LAWS AND THE PROTECTIVE ROLE OF LABOUR LAW IN CANADA: AMBIVALENCE, POWERLESSNESS OR COMPETITION?

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For a long time, labour law extended its protection to an ever-growing number of work situations. Today, the reverse phenomenon is observed. New forms of employment have disrupted the benchmarks of labour law, its boundaries and the effectiveness of its standards[1]. The certainties that used to surround it have become conjectures and the statutory basket, to which it appeared to be inexorably linked, has been emptied of its content, while access to the status of employee has been refused by the legislator. Other dominant forces, which are changing and brisk, are henceforth at work. These forces strive to throw off the constraints of labour law, by transforming yesterday's workers into collaborative persons or legal persons or by managing to create competition, in the same arena, between workers with different work statuses, while watching, with seeming Machiavellian intent, the gradual deterioration of working conditions[2] or,

[1] "The rise of finance capital and neo-liberalism has entailed an assault on every avenue for civilising capitalism — avenues that were the outcome of over two centuries of social dislocation and struggle." in Michael QUINLAN & Peter SHELDON, "The Enforcement of Minimum Labour Standards in an Era of Neo-liberal Globalisation: An Overview", (2011) 22 (2) *Economic and Labour Relations Review*, 5-32, p. 16.

[2] Many wage earners today are in employment situations where the degree of job insecurity is continually increasing. They form a group, a class, referred to as precarious workers, or even vulnerable workers, for

worse still, the continuous decline of wage earners. Ultimately, the picture is not rosy and the battlefield is vast.

Seeking to understand such a vast and complex phenomenon is beyond the scope of this article. Our aim, which is more modest, is to examine two phenomena that can illustrate the cause of the disintegration of the status of employee and the rising tide of inequality, which appears to be the law. Because "[c]ontrary to the dominant political imagery, which effaces the power of the state in structuring social life, the state has always intervened in social life through the design and enforcement of non-neutral, value-laden entitlements established by market-structuring background rules"[3]. "These insights raise the question of what role law and public policy play in causing socio-economic inequality. Implicit in this question is recognition of how law is implicated in the problem […]"[4]. First, we will explore the phenomenon of what we refer to as *interstatus competition* (I). This term refers to the competition created by the co-existence of several different work statuses for performing the same work. The causes and effects of this competition will be examined through two case studies: the delivery

whom neither existing legal instruments nor political will have pushed the legislator to intervene. In 2013, these forms of employment represented 37.5% of all jobs in Quebec and disproportionately affected women, immigrant workers and visible minority workers. They affect certain types of jobs, or certain industry sectors or geographical areas more than others. This precariousness is conceptualized as "social location," "categorization" or "social localization," a concept which demonstrates that precariousness does not strike randomly. Cynthia. J. CRANFORD & Leah F. VOSKO, "Conceptualizing Precarious Employment: Mapping Wage Work Across Social Location and Occupational Context," in L. F. VOSKO (ed.), *Precarious Employment: Understanding Labour Market Insecurity in Canada*, Montreal/Kingston, McGill-Queen's University Press, 2006, pp. 43-66. The statistics were drawn from: INSTITUT DE LA STATISTIQUE DU QUÉBEC (ISQ). 2014. *Emploi typique et atypique chez l'ensemble des travailleurs résultats selon le sexe pour diverses caractéristiques de la main-d'oeuvre et de l'emploi, Québec, Ontario et Canada*, Québec, Gouvernement du Québec. Data updated on June 17, 2014. Available at the following address: http://www.stat.gouv.qc.ca/statistiques/travail-remuneration/lien-statut-emploi/emploi_typique_atypique.html)

[3] Lucy A. WILLIAMS, "The Legal Construction of Poverty: Gender, 'Work' and the 'Social Contract'" (2011) 22 (3) *Stellenbosch Law Review*, 463-481, p. 469.

[4] Colleen SHEPPARD, "'Bread and Roses': Economic Justice and Constitutional Rights" (2015) 5 (1) *Oñati Socio-Legal Series*, 225-245, p. 230.

of childcare services and the interprovincial and international provision of road freight transport services.

Second, we will investigate the cause and effects on workers of *the competition between two distinct normative spheres (II).* In fact, many workers are employed in areas of activity governed by compulsory laws. These laws regulate their work for public health or safety considerations or for consumer protection. What is the impact of these rules on the enforcement of labour laws? Do they have an effect on the work status and working conditions of the workers concerned? These questions will be examined through two case studies involving: truck drivers and representatives of insurance products and financial services.

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I- Interstatus competition

This term refers to the competition created by the co-existence of several different work statuses for performing the same work within the same firm or group of firms or the same sector. We will examine the causes and effects of this competition through two case studies, namely the delivery of childcare services (A) and the provision of road freight transport (B).

A- Delivery of childcare services

The first case study sheds light on the interstatus competition introduced by legislation in the sector of educational services for 0-to-5 year-old children. We will first briefly review the historical and institutional context (1), and will then show how the State has been the architect of this competition between the different work statuses and discuss its impact on the legal framework applied to a group of workers (2).

1- Historical and institutional context

In 1997, the Government of Quebec established a new policy whose main purpose was to expand the national childcare network[5] and subsidize it, with a daily financial contribution from parents. The State sought to reinforce the sector's legal framework in order to counter the informal economy that was rampant therein and to increase the

[5] In 2010, approximately 6 out of 10 children attended daycare (36% in childcare centres; 24% in (non subsidized) daycare centres; 39% in family daycare).
http://www.mfa.gouv.qc.ca/fr/publication/Documents/Situation_des_CPE_et_des_garderies-2011.pdf

number of home childcare providers (RSGs).[6] While childcare centres (CPEs) provide educational childcare services in a facility, through the intermediary of a salaried workforce, RSGs provide these services in their private residences, as independent entrepreneurs. For the same service, these workers thus have a distinct work status, structured by law, although this has not always been the case.

In fact, until 2003, some RSGs were able to obtain the status of employee through a legal process in order to unionize. This legal qualification was far from being taken for granted given the impressive regulatory framework established by the Quebec Ministry of Family and Seniors which structured and controlled their work. For these workers to be able to obtain the status of employee and unionize, they had to demonstrate to the courts that, beyond the legislative and regulatory prescriptions[7] governing their work, there was a relationship of legal subordination. Many of these workers were successful in this endeavour and were recognized as unionized employees.

However, as of 2003, this wave of unionization was halted by the effect of a law adopted under closure[8] which, by legal presumption, imposed on them the status of entrepreneur. Thus, RSGs lost their union certification and the benefit of labour and social protection laws. They were determined to be independent entrepreneurs despite their prescribed roles and responsibilities with regard to children, parents and the institution that controlled their work.

