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WORKING BEHIND BARS:

PRISON LABOUR AND MINIMUM STANDARDS PROTECTION IN CANADA

by

Sheri D. Price

A thesis submitted in conformity with the requirements for the Degree of Master of Laws.
Faculty of Law.
University of Toronto

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Working Behind Bars:

Prison Labour and Minimum Standards Protection in Canada

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ABSTRACT

While prison labour is not readily associated with Canada, the fact is that inmates in Canadian penitentiaries do work while incarcerated. Though inmates work in much the same way as unconfined workers, they are not accorded the same work-related benefits as such "employees". This thesis argues that inmate workers should be treated as "employees" for the purposes of minimum standards legislation. When we examine the aims of minimum standards legislation, as well as those of prison industry, we see that the objectives of both are advanced by applying minimum standards to inmate workers. In order to fairly address the question of prisoners' entitlement to minimum standards protection, it is essential to move beyond thinking of prisoner and employee status as mutually exclusive. Such a view is inconsistent with Canada's legal and jurisprudential framework, and threatens the social policy objectives which underlie minimum standards and possibly other employment-related statutes.
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I. INTRODUCTION

Canada is not a country which leaps to mind when we hear the words “prison labour”. And yet, the little-known fact is that a significant proportion of all federally sentenced offenders in Canada do work while in prison. On one level, inmate workers in Canadian federal penitentiaries closely resemble unincarcerated workers outside the prison environment. They put in a full day's work under the supervision and control of the prison employer, engaged in such tasks as the manufacture of office furniture or the raising of livestock. Like unincarcerated workers, they receive an hourly wage for their efforts, albeit a much lower one than that paid to workers outside the prison context. While inmate labourers look a lot like ordinary workers on the surface, however, there is no denying the fact that they are at one and the same time prisoners whose liberty has been denied them. Indeed, it is in this denial of liberty that the prison work relationship finds its genesis.

Though they bear a close resemblance to unconfined workers, inmates working in Canadian federal penitentiaries are treated differently than unincarcerated workers in society in a number of key respects. In particular, unlike “free” workers, inmates are not accorded the same work-related benefits which are extended to ordinary workers. Neither the Correctional Service of Canada, which operates and manages Canada's federal penitentiaries, nor CORCAN, the agency of the Correctional Service which is specifically charged with operating prison industry programmes in Canadian prisons, extend inmate workers the benefit of minimum standards protections in respect of their work in prison.

The basis upon which prisoners are denied minimum standards protections is unclear. Prisoners as a class are not specifically excluded from the ambit of minimum standards
legislation in Canada. Moreover, there appears to be an absence of jurisprudential support in Canada for the exclusion of inmates from such legislation. Nonetheless, the fact is that inmates are not receiving the benefits of minimum standards protection, and few, if any, have seen fit to question the denial of such protection.

While one can only surmise as to the reasons underlying the broad-based acceptance of the denial of minimum standards to inmate workers, it seems likely that many would maintain that extending the protection of minimum standards legislation to inmates working in Canadian penitentiaries is counterintuitive. The consequences of such a move, which would include paying inmates the minimum wage, strike many as highly implausible. It seems likely that this viewpoint is informed by the notion that prisoners are in prison to be punished, and that, as such, they are necessarily denied the rights which accrue to other members of society. Put another way, the *de facto* exclusion of prisoners from minimum standards legislation appears to operate on the presumption that prisoners are not "employees" entitled to minimum standards protections simply because they are prisoners.

Upon closer examination, however, the exclusion of inmate workers from minimum standards protections may represent an incoherency in the application of minimum standards law. Looking more closely at the principles underlying minimum standards legislation, it may well be that refusing to extend minimum standards protections to inmate workers as "employees" is inconsistent with the social policy aims of minimum standards legislation. Moreover, an analysis of the objectives underlying prison labour may indicate that prisoners need not be denied minimum standards protection in order to achieve those objectives.

It is the intent of this thesis to consider whether prisoners should be entitled as
"employees" to the protection of minimum standards in respect of their work in Canadian federal penitentiaries. To this end, I will explore the precise nature of the prison work relationship in Canada, as well as the statutory provisions and jurisprudence which may be brought to bear on the question of inmates' employee status. Accordingly, in Chapter Two, I draw upon interviews with various individuals involved in prison industry in Canada, as well as printed materials available from Canada's primary prison employer, CORCAN, in order to flesh out the exact nature of the prison work relationship in Canada's federal penitentiaries. In Chapter Three, I begin to lay the groundwork for determining whether, on a legal analysis, the prison work relationship may give rise to an employment relationship. Specifically, in Chapter Three, I consider in detail the jurisprudence of the United States which has grappled with the issue of prisoners' employee status in order to reveal how the issue has been resolved in that jurisdiction. As I prepare to set out the legal principles governing employee status in the Canadian context, in Chapter Four, I discuss whether federal or provincial minimum standards legislation should be the focus of our inquiry as to whether inmate workers in Canada may be "employees" for minimum standards purposes. Specifically, I address the issue as to whether constitutional jurisdiction over labour relations matters in respect of the prison work relationship lies with Parliament or the provinces, or both. In Chapter Five, I turn to the purposes of minimum standards legislation in Canada and to the tests for employee status under both the Ontario Employment Standards Act, as representative of provincial minimum standards legislation, as well as under the test applicable under the Canada Labour Code. This inquiry is undertaken with an ultimate view to deciphering whether there is any legal basis upon which inmates may be categorically excluded from minimum standards protections, or
whether they actually satisfy the test for employee status and therefore fall within the ambit of minimum standards legislation. In Chapter Six, I attempt to resolve the fundamental question which this thesis proposes to address, namely the manner in which to reconcile prisoner status and employee status. Here, I analyse the approach to this question adopted in the United States. I also discuss a number of factors which indicate how we in Canada should approach the issue of prisoners' employee status. Ultimately, I make a proposal regarding the manner in which we in Canada should reconcile the deprivation of liberty which one experiences qua prisoner with the entitlement to minimum standards protections qua worker. Specifically, I argue that the aims underlying both minimum standards legislation and prison industry are best served by extending minimum standards protections to inmate workers. Finally, I end the chapter by assessing whether, on a legal analysis, prison workers currently fall within the scope of minimum standards legislation insofar as they satisfy the test for employee status. In the final chapter of this thesis, and in light of the foregoing chapters, I go on to conclude that inmate workers should be entitled to minimum standards protection in respect of their work in Canada’s federal penitentiaries, and restate my reasons for reaching that conclusion.
II. THE PRISON WORK RELATIONSHIP IN CANADA

A. Introduction

There has been prison labour in Canada for as long as there have been prisons. Indeed, prison labourers carved the stones which built Canada’s first prison, Kingston penitentiary, in the 1830’s. Although inmates in Canada’s federal penitentiaries have always worked as part of their sentences, it was not until the late 1970’s that prison industry began to gain support as a means of rehabilitating offenders, instead of merely as a means of inflicting additional punishment on prisoners and keeping them occupied. In 1977, the MacGuigan Parliamentary Sub-Committee, adopting many of the recommendations that had been put forward by the Quimet Commission in 1969, issued a report emphasizing the importance of inmate employment and training to the rehabilitation of offenders within the correctional system, and calling for prison industry conditions which matched, as closely as possible, “real-world” working conditions. It was felt that the establishment of a national prison industries corporation which would offer inmates incentive pay and bonuses would best realize this objective, and the prison industry branch of the Correctional Service of Canada (hereinafter

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2 Interview with CORCAN Marketing and Communications Staff, National Headquarters, Ottawa, Ontario, June 10, 1997.
3 Canadian Committee on Corrections, Toward Fair Criminal Justice and Corrections (Ottawa: Queen’s Printer, 1969).
"CSC"), CORCAN, was launched."

CORCAN is the Special Operating Agency of the CSC which is responsible for prison industry programmes in Canadian federal prisons. Its mandate is to provide offenders with job-related training, both in prison and, to a lesser extent, immediately following their release from prison, with a view to facilitating their reintegration into the community. In 1995-96, CORCAN provided approximately 3,000 offenders with training and employment in 1700 full-time equivalent positions at its 32 work sites across Canada. CORCAN’s long-term goal is to employ approximately 20 percent of the federal inmate population.8

CORCAN’s prison industry projects fall into five “business lines”: agribusiness, construction, manufacturing, services and textiles.7 Goods and services produced by inmate workers in CORCAN’s five business lines are sold by CORCAN to offset the cost of its operations and programmes. The manufacturing business line has long been CORCAN’s

8 CORCAN’s 1997-98 Business Plan states that “CORCAN’s long-term correctional goal is to employ 20 percent of offenders in the production of goods and services and to be recognized by the CSC as the employer of choice and an integral player in its offender population management initiatives.” CORCAN, <CORCAN Business Plan 1997> [unpublished] 1997 at 3. To date, CORCAN has fallen somewhat short of this aim. In April, 1996, the CSC reported the size of the federal inmate population to be 14,500. Correctional Service of Canada, "Outlook 1996-97 to 1998-99," April, 1996. World Wide Web site http://www.csccanada.ca/outlook-1998-99/1996-97-outlook.htm#11 at 2. Assuming this figure to be representative of the inmate population during 1995-96, the 1700 full-time equivalent positions which CORCAN made available to inmates during the corresponding period would have been sufficient to employ only 11.7 percent of the inmate population on a full-time basis over the course of the year. While it is true that CORCAN actually employed 3000 inmates in the available 1700 positions in 1995-96, this is due to the fact that there was a high rate of inmate turnover in the available positions. Accordingly, many of the 3000 inmates employed by CORCAN in 1995-96 did not hold their positions for the full year, but vacated them, leaving them to be filled by other inmates for a period of time. Interview with CORCAN Marketing and Communications Staff, National Headquarters, Ottawa, Ontario, June 11, 1997.

mainstay,\(^{10}\) engaging inmates primarily in the production of office furniture and other furniture for institutional use.\(^{11}\) The types of shops run by CORCAN in its manufacturing line include wood/cabinetry; metals and upholstery operations.\(^{12}\) Agribusiness operations employ inmates in a diverse range of activities, including the production of agricultural commodities, including beef, pork, poultry, milk and dairy products, egg, vegetables, and feed crops. The agribusiness line also has processing lines, which process meat and baked goods.\(^{14}\) Moreover, forestry and agricultural services form part of CORCAN’s agribusiness operations, particularly in the Western region, and involve inmates in such activities as tree seedling production, forest revitalization, and fire fighting; as well as composting, wildlife habitat recovery, reforestation and highway greenspace upkeep.\(^{15}\) CORCAN’s smallest business line,\(^{16}\) the services business line engages inmate workers in four main areas: printing and graphic services; imaging, microfilm, and CD-ROM; key entry, especially data base creation; as well as inbound

\(^{10}\) Sales of products produced by the Manufacturing line, valued at $15,688,000.00, accounted for 41.5 percent of total sales by CORCAN in 1995 96. \textit{Ibid.}

\(^{11}\) \textit{Ibid.} at 13.

\(^{12}\) Of all the business lines, Manufacturing is the one which provides the greatest number of positions to inmate workers. In 1995/1996, the Manufacturing business line operated in seventeen (17) sites from coast to coast, and provided five hundred and eighty (580) full-time positions for inmate workers, or 35.8 percent of all full-time equivalent positions available within CORCAN \textit{Ibid.} at 12.

\(^{13}\) \textit{Ibid} at 8.

\(^{14}\) \textit{Ibid}.

\(^{15}\) \textit{Ibid.} In 1995/96, CORCAN agribusiness operations, located at 10 CSC institutions across the country, provided 555 full-time equivalent positions to inmates, representing 34.2 percent of all available positions. \textit{Ibid.} at 8-9.

\(^{16}\) In 1995/96, Services accounted for only 109 offender full-time equivalent positions, or 6.9 percent of all CORCAN positions available, at six CSC facilities across the country. Moreover, in 1995 96, the services business line accounted for only 4.5 percent or $1.71 million of CORCAN’s total sales. \textit{Ibid.} at 14-15.

\(^{17}\) Including the production of flat forms, specialty file folders and general printing. \textit{Ibid.} at 14.
telemarketing and distribution. The textiles business line is tailored into three separate spheres of activity for inmate employment: garment manufacture: derived products, such as canvas sewing, mail bag repair, cushions, mattresses and pillows, bean bags; and laundry services. Due to the nature of the construction industry, the CORCAN Construction Business line does not exist at any one worksite on a permanent basis. Rather, the Construction line operates on an "as-needed, where-needed" basis at various CSC institutions throughout the country where construction is underway. The CSC is the CORCAN Construction Line's primary client, and the line's projects have tended to focus on construction work at correctional institutions. During 1996-97, Construction was involved in projects at over 30 correctional institutions, including a number of projects valued at more than one million dollars.

Despite the fact that CORCAN has been the trademark name attached to prison industry

18 Ibid

19 Ibid at 41. The Textiles business line currently operates in nine CSC institutions. In 1995-96, the Textiles business line provided 214 full-time equivalent positions for inmate workers, representing 13.2 percent of all available positions for inmates within CORCAN. Ibid at 17.

20 Ibid at 33.

21 Interview with CORCAN Construction Business Line staff, Toronto, Ontario, June 12, 1997. However, the Construction line also targets various government and non-government organizations as potential clients. CORCAN Construction Five Year Business Plan [unpublished] February 1, 1995 at 2.

22 Such projects include the $1.2 million dollar building renovation in Laval, Quebec for Citizenship and Immigration; a $1.6 million dollar residential complex for 60 offenders at Bath Institution; and a $2.3 million dollar expansion project at Drumheller Institution. Other large projects include a $650,000 multi-purpose building at Mission Institution; and a $770,000 demolition of the B-7 building at Dorchester Institution. Business Plan 1996-98, supra, note 8 at 30. Currently, a large project valued at approximately six million dollars is underway at Beaver Creek Institution. Interview with CORCAN Construction Business Line staff, supra. In 1995-96 revenues from CORCAN's construction line reached the $6.9 million dollar mark. CORCAN Annual Report, 1995-96, supra, note 7 at 11. In 1995-96, the Construction business line provided 87 full-time equivalent positions for offenders, or 5.4 percent of all available full-time equivalent positions. CORCAN Construction Five Year Business Plan, supra.
in Canada since 1977.\textsuperscript{23} Very few Canadians have ever heard of CORCAN and even fewer know what it actually does. In an April 1996 survey conducted by the Angus Reid Group among a representative cross-section of 1501 Canadian adults, it was revealed that 96 percent of Canadians have never even heard of an organization called CORCAN.\textsuperscript{24} Of the remaining four percent who did think that they had heard of CORCAN, 76 percent admitted to having no idea as to what CORCAN does. Of all 1501 surveyed, only seven individuals were able to correctly identify what CORCAN does.

Notwithstanding the fact that the vast majority of Canadians know nothing about CORCAN, there is nonetheless widespread public support for its activities. The Angus Reid survey found that the Canadian public is overwhelmingly in support of inmates receiving job-related training while in prison, with 56 percent of those surveyed indicating their strong agreement with such training, and a further 30 percent indicating that they "somewhat agreed" with such programmes.\textsuperscript{25} Judging from the survey results, Canadians' widespread approval of prison training for inmates no doubt reflects the popularly-held belief among seventy-seven percent of those surveyed that inmates who receive job-related training while in prison are less likely to re-offend after being released from prison than inmates who do not receive such

\textsuperscript{23} Interview, supra, note 8.

\textsuperscript{24} Angus Reid Group, "Awareness of CORCAN and CORCAN's Mandate" [Unpublished Final Report] May, 1996, at 3. The results of the survey are reported to be accurate to within ± 2.5 percent, 19 times out of 20.

\textsuperscript{25} Ibid. at 10. Of the remainder of those surveyed, six percent somewhat disagreed that inmates should receive job-related training while in prison, 7 percent strongly disagreed, and one percent had no opinion.
training. In light of the fact that CORCAN’s long-term objective is to employ 20 percent of all federally incarcerated inmates, and in light of the prevalent lack of information with respect to CORCAN’s activities on the part of the public, a closer examination of the prison work relationship between CORCAN and its inmate workforce is warranted.

B. Objectives of the Prison Work Relationship

1. Rehabilitation of Inmates

As part of the overall federal correctional system, CORCAN’s fundamental legislated purpose is to aid in the rehabilitation of offenders through work with a view to their safe reintegration into the community. Section 105(1) of the Corrections and Conditional Release Regulations, promulgated under the Corrections and Conditional Release Act (hereinafter “CCRA”) mandates CORCAN to ensure that an inmate who participates in CORCAN activities:

(a) is fully, regularly and suitably employed in a work environment that strives to achieve private sector standards of productivity and quality so that the inmate will be better able to obtain and hold employment when the inmate returns to the community; and

(b) is provided with programs and services that facilitate the inmate’s re-

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26 Ibid. Of all those surveyed, 33 percent strongly agreed that inmates who received job-related training while in prison were less likely to recidivate; 40 percent somewhat agreed; 11 percent somewhat disagreed; and 11 percent strongly disagreed. A further 4 percent had no opinion.

27 SOR 920, as amended SOR 96-108.

28 SC 1992, Chapter 20, as amended.
entry into the community."

CORCAN itself has adopted an express mandate which is consistent with its legislated objectives:

CORCAN’s mandate is to aid in the safe reintegration of offenders into Canadian society by providing employment and training opportunities to offenders incarcerated in federal penitentiaries and, for brief periods of time, after they are released into the community.

On the face of CORCAN’s legislative objectives, and on the face of its own express mandate, it is evident that CORCAN’s primary objective in providing prison industry programmes is the rehabilitation of inmates by equipping them with the skills they need in order to obtain and secure post-release employment. This strategy is largely a response to the fact that unemployment is prevalent among federal offenders, with over sixty percent of federal offenders being unemployed at the time of their arrest, and approximately seventy percent of offenders indicating that they have never had a steady job. Moreover, unstable employment

29 It is worthy to note the parallels between CORCAN’s legislated objectives and those of the correctional system generally. In this regard, section 3 of the CCRA states that the purpose of the federal correctional system is to “contribute to the maintenance of a just, peaceful and safe society by (a) carrying out sentences imposed by the Courts through the safe and humane custody and suspension of offenders; and (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community”. Moreover, section 76 of the Act gives the Correctional Service of Canada a mandate to “provide a range of programs designed to address the needs of offenders and contribute to their successful reintegration into the community.”


has been identified as a major risk factor for recidivism among federally released offenders. \(^{13}\)

In attempting to rehabilitate inmates through work, CORCAN’s primary focus is on “the development of positive work attitudes and behaviours (such as motivation and responsibility) that are transferable to post-release employment and life situations.” \(^{14}\) Such work attitudes and behaviours are often referred to in CORCAN’s literature as “employability” skills. “Employability” refers to those generic skills, attitudes and abilities that, in CORCAN’s view, all employers consider when looking for potential employees. \(^{15}\) and specifically encompass the ability to think and learn, good responsibility and adaptability skills, and the ability to work as part of a team. \(^{16}\) Because of the generic nature of such skills, they are transferable to various jobs. The offender with good “employability” skills is thus believed to be well-positioned to find work in many areas, instead of being limited by a particular job-specific skill set, \(^{17}\) and required to look for only one particular type of job. \(^{18}\)

As of June, 1997, CORCAN had implemented an “employability” skills training program.

\(^{13}\) Larry Mottuk, “Targeting Employment Patterns to Reduce Offender Risk and Need” (1996) 8:1 Forum on Corrections Research 22 at 22.


\(^{16}\) In formulating this list of skills which are emphasized in its “employability” skills training, CORCAN has relied heavily on the Conference Board of Canada’s Employability Skills Profile (Ottawa: Conference Board of Canada, 1993). \textit{Ibid.}

\(^{17}\) Such skills are those trade and occupation-specific skills needed to perform a particular job. Such skills encompass the “know-how” and ability to perform specific tasks. Some examples of concrete job skills would be the ability to weld, paint, cut meat, etc.

\(^{18}\) \textit{Supra.} note 35 at 27. “There is no guarantee that offenders with specific job skills will find jobs. However, if they have good work habits, are adaptable and can learn quickly, they are likely to find jobs somewhere and receive on-the-job training.”
programme at eleven of the thirty-two institutions where CORCAN prison industry programs are in effect.\textsuperscript{34} and has plans to implement the programme in all CORCAN workshops by the end of fiscal year 1998/1999.\textsuperscript{40} The manner in which CORCAN proposes to impart the positive work attitudes and behaviours which comprise “employability” skills to offenders is through the leadership of on-site CORCAN supervisors.\textsuperscript{41} CORCAN supervisors supervise and train inmates in the job-specific skills required to perform the particular work underway in a given CORCAN workshop. For example, where CORCAN runs a prison industry programme manufacturing office equipment, CORCAN supervisors might instruct inmates as to how to upholster furniture.\textsuperscript{42} The rehabilitative value of CORCAN prison industry programmes, however, is not seen to lie in the ability of supervisors to teach inmates such job-specific skills. Rather, the specific work activity is regarded as simply providing the setting in which CORCAN supervisors, through their leadership, inspire inmates to develop a good work ethic, as well as a sense of responsibility and personal motivation.\textsuperscript{43}

While CORCAN’s current focus to rehabilitating inmates through work may well answer the inmate’s need to develop a “positive work ethic [which] may improve the likelihood of [his] obtaining post-release employment.”\textsuperscript{44} it is questionable to what extent the

\textsuperscript{34} Interview with CORCAN staff. CORCAN, June 11, 1997, Ottawa, Ontario.

\textsuperscript{40} \textit{Ibid.}

\textsuperscript{41} \textit{Ibid.}

\textsuperscript{42} \textit{Ibid.}

\textsuperscript{43} \textit{Ibid.} See also “The Influence of CORCAN Shop Supervisor Leadership Characteristics on Offender Work Attitudes” [unpublished CORCAN document, 1994].

\textsuperscript{44} Gillis, \textit{supra}, note 34 at 18.
ultimate reintegration objective may be achieved if generic job skills are not part of a broader training program which also teaches marketable job-specific skills. After all, while “employability” skills may well be an asset in obtaining, and particularly in maintaining a job, higher education and job-specific skills also appear vital to success in today’s labour market:

Higher levels of education and special skills are now required for a broad range of economic activities... Unemployment has... become highly correlated with education. Individuals with low education levels tend to have higher unemployment rates than those with better credentials, and this differential has increased over the last decade. Even for those with a high school diploma and some level of post secondary education, job security is not guaranteed and continual skills upgrading may be essential. Those without specific qualifications will likely have to piece together a number of temporary part-time positions offering few benefits and little job security.45

While the optimal approach might thus be to combine job-specific and “employability” skills training, the evidence indicates that job-specific skills which offenders do “pick up” through their participation in CORCAN prison industry programs are unlikely to significantly increase their chances of post-release employment, and consequent reintegration into society.

“One of the most profound changes in the Canadian labour market has been the shift in job creation from goods-producing industries (such as manufacturing and agriculture) to the service sector.”46 Service industries now account for 73 percent of all employment.47

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45 Debra Sunter, “A tough labour market for the young” (1996) 8:1 Forum on Corrections Research 3 at 4 - 5. Statistics Canada research also reflects a trend towards a requirement for higher levels of education and special skills in order to compete successfully in the labour market. Almost one third of the workforce now occupies a managerial or professional position. The proportion of workers with at least some post-secondary education rose from 29 per cent in 1979 to 42 per cent in 1989; and workers holding university degrees became increasingly common during this period, up from 10 per cent to 17 per cent.

46 Ibid at 3.

47 Ibid.
Notwithstanding that a significant majority of the jobs available in the Canadian labour market are to be found in the service sector, however, CORCAN continues to heavily emphasize goods-producing industries in its prison work programs. Agricultural and manufacturing activities, CORCAN’s primary goods-producing business lines, accounted for fully 70 percent of full-time positions available to inmates through CORCAN in 1995/1996.\(^{48}\) By contrast, CORCAN’s services business line provided only 6.7 percent of available positions in 1995-1996.\(^{49}\)

Moreover, the quality of job-specific skill training which occurs in CORCAN’s manufacturing business line, in particular, indicates that inmates being “rehabilitated” in these positions are unlikely to be developing the level of skills necessary to compete for those relatively few jobs available in the manufacturing sector subsequent to their release. This is due to the fact that, as a general rule, CORCAN prison industry programmes have failed to keep pace with technological developments in use by employers outside prisons.\(^{50}\) Thus, have inmate jobs “become less and less like similar jobs in the community.”\(^{51}\) It seems uncontroversial to assert that if jobs in prisons are not like the ones outside prison, then it is highly unlikely that they teach the job-specific skills which inmates may need in order to attach themselves to the labour market after being released from prison.

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\(^{49}\) Ibid.

\(^{50}\) Thomas Townsend, CORCAN Chief Executive Officer, “Offenders and Work in the Correctional Service of Canada: A Historical Evaluation” (1996) 8:1 Forum on Corrections Research 35 at 36.

\(^{51}\) Ibid.
The deficiency of CORCAN prison industry programmes as a means of providing inmates with the job-specific skills they need to obtain post-release employment is also evident in CORCAN's focus on engaging inmates in unskilled work. Rather than determining what projects to undertake in accordance with how effective they will be as a means of teaching offenders job-specific skills, CORCAN determines which programmes to undertake by reference to offenders' existing skill sets. Hence, CORCAN's focus has been on producing products which lend themselves to unskilled labour and easy construction. However, if inmates are only being assigned to do "unskilled" work, it is clear that they will not enter the community subsequent to their release, equipped with the benefit of additional job-specific skills which they have learned in prison and which they may offer to prospective employers. Even if emerging offenders have better "employability" skills, the fact that employers, as a general rule, are increasingly relying on highly skilled workers in order to gain a market advantage indicates that inmates who lack job-specific skills may find it difficult to locate employment in today's labour market.

Of course, the deficiencies in CORCAN prison industry programmes as a means of teaching offenders job-specific skills may come as no surprise in light of CORCAN's view that success in the labour market depends on a worker's having good "employability" skills. There remains an open question, however, as to whether CORCAN's focus on "employability" skills is bona fide, or whether it is merely an attempt to detract attention away from the fact that its

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*2 Interview, supra, note 2. According to CORCAN, projects requiring unskilled inmate labour are preferable because they are more financially viable from a business perspective.

*3 Sunter, supra, note 45.
programmes fail to provide offenders with job-specific skills which they may need in order to secure post-release employment.

Notwithstanding that we are able to identify a number of shortcomings in CORCAN’s prison industry programs, the fact is that such programs are rehabilitating offenders, at least where rehabilitation is defined in terms of reduced recidivism rates. A 1995 1996 CSC study on the effect of CORCAN participation on post-release recidivism rates examined the recidivism rates of 269 federally-sentenced male offenders who had worked for CORCAN for at least six uninterrupted months while incarcerated. The results of the study demonstrated that CORCAN participants who had been released on full parole were 27.8 percent less likely to be re-admitted into federal custody than the national average for offenders released on full parole. If we restrict our definition of recidivism to the commission of new offences by offenders on parole, CORCAN participation shows even more promise as a means of rehabilitating offenders. CORCAN participants in the study who had been released on full parole were 84.3 percent less likely to be returned to federal custody for the commission of a

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44 Correctional concepts such as rehabilitation and deterrence are notoriously difficult to gauge. However, recidivism rates are most commonly used in order to measure rehabilitation. The reasoning underpinning such an approach is that offenders who have been rehabilitated will not re-commit crimes. The flaw in such reasoning is that it assumes that crime detection mirrors actual crime rates. As a result, recidivism is an imperfect means of measuring recidivism insomuch as it does not (can not for obvious reasons) take into account those crimes which offenders who have been released may commit without ever being detected.


46 Ibid. at 16.

47 The 27.8 percent reduction in recidivism rates overall reflects the return of offenders to federal custody for any reason, either because of the commission of a new offence by the offender, or because of technical violations of parole conditions. Ibid. at 17.
new offence than the national average for offenders released on full parole."

