

**Making Family Child Care Work:
Strategies for Improving the Working Conditions
of Family Childcare Providers**

by
Rachel Cox

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ABSTRACT

The vast majority of Canada's 170,000 family childcare providers do not have access to the protection and benefits of labour and employment laws. In the regulated sector, the delivery model for family child care varies from one province to another. In several provinces that use the family childcare agency model, childcare services are structured to circumvent labour and employment laws by avoiding the establishment of an employment relationship between the agency and the family childcare provider. Given, on the one hand, the precarious employment status of these providers and, on the other hand, the impact of this precariousness on the quality of childcare services, this report provides recommendations for extending, to all regulated childcare providers, the protection afforded by certain social security schemes.

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LIST OF ACRONYMS

CCCF	Canadian Child Care Federation
CCRR	Childcare Resource and Referral Program (British Columbia)
CRRU	Childcare Resource and Research Unit
CPE	<i>Centre de la petite enfance</i> (Quebec)
CPP	Canada Pension Plan
CSST	<i>Commission de la santé et de la sécurité du travail</i> (Quebec)
ECCE	Early Childhood Care and Education
LNR	Licence not required (British Columbia)
MCAWS	Ministry of Community, Aboriginal and Services (British Columbia)
MESF	<i>Ministère de l'Emploi, de la Solidarité et de la Famille</i> (Quebec)
MFE	<i>Ministère de la Famille et de l'Enfance</i> (Quebec)
QPP	Quebec Pension Plan (Quebec)
RRSP	Registered Retirement Savings Plan
SS	Subsidized spots

PREFACE

Good public policy depends on good policy research. In recognition of this relationship, Status of Women Canada instituted the Policy Research Fund in 1996. The fund supports independent policy research on issues linked to the public policy agenda and in need of gender-based analysis. Our objective is to foster 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 reports.

This policy research paper was proposed and developed under a call for proposals in September 2000, entitled *Women's Access to Sustained Employment with Adequate Benefits: Public Policy Solutions*. Other research projects funded by Status of Women Canada on this theme examine such issues as policy options for women in non-standard employment, support for single mothers and women with disabilities, and occupational health.

A complete list of the research projects funded under this call for proposals 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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I am grateful for Josée Belleau's contribution to this report. Her perceptive reflections enriched my understanding of the reasons for the persistent undervaluing of the work done by childcare providers.

Finally, I thank Status of Women Canada for its financial support of the project. More specifically, I am grateful to Julie Cool, Jo Anne de Lepper, and Beck Dysart who, throughout this project, offered me support and greatly valued advice.

EXECUTIVE SUMMARY

In Quebec and in Canada, some 170,000 providers offer child care in their homes. Family childcare providers generally have a fairly low annual income. And, with rare exceptions, they do not have access to the benefits and protection of labour and employment laws.

During the last 20 years, thousands of providers in Canada have moved across the line that separates the informal sector of childminding in private homes and the formal sector of regulated family child care. Today, more than 15,000 providers offer regulated family childcare services. Those who choose to work in the formal sector must comply with a multitude of regulations, and they are required to have increasingly rigorous professional training. Yet despite the substantial increase in what is required of regulated providers, a fundamental contradiction remains: their income and working conditions continue to reflect the conditions that prevail for work typically done by women in the informal sector.

In the regulated sector, the delivery model for regulated family childcare services varies from one province to another. Within the *direct licensing* model, a government ministry grants a licence to, and supervises, the family childcare provider. In the *agency* model, the provider is recognized and supervised by an agency with a government licence. Generally, in the provinces that use the agency model, the employment status of providers has frequently been the object of litigation. In Ontario and Alberta, family child care has been organized in a way that prevents the creation of an employment relationship between agencies and childcare providers. Considerations regarding the development of the best possible quality childcare services (e.g., compulsory training, provider evaluation, equipment loans, regular visits to the childcare home) have been relegated to the background. Considerations regarding improved working conditions for providers, such as income stabilization, access to social benefits, and the possibility of greater personal support, have also been put aside.

In Quebec, the government adopted an altogether different approach. It did not compromise on the organization of family childcare services in order to prevent the establishment of an employment relationship between the *Centres de la petite enfance* (the counterpart to agencies in other provinces) and family childcare providers. Indeed, in a policy context of significant public funding of family child care, as is the case in Quebec, considerations of public spending accountability would decrease the probability of such a reorganization. A certain degree of control over childcare services and, consequently, over providers' work is appropriate. On the other hand, today, even though some family childcare providers' work is indeed under the control and management of a *Centre de la petite enfance*, the Quebec government is attempting to withdraw from providers any possibility of access to the benefits and protections of labour and employment laws. Once again, despite the considerable increase in requirements imposed on regulated family childcare providers, their working conditions remain precarious.

Unfortunately, stereotypes regarding women's work legitimize approaches that fail to recognize the true value of a family childcare provider's work. It is time to recognize the job

done by these providers for what it really is: real work. We hope our recommendations will serve as concrete tools for ensuring that their work receives the recognition it deserves.

This study examines three provinces representing different delivery models for regulated family child care: British Columbia (a direct licensing model), Quebec (an agency model) and Newfoundland and Labrador (a mixed model). Then, for five areas of law, (maternity and parental benefits offered under the *Employment Insurance Act*; the Canada Pension Plan/Quebec Pension Plan (CPP/QPP); compensation for workplace injuries; employment standards; and pay equity), we formulate a hypothesis about the current eligibility of family childcare providers.

More specifically, from a legal point of view, in principle the right to protection and benefits under labour and employment laws is contingent on the determination of employee status. However, regardless of the model used for delivering regulated family child care, almost all providers are currently considered to be self-employed.

Even so, in Quebec and Canada some exceptional measures have gradually been introduced into labour and employment laws, thus extending some social protection to the self-employed. Such measures are of particular interest to childcare providers. For example, consider the use of regulatory power to make it possible for family childcare providers to access benefits under the *Employment Insurance Act* in the same way that persons holding insurable employment can. Another example lies in the possibility of extending protection to regulated family childcare providers in the event of a work-related accident or illness. Already, some groups of workers who are vulnerable or engaged in activities in the public interest enjoy such protection, even though they are not considered to be employees.

In the final analysis, in any strategy that is geared towards the long-term improvement of the working conditions of regulated family childcare providers, it is impossible to avoid the question of public funding for child care. In the meantime, immediate demands for some measure of social protection for providers can only reinforce demands for better funding of child care, while at the same time contributing to increased recognition of the value of providers' work.

INTRODUCTION

In 1998, a sectorial study sponsored by the Department of Human Resources Development Canada (HRDC) disclosed that approximately 300,000 individuals, almost all women,¹ offered childcare services in Quebec and Canada. The study also indicated that approximately 170,000 workers in the sector were family childcare providers. More than 15,000 of them offered regulated family child care.² In Canada, family child care is the dominant model of child care for children aged five and under (Beach *et al.* 1998b: 10, 3), and employment in family child care represents one of the 10 most common jobs for women (Hughes and McCuaig 2000: IX).

Family child care is a complex job that combines the roles and duties of managing a small business with educating children and communicating with parents. In terms of educating children, the childcare provider's task requires emotional commitment and constant attention to the children in care. With respect to materials, regulated childcare providers have to equip and maintain their residences in compliance with a multitude of regulations dictating hygiene and safety standards. Working conditions are characterized by long hours without contact with other adults, the absence of breaks and a lack of outside support (Belleau 2002). As a general rule, regulated childcare providers work a 56-hour week, of which 47 hours are dedicated to the care of children, and nine hours to preparation of children's activities and meals. On average, they care for 5.4 children. In the unregulated sector, only 60 percent of childcare providers work all year, compared with 80 percent in the regulated sector. And even though childcare providers in the unregulated sector care for somewhat fewer children (4.1 on average) than providers in the regulated sector, they still work nearly as many hours a week (CCCF 1998b: vi; 1998a: iv).

In spite of working so many hours, family childcare providers' annual income is generally rather low.³ Whether or not they work in the regulated sector, providers, with some rare exceptions, do not have access to the benefits and protections of labour and employment laws (Beach *et al.* 1998b: 82).

In reality, issues surrounding the working conditions of family childcare providers are linked to a more general social problem that involves non-recognition of the value of women's work, be it personal service work, work that replaces women's unpaid work in the home, or work from home. However, the host of reasons for this historic non-recognition of the value of family childcare providers' work does not justify allowing this situation to continue.

During the past 20 years, thousands of family childcare providers in Canada have moved across the line that separates the informal sector of childminding in private homes and the formal sector represented by regulated family child care. The importance of good quality early-childhood care in child development is now widely recognized (Beach *et al.* 1998b: 34-35; Bertrand *et al.* 1998: 9-10). Regulation is associated with better quality child care (Beach. 1998b: 44). Just as other workers in the childcare sector are becoming more and more professionalized, regulated childcare providers are increasingly subject to ever more stringent requirements for occupational training (Beach *et al.* 1998b: 126 ff). And yet, despite these

ever increasing requirements, a fundamental contradiction remains: the income and working conditions of family childcare providers continue to reflect the conditions that prevail in the informal sector for work typically done by women.

At present, the responsibility for and cost of child care is generally perceived to be a private matter, essentially concerning parents. The providers' remuneration is thus connected to the parents' ability to pay. Middle-class families and low-income families alike are often stretched to the limit in terms of their ability to pay. Only significant public funding will improve the working conditions of family childcare providers and providers of other childcare services in a meaningful way. And in any case, as with health or educational services, we believe that because it is to the benefit of society as a whole to have quality early childhood care, these services should be funded from public monies.

The purpose of this study is not to reiterate the necessity or profitability of public funding for child care. Several recent studies have already demonstrated this most convincingly.⁴ Our study simply aims to identify concrete, unifying and pragmatic strategies with a view to improving the working conditions of family childcare providers in the short and medium term. Ultimately, it is clear that any strategy geared towards the long-term improvement of the working conditions of regulated family childcare providers must address the broad question of the need for public funding for child care. Even so, immediate demands for some measure of social protection for providers can only reinforce this idea and at the same time, contribute to increased recognition of the value of providers' work.

The environment and working conditions of family childcare providers are defined both by the framework of childcare policy and the legal framework that governs employment and self-employment or independent contracting. This study deals with certain aspects of the legal framework and proposes measures to increase access by family childcare providers to the protection offered by labour and employment laws.

The whole issue of the right of family childcare providers to protection under various labour and employment laws must be put in the broader context of the social and legal problems associated with what is commonly referred to as "atypical work". Labour law evolved within the framework of working relationships that are "homogeneous, marked by stable, regular and continuous employment, occupied by employees working full-time, performing their work for a single employer, under the control and on the property of the company" (Valleé 1999: 278, translation mine). Regrouped under the term of "atypical work," several of the current forms of work no longer correspond to that model: self-employment, work from home, part-time employment, contract work, occasional or on-call work, or even work through a personnel agency. In some sectors (computing, financial services, and telecommunications), atypical work represents a relatively recent development. In other sectors (garment, agricultural, and taxi workers) atypical employment has been the norm for a very long time.

Although the forms of atypical work are heterogenous and eclectic, some constants can nonetheless be seen in this kind of work. The income, social benefits and job security of atypical workers are consistently lower than those of workers who hold permanent, regular, full-time employment.⁵ And this scenario is borne out in the childcare sector. In fact, even

though the working conditions of childcare workers in childcare centres are poor in some respects, they nonetheless offer more stability and social protection than the working conditions that are the lot of family childcare providers.

Over the last two decades, in the provinces that use the agency model to provide family child care, there has been periodic litigation over the employment status of regulated family childcare providers. These disputes are characteristic of a certain category of atypical workers sometimes referred to as “pseudo-independent contractors”. In fact, the employment status of persons working in a range of industries, from trucking, to taxi and limousine services, to home delivery of newspapers, as well as the status of any person working in the home care sector, has given rise to many legal disputes.

On the one hand, the legal problems associated with the uncertainty of the employment status of workers in these sectors include epic legal battles about employment status. Too, there is the issue of the court’s *a posteriori* redefinition of the contractual relationship between these workers and those who gave them work, with all the attendant complications, unforeseen costs, and fines for employers.

On the other hand, atypical workers who are “pseudo-independent contractors” also experience tensions associated with these same epic legal battles over their employment status. As well, they are also likely to experience social problems associated with the lack of social protection, the instability that is characteristic of their employment and, often, their low income (Dagenais 1998; De Wolffe 2000).

Despite the considerable difficulty of accurately predicting how a court will draw the line between employment and independent contracting, it is not uncommon for potential employers of these workers to deliberately try to structure their relationship with the workers so as to sidestep the status of employer. As we see in this paper, in Ontario and Alberta, the reaction of family childcare agencies to disputes over the employment status of regulated family childcare providers is entirely consistent with this phenomenon.

Restructuring relations between providers and agencies in order to avoid, at any cost, having providers become agency employees, inevitably has a major impact on how family child care is offered, as well as on the working conditions of family childcare providers. Recent studies have clearly demonstrated the relationship between the working conditions of family childcare providers and the quality of the child care that they offer.⁶ So since the “atypical” work here concerns family child care—instead, for example, of newspaper delivery—one of the equally critical legal and social problems associated with the workers’ precarious status is the issue of the impact of this precariousness on the quality of family childcare services. So the definition of the employment status of family childcare providers is a matter of great interest.

This study presents, in two chapters, issues associated with the employment status of family childcare providers. The first chapter describes in general terms the criteria for determining employment status. It reviews decisions handed down by courts and tribunals

on the employment status of regulated family childcare providers in Ontario and Alberta and describes the impact of such litigation on working conditions. In the second chapter, we see how family childcare providers in British Columbia, Quebec, and Newfoundland and Labrador may or may not be eligible for the benefits and protection of certain labour and employment laws. Recommendations complete the analysis, emphasizing potential solutions that recognize alternatives to employee status as the gateway for accessing the various types of social protection.

Methodology

Our study is based on a four-stage methodology. First, favouring sources with a comparative gender analysis, we consulted recent Canadian literature on atypical work and the adequacy of the legal regulations that govern it. Then, the members of the Working Committee of the Child Care Human Resources Round Table⁷ (now the sector-based Child Care Human Resources Sector Council) selected five areas of law where the absence of social protection for family childcare providers is most striking: maternity and parental benefits; public pension plans; workers' compensation; employment standards; and pay equity. Then, Working Committee members chose three provinces representing different delivery models for the provision of regulated family child care: British Columbia (direct licensing model), Quebec (agency model) and Newfoundland and Labrador (mixed model).

We stress that this study is primarily concerned with the situation of family childcare providers who work in the regulated sector, even though they represent only a minority of family childcare providers in Canada. We chose the regulated sector because the question of employment status does not arise in the work setting of unregulated or informal family child care. Furthermore, an interest in wanting to improve the working conditions of family childcare providers in the regulated sector is twofold. First, improving the working conditions of these providers is likely to have a positive impact on the quality of those services already offered in the regulated sector. At the same time, such an improvement could increase the attractiveness of the regulated sector, and in so doing, could increase the number of family childcare services in the regulated sector.

In each province under study, we formulated a detailed description of the working conditions of family childcare providers. For each selected field of law, we analyzed the legislative and regulatory framework, in order to formulate a hypothesis about the eligibility of regulated family childcare providers for the benefits and protection of the law. It is important to note that our hypothesis deals only with the regulated caregiver herself, and excludes any person who assists or replaces her. Moreover, we did not discuss the consequences for the employment status of the family childcare provider if her childcare service were to be incorporated. Such a situation seems to be extremely rare, and we chose to concentrate our energies on the other, more fundamental, questions.

We also queried two legal databases (QUICKLAW and SOQUIJ) to list reported decisions on the employment status of family childcare providers. We interviewed key informants in the childcare sector to measure the impact of these decisions on the working conditions of

family childcare providers in the designated provinces, and to complete our research on the jurisprudence.

Finally, simply reading the statutes and regulations does not necessarily provide conclusive information on how the law is actually applied. In light of the issues raised by the case law on the employment status of family childcare providers, we validated the preliminary results gleaned by analysis of statutes and regulations by consulting with experts in the application of the law. In some cases, we also used selective analysis of the jurisprudence to complete the validation of the data.

The statutes referred to in this research are current as of June 30, 2001. The case law is current as of September 30, 2001. Nevertheless, we also reference some interesting decisions that were handed down, as well as some legislative amendments that were adopted, after these dates.

Notes

¹ In this paper, given that 98.4 percent of family childcare providers, 96.8 percent of childcare providers in the child's residence, and 96.3 percent of educators in daycare centres are women (Beach *et al.* 1998: 8), the feminine (she/her) is used when speaking of providers.

² The figure of 15,000 regulated family childcare providers does not take into account the rapid increase in the number of regulated providers in Quebec since 1998, nor the licensing of providers in Newfoundland and Labrador since 2001.

³ For example, for regulated family childcare providers working 48 weeks or more a year, the average gross income before deduction of childcare expenses was \$15,600, for an average work week of 56 hours. (After deduction of expenses related to childcare, this amount decreases to \$8,400) (CCCF, 1998b). See also CCCF (1998a).

⁴ See, among other sources, CRRU (2000) and Cleveland and Krashinsky (1998).

⁵ See, among other sources, Dagenais (1998), Spalter-Roth and Hartman (1998) and De Wolffe (2000).

⁶ See Goelman *et al.* (2000: 65, 70) and Doherty *et al.* (2000b: 90).

⁷ The Child Care Human Resources Round Table is composed of approximately 15 sector-based representatives of groups and organizations of childcare services, unions, and the childcare work force. It was formed in April 2000 in order to highlight the importance of the social and economic contribution of the sector's work force, in keeping with recommendations of the sectorial study (Beach *et al.* 1998). In November 2003, the Round Table was incorporated and became the sector-based Child Care Human Resources Sector Council.

1. THE SIGNIFICANCE OF EMPLOYMENT STATUS

The first section of this chapter on the significance of employment status describes the general framework for determining employment status. The second section describes how the courts have decided the employment status of family childcare providers. The third and final section focuses on past recommendations for improving the working conditions of family childcare providers, with an analysis of these recommendations from the perspective of labour and employment-related legislation.

General Framework

Whether according to common law, civil liability, or labour and employment-related legislation, recognition of employee status (and not self-employed or independent contractor status) is the primary and essential prerequisite for access to a whole range of rights, protections and benefits. A worker must have employee status in order to be entitled to:

- the minimum wage;
- increased pay for supplementary overtime hours;
- paid vacation time and compensation for statutory holidays;
- reasonable notice in case of termination of employment, or the right not to be dismissed without just and sufficient cause;
- Employment Insurance benefits including sickness, maternity, and parental benefits;
- income replacement and other benefits in the event of a work-related accident or illness;
- protection under occupational health and safety legislation and, where the right exists, to preventive reassignment or withdrawal of a pregnant worker;
- pay equity; and
- employer contributions to the Canada Pension Plan/Quebec Pension Plan (CPP/QPP).

Only persons who are considered to be employees may organize in a union and engage in collective bargaining of their working conditions. The employment relationship also opens the door to benefits under a group insurance plan (sickness/drug). Employment status determines the employer's liability in the event of misconduct or negligence by the worker. It also determines ownership of copyright on creative works. The list of all the consequences of employment status is so impressive that, from the point of view of the worker:

... the salary ceases to be limited retribution for a task. It provides entitlement to rights, gives access to benefits outside of work (sickness, accidents, pension) and allows broader participation in social life (Castel, 1995: 324).

In some cases, in order to allow a person who is considered to be a dependent contractor access to some rights, protections or benefits, the law stipulates that she or he *be deemed an employee*. This exception proves the rule that employment status is an essential condition

for access to the benefits that flow from labour and employment-related legislation. (This question is explored further, in the section devoted to the application of criteria to dependent contractors.)

Finally, we know that employment and self-employment are governed by different taxation regimes. So it is important to keep in mind that tax deductions at source and the many deductions calculated on the basis of the employer's total payroll (Employment Insurance, workers' compensation, employment standards and CPP/QPP) mean that employment is an important source of income for the government.

Criteria Determining Employment Status

Several areas of law, such as civil liability or tort law, tax law and labour and employment law, rely on a distinction between employee status and status as an independent contractor or self-employed worker. Since the 1980s, in the context of agency-supervised family childcare services, litigation has arisen in each of these areas over this crucial distinction.

Generally speaking, the distinction between employee status and independent contractor (or self-employed) status traditionally depends on the degree of control or, in Quebec, on the degree of legal subordination to which a worker is subject.¹ In the context of liability for the acts of others, or *vicarious liability*, imputed to employers for their employees' negligence, the importance of actual control of work is readily understandable: one cannot hold a party legally responsible for the wrongdoing of others if she has no control over them. In labour law, in order to determine whether an employment relationship exists, the courts have most frequently relied on a formulation put forward in 1947 by Lord Wright in the *Montreal Locomotive Works* case about an employer's responsibility for an employee's wrongdoing:

...a fourfold test would...be...a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.... In many cases the question can only be settled by examining the whole of the various factors which constitute the relationship between the parties.²

Thus, the fourfold test put forward by Lord Wright has the effect of adding to the question of control other considerations that clarify the characteristics of a truly independent contractor, namely the possibility of profit or risk of loss as well as capital investment in working tools. In other words, beyond the concept of control, one must categorize a relationship as an employment relationship or a business relationship, by asking "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."³

Over the years, various courts have developed a multitude of tests to differentiate a person with employee status from a person engaged in a business relationship as an independent contractor.⁴ Much has been written about correct categorization, proper application and, more recently, about the relevance of these tests.⁵ That said, on the whole, the indicators used in this profusion of tests all relate to two main criteria, namely control and economic

dependence (or subordination). In the following pages, we discuss the application of these two basic criteria, focussing mainly on the indicators that are likely to be relevant in the context of family child care.

Control

Generally speaking, a person who supplies a service under the direction and control of another person is considered as the latter's employee, whereas a person who undertakes to supply a service to another, but can choose how to go about providing that service is generally considered to be an independent contractor.

Furthermore, the concept of control does not refer solely to the immediate control over how work is performed. For example, in spite of substantial professional autonomy, professionals, such as dentists or doctors, may well be employees. As well, in the case of sales representatives or ambulance technicians, for example, despite the lack of immediate supervision of the performance of their work, nothing prevents less specialized workers who do their work outside the employer's premises from benefiting from employee status.

The concept of control includes the general power held by one party to direct the work of another and refers, among other things, to the full range of administrative control over the work.⁶ The power to select a person to do a job, the right to set the hours or schedule, the possibility of taking disciplinary measures if the employee's work performance is not satisfactory or even suspending, or dismissing, her or him are all indicators of control typical of an employment relationship. In contrast, in a business relationship it is the services offered by the contractor that are evaluated, rather than her or his personal qualities. The hours required to do the work are generally part of the risk assumed by the contractor. Nor does unsatisfactory work trigger a series of graduated penalties. Instead, in future, the supplier of work will turn to other contractors or, ultimately, terminate the contract.

Any process whereby one party is evaluated presupposes some degree of control for the other party. Normally, such a process is a part of an open-ended relationship and is, consequently, an indicator of an employment contract.

Also, being trained by the employer or according to the employer's directive indicates another aspect of the control typically seen in an employment relationship, since an employer generally only trains her or his employees. This is even truer if the employer expects the methods and procedures set out during training to be the methods that the person is then obliged to use when subsequently performing the work. In contrast, a contractor, instead, offers a set of predetermined services to the client. Clients who think they can find services somewhere else that offer better value for their money can simply refuse to contract for them as offered.

Furthermore, the obligation to do the work personally (in other words, the *intuitu personae* nature of the contract) clearly indicates the presence of an employment contract. The obligation to perform the work personally is in fact considered to be one of the most telling indicators in the characterization of an employment contract (Valleé 1999: 285). Similarly, typical characteristics of an employment relationship include when a person has no right to

work for other employers, can only be replaced on an occasional basis without the other party's consent, or cannot hire employees to work with her or him.

Finally, as a general rule, an employer holds liability insurance to cover any negligence or misconduct on the part of an employee in the performance of the latter's duties. An independent contractor, in contrast, assumes the costs of damages incurred through her or his own fault. However, a client does not usually require a contractor to carry liability insurance.

Economic Dependence

Generally speaking, if a party has no control over the economic matters that affect her or him with respect to the other party, then she or he is bound to the latter by an employment contract. On the other hand, if a party has some decision-making power or control over economic questions and its economic relationship to the other party, then she or he is doing business with a co-contractor rather than an employer.

Thus, being able to negotiate and set one's own rates freely is a major indicator of the economic independence that is typical of a genuine contractor. If a person has some control over the profits to be made from the service she or he provides, then she or he would be considered an independent contractor. The corollary is also true: having to bear the risk of losing money on the services provided is a significant indicator of the economic independence that is typical of an independent contractor.

Ownership of tools is a criterion that also refers to a person's possibility of making a profit or incurring a loss. Normally, an employer owns the tools and supplies everything that is required to perform the work. On the other hand, a capital investment in work tools can represent either a risk of loss or possibility of profit, or the ability to take these tools and go to work for another client. The ownership of tools therefore represents one of the traditional indicators of a contract for services (business contract).

As well, in the case of a contract for services, services are typically performed for a set rate. Within the context of an employment contract, a person is paid according to an hourly, daily or weekly rate. However, in the legal sense, piecework payment is not always synonymous with a possibility of loss or profit. Even if a worker's piecework income decreases or increases according to the amount of work assigned to her or him, pay is, nevertheless, directly related to the work done. In other words, a decrease in income caused by having less work is not the same as a loss.⁷

Normally, the payment of benefits, sick leave, paid vacation time as well as inclusion in group insurance plans (disability insurance and extended medical coverage) and participation in a pension plan are associated with an employment contract. Conversely, a contract for services does not provide for this kind of protection.

If a person gets all her or his work from a single source (in family childcare setting, this most probably means from an agency), then this is an indicator of employee status. This

economic dependence often translates into an erosion of the worker's autonomy and latitude in setting rates and deciding how to do the work. In contrast, if a person offers services to a wider public and has several client bases, she or he is more like a truly independent contractor.

The Application of These Criteria to the Dependent Contractor

The backdrop against which the employment status of family childcare providers is determined would be incomplete without a description of the application of these criteria to the dependent contractor. Often, in labour and employment-related legislation, there is an intermediate statutory category situated between the employee and the independent contractor: that of "dependent contractors." The concept of a *dependent* contractor is in contrast to that of an *independent* contractor or self-employed person.

Generally speaking, such a category has the effect of increasing the relative weight of the criterion of economic dependence or subordination in the definition of eligibility for statutory benefits. Usually, the definition of an intermediate category of dependent contractors eliminates or minimizes the importance of certain traditional criteria, such as ownership of tools. Furthermore, the creation of such a category of dependent contractors sanctions the fact that the categorization given by the parties to their relationship, and the form of payment adopted as a consequence, are not important.