In response, two complaints were filed with the Committee on Freedom of Association of the International Labour Organization. This Committee came to the conclusion that

[6]Today, there are 15 000 RSGs. Ministère de la Famille: http://www.mfa.gouv.qc.ca/fr/services-de-garde/rsg/garde-milieu-familial/Pages/garde-en-milieu-familial.aspx, consulted on December 9, 2014.
[7] What is referred to as administrative control, see *infra*, pp. 21-22.
[8] This exceptional legislative procedure allows the government to amend the rules relating to the adoption of a bill in the National Assembly. This measure is used to limit the time for debate in order to proceed more rapidly to the adoption of an often controversial or urgent bill.

there had been a violation of ILO Convention No. 87[9]: "[The situation in reality is that] existing certifications will be revoked through legislation which is contrary to the principles of freedom of association."[10] In 2008, the Superior Court of Quebec[11] declared this law unconstitutional and left it up to the legislator to draft a new law[12], which would establish the difference in status between RSGs and CPE workers. [13]

2- The legislator, architect of the competition between the different work statuses

The new legislation consecrated the RSGs' status as self-employed workers[14] while granting them an *ad hoc* representation and bargaining regime.[15] This regime does not provide the same guarantees as those provided for in the general regime set out in the *Labour Code*[16] and enjoyed by their counterparts, CPE workers.[17]

RSGs can negotiate within a recognized association or group of associations[18] with the Minister of Family and Seniors under the control of the Treasury Board. However, the

[9] Convention No. 87 on Freedom of Association and Protection of the Right to Organise, 9 July 1948, 68 R.T.N.U. 17; ratified in 1972 by Canada.
[10] International Labour Office, Committee on Freedom of Association Report, *Cases Nos. 2314 and 2333, Complaints against the Government of Canada concerning the Province of Quebec*, Geneva, International Labour Organization, GB. 295/8/1, 2006, § 373-432; § 425.
[11] *CSN* c. *Québec (Procureur général)*, C.S. Montréal, n°500-17-019415-044, 31 October 2008.
[12] Urwana COIQUAUD, «La représentation des travailleurs précaires: évolution et défis contemporains», (2011) 66 (4) *Relations industrielles/Industrial Relations*, 631-654, pp. 640-644.
[13] An *Act Respecting the Representation of Certain Home Childcare Providers and the Negotiation Process for their Group Agreements*, CQLR, c. R-24.0.1, (hereafter: "HCPRA").
[14] Pursuant to the *Educational Childcare Act*, the home childcare provider is a natural person "who is an own-account self-employed worker who contracts with parents to provide childcare in a private residence, in return for payment (...)" (s. 52).
[15] s. 61 HCPRA.
[16] CQLR, c. C-27.
[17] For more details on this process, see: Michel COUTU, Laurence-Léa FONTAINE, Georges MARCEAU and Urwana COIQUAUD, *Droit des rapports collectifs au Québec, Vol. 2 – Les régimes particuliers*, Cowansville, Les Éditions Yvon Blais, 2014, pp. 338-370.
[18] s. 30 par. 2 HCPRA.

object of the negotiation does not involve all working conditions as set out in the *Labour Code* (s. 62). First, excluded from the negotiation[19] are all the rules and standards stemming from the *Educational Childcare Act* and its regulations as well as the service agreement that binds the parent to the childcare provider. The onus is thus on the RSG to negotiate, on her own, the core services that she will provide to parents. Second, removed from the scope of negotiation is the vast series of standards that directly affect RSGs' working conditions as stated in the *Educational Childcare Act* and its regulations and which are part of what is referred to as "administrative control."[20] Yet, each of these standards affects, sometimes significantly, the daily work of RSGs. This leaves a meagre set of issues on which negotiations can be undertaken. These issues include negotiating the subsidy granted by the Ministry to the RSG. However, since RSGs are designated as self-employed workers, they are in principle excluded from the benefit of the public social and protection laws[21] enjoyed by employees. They have to try, through negotiation and according to the guidelines of the law, to regain the many rights that in Quebec[22] make up the social safety net covering all employees, while seeking to exchange these rights for a more generous subsidy.

The case of RSGs illustrates how the government resorted to legislative tinkering by hybridizing and constructing an *ad hoc* regime of collective relations whose aim was to evade the monetary impact that recognizing a status of employee would represent. A substantial portion of labour rights and social rights were removed from the working conditions of RSGs. These diverse statuses, which the government itself constructed,

[19] s. 31 HCPRA.

[20] *Infra.*

[21] This refers to the substantive law provided for, in particular, in the *Act respecting labour standards*, CQLR c. N-1.1.

[22] Such as various types of leave that could "be modelled on" those provided for in the *Act respecting labour standards* (s. 31 (2) HCPRA).

have further deteriorated the working conditions in this sector, divided a community of workers and artificially created a form of interstatus competition that benefits the government, allowing it to make the most of this division. Similarly, let us now consider a case in the road freight industry.

B- Interprovincial and international road freight transport services[23]

In 1987, the interprovincial and international freight transport industry was deregulated (1). Since then, corporate structures have become more complex (2) and different forms of employment have proliferated (3). These latter two phenomena combined have inevitably led to the deterioration of working conditions among truck drivers due, in particular, to the competition that has emerged between the different forms of employment.

1- The regulatory context behind this phenomenon

In the 1980s, Canada adopted the neoliberal doctrine. The country thus undertook to liberalize trade pursuant to various agreements.[24] The transportation sector was no

[23] These developments were examined in a research project entitled *L'obligation de disponibilité du salarié : une nouvelle source de précarité ou de flexibilité*, financially supported by the Social Sciences and Humanities Research Council of Canada (SSHRC, 2010-2015) (G. Vallée, lead researcher; S. Bernstein, U. Coiquaud, L.-L. Fontaine, É. Genin, L. Morissette, and L. Boivin, co-researchers; D. Gesuladi-Fecteau, N. Martel, scientific collaborators from Canada, where this research was based. The research was conducted in the federal transportation sector in spring 2014 and 38 people (drivers, union leaders, company managers) were interviewed using a semi-structured questionnaire. It was within the framework of this project that Marjorie Banville completed her dissertation (Marjorie BANVILLE, *L'obligation de disponibilité des camionneurs syndiqués sous juridiction fédérale canadienne*, Master's dissertation, Montréal, HEC Montréal, 184 pages).

