conventions of international law, which have binding force of law in member States upon ratification" (Plant 1994: 11).

The definition of homework found in the *Home Work Convention* and the *Home Work Recommendation* provides a reference point for an analysis of Canadian domestic legislation. "Home work" is defined in article 1 of the Convention as follows.

> (a) the term [home work] means work carried out by a person, to be referred to as a homeworker,
> (i) in his or her home or in other premises of his or her choice, other than the workplace of the employer;

> (ii) for remuneration;
> (iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used, unless this person has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions;
>
> b) persons with employee status do not become homeworkers within the meaning of this Convention simply by occasionally performing their work as employees at home, rather than at their usual workplace;
>
> c) the term [employer] means a person, natural or legal, who, either directly or through an intermediary, whether or not intermediaries are provided for in national legislation, gives out home work in pursuance of his or her business activity.

This definition can be considered broad and inclusive since it covers all forms of homework (industrial, telework, etc.). The place of work is also broadly defined to include not only a worker's residence but also premises other than the workplace of the employer (e.g., workshops in private residences, etc.). The only workers expressly excluded from the Convention's definition are independent contractors (in accordance with national law on the status of independent workers) and persons who work only occasionally at home. The definition of employer in the Convention makes explicit reference to subcontractors and intermediaries as employers. The ILO definition, therefore, appears to provide a definition which is in accordance with the reality of homework today. *It is essentially this definition that we have adopted for the purpose of our legislative analysis.*[4]

By ratifying the *Home Work Convention*, states agree to adopt, implement and periodically review a national policy on homework, with the participation of workers' and employers' organizations. This national policy should seek to attain equal treatment between homeworkers and on-site workers in all areas of labour law and social security law: freedom of association and the right to collective bargaining, protection against discrimination, remuneration, health and safety in the workplace, inspection, social security, parental leave and training. The Convention also stresses the need for states to take into consideration the special characteristics of homework and to gather comprehensive statistics on the number and situation of homeworkers.

The *Home Work Recommendation* further elaborates proposals to improve the situation of homeworkers. It specifies that, when implementing a national policy on homework, representative employer and employee associations directly concerned with homeworkers should be involved in the formulation and implementation of the policy. It also provides for the right of homeworkers to be kept informed of their conditions of employment in writing, as well as the obligation for employers to register with the authorities when they employ homeworkers, and includes the registration of any intermediaries used by them and the keeping of registries concerning individual homeworkers and their terms of employment.

Contained as well in the Recommendation are mechanisms to ensure equality of remuneration with on-site workers, or workers doing comparable work in the same sector of activity, including compensation for expenses incurred in connection with their work at home (energy, communications, maintenance of machinery, etc.) and for time spent doing secondary activities such as maintenance of machines, sorting and packing.

With regard to occupational health and safety, the Recommendation proposes that employers be required to inform homeworkers of any hazards related to their work and to ensure that homeworkers have the appropriate safety equipment and that the machines used are properly maintained. The right to refuse to do dangerous work, without being subject to reprisals, is also provided for. The right to daily and weekly rest periods should also be guaranteed to homeworkers, notwithstanding production demands and deadlines to complete work assignments. Equal access to social security programs, either within the parameters of existing programs or through the development of special schemes or funds for homeworkers, is recommended.

The Recommendation also states that specific programs related to homework be established and supported in collaboration with employer and worker organizations. These include information campaigns on homework, measures to facilitate the organization of homeworkers, training programs and improved child care.

In its representations to the International Labour Organization preceding the adoption of the Convention and the Recommendation, the Canadian government pronounced itself essentially in agreement with the definition of homework established in the Convention and the Recommendation, as well as with the standards set out (HRDC 1996b). While workers' associations were in agreement with the terms of the Convention and the Recommendation, Canadian employers opposed the adoption of the Convention for several reasons.[5] They found that the Convention supplies only one definition of homework to cover many realities, from the unskilled, exploited homeworker to the well-paid, highly qualified teleworker. They also claimed that the Convention was based on a presumption that all homeworkers were vulnerable and subject to exploitation in the absence of government intervention. They considered such standards to be superfluous since Canadian legislation applies to all employees, as long as an employee–employer relationship exists. The provisions in the Recommendation concerning the obligation for employers to sign a written contract with homeworkers indicating the type of remuneration, the nature of the work to be performed and deadlines for the completion of work were considered by employers' organizations to be unrealistic and not in keeping with current practices in the workplace.

It is important to remember that, although the *Home Work Convention* addresses the specific situation of people who work at home, it must be read and interpreted in keeping with other ILO conventions and recommendations, as they are equally applicable to homeworkers. One hundred and eighty-two conventions and 189 recommendations have been adopted since 1919, when the ILO was created. Eight conventions have been determined to be fundamental, irrespective of the state of development of the member countries, and a precondition to the exercise of other workers' rights. They are:

- *Freedom of Association and Protection of the Right to Organize Convention, 1948* (No. 87);
- *Right to Organize and Collective Bargaining Convention, 1949* (No. 98);
- *Forced Labour Convention, 1930* (No. 29);
- *Abolition of Forced Labour Convention, 1957* (No. 105);
- *Discrimination (Employment and Occupation) Convention, 1958* (No. 111);
- *Equal Remuneration Convention, 1951* (No. 100);
- *Minimum Age Convention, 1973* (No. 138); and most recently
- *Convention on the Worst Forms of Child Labour, 1999* (No. 182) (ILC 1998e; ILO 1999).

The ratification of four other conventions has also been declared a priority by the ILO as they concern the implementation mechanisms for international labour standards and domestic policy. They are:

- *Tripartite Consultation (International Labour Standards) Convention, 1976* (No. 144);
- *Labour Inspection Convention, 1947* (No. 81);
- *Labour Inspection (Agriculture) Convention, 1969* (No. 129); and
- *Employment Policy Convention, 1964* (No. 122).[6]

Other pertinent conventions and recommendations include standards regarding conditions of work (working hours, minimum wage, etc.), social security schemes, private placement agencies, migrant workers and specific categories of workers such as older workers.[7]

There have recently been attempts to adopt international standards on contract labour, and more specifically, on dependent contractors, but without much success. As will be seen, the issue of independent and dependent contractors, and the definition of "employee" for the purposes of labour legislation are of the utmost importance to homeworkers, who often find themselves in a legislative "grey zone." (See Chapter 3.) For the moment, no international standards or guidelines exist on this issue. The *Home Work Convention* explicitly does not apply to independent contractors. At the 1998 International Labour Conference, a draft convention and recommendation on contract labour was submitted for discussion (ILC 1998b,c,d,e 1997). There were important definitional problems as to what was to be covered by the convention, as well as categorical opposition from employers' associations to the adoption of such standards (ILC 1998e; HRDC 1996b). The study of the question was put on a future agenda of the International Labour Conference, since no agreement could be reached.

The adoption of the ILO *Home Work Convention* and *Home Work Recommendation* represents an important step toward recognizing the specificity of the home as workplace and

the potential vulnerability of homeworkers. They also provide a framework for an examination of national realities.[8] The guiding principle of these international instruments is the promotion of the equality of treatment between homeworkers and on-site workers. Even though Canada has not yet ratified the Convention, both of these instruments provide interesting proposals for possible policy directions at the national and provincial levels.

***HOME WORK CONVENTION, 1996* (NO. 177)**

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Eighty-third Session on 4 June 1996, and

Recalling that many international labour Conventions and Recommendations laying down standards of general application concerning working conditions are applicable to homeworkers, and

Noting that the particular conditions characterizing home work make it desirable to improve the application of those Conventions and Recommendations to homeworkers, and to supplement them by standards which take into account the special characteristics of home work, and

Having decided upon the adoption of certain proposals with regard to home work, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts, this twentieth day of June of the year one thousand nine hundred and ninety-six, the following Convention, which may be cited as the Home Work Convention, 1996:

Article 1

For the purposes of this Convention:

(a) the term home work means work carried out by a person, to be referred to as a homeworker,

(i) in his or her home or in other premises of his or her choice, other than the workplace of the employer;

(ii) for remuneration;

(iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used, unless this person has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions;

(b) persons with employee status do not become homeworkers within the meaning of this Convention simply by occasionally performing their work as employees at home, rather than at their usual workplaces;

(c) the term employer means a person, natural or legal, who, either directly or through an intermediary, whether or not intermediaries are provided for in national legislation, gives out home work in pursuance of his or her business activity.

Article 2

This Convention applies to all persons carrying out home work within the meaning of Article 1.

Article 3

Each Member which has ratified this Convention shall adopt, implement and periodically review a national policy on home work aimed at improving the situation of homeworkers, in consultation with the most representative organizations of employers and workers and, where they exist, with organizations concerned with homeworkers and those of employers of homeworkers.

Article 4

1. The national policy on home work shall promote, as far as possible, equality of treatment between homeworkers and other wage earners, taking into account the special characteristics of home work and, where appropriate, conditions applicable to the same or a similar type of work carried out in an enterprise.

2. Equality of treatment shall be promoted, in particular, in relation to:

(a) the homeworkers' right to establish or join organizations of their own choosing and to participate in the activities of such organizations;

(b) protection against discrimination in employment and occupation;

(c) protection in the field of occupational safety and health;

(d) remuneration;

(e) statutory social security protection;

(f) access to training;

(g) minimum age for admission to employment or work; and

(h) maternity protection.

Article 5

The national policy on home work shall be implemented by means of laws and regulations, collective agreements, arbitration awards or in any other appropriate manner consistent with national practice.

Article 6

Appropriate measures shall be taken so that labour statistics include, to the extent possible, home work.

Article 7

National laws and regulations on safety and health at work shall apply to home work, taking account of its special characteristics, and shall establish conditions under which certain types of work and the use of certain substances may be prohibited in home work for reasons of safety and health.

Article 8

Where the use of intermediaries in home work is permitted, the respective responsibilities of employers and intermediaries shall be determined by laws and regulations or by court decisions, in accordance with national practice.

Article 9

1. A system of inspection consistent with national law and practice shall ensure compliance with the laws and regulations applicable to home work.

2. Adequate remedies, including penalties where appropriate, in case of violation of these laws and regulations shall be provided for and effectively applied.

Article 10

This Convention does not affect more favourable provisions applicable to homeworkers under other international labour Conventions.

Article 11

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 12

1. This Convention shall be binding only upon those Members of the International Labour Organization whose ratifications have been registered with the Director-General of the International Labour Office.

2. It shall come into force 12 months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member 12 months after the date on which its ratification has been registered.

Article 13

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 14

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organization of the registration of all ratifications and denunciations communicated by the Members of the Organization.

2. When notifying the Members of the Organization of the registration of the second ratification, the Director-General shall draw the attention of the Members of the Organization to the date upon which the Convention shall come into force.

Article 15

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations, for registration in accordance with article 102 of the Charter of the United Nations, full particulars of all ratifications and acts of denunciation registered by the Director-General in accordance with the provisions of the preceding Articles.

Article 16

At such times as it may consider necessary, the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 17

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides -

(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 13 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force, this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 18

The English and French versions of the text of this Convention are equally authoritative.

Home Work Recommendation, 1996 **(NO. 184)**

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Eighty-third Session on 4 June 1996, and

Recalling that many international labour Conventions and Recommendations laying down standards of general application concerning working conditions are applicable to homeworkers, and

Noting that the particular conditions characterizing home work make it desirable to improve the application of those Conventions and Recommendations to homeworkers, and to supplement them by standards which take into account the special characteristics of home work, and

Having decided upon the adoption of certain proposals with regard to home work, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation supplementing the Home Work Convention, 1996;

adopts, this twentieth day of June of the year one thousand nine hundred and ninety-six, the following Recommendation, which may be cited as the Home Work Recommendation, 1996:

I. DEFINITIONS AND SCOPE OF APPLICATION

1. For the purposes of this Recommendation:

(a) the term home work means work carried out by a person, to be referred to as a homeworker,

(i) in his or her home or in other premises of his or her choice, other than the workplace of the employer;

(ii) for remuneration;

(iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used, unless this person has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions;

(b) persons with employee status do not become homeworkers within the meaning of this Recommendation simply by occasionally performing their work as employees at home, rather than at their usual workplaces;

(c) the term employer means a person, natural or legal, who, either directly or through an intermediary, whether or not intermediaries are provided for in national legislation, gives out home work in pursuance of his or her business activity.

2. This Recommendation applies to all persons carrying out home work within the meaning of Paragraph 1.

II. GENERAL PROVISIONS

3. (1) Each Member should, according to national law and practice, designate an authority or authorities entrusted with the formulation and implementation of the national policy on home work referred to in Article 3 of the Convention.

(2) As far as possible, use should be made of tripartite bodies or organizations of employers and workers in the formulation and implementation of this national policy.

(3) In the absence of organizations concerned with homeworkers or organizations of employers of homeworkers, the authority or authorities referred to in subparagraph (1) should make suitable arrangements to permit these workers and employers to express their opinions on this national policy and on the measures adopted to implement it.

4. Detailed information, including data classified according to sex, on the extent and characteristics of home work should be compiled and kept up to date to serve as a basis for the national policy on home work and for the measures adopted to implement it. This information should be published and made publicly available.

5. (1) A homeworker should be kept informed of his or her specific conditions of employment in writing or in any other appropriate manner consistent with national law and practice.

(2) This information should include, in particular:

(a) the name and address of the employer and the intermediary, if any;

(b) the scale or rate of remuneration and the methods of calculation; and

(c) the type of work to be performed.

III. SUPERVISION OF HOME WORK

6. The competent authority at the national level and, where appropriate, at the regional, sectoral or local levels, should provide for registration of employers of homeworkers and of any intermediaries used by such employers. For this purpose, such authority should specify the information employers should submit or keep at the authority's disposal.

7. (1) Employers should be required to notify the competent authority when they give out home work for the first time.

(2) Employers should keep a register of all homeworkers, classified according to sex, to whom they give work.

(3) Employers should also keep a record of work assigned to a homeworker which shows:

(a) the time allocated;

(b) the rate of remuneration;

(c) costs incurred, if any, by the homeworker and the amount reimbursed in respect of them;

(d) any deductions made in accordance with national laws and regulations; and

(e) the gross remuneration due and the net remuneration paid, together with the date of payment.

(4) A copy of the record referred to in subparagraph (3) should be provided to the homeworker.

8. In so far as it is compatible with national law and practice concerning respect for privacy, labour inspectors or other officials entrusted with enforcing provisions applicable to home work should be allowed to enter the parts of the home or other private premises in which the work is carried out.

9. In cases of serious or repeated violations of the laws and regulations applicable to home work, appropriate measures should be taken, including the possible prohibition of giving out home work, in accordance with national law and practice.

IV. MINIMUM AGE

10. National laws and regulations concerning minimum age for admission to employment or work should apply to home work.

V. THE RIGHTS TO ORGANIZE AND TO BARGAIN COLLECTIVELY

11. Legislative or administrative restrictions or other obstacles to:

(a) the exercise of the right of homeworkers to establish their own organizations or to join the workers' organizations of their choice and to participate in the activities of such organizations; and

(b) the exercise of the right of organizations of homeworkers to join trade union federations or confederations,

should be identified and eliminated.

12. Measures should be taken to encourage collective bargaining as a means of determining the terms and conditions of work of homeworkers.

VI. REMUNERATION

13. Minimum rates of wages should be fixed for home work, in accordance with national law and practice.

14. (1) Rates of remuneration of homeworkers should be fixed preferably by collective bargaining, or in its absence, by:

(a) decisions of the competent authority, after consulting the most representative organizations of employers and of workers as well as organizations concerned with homeworkers and those of employers of homeworkers, or where the latter organizations do not exist, representatives of homeworkers and of employers of homeworkers; or

(b) other appropriate wage-fixing machinery at the national, sectoral or local levels.

(2) Where rates of remuneration are not fixed by one of the means in subparagraph (1) above, they should be fixed by agreement between the homeworker and the employer.

15. For specified work paid by the piece, the rate of remuneration of a homeworker should be comparable to that received by a worker in the enterprise of the employer, or if there is no such worker, in another enterprise in the branch of activity and region concerned.

16. Homeworkers should receive compensation for:

(a) costs incurred in connection with their work, such as those relating to the use of energy and water, communications and maintenance of machinery and equipment; and

(b) time spent in maintaining machinery and equipment, changing tools, sorting, unpacking and packing, and other such operations.

17. (1) National laws and regulations concerning the protection of wages should apply to homeworkers.

(2) National laws and regulations should ensure that pre-established criteria are set for deductions and should protect homeworkers against unjustified deductions for defective work or spoilt materials.

(3) Homeworkers should be paid either on delivery of each completed work assignment or at regular intervals of not more than one month.

18. Where an intermediary is used, the intermediary and the employer should be made jointly and severally liable for payment of the remuneration due to homeworkers, in accordance with national law and practice.

VII. OCCUPATIONAL SAFETY AND HEALTH

19. The competent authority should ensure the dissemination of guidelines concerning the safety and health regulations and precautions that employers and homeworkers are to observe. Where practicable, these guidelines should be translated into languages understood by homeworkers.

20. Employers should be required to:

(a) inform homeworkers of any hazards that are known or ought to be known to the employer associated with the work given to them and of the precautions to be taken, and provide them, where appropriate, with the necessary training;

(b) ensure that machinery, tools or other equipment provided to homeworkers are equipped with appropriate safety devices and take reasonable steps to ensure that they are properly maintained; and

(c) provide homeworkers free of charge with any necessary personal protective equipment.

21. Homeworkers should be required to:

(a) comply with prescribed safety and health measures;

(b) take reasonable care for their own safety and health and that of other persons who may be affected by their acts or omissions at work, including the proper use of materials, machinery, tools and other equipment placed at their disposal.

22. (1) A homeworker who refuses to carry out work which he or she has reasonable justification to believe presents an imminent and serious danger to his or her safety or health should be protected from undue consequences in a manner consistent with national conditions and practice. The homeworker should report the situation to the employer without delay.

(2) In the event of an imminent and serious danger to the safety or health of a homeworker, his or her family or the public, as determined by a labour inspector or other public safety official, the continuation of home work should be prohibited until appropriate measures have been taken to remedy the situation.

VIII. HOURS OF WORK, REST PERIODS AND LEAVE

23. A deadline to complete a work assignment should not deprive a homeworker of the possibility to have daily and weekly rest comparable to that enjoyed by other workers.

24. National laws and regulations should establish the conditions under which homeworkers should be entitled to benefit, as other workers, from paid public holidays, annual holidays with pay and paid sick leave.

IX. SOCIAL SECURITY AND MATERNITY PROTECTION

25. Homeworkers should benefit from social security protection. This could be done by:

(a) extending existing social security provisions to homeworkers;

(b) adapting social security schemes to cover homeworkers; or

(c) developing special schemes or funds for homeworkers.

26. National laws and regulations in the field of maternity protection should apply to homeworkers.

X. PROTECTION IN CASE OF TERMINATION OF EMPLOYMENT

27. Homeworkers should benefit from the same protection as that provided to other workers with respect to termination of employment.

XI. RESOLUTION OF DISPUTES

28. The competent authority should ensure that there are mechanisms for the resolution of disputes between a homeworker and an employer or any intermediary used by the employer.

XII. PROGRAMMES RELATED TO HOME WORK

29. (1) Each Member should, in cooperation with organizations of employers and workers, promote and support programmes which:

(a) inform homeworkers of their rights and the kinds of assistance available to them;

(b) raise awareness of home-work-related issues among employers' and workers' organizations, non-governmental organizations and the public at large;

(c) facilitate the organization of homeworkers in organizations of their own choosing, including cooperatives;

(d) provide training to improve homeworkers' skills (including non-traditional skills, leadership and negotiating skills), productivity, employment opportunities and income-earning capacity;

(e) provide training which is carried out as close as practicable to the workers' homes and does not require unnecessary formal qualifications;

(f) improve homeworkers' safety and health such as by facilitating their access to equipment, tools, raw materials and other essential materials that are safe and of good quality;

(g) facilitate the creation of centres and networks for homeworkers in order to provide them with information and services and reduce their isolation;

(h) facilitate access to credit, improved housing and child care; and

(i) promote recognition of home work as valid work experience.

(2) Access to these programmes should be ensured to rural homeworkers.

(3) Specific programmes should be adopted to eliminate child labour in home work.

XIII. ACCESS TO INFORMATION

30. Where practicable, information concerning the rights and protection of homeworkers and the obligations of employers towards homeworkers, as well as the programmes referred to in Paragraph 29, should be provided in languages understood by homeworkers.

Endnotes

[1] See the end of this chapter for the full texts of the Convention and the Recommendation. For a convention to be adopted, two thirds of the delegates (government representatives, worker representatives and employer representatives) must vote in favour. The vote on the Convention was 246 for, 14 against and 152 abstentions (most of the employers' delegates abstained). The vote on the Recommendation was: 303 for, 4 against and 111 abstentions (again, many of the employers' delegates abstained). The Canadian government voted both for the Convention and the Recommendation.

[2] ILO (1989, 1990b); ILC (1994); Vega Ruiz (1996). Homebased workers' organizations developed an international network called HomeNet, which mounted a campaign for the adoption of an ILO convention. See their Web site <http://www.homenetww.org.uk/index.html>.

[3] Number of ratifications as of April 30, 2000. Art. 12(2) of the Convention states that it will come into force 12 months after the date on which the ratifications of two Members have been registered. For information on ratifications of the Convention, see the ILO Web site <http://ilolex.ilo.ch:1567/scripts/ratifce.pl?C177>.

[4] As explained in the Introduction, this study does not cover caregivers and agricultural workers, who would fall under the purview of the Convention.

[5] Steering Committee (1997: 215-216). On the employers' position during the adoption process of the convention, see generally ILO Washington Branch (1996).

[6] See the ILO Web site <http://www.ilo.org/public/english/50normes/whatare/priority/index.htm>.

[7] See the ILO Web site <http://www.ilo.org> under ILOLEX for access to the complete texts of the conventions and recommendations.

[8] The ILO has initiated follow-up activities to the adoption of the Convention to provide technical support to certain countries (whether they have ratified the Convention or not) for the development of further research and national policies on homework. For example, a tripartite technical seminar was recently held on homework in Latin America in Santiago, Chile. See Tomei (1999).

3. SELF-EMPLOYMENT: A GREY ZONE FOR HOMEWORKERS

The increase in subcontracting of peripheral or even core aspects of an enterprise's operations and government policies to encourage workers to start their own businesses, among other factors, have led to a rise in the number of "self-employed" homeworkers, be it in the industrial or service sector. The number of people who are self-employed has in fact doubled in the last 20 years in Canada, and they now represent 11 percent of the employed and over 50 percent of total job growth.[1] Self-employment is also much more common among homeworkers than it is among people who work outside the home: according to Statistics Canada, one third of homeworkers are self-employed compared to four percent of people who work outside the home (Nadwodny 1996).

While some of these self-employed workers may, in fact, be independent contractors, many are not.[2] The foundation of labour law and work-related social policy in Canada and elsewhere until now has been the employee–employer relationship, with subordination being the key element. Some authors and workers' advocacy groups point to the need to guarantee employee status to homeworkers legislatively through a broader and clearer definition of the term "employee" as a first step to improving their working conditions.[3] Others point to a need to reconceptualize labour law so it takes into consideration the legal difficulties surrounding the development of self-employment, since the historical legal separation between self-employment and salaried work is becoming less and less clear, creating confusion as to whether or not legal provisions apply to a worker.[4]

Each law studied in all the jurisdictions contains a definition of an "employee" for the purposes of the particular statute. These definitions cannot be transposed from one law to another, since each is specific to the purpose and the intent of the act. For example, in the definition of "employee" in the Quebec *Labour Code*,[5] which provides the framework for unionization and collective bargaining, forepersons are not considered "employees" since they are representatives of the employer. In the Quebec *Act Respecting Labour Standards*, however, forepersons are considered "employees " since the purpose of the Act is to ensure minimum working conditions for all workers.[6] Nevertheless, the initial difference between an independent contractor and an employee must be established for protective legislation to apply.

While some laws make specific reference to independent contractors[7] and dependent contractors[8] (i.e., workers who, while appearing to be independent contractors are in fact economically dependent on one employer), the tests to differentiate between independent contractors and employees has essentially been developed over the years by the case law. While the purpose of this study is not to examine the application of the different tests[9] developed to determine whether someone is an independent contractor or not, this is one of the first questions that must be asked when looking at an individual homeworker's situation.

Homework is often the "stepping-stone" to self-employment. To illustrate, take a female employee who works on-site with co-workers doing clerical work. The employer then

offers to let her work at home part time, and then full time, with her own computer equipment, doing essentially the same work she has always done. The worker discovers it is now costing her money to work (electricity, computer repairs, etc.). She decides to declare herself to be an independent contractor for tax purposes, with her employer's blessing since the company presumes it will no longer have to make contributions for employment insurance and other social programs for the employee. Over time, there is less and less work coming from the employer and her hours are cut almost in half, so she decides to accept clerical work on a part-time basis from other businesses or "clients." The line between employee and independent contractor gets fuzzier and fuzzier, without the worker having made a choice to "run her own business."

There is no magic formula to determine whether someone is an independent contractor or not: it always depends on the facts of each case. Here are *some* of the criteria that have been taken into consideration under the laws studied to determine whether there exists a contract of service.

- What is the purpose of the statute in question?
- Who controls the work, even at arm's length?
- Who decides on the standards to be met for the completed work or the carrying out of the work?
- Who decides how the work will be done?
- Is there a written job description?
- Does the worker have to submit written reports or time sheets?
- Who decides on the hours and days to be worked?
- Who decides on the remuneration to be paid for the work?
- Is the work done an integral part of the employer's activities or only secondary to the main activities?
- Who provides and pays for job training?
- Is there a formal work evaluation process?
- Can the worker be subject to disciplinary action on the part of the employer?
- Can the worker recruit her/his own clients?
- How many clients (or employers) does he/she have?

- Does the worker have to buy liability insurance?
- Does the worker use her/his own letterhead for correspondence and have her/his own business cards?
- Can the worker find a substitute to do the work without the employer's consent or hire people to help?
- Can the worker only work for the employer?
- Does the worker have working conditions similar to those of the other employees?
- Does the worker have the same benefits as the employees of the company (pension fund, group insurance, etc.)?
- Who owns the copyright and patents on the work produced?
- Does the worker run the risk of loss or have a possibility of making profits?
- Who owns the tools and equipment used to perform the work?
- How is the worker paid (piecework, global amount per contract, hourly wage, commissions, etc.)?
- Has the worker incorporated her/his own company to perform the work?

It is not necessary that each of these criteria be considered, nor that each, several or all of them necessarily be applied to each case. Also, depending on the purpose of the statute, a person can be determined to be an independent contractor under one statute and not under another in the same jurisdiction. As well, a worker's status as an employee or an independent contractor under one law does not determine status under another law. The situation can become very confusing for both workers and employers. Workers may very well assume that since they have declared themselves to be independent contractors for income tax purposes, that they cannot be "employees" with the right to join a union or the right to paid maternity leave, even though this may not be the case. In addition, in some jurisdictions, one factor can be more determining than another when compared to other jurisdictions, so, a worker could be an employee under one jurisdiction's employment standards legislation and not under another's. For example, a worker incorporating a company in Quebec will generally lose status as an employee under the *Act Respecting Labour Standards*, while in British Columbia this will not be a determining factor.[10] At the same time, the homeworker who is excluded from the Quebec *Act Respecting Labour Standards* because of being incorporated, will only have the right to preventive reassignment under the Quebec *Act Respecting Health and Safety* in case of pregnancy if incorporated. (See Chapter 6.) Such inconsistencies between different laws create an impossible situation for workers, since they can find themselves in a no-win situation.

It must be emphasized that whether someone works at home does *not* determine status as an "employee."

> Canadian courts have not accorded any special significance to the fact that an employee works in his/her own residence as a homeworker rather than on the employer's premises. Plainly control and economic subordination can be present regardless of the geographical location of work.... If the homeworker's "freedom" exists only in regard to choosing the hours when the job is done when in reality he/she is required to produce a target volume within a specified time, in a predetermined manner and on the employer's financial terms, this would resemble an employment relationship (Christie et al. 1993: 22-23).

The actual situation of each homeworker must be looked at to establish whether the individual is an independent contractor, or an employee (or, in some cases, a dependent contractor) for the purposes of each law. Homeworkers often mistakenly believe they are independent contractors and that they do not have the right to minimum wage or other benefits, to unionize, to receive employment insurance benefits, to a safe workplace or to workers' compensation in case of injury or occupational illness. In many cases, they may actually be "employees" under all or some of the different acts.

Some workers may decide they prefer to be self-employed and their actual situation is in fact one of self-employment, according to the criteria developed by the case law. However, there are situations which have been amply illustrated in both the literature and the case law where workers are forced to accept working conditions that, at first glance, transform them into independent contractors. For example, an employer may tell a worker to incorporate in order to keep her/his job. The crux of the issue is the voluntary nature of self-employment, and the desire to run one's own business. The burden of proving that a worker is an independent contractor should, in all cases, be on the employer, with the benefit of doubt in favour of the worker. There should also be protection against reprisals (dismissal, suspension, discriminatory measures or any other reprisals) against workers who refuse to enter into an independent contractor relationship with their employer.[11]

Other solutions have been adopted in different countries. For example, the French labour code contains a chapter on homework[12] that significantly differs from the approaches in Canadian jurisdictions where specific provisions have been adopted to protect homeworkers, notably in Ontario and British Columbia. In France, the definition of homeworker is very broad and applies to homeworkers in all sectors of activity, not just in the industrial sector. The distinctions between "independent contractor," "dependent contractor" and "employee," which cause so much confusion in Canada, have been tempered by relieving the worker or the employer of having to prove or disprove the existence of immediate or even indirect control on the part of the employer, or the ownership of and payment for tools and equipment necessary for the work.[13] As well, it is not necessary that the person work exclusively for one employer, nor is the worker excluded from coverage if he/she has occasional help from family members or even from unrelated people (Desjardins et al. 1997: 1348-1351). The category of

independent contractor working at home still exists in French labour law, but is circumscribed legislatively.[14]

In Canada, clarification of the "employee" status of homeworkers under the different laws is necessary, as is an attempt at consistency among the laws, especially within the same jurisdiction. Over 50 years of case law, applied according to the purpose and intent of a particular statute, has developed criteria that can help workers and employers determine whether an employee–employer relationship exists, but these interpretations of statutes are not readily available to the parties concerned and their ambiguities often serve only to facilitate the exclusion of workers from protective legislation. This is especially the case with homeworkers, since the traditional criteria concerning the "control" over their work has changed with the emergence of new forms of homework such as telework, and the restructuring of companies toward outsourcing.

Policy Recommendations

A detailed review of the inconsistencies among different labour and social security laws should be undertaken by governments and independent researchers, especially within jurisdictions, in order to reduce the exclusion of homeworkers and other workers from protective legislation.

Legislation should put the burden of proving a worker is an independent contractor on the employer, and the benefit of doubt should favour the worker. Given the numerous and evolving criteria developed in the case law to determine whether or not a worker is an independent contractor, it seems more prudent to use this approach rather than include specific criteria in the legislation along the lines of the French model, for example.

Legislation should provide for the protection of homeworkers and other workers who meet the criteria of "employees" against reprisals (dismissal, suspension, discriminatory measures or any other reprisals) for refusing to enter into an independent contractor relationship with their employer.

Endnotes

[1] Statistics Canada (1998b: 13). These figures only represent self-employed workers who are not incorporated.

[2] For a discussion of this issue, see ILGWU and INTERCEDE (1993); ILO (1990a: 33ff); Lozano (1989). As explained below, some employees may also be "dependent contractors."

[3] See for example, ILGWU and INTERCEDE (1993); Au bas (1996); Allen (1989: 286-287).

[4] For a discussion on an "evolutionary" approach to the concept of "employee," see Verge and Vallée (1997); Brault (1997: 51); Pedrazzoli (1989); Brooks (1988).

[5] RSQ, c. C-27, art. 1 (l).

[6] RSQ, c. N-1.1, art. 1(10). There are some limited exclusions from the Act, however.

[7] See, for example, the *Act Respecting Industrial Accidents and Occupational Diseases*, RSQ, c. A-3.001, art. 2, under "independent operator" and arts. 9, 18 and 19.

[8] See for example, the Ontario *Labour Relations Act*, SO 1995, Chapter 1, Schedule A, s. 1, under "dependent contractor"; and the *Canada Labour Code*, RSC, 1985, c. L-2, s. 3, under "dependent contractor." On the concept of dependent contractor, see Adams (1999: 6-1ff); Brault et al. (1998). On the status of employees, independent and dependent contractors and artisans under the Quebec *Act Respecting Collective Agreement Decrees*, RSQ, c. D-2, see Saint-André (1995: 71).

[9] The classic test has been the "four-fold" test developed by the Privy Council in 1947 in *Montreal* v. *Montreal Locomotive Works Ltd.*, (1947) 1 DLR 161. The four criteria examined under this test are: control, ownership of tools, chance of profit and risk of loss. The essential question that must be asked is "whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior." Subsequent tests were developed, most notably the "business organization" test and the "economic realities" test, which are essentially a further development of the "four-fold" test. See Christie et al. (1993: 12-19); Parry (1999: 1-11); Goyette (1998: 19).

[10] Compare *Dazé* v. *Messageries Dynamiques*, (1991) RDJ 195 (QAC) and *Goldberg et al.* v. *Western Approaches Ltd.* (1985) 7 CCEL 127 (BCSC). In *Dazé*, the Quebec Court of Appeal clearly stated that a person cannot benefit from the advantages of voluntarily being incorporated while at the same time benefiting from the advantages of being an "employee." The corporate veil might be lifted if the worker became incorporated at the employer's instigation to avoid the application of labour laws or if it was done with fraudulent intent. See also *Project Headstart Marketing Ltd.*, BC EST D164/98, April 27, 1998, where an adjudicator found that a determination by Alberta employment standards officials that home telephone solicitors were independent contractors had no bearing on whether employees working for the same company in British Columbia were covered by the B.C. legislation. See Goyette (1998: 43). On the other hand, in Quebec the approach is somewhat different in the context of the Quebec *Labour Code*, where it has been decided that incorporation is not an obstacle to being considered an "employee" for the purpose of the statute. See, for example, *Boulangerie Weston Québec Inc.* v. *Syndicat international des travailleurs et travailleuses de la boulangerie, de la confiserie et du tabac, section locale 324*, DTE 96T-951 (TT), previous reference (1996) CT 248.

[11] This recommendation was made in the context of employment standards legislation by an advocacy group in Quebec. See Au bas (1996).

[12] Arts. L. 721-1 to L. 792-1. Desjardins et al. (1997: 1348-1363).

[13] Art. L. 721-1:

> [TRANSLATION] Home workers are considered to be workers who meet the following requirements: 1 – workers who execute, in exchange for a fixed wage, work which is obtained either directly or through a third party and which benefits one or more industrial, cottage-type or non-commercial or agricultural organizations, regardless of the nature of such organizations which may be public or private, lay or religious, even if they are educational, professional or charitable organizations; 2 – workers who work alone, with their spouse, or with their dependent children, as defined by article 285 of the social security code, or with an auxiliary. It is not necessary to determine: if there exists a legal subordination between these workers and the source of the work subject to the application of the terms of article L. 120-3; if they work under the direct and usual supervision of the person providing the work; - if they own the facility in which the work takes place as well as the materials used to produce such work, regardless of the size and quantity of these; - if they directly obtain these materials; - and the number of hours worked. The conditions set out in this chapter apply to salaried workers who hold a public or departmental charge in a professional occupation, a private corporation, a professional union or an association of any type.

See also the Belgian law on homework, which states that homeworkers do not have to be under the supervision or the direct control of their employer to be covered by the law: *Loi relative au travail à domicile*, art. 119.1, *Moniteur Belge*, December 24, 1996, 31993.

[14] See art. L. 120-3, which defines the independent contractor. The independent contractor must register with government authorities, which creates a presumption that the worker is in fact independent unless he/she can demonstrate permanent legal subordination in relation to an employer. Desjardins et al. (1997: 1348-1351). For a critical analysis of these provisions, see Ray (1997).

4. CAN AN EMPLOYER REQUIRE AN EMPLOYEE TO WORK AT HOME?

There are three potential situations where an employer could ask an employee to work at home. If homework is a condition of employment when someone is hired, homework becomes part of the employment contract. A person could, of course, refuse to accept the job if he/she does not wish to convert home space into a workplace. If, however, an employee has been working at the employer's place of business, and the employer decides the employee will henceforth work at home, the situation is less clear, depending on the statute being interpreted. The third case is the obligation to work at home as a condition for eligibility for certain social programs. For example, under workers' compensation legislation, the issue arises of whether an injured worker who has physical limitations and cannot work at the employer's place of business can refuse homework as "suitable employment." (See Chapter 6.)

None of the laws studied gives any explicit or even implicit indication as to whether someone can be required to work at home. The obvious answer would be that an employee can simply refuse and bear the consequences, which range, potentially, from disciplinary measures or being passed up for promotion, to dismissal. There is little case law on this issue, which would seem to be one of the utmost importance since not every worker is in a position, or wants, to transform home space into a workplace, and few can afford to lose a job. Being obliged to work at home to keep one's job may, in some instances, be considered a unilateral change in working conditions and, therefore, a breach of the employment contract or a constructive dismissal. The question of remedy, however, remains largely unanswered: apart from the possibility, in certain cases, of a general remedy for breach of contract before the civil courts, the worker is still left with the problem of whether to refuse and possibly lose the job, or to accept, even though working at home was not part of the original employment contract.

In British Columbia, however, the Court of Appeal decided that, in the case before the Court, a unionized employee could not be forced to use residence space for work purposes. The Court stated that:

> It is unnecessary to trace the development of the treasured principle of privacy and security to which everyone is entitled in his or her home.... There can be no doubt, in my view, that an employer has no legal right to require an employee to dedicate any part of his home to the performance of job functions.[1]

While this judgment is not binding on other courts, it will be interesting to see if it has an impact on other jurisdictions and under other laws.

The principle itself, that an employee cannot be required to use the home as a workplace, is important, as it rests on the inviolability of the home and the right to dispose freely of one's property. The Quebec *Charter of Human Rights and Freedoms,* for example, could provide some guidance for that province regarding the right of an employee to refuse to work at

home, since it contains provisions on the right to the respect for one's privacy, the peaceful enjoyment and free disposition of one's property, and the inviolability of one's home.[2] There is, however, a paucity of case law on this issue that could be applicable to homework.

- In a Quebec decision[3] rendered under the Quebec *Act Respecting Labour Standards*[4] provisions on unjust dismissal, a labour arbitrator found that a non-unionized worker's refusal to keep working at home did not constitute just and sufficient cause for dismissal. In this case, a sales representative with 17 years' service had recently been working exclusively from home at the employer's request, until he asked to return to the office. His reasons for wishing to work out of the office once again were mainly the presence of a sick relative in his home who made the exercise of his professional activities next to impossible. The employer refused to let him return to the office and eventually fired him. It should be noted, however, that nowhere in the decision does the arbitrator clearly state that the employee had a right to return to the office, or that the employer could not force the employee to work at home if he wanted to keep his job.

Most of the literature on telework as an option for employees who are already working for a company maintains that home telework should be voluntary, and that employees should be able to return to the workplace if they so desire.[5] This issue is, however, not often raised with regard to other forms of homework. In the absence of specific legislation, an employee's bargaining power, either individually or through a union, is a determining factor in whether homework will be truly voluntary. Not all employees are in a position to convert part of their home into a workplace, not all employees wish to work at home, and working at home, while reducing some work-related costs such as transportation to and from work, also reduces employers' overhead costs by transferring some of these costs to homeworkers. The voluntary nature of homework is one that needs to be addressed by policy makers.