In other cases, even though dependent contractors are not expressly contemplated by the wording of a statute, given the law's purpose the courts have interpreted the definition of employee in a broad and liberal fashion, with the result that some dependent contractors are effectively covered by labour laws. This is the case, for instance, of the interpretation of the word "*employee*" in Quebec's *Labour Code*. In short,

There is a spectrum of work arrangement between the quintessential employee and the fully independent contractor. The courts and boards have put the separating line in one place and the dependent contractor amendments have shifted it somewhat towards the employee pole. But the characteristics and tests used to separate one side from the other are still very much the same (Langille and Davidov 1999: 28).

The Protective Mission of Labour Law

In theory, the distinction between employee status and independent contractor status exists to distinguish workers in need of a certain type of protection from others who are in a position that allows them to ensure their own protection. On the one hand, some vulnerable workers are considered to be in need of the protection of labour and employment laws. On the other hand, those workers considered to be "independent" are deemed to be able to negotiate advantageous working conditions for themselves and charge prices that enable them to carry insurance and take time off as they see fit. In other words:

The test for "employee" fixes the boundary between "the economic zone in which business entrepreneurs are expected to compete" and the "economic

zone in which workers will be afforded the relatively substantial protections of the labour standards...and of the common law” (Fudge, 1999: 136).

In the framework of the “protective mission of labour law” (Valleé 1999: 279, translation mine), the two criteria of control (or subordination) and economic dependence take on their full significance. “[T]he subordination of some workers means that they are unable to freely and fully pursue their goals and realize themselves to make (or at least take part in) the decisions that directly affect their lives” (Langille and Davidov 1999: 20). Likewise, it is clear that in an economic context in which workers do not have real autonomy on economic matters that affect them, they need more protection vis-à-vis their employer:

...[O]ne of the foundations of labour law was to introduce personalist preoccupations into a law that otherwise asserts the commercialism of work. Labour law is based on the impossibility of distinguishing the activity of work from the person who performs it. [The law] protects this person, as much in relation to the conditions under which the work is actually performed, as to the person’s security and integrity (Vallée 1999: 278, translation mine).

In the realm of family child care, the nature of the work, namely, the care of young children as well as the working conditions of family childcare providers clearly are more in keeping with the protective mission of labour law than with the idea of “commercial” free enterprise or work as a market commodity.

First, with regard to the nature of work, it is by definition difficult to distinguish the family childcare service *per se* from the woman who is responsible for it and in whose home the service is provided.⁸ Second, according to a study published in 1998, before deduction of expenses family childcare providers working an average of 56 hours per week for 48 weeks or more per year had an annual income of \$15,600. After deduction of childcare operating expenses, this amount drops to \$8,400 a year.⁹ Furthermore, the lack of financial stability and social protection are a recurrent theme of the working conditions of family childcare providers (Doherty *et al.* 2001: 18, 22; CCCF 1998: 34-35; Beach *et al.* 1998b: 82-83) and represent major sources of stress for providers (Doherty *et al.* 2000b: 46). It is therefore no exaggeration to say that “vulnerable” or “dependent” better describes the economic situation of the majority of family childcare providers than “autonomous” or “independent.”

However, even though it is impossible to distinguish the work activity (childcare service) from the person who does the work (childcare provider), the “personalist preoccupations” of labour law are, with some rare exceptions, totally absent from the legal framework applicable to family child care. In other words, as we shall see later in this report, in Quebec and Canada today, no matter which delivery model is used to provide regulated family childcare services, coverage for family childcare providers under labour laws is the exception rather than the rule.

Two basic models exist for the provision of regulated family child care in Canada: the direct licensing model and the agency model. In the direct licensing model, the family childcare provider answers to a governmental department that grants her a licence and supervises her. The direct licensing model is found in British Columbia, Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, the Yukon and the Northwest Territories. In the agency model, the family childcare provider is affiliated with and supervised by an agency that in turn is licensed by a government department. Alberta, Ontario, Quebec and Nova Scotia have adopted the agency model. In Newfoundland and Labrador, there is a dual model based on both the agency model and on direct licensing.

In some of the provinces that use the agency model, family childcare providers work closely with and are supervised by agencies. Consequently, this situation has been used to bolster a certain number of arguments claiming that the providers work *for the agency* and, therefore, have employee status.

In Ontario and Alberta, and more recently in Quebec, the employment status of family childcare providers has been the subject of litigation. Regardless of the ultimate outcome, these court cases have had and will have a major impact on how regulated family child care is delivered, and consequently, on the working conditions of family childcare providers in these provinces. In Ontario and Alberta in particular, we will see that the agencies have generally reacted strongly to the idea that they have responsibility as employers for family childcare providers. The associations of agencies and, to varying degrees, the provincial or municipal governments involved as funders of agencies, have rapidly sought to restructure their relationship with family childcare providers to put an end to any ambiguity about providers' employment status.

In these conditions, the question of identifying which elements in the relationship between the family childcare provider and the agency must be present in order to continue characterizing the relationship as one between a client and an independent contractor, rather than as an employer-employee relationship, is a major issue.

Family Childcare Services in Context

We have compiled a list of decisions handed down by various courts and tribunals on the employment status of family childcare providers in Ontario and Alberta (See Appendix A).

As recently as May 2003, the Quebec *Labour Court* rendered two decisions on the right of family childcare providers to unionize.¹⁰ Both decisions affirmed the right of family childcare providers to employee status under the Quebec *Labour Code* and, consequently, to unionize. The Quebec government reacted by adopting Bill 8, which stipulates that, despite any provision to the contrary in the *Labour Code* or any other statute, family childcare providers are deemed to not be employed by the *Centre de la petite enfance* (CPE).¹¹ These events took place after our report was finished. Consequently, a detailed analysis of their impact is outside the timeframe of this study.

We do want to mention that, as already explained, labour law has evolved in order to govern relationships between two parties with unequal power and, more specifically, in order to protect the employee against the risk of exploitation generated by this unequal relationship. Identifying a relationship of subordination enables us to, first, recognize that there is an unequal working situation within which the employee runs the risk of being exploited and, second, to determine that this situation is being addressed by standards to protect workers' physical, social, and financial security (Vallée 1998: 47). With Bill 8, the Quebec government decided that family childcare providers must in effect carry out their work under the direction and control of a CPE but without the protection of labour law, the purpose of which is to counterbalance the vulnerability of workers in exactly this kind of position of subordination and economic dependence. We note that Bill 8 is currently being challenged before the courts and is the object of a complaint before the International Labour Organization (CSN 2003).

The Impact of Decisions on the Employment Status of Family Childcare Providers in Ontario

In Ontario, decisions on the employment status of family childcare providers have caused considerable tension within the childcare sector on three occasions in the last 15 years. The first was in 1986, when the family childcare providers of a Toronto agency then called Cradleship Creche organized. The second came in 1993, after a decision that ruled that the same agency's family childcare providers were entitled to benefits under the *Employment Standards Act*. And the third dates from 1999, following a decision that the family childcare providers of the municipality of Wellington County were employees for the purpose of pay equity.

The Right to Collective Bargaining

In or around 1985, the Ontario Public Service Employees' Union (OPSEU) filed for certification on behalf of the family childcare providers of a Toronto agency in Toronto that was then known as *Cradleship Creche*. (Today, the same agency goes by the name MacAulay Child Development Centre.) The Ontario Labour Relations Board ruled that the agency's family childcare providers were dependent contractors within the meaning of the law, and had the same right as other employees to unionize.¹²

Cradleship Creche was a large agency that at the time supervised approximately 75 family childcare providers. (Today, the number is closer to one hundred.) The providers serve families in a multiethnic neighbourhood. English is rarely the mother tongue, population density is high and incomes are low. All the children cared for were subsidized by the municipality of Toronto, which set the daily rates for child care. To appreciate the audacity of the providers' organizing drive, it is worth noting that at the time, the agency required that providers prove that they had a source of income other than child care as a condition of affiliation. In other words, right from the start, the agency conceded that the work of a family childcare provider was not viable employment.

At the time, in addition to dissatisfaction with their level of remuneration, a number of providers considered that the agency's placement of children with them was unfair and at times even discriminatory. So it was not surprising that in the course of negotiating a first

collective agreement, special attention was paid to better control over how the agency decides where to place children. Other gains included the establishment of a toy-lending library co-managed by the providers and the agency. Having been unionized as dependent contractors, the family childcare providers kept their self-employed status for tax purposes.

Over the years, the union also negotiated a mechanism allowing the agency to make at-source deductions to a group insurance plan covering all OPSEU members who did not already have such a plan. But in the end, the providers did not want to participate in the plan. Since many of them had access to comparable coverage (except for the disability insurance, of course) through their spouses and given their fairly low incomes, it seems that the benefits of such an insurance plan were not a priority. In short, like many low-income workers, the providers certainly were concerned about their right to certain statutory benefits, but they were not yet interested in participating in a contributory plan like group insurance or a pension plan.

Given, however, the real threat that the agency might close, and with little bargaining clout to oppose such a decision, the union was then — and remains — unable to obtain an increase in rates paid to providers for subsidized childcare spots. The municipality of Toronto, which is responsible for setting the rates, was not willing to raise to them, preferring if need be that the agency close its doors. The agency, in turn, refused the childcare providers' demand for an increase in their income.

In the wake of this key decision recognizing the family childcare providers' union at Cradleship Creche, a first series of cases (see also the *Andrew Fleck Child Centre* case and the *Kuenzler* case, both cited in Appendix A) on the employment status of providers reflected the growing dissatisfaction of a larger group of providers in Ontario with their remuneration and working conditions. All these events provoked considerable consternation in the childcare sector.

At the time, the provincial government organized a series of meetings on the topic and produced documents explaining the alternatives to the agency model in order to circumvent, if need be, the status of dependent contractors for providers and prevent them from organizing. One of these documents reiterated the commitment to offer quality family child care and emphasized the higher costs of equivalent supervision of child care in the framework of a direct licensing model instead of an agency model like Ontario's (Alberta 1989, Appendix B, p.3). But in the end, Ontario did not abandon the agency model and the organizing drive did not gain ground among family childcare providers.¹³

Employment Standards

A few years later, in February 1993, an Ontario Employment Standards Commission adjudicator ruled that the MacAulay family childcare providers affiliated with the MacAulay Child Development Centre were in just as vulnerable a position as that of other employees and that they were therefore entitled to the protection of employment standards legislation.¹⁴ Management at MacAulay examined what the impact of recognizing providers for employment standards' purposes would be. Employment standards include the minimum rate of pay, compensation for statutory holidays and annual vacations, the right to overtime pay, and so on. The agency estimated that it would need to increase its annual budget by more than one million dollars to comply with employment standards provisions.¹⁵

At the same time, the agency raised some questions regarding the practical application of these standards. For example, if a family childcare provider were to become an agency employee and thus receive the minimum wage, the agency would want to ensure the cost-effectiveness of its operations by making sure that the provider always had the maximum number of children allowed by the law (i.e., five children). As well, the agency would no longer want to select family childcare providers whose own children counted toward the five-child maximum, or whose homes were not big enough, because they would not be as profitable. However, the practical difficulties raised by the application of employment standards to family childcare providers are not insurmountable. Models exist in Sweden, and also in the United States, for instance in New York City, where family childcare providers are considered to be agency employees. In both instances, family childcare providers have the right to an hourly wage and care for, on average, 3.5 to 4 children.¹⁶ Thus, it seems that the viability of a family childcare model in which providers have the protection of employment standards is more an issue of public funding than of feasibility *per se*.

Today, management of the MacAulay Centre willingly admits that the biggest obstacle to the application of employment standards is without a doubt the additional costs entailed by such a change in the status of family childcare providers. In light of the provincial government's refusal to reconsider the agency funding mechanism based on payment of daily rates per child to providers, the agency again invoked the possibility of closing its doors if the providers persisted in trying to enforce employment standards.

In contrast to the *Ontario Labour Relations Act*, which establishes a framework in which dependent contractors have the right to negotiate their working conditions on the same basis as employees, Ontario's *Employment Standards Act* applies only to employees. So if they had been able to prove their eligibility for employment standards protection, in all likelihood providers would have lost their independent contractor (or self-employed) status for tax purposes.

A vigorous debate ensued in the bargaining unit. More often than not, providers who had spouses with stable employment lined up in favour of maintaining independent contractor status. In contrast, single-parent providers tended to be more favourable to acquiring employee status. In the end, the majority of the providers decided to opt for a pragmatic strategy. Faced with the threat of agency closure, they preferred to give up employment standards benefits in return for keeping their independent contractor status for tax purposes. To do this, they negotiated for the agency to withdraw some its control, giving them greater autonomy in their work.

The division that was apparent in the bargaining unit reflects the complexity of any comparison of the pros and cons of employee status versus independent contractor status. On the one hand, an employee pays income tax through at-source deductions, as well as Employment Insurance premiums and CPP/QPP contributions. Group insurance premiums for medical coverage, if any, are also deducted from the pay cheque. On the other hand, an independent contractor enjoys tax benefits such as a different approach to the payment of income tax (at tax return time or in instalments) and only pays CPP/QPP contributions when

she or he files a tax return. The result is that the contractor holds on to the money she or he earns for a longer period than does an employee. The contractor's biggest tax advantage is undoubtedly being able to declare business expenses that reduce the amount of taxable income. Note, however, that an employee who is obliged by the terms of her or his work contract to incur expenses in the performance of work can also deduct some lesser, but not negligible, expenses on his or her tax return.¹⁷

Employees, however, are eligible for Employment Insurance benefits in the event of unemployment, illness, maternity, paternity or adoption, employer contributions to their CPP/QPP, employment standards, to compensation in the event of a work-related accident or illness and the right, if they wish, to form a union and negotiate working conditions through collective bargaining. Independent contractors do not have this kind of protection and, if they wish to purchase disability insurance or drug insurance, they do so on an individual basis.

More specifically, in weighing the value of employee status rather than independent contractor status, one must consider:

- tax implications for each person depending on her or his individual and family situation and the kind of expenses incurred in doing the work¹⁸;
- the short-term need for money (in a low-income context, this factor becomes even more imperative);
- the degree of short- and long-term risk, with respect to dismissal, illness, maternity, unemployment, and so on;
- the cushion of protection from sources other than work (individual, family or spousal resources);
- the personal value that she or he attaches to the social security stemming from certain labour laws in the short and medium term; and
- the personal value that she or he attaches to the autonomy that she or he is likely to be able to keep while working as an independent contractor.

In light of the diversity of provider profiles and interests, it is not surprising that faced with the choice between a salaried position paid at minimum wage in the service of an agency and the status of independent contractor, providers did not reach a consensus.

At the end of 1996, the Ontario Workers' Compensation Appeals Tribunal ruled that a MacAulay Centre provider who had injured her back in 1991 going down the stairs to her basement was a worker within the meaning of the *Workers' Compensation Act*.¹⁹ Subsequently, all the MacAulay providers were covered (and continue to be covered) by workers' compensation. Only employers pay workers' compensation premiums, and the agency was able to find the amounts needed to defray these costs within its administrative budget.

Pay Equity

In 1999, the Pay Equity Hearings Tribunal of Ontario upheld a 1996 Pay Equity Office decision ruling that Wellington County providers were employees for the purposes of the *Pay Equity Act*.²⁰ This decision had a definite ripple effect and it is estimated that there are now at least five other municipalities where providers are demanding the right to be covered by the pay equity plan required under the Act. For the Toronto area alone, the estimated cost of retroactive recognition of the fair value of the work of providers would be at least \$30 million.²¹

Led by certain agencies belonging to the Home Child Care Association of Ontario, the family childcare sector reacted strongly to the decision of the Pay Equity Tribunal. A two-day meeting held in the Elora Gorge brought together various participants in the sector to discuss the impact of this decision and the options available to avoid recognizing the employee status of providers for the purposes of pay equity. Following the advice of a law firm, the agencies taking the lead on this issue -- known since as the Elora Group -- are working together to urge other Ontario agencies to modify their practices and structure their relations with providers so as to create and maintain independent contractor status for them.²²

In keeping with the concrete changes put forward for this purpose, most agencies stopped requiring that family childcare providers take specific training, and now offer training activities on a voluntary basis. Also, agencies no longer do formal evaluation of providers. In fact, when the Municipality of Toronto proposed that agencies use a specific evaluation scale to measure the quality of family childcare services, the agencies resisted this proposition, citing its potential for controlling the work methods of providers -- something they wanted to avoid at all costs. It is now the family childcare provider who signs the home safety checklist, whereas previously this list was completed by an agency representative. Family childcare providers are allowed to recruit children privately, and may sometimes even affiliate with more than one agency. Several agencies terminated their toy and equipment lending service for providers, or have begun charging fees. Generally speaking, agencies have been encouraged to adopt a less intrusive, more permissive attitude toward family childcare providers.

In short, to avoid becoming the providers' employers, agencies have tried to give providers as much autonomy as possible while continuing to meet the minimum requirements of the *Day Nurseries Act*, Ontario's childcare legislation.

In a split decision on October 31, 2001, the Ontario Superior Court quashed the decision of the Pay Equity Hearings Tribunal.²³ The providers appealed, and as we draft this report, it seems that the three family childcare providers who filed a complaint against the municipality have settled out-of-court. But since the municipality will only pay compensation to the three complainant providers, other family childcare providers have expressed their intention to file new complaints (Stead 2002: A1). The legal saga concerning family childcare providers' right to benefit from the provisions of the *Pay Equity Act* is far from over.

In conclusion, the specific impact of unionization of some one hundred family childcare providers at MacAulay and the subsequent granting of workers' compensation coverage for these providers is less striking than the wide-ranging impact of these court cases on the entire family childcare sector. These disputes created a climate of insecurity and drained the family childcare sector's resources. The efforts aimed at preventing family childcare providers from benefiting from employee status have clearly played a major role in shaping agency practices. But has this phenomenon improved the viability of employment and working conditions for family childcare providers?

Obviously, if the income of family childcare providers were higher, they would have less need for money in the short-term. The factors that militate in favour of employee status would carry greater weight. But in the current context of limited public funding in Ontario, the question is posed more in these terms: For family childcare providers, would employee status at minimum wage be more advantageous than status as a low-income independent contractor?

As we have already explained, the pros and cons of the two statuses can be evaluated according to *objective* factors, including some factors that are beyond the scope of this study (e.g., the tax benefits related to waged work at home and self-employed work at home). But there are also *subjective* factors that have to be taken into account, such as the personal value attached to the social security offered by the protection of labour laws compared to the value attached to the autonomy the family childcare provider is likely to be able to retain in her work as an independent contractor or, on the other hand, which she believes she has given up simply by affiliating with an agency. There cannot be a universal answer as to the value of employee status with inherently low wages, because family childcare providers represent a heterogeneous group.

In the same way, without consulting the people primarily concerned, it is hard to say whether the various changes resulting from agencies' concern with trying to avoid employer responsibilities for providers are positive or negative. Some of the changes, such as closing equipment or toy lending services, are undoubtedly negative for providers. In 1999, more than half of family childcare providers in Ontario identified agency support in providing training and equipment loans as one of the reasons for affiliating with an agency (Doherty *et al.* 2001: 8).

Other changes, such as making participation in training activities voluntary, may seem neutral, even positive, if agencies are obliged to offer training modelled on the needs expressed by family childcare providers. Agencies in Ontario continue to negotiate childcare agreements and deal directly with parents on money matters which, for most family childcare providers, is the primary reason for affiliation with an agency in Ontario (Doherty *et al.* 2001: 8). This study does not, however, measure the extent to which the less directive approach of agencies is felt or appreciated by family childcare providers.

What is clear, though, is that since the beginning of the series of court cases on the employment status of family childcare providers, family child care has by and large been organized so as to circumvent an employment relationship between agencies and providers.

Considerations relative to the implementation of the best possible quality of child care have been relegated to the sidelines.

The Impact of the Decisions on the Employment Status of Family Childcare Providers in Alberta

The shock wave created by the unionization of the Cradleship Creche (MacAulay) family childcare providers was felt as far away as Alberta. When the the *Family Day Home Program Manual* was revised in the late 1980s, the Alberta government took steps to inquire more precisely into the employment status of Alberta family childcare providers and to ensure that the standards adopted in the Program Manual would maintain the status of these providers as independent contractors.

Then, in 1998, the employment status of family childcare providers was once again a subject of controversy. The administrator of the Alberta Briar Hill Children's Programs agency inadvertently issued T-4 forms (employment income slips) for about 10 family childcare providers. But when she asked Revenue Canada to cancel the T-4 forms, the latter refused. It decided instead to claim Employment Insurance premiums and CPP contributions from the agency for the providers in question in the amount of \$19,246 plus interest. Revenue Canada cited these arguments to explain its decision to claim contributions from the agency:

You, as employer, exercised control over the family childcare providers and over their work because:

- You set the hours for them to be available for day care;
- They had to attend workshops;
- They had to perform services personally;
- They could not hire others to complete the work;
- You provided them with guidelines, handbook and manuals to follow.

The terms of their employment did not allow them to profit or expose them to a risk of loss because:

- They did not set the rate that the parents paid or the rate they received;
- The workers were paid regardless of whether the parents paid you.

The nature of the job they performed was an integral part of your business.²⁴

The Association for Family Day Home Services then retained the services of a law firm to represent Briar Hill before Revenue Canada. On July 12, 1999, the Appeals Division of Revenue Canada reversed this ruling. Given that no family childcare provider contested it, the case did not go any further. But in reaction to Revenue Canada's initial decision, a concerted movement led by the department in charge of child care in the Ministry of Family and Social Services once more undertook to revise the standards set out in the *Family Day Home Program Manual* as well as agency practices to ensure once again that they preserved the independent contractor status of family childcare providers.

In the wake of the changes triggered by the Briar Hill case, the obligatory nature of the training offered by agencies was abolished. Agencies now simply provide "educational opportunities" for family childcare providers. If the agencies were to require providers to

attend training sessions, this would not fit well with the independent contractor status for providers, especially if the training is offered free of charge by the agency itself. If they do lend toys or equipment to providers, the agencies now charge the providers a fee for this service. As well, the monthly visits by an agency representative to the childcare home are no longer mandatory.

Changes were also made to the role of the agencies with respect to collecting fees from parents. Previously, the agency guaranteed payment to the provider for the hours during which she had effectively taken care of a child, whether or not she was able to collect the childcare fees from the parent. Today, though, in keeping with instructions to this effect, it is the family childcare provider who assumes the risk of non-payment, because, in order to maintain her independent contractor status, she must run a risk of loss.

As well, the agency no longer sets fees for child care. As a result, some family childcare providers in more affluent neighbourhoods can charge higher rates, while those located in more working-class neighbourhoods tend to lower their rates. The provider still has the right to refuse a child referred by the agency and she may recruit her own clientele if she has spaces left.

These changes occurred in Alberta at a time of significant reductions in public funding of agencies. So agencies have had to increasingly rely on childcare fees paid by parents for more of their funding. Under these conditions, some agencies have started adopting strategies to offer *à la carte* services to childcare providers, established according to a fee schedule. For instance, for a given price, the agency offered initial screening of a family childcare provider, or home visits, or the collection of childcare fees from parents, training activities, etc.

In conclusion, the impact of fewer than 10 family childcare providers having been temporarily considered to be Briar Hill employees for the purposes of Employment Insurance and the CPP was considerable. This was exacerbated by the specific context in which it occurred, namely substantial cuts to public funding for agencies. As in Ontario, the momentary attribution of employee status to family childcare providers triggered a strong reaction from agencies and government, both anxious to prevent providers from acquiring such status again. But has the reduced role of agencies that seems to have been the result really improved the viability of employment and working conditions of family childcare providers?

At this stage, without consulting with Alberta family childcare providers, it is impossible to answer this question in a categorical way.

On the one hand, if the recent *You Bet I Care* study is any indication, agency-affiliated family childcare providers in Alberta wish to be able to rely *more* on agencies for supplies and reference materials, as well as for greater personal development and respite services (Doherty *et al.* 2001: 15). Yet, these wishes hardly tally with the diminished role of agencies or the imposition of “user fees” for obtaining these services. Furthermore, like family childcare providers in Ontario, for 76.9 percent of Alberta providers, the fact that the agency negotiates

the childcare contract and deals directly with parents regarding money matters is the primary reason for affiliating with an agency (Doherty *et al.* 2001: 8). With regard to the low level of their pay, childcare providers often cite the *instability* of their income as a major source of dissatisfaction with their work (Doherty *et al.* 2001: 18). In such a context, transferring the risk of non-payment by parents to the provider — a risk previously assumed by the agency — hardly seems positive.

On the other hand, it is entirely conceivable that family childcare providers appreciate the withdrawal of certain forms of control over their work.²⁵ They might very well see as positive the greater latitude they now have to refuse a child referred by the agency or to fill spaces in their child-care home themselves. Generally speaking, it is also possible that they might appreciate a less authoritarian approach by agencies. As well, it could be argued that the voluntary nature of participation in the training activities offered by agencies obliges the latter to offer activities that correspond to providers' needs and interests. Finally, at first glance, at least for providers whose service is situated in affluent neighbourhoods, the ability to set their own rates seems positive. The issue of lower rates in poorer neighbourhoods is more complex, especially in a context where family childcare providers and parents make a significant contribution to agencies' budgets.

In the current Alberta context, regardless of what providers want, the possibility of considering providers as agency employees is not an effective strategy for improving their working conditions. Indeed, given the current government's rather lukewarm commitment to agency funding, there is a feeling that every time family childcare providers move toward employee status, the move would inevitably be followed by changes in policies and practices designed to distance them from such a status. In other words, it is seen as imperative that agencies do not establish an employment relationship with family childcare providers. This imperative is important enough to supersede any debate on how changes to agency practices might affect the quality of family child care.

Past Recommendations for Improving the Working Conditions of Family Childcare Providers in Light of Labour and Employment Law

In the following section, we identify some measures that have already been proposed but regrettably, never adopted by the governments in question, for improving the working conditions of family childcare providers. We try to assess the potential impact of these recommendations on the employment status of family childcare providers. We also discuss the need, according to a recent study, to clarify the employment status of family childcare providers affiliated with an agency. Finally, we look at the link between public funding of family child care and control over providers' work.

Measures Already Proposed

In recent years, two major studies dealing with child care proposed various measures for improving the working conditions of family childcare providers. For example, in 1998 a sector-based study proposed a series of recommendations around “a commitment to equitable wages, benefit levels and working conditions” for the childcare workforce. One of the

recommendations was to “explore and advocate for appropriate coverage for the childcare workforce under employment standards, occupational health and safety legislation and other employment-related legislation”.²⁶

Another example: the third and fourth reports of an impressive series of studies on child care, entitled *You Bet I Care*, deal more specifically with the quality of regulated family childcare services. This study concludes that:

Starting immediately, all jurisdictions must implement an income-enhancement grant for regulated providers. The grant amount must ensure that all providers working full-time and caring for four or more children receive, after child care-related expenses and before taxes, the equivalent of what would be earned, on average, by an entry-level staff person working full-time in a centre in the same jurisdiction (Doherty *et al.* 2000b: 114).