[24] In the 1980s, the Conservative Government of Brian Mulroney negotiated a free-trade agreement with the United States. This agreement, concluded in 1989, was subsequently extended to include Mexico,

exception. As of 1987,[25] Amendments to the Motor Vehicle Transport Act made "the exercise of provincial regulation (licensing) of extra-provincial trucking conditional on the application of federally prescribed fitness (safety and insurance) standards, and the elimination of most economic controls."[26] The regulatory restrictions on entry and minimum rates were thus eliminated. The face of this industry was profoundly changed[27]: "Whereas it had tended to "[be organized] in the form of family companies employing salaried truck drivers" (trans.)[28] [the trucking industry] turned into a real jungle where carriers," who are ever more numerous, now fiercely compete with each other," (trans.)[29] as evidenced by the comments we collected in the field:

> "The provider has so many offers, he can be very independent. He says, look, are you going to give me that price, no?, well look, move over, I'm going to take someone else. (…). Because companies go with the driver who makes the best offer or is the cheapest." [S11; trans.] "And there will always be somebody who comes along who needs the money and will take a lower rate to get some cash, even if it means a loss for him." [CS14; trans.]

This stiff competition in the trucking industry pushed industry actors to invent complex legal and financial arrangements that would provide companies with the agility and resistance needed to survive. As a result, another form of competition was intensified by the new opportunities that these arrangements created.

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thus creating the North American Free Trade Agreement (NAFTA) in 1994. Several bilateral free-trade agreements concluded with other countries subsequently followed.

[25] *Motor Vehicle Transport Act*, R.S.C. (1985), ch. 29 (3rd Suppl.).

[26] David JOHANSEN, *Bill C-77: An Act to Amend the Motor Vehicle Transport Act, 1987 and to Make Consequential Amendments to Other Acts*, Law and Government Division, Ottawa, 31 May 1999, LS341 E, (our underlining), available at the following address: http://publications.gc.ca/Collection-R/LoPBdP/LS/361/c77-e.htm

[27] Joseph, MONTEIRO, "Trucking Transportation in Canada Before and After Deregulation – Major Trends," (2011), paper presented at the Canadian Transportation Research Forum 46th Annual Conference, Gatineau, 29 May to 1 June.

[28] Stéphanie BERNSTEIN, Urwana COIQUAUD, Marie-Josée DUPUIS, Laurence Léa FONTAINE, Lucie MORISSETTE, Esther PAQUET and Guylaine VALLÉE, "Les transformations des relations d'emploi : une sécurité compromise ?," (2009) 6 (1) *Regards sur le travail*, 19-29, p. 26.

[29] Marjorie BANVILLE, L'obligation de disponibilité des camionneurs syndiqués sous juridiction fédérale canadienne, Master's dissertation, Montréal, HEC Montréal, 184 pages, p. 3.

2- Development of sophisticated corporate structures

This transformation coincided with the development of a supply method called "just in time."[30] Deregulation combined with the implementation of this method prompted trucking companies to introduce new models of service production focused on flexible corporate structures and labour flexibility.

This structural flexibility had two goals: first, to create an "agile" corporate structure capable of responding to fluctuating demand. The major carriers restructured into holding companies through which the company's financial value was harnessed and into a series of organizations, with one taking charge of administration, another dealing with logistics, and another leasing equipment or drivers (an employment agency). In addition, there were divisions that were, strictly speaking, in charge of transport services, each with their own specificity and, if applicable, covered by distinct collective agreements:

> "They're mostly companies that have been acquired over the years and that we've decided not to integrate yet. There are some that we might integrate because they're big, except that having x number of collective agreements will reduce the power relationship. Even if we have a problem with one of the agreements, they've all been set up so that they don't expire on the same dates, so we negotiate something like one per year. If one group poses a problem, say it decides to go on strike or is in lock-out, this will allow us to keep the rest of the company running. Because if there's a big central union and they go on strike, the company will go under – in less than six months, the company would be dead. There's so little profitability in transport." [T22; trans.]

Thus, a veritable network of "partners" was created, allowing the company to deal with the peaks in business with its partners without having to hire extra staff.[31] But that was

[30] "Just-in-time production management is a strategy that consists in coordinating the production system based on orders rather than inventories, and producing or purchasing just the necessary quantity precisely when it is needed, at each step in the process" (trans.).
http://www.oqlf.gouv.qc.ca/ressources/bibliotheque/dictionnaires/terminologie_logistique

[31] Pierre VERGE, "Les instruments d'une recomposition de droit du travail : de l'entreprise-réseau au pluralisme juridique," (2011) 52 (2) *Cahiers de droit* 135-166, p. 139.

not all. The second goal of the quest for structural flexibility was to shelter the company's assets through sophisticated and complex legal and financial arrangements.

> "Basically, what we do is try to isolate our assets, so that if we have problems with other operating companies, our assets will not be affected. So if we're sued or anything like that, the operating companies, where our workforce is, are a bit like empty shells. Those companies are worthless. Everything that has value is grouped together in a holding company and a company with rolling stock." [T22; trans.]

In addition to this structural agility, flexibility was acquired in the management of the available workforce, within a "set of production units organized into a network,"[32] wherein a clever game of risk transfer and asset protection is played out.

3- Available forms of employment, generating interstatus competition

To perform their transport mission, the companies created networks. They used salaried employment, certainly, but they also resorted to other available forms of employment that competed with it. Most often, this involved transferring to another company the risks related to fluctuations and uncertainties in demand without necessarily remunerating this risk. These forms of employment will be briefly presented in turn and their impact on the enforcement of labour law will be examined.

Owner-operators[33] are highly involved in the trucking industry. They work directly for a carrier and possess their own tractors, but use the carrier's trailers. Although they act as independent contractors, they nevertheless have all the characteristics of dependent

[32] *Id.*, p. 139.
[33] They are also called brokers.

contractors, since they are integrated into the union structure (where applicable) and are entitled to a share of allocated trips.[34]

Many of the carriers interviewed considered that it was to their advantage to do business with owner-operators because this allowed them to reduce their own financial burden (e.g. maintenance and repair of vehicles, responsibility for workers' social welfare), and undermine the workers' capacity to organize collectively:

> "Because for me, those x number of trucks, I don't have to take care of them. It's their responsibility. The trailers belong to me. But the trucks don't, and look, I've got enough on my hands as it is. And at the same time, it challenges the drivers here a bit." [T8; trans.]

Field accounts, moreover, revealed that these owner-operators or even some carriers sometimes hire a "Driver Inc." to make some trips.

This driver becomes incorporated and benefits from the tax advantages associated with this status, but does not own a tractor. His company offers his personal service (driving a truck), mainly to owner-operators and carriers. Evidently, this form of employment transfers the entire professional, fiscal and social responsibility to the "Driver Inc."

