The New Workplace: Surveying theLandscape

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This survey of the landscape of the new Canadian workplace has a strong temporal dimension. It is more akin to an historical atlas than to a topographical map in order to depict the changes to the Canadian labour market and the transformation in employment relationships and the Canadian workplace over the past 50 years. The benefit of an historical perspective is that it portrays continuity and change over the period in which our contemporary regime of employment and labour law was established. It allows us to identify the foundational assumptions about labour market actors and institutions upon which the key elements of Canadian employment and labour law were built. It also provides an opportunity to evaluate the extent to, and ways in which, employment and labour law has adapted to the profound changes globalization and neo-liberalism have caused in the labour market.

The survey sketches key features of the labour market, both its supply and demand sides, and its outcomes from three points in time that epitomize distinctive employment relations. The first point in time discussed is the 1950s, when the standard employment relationship began to flourish as the Canadian system of industrial pluralism stabilized. The second is the early 1980s, which was the cusp of the economic and political transformation that weakened the pillars upon which the standard employment relationship was built. The third is employment relations today in the new economy. These three snapshots of the labour market will enable us to compare the normative assumptions of employment and labour law with the reality of contemporary employment relations. The final snapshot was taken in late 2007, before the impending financial crisis was obvious to most observers.

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I. THE 1950S: THE STANDARD EMPLOYMENT RELATIONSHIP

The standard employment relationship was part of an ensemble of institutions, along with the vertically integrated enterprise, the industrial union, the male-breadwinner family, and the state as employer and provider of services, which served as the basis of an historical compromise between workers, employers, and governments following the strife of World War II. The standard employment relationship was a stable, socially protected, dependent, full-time job the basic conditions of which (working time and pay) were regulated to a minimum level by collective agreement or by labour law. It had three important goals: (1) to protect employees against economic and social risks, (2) to reduce social inequality, and (3) to increase economic efficiency.[1] The high level of social policies, such as pensions, unemployment insurance, and extended medical coverage, associated with it "incorporated a degree of regularity and durability in employment relationships, protected workers from socially unacceptable practices and working conditions, established rights and obligations, and provided a core of social stability to underpin economic growth."[2]

The standard employment relationship was highly regulated. This regulation involved collective bargaining and supporting laws and institutions. In the 1950s unionization took root in the key sectors of the economy – manufacturing, resource extraction, transportation, and utilities – but it never expanded beyond 35 per cent of the non-agricultural workforce. In the mid-1950s, "the typical union member...[was]...a relatively settled, semi-skilled male worker within a large industrial corporation."[3] "The wage gap between [the] unionized and non-unionized sectors grew."[4]

The standard employment relationship was both based upon and supported a division of labour in which men worked full-time outside the home and women worked full-time within the home. It was designed to provide a male worker with a wage sufficient to support a family – a dependent wife and two children. In 1951, one male wage supported three family members.[5]

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1 Gerhard Bosch, "Towards a New Standard Employment Relationship in Western Europe" (2004) 42 British Journal of Industrial Relations 617 at 619, 632.

2 Gerry Rodgers, "Precarious Work in Western Europe: The State of the Debate" in Gerry Rodgers & Janine Rodgers, eds., *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (Geneva: ILO, 1989) 1.

3 Craig Heron, *The Canadian Labor Movement* (Toronto: Lorimer, 1989) at 92.

4 Judy Fudge & Eric Tucker, Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948 (Toronto: Oxford University Press, 2001) at 310.

5 Jane Jenson, Catching Up to Reality: Building the Case for a New Social Model (Ottawa: Canadian Policy Research, 2004) at 31.

Through a combination of legal prohibitions and economic incentives, women's labour force participation rate dropped to a pre-war low of 23.6 per cent in 1954. Throughout the 1950s a greater percentage of people married, and at younger ages, than in the decades preceding or following. Fertility peaked at 3.9 children in 1959.[6] The baby boom was a period of unparalleled prosperity, steady rises in wages and the standard of living, and the rapid expansion of consumerism.[7]

In the 1950s and into the 1960s it was the norm for families to depend on the wages of an adult male breadwinner who worked upon leaving school to support his wife and children until retirement at age 65.[8] This specific form of family – male breadwinner and female housewife – and pattern of the life course was supported by collective agreements that tied wages to productivity and obliged employers to provide retirement benefits. It also depended upon a host of government policies – such as family allowances – that ensured a family wage.[9]

The standard employment relationship was rooted in the labour market of the 1950s, which was both very prosperous and very homogenous. Not only were the vast majority of labour force participants male, they were also overwhelmingly born in Canada. In 1951 only 15 per cent of the population was foreign-born, down from 22 per cent in 1931. Europeans predominated as immigrants in the post-war years; before 1961, 94 per cent of immigrants came from either Europe or the United States. Before 1960 only 10.2 per cent of immigrants were members of visible minority groups.[10]

Throughout the next two decades, the standard employment relationship and regime of industrial pluralism were extended and strengthened. In the late 1960s and early 1970s modified forms of collective bargaining legislation were provided for the public sector. By 1970, minimum wages of general application, hours-of-work regulation, public holidays, paid vacations, and notice of termination of employment became the norm in many jurisdictions across Canada. Real wages continued to rise throughout the 1970s, although at a slower rate than during the previous

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6 Rosemary A. Venne, "A Half Century of Work: Women in the Labour Force" (2004) 67 Sask. L. Rev. 489 at 494.

7 *Ibid.* at 493.