Policy Recommendations

Legislation should explicitly provide for the right to refuse to work at home, except in exceptional circumstances.

Legislation should provide for the protection of employees against reprisals (dismissal, suspension, discriminatory measures or any other reprisals) for refusing to work at home.

Endnotes

[1] *Association of University and College Employees, Local 2* v. *Simon Fraser University and Industrial Relations Council of British Columbia*, (1994) 90 BCLR. (2d) 338 at 347 (McEachern CJBC., for the majority of the Court). For a discussion of this case, see McGrady and Jamieson (1996-97); Roper (1996-97).

[2] *Charter of Human Rights and Freedoms*, RSQ, c. C-12, arts. 5, 6 and 7.

[3] See *Gouvianakis* v. *Fabrications Dennison du Canada Inc.*, [1988] TA 682.

[4] RSQ, c. N-1.1, art. 124ff.

[5] See for example, Blanpain (1997); NUTEK (1997). See also Canada, Treasury Board (1995).

5. MINIMUM EMPLOYMENT STANDARDS

Introduction

Minimum employment standards legislation in Canada constitutes a minimum threshold for setting working conditions in most sectors of activity and for most workers, whether they are unionized or not. The legislation and relevant regulations include standards related to working hours and overtime pay, minimum wages, weekly rest days, general holidays with pay, annual vacations with pay, family-related leave and other leave, notice of individual termination of employment, recourse in cases of non-compliance with an act by an employer, etc. Although the acts are intended to establish universal minimum employment standards for all workers,[1] depending on the act, categories of workers can be, and are, excluded; and, even if covered, certain provisions may not apply.[2] The vast majority of workers are covered by provincial employment standards legislation, with only 10 percent falling under federal jurisdiction, which covers a very limited number of sectors of activity.[3]

Not all the jurisdictions studied have included specific provisions concerning homeworkers; those that do, refer to the particular case of industrial homeworkers. Home telework and homework in the service sector do not appear to have been specifically contemplated by legislators. The definitions contained in the laws pertaining to such concepts as "employee" or "place of employment" often determine to what extent homeworkers are covered, even if no specific mention of them is made. None of the jurisdictions completely excludes homeworkers from the purview of its employment standards act.

The standards contained in the employment standards acts studied are all deemed to be minimum requirements, and contracts that provide for lesser conditions are null and void.[4] This means, for example, that even if a homeworker agrees to work for less than the prevailing minimum wage, even in writing, that worker can still claim the difference between what is received and the hourly minimum wage that should have been received considering the number of hours worked. The same applies if the worker signs a contract saying he/she is an independent contractor, when in actual fact this is not true. The worker can then claim all the rights and benefits to which he/she is entitled.

The Homeworker as "Employee": the Grey Zone

All the jurisdictions studied exclude independent contractors, or self-employed workers, from their employment standards acts. For the acts to apply to homeworkers, it must first be determined whether or not there exists a contract of service, that is, whether there is an employee–employer relationship between the worker and the giver of work. Since employment standards acts are meant to ensure a minimum threshold for the protection of workers, the statutes are interpreted broadly to be inclusive, rather than exclusive. It should, however, be remembered that homeworkers quite often find themselves in a grey zone with respect to their employment relationship, and the question of whether a homeworker is an independent contractor or not arises frequently.[5] Homeworkers also mistakenly believe they

are independent contractors and, therefore, do not file complaints to receive the sums owed them by an employer, such as minimum wage, payment for overtime and severance pay.[6]

While independent contractors are excluded, the statutes implicitly include dependent contractors, that is, workers who are economically dependent on one employer or perform work or services for another person under such terms and conditions as to be in a position of dependence on that person so that the relationship is analogous to that of an employment relationship.[7] The Quebec *Act Respecting Labour Standards* (QARLS) is perhaps more explicit than the other acts in that its definition of "employee" includes the worker who performs the work according to the specifications of the employer, even if the worker provides her/his own tools and materials. The amount left over once expenses have been deducted constitutes remuneration.[8] The fact that the worker deducts the expenses related to the job for income tax purposes as though he/she were an independent contractor, or even occasionally hires someone to help, does not necessarily take away the status as an employee, nor does the fact that he/she also works for other people.[9] A person who is truly an independent contractor (i.e., the giver of work has no effective control over the work done, nor is the worker economically dependent on one employer) is excluded from the Act. In some jurisdictions the burden of proof that a homeworker is not an "employee" is clearly on the employer, thereby facilitating the determination that a homeworker is in fact an "employee" for the purpose of the act.[10]

Workers in Irregular Situations: Undeclared Work and Working without a Work Permit

While undeclared work, or working "under the table," is by no means specific to homeworkers, it should be noted that as employment standards legislation provides for minimum legal protection, a worker will be covered. Whether or not this work has been declared to the appropriate governmental authorities; the worker can claim monies owed by an employer.[11] Also, in most jurisdictions, workers who are not Canadian citizens or permanent residents of Canada under the *Immigration Act*,[12] and who do not have a valid employment authorization to work in Canada, are covered by employment standards legislation.[13] In Quebec, however, the case law and the administrative interpretation of the Act have consistently denied these workers the benefit of the law, despite there being no specific exclusion of these workers in the QARLS.[14]

Reference to Homework and Homeworkers in Employment Standards Legislation

Only the employment standards legislation of Ontario and British Columbia makes specific reference to home as a place of work, and provides for specific protection of certain categories of homeworkers. The QARLS "applies to the employee regardless of where he works," which would imply that it also applies to homeworkers.[15] The New Brunswick legislation is silent with regard to homework, but the term "place of employment" is defined very broadly in the Act and would apply to a private residence.[16] The *Canada Labour Code, Part III* (CLC, Part III) does not contain any provision that would indicate that someone's home could not be a workplace under the Act as it applies to "the employment in or in connection with the operation of any federal work, undertaking or business."[17] All homeworkers, as long as they

are "employees" under the various acts, are, therefore, covered and entitled to the benefit of minimum employment standards legislation. There are, however, other difficulties pertaining not so much to the general coverage of homeworkers, but to the interpretation of the acts, the partial exclusion of homeworkers from certain provisions, and the enforcement of the provisions with respect to homeworkers.

Specific Provisions Concerning Industrial Homework: Ontario and British Columbia

In Ontario, an "employee" includes a person who "does homework for an employer."[18] "Homework" is defined as:

> the doing of any work in the manufacture, preparation, improvement, repair, alteration, assembly or completion of any article or thing or any part thereof in premises occupied primarily as living accommodation, and "homeworker" has a corresponding meaning.

This definition, included in the Act in 1968,[19] does not cover the production of services, such as clerical work and telemarketing from home, and only refers to activities relating to the production of goods, such as sewing or other manufacturing, stuffing envelopes or other packaging, food preparation, and assembly, repairs or alterations.[20]

There are two definitions in the British Columbia *Employment Standards Act* (BCESA) and its regulations that explicitly refer to homework. The first is "work," which is defined in the Act as "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere" (s. 1). The definition of "work" was clarified by a legislative amendment in 1995, since the previous definition had created problems with regard to the application of the statute to homework, including home telework, and was interpreted to exclude homeworkers from the Act.[21] The present definition of "work" would, therefore, include all forms of homework, and all of the provisions of the law apply to people who work in their residences. The second definition relevant to homework is "textile worker," defined in the Regulation as "a person employed to make fabrics or fabric articles, including clothing in a private residence."[22] "Textile workers" are targeted by the provisions on registration with the Director of Employment Standards. These provisions do not apply to other homeworkers.[23]

In New Brunswick, the question of specific provisions on "non-standard" work arrangements, including homework, has emerged as one of the issues being considered under a general review of the Act. In 1999, the government initiated a general consultation on the New Brunswick *Employment Standards Act* (NBESA), in part to respond to the changing face of work.[24] In a brief submitted for the review, the New Brunswick Federation of Labour underlined the need to ensure explicitly full protection for homeworkers and teleworkers in all sectors, especially with regard to their status as employees under the Act (NBFL 1999).

Working Conditions

Despite the apparent neutrality of employment standards laws and regulations, and despite attempts by some provincial legislators to afford special protection to some homeworkers, they do not benefit from many of the provisions of the laws to the same degree as most other workers. As homework is often used as a cost-cutting strategy by employers, the inclusion of provisions on equality of treatment between homeworkers and on-site workers could be a way of ensuring that homeworkers have comparable working conditions to those of their on-site colleagues. An example of a provision designed to ensure equal treatment between workers is the one adopted to remedy the salary difference between part-time and full-time employees introduced into the QARLS in 1990: employees who earn less than twice the general minimum wage cannot be paid a lower salary for the sole reason that they work fewer hours than other employees.[25] Such examples could be extended and applied to other standards as well, to ensure that homeworkers are not disadvantaged just because their workplace is the home. On an international level, it bears reminding that the promotion of equality of treatment between homeworkers and other wage earners is one of the principal aims of the ILO *Home Work Convention* (No. 177), which states that national policies should integrate and fulfill this objective.[26]

Given their isolation, homeworkers often have a difficult time establishing what the actual contract with their employer is, especially with regard to terms of pay and working hours. They do not punch a clock every morning, and they do not have other colleagues who can confirm (and ultimately testify to) how much and when they work. Clearly, an obligation on the employer's part to provide a written contract would be part of the solution. However, in no jurisdiction is there a general obligation to conclude a written contract between an employer and an employee, let alone with all homeworkers.[27] The Ontario act does stipulate that the employer must state in writing the terms of payment and the type of work to be performed by a "homeworker" (as defined in the Act).[28] It is, however, unclear whether employers in Ontario actually comply with this obligation.[29] Again, the imposition of such an obligation on the employer for all homeworkers (and not just industrial homeworkers) is provided for in the ILO *Home Work Recommendation* (No. 184).[30]

The calculation of wages earned may be one of the greater challenges confronting homeworkers, since it depends on the number of hours worked, which is also difficult to determine. The wages earned (or owing) and the number of hours worked serve as a basis for other entitlements under the law, such as overtime pay, paid statutory holidays, vacation pay, and termination or severance pay. Ultimately, the calculation of wages also affects the rate of compensation under workers' compensation acts and the rate of employment insurance benefits in times of unemployment or during parental leave.

Calculation of Wages

It must first be underlined that homeworkers who are "employees" have the right, in all the jurisdictions studied, to the prevailing general hourly provincial minimum wage. If a homeworker is being paid on a piece-rate basis or through commissions, the wages (excluding overtime pay) earned, divided by the hours worked, must be equivalent to the

prevailing minimum wage.[31] Two potential exceptions to this rule are found in New Brunswick and Quebec, and depend on whether or not an employer has control over the number of hours worked.

The New Brunswick *Employment Standards Regulation* provides for a weekly minimum wage "for employees whose hours of work per week are unverifiable and who are not strictly employed on a commission basis," equivalent to not less than 44 (the hours of a normal work week) times the minimum wage.[32] This provision could prove advantageous for a homeworker who works fewer than 44 hours per week, but could also deny the worker the benefit of overtime payment if he/she works more than 44 hours a week. While the provision makes no specific mention of homework, the case law (of which there is none on homeworkers) would have to determine the criteria pertaining to the type and level of verification needed for its application.[33]

One provision that may affect homeworkers in Quebec is the exclusion of the "employee entirely on commission who works in a commercial establishment outside the establishment and whose working-hours cannot be controlled."[34] It must, however, be *impossible* for the employer to control the working hours. If it is merely difficult for the employer to verify and control the working time, or if he/she neglects to do so, the general minimum wage would apply.[35] Some homeworkers, such as home telemarketers, could conceivably be entirely on commission, and without a sophisticated telephone system enabling the employer to verify the hours worked, or the keeping of time sheets, it may be difficult to determine the number of hours worked.

In Ontario, those who fall under the definition of "homeworker" in the law are supposed to receive a premium of 10 percent of the general minimum wage, to compensate for incidental costs arising from working at home.[36] This means that while the general minimum wage in Ontario is $6.85, homeworkers are entitled to $7.54 an hour.[37] If the homeworker is paid on a piece-rate basis, he/she has to take the total amount earned over a pay period and divide it by the number of hours worked for that period. If the hourly rate turns out to be less than the minimum wage for homeworkers, the employer owes the difference. This last provision is unique among the employment standards laws examined for this study. A similar provision exists, however, in the Quebec *Decree Respecting the Women's Clothing Industry*.[38]

While there is no provision for a premium to pay for the cost of working at home in the QARLS, a homeworker must make at least the minimum wage (as in the other jurisdictions). If the cost of working at home (renting a machine, use of a specifically designated telephone line, electricity, insurance, etc.) means the worker will not get at least minimum wage after all these costs are deducted, the employer will have to pay the difference.[39] The obvious problem with this way of calculating wages is how the worker determines (and ultimately proves) how much is spent in the course of the work. If the worker pays a fixed amount per month to rent a machine, the calculation to determine the cost of the machine will be relatively easy, while determining the number of kilowatt-hours used to make the machine work would not be as straightforward.

In Ontario, when an employer fails to keep pay records for employees, an employment standards officer can determine the regular rate of pay and the number of hours worked.[40] The basis for such a provision is that employers cannot use their omission in complying with the obligation to keep records to avoid paying workers. In British Columbia and Quebec, on the other hand, the onus is on the employee to establish the number of hours worked and the rate of pay in the absence of records.[41]

The Limitation of Working Time and the Payment of Overtime

All the jurisdictions studied have provisions concerning the limitation of working time and the payment of overtime. Only Ontario and the federal jurisdiction have maximum work weeks, set at 48 hours.[42] Quebec, British Columbia and New Brunswick's legislation only provides for a rest period ranging from 24 to 32 consecutive hours.[43] In all jurisdictions, there is a general requirement to pay overtime after 40 to 44 hours worked in a week and, in British Columbia and under federal jurisdiction, after eight hours' work in a day.[44] For all the jurisdictions, except New Brunswick, the rate of overtime pay is 1.5 times the employee's hourly wage. In New Brunswick, the overtime rate is 1.5 times the minimum wage, meaning that a worker earning more than 1.5 times the minimum wage, will not get a higher rate of pay if he/she works more than 44 hours a week.[45]

All the acts provide for the possibility of flexible schedules that can surpass the normal work week or workday, or for limited exemptions from overtime provisions, usually for a prescribed period,[46] as well as for the exclusion of certain categories of workers from general hours of work and overtime provisions.[47] None of the statutes or regulations explicitly exclude homeworkers from their purview. Until July 1994, "homeworkers" (as defined in the Act) in Ontario had been excluded from the provisions of the Ontario *Employment Standards Act* (OESA) concerning hours of work, overtime pay and public holidays.[48] With the legislative changes, employers are now obliged to start keeping a record of homeworkers' daily and weekly hours (ON, Ministry of Labour 1994).

While none of the laws explicitly exclude homeworkers from provisions on working hours and overtime pay, there are some provisions that can have this effect. For example, in British Columbia, high-technology professionals who work for a high-technology company are now excluded from provisions on the right to notice of overtime, overtime compensation, days off and compensation for statutory holidays.[49] These amendments were introduced to "address the unique needs and realities of this industry" and based, in part, on a similar model developed in neighbouring Washington State.[50] With advances in telecommunications technology, it is conceivable that many of these workers are or will be working at home.

In Quebec, the provisions on overtime do not apply to "an employee who works outside an establishment whose working-hours cannot be controlled."[51] This exclusion does not automatically apply to homeworkers, since the Act covers workers regardless of where they work. It could, however, be used to deny homeworkers overtime pay above the normal work week if the employer can demonstrate that it was *impossible* to verify the employees' working time. In practice, especially in the case of piecework, determining the number of hours actually worked may be difficult,[52] especially if the worker keeps no written records.

In Ontario, employees are entitled to payment if in fact they work beyond their normal work schedule, and to overtime payment if they work more than 44 hours in a week: the employer cannot deny payment because of not authorizing an employee to work beyond the normal work schedule.[53]

Determining What Constitutes Working Time: Some Ambiguous Situations

If a homeworker is asked by an employer to wait for work to be given to her/him at home, does the worker have to be paid? For example, is the homeworker paid for the time spent waiting for the materials necessary for the work to be delivered to her/his residence, or if the employer's telecommunication system has temporarily broken down and the homeworker is unable to do the work? In Ontario, an employee is deemed to be working if at the place of employment waiting or holding herself/himself ready for a call to work. However, work is deemed not to be performed if the worker can use that time to engage in private affairs or pursuits.[54] If a homeworker does a load of wash while waiting for a call from the employer, is he/she deemed to be working? The homeworker's situation is obviously more ambiguous than that of the worker waiting to be given work at the employer's place of business. In British Columbia, the situation is clearer since "[a]n employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence."[55] In Quebec, an employee is deemed to be working if at the place of employment and required to wait for work to be assigned.[56] A private residence can be considered a place of employment, and it is the compulsory nature of the employee's availability that is the determining factor for the application of this presumption.[57] The NBESA has no provision for compensation when an employee is required to report to work or to be available for work, nor any deeming provision as to when an employee is considered to be at work.[58]

If a homeworker is supposed to work on a given day, has sent any children to day care, and cleared the agenda, and then finds out the same morning that the employer does not need her/his services, is the worker entitled to be paid a minimum amount, as are on-site workers in most jurisdictions?[59] In British Columbia, the answer would clearly be no, because the worker is deemed to not be at work. Employees in British Columbia are, however, entitled to a 24-hour "change of shift" notice, that is, the right to be notified if they will not be required to work, which would apply to homeworkers, although this does not entitle them to any form of compensation.[60] The requirement to notify employees of a change of shift exists only in British Columbia. In Ontario, the answer may be yes depending on whether or not the employee regularly works three hours or more a day and was scheduled or required to work the particular day. There is, however, no case law confirming this. In Quebec, the answer would probably be yes, although, once again, there is no case law to confirm this in the specific case of homeworkers.[61]

Permits and the Registration of Homeworkers

As a solution to the invisible nature of homework, one of the principal recommendations made is that employers be required to register homeworkers with the government authority responsible for the application of employment standards. This recommendation has been put

forward in different policy forums, as well as by workers' advocates.[62] Of the jurisdictions studied, only Ontario and British Columbia have instituted such a system for certain categories of industrial homeworkers or for all industrial homeworkers.[63] In Quebec until recently, only homeworkers in the women's garment and leather glove industries covered by decree had to be registered with the parity committee.[64]

In Ontario, employers must be issued a permit to employ homeworkers by the Director of Employment Standards.[65] This permit can be revoked or suspended if an employer breaches a condition of the permit or is held liable for contravening the Act. This obligation only applies to employers of people who fall under the definition of "homeworker"[66] in the OESA. These permits must be renewed annually, and the majority of them are issued to employers in the garment sector.[67] To obtain a permit, the employer has to provide a list of types of articles and operations to be performed by the homeworker, the piecework or hourly equivalent to be paid (when the work is paid on a piece-rate basis, the employer also has to indicate an hourly rate), and a list of the names and addresses of each homeworker.[68]

For the year 1997-98, 70 permits were issued in Ontario, covering approximately 1,500 workers. The year after, only 45 permits, covering approximately 1,000 workers, were issued. The Employment Practice Branch has not yet determined why the number of permit applications has declined to such an extent.[69] According to some workers' advocates, the permit system does not appear to be working, and can only work if there is proactive enforcement of the Act.[70] In Ontario, there is also an obligation for employers to keep a registry of homeworkers, with their names and addresses, hours worked and wages paid.[71] This registry has to be given to the Ministry and updated when a homeworker is employed after the application for a permit has been made.[72]

British Columbia adopted similar provisions in 1995, as a follow-up to recommendations made in the *Thompson Report* of 1994, in which it was recommended that employers of homeworkers be required to provide the ministry with their names, social insurance numbers, rates of pay and addresses (Thompson 1994: 35). Neither the Act nor the Regulation make it compulsory for employers to obtain permits to employ homeworkers, but they must register certain homeworkers with the Director of Employment Standards. While the *Thompson Report* made a broad recommendation applying to all homeworkers, the legislative amendments left the designation of which homeworkers to register up to the government through its regulatory power.[73] To date, only textile homeworkers must be registered.[74]

In 1999, there were, however, very few textile workers registered with the Director of Employment Standards. According to a spokesperson at the Employment Standards Branch, one of the main difficulties in maintaining a registry of homeworkers is locating them.[75] When a group of homeworkers was canvassed in preparation for the registry, it was also found that many of them considered themselves to be self-employed and they were, in general, reluctant to talk to the Employment Standards Branch about their situation. There are no plans in the immediate future to expand the categories of homeworkers who must be registered, and it remains to be seen whether such a global strategy would be successful given the inherent

difficulties in constructing such a registry, as the effort with textile workers demonstrates. The considerable resources, both human and financial, that would be necessary to carry out such a task as registering all categories of homeworkers must also be taken into account. For the moment, the Employment Standards Branch is studying ways to make the home textile worker registry more effective.[76]

Both jurisdictions provide for fines if employers do not comply with the registry or permit provisions. An employer who uses homeworkers without a permit in Ontario can be subject to penalties of up to $50,000 or a term of imprisonment of not more than six months, or both.[77]

While homeworker registries have often been proposed as a means of ensuring that homeworkers become more visible in order to better enforce employment standards and facilitate organizing, it is difficult to propose registries as a sweeping recommendation for all homeworkers. Since they work in such a wide variety of sectors, and occupy such diverse jobs, registries should be looked at on a sector-by-sector basis. As well, existing registries in different provinces should be evaluated and their shortcomings remedied. For example, proposals have been put forward to have homeworker registries in the garment industry administered by tripartite committees.[78] These bodies would then be responsible for providing information and counselling to homeworkers and for acting as their agents with regard to violations of their employment rights.

The Enforcement of Employment Standards

In Canada generally, there are significant problems concerning the enforcement of minimum employment standards.[79] The situation is even more dramatic with respect to homeworkers, who are difficult to locate and rarely file complaints.[80] Many employers do not respect the law and there is very little effective inspection of workplaces. Most actions taken by the governments concerned follow individual complaints for unpaid wages. Governments do not generally use inspection, including general audits, as a preventive measure, since most workers file complaints after termination or resigning from their jobs.[81] In the case of homeworkers, they are not present in the workplace when an inspector does do a general audit of their employer's workplace. The imposition of fines is rarely used as a dissuasion measure, even in cases where employers are repeat violators of the law. As well, observers have determined that there are not enough inspectors or resources available to enforce minimum employment standards effectively, despite the broad powers given to the competent authorities to enforce the acts.

Other provisions also limit the extent to which workers, in general, and homeworkers, in particular, can have recourse to employment standards legislation. In Ontario, for example, amendments to the OESA[82] have limited the extent to which employers can be forced to comply fully with the Act. Bill 49, introduced in 1996, limits the period for which an employee can claim monies owing by an employer. While the previous complaint period was two years, it has been reduced to six months and to one year in the case of continuing violations. This means the recovery of monies owing under the Act for such things as minimum wages,

overtime and vacation pay is limited to those monies which came due in the six-month period preceding the date the employee's claim was filed or, one year preceding the date the claim was filed where there is a continuing violation under the Act.[83] Workers can still take their employers to court on their own (and at their own expense) without the intervention of the Ministry of Labour to recover their full entitlements under the Act (rather than the six months or one year's worth of entitlements to which they are restricted if they want the Ministry to undertake the procedures). They must also choose between the two recourses: if they decide to claim with the help of the Ministry of Labour, they must forfeit their right to take the employer to court for the rest.[85] As well, the amendments have limited the amount that can be claimed by a worker to $10,000, and establish a regulatory power enabling the government to determine a minimum amount that can be claimed.[86] This means that some employers may avoid being held fully accountable for sums owing to workers for time actually worked.[87] A subsequent change to the OESA also abolished the Employee Wage Protection Program, which guaranteed a maximum of $2,000 to employees who filed claims and whose employer either refused to pay or went bankrupt. According to workers' advocates in Ontario, these changes affect homeworkers who are often owed vast sums of money and whose employers often "disappear" or refuse to pay.[88]

There is no such limitation on the amount that can be claimed in any of the other jurisdictions. There are also no wage protection programs in the other jurisdictions, although the QARLS contains a provision that states that the Commission des normes du travail can compensate an employee for monies owed by an employer in the case of bankruptcy. This provision has never been put into effect.[89]

While the above examples apply to all workers covered by the acts, the isolation of homeworkers amplifies the effects of such measures. This is especially true when they are combined with the difficulties relating to audits and to evidentiary issues when homeworkers attempt to establish a claim. Even though employment standards authorities do a certain amount of public education for employees and employers,[90] more emphasis should also be put on dissuasive measures, such as fines in cases of non-compliance, especially for repeat violators (this possibility already exists in all of the statutes studied), and the publication of the names and statutory violations of companies that do not comply with the law. In British Columbia, the Director of Employment Standards can make available to the public and even publish information on employers' non-compliance with the law, including the names of the employers in question.[91] This is the only such provision in the acts studied. Such negative publicity would have a dissuasive effect on employers who do not comply with the law.[92] While such measures apply in the case of all workers, they could be particularly relevant in the case of homework, as the publication of employment standards violations also serves to educate the public, and employers, about the situation of homeworkers and their legislative protection.

Inspection and Audits

Considering that most inspections are complaint-based and that there is no widespread use of general audits, the question of whether employment standards officers can inspect private dwellings used as workplaces may be rather theoretical. If a homeworker files a complaint

because of not being paid, the worker will more than likely invite the employment standards officer into her/his home. The issue might arise if a homeworker is working in someone else's home, or if a residence is being used as a workshop where several people are employed. As well, in British Columbia and New Brunswick, third parties can file a complaint if there has been a perceived violation of the law,[93] which could conceivably result in the necessity for an employment standards officer to inspect a private home, especially since a third party may not know who the employer is. This could be the case, for example, in British Columbia, if a neighbour was aware of children under the age of 15 doing textile work in a private residence.[94]

In British Columbia and Ontario, an employment standards officer may only enter a private residence with the consent of the occupant or with a warrant.[95] The New Brunswick legislation allows inspectors to enter a "place of employment," but makes no specific reference to the inspection of a private dwelling.[96] The QARLS refers only to the Commission des normes du travail's right to enter an "establishment" or "place of employment,"[97] terms that again, are not defined in the law, but would include a private residence. The Supreme Court of Canada has clearly stated that inspection of a private home in the context of protective legislation (such as employment standards), when it coincides with the workplace, does not make inspection powers unreasonable.[98] Accordingly, the home workplace could be inspected without a warrant in Quebec.

Inadequate enforcement of employment standards remains one of the main obstacles to ensuring adequate legal protection for homeworkers. It is, therefore, necessary to ensure sufficient financial and human resources to employment standards enforcement agencies for inspections and audits, as well as for the investigation of complaints.

Burden of Proof and Presumptions: How Does a Homeworker Prove a Claim?

In Ontario, British Columbia, New Brunswick and under federal jurisdiction (all the common-law jurisdictions studied), when a worker files a complaint, an investigation is initiated and where monies are found to be owing under the act, the director of employment standards or the ministry can issue an order to the employer to pay the sums owing to the worker. The employer then has a time limit to contest the order before a specialized labour tribunal. If the employer neither pays nor contests the order, a certificate of the order can be filed in a court of competent jurisdiction, thereby having the force of a judgment and becoming executable.[99] An employer that does contest, has the burden of proving the officer's order is in error, which may be particularly difficult when the employer has not kept accurate registries and records.[100]

In Quebec, the procedure is quite different. After a claim has been established with the information provided by the employee and the employer, the employer is put in default to pay within 20 days. If the employer does not, the case will be filed before the courts and heard as any other civil suit would be.[101] There is also no reversal of the burden of proof on the employer, even when the proper records are not kept. Needless to say, since homeworkers have particular problems in establishing their rate of pay and their hours of work, the impact of this method of enforcing the law is considerably more onerous for them. The worker must

prove every aspect of the complaint, according to the civil rules of evidence; the person who makes the claim must prove it.[102] This puts an enormous burden on the worker, as well as on the employment standards officers who investigates complaints and the lawyers at the Commission des normes du travail who must plead before the courts.

The Liability of Subcontractors and Intermediaries Under Employment Standards Legislation

Another important issue is joint and several liability. This means, for example, that when an employer subcontracts part of the work to be done, the subcontractor and the employer are both liable for the sums owing to the workers. If one of them cannot or does not pay, the other one is liable for the full amount. Such liability is provided for to one extent or another in the employment standards acts of British Columbia, Ontario and Quebec.[103] In New Brunswick, the introduction of joint and several liability is being contemplated in the review process undertaken in 1999 (NB, Dept. of Labour 1999). Since subcontracting is a common phenomenon in the case of all types of homework, these provisions are often the only way of ensuring that homeworkers actually get paid and that employers become more responsible, instead of "passing the buck" to the subcontractor. Workers' advocates also point to the need to extend this liability throughout the production and distribution chain all the way to the retailer, especially with respect to industrial homework (Yanz et al. 1999; ILGWU and INTERCEDE 1993).

Conclusion

Employment standards legislation receives relatively little attention and is seen more as an afterthought to collective bargaining. However, these minimum standards provide a threshold, albeit low, for collective bargaining. As one author explains, there are compelling reasons to reinforce the role of minimum employment standards.

> Employment standards legislation should be moved from the margin to the centre of a revised labour policy which consists of a constellation of related pieces of legislation, including collective bargaining, pay equity and employment equity. The point of reconceptualizing the role of employment standards legislation is to ensure that it is no longer seen as simply an adjunct to collective bargaining—a fall-back mechanism designed to cover inadequacies in collective bargaining legislation. Limiting employment standards legislation to such a secondary role blinds us to the possibility that effective and extensive minimum employment standards may be a necessary condition for the extension of collective bargaining. It is precisely because employers are able to exploit flexible labour that the collective bargaining norm is threatened (Fudge 1991: 19-20).

It is important for legislators to take into consideration the situation of homeworkers when designing minimum employment standards policy. The legislative goal must be the adoption and effective implementation of provisions that impede the relegation of homeworkers to a

category of workers with few rights. This state action will also facilitate the collective bargaining of improved working conditions for these workers.

Policy Recommendations

Employment standards enforcement agencies should implement general policies on homeworkers, in all sectors, in consultation with employers' and workers' associations, including non-governmental organizations that provide information and support to homeworkers.

Dependent contractors should be explicitly included in the coverage of the acts. The burden of proof that a homeworker is not an "employee" should explicitly be on the employer, thereby facilitating the determination that a homeworker is, in fact, an "employee" for the purpose of the act.

Workers without valid employment authorizations under the *Immigration Act* should be covered by all employment standards legislation, through legislative amendments, if necessary.

The definitions that make explicit reference to homework or homeworkers should be broadened to include forms of homework other than industrial homework. The definition of "place of employment" and analogous definitions, where they exist, should explicitly include the home in order to avoid ambiguities in the interpretation of the statutes.

Explicit provisions on equality of treatment between homeworkers and on-site workers should be adopted, particularly with respect to rates of pay, overtime pay, on-call and waiting-time pay, and public holidays.

Provisions should be adopted to enable homeworkers to be kept informed of their working conditions in writing, including the names and addresses of their employers and any intermediaries, the rate of remuneration and the type of work performed.

When employers neglect to maintain accurate records on the hours of work and the rates of pay of homeworkers, the legislation should provide that employment standards authorities are able to determine their wages based on homeworkers' statements and elements of proof provided by them or gathered during investigations. The provisions on the keeping of records should be strictly enforced and fines imposed in cases of non-compliance.

The legislation should provide for a premium on wages to compensate for the costs incurred by homeworkers in performing their work. The type of costs contemplated should reflect the reality of new forms of homework, such as telework. In no case should a homeworker receive less than the statutory minimum wage, once the worker's costs have been deducted.

The establishment of registries of homeworkers and of employers of homeworkers (including subcontractors and intermediaries) should be provided for in sectors where this is feasible.

Where registries already exist, their efficiency should be evaluated and inadequacies and problems corrected. The possibility of establishing tripartite committees to administer these registries in certain sectors should also be examined.

Joint and several liability provisions should be reinforced and extended. In certain sectors, the extension of joint and several liability provisions throughout the production and distribution chain should be considered. The statutes should specifically establish the responsibilities of intermediaries and subcontractors with regard to employment standards.

Employment standards enforcement agencies should be provided with sufficient resources to undertake inspections, general audits and timely investigations of complaints. When undertaking general audits of workplaces in sectors where homework is present (some industrial sectors, telemarketing, etc.), employment standards officers should systematically inquire whether employers use homeworkers.

Public education campaigns targeted at homeworkers and their employers in all sectors should be undertaken by employment standards enforcement agencies. Information on the difference between independent contractors and employees should be included in these campaigns.

The possibility of third-party complaints, filed with the worker's consent, should also be included in the statutes. The possibility of anonymous complaints should also be examined as a policy option in consultation with workers' organizations and homeworkers.

Employment standards enforcement agencies should make available to the public (and even publish) information on employers' non-compliance with the law, including the names of the employers in question. Such negative publicity would have a dissuasive effect on employers who do not comply with the law. Such a measure could be particularly relevant in the case of homework, as the publication of employment standards violations also serves to educate the public, and employers, about the situation of homeworkers and their legislative protection.

The Virtual Telemarketer

The virtual call centre is a combination of computer software and hardware that allows telemarketers to work from home after they have dialled into the system using their password. The system then logs on all the remote telemarketers' phone activities, recording "on-line talk time", that is, the time spent talking to a client minus the time it takes to dial a number, the time spent on hold, the time the phone is ringing and the time spent dealing with an answering machine. Here is one virtual telemarketing experience.

Super Fitness Centres Inc. retained the services of an expert in virtual call centres and telemarketing to help run a marketing campaign to offer 30-day introductory memberships to its health club facilities. Super Fitness Centres Inc. leased the virtual call centre system, and the expert recruited the managers for the campaign and the telemarketers, who, he assured

the company, would only be paid for "on-line talk time" as independent contractors. The recruitment advertising for the telemarketers read "Work at home for $12.50 an hour," although the ad did not mention for whom the telemarketer was going to work. The job applications were taken by phone and the prospective telemarketers then read a script to a machine over the phone as part of an "interview." The telemarketers were asked to sign a contract with Super Fitness Centres Inc. and the expert's company, as "contractors."

Although the campaign was run by the expert, from a warehouse owned by the expert's company, Super Fitness Centres Inc. paid the managers and the telemarketers, even though it had no direct contact with them. By only paying the on-line talk time, a telemarketer who worked 40 hours would only be credited with about 12 hours of worked time. Apparently, approximately 750 telemarketers, of whom fewer than half worked for more than a few hours or days, logged onto the system. Between 275,000 and 325,000 calls were placed each month by the telemarketers on behalf of Super Fitness Centres Inc. The calls could be monitored and the method of work supervised at a distance through the system. Many of the telemarketers were not paid for their work and claims were filed against the company. At the hearing, it was found that the telemarketers were not independent contractors, but employees of Super Fitness Centres under the Ontario *Employment Standards Act*. [104]

Endnotes

[1] For example, the British Columbia *Employment Standards Act*, SBC 1996, c. 113 (BCESA), s. 2, states that one of the purposes of the Act is "to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment."

[2] Some examples: The Ontario *Employment Standards Act*, RSO, 1990, c. E.14 (OESA) does not apply to welfare recipients who are working under the *Ontario Works Act, 1997* (*Regulation 325*, s. 2(1) b.1)) and the provisions on working hours, public holidays and vacations do not apply to many professionals (*Regulation 325*, s. 3). In New Brunswick, an employer can apply to the Director of Employment Standards to obtain the exemption of workers from any provision of the Act, according to certain criteria (New Brunswick *Employment Standards Act*, RSNB, c. E-7.2 (NBESA), s. 8). In Quebec, caregivers who do not do any domestic tasks are completely excluded from the Act if they work for an individual (Quebec *Act Respecting Labour Standards*, RSQ, c. N-1.1 (QARLS), art. 3(2)).

[3] The federal legislator can adopt labour legislation with respect to a federal work, undertaking or business falling under its jurisdiction. See *Canada Labour Code*, RSC, 1985, c. L-2, s. 2, for a non-exhaustive list of areas that fall under federal jurisdiction. This list includes interprovincial communication, air transportation, banking and radio broadcasting.

[4] OESA, ss. 3 and 4; QARLS, art. 93; BCESA, s. 4; *Canada Labour Code*, Part III (CLC, Part III), s. 168; NBESA, s. 4(1). In New Brunswick, a provision in a collective agreement can prevail over a minimum standard if the collective agreement "expressly states that a benefit, privilege, right or obligation was agreed to in lieu of the application of a provision of

[the] Act" (s. 4(2)). In the other jurisdictions, collective agreements must provide for equal, equivalent or higher benefits than those provided for in the law.

[5] The issue of the employee status of the homeworker is raised as a preliminary question in much of the employment standards case law concerning homework.

[6] This could account for the paucity of case law concerning homework. Workers' advocates and government sources both underlined this problem.

[7] See S. Brault et al. (1998: 12-22); Christie et al. (1993: 23). According to sources at the New Brunswick Employment Standards Branch, dependent contractors are covered by the NBESA, even though there is no specific provision to this effect (interview June 1999). See also *Ouellette* v. *Mann's Construction & Renovation Co*, (1989) NBESD, No. 4, where the Tribunal enumerated 26 criteria to determine whether a person is an independent contractor or not, none of which are decisive in and of themselves. For Ontario, see however, *Sparta Mercantile Ltd. (Re)*, ESC 1657, June 21, 1984, where it was found that although the garment homeworker was in fact economically dependent on the company, she was nevertheless an independent contractor. Compare with *C.N. Shoes (Re)*, ESC 1780, February 4 1985, where a homeworker who sewed shoes at home was determined to be an employee, and the reasoning and interpretation of the Act adopted in *Sparta Mercantile Ltd. (Re)* were not followed.

[8] QARLS, art. 1(10), under the definition of "employee" which:

> includes a worker who is a party to a contract, under which he: i. undertakes to perform specified work for a person within the scope and in accordance with the methods and means determined by that person; ii. undertakes to furnish, for the carrying out of the contract, the material, equipment, raw materials or merchandise chosen by that person and to use them in the manner indicated by him; and iii. keeps as remuneration, the amount remaining to him from the sum he has received in conformity with the contract, after deducting the expenses entailed in the performance of that contract.

[9] See for example, Christie et al. (1998: 20); *Couture-Thibault et Pharmajan*, [1984] TA 326 (Quebec): this case involved a woman who did accounting and clerical work from her home; *Project Headstart Marketing Ltd.*, BC EST D164/98, April 27, 1998 (British Columbia): this case involved home telephone solicitors.

[10] See for example, Parry (1999: 17-4).

[11] Some formalities may have to be met for the worker to be able to claim with the labour ministry. According to a source at the Quebec Commission des normes du travail, this agency will not proceed with a claim if the worker refuses to "regularize" the situation by declaring all sums earned to the governmental authorities responsible for income tax, welfare or employment insurance, depending on the worker's situation (interview August 1999).

[12] RSC,1985, c. I-2.

[13] In Ontario, see for example: *J.E. Travers Restaurant Ltd. (c.o.b. Harvey's) (Re),* ESC No. 2765, October 25, 1990; *Apollo Real Estate (Re),* ESC 94-74, March 24, 1994. In this last case, the referee stated: "Indeed, to deny the protections of the Act to employees who are not Canadian citizens or permanent residents would not only make them vulnerable to exploitation, but would, in effect, do far more to undermine those very provisions of the *Immigration Act* the Applicant is so concerned about, as it would make such persons the employees of choice for unscrupulous employers." A source at the British Columbia Employment Standards Branch confirmed that these workers are also covered in this province (interview March 1999).