> In the end, those guys, the company, instead of hiring employees, and paying, you know, all the benefits that a good employer should pay, says to them, I'll give you x amount an hour, but you organize and plan everything. […] I'm no expert, but I don't think that's legal, because, if you have employees, you should pay, but nobody is paying the contributions to the RRQ, employment-insurance, or the CSST. That's why it borders on illegality, and at the same time, collectively, I think we aren't making the right choices. Because when those people get hurt, they'll get into the system, and collectively, it's all of us who are going to pay for that." [T19; trans.]

[34] Remuneration is generally not specified in the collective agreement, since it is the subject of an individual work contract, which is kept "secret" [S29; trans.]: "On the other hand, what's quite funny is that the remuneration of drivers is not specified clearly in the Annex. It is said that it is linked with the contract that binds (X) with the client." [CS18; trans.]

Others go through employment agencies to recruit drivers. However, unlike in many countries, Quebec has no legislation that regulates employment agencies.[35] One study has shown the kind of institutional and regulatory tinkering to which some agencies have resorted in order to avoid paying drivers' overtime.[36] Our field accounts cited this circumventing of the law in no uncertain terms:

> "So frankly, the idea that they comply with the legislation on working time is just crap, there's is no other word for it." [C9; trans.]

Moreover, many respondents said that employment agencies are detrimental to the industry because, due to their role as intermediaries, they create a downward pressure on drivers' wages:

> "The agency guys, put a huge downward pressure on prices. Because the agency guy, for him, yes, you're the driver, but the agency is looking for a cut. So if the guy gets $20 an hour, he won't give $20 an hour to his driver, because he wants a cut. He might give him $17 and take the rest himself. For sure, that doesn't help." [C15; trans.]

Lastly, encouraged by several federal programs, hiring migrant and immigrant workers[37] is the last avenue among the various forms of employment available to companies.

> "And increasingly, companies bring in immigrants. The immigrants are glad to be in the country, they may not even have their papers yet. They're not even… So, they give in. They're nice, they're all smiles. (…). They come here to get their citizenship, so they'll take anything. So

[35] Marie-France BICH, "De quelques idées imparfaites et tortueuses sur l'intermédiation du travail," in Service de la formation permanente, Barreau du Québec, *Développements récents en droit du travail*, Vol. 153, Cowansville, Les Éditions Yvon Blais, 2001, pp. 257-337; Jean BERNIER, "La location de personnel temporaire au Québec : un état de situation" (2012) 67 (2) *Relations Industrielles/Industrial Relations*, 283-303, pp. 286-289.

[36] Veronique DE TONNANCOUR & Guylaine VALLÉE, "Les relations de travail tripartite de l'application des normes minimales de travail au Québec," (2009) 64 (3) *Relations industrielles/Industrial Relations* 399-441, pp. 406-410.

[37] In particular, the Temporary Foreign Worker Program – Lower Skilled (TFWP-LS) See: http://www.esdc.gc.ca/eng/jobs/foreign_workers/index.shtml

> that affects the market too. I know that companies have to deal with that, but there is incredible profit to be made." [C10; trans.]
> "It's not really the individuals that hurt us, it's the transport companies that hire immigrants." [D2; trans.]

In general, the interface between the provisions on temporary migrant workers and employment law rules gives rise to thorny situations, which often compromise the effectiveness of the rights of temporary migrant workers,[38] but favour those who resort to them.

To sum up, the highly competitive environment in which transport companies operate forces them to integrate these diverse forms of corporate organization and employment into their business model. These forms act as safe-conducts for the company.

> "(…) often the employer realizes that there's a unionization movement underfoot, and suddenly all sorts of tactics appear, layoffs, decreasing the number of trips made by employees, bringing in agencies, including owner-operators in the operations, and then, at some point, you have no more recourse. You might have membership cards, and when you file an application for union certification, when the survey and vote on membership happen – if we manage to get a certain percentage, there might be vote – well those people no longer work here, the employer no longer recognizes them as employees, sometimes they have corporate structures." [D1; trans.]

The above examples have shed light on the role of law in creating interstatus competition. Although the types of legislative intervention differ, they nevertheless have one thing in common in that they create multiple work statuses and thus challenge the status of employee. Interstatus competition is a strong driver designed to facilitate commercial objectives such as competition and efficiency but is poorly designed to protect lo protect labour standards and union input. The second phenomenon to be

[38] For example, like citizens, migrant workers contribute to various public programs (employment-insurance, Quebec Pension Board, Quebec Parental Insurance Plan), but only very few will ever be able to benefit from these programs, either because they are not aware that they can do so, or because the implementation of these programs comes up against the constraints related to their status. In this respect, see the exhaustive study conducted by Marie CARPENTIER, *La discrimination systémique à l'égard des travailleuses et travailleurs migrants*, Cat. 2.120-7.29, Direction de la recherche, de l'éducation-coopération et des communications, CDPDJ, Montréal, 2011, 98 p., pp. 59-67 and 76-80.

presented relates to the increasingly frequent competition between labour law and another normative order.

II- Competition between two normative spheres

Many workers are employed in areas of activity governed by compulsory laws that do not exclusively fall under the Ministry of Labour, but come under other ministries such as the Ministry of Transport or Finance. These laws regulate their work for public safety or public protection considerations. Thus, how do the different normative orders cohabit with each other? Is there an impact on the enforcement of labour law and on the work status and working conditions of the employees concerned? These questions will be examined through two case studies involving: representatives of insurance products and financial services (B) and truck drivers (A).

A- Regulating hours of work: social protection or public safety?

Our research on working time in the trucking industry[39] incidentally brought to light how labour law is subordinate to public safety considerations. We will first present the regulatory framework for truck drivers' hours of work (1) and then examine its effect on their working conditions (2).

[39] *Supra*, note 23.

1- Regulating the hours of work of drivers in the freight transport industry: a responsibility of the Ministry of Transport

In 1987, when the wave of deregulation swept over the industry, the Ministry of Transport adopted a framework regulating the length of the workweek and hours of service for truck drivers.[40] These provisions set the number of hours of a workweek for "highway" drivers at 60 hours (s. 6 of MVOHWR) with a maximum of 70 hours (s. 26 of CVDHSR), and 45 hours for "city" drivers[41] whereas the standard workweek set out in the CLC is 40 hours, with a maximum of 48 hours.[42]

Unlike a highway driver who travels long distances, according to the regulations, a city driver operates within "a 10-mile radius of his home terminal." In reality, however, this distinction is not applied. Rather, it is the industry which, since 2006, set its criteria using a survey administered by Employment and Social Development Canada[43] for "Ascertaining a Prevailing Industry Practice in a Geographical Area." Unfortunately, this practice has not yielded satisfactory results:

> "it's the employer who provides what he wants to as far as documents and answers go, and today they know how the system works, so they give the answers accordingly to make the perimeter as small as possible" [S35; trans.].