Again in the third and fourth reports of this series of studies, other recommendations propose that:

- “all jurisdictions must require regulated providers who have not completed a post-secondary ECCE (Early Childhood Care and Education) credential to complete a basic family child care provider course within the first year of starting to provide care”;
- [thereafter, all childcare providers] “engage in a minimum of six hours of professional development each year” (Doherty *et al.* 2000a: 109).

Potential Impact of Recommendations on the Employment Status of Family Childcare Providers

In some provinces that use the agency model, such as Ontario and Alberta, agencies scrupulously structure their relationship with providers in order to avoid creating an employer–employee relationship. As a result if agencies are not to resist implementing these measures, their potential impact on the employment status of agency-supervised providers must be taken into account.

One example would be a provincial regulation that requires providers to complete certain training. Let us assume that the family childcare agency is responsible for monitoring compliance and penalizing non-compliance of providers with this new regulatory training requirement. In Ontario, in light of the case law that we have reviewed, a court might very well see this monitoring role as an indicator of the agency’s employer-like control over the provider’s work. Furthermore, in Quebec, training is already a statutory requirement. However, the Centres de la petite enfance (CPE) (the counterpart to agencies in other provinces) do have some discretionary power in how they offer and require this training. With respect to the criteria set out in the recent decision of the *Labour Court* in the *CPE la Rose des vents* case and reiterated in the *CPE La Ribouldingue* case, the CPE’s activity with respect to mandatory training could exceed mere administrative control and constitute true employer control over providers’ work.²⁷

In the same way, to the extent that it is administered by an agency, an income enhancement program could help to significantly minimize the provider's risk of loss. However, the absence of income fluctuation that is the intended purpose of such a measure is more consistent with the stable situation of an employee than with that of a genuine independent contractor who charges according to the number of children she has succeeded in recruiting.

As well, the third section of the study, which looks at all regulated family childcare providers, reports that:

Lack of benefits also presents a barrier to recruitment and may contribute to decisions to leave family child care provision. It certainly appears to add to providers' stress. (Doherty *et al.* 2000b: 114)

But one of the first measures recommended in the legal opinions obtained by the agencies wanting to know how to avoid incurring employer responsibilities for family childcare providers is to never allow providers to participate in the benefits programs usually available to employees, such as pension plans, sick leave benefits and group insurance. It is always possible for benefit programs to be established independently of the agencies and their staff. However, to a certain extent, constantly minimizing the role of agencies makes no sense. In the long run, it raises the question of why agencies exist if their potential role is constantly being curtailed, and their activities curbed by considerations related to labour laws rather than child care.

Clarification of the Employment Status of Agency-Affiliated Family Childcare Providers

According to the survey of agency directors conducted as part of the *You Bet I Care* studies, the unresolved question of the employment status of family childcare providers is a major issue. In fact, the fourth report of this series of studies states: "The potential for the unresolved employment status of providers to generate problems and possibly jeopardize the agency model as it currently exists is real" (Doherty *et al.* 2001: 39). Therefore, the study recommends that provincial governments that use agencies and associations of agencies immediately begin to work together to clarify the employment status of agency-affiliated family childcare providers (Doherty *et al.* 2001: 41). (The question that comes to mind is why there are no representatives of providers in such a concerted endeavour!)

However, in the absence of a statute like Bill 8 in Quebec (the constitutionality of which has yet to be demonstrated), clarifying the employment status of family childcare providers requires more than mere abstract changes or even agreement between the parties. Employment status is a question of facts and evidence. Furthermore, it is a matter of public order, which means that any agreement between the parties to characterize the nature of their relationship that does not reflect the reality thereof is null and void. Clarification of employment status therefore depends on structuring and maintaining the relationship between agencies and providers in such a way as to preserve the providers' financial and professional independence. In other words, it is necessary to ensure that family childcare providers do not in fact operate a childcare service under the control and direction of agencies.

Letting the rules of labour law structure relations between agencies and family childcare providers is likely to result in a certain number of compromises, some of which may involve providers' working conditions. According to a recent study, for example, providers would like to be able to rely more on agencies for personal support, respite services, equipment loans or a service for collecting childcare fees from parents. These wishes do not necessarily converge with a diminished role for agencies. These compromises may also involve the quality of child care. For example, the absence of mandatory training and a formal evaluation procedure is not necessarily the best guarantee of quality child care.

As well, it should be kept in mind that the working conditions of regulated family childcare providers are a major part of the appeal of the regulated childcare sector for providers, compared to the working conditions in the unregulated childcare sector. Ultimately, if the working conditions of regulated providers amount to a series of constraints and offer little or nothing in terms of income stabilization or access to benefits, the role played by agencies could become a "disincentive" that leads providers to *not* join or even to withdraw from the regulated sector.

The Link between Public Funding and Control of Work done by Family Childcare Providers

In a context of massive public funding of the childcare sector, as is the case in Quebec, any analysis of the employment status of family childcare providers must take into account the issue of accountability for public spending. The *You Bet I Care* study makes the following criticism of the role played by agencies:

Governments' holding agencies explicitly or implicitly responsible for the care provided by their affiliated providers carries two implications: first, it encourages agencies to act like employers and thus increases the likelihood of providers being deemed employees; the second implication is a blurring, for both providers and agencies, of the fact that providers must ultimately be responsible for the quality of care that they provide (Doherty *et al.* 2001: 42).

But even though the fundamental importance of the providers in the quality of the care they provide is indisputable, the fact remains that when these childcare services are heavily subsidized by the government, some control of the quality of these services is appropriate. In this vein, Québec's Auditor General recently criticized the government's massive investment in family child care on the same basis as centre-based care, among other reasons because of the discrepancy in qualifications of the staff in these two environments. The government justified its investment in part on the basis of the educational program common to all of these childcare services. According to the Auditor General, if this is in fact the case, the government should establish evaluation procedures to ensure that the objectives of its Family Policy are achieved, whether in family childcare settings or in childcare centres.

In response to these criticisms, the staff of the *Ministère de la Famille et de l'Enfance* is currently developing tools to assess how the Educational Program is applied. However, it is obvious that if the educational consultants at CPEs use these tools to conduct even more thorough assessments of how the educational program is applied by providers and then

intervene to help providers address any shortcomings, the providers' work is then more under the control and direction of the CPE and thus moves one step closer to an employment relationship.

In the logic of labour law, if the objective is to avoid creating an employer–employee relationship, then close monitoring of how a universal educational program is applied in family childcare settings is not advisable. However, in the logic of public funding, how can the government justify subsidizing child care that does not meet the minimum criteria of its Educational Program? These contradictions stem from the fact that the government grants considerable public funding for a service that is supposedly delivered – in the current model – by a business enterprise.²⁸

In conclusion, the working conditions of agency-affiliated family childcare providers are governed by the dual logic of labour law and concerns about the quality, accessibility, and accountability of child care. Sometimes these two lines of reasoning collide head-on and the question then becomes which standard should prevail. Solutions that disregard labour law will not always be appropriate or effective. Similarly, solutions developed solely on the basis of considerations related to labour law that do not take into account the needs of family childcare providers or the impact on the quality, accessibility, and accountability of childcare services are not necessarily the best solutions either.

Notes

¹ Unlike other provinces, in which the legal tradition is that of common law as derived from Anglo-Saxon law, the legal approach in Quebec involves “*le droit civil*” or civil law, which is derived from the French legal tradition. However, in practice, when determining the employer–employee relationship according to Quebec law, there is rarely a substantial difference between civil law and the law of other Canadian provinces or federal law (Langille and Davidov, 1999: 19-20). We have therefore grouped the criteria used in Quebec, other Canadian provinces, and in the federal arena without nuance as to the role that civil law plays in Quebec. However, in sections specifically relating to Quebec laws, the special role of civil law in Quebec will be discussed.

² *Montreal v. Montreal Locomotive Works Ltd. et al.* (1947), 1 D.L.R. 161, p. 169.

³ *Ibid.*

⁴ For example, in Ontario, generally speaking, the authors identified four main tests applied by the courts: the test of control, the fourfold test (also known as the test of economic reality), the test of specific results, and the organizational or integration test (Shouldice, c.1999; Osler Harkin and Harcourt, c.1999). In Quebec, in labour law, there are three main tests: the test that refers to the “classic model” of legal subordination (which is based on the fourfold test), the test called the “indicators method” and the test that refers to the “economic model” where an economic indicator is added to the classic concept of subordination (Goyette, 1998). On the other hand, in Quebec tax law in which effective

subordination at work is treated as a key criterion, reference is made to the same tests as those used in Ontario. Furthermore, a final residual test is added relating to the attitude of the parties about their relationship (Quebec, *Ministère du Revenu*, 1998).

⁵ See, for example, Fudge (1999) and Linder (1999).

⁶ Langille and Davidov (1999); Vallée (1999). See also Quebec, *Ministère du Revenu* (1998).

⁷ In the same way, increased income from having worked harder or longer does not constitute a profit (Quebec, *Ministère du Revenu* 1998: 6-7). See also Goyette (1998: 36).

⁸ Of interest is the fact that, in the State of Washington, in the event of a work injury, employees and self-employed workers bound by a contract “the essence of which is his or her personal labor for an employer” are already eligible for benefits under the *Washington State Workers Compensation Act*. Under some social protection plans that have been proposed to replace the current system, which is based wholly on employee status, the simple fact of selling personal services, without any other major capital investment, would be enough to make a person eligible for the kind of protection presently offered by labour and employment-related legislation (Ruckelshaus and Goldstein c.2000).

⁹ CCCF (1998b). See also Hughes and McCuaig (2000: 84).

¹⁰ *Centre de la petite enfance La Rose des vents et al v. Alliance des intervenantes en milieu familial, Laval, Laurentides, Lanaudière (CSQ)*, T.T. 500-28-001293-026 et 500-28-001294-024, May 1, 2003 [hereinafter, the *CPE La Rose des vents* case]; *Centre de la petite enfance La Ribouldingue et al v. Syndicat des éducatrices et éducateurs en milieu familial de la région de Québec (CSN)*, T.T. 200-28-000016-029 et 200-28-000017-027, May 1, 2003 [hereinafter, the *CPE La Ribouldingue* case]. In May 2003, more than 1,200 family childcare providers affiliated with some 60 childcare centres filed for union certification with the *Confédération des syndicats nationaux* (CSN) and the Centrale syndicale du Québec (CSQ).

¹¹ P.L. 8: *Act Amending the Act on Child Care Centres and Other Child Care Services*, 1 sess. 37th leg. Quebec, 2003.

¹² *Ontario Public Service Employees Union v. Cradleship Creche of Metropolitan Toronto*, O.L.R.B. Rep. [1986] 3351-84-R.

¹³ At the time and since, several groups of providers have approached OPSEU to inquire about the possibility of forming a union: G. Lebens and J. Borowy, OPSEU, personal interview, September 21, 2001. However, it would seem that without a childcare system sustained by adequate public financing, even in the opinion of the union, the considerable difficulty of negotiating better rates is a factor that greatly diminishes the providers' interest in unionization.

¹⁴ *Re: MacAulay Child Development Centre*, 1993 CanRepOnt1202, E.S.C. 3157 (Wacyk). Note also that in 1991, another Toronto agency, Dovercourt International Day Care, closed its doors, owing its employees, as well as other creditors, large amounts of money. The Ontario Employment Standards Wage Protection Fund recognized caregivers as being employees of the agency and paid them severance pay as well as annual holiday pay. However, this decision did not create a precedent on which other caregivers could base complaints.

¹⁵ S. Filger, MacAulay Child Development Centre, telephone interview, October 16, 2001.

¹⁶ See Hughes and McCuaig (2000: 24-25, 40-43). For example, in New York City, providers have a normal 40-hour workweek; they receive time and a half for overtime. To administer the 40-hour week, every provider is “paired” with another provider who lives in the same housing area, which also facilitates breaks and replacement services. On average, a family childcare provider receives four children in care. Providers are encouraged to find child care outside their residence for their own children.

¹⁷ For information relating to employment expenses for private individuals, see the Web site of the Canada Customs and Revenue Agency <<http://www.ccr-aadrc.gc.ca/taxindividuals/topics/employment/menu-f.html>>, more specifically, Guide T4044, *Employment Expenses*. In Quebec, see also the brochure *Expenses Connected with Available Employment (IN-118)* on the Web site of the *Ministère du Revenu* <<http://revenu.gouv.qc.ca/fr/publication/in/in-118.asp>> as well as form TP-64.3, *General Conditions of Employment*, available at <http://revenu.gouv.qc.ca/fr/formulaires/tp/tp-64_3.asp>.

¹⁸ For example, in the context of child care in the family setting, occupational and personal expenses tend to overlap. A swing used by children in care may also be used by the provider’s own children, as one example. The small van used for the children in care during the week may also be used for family outings on the weekend. It is thus important to distinguish the expenses that represent a real investment on the part of the provider and derive exclusively from the requirements of the childcare service from those that, while most certainly used in the childcare service, would have been incurred anyway by the provider, mortgage payments on the home, for example.

¹⁹ *Workers’ Compensation Appeals Tribunal Decision No 152/95*, December 18, 1996 (tribunal members: R.E Hartman, W.D. Jago and J. Anderson).

²⁰ *Wellington (County) v. Butler*, [1999] O.P.E.D. No. 9 (Ontario Pay Equity Hearings Tribunal) (QL).

²¹ K. McCuaig, Child Care Education Foundation, telephone interview, September 18, 2001.

²² Many publications exist to advise potential employers on how to avoid establishing an employer–employee relationship with the persons who work for them. See, for example, Shouldice (c.1999) and Hedian (2001). Many employers are interested in this question, and

one author has even suggested that labour and employment laws, as presently conceived, actually incite employers to use these avoidance tactics (Fudge, 1999: 130).

²³ *Wellington (County) v. Butler*, [2001] O.J. No. 4219 (Ontario Superior Court of Justice) (QL).

²⁴ Canada, Department of Revenue Canada. Unpublished decision about contributions for Employment Insurance and the CPP owed by Briar Hill Children Children Programs (December 29, 1998), numbers 94-98-3135/3136/3857/3858/3859/3860/3862/3863/3864.

²⁵ We did not find any study that specifically considers this question. Moreover, with one exception (Kyle, 1999), few studies are interested in the perceptions and expectations of the family childcare providers themselves.

²⁶ Beach *et al* (1998b: 139). Because educators working in childcare centres already benefit from the protection of employment standards legislation, we assume that this recommendation applies to family childcare providers as well as to in-home caregivers. Note also that in the French version of the study, the words “appropriate coverage” were translated as “various types of protection.”

²⁷ For a more detailed discussion about the characterization of the agency’s role in enforcing respect for regulations, see the introduction in the second chapter of this study.

²⁸ This is reminiscent of the debate within the childcare service sector about public financing of for-profit childcare centres. On this subject, see Jenson *et al.* (2003).

2. ELIGIBILITY FOR BENEFITS AND PROTECTION UNDER LABOUR AND EMPLOYMENT-RELATED LEGISLATION

In this chapter, we very briefly describe the framework within which family childcare providers work in each of the three provinces studied. Then, for each of the fields of law selected as part of this study (maternity and parental benefits offered under the *Employment Insurance Act*; the CPP/QPP; the compensation of persons injured at work; employment standards; and pay equity), we identify the relevant provisions for establishing eligibility for benefits and coverage under the various pieces of legislation. We then formulate hypotheses about the current eligibility of family childcare providers in British Columbia, Newfoundland and Labrador, and Quebec. Finally, we discuss legislative amendments and other initiatives that could help improve working conditions for family childcare providers.

Before proceeding, it is important to note the role played by the family childcare agency in ensuring compliance with the provincial regulations that govern family child care. In any work situation, the precise boundary between the status of independent contractor and employee (i.e., the ability to predict the outcome of a dispute before the courts on this matter) is at best an approximate exercise. When one tries to make this determination within the context of family child care offered by a provider and supervised by an agency, the challenge is even greater. In fact, whether in Alberta, Ontario, Nova Scotia or Quebec, the agency must monitor a childcare provider's compliance with provincial regulations. However, the courts have adopted two diametrically opposed approaches on the question of whether this monitoring role represents a form of control over the provider's work in a way that is relevant in the determination of the provider's employment status.

One approach, reflected by the majority of Ontario case law, holds that the underlying reason for the control exercised by an agency or *Centre de la petite enfance* (CPE) over the provider is of no importance. It is the *exercise* or *potential exercise* of control that matters. For example, the decision of the Ontario Labour Relations Board certifying the union as bargaining agent for the Cradleship Creche (now MacAulay Child Development Centre) family childcare providers notes:

The fact that requirements flowing from the law on day childcare providers and from the agreement intervened between Creche and the Metropolitan Region of Toronto impose the necessity of most of the controls that Creche exercises on childcare providers does not change the fact that their economic independence and their possibility of acting as independent contractors are seriously confined.¹

According to our research, on two occasions the Superior Court of Ontario dealt with disputes over the employment status of family childcare providers affiliated with an agency.² On both occasions, the Court sidestepped the question of the underlying rationale for control by the agency, instead basing its decisions on the presence or absence of agency control. In Ontario, the Workers' Compensation Appeals Tribunal³ and the arbitrator appointed under the *Employment Standards Act*⁴ also adopted this approach, which holds that the agency's

monitoring of statutory requirements represents an employer-like exercise of control over the provider's work.

A second school of thought is embodied in the approach of the Tax Court of Canada. Unlike the first approach, this school attributes considerable weight to the rationale that underlies the control exercised by the agency. To the extent that the agency's role is to monitor compliance with statutes or regulations enacted by the government, the agency would exercise only *administrative* control over the childcare provider. Consequently, this control would not amount to the provider's doing work under the control and direction of the agency.⁵

As well, decisions about the employment status of providers in Quebec around the time our study was written add an important nuance to this second school of thought.⁶ According to these decisions, although the tracking that the agency does in order to ensure provider compliance with regulations does not represent employer-like control of the means and methods of work, the situation can be different with regard to the discretion the agency exercises in *how it implements* provincial regulations. Thus, it is necessary to separate the control that derives strictly from the regulations from any control that is not directly dictated by the regulations.⁷ In practice the line can be a hard one to draw.

In a sector as strongly regulated as family child care is, the issue of how to qualify monitoring of statutory requirements is crucial. And the fact that the jurisprudence is not unanimous on this point makes it even more difficult to formulate a hypothesis about the right providers have to access benefits under labour and employment-related legislation.

The Work Setting of the Family Childcare Provider

In this section, we very briefly set out the model within which a provider provides family child care. The maximum ratio of children to caregiver set by provincial regulation, taken together with the fee per child, sets a ceiling on the income of family childcare providers. Appendix B contains, for the three provinces studied, a more detailed description of providers' working conditions. Our hypotheses about the right of childcare providers to the benefits and protections of various labour and employment-related laws are based on these descriptions.

Newfoundland and Labrador

In Newfoundland and Labrador, family child care was regulated for the first time by the *Child Care Services Act* (1998) and the *Child Care Services Regulation* (1999). In view of the vast geographic area covered by Newfoundland and Labrador, the Act permits the accreditation of family childcare agencies in urban centres like St. John's and Cornerbrook, and of individual childcare providers in the less populous regions. This is a dual structure, because even if an accredited agency exists in her region, a provider can ask for individual accreditation. Currently, an implementation committee from the childcare sector is working in consultation with governmental representatives to develop government childcare policies. Until the government has established its policies, neither agencies nor individual providers will be accredited. Currently, two Family Resource Centres have obtained authorization and funding from the government allowing them to assume the responsibilities of a family

childcare agency as a pilot project; they have approved and now supervise a total of approximately 20 providers.

The family childcare provider who cares for a maximum of four children (or a maximum of three children, if all three are younger than 24 months of age) is not necessarily regulated by the *Child Care Services Act*. However, if she applies the provider can obtain a licence or be supervised by a recognized agency and from that moment the Act applies. The provider who cares for more than four children must obtain a licence from the director of childcare services at the regional health and community services board, or work under the supervision of a recognized agency.

Without exception, when a provider is accredited or affiliated with an agency, she can accept a maximum of six children, whose ages are established by the Regulation. The maximum number of six children does not include the provider's own children who attend school full-time.

For this study, we chose to study only family childcare providers who work under the supervision of an agency, and not those who are individually recognized. In effect, it is providers who are affiliated with an agency who would be most likely to develop an employment relationship with an agency.

In Newfoundland and Labrador, in theory, that part of family childcare policy that uses the agency model potentially gives the agencies a lot of latitude in terms of their control over the providers' work and the quality of family child care. Yet it is clear that, currently, childcare providers who are affiliated with an agency could not be considered employees of the agency in part because of the total lack of agency control over matters related to their remuneration (See Appendix B).

Quebec

In Quebec, the provisions of the current family policy came into effect in 1997. The policy features several components, including educational childcare services which have the dual objective of child development and providing equal opportunity for all children in Québec.

Drawing on existing not-for-profit childcare centres and family childcare agencies, a network of *Centres de la petite enfance* (CPEs) was set up. Each CPE offers educational childcare services to children from birth to school age, either in centres or in family childcare homes. These spaces are available for a low fee (previously \$5/day/child, on January 1, 2004 this rose to \$7/day/child) regardless of the parents' income. In 2000-2001, there were about as many available spaces for centre-based child care as for family child care, for a total of over 112,000 spaces in regulated child care.⁸ Despite the very rapid expansion of the childcare sector, there are still not enough spaces to respond to parents' needs. Early-childhood care is regulated by the Ministère de la Famille et de l'Enfance (MFE) which, in 2003, became the Ministère de l'Emploi, de la Solidarité et de la Famille (MESF).

For unregulated family childcare providers, just as for regulated providers, a maximum of six children is allowed; if another adult is assisting the care provider, nine children are allowed. Subsidized spots (“\$5 spots”, now \$7 spots) are available only in regulated child care.

Some elements of the official Quebec policy for family child care would seem to point to a potential employer-employee relationship between the provider and the CPE with which she is affiliated, while other factors suggest a business relationship. To a large extent, the employment status that a court attributes to a provider will depend less on the wording of the official policy than on the way the policy is applied in practice. Without the facts of a particular case, it is very difficult to assess the relative weight of providers’ working conditions within an employer-employee relationship compared with those that would indicate a business relationship.

In the framework of a narrow definition of employee, there is much less chance of providers’ being recognized as employees than there is when the legislation involved equates certain dependent contractors with employees. In such a context, and depending on the objective of the legislation at issue, it is not at all impossible for a provider to have employee status, as seen in the recent decisions of the *Labour Court* in the cases *CPE La Rose des vents* and *CPE La Ribouldingue*.⁹

In reaction to these two decisions of the *Labour Court*, the National Assembly adopted Bill 8 in December 2003. This law provides that, notwithstanding any contrary provision, family childcare providers are deemed *not* to be employees of the CPE. This law also provides the possibility for the government, after consultation, to conclude agreements with one or more associations that represent providers. However, its main object is to confer independent contractor status on providers in a declaratory fashion, with retroactive effect. As we write this study Bill 8 is the subject of a challenge before the courts (CSN 2003). So, subject to the judgment of the courts on this subject, this Bill makes irrelevant any discussion about any right that providers might have to the benefits and protection of Québec labour and employment law. In the context of the areas of law examined in this study, only the question of the providers’ right to maternity and parental benefits remains undecided.

British Columbia

In contrast to the uncertain legal status of family childcare providers in Quebec, the status of regulated childcare providers in British Columbia is clearly that of independent contractors whose clients are the parents of the children in care. Instead of being centralized within a family childcare agency, various duties (that in combination might be considered to constitute control or management of the provider’s work) are distributed among several organizations. The Ministry of Health grants licences to providers while the Ministry for Child and Family Development finances the Child Care Resource and Referral (CCRR) Program. In addition, various not-for-profit bodies apply the CCRR programs throughout the province, offering support and training for providers. A telling indication of the differences in basic philosophy is that while in Quebec the person recognized as provider is necessarily a physical person, in British Columbia once the provider is licensed, it is her home that is

considered a Licensed Family Child Care Facility, and she is asked to choose a name for her facility for licensing purposes.

Once the caregiver is accredited by the government, she can care for up to seven children, subject to certain age restrictions. Her own children under 12 years of age are included in the total number of children. The unregulated caregiver can care for up to two children, and her own children are not included in the total count.

The accredited provider can decide to register with the CCRR Program in her area for the sole purpose of using the referral service for parents looking for child care and for a few other services. For example, this kind of registration makes the provider eligible for subsidies for infants and toddlers, and also gives her the right to insurance coverage at a preferred rate and to loans of infant equipment.

However, for a moderate fee (\$15 - \$20 a year), the vast majority of accredited family childcare providers decide to become full members of the CCRR Program. Full membership in the CCRR Program grants providers access to the full range of services offered: newsletter, toy and equipment loans, activity theme kits, preferential rates for training activities or free training, advice on running a small business and completing subsidy paperwork, and so on. To become a member of the CCRR Program, the family childcare provider must agree to abide by a second series of conditions, in addition to the initial conditions for granting the licence. The second series includes providing proof of insurance coverage, agreeing to an initial visit from a representative of the CCRR Program plus at least one support visit per year, and undertaking to complete 20 hours of initial professional training plus two hours of professional training annually.

The provider who cares for only one or two children other than her own and who is therefore not obliged to hold a licence can also register with a CCRR Program. These providers are commonly referred to as a *Licence Not Required* or *LNR* providers. If an unlicensed provider registers, the CCRR refers parents looking for child care to her and offers her the same services as it does to licensed providers registered with the programme. The conditions that an LNR provider must satisfy in order to register with the CCRR Program include all those that are compulsory for the licensed childcare provider who wants to become a member, plus conditions patterned on some of the conditions a provider must satisfy in order to obtain her licence from the government (certificate of good character, a medical certificate of good health, proof of liability insurance coverage, proof that neither she nor any other person living in the childcare residence has a police record, safety check of the residence, and so on).

Given that the purpose of this study is to examine the employment status of regulated family childcare providers, we have chosen to limit our analysis to the typical case of licensed providers who have chosen, as the vast majority have done, to become members of a CCRR Program, and whose work is therefore subject to both legislative licensing standards and CCRR Program registration conditions. We have also chosen to evaluate the employment status of the provider vis-à-vis the CCRR Program, as the body that represents the best comparison to the role played by agencies in the other provinces studied.¹⁰

Having described, for each of the provinces studied, the work setting of family childcare providers, we will now formulate a hypothesis about their eligibility for benefits such as, for instance, maternity and parental benefits under the *Employment Insurance Act*.