[14] This judicial interpretation has been developed based on the Quebec *Civil Code* and the provisions prohibiting contracting against public order. Thus, the rationale behind this interpretation is that since the *Immigration Act* is of "public order," any contract concluded in violation of the act is null and void. A source at the Commission des normes du travail confirmed that it will not proceed with a claim if the worker cannot demonstrate that he/she has a valid work permit (interview August 1999). It should be noted that the denial of coverage to these migrant workers is in contradiction with the ILO experts' interpretation of state obligations toward these workers. See ILC (1999, paras 289ff).

[15] Art. 2. See also *Commission des normes du travail* v. *International Forums,* [1985] C.P. 1.

[16] NBESA, s. 1: "'place of employment' means any building, structure, premises, water, land or other place or thing in or upon which one or more persons are or has been employed for wages."

[17] S. 167(1).

[18] OESA, s.1, under "employee" (b).

[19] The term "homework" was originally defined in the *Factory, Shop and Office Building Amendment Act, 1932,* SO 1936, c. 21, and then expanded when it was included in the *Industrial Safety Act, 1964,* SO 1964, c.45. In 1968, the homeworker provisions were transferred from the *Industrial Safety Act* to the *Employment Standards Act, 1968,* SO, c. 35, s. 1. The present definition, which is slightly different from the 1968, definition was adopted in 1974 with the *Employment Standards Act, 1974,* SO 1974, c. 112. Schedules adopted under the Ontario *Industrial Standards Act,* RSO 1990, C. I.6, also provide for specific working conditions in certain sectors of the garment industry: *Schedule- Women's Coat and Suit Industry*, Ontario Regulation 282/99, amending Regulation 859, and *Schedule- Women's Dress and Sportswear Industry*, Ontario Regulation 283/99, amending Regulation 660.

[20] See Ontario, Ministry of Labour (1994); *Super Fitness Centres Inc. (Re),* [1997] OESAD No. 245, March 21, 1997 (telemarketers were determined not to be homeworkers under the Act). According to the Employment Standards Branch guidelines: "An employee's design of computer programmes or editing of materials on a word processor or computer constitutes homework." Employment Standards Branch, *Employment Standards Act of Ontario: Policy and Interpretation Manual,* Vol. 1 (Toronto: Carswell, continuous update) at 9-4. There is, however, apparently no case law on this question.

[21] This ambiguity was underlined in the *Thompson Report*. The previous definition of "work" read as follows: "the labour or service an employee is required to perform for an employer and includes the time the employee is required to be available for his employment duties at a place designated by the employer but does not include the time spent by an employee in his own living accomodation, whether on or off the employer's premises." The last section of this definition refers to waiting or "on-call" time which in the new Act has been put into a separate paragraph. The *Thompson Report* recommended that the definition of "work" clearly include homework. See Thompson (1994: 34-35). See also Hickling (1990: 23-24) on how the Act was interpreted by the Ministry to exclude all forms of homework before the changes of 1995.

[22] BC Reg. 396/95, s.1.

[23] BCESA, s.15, and BC Reg. 396/95, s. 13. See the section on permits and registration of homeworkers below.

[24] New Brunswick (1999). There have been no public hearings for this consultation and, at the time of writing this report, the written comments submitted by stakeholders and individuals had not yet been compiled by the government, nor information on the consultations made available to the public apart from the consultation document above.

[25] Art. 41.1: "[Equal rate] No employer may remunerate an employee at a lower rate of wage than that granted to other employees performing the same tasks in the same establishment for the sole reason that the employee usually works less hours each week. [Exception] The first paragraph does not apply to an employee remunerated at a rate of pay which is more than twice the rate of the minimum wage."

[26] *Home Work Convention* (No. 177), preamble, arts. 4 and 5. See Chapter 2.

[27] There is, however, an obligation in British Columbia for employers of "domestics" to provide a written contract containing the terms of employment. BCESA, s. 14.

[28] O. Reg. 325, s. 13.1.

[29] A spokesperson with the Employment Practices Branch stated that, to his knowledge, the Branch had never received any complaints that these contracts were *not* being provided (interview June 1999). Considering the problems surrounding the registry systems for homeworkers in Ontario and British Columbia, it is unclear whether employers fufill this obligation.

[30] *Home Work Recommendation* (No. 184), art. 5.

[31] NB Reg. 95-115, s. 5(2): "Wages paid to piece workers shall not be less than the minimum wage for the number of hours actually worked during a pay period." In Ontario, see the definition of "regular rate" (s. 1) and O. Reg. 325, s. 11. In Quebec, see the broad definition of "wages" at s. 1 of the QARLS. For employees under federal jursidiction, see s. 178(1) of the CLC, Part III and s. 20 of the *Canada Labour Standards Regulation*. In British Columbia, see

BCESA, s. 16, and the *Interpretation Guidelines Manual* under s.16 (available on the Ministry of Labour Internet site <http://www.labour.gov.bc.ca/esb/igm2/igmp03.htm#sect16)>.

[32] NB Reg. 95-115, s. 5(3). This rate is currently set at $253 a week (January 2000).

[33] According to a source at the Employment Standards Branch, this provision was initially intended to cover such employees as lot guards (in the forestry industry, for example) who work alone in isolated areas and whose actual hours of work are not verifiable since they are present in their workplace around the clock (interview June 1999).

[34] *Regulation respecting labour standards*, R.S.Q., c. N-1.1, r. 3 (QRRLS), art. 2. See also Brière (1994: 21).

[35] This is the interpretation applied by the Commission des normes du travail (1998).

[36] O. Reg. 325, s. 10(1) 3.1, as amended by O. Reg. 423/94.

[37] This was the minimum wage at the time of writing. The last change to the general rate was on January 1, 1995.

[38] C. D-2, r.26, art. 6.05.

[39] Although the law does not explicitly say this, art. 1(10) can be interpreted as guaranteeing at least the minimum wage to a homeworker. Article 1(10) contains the definition of "employee," which includes the person who "keeps, as remuneration, the amount remaining to him from the sum he has received in conformity with the contract, after deducting the expenses entailed in the performance of that contract." This interpretation would be applied by the Commission des normes du travail, according to a spokesperson (interview August 1999).

[40] OESA, s. 24(3). See also Ontario Employment Standards Branch (nd: 12-20).

[41] See the section on the burden of proof below. See also Ocran et al. (1993: 34). No provision was adopted with the amendments of 1995 to remedy this.

[42] OESA, s. 17 (this section also limits daily work at eight hours a day); CLC, Part III, s. 171.

[43] QARLS, art. 78 (24 consecutive hours); BCESA, s. 36 (32 consecutive hours and eight hours between shifts); NBESA, s. 17(1) (24 consecutive hours).

[44] OESA, s. 24; QARLS, art. 55; BCESA, s. 40; CLC, Part III, s. 174. In British Columbia, employers must pay double time if a worker has worked 11 or more hours in a day, or 48 or more hours in a week.

[45] NBESA, s. 16. This is one of the issues being considered under the review of the Act: New Brunswick and Newfoundland are the only jurisdictions in Canada that have such a provision. See NB, Dept. of Labour (1999).

[46] For example, the BCESA allows flexible work schedules with the approval of 65 percent of the affected employees (ss. 40 and 41), and the QARLS provides for staggered working hours on an other than weekly basis with the permission of the Commission des normes du travail (the workers' consent is not required) (art. 53). In New Brunswick, the Director of Employment Standards can grant an exemption from the overtime provisions or any other provisions following a request by an employer and according to certain criteria (NBESA, s. 8).

[47] For example, the QARLS states that, among others, managerial personnel and farm workers are excluded from the provisions on working hours and overtime (s. 54), and the Regulation sets a normal work week of 55 hours for people working in remote areas (QARLS, art. 12). In Ontario, the overtime pay provisions do not apply to a list of categories of workers set out in the Regulation (O. Reg. 325, ss. 3 and 7).

[48] O.Reg. 423/94.

[49] BC Reg. 396/95, s. 37.8, effective June 14, 1999. The regulation also contains specific provisions for certain employees of high-technology companies who are not professionals. A "high-technology professional" is defined as:

> …a person who a) is a computer systems analyst, manufacturing engineer, materials engineer, Internet development professional, computer programmer, computer science professional, multimedia professional, computer animator, software engineer, scientific technician, scientific technologist, software developer, software tester, applied biosciences professional, quality control professional, technology sales professional (other than a retail sales clerk), electronic engineer or any similarly skilled worker; b) in addition to a regular wage, receives stock options or other performance based compensation package set out in a written contract of employment, and c) has one of the following qualifications: (i) a baccalaureate or licenciature degree; (ii) a related post-secondary diploma or post-secondary certificate; (iii) equivalent work experience" (s. 37.8 (1)).

A "high-technology company" is defined as "a company where more than 50 percent of employees meet the definition of a high technology professional, are managers of persons meeting the definition of a high technology professional or are employed in an executive capacity" (s. 37.8(1)).

[50] BC Ministry of Labour (1998). It should be noted that the Washington State legislation (WAC 296-128-535) only applies to high-technology professionals who earn at least $27.63 per hour. The British Columbia regulation does not provide for a minimum rate of pay.

[51] QARLS, art. 54(4).

[52] See Brière (1994: 21). See also *C.N.T.* v. *International Forums Inc.*, [1985] C.P. 1, where the court determined that this exclusion applied to homeworkers, since the employers cannot

control homeworkers' hours, even though it was not demonstrated that the employer in this case was incapable of controlling the number of hours worked.

[53] "An employee who is working excess hours contrary to a specific term of an employment contract or without authorization may well face disciplinary action by an employer, but that does not alter the fact that he or she is entitled to overtime pay for overtime hours worked." ON, Employment Standards Branch (nd: 12-10).

[54] O. Reg. 325, s. 12(2) a) iii) and b). See ON, Employment Standards Branch (nd: 11-22 to 11-25).

[55] BCESA, s. 1, under the definition of "work."

[56] QARLS, art. 57.

[57] Commission des normes du travail (1998), under art. 57. According to a source at the Commission, the term "place of employment," which is not defined in the Act, is interpreted to include the home for the purposes of the Act (interview August 1999). See also *Commission des normes du travail* v. *Urgel Bourgie Ltée*, Quebec Superior Court, Montréal, No: 500-05-014034-928, October 18, 1998, where availability time at home for a funeral parlour employee was considered to be worked time. According to a spokesperson from Human Resources Development Canada, the same interpretation would be given to a similar provision in the *Canada Labour Standards Regulation* (s. 11.1).

[58] This is one of the issues to be studied under the review of the Act. See NB, Dept. of Labour (1999); NBFL (1999).

[59] For example, in British Columbia, workers are entitled to four hours at the regular wage if they report in for work (BCESA, s. 34).

[60] BCESA, s. 31(3). Penalties can be imposed on employers, however, if they do not respect this provision.

[61] Interpretation given by a spokesperson at the Commission des normes du travail (interview August 1999).

[62] See, for example, HRDC (1994: 63) where a general recommendation was made to establish homeworker registries. See also: ILGWU and INTERCEDE (1993); Ocran et al. (1993).

[63] Manitoba's *Employment Standards Code*, S.M. 1998, c. 29, s. 80, contains a provision that obliges employers to maintain a detailed registry of homeworkers. Several European countries' legislation and jurisdictions in the United States also provide for a registry of certain categories of homeworkers.

[64] See Chapter 7 for more information on the decree system.

[65] OESA, s. 16. This obligation also existed in the initial *Employment Standards Act* of 1968.

[66] See above for the definition of "homeworker" under the OESA.

[67] Information obtained from a spokesperson at the Ontario Employment Practices Branch of the Ministry of Labour (interview June 1999).

[68] Ontario Ministry of Labour, "Application for a Permit to Employ Homeworkers under the *Employment Standards Act*," Form # 0737 (11/95).

[69] Information and statistics obtained from a spokesperson at the Ontario Employment Practices Branch of the Ministry of Labour (interview June 1999).

[70] Interviews with spokespersons from the Workers' Action and Information Centre of Toronto and the Ontario Regional Council of UNITE (interviews June 1999).

[71] OESA, s. 16(4). Since the exclusion of homeworkers from the overtime provisions was lifted in 1994, the hours worked must be indicated even if section 16(4) does not specify this, according to a spokesperson at the Employment Practices Branch, Ontario Ministry of Labour (interview June 1999). On the Ontario permit system, see also ILGWU and INTERCEDE (1993).

[72] Ontario Ministry of Labour, Application for a Permit to Employ Homeworkers under the *Employment Standards Act*, Form # 0737 (11/95).

[73] BCESA, s. 15, reads: "An employer must provide to the director, in accordance with the regulations, any information required for establishing and maintaining a registry of employees working in private residences."

[74] BC Reg. 396/95, s. 13. There is also a registry of resident domestic workers, which, according to a spokesperson at the Employment Standards Branch, has been much more successful than the homeworker registry, mainly because the branch has been able to obtain the co-operation of Canadian immigration authorities and placement agencies to locate the workers (interview August 1999).

[75] Interview with a spokesperson from the Employment Standards Branch, August 1999.

[76] *Ibid.*

[77] OESA, s. 78 (1).

[78] Yanz et al. (1999: 123). A registry of all entities in the garment chain of production (retailers, manufacturers, jobbers and contractors) is also proposed. See also ILGWU and INTERCEDE (1993: 67).

[79] See Dagg (1997). The problems concerning general enforcement of the acts were raised by all the workers' advocates interviewed, as well as by some of the government spokespersons.

[80] In all the provinces, this was confirmed by workers' advocates, as well as by some of the government spokespersons interviewed, who underlined that there are not enough human and financial resources available to verify the working conditions of homeworkers and employers'

compliance with the Act. The difficulties encountered in maintaining registries of homeworkers also amply illustrate this problem.

[81] A spokesperson for the New Brunswick Employment Standards Branch confirmed that general audits were rarely undertaken (interview, June 1999). Workers' advocates in British Columbia and Ontario also confirmed that few inspections and audits were being done. See also ILGWU and INTERCEDE (1993). For Quebec, see Au bas (1994: 1519). However, in the Commission des normes du travail's *Rapport annuel 1996-1997* (1997) a new program was announced wherein the Commission had audited 401 employers. It was also announced that in 1998-99, 2,000 inspections were to be done in targeted workplaces (Commission des normes 1998).

[82] *Employment Standards Improvement Act, 1996*, SO 1996, c. 23.

[83] OESA, s. 82.3.

[84] OESA, s. 82.3.

[85] OESA, ss. 64.3 and 64.4. The time period for filing a complaint in British Columbia is also six months (BCESA, s. 74), whereas it is one year in Quebec (QARLS, art. 115) and New Brunswick (NBESA, s. 61).

[86] OESA, ss. 65(1.3) and 65(1.5). At the time of writing, no minimum amount had been established in the regulations.

[87] For a commentary on these changes, see Employment Standards Work Group (1996).

[88] See Employment Standards Work Group (1996, 1997). See also Sack Goldblatt Mitchell (1997).

[89] QARLS, art. 5(4).

[90] The efforts at educating the public can be seen on the Web sites of the ministries of labour and the information documents available to employees and employers.

[91] BCESA, s. 101. This provision expressly overides the provincial *Freedom of Information and Protection of Privacy Act*.

[92] Similar initiatives, on a larger scale, have been undertaken in the United States, particularly in the garment industry. See Yanz et al. (1999).

[93] BCESA, s. 74; NBESA, s. 61(1).

[94] BCESA, s. 9, forbids the hiring of children under the age of 15 without the permission of the Director of Employment Standards.

[95] BCESA, ss. 85, and OESA, s. 63(2).

[96] NBESA, s. 58.

[97] QARLS, art. 109.

[98] *Comité paritaire de la chemise* v. *Potash*, [1994] 2 SCR 406. The issue was whether inspection mechanisms under the *Act Respecting Collective Agreement Decrees* were contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*, which protects citizens from unreasonable search and seizure. Home inspections were not considered, per se, to be unreasonable by the Supreme Court.

[99] See, for example, OESA, s. 73, and BCESA, s. 91.

[100] See Parry (1999: 17-1 to 17-8b). See, for example: NBESA, s. 60(4): "Where an employer fails to maintain accurate records in accordance with this Act, the Minimum Wage Board, the Labour and Employment Board or the Director may accept the evidence of an employee with respect to his employment, and the onus of proving the contrary shall be on the employer."

[101] QARLS, arts. 98ff.

[102] Quebec *Civil Code*, arts. 2803ff.

[103] BCESA, s. 95; OESA, s. 12; QARLS, art. 95. The CLC Part III requires that the Minister issue an order regarding the association of federal works undertakings or businesses (s. 255). See also ILGWU and INTERCEDE (1993: 20); Commission des normes du travail (1998), under art. 95.

[104] Facts taken from the Super Fitness Centres case: *Super Fitness Centres Inc. (Re)*, [1997] OESAD No. 245, March 21, 1997. It was determined that these telemarketers were not independent contractors and that "it is precisely these kinds of arrangements that the Legislature had intended should be covered by the minimum standards set out in the [Employment Standards] Act."

6. WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY

Many people improve the quality of their working life by working at home. They control their environment, can work at their own speed and feel less stressed because their employer is not in the immediate vicinity when they are working. However, not all people working at home are necessarily doing safe work or working safely. A seamstress, for example, is often exposed to dust from the materials she uses while working in a poorly ventilated area of the house. Her work station is likely to be uncomfortable, but she will continue to work for long hours at a stretch, making repetitive movements that could contribute to musculo-skeletal disease, and perhaps straining her eyes by doing detail work in poor light. High voltage sewing machines may be plugged into ill-adapted electrical circuitry. Strangers who deliver her piecework may be aggressive, and a source of sexual harassment and potential violence. Her husband may even contribute to stressful working conditions by acting as an in-house overseer, insisting that she work more quickly or continue to work in spite of illness.[1]

While only the workers are endangered by the non-ergonomic work stations, everyone in the home may be exposed to dust, risks of electric shock and fire and, in some cases, toxic substances, such as solvents used to clean tiles or glue used in the making of handicrafts.[2] Many homeworkers combine child care and other unpaid domestic work with the paid homework, accumulating significant sources of stress from conflicting roles. The boundary between paid and unpaid work may be unclear, particularly in the case of women homeworkers who often work in areas of the house that are occupied by other family members.[3]

The very nature of homework changes working conditions that can affect both mental and physical health. On-site workers know they're working because they are physically in the workplace. Because a worker becomes invisible when she works at home, justification of her work derives solely from her actual production. When work entails attendance on a fixed schedule in an office or factory, it's taken for granted that the person is working, even though she might be far less productive. Homeworkers often feel they are working only when they are actually producing, so the actual work day becomes much longer, and actual production time per day is increased. Some workers complain that those in their immediate environment don't recognize what they do as work, so friends and relatives will drop in or children or husbands will interrupt in a way they wouldn't dream of doing if the worker was in an office or a factory (Fitzpatrick 1998).

The incentive to work long hours may be exacerbated by payment mechanisms based on piecework, a problem for health when work implies repetitive movements. There are strong economic incentives to discourage the taking of breaks necessary for protection from repetitive strain injury or eye strain.[4] Some studies have found that transferring a worker home actually increases productivity, but also implies longer hours and fuzzy barriers between leisure time and working time, all of which can increase work-related stress.[5]

There are several issues to consider regarding occupational health and safety and homework. The examples discussed illustrate three types of situations.

- Some of the increased risks to health are actually caused by the fact that the worker is working out of her/his home. Poor wiring or multiple and simultaneous demands from both paid and unpaid work are hazards created by the situation of homework itself.

- Other hazards, such as repetitive movements, eye strain and exposure to cotton dust or solvents, are intrinsic to the task, rather than to its location. The fact that the work is done at home may limit the possibility of ensuring proper ventilation, good lighting or good ergonomics, and cloud issues of responsibility for prevention.

- Fuzzy borders contribute to legal confusion when accidents arise, as in the case of a worker who falls down the stairs while running for the telephone.

Each of these situations may give rise to a gamut of legal issues, both in terms of the right to workers' compensation benefits and in terms of the employers' obligation to prevent injury and disease. Unlike France and Belgium,[6] the jurisdictions covered in our study have no legislation governing homework as such. No Canadian jurisdiction has really developed policy, be it consistent or otherwise, regarding labour law specifically adapted to homeworkers. As a result, the answer to the question as to whether legislation applies or not often seems almost accidental: literal interpretation of terms designed to cover a completely different reality provide rights for some while excluding others.

Cases that test the applicability of current legislation arise infrequently. In many provinces, it is almost impossible to identify cases involving homeworkers, as the classification systems used to manage information do not specify workplace location. Even in those provinces that have easily accessible case law, so few cases involve homeworkers that it leads us to believe that a large part of this work force is invisible to the institutions mandated to prevent and compensate for occupational injury and disease. In her study of homeworkers in British Columbia, Kathleen Fitzpatrick (1998) found that most of the women she interviewed believed they had no rights under labour legislation. They had been told or believed they were self-employed because they were working out of their homes even though, in many cases, application of criteria for determining coverage under compensation legislation would probably have led to the conclusion that they were working under a contract of employment. Another source told us that many homeworkers, particularly in the garment industry, are led by "middlemen" or intermediaries to believe that what they are doing is illegal, thus ensuring their discretion and their fear of the institutions mandated to protect them.[7] Homeworkers are particularly vulnerable to misinformation, as they are far more likely to be isolated.

In this chapter we examine legal questions arising when workers' compensation legislation and occupational health and safety legislation is applied to homeworkers.

WORKERS' COMPENSATION LEGISLATION

An Overview of Workers' Compensation Legislation in Canada

Every Canadian province has legislation guaranteeing economic compensation for workers who suffer from illness or injury because of their work. The first such legislation was adopted in Quebec in 1909,[8] and was rapidly followed by the adoption of broader and more complete legislation in Ontario in 1914.[9] Other provinces followed suit.[10] Each law is unique, although there are many similarities among the different provincial statutes. Those in force in common-law jurisdictions (everywhere except Quebec) have often followed the model of Ontario legislation, although recent changes in Ontario have set it apart from other provinces on several issues. In spite of differences, the essence of the legislation is similar in all provinces.

Workers are guaranteed the right to compensation if it is shown that their injury is one that is covered under the statute. In the absence of a worker's gross negligence, compensation is payable regardless of fault, and benefits cover both temporary and permanent disability. In many provinces, workers also have the right to rehabilitation services, and to benefits paid during rehabilitation. Actual structures of benefits vary from province to province. The amount of benefits is linked to previous working income. Quebec provides for 90 percent of net income, British Columbia pays 75 percent of gross, while Ontario has now reduced benefits to 85 percent of net, and New Brunswick pays 80 to 85 percent of net earnings.[11] All provinces have a maximum coverage, so high earners do not receive full compensation. While the maximum varies from province to province, in 1999 the maximum hovered around $50,000 in the jurisdictions studied.

Although workers have the right to compensation regardless of employer conduct, coverage under the Act implies the exclusion of the right to sue. Thus, if a homeworker is a worker under the Act, regardless of jurisdiction, he/she cannot sue the employer if the injury results from employer negligence (e.g., provision of defective machinery or failure to warn about the dangers of substances provided for work purposes). The situation regarding injury to family members is less clear, as we shall see. If a homeworker is not covered by legislation, the right to sue under the common law or civil law remains.[12]

In all jurisdictions in Canada, workers' compensation is a form of social insurance in which premiums are paid exclusively by employers. Historically, the right to sue employers was abolished in exchange for the right to be compensated without proof of fault. Employers benefit from these schemes because their liability insurance need not cover accidents caused to their workers. They have broad-based protection against lawsuits, and protection from liability may even include protection from human rights-based suits concerning sexual harassment.[13] Premiums vary according to the riskiness of the work and according to payroll data (the number of workers and salaries paid). Some employers try to reduce their compensation costs by contracting out dangerous work or by restructuring the employment relationship. One way is to close on-site positions while farming out work to people working out of their homes. Sometimes, such an approach is legitimate; at other times, it

appears to be a strategy to reduce costs by eluding legislative obligations, making workers "disappear" from traditional regulatory frameworks.

In some of the cases studied, the compensation boards confronted employers who had refused to pay premiums for their "employees" who work out of their homes. In these cases, the homeworkers themselves are frequently not parties to the litigation surrounding issues of homework, as the debate is between the compensation boards and the alleged employers.

Workers' compensation falls under provincial jurisdiction. What happens to workers under federal jurisdiction? Two categories of workers must be considered. Some work for companies that fall under federal jurisdiction,[14] such as CN or Bell Canada. It is very clear that the right to compensation for these workers is governed by provincial legislation,[15] so their actual place of employment determines which legislation applies. Workers who are truly governed by federal legislation are those who work for the federal government, and whose rights are determined by the *Government Employees Compensation Act*.[16] Under this legislation, the rights of federal workers to compensation are governed by the legislation in force in the province where the employee is usually employed.[17] Thus a federal civil servant, whose office is based in Quebec and who is doing telework from home (in Quebec), would be governed by Quebec compensation legislation, to the extent that specific provisions of the provincial act are included in the legislation by reference.[18]

Problems might arise if the office of the employer is in Ottawa and the worker's home is in Quebec. Is the Quebec legislation applicable, or would the Ontario legislation apply?[19] In the case of an employee of the federal government, sources interviewed thought the site of the employer would determine the applicable legislation.

In the case of a Bell Canada worker doing telework in such circumstances, similar problems would arise in determining the applicable legislation, although the rules are different. The Quebec statute applies if the employer has an establishment in Quebec and the injury is sustained in Quebec.[20] If the employer has no establishment in Quebec, Quebec legislation would normally not apply, unless the worker's home is considered to be an establishment.[21] Ontario legislation would apply to the worker "if his or her employer's place of business is in Ontario and if the worker's usual place of employment is in Ontario, and the accident happens while the worker is employed outside of Ontario for a temporary purpose connected with the worker's employment."[22] Furthermore, Ontario legislation specifically provides for cases where the worker could conceivably be entitled to benefits in several jurisdictions. In the example submitted, the Workers' Safety and Insurance Board (WSIB) would ask the worker to elect which legislation he/she wishes to apply to the claim.[23]

Transborder issues could be resolved differently, depending on the legislation of each province involved. Often, the rights of workers differ from one province to another, both in terms of the type of injury covered and the amount of benefits payable. With increasing telework, it is foreseeable that transborder issues could be raised on a regular basis. They are of such complexity that preventive law would dictate that some understanding should be arrived at before work injury occurs. While legislation in some provinces seems to provide

solutions to this type of problem (leaving it up to the choice of the worker, for instance) other jurisdictions don't have clear solutions in these cases.

Other than the specific issue raised by transborder work contracts, the right to workers' compensation for homeworkers falling under federal jurisdiction depends on the provincial legislation applicable, so their situation will not be considered separately.

Is the Homeworker a Worker Under the Act?

Two criteria must be met in order to have coverage under any of the workers' compensation statutes studied: the industry in which the work is performed must be covered by the legislation, and the contractual relationship between the worker and the employer must allow the conclusion that the homeworker is a worker under the definition of the Act.

When considering the *industries covered*, an examination of legislation in the jurisdictions studied shows that three different legislative approaches prevail.

- Quebec covers all industries except professional sports and some home caregivers,[24] and has no provision allowing the Commission de la Santé et la Sécurité du Travail (CSST) to exempt industries from coverage.

- British Columbia and New Brunswick cover all types of industrial activity, unless it is specifically excluded by statute or regulation.

- Legislation in Ontario only covers an industry that is specifically designated by statute or regulation.

Thus, while in Quebec coverage is almost universal, it is estimated that only 70 percent of Ontario's employed work force is covered by the *Worker Safety and Insurance Act* (WSIA). Among those industries that do not fall under the purview of the Ontario legislation are major employers of women, including the banking and insurance industries. In New Brunswick, there must be a minimum number of workers before an industry or establishment falls under the scope of the Act on a compulsory basis.[25] This has particular implications for homeworkers, since an employer may be encouraged to farm out work to homeworkers in order to reduce the size of the work force and thus reduce economic obligations.

All legislation studied presupposes that a claimant must be a *worker covered by the legislation*. In most cases this implies that the worker is hired under a contract of employment. Quebec, in this particular instance, allows for coverage of some self-employed workers, under certain conditions. Other jurisdictions exclude the self-employed from coverage. In those cases where the self-employed are excluded from coverage financed by employers, they may be allowed to insure themselves by paying premiums into the scheme. Issues regarding the homeworker's status as a worker arise in two contexts:

- when the worker makes a claim, she will be compensated only if she has coverage under the act, either by falling under the definition of worker or by having voluntary coverage; and
- when the workers' compensation board makes an assessment as to the financial liability of an employer for premiums.

The employer's obligation to pay premiums and the amount of premiums to be paid depend on the number and salaries of workers employed.

General Coverage

In Ontario and New Brunswick, specific provisions limit or exclude coverage payable to "outworkers," so it is necessary to examine this legislation in order to determine the meaning and scope of the exclusion in relation to homework.[26] British Columbia's legislation will also be examined because it contains definitions governing outworkers. Federal legislation and that of Quebec have no such exclusion, so in these jurisdictions the only issue becomes one regarding the existence and nature of the work contract.

Outworkers and homework

In Ontario, the WSIA specifically excludes workers who in other jurisdictions are designated as outworkers,[27] although an industry covered under the legislation may include a household, if domestics are employed.[28] This exclusion has not been analyzed in policy papers or case law, so we may only speculate as to its scope. Sources interviewed confirmed that this section was originally designed to exclude cottage industries prevalent in the early 20th century and, as such, its continued presence is anachronistic. Ironically, the actual wording of the statute permits the conclusion that most salaried garment workers working out of their homes would be excluded, while telecommuters working out of their homes would be covered. Those excluded are designated as "persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in the person's own home or on other premises not under the control or management of the person who gave out the articles or material." This exclusion is an exception to the rule, and thus should be construed restrictively.[29]

Two issues may be raised by this wording.

- Does the exclusion extend to employees working out of their own homes, such as garment workers who do finishing at home using the employer's equipment, respecting the employer's time frame for production and whose work is quality controlled by the employer?

- Given that telework does not entail work on "articles or materials" as such, would the exception be applicable?

In New Brunswick, sources interviewed at the Workplace Health, Safety and Compensation Commission thought that all homeworkers who had an employer–employee relationship would be covered by the Act,[30] despite the outworker definition. A similar conclusion was

drawn in Ontario, both by the Office of the Worker Advisor and by the Workplace Safety and Insurance Board (WSIB). Although the Ontario WSIB understood the legislation to exclude workers doing manufacturing work out of their homes, the Board would, nevertheless, submit these workers to the organizational test questionnaire to determine whether they were independent operators or employees. Were they to be employees, coverage would then be extended to them, given the ambiguous wording of section 11(1)b.

As for telework, some sources were of the opinion that the terms used were not broad enough to include telework, while others were less categorical. In any case, we were unable to find anyone in any jurisdiction who could remember a case in which this definition was applied. This is not surprising given that many homeworkers feel they are excluded from the purview of all social insurance legislation and would not be likely to bring forward test cases based on the interpretation of ambiguous legislation.

In any case, those workers who are excluded as "outworkers" may sue their employers for negligence if they can prove that their injury was caused by certain conditions described in section 114 of the WSIA.[31] All workers covered under the WSIA are precluded from suing their employers for negligence.[32]

Unlike Ontario, however, New Brunswick specifically allows outworkers to obtain voluntary coverage under the terms prescribed by the Commission,[33] although conditions for application for voluntary coverage exclude the self-employed, unless the individual is operating as a limited company.[34]

British Columbia's *Workers' Compensation Act* defines outworkers but the definition is obsolete,[35] as the term is not used in the body of the legislation itself, but only in the definitions. From the adoption of the original workers' compensation legislation in 1916 until January 1, 1994, outworkers were excluded from compulsory coverage under Part 1 of the *Workers' Compensation Act*, but this exclusion was removed when the Government of British Columbia chose to provide universal coverage to BC workers.[36] The definition itself was repealed by new legislation adopted in British Columbia in 1998.[37]

Homeworkers are, therefore, subject to the same inclusion rules as every other type of worker, and the main issue in British Columbia is to determine whether the homeworker is a "worker" under the Act or an independent operator. As the Appeal Division of the Workers' Compensation Board has stated clearly:

> [P]ersons performing work at home may in some circumstances be workers of a particular employer. Of course, not all persons performing work at home will be workers. For example, a person knitting sweaters at home on their own initiative, and offering them for sale to the public at large, would not be engaged in an employment relationship. Independent operators have the option of purchasing personal optional protection, but are not covered on a compulsory basis.[38]

Workers and independent operators: criteria determining coverage
In all jurisdictions covered, case law has determined several criteria for distinguishing between workers, automatically covered under the Act, and independent operators, who usually must pay for their own coverage if they want insurance under the legislation.

The label given by the parties to the work relationship is not binding on the compensation boards. Thus, even if both the homeworker and the client maintain that the homeworker is an independent contractor, this will have little effect on the final decision as to whether the worker–employer relationship exists.

> For full effect to be given to the principle of compulsory coverage contained in the Act…the prohibition of contractual avoidance must be applicable whether such a contract provides in express terms that no benefits under the Act are payable to a worker of the employer, or whether it seeks to achieve the same objective by more subtle means, such as by describing the parties as independent contractors in circumstances in which the relationship is, in substance, one of employment.[39]

If the worker is a worker in the meaning of the legislation, the fact that the employer has never paid for coverage does not prevent the acceptance of a claim for compensation. On the other hand, those who are not automatically covered as workers will be precluded from claiming if they have not paid into the fund.[40] The situation in Quebec is slightly more complex, as some independent operators, as we shall see, are deemed to be workers in spite of their self-employed status.

Federal workers: In order to benefit from provincial legislation, a person governed by federal legislation must be considered a worker under the *Government Employees Compensation Act*. An individual who is not a worker under that Act, cannot be covered by provincial legislation, even though provincial legislation contains a broader definition of the term "worker."[41] The federal legislation covers a narrower spectrum of contractual relationships, restricting itself to the traditional scope of contract of service.[42] This distinction is of particular relevance to federal workers in Quebec, as other provinces apply criteria similar to those of the federal legislation when determining whether a claimant is a worker under the Act, while Quebec's legislation has a broader scope. [43]

Quebec: Although determining contractual arrangements is paramount under all legislation (i.e., including employees while excluding the self-employed), Quebec provides for a broader possibility of coverage. While the self-employed ("independent operators") are not included in the definition of the term "worker," which presupposes a "contract of hire of personal services," some independent operators are deemed to be workers for the purpose of the Act under certain prescribed circumstances. Thus, a homeworker consistently receiving out-sourced contracts from the same employer could be deemed a worker under the Act and eligible for compensation coverage.

Quebec thus provides for three separate situations.

- Worker: In principle, to be covered a person must be a "worker" defined as "a natural person who does work for an employer for remuneration under a contract of hire of personal services or of apprenticeship.…"[44] In some cases this definition has been narrowly construed, so people working without a work permit, as provided for in the Canada *Immigration Act*, have been held to be excluded by the definition on the grounds that they are not hired under a valid work contract, even in cases where the employer is fully aware of the absence of a work permit.[45] Workers working "under the table," but without the need for a work permit under immigration law, are covered regardless of whether or not the income earned is properly declared in income tax returns.[46] Salaried workers were excluded from the purview of the definition only in those cases involving immigration status. This practice of exclusion does not exist in the other jurisdictions studied.[47]

- Independent operator deemed to be a worker: Quebec legislation first defines restrictively the notion of independent operator[48] and then includes some independent operators in the concept of "worker."[49]

- Independent operators not deemed to be workers and other self-employed persons: An independent operator falling under the statutory exceptions provided for in article 9 will not be covered by the legislation unless he/she pays for voluntary coverage. The same is true of the self-employed person who employs others.

These various definitions are quite convoluted. It is thus interesting to examine case law in order to determine how the different criteria are applied. The people in the following illustrations, drawn from the case law, were all covered by the legislation, either as workers or as independent operators deemed to be workers under article 9.

When workers do not provide their own tools, are under the supervision of the employer and do not run the risk of profit or loss, they are workers under the Act, even if their services are only required sporadically.[50] Others, who provide their own materials or their own equipment have been covered under article 9.

Garment workers working out of their homes, assembling garments that are then delivered to a factory for finishing, have been held to be independent operators covered under the legislation because of the deeming provision of article 9.[51] The workers provided their own sewing machines, needles and other equipment, so they were held to be independent operators. Nevertheless, although some may have occasionally worked for other factories either as salaried workers or as independent contractors, their employment by the factory was not sporadic (six months of the year, in some cases for several years). Given the application of article 9, the CSST was justified in levying assessments from the employer for these workers. The same reasoning will sometimes apply to garment workers working out of their homes for a subcontractor who also works out of her/his home.[52]

A craftsman who does piecework making snowshoes at home that are then delivered to an enterprise that retails in camping equipment as well as snowshoes is covered under article 9. The enterprise controls the quality of the work, but not the hours of work or the productivity of the worker. The worker, who cut himself at home while making snowshoes, is an independent operator deemed to be a worker. The fact that his girlfriend helps with the production does not prevent the application of article 9, as he is not exchanging services with another independent operator.[53]

Other illustrations in which independent operators were deemed to be workers included a rural postal delivery subcontractor who provided service only to one contractor, and who did work similar to that done by the employer (the person having the Canada Post contract)[54]; and a cameraman working on a film, even though he worked on several projects during a year.[55]

The burden of proof in these issues is unclear. In many cases, the CSST admits the worker is an independent operator, but will assess the "employer," unless the employer demonstrates that the self-employed contractor falls under one of the exceptions of article 9. For example, the contractor might employ other people or might have several contracts with several different companies or might do different work from that done in the factory. The Commission d'Appel en Matière de Lésions Professionnelles (CALP) has thus held that the preferred interpretation, in case of doubt, is that which supports coverage of the worker. This was the interpretation given to include homeworkers working for a garment contractor.[56] A different decision was arrived at in the case of a textile manufacturer who subcontracted to 23 different homeworkers. In that case, it was held that it would be "exorbitant" to ask the manufacturer to prove the exceptions provided for in article 9 as it would entail proving work patterns of the homeworkers. The CALP, in that case, held that employers are ill-prepared to prove work situations of their contractors and that it is up to the CSST to demonstrate coverage.[57] Because case law is contradictory, it is difficult to draw clear conclusions about the approach to be taken in the interpretation and application of article 9.

What happens in Quebec when a contractor subcontracts to other homeworkers?
Case law is also contradictory with regard to the status of contractors and subcontractors, and it is not clear whether the primary contractor, who then subcontracts, is an employer who must pay premiums to cover the subcontractors. At least one decision has concluded that the homeworker who subcontracts to others is not an employer under the Act and, as such, is not obliged to pay premiums for the work done by subcontractors.[58]

- An individual working out of her home and using the name Confection LDG enr. received regular contracts from a major textile manufacturer. She, in turn, contracted out the work to several women working out of their homes using their own equipment. The manufacturer controlled the quality of the finished product, and would return the material if dissatisfied. The contractor performed the same type of quality control, and would ask a subcontractor to start over if the work was unsatisfactory. Both contractor and subcontractors were paid on a piecework basis. At issue was whether the contractor was an employer. The appeal tribunal held that she was an independent operator and, therefore, not an employer under the Act. Further, it held that she did not have an

> "establishment" and, therefore, could not be an employer. It remains to be seen whether the major manufacturer could be held to be the employer of all these women. If not, a major factory producer will have successfully contracted out its economic obligations to compensate for work injuries caused by the production process.