This practice is utterly "nonsensical",[44] because it leaves it up to the discretion of the industry to establish its differentiating criterion, which creates perverse effects:

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[40] The *Motor Vehicle Transport Act, 1987* was amended by the *Act to Amend the Motor Vehicle Transport Act, 1987* and other acts, S.C. 2001, ch. 13, the *Motor Vehicle Operators Hours of Work Regulations*, C.R.C., c. 990, hereafter "MVOHWR," and the *Commercial Vehicle Drivers Hours of Service Regulations*, DORS/2005-313, hereafter: "CVDHSR.".

[41](hereafter: "ESDC") http://www.travail.gc.ca/fra/normes_equite/nt/pubs_nt/duree_routier.shtml p. 52

[42] Part III of *Canada Labour Code*, R.S.C. 1985, Ch. L-2 (hereafter: "CLC"), s. 169(1) and 171(1).

[43] http://www.labour.gc.ca/eng/resources/ipg/071/page00.shtml

[44] Marjorie BANVILLE, *L'obligation de disponibilité des camionneurs syndiqués sous juridiction fédérale canadienne*, Master's Dissertation, Montréal, HEC Montréal, 184 pages, p. 133.

> "There are many, many truckers who are just on mileage now. (…). They [the carriers] eliminate their local drivers, and short-haul trucking is done by people who are paid by the mile. It's very disadvantageous for the driver." [C10; trans.]

In fact, the city driver who is unjustly classified as a highway driver will have to forgo additional compensation for his overtime since the standard workweek is 60 hours instead of 45 hours for the city driver. He will also have to forgo being paid on the basis of the number of hours worked because highway drivers are paid on a fee basis, based on the number of kilometres travelled.[45] Lastly, he will have to absorb "unproductive" working time, that is, time during which the highway driver "does not burn" kilometres and is consequently not paid or, at best, is paid, but at a flat rate and therefore only partially:

> "In our company, even drivers who do short-haul trucking are paid by the mile all the same. So the guy who does Quebec City-Montreal, Montreal-Quebec City, Quebec City-Montreal doesn't get a lot of mileage, and on top of that he's paid less. Because, we get extras for going through customs, and things like that. But drivers who do short-haul trucking in our company, for sure they don't make a lot of money. (…). 'Cause, if you get stuck for four hours crossing the bridge into Montreal, and you've only driven four miles, well, you'll only be paid for four miles." (trans.)

This unproductive time is made up of driving time that is slowed down by roadwork, traffic congestion and, especially, waiting time (going through customs, pick-up and delivery at clients, vehicle inspection or filling out administrative paperwork). It constitutes the main source of complaint among drivers.

[45] Garland CHOW, *Enjeux liés aux normes du travail dans l'industrie canadienne interprovinciale du camionnage, présenté à la Commission sur les normes du travail fédérales*, Vancouver, Sauder School of Business, 2006, 258 p., p. 87.

2- Powerless labour law

Since downtime[46] is an endemic problem in the industry and the distinction between drivers is made according to the industry's whims, these two facts combined have seriously deteriorated the working conditions of truck drivers. In fact, their working conditions have deteriorated to the point where it must be asked whether the public safety goals put forward to justify the Ministry of Transport displacing the Ministry of Labour in a regulatory field that normally falls under the latter's expertise have been achieved.

Many truck drivers affirmed that they regularly work 70 hours or more per week because many periods are unpaid:

> "it's always the downtime that you lose… " [CS34; trans.]; "It doesn't make any sense. If the driver wants to earn a decent wage, I'm telling you, he has to put in 100 hours a week! Otherwise, he won't earn anything." [T17; trans.], "Listen, normally we have the right to log 70 hours of service, but we spend 100 hours in the truck. 100 hours on your butt in the truck. Divide your weekly wages by 100 hours, there's nobody who wants to do that." [CS14; trans.]

These long hours of work inevitably have an effect on the drivers' rest time,[47] quality of life[48] and safety as well as on road safety:

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[46] For more details on this concept, see Guylaine VALLÉE, "Les nouvelles formes d'emploi et le brouillage de la frontière entre la vie de travail et la vie privée : jusqu'où va l'obligation de disponibilité des salariés ?" (2010) 15 (2) *Lex Electronica*, 1-34, pp. 11-15.

[47] "You sleep when you can." [C12; trans.]

[48] "We put in a crazy number of hours. We work 70 hours a week, especially those who drive long haul. They work 70 hours. We have two days' off. Two days off at home, and then you leave again. The driver, myself when I was on the road, I was off for two days. I put in my 70 hours. I came back, for a two-day break. You get back home, you have your family life. You need to do the groceries, wash your clothes, prepare your lunches for the week because you don't want to eat in restaurants because it's too expensive, you want to spend a bit of time with the children, and your wife, you want to go out, and then you wake up and it's already Monday morning and you have to leave again. Where did your weekend go? You didn't have it." [C15; trans.]. On this subject, see also:
Judy FUDGE, *Control Over Working Time and Work-Life Balance: A Detailed Analysis of the Canada Labour Code, Part III*, Report prepared as part of the federal labour standards review, Toronto, York University, 2006, 227 p., p. 95; Harry W. ARTHURS, *Fairness at Work – Federal Labour Standards for*

> "That's another thing I didn't understand when they came out with the regulation. It used to be 60 hours a week. They put out a regulation, and instead of 60 hours, they make it 70. It seems to me that when a guy has put in 60 hours a week, don't create the possibility of giving him 70 hours. 'Cause, he's tired, really wiped. And they talk about fatal accidents, flipping over, trucks driving into… " [T17; trans.].
>
> "When you've done 60 hours, that's enough, go home. You need to recharge your batteries. And it's a question of road safety." [C10; trans.]

In 2011, the ILO reaffirmed that "regularly working more than 48 hours per week is associated with a range of safety and health risks as well as (…) increased reported work-family interference."[49] How is it conceivable that Canadian regulations contain provisions that allow up to 70 hours of work per week in the case of truck drivers? Long hours of work, lack of sleep and fatigue are real problems and jeopardize the safety of drivers as well as public safety. In general, truck drivers who "work nonstop" and "run on pills and all that so that they can drive" [T22; trans.] are dangerous on the road: "It's dangerous. You're no longer alert. For sure, you're not alert anymore. It's dangerous." [T8; trans.]