Maternity and Parental Benefits

In a regulated childcare setting, the main reason cited by providers for offering child care at home is the desire to stay at home in order to care for their own children. Over 60 percent of regulated family childcare providers are less than 40 years old; 89 percent are married or live with a spouse; 87 percent of regulated providers have children at home, and more than 58 percent have children younger than six years of age (CCCF 1998b: 8,7,6). Thus, family childcare providers are more likely than other women to want to complete their family and have a particular interest in access to maternity and parental benefits. At the present time, though, anecdotal evidence suggests that like the vast majority of self-employed women (Schetagne 2000), a family childcare provider who decides to have a child feels compelled to return to work within a month after giving birth.¹¹

As of January 2001, it is possible to receive maternity benefits representing 55 percent of insurable pay (up to a maximum of \$413/week in 2001) during a period of 15 weeks. Parental benefits calculated in the same way are then available for one or the other parent for 35 supplementary weeks.

Like the regular benefits of Employment Insurance, maternity and parental benefits come from the Employment Insurance Fund. This Fund consists of contributions paid by employers (in 2001, 3.15 percent of total payroll) and contributions paid by the “insured person,” in other words, by those employees with insurable employment (whose contribution in 2001 was 2.25 percent of their insurable remuneration).

Provisions Governing Eligibility

In order to be eligible for maternity and parental benefits, a person must have accumulated 600 hours of insurable employment during the 52 weeks preceding the date of application. In other words, having had insurable employment in the year preceding the application for benefits is the gateway to maternity and parental benefits, just as it is for ordinary employment insurance benefits.¹²

More precisely, insurable employment is employment:

...in Canada by one or more employers, under any expressed 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 otherwise¹³.

This definition resembles the definition of the employment relationship in common law. On the issue of eligibility for Employment Insurance, the key case is a decision rendered in 1987 by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. The Minister of*

National Revenue.¹⁴ In this case, the Court adopted a fourfold test. The main criteria established by the jurisprudence for determining whether or not a job is insurable are:

- a) the degree or absence of control, exercised by the alleged employer; b) ownership of tools; c) chance of profit and risks of loss; d) interpretation of the alleged employee's work into the alleged employer's business.¹⁵

To this fourfold test must be added the constant and central question that summarizes the issue: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?"¹⁶

British Columbia and Newfoundland and Labrador

The fact that a family childcare provider sets rates and takes the full risk inherent in the collection of childcare fees from parents, as is the present case in British Columbia and Newfoundland and Labrador, is a convincing enough indicator to formulate the following conclusion: Childcare providers in these provinces cannot be considered as having insurable employment in the service of the agencies and centres from which they receive referrals and support. Because the element of control over provider pay is absent here, it is not necessary to examine the other aspects of the degree of control these agencies and centres exercise over providers' work.

Quebec

In Quebec, the question of the insurable character of the family childcare provider's job is not crystal clear. On the one hand, the personal character (*intuitu personae*) and exclusivity of the relationship that develops between the CPE and the provider indicates insurable employment. In Quebec, the provider has the obligation of being personally present on the childcare premises, and she cannot be replaced except for very specific and limited reasons. In the case of maternity leave, a provider may take only six months off, obviously without pay. This absence inevitably entails the temporary closing of the childcare service, because the provider is not allowed to subcontract the service to a competent or recognized person. All this is hardly compatible with independent contractor status.

Furthermore, according to the policy of the Ministry the relationship between the CPE and the provider is exclusive in nature. A family childcare provider cannot be recognized by or affiliated with more than one CPE. And when, because of the number of spots that remain available under the CPE's license, a provider is in turn allotted fewer spaces than she would like, she cannot offer non-subsidized spots as a way of reaching her maximum allotment of children under the Act. This limitation is evidence of subordination that clearly goes beyond the framework of a business relationship.

On the other hand, there are other elements in providers' working conditions in Québec that are associated with a business relationship and that tend to reinforce the hypothesis of status as an independent contractor. If one refers to the fourfold test used in Employment Insurance, the fact of assuming expenses inherent to the operation of a childcare service indicates a

business: fees connected with the private residence where the childcare service is located, food, toys, outdoor play areas, compulsory training, and so on.

As well, having to collect the parental contribution and supplementary fees for extended childcare hours, additional meals and other similar expenses is an indicator of a certain risk of loss that affects the determination of the provider's employment status. Furthermore, it is clear that the provider can herself recruit the children she cares for, just as she can ask the CPE for fewer children than the maximum allowed, and she always has the right to refuse a child.¹⁷

The fact that a family childcare provider depends on the CPE to receive the major portion of her or his pay (the CPE pays her the government contribution for the children registered with her) and that she cannot set her own rates for the basic service are factors that are not as significant here as in the other areas of labour law. Within the field of Employment Insurance, such economic dependence on the CPE carries little weight because the concept of economic dependence is not as important in the determination of what constitutes insurable employment.

A court considering a case involving the insurable nature of the provider's work will rule on the basis of the facts proven in that court. So each case is a specific case. But, keeping these reservations in mind, and despite some elements characteristic of an employment relationship (such as the personal and exclusive character of the relationship between the provider and the CPE), given the lack of weight attached to economic dependence in the area of employment insurance, we think that in Québec the elements favouring the thesis of contractor status probably outweigh the others.

Furthermore, our research shows that on two occasions providers affiliated with agencies in Ontario and Alberta have been unsuccessful in attempts to have their work recognized as insurable employment.¹⁸

Discussion and Analysis

Childcare providers in Newfoundland and Labrador and in British Columbia do not have the right to maternity or parental benefits. Furthermore, in Quebec the provider's right to these benefits is far from being realized. Based on these facts, we see three ways of ensuring that all family childcare providers, or at the very least some of them, have access to maternity and parental benefits. These possibilities are:

- Broaden the definition of "insurable employment" to include the work done by dependent contractors;
- Adopt regulations to explicitly include family childcare providers within the scope of the Act; and
- Implement a contributory parental insurance plan to cover all self-employed workers on the same basis as employees (the Quebec model).

Note that the first two measures would, or could, also have the effect of making family childcare providers eligible for Employment Insurance benefits in case of job loss or sickness.

Broadening the Definition of “Insurable Employment”

Broadening the definition of insurable employment to cover dependent contractors is a measure that might give some family childcare providers in Quebec, and perhaps in Ontario, a better chance of having their work characterized as insurable employment within the meaning of the Act. But building the mobilization that would be needed to get the government to amend the Act in this way is a major challenge because this change would mean that many more workers would be covered by the Act. And even if this challenge were overcome, such an amendment might only benefit a minority of family childcare providers in Canada, namely those affiliated with an agency and whose work is most similar to waged work for the agency. Furthermore, there is no guarantee that a decision on a provider’s eligibility would be favourable, especially if in the meantime governments amended their regulations or agencies changed their practices to specifically avoid being judged to have employer responsibilities for providers.

Adopting Regulations in order to Include Regulated Family Childcare Providers

Even though, generally, the definition of insurable employment does not currently include work done by dependent contractors, the Act does contain a regulatory procedure for including certain specific jobs considered by the government to be *similar* to insurable employment. Under section 5(4) of the Act:

The Commission may, with the approval of the Governor in Council, make regulations for including in insurable employment...

(c) employment that is not employment under a contract of service if it appears to the Commission that the terms and conditions of service of, and the nature of the work performed by, persons employed in that employment are similar to the terms and conditions of service of, and the nature of the work performed by, persons employed under contract of service.¹⁹

In other words, under section 5(4)(c), the following work is included in the category of employment considered analogous to insurable employment:

- the work performed by a barber or a hairdresser, if these persons are not the owners or operators of the salon;
- the work performed by a taxi driver, a driver of a commercial bus, school bus or any other vehicle used by a private or public company for the transportation of passengers, if this person is not the owner of more than 50 percent of the vehicle; and
- the work performed by a person assigned by a staffing agency to supply services to a client of the agency, and which is done under the direction and control of the client but paid for by the agency.²⁰

It is worth noting that hairdressers and drivers are covered here although they are still considered to be persons operating a business - self-employed - for tax purposes.

Also, section 5(5) of the Act grants the government the power to include some jobs within the scope of the Act, even though these jobs are not analogous to insurable employment.

The Commission may, with the approval of the Governor in Council and subject to affirmative resolution of Parliament, make regulations for including in insurable employment the business activities of a person who is engaged in a business, as defined in subsection 248(1) of the *Income Tax Act*.

However, to date, the government has not used this power.

We should also mention that in spite of their status as independent contractors fishers are also explicitly covered by provisions of the *Employment Insurance Act*. Part VII of the *Act* is devoted to them. In short, there are a number of precedents involving categories of jobs of individuals who do not have employee status but whose situation is similar to that of persons with insurable employment in terms of vulnerability in the labour market. Over the years, the government has had no hesitation about acting to include these job categories within the scope of the Act.

Given these precedents for including specific categories of employment, adopting regulations to include a regulated family childcare provider's work as insurable employment is an avenue to explore for giving providers access to maternity and parental benefits, and, also to regular Employment Insurance and Employment Insurance benefits in case of sickness. A regulation could be adopted:

- under the terms of section 5(4), if the work is considered to be analogous to insurable employment such as that of centre-based childcare workers; or
- under the terms of section 5(5), if the work done by the family childcare provider is presented as simply a "commercial" activity that should be covered by the Act.²¹

Making providers who have chosen to be part of the regulated childcare sector eligible for benefits under the *Employment Insurance Act* is an excellent way of recognizing the professionalism of these women and consequently encouraging the quality of child care usually associated with a regulated environment. At least one recent study recommends that in some situations the government use its statutory power to prevent home-based workers with self-employed status from being excluded from the benefits provided under the Act (Bernstein 2001: 179). Other studies point to the combination of an increase in the number of self-employed women and the fall of the birth rate, and call more generally for the expansion of eligibility for benefits that are paid under the *Employment Insurance Act* for all self-employed workers (Schetagne 2000). Further, the House of Commons Standing Committee on Human Resources Development and the Status of Persons with Disabilities has recommended that the protection of Employment Insurance be extended to self-employed workers both for regular benefits and for maternity, parental and sickness benefits (House of Commons 2001, Recommendation 8).

The main element that is missing in order to demand that the work done by family childcare providers be included is the identification of an employer who is responsible for paying the employer contribution to the Employment Insurance Fund. For the other categories of self-employed workers included within the scope of the Act, the government's approach is to treat the cost of benefits as a production cost and transfer it to the purchaser of the product or the user of the service. So, for hairdressers, hairdressing salons pay the employer contributions. For drivers, it is the vehicle owners or businesses operating the vehicles. For fishers, fish purchasers (usually processing plants) are deemed to be the "employer" for the purpose of contributions. Finally, for personnel placed with clients by agencies, the agencies pay the employer contributions.

In the case of the family childcare provider, we reject the hypothesis of transferring the cost of the employer contribution to parents because we assume that the latter have a limited ability to pay for child care. As with educational or health services, we think that because society as a whole benefits from quality early-childhood care, the "production cost" of these services should come from public funds.

In the provinces where family child care is delivered through the agency model, the agency could be considered the providers' employer. However, financing this contribution may be problematic for agencies, especially in provinces such as Ontario and Alberta, where government commitment to child care, especially when offered in the family setting, is tenuous. In provinces that do not use the agency model the problem of identifying an "employer" of the providers remains.

Also, if such a regulation were adopted, even if it were possible to identify who would be in charge of paying the employer's contribution, all regulated family childcare providers would nevertheless still have to pay the equivalent worker's contribution, which in 2001 was 2.25 percent of their total revenue. Furthermore, eligibility for various benefits is one thing; the level of these benefits is another thing entirely. Additional study is needed to determine the appropriate mechanisms for childcare providers to reach an equitable level of benefits. For example, benefits are as a general rule calculated on the basis of net income. Given that this method of calculation clearly penalizes the self-employed, there are other ways to calculate benefits for this group that make it possible, for example, to assume that the income to be replaced corresponds to a fixed percentage of the total of their cash inflow rather than to business income declared for tax purposes.

The Quebec Model

Another approach to addressing the problem of insurable employment is to implement a contributory plan for income replacement for maternity, paternity and adoption leave that would cover both employees and self-employed workers. Adopted unanimously by the National Assembly of Quebec and assented to on May 25, 2001,²² the *Loi sur l'assurance parentale* provides such a plan. But its application is suspended for lack of a funding agreement with the federal government.

In order to be eligible, regardless of employee or self-employed status, a person must have earned a gross income of \$2,000 in the year preceding the application for benefits.

Following the birth of a child, parents would be able to choose between:

- 18 weeks of maternity benefits, 5 weeks of paternity benefits and 7 weeks of parental benefits calculated at 70 percent of salary, plus 25 weeks of parental benefits calculated at 55 percent of salary; or
- 15 weeks of maternity benefits, 3 weeks of paternity benefits and 25 weeks of parental benefits (either parent), all benefits being calculated at 75 percent of salary.

For the adoption of a child, except for maternity benefits, two similar options are offered to parents.²³

In this plan, as in the case of the CPP/QPP, self-employed workers may be required to pay both the employee and employer contributions. Thus, for self-employed workers with low income the main problem with such a plan is that benefits are entirely self-funded.

Recommendation 1:

- Whereas access to maternity and parental benefits is of very great interest for family childcare providers as a group;
- Whereas at present, no work done by family childcare providers is considered to be insurable employment; and
- Whereas women workers should have the choice to stop working during the first months of a newborn's life, even though they are self-employed;

We recommend:

That a feasibility study be conducted to clarify what mechanisms would be needed to make regulated family childcare providers eligible for Employment Insurance benefits, and specifically for maternity, parental and sickness benefits, through the adoption of regulations to include them within the scope of the *Employment Insurance Act*.

The Canada Pension Plan and the Quebec Pension Plan

The main objective of the CPP is to provide some protection of workers' standard of living when they retire. In Quebec, the equivalent of the CPP is the QPP (Quebec Pension Plan), which applies to Quebec workers. In practice these two plans are fully harmonized and allow contributors complete mobility within Canada. At the time of retirement the pensions from these plans are added to the basic pension from *Old Age Security of Canada*, to which everyone aged 65 years or more is entitled.²⁴ In addition to a pension that is paid at retirement, these plans offer other benefits, such as a survivor's pension, children's benefit, disability benefits and a lump-sum death benefit.²⁵ Once payment begins, benefits are indexed annually to the cost of living.

Financial advisers generally say that at the time of retirement a person must have an income equal to approximately 70 percent of pre-retirement income in order to maintain quality of life (Townson, 1995: 2). Under the CPP/QPP, the pension amount is only 25 percent of one's life earnings (up to the maximum of pensionable earnings). So, at first glance, the importance of CPP/QPP may seem very relative. Yet if one considers the typical course of a woman's professional and family life, of which the family childcare provider is a good example, CPP/QPP pensions become, on the contrary, very important.

In fact even though women today dedicate a considerable portion of their adult life to paid work, their financial security as seniors is far from certain. As Monica Townson described in a recent report, the origins of older women's poverty are multiple and include:

- women's lower income, including income generally associated with atypical work and specifically with self-employment;
- precarious or non-existent job security;
- family responsibilities;
- a general reduction in the protection provided by work-related pension plans;
- the fact that women generally live longer than men and, therefore, on average, will spend more years in old age than men will; and
- the fact that eventually most women will end up living alone.²⁶

A number of these factors are characteristic of the working conditions of family childcare providers, especially low income, lack of job security, lack of a work-related pension plan, and the way women combine and accumulate paid and unpaid work during their lifetime. Furthermore, women such as family childcare providers who have low incomes are less able to save for their retirement, for example by contributing to RRSPs.²⁷ The obvious conclusion is that if CPP/QPP pensions represent for women generally "an indispensable element of retirement income" then this statement should also apply to family childcare providers.²⁸

Unlike the Old Age Security which is funded directly from general tax revenues, CPP/QPP financing is based entirely on contributions by employers, employees, and self-employed workers.²⁹ In 2001, if a person is considered an employee for the purposes of the CPP/QPP, then she and her employer each pay a contribution of 4.3 percent of pensionable earnings.³⁰ The employer must deduct the employee's contribution at source, under penalty of being held responsible for the amounts concerned.³¹ Self-employed persons must also pay the required total contribution when they file their tax return, which was 8.6 percent of pensionable earnings in 2001.³² In other words, unlike other labour legislation, in the context of the CPP/QPP lack of employee status does not result in exclusion from benefits under the Act, but rather results in the levy of a self-financing mechanism for the self-employed.

The CPP/QPP is an income replacement plan, and that is why there is a direct relationship between income earned during one's working life and the benefit paid upon retirement. But while keeping in mind that a person's retirement income will always be proportional to the

income earned during her or his working life, it is important here to emphasize a few aspects of how the CPP/QPP works that have a specific impact on providers as low-income self-employed workers. We have identified three of these aspects: the narrow definition of an “employee” (CPP) or of a “*salarié*” (QPP), the obligation of a self-employed worker to pay the total contribution, and the definition of contributory earnings for self-employed workers.

The Definition of an Employee in the CPP and a Salarié in the QPP

Under the CPP, determination of the employment relationship (in order to decide whether a person pays half the contribution, as an employee, or the whole contribution, as a self-employed worker) is made with reference to the definition of what “employment” is:

“employment”: performance of services according to an express or implied contract of services or an apprenticeship.³³

This is a somewhat restrictive definition, which grants no importance whatsoever to the criterion of economic dependence. In other words, this definition does not cover dependent contractors.

In British Columbia and in Newfoundland and Labrador where family childcare providers contribute to the CPP, given their status as independent contractors (self-employed workers) and the narrow definition of employment for the purposes of this Plan, family childcare providers are required to pay the total CPP contribution. In 2001 this amounted to 8.6 percent of their taxable income.

In Quebec, in the QPP, if a person is to pay only the employee contribution, she or he must meet the definition of an “employee”: an individual who performs work under an employment contract.³⁴ The concept of the employment contract is taken from civil law. More precisely, article 2085 of the Civil Code of Quebec describes the employment contract in these terms:

2085. A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

On the other hand, articles 2098 and 2099 of the Civil Code define the opposite of an employment contract, namely the commercial contract:

2098. A contract of enterprise or for services is a contract by which a person, [...] undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.

2099. The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

The concept of effective subordination in the performance of the work is a decisive factor.³⁵ Recall also that, generally, dependent contractors are not covered by the definition of an employee within the meaning of the *Loi sur le régime des rentes*.

In Quebec, the task of the family childcare provider contains not only elements that usually arise from an employment relationship, but also elements that suggest a business relationship. Without a specific factual context it is difficult to draw any conclusions about employee entitlement to QPP benefits. However, we will find further on that several employment statutes in Quebec define eligibility for the benefits they grant more broadly than the QPP does. Consequently, it seems unlikely that family childcare providers would be regarded by the *Ministère du Revenu* as employees for the purposes of the QPP when they are not yet eligible for benefits under other labour laws. For the time being, it seems that family childcare providers will have to continue to pay the total QPP contribution.

Obligation of a Self-Employed Worker to Pay the Entire Contribution

The most recent changes to the CPP/QPP provide that the rate of contribution, which for a self-employed worker was 5.6 percent in 1996, will rise each year, to a ceiling of 9.9 percent in 2003. For self-employed workers, who have to pay both the employee and employer contributions, this increase of 77 percent spread out over a period of only seven years is substantial. In fact some authors have questioned whether the recent surge in self-employment and the self-employed worker's ability to pay were factors that were taken into consideration when the increase in contribution rates was decided (Townson 2000: 23).

The Definition of Contributory Earnings for a Self-Employed Worker

For self-employed workers, pensionable earnings correspond to *taxable* business income (cash inflow less operating expenses). But in the case of family childcare providers, there is constant overlap between business expenses and personal/family expenses. Like other self-employed workers with low or moderate incomes, the viability of this occupation depends on the ability to maximize deductions of operating expenses in order to minimize taxable income. In fact according to a recent study in Canada, family childcare providers declare a business income of 54 percent of their cash inflow (CCCF 1998b: 31). However, under the CPP/QPP, this gap between total cash receipts and declared business income for income tax purposes means low pensionable earnings are recorded; in the long run this goes against the interests of family childcare providers with respect to retirement income.³⁶

Discussion and Analysis

Because the CPP and QPP are “contributory” plans, the pension of a person is calculated on the basis of earnings recorded during a lifetime and of the total number of years during which she paid contributions to the plan. Whether they work for themselves or as employees, if women have low incomes the benefits to which they would be entitled under the CPP/QPP will also remain low. This is true for family childcare providers as well as for many other low-income workers.

Obviously, family childcare providers would obtain higher pension incomes if their income level was raised. That is why some authors stress that, ultimately, the solution to the

problem of women's financial security in retirement, depends on pay equity and other mechanisms aimed at remedying the underpayment of women throughout their lives (Townson, 1995: 7).

This basic principle should be kept in mind, but we will also briefly discuss whether the current situation of providers with respect to the CPP / QPP could be improved in some way through changes to:

- the narrow definition of an “employee” or “*salarié*” (CPP/QPP);
- the obligation for a self-employed worker to pay the total herself; and
- the definition of pensionable earnings for the self-employed.

Expanding the Definition of “Employee” or “*Salarié*”

The Canadian Customs and Revenue Agency, formerly the Department of Revenue Canada, administers both the CPP and the *Income Tax Act* and assists the Employment Insurance Commission in the administration of the *Employment Insurance Act*. There is therefore some consistency in how the three systems characterize someone as employed or as self-employed. In other words, in practice, the status of self-employed worker for tax purposes is closely tied to the status of self-employed for CPP purposes. In practice, assessments issued to employers for employment insurance contributions and for CPP contributions are usually by means of a single notice of assessment.

At best, broadening the concept of “employee” (CPP) or “*salarié*” (QPP) could mean that providers in provinces using the agency model – as well as many other self-employed workers – would be considered as employees for CPP/QPP purposes but would no longer be considered self-employed for tax purposes. Consequently, in the field of family child care, it seems that a demand for a broader definition of employee would not be a rallying point for improving providers' working conditions.

Moreover, like the *Employment Insurance Act*, the CPP expressly provides the possibility that the federal government could adopt regulations to include any employment in “pensionable employment,” if in the opinion of the government, “the nature of the work performed is similar to the work performed by persons employed in pensionable employment.”³⁷ Subsequently, the worker would only have to pay the employee contribution, and the employer's contribution would be defrayed by the person who pays the employee. Note however that up to now the federal government has used this statutory power only for clarification regarding the legal situation of persons working in international transport, i.e., employed aboard aircraft, trains, and so on.

If it seems “the terms or conditions on which the services are performed and the remuneration paid are analogous to a contract of service,” the federal government also has the authority to adopt regulations to include as “pensionable employment” those services performed by a self-employed worker.³⁸ However, to date the government has not taken advantage of this statutory authority.³⁹

Finally, in provinces that use the agency model, it would be possible to demand the adoption of a regulatory exception to include work performed in regulated family child care as employment that is covered by the Act because it is comparable or substantially identical to employment performed by employees. For example, in Quebec there are credible arguments to support the conclusion that childcare providers do work similar to that of centre-based educators in their CPE. However, unlike what has happened with Employment Insurance, for the CPP/QPP there are no precedents justifying the use of such regulatory powers for a specific category of employment.

The Obligation of a Self-Employed Worker to Pay the Whole Contribution

It is also possible to envisage social security models in which the self-employed workers' contribution is not equal to the total of the employee and the employer's contribution. The CPP/QPP is in effect a social or public insurance policy: the members of society who contribute to the plan – employees, employers, self-employed workers – share the risks and costs inherent in paying pensions. Lowering the contribution rate of self-employed workers would make all employees and employers more responsible for ensuring the financial security of self-employed workers in old age. For example in Quebec, in a debate on parental insurance it was suggested that the rate of contribution for the self-employed should be set at 150 percent of that paid by an employee, rather than 200 percent.⁴⁰

It is also possible to envisage social security models where suppliers of work for self-employed workers have to pay the employer contribution. For example some groups have already recommended that employers of self-employed workers without assistants and who are not incorporated pay the employer contributions for these workers in order to fairly distribute the cost of parental insurance. (CSF 2000: 39).

For the time being, however, the CPP provides explicitly that “the contribution rate for self-employed workers for a year must be equal to the sum of the contribution rates for employees and employers for that year.” Because any change to the CPP requires the agreement of two-thirds of those provinces representing two-thirds of the population, it would doubtless be difficult to amend this provision of the CPP.⁴¹

The Definition of Pensionable Earnings for Self-Employed Workers

Redefining pensionable earnings for self-employed workers as earnings that correspond to their entire cash inflow instead of their net *taxable* income (the cash inflow less operating expenses) certainly would have the effect of increasing their pension upon retirement (or when other situations occur giving them a right to a pension, for example, disability). But it is doubtful that family childcare providers and other low-income self-employed workers would be able to afford the greater contribution that such a measure would entail. The obligation to pay the whole contribution is already burdensome for them. For example for 2001 a provider with a net business income of \$14,000 paid \$903 in contributions to the CPP/QPP. By contrast, if the same provider were to pay contributions corresponding to a gross business income of \$26,000, she would have to pay \$1,935, a significant percentage of her annual income.⁴²

Briefly, as long as self-employed workers have to pay the total contribution to the CPP/QPP, redefining pensionable earnings is not an attractive solution for improving the situation of family childcare providers and other low-income self-employed workers.

Finally, measures other than those discussed in this study have been suggested to improve the potential of the CPP/QPP for overcoming the poverty of older women and low-income workers in general. For instance, one measure would be to increase the percentage of income replacement to 50 percent from the current 25 percent. Other proposals aim to improve the situation of low-income workers and ensuring equity between spouses.⁴³ The importance of investigating universal solutions to protect quality of life at the time of retirement is undeniable. Once they retire, when the lack of protection of the quality of life of family childcare providers and other low-income workers is felt so harshly, it is too late to remedy the situation.

We therefore think that in the long term, further research is necessary to better inform representatives of the childcare sector — including, where they exist, providers' associations — about the problem of retirement income for family childcare providers. As well, starting immediately, whenever the occasion arises representatives of the childcare sector could begin to make representations regarding the situation of childcare providers as self-employed workers (independent contractors) or as low-income workers within the current framework of the CPP/QPP. Until these measures are realized, the surest way to help family childcare providers obtain higher retirement incomes is, obviously, to improve their income level *before* they enter retirement.

Recommendation 2:

- Whereas the CPP/QPP pensions are very important to the retirement income of women and in particular family childcare providers; and
- Whereas action is needed now, so that when they retire family childcare providers have access to certain protection of their standard of living;

We recommend:

That additional research be conducted to better inform representatives of the childcare sector about the retirement income problem faced by family childcare providers.