Comparing this case with that of the garment workers working under very similar conditions for another subcontractor in the Loudapier case[59] shows an intrinsic contradiction in the case law. If the women working as subcontractors for LDG are not independent operators deemed to be workers under article 9, then it is difficult to understand what distinguishes them from the women working in the Loudapier case. If the LDG case was wrongly decided, which is entirely possible, then LDG was an employer and, therefore, the major textile manufacturer was not an employer of LDG. Either way, a major producer seems to have successfully transferred workers' compensation costs to the people actually doing the work.

One author (Pratte 1995: 568) addresses the issue of subcontracting in this context by attempting to define the employer in these situations as being both the primary client and the intermediary entrepreneur. He then goes on to revoke the application of article 9 given that one of the exceptions to its application is met: the independent operator who works simultaneously for several employers is not deemed to be a worker under the Act. This rather convoluted reasoning has been rejected by the CALP,[60] and in the majority of their judgments on the issue, they will consider the middleman to be the employer of the subcontractors.

Ontario: A "worker means a person who has entered into or is employed under a contract of service or apprenticeship.[61] It is thus conceivable that a homeworker is a worker under this definition, although coverage will not be offered—not because the homeworker is not a worker, but because of the specific exclusion of section 11(1)b, already discussed. Homeworkers not governed by this exclusion (e.g., teleworkers or home day-care operators) will be covered by the WSIA if they work in an industry covered by the Act under a contract of service. The term contract of service has given rise to both policy directives and case law, although little exists that is specific to homework.[62]

Criteria applied to distinguish between those in an employment relationship and the self-employed are those discussed in Chapter 3.

- In applying these criteria, the Workers' Compensation Appeals Tribunal held that a home day-care operator was an employee because the factual situation showed a significant degree of control exercised by the placement agency on the homeworkers caring for the children. In so doing, the panel concluded that statutory responsibility of the agency, coupled with monthly visits to the worker's home and fairly directive language in the collective agreement between the agency and the bargaining unit (of which the worker was a member) all contributed to the conclusion that the home caregiver, in this case, was a worker under the *Workers' Compensation Act*. The panel specifically underlined that the fact that the individual was judged to have been a dependent contractor under the *Labour Relations Act*, or that the Agency had been held to be an employer under the

Employment Standards Act, was not binding on the panel called upon to apply the *Workers' Compensation Act.*[63]

British Columbia: Four different concepts are used to determine the status of parties in employment relationships. A supplier of labour may be a worker, an independent contractor, a labour contractor or an employer. Some of these concepts are named and defined in the legislation, while others are the creation of various policy manuals of the Workers' Compensation Board.[64] For our purposes, it is not necessary to examine, in detail, the boundaries between the different concepts, all of which have been the object of complex policy directives and decisions. It suffices to explain the basic consequences of belonging to each category, and to evoke some general principles that seem to be shared both in policy and case law. Individual cases of homework relationships should, however, be evaluated more carefully in light of the cases and policy directives governing this complex issue.

A worker under the Act is defined as "a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise…."[65] The definition also provides that the Board may admit an independent operator who is neither a worker nor an employer, as a worker, under the conditions specified by the Board. These conditions entail payment by the independent operator of premiums for voluntary coverage. If the independent operator does not undertake voluntary coverage and pay premiums, he/she is not covered by the Act. Policy guidelines have added a new category under the term of "labour contractors."[66] Determining criteria in evaluating whether a labour supplier is a worker or an independent operator are similar to those already described in Chapter 3.[67] That the supplier of labour is remunerated on a piecework basis is not indicative of status "as this is common both to contracts of employment and to contracts for services."[68]

Case law provides some illustrations of these principles applied to homeworkers.

- The operator of a delivery service who did his own dispatching from his home, owned his own truck and delivered packages for several different clients every day was held to be an independent operator, not subject to compulsory coverage.[69]

- In-home garment knitters were held to be workers under the Act.[70]

- In another case, a foster caregiver assaulted by a child placed in her home by the Ministry of Social Services was held to be an independent operator.[71]

Many of these cases relied on an earlier decision that evaluated coverage of taxi drivers. They were held to be workers, regardless of the explicit stipulation of their contract that they were independent operators.[72]

New Brunswick: Very few issues have arisen in determining coverage for homeworkers. The Commission would recognize coverage for salaried homeworkers, but no case law on this issue exists. The Commission's policy manual specifically addresses the issue with regard

to outworkers, and the approach would allow for the application of the legislation even in cases that seem excluded by the wording of the statute. This is the position inscribed in the policy manual.

> c) Outworker:
>
> An individual working out of his/her home or other premise not under the care and control of an employer, who is given articles or materials to be manufactured (altered, cleaned, washed, ornamented, finished, repaired, adapted) for use or sale is considered to be an outworker and is excluded from being a worker under the WC Act.
>
> The definition of outworker is specific to minor manufacturing tasks that are not controlled by an employer.
>
> The following are examples of outworker:
> home seamstress
> off-site cabinet making
> off-site component modifications
> home crafts person
>
> One of the main determining factors is whether there is an employer/worker relationship and if an employer controls the ways and means utilized in doing the work, and exercises any care and control over the individual or the site.
>
> The outworker provides the tools, the expertise, the resources and utilizes whatever process he/she may feel is required. The outworker is only accountable for the end product, and is usually paid on delivery once that product is completed.

Current criteria throughout the jurisdictions studied are often confusing. Quebec provides the broadest coverage, as no specific provisions exclude homeworkers, and legislation provides for coverage paid for by employers for independent operators who would be excluded from the scheme under other jurisdictions. British Columbia covers homeworkers in its legislation, but the border between worker and independent operator is hard to delineate and, ironically, some homeworkers are excluded from the concept of worker in situations where they have been covered by the far more restrictive Ontario legislation.[73] Both Ontario and New Brunswick statutes create additional obstacles for homeworkers by excluding outworkers, although the meaning and relevance of these exclusions is very ambiguous. No rational basis is provided for excluding homeworkers doing manufacturing jobs while including those providing services or doing telework, and New Brunswick seems to have taken this into consideration in its policy directives by including salaried manufacturing homeworkers in spite of the wording of the statute. British Columbia has chosen to recognize the exclusion of outworkers as being outdated, and we recommend that other provinces follow suit in order to avoid confusion and inconsistent policy.

Voluntary coverage

In all jurisdictions studied, employers or individuals who are not otherwise covered by the act may apply for voluntary coverage if they pay the premium assessed by the compensation board. In Ontario, voluntary coverage only applies to industries usually covered by the legislation, so independent operators in those fields, or those excluded because of the small number of employees, may nevertheless apply for coverage, while those working in excluded industries, such as banking or insurance, may not apply for voluntary coverage.[74] Although the wording is ambiguous, it seems possible that a homeworker excluded as an outworker[75] could nevertheless apply for voluntary coverage if he/she meets the definition of an "independent operator."[76] The homeworker would have to pay the premiums.

Others permit voluntary coverage for all self-employed workers, regardless of the nature of the work. For instance, Quebec allows for coverage, on a voluntary basis, for independent operators, domestics, employers and directors of corporations.[77] British Columbia allows for both employers and independent operators to apply for personal optional protection.

New Brunswick has no provision allowing for the self-employed to apply for voluntary coverage unless they are themselves employers, as only employers may apply for coverage for excluded industries. New Brunswick legislation specifically reserves the possibility for employers of excluded outworkers to apply for voluntary coverage,[78] and the same possibility is available to employers whose industry has been excluded as a small workplace.[79] A self-employed outworker in New Brunswick would be eligible for voluntary coverage only if incorporated as a limited company or if he/she employed at least one person.[80]

Is the Employer an Employer Under the Act?

In Quebec, debate continues as to whether homework sometimes precludes the conclusion that the worker works for an employer. The definition of the term "employer" seems to suggest the existence of an establishment as an essential ingredient,[81] and it has occasionally been held that without an establishment, an individual cannot be an employer.

- In one case where a contractor worked out of her home, it was held that those who worked for her were not workers, because the potential employer had no establishment. In this case, a homeworker in the textile industry subcontracted to other women working out of their home. If this decision is correct, the other homeworkers are not workers, even though they would have been considered workers if the primary producer (the major textile manufacturer behind the contractor) had contracted directly to the homeworkers.[82]

- Other cases have concluded that contractors working out of their home are employers, and that a home may be considered an establishment when it is used as a base for the purpose of subcontracting.[83]

Some cases have considered the situation of individuals working for people in their private homes.

- A gardener who had a regular contract to maintain the garden of a private home was held not to be a worker because the person who hired him was not an employer, because his home was not an establishment under the Act.[84]

However, other decisions have concluded that a private home could be an establishment.[85] These technical arguments lead to contradictory decisions that do not seem soundly based from a policy perspective. As we shall see, grammatical considerations have permitted conclusions that workers are excluded from workers' compensation protection while being covered under occupational health and safety legislation.[86] The contrary has also been held.[87]

This problem does not arise in New Brunswick, as the definition of employer, which itself refers to the broad term "industry," has nothing that would justify exclusion of homeworkers.[88] The same is true in British Columbia.[89] In Ontario, the situation is slightly more complex, as the definition of industry in the Act specifically includes a household "if domestics are employed," which could lead to the conclusion that all other households are excluded.[90] This problem seems to be more theoretical than practical, and does not seem to have been raised in the case law.

How Do You Determine whether an Injury Is Compensable?

Even in those cases where homeworkers are covered by the legislation, difficulties may arise in accessing compensation because of problems relating to the proof of the actual work accident. Homeworkers may have accidents in their homes or on their way to the employer's premises where they are delivering or receiving work. Separate legal issues arise, depending on whether the accident takes place at home or on the way to the employer's premises. While an accident at work is presumed to be work-related in certain provinces, it is hard to determine how these legislative presumptions[91] apply when the home is the workplace. Even if presumptions do not apply, it is possible to conclude that the accident is compensable if the accident arises out of *and* in the course of employment (Ontario, British Columbia, New Brunswick, federal) or, in the case of Quebec, if it arises out of *or* in the course of employment.[92]

Work Accident

Accidents in the home

Although very few cases in any of the jurisdictions studied actually examined claims by homeworkers as such, the legal question as to whether an accident occurring in the home may give rise to rights under workers' compensation legislation has been raised on a number of occasions. The following are examples of accidents occurring at or near a worker's home that have been considered to be work accidents for compensation purposes.

- In Ontario, a child care worker who had a day care in her home fell down the stairs at home. Her accident was covered, and the tribunal did not address the issue as to the nature of her specific activities at the time of the accident, but only her status as a worker.[93]

When accidents occur at home to workers who normally do not work in the home environment, the question is raised as to whether the worker was acting out of, and in, the course of employment when the accident occurred. The prevailing wisdom is that the fact that an accident occurs at home does not permit the conclusion that the injury is not compensable: much will depend on the nature of the activity performed at the time of the accident.

- In New Brunswick, a carpet installer injured himself while loading his truck at his home, with equipment used for the purpose of his work. He was paid for piecework, and did not receive an hourly wage. It was held that he was acting out of and in the course of employment when he was loading his truck with equipment necessary to his work. "The fact that his tools and equipment were at his home rather than at his employer's store or at the customer's residence is, in our opinion, immaterial."[94]

- In Quebec, the Court held that the legislative presumption[95] regarding work-relatedness applied when a janitor who lived in the apartment building he cared for lit a cigarette while unloading groceries from his car. In the course of his janitorial duties he had smelled gas in the apartment building and was on his way to call the fire department when he stopped to light a cigarette and his clothing caught fire. The Court held that his accident was presumed work-related and compensation was paid.[96]

- The legislative presumption was also applied when a tax department worker was working at home with her employer's permission and strained her back while reaching for a file. In this case the worker received compensation.[97]

- In another Quebec case, an on-call ambulance driver injured himself while rushing to get dressed after receiving an emergency call. He slipped and fell in his home. The injury was held to have occurred in the course of employment.[98]

- In a compensation claim for occupational chronic stress, the fact that the worker, a bank manager, brought work home, was one of the many factors taken into consideration in a case where compensation was granted.[99]

The fact that work must be done in the home can be perceived as a risk of employment for the homeworker. As such, accidents caused by perils of the home (slippery stairs or obstacles) may conceivably be covered as work risks, as it can be argued that working in a home environment is one of the risks of the job.[100]

Different issues arise when an accident occurs while the worker is delivering or receiving work. Homeworkers often pick up and deliver the goods they have produced. When the homeworker has coverage under the legislation, an accident that happens during such a delivery could be covered. Generally, if travel is part of the job, an accident occurring during travel-related activities will be covered. An accident that befalls a worker while going to work or coming home from work is not a work accident under the statutes studied. The line between those accidents covered and those that are not is often quite fine.[101]

For instance, in Ontario, accidents on the road may sometimes be covered, depending on the primary purpose of the trip. Thus a worker who has an accident while driving to the bank from home to make a deposit for the employer will be covered under the Act, while coverage would not be extended to the same worker whose primary purpose of travel was personal.[102]

- In Quebec, a worker was compensated after she was injured between her home, where she had been working, and her employer's premises. The fact that she was transporting work-related documents contributed to the conclusion that she had sustained a work accident.[103]

Occupational Disease

Occupational disease claims don't raise any legal issues that are specific to homeworkers. However, with the increase in telework, one can expect an increase in musculo-skeletal disease related to the use of a computer. Homework entails the use of a computer not only for the actual task but for all forms of communication with the employer and colleagues. Given that risk of injury increases with the increase in usage, it is plausible that transfer of the worker from the on-site workplace to the home may often involve an increase in actual exposure time, although studies on this issue were not found.

What Benefits Are Payable Under the Act?

In those cases where compensation is granted, salary calculations may also lead to controversy. These problems are not specific to homeworkers, but affect all those who are paid on a piece-rate basis, undertake seasonal work, work for several employers or in other ways stray from the traditional 40-hour/week, nine to five model. Some of the same issues that arise when calculating income for the purpose of exercising minimum standards rights or employment insurance can arise when a homeworker paid on a piece-rate basis becomes disabled. (See chapters 5 and 7.)

Homeworkers are often paid on a piece-rate basis; their wages are not calculated on an hourly or weekly basis, especially in the industrial sector. In all jurisdictions, this could create complications as the earnings of homeworkers may often be difficult to determine, resulting in undercompensation in cases of disability.[104]

When Is the Worker Ready to Return to Work?

When many of the worker's tasks are done in the home, chances are the decision makers will feel he/she is able to "return to work" sooner than if the worker had to physically get to work with her disability.

- For instance, the fact that most of the tasks of a real estate agent took place at home was a factor in concluding that benefits should cease because she was ready to resume her activities. The tribunal went out of its way to underline that she was already doing many of her own domestic tasks, caring for children as a single mother and running a group

home. As such, she was judged to be able to resume her paid activity, which was seen as less demanding than her unpaid labour.[105]

Is Homework Appropriate Employment for a Previously Injured On-Site Worker?

Once an on-site worker is injured on the job, two situations may arise in which the issue of homework is discussed:

- in the context of temporary reassignment; and
- as a vocational rehabilitation solution when the worker with a permanent disability can't return to the usual job.

Assignment of the Worker with a Temporary Disability to Homework
During the period of temporary disability, legislation in some jurisdictions provides that doctors or the board may suggest reassignment to other positions, for the purpose of promoting the rapid rehabilitation of the worker. In Quebec,[106] the process depends on the opinion of the treating physician, and the framework of the legislation allows for broad discretion on the part of the physician.

- In one Quebec case, it was held that reassignment to work done in the home is possible. To our knowledge, this is the only example where a tribunal has held that homework could be imposed on a worker against her/his will. Given the circumstances of the case, the theoretical issue became moot before the worker was obliged to undertake work in the home.[107]

In British Columbia, policy allows for reassignment to light work in some circumstances, but nothing addresses the issue of homework specifically. It is necessary that the work be appropriate, and approved by both the employer and the union in order to ensure that the work is available. Nothing precludes reassignment to the home, but circumstances of each specific case must be examined.

Is Home-Based Work Suitable Employment after an Employment Injury?
Once the actual injury is consolidated, and the worker is no longer under medical care, it sometimes happens that disability resulting from the injury prevents a return to the previous employment. In many jurisdictions, this gives rise to a program for vocational rehabilitation, and the question arises as to whether home-based work may be a legitimate goal of the rehabilitation program. This issue has been raised in several of the jurisdictions studied.

In Quebec, we found three examples in which such a goal was set. In some of these cases the worker, at least initially, had approved of the proposal.

- Running a home day care was seen as appropriate employment for an injured day labourer who was ordered by her doctor not to lift more than 5 kg. The tribunal felt that running a day care in her home allowed the worker to be selective about the children and to work at her own rhythm.[108]

- In two other cases, the job of telephone solicitor was held to be a reasonable goal for the workers. In the first of these, it was even pointed out that the worker's wife could help with the job, and that this added advantage made the work at home all the more suitable.[109] In the second, a 62-year-old woman who had always worked in health care and who spoke only French and no English was told she could do telephone soliciting from her home, despite her objections, which were to the effect that she was unable to work and that no employer would hire her for telemarketing without English. In her case, her husband was an invalid, always at home and needing care. No one suggested he could help her with her work. No comment was made at all regarding the fact that she was to work from her home.[110]

In New Brunswick, the issue has arisen as to whether telemarketing from the home was suitable employment for a worker with a disability who was no longer capable of returning to her pre-injury employment. The issue as to whether the worker was actually capable of doing that type of work for a full workday was discussed in the appeal, and it was found that she was not capable of working a full day. Thus, the question as to whether home-based work could be considered as suitable post-injury employment was left unanswered.[111]

In Ontario, policy specifically allows for this possibility, permitting the Board to provide for modification to a worker's residence to facilitate home-bound employment when such employment "is required because of the worker's limited functional abilities."[112]

Both legislation and policy provide that the employer must take steps to accommodate an injured worker, but policy does not mention whether such steps could include the creation of home-based employment.[113]

British Columbia legislation does not provide for the right to return to work or an obligation to accommodate a previously injured worker, so the issue as to whether homework would constitute reasonable accommodation has not arisen.[114]

Frequently Asked Questions

What if the Worker Is Working "Under the Table?"

In all provinces, it is the employer's responsibility to ensure that assessments are up to date and that coverage has been obtained for all workers for whom the employer is responsible. Thus, if workers do not declare their income or employers make no deduction at source, this is not an obstacle to obtaining compensation if the worker is an employee under the act. It is, however, difficult to prove both the existence of the work contract and income in these cases, and the fact that a worker has never declared income could create problems in determining coverage and benefit levels. Adjudicators may feel that this raises issues as to the worker's credibility, if credibility is important in regard to other issues. (In other words, if a worker lied to the income tax department about income, how do we know the same individual sustained the injury while working?)

Quebec is the only jurisdiction studied that raises a separate issue when undocumented workers claim for injury. It has been held that migrants working without a work permit have no valid contract, and as such are not workers under the Act.[115] This reasoning is not applied in other jurisdictions,[116] and spokespersons for some compensation boards were even surprised at our question regarding this issue. The two Quebec appeal board decisions seem to fly in the face of the purpose of the legislation and, to us, the policy of refusing such claims seems flawed, particularly in the light of the fact that other "illegal" work arrangements are not sanctioned in this way.[117]

Why Should Compensation Be Payable if the Employer Isn't Supervising or Controlling the Work Space?

Some employers contest coverage of their homeworkers under workers' compensation legislation on the grounds that they are not in a position to prevent accidents taking place in the home, as they have no control over the way the work is done in the home.[118] In Quebec, this argument has been held by one CALP decision to be irrelevant in the context of workers' compensation legislation,[119] while another decision relied on this argument to justify the conclusion that home-based garment workers were not deemed to be workers under the Act.[120] In the other jurisdictions studied, case law[121] and specialists interviewed in the course of the project held this argument to be irrelevant.

In provinces where experience rating[122] is applied in determining employers' compensation costs, attempts have been made to transfer the costs of an accident to a general fund when the accident occurs in a private home. The argument has been made, for instance in the case of home care workers, that the employer cannot be held accountable for the conditions of the homes in which nurses are obliged to attend to patients. Thus, it is argued, when a nurse falls on the premises of a patient, the employer should not be penalized. This argument was specifically rejected by the administrative appeal tribunal in Quebec, on the grounds that the obligation to go to people's homes was a risk of employment and that, as such, it was appropriate to take that risk into consideration when assessing employer payments for compensation purposes.[123] The same reasoning should apply to workers working out of their own homes at the behest of their employer.

Will Workers' Compensation Be Provided if a Family Member Is Injured because of the Homework?

Two situations must be envisaged. First, that of a family member injured while helping the homeworker with work. Second, that of a family member who is not participating in the work but who is injured because of substances or activities used in the home for the purpose of work.

When a family member is actively working at home, even without the knowledge of the employer, the question may arise as to whether the individual is also a worker under the act. In some provinces, the answer is very clear, whereas in others the situation is ambiguous. Children of the employer who are under 16 are specifically excluded from coverage in New Brunswick. If a child is injured while helping an incorporated, self-employed and self-insured

homeworker, no compensation would be payable, unless specific insurance has been previously contracted.[124]

In other provinces, family members who are working with the homeworker could conceivably be eligible for coverage, if the worker is either self-employed and insured or considered to be a worker under the act. All depends on the factual situation.

- In Ontario, a son who helped out his father occasionally, with the knowledge of the employer, did not become a worker under the Act because the help was very irregular and there was no intention to create an enforceable contract.[125]

- In the same vein, the fact that a son occasionally helped his father who was a worker under the Act did not make the father an employer. (The father would have otherwise lost his worker status, as, by definition, a worker has no one in his employ.)[126]

- On the other hand, when a wife of a farm shareholder in effect ran the farm, even though payments to her were sporadic, it was held that the wife was a worker under the Act. Her status was not affected by the fact that the farm's filing practices and the information it provided in the forms submitted to the Board were confusing and untimely.[127]

- In Quebec, a wife who worked for her husband's incorporated small business was held to be a worker covered under the Act, even though the husband had never paid for coverage either as an employer or as an independent operator.[128]

These cases allow us to conclude by analogy that undeclared helpers of an employer who is a homeworker may, in some cases, be considered workers under the act. By analogy, this reasoning could also apply to a self-insured homeworker, in the event of injury to a family member who was helping with the work.

If the injury to the family member does not occur while that family member is working, no coverage under the workers' compensation legislation will be payable, but it is conceivable that a lawsuit for negligence could be brought against the employer. Thus, an employer who provides toxic substances to a homeworker may be liable for damages caused to young children exposed to those substances in the home.

Conclusions

Our study has shown that problems with the application of workers' compensation legislation to homeworkers are caused by different factors, and these factors must be considered when developing new policy that is better adapted to the current reality of work. There are three major considerations that apply when addressing this issue.

- In some cases, the law is obsolete because the social reality at the end of the 20th century is not that which was contemplated by the drafters of the original legislation.

- In other cases, social reality may actually be adversely influenced by the current state of the law, as loopholes in the legislation may encourage a broader use of homework for the very purpose of releasing employers from their historical obligations to their work force.

- We take it as given that there is a legitimate desire on the part of both workers and employers to allow for work to be done in the home, and that this objective must be a premise of any new policy design.

Many of the difficulties identified arise because of inconsistency in the legislation itself, inconsistency that, although probably unintentional, leads to diminished rights for homeworkers. In some cases, the problem may be attributed to anachronisms in the current legal texts; in others, problems stem from poor choice of wording. In very few cases, does the analysis permit the conclusion that policy makers have thought about homeworkers and decided either to provide for them in the legislation or exclude them.

Other problems that may arise are not specific to workers' compensation issues but relate more generally to the isolation imposed on most homeworkers. Information regarding rights under the legislation is not necessarily accessible to these workers, and a special effort must be made to inform them of their rights. In Australia, researchers found that homeworkers in the garment industry are actually more likely to be injured than their counterparts in factories, yet they are less likely to claim compensation for their injuries (Mayhew and Quinlan 1999: 93-94, 100). Although no empirical studies of the same scope have examined the Canadian reality, it is probable that the situation is similar.

Historically, workers' compensation schemes were based on the premise that the costs of injury to workers in the production process should be borne by those who were both most capable of preventing them and of redistributing the costs in the most efficient manner (Dewees and Trebilcock 1992). For these reasons, it made sense, and still does, that employers assume the full costs of compensation.

On the first issue, from the turn of the century it was seen that employers, rather than workers, were in the best position to prevent injury by providing quality equipment and machines, and by discouraging work practices that endangered health. Early 20th century judgments pointed out that employers who encouraged workers to work too quickly should assume the consequences of such incentives. On the second issue, it is clear that employers, who may pass the cost of workers' compensation on to the consumers, are the best placed to redistribute these costs in an equitable manner. When compensation premiums rise, their cost is passed on through an increase in the cost of the product. This may be done efficiently on a large scale. When individual workers have to pay for their own insurance, they are in a far worse position to pass the costs on to the "consumer" (the employer), particularly in industries where workers are fairly powerless, like the garment industry. While high-tech computer programmers can always threaten to move to new horizons if the employer underpays them, this is not the case for manufacturing homeworkers and for many teleworkers who have little bargaining power. The fact that they are less likely to be unionized or to know their rights under minimum

standards legislation only exacerbates the problems they may have in transferring the costs of their compensation premiums to the "consumer."

All jurisdictions studied maintained some form of exclusion of the self-employed from the purviews of workers' compensation legislation, and, with the rise in homework, the border between the status of employee and that of the self-employed is more and more ambiguous. When employers can reduce their costs by transferring work previously done in a factory to homeworkers, they successfully transfer the cost of injury from themselves to individuals who are very often underpaid and in no position to assume the costs of their own injury. The same can be said for health or child-care work, data entry and other more modern forms of homework. If this is allowed to continue, increased injury is predictable, as uninsured workers will not be able to stop working when injury occurs, thus aggravating the consequences of the initial injury. Nothing in the current situation guarantees that homeworkers will work safely, since exclusion from workers' compensation benefits removes all economic incentive for the employer to provide safe working conditions. The ultimate costs will be borne by the workers, their families, and the public health care and welfare systems. This is an unacceptable development, and we propose that it be stopped by changing the incentives to "contract out" that exist in current legislation.

It is of primary importance to clarify that coverage of homeworkers be available in all jurisdictions. The current situation also has an adverse impact on the prevention of injuries. Aside from the previous examples, it must be remembered that underestimating the gravity of health problems caused by work is exacerbated by the fact that many workers are excluded from legislative protection, and those who aren't are unaware of their rights. The statistical invisibility of injury caused to homeworkers has potential repercussions for policy on prevention, as many occupational health and safety priorities are developed on the basis of the cost of compensated diseases or injury in a given sector (Messing and Boutin 1997: 339).

Solutions to this problem require a more inclusive approach to workers' compensation, both in relation to the "self-employed" and in relation to homeworkers. Quebec has the most inclusive workers' compensation legislation in relation to the self-employed, because section 9 deems many self-employed individuals to be workers for compensation purposes. This approach is a good step toward broader coverage for the self-employed working primarily for one contractor, and should be encouraged and perhaps followed in other jurisdictions.[129] Even in the case of Quebec, the application of the legislation is controversial, and sometimes leads to the imposition of costs on the "middleman" or intermediary, or the exclusion from coverage, while absolving the primary contractor from economic liability for work-related injury. It should be clearly stated that the objective of the legislation is to have the cost of injury borne by those who are best-positioned to redistribute the costs. Furthermore, evidentiary burdens are unclear. Problems could be avoided in all jurisdictions if legislation presumed the existence of an employment relationship, unless the contrary was shown. This type of legislative presumption should apply not only in cases where the homeworker works for one contractor, but also in cases involving multiple employers and "shared" homework. It is common for employees to have several part-time contracts, yet their status as employees is not questioned. The same should

be true of homeworkers, particularly in the context of workers' compensation legislation where optimum redistribution of risks is denied every time a worker is relegated to self-employed status.

Many people working out of their homes have recently immigrated to Canada. Exclusion of workers who do not have a valid work permit from the benefits of compensation seems incompatible with the purpose of the legislation, and encourages employers to have recourse to undocumented workers. In jurisdictions where such exclusions exist, they are based on interpretation of broad language, and nothing in the statute imposes exclusion of non-documented workers. Steps should be taken in all jurisdictions to ensure that all workers, regardless of their immigration status, have equal access to workers' compensation if the worker lives in the province and the work is done for an employer situated in that province.

Workers' compensation legislation in some jurisdictions excludes, or may be interpreted to exclude from compensation all homeworkers, even though they are clearly in an employment relationship with the employer. In many cases, this may be inadvertent, but whether or not the exclusion is intentional, it discourages homeworkers from making claims and, perhaps, encourages employers to transfer employees to their homes in order to remove themselves from their obligations under workers' compensation legislation.

Among the steps to be taken, the most important is to eliminate the exclusion of outworkers, as currently exists in some provincial statutes. Both Ontario and New Brunswick statutes create additional obstacles for homeworkers by excluding outworkers, although the meaning and relevance of these exclusions is very ambiguous. No rational basis is provided for excluding homeworkers doing manufacturing jobs while including those providing services or doing telework. New Brunswick seems to have taken this into consideration in its policy directives by including salaried manufacturing homeworkers, almost in spite of the wording of the statute. British Columbia has chosen to recognize the exclusion of outworkers as being outdated, and all exclusionary provisions from British Columbia were repealed on October 1 1999 with the coming into force of Bill 14. We recommend that other provinces follow suit in order to avoid confusion and inconsistent policy.

Other problems could be avoided if attention was given to the wording of specific statutes in order to eliminate situations in which homeworkers are excluded by an accident of wording rather than by legislative intent. For instance, in Ontario legislation, even if the exclusion of outworkers was repealed, problems could arise because of the definition of the term "industry" in the Act, which specifically includes a household "if domestics are employed," which could lead to the conclusion that all other households are excluded.[130] When the legislator decided to cover domestic workers specifically, the primary purpose was not to exclude all other homeworkers, yet this might be an unintended result of the current wording. Similarly, in Quebec, the definition of employer should be simplified to avoid problems relating to the term "establishment."

Other problems for homeworkers relate to the fact that they are often remunerated on a piece-rate basis. We've already discussed how this aspect of their employment can impede fair

application of minimum standards legislation. Similar problems arise in the context of workers' compensation, and should be specifically addressed not only with regards to homeworkers but with regard to all workers working on a piece-rate basis. In many jurisdictions, compensation depends on evaluation of loss of earning ability. Post-injury, piece-rate workers may earn the same rate, but their production ability is often significantly reduced, and it is important to ensure that compensation reflects the true loss of earning capacity.

We have also found that in evaluating the ability of a worker to return to work, the fact that he/she works from home is considered a factor permitting a shortened recovery period. Stereotypes seem to equate homework with light work. This problem can particularly affect the rights of women homeworkers who, like most injured women workers, continue to care for their children while they are injured. Decision makers should be made aware that homework is equivalent to on-site work, and that early return to work is not justified by the fact the work is done at home.

Finally, it seems of primary importance to reiterate that no worker should be obliged to work out of the home if he/she does not wish to do so. In the context of workers' compensation schemes, this means that temporary reassignment of injured workers who are temporarily incapable of working at their usual job should not include the right to reassign the worker to work out of the home, pending consolidation of the injury. This also means that, in evaluating rehabilitation solutions, home-based work should not be an acceptable objective unless the worker was previously working out of the home or unless the worker explicitly requests that home-based work be considered suitable employment.

Policy Recommendations

- Generally, remove all superfluous technical language that inadvertently leads to the exclusion of homeworkers.

- Clarify applicable legislation in cases where transborder issues arise.

Coverage

- Broaden coverage to include self-employed individuals who work primarily for one contractor.

- Presume coverage unless it is demonstrated that an individual is an independent operator. The fact that the individual has contracts with multiple employers or shares homework should not, in itself, be a reason to exclude the individual from coverage under the act.

- Legislatively presume that an individual contractor is a worker unless the contrary is proven.

- Eliminate exclusions of outworkers from all legislation.

- Eliminate exclusions of undocumented workers or workers whose income has thus far not been declared to government authorities.

- Allow for voluntary coverage of all independent contractors who would otherwise be excluded from the purview of the legislation.

Calculation of Benefits

- Provide mechanisms for fair treatment of pieceworkers when calculating benefits, both in terms of initial compensation and in terms of wage loss calculations.

Reassignment and Rehabilitation

- When evaluating a worker's ability to return to work, the fact that he/she works from home should not be used to shorten the recognized period of disability.

- Guarantee that workers who are injured on the job have the right to refuse temporary assignment to work in their home.

- Guarantee that workers who are injured on the job have the right to refuse a rehabilitation goal that aims for return to work in the home.

OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

Origin and Purpose of Occupational Health and Safety Legislation in Canada

The first Canadian occupational health and safety legislation dates back to the 19th century. At that time, most provisions aimed at working conditions in factories. Today, all provinces have a broader approach to occupational health and safety, promoting prevention to eliminate risks at their source. Occupational health and safety is under provincial jurisdiction, although federal legislation applies to federal employees and to employees working in industries subject to federal jurisdiction.[131] Most legislation provides for a general duty clause, obliging the employer to take measures to prevent occupational injury. Specific obligations are then prescribed, either in the law itself or in regulations. Statutes also guarantee the right to information, to refuse dangerous work and, in some cases, to protective reassignment. All statutes provide for some form of inspection by government inspectors, and all provide for regulatory powers, and some penal provisions.

Application of the different laws and the different provisions of these laws depends on the specific wording in each statute and, as we shall see, it is not uncommon to find that some rights and obligations apply to homework while others do not. As with workers' compensation, the applicability of provisions seems almost accidental. If a provision applies to a "workplace," chances are it will apply to the home. If it applies to a "factory" or an "establishment," its applicability to home-based work will be, in some cases, subject to debate, while in others, provisions will clearly not apply. Some acts will apply the general duty clause, while excluding homework from sections defining specific obligations. Others

simply exclude homework from the entire regulatory framework. The information that follows shows, in detail, the inconsistencies in the protection offered to homeworkers.

Is the Homeworker Protected Under the Act?

Federal Legislation

Contrary to provincial workers' compensation legislation which, as we have seen, applies to federal employees, employees of the federal government and federally regulated employees are not affected by the provincial occupational health and safety legislation.[132] Their only protection is that offered by the federal legislation, in particular by Part II of the *Canada Labour Code* (CLC).

Part I of the CLC which applies to industrial relations, defines the term "employee" in specific terms applicable with regard to industrial relations covering both salaried workers and "dependent contractors."[133] Those homeworkers who are salaried workers or dependent contractors are covered by provisions granting rights or creating obligations for employees. Part II of the CLC has a different and more general definition of employee,[134] and common law would dictate that dependent contractors be covered by the general terms.[135] Some self-employed individuals may possibly be covered.[136]

Nothing in these definitions allows for the exclusion of homeworkers from the purview of the statute for the sole reason that they are working out of their homes. On the contrary, Part II defines "work place" in very broad terms to include "any place where an employee is engaged in work for the employee's employer."[137]

We can conclude that homeworkers working as employees either for the federal government or for an undertaking governed by federal legislation[138] are subject to the rights and obligations of employees under Part II of the *Canada Labour Code*. In practice, however, most of the core provisions that give meaning to the Code, particularly the specific obligations of employers and the regulatory provisions, only apply to "a work place controlled by the employer."[139] Without the possibility of taking penal measures against a recalcitrant employer, in practice Part II of the Code is not considered to apply to work done in private homes.[140]

Quebec

Quebec's *Act Respecting Occupational Health and Safety*[141] contains no provisions that would exclude employees who are homeworkers from the purview of the Act for the sole reason that they work out of their home. Workers, if they are employees, are protected by the legislation, regardless of the workplace.[142] Dependent contractors are not mentioned in the legislation, but are often considered to be workers, depending on the degree to which they are economically independent.[143] Independent operators cannot undertake voluntary coverage, and will not be subject to the rights provided for in the Act, including the right to protective reassignment of pregnant workers, even though they have voluntary coverage under the Act respecting industrial accidents and occupational diseases.[144] Ironically, if contractors or independent operators are incorporated, they will be covered as employees of

their own corporation, for the purpose of protective reassignment and the right to a secure working environment.[145] If unincorporated they have no protection.

Rights depend on wording, and some provisions of the Act refer to the "establishment" of the employer. There has been some debate as to whether a private home may constitute an "establishment" as defined in the Act.[146] The majority of cases hold that the term "establishment" includes a private dwelling when that dwelling is used for the purpose of work, particularly the provision of goods or services.[147] It is clear that a home may be considered a "workplace" under the Act.[148] Rights and obligations are very dependent on wording; those applicable to "workplaces" clearly apply to homeworkers, while those applicable to "establishments" are more problematic, particularly if the provision is of a penal nature.[149]

In summary, salaried workers in Quebec are protected by occupational health and safety legislation regardless of their place of work. Certain specific provisions could be held to be inapplicable, because of controversy regarding the meaning of "establishment." Given that these provisions refer in general to mechanisms for implementing prevention programs and joint health and safety committees—mechanisms that are designed for larger workplaces—the issue of whether the home is an establishment will probably not come up very often.

Ontario

Both salaried workers and dependent contractors are protected by Ontario's occupational health and safety legislation, since both the term "worker"[150] and the term "employer"[151] are broadly defined. The term "workplace" is also broadly defined, and could include a private home.[152] Furthermore, certain provisions of the legislation apply to independent contractors.[153]

However, section 3 of the Act specifically excludes from all protection "work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence."[154] To obtain protection, not only must the definitions be changed, but the exclusionary provisions must be repealed.

Furthermore, the Act specifically excludes "homework" from the definition of "factory."[155] The restrictive definition applies only to the term "factory," and the restriction itself does not necessarily exclude all types of homework. A narrow interpretation of the definition of homework would exclude manufacturing work, but would not exclude other types of work activity such as child care or perhaps even telecommuting. Section 3 is the major obstacle for Ontario homeworkers seeking legislative protection.

The Ministry of Labour is aware that all types of work done by a worker in the home are excluded from the protection of the Act. Legislation regarding occupational health and safety in Ontario is under review, and one of the many issues being looked at is its application to people working from their homes. In 1997, the Minister of Labour solicited consultation on this issue,[156] and since the terms of the consultation are enlightening, we will reproduce them in their entirety:

> Homework
>
> Under existing legislation, there is inconsistent treatment of work performed in the private home. Currently, the Act does not apply to work performed in the home, by an owner or occupant, or a servant of the owner or occupant.
>
> At the same time, the Act has a broad definition of workplace, which permits a private home to be regarded as a workplace provided the work is performed by someone other than an owner, occupant or servant.
>
> For various reasons, work is increasingly being performed in the private home. For example
>
> Garment workers are given sewing materials and will often complete articles of clothing in their own homes, using their own machines.
>
> Because of health care reforms, more patients, disabled persons and senior citizens are receiving care and services in their own homes rather than in hospitals and institutions.
>
> The Act does not apply to the work and workers described in the first example but it does apply in the second case, to the visiting home care workers.
>
> The application of the Act to work in the home is being reviewed because of the inconsistencies in the current legislation, the growth of work at home, and the potential health and safety hazards (Witmer 1997: 25-26).

The ministry document then proceeds to solicit discussion on the following question: "Are there certain types of work or workers that should be included under the Act when the work is performed in a private home" (Witmer 1997: 26)?

The origin of the exclusion of "homework" from the concept of "factory" dates back to 1964 when legislation was introduced to create separate mechanisms of regulation for homeworkers as defined in the Act.[157] Thus, the origin of the exclusion was to permit specific regulation of manufacturing in the home, but the specific legislative provisions disappeared from the health and safety legislation in 1968.[158]

The original provisions[159] prohibited the employment of homeworkers without a permit, allowed the chief inspector broad discretion in determining whether to authorize homework and provided for inspection powers of premises where homework is carried on. It also imposed upon employers the obligation of keeping a registry of every homeworker, including information regarding days and hours of work and wages paid. Regulatory powers were broad.