If the main purpose of the regulations is to promote public safety, why was the Ministry of Labour set aside? On this subject, Harry Arthurs, commissioned by the federal Minister of Labour to review Part III of the *Canada Labour Code* stated plainly that:

> "Transport Canada is primarily concerned with ensuring the safety and convenience of the traveling public and the efficient operation of transportation systems, rather than fair working time norms for workers. This is understandable, given its mandate and expertise. However, the result is that road transportation workers are not governed by maximum hours regulations deemed appropriate by the one agency – the Labour Program – that has expertise in establishing and implementing labour standards." [50]

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the 21st Century, No. LT-182-10-06F, Gatineau, Employment and Social Development Canada (ESDC), 2006, p. 77. http://www.travail.gc.ca/fra/normes_equite/nt/pubs_nt/ntf/pdf/rapport.pdf.

[49] INTERNATIONAL LABOUR ORGANIZATION (ILO), *Working time in the 21st century*: Report submitted for discussion at the Tripartite Meeting of Experts on Working-time Arrangements, Geneva, 17-21 October 2011 / International Labour Office/ Sectoral Activities Programme, Geneva, ILO, 2011, p. 29, pp. 37-41.

[50] Harry ARTHURS, *Fairness at Work: Federal Labour Standards for the 21st Century*, Ottawa, Ont.: Federal Labour Standards Review Commission (Canada), 2006, 319 p., pp. 76-77.

And he added:

> "These regulations permit maximum driving times well in excess of 48 hours per week. […] the purpose of this regulation is to promote the safety of truckers and other highway users – a subject on which Transport Canada is well informed and one on which it has the mandate to act. However, Transport Canada is not necessarily knowledgeable about workers' needs regarding work-life balance, the cumulative health impact of long hours of work and other matters that labour standards regulators must take into account. That is why I recommend in Chapter 4 that the labour standards of transport drivers – and all other employees within federal jurisdiction – should be regulated under Part III rather than under some other statute." [51]

Despite the deterioration of working conditions among truck drivers and the considerable labour shortage,[52] which is, moreover, related to their poor working conditions, the government has not taken action. Labour law has remained powerless to reintroduce the reasonable guidelines concerning working hours which would not only allow the sector to comply with the international commitments which Canada has signed,[53] but also ensure full and complete coherence among Canada's own government policies. In fact, the intervention of the Ministry of Transport in a field that does not fall under its expertise cannot be justified, especially when its uninformed actions have undermined the very mission of this Ministry, namely public safety. This inconsistency is untenable.

[51] *Id.*, p. 147.

[52] A shortage of 25 000 to 33 000 truck drivers by 2020 is predicted in Canada, in The CONFERENCE BOARD of CANADA (CBC) (2013). *Understanding the Truck Driver Supply and Demand Gap and Its Implications for the Canadian Economy*, Ottawa, 46 p., p. 16.

[53] INTERNATIONAL LABOUR ORGANIZATION, *Hours of Work (Industry) Convention, 1919 (No.1).* Moreover, the ILO recognizes the singular nature of the profession, since, in Article 6(1) of the *Convention (No. 153) concerning Hours of Work and Rest Periods in Road Transport*, it sets the maximum total driving time at 48 hours per week and nine hours per day. INTERNATIONAL LABOUR ORGANIZATION, *Measurement of Decent Work: Tripartite Meeting of Experts on the Measurement of Decent Work, discussion paper*, Geneva, 8-10 September 2008 (TMEMDW/2008)/International Labour Organization. Geneva: ILO, 2008, iii-iv, 66 pp., p. 9.

As regards the mission of the Ministry of Labour,[54] given the dangers inherent in long hours of work and to ensure coherence among public policies, perhaps it is necessary to consider means of cooperation between these ministries or, better still, to repatriate this regulatory jurisdiction to the Ministry of Labour. Our last case will illustrate the effects of the existence of two normative orders on the work status of representatives of financial products and services.

B- Representation of financial and insurance products: consumer or employee protection?

Access to unionization or minimum labour standards is achieved through the status of employee, which is sometimes very hard to acquire. A typically cited explanation for the difficulty some workers have acquiring the status of employee is the hybrid nature of the terms and conditions under which they work.[55] Another reason, less often cited,

[54] "The Labour Program is responsible for overseeing federal labour regulatory responsibilities, including facilitating compliance with occupational health and safety, labour standards and employment equity legislation, as well as assisting trade unions and employers in the negotiation of collective agreements and their renewal in federally regulated workplaces. The Labour Program also represents Canada in international labour organizations and negotiates and implements labour provisions in the context of trade liberalization initiatives." in Employment and Social Development Canada, *Report on Plans and Priorities*, Ottawa, 2014, 90 pages, p. 6. Available at the following address: http://www.esdc.gc.ca/eng/publications/rpp/2014_2015/section1.shtml (our underlining).

[55] For a detailed study of methods of conceptualizing legal subordination, see Rodrigue BLOUIN, "La C.R.T., le concept de salarié et les nouvelles réalités d'exécution du travail subordonné," *Développements récents en droit du travail*, Volume 190, Service de la formation permanente du Barreau du Québec, Cowansville, Les Éditions Yvon Blais, 2003, p. 145ff. See, in particular, the analysis of five indicators revealing an employer-employee relationship: technical, administrative, economic, human resources and strategic indicators. In their treatise, authors Y. BERNARD, A. SASSEVILLE and B. CLICHE, *Robert P. Gagnon Le droit du travail du Québec*, 6e éd., Les Éditions Yvon Blais, Cowansville, 2008, p. 145, explain the concept of a "dependent contractor" which appears in several labour laws in Quebec: "a person working under a framework established by his client, who provides the necessary material elements for this purpose and who keeps as remuneration the difference between the costs incurred in this way and the amount specified in the contract. The degree of control exercised by the client thus becomes the determining factor in distinguishing between a dependent contractor and an independent contractor, to whom the Law remains inapplicable." (trans.) (our underlining).

is the role of law in this exclusion through what is commonly referred to as "administrative control." This term refers to an employment relationship described by law, and sometimes its related regulations, which imposes on one of the parties the role of controlling the work of the other party. It is different from the relationship of legal subordination because it is imposed by law. The question is whether administrative control, namely that described and imposed by legislation, supports the argument that workers are subject to the relationship of legal subordination. Before answering this question through an analysis of laws (2) we will examine the administrative control experienced by the representatives of financial products and services[56] (1).

1- Administrative control

The firms and representatives involved in this study were subject to the *Autorité des marchés financiers* (Financial Market Authority)[57] and governed by the *Act respecting the distribution of financial products and services*[58] as well as two sets of regulations that form a public protection system. The first, *Regulations respecting firms, independent representatives and independent partnerships*[59] lays down strict rules on keeping client records, advertising and representations, while the second, the

[56] Hereafter referred to as "representatives."