While CORCAN thus seems to be showing promise in terms of its rehabilitative objective, it should be noted that no studies have been done to date with respect to whether participants who have participated in CORCAN programmes and been released into the community have been successful in obtaining employment." Until such studies are available, some tentativeness may be warranted in reaching the conclusion that CORCAN is achieving its rehabilitative mandate by equipping offenders with the skills they need to obtain and secure post-release employment.

2. Financial Sustainability

While the rehabilitation of inmates is undoubtedly CORCAN's primary mandate, the offsetting of correctional costs associated with running prison industry programmes, through the sale of inmate-produced goods and services, emerges as an additional objective of the organization. There is no express mention of this, or indeed of any other possible objectives, in either the Correctional and Conditional Release Act or the Regulations. However, much of CORCAN's own literature emphasizes "financial sustainability" as part of its mandate. CORCAN's 1995/1996 Annual Report, for example, states, "We at CORCAN consider part of our mandate to be working towards financial sustainability while maintaining the high

\footnote{\textit{Ibid.}}

\footnote{Interview, \textit{supra}, note 2; Interview, \textit{supra}, note 39.}
employment and rehabilitation goals set for us by the Correctional Service."

CORCAN's focus on financial sustainability is derived from its status as a Special Operating Agency of the CSC. While prison industry in Canada has operated under the CORCAN name since the 1970's, prior to 1992, CORCAN was operated by the CSC as merely one of a number of its correctional programmes and was known as the "Industries" programme. In 1992, however, when CORCAN was designated as a Special Operating Agency of the Service, it was placed under an obligation to operate on a "break even" basis, and to generate sufficient sales revenues to cover the costs of its operations and programmes. Accordingly, since 1992, CORCAN has been responsible for its own finances. To this end, it has access to a revolving fund (a financing mechanism similar to a commercial line of credit) made available by the Treasury Board of Canada, which fund it uses to finance its prison industry programmes.

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61 Interview, supra, note 8.
62 Bob LeDrew, "How One SOA is Challenging Today's Fiscal Programmes" supra, note 1 at 8.
63 Ibid, and interview, supra, note 8. The CORCAN Revolving Fund was established under Appropriation Act No. 4 1991/1992, which authorized the establishment of the Fund effective April 1, 1992 in the current and subsequent fiscal years in accordance with terms and conditions prescribed by the Treasury Board. The Fund has a continuing non-lapsing authority from Parliament to make payments out of the Consolidated Revenue Fund for working capital, capital acquisitions and temporary financing of accumulated operating deficits, the total of which is not to exceed forty-five million dollars ($45,000,000.00) at any time. An amount of $15,217,833.00, representing net assets assumed by the Fund, was charged to this authority when the Fund became operative on April 1, 1992. CORCAN Annual Report 1992/1993, (CORCAN Printing, Saskatchewan Penitentiary: CORCAN, 1993) at 17. In addition to having access to a forty five million dollar revolving fund from the Treasury Board, CORCAN also receives a Training and Correctional Fee from the CSC to help offset the costs of offender training which cannot be passed on to CORCAN's customers in its prices. The training and correctional fee is intended to compensate CORCAN for the hours and resources that it spends training inmates. The justification for the payment of the fee to CORCAN is that, if CORCAN weren't employing inmates, the CSC would have to make alternate programming available to occupy inmates' time.
Since becoming a Special Operating Agency of the CSC, CORCAN operates on a largely independent basis from the CSC. Essentially, CORCAN has a traditional top-down management structure with its own officials exercising effective control over all of CORCAN’s operations, including matters with respect to which programmes are undertaken and which products are produced for sale in order to generate revenues.84 At the top of the CORCAN bureaucracy is the Chief Executive Officer, Thomas Townsend.85 Roughly on a par with an Assistant Deputy Minister within the federal government, the Chief Executive Officer is accountable directly to the Commissioner of the CSC.86 He also heads up the CORCAN Management Team, comprised of the general managers of CORCAN’s five business lines, as well as the Managers of Private Sector Alliances, Corporate Marketing, Informatics, Corporate Renewal and the Comptroller.87

Essentially the directing mind of CORCAN, the Management Team does receive guidance from CORCAN’s Advisory Board. Section 108 of the Correctional and Conditional Release Act Regulations provides for the creation of the Advisory Board, whose function is to advise the CORCAN Management Team, the Minister and the Commissioner of the CSC on CORCAN’s activities.88

The Minister shall appoint a committee to be known as the Advisory Board of

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84 Bob LeDrew, “How One SOA is Challenging Today’s Fiscal Pressures”, ibid
85 Interview, supra, note 8.
86 Ibid.
88 Ibid. and interview, supra, note 8.
CORCAN, consisting of not more than twelve (12) persons chosen from the fields of business, non-profit organizations, labour and government from the general public, to support the operation of CORCAN by:

a) advising CORCAN on its operating plans, budgets and marketing and sales plans on its performance;
b) commenting on major initiatives of CORCAN in devising new products and markets;
c) assisting the Service in building a positive public image of CORCAN; and
d) representing CORCAN to labour and business organizations.

The Advisory Board essentially serves as a fail-safe mechanism for CORCAN, taking on a generally consultative role, and occasionally, a strong advisory role.\(^6\) The CORCAN Management Team, however, has ultimate authority over CORCAN’s operations, and is under no obligation to follow Advisory Board recommendations.\(^7\)

CORCAN is not under a mandate to generate a profit - its Special Operating Agency status requires it to "break even" only. However, the evidence indicates that CORCAN is, in

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\(^6\) Appointments to the Advisory Board, which is chaired by the Commissioner of the CSC, are made by the Minister of the Solicitor-General of Canada. Corrections and Conditional Release Regulations, supra, note 28, section 108(1). Such appointments may be made on the basis of recommendations from the CEO of CORCAN, but are ultimately at the discretion of the Minister by way of Order-in-Council. Interview, supra, note 8.

\(^7\) Interview, \textit{ibid}.

\textit{Ibid.} One of the supposed benefits of the CORCAN Advisory Board is that it is well positioned to fairly represent the broad spectrum of business, labour and community interests. \textit{Ibid} However, only one member of the Board in 1995/96 appeared to have any links to community interests, specifically, Bernie Sutton of the United Way; and only one member had any obvious connections with the Labour movement, Canadian Labour Congress Secretary Treasurer, Richard Martin. The others appear to be aligned primarily with business. The remaining seven (7) members in 1995/96 were: Dr. Owen Anderson, Director, Consulting Corporation of BDO. Dunwoody Ward Mallette; Claude Boyer, Associate, Bourassa Boyer, Chartered Accountants; James Garfield Carl, Consultant; Diane Lemelin, Director of Communication and Training, Director of International Products, Quebec Businesswomen’s Association; Douglas Montgomery, Vice-President Government Relations, Canadian Manufacturers Association; Ronald Quai, Deputy Minister, Public Works and Government Services Canada; and Alvin Wasserman, President and Creative Director, Wasserman, Cozens, Dunstan Inc. \textit{Ibid; Annual Report, 1995/96, supra, note 7, at 20.}
fact, rapidly becoming a profitable enterprise. For its first four years as a Special Operating Agency, CORCAN operated at net deficits. In fiscal year 1996/1997, however, with more than $49 million in sales, CORCAN reported no deficit. Moreover, CORCAN’s 1997/98 Business Plan anticipates that CORCAN’s profitability will increase in the coming years, and predicts net profits for 1997/98, 1998/99 and 1999/2000 of $682,000, $1.425 million, and $1.8 million, respectively. If the current predictions hold true, it is clear that CORCAN will be outperforming its financial sustainability objective, and generating substantial profits through its prison industry programmes.

In attempting to achieve financial sustainability, it should be noted that there are certain constraints within which CORCAN must operate. CORCAN’s access to a cheap inmate workforce could conceivably enable it to produce its products for much less than the private sector. In addition, CORCAN has a benefit over the private sector insofar as it pays no rent for the CSC facilities from which it operates its prison industry programmes. If CORCAN were entitled to take advantage of its low labour costs and ability to operate without paying rental

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73 CORCAN Express Special Edition [unpublished internal newsletter], April 1997 at 1. To date, no information has been made available with respect to whether CORCAN also made a profit during 1996-97.


75 For inmate pay scales, see notes 138 to 152, infra, and accompanying text.

76 Interview, supra, note 8. Permitting CORCAN to operate without paying rent is justified on the basis that it would be impossible to calculate the commercial market value of space located within the confines of a correctional institution. In the words of one CORCAN employee, “if we occupy 5000 square feet in an institution, we don’t pay rent on that because there is no way of calculating what the market rent would be. Who else is going to come in and rent 5000 square feet?”
costs, it could conceivably sell its products at significantly lower prices than the private sector, thereby drastically increasing its overall sales and advancing its financial sustainability objective. However, such an initiative on CORCAN's part could also have a negative impact on private sector businesses. In order to avoid this impact on the private sector, CORCAN is required to compete with private sector enterprise on a level playing field, and to sell its products at prices equivalent to those available from the private sector.**

In this regard, section 106 of the *Correctional and Conditions Release Regulations*, which provides for the disposal of inmate-produced goods, is noteworthy.

Goods and services that are produced or made available by CORCAN may be transferred, leased, loaned or provided to:

a) any department, branch or agency of the Government of Canada or the government of a province or to any municipality:

b) any charitable, non-profit, religious or spiritual organization; or

c) any purchaser in the ordinary course of trade under competitive conditions.

From the above section, it is not apparent that CORCAN is under an obligation to sell its products at fair market value to government departments or agencies, or to charitable and similar organizations. On the face of the section, only where CORCAN sells to purchasers other than those governmental departments and agencies, and charitable and similar organizations, such as private sector buyers, is it required to dispose of inmate-produced goods

**Ibid.**
and services "under competitive conditions."

This is particularly remarkable since government departments and agencies, particularly at the federal level, represent by far CORCAN's most significant client base. In 1995/96, for example, nearly four-fifths of CORCAN's sales were to federal departments and agencies, representing revenues of approximately $30 million of its total sales of $37.8 million for that year.\(^8\) Sales to municipal and provincial governments in 1995-96 were relatively modest and accounted each for $242,000. Private sector sales represented approximately 17 percent of CORCAN's total sales for 1995-96, at $6.45 million.\(^9\)

While it is not as apparent from the face of the Regulations that the majority of CORCAN's sales to departments and agencies of the federal government, in particular, would be covered by the requirement that CORCAN dispose of inmate-produced goods and services under competitive conditions, the Commissioner's Directives\(^80\) appear to establish the requirement that CORCAN sell all of its products at fair market value, regardless of the identity of the buyer. Commissioner's Directive 731 regarding "Occupational Development Programs" states:

Prices of products and services shall equal private sector fair market values for equivalent products and services in the area where the goods are sold.

\(^8\) CORCAN Annual Report, 1995-96, supra, note 7 at 18. The CSC itself was by far CORCAN's largest client, with purchases of $17.3 million for 1995-96. Other federal government agencies making purchases from CORCAN in 1995-96 included the Department of National Defense ($5.551 million); the Department of Public Works ($814,000); the Royal Canadian Mounted Police ($835,000); and other departments of the federal government ($6.45 million).

\(^9\) Ibid

\(^80\) The Commissioner's Directives are directives issued by the Commissioner of the CSC, intended to be binding on the Service in the operation and maintenance of all federal penitentiaries.
Discounts may be set as a result of high stock levels or large purchases.

It should be noted, however, that Commissioner's Directive 731 was issued in 1987, prior to the time that CORCAN was established as a Special Operating Agency of the CSC. The Directive makes no specific reference to CORCAN. It does, however, purport to regulate all activities designed to improve inmates' ability to secure and maintain employment when released from prison where particular emphasis is placed on learning through doing and include specifically industrial shops, data processing service bureaus, agricultural and forestry operations, joint ventures, and other private sector involvement.\(^1\)

At the time the Directive was issued, responsibility for prison industry programmes of the type described in the Directive lay with the CSC.\(^2\) At any rate, it is clear that those activities covered by Commissioner's Directive 731 now fall within the scope of CORCAN's responsibility for the establishment of prison industry programmes which are designed to assist inmates to obtain and hold employment when they are returned to the community. Moreover, although there have been changes in the way occupational development programmes are operated insofar as responsibility for such programmes has been transferred from the CSC to CORCAN, the Directive continues to be included among other "active" Directives of the Commissioner, indicating that it is binding on CORCAN.

Whether or not Commissioner's Directive 731 places CORCAN under an express


\(^2\) ibid. at 1.

\(^3\) Interview, supra, note 8.
obligation to sell its products at fair market value, regardless of the identity of the buyer. It appears that CORCAN, at least, regards itself as being bound to dispose of inmate-produced goods and services at fair market value, whether its client is a governmental department or agency, or otherwise. Moreover, CORCAN maintains that if its prices for certain products are lower than those available from the private sector, it is because its products are not as “high tech” as equivalent products produced in the private sector.

In spite of CORCAN's outward adherence to a policy of pricing its products in accordance with private sector fair market values for equivalent products, however, it should be noted that there is some anecdotal evidence that the policy is not strictly adhered to in all cases. At Pittsburgh Institution in Kingston Ontario, for example, flowers and plants grown by inmates in one of CORCAN’s agribusiness enterprises are reportedly sold for approximately three or four dollars less per flat than the price available from local private sector flower sellers, representing a saving to buyers of approximately 30 percent.

It is clear that CORCAN has dual objectives: to rehabilitate inmates through work in order to assist them in obtaining and securing post-release employment and to operate as a financially sustainable business enterprise. While a certain amount of financial responsibility is undoubtedly necessary in order to preserve CORCAN’s ability to continue to offer rehabilitative work programmes to offenders, it is also clear that CORCAN’s commercial focus

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84 Ibid
85 Ibid
86 Interview by the Author of Correctional Supervisor, Correctional Service of Canada, Pittsburgh Institution, April 24, 1997.
sometimes finds itself in conflict with its overall rehabilitative mandate.

In particular, CORCAN’s continued emphasis on goods-producing activities in its prison industry programmes - notwithstanding that such activities account for a relatively small proportion of the jobs available in the Canadian labour market - is elucidated by the fact that such activities account for a large percentage of CORCAN’s overall sales. In 1995/96, for example, CORCAN’s primary goods-producing business lines, manufacturing and agribusiness, accounted for 41.5 percent and 26.3 percent of CORCAN’s yearly sales, respectively.\textsuperscript{37} These figures indicate that while employing inmates in goods-producing activities may not be training them for the types of jobs which they are likely to obtain subsequent to their release, it is likely that CORCAN continues to focus its efforts on goods-producing activities because of their financial viability.

Further, the fact is that CORCAN’s financial sustainability objective, and not its rehabilitative objective, sometimes operates as a bottom line for CORCAN in determining which of its programmes to continue to operate. In its 1997/98 Business Plan, for example, CORCAN has intimated that it may have to discontinue seven of its seventeen manufacturing work sites unless they become financially sustainable in the near future. This decision may or may not have a negative impact on CORCAN’s ability to fulfill its rehabilitative mandate. However, such impact does not appear to have even been considered in deciding to shut down the sites. The Business Plan makes no mention whatsoever of the rehabilitative value of work

done by inmates at the seven sites targeted for shut down. 88

C. Creation of the Prison Work Relationship

As noted above, CORCAN does not "employ" all federally sentenced inmates. Indeed, CORCAN's long-term objective is to employ only 20 percent of the federal inmate population. Accordingly, there must exist a mechanism by which to determine which inmates are to be employed in CORCAN's prison industry programmes.

Upon arrival at a CSC penitentiary,89 an inmate will be assigned to a Case Management Officer of the Correctional Service of Canada, who will perform an intake assessment of the inmate in order to identify the areas in which an inmate needs to improve during his period of

88 CORCAN 1997-98 Business Plan, supra, note 8, at 36.

89 It should be noted that offenders who have been sentenced to a period of incarceration, as a general rule, are not immediately assigned to the CSC institution where they will ultimately serve their sentence. Rather, inmates who are entering the federal correctional system will usually be transferred to the CSC Regional Assessment Unit for their region. For the purpose of ensuring that the penitentiary to which the inmate is ultimately confined is one that provides the least restrictive environment possible for that person. Pursuant to section 28 of the CCRA, during this assessment process, the CSC must take into account the "degree and kind of custody and control necessary for the safety of the public, the safety of that person and other persons in the penitentiary, and the security of the penitentiary," as well as "accessibility to the person's home, community and family, a compatible cultural environment, and a compatible linguistic environment and the availability of appropriate programs and services and the person's willingness to participate in those programs." Having thus taken all of these factors into account, and pursuant to section 30 of the CCRA, the CSC must assign a security classification of maximum, medium or minimum to each inmate. Following such classification, the inmate is placed in a corresponding maximum, medium or minimum security level institution for the purpose of serving his/her sentence. Generally speaking, inmates do not participate in any rehabilitative programmes during the assessment process, although there have been some exceptions to this rule. For example, when prison riots ravaged the maximum security Millhaven Institution in Kingston, Ontario from January 21, 1997 to February 27, 1997, all of the maximum security inmates serving the bulk of their sentences at Millhaven were "locked down" for twenty-three hours per day, and precluded from participating in the CORCAN manufacturing programme for maximum security inmates in that institution. Given that CORCAN had contractual obligations to meet, and since its regular workforce of maximum security inmates was not available for work, CORCAN drew upon inmate labour from the Central Regional Assessment Unit, also located at Millhaven Institution, in order to ensure the continued productivity of its business line. As a general rule, however, the development of a correctional plan and the assignment of an inmate to rehabilitative programming will not occur until an inmate has been assigned to his/her host institution. Interview by the Author of Case Management Officer, Millhaven Institution, Kingston, Ontario, April 25, 1997.
incarceration in order to be successfully re-integrated into society subsequent to his release into
the community. Having identified the areas in which an inmate is "needy", the Case
Management Officer and the inmate set personal correctional goals to be attained by the inmate
while incarcerated, which goals are incorporated into a "correctional plan" for the inmate. In
theory, correctional plans are formulated jointly by the inmate and his Case Management
officer. However, in reality, inmates essentially "sign off" on whatever correctional plans
have been developed for them by their Case Management Officers. Once it has been
formulated, the correctional plan serves as a blueprint for the type of correctional programming
required in order to rehabilitate the inmate and to allow for his reintegration into the
community as a law-abiding citizen.

The legislative authority for the formulation of correctional plans, as well as the
purpose served by such plans, is contained in section 102 of the Corrections and Conditional
Release Regulations:

The institutional head shall ensure that a correctional plan for an inmate is
developed as soon as practicable after the reception of the inmate in the
penitentiary, and is maintained, with the inmate to ensure that the inmate
receives the most effective programs at the appropriate time in the inmate's
sentence to prepare the inmate for reintegration into the community, on release,
as a law-abiding citizen.\footnote{Supra. note 27.}

Once a correctional plan has been formulated, a body called the "Program Board" at the

\footnote{37} Once a correctional plan has been formulated, a body called the "Program Board" at the

\footnote{38} Interview by the Author of Case Management Officer, Collins Bay Institution, Correctional Service of Canada, April
24, 1997.

\footnote{39} Ibid.

\footnote{40} Ibid.
institution in which the inmate is incarcerated will attempt to assign inmates to those programmes which will enable the inmate to achieve the goals identified in his correctional plan. In accordance with this responsibility, federal penitentiaries are required to make programmes available which are suitable to the identified needs of its inmate population.

CORCAN work programmes are only one type of programme available to inmates within the Canadian correctional system designed to “promote the achievement of goals established in an individual inmate’s Correctional Plan.” Educational training and personal development programmes also occupy a high priority within the CSC. However, for those

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*In this regard, it is worthy of note that section 102(b) of the *Corrections and Conditional Release Regulations* provides that “[w]hen considering program selection for... an inmate, the [CSC] shall take into account the inmate’s progress towards meeting the objectives set out in the inmate’s correctional plan.” *Ibid*

*In this regard, section 5(b) of the *Corrections and Conditional Release Act*, *supra*, note 28, provides: “There shall continue to be a Correctional Service in and for Canada, to be known as the Correctional Service of Canada, which shall be responsible for... the provision of programs that contribute to the rehabilitation of offenders and to their successful reintegration into the community.” Similarly, section 76 of the Act provides: “The Service shall provide a range of programs designed to address the needs of offenders and contribute to their successful reintegration into the community.” Moreover, section 5 of Commissioner’s Directive 730, issued May 13, 1984, regarding “Inmate Program Assignment and Pay” provides: “The institutional head shall ensure that a range of program opportunities, suitable to the identified needs of the population, shall be available within the institution.” Moreover, it should be noted that Commissioners’ Directive 730 specifically defines a “program” in terms of the furtherance of the goals identified in inmates’ correctional plans as “therapeutic intervention, employment or training or any combination thereof which promotes achievement of goals established in an individual inmate’s Correctional Plan.”


*Educational programmes consist of Adult Basic Education (Grades 1 through 10); secondary education, as well as college and university level programmes and vocational training. Vocational training shares some of the components of CORCAN programmes, insofar as it aims to teach offenders job-related skills which will help them to find employment once they are released into the community. The main difference between vocational training and CORCAN programmes is that whereas inmates employed by CORCAN are encouraged to think of their work as a “real” job, and in respect of which they receive incentive pay, vocational training programmes place less emphasis on creating “real world working conditions” in which inmate workers are productive members of the workforce, and focus instead on merely teaching inmates basic job-related skills. Vocational programmes may teach inmates such skills as plumbing, welding, and small engine repair. See CSC, *Basic Facts about Corrections in Canada*, Ottawa: Minister of Supply and Services, 1995 at 39.

*Personal development programmes focus on helping inmates to attain personal skills which they will need to succeed in the community, and to change problematic behaviours which present barriers to inmates’ rehabilitation. Such programmes may be broadly grouped under four headings: living skills programming, substance abuse intervention, sex offender programmes, and family violence programmes. The Living Skills Programme, in turn, consists of six inter-related components, each of which focuses on different offender needs. The six components are: the Cognitive Skills Training...*
inmates who have been identified as being “needy” in the area of employment, CORCAN is intended to provide an opportunity to inmates to gain the experience and training they need in order to obtain and secure post-release employment.

Technically, inmates may be “assigned” by the Program Boards of their penitentiaries to participate in CORCAN prison industry programmes without their input. In reality, however, the norm is for inmate participants in CORCAN prison industry programmes to voluntarily apply for a position with CORCAN. When CORCAN has an opening at one of its prison industry programmes, it will ordinarily post the available position on a “job posting” board within the institution at which its programmes is located. An inmate interested in such a position may then fill out an application form and submit it to the Program Board of his institution for consideration. The Program Board then serves the function of notifying CORCAN of the inmate’s application. Once CORCAN has been notified of an inmate’s application, the decision with respect to whether or not the inmate will be “employed” by CORCAN will be CORCAN’s and CORCAN’s alone.

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Footnotes:

99 In this regard, Commissioner’s Directive 730 makes a number of references to the Program Board’s ability to assign inmates to programmes. See, for example, section 10(a) which states that the Program Board “shall normally make interim assignments within two weeks of an inmate’s admission to the institution;” and section 10(b) which states that “within two weeks of initiation of the Correctional Plan, [the Program Board shall] determine program assignments that best address the needs and time frames identified in the Plan.”


101 Ibid.

102 Ibid.

103 Ibid.
application and possibly interviewing the inmate. CORCAN will decide whether or not to engage the inmate applicant in the position for which he has applied.\textsuperscript{104} If both the inmate applicant and CORCAN are content to form a working relationship, the Program Board will generally "rubber stamp" the assignment of the inmate to CORCAN.\textsuperscript{105} Hence, the creation of the prison work relationship.

It should be noted that in addition to running its own prison industry programmes, CORCAN also has the authority to engage members of the private sector to "employ" inmates in their business enterprises and to thereby provide the training and employment which CORCAN would otherwise have to provide in order to assist inmates in obtaining employment subsequent to their release. Section 107 of the \textit{Corrections and Conditional Release Regulations} provides:

CORCAN may enter into an agreement with a private sector enterprise

(a) for the production of goods or the provision of services; or

(b) for the training and employment of inmates by that enterprise.

\textsuperscript{104} While it is rare for CORCAN to refuse outright to hire an inmate who has applied for a position in its programme, it has happened in circumstances where an inmate applicant has been previously "employed" by CORCAN, and "fired" for misconduct. Typically, CORCAN has difficulty in locating sufficient numbers of inmates to work in its prison industry programmes. Accordingly, it is rare for CORCAN to turn down inmate applicants unless there is a compelling reason to do so. It should be noted that even if CORCAN does not have a position available for an inmate at the time the inmate's application is reviewed, if the inmate applicant is suitable to CORCAN, it will place the inmate on a waiting list, and begin to employ the inmate as soon as a position becomes available. \textit{Ibid.}

\textsuperscript{105} It should be noted, however, that there is one important limit on the inmate's ability to participate in CORCAN work programmes, and on CORCAN's ability to employ inmates. Specifically, and as noted briefly above, while incarcerated and in pursuit of their correctional plans, inmates not only participate in CORCAN programmes. They are frequently assigned to educational and personal development programmes as well. Accordingly, CORCAN and its inmate workers will frequently have to accommodate the inmate's need to be present at other programmes for part of the normal workday. As a result, many inmates are only able to accept part-time positions with CORCAN in order to allow them to fulfill their other correctional objectives. \textit{Ibid.}
On at least one occasion, CORCAN has exercised its authority under the Regulations to enter into an agreement with private sector enterprise for the training and employment of inmates by that enterprise. Specifically, Wallace Meats is a privately owned and operated abattoir located on the premises of Pittsburgh Institution in Kingston, Ontario. The abattoir has entered into an agreement with CORCAN which allows it to have “employ” inmate labour in its business.\textsuperscript{106}

The workforce at the abattoir is made up mostly of inmate workers. Currently, aside from the owner, who also works at the abattoir, there are two non-inmate full-time employees at the abattoir, as well as thirteen inmate workers.\textsuperscript{108} These inmates have been engaged by the abattoir in much the same way as inmates who work for CORCAN directly. When the privately owned abattoir has an opening for an inmate, it will post the available position on the job posting board at Pittsburgh Institution where the abattoir is located.\textsuperscript{108} Inmates who are interested in applying for the position then fill out an application form and submit it to the Program Board for consideration.\textsuperscript{109} The Program Board will then bring the inmate’s application to the abattoir owner’s attention, who upon reviewing the application and sometimes interviewing the inmate, will make a decision as to whether the inmate is a suitable candidate for “employment”.\textsuperscript{129} If the inmate is not considered suitable, he will be told that

\textsuperscript{106} Interview by the Author of non-inmate employee of Wallace Meats, Pittsburgh Institution, Kingston, Ontario, September 5, 1997.

\textsuperscript{107} Ibid

\textsuperscript{108} Ibid

\textsuperscript{109} Ibid

\textsuperscript{129} Ibid
there is nothing available for him.\textsuperscript{111} If he is suitable, he will either be hired immediately, or else placed on a waiting list until such time as a position comes available.\textsuperscript{112} All inmates who currently work at the abattoir have voluntarily applied to be there: none have been involuntarily assigned to work in the abattoir by the Program Board of Pittsburgh Institution.\textsuperscript{113} Nor has Wallace Meats been forced to accept the assignment to the abattoir of an inmate whom it was not willing to hire. Wallace Meats has ultimate authority with respect to whether a given inmate will be engaged to work in its business.\textsuperscript{114}

From the above, it is apparent that whether prison industry is operated either by CORCAN or by a private sector enterprise which has entered into an agreement with CORCAN under section 107 of the Regulations, the prison industry "employer" voluntarily enters into the prison work relationship. It is also clear that in the vast majority of cases, inmates will voluntarily apply for positions in CORCAN's prison industry programmes. A small minority of inmates, however, will not apply for a position working for prison industry. Nor will they will be engaged on a full-time basis in other correctional programmes. In such cases, the Program Board may involuntarily assign an inmate to participate in a CORCAN prison industry programme in order to ensure that the inmate is occupied on a full-time basis.\textsuperscript{115}

\textsuperscript{111} {\textit{Ibid}}

\textsuperscript{112} {\textit{Ibid}} Where the abattoir posts an availability in its operations, it may receive applications from more than one suitable inmate applicant. In such cases, suitable candidates for whom positions are not available are placed on a waiting list at the abattoir.