Work done in the home was completely "deregulated" in 1978 with the introduction of section 3, excluding homeworkers from the entire occupational health and safety regulatory framework.[160] Today, we are left with anachronistic definitions and inconsistent policy, both for the reasons underlined by the Ministry and because a home may be an office or a "shop" under the Act but not a "factory."

Not all homeworkers, such as child caregivers or perhaps telecommuters, are excluded by the definition of homework. Nevertheless, they are excluded from all protection under the Act for work done in their own home by an explicit exclusion in the body of the legislation.[161] If they have others working in their home, these people could be protected by the legislation currently regulating occupational health and safety, unless they are considered to be "servants." Given the position of the Minister of Labour, as cited above, it is important to follow upcoming developments in Ontario, where some change on this issue should be expected.

British Columbia

The situation of the British Columbia homeworker is fairly ambiguous when it comes to occupational health and safety issues. Since 1985, legislation has specifically provided for the possibility of obliging homeworkers and employers to register with the Board, and specific regulatory powers were adopted to permit regulation of homework from a health and safety perspective.[162] In spite of this legislative attention, nothing seems to have come from the introduction of these regulatory possibilities. No one interviewed could recall debate regarding the application of these provisions, and no regulations have been made under this statute with regard to homeworkers (McGrady and Steeves 1989).

The *Workplace Act* also excludes homeworkers from the definition of "factory, office or shop."[163] As such, one would think that all regulations adopted under the *Workplace Act* would not apply to homeworkers if the provisions governed factories, offices and shops. However, the reality is more complex.

The *Workplace Act* is not the only source of regulatory powers, and current regulations have been adopted under the *Workers' Compensation Act*, which also provides for the enactment of regulations regarding occupational health and safety. Although the status of homeworkers is ambiguous under the *Workplace Act*, as we have seen, homeworkers are workers under the British Columbia *Workers' Compensation Act*, so regulations adopted under the latter statute could easily be applied to homeworkers, depending on the wording of the specific regulation.

Thus, although the *Workplace Act* remained in force, it had been overshadowed by the enactment of regulations enabled by the *Workers' Compensation Act*. In any case, Bill 14, which came into force on October 1, 1999, provides for the repeal of the *Workplace Act.*[164]

Because the *Workers' Compensation Act* allows for enactment of occupational health and safety regulations without limiting the coverage of homeworkers, it is reasonable to conclude that these provisions apply to homeworkers. Regulations may be made to apply to workers, employers and "all other persons working in or contributing to the production of an industry."[165] Homeworkers are workers under the Act, unless they are judged to be

independent contractors, in which case some regulatory provisions may nevertheless be applicable. To be covered, a homeworker must work in an "industry," which is broadly defined as including an "establishment, undertaking, work, trade and business."[166]

Under Bill 14, the same conclusion as to coverage of homeworkers may be drawn: the home may clearly be a workplace,[167] and all provisions specifically governing homework[168] are repealed. While the new act creates no obstacles to the application of the legislation to homeworkers, specific provisions must be examined to determine potential application.

New Brunswick

New Brunswick legislation provides, in most mysterious terms, for the exclusion of work done in the home, and the interpretation of the statute is far from obvious given that the issue of its application has not arisen either in the case law or before an administrative agency. According to section 3: "This Act does not apply to a place of employment that is a private home unless the work that is carried on has been contracted to the employer of one or more persons employed at that private home."[169]

A plain meaning reading of the statute would lead to the conclusion that salaried workers who work at home are not covered unless they are working for a contractor who is in turn working for a client. Thus, if a garment worker is an employee of a contractor who obtains contracts from a factory making women's clothes, the garment worker's home would be covered; however, if the same garment worker is employed directly by the manufacturer, the home would be excluded. Similarly, a home care worker working for the Red Cross would be covered, but if working directly for the patient, he/she would be excluded.[170] The self-employed are definitely excluded, and even salaried workers who work directly for an employer, but in their own home, are not considered to fall under the statute by the Commission.[171]

Section 3 is the only obstacle to the Act's application to an employee who is a homeworker and, depending on the interpretation, it could be construed as allowing for application of the legislation to salaried workers of a contractor. Thus, these homeworkers are "employees"[172] under the Act, and the home may be covered by the concept "place of employment."[173] The children of a worker could also be covered under these definitions. Although the Commission does not, as a rule, inspect private homes, if it receives a complaint, it may intervene if the work done in the home has been contracted to the employer of a person employed in the private home. Even though this distinction is clear in the statute, it may be obsolete. Not all employees are covered, and the reasons for excluding some while including others are far from clear.

Is the Employer an Employer Under the Act?

Once it has been determined that the Act may apply to work done in the home, the actual definition of employer presents few problems in the jurisdictions studied. In summary, as we have seen, Ontario legislation is inapplicable to work done in the home by the owner/ occupant,[174] and that of New Brunswick is probably inapplicable because it is so ambiguous. In

the remaining jurisdictions, the definition of employer poses few obstacles. Nothing in the *Canada Labour Code* or in the legislation of British Columbia prevents a homeworker's employer from being bound by the legislation.

In Quebec, however, there had been some debate as to whether the employer of a worker in a private home can be an employer under the Act. Case law allows us now to conclude that an employer of a homeworker who works under a contract of employment is an employer under the Act,[175] even if the worker works in a private home.

- A pregnant worker was given the right to protective reassignment under the *Occupational Health and Safety Act*, although she worked in a private home. The CSST had contested her right on the grounds that the "employer" had no establishment.[176] The CALP concluded that the definition of employer under the Act does not include the term establishment, thus even if a home were not an establishment, the status of an employer would not be affected and provisions of the Act that were binding on the "employer" would nevertheless apply.

Do Rights and Obligations of Employers and Workers Apply to Homeworkers?

Most health and safety legislation provides for a general duty clause that enjoins the employer to ensure that employees' conditions of work protect their health and safety. More specific duties are sometimes stipulated as well. At issue is whether the employer must ensure safe working conditions when the worker is working from home. Even in those jurisdictions that provide protection for homeworkers, some will impose broader obligations on employers with regard to their on-site employees than toward homeworkers.

For instance, employers of federal homeworkers are bound by the general duty clause to "ensure that the safety and health at work of every person [they employ] is protected."[177] However, when the *Canada Labour Code* proceeds to define more specific duties regarding a multitude of issues including the security of the work site, the storage of hazardous substances and the provision of information regarding the safety of products, it is less clear that the obligations apply to employment in the home, as the obligation exists with regard to "every workplace controlled by the employer."[178] It becomes hard to determine what obligations are included in the general duty clause, given that literally dozens of specific obligations apply only to workplaces controlled by the employer. Nevertheless, because the general duty clause applies, it is conceivable that the employer of a homeworker could be charged under penal provisions if that duty is breached, particularly if injury or death results from the violation.[179]

Some practitioners in the field were of the opinion that an individual working at home at the behest of the employer was subject to, and protected by, all of Part II of the Code. Others felt that, regardless of the wording, none of the provisions applied to people working out of their homes.[180] No case law on this issue exists, and until amendments to the Code[181] clarify this issue, its application will be difficult and controversial.

Under federal legislation, general rights, such as the right to protection from reprisals for lodging a complaint, apply to all employees, regardless of work site.[183]

In Ontario, no rights under the Act apply to people working out of their homes.[184]

In Quebec, the legislation has, as its defined objective, "the elimination, at the source, of dangers to the health, safety and physical well-being of workers."[185] Employers must comply with specific regulations but also with several provisions of a more general nature. The general duty clause could easily apply to employers of homeworkers,[186] but when obligations are specified in the legislation, it becomes less clear that all of those imposed on employers with on-site employees apply to employers of homeworkers.

An employer must "see that the establishments under his authority are so equipped and laid out as to ensure the protection of the worker."[187] It is highly likely that a tribunal would conclude that the worker's home, even if it could be thought of as an "establishment," was not an establishment "under the employer's authority." Were that to be the interpretation applied, employers could argue that they do not have to ensure adequate ventilation in the home. Yet other provisions covered under the general obligations of employers could be invoked to conclude that the employer is responsible for the ventilation system.

For instance, an employer must "use methods and techniques intended for the identification, control and elimination of risks to the safety or health of the worker"[188] and must "see that no contaminant emitted or dangerous substance used adversely affects the health or safety of any person at a workplace."[189] If the homeworker uses solvents (e.g., glue for handicrafts, cleaning products for polishing) at the behest of the employer, it is probable that the employer is responsible for the conditions under which the product is used.

The general duty clause in British Columbia is very broad, and would certainly apply to homeworkers. The substantive regulation of occupational health and safety in the province is governed by a regulation that applies to all employers, workers and all other persons working in, or contributing to, the production of any industry within the scope of Part I of the *Workers' Compensation Act*[190] and creates a general duty to ensure that "all work must be carried out without undue risk of injury or occupational disease to any person."[191]

In Quebec[192] and British Columbia,[193] regulations cover even the smallest workplaces, although the obligations of employers of a small operation are less stringent than those applicable to a larger work force. The Quebec employer must ensure that the "establishments under his authority are so equipped and laid out as to ensure the protection of the worker,"[194] yet the issue as to whether the home could be an establishment, let alone an establishment considered to be under the employer's authority, is unclear.

In New Brunswick, it is doubtful that the Act applies at all. If it does, the general duty clause is equally applicable to an employer of employees working at home.[195] It would apply to workers working in someone else's home, if they were working for a contractor.

Right to Refuse Work

Homeworkers governed by federal legislation clearly have the right to refuse dangerous work, as the right applies to "an employee while at work."[196] The same is true of workers in British Columbia[197] and Quebec.[198] In Ontario and New Brunswick, as we have seen, it is unlikely that the legislation would be applicable.

Right to Protective Reassignment

Protective reassignment provisions concerning pregnant workers exist in only two jurisdictions in Canada: federal workers have a limited right to protective reassignment while Quebec workers not only have the right to be reassigned but also the right to paid leave if reassignment is not forthcoming.

Two issues arise in this context: Can homeworkers apply for protective reassignment and can on-site workers apply for reassignment to their homes?

Rights of the pregnant homeworker

Protective reassignment of federal workers is governed by Part III of the *Canada Labour Code*[199] and, as we have seen, these provisions apply to all homeworkers who are either salaried workers or dependent contractors. (See Chapter 5.)

Nothing in the federal legislation precludes a homeworker from requesting reassignment if the work may pose a risk to her health or to that of the fetus (or to that of her child in the case of nursing mothers). Thus, a telecommuter who has been told she cannot sit for long periods of time may require redefinition of her production quotas, as she may need to get up and walk around more often. This would be an example where reassignment might imply redefinition of production expectations, a modification of job function that would allow her to continue working without being penalized because of health constraints imposed by pregnancy.

In Quebec, all pregnant workers have the right to protective reassignment if work is dangerous to their health or to that of the unborn child. Nursing mothers may also apply for reassignment if work endangers the nursing infant.[200] Self-employed workers are not covered under the scheme, even if they have voluntary coverage under workers' compensation legislation, unless they work for their own incorporated company.[201] Homeworkers would be covered by the legislation. Unlike the federal legislation, Quebec legislation allows the worker to cease work and receive economic compensation if she is not assigned to work that eliminates the dangerous working conditions.

Little case law on the issue of protective reassignment of workers in private homes has been found. One decision specifically allowed the claim of a home-care provider working in someone else's home.[202] Given that day-care workers are generally withdrawn from work under the protective reassignment legislation because of the biological risks involved in working with small children, it would not be surprising to find that home day-care workers could avail themselves of the same provisions, if they are workers under the act.

Reassignment of the pregnant on-site worker to work at home

On-site workers may want to request reassignment to work at home. Under federal legislation, nothing prevents reassignment to the home. It is unclear whether an employer may be obliged to comply with such a request. Much depends on the nature of the work. However, if it is conceivable that tasks needed by the employer could be performed by the worker at home, a case could be made that reassignment to home-based work was a "reasonably practicable" alternative.[203]

In Quebec, reassignment to the home is theoretically possible. Much depends on the reasons for which the worker requests reassignment. Workers who, because of personal health reasons related to their pregnancy, cannot work at all, may not request reassignment under the Quebec scheme as it is not the work itself that endangers their health. The only case where a worker sought reassignment to her home was refused on the grounds that she was incapable of all work.[204] If the worker is unavailable for reassignment she cannot receive benefits under the Act.

Do Health and Safety Regulations Apply to Homeworkers?

General health and safety regulations provide for a gamut of protections against harmful working conditions, regulating everything from air quality and climate control to threshold limit values relating to toxic substances and, in some jurisdictions, ergonomic work stations, smoking and protection from violence.

Nothing in the federal regulations themselves suggests that homework would be excluded from their purview, although they are "prescribed for the purposes of sections 125, 125.1, 125.2 and 126 of the Act."[205] An argument may be made that they only apply to a workplace "controlled by the employer," as that caveat appears in sections 125, 125.1 and 125.2. The term itself is ambiguous, as some believe that no provisions of Part II of the Code would apply in the case of home employment requested or approved by the employer, since the employer has no control over the home workplace itself. Nevertheless, if proposed modifications are enacted, the sections in question will apply to the home workplace of an employee. Many current regulations are perhaps irrelevant to homework by the very nature of the regulated activity, but some provisions, such as those governing lighting and visual display terminals (VDTs)[206] could easily apply to a home workstation.

In Ontario, no rights under the Act apply to people working out of their homes.

In Quebec, the *Regulation Respecting the Quality of the Work Environment*[207] applies to an "establishment," and it is possible that the home may be considered to be an employer's establishment, although, as we have seen, there is some debate on this issue.

In British Columbia, if an employment relationship is found to exist between a homeworker and an employer, both would be subject to the requirements of the *Occupational Health and Safety Regulations.*[208] As we have seen, a number of these regulatory provisions can be applicable. One issue that has yet to be tested but that could become significant is the

applicability of the "Ergonomics (MSI) Requirements."[209] Telecommuting is becoming a very significant part of home-based work, and ergonomics requirements designed to prevent musculo-skeletal injury to workers could conceivably apply to work done in the home. The employer has a duty to "eliminate or, if that is not practicable, minimize the risk of MSI (musculo-skeletal injury) to workers." It is possible that this could include an obligation to provide sound information on the prevention of MSI to the homeworker, and in the future, it may even be possible that the regulation could serve as a basis for a request that the employer provide ergonomically sound equipment to workers working at home. Thought must also be given to provisions regulating lighting,[210] indoor air quality[211] and environmental tobacco smoke.[212]

The applicability of these provisions is all the more clear because some provisions of the Occupational Health and Safety Regulations (OHSR) Core Requirements specifically do not apply to work in the home. The regulations governing "occupational environment requirements" do not apply to a private house.[213] These rules relate to providing lunchrooms and washrooms, and were enacted under the *Workplace Act*.

British Columbia also regulates hazardous substances as well as specific industries. Hundreds of rules are provided for, although most, in practice, would not be relevant to the type of work that is done in the home. Nothing in the provisions excludes the home workplace from the applicability of these regulations, when relevant.[214]

Inspection

Do Employers Have the Right to Inspect the Worker's Home for Health and Safety Purposes?

Little has been provided for in the legislation studied, although it makes sense that in those jurisdictions where government inspectors may not inspect a residence the same is necessarily true of the employer.

In British Columbia, where inspection of homes is possible, employers have the right to have a representative accompany the inspector,[215] but nothing seems to allow for an independent inspection by the employer, and privacy law would dictate that such an inspection could not take place without a clear legislative mandate. Given the employer's responsibility for lighting quality and good ergonomic conditions, it seems reasonable to conclude that a worker who wants the employer to take some action under these regulations would be well advised to consent to a visit from the employer before applying for an inspection by Workers' Compensation Board inspectors.

Nothing specific exists in Quebec legislation, although a worker is obliged to "participate in the identification and elimination of risks of work accidents or occupational diseases at his workplace."[216] At the same time, an employer must ensure that the way in which work is organized and the equipment used, provide for safe working conditions.[217] This could be interpreted as creating an obligation for the employee and the employer to co-operate in the design of the home work station.

While one author (Pratte 1995) has suggested that the homeworker's residence becomes an establishment of the employer, this interpretation seems unlikely. In the cases where it was concluded that a private residence could be an establishment, it was clear that the home belonged to the employer. We found no cases concluding that the *worker's* home had become an establishment.

Do Occupational Health and Safety Inspectors Have the Right to Inspect the Worker's Home?

Although this question is very important from a legal standpoint, it is often more theoretical than practical, as limited resources in all jurisdictions covered make it highly unlikely that the home-based workplace would become the target of a random inspection. This having been said, given that workers may feel the need to call in an inspector, it is quite possible that the issue of inspection of the home-based workplace could arise.

Federal legislation provides that safety officers may "enter any work place controlled by an employer,"[218] and it is doubtful that the private home of an employee would be seen to fall under this qualification. Nevertheless, it is possible that an employee could invite a safety officer into the home for inspection purposes, and it must then be determined if the powers of the safety officer would be applicable in these cases.[219]

In Ontario, the *Occupational Health and Safety Act* does not apply to people working from home. However, it can apply to the home used as a workplace by those other than the owner or occupant. Work done by the nurse who provides home care in a private home or the teleworker who works out of someone else's home is governed by the legislation, and issues of inspection could arise in these cases. The statute specifically provides for a limited right to inspect private homes used as workplaces. Inspectors may enter with the permission of the occupant. Without such consent they must obtain a warrant.[220]

Quebec legislation clearly allows for inspection of all workplaces, and nothing in the statute itself would lead us to conclude that private homes would be an exception.[221] The role of health and safety inspectors is similar to that of inspectors named under the *Act Respecting Collective Agreement Decrees,*[222] and the Supreme Court of Canada has clearly stated that inspection of a private home, when it coincides with the workplace, does not make inspection powers unreasonable.[223] "The standard of reasonableness is less strict in a matter involving the regulation of an industrial sector than it is in criminal matters."[224] By analogy, a court could possibly conclude that the expectation of privacy is lowered when a worker (or an employer) uses the home for activities subject to regulation. Given the clear language, it seems that an inspection could be made without a warrant.[225] A person who hinders an inspector in the performance of her/his duties is liable to prosecution and subject to fines.[226]

The situation in British Columbia, where regulations were reviewed in 1998, is very different from that existing in Ontario and on the federal level. Legislation in British Columbia actually imposes on the employer the obligation of ensuring that the workplace is regularly inspected, and the obligation is broad enough to include inspections of private homes.[227] New provincial legislation provides for the inspection of workplaces in private homes in very explicit terms.

Section 181 of Bill 14, which will undoubtedly be held to supersede powers granted by regulation under the previous act, delimits the right to inspect the private residence that is also a workplace, providing for four alternative conditions:

- the occupier consents; or
- the Board has given the occupier at least 24 hours' written notice of inspection; or
- the entry is made under the authority of a warrant under the *Workers' Compensation Act* or the *Offence Act*; or
- "the Board has reasonable grounds for believing that the work activities or the workplace conditions are such that there is a significant risk that a worker might be killed or seriously injured or suffer a serious illness."[228]

In New Brunswick, as we have seen, there are very few situations in which the Act could be held to apply to work done in a private home. When the Act does apply, inspection powers make no exception for private homes, and inspections may take place without a warrant, and perhaps even without the consent of the owner/occupier.[229] In practice, in a jurisdiction with only 16 inspectors for the whole province, it is unlikely that resources suffice for the inspection of private homes.[230]

Regulatory Powers

In the field of occupational health and safety, the bulk of protective legislation is adopted in the form of regulations. It is thus relevant to determine whether current legislative powers would allow the adoption of a health and safety regulation designed specifically for homeworkers. It is also important to determine whether anything in the acts prevents the application of general regulations to homeworkers.

The *Canada Labour Code* provides for broad regulatory powers, and nothing would prevent the Governor in Council from adopting regulations aimed at governing the health and safety of homeworkers subject to federal legislation.[231] No such regulations currently exist.

In Ontario, the Act does not apply to people working out of their homes, and even though regulatory powers are broad,[232] current language would prevent the regulation of workers working out of their own homes.

Broad regulatory powers in Quebec could easily allow for regulation of health and safety in the home-based workplace.[233]

Currently, most occupational health and safety provisions in force in British Columbia are provided for in regulations, and these regulations cover workplaces and workers, and therefore homework.

Broad regulatory powers exist in New Brunswick,[234] but they are subject to the same ambiguity as the rest of the Act, as it is unclear that work in the home is covered by the legislation.

Conclusions

Issues surrounding the application of occupational health and safety legislation to work done in the home are more complex than those raised by workers' compensation, as a balance must be found between the right to privacy and the right to safe working conditions. To what extent can safe working conditions be imposed upon an individual? In the context of a factory, the answer is that broad powers are given to many intervenors to protect the worker from dangerous conditions, even when the worker accepts working under those dangerous conditions. Rights are sometimes in conflict, as in the case where mines are shut down and workers thrown out of work because it is dangerous. They don't always approve of the decision, but in the interest of society in general, it has been accepted that unemployment may sometimes be a more suitable solution than dangerous employment. Can these principles be transposed to a worker working from home? Can we, as a society, dictate to individuals what they can and cannot do in the privacy of their own homes? Should neighbours be provided with legal recourse that could include the calling in of inspectors from the health and safety commission?

When an on-site worker requests an inspection of the workplace because he/she believes the equipment provided to be unsafe, it is possible that the inspector may discover other violations of which the worker was unaware. Were a homeworker to request support from an inspector with regard to the poor quality of the sewing machine provided by the employer, it may be possible that the inspector finds fault not only with the sewing machine, but with the front steps and the ventilation system. This could lead to the worker's being prevented from continued work in the home, as it is clear that the employer will not be called upon to reconstruct the staircase or provide adequate air intake. Reflection is needed in order to find the necessary balance between prevention objectives and respect for the autonomy of the homeworker.

Occupational health and safety legislation is predicated, in most cases, on the idea that inspectors could be called in, and penal sanctions imposed, if legislated standards are not met. Yet in practice, in all jurisdictions studied, the available resources could never possibly cover all workplaces in their jurisdictions, even without including private homes as potential inspection sites. This means there is something more to occupational health and safety legislation than simply inspection and prosecution of violations; that prevention can be aspired to without relying exclusively on inspection.

For homeworkers, it makes sense that those aspects of legislation that aspire to preventing injury, such as the right to refuse, protective reassignment and the right to information, should apply in exactly the same way as they apply to other workers. When it comes to inspection, either by the employer or by government authorities, it may be necessary to mitigate the application of traditional health and safety rules in order to better accommodate the right to

privacy. However, the right to privacy does not include the right to endanger self and family, so some inspection powers seem necessary.

Currently, inspection of homework is illusory both because of the ambiguity of the legislation and because of the limited resources of the institutions mandated to inspect workplaces. This problem is not unique to Canada,[235] and authors in other jurisdictions have suggested that focussing on the intermediary or retailers, at least in the garment industry, is a strategy that has yet to be applied by occupational health and safety authorities (Mayhew and Quinlan 1999: 94). For instance, ensuring that the workers' right to information has been complied with may be more easily achieved by inspecting the suppliers of work than by visiting the individual homeworkers.

For the moment, aside from British Columbia,[236] no jurisdiction studied has specifically addressed the particular challenges of applying health and safety legislation to work performed in the home. As with workers' compensation legislation, many current rules seem to either apply or not, depending on grammatical accident rather than as a result of policy choices. Federal legislation could be partially applied, but the legislative intention is so contradictory under the current wording that it is unlikely that any protection would be forthcoming without giving a clearer mandate to those called upon to apply the legislation.[237] In Quebec, some rules apply while others are more controversial. For instance, access to protective reassignment for the self-employed is available only if the worker is incorporated; if the worker is simply registered, the right is unavailable. Inspection seems possible, yet the provision requiring the employer to provide safe equipment is ambiguous when it comes to applying it to a home-based worker.

Nowhere in the legislation are there provisions explicitly preventing certain types of very dangerous work from taking place in the home.

In the case of Ontario, all homework is excluded from the purview of the Act.[238] Although this has the advantage of being clear, it may serve to encourage employers to choose homework as a way of circumventing statutory obligations. It certainly does nothing to promote the occupational health and safety needs of this growing work force. Ontario is in the midst of a consultation of stakeholders on this specific issue, and it will be important to follow developments.

Some jurisdictions studied are in violation of the most rudimentary standards and recommendations of the ILO with regard to homework and occupational health and safety. (See Chapter 2.) Even in those jurisdictions where current legislation may be applicable, with the exception of British Columbia, it is ambiguous and manifestly not designed specifically for regulating homework. We recommend that legislation be reviewed in order to ensure at least compliance with the ILO standards and recommendations.

Policy Recommendations

Right to Equal Protection

- Legislation should be designed to apply to all workers, including homeworkers, and exclusion from specific provisions should be the exception, motivated by the special characteristics of homework, and clearly stated.

- Waged homeworkers should have the same rights and obligations as waged on-site workers, including the right to safe equipment and personal protective equipment to be provided by the employer.

Fundamental Rights Regardless of Contractual Status

- Fundamental provisions of health and safety legislation should apply to everyone in a workplace, be they wage earners or the self-employed, and the home should be considered to be a workplace when work takes place therein. These should include:

    - the right to information regarding hazards that are known or ought to be known to the employer associated with the work given to the homeworker and regarding precautions to be taken;
    - the right to necessary training with regard to those hazards; and
    - the right to refuse dangerous work and to be protected from sanctions for so doing.

Inspection

- Special inspection provisions should be developed, designed to achieve a balance between the right to safe working conditions and the right to privacy. Current specific provisions to this effect should be examined as a possible model for other jurisdictions.[239]

Endnotes

[1] Illustrations drawn from a fascinating and detailed study of women working at home in the textile industry in Australia. See Mayhew and Quinlan (1998). They found that occupation-related violence was a significant health problem for homeworkers. See also Mayhew and Quinlan (1999: 93-94, 100).

[2] Examples drawn from interviews in Fitzpatrick (1998).

[3] It has been found that women homeworkers work more in the living area while men tend to have their offices in the basement, set apart from family activity (Gurstein 1995: at 27). See also Fitzpatrick (1998) who documented cases where women not only cared for their own children while doing paid production work, but also ran a home day care at the same time. Lipsig-Mummé (1983: 557).

[4] Mayhew and Quinlan (1999: 100-102). The authors found that piece-rate payments were associated with increased incidence of musculo-skeletal disease in homeworkers. These

findings were consistent with other studies that looked at the effects on health of piece-rate payments to factory workers.

[5] See for example, Huws (1993, Chapter 10). Greater productivity was found among teleworkers than on-site workers.

[6] Desjardins et al. (1997) *Le Code du travail annoté* at 1348; *Loi relative au travail à domicile*, art. 119.1; *Moniteur Belge*, 24 December, 1996, 31993.

[7] Ng et al. 1999. Information also provided in an interview with UNITE in Vancouver, April 1999.

[8] *An Act respecting the responsibility for accidents suffered by workmen in the course of their work, and the compensation for injuries resulting therefrom*, SQ 1909, c. 66.

[9] *Workers' Compensation Act*, SO 1914 c. 25.

[10] British Columbia in 1916, *Workers' Compensation Act*, SBC 1916, c. 77; New Brunswick in 1918, *Workers' Compensation Act*, SNB, c. 37. Federal legislation protecting federal employees was first adopted in 1918, SC 1918 c. 15.

[11] New Brunswick legislation is quite complex and provides for different rates according to the date of the accident, the number of weeks of disability, etc. See *Workers' Compensation Act*, RSNB c. W-13, s. 38 (WCANB).

[12] Some legislation specifically circumscribes the right to sue, as in New Brunswick: WCANB s. 87 and Ontario, *Workplace Safety and Insurance Act*, SO 1997, c. 16, s. 113 (2.2) (WSIA).

[13] *Béliveau St. Jacques* v. *Fédération des employées et employés de services publics inc.*, [1996] 2 SCR 345.

[14] Because of section 92(10) of the *British North America Act.*

[15] *Workmen's Compensation Board* v. *Canadian Pacific Railway*, [1920] AC 184.

[16] *Government Employees Compensation Act*, RSC 1985, c. G-8 (GECA).

[17] GECA, s. 4, reads as follows.

> The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who a) are caused personal injuries in that province by accidents arising out of and in the course of their employment; or b) are disabled in that province by reason of industrial diseases due to the nature of their employment.

[18] This is quite a complex technical problem that doesn't have any real consequence specific to homeworkers. Nevertheless, for the sake of accuracy, it is important to note that federal workers are not governed by all provincial provisions. See *Lamy et Société canadienne des postes*, (1998) CLP 1472 (QAC).

[19] The regulation governing this issue provides that the place where an employee is habitually employed determines the legislation. Literally applied, this would mean the home, but this interpretation could result in different rights applicable for workers working at home for the same government office, their rights varying according to their home address. See *Government Employee Compensation Place of Employment Regulations,* SOR/86-791, GO Canada Part II, 1986, vol. 120, 3129, s. 2. In practice, HRDC would apply the legislation of the province in which the supervisor works. Information obtained in an interview with HRDC.

[20] *Act Respecting Industrial Accidents and Occupational Diseases*, RSQ, c. A-3.001, s. 7 (AIAOD).

[21] This is not impossible, although case law is somewhat divided on this issue.

[22] WSIA, s. 19.

[23] This is the position of the WSIB policy branch; it is based on sections 18 and 20 of the WSIA.

[24] AIAOD, art. 2. Domestic workers also have limited access to compensation in Quebec, but they are not, as such, excluded from the purview of the legislation itself.

[25] *Regulation 82-79* under the *Workers' Compensation Act* (OC 82-360), April 29, 1982, s. 3, excludes from Part 1 (coverage) an industry "unless it has throughout its operations in the year at least three workers at the same time usually employed therein."

[26] Saskatchewan's legislation has a similar exclusion. See *Workers' Compensation Act*, SS 1979 c. W-17.1.

[27] WSIA, s. 11(1), reads as follows.

> The insurance plan applies to every worker who is employed by a Schedule 1 employer or a Schedule 2 employer. However, it does not apply to workers who are […] b) persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in the person's own home or on other premises not under the control or management of the person who gave out the articles or materials.

The wording defining this exclusion is identical to the definition of "outworker" in the New Brunswick legislation. See WCANB, s. 1. Up until 1997, the Ontario legislation designated this exclusion as an exclusion of "outworkers," but the term, not the exclusion, disappeared in Bill 99. See the *Workers' Compensation Act*, RSO 1990, c. W.11 s. 1, for the definition of outworker, which is then excluded from the definition of worker.

[28] WSIA, s. 2, definition: "industry includes an establishment undertaking, trade, business or service and, if domestics are employed, includes a household." Ironically, Ontario excludes up to 30 percent of the work force, while specifically providing coverage for domestics, while Quebec includes all workers except professional sports players and domestics, the latter being covered only if they pay their own premiums.

[29] Two principles of statutory interpretation support a strict construction of this exception. In all legislation, exceptions to the rule are of strict construction. When, as in the case of workers' compensation legislation, the exception is in social legislation, the law should be interpreted in favour of the claimant. This implies that provisions aiming to exclude a claimant should be construed restrictively. See Sullivan (1994: 376-379).

[30] The same exclusion of outworkers applies in New Brunswick, and the issues raised regarding the wording of the Ontario statute are thus the same. New Brunswick seems to have imported the wording of the definition of "outworker" from the old Ontario *Workers' Compensation Act*. New Brunswick law then excludes outworkers from the purview of the insurance scheme, while providing for the possibility of lawsuits for negligence against the employer. See WCANB, s.1, WCANB s 2(3)b, WCANB s. 87. Interviews held in June and August 1999.

[31] Outworkers maintain the right to sue as stipulated in s. 113(2.2) of the WSIA. No case law was found that applied these provisions.

[32] WSIA, s. 26(2).

[33] WCANB, s. 2((3)b, reads as follows: "Subject to sections 4 and 6, this Part does not apply to the following…b) outworkers." Section 4 allows the worker to apply for voluntary coverage.

[34] Interpretation confirmed by interview with representatives of the Workplace Health, Safety and Compensation Commission, August 1999.

[35] This has been clearly demonstrated in Decision 96-1247 of the Workers' Compensation Appeal Division, (1996) 13 *Workers' Compensation Reporter* 71, where in-home garment knitters were held to be workers under the Act, regardless of the definition of outworkers.

[36] Bill 63, the *Workers' Compensation Amendment Act*, 1993, removed the legislative exclusions. On the history of these provisions and subsequent amendments, see Decision 96-1247 of the Workers' Compensation Appeal Division, (1996) 13 *Workers' Compensation Reporter* 71.

[37] Bill 14-1998, *Workers' Compensation Amendment Act*, 1998. All provisions relevant to homework came into force on October 1, 1999.

[38] Decision 96-1247 of the Workers' Compensation Appeal Division, (1996) 13 *Workers' Compensation Reporter* 71 at 78.

[39] Quoted from a British Columbia decision. See Decision 32, *Re the Employment Relationship*, March 28, 1974, (1974) 1 *Workers' Compensation Reporter*, 127 at 128. The same principle would apply in other jurisdictions, as all legislation prohibits contracting out of the purview of workers' compensation legislation if the true employment relationship falls within its scope.

[40] This is true in all jurisdictions studied. For an example of the application of this principle, see Workplace Safety and Insurance Tribunal Decision 1178/97, 28/01/98 (Ontario).

[41] See for instance *Aganier et DRHC-Direction travail*, CALP 70604-60-9506, 27-02-97, A. Suicco, Commissioner. It was decided that a scrutineer hired under the *Canada Elections Act* was not a worker under the GECA.

[42] The Act provides that "'employee' means a) any person in the service of Her Majesty who is paid a direct wage or salary by or on behalf of Her Majesty." It does not cover independent operators. See *Succession Philippe Lalonde et Ministère du Développement des ressources humaines Canada*, (1996) CALP 1591.

[43] Art. 9 of the Quebec statute broadens the scope of the term "worker" to include self-employed people who would be excluded under criteria applicable in common-law provinces. Compare Ison (1989: 13) with the criteria determined in art. 9. Even though the definition of worker at art. 2 of the Quebec legislation resembles that applicable in other provinces, the addition of art. 9 employees includes people who would be excluded elsewhere.

[44] AIAOD, art. 2. The definition goes on to exclude: "a domestic, a natural person engaged by an individual to care for a child or a sick, handicapped or aged person and who does not live in the dwelling of the individual and a person who plays sports as his main source of income."

[45] *Laur et Verger Jean-Marie Tardif inc.*, (1992) CALP 510; *Boulaajoul et Ferme M.S. Nadon enr.*, (1994) CALP 1540.

[46] *Chagnon et Bienvenue*, (1986-87) BRP 831; *Lafontaine et Transmission Iberville*, CALP 70135-04-9505, 03/06/96, M. Renaud, Commissioner; *Denis Raymond et Rajotte*, CALP 15942-62-8912, 3/10/94, M. Duranceau, Commissioner.

[47] Information obtained in interviews in British Columbia, Ontario and New Brunswick.

[48] AIAOD, art. 2: "'independent operator' means a natural person who carries on work for his own account, alone or in partnership, and does not employ any worker." Thus a self-employed subcontractor who employs others is excluded from the definition of independent operator and thus from the purview of the Act, unless the subcontractor pays her/his own premiums under provisions governing voluntary coverage (AIAOD, art. 18).

[49] AIAOD, art. 9: "An independent operator who in the course of his business carries on activities for a person similar to or connected with those carried on in the establishment of that person is deemed to be a worker in the employ of that person, unless 1. he carries on the activities a) simultaneously for several persons, b) under a remunerated or unremunerated

service exchange agreement with another independent operator carrying on similar activities; c) for several persons in turn, supplies the required equipment and the work done for each person is of short duration; or 2. in the case of activities that are only intermittently required by the person who retains his services."

[50] *Gely Construction inc. et Michel Lessard*, (1986-87) BRP 789.

[51] *Confection Loudapier inc. et CSST*, (1994) CALP 11.

[52] *Richard Adam enr. et CSST*, (1998) CALP 141. The same reasoning was followed in *Confection PD inc. et CSST*, CALP 90782-63-9708, May 3, 1998, F. Poupart, Commissioner. These cases contradict a previous case, *Confection LDG enr. et CSST*, (1997) CALP 354. Recently, the appeal tribunal backtracked again in *Confection PD inc. et CSST*, CLP 907-63-9708-2, June 25, 1999, M. Renaud, Commissioner, holding that art. 9 did not apply. The case law is manifestly contradictory.

[53] *Faber et cie et M. Serge Marcotte*, (1986-87) BRP 126.

[54] *Blanchard/Les entreprises TW et Marcoux*, (1995) BRP 455.

[55] *Papaya Films inc. et Keith Young*, (1989) BRP 562. This seems to us to be a dubious conclusion given that the Act specifically excludes the independent operator who carries on activities for several persons in turn. In this particular case, other factors affected the conclusion.

[56] *Richard Adam enr. et CSST*, (1998) CALP 141.

[57] *Vêtements de Sports C'est la vie inc. et CSST*, (1997) CALP 1611.

[58] *Confection LDG enr. et CSST*, (1997) CALP 354.

[59] *Confection Loudapier inc. et CSST*, (1994) CALP 11.

[60] *Richard Adam enr. et CSST*, (1998) CALP 141.

[61] WSIA, s. 2.

[62] The only decision found on homework and workers' compensation in Ontario was Workers' Compensation Appeals Tribunal Decision No. 152/95, released on July 26, 1996, by a panel composed of R.E. Hartman, W.D. Jago and J. Anderson, which determined that a home day-care operator who received her clientèle via an agency was a worker covered under the Act.

[63] *Ibid*, at 7. Although this decision was rendered regarding the *Workers' Compensation Act*, since replaced by the WSIA, there is no reason to believe that the decision would have differed under the more recent statute.

[64] These concepts have been defined both in the *Rehabilitation Services and Claims Manual* and the *Assessment Policy Manual*. The WCA defines workers and employers, while

mentioning, without defining, independent operators. The concept of labour contractors is a policy creation that designates those contractors whose status is particularly ambiguous.

[65] *Workers' Compensation Act*, RSBC, c. 491, a. 1 (WCABC).

[66] Previously s. 7.42, deleted in 1994. For an understanding of the full complexity of the BC provisions and policy, see Decision 98-0563, Workers' Compensation Appeal Division, April 7, 1998, H. Morton, panel chair.

[67] These include:

> the degree of control exercised over the supplier of labour by the person for whom he works, whether the supplier of labour or the person for whom he works provides the necessary equipment or licences, and whether the supplier of labour engages continuously and indefinitely for one person or works intermittently and for different persons. The major test, which largely encompasses these factors, is to ask whether the supplier of labour has any existence as a business enterprise independently of the person for whom he works (Decision No. 255 at 155-156, as cited in Decision 98-0563, Workers' Compensation Appeal Division, April 7, 1998, H. Morton, panel chair, at 23).

[68] Decision 98-0563, Workers' Compensation Appeal Division, April 7, 1998, H. Morton, panel chair, at 24.

[69] Decision 98-0563, Workers' Compensation Appeal Division, April 7, 1998, H. Morton, panel chair.

[70] Decision 96-1247,Workers' Compensation Appeal Division, (1996) 13 *Workers' Compensation Reporter* 71.

[71] Workers' Compensation Appeal Division, Decision 98-0584, April 15, 1998, panel composed of P.L. Byrne, J.M. Callan and S. Hadley.

[72] Decision 32 *Re the Employment Relationship*, March 28, 1974, (1974) 1 *Workers' Compensation Reporter*, at 127.