[57] The mission of the Autorité des marchés financiers, hereafter referred to as the "Authority" is to:

> " (…) 2° ensure that the financial institutions and other regulated entities of the financial sector comply with the solvency standards applicable to them as well as with the obligations imposed on them by law with a view to protecting the interests of consumers of financial products and services, and take any measure provided by law for those purposes;
>
> 3° supervise the activities connected with the distribution of financial products and services, administer the rules governing eligibility for and the carrying on of those activities, and take any measure provided by law for those purposes;" s. 4 *An Act Respecting the Autorité des Marchés Financiers*, C.Q.L.R., c. A-33.2.

[58] R.S.Q., c. D-9.2, hereafter referred to as "ADFPS".

[59] c. D-9.2, r. 2.

Regulation respecting the pursuit of activities as a representative[60] governs the activities of representatives, and specifies their duties and obligations as such.

This regulatory framework, for example, requires the firm to ensure that the representative pursues activities only if he/she is acting for a firm and is registered as an independent representative or is a partner in or employee of a single independent partnership.[61] Representatives, for their part, in addition to being honest and loyal in their dealings with clients, must also be competent and professional.[62] They must disclose all the information they gather on clients to the establishment to which they are attached.[63] The firm oversees the conduct of the representatives and ensures, in particular, that they respect the list of occupations incompatible with the activities of a representative, devote themselves mainly to pursuing their activities,[64] and have the required professional registrations on their business cards, as well as information on the products offered.[65] Does this administrative control, namely that described and imposed by regulation, support the argument that representatives are subject to the relationship of legal subordination?

[60] c. D-9.2, r.10.
[61] s. 14 ADFPS.
[62] s. 16 ADFPS.
[63] s. 23 ADFPS.
[64] Moreover, since 2010, the AMF has required a minimum of 28 hours of work per week for representatives during the first three months.
[65] s. 85 and s. 86 ADFPS.

2- Administrative control and its impact on recognizing the status of employee

Case law's answer to this question is no.[66] Although a "certain" relationship of subordination exists, linked with the public legislative framework regarding management and public protection applicable to the financial products distribution sector, this control does "not necessarily or '*undeniably'* constitute legal subordination as generally understood in the context of an employer-employee relationship."[67] As pointed out by the courts, the notion of "legal subordination" must not be confused with the notion of "subordination to the regulatory mechanisms for public protection" [68] (trans.). "It is necessary to identify other elements of control in addition to the legal obligations imposed on the employer as part of various regulatory mechanisms for public protection."[69] Yet, "[the] fact of being linked with a single customer that imposes a number of duties or obligations regarding standards of service quality, sets the product's price or dictates certain advertising standards, does not necessarily mean that there is legal subordination. On the contrary, legal subordination includes economic

[66] From the analysis of case law, fewer than ten decisions were rendered on this question, in particular: *Lamontagne* c. *Distribution financière Sun Life (Canada) inc*, 2011 QCCRT 277, application for judicial review rejected (C.S., 2011-11-08 (judgment revised on 2011-11-08)), 400-17-002377-113, 2011 QCCS 6802, SOQUIJ AZ-50815086. Application for leave to appeal rejected, 2012 QCCA 37, SOQUIJ AZ-50820082. *Blackburn c. Industrielle Alliance, assurance et services financiers inc.*, 2014 QCCRT 737. Two decisions concluded differently: *Couture* c. *Les Services Investors,* [2000] R.J.D.T. 1730, AZ-50081153, Application for judicial review rejected (C.S., 2001-02-22), SOQUIJ AZ-50083966, D.T.E. 2001T-265; *Commission des normes du travail* c. *Combined Insurance Company of America*, 2008 QCCQ 7107, AZ-50509228, Application for wages and compensation claim ($1081) under the *Act respecting labour standards* (LSA). Allowed; Application for leave to appeal allowed C.A., AZ-50517164, Appeal abandoned.

[67] *9095-3532 Québec inc. (La Capitale Saguenay—Lac-St-Jean)* c. *Daigle*, 2010 QCCS 6066, par. 35 cited with approval in *Blackburn* c. *Industrielle Alliance, assurance et services financiers inc.*, 2014 QCCRT 737, par. 128.

[68] For an analogy with real estate agents*: 9095-3532 Québec inc. (La Capitale Saguenay—Lac-St-Jean)* c. *Daigle,* 2010 QCCS 6066, SOQUIJ AZ-50698776, D.T.E. 2011T-16 (23 pages); Application for judicial review allowed, *9095-3532 Québec inc. (La Capitale Saguenay--Lac-St-Jean)* c. *Daigle*, AZ-50698776; Application for leave to appeal rejected, AZ-50714314.

[69] *Blackburn* c. *Industrielle Alliance, assurance et services financiers inc.*, 2014 QCCRT 737, par. 127.

dependence"[70] (trans.). "[…] contrary to what the [representative] claims, the fact that he cannot offer customers products other than the range of products at Investors and those of its partners, does not demonstrate that legal subordination exists. The same is true of the price of products and the commission rates set by Investors"[71] (trans.). Although these elements can constitute a form of economic dependence, they do not, on their own, constitute the legal subordination inherent to the status of employee.

The analysis of this case reveals, first, the legislator's intention to emphasize the coexistence of different work statuses despite the administrative control it establishes. The courts note in this respect that the freedom to choose between "*being in the employment of"* (as an employee) and being "*authorized to act for"*[72] (as a self-employed worker) opens up two different types of work status which are perfectly compatible with the legislation. Second, given the minute detail in which this profession is regulated by law, the legal sources of this control are removed from the factual analysis for the purposes of recognizing the status of employee. Although the developing case law is somewhat rigid in the way it evaluates the work of representatives, as salaried employment, the status of employee continues to be available. However, the legislator's intervention removes and neutralizes from the legal arena the employer's characteristics when it comes to analyzing them in order to determine the legal nature of the contract. The control exercised by "the employer" is nevertheless experienced as control by the person who is subjected to it. The courts'

[70] *Paquin* c. S*ervices financiers Groupe Investors inc*., 2010 QCCRT 589, par. 16 and repeated with approval in the case. *Blackburn* c. *Industrielle Alliance, assurance et services financiers inc.*, 2014 QCCRT 737, par. 123.
[71] *Id.*, par. 126.
[72] According to the terminology used in: *9095-3532 Québec inc. (La Capitale Saguenay—Lac-St-Jean)* c. *Daigle*, 2010 QCCS 6066.

analysis certainly exposes itself to criticism. In fact, the courts appear to completely disregard "the self-employed worker's contribution" to the common organizational objective, retaining only a highly individualistic vision[73] of this person's work. On the other hand, the fact that the origin of this control is treated differently according to whether or not it is imposed by law gives rise to questions when, through its action, the law weakens the socio-economic situation of these workers. This demonstrates once again that the narratives relating to the roles of labour law have lost ground to other narratives, promoted by a quasi-invisible hand, the vehicle of which is the law. The outcome of this policy-driven law is motivated by the desire to undermine the social gains and call into question the roles of labour law.