That, starting immediately, during public debates on the reform of retirement income policies, representatives of the childcare sector make representations regarding the situation of family childcare providers:

- **as low-income self-employed workers or,**
- **as low-income employees, as the case may be;**

as well as the need to reform the current system in order to improve their retirement income.

Workers' Compensation

Incapacitating accidents are not a daily occurrence in family child care, but no family childcare provider is immune to such accidents. She may stumble over a toy or trip down a stairway and break a leg. Or she may develop major back problems as a result of lifting heavy toddlers onto the change table. When such an injury occurs, the consequences can be very serious for the provider who as an independent contractor (self-employed worker) is not entitled to any compensation.

In family child care, the lack of concern for the provider's health and safety and the lack of income protection in the event of a work-related accident or illness seem paradoxical. After all, the provider's work consists partly in applying a multitude of regulations aimed precisely at ensuring the health, safety and well-being of the children in her care.

Compensation for workers who contract a disease or experience an injury because of their work is a form of social insurance found in all Canadian provinces (Bernstein *et al.* 2001: 81). Benefits under the various workers' compensation laws include:

- Benefits covering the period of temporary or permanent disability;
- Rehabilitation services and benefits during the period of rehabilitation; and
- In some cases, the right to return to work.

The amount of these benefits is based on earned income, and varies from one province to another. For example, benefits represent 90 percent of net income in Quebec, 80 percent of net income in Newfoundland and Labrador, and 75 percent of gross income in British Columbia. Compensation is thus an important mechanism of income security for injured workers.

Historically, the right of workers to sue their employers was abolished in exchange for the right to no-fault compensation. The full amount of the premiums collected to fund the system are charged to employers.

Two conditions must be met in order to be entitled to workers' compensation coverage:

- The sector in which work is done must be covered by the legislation; and
- The contractual link between the worker and the employer must make it possible to conclude that the worker is a worker within the meaning of the Act.

The definition of sectors which are covered and the definition of workers within the scope of the law vary considerably depending on the provincial jurisdiction.

Provisions Governing Eligibility **Newfoundland and Labrador**

In theory, child care is a sector for work covered by the *Workplace Health, Safety and Compensation Act* of Newfoundland and Labrador.⁴⁴ The definition of worker covered by the Act is narrow. However, the Act presumes that self-employed workers in the fishing, whaling and sealing industries who work for a share of the catch are also covered by the definition of “worker.”⁴⁵ Furthermore, the government has the power to adopt regulations to include other people in the scope of the law, such as independent contractors working in logging.⁴⁶

Given that the legal status of family childcare providers in Newfoundland and Labrador seems closer to that of independent contractor (self-employed), it is unlikely that in the current legal framework agencies that supervise family childcare providers would be considered to be their employers within the meaning of the Act.

It is nevertheless possible for independent contractors to register with the Workplace Health, Safety and Compensation Commission of Newfoundland and Labrador. By paying contributions applicable to their sector of work, for the amount of income they want to insure, self-employed workers can obtain personal coverage against work-related accidents and illnesses. For example, in 2001 the annual premium for a childcare worker earning \$24,000 a year was \$98.40.⁴⁷ And in the event of work injury or illness within the meaning of the Act, the act provides for payment of benefits equal to 80 percent of the injured worker’s business income (the income after deduction of expenses, but before deduction of taxes).⁴⁸ Given that for childcare providers, the gap between cash inflow and business income declared for tax purposes is usually very significant, this method of calculating compensation is not advantageous.

British Columbia

The *Workers’ Compensation Act* of British Columbia covers all sectors, except when the Act or regulations explicitly exclude an activity, which is not the case for childcare services.⁴⁹

The definition of worker for the purposes of the application of the Act is relatively narrow, circumscribed by the traditional concept of a “contract of service.” Despite their status as independent contractors (self-employed), commercial fishers are explicitly covered by the law.⁵⁰ As well, in the opinion of the Workers’ Compensation Board, if individuals are engaged in an activity in the public interest, the Commission may, subject to terms and conditions it sets, rule that such persons are deemed to be workers for the purposes of the Act. Moreover, with the government’s approval, the Commission can stipulate that they are deemed to be working for the provincial government and can obtain funding from the latter for their coverage.⁵¹

Although not explicitly mentioned in the Act, the Board also recognizes a category of dependent contractors designated as “labour contractors.” Unless a labour contractor decides to register with the Board and pay the applicable premiums herself or himself – and some of them opt for this so as to qualify to obtain contracts – the main firm or contractor for which the labour contractor works is deemed to be his or her employer for the purpose of the Act.

And then the labour contractor, like all workers, is covered by the Act, even if the “employer” has not paid the premiums at the time an injury occurs.

The current legal status of family childcare providers in British Columbia seems to be one of an independent contractor offering services to parents. Within this context, as in Newfoundland and Labrador, it seems unlikely that in the current legal setting organizations in charge of delivering the CCRR Program will be considered as the employers of family childcare providers for the purposes of the *Workers’ Compensation Act*. Furthermore, these providers do not fit into any category in the definition of a labour contractor, a definition designed more to respond to the realities of contract work in the forestry industry and construction than for the employment models associated with personal care services.⁵²

However, the Workers’ Compensation Board considers that childcare providers meet the criteria of the definition of independent operators.⁵³ As such, by registering with the Commission and paying contributions applicable to their sector of work for the amount of income they want to insure, childcare providers can obtain personal workers’ compensation coverage.⁵⁴ For example to insure a worker in the childcare sector earning \$24,000 a year the 2001 annual contribution was \$172.80.⁵⁵ In the event of a work-related accident or illness covered by the Act, the Commission pays benefits equal to 75 percent of the gross income of the injured person.

Quebec

In Quebec, all sectors are covered by the *Loi sur les accidents du travail et les maladies professionnelles (LATMP)*. Furthermore, the Commission de la santé et de la sécurité du travail (CSST) cannot exempt sectors from the application of the Act. However, the concept of “worker” itself has the effect of restricting the scope of the Act because it explicitly excludes:

- Professional athletes;
- Domestic workers; and a
- “(P)erson engaged by an individual to care for a child and who does not live in the dwelling of the individual”.⁵⁶

The nuance between the concept of a domestic — today more commonly called family aide — and the concept of a babysitter is very important. If a person hired to take care of a child lives in her employer’s home, she is considered to be a domestic and can benefit from some alternate forms of access to benefits under the Act. On the other hand, if she does not live in her employer’s home and cares for the children in her own home, she is considered to be a babysitter and consequently is not entitled to benefits under the Act.

Moreover, the law includes some self-employed workers in the definition of employees within the meaning of the Act. Specifically, under section 9 of the Act:

9. An independent operator who in the course of his business carries on activities for a person similar to or associated with those carried on in the establishment of that person is considered 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 a person who retains his services.⁵⁷

It should be noted that here the definition of a self-employed worker applies only to someone who does not employ any workers.⁵⁸

The Act also creates other categories of persons who are treated as workers under the Act. For example, persons who do compensatory work or hours of community service as part of a probation order, and people on social assistance who participate in job readiness programs are considered workers employed by the government.⁵⁹

Asked whether family childcare providers in Quebec who do not have an assistant could be considered as independent operators similar to employees of the CPE within the meaning of the Act, the CSST took the following position: they are babysitters working for private individuals, parents, to take care of children and are thus entirely excluded from the scope of the Act.⁶⁰ However, Katherine Lippel, professor and expert in the analysis of workers' compensation case law in Quebec, argues that, to the extent that one can demonstrate that the CPE and not the parent is hiring the provider, the exclusion of a "babysitter engaged by a private individual" would not apply. It follows that the eligibility of family childcare providers would be decided in accordance with the application of Article 9.

Ms. Lippel considers that the appeal body — the *Commission des lésions professionnelles* — could very well decide that family childcare providers (provided that they do not employ an assistant) are covered under section 9 of the Act as independent operators offering a child care service similar or related to that offered by the CPE.⁶¹ Given the inclusive nature of the provisions of section 9, it is clear that there is a strong potential for litigation on coverage for providers in the event of a work-related accident or illness. The first cases on the employment status of family childcare providers in Quebec support this conclusion.⁶²

The Act allows "domestics," self-employed workers, and even employers to register with the CSST. Subsequently, if they pay the premiums applicable to their sector of work for the amount of their income they want to insure, they can obtain personal coverage for work-related accidents and illnesses as if they were workers within the meaning of the Act. Associations of family aides ("domestics") and self-employed workers can also register their members with the CSST.⁶³ However, there is still the issue of who funds the premiums. For example, to insure a worker in the childcare sector earning \$24,000 a year in 2001, the

premium was \$542.40 a year. In the event of a work injury as defined by the Act, the Act provides for the payment of benefits equal to 90 percent of the net income of the injured person. In the case of an independent contractor, this amount corresponds to the business income declared for tax purposes, after taxes and deductions. Keep in mind, however, that this optional personal coverage is not available for persons hired as babysitters, the status the CSST currently assigns to providers .

Finally, despite the fact that workplace health and safety legislation has aimed at risk prevention is not covered by this study, the right to protective leave or reassignment for centre-based childcare workers in Quebec cannot be ignored. In fact, under the *Loi sur la santé et la sécurité au travail*, a pregnant worker who provides the employer with a medical certificate stating that her working conditions entail physical dangers for her unborn child or herself because of her pregnancy, can ask to be assigned to duties that do not entail such dangers.⁶⁴ If the employer cannot reassign her, the worker is entitled to income replacement benefits as if she were unable to do her job because of a work-related accident. Case law has held that a worker exposed to young children in child care is entitled to reassignment (or if reassignment is not possible to income replacement benefits) because of the risk to her unborn child from the common infectious diseases of childhood.

However, while it can be presumed that in some cases the risk to the family childcare provider's unborn child is similar to that of the centre-based childcare worker's unborn child, since the provider is an independent contractor, the family childcare provider is not entitled to reassignment.⁶⁵ Finally, it should be noted that an independent contractor's (self-employed worker's) registration with the CSST and payment of premiums for personal coverage does not entitle her to reassignment or leave because of pregnancy.

Since the purpose of the *Loi sur la santé et la sécurité au travail* is the elimination at source of dangers to the health, safety and physical well-being of workers, it seems questionable to say the least to have two classes of workers, one of which, the centre-based worker, benefits from protection of her unborn child and the other, the family childcare provider, does not have the same protection. This lack of parity seems to be in direct contradiction to the provisions of the *Home Work Convention* of the International Labour Organization. Using a definition of home worker that includes dependent contractors, this Convention sets out the principle of equality of treatment between workers at home and other workers in occupational health and safety matters as well as in other fields.⁶⁶

Discussion and Analysis

In British Columbia and Newfoundland and Labrador, even if the law were amended to extend workers' compensation coverage to all dependent contractors, such a change would probably not affect the working conditions of family childcare providers. In the current context, the degree of providers' economic dependence on agencies and CRR program is simply not significant enough for them to be covered by the typical definition of a dependent contractor. In Quebec, section 9 of the Act already extends protection to many contractors in the event of a work-related accident or illness. So it is not inconceivable that family childcare providers who do not employ an assistant could be ruled eligible for this type of coverage

within the current legal framework. Moreover, if the courts decide that the withdrawal of employment status from family childcare providers set out in Bill 8 is constitutional, this provision of the *Loi sur les accidents du travail* will make little difference for family childcare providers, who still will not be entitled to coverage in the event of a work-related accident. In short, at the present time, broadening the provisions on access to workers' compensation coverage does not seem to be an appropriate strategy for improving the working conditions of family childcare providers in any of the provinces studied.

The demand for a legislative amendment or regulation to provide coverage for regulated family childcare providers regardless of their employment status is an avenue worth exploring. There are precedents for the inclusion of categories of self-employed workers, such as fishers (British Columbia and Newfoundland and Labrador), contractors in the forestry industry (Newfoundland and Labrador) or persons engaged in an activity in the public interest (British Columbia). If Quebec courts decide the government can deny family childcare providers the protections and benefits of labour and employment laws, the gross injustice relative to other professional groups makes a stronger argument in favour of including them within the scope of the law. We reiterate that this is already the case for people who do community service under a probation order or those on social assistance who participate in job readiness programs.

The general principle is that the purchasers of the goods produced or services performed by contractors are responsible for the premiums required to fund this coverage. So ultimately the cost of compensation for injured workers is transferred to consumers. But in the absence of any other "substitute" employer to pay the premiums funding the extended coverage, the government is called upon to fill the gap.⁶⁷

Optional personal coverage is an alternative that currently exists in each province studied. The purchase of personal workers' compensation has the advantage of being available immediately. It both represents an individual choice for every family childcare provider, and also provides access to the benefits of a major group plan. This is in contrast to insurance plans with compulsory contributions in which the plan's viability requires all providers to contribute in order to spread the risk across the widest group possible. The fact that this coverage is necessarily entirely self-funded is partly offset by the fact that contributions destined to fund workers' compensation coverage are by definition chargeable to the employer. As such, they are a business expense that is fully deductible from taxable income.

To assess the value of this coverage, it would be necessary to conduct a more detailed evaluation of the costs, the conditions of coverage, and the benefits paid in the event of an accident or illness, for all jurisdictions. For example, in Newfoundland and Labrador, even when stress in the workplace is so significant that it results in a worker's being unable to perform her or his duties, the situation may not be considered a work-related injury. Yet, if we look at the profile of work-related injuries incurred by centre-based childcare workers, back injuries and burn-out due to work stress are two major sources of claims.

Recommendation 3:

- Whereas when a work-related injury occurs in a family childcare setting, the implications can be very serious for the provider;
- Whereas given the scope of this study it is not appropriate to recommend broadening provisions that govern eligibility for workers' compensation coverage under various provincial laws; and
- Whereas, further, there are many precedents where worker's compensation protection is available to groups of vulnerable workers or to those engaged in activities in the public interest although these workers are not employees;

We recommend:

That, in the short term, for all jurisdictions there be a more detailed evaluation of the availability, costs, and benefits of personal coverage for the regulated family childcare provider in the event of a work-related injury;

That the results of these evaluations be communicated to childcare providers, to their associations and to the family childcare sector as a whole, so that they may be better informed about the personal coverage available to them and so they can purchase it if they consider it appropriate.

That in the medium term all provincial and territorial governments take measures to extend workers' compensation coverage to regulated family childcare providers, and finance this protection directly from public funds.

Employment Standards

Theoretically, in the absence of a union each employee has to negotiate her or his working conditions individually with the employer. However, in recognition that the absence of negotiating power of low-income workers can lead to aberrant situations, each jurisdiction in Canada has a law setting out employment standards. Because these standards are supposed to represent a *minimum* threshold to establish working conditions, any contract that provides less advantageous conditions for an employee is considered null and void. Employment standards establish, among other things, a minimum wage, weekly rest days, calculation and rate of overtime pay, paid statutory holidays, annual vacations, layoff notice and, in some cases, the right to some job security.

In theory, these standards apply to all employees. In fact there are some exclusions, in particular in the sectors of domestic work and agriculture. Furthermore, as in labour law, only workers who benefit from employee status are covered by employment standards legislation. Also note that in some jurisdictions, Quebec for example, self-employed workers who are considered to be dependent contractors are deemed to be employees for the

purposes of the application of employment standards. In that case, their working conditions must satisfy the minimum employment standards.

In order for a family childcare provider to be able to benefit from the application of employment standards in a given jurisdiction, two conditions must be met:

- The law must contemplate the family childcare sector;⁶⁸ and
- The provider must have employee status or, as the case may be, dependent contractor status similar to an employee, for the purposes of the application of the law in question.

Provisions Governing Eligibility

Newfoundland and Labrador

In Newfoundland and Labrador, the *Labour Standards Act* applies to early-childhood care and waged work at home, despite the fact that many fields of work are excluded.⁶⁹ So it can be presumed that, if need be, the Act applies to family child care.

The key definition for determining who is covered by the legislation is the definition of a *contract of service*. The constituent elements of such a contract include work performance, remuneration, and terms (explicit or implicit) by which the employer reserves the right to control and direct the manner and method by which the employee does the work.⁷⁰ Briefly, the definition of a contract of service contains the traditional elements of the definition of an employment relationship.

Given the conclusion that the legal status of family childcare providers in Newfoundland and Labrador resembles that of a genuine independent contractor, within the legal framework described above, agencies in charge of supervising childcare providers are not likely to be considered their employers in the application of employment standards.

British Columbia

In British Columbia, the application of the *Employment Standards Act* is broader than that of Newfoundland and Labrador's legislation. But the Act still excludes, in part or in full, several categories of workers in the personal-care sector and some who work from home from employment-standards protection.⁷¹ However, the family childcare sector is not subject to any of these exclusions and, therefore falls within the scope of the Act.

However, this scope is also circumscribed by the concept of "employee," which does not include dependent contractors.⁷² Consequently, it seems clear that the *Employment Standards Act* does not apply to family childcare providers in British Columbia, because their status corresponds to that of independent contractor.

Quebec

In Quebec, providing that the employer's purpose is non-profit, the employee is excluded from the scope of the Act: "whose main function is to take care of or provide care to a child ... and to perform domestic duties in the dwelling that are not directly related to the immediate needs of the person in question."⁷³ But it would seem that this exclusion does not cover the work of family childcare providers because they are not caregivers "in [the

child's] dwelling” within the meaning of this provision of the Act.⁷⁴ The family childcare sector appears to be covered by the Act.

Unlike the situation in British Columbia and in Newfoundland and Labrador, in Quebec the definition of the term “*salarié*” also covers some dependent contractors. Specifically, the Act stipulates that:

- ...this word also 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 expenses entailed in the performance of that contract.⁷⁵

In other words, as is often the case when the legislator chooses to deem certain dependent contractors to be employees, ownership of tools and furnishing materials do not have the effect of excluding a person from the scope of the Act. At the same time, the importance of the terms and conditions of payment (e.g., a fixed rate instead of an hourly fee) and the form of the contract that binds the parties are minimized. In this context, the application of the concept of profit and loss in the fulfillment of the contract becomes decisive. If there is a real financial risk for the worker or if she can realize a profit, then she is deemed to be a self-employed worker and as such is excluded from the scope of the Act.⁷⁶

On the other hand, regardless of the concept of profit or loss, if the family childcare provider hires an assistant on anything other than an *ad hoc* or occasional basis, she herself becomes an employer and then cannot normally be considered to be an employee within the meaning of the *Loi sur les normes du travail*.⁷⁷

According to an opinion issued by the *Commission des normes du travail du Québec*, family childcare providers without an assistant are not covered by the Act as dependent contractors deemed to be employees. However, this opinion is based on the premise that despite the fact that some childcare spaces may be subsidized, family childcare providers generally set rates for the children they accept, and thus have the possibility of making a profit.⁷⁸ This premise may correspond to a theoretical model in the *Loi sur les Centres de la petite enfance*, but it does not reflect the real situation of family childcare providers.⁷⁹ In Quebec the government's promised expansion of the network of subsidized early-childhood care is based in large part on the development of spaces in family child care. At present, no regulated provider has the right to offer non-subsidized spots in her childcare service.

Moreover, as mentioned above, in May 2003 in the *CPE La Rose des vents* case the Labour Court decided that, for the purposes of an application for trade-union certification filed under the Quebec *Labour Code*, a group of family childcare providers had employee status.⁸⁰ It is important to emphasize that the definition of the term “*salarié*” in the *Loi sur les normes du travail* is broader than the definition in the *Code du travail*.⁸¹ Given how little room family childcare providers have to determine their working conditions, their lack of control over setting rates and, more generally the tendency of courts to give a broad interpretation to the concept of employee within the framework of the *Loi sur les normes du travail*, there is reason to think that family childcare providers could be considered “*salariés*” for the purposes of employment standards legislation.⁸²

Discussion and Analysis

In British Columbia and in Newfoundland and Labrador, even if the Act were to be amended to extend employment-standards protection to all dependent contractors the amendment would probably not have any impact on the working conditions of family childcare providers. As it stands today, the degree of economic dependence of family childcare providers on agencies and CCRR programs is not enough to bring them within the usual definition of dependent contractors.

In Quebec the Act already applies to dependent contractors inasmuch as they can be included as employees under the broad definition of this concept adopted by the legislature. It is therefore possible that even within the current legal framework some family childcare providers could be considered by the *Commission des normes du travail* to be protected by the Act. On the other hand, if regardless of the provisions of the *Loi sur les normes du travail* the courts uphold Bill 8, which says that family childcare providers are deemed not to be employed by the CPE, then these providers would not have the right to the minimum protections guaranteed by the law.

In light of this brief overview of the eligibility of family childcare providers for employment-standards protection in the provinces studied, it seems, for reasons that vary from one jurisdiction to another, that demanding more flexible provisions on access to employment-standards protection is not the best strategy for improving the working conditions of family childcare providers.

However, employment standards have always been seen as playing a complementary or supplementary role to collective labour relations (Fudge 1991). Both systems are intended to address the power imbalance that occurs between a worker and an employer when individually negotiating working conditions. Thus, given the independent contractor status held by the majority of family childcare providers in Canada, identifying alternatives to traditional collective bargaining, developed specifically to allow self-employed workers to bargain working conditions collectively, seems a more promising approach to explore, rather than broadening the provisions that govern access to employment-standards’ protection.

The plans (Quebec and federal) that are applicable to artists are the most frequently cited example of a system that facilitates sector-based grouping of self-employed workers to allow them to negotiate minimum working conditions collectively, while recognizing the right of

individuals to conclude more favourable agreements.⁸³ A recent study concludes that with certain adjustments the system used for artists could be usefully be extended to other sectors. Furthermore, the author of this study emphasizes that for the category of atypical workers composed of “small contractors” sometimes called “pseudo-independent contractors,” recognition of the right to collective bargaining is often a more suitable alternative than a general extension of the definition of eligibility for protection and benefits under labour legislation.⁸⁴

In Quebec, Bill 8, which provides that family childcare providers are deemed not to be employees of a CPE, creates a convoluted model of sector-based organization of family childcare services. The Bill provides that the government can conclude an agreement with one or several family childcare providers’ associations. More specifically, this agreement concerns the delivery of family child care, its funding, and the setting up and running of programs and services for family childcare providers. Before concluding such an agreement, the Minister must consult every association that represents at least 350 family childcare providers, and associations that represent at least 150 CPEs. The Minister also must submit any agreement to the government for approval. Thereafter, the agreement binds all family childcare providers — whether or not they are members of the association that concluded the agreement — as well as all CPEs. The working conditions of family childcare providers, as such, do not figure among the subjects that can be the object of an agreement. Nor is any funding mechanism established for providers’ associations.

The primary objective of Bill 8 is to deny family childcare providers the right to union representation and collective bargaining as a means of participating in the determination of their working conditions. The model that this Bill puts forward is more a unilateral means of determining providers’ working conditions than a model of sector-based bargaining (Bernier *et al.* 2003). In this context, we consider it useful to clarify that the purpose of a sector-based bargaining model is to offer family childcare providers the collective ability to participate in the determination of their working conditions *as self-employed workers*. At the very least, where employee status exists in fact, family childcare providers should have the right to union representation and to collective bargaining, as do all other employees.

Recommendation 4:

- Whereas presently, within the scope of this study it is not appropriate to recommend an extension of the provisions that govern eligibility for employment-standards protection; and
- Whereas, moreover, the collective voices of family childcare providers would increase their ability to gain attention on issues concerning their pay, working conditions, and the regulation of family child care;

We recommend:

That research be conducted on the possibility of family childcare providers’ adopting a sectoral model of collective bargaining as self-employed workers, with the objective of

creating an inventory of existing innovative models and identifying issues and conditions for success in this type of bargaining;

That, on the basis of this research, there be consultation with the family childcare sector, in order to determine family childcare providers' interest in further exploring one or more models of sector-based bargaining.

Pay Equity

The concept of pay equity refers to determining the fair value of work by comparing pay for predominately female jobs with that of pay for predominately male jobs. Ninety-nine percent of all regulated family childcare providers are women.⁸⁵ The intense concentration of women in the sector has in all likelihood resulted in lower pay for providers.

More specifically, implementation of a pay equity program aims to identify and correct wage gaps that are due to systemic discrimination against women. In the case of family child care, the concept of systemic discrimination refers to prejudices that influence how we see the value of family childcare provider's work. Generally, the traditional work of women has been undervalued and underpaid. As reported by Ruth Rose and Elizabeth Ouellet:

The problem of low wages is common to all workers who perform, in the labour market, a type of replacement of housewives' unpaid work. (2000: 13)

For example, in the personal-service sector where employees are predominantly women, there is often a tendency to see women workers' real relational and behavioural skills as *personal* qualities, such as kindness, dedication, neatness, or patience (CSF 1995; Rose and Ouellet 2000: 15). These qualities are certainly sought after, but under current standards they are not likely to be rewarded with any remuneration or recognition in return.

The work the family childcare provider does is at the core of several problems associated with the failure to recognize the value of women's work. In the personal-service sector, the lack of recognition of the value of caregivers' work is particularly acute in early childhood care (Beach *et al.* 1998c: 8). Within the childcare sector, work done by caregivers in the home, and often concurrently with unpaid work, such as taking care of their own children is also undervalued. Moreover, historically, the home has been seen as a place that is by definition devoid of "real" work or paid work. (Prügl 1999: 19).

As far as we know, the only evaluation of family childcare providers' work with regard to pay equity principles occurred during the 1990s in Toronto. Following a preliminary evaluation of the providers' work by a committee set up by the City of Toronto (and therefore as far as we know, without representation by family childcare providers themselves), work done by an untrained provider was evaluated as comparable to jobs with an annual salary of between \$31,160 and \$35,911 in 2001.⁸⁶ This salary is considerably higher than the income earned by family childcare providers as independent contractors.

Thus, we can assume that an evaluation of the work done by family childcare providers according to pay equity principles would reveal the inequitable nature of current pay for this work compared to the remuneration for jobs dominated by men.

Two observations should be made, however, about the potential of pay equity as a way of improving the situation of family childcare providers. First, public sector employers have the legal obligation to pursue a pay equity program in only seven provinces (British Columbia, Prince Edward Island, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec) (Bakan and Kobayashi 2000). Further, pay equity legislation applies to most *private* sector companies only in Ontario, Quebec and fields under federal jurisdiction.

Second, where this right exists, the right to receive equal pay for work of equal value, or in other words pay equity, is reserved to employees as defined in each of the pay equity acts. In a business context, the fact that a company, including a public enterprise, pays an independent contractor compensation that does not reflect the true value of the work is considered an entirely legitimate and sound business practice, even when undervaluing and underpaying this work is part of the historical systemic discrimination against women's work.