8 Andrew Jackson, *Work and Labor in Canada* (Toronto: Canadian Scholars' Press, 2005) at 6.

9 Fudge & Tucker, *supra* note 4 at 309.

10 Jeffrey G. Reitz & Rupa Banerjee, "Racial Inequality, Social Cohesion and Policy Issues in Canada" in Keith Banting, Thomas J. Courchene & F. Leslie Seidle, eds., *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Montreal: The Institute for Research on Public Policy, 2007) 489 at 489.

two decades.[11] These developments not only generated increases in union density in Canada, they led to increased feminization in the union movement as large numbers of women were employed as nurses, teachers, and clerks in the burgeoning public sector.[12]

Women's labour market participation took off in the 1960s, increasing at an average of 4.4 per cent per year between 1976 and 1986, while during the same period men's participation was declining slightly by 0.1 per cent per year.[13] However, women continued to be crowded into a small range of low-paid occupations. The norm of employment for women departed significantly from that of men; women were much more likely than men to work part-time and on a temporary basis.[14]

II. THE 1980S: THE FEMINIZATION OF LABOUR

From the end of World War II to the early 1980s Keynesian demand-management techniques and social welfare policies supported the standard employment relationship. The trade-off of productivity gains for wage increases in key economic sectors (manufacturing, transportation, and resources), which were secured through collective agreements, was the basis of the industrial relations system. In the 1980s this compromise unravelled as productivity decreased and unemployment and inflation grew.[15]

In the early 1980s, the industrial pluralist labour regime and the standard employment relationship reached their breaking point. In 1982, unionization peaked at 40 per cent. That year the federal government imposed wage controls on its own employees in an effort to wring inflation out of the system. The central bank embarked on a high-interest rate policy and unemployment increased. The majority of the provinces imposed restrictions on public sector collective bargaining, and many began to privatize government industries and services as well as to deregulate economic activities.[16]

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11 Abdul Rashid, "Seven Decades of Wage Changes" (1993) 5 Perspectives on Labour and Income 8 at 9, cited in Venne, *supra* note 6 at 499.

12 Julie White, *Sisters and Solidarity: Women and Unions in Canada* (Toronto: Thompson Educational Publishing, 1993).

13 Venne, *supra* note 6 at 496.

14 *Ibid.* at 498; Judy Fudge & Leah Vosko, "Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law, Legislation and Policy" (2001) 22 Economic and Industrial Democracy 271.

15 Leo Panitch & Donald Swartz, From Consent to Coercion: The Assault on Trade Union Freedoms, 3d ed. (Aurora, Ont.: Garamond Press, 2003) at 26; Daniel Drache & Harry Glasbeek, The Changing Workplace: Reshaping Canada's Industrial Relations System (Toronto: James Lorimer, 1992).

16 *Ibid.*; Mark Thompson, Joseph B. Rose, & Anthony E. Smith, eds., *Beyond the National Divide: Regional Dimensions of Industrial Relations* (Montreal & Kingston: McGill-

Women continued to enter the labour force. Their contributions were necessary to maintain household living standards in the face of the decline in male wages. By 1981, the male wage only supported two family members.[17] With women's labour force participation increasing, women's organizations pressed for legal rights to ensure women's equality at work. These rights included prohibitions against sexual harassment, better job protection and benefits to accommodate pregnancy, as well as pay and employment equity to combat wage discrimination and occupational segregation.[18] However, just as the law was enshrining substantive equality for women in the world of work, the labour market was restructuring. Throughout the 1980s and 1990s, labour market outcomes began to polarize more profoundly and the male employment norm began to deteriorate.

III. RISK AND REWARD AT WORK IN THE NEW ECONOMY

A. Globalization and Neo-liberalism

In the 1990s, globalization and neo-liberalism combined to challenge both the sovereignty of the nation state, which traditionally has been the main author of labour legislation, and the traditional goals of labour protection and enhancing workers' agency through democratic participation.[19] Globalization (deeper economic and political integration across national boundaries) places constraints upon the ability of elected governments to develop and implement policies that are at odds with the central tenets of neo-liberalism.

Promoted by such international financial institutions as the International Monetary Fund and the World Bank, neo-liberalism emphasizes international free trade, deregulation (especially of labour

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Queen's University Press, 2003); Yonatan Reshef & Sandra Rastin, *Unions in the Time of Revolution: Government Restructuring in Alberta and Ontario* (Toronto: University of Toronto Press, 2003); Gene Swimmer, ed., *Public-Sector Labour Relations in an Era of Restraint and Restructuring* (Don Mills, Ont.: Oxford University Press, 2001).

17 Jenson, *supra* note 5 at 31.

18 Judy Fudge & Leah F. Vosko, "Gender Paradoxes and the Rise of Contingent Work: Towards a Transformative Political Economy of the Labour Market" in Wallace Clement & Leah F. Vosko, eds., *Changing Canada: Political Economy as Transformation* (Montreal & Kingston: McGill-Queen's University Press, 2003) 183; White, *supra* note 12.