\textsuperscript{113} {\textit{Ibid}}

\textsuperscript{114} {\textit{Ibid}}

\textsuperscript{115} Interview, supra, note 100.
These cases remain the exception, however, and the general rule is that inmates enter CORCAN programmes because they have voluntarily submitted an application for a CORCAN position.

The extent to which such applications are voluntary, however, is underwritten to some extent by the high level of coercion which exists for inmates to participate in prison industry programmes. Not only may an inmate’s refusal to work lead to the inmate receiving no pay from his/her CSC institution, such an inmate may also expose himself to the possibility of institutional discipline. Commissioner’s Directive 730 provides for five levels of inmate pay, which all federal offenders normally receive while incarcerated. The lowest level of pay, Level One pay, is set at the subsistence rate of $1.90 per day. and is available to inmates who do participate in any type of CSC rehabilitative programming for a number of reasons. The other four levels of pay are reserved for inmates who are actually participating in a programme assignment, or who are simply awaiting assignment to a programme. Despite the fact that Level One pay is regarded as basic subsistence pay, and is usually granted to inmates who are not participating in any type of programme assignment, an inmate who refuses to work will find himself at a greater disadvantage even than inmates receiving only the subsistence Level

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116 Supra. note 95, sections 14-19.
117 Interview, supra, note 100.
118 Section 14 of Commissioner’s Directive 730 provides that Level One pay will be provided for inmates “(a) who are certified by the institutional health care facility to be medically unfit and not participating in a program assignment; (b) in administrative segregation where no program opportunities exist; (c) who are unemployed because no programme assignment is available; or (d) who are on extended periods of temporary detention or conditional release suspension and not participating in a program assignment.” Supra, note 95.
119 See notes 140 to 145, infra, and accompanying text.
One pay.\textsuperscript{120}

Specifically, section 22 of Commissioner’s Directive 730 states that “the Program Board shall award “zero pay” to inmates who, \textit{inter alia}, “refuse to participate in any program assignment.” Accordingly, where an inmate who is not otherwise occupied on a full-time basis is assigned to a CORCAN prison industry programme by the Program Board of his institution, and where such inmate refuses to work for CORCAN, he will receive no pay whatsoever from the CSC institution at which he is incarcerated.\textsuperscript{121}

In addition to risking the loss of pay, an inmate refusing to participate in a CORCAN programme assignment, or indeed, any programme assignment, may be subject to institutional discipline. In particular, section 40 of the CCRA provides that “an inmate commits a disciplinary offence who, \textit{inter alia}, “without reasonable excuse, refuses to work or leaves work.” Section 44(1) of the Act provides that an inmate who is found guilty of a disciplinary offence is liable to one or more of the following punishments:

a) a warning or reprimand;
b) a loss of privileges;
c) an order to make restitution;
d) a fine;
e) performance of extra duties; and
f) in the case of a serious disciplinary offence, segregation from other inmates for a

\textsuperscript{120} It should be noted that inmates are responsible for their own purchases at prison canteens, such as cigarettes and confectionary items, and even certain medicinal items, such as cold tablets. Thus, the institutional thinking is that every inmate needs some bare income for “subsistence” purposes: Level One pay is intended to be sufficient for such purposes. Interview, supra, note 90.

\textsuperscript{121} Section 23 of the Commissioner’s Directive goes on to state that the maximum period of time for which an inmate shall receive zero pay, and be excluded from any other programme assignment, shall be six weeks. If the inmate continues to refuse to work after that period of time, the warden of the inmate’s institution may authorize the continued suspension of pay to the unco-operative inmate, and exclude him from any other rehabilitative programming.
maximum of thirty days.

In addition to being liable to the above punishments, an inmate who refuses to work for CORCAN where he has been assigned to do so by the Program Board at his institution risks being transferred to a higher security institution where he will enjoy fewer freedoms and privileges, and may even jeopardize his chances of being granted early parole.

Accordingly, while it is clear that federal offenders cannot be physically forced into working for CORCAN while incarcerated, the possibility that an inmate who refuses to work for CORCAN will be subject to institutional punishment, up to and including solitary confinement, the certainty that such an inmate will not even receive subsistence pay while in prison, and the detrimental impact which such refusal would have on an inmate’s chances of being granted parole means that there is a high degree of coercion of inmates to work for CORCAN once the Program Board has determined such an assignment to be consistent with the inmate’s Correctional Plan. Whether or not an inmate can be said to voluntarily enter into CORCAN work programmes is thus somewhat unclear, and will depend heavily on the definition which we choose to assign to the notion of voluntariness.

If the creation of the prison work relationship is important, so too perhaps is the manner in which the prison work relationship is terminated. It is clear that inmates engaged by CORCAN or by a private sector prison employer such as Wallace Meats may be disciplined in

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122 Interview, supra, note 100.

123 Interview, supra, note 90. According to one Case Management Officers, he has a great deal of input into the decision with respect to whether an inmate should be released on early parole in accordance with Part II (ss. 99 to 156) of the CCRA. In his view, where an offender has refused to participate in programmes which have been identified as consistent with the offender’s correctional plan, he will be unlikely to be released on parole.
respect of their work in prison industry programmes, up to and including dismissal from their work positions. At various times, the owner of the privately owned and operated abattoir has had to give inmate workers verbal warnings regarding their conduct at work, which warnings have thus far been successful in correcting the inmates' behaviour and allowing them to continue work at the abattoir.\footnote{124 Interview, supra, note 106.} For those inmates who work for CORCAN directly, it is certainly not unheard of for CORCAN to discipline its inmate workers and even to dismiss them from their positions in its prison industry programmes where they commit some act or mischief which renders them untrustworthy or otherwise unsatisfactory to continue to participate in CORCAN's programmes.\footnote{125}

Just as the prison employer can terminate the prison work relationship, so too can inmates effectively "quit" from their positions with CORCAN or with a private prison employer, if they wish to seek "employment" in another prison work programme available at the institution. At Pittsburgh Institution in Kingston, Ontario, for example, several inmate workers at Wallace Meats have resigned from their positions during the summer in order to allow them to accept work in CORCAN's agribusiness enterprise at the same institution, and to be outdoors during the warm months.\footnote{126 Interview, supra, note 106.} Such transfers are at the inmates' own initiative, and as long as the inmate is successful in arranging for alternative employment, the Program Board

\footnote{124 Interview, supra, note 106. In this regard, it is also worthy of note that Commissioner's Directive 730 contemplates the suspension of inmates from their programme assignments. Section 27 of Commissioner's Directive 730 states: "Program supervisors may recommend suspension of inmates whose behavior requires their immediate removal from their assignment location. When this occurs the program supervisor shall provide written notification to the Program Board and to Case Management." Moreover, section 22 of the Directive contemplates that "zero pay" may be awarded by the Program Board to an inmate who has "been suspended from [his] program assignment."

\footnote{126 Interview, supra, note 106.}
does not interfere with the inmate’s decision to change jobs. In light of the institutional requirement that inmates be occupied on a full-time basis, however, it seems unlikely that an inmate would be able to resign from a CORCAN position or from a position with a private prison employer, if he did not have some other programme available in which he could participate to ensure his full-time occupation.

D. Terms and Conditions of the Prison Work Relationship

1. Scheduling and Supervision of Inmate Work

As noted above, the general policy of the CSC is to require all able-bodied offenders to be occupied on a full-time basis. In this regard, section 12 of Commissioner’s Directive 730 provides:

Inmates shall be paid for participation in programs that have been approved by the Program Board, normally up to the equivalent of five full days per week.

Inmates’ weekly working hours are established by each individual CSC institution by way of Institutional Standing Order. Accordingly, what will constitute full-time employment will depend on the work week which has been established at the institution where an inmate is

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127 Interview, supra, note 100.

128 Ibid

129 Interview, supra, note 100

130 Supra, note 95.

incarcerated. However, the norm seems to be for inmates to be occupied in rehabilitative programmes, including prison industry programmes, for approximately seven hours per day, fifteen days per week. As a general rule, inmates tend to be occupied in correctional programmes for several hours in the morning, and again for several hours after the lunch break.

Where an inmate is assigned to a prison industry programme, he will attend at the worksite at those hours set aside for inmates to participate in correctional programming. Once at the job site, inmates are supervised by CORCAN supervisors or, in the case of private sector prison employers, by non-inmate employees of the private prison employer. No CSC security personnel are present at prison industry worksites, whether operated by CORCAN or by a private sector prison employer. Rather, inmates are regularly supervised only by non-inmate prison industry employees.

2. Inmate Pay

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132 Interview, supra, note 100.

133 See Commissioner's Directive 730, supra, note 95, section 32, which provides that inmates do not work on Saturdays and Sundays except (a) for performance of essential tasks required to be performed on a daily basis; (b) for emergency requirements; and (c) for exceptional requirements of the program assignment.

134 Interview, supra, note 39.

135 Interview, supra, note 100.

136 Interview, supra, note 106.

137 Though it should be noted that, during the course of the day, CORCAN supervisors may periodically telephone security personnel to advise that there are no security problems at the worksite. Interview, supra, note 100. Similarly, at the privately owned and operated prison employer, Wallace Meats, security personnel stop by for a few moments twice a day to ensure that there are no security problems. For the remainder of the time, however, inmate workers at the abattoir are under the sole supervision of the owner of the abattoir and the two non-inmate regular employees of the abattoir. Interview, supra, note 106.
Pursuant to Commissioner’s Directive 730, there are five levels of inmate pay available to all offenders incarcerated in a federal penitentiary.\footnote{With the exception of those offenders who have been awarded “zero pay” by the Program Board pursuant to section 22 of Commissioner’s Directive 730, supra, note 95, as inmates who “(a) refuse to participate in any programme assignment; (b) are serving sentences of disciplinary segregation; (c) have been suspended from their program assignment.”} whether or not they are engaged in prison industry, which pay is provided to inmates directly by the Correctional Service of Canada. Inmate pay is intended to be paid to inmates “for participation in programs that have been approved by the Program Board, normally up to the equivalent of five (5) full days per week.”\footnote{Ibid., section 12.} As mentioned above, Level One pay, at the subsistence rate of $1.90 per day, is reserved for those inmates who are not participating in any CSC programmes for one of a number of possible reasons. Level Two pay is considerably higher than Level One pay, at a rate of $5.25 per day,\footnote{Interview, supra, note 100.} and is available to inmates who are in a reception program or interim placement pending a programme assignment in accordance with their correctional plan.\footnote{Commissioner’s Directive 730, supra, note 95, section 16.} Level Two pay is also paid to inmates who are willing to work, but who refuse to participate in other forms of programming related to their correctional plans.\footnote{Ibid} It is worthy of note that inmates who fall into this latter category are “not eligible for any other financial incentives related to employment.”\footnote{Ibid.} Pay Level Three, at a rate of $5.80 per day, is paid to those inmates...
who are participating in programmes related to their Correctional Plans.\footnote{Ibid., section 17.} Pay Levels Four and Five, set at \$6.35 and \$6.90 per day, are awarded to inmates for their "satisfactory" and "excellent" performance in their assigned programmes, respectively.\footnote{Ibid. sections 18 and 19. It should be noted that in order to qualify for Level Four pay, an inmate must have demonstrated satisfactory performance in the assigned program areas related to the Correctional Plan for a period of at least three months. Level Five pay is awarded to inmates who have been rated as "excellent" over an interval specified in the Correctional Plan or quarterly, whichever is less.}

As a general rule, inmates who participate in CORCAN or CORCAN-authorized\footnote{Here, I am referring to prison industry programmes run by a private sector enterprise, pursuant to an agreement to do so with CORCAN under section 107 of the Corrections and Conditional Release Regulations, supra, note 27.} receive an amount of incentive pay over and above the institutional pay which is provided to all inmates by the CSC. The amount of incentive pay which CORCAN participants receive appears to range from fifty cents per hour\footnote{Interview by the Author of Construction Supervisor, Bath Institution, Kingston, Ontario, April 25, 1997.} to as much as four dollars per hour. In certain circumstances, inmates are paid incentive pay not on an hourly basis, but rather on some other basis. For example, inmate participants in CORCAN’s agribusiness composting programme located at Pittsburgh Institution in Kingston, Ontario receive a percentage of CORCAN profits from the programme, which profits are calculated according to the tonnage of raw material which is brought to CORCAN for composting.\footnote{Interview, supra, note 21.} In that case, on average, inmates receive approximately fifty cents per hour incentive pay, although certain inmate participants in the programme who occupy more responsible positions, such as tractor driving, receive a higher percentage of CORCAN’s profits than other participants, and may be paid, on average, up to
one dollar per hour. The amount of incentive pay which CORCAN participants will receive is determined in respect of individual CORCAN programmes by CORCAN's National Headquarters in Ottawa.41

At the privately owned and operated abattoir, Wallace Meats, inmates are paid one dollar per hour for their work. It should be noted that while at the abattoir, inmates perform all of the work tasks performed by the two non-inmate employees of the abattoir.42

Undoubtedly, the fact that Wallace Meats is able to engage inmate labour at the low rate of one dollar per hour enables it to sell meat products to the public at considerably lower prices than those available from competitors. In this regard, a regular non-inmate employee of Wallace Meats advises that the abattoir sells ground beef to the public for 25 percent less than the price at which ground beef is available from local butchers and grocery stores.43

Whether an inmate is paid incentive pay from CORCAN itself or from a private sector prison employer, his earnings are paid directly to the inmate's account held in his own name at the CSC institution in which he is incarcerated.44 Inmates are paid in this way every two

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41 Ibid
42 Ibid
43 Interview, supra, note 106.
44 Ibid.
45 Ibid.
weeks, and receive a pay stub which records the institutional pay which they receive as well as the incentive pay they receive by virtue of participation in CORCAN prison industry. The two types of pay are recorded separately on the pay stub.

No standard employee deductions are made from inmates' earnings in respect of their participation in prison industry programmes. However, there is a mandatory withholding of two dollars from each inmate's pay during the two week pay period which is deposited into an Inmate Welfare Fund of each CSC institution. This Fund is used in order to fund activities for the benefit of all inmates within each CSC institution, such as the installation of cable television.

It is also interesting to note that inmates engaged in prison industry programmes, because of the higher income they receive compared to other inmates not participating in such programmes, are more likely to have deductions made from their pay in respect of room and board. In this regard, section 78(2) of the CCRA empowers the CSC to make deductions from inmate payments of

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156 Section 20 of Commissioner's Directive 7330, supra, note 95 provides: "Pay earned by inmates will be computed on a 14 day period and placed to their credit no later than the last normal working day in the next 14 day period."

157 Here, I refer to Pay Levels One through Five which almost all inmates receive by virtue of being incarcerated in a federal institution. See notes 140 to 145, supra, and accompanying text.

158 Interview, supra, note 100.

159 ibid

160 ibid

161 ibid

162 ibid
... an amount, not exceeding thirty per cent of the gross payment referred to in subsection (1) or gross income, for reimbursement of the costs of the offender’s food and accommodation incurred while the offender was receiving that income or payment, or for reimbursement of the costs of work-related clothing provided to the offender by the Service.

Section 104.1 of the *Corrections and Conditional Release Regulations* establishes the “sources of income [which] are prescribed for the purposes of 78(2) of the Act,” and from which deductions for room and board, as well as work clothing, may be made:

(a) employment in the community while on work release or conditional release;
(b) employment in a penitentiary provided by a third party;
(c) a business operated by the offender;
(d) hobby craft or custom work; and
(e) a pension from a private or government source.

The current practice of the CSC is to deduct 30 percent of that portion of an inmate’s earnings which exceed $69.00 in a regular two week pay period to cover part of the cost of an inmate’s room and board, and work related clothing, if any. Since inmates who do not earn incentive pay from participation in a prison industry programme are unlikely to earn more than $69.00 in any given two week pay period, they are not subject to the deductions for room and board. CORCAN participants, however, who may earn anywhere from an additional $17.50 to $140.00 every two weeks, regularly have deductions made from their pay in accordance with

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11 Supra, note 27.
124 Interview, supra, note 100.
116 As there are ten work days in a two week pay period, and since inmates not receiving incentive pay can earn a maximum of $6.90 per day at Pay Level Five, the most an inmate not engaged in prison industry can earn is $69.00 every two weeks.
116 Based on a thirty five hour work week and incentive rates ranging from fifty cents to four dollars an hour. See notes 147 to 148, supra, and accompanying text.
section 78(2) of the CCRA and section 104.1 of the Regulations."

In this regard, it is interesting to note that in order for the CSC to make deductions from inmate pay in accordance within the legislative framework, it must regard CORCAN, and less surprisingly privately-owned and operated prison industry enterprises, as "third party" employers within the penitentiary. Section 104.1 of the Regulations clearly stipulates that only the five sources of income listed above may be subject to a maximum thirty percent deductions for room and board and work clothing under section 78(2) of the Act. Inmate earnings from prison industry programmes clearly do not constitute earnings from "employment in the community while on work release or conditional release." within the meaning of section 104.1(a). Nor is CORCAN a "business operated by the offender" within the meaning of section 104.1(c). Equally clear is that CORCAN income is not income from "hobby craft or custom work" by an inmate, nor income from "a pension from a private or government source." The only plausible alternative, it is submitted, is that deductions are made from CORCAN participants earnings in accordance with section 104.1(b) of the Regulations, on the basis that inmates engaged by CORCAN are "employ[ed] in a penitentiary ... by a third party."

3. Overtime

Inmates participating in prison work programme are not infrequently requested to work

\footnote{167 Interview, supra, note 100; Interview, supra, note 311.}

\footnote{168 Section 104.1(d), supra, note 163 and accompanying text.}

\footnote{169 Section 104.1(e), ibid.}
overtime.\textsuperscript{170} When CORCAN requires inmates to work overtime, it will request them to do so.\textsuperscript{171} If the inmates are willing to work overtime, CORCAN merely notifies the correctional institution that the inmates will be working later than usual on that particular day.\textsuperscript{172} As a matter of course, the CSC institution never refuses to allow inmates to work overtime.\textsuperscript{173} However, inmates do not receive overtime pay in respect of their overtime assignments.\textsuperscript{174} In this regard, section 33 of Commissioner's Directive 730 provides that inmates who work on Saturdays and Sundays will not be paid overtime, but will be given equivalent compensatory time off during the week.\textsuperscript{175} The Directive is silent with respect to overtime hours worked during the course of the day. However, in practice, it appears that inmates working hours in addition to their regular working day are not financially compensated for overtime hours worked in excess of their regular working day.\textsuperscript{176} It remains unclear whether inmates working additional hours above and beyond their regular working day are compensated by receiving equivalent time off as are inmates who work Saturdays and Sundays.

The private sector prison employer, Wallace Meats, also requires inmates to work

\textsuperscript{170} Interview, \textit{supra}, note 100. Interview, \textit{supra}, note 106

\textsuperscript{171} \textit{Ibid}

\textsuperscript{172} \textit{Ibid}. At Pittsburgh Institution, inmates usually take their usual break time for supper, and are collected by CORCAN non-inmate staff subsequent to the supper break, and taken to the work site in order to perform their overtime assignments.

\textsuperscript{173} \textit{Ibid}.

\textsuperscript{174} \textit{Ibid}

\textsuperscript{175} \textit{Supra}, note 95.

\textsuperscript{176} Interview, \textit{supra}, note 100.
Inmates work in prison industry programmes. Like inmates participating in any CSC rehabilitative programming receive their regular pay on statutory holidays even though they are not required to work on such days.\footnote{\textsuperscript{182} "Statutory holidays, Saturdays and Sundays are not normal working days." Commissioner's Directive 730, \textit{supra}, note 95, section 32.} However, inmates who work for the private sector prison employer are paid their regular hourly rate of one dollar per hour for overtime hours.\footnote{\textsuperscript{180} \textit{Ibid.}} Inmates at Wallace Meats are paid wages on the basis of hours recorded on time punch cards used by them at the abattoir to record their work starting and stopping times. When an inmate works late, the additional overtime hours he will have worked will be recorded on his time punch card when he punches out, and the additional monies earned by him will be deposited directly to his inmate account at the institution by Wallace Meats when the inmate is next paid.\footnote{\textsuperscript{181} \textit{Ibid.}}

4. Statutory Holidays

Inmates working in prison industry programmes, like inmates participating in any CSC rehabilitative programming receive their regular pay on statutory holidays even though they are not required to work on such days.\footnote{\textsuperscript{182} "Statutory holidays, Saturdays and Sundays are not normal working days." Commissioner's Directive 730, \textit{supra}, note 95, section 32.}

\footnote{\textsuperscript{177} Interview, \textit{supra}, note 106.}
\footnote{\textsuperscript{178} \textit{Ibid.}}
\footnote{\textsuperscript{179} \textit{Ibid.}}
\footnote{\textsuperscript{180} \textit{Ibid.}}
\footnote{\textsuperscript{181} \textit{Ibid.}}
\footnote{\textsuperscript{182} "Statutory holidays, Saturdays and Sundays are not normal working days." Commissioner's Directive 730, \textit{supra}, note 95, section 32.}
730 states that. “Inmates shall be paid regular inmate pay for statutory holidays at their normal daily rates of pay.” Section 35 of the Directive provides that inmates engaged in “an employment placement component of their program assignment” may work on statutory holidays, but when they do so, they “shall receive an additional day’s regular inmate pay.” Since all inmates are entitled to receive statutory holiday pay even where they do not work on the holiday, it would appear that the provision in section 35 would effectively entitle prison industry programme participants to “double time” where they work on statutory holidays. This is to be contrasted with the situation in which inmates work on Saturdays or Sundays, in which case, they are only entitled to receive equivalent time off for such overtime work.

E. Conclusion

The above section has discussed the objectives underlying the prison work relationship which exists between CORCAN and federally incarcerated inmates. While CORCAN’s primary mandate is the rehabilitation of inmates through work, it is also clear that CORCAN is under an obligation to be a financially sustainable “business” enterprise. At times, these dual objectives come into conflict, with the possible consequence that the financial sustainability objective takes precedence over CORCAN’s rehabilitative mandate. As we shall see in the coming sections, the objectives underlying the prison work relationship may be crucial to the determination as to whether prison workers may also be “employees” for the purposes of minimum standards legislation.

The above section has also attempted to provide an overview of the prison work
relationship, with particular attention being paid to the creation of the prison work relationship, as well as the terms and conditions of the relationship. As shall also be borne out in the subsequent chapters, these factors become significant when we apply the tests for employee status under minimum standards law to the prison work relationship in order to determine whether it may be characterized as one of employment.
II. EXISTENCE OF AN EMPLOYMENT RELATIONSHIP

A. Whether Prisoners are Employees under the US Fair Labor Standards Act

The question with respect to whether inmate workers are “employees” for the purposes of minimum standards legislation has been subject to extensive litigation in the United States. Since the issue of prisoners’ employee status has been given scant consideration in Canada, an analysis of the US jurisprudence is helpful as a means of focussing the debate in Canada regarding whether prisoners working in Canadian federal penitentiaries are entitled to the protections afforded by minimum standards legislation. In particular, the US jurisprudence highlights a number of arguments for and against finding that prisoners fall within the definition of “employees”. An in-depth look at such arguments is warranted, since any determination of inmates’ employee status in Canada would be likely forced to resolve similar arguments.

A number of prisoners in the US have claimed before the courts to be entitled to the federal minimum wage as established by the Fair Labor Standards Act of 1938 (hereinafter “FLSA”), on the basis of the fact that they are “employees” within the meaning of the FLSA. Litigation in the United States has thus focussed on whether inmate workers may be characterized as “employees” for the purposes of the FLSA. The terms “employee” and “employer” are defined in a circular manner by the FLSA. “Employee” is defined as “any individual employed by an Employer,” and the term “employer” means “any person acting

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183 29 USC §§ 201-19.

184 Employers are required to pay their employees the federal minimum wage, currently $5.15 per hour, by virtue of 29 USC § 206(a)(1). “Employee” is defined in §203(a)(1) of the Act.
directly or indirectly in the interest of an employer in relation to an employee and includ[ing] a public agency...." To "Employ" is broadly defined in the FLSA as "to suffer or permit to work." Though a number of workers are expressly excluded from the scopes of the FLSA, prisoners are not among them.

While the US federal courts have been reluctant to categorically exclude prisoners from the scope of the Fair Labor Standards Act, the vast majority of decisions have refused to conclude, on the facts of the cases before them, that inmate workers are employees for the purposes of the FLSA. The reasons cited for denying prisoners FLSA protection have been varied and the jurisprudence from the US Circuit Courts does not disclose a uniform approach to the question of inmates' employee status under the FLSA. A number of US Courts of Appeal have tended to deny inmates status as employees for FLSA purposes on the stated basis that to extend such status to prisoners would not advance the underlying purposes of the FLSA. Other courts, following the direction of the United States Supreme Court in Goldberg v. Whitaker House Cooperative Inc., have determined the issue by focusing on the "economic reality" of the relationship between inmates and their putative employers in order to determine whether the relationship is one of employment. Still other courts have adopted both a purposive approach to the interpretation of the definition of "employee" in the FLSA, and

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185 29 USC § 203(d).

186 29 USC § 203(g). "The words "suffer or permit to work" include those who suffer by a failure to hinder and those who permit by acquiescence in addition to those who employ by oral or written contract." 29 CFR 570.113(a), as cited in Hale v State of Arizona, 993 F. 2d 1387 (9th Cir. 1993) (en banc).

187 The exclusions, too detailed to reproduce here, are set out in 29 USC § 213.

considered the "economic reality" of the relationship between employees and their putative employers in determining whether inmates are employees for the purposes of the minimum wage provisions of the *Fair Labor Standards Act*.

In the following sections, I propose to discuss the US case law regarding the employment status of inmates under the FLSA according to the analyses which have been employed by the courts in determining whether inmate workers are entitled to the Act's protection. First, I will consider the purposive approach to the FLSA employed by the courts in construing the definition of "employee" in the Act. Secondly, I will address the varied considerations which have been brought to bear on the question with respect to whether the "economic reality" of the relationship between inmates and their putative employers is such that inmate workers can be aptly described as "employees". As stated above, it should be borne in mind that a number of the decisions of the US Circuit Courts utilize one or the other, or both, of the two types of analysis in reaching their conclusions with respect to inmates' status as employees under the FLSA.

1. Statutory Purpose of the *Fair Labor Standards Act*

A number of Courts have attempted to resolve the ambiguity surrounding the definition of "employee" in the FLSA by reference to the underlying purposes of the Act. There are commonly thought to be two basic statutory purposes underlying the provisions of the *Fair Labor Standards Act*: the maintenance of a minimum standard of living necessary for the health, efficiency and general well-being of workers; and the prevention of unfair competition
in commerce by establishing certain minimum standards of employment which must be
adhered to by all employers. The underlying purposes of the FLSA are set out in section 202
of the Act.

(a) The Congress finds that the existence, in industries engaged in commerce or
in the production of goods for commerce, of labor conditions detrimental to the
maintenance of the minimum standards of living necessary for health,
efficiency, and general well-being of workers

(1) causes commerce and the channels and
instrumentalities of commerce to be used to
spread and perpetuate such labor conditions
among the workers of the several States;
(2) burdens commerce and the free flow of goods in
commerce:
(3) constitutes an unfair method of competition in
commerce:
(4) leads to labor disputes burdening and obstructing
commerce and the free flow of goods in
commerce; and
(5) interferes with the orderly and fair marketing of
goods in commerce...