Provisions Governing Eligibility

Newfoundland and Labrador

In Newfoundland and Labrador, there is no pro-active legislation obliging public and private sector employers to pursue a pay equity program. The Human Rights Code simply forbids an employer from paying a female employee less for work equivalent to that performed by a male employee in the same establishment.⁸⁷

For the purposes of the present discussion, suppose that childcare providers in Newfoundland and Labrador can be considered agency employees. In every case, because there is no predominately male job within the family childcare agency or within the same establishment (every private residence offering child care could even be considered an establishment), filing a complaint under the Human Rights Code would not be a useful way to obtain more equitable pay for family childcare providers in Newfoundland and Labrador.

British Columbia

In British Columbia, the policy framework for pay equity adopted under the *Public Service Employers Act* applies to public sector employers.⁸⁸ However, social and community employers in the health and social and community services sector — including the ministry responsible for child care — are excluded from the application of the Act.⁸⁹

In the early 1990s employees in these sectors benefited from a government policy of wage adjustment, without any formal job evaluation process.⁹⁰ Childcare workers benefitted from this policy, receiving wage increases that progressively increased low wages — often minimum wages — to reach, within a few years, hourly rates of \$13 and \$14. Similarly, in 2000, daycare centre supervisors also benefited from salary adjustments within the framework of pay equity measures, adjustments that translated into increases of \$345 a month.⁹¹

In the area of employment, the Human Rights Code of British Columbia has fairly wide application because the Code defines the employment relationship very broadly. This definition even includes the relationship between an independent contractor and her client, to the extent that a significant portion of the services performed by the contractor relate to this client.⁹² However, the Code imposes a lower standard of pay equity than equal pay for work of equal value on employers. It prohibits an employer from paying an employee of one sex less than an employee of the other sex for work that is “similar or substantially similar.”⁹³

In British Columbia, nothing obliges an employer to pursue a pay equity program. Only if a woman (or a group of women) lodges a complaint can there be an evaluation of the comparable nature of the pay providing that the work is “similar or substantially similar” to that of a man employed by the same employer. In British Columbia, the fact that the right to pay equity is conditional on the presence of male-dominated job classes at the same employer’s company represents an important obstacle in a sector like child care where the workforce is so overwhelmingly female.

Finally, given the legal status of family childcare providers as independent contractors, it would seem that even the very broad scope of the Human Rights Code does not make it a suitable tool for helping family childcare providers obtain equivalent pay.

Quebec

In 1999, following a collective bargaining campaign by unions representing childcare workers, Quebec adopted a national wage adjustment program for all centre-based childcare workers and family childcare providers. In the context of this program in the family childcare sector the government’s daily contribution, which was \$15 per child in 1999-2000 (to which the parental contribution of \$5 a day was added) became \$17.20 in 2001-2002, an increase of 15 percent over three years. As a comparison, the average hourly pay of centre-based childcare workers rose from \$11 an hour in 1999-2000 to \$16 an hour by 2002-2003, representing an increase of 45 percent over four years (Rodrique 2001). To be sure, these increases represent major gains, but as one advocate points out they do not necessarily mean that the childcare workers and providers achieved pay equity.⁹⁴

On November 21, 1997, the *Loi sur l’équité salariale* came into effect in Quebec. This law obliges all employers with more than 10 employees to prove that there is no wage discrimination within their company and, if necessary, to eliminate discriminatory wage gaps. Unlike the Ontario law, which obliges companies to pay wage adjustments of up to one percent of annual total payroll until pay equity is achieved, the Quebec law stipulates that wage adjustments can be spread over a maximum of four years. For companies that have predominately female and predominately male job classes, November 21, 2001 was the deadline for filing a plan for achieving pay equity.

Unlike the situation in British Columbia, the Quebec law does not deny the right to pay equity to employees who work within a company that does not have a predominately male job class. The Quebec act obliges the employer to produce a pay equity plan and to make wage adjustments, but this is conditional on the adoption of regulations by the *Commission de l’équité salariale*, that determine the jobs with which the predominately female jobs must be

compared. The Commission has not yet adopted such regulations, and it certainly appears that it will be a long time before it does so.⁹⁵ The net result of this delay is that the right to pay equity for employees working for a company that does not have a predominately male job class — which is the case in the entire early-childhood care sector — has been put on the back burner.

However, despite these limitations, the *Loi sur l'équité salariale* has several features worth noting. It contains a definition of employee that includes, in certain conditions, self-employed workers. Although the Act applies only to employees, it nevertheless provides that:

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 enterprise of that person is considered an employee of that person, except:

- 1) where 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; or
 - (c) for several persons in turn and 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.⁹⁶

Nevertheless, despite these limitations, the definition of an independent operator includes only those contractors who do not in turn have their own employees. Good arguments can be made that for the purposes of pay equity, providing they do not employ an assistant, family childcare providers perform activities for the CPE that are similar or substantially similar to those of the CPE. Consequently, they could be considered employees of their CPE. On the other hand, once they have hired an assistant family childcare providers are excluded from the definition of an independent operator who can be treated as an employee. In Quebec, there is therefore some potential for family childcare providers seeking to obtain remuneration consistent with the principles of pay equity to use recourse under pay equity legislation without putting into question their self-employment status for tax purposes.

Discussion and Analysis

In spite of the gains made by some childcare workers in Canada, the underpayment of providers in the childcare sector -- the result of historic prejudices about women's work -- remains a significant obstacle to equality rights for the nearly 333,000 women who work in this sector. Furthermore, there is every indication that the underpayment of caregivers is likely to be particularly pronounced in the family childcare sector. In other words, even though it is difficult to assess the equivalent value of the work done by family childcare providers (unless an evaluation of the job is conducted for every province and every territory), everything suggests that in family child care, the current remuneration does not reflect the real value of the work done.

In British Columbia and Newfoundland and Labrador, there is no proactive pay equity legislation. In every case, even assuming that a broad definition of the term “employee” were used in anti-discrimination legislation or proactive pay equity legislation, family childcare providers in these provinces would not be considered employees, because it is the parents that negotiate rates and pay them, entirely or in large part. One premise on which this study is based is that parents have a limited ability to pay for child care – a limit that is often already reached.

In Quebec, the situation is different. The current definition of the term “*salarié*” is already very broad, and the employment status of family childcare providers is much more ambiguous than is the case for providers in the other provinces studied. Under current legislation, family childcare providers who do not employ an assistant could be considered to be the CPE’s employees for the purposes of the *Loi sur l’équité salariale*. On the other hand, if the courts uphold Bill 8, which provides that family childcare providers are deemed not to be employed by the CPE, no provider would have any right to benefits under the *Pay Equity Act*.

In this context, it seems that broadening the definition of eligibility for rights granted by pay equity legislation, where such legislation exists, is not a suitable strategy for improving the working conditions of family childcare providers.

Moreover, despite the asymmetrical situation described in the three provinces studied, both at the legal level and in terms of the delivery models for family child care, we think that it would be useful to do an evaluation of the regulated family childcare provider’s job in all provinces and territories. In a broad sense, the detailed and methodical description of a task to be done and the skills necessary to perform it are linked to a process of professionalization of the family childcare provider’s job. An evaluation of this work can serve as a tool for generating awareness, both among the general public and among those people more closely associated with the childcare sector, in order to improve recognition of the value of this work. Indeed, in the childcare sector there is still the perception that the family childcare provider’s work is of less value than the work performed by a centre-based worker, even though the childcare worker’s own work also remains undervalued.

During the negotiation of collective agreements that led to the adoption in 1999 of the wage adjustment program in Quebec, advocates came to the table with a study evaluating the work done by centre-based childcare workers. This study, produced by the *Conseil du statut de la femme* in 1995, contributed greatly to legitimizing their demands.⁹⁷ Similarly, the *Association des aides familiales du Québec* recently evaluated the work done by family aides. Among other things, the job evaluation has helped support the Association’s demands to put an end to the exclusion of domestic workers from employment legislation (Rose and Ouellet 2000).

Recommendation 5:

- Whereas presently, within the scope of this study, it is not appropriate to recommend broadening the provisions that govern eligibility for the right to pay equity;
- Whereas, moreover, the massive concentration of women in the family childcare sector has undoubtedly resulted in lower levels of pay in this sector; and

- Whereas the evaluation of a job with reference to pay equity principles reveals the undervaluing of this work, which results from unyielding prejudices toward the work done by women;

We recommend:

That the job of the regulated family childcare provider be evaluated in all jurisdictions in a way that allows it to be compared with other jobs that have certain similar duties, with a view to informing decision-makers, the childcare sector, and the general public about the content and value of this work.

Notes

¹ *Ontario Public Service Employees Union v. Cradleship Creche of Metropolitan Toronto*, O.L.R.B. Rep. [1986] 3351-84-R. See also *Ontario Public Service Employees Union v. Ottawa Day Nurseries Inc. c.o.b. as Andrew Fleck Child Centre*, O.L.R.B. Rep. [1987] 0855-85-R.

² *Lapensée v. Ottawa Day Nurseries*, [1986] O.J. No. 63 (QL) (Supreme Court of Ontario) overturning the decision of the Pay Equity Hearings Tribunal, but for other reasons, *Wellington (County) v. Butler*, [2001] O.J. No. 4219 Ontario Superior Court of Justice) (QL).

³ Workers' Compensation Appeals Tribunal Decision No 152/95, December 18, 1996 (Tribunal members: R.E. Hartman, W.D. Jago and J. Anderson).

⁴ *Re : MacAulay Child Development Centre*, 1993 CanRepOnt E.S.C. 3157 (Wacyk).

⁵ See the cases of *Kuenzler v. Canada (National Minister of Revenue - M.N.R.)* [1988] T.C.J. No. 131 (QL) and *Clark v. Canada (National Minister of Revenue - M.N.R.)* [1993] T.C.J. No. 925 (QL).

⁶ *Centre de la petite enfance La Rose des vents et al. v. Alliance des intervenantes en milieu familial, Laval, Laurentides, Lanaudière (CSQ)*, T.T. 500-28-001293-026 et 500-28-001294-024 May 1, 2003 [hereinafter the *CPE La Rose des vents* case]; *Centre de la petite enfance La Ribouldingue et al. v. Syndicat des éducatrices et éducateurs en milieu familial de la région de Québec (CSN)*, T.T. in May 200-28-000016-029 and 200-28-000017-027, 1st 2003 [hereinafter, the *CPE Ribouldingue* case]. See also *Alliance des intervenantes en milieu familial, Laval, Laurentides, Lanaudière (CSQ)* and *Centre de la petite enfance Marie Quat'Poches, Centre de la petite enfance La Rose des vents, Centre de la petite enfance l'Arche de Noé* and *Procureur général du Québec* (February 6, 2002), files CM-1010-3182, CM-1010-4121, CM-1010-5509 (Commissaire du travail Jacques Vignola).

⁷ In Quebec, in the decision about the employment status of the providers affiliated with the *CPE La Rose des Vents*, the Labour Commissioner adopted an analytical framework that

was similar to that of the Canadian Tax Court. This did not, however, prevent the Commissioner from awarding employment status to the providers for the purposes of the application of the *Labour Code* *Code du travail*. According to him, in *implementing* the regulations, the CPE exercised its discretionary power as well as a choice of approaches that exceeded the activities strictly required by its supervisory mandate. The analysis of the Labour Commissioner was confirmed by the *Labour Court*: see the CPE *La Rose des Vents* case.

⁸ Quebec, Ministère de la Famille et de l'Enfance (2001), *La situation des centres de la petite enfance et des garderies au Québec en l'an 2000*, p.12.

⁹ See the CPE *La Rose des Vents* and CPE *La Ribouldingue* cases.

¹⁰ Given the division of functions of support and supervision between the government and the CCRR Program, the other option would have been to evaluate the employment status of the provider vis-à-vis the Ministry of Community, Aboriginal and Women's Services. At a time when the Ministry paid amounts corresponding to subsidies for children of low or medium-income families directly to the family childcare providers, it seems there were certain disputes about the employment status of the providers with respect to the Ministry. S Griffin, Canadian Child Care Federation, personal interview, January 26, 2002.

¹¹ L. Dunster, Family Child Care Training Project, personal interview, June 28, 2001; K. Norman, Child Care Resource and Referral Program, Surrey (British Columbia), phone interview, September 7, 2001; N. Murphy, Churchill Park Family Care Society, Calgary, phone interview, October 5, 2001.

¹² Generally, it is important to indicate that even though this report is interested only in the question of eligibility for maternity and parental benefits, the issue goes farther than this question alone. To appreciate the value of coverage by the *Employment Insurance Act*, one must also take into account the amount of the benefits to which a provider would have right of access. See Bernstein *et al.* (2001).

¹³ Subsection 5(1)(a), *Employment Insurance Act*, R.S.C. chap. E-5.6.

¹⁴ [1986] 3 C.F. 553.

¹⁵ [1986] 3 C.F. 553, p. 556.

¹⁶ [1986] 3 C.F. 553, p. 564.

¹⁷ In the context of attributing employment status to a family childcare provider, it becomes problematic to evaluate the probative character of the right to refuse to accept a child — a right granted to family childcare providers in all three provinces studied. At first, this right seems to be indicative of the provider's autonomy in her work. However, when a person works for an employer in her private residence, the right to respect for private life have some bearing on labour law, and can, for certain issues, mitigate the classic subordination of the

employee. See Cox *et al.* (2001). In other words, even if a family childcare provider is accorded employ status, one would expect that she would retain the right to refuse to accept a child in her home.

¹⁸ *Clark v. Minister of Revenue Canada* [1993] T.C. J. no 925 and *Kuenzler v. Minister of Revenue Canada* [1988] T.C. J. no 131.

¹⁹ *Employment Insurance Act*, R.S.C. chap. E-5.6, ss. 5(4).

²⁰ Fishing and driving represent jobs with a strong predominance of male workers. It would be interesting to conduct a gender-based analysis, to ascertain the number of women who benefit from the exercise of this statutory power by the government.

²¹ The possibility of adopting a regulation directed only at access to maternity, parental and sickness benefits, but not access to regular Employment Insurance benefits, was suggested by a resource person (Gilbert Nadon, lawyer, Ouellet Nadon; [a firm specializing in Employment Insurance disputes], Montréal, personal interview, November 21, 2001). However, another resource person found such a situation unprecedented and would find it more realistic to access the full range of benefits offered under the aegis of the law (Tony Wohlfarth, Employees Commissioner, Employment Insurance of Canada, Human Resources Development Canada, phone interview, December 17, 2001). This question should be the object of more detailed research.

²² The *Employment Insurance Act* allows the federal government to reduce contributions rates in a province when a provincial law provides for the payment of benefits that are at least equivalent to federal benefits (ss. 69(2)).

²³ More specifically, in the case of adoption, parents will have a choice of receiving 12 weeks of parental benefits calculated at 70 percent of salary, plus 25 weeks of parental benefits calculated at 55 percent of salary, or 28 weeks of parental benefits calculated at 75 percent of salary.

²⁴ However, a percentage of these benefits will be subtracted from the amount of the Guaranteed Income Supplement.

²⁵ Note, however, that there are some differences between the QPP and the CPP regarding survivor pensions and surviving children. Furthermore, regulations dealing with the pension sharing, as in the case of a conjugal breakdown, actually depend on provincial family law. Given that Quebec is governed by the Civil Code, results can be different in this respect from other Canadian provinces.

²⁶ Townson (2000: vi-vii). This document is much more exhaustive and detailed than the present study. We refer to it throughout this section.

²⁷ Indeed, today, the RRSP represents only 13 percent of the income of older women, while 60 percent of their income comes from Old Age Security and from the Guaranteed Income Supplement and the CCP/QPP: Townson (2000: 52, 39-48). See also Beach *et al.* (1998b: 83).

²⁸ Unlike private pension plans, the CPP/QPP contains several mechanisms that are well-suited to the typical professional and family paths taken by women. By means of such mechanisms as exclusion clauses for raising children and for periods when contributory earnings are lower, the CPP/QPP takes into account the possibility of moving between paid and unpaid work as a result of family responsibilities. Also worth mentioning is the sharing of pension credits in case of divorce, and provisions for various retirement ages. For a detailed description of the advantages of the CPP for women, see Townson (2000: 64-66).

²⁹ Moreover, the pension plan prohibits the use of government funding to pay contributions (Townson 1995: 3).

³⁰ *Canada Pension Plan*, R.S.C. c. C-8, Appendix: Contribution Rates; *Loi sur le régime des rentes du Québec*, L.R.Q. C. R-9, Article 44.1.

³¹ *Canada Pension Plan*, R.S.C. c. C-8, ss. 21(2); also See *Loi sur le régime des rentes du Québec*, L.R.Q., c. R-9, Article 60.

³² *Canada Pension Plan*, R.S.C. c. C-8, Appendix: Contribution Rates; *Loi sur le régime des rentes du Québec*, L.R.Q. C. R-9, Article 44.1.

³³ *Règlement sur le travail visé*, R.R.Q., 1981, c. R-9, r.8.

³⁴ *Loi sur le régime des rentes du Québec*, L.R.Q., c. R-9, Article 1, para. g.

³⁵ To the extent that the criterion of subordination is not determinative, other factors can be taken into account, such as the possibility of profits and the risks of loss, the way payments are made, the ownership of tools, the degree of integration in the employer's business, the requirement of a specific result, or the fact that the worker's services are really the services of the employer and, finally, as a residual argument, the attitude of the parties about their relationship. For a detailed discussion of the interpretation of the definition of the word "salarie," see Quebec, *Ministère du Revenu* (1998).

³⁶ During a first draft of Quebec's *Loi sur l'assurance parentale*, benefits were calculated on the basis of net income and were not taxable. This law, like the CPP/QPP, is directed at both employees and self-employed persons. Eventually, this way of calculating the benefits, untailed as it was to the reality of self-employment, was amended. Today, the Act provides that benefits must be calculated on the basis of gross income, and that benefits are taxable.

³⁷ *Canada Pension Plan Regulations*, C.R.C. c. 385, ss. 7(1)(c).

³⁸ *Canada Pension Plan Regulations*, C.R.C. c. 385, ss. 7(1)(d).

³⁹ As in the federal jurisdiction, the QPP recognizes the Quebec government's statutory power to declare that work similar to that performed by employees, or even work that is analogous to employment, is deemed by the Act to be work performed under an employment contract. However, following the example of the federal government, the Quebec government has never used this power, except in a context of clarifying the situation of cross-border jobs.

⁴⁰ The Minister mentioned this possibility during the parliamentary hearing on the *Loi sur l'assurance-parentale*. The Act does not set the contribution rate for self-employed persons. Instead, this rate is determined by regulation of the *Conseil de gestion de l'assurance-parentale: Loi sur l'assurance-parentale*, L.R.Q. c. A-29.001.

⁴¹ *Canada Pension Plan*, R.S.C. c. C-8, ss.114.

⁴² A person has to pay contributions based on the annual amount of earnings between the set minimum and maximum amounts. No contribution is required for the first \$3,500 of annual earnings, the annual basic exemption fixed by the Act. No contribution is required beyond the set maximum, fixed for 2001 at \$38,300. Thus, for 2001, the childcare provider who earned an annual net salary of \$14,000 had to pay a contribution of $(8.6\% \times \$10,500) = \903 . However, if the family childcare provider's pensionable earnings corresponded instead to a gross business income of \$26,000, the contribution would be $(8.6\% \times \$22,500) = \$1,935$.

⁴³ See Townson (2000), for a detailed discussion of these measures.

⁴⁴ RSN 1990, c.W-11. However, the Act provides that the government can adopt regulations in order to exclude certain sectors from the application of the Act. In particular, at the end of ss. 4(b) of the *Workplace Health, Safety and Compensation Regulation*, "employment by a person in respect of a function in a private residence of that person" is excluded from the application of the Act: *Workplace Health, Safety and Compensation Regulation and C.N.R 1025/96*, ss. 4(b).

⁴⁵ *Workplace Health, Safety and Compensation Act*, ss. 40(d).

⁴⁶ *Workplace Health, Safety and Compensation Act*, ss. 40(d).

⁴⁷ In 2001, for those daycare centres and nursery schools bearing Code 608, the contribution rate per \$100 of insured income was \$0.41. However, this rate is expected to increase dramatically in the coming years. Paul Newman, Rates Analyst, Workplace Health, Safety and Compensation Commission, Newfoundland and Labrador, phone interview, November 8, 2001. As well, it is not evident that a family childcare provider who would like to register with the Commission as an independent contractor would be covered by the same contribution rate as the workers and the employees in childcare centres. According to Keith Hutchings, Manager of Assessments, Workplace Health, Safety and Compensation Commission, Newfoundland and Labrador, Opinion of March 14, 2002, such a provider would be considered to belong to the Other Personal Household Services sector, which includes sitters. In 2002, the contribution

rate/\$100 of insured income in this sector was \$1.57. For example, in 2002, to insure a worker in the childcare sector earning \$24,000 a year, the annual contribution is \$352.80.

⁴⁸ Keith Hutchings, Manager of Assessments, Workplace Health, Safety and Compensation Commission, Newfoundland and Labrador, Opinion of March 14, 2002. As well, note that in the event of a work-related accident, the worker insured by her or his employer has a right to payment of benefits equivalent to 80 percent of net income.

⁴⁹ *Workers' Compensation Act*, RSBC 1996, c. 492. The Regulation excludes only persons who are employed in a private residence by another person to attend to the personal needs of the latter's family, and who works less than eight hours a week or less than 15 hours a week, if the employed person provides child care for the period immediately preceding or following school. See Assessment Operating Policy, Policy 20:10:20 (November, 1994).

⁵⁰ Subsection 4(1), *Workers' Compensation Act; Fishing Industry Regulations*, B.C. Reg. 674/76. The buyers and fish-processing companies pay the employer contributions.

⁵¹ Article 3(5), *Workers' Compensation Act*: "(5) Where a person or group of persons that the Board thinks is in the public interest, the Board may, on the terms and conditions it directs, (a) deem the person or group of persons, whether or not any of them receive payment for their services, to be workers for the purposes of this Act; (b) on approval of the Lieutenant Governor in Council, deem the person or group of persons to be workers of the Crown in right of the Province". As an example, the Commission used this power to extend protection to voluntary fire brigade services in remote regions: Workers' Compensation Board, *Assessment Operating Policy*, Policy 20:10:40.

⁵² According to the Assessment Policy Manual, Policy 20:30:20, part 3, of the Workers' Compensation Board, labour contractors are: "proprietors or partners who: have workers and supply labour only to one firm at a time; are not defined as workers, do not have workers, or do not supply major materials or major revenue-producing equipment but who contract a service to two or more firms on an ongoing simultaneous basis; or may or may not have workers but contract a service including one piece of major revenue-producing equipment to a firm or individual (e.g. an entrepreneur who supplies a back-hoe shovel)."

⁵³ Susan Furlong, Policy Analyst, Policy and Regulation Development Bureau, Workers' Compensation Board of British Columbia, phone interview, November 23, 2001.

⁵⁴ Subsection (2)2 of the Act refers implicitly to the notion of optional personal protection and reads as follows: "The Board may direct that this Part applies on the terms specified in the Board's direction: (a) to an independent operator who is neither an employer nor a worker as though the independent operator was a worker, or (b) to an employer as though the employer was a worker."

⁵⁵ In 2001, for those daycare centres bearing Code 764013 (as for the "Child Caregivers-In-Home" bearing Code 764029), the contribution rate per \$1,000 of insured income was

\$0.72. Susan Furlong, Policy Analyst, Policy and Regulation Development Bureau, Workers' Compensation Board of British Columbia, phone interview, November 23, 2001.

⁵⁶ See the definition of “worker” in Art. 2 of the LATMP.

⁵⁷ As an example of the application of section 9 of the Act, in the *Confection Loudapier Inc. v. CSST* case, the *Commission d'appel* decided that needlewomen working from home were self-employed workers comparable to employees for the purpose of the application of the Act: [1994] C.A.L.P. 11. Their assembly activities were considered as being similar or substantially similar to those exercised in the factory by employees who performed only finishing tasks. In the context of the application of Article 9, the fact that the home workers supply their sewing machine, needles, and other equipment and necessary materials to perform their task did not in any way change the conclusion of the *Commission d'appel*.

⁵⁸ See the definition of “independent operator” in Art. 2 of the *Loi sur les accidents du travail et les maladies professionnelles*. Once again, for a more detailed discussion of this definition, see Cliche and Gravel (1997: 60 and ff).

⁵⁹ Art. 11, *Loi sur les accidents du travail et les maladies professionnelles*.

⁶⁰ Commission de la santé et de la sécurité au travail du Québec (2002).

⁶¹ Katherine Lippel, Professor, Department of Legal Sciences, UQAM, personal interview, October 18, 2001.

⁶² In the recent cases of *CPE La Rose des Vents* and *CPE La Ribouldingue*, in spite of a definition of eligibility that was narrower than the one in section 9 of the *Loi sur les accidents du travail et les maladies professionnelles*, the Labour Court found that the family childcare providers affiliated with the CPE in question had employment status.

⁶³ See Article 19 and following of the *Loi sur les accidents du travail et les maladies professionnelles*.

⁶⁴ Article 40, *Loi sur la santé et la sécurité du travail*, L.R.Q. c. S-2.1. The same right exists for the worker who is breast-feeding and whose conditions of employment represent a danger for the breast-fed child: see Article 46 of the same Act.

⁶⁵ In effect, for the purposes of preventive withdrawal, the concept of “worker” in the *Loi sur la santé et la sécurité au travail* is a broad one that even includes managers and administrators. However, unlike the definition of “worker” in the *Loi sur les accidents du travail et les maladies professionnelles*, this notion does not extend to independent contractors. See the definition of “worker” in Article 1 and also in Article 11, *Loi sur la santé et la sécurité au travail*, L.R.Q. C. S-2.1. As well, the concept of “worker” is sometimes interpreted to include certain dependent contractors. On this subject, see Cliche *et al* (1993: 104).

⁶⁶ *Home Work Convention (1996)* (No.177), International Labour Organization, Geneva. See sections 1 and 4. As Bernstein *et al.* (2001) highlight, even though Canada has not yet ratified the Convention, this legal text can inspire and inform national and provincial policies.

⁶⁷ This is the case, in particular, for persons who are engaged in public interest activity in British Columbia and also persons who, in Quebec, perform compensatory work or hours of community service under a probation order, or people who are on social assistance and participating in a job readiness program.

⁶⁸ Note that in certain provinces, such as British Columbia and Ontario, employment standards laws contain specific provisions on *industrial* homework. Since these provisions do not apply to family child care, they are not examined with any detail in this text. For more information about specific standards for industrial homework, see Bernstein *et al* (2001: 51 and ff).

⁶⁹ These sectors include accounting, architecture, law, medicine, pharmacy, professional engineering, surveying, education, and veterinary science. See ss. 2(b), *Labour Standards Act*, R.S.N. 1990, c.L-2, as amended.