19 H.W. Arthurs, "Labour Law Without the State" (1996) 46 U.T.L.J. 1; Adelle Blackett, "Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct" (2001) 8 Ind. J. Global Legal Stud. 401.

markets), and privatization.[20] These institutions, along with the Organization for Economic Cooperation and Development (OECD), blame labour market rigidities for poor economic performance and especially for unemployment.[21] They advocate a greatly decentralized structure of bargaining and workplace norm setting within a market governed largely by the property and contract rights of employers.[22] Anglo-Saxon countries have embraced the "employability model" of social welfare, which is based on the assumption of multi-earner families and on the notion that all adults, male and female, should be employed. Public policies have encouraged the growth of precarious work by offering wage subsidies and income supplements to low-wage labour, legitimating temporary employment agencies, and by introducing punitive workfare programs.[23]

The re-organization of work has reinforced the trend towards a market-oriented approach to governing employment relations. "Just-in-time" production methods, through which businesses attempt to respond more immediately to market pressures, require increased flexibility from workers as corporations find new ways to structure their operations. Production chains stretch across the globe, involving workers across a number of different continents in the production of a single item. At the same time as the global corporate networks have developed, there has also been a proliferation of small businesses. Often these smaller operators are linked to other firms through franchising agreements or joint ventures. There has also been a "commercialization" of employment relations, and an increase in self-employment and various forms of subcontracting.[24]

The changing nature of industry has meant the old "Fordist" paradigm of the mass of workers performing a standard set of skills in large-scale production enterprises is rapidly becoming a thing of the past. In industrialized countries, employment patterns and practices are now

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20 Guy Standing, "Brave New Words? A Critique of Stiglitz's World Bank Rethink" (2000) 31 Development and Change 737; Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (The Hague: Kluwer International, 2002).

21 OECD, The OECD Jobs Study – Evidence and Explanations (Paris: OECD, 1994).

22 Kerry Rittich, "Rights, Risk, and Reward: Governance Norms in the International Order and the Problem of Precarious Work" in Judy Fudge & Rosemary Owens, eds., *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Oxford OR: Hart, 2006) 31.

23 Sylvia Bashevkin, Welfare Hot Buttons: Women, Work, and Social Policy Reform (Toronto: University of Toronto Press, 2002); Leah F. Vokso, Temporary Work: The Gendered Rise of a Precarious Employment Relationship (Toronto: University of Toronto Press, 2000); Robert Johnson & Rianne Mahon, "NAFTA, the Redesign and Rescaling of Canada's Welfare State" (2005) 76 Studies in Political Economy 7.

24 Judy Fudge, "The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection" in Guy Davidov & Brian Langille, eds., *Boundaries and Frontiers of Labour Law* (Oxford OR: Hart, 2006) 295.

primarily determined not in manufacturing, but in the service sector, which since 2000 has accounted for over 60 per cent of total OECD employment and close to three-quarters of all employment in a number of major OECD countries.[25]

The Canada-US Free Trade Agreement and NAFTA were important steps towards continental economic integration. Despite the fact that social policy is not covered by these agreements, the two countries' social models have converged, generally because Canada has followed the United States.[26] In the mid-1990s, unemployment insurance in Canada was transformed to more closely resemble the US model; benefits were reduced, qualifications were tightened, and disqualifications were added. At the same time, the universal family allowance system, a cornerstone of the Canadian post-war compromise, was turned into a targeted benefit delivered through the tax system. Here, too, the model was American. Moreover, the combination of tax and expenditure cuts in Canada during the 1990s helped to shrink the gap between Canada and the U.S. in the share of government expenditures in GDP spent on non-defense programs. This gap fell from 15 percentage points of GDP in 1992 to just 6 percentage points in 2001.[27]

B. Creating a Flexible Labour Market in Canada

Fuelled in part by free trade and new communication and logistics systems, the Canadian economy underwent a dramatic restructuring. Manufacturing, the heartland of the standard employment relationship, shrank drastically, which had a profound impact both upon union density and the demographics of union membership. The typical unionized worker in the 1950s – the male manufacturing worker – has been replaced. Today she is more likely to be a teacher or a homecare worker.

Since 1985 union density has been slowly declining; it dropped from 38 per cent in 1981 to 31 per cent in 2004. This decline was gendered; the unionization rate for men dropped by 12 per cent whereas the rate for women dropped by less than 1 per cent.[28] There has been "a marked decline in union density in the traditional bastion of male blue-collar unionism."[29]

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25 OECD, *Employment Outlook* (Paris: OECD, 2000); Jill Rubery & Damian Grimshaw, *The Organization of Employment: An International Perspective* (Houndsmill, Basingstoke: Palgrave Macmillan, 2003).

26 Johnson & Mahon, *supra* note 23; Keith G. Banting, "Dis-embedding Liberalism? The New Social Policy Paradigm in Canada" in David A. Green & Jonathan R. Kesselman, eds., *Dimensions of Inequality in Canada* (Vancouver: University of British Columbia Press, 2006) 417.

27 Jackson, *supra* note 8 at 207.

28 René Morissette, Grant Schellenberg & Anick Johnson, "Diverging Trends in Unionization" (2005) 6:4 Perspectives on Labour and Income 5 at 5.

29 Jackson, *supra* note 8 at 168.

Union density in manufacturing has fallen from about one-half to one-third of all workers since the mid-1980s.[30]Other industries that historically have sustained the standard employment relationship – primary industries, transportation, and, to a lesser extent, communications and utilities – have also experienced declining union density.[31]

Unionization continues to be very low in private consumer services and in financial and business services. By contrast, the public service, which is composed of governments, Crown corporations, and government-funded institutions (such as schools, hospitals, and many social services) is densely unionized. In 2006, a worker in the public sector was four times as likely as a counterpart in the private sector to be unionized (71 per cent density in the public sector versus 17 per cent in private). The concentration of union membership in the public service helps to explain why the rate of unionization of women (29.7 per cent) surpassed that of men (29.1 per cent) in 2006.[32]

Young workers' unionization rate showed the steepest decline. Union members are most likely to be prime age, between 45 and 54 years old, and are more likely than not to have postsecondary education. Moreover, the temporal dimension of the employment relationship – both in terms of hours worked on a weekly basis and the duration of the relationship – influences the likelihood of unionization. Full-time and permanent workers have a higher chance, one in three, of being union members than do part-time and temporary workers, who have only a one in four chance.[33]

A shift in the occupational structure of the Canadian labour market has accompanied economic restructuring. The number of jobs requiring higher levels of formal education and skills has increased. Between 1989 and 2003, the share of all jobs in professional occupations rose from 18 per cent to 22 per cent.[34] Yet, as Andrew Jackson notes, more than 40 per cent of men still work in traditional blue-collar jobs and one-third of women still work in pink-collar clerical, secretarial, and administrative jobs in offices. Moreover, one in five men and almost one in three women work in sales and service occupations – mainly lower paid and often part-time jobs in stores, hotels and restaurants - and as security guards and building cleaners.[35]

The firms that employ labour have also reorganized. Today fewer employees work for large vertically integrated firms of the type that once

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30 *Ibid.* at 172.