At first blush, it is not readily apparent that the FLSA has as its only purposes the
maintenance of a minimum standard of living for workers and the prevention of unfair
competition. One plausible reading of the Act might also lead to the conclusion that preserving
the free flow of goods in commerce is a further purpose of the FLSA.\(^\text{199}\) Nonetheless, the case
law has been fairly consistent in maintaining that the FLSA has only the two purposes


\(^{199}\) In this regard, §§202(1)(2), (4), and (5) seem primarily concerned with ensuring that commerce is not hindered or
obstructed as a result of labour conditions detrimental to a minimum standard of living for workers.
indicated above. Regardless, it is clear from the face of section 202 of the FLSA that, with the passage of the Act, Congress sought to eradicate conditions detrimental to the minimum acceptable standard of living for workers, as a good in its own right.\(^\text{191}\) and because the existence of such conditions constituted an unfair means of competition in commerce.\(^\text{192}\)

Adopting a purposive approach to the definition of “employee” under the FLSA, a number of cases assess whether granting employee status to such workers would advance the two commonly accepted objectives of the Act. While the majority of the courts have concluded that the purposes of the Act would not be advanced by granting employee status to inmate workers, sound arguments have been put forward that, properly conceived, the extension of the FLSA’s protection to working inmates working is consistent with the Act’s goals of preventing the erosion of the standard of living of American workers in the “free world” and of avoiding unfair commercial competition.

\[\text{a) Minimum Standard of Living for Workers}\]

The central aim of the FLSA is to achieve certain minimum labour standards in order to correct labour conditions that are “detrimental to the minimum standard of living necessary for the health, efficiency, and general well-being of workers.” A number of the US Circuit Courts have concluded that, since inmates’ standard of living is provided for and maintained by the penal institutions in which they are incarcerated, there is no need to extend FLSA protection to

\(^{191}\) § 202(a)(1).

\(^{192}\) 202(a)(3).
inmate workers in order to satisfy the first stated purpose of the Act. The oft-cited decision of the Court of Appeals for the Seventh Circuit in *Vansikke v. Peters*\(^{14}\) articulates the reasoning behind this conclusion:

The first purpose of the FLSA has little or no application in the context presented here. Prisoners' basic needs are met in prison, irrespective of their ability to pay. Requiring the payment of minimum wage for a prisoner's work in prison would not further the policy of ensuring a "minimum standard of living," because a prisoner's minimum standard of living is established by state policy: it is not substantially affected by wages received by the prisoner. It is true, as *Vansikke* points out, that some cases have characterized the FLSA's primary purpose more specifically, as aimed at "substandard wages and oppressive working hours."... The evil of substandard wages, however, as just noted, does not apply where workers' welfare is not a function of wages.\(^{15}\)

Other Circuits have endorsed the reasoning in *Vansikke*, holding that since prisoners' food, clothing and shelter is provided for by the state, the first purpose of the Act will not be furthered by extending FLSA protection to inmates, and hence, minimum wage provisions are unnecessary\(^{16}\).

The Fourth Circuit, in *Harker v. State Use Industries*,\(^{17}\) stated the proposition strongly:

[T]he FLSA does not cover these inmates because the statute itself states that Congress passed minimum wage standards in order to maintain a standard of living necessary for health, efficiency, and general well-being of workers.... While incarcerated, inmates have no such needs because the DOC [Department

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\(^{14}\) 974 F.2d 806 (7th Cir. 1992).

\(^{15}\) *Ibid.* at 810-11.


\(^{17}\) 990 F.2d 131 (4th Cir. 1993).
of Corrections] provides them with the food, shelter, and clothing that employees would have to purchase in an true employment situation. So long as the DOC provides for these needs, Harker can have no credible claim that inmates need a minimum wage to ensure their welfare and standard of living.197

Thus have a majority of the federal courts which have considered whether treating inmate workers as employees is consistent with the underlying purposes of the FLSA concluded that the first purpose of the Act - the maintenance of a minimum standard of living for workers - is inapplicable in the prison context because inmates' material needs are provided for by the State. This conception of the Act's "minimum standard of living" purpose, however, fails to take into account the impact which the payment of substandard wages to inmate workers may have on the standard of living of "free world" American workers who might otherwise be employed to perform the tasks carried out by inmate workers. This impact is discussed in the following section with respect to whether the FLSA's objective of preventing unfair competition is jeopardized by failing to pay inmate workers the minimum wage.

b) Prevention of Unfair Competition in Commerce

Closely related to the FLSA's purpose of ensuring a minimum standard of living for all workers is the Act's objective in eliminating unfair competition in commerce. Specifically, the FLSA's adherence to a minimum standard of living for all workers within the United States is partially intended to ensure that workers need not compete with one another for jobs by accepting terms and conditions of employment which are not consistent with their "health.

197 Ibid. at 133.
efficiency, and general well-being.” Thus, the Act’s purpose of preventing such competition goes towards ensuring the minimum standard of living for workers which it seeks to achieve. Perhaps nowhere is the need to prevent unfair competition as great as it is with respect to wages.

The Act’s purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. 44

Insofar as the use of cheap inmate labour may give rise to unfair competition in the labour market, it may thereby threaten the minimum standard of living, if not of inmates themselves, of workers in society at large. Where inmates are available to perform work at substandard wages, free world workers are much less likely to obtain jobs performing such work. Of course, this argument is premised on the assumption that if cheap inmate labour were not available, the work performed by prisoners would still need to be done by someone, namely free workers compensated at no less than the federal minimum wage. 45 This is a real concern since the fact is that much of the work performed by inmates would have to be done even if inmates were not available to do such work. This is particularly true of private sector prison employers, for example, who, were it not for the accessibility of cheap inmate labour, would be required to hire free world workers at no less than the minimum wage. Similarly, the

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45 Where inmates are employed in work specifically created for their training and rehabilitation - which work would not exist but for the need to offer inmates “employment” - free world workers may have a weakened claim that they are being unfairly forced to compete with prisoners for the work in question. Even in this scenario, however, and as is discussed in greater detail in the following section, the standard of living of free world workers may be jeopardized by the tolerance of cheap inmate labour where the products of prison industry - whether or not such industry exists primarily to provide work opportunities for inmates - enter the marketplace and compete with the products of properly compensated free labour.
employment of inmates in institutional tasks at the prisons in which they are incarcerated also represents the removal from the labour market of jobs which would otherwise be filled by free world workers. While institutions do have a tendency to assign more inmates than necessary to such tasks as cleaning, kitchen work, et cetera, in an effort to prevent inmate idleness and to provide inmates with work opportunities, there is no question that if inmates were not able to perform such tasks for little or no compensation, a certain number of free world workers would have to be hired to perform such work.

The fact that free world workers might obtain the jobs performed by inmates, were it not for the absence of any need to pay the minimum wage to the latter, translates into downward pressure on the wages and working conditions of free world workers in order to allow them to compete with inmate labour. When viewed in this light, it becomes clear that extending minimum wage protections to inmate workers may well advance the FLSA’s statutory purpose of ensuring a minimum standard of living for the well-being of workers generally.

This view has been best articulated in the jurisprudence by the dissenting judge in the Ninth Circuit’s decision in Gilbreath v Cutter Biological, Inc. In that case, Nelson J., writing in dissent, criticized the two majority judges on the panel for failing to pay adequate attention to the underlying purposes of the FLSA in arriving at the conclusion that Arizona state inmates working at a privately-owned and operated blood plasma treatment centre located in the state prison were not employees under the FLSA, and not entitled to the minimum wage.

\(^{29}\) 931 F.2d 1320 (9th Cir. 1991)
Nelson J. urges an interpretation of the term “employee” which would include inmate workers, not out of any “particular sympathy for inmates” but rather as a means of ensuring that the working conditions of free workers are not depressed because of employers’ accessibility to a cheap pool of inmate labor.

The FLSA is comprehensive legislation. It certainly is designed to directly assist exploited employees requiring its enforcement in a specific instance. But its sword is double-edged. It also purports to come to the indirect aid of compliant employers and their employees who might suffer from the ill effects of nonobservance... In most cases, both concerns overlap: the persons seeking application of the FLSA are precisely those Congress wished to assist, and, in so doing, Congress protects compliant employers and their employees as well. Here, however, we have a slightly different scenario: Congress, arguably, is indifferent to the economic well-being of prisoners. But it remains concerned, and so, by implication, must we, with the effect of their working conditions on other employers and their employees.\footnote{Nelson J.'s approach to the question with respect to whether inmates should be considered "employees" within the meaning of the FLSA would seem to be more aligned with the original congressional purpose of the Act than that adopted, for example, by the court in 

\textit{Tanskihe}

where the impact of substandard inmate wages on free workers was not even considered. The original intent of Congress is evidenced by statements made in the House Report which

\footnote{ibid. at 1331. Though concurring in the result, Judges Trott and Rymer cited separate reasons for their conclusion that the inmates in question were not "employees" within the meaning of the Act. Judge Trott states in his judgment that because food, shelter and clothing are provided to inmates by the state, "Arizona's prisoners have no economic need for the FLSA, none." \textit{ibid.} at 1325. He goes on to conclude that in light of the "express purpose of the FLSA, i.e. to provide for workers a minimum standard of living necessary for health, efficiency and ... general well-being", it is readily apparent that the FLSA was not intended to apply to the prisoners in the case before him. \textit{ibid.} at 1326. Judge Rymer deals with the statutory purposes underlying the FLSA in an even more cursory manner, stating simply that "The facts in this case show that inmate labor belongs to the institution. That being so, there is no need to protect "the standard of living and general well-being of the worker in American industry." \textit{ibid.} at 1331.}

\footnote{ibid. at 1332.}

\footnote{ibid.}
followed the passage of the FLSA in 1938, touting the passage of the Act as an end to oppressive labour standards throughout the United States.

[N]o employee need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes.

The above passage supports Nelson J.’s purposive interpretation of the FLSA, insofar as it makes clear that the Act was not only “designed to directly assist exploited employees requiring its enforcement”, but also to come to the indirect aid of compliant employers and employees who might otherwise be compelled to accept oppressive labour standards in order to remain competitive. The broader conception of the “minimum standard of living” purpose of the FLSA endorsed by Judge Nelson in Gilbreath was met with approval by the Court of Appeals for the Second Circuit in Carter v. Dutchess Community College.205 In this decision, often cited in support of inmate FLSA claims, the court held that prison inmates may not be categorically excluded from the protection of the FLSA, relying, in part, on the underlying purposes of the Act. Carter was an inmate at the Fishkill Correctional Facility in New York. While at that correctional facility, Carter conducted tutorial classes for other inmates in a prison education programme located at the prison, and run by Dutchess Community College. While non-inmate tutors hired by Dutchess were paid at least the minimum wage, Carter received only three dollars per day, which was deposited directly to his inmate account by the

204 H.R. Rep. No 2182, 75th Cong., 3d Sess. 6-7 (1938), as cited in International Ladies’ Garment Workers’ Union v. Donovan, 722 F.2d 795 (1983) at 808; and in Gilbreath, supra, note 200 at 1332.

Community College. At first hearing, the District Court had dismissed Carter's claim to the federal minimum wage on the basis that he had not disclosed a claim of arguable merit, as he was not an "employee" within the meaning of the FLSA. On appeal, however, the Second Circuit overturned the decision of the inferior court, and remanded the matter back to be determined on the merits. In concluding that Carter had presented a claim of arguable merit, the Court held that extending FLSA protection to inmates employed by "outside" employers would be consistent with the FLSA's purpose of protecting the working conditions of workers generally. Moreover, the Court in Carter specifically rejected as superficial the argument articulated in other cases that prisoners have no need of FLSA protection because their material needs are provided by the state.

The argument begins by pointing out that the FLSA was enacted to improve the living conditions, bargaining strength vis-a-vis employers, and general well-being of the American worker... In light of that, they contend that the FLSA has no application to imprisoned persons such as Carter, whose living conditions are determined as a matter of state policy, and who have no need for bargaining strength since their right to work in the first place is a matter of legislative grace. Despite the surface appeal of this logic, we reject it for three reasons. First, there are purposes behind the FLSA other than those set forth above, among which is the establishment of minimum standards in the workplace... This results in the elimination of unfair competition, not only among employers, but also among workers looking for jobs. We believe that courts should refrain from exempting a whole class of workers, based on technical labels, from the coverage of the FLSA, because such action would have the potential for upsetting the desired equilibrium in the workplace.206

While the majority of US Courts have adopted the more narrow superficial interpretation of the FLSA's "minimum standard of living" purpose in the context of inmates' claims to the minimum wage, a conception of the purpose which takes into account the impact

206 ibid at 13.
that subminimum inmate wages may have on non-inmate workers is in greater accord with the Congressional purpose underlying the FLSA. Whether or not we court "any particular sympathy for inmates," it may well be that the best way in which to ensure the preservation of certain minimum labour standards for all workers in society is to extend minimum standards legislation to prisoners in respect of their work.

Of course, the Act's intended prevention of unfair competition in respect of commerce is not limited to that which might otherwise exist among workers. The FLSA is also concerned with the prevention of unfair competition among US businesses. In this regard, the FLSA seeks to eliminate unfair competition with employers which, if permitted to do so, would maintain oppressive labour standards for their workers, making it difficult for fair employers to compete in the marketplace. In its House Report following the passage of the FLSA, Congress spoke to the benefit of the new minimum labour standards legislation from the perspective of employers.

No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors.267

While the majority of the Circuit Courts have dealt in a relatively cursory manner with the FLSA's "minimum standard of living" purpose, the prevention of unfair competition, among businesses in particular, has been given closer consideration in the jurisprudence. Essentially, the "prevention of unfair competition" argument in favour of granting inmate

267 HR Rep. No. 2182, 75th Cong., 3d Sess. 6-7 (1938), as cited in International Ladies' Garment Workers' Union, supra, note 204 at 808.
workers employee status under the FLSA is that the Act's underlying purpose in requiring all businesses to pay their workers no less than the federal minimum wage will be undermined if certain employers in a given industry are permitted to make use of cheap inmate labour. The rationale for granting inmate workers employee status in order to prevent unfair competition among business competitors has been given its most thorough treatment by Nelson J, writing in dissent, in *Gilbreath v Cutter Biological Inc.* In *Gilbreath*, Arizona state inmates working for a privately-owned plasma treatment centre, located in the state prison, were engaged as assistants to Cutter's technical staff. Under the terms of the contract between the Arizona Department of Corrections and Cutter, inmates were assigned to work at Cutter by the Department of Corrections. In return, Cutter paid twelve dollars per week for each inmate so assigned directly to the Inmates' Accounts office of the state prison. In his dissent, Nelson J. maintained that the FLSA's purpose of eliminating unfair competition among private companies and among workers looking for jobs would be circumvented if Cutter Biological was not obliged to pay its inmate workers the minimum wage in accordance with the FLSA.

... Congress intended the FLSA to have the widest possible impact in the national economy because one of its purposes was the establishment of minimum standards in the workplace in order to eliminate unfair competition among private companies and among workers looking for jobs.... This national purpose is subverted when a court permits one company within an industry to avoid the strictures of the Act. By exempting appellants from FLSA coverage, the majority, without even discussing this issue, has given Cutter Biological an unfair cost advantage over its competitors, who are required to pay minimum wage. Quite simply, Cutter, with the state's assistance, is making use of a cheap

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20 Supra, note 200.

21" Ibid., at 1322.

210 Ibid
labor pool, by-passing the Act's constraints and thwarting its overriding purpose. I cannot believe that Congress intended to create a loophole of such proportions, permitting employers to hire labor at substandard pay and then sending the output into the flow of commerce. 211

At least one case has adhered to the type of rationale articulated by Judge Nelson in *Gilbreath* in order to reach the conclusion that inmates employed by a private construction company were employees for the purposes of the FLSA, and therefore entitled to the minimum wage. In *Watson v Graves*, 212 inmates incarcerated at the Livingston Parish Jail who had not been sentenced to hard labour as part of their sentences were given the choice of participating in a work release programme with a privately owned construction company for a flat rate of twenty dollars per day. 211 The inmates in *Watson* who were seeking their entitlement to the federal minimum wage in accordance with the FLSA had been assigned to work for a privately-owned construction business. 214 which relied on inmate labour in order to have work completed. 215 Primarily, the Court in *Watson* held that the inmate workers were employees of the construction company on the basis that the "economic reality" of the situation disclosed the existence of an employment relationship. However, the purposes underlying the FLSA also factored heavily in the Court's decision. Though all of the factors which would ordinarily be

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212 909 F. 2d 1549 (5th Cir. 1990).


215 It is worthy of note that the defendant owners of the construction company were the daughter and son-in-law of the Sheriff of the Livingston Parish Jail, at which the inmates in question were incarcerated. Moreover, the Sheriff had ultimate responsibility for the operation of the work release programme at the Jail. *Ibid.*

216 Apparently, the only two non-inmate employees of the unincorporated construction company were the daughter and son-in-law of the Sheriff of the Livingston Parish Jail, Marilyn and Darryl Jarreau. Subcontractors were also reportedly used by the company in order to fulfill its work requirements. *Ibid.*
present in an employment relationship were not evident on the facts in Watson, the court concluded that this matter was of little concern when the economic reality of the relationship between the construction company and its inmate workers was assessed in light of the FLSA’s purposes.

Jarreau [the owner of the construction company] had at his disposal a “captive” pool of workers whom he had only to pay token wages. Those wages were well below the legal minimum, and, we speculate, even further below the “going rate” for workers with the inmates’ skill and abilities. Unlike his competitors, Jarreau incurred no expense for overtime, unemployment insurance, social security, workers’ compensation insurance, or other employee benefit plans because he had no “employees”. Jarreau had no need to hire any non-inmate employees because his labor needs were in cheap and easy supply at his father-in-law’s jail. Such a situation is fraught with the very problems that [the] FLSA was drafted to prevent - grossly unfair competition among employers and employees alike. Obviously, construction contractors in the area could not compete with Jarreau’s prices because they had to pay at least minimum wage for even unskilled labor, not to mention all of the above listed overhead costs avoided by Jarreau. It takes little imagination to recognize that job opportunities for non-inmate workers in the areas was severely distorted by the availability of twenty dollar per day workers from the parish jail. 216

The vast majority of the decisions which have been handed down with respect to inmates’ status as “employees” under the FLSA, however, have declined to follow Watson’s approach to the “unfair competition” purpose of the Act. A number of these decisions have concluded that unfair competition among business competitors did not arise as a concern on the facts of those particular cases, since the fruits of the inmates’ labour did not enter the marketplace. A number of other decisions of the federal courts have relied upon Congress’ criminalization of the interstate transport of prison-made products in the Ashurst-Summers

216 ibid. at 1555.
67

...to conclude, as a matter of statutory interpretation, that Congress did not intend the FLSA provisions to be extended to inmates working while incarcerated.

i) Whether Threat of Unfair Competition Arises from Use of Inmate Labour

In *Vansikke v Peters*, the Court was not persuaded that extending the FLSA's minimum wage protection to the inmate, Vansikke, would advance the second purpose of the Act, namely, to eliminate unfair competition in commerce. Vansikke brought a claim against the Illinois Department of Corrections alleging that he was entitled to be paid the federal minimum wage in respect of various work assignments - as a janitor, kitchen worker, gallery worker and "knit-shop piece-rate worker" - performed by him while incarcerated. The Court found that no concern with respect to unfair competition arose on the facts since there was no evidence that Vansikke was working to produce goods which were distributed outside the prison. A number of other courts have similarly indicated that inmates were not entitled to minimum wage protection under the FLSA since the goods or services produced by inmate labour did not enter the marketplace.

In *Harker v State Use Industries*, for example, the Court rejected Harker's argument that a purposive reading of the definition of "employee" in the FLSA entitled him to the

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17 18 USC §§ 1761-62.
18 *Supra* note 193.
21 *Supra* note 196.
minimum wage. Harker worked in several capacities at a graphic print shop located within the Maryland Correctional Institution and operated by State Use Industries (SUI), an organization within the Department of Corrections responsible for providing inmates with rehabilitative work and training. The goods and services produced within State Use Industries' programmes were generally sold to government agencies, institutions, and political subdivisions of Maryland, as well as federal institutions and agencies, and to the institutions and agencies of other states. State Use Industries was prohibited by statute from selling its products on the open market; however, in limited circumstances, it was permitted to make sales to charitable or civic entities, or to the general public where a surplus of goods remained unused after one year. Harker argued that the FLSA should apply to him because of the second intended purpose of the Act - the prevention of unfair competition. Specifically, Harker claimed that "because some SUI goods may reach the open market, through sale of surplus goods or sales to civic charitable entities, it would create unfair competition in commerce if the State were permitted to employ him for less than the minimum wage." The Court rejected this argument, however, because it was not persuaded "that the limited ways in which SUI goods might enter the open market threaten(ed) fair competition."

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222 Ibid. at 132.
223 Ibid.
224 Ibid.
225 Ibid. at 134.
226 Ibid. The Court also went on to state that even if Harker was correct in his assertion that unfair competition in the manner described was a viable threat, the FLSA would still not apply because Congress had addressed the problem of competition with inmate labour specifically in the Ishurst-Summers Act. See notes 239 to 247, infra, and accompanying text.
Similarly, the Court of Appeals for the First Circuit, in *Miller v. Dukakis*, held that the unfair competition purpose of the FLSA was not threatened by the fact that inmates performing institutional tasks at the prison in which they were incarcerated did not receive the minimum wage because the institution did not “operate in the marketplace and ha[d] no business competitors.”

In light of the above cases, it emerges that a number of courts have been prepared to conclude that the threat of unfair competition does not exist where inmates are performing institutional tasks for the prison in which they are incarcerated, or where they are producing products for use or sale by prison authorities to other government departments or agencies. In a recent decision, *Danneskjold v. Hausrath*, however, the Court of Appeals for the Second Circuit expanded this more conventional approach to the issue, and found that there was no threat of unfair competition where a private sector college consortium offering college training to inmates employed inmate tutors in that enterprise for as little as ninety-five cents per day, well below the minimum wage in the FLSA. The Court in *Danneskjold* held that where “a prisoner’s work produces goods or services for the use of the prison” - the tutoring of other inmates in a prison education programme - the fact that a private contractor delivers such

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227 961 F.2d 7 (1st Cir. 1992)
229 82 F. 3d 37 (2nd Cir. 1996).
231 At the time the case in *Danneskjold* was heard, the federal minimum wage would have been $4.25 per hour, pursuant to §206(a)(1) of the FLSA.
232 *Supra.* note 229 at 43.
services for a profit does not create a threat of unfair competition for the purposes of the FLSA.

Where a prisoner’s work produces goods or services for the use of the prison, we also do not believe that the use of a private contractor as an intermediary subjects either the contractor or the institution to the FLSA unless the work undermines the FLSA in a particular labor market. For example, if a prison operated a laundry that served only inmates, clearly it might use prisoners to operate the laundry without paying FLSA wages. We perceive no distinction of legal consequence between those circumstances and the provision of similar services to the prison by a private contractor using prison labor. Some tasks may be more efficiently handled by private contractors, but the legal status of prison labor under the FLSA should not be altered by the fact that the boss works under a contract with the corrections authorities instead of as a prison employee. For the reasons stated above, we also believe that whether the labor is performed inside or outside the physical walls of the institution is irrelevant. If penal needs are better served by off-site labor, that fact does not alter the relationship for FLSA purposes.211

The above analysis of the unfair competition issue by the Court in Danneskjold seems to be internally inconsistent, and, indeed, somewhat perverse. While the court implies that the failure to pay the minimum wage may give rise to unfair competition where the “work undermines the FLSA in a particular labor market,” ironically, it seems oblivious to the fact that permitting a private sector employer, such as the college consortiums, to make use of cheap inmate labour will give rise to precisely that result. Where a private employer is permitted to hire inmate workers in its profit-making enterprise, free non-inmate workers lose the opportunity to be employed by the private employer in question. Thus, one would assume, on the Court’s own reasoning, that failure to pay inmate-tutors the minimum wage would undermine the FLSA in a particular labor market, namely, among non-inmate tutors.

211 Ibid. at 43-44.
Rather than considering whether the sub-minimum wage employment of inmate tutors would undermine that particular labour market, however, the Danneskjold Court instead concluded that no unfair competition arose in the case because the prison was the ultimate beneficiary of the education services provided by the private contractor. It is far from clear how the identity of the beneficiary of privately produced goods and services impacts on the unfair competition issue.234 One would think that in determining whether unfair competition arose as a concern in the case, focus should rather have been on the parties for whom competition was an issue, namely free workers and businesses in the marketplace who were in a position to compete with the underpaid inmate workers and the private contractor, respectively.

It is true that the fact that goods or services are ultimately consumed by the prisons themselves or by other state agencies has been put forward in other contexts as the rationale for not finding that the second purpose of the FLSA - the prevention of unfair competition - warranted the extension of the minimum wage to inmate workers. However, these cases differ in that goods were being produced with inmate labour not only for the State, but also by the State, whether through prison-run prison industries organizations, or otherwise. In those cases, the conclusion that the production by the State of goods and services for the use of the State does not give rise to unfair competition is supported by the reasoning that inmate-produced goods and services neither originate in nor enter the marketplace. This is not the case.

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234 Similarly, the Danneskjold Court's reference to the fact that the private sector may be positioned to provide services more "efficiently" than the prison itself appears to be misguided. The fact that a private sector contractor may be able to provide services more "efficiently" than a prison itself would seem to have no connection whatsoever to the issue with respect to whether the use of inmate workers by the private employer gives rise to unfair competition among either workers or vis-à-vis its business competitors.
For the Seventh Circuit in *Northrup v. Nourse* acknowledged that, in a certain context, an activity performed
that the use of immigrant labour increased with labour market competition, the Court of Appeals
Although the Court in *Dumbesfield* failed even to entertain the possibility, in that case

contractor in *Dumbesfield*

likely have been unable to compete with the cheap immigrant labour available to the privilege
jobs. As stated above, contractor in the local labour market, non-immigrant workers would most
may well occur among businesses. It also lacks the form of competition among workers for
Nonetheless, this approach pays inadequate attention to the fact that while the ultimate competition
was "sold" to the panel in Northern District of Iowa the immigrant-workers themselves were uninterested.
- business by selling its products on the open market. Rather, its product — college training

competition concern in this case because the prevailing contractor was not competing with other
presoners' upkeep. It may be that the Court in *Dumbesfield* reasoned that there was no unthat
cheap immigrant labour helps them to maximize profits, and who do not bear any of the burden for
Neither of these rationales apply in the case of private contractors whose access to

theoretically justifiable.

labour by the state may be seen as merely an exercise of altering some of this cost, and

immune labour: it must also bear the huge cost of contracts. In this way, the use of immigrant

informed by the view that while the state would deliver a benefit from the use of cheap
and services for some use. Further, it is likely that the Court's reasoning in those cases is also
however, whereas a private contractor, such as the one in *Dumbesfield*, is the producer of goods

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by prison inmates - regardless of whether it is performed for prison authorities or for private
sector inmate "employers" - creates competition with non-inmate workers:

For every prisoner who is assigned to sweep a floor or wash dishes for little or no pay, there is presumably someone in the outside world who could be hired to do the job - someone who would have to be paid at least [the minimum wage]. This approach to the FLSA's second purpose thus cuts a broad swath: carried to its logical conclusion, prisoners must be paid minimum wage for anything they do in prison that can be considered "work." 26

Though ultimately rejecting the argument that even inmates performing institutional tasks would have to be paid the minimum wage in order to prevent unfair competition, the Court in Vanskike tacitly endorsed the argument that the FLSA's purpose of eliminating unfair competition requires the payment of the minimum wage to inmates working for private sector employers.

For the government, competition in the marketplace is not a dominant mode and profits are not the ultimate goal. A governmental advantage from the use of prisoner labor is not the same as a similar low-wage advantage on the part of a private entity: while the latter amount to an unfair windfall, the former may be seen as simply paying the costs of public goods - including the costs of incarceration... 27

In other words, while the use of inmate labour by the State as a means of offsetting its correctional costs is arguably a compelling objective sufficient to justify any "unfair competition" which could arise from permitting inmates to perform work for which other non-inmate workers would otherwise have to be hired, there is no comparable justification in

26 Ibid

27 Ibid, at 811-812. This reasoning in Vanskike was also relied upon by the Court in George v Badger State Industries, in which the Court refused to extend FLSA protection to inmates providing laundry services for state agencies, and producing licence plates for sale to various levels of government. Supra, note 195 at 587-588.
support of private sector employers enjoying a similar benefit.

ii) Criminalization of Interstate Transport of Prison-Made Goods in the *Ashurst-Sumners Act*

In reaching their conclusion that "employment" of inmates at subminimum wages does not warrant extension of the FLSA to inmates, on a purposive reading of that statute, a number of Courts have drawn support from the provisions of the *Ashurst-Sumners Act.* In the *Ashurst-Sumners Act,* Congress specifically addressed the problem of the unfair competition which arises from the use of cheap inmate labour by criminalizing the knowing interstate transport of prison-made goods. The underlying purpose of the *Ashurst-Sumners Act* is very similar to that of the FLSA, namely the maintenance of a minimum standard of living for workers by preventing unfair competition with underpaid labour.