[73] Thus, in Ontario, a home day-care provider was held to be a worker (Workers' Compensation Appeals Tribunal Decision No. 152/95, released on July 26, 1996, by a panel composed of R.E. Hartman, W.D. Jago and J. Anderson), while a foster care provider in British Columbia was held to be an independent operator (Workers' Compensation Appeal Division, Decision 98-0584, April 15, 1998, panel composed of P.L. Byrne, J.M. Callan and S. Hadley).

[74] WSIA, s.12, allows for voluntary inclusion of some people who were otherwise excluded (i.e., independent operators or sole proprietors or business partners) who work in industries described in Schedule 1 or 2 of the Act.

[75] Under the terms of s. 11(1)b of the WSIA.

[76] WSIA, s.12, allows for voluntary coverage of an independent operator who is defined in s. 2 as "a person who carries on an industry included in Schedule 1 or Schedule 2 and who does not employ any workers for that purpose."

[77] AIAOD, art.18.

[78] *Workers' Compensation Act*, RSNB, c. W-13, s. 2((3)b, reads as follows: "Subject to sections 4 and 6, this Part does not apply to the following […] b) outworkers." Section 4 allows the worker to apply for voluntary coverage.

[79] Regulation 82-79, adopted under the *Workers' Compensation Act* (O.C. 82-360), April 29, 1982 excludes an industry with fewer than three workers usually employed at the same time.

[80] Information confirmed by interview with representatives of the Commission in August 1999.

[81] AIAOD, art. 2: "employer means a person who, under a contract of hire of personal services or of apprenticeship, uses the services of a worker for the purposes of his establishment." An establishment is defined in the *Act Respecting Occupational Health and Safety*, RSQ, c. S-2.1, art. 1: "Establishment means all the installations and equipment grouped on one site and organized under the authority of one person or of related persons in view of producing or distributing goods or services, except a construction site; this word includes, in particular, a school, a construction firm and the lodging, eating or recreational facilities put at the disposal of workers by the employer, excepting, however, private lodging facilities."

[82] *Confection LDG enr. et CSST-Laval*, (1997) CALP 354.

[83] *Richard Adam enr. et CSST*, (1998) CALP 141. See also *Blanchard/Les entreprises TW et Marcoux*, (1995) BRP 455.

[84] *Brulotte et Peter D. Curry*, (1991) CALP 1096.

[85] *CSST et Lebel et Gérard Houle*, (1997) CALP 1470**.** A pregnant worker was given the right to protective reassignment under the *Occupational Health and Safety Act*, although she worked in a private home. The home was considered to be an establishment.

[86] *CSST et Lebel et Gérard Houle*, (1997) CALP 1470. A domestic worker in a private home was held to have the right to protective reassignment legislation, although she would have been excluded from workers' compensation benefits because of the definition of worker in the relevant compensation legislation.

[87] Self-employed hairdressers may obtain voluntary coverage under compensation legislation, but they can only have access to protective reassignment under health and safety law if they are incorporated as a limited company and work for their company.

[88] S. 1 of the *Workers' Compensation Act* of New Brunswick defines "employer" to include "every person having in his service under contract of hire or apprenticeship, written or oral, express or implied, any worker engaged in any work in or about an industry…" and industry

is defined as meaning "the whole or any part of any industry, operation, undertaking or employment within the scope of this Part…."

[89] *Workers' Compensation Act*, RSBC, c. 492, 1996, s. 1: "Employer includes every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry."

[90] WSIA, s. 2: "employer means every person having in his, her or its service under a contract of service or apprenticeship another person engaged in work in or about an industry…"; "industry includes an establishment, undertaking, trade, business or service and, if domestics are employed, includes a household."

[91] A legislative presumption infers, by law, factual conclusions, if certain other facts are proven, thus lightening the burden of the person having to prove that fact. Thus, in Quebec, art. 28 of the AIAOD provides that "an injury that happens at the workplace while the worker is at work is presumed to be an employment injury." The claimant need not prove that an injury is work-related if he/she proves the injury happened at work while the individual was working.

[92] In practice, it is difficult to conclude that these different formulations lead to different meanings. In speaking of the differing wording, Professor Terence Ison (1989: 26) has stated that "the difference in result is fairly marginal." Nevertheless, the Quebec Court of Appeal has held that the different wording justifies the exemption of federal employers from the application of the presumption of s. 28, previously described. See *Lamy et Société canadienne des postes*, [1998] CLP 1472 (QAC).

[93] Workers' Compensation Appeals Tribunal Decision No. 152/95, released on July 26, 1996, by a panel composed of R.E. Hartman, W.D. Jago and J. Anderson.

[94] *Thibodeau* v. *Workers' Compensation Board (N.B.*), (1992) 129 NBR (2d) 271 at 274.

[95] AIAOD, art. 28:"An injury that happens at the workplace while the worker is at work is presumed to be an employment injury."

[96] *Duval* v. *CALP*, (1997) CALP 1840 (Q.S.C.).

[97] *Vigneault et Ministère du revenu du Québec*, CLP 120299-62B-9907, January 7, 2000, N. Blanchard, Commissioner.

[98] *Guay et Entreprises J.-L. Bérubé ltée et CSST*, CALP 57431-02-9403, October 26, 1995, R. Jolicoeur, Commissioner.

[99] *Ferland et Banque de Nouvelle-Écosse et CSST, JuriSélection*, Vol. 5, No. 15, J5-15-14, May 19, 1993.

[100] This argument was retained in a Quebec case where a worker fell in someone else's home. The employer had tried to argue that slippery stairs in a patient's home were the cause of the accident, and that as such the cost should not be attributed to the employer but to the general compensation fund. The tribunal specified that working in other people's home was a risk of

employment and that the employer was rightfully assessed for the costs of the injury. The same reasoning could easily apply to an accident in the worker's own home. See *Hôpital Laval et CSST*, CALP, 70401-03-9506, May 26, 1997, B. Roy, Commissioner, confirming a decision to the same effect rendered on November 25 by Commissioner P. Brazeau, also of the CALP. To the same effect see *Hôpital Laval ET CSST*, (1996) CALP 1005.

[101] For the guiding principles on these issues in common-law jurisdictions see Ison (1989: 28-29). In Quebec, see Cliche and Gravel (1997: 182-185).

[102] WCAT Decision 146/93, November 23, 1993, panel composed of Strachan, Robillard and Jago.

[103] *Daminco et Pinet*, CLP 112072-71-9903, 29 September 1999, A. Vaillancourt, Commissioner.

[104] This problem has been evoked in Australia. See Mayhew and Quinlan (1999).

[105] *Lalancette et Canada Trust*, CALP 88236-09-9705, March 27, 1998, C. Bérubé, Commissioner.

[106] Quebec provides for reassignment under art. 179 of the AIAOD.

[107] See *Tremblay et Provigo Distribution inc.*, CALP, 79396-03-9605, October 4, 1996, M. Carignan, Commissioner.

[108] *Lussier et Saladexpress inc. et CSST*, CALP, 76854-62-9602, October 14, 1997, F. Dion-Drapeau, Commissioner. The worker herself had initially suggested this employment. It is unclear whether the same decision would have been reached if the homework were being imposed on the worker.

[109] *Tremblay et Hopital De Chicoutimi Inc*, BRP, 61042844, November 3, 1993, unpublished decision. The worker was 55 at the time of the hearing and maintained he was incapable of working full time.

[110] *Jean et Hôpital Saint-Joseph de la Providence*, BRP, 61357994, November 16, 1993, unpublished decision.

[111] Information obtained from an interview with the Office of the Worker Advisor in New Brunswick.

[112] Criteria under previous policy were broader, allowing such payments when home-bound employment was "medically and vocationally appropriate." Compare current policy: *WSIB Operational Policy-Labour Market Re-entry (LMR) Home Modifications for Homebound Employment 12.8*, January 1, 1998, with previous *WCB policy: Vocational Rehabilitatoin (VR) Programs, Home Modifications for Homebound Employment, 07-03-11*.

[113] *WSIB Operational Policy - Re-employment Provisions, 9.6*, January 1, 1998.

[114] Information obtained in an interview at the Workers' Compensation Board of British Columbia, April 1999.

[115] *Laur et Verger Jean-Marie Tardif inc.*, (1992) CALP 510; *Boulaajoul et Ferme M.S. Nadon enr.*, (1994) CALP 1540.

[116] Ontario has a policy regarding non-resident workers in which the only criterion is that the claimant has worked in Ontario for more than 11 days and has a substantial connection with Ontario (*Policy Guidelines 01-02-11*). Spokespersons for British Columbia stated, in an interview held in April 1999, that the issue had not arisen but that they could see no reason to refuse a claimant because of immigration status. The same conclusion was arrived at by a spokesperson for the New Brunswick Workplace Health, Safety and Compensation Commission in August 1999.

[117] Undeclared income may nevertheless be considered in determining salary and benefits. See *Chagnon et Bienvenue*, (1986-87) BRP 831; *Lafontaine et Transmission Iberville*, CALP 70135-04-9505, June 3, 1996, M. Renaud, Commissioner; *Denis Raymond et Rajotte*, CALP 15942-62-8912, October 3, 1994.

[118] One Quebec author (Pratte 1995: 561) was critical of decisions permitting the application of art. 9 to independent operators who were homeworkers on the grounds that the employer had no control over their working conditions. He adds that salaried homeworkers would be justifiably covered by workers' compensation legislation because their home becomes part of the employer's establishment when they are working.

[119] *Richard Adam enr. et CSST*, (1998) CALP 141.

[120] *Vêtements de Sports C'est La Vie inc. et CSST*, (1997) CALP 1611. At issue was the application of art. 9, AIAOD.

[121] Decision 96-1247 of the Workers' Compensation Appeal Division, (1996) 13 *Workers' Compensation Reporter* 71, at 80 (British Columbia).

[122] Technical term meaning that the individual employer's accident record affects the cost of his premiums.

[123] *Hôpital Laval et CSST*, CALP, 70401-03-9506, May 26, 1997, B. Roy, Commissioner, confirming a decision to the same effect rendered on November 25 by Commissioner P. Brazeau, also of the CALP. To the same effect see *Hôpital Laval et CSST*, (1996) CALP 1005.

[124] WCANB, s. 3, excludes "members of the family of the employer residing with the employer who are under sixteen years of age."

[125] WCAT Decision 647/91, October 15, 1991, panel composed of Chapnik, Leberta and Preston.

[126] WCAT Decision 837/91, March 19, 1993, panel composed of Newman, Shartal and Apsey (dissenting).

[127] WCAT Decision No. 185/95, June 2, 1995, panel composed of Moore, Ferrari and Apsey.

[128] *Trudel et Doc Mécano inc.*, CALP, 38274-04-9204, August 12, 1999, M. Renaud, Commissioner.

[129] In Quebec, recommendations have been made to repeal article 9, in order that all self-employed, except for dependent contractors, be obliged to pay for their own premiums. This seems to us to be a step backward if the objective is to insure transfer of costs to those best able to bear them. See Bich et al. (1997). Thus far, these recommendations have not led to legislative amendments, and nothing, at present, allows us to conclude that they will be followed. Pratte (1995: 562) also recommends that homeworkers be excluded from compensation.

[130] WSIA, s. 2: "employer means every person having in his, her or its service under a contract of service or apprenticeship another person engaged in work in or about an industry…"; "industry includes an establishment, undertaking, trade, business or service and, if domestics are employed, includes a household."

[131] *British North America Act, 1867*, s. 92(10).

[132] This has been clearly stated by the the Supreme Court of Canada in a trilogy of decisions: *Bell Canada* v. *CSST*, (1988) 1 SCR 749; *Canadien National* v. *CSST et Courtois*, (1988) 1 SCR 868; and *Alltrans*, (1988) 1 SCR 897.

[133] *Canada Labour Code*, RSC, 1985, c. L-2 (CLC), s. 2: "'employee' means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations." See Chapter 7.

[134] CLC, s. 122: "In this part...'employee' means a person employed by an employer" and "employer means a person who employs one or more employees and includes an employers' organization and any person who acts on behalf of an employer."

[135] Rules of interpretation could lead the reader to believe that dependent contractors may be excluded under Part II, but the terms are still broad enough to cover them and the Code should be construed as favouring a broad application of the statute because of its remedial nature.

[136] Sources interviewed stated that this issue had yet to be determined by the courts so this conclusion is uncertain. Nevertheless, sources at HRDC confirmed that a truly dependent contractor would likely be considered an employee under Part II of the Code.

[137] CLC, s. 122

[138] Those enterprises falling under federal jurisdiction because of s. 92(10) *British North America Act*, such as telecommunications companies, railways, airlines, etc.

[139] CLC, s. 125ff. See discussion that follows.

[140] Information confirmed by a spokesperson from HRDC in September 1999.

[141] RSQ, c. S-2.1 (LSST).

[142] Art. 1 of the LSST defines both worker and employer to include those whose relation is based on a "contract of lease of personal service." For certain purposes, the term worker also includes "a person employed as manager, superintendent, foreman or as the agent of the employer in his relations with his workers [and] a director or officer of a corporation except where a person acts as such in relation to his employer after being designated by the workers or by a certified association."

[143] See discussion in Cliche et al. (1993: 103-104).

[144] See, for instance, *Archambault et Salon de coiffure La Jonction*, CALP 29132-62-9105, January 17, 1992, M. Billard, Commissioner.

[145] LSST, art. 11 extends certain rights to management.

[146] LSST, art. 1: "'establishment' means all the installations and equipment grouped on one site and organized under the authority of one person or of related persons in view of producing or distributing goods or services, except a construction site; this word includes, in particular, a school, a construction firm and the lodging, eating or recreational facilities put at the disposal of workers by the employer, excepting, however, private lodging facilities."

[147] *CSST et Lebel et Gérard Houle* (1997) CALP 1470; *Blanchard/Les entreprises TW et Marcoux*, (1995) BRP 455. This is also the opinion of Pratte (1995: 561) who maintains that a salaried worker's home becomes an establishment of the employer. However *Confection LDG enr. et CSST* (1997) CALP 354, concluded that a private home was not an establishment, and *Brulotte et Peter D. Curry* (1991) CALP 1096, held that a gardener working in a private home did not work for an employer who had an establishment because production was not involved, nor were services being provided to third parties.

[148] LSST, art. 1: "'workplace' means any place in or at which a person is required to be present out of or in the course of work, including an establishment and a construction site."

[149] For a general discussion on the distinction between establishment and workplace and its relevance see Cliche et al. (1993: 105).

[150] *Occupational Health and Safety Act*, RSO 1990, c. O.1 (OHSA), s. 1: "'worker' means a person who performs work or supplies services for monetary compensation but does not include an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation programme."

[151] OHSA, s. 1: "'employer' means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services." The term "employer" includes employers of both those who have a contract of service

(employees) and those who have a contract for service (independent contractors): *R.* v. *Whyssen*, (1992) 10 OR (3d) 193. See: S. Brault et al. (1998: 47).

[152] OHSA, s. 1: "'workplace' means any land, premises, location or thing at, upon in or near which a worker works."

[153] OHSA, s. 4.

[154] OHSA, s. 3(3): "This Act does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection therewith."

[155] OHSA, s. 1: "'factory' means, a) a building or place other than a mine, mining plant or place where homework is carried on…." The same section defines homework thus: "'homework' means the doing of any work in the manufacture, preparation, improvement, repair, alteration, assembly or completion of any article or thing or any part thereof by a person for wages in premises occupied primarily as living accommodation." Note the use of the term "means" which indicates that the definition is an exhaustive one and should not be broadened to include unnamed activities.

[156] As of September 3, 1999, the results of the consultation are not public. Sources from the policy advisors of the Ministry of Labour informed us that the response from stakeholders was mixed, some employers object to any application of occupational health and safety legislation to homeworkers because the employer had no control, while other employers felt that some regulatory measures could be appropriate.

[157] *Industrial Safety Act, 1964*, SO 1968, c. 45. Section 1 introduces a definition of homework similar to the one in force today. It also excludes homework from the definition of "factory" and from the definition of "shop." A regulatory system specifically designed for homeworkers appears in Part II of the Act (ss. 27-30), and seems to be the justification for their exclusion from the first part.

[158] *Industrial Safety Amendment Act*, SO 1968, c. 56, s. 5, repealed Part II of the *Industrial Safety Act, 1964*.

[159] *Industrial Safety Act, 1964*, ss. 27-30. In 1968, the homeworker provisions were transferred from the *Industrial Safety Act* to the *Employment Standards Act*, 1968, SO, c. 35, s. 1.

[160] *Occupational Health and Safety Act*, SO 1978, c. 83, s. 3. Most homeworkers were already excluded by the definition of factory, which was not repealed when Part II of the previous act was repealed in 1968. However, the 1978 wording made it very clear that homeworkers of all kinds who worked out of their own homes were not subject to the provisions of the Act, regardless of their employment status.

[161] OHSA, s. 3(3): "This Act does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection therewith."

[162] *Workplace Act*, RSBC 1996, c. 493, s. 5 (WABC).

[163] WABC, s. 1(2):"A private house, room or place used as a dwelling is not a factory, office or shop for the purposes of this Act, except where it is in a class specified by regulations to be a factory, office or shop."

[164] Bill 14-1998: *Workers Compensation Amendment Act, 1998,* s. 23. All provisions relevant to homework came into force on October 1, 1999.

[165] WCABC, s. 71.

[166] WCABC, s. 1.

[167] "'Workplace' means any place where a worker is or is likely to be engaged in any work and includes any vessel, vehicle or mobile equipment used by a worker in work."

[168] The definition of outworker in the *Workers' Compensation Act* and the *Workplace Act* disappears in its entirety. As we have seen, the provisions regarding homeworkers are currently obsolete in any case.

[169] *Occupational Health and Safety Act*, RSNB 1983, c. O-0.2 (OSHANB) s. 3.

[170] Example provided in an interview with a spokesperson for the Workplace Health, Safety and Compensation Commission.

[171] Interview with a spokesperson for the Workplace Health, Safety and Compensation Commission.

[172] OSHANB, s. 1: "'employee' means a) a person employed at a place of employment or b) a person at a place of employment for any purpose in connection therewith."

[173] OSHANB, s. 1:"'place of employment' means any building, structure, premises, water or land where work is carried on by one or more employees, and includes a project site and a mine."

[174] If the owner or occupant employs other people to work in the owner/occupant's home, then the work done by these people could be governed by the Act, and nothing prevents the owner/occupant from being considered the employer.

[175] LSST, art. 1: "'Employer' means a person who, under a contract of lease of personal service or a contract of apprenticeship, even without remuneration, retains the services of a worker."

[176] *CSST et Lebel et Gérard Houle*, (1997) CALP 1470.

[177] CLC, s. 124.

[178] CLC, s. 125 and 125.1ff.

[179] See, for example, CLC, s. 148 (4). This is more theoretically possible than practically applicable as it is very difficult to apply such ambiguous legislation in a penal context.

[180] The whole of Part II of the CLC is seen to apply only to work places under the control of the employer, according to sources responsible for its application. Information confirmed by a spokesperson from HRDC in September 1999.

[181] For instance, see proposed amendment to s. 125.1, which broadens the scope of the provision to include "an obligation for the employer" in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity." *Act to Amend the Canada Labour Code (Part II) in Respect of Occupational Health and Safety*, Bill C-12, First Reading, October 28, 1999, Second Session, 36th Parliament, 48 Elizabeth II, 1999.

[183] CLC, s. 147.

[184] The Ontario legislation not only excludes work done out of the worker's home, but specifically excludes some types of work done from someone else's home in regard to specific rights. For instance, OHSA, s. 43, specifically excludes workers in residential group homes from the right to refuse dangerous work.

[185] LSST, art. 2.

[186] LSST, art. 51: "Every employer must take the necessary measures to protect the health and ensure the safety and physical well-being of his worker."

[187] LSST, art. 51 (1).

[188] LSST, art. 51 (5).

[189] LSST, art. 51 (8).

[190] *Occupational Health and Safety Regulation: Core Requirements* (OHSR Core Requirements), B.C. Regulation 296/97, s. 2.1, effective April 15, 1998.

[191] OHSR Core Requirements, s. 2.2. Provisions governing this right appear in Bill 14, but the chapter regarding the right to refuse did not come into force with the rest of the Act, which came into force on October 1, 1999.

[192] *Regulation Respecting the Quality of the Work Environment*, c. S-2.1, r. 14, applies to establishments, and some cases have concluded that a private home can be an establishment, see above.

[193] OHSR Core Requirements, s. 3.2.

[194] LSST, art. 51 (1).

[195] OHSANB, s. 9.

[196] CLC, s. 128.

[197] OHSR Core Requirements, s. 3.24.

[198] LSST, art. 12.

[199] CLC, s. 204ff.

[200] LSST, arts. 40-48. For details as to the application of this legislation, see Lippel et al. (1996).

[201] *Archambault et Salon de coiffure La Jonction*, CALP 29132-62-9105, January 17, 1992, M. Billard, Commissioner; *Sirois et CSST*, CALP 36096-62-9201, July 31, 1992, L. McCutcheon, Commissioner; *Deschênes et Salon Le Havre*, CALP 43492-62b-9209, March 4, 1993, N. Lacroix, Commissioner.

[202] *CSST et Lebel et Gérard Houle*, (1997) CALP 1470, at 1479.

[203] CLC, s. 205(1), provides that "[a]n employer to whom a request has been made under subsection 204(1) shall examine the request in consultation with the employee and, where reasonably practicable, shall modify the employee's job functions or reassign her."

[204] *Forlini et Watt et Scott inc.*, CALP 27842-60-9103, October 24, 1991, A. Leydet, Commissioner. In this particular case, the worker suggested she could work from her bed, as her doctor had told her she had to stay in bed all the time.

[205] *Canada Occupational Safety and Health Regulations (Consolidated), Canadian Employment Safety and Health Guide* (Toronto: CCH, 1999) at 30141 (Canadian Health and Safety Guide).

[206] Canadian Health and Safety Guide, s. 6.6 and 6.7.

[207] c. S-2.1, r. 15.

[208] Decision 96-1247 of the Workers' Compensation Appeal Division, (1996) 13 *Workers' Compensation Reporter* 71, at 80. This decision refers to the *Industrial Health and Safety Regulations* which were replaced in 1998 by the *Occupational Health and Safety Regulations*.

[209] OHSR Core Requirement, ss. 4.46-4.53.

[210] OHSR Core Requirements, ss. 4.64-4.69. Lighting is particularly important in the garment industry.

[211] OHSR Core Requirements, ss. 4.70-4.80. Indoor air quality is an issue in many workplaces, particularly if the worker is exposed to solvents, fur, dust or fibres. Many homeworkers in British Columbia are working in industries that expose them to these substances.

[212] OHSR Core Requirements, ss. 4.81-4.82. This issue was raised during interviews at the Workers' Compensation Board. When workers are obliged to enter the homes of other people (as in the case of home care), it is possible that regulations might be applicable.

[213] OHSR Core Requirements, s. 4.84, specifically import the exclusions of the *Workplace Act* for the purpose of ss. 4.84-4.106. Rules of statutory interpretation allow us to conclude that these exclusionary provisions do not apply to the rest of the regulation.

[214] *OHSR General Hazard Requirements*, *OHSR Industry/Activity Specific Requirements*. In practice, the nature of the subject matter in the latter regulation precludes its application to home-based work, as it governs industries such as construction projects, diving, forestry, etc.

[215] OHSR Core Requirements, s. 3.18. See also Bill 14-1998, *Workers Compensation Amendment Act, 1998*, s. 23 and s. 182, which came into force on October 1, 1999.

[216] LSST, art. 49 (5).

[217] LSST, art. 51(3).

[218] CLC, s.141.

[219] For instance, CLC, s. 145, allows a safety officer to direct the employer or employee to remedy a situation in contravention of health and safety provisions. There is nothing that would prevent such powers being exercised with regard to a contravention occurring in the home. It must be remembered, however, that under current legislation few specific provisions could apply to home-based work if the home is not controlled by the employer (CLC, ss. 125 and 125.1). In practice, this situation is highly unlikely.

[220] OHSA, s. 54(2): "An inspector shall only enter a dwelling or that part of a dwelling actually being used as a workplace with the consent of the occupier or under the authority of a search warrant issued under section 158 of the *Provincial Offences Act.*"

[221] LSST, art. 179: "An inspector, in the performance of his duties, may, at any reasonable hour of the day or night, enter a place where activities are carried on in the fields contemplated in this act and the regulations, and inspect that place."

[222] RSQ, c. D-2.

[223] *Comité paritaire de la chemise* v. *Potash*, (1994) 2 SCR 406, at 407. The issue was whether inspection mechanisms under the Act were contrary to s. 8 of the Charter of Rights, which protects citizens from unreasonable search and seizure. Home inspections were not, per se, unreasonable.

[224] *Ibid.*, 410.

[225] In its original version, the LSST specified that inspection of a private home could only be done with a warrant. This provision was repealed in 1986 by the *Loi modifiant diverses dispositions législatives eu égard à la Charte des droits et libertés de la personne*, SQ 1986, c. 95, s. 302. The reason for the repeal is unclear. However, it could be assumed that the

right to privacy under s. 5 of the *Quebec Charter of Rights and Freedoms* restricts the right of inspection. Given the limited application of the right to privacy in the context of labour relations in Quebec, it is unlikely that the right of inspection would be curtailed by the broad language of the Quebec Charter. See, for example, *Syndicat des travailleuses et travailleurs de Bridgestone Firestone de Joliette (CSN)* v. *Trudeau and Bridgestone/Firestone Canada Inc.*, [1999] RJQ 2229 (QAC).

[226] LSST, arts. 185 and 236.

[227] OHSR Core Requirements, s. 3.15 (the obligation applies to "all workplaces"). Information confirmed in interviews.

[228] Bill 14-1998, *Workers Compensation Amendment Act, 1998*, s. 181 (in force as of October 1, 1999).

[229] OHSANB, s. 28 (1), allows for an inspection by an officer in these terms: "at any reasonable hour and without notice, enter upon and inspect any place that he believes to be a place of employment, and at that place of employment conduct any tests, take photographs, make recordings, take any samples and make any examinations that he considers necessary or advisable."

[230] Information obtained by interview with a spokesperson for the Prevention Services Division of the Workplace Health, Safety and Compensation Commission, June 1999.

[231] CLC, s. 157.

[232] OHSA, s. 70.

[233] LSST, arts. 223ff.

[234] OSHANB, s. 51.

[235] See generally, Vega Ruiz (1992). See also the discussion regarding debate on this issue in the United States where the role of the Occupational Safety and Health Administration in home inspections is hotly debated (Levenstein 1999).

[236] Bill 14, which came into force on October 1, 1999, provides for specific mechanisms of inspections of private homes.

[237] Proposed amendments in Bill C-12 would dissipate much of the confusion surrounding the current legislation.

[238] OHSA, s. 3(3): "This Act does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection therewith."

[239] See, for example, British Columbia's Bill 14, s. 181.

7. ORGANIZING AND COLLECTIVE BARGAINING

Throughout this study we largely address issues that concern the vast majority of homeworkers who are not covered by collective agreements. Issues faced by homeworkers in unionized workplaces can be quite different and their situation also requires further research. Collective bargaining is an important avenue available to workers for improving their working conditions and income.[1] The unionization rate in Canada is over 30 percent, although only 19 percent of private sector workers are unionized.[2] Homeworkers, who, because of their place of work, are isolated and difficult to locate, have great difficulty organizing. This has been a challenge to the labour movement since its beginnings.[3] The Canadian collective bargaining model, which is essentially the one employer, one site, one bargaining unit model, appears to be flawed, since it tends to exclude small workplaces and more marginal workers, including many homeworkers. Because of the location of their work, homeworkers are often unable to exercise their right of association with other workers, or, if they are part of an association, such as a union, often have difficulty participating in its activities. The need for homeworkers to form associations, including unions, has often been reiterated, and innovative forms of organizing from the grass roots up have been documented in several countries, including in the Canadian garment sector.[4]

The majority of workers are covered by provincial labour legislation for the purpose of unionization and collective bargaining, with just 10 percent falling under federal jurisdiction, which only covers a very limited number of sectors of activity.[5] None of the jurisdictions studied denies homeworkers, in any sector, the right to form and join a union with other workers. The laws pertaining to unionization and collective bargaining are essentially silent regarding the situation of homeworkers. Since most of the laws concerning organizing and collective bargaining make no mention of their application to workers who do not fit the unambiguous full-time, on-site worker model, specialized tribunals have developed legislative interpretations based on the facts of each case that tend to promote the right of workers to benefit from the right to unionize and to be a part of the same unions as permanent, full-time workers.[6]

We have found it important to distinguish between situations where employees are performing homework before the certification process, and after. In the first case, it would appear that the present certification model renders the unionization of homeworkers particularly difficult, since identifying and locating homeworkers without the involvement of the employer is unlikely. At the same time, the communication by the employer of personal information concerning workers, such as telephone numbers and addresses, without the prior consent of the concerned employees, is also problematic under both labour and privacy laws. This does not, however, necessarily constitute an insurmountable problem, as will be explained further on.

It is equally important to identify the effects and consequences of homework on union life and the difficulties related to the application of collective agreements once employees working for a same employer are dispersed outside the workplace. When the certified association is already in place, co-operation between the employer and the union is generally the result of specific provisions in the collective agreement. None of the laws studied prohibits or limits the possible

content of a collective agreement, as long as its provisions are not contrary to the law. It is, therefore, possible to contemplate the inclusion of specific clauses in collective agreements to protect homeworkers more adequately and to promote the exchange of information on union-related activities between homeworkers and their union.[7]

One preliminary determination to be made before a particular homeworker or group of homeworkers can unionize, is the "employee" status of the homeworker. Once again, the homeworker finds herself/himself facing the problem of the definition of the limits of self-employment. The next obstacle encountered by unions and homeworkers is how to communicate for the purpose of an organizing campaign. How can homeworkers know who and where their colleagues are? How is the union to know that homeworkers are working for a company, or who they are? How are the homeworkers to know that an organizing campaign is under way if they have little or no contact with their colleagues? The Canadian model for determining the appropriate bargaining unit also has repercussions on homeworkers, as it is not necessarily adapted to the reality of homework. In addition to the model becoming increasingly obsolete, new forms of homework, such as home telemarketing, are emerging in the service sector, which has traditionally been difficult to unionize. Different bargaining models have been developed over the years to respond to particular realities of the work force. By examining these models, it is possible to start to develop bargaining frameworks that are more adapted to the situation of homeworkers.

Independent Contractor, Dependent Contractor or Employee?

Under all the laws analyzed, an "employee" is someone who performs work under the orders of an employer in exchange for remuneration. Each law also excludes from its purview certain categories of employees on the basis of the nature of the work they perform and their level of responsibility.[8] The truly independent contractor or self-employed person is also excluded from the definition of "employee" in labour relations legislation in all jurisdictions. Dependent contractors, however, have been found to be covered and thereby are able to form part of a bargaining unit (Adams 1999: 6.10). In Ontario, British Columbia and federally, dependent contractors are explicitly covered by labour relations legislation.[9] In Quebec, the term "employee" has often been broadly interpreted by labour tribunals to include dependent contractors.[10]

Homework and Organizing

Access to employees for organizing purposes obviously constitutes one of the main obstacles to the exercise of the right to unionize for homeworkers. While there have been reams written on the question of union access to employers' property for organizing purposes and the hours at which this can be done,[11] as well as the adoption of provisions to delimit organizers' access, the legislation and the case law are relatively silent on the question of access to employee lists to organize homeworkers. All the jurisdictions have provisions on limited access to remote sites controlled by the employer for organizing purposes.[12] While some provincial labour relations boards have ruled that unions can have access to employees' addresses and telephone

numbers (Adams 1999: 10.580), only the *Canada Labour Code, Part I*, has a specific legislative provision that could encompass the situation of homeworkers.

Following a recommendation made in the Sims Report (1996), this provision on the communication with "off-site" workers came into force at the beginning of 1999.[13] It had been the subject of much discussion before parliamentary committees, particularly with respect to employee rights to privacy.[14] Under the provision, a trade union can apply to the Canadian Industrial Relations Board for an order requiring an employer to give the union or the Board the names and addresses of employees whose normal workplace is not on premises owned or controlled by the employer. The Board can also authorize the union to communicate with these employees by electronic or other means for the purpose of soliciting union memberships, negotiating or administering a collective agreement, processing a grievance or providing union services to employees. In order to respect the privacy of the employees on such a list, the Board can set the terms and conditions for such communications. These terms can include obtaining the consent of each employee for the transmission of the information to the union. The Board can also require the employer to transmit the information that the union wants to communicate to workers by electronic mail or other electronic communications systems. Future case law will determine how these new provisions will be applied.

New technologies in the workplace, such as electronic mail, are requiring that new attitudes be adopted by legislators, labour boards and employers. For example, the Ontario Labour Relations Board has found the use of an internal mail system during an organizing drive to be legal if the employer permitted the use of this system during working hours for non-work related communications in the past, such as for the activities of a staff association.[15] The provision in the *Canada Labour Code* is an example of how a union's right of access to workers can be clarified and extended, including for organizing purposes.

Collective Bargaining

A single collective bargaining model exists in all five jurisdictions.[16] Employees can negotiate a collective agreement if they form a recognized bargaining unit within an enterprise. The prevailing model is one workers' representative (certified bargaining unit) for one employer. The provisions on the certification process are to all intents and purposes identical from one law to the next, in that they exclude interference on the part of the employer, such as financial contributions to the union.[17] If it is determined that there has been interference, the unit will generally not be certified. Once the unit is certified, the situation changes somewhat; for example, employers can provide a place for union activities.

In order for an employee's association to become certified and have the right to be the bargaining agent for and represent the employees, it must initially have the support of a certain percentage of the employees contemplated for the bargaining unit. In all the jurisdictions looked at for this study, with the exception of Ontario,[18] certification can take place without a vote if the percentage of employees supporting the union reaches a set percentage. A union can be certified following a representation vote if, in Quebec and

federally, there is evidence of at least 35 percent employee support for certification,[19] in British Columbia 45 percent,[20] and in Ontario and New Brunswick, 40 percent.[21]

With this model, one collective agreement covers all employees or a defined group of employees working for a same employer. Employees will be grouped within a single bargaining unit in their negotiations with the employer and for the purpose of the application of the collective agreement. This model is based on the identification of the employer as an enterprise, division or factory, generally located in one place. The case law tends to recognize certification by work site, which makes it possible for an employer having several work sites in different geographical locations to have workers under different bargaining units. Each bargaining certificate, however, usually only covers a group of workers organized according to their geographical location, work activity (e.g., office workers versus production workers) or professional category. To be grouped into one bargaining unit, the workers must share a "community of interests."

This traditional collective bargaining model tends to have exclusionary effects on women, generally, and particularly on precarious workers and those who work in small workplaces.

> Although individual worksites are considered "natural" bargaining structures, work site based bargaining units tend to be gender-biased. This is because women who are employed in female-dominated workplaces are placed into bargaining units separate from their male counterparts. Moreover, individual employer units have made bargaining difficult for employees in small workplaces and precariously employed individuals who do not have the strength to overcome hard bargaining tactics by employers. Unit by unit bargaining generally leaves such employees weak and vulnerable.[22]

Added to this gender division among bargaining units, homeworkers and other precarious workers may sometimes be excluded from bargaining units altogether, since their interests may be considered to be different from those of the other workers.[23]

New Challenges for Unionization and Collective Bargaining

While unions have been grappling with industrial homework for over a century, other forms of homework have been emerging in new sectors of activity. The revolution in information and communications technologies, in recent decades, has put home telework on the union agenda.

For example, telework in the Canadian federal public service has received much attention lately.[24] The Public Service Alliance of Canada, which represents these employees, has not taken an unequivocal position against home telework, since it allows that these types of arrangements can be beneficial for some of its members.[25] It has, however, determined conditions that it considers essential for the implementation of telework programs. Some of these conditions are:

- telework must be voluntary;
- telework arrangements must respect existing collective agreements and teleworkers must remain members of their bargaining units;
- telework must not be used to avoid implementing employment equity programs in the workplace;
- telework should only rarely be used on a full-time basis, although the union recognizes that a telework arrangement can be a short-term solution for workers with disabilities or chemical sensitivities;
- telework should not be used as a long-term solution to health and safety problems; and
- telework should not result in a requirement for productivity increases and the hours of work provisions of the collective agreement should apply (PSAC 1994).

This position echoes recommendations made in some of the literature on the subject.[26] Other issues that have also been addressed in the context of collective bargaining are the right of return to the workplace, the provision of equipment, the payment of overhead costs, access to training, and the employer's right of access to the home-based workplace.[27]

There is debate on whether an employer can conclude a telework agreement (or any homework agreement, for that matter) with an individual employee, if this possibility has not been negotiated between the employer and the union. For example, the Federal Public Service telework pilot policy, implemented in 1992, provides that individual employees and managers can conclude a voluntary home telework arrangement without the consent of the union (employees are however encouraged to inform their union representatives of the arrangement).[28] At the time of writing, no telework agreements had been incorporated into a collective agreement between the unions and Treasury Board.[29]

The issue of the union's exclusive bargaining authority was also raised in a British Columbia case before the Court of Appeal in which it was determined that employers cannot unilaterally oblige an employee to work from home. Stemming from this principle, employers (in British Columbia, in any case) may not be able to arrive at individual agreements with employees on working at home, since the union would have exclusive bargaining rights and must, in turn, obtain the consent of individual employees.[30]

Order taking from home in the fast-food business is another example of the possibilities offered to companies by new technologies. In 1992, a Toronto fast-food company began contracting out its order-taking service to "independent" operators working at home.[31] Unionized order takers at the restaurants received over $10 an hour, bonuses, sick leave and vacation pay, and had group insurance. The "independent" homeworkers under contract were paid by the call, and got no benefits. They also had to pay rent to the company for the computer and modem, and were required to install and pay for another phone line. They were also obliged to pay for a service contract on the computer equipment.

After a lengthy strike, a collective agreement was signed with specific provisions on this type of homework, the first of its kind in Canada. Among other provisions, the homeworkers' current collective agreement provides that homeworkers do not have to pay for their equipment or for its maintenance and repair, are reimbursed for the installation of additional phone lines, have access to training, and are to be paid in case of computer failure or technical difficulties that keep them from working.[32] The agreement also provides that the union can use the company's computer network to transmit information on union activities.

Policies on telework being developed by unions and management are becoming increasingly prevalent, and models of collective agreements containing home telework clauses are multiplying. It is foreseeable that more and more collective agreements will provide for increased protection of homeworkers, as the realities of working at home become more widely known and discussed.

Some other issues have been raised in regard to the participation of homeworkers in union activities (Huw and Podro 1995: 22ff). Among them is the representation of homeworkers in union decision making, and the guarantee that their interests be protected during negotiations. For example, a way to ensure that homeworkers are able to attend union meetings is to provide child care and hold meetings at times and places convenient for homeworkers.

Broader-Based Bargaining

To overcome some of the problems of locating workers for unionization purposes and of ensuring adequate bargaining power, different models of sectoral, or multi-employer, bargaining have been put forward, especially by workers' advocates.[33] This form of bargaining, which exists in such sectors as the construction industry, applies to workers and employers in a given occupational sector, economic sector and/or geographical territory. Such models also exist to a limited extent in some sectors where homework is present, such as the garment industry. Sectoral bargaining is seen as a means to render collective bargaining more accessible to a wider range of workplaces, particularly small workplaces, since it is more inclusive with regard to workers who have been traditionally marginalized.