31 However, unions in construction, which continues to be organized as a craft, have been remarkably resilient. *Ibid.* at 173.

32 "Unionization" (2007) 8:8 Perspectives on Labour and Income 1 at 6.

33 *Ibid.* at 5.

34 Jackson, *supra* note 8 at 13.

35 *Ibid.*

formed a stable anchor for the standard employment relationship. Outsourcing and franchising fuel the disintegration of the vertically integrated firm, and networks are an alternative form of organization to bureaucracy. Thus, it is not surprising that the proportion of employees working in firms with less than 100 employees increased from 36 to 41 per cent between 1983 and 2001.[36] This change in the structure of firms has affected employment. Jobs in smaller firms are less well paid than jobs in big firms. They are also less likely to provide benefits, security, and union representation than jobs provided by large firms.[37]

One of the most significant impacts of the new economy on employment is the rise in non-standard, contingent, or precarious forms of work.[38] This work departs from the normative model of the standard employment relationship, which is a full-time and year-round employment relationship for an indefinite duration with a single employer. It includes self-employment, part-time work, temporary employment, contract work, and multiple-job holding. In 1989 these forms of nonstandard employment made up 33 per cent of jobs, whereas in 2002 these forms of employment made up 37 per cent of total employment. The further the form of employment departs from the normative model the more precarious it is.[39] Temporary, part-time, and self-employment tend to be precarious both in terms of income and security.[40] For example, temporary workers earned 16 per cent less per hour than permanent workers.[41] In 2000, 30 per cent of workers who were paid under ten dollars an hour were employed in temporary jobs, compared to 16 per cent of workers paid between 10 and 20 dollars an hour and 9 per cent of workers who were paid more than 20 dollars an hour.[42]

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36 Morissette, Schellenberg & Johnson, *supra* note 28 at 9.

37 Marie Drolet & René Morissette, *Recent Canadian Evidence on Job Quality by Firm Size,* Analytical Studies Branch Research Paper Series (Ottawa: Statistics Canada, 1998). However there was an increase in union density between 1997 and 2003 in small workplaces with fewer than 100 employees and a decline in larger ones. Ernest B. Akyeampong, "The Union Movement in Transition" (2004) 5:8 Perspectives on Labour and Income 5 at 12.

38 Judy Fudge, "Beyond Vulnerable Workers: Towards a New Standard Employment Relationship" (2005) 12 C.L.E.L.J. 150.

39 Leah F. Vosko, Nancy Zukewich & Cynthia Cranford, "Precarious Jobs: A New Typology of Employment" (2003) 4:10 Perspectives on Labour and Income 16.

40 *Ibid.*

41 Diane Galarneau, "Earnings of Temporary versus Permanent Employees" (2005) 6:1 Perspectives on Labour and Income 5.

42 Katherine Marshall, "Benefits of the Job" (2003) 4:5 Perspectives on Labour and Income 5, cited in Ron Saunders, *Risk and Opportunity: Creating Options for Vulnerable Workers* (Ottawa: Canadian Policy Research Networks, 2006) at 17.

Social location – sex, race, immigration status, ethnicity, disability, and type of household – interacts with occupation and industry to channel vulnerable workers into precarious employment.[43] Women and new immigrants, who tend also to be members of visible minorities, disproportionately perform precarious work. Between 1989 and 2002, the proportion of non-standard jobs as a percentage of total jobs held by women grew from 37 to 41 per cent, while for men it increased from 29 to 33 per cent.[44] Recent immigrants, most of whom are members of a visible minority group, comprise a disproportionate number of workers in non-standard employment.[45] Men and women of colour are less likely to be covered by a collective agreement than white women and men.[46] There is, however, considerable diversity within the category of visible minority; for example, Chinese women are disproportionately found in part-time temporary wage work, whereas Black and South Asian women are more likely to be found in temporary work that is full-time.[47] Young men are also overrepresented in precarious employment.

Most employees who are in precarious employment remain in such jobs for extended periods of time because there are virtually no ladders into better jobs.[48] Moreover, relative to other similar countries Canada has a high proportion of low-paid jobs.[49] One out of ten persons aged 18 to 59 in 1996 and not a full-time student was a low-income worker for at least one year between 1996 and 2001. One in six Canadians working full-time earned less than $10 an hour (in dollars adjusted to 2001).[50]

Despite these changes, the standard employment relationship has been remarkably resilient. Although the proportion of jobs that fit the model of standard employment has declined, they continue to predominate – they

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43 Cynthia Cranford & Leah Vosko, "Conceptualizing Precarious Employment: Mapping Wage Work Across Social Location and Occupational Context" in Leah Vosko, ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill-Queen's University Press, 2006) 43 at 65.

44 Vosko, Cranford & Zukewich, *supra* note 39.

45 Fudge & Vosko, *supra* note 18.

46 Cranford & Vosko, *supra* note 43 at 59.

47 *Ibid.*; Vosko, Zukewich & Cranford, *supra* note 39.