In *Vanskike,* where the issue was whether various institutional work assignments performed by the inmate should be compensated at the federal minimum wage under the FLSA, the Court found that the *Ashurst-Sumners Act* undermined the inmate's claim in two ways. Firstly, the Act exempts commodities which are manufactured for the use of federal.

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234 *Supra,* note 217.

235 Specifically, § 1761 (a) provides: "Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined not more than $50,000 or imprisoned not more than two years or both."

236 The purpose of the Act was addressed by the US Supreme Court in *Kentucky Whip & Collar Co v Illinois Central RR Co.* 299 U.S. 334 at 351: "All such legislation [prohibiting the importation of the products of convict labor], state and federal, proceed upon the view 'that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison.'" See also *Wentworth v Salem,* 548 F. 2d 773 (8th Cir. 1977) at 775, where the Court held that the *Ashurst-Sumners Act* "embod[i]es Congressional interest in free labor and w[as] designed to protect private businesses from competition from goods produced with inexpensive convict labor."
The Court in *Van skike* reasoned that this exemption for government indicated that "Congress ha[d] struck the balance by precluding a wide range of inmate-labor competition while permitting governments to use the fruits of such labor." In terms of the implication of the government exemption in the *Ashurst-Sumners Act* in the context of the FLSA's purpose of preventing unfair competition, the Court stated:

The second purpose of the FLSA coincides with the single purpose of the *Ashurst-Sumners Act* - preventing unfair competition - and the latter statute, by its exception for goods used by government, belies the notion that any and all uses of prison labor by the government unduly obstruct fair competition.  

Other courts have similarly relied upon the *Ashurst-Sumners* exemption with respect to commodities manufactured for state use in declining to extend FLSA protection to inmate workers.  

The second way in which the Courts have relied upon the provisions of the *Ashurst-Sumners Act* in order to justify their reading of the FLSA as excluding inmate workers goes to the very existence of the Act. As the Court of Appeals for the Fourth Circuit asked in *Harker v*

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241 Specifically, §1761(b) provides: "This Chapter shall not apply ... to commodities manufactured in a Federal, District of Columbia, or State institution for use by the Federal Government, or by the District of Columbia, or by an State or Political subdivision of a State or not-for-profit organizations."

242 *Supra*, note 193 at 811.

243 *Ibid*

244 See *Harker v State Use Industries*, * supra*, note 196 at 134; *George v Badger State Industries*, * supra*, note 195 at 587-88; and *McMaster v State of Minnesota*, * supra*, note 195, at 880.
State Use Industries.

What need would there be to criminalize the transport of prison-made goods if they did not enjoy the unfair economic advantage of being produced by cheap (non-FLSA) labor?14

Stated another way, there would be no need to protect businesses or workers from the threat of unfair competition by criminalizing the interstate transport of prison-made products if all inmate workers were paid the minimum wage.15

At first blush, it may appear that the latter way in which the Ashurst-Sumners Act was held by the Court in Vanskike to undermine the inmate’s claim to FLSA protection could be carried over into the context of private sector use of inmate workers. The Ashurst-Sumners Act has been interpreted as supporting the proposition that Congress did not intend for all inmate labour to be compensated at the minimum wage - else it would not have had any need to criminalize the transport of cheaply produced inmate goods. Private sector prison employers, seeking to avoid the application of the FLSA, might attempt to argue that the fact that Congress contemplated that their inmate labour would not be paid at the minimum wage should lead to the conclusion that inmate workers are not “employees” under the FLSA. Such an argument, however, would proceed on faulty reasoning. For though the Ashurst-Sumners Act may support the conclusion that Congress did not intend the FLSA to apply to all inmate

14 Ibid. See also McMaster, ibid; Vanskike, supra, note 143 at 812; and George, ibid at 587.

15 This argument is lent further force by the fact that the Ashurst-Sumners Act was enacted in 1935, just three years before the FLSA was passed into law. In light of this legislative history, the Courts have further reasoned that it is unlikely that Congress intended for inmates to have been covered by the minimum wage provisions of the FLSA, because if it had, the passage of the FLSA in 1938 would have essentially rendered the Ashurst-Sumners Act superfluous. See Vanskike, ibid; and Harker, ibid.
labour, it does not lead to the argument that Congress intended no inmate workers to be covered by the FLSA. It is conceivable that Congress believed that, at the time of the passage of the *Ashurst-Sumners Act*, that certain inmates would be entitled to the minimum wage under the FLSA, while others would not. In criminalizing the interstate transport of prison-made goods, Congress might well have intended to address the entry into the marketplace of goods produced by those inmates not entitled to FLSA protection. This argument is lent further force by the fact that §1761(c)(2) of the *Ashurst-Sumners Act* provides that the Act does not apply to “goods, wares, or merchandise manufactured, produced, or mined by convicts or prisoners who...have, in connection with such work, received wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed.” This provision evidences the fact that Congress clearly contemplated that some inmates might receive at least the minimum wage in respect of their work in prison. Whether we are persuaded by the Court’s reasoning, in cases such as *Vinson*, that the exemption for inmate-produced goods for government use means inmates who work for prison authorities are not entitled to FLSA protection, the Act is essentially silent when it comes to determining inmate FLSA claims against private sector prisoners.

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18 U.S.CA §1761(c)(2) goes on to state that “such wages may be subject to deductions which shall not, in the aggregate, exceed 20 per centum of gross wages, and shall be limited as follows: (A) taxes (Federal, State and local); (B) reasonable charges for room and board...; (C) allocations for support of family pursuant to State statute, court order, or agreement by the offender; and (D) contributions to any fund established by law to compensate the victims of crime of not more than 20 per centum but not less than 5 per centum of gross wages.”
2. Economic Reality of the Relationship

A number of US Courts have focussed less on whether a purposive reading of the FLSA leads to the conclusion that inmate labourers are "employees" within the meaning of the Act, and have concentrated instead on the "economic reality" of the working relationship in order to determine whether prisoners fall within the ambit of the FLSA. The requirement that courts examine the "economic reality" of the working relationship was established in Goldberg v Whitaker Housing Cooperative, Inc..\textsuperscript{248} There, the US Supreme Court held that courts should be guided by the totality of circumstances of the work relationship in order to assess whether, in "economic reality", it is one of employment.\textsuperscript{249} In determining the "economic reality" of the prison work relationship, a number of earlier decisions considered the extent of the control exercised by putative employers over inmate workers in determining whether the relationship is one of "employment" for the purposes of the FLSA. In applying this "control" test, the courts have considered the existence of a number of factors which traditionally characterize employment relationships, as set down by the Ninth Circuit in Bonnette v California Health & Welfare Agency.\textsuperscript{250}

The "control" test for employment status in the US jurisprudence was formulated and typically applied in the context of determining whether a given individual was an "employee"

\textsuperscript{248} Supra, note 188, following previous decisions of the Court in United States v Silk, 331 US 704 at 713; Rutherford Food Corp v McCorm, 331 US 722 at 729.

\textsuperscript{249} Goldberg, ibid. at 33. Though the Court does not specifically refer to the need to assess the "totality of circumstances" in order to determine if a working relationship is one of employment, this appears to be the de facto approach adopted by the court in that case. It is also the express reading given Goldberg by the Court of Appeals for the Seventh Circuit in Vansikke, supra, note 193, at 808.

\textsuperscript{250} 704 F.2d 1465 (9th Cir. 1983).
or an independent contractor, with evidence of greater control by a putative employer over an individual leaning towards a finding of employment status. The test has also been used to determine which of a number of possible employers is the actual employer of a given employee, as, indeed, was the case in *Bonnette*.

In recent years, the Courts have moved away from the traditional "control" test as a means of determining inmates' employment status. Certain Courts have maintained that traditional "control" tests are of little assistance in the prison industry context, because they are concerned with the wrong boundary. Whereas the traditional "control" test is generally used to answer the question whether there is *enough* control over an individual to classify him/her as an employee; with inmate workers, the argument is that there may be *too much* control over them by putative employers to classify the relationship as one of employment. While the US Courts continue to assess the "economic reality" of the prison work relationship, they have increasingly relied upon factors unique to the prison context to determine inmates' employee status. Below, I discuss in greater detail the use of the "economic reality" test set down in *Bonnette* as a means of determining inmates employee status, and outline in greater depth the Court's reasons for ultimately rejecting *Bonnette*. Next, I proceed to discuss the factors particular to the prison context which are increasingly brought to bear on the determination of inmates' FLSA claims pursuant to an "economic reality" analysis.

a) The "Control" Test

Interestingly, the two cases which are most often cited in support of prisoners'
employment status. Carter v Dutchess Community College251 and Watson v Graves,252 both rely, at least in part, on an application of the traditional "economic control" test in order to determine that inmate workers may be "employees" for the purposes of the FLSA.

In Carter v Dutchess Community College, the court a quo had granted the defendants’ motion for summary judgment on the basis that Carter, as a state inmate, could not be an "employee" for the purposes of the FLSA. In determining that the defendants’ motion for summary judgment should not have been granted, the Court of Appeals for the Second Circuit "emphatically h[e]ld that the fact that [an individual] is a prison inmate does not foreclose his being considered an employee for purposes of the minimum wage provisions of the FLSA."253 Indeed, the Court specifically eschewed the notion that prisoners could be categorically excluded from FLSA protection, stating that to do so would be an encroachment on Congressional prerogative.

In ... the FLSA, ... Congress has set forth an extensive list of workers who are exempted expressly from FLSA coverage. The category of prisoners is not on that list. It would be an encroachment upon legislative prerogative for a court to hold that a class of unlisted workers is excluded from the Act. Congress must be presumed to be aware of and to approve of the use by the courts of the economic reality test, which involve[s] a case-by-case factual analysis..."254

Accordingly, the Second Circuit stated that the approach to be adopted in determining an inmate’s employment status was to evaluate the "economic reality" of the relationship by

251 Supra. note 205.
252 Supra. note 212.
253 Supra. note 205 at 12.
254 Ibid. at 13.
applying the traditional four-part control test which had been set down by the Ninth Circuit in

_Bonnette v California Health and Welfare Agency._

It is common ground that courts, in determining whether an employment relationship exists for purposes of the FLSA, must evaluate the “economic reality” of the relationship. Such an evaluation was first applied in the FLSA context in _Goldberg v Whitaker House Cooperative_. The “economic reality” test since has been refined and now is understood to include inquiries into:

> “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. [The Bonnette factors].”

According to the Second Circuit in _Carter_, a proper application of the “economic control” test to the particular facts of a case could result in an inmate being entitled under the law to receive the federal minimum wage from an outside employer, depending on how many typical employer prerogatives are exercised over the inmate by the outside employer and to what extent. Moreover, even though the “full panoply of an employer’s prerogatives” may not be present in a given relationship, the extent of economic control over inmate workers may still be sufficient to bring the relationship within the scope of the FLSA.

Significantly, the Court in _Carter_ makes it difficult for private employers who hire

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244 _Ibid._ at 13.

256 _Ibid._ at 12. The Court also stated that determinations with respect to prisoners’ employment status had to be undertaken in the context of a “particularized inquiry into the facts of each case.” _Ibid._ at 13.

257 _Ibid._ at 13. Though the Court in _Carter_ addresses the possibility of inmates being able to state a claim against outstanding employers, it is silent with respect to whether the same would hold true with respect to prisoner’s employment by prison authorities.

258 _Ibid._ at 15.
inmate labour through the correctional institution in which inmates are incarcerated, to claim that they are not employers for FLSA purposes because “ultimate control” over inmate labour resides with the correctional institution. The Court a quo in Carter had held that since Dutchess Community College had only “qualified control” over inmates in respect of their work, with the State Department of Correctional Services maintaining “ultimate control,” Carter could not have been an employee of Dutchess for FLSA purposes. On appeal, the Second Circuit explicitly rejected this view.

We do not agree that an entity’s control over a worker must be “ultimate” in order to justify a finding of an employer-employee relationship. The statute is a remedial one, written in the broadest possible terms so that the minimum wage provisions would have the widest possible impact in the national economy. It runs counter to the breadth of the statute and to the Congressional intent to impose a qualification which permits an employer who exercises substantial control over a worker, but whose hiring decisions occasionally may be subjected to a third party’s veto, to escape compliance with the Act. 

*Watson v Graves* represents a rare, if not unique, decision which combines application of the “economic reality” test as articulated in *Bonnette* with a purposive reading of the FLSA, which resulted in a finding that the inmates, Watson and Thrash, were employees of a privately owned construction company within the meaning of the FLSA, and entitled to be

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249 *Supra*, note 212.

244 In their original complaint, Watson and Thrash had alleged that they were employees of the Jarreau’s unincorporated construction company, and also employees of the Sheriff and Warden of the Livingston Parish Jail. On appeal before the Fifth Circuit, however, the record before the Court disclosed no facts in support of the fact that the inmates were employees of the Sheriff and Warden. According, the Court stated that it could “reach no other conclusion but that the appellants [had] abandoned their FLSA claim against the Sheriff and the Warden”, and the decision of the Court below on that point was affirmed. *Ibid.* at 1556-57.
paid the federal minimum wage in respect of work performed by them for that company.262

The *Watson* court concluded that a consideration of the first two factors of the *Bonnette* test were indicative of the existence of an employment relationship between the inmates and the private employers. Once the inmates left the prison and arrived at the construction worksite, they were supervised by the Jarreaus "and no one else" for the entire time they were away from the prison. Moreover, the Jarreaus kept the inmates for as long as they needed them. On that basis, the court was satisfied that the putative employers, the Jarreaus, "supervised and controlled employee work schedules or conditions of employment" within the meaning of the "economic control" test.263 The Court also found that the Jarreaus had the power to "hire and fire" in satisfaction of a second factor of the "economic control" test.

Jarreau also had the de facto power to hire and fire because he could request or reject particular inmates. Technically, the Warden could overrule Jarreau and declare an inmate ineligible for work-release or proffer some inmate other than the one requested - we speculate that such rejection by the Warden would be quite unlikely... That technicality, however, does not change the realities of the situation.264

The third and fourth factors under the *Bonnette* test - namely the determination of the rate of pay and method of payment; and the maintenance of employment records - posed some difficulties for the Court in reaching its conclusion that the inmates were employees. The Court found that the rate of pay for the inmate workers was "technically" set by the Sheriff:

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262 Ibid. at 1554. "... [In order to determine the true "economic reality" of the inmates' employee status, we must apply the four factors of the economic realities test to the facts in the instant case in light of the policies behind the FLSA..."

263 Ibid

264 Ibid. at 1555. Footnote omitted.
and neither the prison nor the private employer maintained any employment records with respect to the inmates whatsoever. 264 However, the Court dismissed these as "superficial facts" which did not preclude the FLSA’s application to the inmates once the economic realities of the relationship between the Jarreus and the inmates were analysed in light of the policies underlying the FLSA. 265

Although the Court of Appeals in Watson v Graves rejected the categorical exclusion of inmate workers from the scope of the FLSA, 266 and proceeded to state that the appropriate manner for determining inmate workers’ employment status was the case-by-case application of the four-factor economic reality test enunciated in Bonnette, 267 ironically, the Court went on to identify a situation in which it apparently felt that inmate workers could never be employees within the meaning of the FLSA. Where inmates are sentenced to “hard time”, 268 the Fifth Circuit in Watson stated that inmate labour would “belong to the institution” and “could be disposed of legitimately within the discretion of the correction facility or agency”. 269

Moreover, the Court asserted that the purposes of the FLSA would not militate in favour of a

265 ibid.

266 The Court emphasized the FLSA’s purpose in preventing unfair competition, and maintained that this purpose could be jeopardized if the Jarreus were permitted to avoid FLSA minimum wage requirements by employing a workforce consisting entirely of inmate workers. The Court found, as a matter of fact, that Marilyn and Darryl Jarreau were the only two employees listed by their construction business. Otherwise, the business used inmate labour or subcontractors in order to complete all of its work. ibid. at 1551.

267 “We agree with the Carter court that status as an inmate does not foreclose inquiry into FLSA coverage...” ibid. at 1554.

268 “We also agree [with the Carter court] that in order to determine the true “economic reality” of the inmates’ employee status, we must apply the four factors of the economic realities test to the facts in the instant case in light of the policies behind the FLSA.” ibid.

269 By the term “hard labour”, I understand the courts to be referring to forced labour which is intended to serve as an additional punishment to be imposed on inmates while incarcerated.

270 Supra. note 212 at 1555.
finding of employee status where inmates are sentenced to hard labour since

there is no need to ‘protect the standard of living and general well-being of the worker in American industry...’. Neither is there fear of ‘upsetting the desired equilibrium in the work place, because the ‘work place’ [is] the prison itself.”

The Watson Court’s reasoning in this regard may merely represent an attempt to distinguish the case before it from those in which other Courts had refused to extend FLSA protection to inmate workers who had been compelled to work as part of their “hard time” sentences. Certainly, the Court makes a point of emphasizing the voluntary nature of Watson and Thrash’s participation in the Livingston work release programme.

By stark contrast, Watson and Thrash were not required to work as a part of their respective sentences. (An inmate may be required to perform maintenance or upkeep work within the jail, but work-release is entirely voluntary...) Therefore, their labor did not “belong” to the Livingston Parish Jail and was not legitimately at the disposal of the Sheriff or the Warden. Consequently, the reasoning and the holdings in Alexander, Young, Hudgins and similar cases are inapposite. [Emphasis in original. Original footnote in parentheses.]

Regardless of the Court’s motivation for reasoning that the exclusion of “hard time” inmates’ labour from the scope of the FLSA was not at odds with the Act’s purposes, its comments in this regard are not persuasive and indeed contradict its own reasons for extending FLSA protection to the inmate workers in Watson. Had Watson and Thrash been sentenced to “hard time”, the Jarreaus would nonetheless have gained an unfair competitive advantage over

\[^{21}\textit{Ibid.}\]

\[^{22}\text{In particular, the Watson Court distinguishes the case before it from A}\textit{lexander, supra, note 195: Young, 694 F. Supp. 655; and Hudgins v Hart, 323 F. Supp. 898 (1971), all of which the court identifies as involving instances of "hard time" inmates' labour. Id.}\]

\[^{23}\textit{Ibid. at 1556.}\]
other construction contractors in their area because of their access to "a captive pool of workers whom [they] had only to pay token wages" and in respect of whom they incurred "no expense for overtime, unemployment insurance, social security, worker’s compensation insurance, or other employee benefit plans..."²⁷² Clearly, even if Watson and Thrash had been sentenced to "hard time", it would have made no difference to the Jarreaux or to their competitors. Nor would it have made any difference to non-inmate workers in the area who, according to the Court in Watson, would have suffered from "severely distorted" job opportunities by the "availability of twenty dollar per day workers from the parish jail."²⁷⁵ Moreover, the Court’s finding that the Jarreaux supervised and controlled employee work schedules on conditions of employment and that they had the permission to hire and fire inmates under an "economic reality" analysis would surely have remained unchanged even if Watson and Thrash had been sentenced to "hard labour".

b) Rejection of the Bonnette Standard

The decisions in Carter and particularly in Watson, with their acceptance of the traditional "economic reality" test as the appropriate means by which to determine the

²⁷² Ibid., at 1555.

²⁷⁵ Ibid. With respect to the Watson Court’s conclusion that "under no factual scenario could a hard-labor inmate convert his primary status to that of an employee", see also MA Cunningham, "Watson v. Greaves: Locked into Minimum Wage: Fair Labor and Standard Act Coverage of Prison Inmates" (1991) 65 Tulane Law Review 1767 at 1776. It should be noted that Cunningham’s view is that the Watson court acknowledges three per se exceptions to FLSA coverage, instead of one, as I have indicated. In Cunningham’s view, Watson should be read as supporting the per se exclusion of the following: (1) inmates whose labour is statutorily authorized and therefore belongs to the prison; (2) in the hard labour context; and (3) where inmate work is performed on prison property. At 1774. Although arguably these three exclusions may be implicit in the Court’s distinction of Watson from the decisions in Alexander, Young and Hudjan, in my view, it is far too broad a reading of the Court’s reasons.
employment status of prisoners, illustrate the manner in which such a test may result in a finding of employee status for inmate workers. A number of courts have rejected the application of the four-part “economic reality” test articulated in *Bonnette* precisely because, in their view, the test tends towards such a result.

In *Vanskike*, for example, the Court declined to apply *Bonnette*’s four factor standard to the case at bench, distinguishing it from *Carter* and *Watson* on the basis that those decisions involved inmates who were given the choice of working for private, outside employers; whereas the inmate Vanskike performed “forced” labour for the Department of Corrections itself.\(^{276}\) In the latter context, the Court of Appeals for the Seventh Circuit in *Vanskike* considered the *Bonnette* test unhelpful insofar as it failed to take into account that the control exercised by the Department of Corrections (DOC) over inmate workers, arose, not by virtue of an economic relationship of employment, but rather as a consequence of incarceration.

The *Bonnette* factors, with their emphasis on control over the terms and structure of the employment relationship, are particularly appropriate where (as in *Bonnette* itself) it is clear that some entity is an “employer” and the question is which one. The dispute in this case is a more fundamental one: Can this prisoner plausibly be said to be “employed” in the relevant sense at all? Consider a literal application of the *Bonnette* factors in the present context. The DOC might be said to have “had the power to hire and fire” Vanskike: it surely “supervised and controlled” his schedule and work conditions, determined his pay and (presumably) kept work records. But the *Bonnette* factors fail to capture the true nature of the relationship for essentially they presuppose a free labor situation. Put simply, the DOC’s “control” over Vanskike does not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself. The control that the DOC exercises over a prisoner is nearly total, and control over his work is merely incidental to

\(^{276}\) Supra. note 193. at 808.
that general control.

Similarly, in the rehearing en banc of *Hale v State of Arizona* (*Hale II*), the Court of Appeals for the Ninth Circuit rejected the use of the *Bonnette* test which had been relied upon in the original hearing (*Hale I*). In *Hale I*, the Court considered whether an Arizona State-run prison industry programme, ARCOR, exercised sufficient control over inmate workers in accordance with the four *Bonnette* factors so as to bring the relationship within the scope of the FLSA. The *Hale I* court found that the Department of Corrections (which ran the ARCOR programme) effectively controlled the hiring and firing of inmates, was solely responsible for supervising and controlling inmate work schedules and conditions of employment, determined the rate and method of inmate pay, and maintained whatever employment records existed. Accordingly, on an application of the four-factor *Bonnette* test, the inmate workers in *Hale* were found on first hearing to have been employees within the meaning of the FLSA.

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277 *Ibid.* at 809. See also, *George*, *supra*, note 195 at 587, which cites *Lansky* with approval in this and other regards. Cf. *Franks v Oklahoma State Industries*, 711 F. 2d 971 (10th Cir. 1983) at 973, where the Court held that the traditional formulation of the "economic reality" test "was not intended to apply to work performed in prison by a prison inmate." However, in that case, the test rejected by the court was not the *Bonnette* test, but rather the "economic reality" test laid down in *Dify v Elias*, 733 F. 2d 720 (10th Cir. 1984) which focussed on five factors: (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work." It is interesting to note that the criticisms which courts have leveled against the *Bonnette* test as a means of determining inmate employee status, could likely be directed at the test set down in *Dify v Elias*, and with equal force.

278 *Supra*, note 186.

279 *Hale v State of Arizona*, 967 F. 2d 1356 (9th Cir. 1992) at 1366.

280 *Ibid.*, at 1367. It should be noted that in addition to the *Bonnette* factors, the *Hale I* court considered the existence of three other factors, which Judge Rymer had asserted in the previous decision of the Ninth Circuit in *Gilbreath v Baby Biological, Inc.*, *supra*, note 200, should be taken into account in determining prisoner's FLSA claims. The three additional factors highlighted by Judge Rymer in *Gilbreath*, and applied by the *Hale I* court were: (1) whether the risk of interfirm competition was posed by the use of inmate labour on the facts of the case; (2) whether the employer and employee exercised discretion in the creation of the working relationship; and (3) whether there was an exchange of labour for wages. The *Hale I* Court found that ARCOR produced products for competition with private industry, as well as products for state use only. Accordingly, the
In the rehearing *en banc*, however, the Court of Appeals for the Ninth Circuit in *Hale II* rejected its earlier reliance upon the “economic reality” test enunciated in *Bonnette* on the basis of the fact that it failed to take into account that “control” over inmate workers in the prison industry context arose not by virtue of any “remunerative relationship for bargained-for exchange of labor for consideration,” but rather from incarceration itself.28

The above cases amount to a rejection of *Bonnette* test on the basis that it focuses on the wrong boundary of the prison work relationship. The test focuses on the extent of employer control inherent in the employment relationship and excludes any assessment as to whether the work relationship is characterized by a freely bargained-for exchange of labour for wages. The criticism of the *Bonnette* test by the Courts in the above cases addresses this problem with the test’s application in the prison context. Other Courts, however, have explicitly rejected the test because of the result to which it tends. Specifically, certain courts have refused to apply *Bonnette* in the prison context on the stated basis that the test is biased in favour of a finding that inmate workers are employees for the purposes of the FLSA. In

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28 Supra, note 186 at 1394, where the *Hale II* court cites *Fomseke* with approval in this regard. See also *Morgan v MacDonald*, 41 F. 3d 1291 (9th Cir. 1994) at 1293, where the Court of Appeals for the Ninth Circuit followed its decision in *Hale II*, and rejected the applicability of the four factor *Bonnette* test in the prison labour context: “The *Bonnette* factors are properly applied when an individual is clearly employed by one of several entities and the only question is which one. They are of no help, however, in deciding the more fundamental question present here: whether the inmates are “employed” in the relevant sense at all. Left without a conclusive test to apply when analyzing inmate FLSA claims, we rely on the broad principles enunciated in *Hale.*”
Daneshkold v Hausrath.\textsuperscript{232} The Court of Appeals for the Second Circuit "reexamine[d] and reject[ed] its [previous] use of the four part Bonnette test" in Carter and Watson as a means of determining inmate's employee status under the FLSA. In so doing, it was significant to the Court that the literal application of the Bonnette test would render even involuntary prison labour subject to the FLSA.

In the prison context, therefore, application of Bonnette leads to a radical result. Literally applied, the Bonnette factors would render all prison labor, including involuntary labor inside the penal institution, such as in a prison laundry, subject to minimum wage laws. No court has ever suggested, much less held, that the FLSA applies to such labor.\textsuperscript{233}

Similarly, the Court of Appeal for the Fifth Circuit in Reimonenq v Foti\textsuperscript{234} stated:

We find that the "economic reality" test, which is cast as a "control" question designed to identify the responsible employer in a free-world work environment, is unserviceable, and consequently inapplicable, in the jailer-inmate context. The test has a natural bias that favours a finding that the prison custodian is the inmate's "employer" because of the considerable control a jailer must exercise over inmates... [M]any of the actions Sheriff Foti may take as Reimonenq's custodian are the very same actions that trigger FLSA "employer" status under the "economic reality" test.\textsuperscript{235}

If the "economic reality" test in Bonnette is biased in favour of prison workers, then surely the courts in Daneshkold and Reimonenq have demonstrated their bias against prisoners. Explicitly rejecting Bonnette as a means of determining inmates FLSA claims on

\textsuperscript{232} Supra. note 195.

\textsuperscript{233} Ibid. at 41.

\textsuperscript{234} 72 F. 3d 472 (5th Cir. 1996).

\textsuperscript{235} Ibid. at 475.
the basis that it tends towards a finding of employee status is tautological, and moreover fraught with prejudice against prisoners. At its most basic, the reasoning in Damneskjold and Reimonenq is that the Bonnette test cannot be applied to prisoners because it would result in prisoners being employees which prisoners cannot be because they are prisoners. This circular reasoning must be rejected as an unsound basis upon which to refuse to apply traditional “economic reality” tests in the prison work context.