> Without the aid of some form of sectoral certification and bargaining, unions are in a weak position in terms of removing workers' standard of living from competition among employers. Unions generally cannot use economic sanctions to persuade other employers within a sector to adopt the provisions of a specific collective agreement. Nor can they encourage other employers to maintain the same overall labour costs as the employers bound by the collective agreement. Their only recourse is to bargain on an individual basis to induce each employer to agree to the same terms and conditions that were achieved at other individual worksites (MacDonald 1998: 267).

It is difficult to make generalizations about homework as a whole, since, apart from some industrial sectors, such as the garment sector, and perhaps some service sectors where home order taking is present, such as the fast-food industry, it may be difficult to define sectors that

could bargain in this fashion. Not only must workers be represented, but employers also have to be grouped together for this model to work. As homework has expanded into almost all sectors of activity, it may be necessary in some cases to design models for specific sectors. It is, therefore, difficult to find one solution adapted to all homeworkers.

As well, homeworkers in a given sector must have the necessary bargaining power to be able to get a group or an association of employers to sit down at the table and negotiate. In sectors that generally have low union density, such as much of the private service sector, it is difficult to foresee how homeworkers will be able to bargain for their specific needs when on-site workers have had problems organizing. Below are some models that provide interesting examples of how sectoral bargaining could be designed to encourage greater bargaining power between homeworkers and their employers.

The British Columbia "Sectoral Certification" Model

One model of sectoral bargaining was developed in British Columbia. Although it was never implemented, since it was confronted with substantial employer opposition and timid support from the union movement, it provides some ideas for overcoming the difficulties encountered by more vulnerable workers.[34] Under this proposal, bargaining units in small firms in a given sector would be able to join together to negotiate collectively with their employers, with one master collective agreement covering the entire sector. In each workplace, majority union support would be necessary to bargain jointly with employers, thereby leaving the choice of being represented by a union to workers in each enterprise. Bargaining units organized during the life of a collective agreement could then be covered by the agreement for the sector and, subsequently, participate in negotiations with the employers for a new agreement on its expiry. Unions with sufficient support at new locations within the sector could also obtain changes to the bargaining certificate to encompass the employees in these other locations, thereby dismantling, in part, the location-specific bargaining unit model. Such a framework would facilitate the negotiation and enforcement of collective agreements in small workplaces, as well as increase workers' bargaining power with employers (MacDonald 1998: 271).

The Quebec Collective Agreement Decrees Model

The Quebec decree system is unique in North America and dates back to the 1930s.[35] Originally designed to curtail unfair competition between unionized and non-unionized companies in a given industrial sector or geographical region, the system has been important in raising the legal standards pertaining to working conditions in many industries: garment, furniture, building cleaning, private security agencies, hairdressing, etc. The legal framework for the decree system is to be found in the *Act Respecting Collective Agreement Decrees,*[36] which provides for the extension by the government of certain collective agreements in specific regions and sectors of activity in Quebec, thereby offering similar[37] working conditions to those found in the relevant collective agreements to non-unionized employees working in these sectors of activity. The decrees are administered by parity committees composed of representatives from the contracting unions and employers' organizations. The parity committee is responsible for the enforcement of the decree, including the receipt of complaints, inspection of workplaces and legal recourse against employers on behalf of

workers covered by the decree. Only the decrees in the garment sector make specific reference to homework. It should be noted that the decrees in this sector are being repealed as of July 2000.

The *Decree Respecting the Women's Clothing Industry*[38] permits homework and contains specific provisions concerning working conditions for homeworkers. First, a person already working in a factory cannot be asked by the employer to do at home the same work being performed in the factory.[39] Work is considered to be "homework" if it is performed at the home of the worker or any other private residence.[40] Homeworkers are to be remunerated on a piece-rate basis, at the prevailing rate for similar clothing in the industry or in the employer's factory. This rate must be increased by an additional 10 percent for homework, and homeworkers also get a bonus, the amount of which is fixed by the decree.[41] Employers are obliged to provide the thread and must deliver and pick up the clothing at the employee's home.[42] An employer asking someone else to redo work that is not satisfactory, may not request that the worker who performed the work in the first place shoulder the cost.[43]

Homeworkers must be registered with the parity committee. The exact number of homeworkers in the women's garment industry has for obvious reasons not been determined, but the parity committee estimates their number at close to 20,000, that is two homeworkers for every one of the 9,500 in-shop workers covered by the decree. There were, however, only about 200 homeworkers registered in 1999,[44] down from 600 in 1990.[45] A spokesperson for the parity committee commented that it has become extremely difficult to enforce the provisions of the decree concerning homework.[46] The vast number of jobs that have officially "disappeared" in the garment industry seem to have been transferred to the home and remain undeclared and hidden.[47]

The *Decree Respecting the Men's Clothing Industry* completely prohibits employers from hiring homeworkers to make men's clothing and prohibits workers from working at home on items covered by this decree.[48] However, if a homeworker works on items covered by the men's garment decree, and has a claim for unpaid wages or other benefits covered by the decree, the men's parity committee will claim the money on the worker's behalf, and perhaps fine the employer since homework is not allowed under the decree.[49]

In recent years, the relevance of the decree system for certain industries has been called into question. In 1997, the decrees for the woodworking and flat glass industries were both repealed, and in the 1997 Quebec budget speech there was a commitment to review the decrees governing the furniture, automotive services and garment industries.[50] In 1998, the *Lemaire Report*,[51] prepared by the Advisory Panel on Regulatory Reform for the Premier of Quebec, recommended the dismantling of the decree system for the men's, women's and boys' shirt and leather glove industries. The Panel concluded that the decrees overlap with the universal labour relations and labour standards already in place, that their administration is costly, and that their repeal would be beneficial for investment and employment.[52] This recommendation was endorsed by the Premier (Quebec, Premier's Office 1998) and, in May 1999, Bill 47 was tabled, providing for the disbanding of the parity committees, the repeal of the decrees in the garment industry, and the adoption of special transitory and sectoral

provisions concerning wages and working conditions for garment workers to be included in regulations adopted under the *Act Respecting Labour Standards.*[53] Public consultations on the bill were held in the fall of 1999.[54] The *Act Respecting the Conditions of Employment in Certain Sectors of the Clothing Industry and Amending the Act Respecting Labour Standards* (Bill 47)[55] came into force in November 1999. The decrees in the four clothing industries above were thus extended until June 30, 2000 and are repealed after that date. The parity committees are also disbanded after that date: monitoring and inspection duties are transferred to the Commission des normes du travail. The government reserves the right to adopt specific regulations under the *Act Respecting Labour Standards* on minimum wages, working hours, holidays, meal periods and leave for family events for workers who were covered by the abolished decrees.

There are no specific references to homework in the new law, although it does provide for broad regulatory powers that could conceivably encompass provisions protecting garment workers who work in private residences, particularly in the women's garment industry. According to a spokesperson for the parity committee, the section in the women's garment decree concerning homework will most probably not be maintained in the regulations, and there are no immediate plans to provide special protection for homeworkers in the projected changes.[56] With declining government and employer support for the decree system, particularly in the industrial sector,[57] its future remains uncertain.

The "Status of the Artist" Model

Another model that has emerged in the last decade is that pertaining to the status of the artist. Three statutes, two adopted in Quebec[58] and one federally,[59] provide for an organizing and collective bargaining framework for "artists," as defined in the legislation. These statutes provide for the recognition of artists' associations and of producers' and distributors' associations for bargaining purposes. Two main features of this model are the recognition of artists as independent contractors and their right to bargain collectively, and the recognition of producers or distributors as providers of work who must adhere to collectively bargained standards, or specific statutory contractual standards. Artists who are "employees" and can be part of a bargaining unit under the Quebec or Canada labour codes are excluded from the purview of the status of the artist acts.

To illustrate, performing, recording and film artists under the Quebec law can request that their association be recognized for the purpose of bargaining collectively with producers' associations.[60] The association represents its members for the purpose of collective bargaining and the application of collective and individual contracts, and collects dues and monies owed to a member on the member's behalf, etc.[61] Collective contracts provide for a minimum with regard to salary and working conditions; members can negotiate individually with producers for more generous conditions. The artists' and producers' associations have an obligation to negotiate in good faith, and can have recourse to mediation, or, in the case of a first collective contract, to arbitration or, if negotiations fail, to pressure tactics.[62] This model, therefore, provides a framework for sectoral bargaining between workers and "providers of work," neither of whom meets the traditional criteria of the definition of "employee" or "employer" under labour relations legislation.

There are various models for sectoral or multi-employer bargaining adapted to the Canadian labour relations landscape, not all of which have been discussed here. Several have been tried and tested, and have proven successful. The Quebec decree system, for example, has been around for almost 70 years, despite its detractors. The traditional single employer, one work site bargaining model is less and less suited to today's reality. Broader-based bargaining has to be looked at seriously by policy makers and employers; the labour movement has been discussing the issue for years. In the case of homeworkers, this form of bargaining, for both "employees" and truly independent contractors, in all sectors, would clearly be beneficial.

The obstacles encountered by homeworkers to organize and bargain collectively are many, and most of them are created by the prevalent framework for the certification of bargaining units. Organizing and bargaining collectively cannot, however, be isolated from other realities surrounding homework. Since locating homeworkers for the purpose of organizing is one of the first steps, mechanisms must be developed to ensure union access to these workers. In some sectors, particularly in industrial sectors, registries of homeworkers and providers of work, throughout the chain of production, can remedy part of the problem.[63] More generally, labour relations legislation should provide for union access to employee lists, with addresses, phone numbers and/or electronic addresses, under conditions that respect workers' privacy. Collective bargaining remains the best means of protecting workers' interests and improving working conditions. The legislative framework must be adapted to fulfil this goal and promote an effective right to organize.

Policy Recommendations

- The burden of proving the status of independent contractors for the purpose of inclusion in a bargaining unit should be on the employer. In jurisdictions where "dependent contractors" are not explicitly covered by labour relations legislation, they should be included.

- Labour codes should explicitly indicate that homeworkers are "employees" for the purpose of the legislation. It will then be up to the employer to demonstrate that a homeworker is, in fact, an independent contractor.

- The adoption of a provision modelled after section 109.1 of the *Canada Labour Code* on communication with off-site workers should be included in other labour relations legislation.

- Forms of broader-based bargaining, which take into consideration the situation of homeworkers, should be explored and implemented, in consultation with unions and other stakeholders.

- Financial and technical support should be given to associations which provide services and meeting places (including "virtual" meeting places) for homeworkers.

- Formal recognition, by the adoption of legislative and other measures, should be given to homeworkers' associations to ensure the representation of their interests at forums where policy issues and legislative changes relating directly or indirectly to homework are being discussed.

Endnotes

[1] For instance, statistics show that unionized workers earn considerably higher wages than non-unionized workers. Average hourly earnings of full-time unionized workers in 1999 were $19.06 versus $15.57 for non-unionized workers, and $16.80 versus $9.81 for part-time workers (Akeampong 1999).

[2] The unionization rate in the public sector is around 71 percent. Women's unionization rate is slightly lower than the average rate of 30.9 percent, at 29.3 percent. These rates vary as well from province to province, with Quebec having the highest rate.

[3] For an account of the U.S. experience, see du Rivage and Jacobs (1989).

[4] See Tate (1993, 1996); Huws (1995); SEWA (1998); European Commission (1995). For example, according to union representatives in the garment sector and workers' advocates interviewed in Canada, English as a second language training and other training courses are effective ways of getting homeworkers together to exchange information and ideas on their working conditions.

[5] See s. 2 of the *Canada Labour Code*, RSC, 1985, c. L-2 (CLC, Part I) for a non-exhaustive list of areas that fall under federal jurisdiction. This list includes interprovincial communication, air transportation, banking and radio broadcasting.

[6] Gagnon (1992: 422). However, see for example, *Paris Neckwear Co. Ltd*. (1970) OLRB Rep. May 203, where homeworkers were excluded from the bargaining unit of production workers in a garment factory.

[7] See for example, "Collective Labor Agreement Between: Franchise Owners Toronto Limited and United Food and Commercial Workers International Union, Local 175 CLC-AFL-CIO." Expiry date August 19, 2000, article 16.01, which provides for the opportunity for the union to have notices transmitted to employees through the employer's computer system.

[8] For example, persons exercising managerial functions are excluded from the legislation of all the jurisdictions studied. Domestic workers are excluded from the purviews of the Ontario *Labour Relations Act, 1995*, SO, 1995, C. 1, Sch. A, as amended (OLRA), s. 3a), and of the New Brunswick *Industrial Relations Act*, RSNB, c. I-4 (NBIRA), s. 1 ("employee"). Small numbers of agricultural workers cannot form a certified bargaining unit under the Quebec *Labour Code*, RSQ, c. C-27 (QLC), art. 21(5) or the NBIRA (s. 1(5)), and are completely excluded from the OLRA (s. 3 (b), (c)).

[9] OLRA, s. 1(1): "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, materials, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor; ('entrepreneur dépendant')." British Columbia *Labour Relations Code, 1996*, SBC, c. 244 (BCLRC), s. 1(1) defines "dependent contractor" as:

> …a person, whether or not employed by a contract of employment or furnishing his or her own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he or she is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

In the CLC, Part I, s. 2, the term "employee" "means a person employed by an employer, and includes a dependent contractor." See CLC Part I, s. 2, under "dependent contractor."

[10] See Gagnon (1996: 48-51). Unions in Quebec have, however, repeatedly asked that the Quebec *Labour Code* be explicitly modified to include dependent contractors. See for example, CNTU (1998). See also the recent consultation document presented by the Quebec Minister of Labour which discusses the status of independent and dependent contractors under the Code (Quebec, Ministère du Travail 2000).

[11] See for example Adams (1999: 10.57ff).

[12] CLC Part I, s. 109; BCLRC, s. 7; NBIRA, s. 4(2); QLC, ss. 8 and 9; OLRA, s. 13. In Ontario, for example, it has been held that an employer must disclose job-site locations to a union when there is to be a representation vote. Adams (1999: 10.590).

[13] CLC Part I, s. 109.1; SC 1998, c. 26, s. 50:

> (Communication with off-site workers) 109.1 (1) On application by a trade union, the Board may, by order, require an employer to give an authorized representative of the trade union mentioned in the order, or the Board, or both, the names and addresses of employees whose normal workplace is not on premises owned or controlled by their employer and authorize the trade union to communicate with those employees, by electronic means or otherwise, if the Board is of the opinion that such communication is required for purposes relating to soliciting trade union memberships, the negotiation or administration of a collective agreement, the processing of a grievance or the provision of a trade union service to employees; (Contents of order) (2) An order made under subsection (1), (a) must specify the method of communication, the times of day and the periods during which the

> communication is authorized, and the conditions that must be met in order to ensure the protection of the privacy and the safety of affected employees and to prevent the abusive use of information; and (b) may include a requirement that the employer, in accordance with any terms and conditions that the Board establishes, transmit the information that the union wishes to communicate to the employees by means of any electronic communications system that the employer uses to communicate with the employees; (Board transmission) (3) If the Board is of the opinion that the privacy and safety of affected employees cannot otherwise be protected, the Board may (a) provide each employee with the opportunity to refuse the giving of their name and address to the representative of the trade union that the Board authorizes and, if the employee does not so refuse, may transmit that name and address to the authorized representative; or (b) transmit the information that the union wishes to communicate to the employees in the manner it considers appropriate; (Protection of names and addresses) (4) The names and addresses of employees provided under subsection (1) shall not be used unless it is for a purpose consistent with this section.

[14] See the "Proceedings of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities" March 24, 1998 (0945, 1025, 1040, 1045, 1055, 1115, 1210, 1535, 1540, 1635), March 25, 1998 (1710, 1735, 1740, 1745, 1805, 1810, 1815, 1820), March 26 1998 (0910, 0915, 1125, 1140, 1545, 1550, 1655), March 31, 1990 (1605, 1615), April 1, 1998 (1700), April 2, 1998 (1050, 1055, 1100, 1715, 1720), April 30, 1998 (2012, 2015); and the "Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology," First Session, 36th Parliament, 1997-98, Issue 4, June 10, 1998, Issue 15, June 16, 1998, and Issue 16, June 17, 1998. One of the principal subjects of debate was whether it would be necessary to obtain employee consent before giving names and other specified information to the union.

[15] See for example *CUPE and University of Toronto (Re)*, (1988) 18 CLRBR (NS) 321 (Ont.). If this practice was not permitted by the employer, it has however been found that such a system cannot be used for organizing purposes. See *Union of Bank Employees, Loc. 2104 and Canadian Imperial Bank of Commerce (re)*, 85 CLLLC 16, 021 (CLRB). See also Broder (1996) for a discussion of "cyberspace" as a workplace for the purposes of the US *National Labor Relations Act.*

[16] For an overview, see Adams (1999: 2.05ff).

[17] QLC, art. 12; OLRA, s.15; BCLRC, s. 6(1); NBIRA, s. 5, CLC Part I, s. 25(1).

[18] OLRA, s. 8(2).

[19] CLC Part I, s. 29(2); QLC arts. 28-32.

[20] BCLRC, ss. 18(1), 24(2).

[21] NBIRA, s. 14(2); OLRA, s. 8(2).

[22] MacDonald (1998: 256). See also ILGWU and INTERCEDE (1993: 58ff).

[23] See for example, *Paris Neckwear Co. Ltd*., (1970) OLRB Rep. May 203, where homeworkers were excluded from the bargaining unit of production workers in a garment factory. See also Gagnon (1996: 272).

[24] See Johnson (1996); Borowy and Johnson (1995).

[25] For a critique of the telework program in the federal public service, see Borowy and Johnson (1995).

[26] See for example: "To conclude an agreement on teleworking in the home: Working at a distance" in NUTEK (1997); McGrady and Jamieson (1996-97).

[27] See also the "Memorandum of Understanding #4: Telework" agreed to in April 1996 by the Government of British Columbia and the British Columbia Government Employee's Union (BCGEU) reproduced in "Telework: a sign of changing times," (1996). See also in the same issue a summary of the provisions contained in the 1997 collective agreement between Ontario Hydro and the Society of Ontario Hydro Professional and Administrative Employees, at 3.

[28] See PWGSC (1996); Johnson (1996). The exclusive bargaining authority of the union over telework arrangements was raised in a 1993 case concerning the Treasury Board policy but the Public Service Staff Relations Board did not determine one way or another whether such agreements could be concluded between an individual employee and the employer. *Association of Public Service Financial Administrators and Treasury Board*, Files 161-2-684, 169-2-531, March 3, 1993 (PSSRB).

[29] Information obtained from a spokesperson at the Treasury Board, August 1999. However, see the "Framework Agreement on Telework" concluded between the Procedural Clerks and Analysis and Reference Bargaining Unit (represented by the Professional Institute of the Public Service of Canada) and the House of Commons of Canada, which came into effect January 1, 1998.

[30] See McGrady and Jamieson (1996-97); Roper (1996-97: 316). McEachern CJBC did not explicitly determine that homework arrangements must in all cases be negotiated: "I leave the dimensions of residual management rights and exclusive bargaining authority to be defined, as they are in the course of being defined, by the arbitration process or by collective bargaining." *Association of University and College Employees, Local 2* v. *Simon Fraser University and Industrial Relations Council of British Columbia* at 348. See also "Telework: a sign of changing times" (1996).

[31] See the "Pizza Pizza" case in Canadian Centre for Policy Alternatives (1992: 15-16).

[32] See "Collective Labor Agreement Between: Franchise Owners Toronto Limited and United Food and Commercial Workers International Union," Local 175 CLC-AFL-CIO. Expiry date August 19, 2000.

[33] See for example, ILGWU and INTERCEDE (1993: 58ff); Massé (1998); CNTU (1998).

[34] For a description and a critical analysis of this model, see MacDonald (1998). This proposal was introduced by John Baigent and Vince Ready in a Report for the Minister of Labour on labour law reform (Baigent et al. 1992).The proposal is known as the Baigent/Ready proposal.

[35] For a history of the decree system, see Dubé (1990); Bergeron and Veilleux (1996-97).

[36] RSQ, c. D-2, art. 2 states: "The Government may order that a collective agreement respecting any trade, industry, commerce or occupation shall also bind all the employees and professional employers in Quebec or in a stated region of Quebec, within the scope determined in such decree."

[37] Not all working conditions found in the collective agreement are found in the decree, however. For example, the decrees do not provide for general seniority or job protection clauses.

[38] RRQ, 1981, c. D-2, r. 11 (DWCI). The *Decree Respecting the Leather Glove Industry*, RRQ, 1981, c. D-2, r. 32, also permits and regulates homeworking.

[39] DWCI, art. 6.

[40] DWCI, art. 6.02.

[41] See DWCI, arts. 6.03 to 6.06.

[42] DWCI, art. 6.08. According to a spokesperson from the Comité paritaire de l'industrie de la confection pour dames (parity committee), employers often do not respect this provision. Interview, August 1999.

[43] DWCI, art. 6.09.

[44] Interview with a spokesperson from the Comité paritaire de l'industrie de la confection pour dames (parity committee), August 1999.

[45] Ordre professionnel des conseillers en relations industrielles du Québec, *Le travail au noir dans l'industrie du vêtement*, May 1997, at 8-9.

[46] Interview with a spokesperson from the Comité paritaire de l'industrie de la confection pour dames (parity committee), August 1999.

[47] Ordre professionnel des conseillers en relations industrielles du Québec, *Le travail au noir dans l'industrie du vêtement*, May 1997.

[48] *Decree Respecting the Men's Clothing Industry*, RRQ, 1981, c. D-2, art. 6.01. The decrees covering the men's and boys' shirt industry do as well.

[49] Interview with a spokesperson from the Comité paritaire de l'industrie de la confection pour hommes (parity committee), August 1998.

[50] Quebec, Ministère des Finances (1997: 20).

[51] Advisory Panel (1998).

[52] *Ibid.*, at 15 to 17.

[53] *Bill 47: An Act respecting certain conditions of employment in certain sectors of the clothing industry and amending the Act respecting labour standards*, National Assembly, 1st Session, 36th Legislature, May 13, 1999. For a more detailed analysis of the Labour Minister's position on the repeal of the decrees in the garment sector and of the possible legislative amendments to replace them, see Quebec 1999.

[54] *Consultation générale: Projet de loi no. 47, Loi concernant les conditions de travail dans certains secteurs de l'industrie du vêtement et modifiant la Loi sur les normes du travail*, National Assembly, 1st Session, 36th Legislature, June 29, 1999, copy of the notice available on Internet <http://assnat.qc.ca/fra/publications/av990629-4.html>. These consultations were announced at the close of the National Assembly due to pressure mostly from labour organizations.

[55] LQ 1999, c. 57.

[56] Interview with a spokesperson from the Comité paritaire de l'industrie de la confection pour dames (parity committee), August 1999.

[57] For a discussion of the pros and cons of maintaining decrees in the remaining industrial sectors covered, see Quebec, Ministère du Travail (1999).

[58] *Act respecting the professional status and conditions of engagement of performing, recording and film artists*, RSQ, c. S-32.1 (APRFA); *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters*, RSQ, c. 32.01.

[59] *Status of the Artist Act*, SC 1992, c.33.

[60] APRFA, art. 9ff.

[61] APRFA, art. 24.

[62] APRFA, arts. 27-34.

[63] See Yanz et al. (1999: 123). The authors made the following recommendation on registries:

> Create a central registry for homeworkers, administered by a tripartite committee. Require employers to apply to the registry for a permit to employ homeworkers, and to register all homeworkers doing work for them. Mandate the registry to provide information and counselling to homeworkers regarding their legal rights, and to act as an agent for homeworkers concerning violations of those rights. Require all entities in the garment chain of production to register and to provide information on the jobbers and contractors producing for them.

The authors consider that such registries, along with provisions on joint and several liability and the possibility of anonymous and third-party complaints on labour standards violations, are a precondition to improving garment workers' access to collective bargaining (at 23).

8. EMPLOYMENT INSURANCE

From a historical perspective, it could be said that the *Unemployment Insurance Act*—now the *Employment Insurance Act*[1] (EI Act)—was designed to fit the industrial postwar "male breadwinner" model in order to replace earned wages temporarily. But since the 1940s, when the initial act was implemented, not only have the workers entering, participating in or leaving the labour force changed, but so has the nature of work itself.

The economic, sociological and gendered reality of the labour market has not been sufficiently taken into consideration in the EI Act, and this is reflected in the access women homeworkers have to Employment Insurance benefits. Their access to benefits and the level of these benefits are affected by certain assumptions made in the legislation. This is true not only for homeworkers who have recourse to the scheme during periods of involuntary unemployment, but also in the case of claims for maternity and parental benefits, which are also provided for in the EI Act. The focus of the next section is on the contemporary problems of inequitable exclusion or gender discrimination created by the new EI Act of 1996. As will be seen, homework presents significant policy challenges for such contribution-based social security programs.

The EI Act should provide coverage for all forms of employment. However, some employment, such as homework, is largely ignored when all the potential prejudicial gendered effects of such a social security scheme are considered. Although gender impact analysis studies were done for the Unemployment Insurance review of 1996 (HRDC 1996a,c), no consideration was given to the reality of women as homeworkers and to the realities of this form of work. Not only does the gendered reality of homework challenge the assumptions on which the EI Act is based—the male sole breadwinner model—but it also brings to the forefront how homework, which is becoming increasingly "typical," is still treated as if it were "atypical" in the context of social security programs. As the EI Act is one of the more technical social security schemes (the law itself is often compared to the *Income Tax Act* in terms of its complexity), the problems encountered by homeworkers also arise in part from the complicated and technical nature of the Act.

An analysis of the application of the EI Act to women homeworkers shows they encounter problems in establishing their right to benefits, as well as in availing themselves of the program as a means of ensuring a decent standard of living, considering the low level of benefits they may receive. This does not necessarily mean a specific category of worker should be created under the EI Act for homeworkers, but rather that the Act should be redesigned to be more inclusive and to take into account their reality. The situation of women homeworkers is not "atypical." They often work long hours under the tight, albeit remote, control of an employer. They are more often than not confronted by non-negotiable deadlines, whatever their occupation. They are frequently in a "produce or perish" situation, which is exacerbated by their economic vulnerability and, in many cases, their family responsibilities.

There are two key issues relevant to homeworkers with regard to Employment Insurance. The first is whether or not the homeworker's earnings are insurable. For earnings to be insurable, the homeworker must have a contract of service with one or more employers. This essentially means that if a homeworker is *in fact* self-employed (Chapter 3) and has a home business, earnings will not be insurable. The second issue is the level of benefits to which the homeworker will be entitled once it has been determined that he/she held insurable employment and has worked enough hours to establish entitlement to benefits. As will be seen, the EI Act of 1996 created a mechanism whereby, although all hours of insurable employment are calculated (and not weeks or a certain minimum weekly earning as in the previous act), the actual benefits received can be lower than anticipated when the long hours worked over a period of time are considered. Finally, both the way insurability is determined, and the level of benefits established, impact on maternity and parental benefits provided for by the EI Act of 1996.

Is Homework Insurable Employment?

The EI Act (s.5(1)a)) contains a basic definition of what constitutes insurable employment, the existence of which is a precondition for the eventual exercise of the right to Employment Insurance:

> [I]nsurable employment is:
>
> (a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise; [...][2]

This definition also existed under the previous law. The EI Act allows for a certain amount of flexibility with regard to the definition of insurable employment by enabling the government to adopt specific standards in the regulations for certain categories of workers, to either include[3] or exclude[4] them from the purview of the Act. Notwithstanding these special provisions, independent contractors, not being party to a contract of service, are generally excluded from the Act, although the government does have the regulatory power to include people engaged in a " business."[5] To date, no regulations have been adopted to this effect.

People who work for multiple employers are, however, covered by the Act and each of these contracts of service can be insurable employment. Piece wages and commissions are also considered insurable earnings, which, although not specific to homeworkers, constitute a common form of remuneration for work done at home. The Act itself does not provide any explicit guidance concerning the situation of homeworkers and is, therefore, neutral in appearance.

The requirement that a person hold insurable employment to qualify for Employment Insurance benefits obviously applies not only to homeworkers but is a general requirement for everyone.

The case law has developed criteria to interpret the meaning of insurable employment, most of which does not specifically concern homeworkers, but can nevertheless be applicable to determine whether or not they are covered by the law. These criteria essentially distinguish the independent contractor from the worker under the control of an employer. Again, this determination is a question of fact: a homeworker cannot decide that he/she is an independent contractor if the facts of the situation do not lead to this conclusion. Nor can the person giving the work, regardless of whether that person calls herself/himself an employer or a client, decide that the homeworker is an independent contractor. A written contract stipulating that a homeworker is an independent contractor is to no effect if, in reality, the homeworker is party to an albeit unwritten contract of service.[6] In addition, an employer who has failed to remit Employment Insurance premiums to the Employment Insurance Commission, can be obliged to pay both the employer's and the employee's contributions.[7]

The principal criteria used to determine whether or not employment is insurable, as developed by the case law, are the following: the level of control by the employer over the work performed, the integration of this work to the main activities of the business for which the work is being performed, and the means of payment for the work.[8]

In the 1970s and 1980s, decisions were rendered that specifically addressed the situation of homeworkers, and tended toward a broad interpretation of the definition of insurable employment that favoured their coverage. The criterion of the level of control over the work performed has been interpreted to include the occasional appearance of the employer at the worker's home to oversee the performance of the work. Or it could be that the employer has declared her/himself satisfied with the work after having given precise guidelines or instructions on how to do it. Production deadlines or quality control mechanisms are sufficient to qualify as guidelines.[9] When a homeworker is under the control of an employer, (i.e., work is provided and then received by an employer or a representative, and an agreement has been reached as to the payment of wages on a piece-rate or hourly basis), the homeworker is covered by the EI Act since he/she holds insurable employment.

One should not, however, simplify what, in fact, is often a complex employment relationship. There are at least two possible situations that put homeworkers at odds with the definition of insurable employment under the Act. In many cases, a homeworker will be subject to impossible deadlines and have to ask for help from family members, neighbours or friends. By, in effect, subcontracting part of the work, even though the work will still be done in her/his home, the homemaker has created a business context which, from a legal perspective, may eventually deprive her/him of the right to Employment Insurance benefits. This can be true even if the initial provider of work and the homeworker had a contract of service between them. A homeworker may also be considered an independent contractor if he/she accepts work from several employers at the same time. A closer look at these two situations, which are not atypical, shows a significant gap between the reality of homework and the assumptions present in the EI Act.

The existence of a degree of control on the employer's part over the volume of work and over production determines, in large part, the existence of a contract of service, or an

employee–employer relationship. In many cases, homeworkers themselves exercise a certain amount of control over their work. Multiple scenarios illustrate this, as demonstrated by the case law. The giver of work will often offer the homeworker the "chance" to produce more than the minimum quota if he/she wants to. The person giving the work will not, however, demand it. In other cases, even though the giver of work exercises control over the final product or result, he/she will allow the homeworker a great deal of latitude to produce at the worker's own rhythm. These situations begin to resemble "business risks," that is, the decisions and expenses made by an independent contractor to increase the chance of profit, even though the worker runs the risk of making a bad decision or actually losing money.[10] Homeworkers may want to take advantage of this leeway since it gives them the possibility of increasing their earnings, and this possibility for increasing production may coincide with a temporarily greater availability on their part because of reduced family responsibilities, for example.

In a 1984 decision, a Canadian Tax Court judge made a clear distinction between this leeway in the organization of the actual production, and the running of a business. He concluded that a contract of employment existed, as it was important to distinguish the situation where a worker could decide to work harder from a situation where actual business decisions were being made that implied expertise in running a business.[11] In the case of homeworkers, this so-called "business risk" and the minor variations in profits and losses, are really variations in the conditions of production and not business risks in the real sense. When one examines the economic and family contexts in which women's homework is done (making working conditions more flexible, the forced transfer of work to home, the need to supplement family income, etc.) it is, in fact, very often difficult to compare homework to a business, and turn an employee–employer relationship into an independent contractor–client situation.

The dynamics of homework tend to produce multiple employment relationships, either with other workers in order to respect deadlines, or with several employers to increase income. This last case clearly puts the homeworker at a disadvantage regarding the recognition of the insurability of earnings.[12] The presence of multiple employers increases the burden of proof on the homeworker when he/she tries to establish an employer–employee relationship with each one, and to determine that the homemaker does not operate a business. In many cases, the fragile nature of the income will force the homeworker to maintain links with more than one employer. The case of "shared" homework is also common. In most instances, this is simply a way for the homeworker to organize work more efficiently in order to be able to meet tight deadlines by asking other people for help. This creates an ambiguous situation for the homeworker, who then becomes a giver of work as well, since he/she normally pays the people who help. The homeworker, in turn, may be considered the employer for the purpose of the EI Act.

Although the reality of non-standard work was generally taken into account in the legislative amendments of the EI Act of 1996, by introducing the concept of insurable worked hours, it cannot be said that the specific situation of female homeworkers was sufficiently taken into consideration in the designing of the legislation. The government should consider shifting the burden of proof onto the Employment Insurance Commission in the case of "shared"

homework or multiple employers, to determine whether the homeworker's employment is insurable or not. The government should also consider adopting regulations under the EI Act[13] to impede the exclusion of homeworkers in "business-like" situations where they have no control over business decisions related to the market but some control over their level of production.

The Calculation of the Number of Insurable Hours Worked

The legislative amendments of 1996 changed the basis for calculating insurable earnings from weeks to hours.[14] As all hours worked for one or several employers are now insurable, some of the inequities present in the old law with regard to homework have been partially eliminated. These improvements do not necessarily help homeworkers attain a decent level of benefits however, since other provisions in the legislation have the effect of not considering, for the purpose of calculating benefits, the invisible long hours worked by some homeworkers over a short period of time.

Since the EI Act came into force in 1996, every hour worked is insurable for the purpose of establishing a period of benefits, as opposed to the previous system, which provided that earnings were insurable as of a determined weekly amount, or a minimum of 15 hours worked. In cases where wages are paid on an other than hourly basis, the regulation provides a method for determining the number of insurable hours worked in a week.[15] In some cases, employers and employees will agree on the number of hours worked for the purpose of the EI Act, especially in sectors where workers and employers are represented by associations. The Employment Insurance Commission accepts this agreement as representing the actual number of hours worked.[16] Obviously, not all workers, especially those not represented by a union or other representative association, such as a professional association, will be able to arrive at such an agreement with their employers. The mechanism allowing for such agreements was adopted at the last minute before the implementation of the new act, as it became increasingly clear that the shift from insurable weeks to insurable hours would cause problems. Given the isolated nature of homework in most instances, such a mechanism is of limited use to homeworkers.

In an effort to respond to other situations where workers are not paid by the hour, a procedure was established to determine the number of hours worked when the employer is unable to determine exactly the correlation between the worker's earnings and the number of hours worked.[17] The EI Regulation established the following rule, which could be of particular relevance to homeworkers. Where a person's earnings are not paid on an hourly basis but are paid periodically, intermittently or at random intervals by the piece, commission or lump sum amounts and the actual hours of insurable employment in the period of employment are not known or ascertainable by the employer, the worker is deemed to have worked in insurable employment during the period of employment for the number of hours obtained by dividing the total earnings for the period of employment by the minimum wage applicable, on January 1 of the year in which the earnings were payable, in the province where the work was performed.

In this case, the total earnings for the worked period are divided by the provincial legal hourly minimum wage, and the worker is then deemed to have worked not more than seven hours a day and 35 hours a week.[18]

For example, if a homeworker works 60 hours a week for 26 weeks and is paid $400 a week, the total earnings ($10,400) will be divided by $7.00 (a hypothetical hourly provincial minimum wage) for a total of 1,486 insurable hours. But by dividing 1,486 insurable hours by 35 hours a week, this would mean that the worker has worked 42 weeks, which is not the case. The insurable hours will, therefore, be established at 910 (35 hours times 26 weeks) for 26 weeks at an hourly rate of $7.00.[19]

In the case of homeworkers, this rule could be considered advantageous since it ensures a minimum of insurable hours for a worked period. On the other hand, it could also be contended that this presumption of a maximum number of hours worked in a week by which the total income is divided obscures the reality of homeworkers who often work much more than 35 hours a week to generate their income. This income is then divided by a standard that refers to a work day and a work week that have nothing to do with the actual working conditions of many homeworkers.

It would, however, be hard to establish another method of calculating the number of weekly insurable hours in the case of homeworkers for whom employers cannot determine the exact number of hours worked on a weekly basis. Moreover, the method itself does not necessarily produce exclusionary effects. On the contrary, by dividing total wages by the provincial minimum wage, the rule facilitates the establishment of the homeworker's right to Employment Insurance benefits. In cases where the total number of hours worked in a week are unknown or cannot be agreed upon with the employer, the division of the total earnings over a period by the minimum wage can increase the number of insurable hours since there can be no lower reference point than the minimum wage. Homeworkers are, therefore, better served by this method of calculation for the purpose of establishing their *eligibility* to Employment Insurance benefits.

It must nevertheless be underlined that a disproportionate number of women do not qualify for Employment Insurance benefits. Compared to 1997-98, during 1998-99, the percentage of women who qualified for regular benefits decreased by 3.8 percent while the number of men who qualified increased by 1.5 percent (HRDC 1999, Annexes Box 2.4). This highlights the need for disaggregated statistical research in order to verify the existence of a causal link between the general decrease in female beneficiaries, and the possible increase in the number of female homeworkers accumulating insurable worked hours (for which determination is a problem). Only then, would it be possible to say with any certainty that the method provided for in the EI Act of 1996, to estimate the amount of weekly worked hours, does not negatively affect female homeworkers.

The Calculation of the Level of Benefits

As is the case with all Employment Insurance claims, the total number of insurable worked hours needed for determining the right to benefits must not be confused with the *amount* of benefits the claimant will receive. In other words, establishing the number of insurable hours worked determines whether a claimant has the right to benefits or not. For example, in a region of the country where the unemployment rate is between 9 and 10 percent, a claimant would need at least 560 insurable hours to qualify for benefits. Once the claimant's right to receive benefits has been established, there is also a method for calculating the amount of benefits he/she will receive.[20] Under the previous act, a claimant's weekly insurable earnings served to establish the amount of weekly benefits. Under the new act, a different method was adopted, since insurable earnings are now based on the number of hours worked and not the number of weeks.

The EI Act now stipulates that benefits will be calculated in the following manner: the total amount of insurable earnings is divided by the higher of either the total number of worked weeks or the number of weeks provided for in a schedule to the Act. This schedule establishes different numbers of weeks by which the total earnings will be divided, depending on the regional rate of unemployment. In either case, the total number of weeks by which total earnings can be divided cannot exceed 26. This period of 26 weeks preceding the establishment of a benefits period represents the maximum time period for which insurable gains can be considered for the purpose of establishing the rate of benefits. This is true even though insurable hours may have been accumulated during the period that precedes the 26 weeks.

For example, a homeworker who has worked 16 weeks for earnings of $8,000, in a region where the employment rate is between 9 and 10 percent, will see earnings divided by 18 (the number of weeks prescribed in the Schedule) and not 16 weeks, which will result in average weekly benefits of 55 percent of $444, instead of 55 percent of $500, which would have been the case under the old act.

Additionally, a homeworker who has worked 30 weeks where a substantial amount of worked hours were accumulated between the 26th and the 30th week preceding the establishment of the Employment Insurance benefits period will see earnings divided by 26 weeks (the maximum amount of weeks by which insurable earnings can be divided according to the Act), and thereby face a diminished amount of Employment Insurance benefits per week.