48 Costa Kapsalis & Pierre Tourigny, "Duration of Non-Standard Employment" (2004) 5:12 Perspectives on Labour and Income 5.

49 Garnett Picot & John Myles, *Income Inequality and Low Income in Canada: An International Perspective,* Analytical Studies Branch Research Paper Series (Ottawa: Statistics Canada, 2005) at 6.

50 Dominique Fleury & Myriam Fortin, "Canada's Working Poor" (2004) 7:2 Horizons Policy Research Initiative 51 at 54. In their definition the workers had to have worked 910 hours for pay over the course of a year (roughly full-time for half a year) and earned wages below a measure of poverty. Ron Saunders, *Lifting the Boats: Policies to Make Work Pay* (Ottawa: Canadian Policy Research Networks, 2005) at 3.

are still 63 per cent of all jobs. Moreover, in a study designed to investigate whether well-paid jobs had disappeared in Canada between 1981 and 2000, René Morissette and Anick Johnson found that the proportion of good and bad jobs has been constant.[51] During the same period job stability did not decline.[52]

However, just below this reassuring picture of continuity there are some disturbing trends, such as the deterioration in the terms and conditions of new jobs. The quality of new jobs is an important indicator since it is the characteristics of new positions rather than the entire stock of jobs that is best suited for detecting changes in the jobs provided by firms. Morissette and Johnson found that the median hourly wages of male workers aged 25 to 64 with two years or less seniority fell 13 per cent between 1981 and 2004.[53] In addition to lowering the wages of new jobs, "Canadian employers may have responded to their changing environment" by "offering temporary jobs to an increasing fraction of [new employees]."[54] The incidence of temporary work amongst newly hired employees rose from 12 per cent in 1989 to 22 per cent in 2004. This increase in temporary employment was widespread, affecting full-time jobs, unionized and non-unionized workers, individuals aged 25 to 34 as well as their older counterparts, men and women, and graduates as well as other individuals.[55]

Moreover, only a small proportion of new jobs are being unionized. Union coverage of newly hired men fell by almost 20 percentage points, from 38 per cent in 1981 to 19 per cent in 2004. This is twice the drop in union density observed among other male employees.[56] The percentage of workers covered by a registered retirement plan (RRP) has decreased overall. RRP coverage has fallen substantially for men aged 25 and over while it has dropped slightly for women aged 25 to 34.[57] It is not clear whether the decline in RRP coverage has been offset by an increase in group registered retirement savings plans. However, the decline in registered retirement plans suggests that male employees are less likely to be covered by defined benefit plans than their counterparts were in the 1980s and,

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51 René Morissette & Anick Johnson, *Are Good Jobs Disappearing in Canada?*, Analytical Studies Branch Research Paper Series (Ottawa: Statistics Canada, 2005).

52 Andrew Heisz, "The Evolution of Job Stability in Canada: Trends and Comparisons with U.S. Results" (2005) 38 The Canadian Journal of Economics 105.

53 *Supr*a note 51 at 13.

54 *Ibid.* at 18.

55 *Ibid.* at 18-19.

56 Morissette, Schellenberg & Johnson, *supra* note 28 at 5-6.

57 However, women aged 45 to 54 have experienced a rise in coverage. The percentage of male tax filers contributing to a RRP fell substantially in most age groups since 1986. It dropped between 7 and 12 points among men aged 25 to 64. Morissette & Johnson, *supra* note 51 at 19-20.

thus, they are exposed to greater risk of inadequate income during retirement.[58]

These trends suggest that the standard employment relationship is deteriorating. Moreover, a closer look at wages since the 1980s tends to support this conclusion. The growth in real wages slowed down dramatically in the 1980s with an increase of only 2 per cent, compared to increases of 8.5 per cent over the 1970s, and the astonishing growth of the 1950s, which saw an increase of 42.5 per cent.[59] There were no real wage gains for workers in the recovery period from 1993 to 2003. Private sector workers saw real wage gains of only 2 per cent during this period, whereas real public sector wages fell by 1 per cent. Wage stagnation during this period is remarkable given that the unemployment rate dropped from 11.4 per cent in 1993 to 7.6 per cent in 2003.[60] It is also surprising in light of the increase in the human capital, both in terms of education and experience, embodied in the labour force during the 1980s and 1990s. Despite this increase, during the same period the labour market outcomes for male workers with a representative level of human capital deteriorated.[61]

Between 1980 and 2000, men's median weekly earnings dropped by 7 per cent while women's grew by 13 per cent.[62] From 2000 to 2005, median earnings remained constant for men but rose by 4 per cent for women. Most of this increase in women's earnings went to prime-age women.[63] These changes in men's and women's earnings help to explain why the pay gap between women and men declined through the 1980s and into the mid-1990s. Much of the decline is attributable to the fact that men's labour

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58 Morissette & Johnson, *supra* note 51 at 21-22.

59 Abdul Rashid, "Seven Decades of Wage Changes" (1993) 5 Perspectives on Labour and Income 8 at 9, cited in Venne, *supra* note 6 at 499.