In many cases, the rejection of the Bonnette test as a means of determining inmates’ employee status occurred in a context where the putative employer of inmates was the prison or the prison-run prison industry programme itself. Where the putative employer is a prison authority, the rejection of the Bonnette test as a means of determining inmate employee status may carry some logic. Whether the Bonnette test is used as a means of determining which of a number of possible employers is an employee’s de facto employer, or whether it operates as a method for distinguishing independent contractors from employees, where the test is applied in the free market context, there is no apparent need to consider the nature of the control that is exerted over workers. The underlying premise for applying the four factor

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260 In Vanskike, the inmate was “employed” in various institutional tasks. Supra, note 193 at 806. In Harker, inmates were employed in a graphic print shop run by State Use Industries of Maryland, an organization, similar to CORCAN, within the DOC and created by the Maryland legislature to meet the rehabilitative needs of inmates. Supra, note 196 at 132. In Franks, inmates worked for Oklahoma State Industries, a division of the Oklahoma Department of Corrections. Supra, note 277 at 972. Inmates in George v Badger State Industries worked in the Wisconsin Prison Industry programme at their respective correctional institutions, providing goods and services for distribution to government departments and agencies. Supra, note 195 at 585. And in Hale II, inmate employees worked for Arizona Correctional Industries (ARCOR), which although “deemed a private enterprise” by Arizona state law, was effectively operated by the Department of Corrections. Supra, note 186 at 1390.

287 This was the stated application of the test in Reimonenq, supra, note 284 at 435.

288 “Bonnette’s emphasis on control harkens back to the common law distinction between an employee and an independent contractor...” Vanskike, supra, note 193 at 810.
“control” test is that the control which is exercised in the working relationship is economic in nature. Where inmates work for prison authorities, however, we are concerned not so much with determining which party exercises control over inmate workers, or whether there is sufficient control to give rise to an employment relationship. In the context of prison labour, the inquiry is a more fundamental one: it goes to the very nature of the control exercised by prison “employers” over the inmate workforce.

Where an inmate’s putative employer is a private employer, it is not readily apparent that the Bonnette test should not apply, in precisely the same way it is used to determine the employee status of “free world” workers. Whereas prison industry employers may exercise the typical employer prerogatives highlighted by the Bonnette test in respect of inmate workers as a consequence of the custodial relationship, private employers making use of inmate labour do not exercise any such equivalent control. Accordingly, the criticisms of the Bonnette test where the putative employer is a prison authority do not carry over into the private sector context.

Notwithstanding this fact, certain Circuit Courts have rejected the Bonnette test even where the putative employer of inmate workers was an outside non-prison employer. In Morgan v. MacDonald, for example, the Court eschewed the applicability of Bonnette as a means of determining whether the inmate was an employee for FLSA purposes, even though the inmate, Morgan, was “employed” by the White Pine County School Board as a computer “trouble-shooter”.289 Similarly, in Danneskjold, the Court of Appeal for the Second Circuit

289 Supra, note 281 at 1292.
rejected the *Bonnette* test as a means of determining the employee status of an inmate who worked as a clerk-tutor in a prison education programme run by a local college consortium.\(^{290}\)

In the latter case, while the Court expressly stated that the problem with *Bonnette* was that it would render even "involuntary labor inside the penal institution" subject to the FLSA, it went on to reject the test even as a means of determining whether an employment relationship existed between a private "employer" and inmate workers, and did so without addressing why *Bonnette* should not apply in the latter case.

Though it seems that *Bonnette* may continue to provide a useful framework for determining inmate claims under the FLSA at least vis-a-vis non-prison employers, a close reading of the current case law surrounding inmates' employee status reveals that the "economic reality" test articulated in *Bonnette* has been effectively "read out" of the determination as to whether inmate labour is subject to the FLSA.\(^{291}\) Notwithstanding the rejection of the *Bonnette* test, however, the Courts still tend to focus their inquiry on whether the "economic reality" of the working relationship between prisoners and their putative employers constitutes an employment relationship for the purposes of the FLSA.\(^{292}\) Below, I turn to the various factors currently considered by the Courts in assessing the "economic reality" of the prison work relationship since moving away from *Bonnette*.

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\(^{290}\) *Supra*, note 195 at 41.

\(^{291}\) *Ibid.* at 43.

\(^{292}\) *Ibid.*.
e) Penological Purpose of Inmate Labour

Since moving away from the test in *Bonnette*, the courts have emphasized a number of factors particular to the prison industry context as crucial to the determination of inmates' employee status. In assessing whether the "economic reality" of the prison work relationship is that it is an employment relationship, the courts have begun to consider the extent to which the inmate work relationship resembles the freely bargained-for exchange of labour for wages which is said to characterize free world employment. In so doing, certain courts have emphasized the voluntariness of inmate labour as the deciding factor in determining inmates' employee status. Such courts have indicated that only work which is voluntarily performed by inmates could conceivably give rise to an employment relationship, since work performed under legal compulsion would not be consistent with a freely bargained-for exchange of labour for consideration. Other courts have taken the issue of voluntariness even further, concluding that the labour of inmates working under legal compulsion as part of their sentences actually "belongs" to the institution in which such inmates are incarcerated. Implicit in this reasoning is the view that inmates may not bargain to exchange labour for wages with prison authorities, since their labour is already the property of such authorities. The rehabilitative purpose which frequently underlies prison industry programmes has been cited as another factor which may militate against a finding that inmates are "employees" for the purposes of the FLSA.

Essentially, whichever of the above factors are cited by the courts as determinative of the "economic reality" of the prison work relationship, it is clear that the self-perceived task before the courts in inmate FLSA claims is to distinguish between prison industry which is penological in nature, and that which is pecuniary or economic in nature. Thus, the recent case
law betrays an unwillingness on the part of the Circuit Courts to recognize any prison work relationship comprising penological elements as an employment relationship within the meaning of the FLSA. The Court’s unwillingness in this regard is evident, too, in the inconsistent manner in which the courts have applied the post-Bonnelle “economic reality” tests to prisoner FLSA claims. Where inmates work under legal compulsion, the courts have tended to focus on the involuntariness of inmate labour in order to place the prison work relationship outside the scope of the FLSA. Accordingly, one would expect that a finding that prisoners volunteered to perform the work in respect of which FLSA protection is sought would tend towards the conclusion that an employment relationship exists. However, this has not been the case. Where the courts have actually been confronted with voluntary prison labour, they have tended to conclude that the voluntariness of prison labour was irrelevant to the determination of inmate employee status, and then proceeded to deny such status on other “penological” grounds.

Judicial reliance on the penological nature of prison industry as justifying the denial of inmates FLSA claims is also problematic in that the purposes underlying prison industry do not break evenly along penological and pecuniary lines. It seems uncontroversial that nearly all prison industry could be said to serve some penological purpose, either as a form of punishment or rehabilitation of inmates, or merely as a means of reducing inmate idleness. It is also incontrovertible that where inmate-produced goods and services are used in the prison itself or sold outside the prison as a means of limiting and offsetting correctional costs, pecuniary purposes are also served by the use of prison labour. The pecuniary purpose underlying prison industry is even more evident where the putative employer of inmate
workers is a private sector outside employer, whose primary objective in using inmate labour is
to generate profits. Thus, in the usual instance, the use of inmate labour will be animated by
both penological and pecuniary aims. In the result, the distinction between the penological and
pecuniary purposes of prison labour which the courts have attempted to draw is, at worst,
contrived and misleading, and, at best, an unworkable framework in which to determine
whether inmates are employees for the purposes of the FLSA because of its failure to recognize
that the pecuniary and penological purposes of prison labour are not mutually exclusive and
frequently overlap.

d) Inmate Labour: Voluntary or Compelled

A number of courts have relied upon the involuntariness of prison labour as a means of
determining that no employment relationship exists. Generally speaking, a number of the US
Circuit Courts have been of the view that inmates who are compelled to work while in prison
are not “employees” for the purposes of the FLSA because such compulsion negates the
existence of the freely bargained-for exchange of wages for services which is said to
characterize free world employment.

In Morgan v MacDonald, the Court relied upon the fact that the inmate Morgan was
statutorily required to work or to receive vocational training for forty hours per week\textsuperscript{293} to
conclude that he was not an employee for FLSA purposes in respect of his work as a computer
“trouble shooter” in a prison education programme operated by an outside employer.

\textsuperscript{293} Supra, note 281 at 1292.
... Morgan worked pursuant to a statutory requirement... Thus, Morgan was in no sense free to bargain with would-be employers for the sale of his labor; his work at the prison was merely an incident of his incarceration... Morgan and the prison didn't contract with one another for mutual economic gain, as would be the case in a true employment relationship: their affiliation was "penological, not pecuniary." 24

Similarly, in McMaster v State of Minnesota, the Court held that the "economic reality" of the relationship between inmates required to work in prisons industry programmes established and operated by the Minnesota Department of Corrections (DOC) was such that inmate workers were not in an employment relationship with the DOC. Since the inmates had "neither contracted with the government to become employees nor engaged in a bargained-for exchange of labor for consideration. [but] [r]ather, [had] been assigned work within the prison industry for the purposes of training, rehabilitation and reduction of idleness," the inmates were not entitled to FLSA protection. 25

The Court of Appeals for the District of Columbia Circuit in Henthorn v Department of Navy placed heavy emphasis on the fact that the inmate, Henthorn, was legally compelled to work in determining that Henthorn was not an employee for FLSA purposes. The Court indicated that voluntariness in the prison work relationship was one of the "indicia of a traditional, free-market employment relationship" which any successful inmate claimant under the FLSA would have to demonstrate:

24 Id. at 1293.
25 Id. at 970.
26 Id. at 980.
27 2 F. 3d 682 (DC Cir. 1994).
... [A prerequisite to finding that an inmate has "employee" status under the FLSA is that the prisoner has freely contracted with a non-prison employer to sell his labor. Under this analysis, where an inmate participates in a non-obligatory work release programme in which he is paid by an outside employer, he may be able to state a claim under the FLSA for compensation at the minimum wage. However, were the inmate's labor is compelled and or where any compensation he receives is set and paid by his custodian, the prisoner is barred from asserting a claim under the FLSA, since he is definitively not an "employee."]

The above cases are examples of the courts' unwillingness to recognize inmates' employee status in situations where the inmates were legally compelled to perform the specific work in respect of which they sought FLSA protection. The Ninth Circuit has taken the matter even further and has extended the meaning of "involuntary" labor to describe not only the work which inmates are specifically compelled to do, but to capture any work performed by inmates who may be legally compelled to perform some form of work by prison authorities, even where they are not so compelled, in fact.

Thus, in the rehearing en banc in Hale v. Arizona, the court found that the inmates' participation in ARCOR prison industry programmes was involuntary. This finding was based on the fact that, under Arizona state law, the state "had the authority to require that

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284 ibid at 686. As noted in the above-cited passage, the Court also held that where the inmate performs labor in respect of which he is paid by his custodian, he is not an "employee" under the FLSA. In this regard, the Court reasoned that inmates paid by prison authorities are "involuntary servant[s] to whom no compensation is actually owed." This latter conclusion is based upon a notion of inmate labor "belonging" to the penal institution in which an inmate is housed. This issue is discussed in greater detail in the following section. See further support for the proposition that inmates are not "employees" under the FLSA where they are compelled to work in fitton v. Clinton 882 F. Supp. 1128 (DDC 1995) at 1130, citing Henning with approval.

285 "The case of inmate labor is different from this type of situation where labour is exchanged for wages in a free market. Convicted criminals do not have the right freely to sell their labour and are not protected by the Thirteenth Amendment against involuntary servitude." Supra, note 186 at 1394.
each able-bodied prisoner ... engage in hard labour for not less than forty hours per week." It is particularly interesting to note that the *Hale II* conclusion regarding the involuntariness of ARCOR participants’ labour is contrary to the finding of the *Hale I* court, which had concluded on the basis of the same facts that discretion existed on the part of both the inmates and prison authorities in the creation of the working relationship.²⁰¹

Notwithstanding that the evidence in *Hale* indicated that, in fact, inmates voluntarily participated in ARCOR programmes, the *Hale II* court was willing to conclude that ARCOR participants’ labour was involuntary, simply because of the underlying statutory authority of prison officials to compel inmates to work. There was no evidence that this statutory authority was actually exercised in respect of ARCOR programmes. The approach of the *Hale II* Court appears to be at odds with the “economic reality” test set down by the US Supreme Court in *Goldberg*.²⁰² Implicit in the holding in *Goldberg* is that courts should be guided by the actual circumstances of the work relationship in order to determine whether, in “economic reality”, it is one of employment. Moreover, the *Goldberg* Court specifically rejects the use of “technical concepts” as a means of determining the existence of an employment relationship.²⁰³ Accordingly, the *Hale II* Court’s reliance upon the notional ability of prison authorities to compel inmates to do some form of work, where indeed they have actually not chosen to do so, would seem to contradict the Supreme Court’s direction in *Goldberg* insofar as it emphasizes

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²⁰² *Supra*, note 279, at 1366, where particular note was made by the *Hale I* court of the fact that inmates working for ARCOR entered the programme by voluntarily applying for an ARCOR position.

²⁰³ *Supra*, note 188.

theoretical possibilities over actual circumstances. Moreover, in ignoring the de facto voluntariness of inmates' work for ARCOR, and relying instead upon the statutory possibility that such work could be compelled, the Ninth Circuit in \textit{Hale II} runs counter to Goldberg's assertion that courts should not be swayed by the technicalities of a work relationship, but rather be guided by the realities of the relationship.

Aside from those cases in which the Courts have concluded that seemingly voluntary labour is actually involuntary, several Circuit Courts, when confronted with clearly voluntary prison labour, have rejected the notion of voluntariness altogether as indicative of the existence of an employment relationship. In \textit{George v Badger State Industries}, the inmate voluntarily participated in a prison-run prison industry programme, producing goods and services for government use. The \textit{George} court attempted to distinguish previous cases which had relied upon the involuntariness of prison labour to deny inmates' employee status, indicating that the crucial determinant was not the voluntariness of inmate labour, but rather the purpose underlying such labour.

Whether the prison labor is compelled or voluntary, what matters is that the purpose of such labor is to further penological as opposed to economic ends... The voluntary nature of the Prison Industries program does not manifest a bargained-for-exchange of labor. Instead, it reflects the program's emphasis on rehabilitative objectives as opposed to the punitive ones traditionally associated with forced labor in prison.\footnote{In this regard, see also the decision of the Fourth Circuit in \textit{Harker v State Us Industries}, supra, note 196, at 133, where the Court implied that though Harker voluntarily applied to work in the graphic print shop run by State Us Industries, his labour was not voluntary because he was "certainly not free to walk off the job site and look for other work. When a shift ends, inmates do not leave DOC supervision, but rather proceed to the next part of their regimented day".}

\footnote{Supra, note 195.}

\footnote{Ibid. at 588.}
Similarly, the Second and the Fifth Circuit, in *Danneksjold*, and *Burleson v State of California*, respectively, held that the voluntariness of prison labour was not indicative of the existence of an employment relationship. In *Danneksjold*, the court stated that "so long as the labor produce[d] goods or services for the use of the prison, voluntary labor by the prisoner [was] ... not subject to the FLSA. [since it] serve[d] all of the penal functions of forced labor...""* In *Burleson*, inmate workers could not be assigned to work for the state Prison Industry Authority (PIA) against their express wishes, though they could be required to perform some form of prison work. The *Burleson* Court was unpersuaded that the voluntariness of inmates' participation in PIA programmes created "an oasis of contractually 'bargained-for exchange' in the midst of a desert of compelled labor in the California state prison system."

[P]laintiff's 'mistakenly equate the ability to choose between various work programs offered by the [prison authority] with the freedom to 'sell' their labor to the PIA.' The consensual nature of a particular work assignment in a hard-labor state does not remove the penological purpose from the work relationship."*11

It is interesting to note that the holding of the *Burleson* court, in particular, is at odds with the Court's decision in *Watson v Graves*, where the Court expressly held that the inmates'...
work for a private construction company on a work release programme was voluntary, because although inmates could be forced to do some work in the prison, they could not be specifically compelled to participate in work release programmes.\textsuperscript{112}

The above jurisprudence reveals that the voluntariness criterion has been applied in a very unprincipled manner by the courts in determining inmates’ FLSA claims. Where inmate labour has been involuntary, the courts have tended to latch onto that fact as the basis upon which to deny entitlement to the minimum wage. Where prisoners have worked voluntarily while incarcerated, the \textit{Hule II} court, as well as the court in \textit{Harker}, concluded that the mere existence of the possibility that inmates could be legally compelled to work rendered their labour involuntary. As noted above, this seems to be precisely the type of reliance on technical factors which was eschewed by the US Supreme Court in \textit{Goldberg}. In other cases of voluntary inmate labour, where the possibility of legal compulsion to work did not appear to exist, certain courts have rejected the voluntariness of work as a factor indicative of an employment relationship altogether. This is in seeming contradiction of those cases where the involuntariness of prison work was relevant to the determination that the inmates were not “employees”.

e) Proprietary Interest in Prison Labour

A number of decisions of the US Courts have cited prison authorities’ proprietary

\textsuperscript{112} \textit{Supra}, note 212 at 1556. “An inmate may be required to perform maintenance or upkeep work within the jail, but work-release is entirely voluntary.”
interest in prison labour as a factor which militates against a finding of employee status for
inmate workers. The rationale that inmates cannot be "employees" because their labour
"belongs" to State prison authorities is closely related to the argument that inmates whose work
in prison is involuntary cannot succeed on FLSA claims. In both instances, the argument is
that prisoners are not employees because they are not free to enter into an employment
relationship - the "bargained-for exchange of labour for wages" often referred to in the
jurisprudence. However, there is a slight difference between the two justifications. Where a
prisoner is forced to work in prison, it is said that he cannot bargain to exchange his labour for
wages because he has no free choice in the matter; he is legally compelled to render his labour
to prison authorities. The fact that the "bargain" is not voluntary is thus said to nullify the
existence of an employment relationship. Where the rationale for denying inmate employee
status is that the prisoner's labour belongs to the institution in which he is incarcerated,
however, the employment relationship is not nullified because the prisoner does not freely
enter into a bargained-for exchange of labour for wages, though that might also be the case.
Rather, if a prisoner's labour belongs to the State, he can enter into no such bargain because he
has nothing with which to bargain. On this rationale, his labour is not his own. The prisoner
cannot possibly "sell" to prison authorities that which already belongs to them.

The prison's proprietary interest in prison labour was put forward by a Michigan
District Court during one of the earliest prisoner FLSA claims in Huntley v Giant Furniture
Co. as the basis for denying the inmates' claim to the minimum wage.\(^{11}\) In that case, prisoners
working in a privately owned prison stamping plant, where they made, stamped, and assembled

\(^{11}\) Supra., note 198.
shell casings to be furnished to the war department of the US government, claimed to be entitled to the minimum wage under the FLSA. Inmate workers were paid the average sum of 52½ cents for each 12-hour shift they worked, usually six shifts per week. Without actually stating the basis for its conclusion in this regard, the Court held that:

It is clear that the labor of the plaintiffs as inmates of the State prison belonged to the State of Michigan, and they concede in effect that they could be lawfully employed only by the State.\textsuperscript{15}

In a 1971 decision of a Louisiana District Court, \textit{Hudgins v Hart},\textsuperscript{16} the Court relied upon the decision in \textit{Huntley}, and concluded that the labour of an inmate hired to work as an assistant medical technician and clerk in connection with the extraction of blood plasma from inmates at the penitentiary was not an “employee” under the FLSA, since the inmate’s labour

\textsuperscript{15} \textit{Ibid.} at 112.

\textsuperscript{16} \textit{Ibid.} at 113. It is interesting to note that the decision of the District Court in \textit{Huntley} also relied heavily on the fact that the defendant manufacturer had contracted, not with the prisoners directly, but rather with Michigan prisons industries for the provision of inmate workers. Though the FLSA broadly defines to “employ” as to “suffer or permit to work,” the Court held that this definition could not be construed to mean that the inmate workers hired by a third party, namely Michigan prison industries, were employed or “suffered or permitted to work” by the defendant notwithstanding the fact that the product of their labour was ultimately used for the benefit of the defendant manufacturer. \textit{Ibid.} at 114-15. The Court rejected an interpretation of “to employ” which would render those hired by a third party employees of the party with whom the third party had contracted to provide services on the basis that such an interpretation would encompass all employed humanity. “It is difficult to conceive instances wherein an industrial plant, through its management “suffers or permits to work” within the meaning of the Act, employees with whom the plant has no contractual relationship as employer and employee or as master and servant. It is a matter of common knowledge that thousands of industries contract for services or material to be furnished by or through independent contractors thousands of miles away, or even on the premises of the plant or industry which receives the ultimate benefits of the labor performed by the employees of the contractor. Those industries, in a sense, “suffer or permit” such employees to work, but not within the sense or meaning of “suffer or permit” as used in the \textit{Fair Labor Standards Act}. Accordingly, the \textit{Huntley} Court stated that an employee employed by a third party for the ultimate benefit of another party, “may hold the third party responsible [for wages] but not the [party] who ultimately benefits from an employee’s work, but which has no contractual relationship with the employee.” \textit{Ibid.} at 115. In light of this statement, it may be somewhat less surprising, but only somewhat, that the \textit{Huntley} Court affirmatively held that the inmate workers in the prison stamping plant “were employees of the Michigan prison industries and not of the defendant.” \textit{Ibid.} at 116. Notwithstanding the willingness of the \textit{Huntley} Court to conclude that the prisoners in that case were employees of the state-run prison industry program, its dicta in this regard has not been followed or even acknowledged in any subsequent cases of the Circuit Courts of Appeal.

\textsuperscript{15} \textit{Supra}, note 272.
belonged to the penitentiary. Accordingly, it was held that the penitentiary was entitled to
dispose of inmate labour as it chose.

There was simply no employer-employee relationship between any of these
parties. All contractual arrangements in this case were between the defendants,
Hyland and Hart [the privately owned plasma centre], and the Louisiana State
Penitentiary, and the Louisiana Department of Corrections. The Plaintiff was an
inmate at the penitentiary, and as such, his labor belonged to the penitentiary. It
was the penitentiary that assigned him to work for Hyland and or Hart, and it
was the penitentiary that decided what Hyland and or Hart would pay to the
penitentiary for that labor. The fact that the penitentiary deposited all or part of
the money paid by Hyland and or Hart for the services of the plaintiff to the
account of the inmate does not make the plaintiff an employee of the
defendants.317

Although the rationale that inmates cannot be employees because their labour belongs
to the institutions in which they are incarcerated has not been discussed in any detail in more
recent decisions of the US Circuit Courts, it nonetheless has been not infrequently cited as an
additional basis upon which inmate employee status is to be denied.118

The conclusion in the above cases that prisoners cannot be "employees" for FLSA
purposes because their labour belongs to the State is unsupported by fact or argument, and
appears groundless. While a number of courts have stated that inmate labour belongs to the
State, they have offered no basis for that statement. It is true that inmates are not protected by
the Thirteenth Amendment against slavery and involuntary servitude.119 However, this should

117 Ibid. at 899.

118 See Fauske, supra, note 193 at 809; Morgan, supra, note 281 at 1292; Alexander v. Sara, supra, note 195 at 150;
Burleson, supra, note 308 at 315; and Gilbreath, supra, note 200 at 1331.

119 The Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof
the party shall have been duly convicted, shall exist within the States, or any place subject to their jurisdiction." US Const.
Amend. XIII, §1.
not, it is submitted, be read as giving prisons a proprietary interest in inmate labour, any more than it gives them a proprietary interest in inmates themselves. While prisons may not be constitutionally barred from forcing inmates to work, this is not necessarily the same as "owning" their labour. Without being offered some authority for the proposition that inmate labour becomes the property of the institutions in which they are incarcerated, it is submitted that the above jurisprudence is of limited utility in determining inmates' employee status, and ought not to be relied upon.

f) Rehabilitative Purpose of Inmate Work

In light of the fact that, in Canada, CORCAN's express mandate is the rehabilitation of inmates, perhaps the most salient of all justifications offered in the US jurisprudence for the denial of inmates' FLSA claims is that the rehabilitative nature of prison industry precludes the existence of an employment relationship. Where prison industry programmes seek to achieve some rehabilitative goal, the Courts have been reluctant to conclude that inmate participants in such programmes are "employees" for the purposes of the FLSA.

*In Harker v State Use Industries*, the Court of Appeals for the Fourth Circuit specifically rejected the argument that the "free world" elements of a rehabilitative prison industry programme rendered the relationship between inmate participants and prison industry authorities one of employment.

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120 "Inmates fill all nonmanagerial positions within SU1 [State Use Industries], and SU1 maximizes the rehabilitative value of the inmates' work experience by resembling a "private corporate entity as closely as possible." Supra. note 196 at 132.
Inmates perform work for SUI [State Use Industries] not to turn profits for their supposed employer, but rather as a means of rehabilitation and job training. As a part of the DOC, SUI has a rehabilitative, rather than pecuniary, interest in Harker's labor. By producing useful goods in an atmosphere that mirrors the conditions of a true private employer, SUI helps prepare inmates for gainful employment upon release. [The Maryland Division of Corrections]'s effort to prepare inmates for eventual private employment, however, does not mean that inmates have achieved such a goal while still incarcerated.\[122\]

The Court goes on to state its unwillingness to extend FLSA protection to inmate participants in SUI's prison industry programme because to do so would threaten the existence of such programmes.

Forcing states to pay the minimum wage to every inmate involved in an SUI-type program would dramatically escalate costs and could well force correctional systems to curtail or terminate these programs altogether.\[123\]

Interestingly, the Court in *Hale II* echoes the sentiment that requiring the payment of the minimum wage to inmate workers could not have been intended by Congress because it would result in the curtailment of prison industry programs.\[123\] However, in *Hale II* ARCOR's prison industry programs were not expressly rehabilitative in focus.\[123\]

The Court in *Reimonenq* also relied upon the rehabilitative nature of the prison work programme in that case to decline to extend employee status to the inmate worker. There, the basis for the Court's conclusion was that the rehabilitative programme existed for the benefit of the inmate and not the institution itself. Thus, nothing of value accrued to the institution in

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121 *Ibid.* at 133.
123 *Supra.* note 186 at 1389-90.
When prisoners are permitted to work for private employers through the prison's work release program, they have not contracted with the jail to become its employees. They are providing no compensable services for the government or otherwise benefitting it. At its root, the work release program exists for the benefit of the prisoner himself. The purpose of the program is to prepare inmates upon release from prison to function as responsible, self-sufficient members of society.

It is to be noted that even if they are required to pay prisoners the minimum wage in respect of their work, penal institutions would frequently be entitled by statute or otherwise to recoup some of this cost by charging prisoners for their room and board. The fact that many penal institutions are thus able to recoup some of the monies which they would have to spend on paying prisoners the minimum wage paves the way for an argument that rehabilitative prison work programmes do not exist solely for the benefit of prisoners. Rather, the fact that prisons stand to gain financially by charging inmates room and board may give rise to a mutually beneficial work relationship which can be characterized as employment.

The Court in Reimoneng, however, rejected this argument. It maintained that the amounts charged the inmate Reimoneng who worked for a private employer in respect of room and board could not be characterized as a benefit accruing to the prison as a consequence of prison industry. Rather.