The Act, therefore, provides for an inequitable level of benefits, as there is no correlation between the actual period during which the homeworker's wages were earned and the period prescribed for the purpose of determining the level of benefits**.** In a homeworker's case, the obligation to meet tight deadlines leading to long hours for certain weeks, and the risk of being laid off in periods of low production, result in the likely lowering of the level of benefits. As the majority of homeworkers are women, and as women, on the whole, receive lower benefits than men,[21] it seems that the method prescribed by the Act for the purpose of establishing homeworkers' weekly Employment Insurance benefits contributes to the fact that women receive lower benefits than men. A gender-based analysis focussing specifically on the

impact on atypical workers, including homeworkers, of the Employment Insurance reform with respect to irregular earnings and average benefits would shed light on the differential impact of these new measures. Although the shift to considering each worked hour for the purpose of establishing *eligibility* seems to benefit all atypical workers, particularly female atypical workers, there seems to be a need to assess whether or not the method of calculation based on prescribed worked weeks for the purpose of establishing the *level* of benefits negatively affects those same female workers.

It could be contended that this situation is partially offset by the provision of the Family Supplement under the Act.[22] This supplement cannot, however, exceed 25 percent of weekly benefits, and any amount received under the Child Tax Benefit programs[23] will be considered income for the purpose of establishing the amount of the Supplement. Homeworkers usually operate under conditions where they have very little or no control over production contingencies. They cannot be presumed to be in a situation where they can easily supplement a low level of Employment Insurance benefits by rapidly finding other work. Home is their workplace: if they look for other solutions to supplement their income, they may simply lose contact with their work providers by not being available at the right moment. The *HRDC 1998-1999 Monitoring and Assessment Report* (1999) concludes that the parameters set by the new act did not really affect claimants that used other means to compensate for the decrease of their benefits during the unemployment period and took advantage of the new Family Supplement program. This conclusion obviously does not take into account the specific reality of such vulnerable workers as homeworkers.

The effects on the level of benefits for homeworkers, who accumulated either irregular worked hours or a significant number of worked hours outside the maximum prescribed period of 26 weeks, are even worse than for the homeworker who has been deemed to work seven hours a day and 35 hours a week. As was explained earlier, these homeworkers are deprived of the recognition of some of their hours worked for the purpose of establishing a period of Employment Insurance. In addition, they are more vulnerable than other workers to the impact of high and low production periods as some high production periods may occur outside the maximum period of 26 weeks used to calculate their average wages for the purpose of establishing the amount of weekly Employment Insurance benefits. Although the EI Act, and the *Unemployment Insurance Act* before it, were never designed to be a means of ensuring a decent standard of living for low-income workers, no one can contest the fact that women homeworkers are victims of a technical aspect of the Act that produces inequitable effects. It appears obvious that an amendment to the Act, to re-establish the rule of “average weekly wages” based on all worked weeks up to a reference period of a year or so as a guide to establishing the level of weekly benefits in the case of homeworkers (and other workers who may be affected by a pattern of irregular worked hours), is necessary to avoid the possible impoverishing effects of the Act as it now stands.

A proposal aimed at re-establishing the average earnings during a reference period for the purpose of determining the amount of weekly benefits may be interpreted by some as a refusal to take into account the new philosophy of the EI Act with regard to the coverage of most forms of employment. But it is important not to underestimate the problems related to the

introduction of the combined rule of worked hours (entitlement to benefits) and weekly earnings (level of benefits). Some other inequitable effects of the Act were, in part, corrected through specific or transitory regulations. This is the case, for example, of the rule concerning low-earnings weeks, which are excluded for the purposes of establishing the weekly level of benefits in certain regions of Canada.[24] It is precisely because the EI Act has produced unexpected and inequitable results that adapted solutions must be envisaged to avoid not only its inequitable, but also its discriminatory effects.

Homeworkers are, in the majority, women who receive lower benefits than men. The requirements of homework production create an uncertain relationship between the number of hours worked and earnings, challenging the notion of the average work week. The re-establishment of the average earnings method of calculating benefits would not generate any unacceptable discrepancy among workers (including between homeworkers and other workers) affected by the new method of calculation. The government has already recognized that the Act adversely affects certain workers more than others through the adoption of special projects, such as the Small Weeks Adjustment Project, which provides for the possibility in certain areas of Canada to exclude, for the purpose of calculating benefits, certain worked weeks that generated low wages. In fact, 61 percent of claims that included "small weeks" were filed by women.

Homeworkers and the Family Supplement

The EI Act provides for the Family Supplement aimed at increasing the benefits of claimants with dependent children, although it is only available to claimants whose annual income does not exceed $25,921. This Supplement was intended to increase the rate of weekly benefits from 55 to 70 percent of weekly insurable earnings in 1998 and up to 80 percent by the year 2000. The Family Supplement replaces the Unemployment Insurance dependency provision which was available to any claimant with low weekly benefits. According to the *HRDC 1998-1999 Monitoring and Assessment Report* (1999), two thirds of the claimants receiving the Supplement for the year 1997-98 were women, representing 16 percent of all the women claimants for that year. The average amount of the Supplement received weekly was $38. This amount was included in the total average benefit of $221, paid to female claimants receiving the Family Supplement.

It is interesting to note that an increasing proportion of Family Supplement claimants in 1997-98 were men. Indeed, many male claimants occupy seasonal work generating higher wages than those of women. When they claim Employment Insurance benefits they, consequently, can collect higher weekly benefits based on the low annual family income and their high seasonal insurable earnings. The Family Supplement is a more effective measure when the male breadwinner generates high wages from seasonal work while his spouse has a lower income. It is of much more limited help in the case of the single mother, as can be seen from the fact that the average supplement ($38) is included in a far lower weekly benefit for women claimants ($221) than that paid to men ($296).

At the same time, the *1998-1999 Employment Insurance Monitoring and Assessment Report* (HRDC 1999) reveals that women claimants have been more severely affected by the introduction of an hour-based eligibility system. The number of claims had already declined by 20 percent for women in 1997-98, compared to 16 percent for men. The average weekly benefit received by women in 1998-99 was $235, compared to $313 for men.

The unexplored dimensions of the relationship between homeworking and eligibility for Employment Insurance benefits would affect any assessment of the positive impact of the new Family Supplement program. Since women must first qualify for benefits before becoming eligible for the Supplement to increase the benefits received and, since the 1999 report demonstrates male claimants collect more Family Supplement benefits and a higher level of benefits, it is important to scrutinize more carefully the eligibility requirements for the Family Supplement that appear to affect unemployed homeworkers adversely who already suffer under the requirements of the new act. By examining the existing mechanisms, it may be possible to develop less prejudicial means of enhancing homeworkers' eligibility, as well as increase their possibility of benefiting from the Family Supplement. This needs to start with data analysis that pays special attention to homeworkers with irregular wages or with wages made invisible by the current method of determining eligibility to Employment Insurance benefits as well as the level of benefits. In fact, the limited benefits that homeworkers can get from the Family Supplement program, if they are determined by the family income in general, are also preconditioned by rules specifically affecting the eligibility and the level of benefits of homeworkers. Now that the 1999 Report is out, it seems that a need for such an analysis is increased by the fact that the data shows how, and why, male claimants are advantaged by the Family Supplement program.

Maternity and Parental Benefits

The overall problems regarding eligibility for Employment Insurance benefits also apply to access to maternity and parental benefits for homeworkers. Under the EI Act, claimants need a minimum of 700 hours of insurable employment to qualify.[25] Under the previous act, 20 insurable weeks were required to qualify for these special benefits. The new 700-hour requirement is based on government data showing that two thirds of claimants for these benefits had accumulated more than 46 weeks of insurable employment. But under the old act, someone who had accumulated 300 hours (15 worked hours in a week—the minimum requirement—times 20 weeks) would have been eligible. Therefore, the effect of the new requirement is to increase the number of hours necessary for eligibility. The *1998 Employment Insurance Monitoring and Assessment Report* (HRDC 1998), however, concludes that the reform had, at most, a neutral effect on access to these benefits.

Generally, the problems encountered by homeworkers in qualifying for benefits also affect access to maternity and parental benefits. In addition, it is likely that many homeworkers are among the one third of claimants who could not qualify for these benefits under the old system, and thus do not qualify under the new one. Therefore, the combined obstacles to having all their hours recognized as insurable and the 700-hour minimum requirement may put homeworkers at a greater risk of not qualifying for maternity and parental benefits.

Amendments to the provisions governing maternity and parental benefits are expected for December 2000.[26] The required number of worked hours in order to qualify for these benefits will be lowered to 600 and a maximum of 50 weeks combined maternity and parental benefits will be made available, compared to the present 25. Although this announcement can only be described as good news, it is impossible to assess the impact of such positive changes on homeworkers. In their case, the difference between 300 and 600 worked hours to qualify for maternity and parental benefits (representing the difference between the previous requirement of 300 hours under the old act, and the proposed 600 hours for qualification) remains a major cause for concern because of the specific difficulties identified for homeworkers in qualifying for regular benefits. The economic impact of an eventual maternity and parental leave of one year, with a disposable income determined by a prescribed method that does not always take into account all worked hours is another cause for concern, especially in light of the relatively small amount made available to female homeworkers by the Family Supplement program.

As Canadian family policy is built on the Employment Insurance and Child Benefits programs, special attention should be paid to female workers who clearly contribute to this program, but who may be excluded from it for reasons that are not related to a sporadic attachment to the labour market, but to the complexity of the legislation. Although the EI Act is aimed at protecting atypical workers, it has not adequately fulfilled this objective by adopting flexible and appropriate regulations. Based on our concerns, we cannot see how the government can proceed with the positive changes contemplated without studying the real impact of the proposed maternity and parental benefits program on female homeworkers. More specifically, it seems to us that an urgent study should be conducted in order to evaluate the real impact on homeworkers (especially those with irregular working hours and weeks) of a future benchmark of 600 worked hours in order to qualify for maternity and parental benefits. Regulatory adaptations should be considered in order to avoid the risk of not taking into account invisible worked hours and thereby denying eligibility to these benefits.

In conclusion, homeworkers do not appear to have been taken into account in the design of the new EI Act. They are affected by the provisions that determine the insurability of employment to a larger extent than most other workers, due to the invisible nature of their work. The new mechanisms for calculating the number of insurable hours in a qualifying period, as well as the method for calculating the level of benefits, also adversely affect homeworkers by not taking into account the long hours they often work during a given week. The eligibility requirements, consequently, also affect their access to paid maternity and parental leave. As well, the potentially low benefits homeworkers receive contribute to their impoverishment in times of unemployment.

Policy Recommendations

- The burden of proof should be shifted onto the Employment Insurance Commission in the case of “shared” homework or multiple employers, to determine whether the homeworker’s employment is insurable or not.

- The government should consider adopting regulations under the EI Act to impede the exclusion of homeworkers in "business-like" situations where they have no control over business decisions but some control over their level of production.

- Attention should be paid to the need for disaggregated statistical research in order to verify the existence of a causal link between the general decrease in female beneficiaries, and the possible increase in the number of female homeworkers accumulating insurable worked hours for which determination is a problem.

- A study should be carried out that focusses on the economic impact, on access to benefits and on the duration of benefits paid to homeworkers under current deeming provisions in order to assess the real impact of the provisions. This is particularly important with regard to areas with lower regional unemployment rates.

- The EI Act should be amended to re-establish the rule of the "average weekly wage" as a reference point to determine the level of weekly benefits in the case of homeworkers and other workers who may be affected.

- To increase the effectiveness of the Family Supplement, it is important to scrutinize more carefully the eligibility requirements for the Supplement that appear to affect adversely homeworkers since they already suffer from the requirements of the new act. To this end, statistical analysis is required that pays particular attention to homeworkers with irregular wages or with wages made invisible by the prescribed method of determining eligibility to Employment Insurance benefits or calculating the level of benefits.

- Standards governing access to maternity and parental benefits should be specifically adapted to ensure that homeworkers are not adversely affected by the irregularity of their work schedules and earnings. In order to balance the risk of miscalculating the real amount of worked hours for the purpose of these special benefits, a lower level of required worked hours should be considered.

- Considering that parents will shortly have access to an extended period of EI parental benefits, a more detailed analysis should be undertaken to determine the real impact of the new requirements of the EI Act on the level of maternity and parental benefits for homeworkers.

Endnotes

[1] SC 1996, c. 23, RSC, c. E-5.6.

[2] The following paragraphs of this section outline specific cases which are deemed to be insurable employment or excluded from the Act, none of which are relevant to the situation of homeworkers, apart from the regulatory power defined at s. 5(4) of the EI Act (see below).

[3] EI Act, s. 5(4). There is a specific regulation to include people working as independent contractors in the fishing industry (*Employment Insurance (Fishing) Regulations*, SOR/96-445). Taxi drivers who do not own more than 50 percent of their vehicle are also covered by the Act (*Employment Insurance Regulations*, SOR/96-332, s. 6(e) (EI Regulation)).

[4] EI Act, s. 5(6).

[5] EI Act, s. 5(5). The term "business" is the same as that used at s. 248(1) of the federal *Income Tax Act*.

[6] *Jean R. Fabi & Cie. Ltée.* v. *Minister of National Revenue (MNR)*, Tax Court of Canada, 95-167 (UI). The Canadian Tax Court has jurisdiction over the insurability of employment for the purposes of the EI Act.

[7] EI Act, s. 82(4). Employment Insurance is entirely funded by employer and employee contributions.

[8] *Whitney Elizabeth Gleason* v. *MNR*, Tax Court of Canada, 83-177 (UI), 1984.

[9] See *Denise Normand* v. *MNR*, (1977) National Revenue (NR) 133 (garment homeworker); *Yolande Desjardins* v. *MNR*, (1977) NR 187, December 1977 (garment homeworker); *Desneiges Laroche* v. *MNR*, NR 908, April 1981 (collection agent working from home); and *MNR* v. *Émile Standing*, A-857-90, FCA, September 1992 (repairer of fishnets).

[10] See *Viens* v. *MNR*, Tax Court of Canada, no. 678, 1992, and *Whitney Elizabeth Gleason* v. *MNR*, Tax Court of Canada 83-177 (UI), 1984.

[11] *Whitney Elizabeth Gleason* v. *MNR*, Tax Court of Canada 83-177 (UI), 1984 (J. Millar).

[12] See *Bonneau* v. *MNR*, Tax Court of Canada, no. 953, October 1991.

[13] EI Act, s. 5.

[14] EI Regulation.

[15] EI Regulation, s. 10.

[16] EI Regulation, s. 10(2).

[17] EI Regulation, s. 10(4) and 10(5).

[18] EI Regulation, s. 10(4) and 10(5).

[19] In exceptional circumstances, the Employment Insurance Commission can take into consideration the hours worked over and above 35 hours per week.

[20] EI Act, s. 14.

[21] HRDC (1996a, 1999, Annexes Box 2.4). Women received an average of $235 of weekly regular benefits while men received a weekly average of $313 for the 1998-99 period.

[22] EI Act, s. 16. See below.

[23] EI Act, s. 16(3).

[24] *Regulation Amending the Employment Insurance Regulation*, SOR/98-551, November 6, 1998, regarding the Pilot Project for the exclusion of low-earning weeks (less than $150/week) in the calculation of weekly benefit rates. See also HRDC (1999: Section VII).

[25] These benefits concern primarily women, even though men can also be entitled to parental benefits. Statistics show that the vast majority (over 90 percent) of parental benefits are claimed by women (HRDC 1998).

[26] See HRDC, *Proposed changes to parental and sickness benefits,* December 31, 1999 <http://www.hrdc-drhc.gc.ca/ei/common/IN007_e.shtml>.

9. CONCLUSION AND SUMMARY OF POLICY RECOMMENDATIONS

When home is the workplace, workers often find themselves in a legal limbo, and our study reveals that many ambiguities could be avoided if policy makers addressed the issue of homework as it is practised today. As we have shown, homeworkers' legal protection with respect to minimum employment standards, workers' compensation, occupational health and safety, and employment insurance may be inadvertently denied or expressly pre-empted. The capacity of homeworkers to organize to advance their collective interests is also limited by existing collective bargaining models. Confusion—on the part of homeworkers, their employers and government agencies mandated to implement labour legislation—as to whether or not a homeworker is an independent contractor also renders the application of the laws and the exercise of homeworkers' rights more complicated.

The gendered nature of homework must be taken into consideration when designing policy, since laws which are considered "gender neutral" can, and do, adversely affect women. For example, the difficulties encountered by women homeworkers in establishing their status as "employees" have repercussions on their access to maternity and parental benefits under the Employment Insurance scheme, which is the only source of income for the majority of women workers during maternity and parental leave. The level of these benefits will depend not only on the Employment Insurance scheme, but also on the effective coverage of homeworkers under provincial minimum employment standards acts and their capacity to prove how much they work.

Although beyond the scope of this study, there is an evident need for sex-disaggregated statistics on homework, including on self-employed homeworkers, which contain detailed information on the sectors in which these women work. New realities of homework are emerging. The increase in homework in the service sector, for example, which has always been dominated by women, requires that a clearer portrait of homework be drawn. As well, before promoting homework as a solution to reconciling family and work responsibilities, further research is needed to determine the actual working conditions in all sectors of women with children working at home.

After analyzing the legislative framework, several conclusions can be drawn. There are few legislative examples to suggest that policy makers consciously designed a framework that includes the realities of homework. When such legislation does exist, it is often out of date. It does not consider new forms of homework, such as home telework, even though these workers encounter many of the same problems as industrial homeworkers because of their place of work. Since those working in the home seem to have been overlooked by policy makers, the existing enforcement mechanisms in many of the laws analyzed are ill-adapted to their reality. Although our study allows us, in most cases, to provide an accurate portrait of the current rights of homeworkers, many of the legislative interpretations are unsatisfactory. We have found that homeworkers are sometimes covered (or not covered) by the legislation more as a result of accident than design. Because the laws are not thought through, there are inconsistencies among them with respect to homework, even within a same jurisdiction.

These problems are not just inelegant reflections of poorly designed policies. They have a negative impact on actual rights of real workers, and in many cases, allow employers to circumvent legislation that is essential to the social safety net. For instance, without legislative changes, the costs of working will increasingly be transferred to the homeworker—the individual least capable of shouldering the costs of the risks intrinsic to her/his work. Rights designed specifically to encourage women's equality in the work force, such as maternity leave, are less accessible to homeworkers. These workers' isolation also leads to ignorance of the rights that do exist. Finally, the boundary between women's "private" and "professional" lives gets blurred when they work at home. Policy makers can improve this situation by adopting clear legislation that enables workers and employers to recognize more easily these boundaries. It is, therefore, necessary that further research be done on actual workplace practices and on the effects of existing policies aimed at reconciling work and family life.

Other fundamental issues also warrant attention. The question of whether or not an employee can refuse to work at home must be answered. Such encroachment on an individual's private life should logically be restricted, but nowhere in the legislation of any jurisdiction is this spelled out. For homework to be a viable option for workers, it must be voluntary and the rules must be clear. Equal treatment between homeworkers and on-site workers should be the guiding principle of any policy on this issue. Homework must not be seen or essentially used as a means by which employers can reduce overhead and labour costs, or transfer to their workers the risks of doing business.

More research is needed on a variety of subjects related to homework in Canada, not only from a legal perspective, but from a sociological and economic one as well. The issue of self-employment, which is intimately linked to homework, must be studied in more depth. As jurists, we attempted to point out the ambiguities and misconceptions surrounding this status and their impact on the application of labour and social security legislation to homeworkers. But this was not the primary focus of our study. As self-employment grows, and more and more women (and men) operate their own "businesses" from their homes, the number of people who contribute to employment remuneration-based social programs will decrease. It is highly likely that many of these workers are in fact "employees" under some of the legislation, but may believe that they are independent contractors. The inconsistencies among laws with regard to a person's "employee" status have to be examined thoroughly, and changes should be made so the burden of proving the legitimacy of excluding such workers from the purview of protective legislation be borne by employers. Further research should examine the possibility of redefining social programs so they protect all working people, regardless of their contractual status.

More in-depth research is also needed to determine who homeworkers are, what type of work they do and why they work at home. Telework, especially that done for large companies, has been receiving increasing attention. Industrial homework, particularly in the garment sector, has also been examined and targeted for policy proposals. Other forms of homework, primarily in the service sector, which is particularly heterogeneous, are perhaps more difficult to examine. As technology changes and working at home becomes easier, new legal questions will no doubt arise. In order for policy makers to keep abreast of the situation, new research

must be undertaken, from a multidisciplinary perspective, to ensure that policy reflects reality. The adoption of the ILO *Home Work Convention* and *Home Work Recommendation* in 1996 has given new impetus for a re-examination of existing national policy. Our analysis of the Canadian legislative framework surrounding homework provides a portrait of today's legal reality. We hope that our policy proposals will be helpful in designing a new framework and correcting existing problems.

Summary of Policy Recommendations

These recommendations are addressed to different bodies and authorities. The vast majority require legislative or regulatory changes, while others require a more favourable interpretation of existing legislation and regulations with regard to homeworkers through changes to policy manuals and new case law. Yet other recommendations are addressed to funding agencies, especially for the purpose of further research. We have indicated in parentheses to whom each recommendation is destined: legislators, regulatory agencies, ministries, enforcement agencies, decision makers and funding agencies.

Self-Employment

- A detailed review of the inconsistencies (especially within jurisdictions) among different labour and social security laws should be undertaken by governments and independent researchers, in order to reduce the exclusion of homeworkers and other workers from protective legislation *(ministries, enforcement agencies, funding agencies).*

- Legislation should provide that the burden of proving that a worker is an independent contractor is on the employer and the benefit of doubt should favour the worker. Given the numerous and evolving criteria developed in the case law to determine whether or not a worker is an independent contractor, it seems more prudent to use this approach rather than include specific criteria in the legislation along the lines of the French model, for example *(legislators).*

- Legislation should provide for the protection of homeworkers and other workers who meet the criteria of "employees" against reprisals (dismissal, suspension, discriminatory measures or any other reprisals) for refusing to enter into a nebulous, independent contractor relationship with their employer *(legislators).*

The Right to Refuse to Work at Home

- Legislation should explicitly provide for the right to refuse to work at home, other than occasional work at home in exceptional circumstances *(legislators).*

- Legislation should provide for the protection of employees against reprisals (dismissal, suspension, discriminatory measures or any other reprisals) for refusing to work at home *(legislators).*

Minimum Employment Standards

- Employment standards enforcement agencies should implement general policies on homeworkers, in all sectors, in consultation with employers' and workers' associations, including non-governmental organizations that provide information and support to homeworkers *(enforcement agencies)*.

- Dependent contractors should be explicitly included in the coverage of the acts. The burden of proof that a homeworker is not an "employee" should explicitly be on the employer, thereby facilitating the determination that a homeworker is in fact an "employee" for the purpose of the act *(legislators)*.

- Workers without valid employment authorizations under the *Immigration Act* should be covered by all employment standards legislation, through legislative amendments, if necessary *(legislators, regulatory agencies, enforcement agencies, decision makers)*.

- The definitions that make explicit reference to homework or homeworkers should be broadened to include forms of homework other than industrial homework. The definition of "place of employment" and analogous definitions, where they exist, should explicitly include the home in order to avoid ambiguities in the interpretation of the statutes *(legislators, regulatory agencies, enforcement agencies)*.

- Explicit provisions on equality of treatment between homeworkers and on-site workers should be adopted, particularly with respect to rates of pay, overtime pay, on-call and waiting-time pay, and public holidays *(legislators, regulatory agencies)*.

- Provisions should be adopted to enable homeworkers to be kept informed of their working conditions in writing, including the names and addresses of their employers and any intermediaries, the rate of remuneration and the type of work performed *(legislators, regulatory agencies)*.

- When employers neglect to maintain accurate records on the hours of work and the rates of pay of homeworkers, the legislation should provide that employment standards authorities are able to determine their wages based on homeworkers' statements and elements of proof provided by them or gathered during investigations. The provisions on the keeping of records should be strictly enforced and fines imposed in cases of non-compliance *(legislators, regulatory agencies, enforcement agencies)*.

- The legislation should provide for a premium on wages to compensate for the costs incurred by homeworkers in performing their work. The type of costs contemplated should reflect the reality of new forms of homework, such as telework. In no case should a homeworker receive less than the statutory minimum wage, once costs have been deducted *(legislators, regulatory agencies)*.

- The establishment of registries of homeworkers and of employers of homeworkers (including subcontractors and intermediaries) should be provided for in certain sectors,

where this is feasible. Where registries already exist, their efficiency should be evaluated and inadequacies and problems corrected. The possibility of establishing tripartite committees to administer these registries in certain sectors should also be examined *(legislators, regulatory agencies, enforcement agencies and funding agencies).*

- Joint and several liability provisions should be reinforced and extended. In certain sectors, the extension of joint and several liability provisions throughout the production and distribution chain should be considered. The statutes should specifically establish the responsibilities of intermediaries and subcontractors with regard to employment standards *(legislators).*

- Employment standards enforcement agencies should be provided with sufficient resources to undertake inspections, general audits and timely investigations of complaints. When undertaking general audits of workplaces in sectors where homework is present (some industrial sectors, telemarketing, etc.), employment standards officers should systematically inquire whether employers use homeworkers *(ministries, enforcement agencies).*

- Public education campaigns targeted at homeworkers and their employers in all sectors should be undertaken by employment standards enforcement agencies. Information on the difference between independent contractors and employees should be included in these campaigns *(enforcement agencies).*

- The possibility of third-party complaints, filed with the worker's consent, should also be included in the statutes. The possibility of anonymous complaints should also be examined as a policy option in consultation with workers' organizations and homeworkers *(legislators).*

- Employment standards enforcement agencies should make available to the public and even publish information on employers' non-compliance with the law, including the names of the employers in question. Such negative publicity would have a dissuasive effect on employers who do not comply with the law. Such a measure could be particularly relevant in the case of homework, as the publication of employment standards violations also serves to educate the public, and employers, about the situation of homeworkers and their legislative protection *(legislators, regulatory agencies, enforcement agencies).*

Workers' Compensation

- Generally, remove all superfluous technical language that inadvertently leads to the exclusion of homeworkers *(legislators, regulatory agencies).*

- Clarify applicable legislation in cases where transborder issues arise *(legislators).*

Coverage

- Broaden coverage to include self-employed individuals who work primarily for one contractor *(legislators).*

- Presume coverage unless it is demonstrated that an individual is an independent operator. The fact that the individual has contracts with multiple employers or shares homework should not, in itself, be a reason to exclude the individual from coverage under the Act *(legislators)*.

- Legislatively presume that an individual contractor is a worker unless the contrary is proven *(legislators)*.

- Eliminate exclusions of outworkers from all legislation *(legislators)*.

- Eliminate exclusions of undocumented workers or workers whose income has thus far not been declared to government authorities *(regulatory agencies, ministries, enforcement agencies, decision makers)*.

- Allow for voluntary coverage of all independent contractors who would otherwise be excluded from the purview of the legislation *(legislators)*.

Calculation of benefits

- Provide mechanisms for fair treatment of pieceworkers when calculating benefits, both in terms of initial compensation and in terms of wage loss calculations *(enforcement agencies, decision makers)*.

Reassignment and rehabilitation

- When evaluating a worker's ability to return to work, the fact that he/she works from home should not be used to shorten the recognized period of disability *(enforcement agencies, decision makers)*.

- Guarantee that workers who are injured on the job have the right to refuse temporary assignment to work in their home *(legislators, enforcement agencies, decision makers)*.

- Guarantee that workers who are injured on the job have the right to refuse a rehabilitation goal that aims for return to work in the home *(legislators, enforcement agencies, decision makers)*.

Occupational Health and Safety

Right to equal protection

- Legislation should be designed to apply to all workers, including homeworkers, and exclusion from specific provisions should be the exception, motivated by the special characteristics of homework, and clearly stated *(legislators)*.

- Waged homeworkers should have the same rights and obligations as waged on-site workers, including the right to safe equipment and personal protective equipment to be provided by the employer *(legislators)*.

Fundamental rights regardless of contractual status

- Fundamental provisions of health and safety legislation should apply to everyone in a workplace, be they wage earners or the self-employed, and the home should be considered to be a workplace when work takes place therein. These should include:
  - the right to information regarding hazards that are known or ought to be known to the employer associated with the work given to the homeworker and regarding precautions to be taken *(legislators);*
  - the right to necessary training with regard to those hazards *(legislators)*; and
  - the right to refuse dangerous work and to be protected from sanctions for so doing *(legislators).*

Inspection

- Special inspection provisions should be developed, designed to achieve a balance between the right to safe working conditions and the right to privacy. Current specific provisions to this effect should be examined as a possible model for other jurisdictions[1] *(legislators, enforcement agencies, decision makers).*

Organizing and Collective Bargaining

- The burden of proving the status of independent contractors for the purpose of inclusion in a bargaining unit should be on the employer. In jurisdictions where "dependent contractors" are not explicitly covered by labour relations legislation, they should be included *(legislators).*

- Labour codes should explicitly indicate that homeworkers are "employees" for the purpose of the legislation. It will then be up to the employer to demonstrate that a homeworker is in fact an independent contractor *(legislators).*

- The adoption of a provision modelled after section 109.1 of the *Canada Labour Code* on communication with off-site workers should be included in other labour relations legislation *(legislators).*

- Forms of broader-based bargaining, which take into consideration the situation of homeworkers, should be explored and implemented, in consultation with unions and other stakeholders *(legislators, regulatory agencies, ministries, funding agencies).*

- Financial and technical support should be given to associations which provide services and meeting places (including "virtual" meeting places) for homeworkers *(ministries, funding agencies).*

- Formal recognition, by the adoption of legislative and other measures, should be given to homeworkers' associations to ensure the representation of their interests at forums where policy issues and legislative changes relating directly or indirectly to homework are being discussed *(legislators, ministries, funding agencies).*

Employment Insurance

- The burden of proof should be shifted onto the Employment Insurance Commission in the case of "shared" homework or multiple employers, to determine whether the homeworker's employment is insurable or not *(legislators, regulatory agencies).*

- The government should consider adopting regulations under the EI Act to impede the exclusion of homeworkers in "business-like" situations where they have no control over business decisions but some control over their level of production *(regulatory agencies).*

- Attention should be paid to the need for disaggregated statistical research in order to verify the existence of a causal link between the general decrease in female beneficiaries, and the possible increase in the number of female homeworkers accumulating insurable worked hours for which determination is a problem *(ministries, funding agencies).*

- A study should be carried out that focusses on the economic impact, on access to benefits and on the duration of benefits paid to homeworkers under current deeming provisions in order to assess the real impact of the provisions. This is particularly important with regard to areas with lower regional unemployment rates *(funding agencies).*

- The EI Act should be amended to re-establish the rule of the "average weekly wage" as a reference point to determine the level of weekly benefits in the case of homeworkers and other workers who may be affected *(legislators).*

- To increase the effectiveness of the Family Supplement, it is important to scrutinize more carefully the eligibility requirements for the Family Supplement that appear to affect homeworkers adversely since they already suffer from the requirements of the new act. To this end, statistical analysis is required that pays attention to homeworkers with irregular wages or with wages made invisible by the prescribed method of determining eligibility to Employment Insurance benefits or calculating the level of benefits *(ministries, funding agencies).*

- Standards governing access to maternity and parental benefits should be specifically adapted to ensure that homeworkers are not adversely affected by the irregularity of their work schedules and earnings. In order to balance the risk of miscalculating the real amount of worked hours for the purpose of these special benefits, a lower level of required worked hours should be considered *(legislators, regulatory agencies).*

- Considering that parents will shortly have access to an extended period of EI parental benefits, a more detailed analysis should be undertaken to determine the real impact of the new requirements of the EI Act on the level of maternity and parental benefits for homeworkers *(ministries, funding agencies).*

Endnote

[1] See, for example, British Columbia's Bill 14, s. 181.

APPENDIX A: COMPARATIVE TABLES OF SOME OF THE LEGISLATION

Minimum Employment Standards Legislation

	Federal	**Quebec**	**Ontario**	**British Columbia**	**New Brunswick**
Definition of "homeworker" in the Act	No	No	Yes (not all homeworkers fall under definition).	Yes (not all homeworkers fall under definition).	No
Coverage under Act if worker meets the definition of "employee" and works at home	Yes	Yes	Yes	Yes	Yes
Coverage of self-employed workers	No	No	No	No	No
Right to general minimum wage	Yes	Yes, but possible exception for certain homeworkers who are entirely paid by commission.	Yes, and certain homeworkers have the right to a 10 percent premium to cover costs.	Yes	Yes, but certain homeworkers could receive less if entirely paid by commission or if working hours not verifiable.
Registration of homeworkers	No	No	Yes, for industrial homeworkers.	Yes, for certain industrial homeworkers.	No
Undeclared work covered	N/A	Yes, unless worker not in possession of a valid work permit under the *Immigration Act*.	Yes	Yes	N/A

Workers' Compensation Legislation

	Federal	**Quebec**	**Ontario**	**British Columbia**	**New Brunswick**
Homeworker or outworker defined	No	No	Yes; not all homeworkers are in definition.	No, not since Bill 14.	Yes; not all homeworkers are in definition.
Coverage under Act if homeworker	N/A	Yes	No, except non-manufacturing homework. Policy accepts employees in spite of statute wording. 30 percent of workers excluded because of industry they work in.	Yes	No, except non-manufacturing homework, as law excludes outworkers. Policy accepts employees in spite of statute wording. Small workplaces excluded.
Coverage of self-employed	No	Yes, some.	No	No	No
Voluntary coverage of self-employed	N/A	Yes	Yes, if industry covered.	Yes	No, only employers may pay voluntary coverage.
Accident in the home	N/A	Yes	Yes	Yes	Yes
Undeclared work covered	N/A	Yes, unless not in possession of a valid work permit under the *Immigration Act*.	Yes	Yes	Yes

Occupational Health and Safety Legislation

	Federal	**Quebec**	**Ontario**	**British Columbia**	**New Brunswick**
Coverage under Act	Yes	Yes	No	Yes	Probably not (ambiguous).
Right to information	No, see however C-12.	Yes	No	Yes	Probably not (ambiguous).
General duty clause (p. 75ff)	Yes	Yes	No	Yes	Probably not (ambiguous).
Specific duty clauses	No, see however C-12.	Ambiguous: depends on wording.	No	Yes	Probably not (ambiguous).
Inspection	Invitation only, see however C-12.	Yes	No	Yes (specific provisions for homework).	Probably not (ambiguous).

APPENDIX B: LAWS AND REGULATIONS

- **British Columbia**

- Laws:
- *Employment Standards Act*, RSBC 1996, c. 113.
- *Labour Relations Code*, 1996, RSBC, c. 244.
- *Workers' Compensation Act*, RSBC, c. 491.
- *Workers' Compensation Act*, 1996, RSBC, c. 492.
- *Workers' Compensation Act*, SBC 1916, c. 77.
- *Workers' Compensation Amendment Act, 1998* (Bill 14 - 1998, in force October 1, 1999).
- *Workplace Act*, 1996, RSBC, c. 493.

- Regulations:
- BC. Reg. 396/95 (employment standards)
- *Occupational Health and Safety Regulation: Core Requirements*, BC Regulation 296/97.

- **New Brunswick**

- Laws:
- *Employment Standards Act*, RSNB, c. E-7.2.
- *Industrial Relations Act*, RSNB, c. I-4.
- *Occupational Health and Safety Act*, RSNB 1983, c. O-0.2.
- *Workers' Compensation Act*, RSNB c. W-13.
- *Workers' Compensation Act*, SNB 1918, c. 37.

- Regulations:
- NB Reg. 95-115 (employment standards).
- Regulation 82-79 under the *Workers' Compensation Act* (OC 82-360), April 29, 1982.

- **Ontario**

- Laws:
- *Employment Standards Act*, 1968, SO, c. 35.
- *Employment Standards Act*, 1974, SO, c. 112.
- *Employment Standards Act*, RSO, 1990, c. E.14.
- *Employment Standards Improvement Act*, 1996, SO, 1996, c. 23.
- *Factory, Shop and Office Building Amendment Act*, 1932, SO 1936, c. 21.
- *Industrial Safety Act, 1964*, SO 1968, c. 45.
- *Industrial Safety Amendment Act*, SO 1968, c. 56.
- *Industrial Standards Act*, RSO 1990, c. I.6.
- *Labour Relations Act*, 1995, SO, 1995, C. 1, Sch. A, as amended.

- *Occupational Health and Safety Act*, SO 1978, c. 83.
- *Workers' Compensation Act*, RSO 1990, c. W.11.
- *Workers' Compensation Act*, SO 1914 c. 25.
- *Workplace Safety and Insurance Act*, SO 1997, c. 16.

Regulations:
- Reg. 325 (employment standards).
- O.Reg. 423/94 (employment standards).
- *Schedule- Women's Coat and Suit Industry*, Ontario Regulation 282/99, amending Regulation 659.
- *Schedule- Women's Dress and Sportswear Industry*, Ontario Regulation 283/99, amending Regulation 660.

Quebec

Laws:
- *Act Respecting Collective Agreement Decrees*, RSQ, c. D-2.
- *Act Respecting the Conditions of Employment in Certain Sectors of the Clothing Industry and Amending the Act Respecting Labour Standards*, LQ 1999, c. 57.
- *Act Respecting Industrial Accidents and Occupational Diseases*, RSQ, c. A-3.001.
- *Act Respecting Labour Standards*, RSQ, c. N-1.1.
- *Act Respecting Occupational Health and Safety*, RSQ, c. S-2.1.
- *Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists*, RSQ, c. S-32.1.
- *Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and Their Contracts with Promoters*, RSQ, c. 32.01.
- *Bill 47: An Act respecting certain conditions of employment in certain sectors of the clothing industry and amending the Act respecting labour standards*, National Assembly, 1st Session, 36th Legislature, May 13, 1999.
- *Charter of Human Rights and Freedoms*, RSQ, c. C-12.
- *Civil Code*.
- *Labour Code*, RSQ, c. C-27.
- *An Act respecting the responsibility for accidents suffered by workmen in the course of their work, and the compensation for injuries resulting therefrom*, SQ 1909, c. 66.
- *Loi modifiant diverses dispositions législatives eu égard à la Charte des droits et libertés de la personne*, SQ 1986, c. 95.

Regulations:
- *Decree Respecting the Leather Glove Industry*, RRQ, 1981, c. D-2, r. 32.
- *Decree Respecting the Men's Clothing Industry*, RRQ, 1981, c. D-2, r. 27.
- *Decree Respecting the Women's Clothing Industry*, RRQ, 1981, c. D-2, r. 26.
- *Regulation Respecting labour standards*, RSQ, c. N-1.1, r. 3.
- *Regulation Respecting the Quality of the Work Environment*, c. S-2.1, r. 14.

Federal

- *Act to Amend the Canada Labour Code (Part II) in Respect of Occupational Health and Safety*, Bill C-12, First Reading, October 28, 1999, Second Session, Thirty-sixth Parliament, 48 Elizabeth II, 1999.
- *Canada Labour Code*, RSC, 1985, c. L-2.
- *Employment Insurance Act*, SC. 1996, c. 23, RSC, c. E-5.6.
- *Government Employees Compensation Act*, RSC 1985, c. G-8.
- *Status of the Artist Act*, SC 1992, c. 33.

Regulations:

- *Canada Labour Standards Regulation*, CRC 1978, c. 986.
- *Canada Occupational Safety and Health Regulations (Consolidated)*, Canadian Employment Safety and Health Guide (Toronto: CCH, 1999).
- *Employment Insurance (Fishing) Regulations*, SOR/96-445.
- *Employment Insurance Regulations*, SOR/96-332.
- *Government Employee Compensation Place of Employment Regulations*, SOR/86-791.
- *Regulation Amending the Employment Insurance Regulation*, SOR/98-551.

Other Provinces

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- *Employment Standards Code*, SM 1998, c. 29 (Manitoba).

Europe

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- *Home Work Recommendation, 1996* (No. 184).

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* Some of these papers are still in progress and not all titles are finalized.