60 Jackson, *supra* note 8 at 19.

61 See, for example, Andrew Heisz, Andrew Jackson & Garnett Picot, *Winners and Losers in the Labour Market of the 1990s*, Analytical Studies Branch Research Paper Series (Ottawa: Statistics Canada, 2002); Charles M. Beach & Ross Finnie, *A Longitudinal Analysis of Earnings Change in Canada*, Analytical Studies Branch Research Paper Series (Ottawa: Statistics Canada, 2004); Andrew Jackson, *Better Educated, Badly Paid and Underemployed: A Statistical Picture of Young Workers in Canada*, Canadian Labour Congress, Research Paper #33, July 2005. Heisz, Jackson and Picot chart rising labour market inequality during the 1990s, especially for young men. Beach and Finnie note that although distributional concerns were partially offset after the recovery and growth of the economy since the late 1990s, the youngest cohort continued to experience a loss of earnings. Jackson charts the declining fortunes of young workers relative to young workers a generation ago; this decline has occurred even though the current generation of workers has more education.

62 Lucy Chung, "Education and Earnings" (2006) 7:6 Perspectives on Labour and Income 5 at 8.

63 *Ibid.* at 8-9.

market fortunes have declined while women have been moving into higher paid, such as professional, occupations.[64]

The cumulative impact of these changes – declining unionization, the increase in precarious employment, and the deterioration in the terms and conditions of new jobs – has been a polarization of earnings. The increase in earnings inequality during the second half of the 1990s is surprising given that it was a period of prosperity and economic expansion. The conventional theory that "a rising tide lifts all boats" predicts that wage differentials narrow and that lower-skilled workers disproportionately benefit from tighter labour markets. However, the result of the 1990s – increasing earnings inequality – suggests that a new paradigm based on the new economy is at play. Globalization, outsourcing, international trade, information technologies, work reorganization and new forms of employment relationships, especially in the high-growth and more manufacturing-orientated provinces, explain some of the earnings inequality.[65]

The changes in labour market demand and outputs that have accompanied the new economy have been matched by a change in labour supply. Over the past twenty-five years the labour force has become much more heterogeneous than it was before. Virtually all of the growth of the Canadian labour force now comes from immigration.[66] Increasingly immigrants to Canada are members of visible minority groups. Since the late 1980s about three in every four immigrants to Canada have belonged to a visible minority group. This increase is due to a shift to non-European sources of immigration since 1960. Before 1960 only 10 per cent of immigrants were members of racial minorities, by the 1970s it rose to 51.8 per cent, climbing to 75 per cent in 1990. In 1971 members of visible minority groups made up 1 per cent of the population, whereas by 2001 they comprised 13.4 per cent.[67] However, recent immigrants who are members of visible minority groups are largely concentrated in a few big metropolitan centres and not distributed equally across the country.[68]

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64 Jackson, *supra* note 8 at 93-96. Jackson notes that since the mid-1990s the wage gap between men and women has increased, which he attributes to the fact that earnings gains since the mid-1990s have been concentrated at the highest paid workers, who tend to be men.

65 Charles M. Beach, Ross Finnie & David Gray, *The Impact of Macroeconomic Conditions on the Instability and Long-Run Inequality of Workers' Earnings in Canada*, Analytical Studies Branch Research Paper Series (Ottawa: Statistics Canada, 2006) at 14-15.

66 Jackson, *supra* note 8 at 103. Seventy per cent of the net employment growth in the first half of the 1990s was due to immigration.

67 Reitz & Banerjee, *supra* note 10.

68 Gillian Creese, "Racializing Work/Reproducing White Privilege" in Vivian Shalla & Wallace Clement, eds., *Work in Tumultuous Times: Critical Perspectives* (Montreal &

Visible minority workers are on average paid significantly less and have less job security than other workers, despite much higher than average levels of education.[69] Unemployment rates for visible minority workers are consistently higher than for white workers. Moreover, there are racialized patterns of occupational distribution. Women of colour are twice as likely as white women to be in manual occupations.[70] The combination of being a recent immigrant and a member of a visible minority group heightens an employee's risk of low pay.[71] Almost one third of recent immigrants who were members of visible minority groups were low paid, compared to less than a fifth of recent immigrants who were not members of visible minorities.[72] Immigrants experience an income gap and a higher poverty rate. The drop in earnings of immigrant men is particularly troubling. In 1981 they earned on average 73.1 per cent of what Canadian-born workers earned, while in 1996 they only earned 62.4 per cent. There was a narrowing of the gap in 2000, although it continues to be about 15 per cent wider than 1970 levels even though the more recent immigrants are more highly skilled. Overall, recent immigrants fare much worse in incomes than did immigrants who arrived in Canada in the 1980s.[73]

Aboriginal people and disabled people are two groups characterized by low labour force participation and higher unemployment rates, fewer hours of work, and lower incomes.[74] Historically, Aboriginal people have not fared well in the labour market.[75] They have higher unemployment rates and lower educational attainments than other people in Canada. However, they are an important source of labour supply. They have a much younger average age than other Canadians, and their population is growing at a faster rate.[76] In 2001, Aboriginal people made up 3.4 per cent of the population, about 1.1 million people. There is evidence of some recent improvement in employment prospects and outcomes for Aboriginal people

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Kingston: McGill-Queen's University Press, 2007) 192 at 196; Grace-Edward Galabuzi, *Canada's Economic Apartheid: The Social Exclusion of Racialized Groups in the New Century* (Toronto: Canadian Scholars' Press, 2006).

69 Jackson, *supra* note 8 at 104.

70 Creese, *supra* note 68 at 198.

71 Ron Saunders, *Does a Rising Tide Lift All Boats? Low-Paid Workers in Canada* (Ottawa: Canadian Policy Research Networks, 2005) at 9.

72 *Ibid.* at 9.

73 Picot & Myles, *supra* note 49 at 19-20; Garnett Picot, Feng Hou & Simon Coulombe, *Chronic Low Income and Low-Income Dynamics Among Recent Immigrants*, Analytical Studies Branch Research Paper Series (Ottawa: Statistics Canada, 2007).