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12 Ibid. A number of cases of the US courts have referred to the fact that prison industry programmes, inter alia, benefit prisoners by improving their post-release work opportunities, though they have not all relied upon this fact as an additional basis upon which to deny inmate employee status. See, for example, Darneskyjald v Hauworth, supra, note 115, at 43, wherein the Court stated: "Prisoners may thus be ordered to cook, staff the library, perform janitorial services, work in the laundry, or carry out (sic) numerous other tasks that serve various institutional missions of the prison, such as recreation, care and maintenance of the facility, or rehabilitation. Such work occupies prisoners' time that might otherwise be filled by mischief; it trains prisoners in the discipline and skills of work; and it is a method of seeing that prisoners bear a cost of their incarceration. Similarly, in Yanksie, the Court held that "the legislature's purpose in authorizing prisoner work assignments is to "equip such persons with marketable skills, promote habits of work and responsibility and contribute to the expense of the employment program and the committed person's costs of incarceration." Supra, note 193 at 819."
the reimbursed amounts are a quid pro quo - the jail "benefits" from the
disbursed amounts no more than any provider of goods and services benefits
from the wages that have been paid to his customers by their respective
employers. To be sure, these reimbursements for goods and services serve a
fundamental purpose of the work-release program in teaching inmates to be
self-sufficient through honest work and individual responsibility.
Consequently, an inmate's reimbursements for maintenance costs do not
constitute an economic benefit sufficient to establish an employer employee
relationship.\textsuperscript{226}

It is interesting to note that in one case of the Court of Appeals for the Ninth Circuit,
the argument that the rehabilitative nature of prison industry precluded a finding of inmate
employee status was specifically considered and rejected by the Court. In Baker v McNeil
Island Corrections Center,\textsuperscript{227} the inmate Baker brought a Title VII\textsuperscript{228} suit against the prison
alleging that he had been denied employment at the prison library due to his race. The District
Court had dismissed Baker's claim on the basis that he had failed to state a cause of action
because he was not in an employment relationship with the prison.\textsuperscript{229} and Title VII protections
only apply where there is some connection with an employment relationship. In examining
the economic realities of Baker's relationship with the prison, the District Court had concluded,
\textit{inter alia}, that inmate work assignments "are more in the nature of rehabilitation and
employment training than in the nature of commercial employment" and that Baker had

\textsuperscript{226} Supra, note 284 at 476.

\textsuperscript{227} 859 F. 2d 124 (9th Cir. 1988)

\textsuperscript{228} Title VII of the Civil Rights Act of 1964 (Title VII), 42 USC § 2000e-2, states in relevant part: "It shall be an unlawful
employment practice for an employer ... to fail or refuse to hire ... any individual ... because of such individual's race, color,
religion, sex, or national origin."

\textsuperscript{229} Supra, note 327 at 126.

\textsuperscript{230} Baker, supra, note 327 at 127. On this general point of law, see also Lutcher, 633 F. 2d 883.
therefore failed to state a claim. On appeal, however, the Ninth Circuit was unpersuaded by the argument that the rehabilitative nature of inmate work assignments necessarily precluded the existence of an employment relationship. Ultimately, the Baker court reversed the dismissal of Baker’s claim, and remanded the matter to the District Court.

One of the arguments articulated in the above jurisprudence - namely that inmates in prison industry programs should not be considered employees because such a finding would jeopardize the existence of rehabilitative programs - is a result-based and unprincipled argument which ought to be rejected. The question with respect to whether an inmate is an “employee” for FLSA purposes must, according to the standard established by the US Supreme Court in Goldberg be assessed in accordance with the economic realities of the work relationship. Such an analysis does not allow for the potential consequences of a finding of employee status to cloud the issue with respect to whether any worker is in reality an “employee”. Maintaining that inmates in prison work programs are not “employees” because finding otherwise would curtail such programs is akin to arguing that, during periods of economic recession, free workers are not “employees” because otherwise their entitlement to the minimum wage could increase levels of unemployment.

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111 “Baker’s complaints should not have been dismissed. First, the district court recognized the most important factor to determine whether an employment relationship exists [the extent of the employer’s right to control the means and manner of the worker’s performance] strongly suggested that Baker was an employee. Thus, the court could not be convinced beyond doubt that no set of facts could be proven to entitle Baker to relief.” It is worthy to note that Baker’s claim was also bolstered by the fact that the Equal Employment Opportunity Commission had published a Notice of Policy Statement, on May 30, 1986, that Title VII applied to prisoners eligible for work release. In the work release context, Title VII would apply not only to the work release employer, in the normal course, but also to the prison which “becomes a third party who has the ability to control or interfere with the inmate’s employment opportunities with another employer, and its activities are covered by the Act.” Though Baker was not and would not have been on a work release in the prison library position, the Court felt that it “simply [did] not know enough about that position” in order to determine whether Baker could successfully state a claim under Title VII.” Ibid. at 128.
Clearly, such an argument would hold no sway whatsoever in the “free world” context. In the FLSA, Congress has made clear its intention that all employees are entitled to the minimum wage. This clear statutory imperative does not permit of the judiciary’s second-guessing Congress. Any consequences may flow from the fair and unbiased application of the provisions of the FLSA to any class of workers must be regarded by the judiciary as irrelevant to the determination of employee status.

Moreover, the payment of the minimum wage to inmate workers need not result in the curtailment of rehabilitative prison industry programs. Firstly, the profits generated through the sale of inmate-produced goods and services may be sufficiently high to cover the cost of minimum wage payments. The ability of penal institutions to charge inmates a portion of their earnings for room and board could also offset some of the cost of paying inmates the minimum wage. And even if the immediate costs generated by minimum wage payments to inmate workers were not covered by profits made on prison industry, it is possible that a reduction in recidivism rates would flow from paying inmates the minimum wage. Conceivably, such a reduction in recidivism rates could drastically reduce the cost of corrections.

There is the additional concern that finding that inmates working in rehabilitative prison industry programs are “employees” for the purposes of the FLSA could alter the face of prison work in the US. In determining whether an inmate is an “employee” for FLSA purposes, the courts tend to examine the extent to which prison work resembles the type of freely bargained for exchange of labour for wages which characterizes employment outside penitentiaries. As was the case in Harker v. State Use Industries, certain rehabilitative prison industry programs model themselves as closely as possible on “free world” employment
opportunities. Accordingly, on an “economic reality” analysis, such rehabilitative programs are more likely to give rise to the existence of an employment relationship because, by definition, they will more closely resemble the work relationships of non-inmates. Such a finding could have the perverse result of encouraging penitentiaries to implement punitive prison industry programs rather than rehabilitative ones. Since the former is less likely to be illustrative of the “bargained for exchange of labour for wages”, which characterizes free world working relationships. In this way, punitive “hard labour”-type prison industry programs could become the order of the day as penal institutions attempt to avoid the applicability of the FLSA to inmate labour.

3. Conclusion

The above jurisprudence reveals that inmates are in a no-win situation before the courts. Where inmates are compelled to work, they will not be “employees” in the eyes of the courts because they are not freely bargaining to exchange their labour for wages. Where inmate work does seem to be characterized by a “free bargain”, as is often the case with rehabilitative programmes, the courts may be reluctant to make a finding of employee status because of the consequences of such a finding.

The judiciary’s application of the “economic reality” test in the prison context belies a tendency to continually move the “economic reality” goalposts so as to consistently defeat prisoners’ claims to employee entitlements. When it became apparent that the application of traditional control tests of employee status tended towards the finding of inmate employee
status, the courts concluded that such tests were inapplicable in the prison context. While the
criticisms of the control test arose in the context of inmates working for prison authorities, the
courts have refused even to apply the test to private sector prison employers where the same
criticisms cannot be said to apply.

In an attempt to formulate a new test for inmate employee status under the FLSA, the
courts have identified numerous other criteria said to be determinative of prisoners’ claims.
However, there has been no uniform application of these criteria, and in a given context, the
courts seem to have emphasized whatever criteria have been necessary to defeat inmate claims.
Where inmate labour has been compelled, the courts have relied on the involuntariness of
inmate labour to refuse to make a finding of employee status. Where inmates have volunteered
to work, the courts have taken pains to conclude such work was not truly voluntary, or have
rejected the voluntariness criteria outright, to reach the same result.

The Court in Carter made the clear statement that to categorically exclude prisoners
from the scope of the FLSA would be an encroachment on Congressional prerogative, since
Congress itself had not chosen to specifically exclude inmates from the Act’s protection. The
US Courts have claimed to adopt this approach, and have not expressly stated that prisoners are
per se excluded from the protection of the FLSA. In reality, however, this is precisely what
most of the US courts have done. Through their inconsistent application of “economic reality”
criteria to inmate workers, one gets the impression that the courts are prepared to identify one
factor or another which will best serve as the basis to defeat prisoners’ FLSA claims in a
particular case.
The inconsistent and frequently incoherent application of “economic reality” factors to inmate labour indicates that a determination of prisoner FLSA claims in accordance with the underlying purposes of the Act would be a superior approach. A purposive approach to inmate claims is more likely to ensure that Congress’s intention in passing the FLSA is realized. As discussed in detail in the earlier sections of this chapter, in passing the FLSA, Congress intended to ensure a minimum standard of living for all workers and to prevent unfair competition in labour and product markets as a result of the existence of substandard wages and other working conditions. It is submitted that any determination of inmate FLSA claims which defeats these purposes must be regarded as inferior, and rejected outright.

An interpretation of the definition of “employee” in the FLSA which makes the underlying purposes of the Act the direct focus of its inquiry is more likely to yield decisions which achieve the Act’s objectives. Unfortunately, the US jurisprudence indicates that even where the courts have purported to adopt a purposive approach, they have not tended to decide inmate FLSA claims in a manner which furthers the Act’s objectives. Generally speaking, the courts have not paid sufficient attention to the fact that wherever inmate labour is used in order to generate profits - whether by a private sector enterprise or by prison authorities themselves - unfair competition will arise in either labour markets or product markets or both. This unfair competition translates into a threat to the minimum standard of living necessary for the health, efficiency and general well-being of workers; either because workers themselves will have to compete with underpaid inmate workers for jobs, or because their employers will have to compete with cheaply produced inmate-made products in the marketplace. Applied in a principled manner, a purposive approach to the FLSA would acknowledge the threat of unfair
competition posed by the use of inmate labour in profit-making enterprises, and lead to a finding of inmate employee status in such circumstances. It is only in this way that the underlying purposes of the FLSA will be served.

In stating that a purposive approach would be superior to an “economic reality” analysis as a means of determining inmate FLSA claims, I do not intend to suggest that, in “economic reality”, prison workers are not employees. Rather, it is submitted that determining employee status in accordance with the purposes of the FLSA will result in the Act’s protections being extended to those who are, in “economic reality”, employees. Specifically, a purposive definition of “employee” in the FLSA should include all workers who compete with other workers in the labour market, or whose products compete with other products in the marketplace. In this way, a purposive approach encompasses all workers who are engaged by another party in order to do work for its benefit. Thus do we arrive at what, in my submission, is the most basic definition of “employee”: a worker engaged by another party to do work for its benefit.

The strongest criticism levelled against traditional “economic reality” tests in the prison context is that they have neglected to take into account that the control that is exerted over inmate workers is custodial in nature. However, as discussed above, it is impossible to say where prison labour stops being pecuniary and starts being penological. As long as the prison employer derives an economic benefit from the use of inmate labour, it seems clear that in economic reality, the inmates are “employees” insofar as they work for the employer’s benefit. The one caveat to this general principle is that workers who derive profits from working for another party, and whose work is more entrepreneurial in nature, may properly be excluded
from the definition of "employee". Such workers are generally referred to as independent contractors. It is with these workers that the traditional economic reality tests, focusing on whether there is sufficient control over a worker to characterize him as an employee, are primarily concerned. Thus, properly conceived, an economic reality test may well lead to the result that inmate workers, if they work for the economic benefit of another party, are employees for the purposes of the FLSA. Since this approach would accord with the underlying purposes of the Act, it seems that the attack on the economic reality tests by the US courts has been misguided.
IV. CANADIAN CONSTITUTIONAL JURISDICTION OVER PRISON WORK

A. Determining Constitutional Jurisdiction over Labour Relations Matters

Before we may even begin to analyse specific labour and employment-related statutes in Canada in order to determine whether prison workers may possibly fall within their protective scope, it is necessary to identify at the outset whether federal or provincial statutes should be the primary focus of our inquiry.

As a constitutional matter, it is clear that neither Parliament nor the provinces have exclusive legislative authority over the subject matter of labour relations by virtue of sections 91 and 92 of the *Constitution Act of 1867*. As a general rule, the provinces have legislative authority over labour relations matters by virtue of their exclusive jurisdiction to make laws relating to property and civil rights pursuant to section 92(13) of the Constitution. Provincial competence over the regulation of labour relations under this heading was affirmed in the leading case of *Toronto Electric Commissioners v. Snider* in 1925. In that case, the Privy Council held that an attempt by the federal government to regulate relations between trade unions and employers in the *Industrial Disputes Investigation Act of 1902* was unconstitutional, since the Act clearly related to property and civil rights in the provinces.

The breadth of the provinces' authority over labour relations matters was confirmed in the *Attorney General of Canada v. The Attorney General of Ontario (Labour Conventions)*. There, the Privy Council held that federal legislation with respect to minimum labour

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112 *Constitution Act, 1867*, c. 5 (UK), so renamed by the Canada Act 1982, c. 11 (UK).


114 [1937] AC 326.
standards, which had been passed by Parliament in performance of obligations undertaken pursuant to the Treaty of Versailles was *ultra vires* the federal government since the legislation dealt with property and civil rights, the exclusive domain of the provinces. Thus, it was confirmed that legislation relating to the relations between trade unions and employers, as well as legislation governing minimum standards, was within the exclusive legislative competence of the provinces.

While provincial competence over labour relations is the general rule, the federal government does retain the authority to legislate with respect to labour relations matters where such matters are an integral part of an exclusively federal work or undertaking. Thus, in the *Stevedoring Reference*, the Supreme Court of Canada held that Parliament had exclusive constitutional authority to enact collective bargaining legislation governing employers and employees whose operations were integral to federal works, undertakings, businesses and activities. These works and undertakings were those coming within Parliament's exclusive constitutional jurisdiction by virtue of sections 91 and 92 of the Constitution. Section 91(10) of the Constitution gives Parliament the exclusive jurisdiction to pass laws relating to navigation and shipping. Since the work of stevedores, who load and unload ships, was regarded as integral to the federal undertaking of shipping, the Court in the *Stevedoring Reference* held that labour relations legislation governing such work was within the exclusive legislative competence of Parliament.  

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116 It should be noted that in the *Stevedoring Reference*, the ships to whom stevedoring services were supplied operated on regularly scheduled between ports outside of Canada. Moreover, the stevedores with whom the Court was concerned were engaged exclusively in rendering services in respect of such ships. Where ships operate on a purely *intra* provincial basis,
Not only does Parliament have the ability to exert jurisdiction over labour relations matters in respect of federal works and undertakings, and matters integral to such undertakings. primary federal competition in a given area has been held to prevent the application of provincial laws relating to labour relations, even where there is no comparable federal law to fill the gap. Thus, in *Commission du Salaire Minimum v. Bell Telephone Co. of Canada*, it was held that the Quebec *Minimum Wage Act* was inapplicable to employees engaged in the federal undertaking of interprovincial telecommunications. In that case, the Supreme Court of Canada held that the determination of hours of work, rates of pay, working conditions and the like were a vital part of the management and operation of any commercial undertaking. Thus, the regulation of such matters in respect of federal undertakings was held to be within the exclusive legislative competence of Parliament, and any provincial legislation in the field was rendered inoperable.

In order to determine whether Parliament has the constitutional authority to regulate labour relations in respect of a given activity, two issues need to be determined. Firstly, is

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the Court stated that their operations would not be subject to the legislative authority of Parliament by virtue of section 91(10) of the Constitution. See judgments of Taschereau, Rand, Kellock, Locke, Cartwright, Fauteaux and Abbot, J.J. at 736, 746, 752, 770, 772, 776, and 779, respectively.


[158] Federal jurisdiction over interprovincial telecommunications had been previously upheld in *Toronto v Bell Telephone Co.* [1905] A.C. 52.


[160] I borrow the following analysis of the constitutional jurisdiction question from the Canada Labour Relations Board in *Marathon Realty* [1977] 1 CLRBR 493 at 498–499.
there a federal work, undertaking or business involved at all?\textsuperscript{121} The Supreme Court of Canada has held that the question with respect to whether an undertaking is a federal one depends on the nature of its operation: constitutional jurisdiction over labour matters depends on legislative authority over the operation and not, for example, over the person of the employer.\textsuperscript{142} Having ascertained that there is a federal work or undertaking involved, the second question to be determined is whether the particular work under question is work in connection with the operation of the federal work, undertaking or business which has been identified.\textsuperscript{143} It is this second question which has given rise to extensive litigation with respect to whether a particular activity, as a going concern, is "integral" or "essential" to an accepted federal work or undertaking.\textsuperscript{144}

\textsuperscript{121} \textit{Ibid} at 498.


\textsuperscript{141} \textit{Marathon Realty, supra}, note 340 at 498.

\textsuperscript{144} In order to determine the nature of an operation, the courts have held that it is necessary to examine the normal or habitual activities of the business "as a going concern" and not to be distracted by exceptional or casual factors. Otherwise, the constitution could not be applied with any degree of continuity and regularity. \textit{Agency Maritime Inc v C.R.B. et al} (1969), 12 D.L.R. (3d) 722; \textit{Letter Carriers Union of Canada, supra}, note 339. Also, determining whether the normal or habitual activities of a given employer are integral to a federal work or undertaking helps to avoid the result that employees are within federal jurisdiction in respect of certain tasks and under provincial authority in respect of others: If the bulk of a particular operation is integral to a federal work or undertaking, then the fact that occasionally the operation is engaged in activities outside the scope of federal competence will not draw it outside Parliament's legislative authority. \textit{Marathon Realty, supra}, note 340 at 500-501 and \textit{Letter Carriers Union of Canada, supra}, note 339 at 188.

\textsuperscript{145} See, for example, \textit{Letter Carriers Union of Canada, supra}, note 339, holding that the work of truck drivers delivering mail was an integral part of the effective operation of the Postal Service, which is within federal jurisdiction. See also \textit{Northern Telecom Canada Ltd et al v Communication Workers of Canada} (1979) 147 D.L.R. (3d) 1, in which it was held that the installation of telephone equipment was integral to the federal interprovincial telecommunications utility; \textit{Central Western Railway Corp v United Transportation Union} (1990) 76 D.L.R. (4th) 1, maintaining that an interprovincial railway carrying grain to the interprovincial line was not integral to core federal undertaking; \textit{Canadian Pacific Railway Co and Attorney General of Canada} (the "Empress Hotel" case), [1959] 1 D.L.R. 721, holding that a hotel operating much as any other was not integral to the federal undertaking of railways though it was owned by Canadian Pacific and operated at least in part for the comfort of its travelers; \textit{Montcalm Construction Inc v Minimum Wage Commission}, (1978) 95 D.L.R. (3d) 641 maintaining that the construction of a runway was not integral to the federal undertaking of aeronautics.
As a general rule, the identity of the employer is not at all relevant to the question of constitutional jurisdiction over labour relations matters. As stated above, the focus is on the nature of the operation itself - whether the work under question is integral to a federal undertaking. Nonetheless, there is one important exception to this general rule. In particular, it has been consistently held that Parliament has exclusive jurisdiction to make laws relating to labour relations matters in respect of employees of the federal government, and that the provinces have no jurisdiction over the employment of such persons.

Initially, the federal government drew its authority to legislate in respect of labour matters concerning its own employees from section 91(8) of the Constitution Act, 1867, which establishes Parliament's exclusive jurisdiction over:

the fixing of and providing for the Salaries and Allowances of Civil and other officers of the Government of Canada.

Arguably, on the wording of section 91(8), Parliament's legislative competence over federal government employees is limited to those who may aptly be described as "officers" of the federal government. Such a reading could exclude vast numbers of employees of the Government of Canada from Parliament's exclusive jurisdiction over labour matters.

However, the jurisprudence has consistently given broad scope to the federal

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126 This principle has been expressly stated in Marathon Realty, supra, note 340 at 499. See also CLRBB v City of Yellowknife, supra, note 342 at 736-737: "It is well settled that jurisdiction over labour matters depends on legislative authority over the operation, not over the person of the employer". The principle is implicit in a number of other cases where constitutional jurisdiction over labour relations has been determined in accordance with legislative authority over the activity in question and notwithstanding the fact that the identity of the employer, if considered as relevant, might well point to the opposite conclusion. Canadian Pacific Railway v Corp of the Parish of Notre-Dame de Bonsecours, [1989] A.C. 367, Canadian Pacific Railway v Attorney General of Canada (the "Empress Hotel" case), ibid.; Letter Carriers' Union, supra, note 339.
government's jurisdiction to pass laws relating to its own employees. In 1925, in the Re Legislative Jurisdiction over Hours of Labour case, Duff J. had held that the provinces had exclusive jurisdiction to pass laws in relation to labour standards such as those to which Parliament had bound Canada by becoming a signatory to the Labour Part of the Treaty of Versailles and other Treaties. However.

This general proposition is subject to this qualification, namely, that as a rule a Province has no authority to regulate the hours of employment of the servants of the Dominion Government.

The Court thus held that "the Parliament of Canada [had] exclusive legislative authority... upon the subjects dealt with in the draft convention in relation to the servants of the Dominion Government." Similarly, in the Stevedoring Reference, both Rand J., dissenting in part, but not with respect to this issue, and Kellock J., maintained that it was past question that government employees are exclusively subject to federal jurisdiction.

In addition, a number of commentators have maintained that it is beyond doubt that Parliament has exclusive jurisdiction to regulate labour relations in the federal public sector, which brings within its ambit all employees of the departments and agencies of the federal

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148 Ibid. at 1115.
149 Ibid. at 1115-1116.
150 Ibid. at 1117.
151 Supra, note 335 at 738 and 748. See also judgments of Taschereau, Estey and Locke supra, note 335 at 736, 755 and 779, respectively.
Parliament's exclusive legislative jurisdiction in respect of labour matters concerning employees of the federal government has been given more recent treatment in *Attorney General of Canada and St. Hubert Base Teachers' Association*. At issue in that case was whether the collective bargaining provisions of the Quebec *Labour Code* applied to teachers employed by the federal government at military base schools for the children of military service members and civilian employees of the Department of National Defence located in the province of Quebec. By virtue of section 93 of the Constitution, the provinces have exclusive legislative competence over education. However, since the teachers in question were employees of the federal government, it was held that they were within the exclusive legislative competence of Parliament in respect of labour relations matters, and therefore that the Quebec *Labour Code* had no application to them.

It would seem that Parliament's exclusive jurisdiction over labour relations matters affecting its own employees is the full extent to which constitutional jurisdiction in such matters is determined by reference to the identity of employees *per se*. In *Four B Manufacturing Ltd. v. United Garment Workers of America*, the Supreme Court of Canada

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353 Ibid.

354 Ibid at 507.

355 (1979) 102 D.L.R. (3d) 385 (S.C.C.)
held that the Ontario *Labour Relations Act* was applicable to native employees of a native-owned and operated shoe manufacturing company, notwithstanding Parliament's exclusive jurisdiction over "Indians and Lands reserved for the Indians" pursuant to section 91(24) of the Constitution.

Applying a "functional" test, the Court held that there was nothing about the nature of the activities carried out by Four B which would allow it to be considered a federal business or undertaking. On the contrary, the Court found that Four B's business activity, the sewing of uppers on sport shoes, was "an ordinary industrial activity which clearly [came] under provincial legislative authority for the purposes of labour relations."  

Moreover, the Supreme Court expressly rejected Four B's argument that a functional approach focussing on the nature of its operations was inappropriate "where legislative competence [was] conferred not in terms relating to physical objects, things or systems, but to persons or groups of persons such as Indians or aliens." According to Four B, the fact that the business was operated by natives and employed natives on an Indian reserve under an express federal permit to do so indicated that the regulation of its labour relations was within the jurisdiction of the federal government pursuant to section 91(24) of the Constitution. The fact that Four B received loans and subsidies from the federal Department of Indian Affairs and Northern Development to commence and carry on its business under the express provision that the business contribute to the "economic development of Indians" was also regarded by Four B

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156 *Ibid* at 396.

157 *Ibid*.

158 *Ibid*.
as a relevant factor indicating federal jurisdiction over it labour relations.\textsuperscript{14a} The Court was not persuaded by these arguments, however, and maintained that the appropriate test was a functional inquiry directed at the nature of Four B’s operations and not at its “Indian” elements.\textsuperscript{14b} Even assuming, however, that the functional test was not conclusive, the Court held that “the power to regulate the labour relations issue [did] not form an integral part of primary federal jurisdiction over Indians or lands reserved for the Indians.”\textsuperscript{14c}

The conferring upon Parliament of exclusive legislative competence to make laws relating to certain classes of persons does not mean that the totality of those persons’ rights and duties comes under primary federal competence to the exclusion of provincial laws of general application.\textsuperscript{15}

Accordingly, as long as provincial laws do not attempt to “single out Indians nor purport to regulate them \textit{qua} Indians, and as long also as they are not superseded by valid federal law,” there exists no constitutional barrier to their application to persons who might otherwise fall \textit{per se} within Parliament’s exclusive legislative authority.\textsuperscript{16}

B. Whether Work Performed by Federally Sentenced Inmates Potentially Falling within Provincial or Federal Jurisdiction

A number of the considerations articulated in the above jurisprudence come to bear on

\textsuperscript{14a} \textit{Ibid} at 395 and 396; see also the consideration of this argument in judicial review of the OHRB’s decision by the Divisional Court in \textit{Four B Manufacturing Ltd. v. United Garment Workers of America}, (1977) 79 D.L.R. (3d) 576 at 579.

\textsuperscript{14b} \textit{Ibid} at 396.

\textsuperscript{14c} \textit{Ibid} at 397.

\textsuperscript{15} \textit{Ibid}.

\textsuperscript{16} \textit{Ibid} at 398.
the question with respect to whether the work performed by prisoners while incarcerated at federal penitentiaries falls within federal or provincial constitutional jurisdiction. As discussed in the first chapter, the majority of inmates involved in prison industry in Canada are engaged by CORCAN directly. These prisoners work in respect of one of CORCAN’s five business lines, and are under CORCAN’s direct supervision and control as to the terms and conditions of their work. Assuming that inmates engaged by CORCAN are “employed” by it, the question becomes whether such inmates would fall under provincial or federal jurisdiction for labour relations purposes.

As previously stated, CORCAN is an agency of the CSC, which itself is part of the Ministry of the Solicitor General. Accordingly, employees of CORCAN would be employees of the federal government for the purposes of determining constitutional jurisdiction over inmate labour. Given that it is a well-settled principle of constitutional law that Parliament has exclusive constitutional authority to legislate in respect of labour relations matters relating to federal government employees, we may conclude that the employment of inmate workers by CORCAN is governed by federal labour and employment laws. This is subject to the provision that inmate workers must otherwise satisfy the criteria for the applicability of such laws, including the requirement that they fall within the definition of “employees” in the relevant statutes. Accordingly, where inmates work for CORCAN directly, we need not undertake the typical inquiry with respect to whether the activities in which CORCAN’s inmate workers are engaged are integral to a federal work or undertaking in order to determine constitutional jurisdiction over inmate labour relations. The question is resolved before we reach that point.

This is not so, however, where inmates in federal penitentiaries work for private sector
prison industries which have contracted with CORCAN to have access to the inmate workforce. Where inmate workers are not “employed” by CORCAN, but rather, by a private sector prison employer, we must assess whether the normal and habitual activities of the business are integral to a federal work or undertaking in order to determine constitutional jurisdiction for labour relations purposes. In certain circumstances, the determination might be easily made. Where a private employer primarily engages inmate workers in an integral aspect of banking, for example, and however unlikely, then it is clear that labour relations regulation of the private employer’s operations would fall within the exclusive legislative authority of Parliament. The confusion arises where a private prison employer is not engaged in a federal work or undertaking within the meaning of the Constitution. Where the business operations of the private prison employer would otherwise fall within provincial jurisdiction, but the employer is expressly engaged to assist in the rehabilitation of inmates, it is less than clear which level of government would have constitutional jurisdiction for labour relations purposes.