⁷⁰ Subsection 2(b), *Labour Standards Act*, R.S.N. 1990, c. L-2, as amended: a “contract of service” means a contract, whether or not in writing, in which an employer, either expressly or by implication, in return for the payment of a wage to an employee, reserves the right of control and direction of the manner and method by which the employee carries out the duties to be performed under the contract, but does not include a contract entered into by an employee qualified in or training for qualification in and working for an employer in the practice of (i) accountancy, architecture, law, medicine, pharmacy, professional engineering, surveying, teaching, veterinary science, and (ii) other professions and occupations that may be prescribed.

⁷¹ For example, sitters are completely excluded from the protection of employment standards. Live-in support workers have the right to a minimum wage that is lower than that of other employees. Residential care workers have minimal breaks that are specific to them. As for childcare workers employed by a charity to assist in a program of therapy, they are excluded from the standards for working hours and overtime. See sections 1 and 32(1)(c), sections 1, 16(1) and 34(1)(q), sections 1, 22 and 34(1)(x) as well as sections 1 and 34(1)(r), *Employment Standards Regulation*, B.C. Reg. 396/95, as amended.

⁷² A recent report on the *Employment Standards Act* of British Columbia recommends coverage for dependent contractors. However, this recommendation was not followed (Thompson 1994). For a more detailed description of the directives of the Employment Standards Commission of British Columbia on the determination of the employment status of a person, see *Guidelines Manual, Employment Standards Commission*, available at <http://www.labour.gov.bc.ca/esb/igm/igm_toc.htm>, accessed November 20, 2001.

⁷³ *Loi sur les normes du travail*, L.R.Q. c. N 1.1, Article 3(d).

⁷⁴ Commission des normes du travail du Québec (2001), *Avis juridique sur les responsables de service de garde en milieu familial*.

⁷⁵ *Loi sur les normes du travail*, L.R.Q. c. N 1.1, Article 1(10).

⁷⁶ Commission des normes du travail du Québec, *Guide d'interprétation*. Available at <<http://www.cnt.gouv.qc.ca/fr/normes/index.asp>>, accessed November 22, 2001.

⁷⁷ Note that the Québec Civil Code, which plays an auxiliary role in the interpretation of the *Loi sur les normes du travail*, provides that one of the characteristics of a commercial contract is the possibility of appointing a third party to perform the contract (Article 2101, *C.c. Q.*).

⁷⁸ Commission des normes du travail du Québec (2001), *Avis juridique sur les responsables de service de garde en milieu familial*.

⁷⁹ It is true that Article 38 of the *Loi sur les centres de la petite enfance et autres services de garde à l'enfance*, L.R.Q. c. C-8.2 provides that: "The permit holder or the home childcare provider shall fix the amount of the contribution to be paid for each child they receive." However, Article 39 of the same Act provides that: "The government may, by regulation, fix an amount of contribution other than the amount payable under Article 38 for certain services determined in the regulation...." The government exercised this power for all spots in the regulated family childcare sector.

⁸⁰ See the *CPE La Rose des Vents* and *CPE La Ribouldingue* cases.

⁸¹ To this effect, see, among others, *Lajoie v. Multi-Markets Inc.*, D.T.E, 87T-160 (Arbitration), *Choquette v. Commission de la santé et de la sécurité au travail du Québec*, D.T.E. 95T-51 (Commissaire du travail), *Lamarche v. Services d'interprétation visuelle et tactile*, (1998) R.J.D.T. 722 (Commissaire du travail) et *Visionic Inc. v. Michaud*, D.T.E. 82T-30 (Cour supérieure), leave to appeal refused: C.A.Q. 200-09-000873-817, March 3, 1982.

⁸² According to a lawyer specializing in labour law, family childcare providers would in effect be dependent contractors under the definition in Art. 1(10) of the *Loi sur les normes du travail* and there would be a contract of employment within the meaning of the Code Civil between the childcare provider and the CPE. Stephanie Bernstein, lawyer, Ouellet Nadon/University of Quebec in Montréal, personal interview, November 21, 2001.

⁸³ In Quebec, two statutes establish the scheme that is applicable to artists: *An Act respecting the professional status and conditions of engagement of performing, recording and film artists*, R.S.Q. c. S-32.1 and *An Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters*, R.S.Q. c. S-32.01. In federal legislation, there is the *Status of the Artist Act*, 1992, c. 33, as amended.

⁸⁴ MacPherson (1999). See also the scheme applicable to artists (Morin and Brière 1998: 646-655; Vallée 1999: 307; Bernstein *et al.* 2001: 157-158; Blanchette 1999).

⁸⁵ CCCF (1998b: 5). In unregulated home-based care, women represent 98 percent of all staff (CCCF 1998a: 6).

⁸⁶ Brenda Patterson, Children's Services Division, Metropolitan Toronto, telephone interview, September 18, 2001.

⁸⁷ *Human Rights Code*, RSN 1990, c. H-14, section 11. See also the definition of an establishment in section 2(e). Note that the Code does not contain a definition of employee.

⁸⁸ See British Columbia, *Public Sector Employers' Council Pay Equity Framework*, available at <<http://www.psec.gov.bc.ca/old/pay%5Fequity%5Ff.htm>>, accessed December 5, 2001.

⁸⁹ John Blakely, Executive Director of Labour Relations Planning, Public Sector Employers' Council, British Columbia, telephone interview, December 5, 2001.

⁹⁰ *Ibid.*

⁹¹ British Columbia Government and Service Employees' Union (2001).

⁹² *Human Rights Code*, R.S.B.C. 1996, c. 210, section 1: "employment" includes the relationship of master and servant, master and apprentice, and principal and agent, if a substantial part of the agent's services relates to the affairs of one principal, and "employ" has a corresponding meaning.

⁹³ *Human Rights Code*, R.S.B.C. 1996, c. 210, ss. 12(1): "An employer must not discriminate between employees by employing an employee of one sex for work at a rate of pay that is less than the rate of pay at which an employee of the other sex is employed by that employer for similar or substantially similar work." In spring, 2001, the New Democrat Government adopted amendments in the *Human Rights Code* that strengthened those provisions of the Code relating to pay equity, prohibiting instead lesser remuneration for work "of equal value" (*Human Rights Code Amendment Act*, 2001, S.B.C. 2001, c. 15). However, that same year, the newly elected Liberal Government repealed these amendments, preferring to entrust to a working group chaired by lawyer Nitya Iyer the mandate of examining the question of pay equity in the private sector (Section 11, *Miscellaneous Statutes Amendment Act*, 2001, S.B.C. 2001, c. 32). See also the press release of August 8, 2001 of the Attorney General of British Columbia entitled "Photo radar, pay equity commitments honoured," available at <<http://os8150.pb.gov.bc.ca/4dcgi/nritem?4829>>, accessed December 5, 2001.

⁹⁴ Raymonde Leblanc, trade union counsellor, Research Services, CSN, telephone interview, February 14, 2002.

⁹⁵ Claudyne Bienvenu, lawyer, Tribunal des droits de la personne, Quebec, telephone interview, October 4, 2001.

⁹⁶ *Loi sur l'équité salariale*, L.R.Q., c E-12.001, Article 9.

⁹⁷ Conseil du statut de la femme (1995), *Le salaire des éducatrices en garderie*.

CONCLUSION

As illustrated by the three provinces studied here and by an examination of decisions on the employment status of providers in Ontario and Alberta, family child care varies a great deal from one province to another. In provinces where the family childcare agency model has been well entrenched for a number of years (Alberta, Ontario, Quebec), the employment status of family childcare providers has been the subject of important legal disputes. Moreover, nothing indicates that the agency model should be put aside in regulated family child care. On the contrary, this model has the potential to offer providers better support, interesting possibilities for customized training and even some respite services (Belleau 2002). Also, the costs for equivalent supervision of child care within the direct licensing model seem to be higher than those for the agency model.¹

In Ontario and Alberta, in order to get around the issue of the employment status of family childcare providers, family child care has been set up so as to avoid creating an employment relationship between agencies and providers. Considerations about the development of the best possible quality child care (e.g., compulsory training, evaluation of care providers, equipment loans, regular visits to childcare homes) have been relegated to the background. Considerations about the working conditions of family childcare providers have also been abandoned, in particular the stabilization of income by guaranteeing collection of fees, the provision of benefit plans, and personal support for providers.

In Quebec, the government has adopted an altogether different approach to the employment status of family childcare providers affiliated with a CPE. Even when the providers' work is under the control and direction of a CPE, the benefits and protections of labour and employment laws are denied. In many ways, the low income and absence of benefits and protections for these providers already subsidize family child care (Beach et al. 1998c: 5-6). The government's imposing more requirements and controls on providers, while at the same time denying them the possibility of obtaining the protections offered by labour and employment law is a significant setback in the fight for recognition of the value of family childcare providers' work.

Family childcare providers who professionally and economically are caught in an uneven power relationship with the family childcare agency with which they are affiliated require as much protection against exploitation as any employee. If we consider the work done by family childcare providers to be real work rather than a "natural" continuation of the maternal role of women, this is the only logical conclusion. Aside from prejudices about women's work, the refusal to consider the possibility that labour and employment-related legislation could apply to family child care seems mainly tied to the issue of costs.

In Quebec, it is true that the government did not compromise by changing family childcare policy as a way to prevent the CPE from establishing an employment relationship with family childcare providers. However, by trying to maintain the cap on its childcare policy, the government fell into another trap, namely, supporting the belief that labour and employment-related legislation cannot or need never apply to family childcare providers.

This approach is erroneous. Models in Sweden and the United States, in particular in New York City, demonstrate that the viability of a family childcare model that recognizes providers as employees is more an issue of financing than feasibility *per se*.

In any case, whatever delivery model is used for family child care, the question of public funding of child care is impossible to ignore in a strategy that aims for real improvement in the working conditions of childcare providers in the long term. Immediate action to demand some measure of social protection can illustrate this point. The exceptions that make it possible for self-employed persons to attain some degree of social protection are of particular interest for improving the working conditions of family childcare providers in the short and medium term. Innovations like this could allow providers, regardless of their employment status and the province in which they live, to have access to improved social protection.

More specifically, in the realm of Employment Insurance, the definition of insurable employment is narrow enough to exclude the vast majority, if not all, of family childcare providers in Quebec and Canada. Broadening this definition is not the best strategy for giving all regulated family childcare providers access maternity and parental benefits as well as, as the case may be, regular employment insurance and sickness benefits available under the *Employment Insurance Act*. However, adopting regulations aimed at including providers within the scope of the Act is clearly an avenue to be explored.

As for retirement or public pensions, the definition of an employee is again narrow. However, exclusion from these definitions does not entail exclusion from the benefits of the Act, but rather imposes a self-funding mechanism. Given the close relationship between the status of a person for pension law and her or his status for tax purposes, demanding a broader definition is not appropriate at the present time.

On the one hand, in Quebec, in three of the areas of law studied (workers' compensation; employment standards; and pay equity), the current definition of eligibility means that a number of dependent contractors already have legal protection. So it is possible that in the near future, some childcare providers may gain access to the benefits of these laws within the current legal framework. But if the courts uphold Bill 8, family childcare providers will have no right to the protections and benefits that flow from these statutes. Consequently, it is premature to demand amendments to the definition of eligibility, which is already very broad as formulated in these laws.

On the other hand, in British Columbia and Newfoundland and Labrador, it doesn't really matter to family childcare providers whether workers' compensation, employment standards, and pay equity legislation covers dependent contractors. Childcare providers, whose legal status is more like that of an independent contractor will probably be excluded from the scope of these laws in every case.

By contrast, for workers' compensation in Quebec as in British Columbia and Newfoundland and Labrador, personal protection is already an option. Also, several precedents exist where protection is extended to groups of vulnerable workers or to those engaged in activities in the

public interest even though they are not employees. For this reason, we recommend that all jurisdictions undertake measures to extend workers' compensation to regulated family childcare providers, and that this protection be financed directly from public funds.

In conclusion, we reiterate that the specific rules of labour and employment law and considerations about the quality, accessibility, and accountability of childcare services together determine the working conditions of family childcare providers. A policy that completely ignores labour and employment-related legislation, like the Quebec government's policy, is neither just nor effective. In the same way, proposed solutions that are founded solely on considerations of labour and employment-related legislation, without taking into account the needs of family childcare providers or the impact on the quality of child care, as in the Alberta and Ontario governments' policies, are not the best solutions either.

The desire to avoid increasing the costs of family child care interferes with the recognition of the work of the providers, whether the family childcare provider is licensed individually or through an agency. Stereotypes about women's work legitimize approaches that reject cost increases for these services. It is high time to recognize the family childcare provider's job for what it is: real work. We hope our recommendations will supply practical tools to enable the immediate, full and well-deserved recognition of the value of the work these providers do.

Note

¹ See above, chapter 1, note 12.

LIST OF RECOMMENDATIONS

Recommendation 1:

Make providers eligible for Employment Insurance benefits (maternity, parental, sickness)

We recommend that a feasibility study be done to clarify what mechanisms would be needed to make regulated family childcare providers eligible for Employment Insurance benefits, and specifically for maternity, parental and sickness benefits, through the adoption of regulations to include them within the scope of the *Employment Insurance Act*.

Recommendation 2:

Develop tools to better defend the rights of family childcare providers with regard to retirement income

We recommend that additional research be done to better inform representatives of the childcare sector about the retirement income problem faced by family childcare providers.

We also recommend that, starting immediately, during public debates on the reform of retirement income policies, representatives of the childcare sector make representations regarding the situation of family childcare providers:

- as low-income self-employed workers or,
- as low-income employees, as the case may be,

as well as about the need to reform the current system in order to improve their retirement income.

Recommendation 3:

Make known, starting immediately, the personal coverage already available in the event of work-related injury; then, undertake measures to extend automatic protection in the event of such an injury to all regulated family childcare providers

We recommend that in the short run, for all jurisdictions, there be a more detailed evaluation of the availability, costs and benefits of personal coverage for the regulated family childcare provider in the event of a work-related injury.

We recommend that the results of these evaluations be communicated to childcare providers, to their associations and to the family childcare sector as a whole, so that they may be better informed about the personal coverage available to them and purchase it if they consider it appropriate.

We also recommend that in the medium term all provincial and territorial governments take measures to extend workers' compensation coverage to all family-regulated childcare providers and finance this protection directly from public funds.

Recommendation 4:**Investigate the conditions for success in sectoral models of collective bargaining**

We recommend that research be conducted on the possibility of family childcare providers' adopting a sectoral model of collective bargaining as self-employed workers, with the objective of creating an inventory of existing innovative models and identifying issues and conditions for success in this kind of bargaining.

Furthermore, we recommend that on the basis of this research, there be consultation with the family childcare sector, in order to determine family childcare providers' interest in further exploring one or more models of sector-based bargaining.

Recommendation 5:**Carry out an evaluation of the family childcare provider's work, to highlight the value of this work**

We recommend that the job of the regulated family childcare provider be evaluated in all jurisdictions in a way that allows it to be compared with other jobs that have certain similar duties, with a view to informing decision-makers, the childcare sector, and the general public about the content and value of this work.

**APPENDIX A: CHRONOLOGY OF DECISIONS REGARDING THE
EMPLOYMENT STATUS OF FAMILY CHILDCARE PROVIDERS AFFILIATED
WITH AN AGENCY OR *CENTRE DE LA PETITE ENFANCE***

- 1986 *Lapensée v. Ottawa Day Nursery*, [1986] O.J. No. 63 (QL) (Supreme Court of Ontario).
- Ontario Public Service Employees Union v. Cradleship Creche of Metropolitan Toronto*, O.L.R.B. Rep. [1986] 3351-84-R.
- 1987 *Ontario Public Service Employees Union v. Ottawa Day Nursery c.o.b. as Andrew Fleck Child Centre*, O.L.R.B. Rep. [1987] 0855-85-R.
- 1988 *Kuenzler v. Canada (Minister of National Revenue – M.N.R.)*, [1988] T.C.J. No. 131 (QL).
- 1993 *Re: MacAulay Child Development Centre*, 1993 CanRepOnt 1202, E.S.C. 3157 (Wacyk).
- Clark v. Canada (Minister of National Revenue – M.N.R.)*, [1993] T.C.J. No. 925 (QL).
- 1996 Workers' Compensation Appeals Tribunal Decision No. 152/95, 18 December 1996 (tribunal consisted of R.E Hartman, W.D. Jago and J. Anderson).
- 1999 *Wellington (County) v. Butler*, [1999] O.P.E.D. No. 9 (Ontario Pay Equity Hearings Tribunal) (QL).
- 2001 *Wellington (County) v. Butler*, [2001] O.J. No. 4219 (Ontario Superior Court of Justice) (QL).
- 2002 *Alliance des intervenantes en milieu familial, Laval, Laurentides, Lanaudière (CSQ) and Centre de la petite enfance Marie Quat'Poches, Centre de la petite enfance La Rose des vents, Centre de la petite enfance l'Arche de Noé and Procureur général du Québec* (February 6, 2002), File numbers CM-1010-3182, CM-1010-4121, CM-1010-5509 (Commissaire du travail Jacques Vignola).
- Syndicat des éducatrices et éducateurs en milieu familial de la région de Québec (CSN) and Centre de la petite enfance La Ribouldingue and Procureur général du Québec* (March 5, 2002), File number CQ-1010-3667 (Commissaire du travail Louis Garant).

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Centre de la petite enfance La Rose des vents et al. v. Alliance des intervenantes en milieu familial, Laval, Laurentides, Lanaudière (CSQ), T.T. 500-28-001293-026 and 500-28-001294-024, May 1, 2003.

Centre de la petite enfance La Ribouldingue et al. v. Syndicat des éducatrices et éducateurs en milieu familial de la région de Québec (CSN), T.T. 200-28-000016-029 and 200-28-000017-027, May 1, 2003.

Centre de la petite enfance Marie Quat'Poches, Centre de la petite enfance l'Arche de Noé and Procureur général du Québec v. Centre de la petite enfance La Rose des vents et al. v. Alliance des intervenantes en milieu familial, Laval, Laurentides, Lanaudière (CSQ), T.T. 500-28-001293-026 and 500-28-001294-024, May 6, 2003.

APPENDIX B: DESCRIPTION OF FAMILY CHILDCARE PROVIDERS’ WORKING CONDITIONS WITH REFERENCE TO CRITERIA FOR DETERMINING EMPLOYMENT STATUS

The following criteria are used in determining employment status (for more details, see the section entitled “General Setting” of this study):

1. Control or subordination
 - 1.1 Selection of the family childcare provider
 - 1.2 Remuneration
 - 1.3 Means and methods of work
 - 1.4 Placement of children
 - 1.5 Number of children in care
 - 1.6 Working hours and leave
 - 1.7 Training
 - 1.8 Program of activities
 - 1.9 Compliance with statutory standards
 - 1.10 Visits to the childcare home
 - 1.11 Evaluation
 - 1.12 Discipline
 - 1.13 Personal nature (*intuitu personae*) of the provider’s obligations
 - 1.14 Liability insurance
2. Degree of integration of the activities of both parties
3. Risk of loss and possibility of profits

THE FAMILY CHILDCARE PROVIDER IN NEWFOUNDLAND AND LABRADOR

1. Control or Subordination

1.1 Selection of the Provider

The family childcare agency evaluates a person who wants to become affiliated with the agency as provider, and decides whether or not to accept the affiliation application. From the moment a provider becomes affiliated with the agency, a long-term relationship is anticipated wherein the provider will take charge of a series of children over a prolonged period. This power is similar to the power to select staff.

1.2 Remuneration

Providers set family childcare rates for all children in their care. Given that no subsidy is currently available for medium- and low-income parents who take their children to family child care, the question of fees set by the government does not enter into the calculation of providers’ pay. The agency thus has no control over the remuneration of the providers, which establishes a strong, if not determinant, indicator of the absence of an employment relationship.

1.3 Means and Methods of Work

An examination of the element of control over the means and methods of work raises the question of whether the work of a family childcare provider affiliated with an agency is performed under the administrative control and professional management of the agency. The agency's licence is granted on condition that the agency "supervise" those caregivers who are affiliated with it and appoint a "home visitor," who is charged with "monitoring" family child care. At present, the actual degree of supervision is influenced in a significant way by the fact that the implementation of regulations pertaining to family child care is still in its formative stage. Regulated family childcare may well evolve in a dynamic way over the years to come. However, in the current context, even with the small amount of data available, it would be difficult to claim that agencies control the means and methods of work of the providers affiliated with them.

1.4 Placement of Children

In the context of family child care, the traditional determining factor of the potential employer's control over the task to be performed turns largely on the question of knowing who decides which children will be cared for by the provider. If the agency offers a true placement service, it exercises considerable control over the provider's tasks. If, on the other hand, the agency offers a simple referral service for parents and supplies them with a list of some family childcare providers who meet the parents' main objective criteria (e.g., location, age of children in care), it has less control over the provider's work. In Newfoundland and Labrador, the agency does not place children with a provider. It offers a simple referral service.

1.5 Number of Children

The Act sets a maximum number of six children per family childcare provider. The agency cannot decide to entrust a care provider with fewer children than the maximum provided for under the Act. By contrast, the provider can decide at any time to accept fewer children than the maximum allowed by the Act. This situation is typical of a business context, and not of a context wherein the provider is subordinate to the agency.

1.6 Working Hours and Leave

The family childcare provider alone decides what hours her child care setting is open. However, regulations require the *agency* to maintain a daily register in which the provider indicates the arrival and departure times of each child. This aspect of the agency model in Newfoundland is analogous to the agency model in Ontario where, under the Act, the agency is accountable for the acts of its providers, and there is confusion regarding which responsibilities belong to the agencies, and which to the providers.

If a family childcare provider wishes to take leave, she can call on her substitute. This person must be approved in advance by the agency, have completed a first-aid course, have a certificate of good character from the Royal Canadian Mounted Police, and supply proof of immunization. If the provider calls on her substitute, she must inform the agency, preferably in advance, otherwise within 24 hours of the replacement.

The family childcare provider decides on the timing and duration of holidays, and can call on her substitute or temporarily close the child care. The provider determines her own policy with regard to statutory holidays, and is responsible for including this policy in the care agreement reached with parents. This situation is more like a business context than an employment relationship.

1.7 Training

Like the family childcare provider who holds an individual licence, the provider affiliated with an agency must have entry-level certification in the field of family childcare services. This certification is issued after successful completion of a Family Child Care Orientation Course. To maintain certification, the provider must take at least 30 hours of continuing professional education every three years.

As in Quebec, the agency is charged with verifying compliance with training requirements by its affiliated providers, and providers are expected to respect the general principles of basic training within the family childcare home.

1.8 Program of Activities

When the agency presents a licence application, it must describe to the regional director the policies and program it proposes for the family childcare services it supervises. Likewise, the provider must offer a program of activities that conforms to the policies and programs approved as part of the accreditation application of the family childcare agency that supervises her.

However, as of August 2001, the Minister had not yet established policies and directives for programming to which the agencies had to conform. Agencies thus still have no programs and the obligation of family childcare providers to conform to such a program is suspended. The agency simply asks childcare providers to supply it with a list of daily activities in the childcare service, but does not impose any particular activity, nor any particular way of structuring the physical environment of the service.

For now, it is up to the family childcare provider to determine the program of activities, and the agency does not exercise control in this matter. In other words, the provider supplies a service, but retains free choice over the means of doing it. Consequently, with reference to the test of control over the program of activities, the provider would be considered an independent operator.

1.9 Respect for Regulatory Standards

The home visitor verifies that the family childcare home complies with the numerous statutory standards. Also, once a year, the “childcare services consultant” of the regional management of the department of health and community services inspects 10 percent, or five, family childcare homes that are supervised by an agency. Remember that, as in Quebec and Ontario, the minister can suspend, revoke or refuse to renew an agency’s licence if the health, safety or well-being of the children in a family childcare setting is threatened. Furthermore, once a year, an inspector from Government Services verifies that the private

residence complies with the building code and other standards that apply to the physical environment of a family childcare home.

1.10 House Calls

Every family childcare agency employs home visitors, who monitor and advise family childcare providers under the supervision of the agency. At least once a month, home visitors visit the family childcare home, and offer support, resources and occupational training. Sometimes advance notice of visits is given, sometimes it is not.

Considering that agencies are trying to promote acceptance of the new regulation among providers, it would seem that, at present, home visitors are placing emphasis on their *support* role. Moreover, the *formal* role of the home visitors in Newfoundland and Labrador unmistakably establishes a close analogy to the role of home visitors in Ontario, both in terms of the frequency of visits and the double role of support and control.

1.11 Evaluation

Although agencies may in future be called on to develop a procedure for the evaluation of family childcare providers, the agency does not presently do evaluations. In this aspect, thus, there is no indication of an employment context.

1.12 Discipline

As a rule, the agency has the power to terminate affiliation with the care provider. However, once again, the relatively recent regulation in Newfoundland and Labrador makes it difficult to assess the power of an agency “to dismiss” a provider.

Moreover, if a family childcare agency terminated its affiliation with a provider, parents could continue to have their children taken care of by that same provider, as long as the ratio for an unregulated family childcare service (maximum of four children rather than six) is respected and the reasons for withdrawal of the affiliation do not involve issues surrounding child protection. The power of the agency to terminate affiliation with a care provider is thus tempered by the fact that the main impact of such a gesture is to reduce to four children (rather than six) the maximum number of children the provider can accept in her family childcare setting.

1.13 Personal Character (*intuitu personae*) of the Family Childcare Provider’s Obligations

Even though a family childcare service cannot be transferred completely to another person without advising the agency, a substitute can replace the provider occasionally. The provider can also request the substitute’s services for a period of several weeks when she herself goes on holiday. Thus, the provider in Newfoundland and Labrador has considerably more flexibility than her counterpart in Quebec. On the other hand, she is not permitted to have an assistant.

Briefly put, unlike the situation in Quebec, the personal character of the arrangement between the family childcare agency and the provider does not clearly point toward employee status.

1.14 Liability Insurance

Under provincial regulation, it is the family childcare agency rather than the providers who must subscribe to a commercial liability insurance policy. This situation is typical of an employment context where the employer anticipates being held responsible for the fault of its agents.

2. Degree of Integration of the Activities of Both Parties

Under the Act, the residences of family childcare providers are considered to be the location where the agency offers childcare services. By contrast, when the Regulation refers specifically to the offices of the agency, the expression used is “offices of that agency.” Furthermore, the legislator holds the family childcare agency as guarantor for some obligations, like keeping the daily register, which must, in fact, be done by the childcare providers. These two factors show an important degree of integration of activities of the family childcare agency with those of the care provider.