74 Harvey Krahn, Graham Lowe & Karen Hughes, *Work, Industry & Canadian Society*, 5th ed. (Toronto: Thompson, 2007) at 146.

75 Jackson, *supra* note 8 at 115-117.

76 Krahn, Lowe & Hughes, *supra* note 74 at 146-47.

in Western Canada, which seems to be propelled both by tight labour markets in the west and the improvement in education levels for younger Aboriginal people.[77]

Evidence from 2001 indicated that one in ten working-age Canadians had a disability, of whom about 40 per cent (or about 4 per cent of the entire working-age population) experienced severe limitation in their activities.[78] The majority of disabled Canadians are not so disabled that they are unable to be employed.[79] However, disabled workers are disproportionately clustered in non-standard and precarious jobs.[80]

The most profound change in the labour force over the past fifty years has been the flood of women into paid employment. The participation rate of women in the labour force has increased steadily since the 1960s, and Canada's female labour force participation rate is amongst the highest of the thirty member states of the OECD.[81] In 2003 the labour force participation rate of women was 73 per cent, still below that of men, which stood at 83.2 per cent.[82] This difference in participation rates is mostly due to women's childrearing responsibilities. Women with children under the age of three are less likely than other women to have a job; however, in 2003 even the majority of those mothers, 60 per cent, were in paid employment.[83] Married women with children are disproportionately concentrated in part-time employment.[84]

The increase in women's employment – both participation rate and working hours – has not been matched by a concomitant shift in unpaid domestic work to men, although men have increased their contribution to domestic labour.[85] An increase in long hours of work, especially amongst

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77 Jacqueline Luffman & Deborah Sussman, "The Aboriginal Labour Force in Western Canada" (2007) 8:1 Perspectives on Labour and Income 13.

78 Jackson, *supra* note 8 at 118.

79 Krahn, Lowe & Hughes, *supra* note 74 at 147.

80 Emile Tompa *et al.*, "Precarious Employment and People with Disabilities" in Leah Vosko, ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen's, 2006) 90.

81 Jackson, *supra* note 8 at 80.

82 *Ibid.* at 81.

83 *Ibid.*

84 Judy Fudge, "The New Duel-Earner Gender Contract: Work-life Balance or Working-time Flexibility?" in Joanne Conaghan & Kerry Rittich, eds., *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford: University Press, 2005) 261 at 268-69.

85 *Ibid.* at 270-71.

men, and an increase in the length of the standard work week during the 1980s and 1990s contributed to a rise in work-life conflict.[86]

The lack of fit between the organization of employment and the demands of domestic labour, especially caring for others, has resulted in a struggle to find a suitable work-life balance. Linda Duxbury and Chris Higgins analyzed two large-scale surveys of employees in large firms held ten years apart. They found rising levels of stress caused by too many demands on mothers' time, while fathers are increasingly reporting stress from work-life conflict.[87] They have also quantified the costs to employees, their families, employers and society at large of this conflict between the demands of work and personal, family and community life.[88]

The deterioration in employment and wages places households under pressure, which influences social cohesion and labour supply. Under the contemporary employability model of welfare, women with children and young families are especially vulnerable in the new economy. Women with young children are expected to work. However, the kind of employment that is compatible with caring for young children does not, generally, provide sufficient income or security for women to support dependents on their own earnings. Yet, household structures are changing, and families are less stable. Married couples with children are the only census family structure to experience a sharp decline in numbers compared to 2001.[89] The percentage of divorces per 100,000 married couples rose from 180 in 1951, where it remained for the next decade, when it shot up in the 1970s and 1980s, reaching 1222 per 100,000 in 2001.[90] One of the most visible social transformations since the 1950s is the rise in the number of lone-parent families created by divorce or childbearing outside marriage. Lone-parent families are at much higher risk of low income than other types of families.[91]

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86 For a discussion of working hours and increased work-life conflict see Judy Fudge, "Control Over Working Time and Work-Life Balance" (Report prepared for the Federal Labour Standards Review Commission, 1 March 2006).

87 For a discussion of work-life stress and recent reports on the topic see *ibid.*

88 Health Canada, *The 2001 National Work-Life Conflict Study: Report One* (Ottawa: Health Canada, 2002), online: Public Health Agency of Canada <http://www.phac-aspc.gc.ca/publicat/work-travail/report1/#fore>; Canada, Labour Program, *Voices of Canadians: Seeking Work-Life Balance* (Hull: Human Resources Development Canada, 2003); Health Canada, *Work-Life Conflict in Canada in the New Millennium: A Status Report* (Ottawa: Health Canada, 2003).

89 Anne Milan, Mireille Vézina & Carrie Wells, *Family Portrait: Continuity and Change in Canadian Families and Households in 2006, 2006 Census* (Ottawa: Statistics Canada, 2007). There has been a shift to common law unions.

90 Jenson, *supra* note 5 at 6.

91 Fudge, *supra* note 84 at 268.

Young people today have to work harder and longer to reach earnings achieved by previous generations.[92] The earnings of younger adults under 35 have declined since the 1970s, which had a corresponding negative impact on young families.[93] The result is that the fertility rate is below the rate necessary to replace the population, declining to 1.5 in 2001.[94] However, the fertility rate does not reflect what people say they would prefer; when polled people say they want to have more children than they actually have.[95]

The dwindling labour supply might be offset by changes in the life-course, in particular phased-in or delayed retirement. The population over 65 years old as a percentage of total population rose from 7.8 per cent in 1951 to 13 per cent in 2001, and will rise to 20 per cent by 2020.[96] The increase of the proportion of the population over the age of 85 is even more dramatic, rising from 4.8 per cent in 1951 to 10.7 per cent in 2001. People are now living on their retirement income for much longer periods than expected. There was a dramatic increase in the employment rate of older workers from the mid-1990s to 2003; the rates for men and for women aged 60 to 64 increased by about ten percentage points.[97] With the 2008 financial crisis, it is likely that this trend will increase.