Conclusion

Collective autonomy,[74] and later state intervention led to the establishment of contemporary labour law in Quebec and Canada. Although different, these two approaches were mutually reinforcing from the mid-20th century onwards in

[73] In fact, how to justify, if not by the existence of common objectives and a concerted common strategy, that the division manager can receive an "overriding commission" calculated on the basis of sales or commissions received by the representatives of his division? (see the facts in Case *9095-3532 Québec inc. (La Capitale Saguenay—Lac-St-Jean)* c. *Daigle*, 2010 QCCS 6066; 2010 QCCRT 589, par. 141).

[74] This regime prioritizes voice "and the workplace's specific rules" (substantive law is established through the negotiation of working conditions with the union) and state intervention is limited to formulating a procedural framework, while implementing a democratic ideal. Structured in this way, this regime is the expression of industrial pluralism (Judy FUDGE & Eric TUCKER, "*Pluralism or Fragmentation? The Twentieth-Century Employment Law Regime in Canada,"* (2000) 46 Labour/Le travail, p. 251-306.251-306; Christian BRUNELLE & Pierre VERGE, "L'inclusion de la liberté syndicale dans la liberté générale d'association : un pari constitutionnel perdu?" (2003) 83 *Revue du Barreau canadien*, 711-755, p. 728; Hugh COLLINS, "Contre l'abstentionnisme en droit du travail" (1987) 6 *Droit et Société* 193-214, p. 193).

establishing a relatively autonomous labour law.[75] In more recent years, globalization has provoked a veritable crisis of the Welfare State[76] while the Fordist paradigm,[77] on which labour law relied, has gradually disintegrated.

In this complex equation, we have attempted to isolate a single factor – the law. We have sought to better understand its role in the disintegration of the status of employee, based on the analysis of four work situations. Two major phenomena have been highlighted. The first reveals how easily the forms of work that compete with the status of salaried employment have become widespread in the labour market. This phenomenon was caused by legislative action which created new work arrangements that compete with the status of employee (the case of RSGs) or which, through legislative offloading (deregulation), has led to a multiplicity of work statuses regulated more by contract law than by labour law (the case of truck drivers).

The second shows how the Ministry of Labour lost influence over "law making"[78]. This phenomenon, which we referred to as *competition between two normative spheres*, reveals how the Ministry of Labour lost its responsibility for determining working conditions to other ministries, which relegate these types of concerns to matters of secondary importance (the case of representatives of financial and insurance products and truck drivers). Replacing labour law with another normative order, in a field of expertise wherein the latter is a novice, produces negative effects on employees'

[75] A labour law which replaced common law, see *Isidore Garon ltée* c. *Tremblay*; *Fillion et Frères (1976) inc.* c. *Syndicat national des employés de garage du Québec inc.*, [2006] 1 RCS 27, 2006 CSC 2, SOQUIJ AZ-50353146, par. 10.

[76] Bernard BILLAUDOT, "Une théorie de l'Etat social," (2008) 2 *Revue de la régulation* 1-41, available at the following address: http://regulation.revues.org/2523

[77] The labour of men who spend their entire careers with a single employer, holding a permanent full-time position in a large, highly unionized and homogeneous firm in a single industry sector.

[78] Guylaine VALLÉE & Annie GIRAUD-HÉRAUD, "La 'fabrique' de la loi à l'épreuve de la démocratie Décréter, consulter, négocier. Interview with Guy ROCHER", (2004) 1 *Négociations*, 93-109.

working conditions. It also brings to light the existence of complex systems that are henceforth omnipresent in the legal field. In this jumble of complex rules governing social activity, labour law is simply in the process of disintegrating.

These analyses show that legislative action is far from being uniform, but is, rather, found along a continuum ranging from abstention to authoritarian intervention. On the other hand, this multiplicity of action is in sharp contrast with the directional uniqueness of the action's result: labour law's unrelenting loss of influence to the rising power of market forces. The law creates the opportunity for several forms of work other than salaried employment, and these forms end up imposing themselves and competing with the latter. Are wage earners therefore in any way different from a commodity? This question is worth asking given that "the Welfare State"[79] is in crisis and the Ministry of Labour[80] appears no longer to play the role of the "identifiable governmental champion."[81] Does this mean that labour law is losing its mission to common law?
To prevent such an outcome, it is important to consider developing original solutions to remedy the disintegration of the status of employee. Although, for many observers, constitutionalizing labour law[82] is a promising avenue, our research shows that it is essential to mobilize actors around abstention or law making. To this end, the actors

[79] Michel COUTU & Georges MARCEAU, Le droit administratif du travail, Cowansville, Éd Yvon Blais, 2007, p. 26.
[80] In this respect, see Harry ARTHURS, "What Immortal Hand or Eyes? Who will Redraw the Boundaries of Labour Law," in G. DAVIDOV & B. LANGILLE (eds.) *Boundaries and Frontiers of Labour Law*. Oxford and Portland, Oregon: Hart Publishing, 2006, 373-389, pp. 375-377. Also, Michel COUTU & Georges MARCEAU, *Le droit administratif du travail*, Cowansville, Les Éditions Yvon Blais, 2007, p. 26.
[81] Expression borrowed from Harry ARTHURS, "What Immortal Hand or Eyes? Who will Redraw the Boundaries of Labour Law," in G. DAVIDOV & B. LANGILLE (eds.) *Boundaries and Frontiers of Labour Law*. Oxford and Portland, Oregon: Hart Publishing, 2006, 373-389, p. 387.
[82] Christian BRUNELLE, Michel COUTU and Gilles TRUDEAU, "La constitutionnalisation du droit du travail : Un nouveau paradigm," (2007) 48 *Cahiers de Droit* 5-42.

likely to intervene (politicians, trade unions, community organizations) will have to re-invent their actions, grasp every window of opportunity and make the case for their intervention. The winning normative order must be challenged when its own mission is jeopardized by the lack of cooperation and harmonization with the normative order designed to protect the well-being of employees. Thus, actors will have to rely on arguments that can take into account the entire mix and complexity of social situations, and develop a narrative that is capable of involving the other actors in economic life. This mobilization is crucial to prevent wage-earners from falling into oblivion.