3. Risk of Loss and Possibility of Profits

As in British Columbia and in Quebec, the family childcare provider in Newfoundland and Labrador, supplies not only her private residence, but also food. Even if the agency supplies a free loan service of equipment or toys, to a large measure, she also supplies toys, materials, and equipment for child care. The provider’s power to freely negotiate and set rates constitutes a major indicator of her economic independence and ability to realize a profit. The fact that the care provider alone who collects amounts owed by parents represents a risk of loss. The autonomy of the provider on any question connected with remuneration constitutes a persuasive indicator of her self-employed status.

Conclusion

In Newfoundland and Labrador, as a rule, that component of family childcare policy that refers to the agency model potentially leaves considerable room for agencies to control the work done by providers. Currently, however, it is clear that providers affiliated with an agency could not be considered employees of the agency, among other reasons because of the complete absence of any control by the agency over any question connected with provider remuneration.

THE FAMILY CHILDCARE PROVIDER IN QUEBEC

1. Control or Subordination

1.1 Selection of the Provider

The CPE (*Centre de la petite enfance*) has the power to recognize or refuse to recognize a provider, thus allowing her (or not) to offer spaces at \$7 each (subsidized spots). This power is similar to the power of staff selection, especially since recognition is for an indefinite duration.

1.2 Remuneration

The providers have no power to set daily rates for basic child care. Their pay comes from two sources: the parental contribution established by regulations (initially \$5/day/child, this was increased to \$7/day/child on January 1, 2004) and a government contribution from the Ministère de l'Emploi, de la Solidarité et de la Famille (MESF).

Rates set by the government apply to basic child care, which is nonetheless a fairly comprehensive service; for children of pre-school age it is 10 hours of child care a day, 52 weeks a year, one meal and two snacks a day, plus all material for the educational program.

The fact that family childcare providers are not able to set their daily rates for basic service is an indicator of their subordination when it comes to pay, which is a fundamental aspect of their working conditions, thus indicating an employment relationship.

1.3 Means and Methods of Work

In a given territory, the CPE “co-ordinates, monitors and controls” family childcare services, offering to this end technical and professional support to providers and applying to them “measures of control and supervision.” The provider “must undertake to provide educational child care that fosters the physical, intellectual, emotional, social, and moral development of children in accordance with the program prescribed by regulation, and must agree to monitoring and supervision by the holder of the CPE permit that recognizes the individual [as a family childcare provider].” (See Article 8, para. 3, *Loi sur les CPE*, translation mine.) In itself, this authoritarian language belongs clearly to the world of subordinated work, and thus, employment.

However, once again, no matter what terms the parties use to characterize their relationship, when the moment comes to determine employment status, it is the reality of the relationship that counts, rather than the terms of the Act. The real role played by the CPE would be determinant.

1.4 Placement of Children

According to our data, it would seem that practices in placing children vary considerably from one CPE to another. Moreover, given the strong demand for subsidized spots, filling spaces within a regulated childcare service is rarely a problem. In every case, the family childcare provider has the right to accept or refuse a child (Art. 2, *Loi sur les CPE*) and thus, to recruit children herself. To what point the provider exercises this right is another important indicator of the control the provider retains or, alternately, cedes to the CPE over her family childcare service.

1.5 Number of Children

The Act sets a maximum number of children (six, with additional limitations depending on the age of the children) per family childcare provider. When the provider applies to the CPE for accreditation, she specifies, within this limit, the number of children she intends to care for. The provider is thus free to specify a lower number of children than provided for in the Act, which indicates a certain autonomy.

The licence held by a CPE indicates the maximum number of children who can be cared for by all the family childcare providers recognized through that CPE. In other words, a provider with that CPE could not take care of more children than the available spaces indicated on the permit. And when, because of the number of spots allotted within the CPE license, a provider is in turn allotted fewer spaces than she would like, she cannot offer non-subsidized spots as a way of reaching her maximum allotment of children under the Act.

The number of spots for which a provider is recognized depends also on the needs of the community, as determined by the CPE, as well as on the physical capacity of the provider's residence. Thus, the CPE has an important control over the number of children cared for by the provider.

1.6 Working Hours and Leave

To obtain recognition, the family childcare provider must be able to be present in her childcare home during all the opening hours of the service. Moreover, to offer the basic service included in subsidized spots (and, thus, to be eligible for government subsidy), the childcare home must be open at least 10 hours/day for a minimum of 20 days per four weeks and 52 weeks per year. Otherwise, it is the provider herself who decides which hours her childcare service will be open.

As a rule, it is the provider alone who decides when she will take holidays. During these holidays, the provider cannot accept the government contribution for the children registered at her childcare service.

The provider who takes leave has no formal obligation to inform the CPE. However, she "must be able to explain, at any time, the reasons and circumstances for her absences. Furthermore, if necessary, [she] must be able to prove the reason for her absences" (Quebec, Ministère de la Famille et de l'Enfance, 2001b, s. 2.6.2, translation mine).

Briefly, the family childcare provider has a certain autonomy as to when to take a vacation. Except for this, the provider's autonomy in terms of hours and days of work is subject to substantive constraints.

1.7 Training

Within six months of recognition, the family childcare provider must demonstrate possession of a certificate showing that she recently passed either a general first aid course or a refresher course. Within two years of recognition, the provider must take a training course of at least 45 hours, on the role of the family childcare provider, child development, health and food, and the educational program set forth in the Act and regulations. At least 30 hours of this training must be dedicated to child development and the educational program. Furthermore, the provider must take six hours of continuing education each year.

Even though the requirements result from the *Regulation*, it is the CPE that communicates them to its family childcare providers and verifies compliance. Furthermore, it is part of the mandate of the CPE "to promote the implementation of a professional training and

continuing education for family childcare providers” (Art. 9, *Loi sur les CPE*). Even though lack of compliance with statutory provisions regarding training does not constitute a reason to suspend or revoke a provider’s recognition, a court has already confirmed the decision by one CPE to revoke the recognition of a provider who failed to undertake the hours of training required (*Gagné v. CPE Do-Mi-Si-La-Do-Ré*, C.S. 760-05-002731-998, the Honourable Judge Anne-Marie Trahan, decision of July 28, 1999). This case illustrates the discretion exercised by the CPE with respect to training.

This situation resembles an employment context more than a business context or self-employment. By contrast, if need be, the provider must pay training expenses herself, and is not paid while taking the required training, two characteristics typically associated with self-employment.

1.8 Program of Activities

A person who undertakes to supply a service to another, but who retains free choice as to the means of doing so, is generally considered an independent operator. In Quebec, the government adopted a compulsory educational program common to family and in-centre childcare settings. Outlined in a 36-page document, the educational program establishes five basic educational principles. Then, 25 applications are developed from these principles for the structuring of the childcare premises and activities, and the mode of intervention with the children.

That the common educational program is compulsory raises the question of whether providers truly maintain free choice over the child care they offer. The court that is called upon to settle the question of a provider’s employment status would have to weigh the fact that the provider decides which activities are offered in her childcare service, but only within the constraints imposed by the educational program, such as they are interpreted by the CPE in question. Once again, outside any specific factual context, it is difficult to assess the real impact of the educational program on the relationship between the CPE and the provider.

1.9 Compliance with Regulatory Standards

The *Regulation* provides a multitude of specific requirements regarding the physical environment of the family childcare setting, the substitute on whom the provider will rely to replace her in case of emergency, evacuation procedures, the use of a playpen outside sleeping hours, the provider’s obligation to inform parents of the contents of the meals and snacks served, and on the use and washing of children’s bedding.

The *Regulation* also lists a series of requirements common to CPEs and to family childcare settings with regard to, among others, procedures in case of sickness or a serious accident, safe installation of climbing structures, swings and slides, disinfection and arrangement of wading pools, use of a television, healthy meals and snacks, and giving medication. Furthermore, for family childcare settings and CPEs alike, the *Regulation* requires that children be taken outside everyday, unless inclement weather does not allow it.

Under the Act, the CPE is responsible for verifying compliance with all these standards. Moreover, the minister can suspend, revoke or refuse to renew the licence of the CPE if the health, safety or well-being of the children in a family childcare service is threatened.

1.10 Home Visits

Every year, the family childcare provider receives at least one re-evaluation visit from the education consultant (the person responsible for recognition of providers), as well as a minimum of three unannounced visits. The purpose of these spot-checks is to verify that the childcare home is in compliance with the Act and *Regulation*. A visit must last at least 30 minutes, but may last up to one hour or more, depending on the case.

The right of the CPE to inspect the family childcare home at any time and without notice (recall that the provider formally undertakes “to submit to the control and supervision” of the CPE) constitutes a way of controlling the provider’s work.

1.11 Evaluation

Once a year, the CPE formally re-evaluates the family childcare provider as well as the private residence where she offers her childcare services. To this end, the CPE conducts an interview with the care provider, with every person over 14 years of age who lives in the private residence where child care is being provided and, if need be, with any adult who assists the provider. The CPE must also conduct an unannounced visit to the provider’s residence. Such an evaluation process presupposes some degree of control by the CPE over the provider. Furthermore, this occurs within a relationship of indefinite duration, and thus indicates an employment contract.

Under the *Regulation*, parents who are not satisfied with a childcare service can lodge a complaint with the CPE. For its part, the CPE must have in place a procedure for handling complaints from parents who use the family childcare services overseen by that CPE. Under the Act, it is the CPE that holds ultimate responsibility for the quality of care provided in its affiliated family childcare settings.

1.12 Discipline

The CPE can suspend or revoke recognition of a family childcare provider. According to the Ministry, the distinction between suspension and revocation “allows graduated means [of discipline]” (Quebec, Ministère de la Famille et de l’Enfance 2001b, s. 4.1, translation mine). The concept of graduated penalties is directly imported from the world of employment law. The family childcare provider may contest the suspension or revocation of her recognition before the *Tribunal administratif du Québec*.

If a provider’s recognition is withdrawn, she can continue to take care of the same number of children, and parents can continue to take their children to her, but they will no longer benefit from subsidized spots. This power to withdraw the government subsidy by revoking a provider’s recognition is equivalent to power of dismissal. It indicates a high degree of subordination of the provider to the CPE.

1.13 Personal Character (*intuitu personae*) of the Family Childcare Provider's Obligations

The obligation to do the work personally, i.e., the *intuitu personae* character of the contract, clearly indicates an employment contract. In Quebec, the provider has the obligation to be personally present on the childcare premises. She cannot be replaced except under very specific, and restricted, circumstances. Likewise, a provider's maternity leave may not exceed six months. Furthermore, she may not subcontract the service to another competent or recognized caregiver, which is hardly compatible with the status of independent operator.

Furthermore, according to Ministry policy, the relationship between the CPE and the provider is exclusive in character. A provider cannot be recognized by or affiliated with more than one CPE. And when, because of the number of spots allotted within the CPE license, a provider is in turn allotted fewer spaces than she would like, she cannot offer non-subsidized spots as a way of reaching her maximum allotment of children under the Act. Those aspects of the Quebec family policy that require the personal character (*intuitu personae*) of the relationship between the CPE and the provider are important indicators of an employment relationship.

On the other hand, for the provider, the power to hire an assistant is more characteristic of a business context than an employment context, even though the choice of assistant must be approved in advance by the CPE. Note, however, that the presence of the assistant does not allow the care provider to leave the childcare setting, even if the ratio (six children per adult) is respected.

1.14 Liability Insurance

Before recognizing a provider, the CPE requires proof of third party liability insurance coverage. The fact that it is the provider who carries this coverage seems to indicate that the provider, and not the CPE, is responsible for any damages she incurs.

2. Degree of Integration of the Activities of Both Parties

The family childcare setting has been an integral part of the mission of the CPE, which is to offer educational childcare services to children from birth to kindergarten. The very definition of a CPE refers to its role in co-ordinating, supervising and controlling educational childcare services in a family setting.

It is thus clear that child care offered by a provider in a family childcare setting, as well as in-centre care offered by a CPE are both an integral part of Quebec's family policy to set up educational childcare services that are accessible to all families with young children.

3. Risk of Loss and Possibility of Benefits

The lack of power to negotiate and set rates constitutes a major indicator of the economic dependence of the family childcare provider, and sets a certain limit on her capacity to realize a profit.

The care provider supplies not only her private residence, but also the toys, materials, and equipment used in child care. Furthermore, the provider must supply the necessary food for the meal and two snacks that are included in the basic service offered within the structure of \$7 (subsidized) spots. For a price, the care provider may choose to have the CPE supply her with toy loans, educational kits, equipment, and so on. Still, one way or another, the care provider must arrange to supply these “working tools.”

The provider is responsible for collecting parental contributions and so, in theory, runs some risk of loss. However, given that the failure of parents to pay their contribution can result in the exclusion of the child from child care, this risk seems small, given the current scarcity of subsidized spots.

The only way for a family childcare provider to profit from the effective management of her childcare setting is to control expenses. The possibility of profiting from a family childcare service is thus totally relative.

Conclusion

Certain elements of Quebec’s official policy on family child care indicate the potential for an employment relationship between a provider and the CPE with which she is affiliated. Yet other elements reveal a business relationship between the parties. The employment status that a court would accord a provider depends in large part on the way the policy is actually applied. Without a specific factual context, it is very difficult to assess the relative weight of providers’ working conditions within an employment relationship versus those that indicate a business connection.

Within a narrow definition of an employee, the chances that family childcare providers would be accorded employee status are less than when the law in question equates certain dependent contractors with employees or workers. When dependent contractors are covered by the law, it is not inconceivable that a provider could be seen to have employee status, as is demonstrated by the recent decisions of the *Tribunal du travail* in the *CPE La Rose des vents* and *CPE La Ribouldingue* cases. (See Appendix A.)

THE PROVIDER IN BRITISH COLUMBIA

1. Control or Subordination

1.1 Selection of the Provider

The Child Care Resource and Referral (CCRR) Program recruits and guides individuals who want to become accredited family childcare providers throughout the licensing process. However, it is the Health Board Community Care Facilities Licensing Officer who decides whether to grant a licence to a provider. In other words, the CCRR Program does not have power comparable to the power to select staff.

1.2 Pay

In British Columbia, providers set their own rates and are responsible for collecting childcare fees from parents. If they accept subsidized children, providers take charge of filling out the subsidy request forms and sending them to the government. The CCRR Program plays no role in the remuneration of providers.

1.3 Means and Methods of Work

The mission of the CCRR Program is to recruit, train, and supply support services for family childcare providers. Their mission does not include accreditation of providers or monitoring compliance of the childcare home with the Act and regulation. Briefly, in this context, the essential aspects of work performed under the administrative control and professional management of another party are absent from the working conditions of the providers.

1.4 Placement of Children

For parents looking for child care, the CCRR Program uses specialized software (CareFinder) to produce a list of providers, with first names and phone numbers, as well as the main intersection nearest each provider's residence. This list constitutes a reference, not a recommendation. Parents may use it to pursue their child care on their own. So, the CCRR Program has no control as such over which children will be accepted by a provider.

1.5 Number of Children

The Act sets a maximum number of children per provider (seven, of whom no more than five can be of preschool age, no more than three can be younger than three years old, and only one of whom can be less than a year old). For reasons connected to the referral service, the accredited childcare provider informs the CCRR Program of the number of available spaces in her childcare home (but not of the children's names). The provider can decide any time to accept fewer children than the maximum allowed by the Act. In brief, the CCRR Program in no way determines the number of children cared for by a provider.

1.6 Working Hours and Leave

The family childcare provider alone decides the opening hours of her childcare service. The regulation requires that the provider maintain at her residence current a file for every child, containing a daily attendance record. Parents sign the daily register, but the CCRR Program does not see the child's files. The provider determines the timing and duration of her own holidays, and she sets her own policy for holiday leave, which she is responsible for including in the care agreement reached with parents.

If the provider wants to take a leave, she can have a substitute replace her who is also accredited or registered with the CCRR Program, or both (certain CCRR programs offer a list of available substitutes), or by a person whom she has identified to the licensing officer as her replacement. This person must be over 19 years old, must have undergone a check of her or his police record and must be certified in first-aid. If a provider cannot offer child care, she is not obliged to inform the CCRR Program. In this sense, the CCRR Program has no control over providers' working hours or leave. This contrasts greatly with the situation of providers in Quebec where, for example, children's attendance cards are regularly inspected by the CPE in order to determine how much providers are paid.

1.7 Training

A provider must have a first-aid certificate before she is allowed to offer a family childcare service. However, it is the licensing officer and not the CCRR Program who verifies whether a provider satisfies this condition. Next, another condition for becoming a member of the CCRR Program is a commitment to take 20 hours of initial occupational training plus two hours of occupational training each year. The CCRR Program offers first-aid courses and participates actively in the initial and ongoing occupational training of providers.

The provider is not paid by the CCRR Program while she is in training. When there is a fee for training, it is the provider who pays it.

If a provider does not honour a commitment to pursue training, the CCRR Program can in theory, initiate a process of de-registering the provider. Still, de-registration from the CCRR Program does not imply that the provider loses her licence, because training is a condition for registration in the CCRR Program, but not for accreditation.

The CCRR Program plays an important role in the occupational training of providers, but this role is more one of promotion than supervision. Thus, there is no indication of an employment relationship between the CCRR Program and provider.

1.8 Program of Activities

The family childcare provider must offer the children she cares for a comprehensive and structured program of activities the objective of which is the development, care, and protection of the children. This program must be adapted to the age and developmental stage of every child in her service. Such a program must satisfy the requirements of Appendix D of the *Regulation*, which establishes some very general objectives for the physical, intellectual, linguistic, emotional, and social development of the children. However, as a statutory requirement, it is the licensing officer, not the CCRR Program, who must verify compliance with the activity program.

1.9 Respect for Statutory Standards

The CCRR Program does not play any formal role in verifying compliance with statutory standards. It is the licensing officer who must verify compliance of the childcare home with provincial regulations. To this end, the officer inspects the family childcare homes throughout her territory, as she deems necessary. Normally, a family childcare home receives a visit from a licensing officer once a year.

1.10 Home Visits

Normally, the CCRR Program pays a “support” visit once a year to accredited providers. Notice is given of the date of the visit. Normally, a visit from the CCRR Program lasts 15 to 20 minutes. That visits from the CCRR Program to the family childcare home are so infrequent, and the fact that notice is always given of these few visits, indicates that the CCRR does not really supervise the provider’s work.

1.11 Evaluation

The CCRR Program does not evaluate the provider's work.

1.12 Discipline

If a provider fails to comply with the registration conditions of the CCRR Program, the program has the power to initiate a process of de-registering the provider. Yet even then, to the extent that the provider continues to have a licence from the Ministry, the CCRR Program must continue to refer parents to that provider. If discipline is warranted, it is the licensing officer who pursues the process of suspending or revoking the provider's licence.

In addition, the Government of British Columbia subsidizes child care for low- and middle-income families, whether or not the childcare service is regulated. So, even if a provider is de-registered *and* has her licence revoked, she can continue to accept subsidized children. The impact of revoking a provider's licence is to reduce to two the number of children that she can care for, in addition to her own children.

Thus, put briefly, the CCRR Program has no power akin to a power to dismiss or suspend providers.

1.13 Personal Character (*intuitu personae*) of the Family Childcare Provider's Obligations

Unlike the situation in Quebec, in British Columbia, the accredited provider is not obliged to be personally present on the childcare premises at all times, and she can be replaced occasionally by a substitute or the replacement she identifies to the licensing officer. Otherwise, even though B.C. providers have more latitude than their Quebec colleagues, it is clear they cannot subcontract a family childcare service to someone else. In this sense, the provider is personally bound by the conditions of her licence.

The relationship between the CCRR Program and the provider is not exclusive in nature. A provider is free to register with a referral service as well as with the CCRR Program.

The provider's power to hire an assistant is suggestive of a business context, except that, unlike the situation in Quebec, the presence of the assistant does not allow the provider to take on more children.

1.14 Liability Insurance

One condition of registration in the CCRR Program is to supply proof of liability insurance coverage. Moreover, the mandate of the CCRR Program stipulates that it must make available to providers a group liability insurance policy at cost. The fact that it is the provider who holds the liability coverage indicates a lack of responsibility on the part of the CCRR Program for damages incurred by the provider. Moreover, the CCRR Program issues a waiver of any such responsibility to the families its refers to a provider.

2. Degree of Integration of the Activities of Both Parties

CCR programs exist to provide referrals and support to family childcare providers. However, in a context where use of CCR services is optional, the degree of integration of the activities of both parties is no longer a relevant criterion.

3. Risk of Loss and Possibility of Benefits

The care provider supplies not only her private residence, but also food and, to a large extent, the toys, materials, and equipment used in her childcare setting. The provider's ability to negotiate and freely set her rates constitutes a major indicator of her economic independence and ability to realize a profit. The fact that she alone collects the amounts owed by parents represents a risk of loss. Income is thus a function not only of the number of children under her care, but also of the fees and conditions negotiated in agreements with parents, and of the number of subsidized children she agrees to accept into care. In effect, subsidized rates are generally lower than the market price for family child care.

Conclusion

In a context where the provider's pay is negotiated with parents, and the power to grant and revoke a licence belongs to the licensing officer of the Ministry of Health, the relationship between the CCR Program and the provider can hardly be categorized as an employment relationship. Legally speaking, in British Columbia, the family childcare provider is an independent operator in the service of the parents of the children she cares for, in other words, a self-employed worker.

APPENDIX C: LIST OF PERSONS CONSULTED

Alberta

Noreen Murphy, Churchill Park Family Care Society, Calgary.
Irene Savage, Calgary Rocky View Child and Family Services, Social Department of Family and Services.

British Columbia

John Blakely, General Manager, Labour Relations Planning, Public Sector Employers' Council.
Susan Furlong, Policy Analyst, Policy and Regulation Development Bureau, Workers' Compensation Board.
Ken Elchuk, Policy Advisor, Employment Standards Branch, Department of Labour.

Ontario

Mary-Anne Bédard, Ontario Coalition for Better Child Care, Toronto.
Jan Borowy, Ontario Public Service Employees Union (OPSEU), Toronto.
Maria De Wit, Family Day Care Services, Toronto.
Lee Dunster, Family Child Care Training Project, Ottawa.
Sharon Filger, MacAulay Child Development Centre, Toronto.
Marni Flaherty, Today's Family, Hamilton.
Judy Fudge, Professor, York University.
Sandra Griffin, Canadian Child Care Federation, Ottawa.
Gayle Lebens, Ontario Public Service Employees Union (OPSEU), Toronto.
Kerry McCuaig, Child Care Education Foundation, Toronto.
Brenda Patterson, Children's Services Division, Metropolitan Toronto.
Tony Wohlfarth, Canada Employment Insurance Commission, Human Resources Development Canada.

Quebec

Stephanie Bernstein, Lawyer, Ouellet Nadon/*Université du Québec à Montréal*.
Claudyne Bienvenu, Lawyer, *Tribunal des droits de la personne du Québec*, Quebec.
Raymonde Leblanc, CSN, Montreal.
Francine Lessard, *Fédération des Centres de la petite enfance du Québec*, Quebec.
Katherine Lippel, Professor, *Université du Québec à Montréal*.
Gilbert Nadon, Lawyer, Ouellet Nadon (firm specializing in Employment Insurance disputes), Montreal.
Françoise Tremblay, *Ministère de la Famille et de l'Enfance*, Montreal.

Newfoundland and Labrador

Ron Croucher, Labour Standards Branch, Ministry of Labour.

Gerald Dwyer, Employee Counsellor, Workplace Health, Safety and Compensation,
Newfoundland Federation of Labour.

Keith Hutchings, Assessment Officer, Workplace Health, Safety and Compensation Board.

Paul Newman, Rates Analyst, Workplace Health, Safety and Compensation Commission.

APPENDIX D: LIST OF STATUTES AND REGULATIONS

British Columbia

Laws:

Community Care Facility Act, RSBC 1996, c. 60
Employment Standards Act, RSBC 1996, c. 113
Human Rights Code, R.S.B.C. 1996, c. 210
Human Rights Code Amendment Act, 2001, S.B.C. 2001, c. 15
Miscellaneous Statutes Amendment Act, 2001, S.B.C. 2001, c. 32
Workers' Compensation Act, RSBC 1996, c. 492

Regulations:

Child Care Licensing Regulation, B.C. Reg. 319/89
Employment Standards Regulation, B.C. Reg. 396/95
Fishing Industry Regulations, B.C. Reg. 674/76

Quebec

Laws:

Charte des droits et libertés de la personne, L.R.Q., c. C-12
Code civil du Québec
Code du travail, L.R.Q., c. C-27
Loi modifying la Loi sur les centres de la petite enfance et auras services de garde à l'enfance, L.Q. 2003, c. 13 (*Projet de loi 8*)
Loi sur l'assurance parentale, L.R.Q., c. A-29.001
Loi sur la santé et la sécurité du travail, L.R.Q., c. S-2.1
Loi sur l'équité salariale, L.R.Q., c. E-12.001
Loi sur le régime des rentes du Québec, L.R.Q., c. R-9
Loi sur le statut professionnel des artistes des arts visuels, des métiers d'art et de la littérature et sur leurs contrats avec les diffuseurs, L.R.Q., c. S-32.01
Loi sur le statut professionnel et les conditions d'engagement des artistes de la scène, du disque et du cinéma, L.R.Q., c. S-32.1
Loi sur les accidents du travail et les maladies professionnelles, L.R.Q., c. A-3.001
Loi sur les centres de la petite enfance et auras services de garde à l'enfance, L.R.Q., c. C-8.2
Loi sur les normes du travail, L.R.Q., c. N-1.1

Regulations:

Règlement sur les normes du travail, L.R.Q., c. N-1.1, r. 3
Règlement sur les centres de la petite enfance, L.R.Q., c. C-8.2, r.2
Règlement sur le travail visé, Loi sur le régime de rentes du Québec, L.R.Q., c. R-9, r.8

Newfoundland and Labrador

Laws:

Child Care Services Act, SN 1998, c. C-11.1, as amended

Human Rights Code, RSN 1990, c. H-14

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

Workplace Health, Safety, and Compensation Act, RSN 1990, c. W - 11

Regulations:

Child Care Services Regulation, N.R. 37/99, as amended

Workplace Health, Safety, and Compensation Regulation, C.N.R 1025/96

Federal Government

Laws:

Employment Insurance Act, R.S.C. c. E-5.6 (1996, c.23)

Status of the Artist Act, 1992, c. 33, as amended

Canada Pension Plan, R.S.C. c. C-8

Regulations:

Regulations amending the Employment Insurance Regulations, SOR/ 98-551

Employment Insurance Regulations, SOR/ 96-332

Employment Insurance Fishing Regulations, SOR/ 96-445

Canada Pension Plan Regulations, C.R.C. c. 385

Legal Documents of the International Labour Organization

Home Work Convention, 1996. C177. International Labour Organization. Geneva

Home Work Recommendation, 1996. R184. International Labour Organization. Geneva

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