IV. NEW LABOUR LAW NORMS FOR THE NEW ECONOMY?

The changing composition of the labour force has generated changes in the legal landscape. Mandatory retirement has been abolished in almost all jurisdictions in Canada, and private pensions are much less secure. Reasonable accommodation of religious difference and disabled workers is an increasingly important aspect of the law of the workplace and a contentious area of public debate. Employment standards – such as longer maternity and parental leave and benefits as well as family responsibility leave – have been enacted to accommodate the increasing labour force participation of women and alleviate growing work-life conflict.[98]

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92 Saunders, *supra* note 42 at 18.

93 John Myles, *Postponed Adulthood: Dealing with the New Economic Inequality*, New Social Architecture Series (Ottawa: Canadian Council on Social Development, n.d.) at 3, online: <http://www.ccsd.ca/pubs/2005/pa/pa.pdf>.

94 Jenson, *supra* note 5 at 6.

95 Myles, *supra* note 93 at 4.

96 Jackson, *supra* note 8 at 124.

97 Katherine Marshall & Vincent Ferrao, "Participation of Older Workers" (2007) 19:3 Perspectives on Labour and Income 5.

98 Fudge, *supra* note 84.

It is possible to discern a broader shift in the normative language and institutional arrangements of employment and labour law. Industrial pluralism, with its emphasis on collective bargaining supplemented by grievance arbitration as the preferred method of standard setting and dispute resolution, is being both eclipsed and colonized by human rights norms. While these norms are important for fostering an inclusive society and a labour market that treats people with equal dignity, the problem is that these norms are only able to flourish if they have institutional support. Trade unionism and grievance arbitration have been at the forefront of putting human rights to work. Unions have also managed very recently to persuade the Supreme Court of Canada that collective bargaining is a constitutional right.[99] However, union representation is declining, and there is little evidence that any government in Canada is willing to modify collective bargaining legislation to make it easier for workers in the private sector to unionize.

At the same time as the capacity of unions to represent the rights of workers has diminished, governments have also dismantled the public services needed to enforce labour standards and human rights.[100] While courts have expanded their capacity to address violations of individual labour rights, either by allowing civil enforcement of a statutory right or by expanding the common law, litigation, even if class actions prove to be successful, is not an effective means of combating increasing inequality in the labour market.[101]

The new economy has produced distinctive patterns of winners and losers when it comes to labour market outcomes such as types of jobs, wages, benefits and working hours. The consequences of a deregulated labour market accumulate along the ascriptive features of traditionally disadvantaged groups such as women and immigrants, especially those who are visibly different.[102] Moreover, the evidence suggests that one of the

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99 Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27, [2007] 2 S.C.R. 391.

100 David Fairey, *Eroding Worker Protections: British Columbia's New 'Flexible' Employment Standards*, Economic Security Project Report (Vancouver: Canadian Centre for Policy Alternatives, 2005); Judy Fudge, "Flexibility and Feminization: The New Ontario Employment Standards Act" (2001) 16 J.L. & Soc. Pol'y 1.

101 Judy Fudge, "The Limits of Good Faith in the Contract of Employment: From *Addis* to *Vorvis* to *Wallace* and Back Again?" (2007) 32 Queen's L.J. 529; Michael D. Wright & Simon Archer, "Class Proceedings as a Framework for Employee and Retiree Claims" (2005) 2 Can. Class Action Rev. 5. In British Columbia, the Court of Appeal refused to allow workers to enforce the *Employment Standards Act* in civil courts using class actions on the ground that the legislation provided an effective and exclusive means of enforcement. See *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182. For a discussion of the B.C. government's failure to enforce the *Employment Standards Act* see Fairey, *supra* note 100.

102 Ulrich Beck, *The Brave New World of Work* (Cambridge: Polity, 2000) at 104.

consequences of deregulation has been to downgrade the norm for new jobs for all labour market participants.

In the new economy, the rising tide of economic prosperity has not lifted all boats; too many have been tethered to the bottom. Despite an annual rate of economic growth of 3 per cent, a thirty-year record low rate of unemployment (hovering about 6 per cent), and an all time high employment rate (over 63 per cent of the population is employed), a greater proportion of jobs are insecure and precarious and the standard employment relationship is deteriorating. Inequality in labour market outcomes, especially earnings, has grown. Precarious work and inequality undermine the sustainability of households and create fissures and tensions in social cohesion.

Over the last half century there has been a transformation both in employment and household structures. Thus, we need to reconsider for whom employment and labour law should be designed. The scope of employment and labour law is dwindling as the standard employment relationship shrinks. It is time to institutionalize a new standard employment relationship, one that achieves the traditional goals of protecting employees against economic and social risks, reducing social inequality, and increasing economic efficiency. But it should also be one that provides equal access for women and men to the employment system, supports lifelong learning and the new patterns of the life-course, and accommodates diversity without penalty.[103] The construction of a new employment norm is necessary in order to revitalize labour law's distinctive contribution, which is to strengthen the bonds of social solidarity against the fragmentation of the market. The current economic crisis simply underscores the urgency of the need to institutionalize new, inclusive employment norms that protect workers from the risks inherent in the market.

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[103] I have adapted Bosch's goals, *supra* note 1 at 634-35.