Consider the private prison “employer” of Wallace Meats as an example. Wallace Meats operates an abattoir at Pittsburgh Institution in Kingston, Ontario, at which it “employs” a number of inmate workers. The slaughtering of animals in an abattoir is not a federal work or undertaking within the meaning of the Constitution, but rather, an industrial activity which would ordinarily come under provincial legislative authority for the purposes of labour relations. Applying a functional test to the question of constitutional jurisdiction over labour relations at the abattoir, it is relatively easy to conclude that the operational nature of the
business places it firmly under provincial authority for labour relations purposes. Such an analysis, however, might rely upon an oversimplification of the question with respect to the nature of the undertaking in which a private prison employer, such as Wallace Meats, is engaged.

It is true that the ordinary business operations of Wallace Meats qua business is the slaughtering of animals for commercial purposes. However, this does not necessarily fully answer the question with respect to whether the abattoir’s activities are integral to a federal undertaking. Specifically, in respect of its employment of inmate workers, an argument could be made that the core activity in which the abattoir is engaged is the rehabilitation of inmates by providing them with work and training opportunities, and not merely the slaughtering of animals. Since there are a number of indications that the rehabilitation of inmates is integral to the core federal undertaking of managing penitentiaries, it may be that the rehabilitative purpose of prison industry would place a private prison employer, such as Wallace Meats, under federal jurisdiction for labour relations purposes.

There is no question that Parliament has constitutional jurisdiction over the “Establishment, Maintenance and Management of Penitentiaries” by virtue of section 91(28) of the Constitution. The issue is whether the rehabilitation of inmates is an integral part of that

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304 In this regard, it is worthy of note that a bargaining unit consisting of both inmate and non-inmate employees of an abattoir operated privately on a provincial prison's premises in Guelph, Ontario was certified by the Ontario Labour Relations Board as a bargaining unit in 1977. In that case, there no issue was raised with respect to the constitutional jurisdiction of the Board over the abattoir for labour relations purposes. *Guelph Beef* [1977] OLRB March 184.

305 It is interesting to note that by virtue of section 92(6) of the Constitution, provinces have exclusive authority to legislate in respect of “Establishment, Maintenance and Management of Public and Reformatory Prisons in and for the Province”. The Constitution does not define the difference between penitentiaries, which are federal, and prisons, which are within the jurisdiction of the provinces. The distinction made by the *Criminal Code* is that offenders who are sentenced to two or more years imprisonment are to be confined in federal penitentiaries, whereas those sentenced to less than two years are incarcerated
core federal undertaking. The answer to this question depends on our view of what objectives are comprised in the penal undertaking. Arguably, one of the central functions served by penitentiaries is the rehabilitation of inmates. Certainly, this is one of the main objectives of imprisonment set out in the Criminal Code and in the Corrections and Conditional Release Act. Section 718 of the Criminal Code states that, in sentencing offenders, judges must attempt to impose sentences which, inter alia, "assist in rehabilitating offenders." Moreover, according to the Correction and Conditional Release Act, the Act governing all matters relating to the operation and management of federal penitentiaries, the overall purpose of the Correctional Service of Canada is to "contribute to the maintenance of a just, peaceful and safe society by:

a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

b) assisting in the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programmes in penitentiaries and in the community.

[Emphasis added.]

In this way, the legislation relating to the imprisonment of offenders supports the view that the rehabilitation of inmates is integral to the core federal undertaking of managing penitentiaries.\(^{106}\)

\(^{106}\) Section 718 (d) of the Criminal Code, RSC 1985, C. C-46.

\(^{107}\) Notwithstanding the fact that a number of other objectives might be served by incarcerating offenders, the rehabilitation of offenders is at least one objective which characterizes our correctional system. Such other objectives may include the retributive aim of punishing offenders in proportion to their wrongs, which aim is discussed in greater detail in the penultimate chapter of this paper: the incapacitation of offenders, that is, the prevention of further crimes being committed by a particular
In addition, the express purpose underlying prison industry programmes specifically is the rehabilitation of inmates. CORCAN's express mandate is to rehabilitate inmates through work and to thereby facilitate their post-release re-entry into the community.\(^8\) In addition to allowing CORCAN to institute its own prison industry programmes in pursuit of this objective, section 107(1) of the CCRA regulations explicitly authorizes CORCAN to enter into agreements with private sector enterprises for the rehabilitative training and employment of inmates by that enterprise. Thus, the argument could be made that since the rehabilitation of inmates is integral to the federal penal undertaking, and since prison industry programmes are intended to serve this rehabilitative objective, the regulation of labour relations in respect of private prison industry programmes falls squarely within the scope of federal competence.

Even if the underlying purpose of privatized prison industry programmes is the rehabilitation of inmates, and accepting that the rehabilitation of inmates is integral to the core federal penal undertaking, it is still far from clear that privatized prison industry would be subject to federal jurisdiction for the purposes of labour relations. Certainly, prison industry programmes, whether privatized or not, may serve the objective of rehabilitating inmates from the perspective of CORCAN, the CSC, and the federal government. What is not altogether clear is whether the federal government's objective for prison industry programs would be

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offender removing him from society; and the objective of deterrence. Deterrence may be either specific or general. Specific deterrence operates on the principle that punishing an offender will discourage him from committing further crimes once released from prison so as to avoid re-imprisonment. General deterrence operates on the view that the witnessing by society of the punishment of an offender for a crime will discourage its citizens from likewise committing crime, lest they too should be punished. For a general overview of the various objectives which may be put forward as justifications for punishment, see Ted Honderich, *Punishment: The Supposed Justifications* (Harmondsworth, Middlesex, England: Penguin Books Ltd., 1976); Nigel Walker, *Why Punish?* (Oxford: Oxford University Press, 1991); Edmund L. Pincofs, *The Rationale of Legal Punishment* (New York: Humanities Press, 1966).

\(^8\) Section 105 of the CCRA Regulations. *supra*, note 27.
sufficient to characterize the activities of private prison industry as integral to a federal work or undertaking, and to place it within federal jurisdiction for labour relations purposes. After all, from the private prison employer's perspective, it is unlikely that its business is the rehabilitation of inmates. Private sector businesses benefit from the training and employment of inmate workers because it provides them with a cheap source of labour. Additionally, private prison employers may benefit from gaining access to otherwise expensive facilities located on penitentiary premises from which they may conduct their business. The training and employment of inmates may well incidentally serve the rehabilitative objectives of the overall federal undertaking of penitentiary management. However, from the perspective of the private prison employer, the nature of its business activities may have little to do with the rehabilitation of inmates and everything to do with the generation of profits through its normal business activities.

In this regard, the jurisprudence indicates that the governmental purpose underlying prison industry will not be sufficient to place regulation of prison labour relations within federal jurisdiction, where the normal business activities of the operation ordinarily fall within provincial jurisdiction. This seems to be the case even where the government's rehabilitative purpose for prison industry, considered alone, would be integral to the federal undertaking of managing penitentiaries.

In *Four B Manufacturing*, for example, the federal government gave loans and subsidies to the business in question with the objective that to do so would contribute to the "economic development of the Indians". From the federal government's perspective, the goal underlying the business was the improvement of the economic plight of the Indians. Such an
objective might well be seen as integral to the federal government’s exclusive jurisdiction over “Indians” pursuant to section 91(24) of the Constitution. This fact was insufficient, however, to characterize the nature of Four B’s activities as integral to a federal work or undertaking. The Supreme Court of Canada rather relied upon the fact that Four B’s business qua business was engaged in industrial activities which would normally fall within provincial jurisdiction for labour relations purposes by virtue of the province’s exclusive legislative authority in respect of property and civil rights.

In another case before the Supreme Court of Canada, *Montcalm Construction Inc. v. Minimum Wage Commission,¹⁶⁹* at issue was whether Montcalm was subject to Quebec Minimum Wage laws in respect of its construction of runways on federal Crown land at the Mirabel Airport in Quebec. Aeronautics is within the exclusive legislative competence of Parliament for the purposes of labour relations,¹⁷⁰ and the construction of runways, from the federal government’s perspective, is certainly necessary to the operation of an airport. For the purpose of determining constitutional jurisdiction over the construction of runways regarding labour relations matters, however, the governmental purpose underlying the construction of the runways—namely to enable it to operate an airport—was insufficient to alter the fact that Montcalm’s ordinary business was the business of building.¹⁷¹ Since the activity of building

¹⁶⁹ Supra, note 345.


¹⁷¹ “Building contractors and their employees frequently work successively or simultaneously on several projects which have little or nothing in common. They may be doing construction work on a runway, on a highway, on sidewalks, on a yard, for the public sector. One does not say of them that they are in the business of building runways because for a while they happen to be building a runway and that they enter into the business of building highways because they thereafter begin to do construction work on a section of a provincial turnpike. Their ordinary business is the business of the building. What they build is accidental. And there is nothing specifically federal about their ordinary business.” *Montcalm Construction Inc.*,.
was far removed from the federal undertaking of aeronautics. It remained within provincial jurisdiction for labour relations purposes.

In light of the above cases, it is unlikely that the rehabilitative purpose underlying prison industry from the government's perspective would alter the fact that constitutional jurisdiction over prison labour relations will depend on the nature of a private prison industry business operations *qua* business. In the case of a prison industry such as *Wallace Meats*, for example, it is undeniable that Wallace is in the business of slaughtering animals for sale. Just as *Montcalm* was in the business of building, Wallace is in the business of operating an abattoir. Since there is nothing particularly federal about operating an abattoir, it follows that Wallace Meat's normal business activities would place it within provincial constitutional jurisdiction for the purposes of labour relations. What *Four B* and *Montcalm Construction* demonstrate is that in determining constitutional jurisdiction over a business activity for labour relations purposes, we should be guided by the activity of the business from the perspective of the employer. Even though a broader governmental purpose - whether it be the improvement of the economic plight of "Indians" or the rehabilitation of offenders - may animate the business activities of the employer, such a purpose, from the government's perspective, will not suffice to place business activities normally falling within provincial jurisdiction *qua* business activities under the jurisdiction of Parliament.

By way of final note, an interesting argument may be made that the constitutional jurisprudence with respect to jurisdiction over labour relations matters actually bolsters

*supra*, note 345 at 659.
prisoners' claim to employee status under minimum standards legislation. If a private prison industry were regarded as coming within federal jurisdiction because of the underlying rehabilitative purpose of such industry, then a much stronger argument could conceivably be made that prisoners were not "employees" for the purposes of the Canada Labour Code. If the nature of a private prison employer's business is the rehabilitation of prisoners, then it would likely follow that prisoners are not "employees" within the meaning of the Code, but rather the recipients of training services intended primarily for their own benefit. Where, however, we regard the private prison industry as a business like any other, as the constitutional jurisprudence directs us to, and are not swayed by any rehabilitative purpose which might underlie such industry, it becomes much easier to argue that prisoners are employees like any others in that they, like regular free world employees, contribute to the employer's business by performing the normal activities of that business.

The above section establishes that both federal and provincial minimum standards legislation may govern the prison work relationship in Canada depending on the circumstances. According, in considering the question as to whether prison workers fall within the definition of "employees" within the meaning of minimum standards legislation in Canada, I will focus on the tests for employee status which have been set out in the jurisprudence under the Canada Labour Code and the Ontario Employment Standards Act. From the above section, we know that any inmates working directly for CORCAN fall within federal jurisdiction for labour relations purposes, provided that they are "employees". Accordingly, the provisions governing minimum standards in the federal sector which are set down in the Canada Labour Code will be considered. With respect to provincial minimum standards legislation, it is true that
prisoners' minimum standards claims could conceivably arise in a number of the provinces in which federal penitentiaries are located and at which penitentiaries prison industry programmes are in place. However, due to time and space constraints, I will limit my analysis of provincial minimum standards law to that of the province of Ontario.
V. CANADIAN EMPLOYMENT STANDARDS LEGISLATION

A. Purpose of Minimum Standards Legislation in Canada

As discussed above, because of the fact that constitutional jurisdiction over labour relations matters resides exclusively with the provinces, except where authority over labour relations matters is integral to a federal work or undertaking or where employees of the federal government are concerned, different employment standards legislation exists in each of the provinces, and also at the federal level. Notwithstanding the multiplicity of employment standards legislation at the provincial and federal levels, however, the impetus and purpose underlying employment standards legislation is constant throughout all Canadian jurisdictions.

Unlike the US Fair Labor Standards Act, employment standards acts in Canada do not tend to specify their underlying purpose in the legislation itself. Paul Malles, however, in his overview of the history of labour standards in Canada, has identified that employment standards legislation tends to be protective legislation, intended to fix the minimum conditions at which labour, whether organized or unorganized, may be employed, in search of the following objectives:

(1) to narrow the gap between the wages and working conditions obtained by organized labour through collective action, and by unorganized labour;
(2) to protect the individual employee against undue exploitation;
(3) to eliminate unfair competition between employers; and
(4) to raise the living standards of the working poor.\(^\text{12}\)

Notwithstanding the uniformity of purpose underlying minimum standards statutes in

all Canadian jurisdictions. the fact remains that each jurisdiction has distinct, albeit similar, legislation establishing the "irreducible floor of rights" of employment-related entitlements to which the vast majority of Canadian workers are entitled. In determining whether prisoners working in Canadian penitentiaries are entitled to the protection of minimum standards legislation, it is necessary to turn to the specific employment standards statutes whose protections inmate workers could conceivably seek, in order to assess whether inmates fall within the scope of such Acts.

As noted at the end of the previous chapter, federal minimum standards legislation, as well as minimum standards legislation at the provincial level, has potential application to the prison work relationship. Due to time and space constraints, it is not possible to canvass minimum standards legislation in all of the provinces in which prison industry programmes operate at federal penitentiaries. Instead, I will focus my inquiry on the scope of the Ontario Employment Standards Act, with a view to ultimately determining whether inmate workers fall within its protective scope. Subsequently, I will turn to the federal employment standards legislation contained in Part III of the Canada Labour Code.

B. Ontario Employment Standards Legislation

In Ontario, minimum standards for terms and conditions of employment are set down in

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the *Employment Standards Act*.\(^74\) Similar to Part III of the *Canada Labour Code*, the Ontario *Employment Standards Act* regulates minimum standards in respect of a number of employment-related areas. Part IV of the *Act* provides that maximum working hours shall not exceed eight in the day and forty-eight (48) in the week.\(^74\) Specific provision is made however, for exceeding the maximum number of working hours provided in the *Act* in certain limited circumstances.\(^77\) Part V of the *Employment Standards Act* provides that every employer who permits any employee to perform work or supply services in respect of which a minimum wage has been established, is deemed to have agreed to pay the employee no less than the minimum wage.\(^77\) Overtime pay is payable in respect of hours worked in excess of forty-four in a week at not less than one and one half times the employee’s regular rate pursuant to Part VI of the *Act*.\(^78\) Parts VII and VIII make provision for paid public holidays\(^79\) and vacations with pay,\(^80\) respectively. An employee’s right to pregnancy and parental leave is provided for in Part XI of the *Employment Standards Act*.\(^81\)

The right to receive certain minimum periods of notice or payment in lieu thereof upon

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\(^74\) RSO. 1990, c. E.14.

\(^75\) Section 17 of the ESA, *ibid*.

\(^76\) Sections 18-21 of the ESA, *ibid*.

\(^77\) Section 23 of the ESA, *ibid*.

\(^78\) Section 24 of the ESA, *ibid*.

\(^79\) Sections 25, 26 and 27 of the ESA, *ibid*.

\(^80\) Sections, 28, 29 and 30 of the ESA, *ibid*.

\(^81\) Section 34-45.
the termination of employment by an employer is another noteworthy entitlement in the Act.\footnote{382}{Section 57(1) of the Act sets out the minimum notice periods required pursuant to the terms of the Act. Pursuant to section 57(1), employees who have been employed by an employer for more than three months and less than one year are entitled to one week's notice. Employees who have been employed for more than one year are entitled to one week's notice per fully completed year of employment with an employer, to a maximum of eight weeks notice.}

Where an employer terminates the employment of fifty or more employees within a six month period or less, which terminations are caused by the permanent discontinuance of all or part of the employer's business; or where an employer with a payroll of $2.5 million or more terminates an employee's employment, it is additionally required by the Act to pay severance pay.\footnote{383}{Section 58(2).} The severance pay to which such employees are entitled is one week's regular, non-overtime wages for every completed year of employment, to a maximum of twenty-six weeks.\footnote{384}{Section 58(4).}

1. Applicability of the Ontario Employment Standards Act to Inmate Workers

There are a number of persons who are excluded from the provisions of the Employment Standards Act altogether pursuant to section 2 of Regulation 325 under the ESA.\footnote{385}{RRO 1990, Reg. 325.} These persons include:

a) a secondary school student who performs work under a work experience program authorized by the school board of the school in which the student is enrolled;

b) a person who performs work under a program approved by a community college or university:
conditionally suspended inmates working for private sector enterprises which have connected with

accordingly, Section 2(6) of Regulation 22 should not act as a barrier to the claim of

Conditioned Release Act and the Corrections and Conditional Release Regulations,

from the Ministry of Correctional Services, i.e., but rather from the federal Correctional and

the scope of the Act, (COR. V.) as its authority for the prison industries programs are not

authorized under the Ministry of Correctional Services Act, etc. Provincial statute are outside

provisions. Only those inmates whose work projects or rehabilitation programs are

application in respect of federally sentenced inmates participating in prison industry

of Correctional Services Act. The exclusion, however, would not appear to have any

inmates participating in work projects or rehabilitation programs authorized under the Ministry

Of all the above, the most noteworthy for our purposes is the exclusion of certain

an order of sentence of a court,

an offender who performs work or services under

under the Ministry of Correctional Services Act,

work project of rehabilitation program authorized

participates inside or outside the institution in a

impose a correctional institution who

(c) Participation activities

that involves participation in community

but only with respect to that part of the program

made under the General Re-entry Assistance Act

Revised Regulations 17990 C. General Law replacement (excusion 4.3(3) of Regulation 227 of the

a partipant in a program established under

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CORCAN for the use of inmate labour, provided that such enterprise’s activities otherwise fall within the scope of provincial jurisdiction for labour relations purposes.

It may be that the failure to exclude federally sentenced inmates working in respect of federally authorized work projects or rehabilitative programmes was merely the result of an oversight on the part of the Ontario legislature. Perhaps it was presumed that the regulation of "employment" in respect of federally sentenced inmates would fall within federal jurisdiction for labour relations purposes, and that, no issue would arise with respect to the Employment Standards Act’s applicability to such inmates. On the other hand, constitutional jurisdiction over labour relations matters has been subject to extensive litigation and can hardly be said to be easily decipherable. Thus, it may be presumed that the Ontario legislature was aware of the possibility that claims under the Employment Standards Act would arise from federally sentenced inmates working for private sector prison employers within the province of Ontario. The legislature could have attempted to place the “employment” of such inmates outside the scope of the ESA, but chose not to do so. 119

Indeed, if anything, the exclusion of inmates working or participating in work projects or rehabilitative programmes authorized by the Ministry of Correctional Services Act bolsters the claim of federally incarcerated inmates to the protections of the ESA. The specific exclusion of provincially incarcerated inmates in the ESA evidences the fact that the legislature turned its mind to the question of whether inmates should be excluded from the scope of the Act, and specifically chose to exclude only those inmates performing work authorized by the

119 Although the provincial legislature’s authority to legislate in respect of federally sentenced inmates qua federal inmates is dubious. a general exclusion of all persons working while incarcerated could conceivably pass constitutional scrutiny. See notes 358 to 363, supra, and accompanying text.
provincial legislation.

It should be noted that section 2(d) of *Regulation 325* under the *Employment Standards Act* also states that the Act does not apply to "an offender who performs work or services under an order or sentence of a court." The intent of this section would seem to be to exclude from the scope of the ESA those offenders who, at the time of sentencing, are ordered to perform community service work as part of their sentence. At any rate, and whatever the intent, it is clear that section 2(d) of *Regulation 325* does not operate so as to exclude federally incarcerated inmates from the protective scope of the ESA. Inmates do not participate in CORCAN or CORCAN-authorized prison industry programmes because they have been ordered to do so by the courts. Rather, upon receiving sentences of incarceration for two years or more, offenders are placed in federal penitentiaries where certain of them will be identified by Case Management Officers as appropriate participants in CORCAN's work programmes.\(^3\)

Thus, federally sentenced inmates engaged in prison industry would not fall within section 2(d)'s exclusion of inmates who are sentenced by the courts to perform work as part of their sentences.

In light of the above, there seems to be no reason to conclude that federally sentenced inmates engaged in prison industry are specifically excluded from the protective scope of the Ontario *Employment Standards Act*. However, simply because such inmates are not specifically excluded from the Act, this does not mean that they are automatically included

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\(^3\) Here, I refer to prison industry programmes operated by private sector enterprises under express agreement with CORCAN, pursuant to s. 107 of the *Corrections and Conditional Release Regulations*. See note 106, *supra*, and accompanying text.

\(^4\) See notes 89 to 92, *supra*, and accompanying text.
within its protective ambit. In order to qualify for the entitlements and protections in the ESA, federal inmates first have to demonstrate that they are in an employment relationship within the meaning of the Act, and therefore entitled to have it apply to their work in prison industry programmes. With this in mind, I now turn to the definition of "employee" under the ESA.

2. Definition of "Employee" under the Ontario Employment Standards Act

Like Part III of the Canada Labour Code, the employment standards in the Employment Standards Act are consistently extended to "employees" vis-a-vis "employers". Accordingly, in the absence of an employer-employee relationship, the Employment Standards Act has no application. It is thus not surprising that "no definition has attracted more attention and controversy than the definition of "employee" or "employer" under the Act.""

The terms "employee" and "employer" are very broadly defined in the Ontario Employment Standards Act. "Employee" is defined in relation to an "employer" to include:

a person who.

(a) performs any work for or supplies any services to an employer for wages;

(b) does homework for an employer; or


41 Ibid

40 Though not directly relevant for our purposes here, it is worthy of note that "homework" is also expressly defined in section 1 of the Act as "the doing of any work in the manufacture, preparation, improvement, repair, alteration, assembly or completion of any article of thing or any part thereof in premises occupied primarily as living accommodation, and "homeworker" has a corresponding meaning."
(c) receives any instruction or training in the activity, business, work, trade, occupation or profession of the employer.

and includes a person who was an employee. 

Employer is also expansively defined, in relevant part, to include:

(a) any owner, proprietor, manager, superintendent, overseer, receiver or trustee of any activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person therein...

a) Exclusion of Independent Contractors from the Scope of the ESA

Given the broad scope of the above definitions, it is arguable that the Employment Standards Act applies to any situation where one person supplies any work or services to another person. Indeed, in Re Telegram Publishing Co. Ltd. and Annu, Professor Carter explicitly acknowledged this as one plausible reading of the Act. However, Professor Carter and other decision-makers under the ESA have consistently held that the Act does not reach that far. Specifically, it is well-established that, notwithstanding the potentially very wide application of the ESA on the face of the Act, there is one particular class of persons who may well supply work or services to another person, but who are nonetheless outside the ESA's

146 Section 1 of the ESA.

146 Ibid

147 (1973) 3 LAC (2d) 175 (DD Carter).

148 Ibid at 182-3.
protective ambit, namely independent business persons or independent contractors.

The Employment Standards Act is legislation establishing minimum standards of employment for the Province of Ontario. The statute governs such matters as hours of work, overtime pay, minimum wages, equal pay for equal work, vacation with pay, and termination of employment. The subject matter of the legislation indicates that the Legislature did not contemplate the regulation of the supply of services by independent businessmen but rather, was concerned with those situations where the supplier of services was tied to another by an employment relationship.” In other words, despite the potentially wide definition of employer, the Act was not intended to regulate those persons who buy services from another who is truly supplying these services as an independent businessman, or independent contractor.”

The premise underlying the exclusion of independent contractors from the otherwise “all-encompassing” definition of “employee” in the Act has been stated by Employment Standards Referee Randall in Super Fitness Centres Inc.:

The concept of independent contractor is predicated on the notion that the parties to the arrangement have something resembling equal bargaining power. The contractor has specialized knowledge, skills and equipment that places her in a position to at least attempt to negotiate her remuneration and terms and conditions of employment.”

Thus, independent contractors are said to be excluded from the scope of the ESA specifically because their particular attributes endow them with equal bargaining power to those for whom they supply services or perform work. This equal bargaining power, in turn, allows independent contractors, in theory at least, to negotiate their own acceptable terms and

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"Ibid., where Professor Carter cites a passage from his former decision in Re Becker Milk Co Ltd (1973) 1 LAC (2d) 337 at 339. See also Sonders Studios Ltd (Re), November 30, 1991 (Gray) ESC 2954; and Belgoma Transportation Ltd (Re) (Checkers case) (Re), April 8, 1991 (Gray) ESC 2838, citing Professor Carter with approval in this regard.

"Super Fitness Centres Inc (Re), March 21, 1997 (Randall) ESC 97-48."
conditions of work without the necessity of having recourse to the legal minima established by the Act. On the case law, independent contractors appear to be the only category of workers which are excluded from the scope of the ESA because of the inherent limitations of the definition of "employee".\textsuperscript{a1}

Accordingly, much of the jurisprudence concerning who is an "employee" has focussed on distinguishing "employees" from "independent contractors". In making this determination, employment standards decision-makers have relied upon a number of different tests, some of which have been developed at common law, and others which have been specifically developed in accordance with the purposes of the ESA.

b) The "Control" Test in Montreal Locomotive

Earlier decisions of Employment Standards tribunals relied heavily upon the four-fold test set down in the well-known decision of the Privy Council in Montreal \textit{v.} Montreal Locomotive Works \textit{Ltd.} to distinguish independent contractors from employees.\textsuperscript{a2} In that case, the Court was examining a contract in order to determine whether a corporation was acting as

\textsuperscript{a1} It is to be noted, however, that certain other categories of workers are excluded from either all or some of the Act's protections by way of specific exemption. See Regulation 225 promulgated under the ESA, \textit{supra}, note \textsuperscript{85}. Moreover, in certain instances, the wording of the Act has been read as excluding certain categories of persons, such as office holders. In this regard, see \textit{Devine \textit{v.} Re.}, February 14, 1996, (Muir) ESC 95-74A, where it was held that Justices of the Peace did not fall within the scope of the Act since they are office holders. Here the fact that police officers were specifically included in the definition of "employee" in section 46 of Part XII of the Act regarding Lie Detector Tests, but not in the general definition in section 1, led the Referee to conclude that police officers \textit{qua} office holders did not fall within the general definition of "employee" in section 1, and thus were not intended to be covered by the general provisions of the Act.

\textsuperscript{a2} [1947] 1 DLR 161. For Employment Standards decisions which determined employment status in accordance with the Montreal Locomotive test, see Gervais Service Station \textit{v.} Re., March 26, 1974 (Bell) ESC 92; Omega Driving School \& Traffic Education Centres (Canada) \textit{v.} Re., July 3, 1973 (McNish) ESC 39; Dartroc Estates \textit{v.} Re., September 5, 1975 (Learie) ESC 280; Advanced Alternative \textit{v.} Re., December 22, 1988 (Kilgour) ESC 2433.
an agent of the government or as an independent contractor on its own behalf in the
manufacture of military vehicles for the purpose of determining whether the corporation or the
government was liable for injury to third parties. In concluding that *Montreal Locomotive
Works Ltd.* was merely acting as an agent for the government, the Privy Council relied upon
the four-fold test, which has since been frequently adopted as a means of determining the
existence of an employment relationship. The four factors identified in *Montreal Locomotive*
were: (1) ownership of tools; (2) chance of profit; (3) risk of loss; and (4) the element of
control over the worker by the putative employer.¹

Where a worker does not own the tools with which he works, has no chance of making
a profit from his work for a given enterprise, and does not risk losing any investment in the
enterprise, these factors will point to status as an employee rather than as an independent
contractor. While the first three factors are significant, in the employment standards context,
the element of control which a putative employer exercises over a worker has been held to be
the most significant of the four factors in determining the existence of an employment
relationship.²

It is interesting to note that certain employment standards referees have been reluctant
to conclude that a worker's "chance of profit" or "risk of loss" is sufficient to characterize him
as an independent contractor where the existence of these factors is not the result of the
entrepreneurial flavour of the relationship, but rather the product of unequal bargaining power.

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¹ *Montreal Locomotive,* *ibid.* at 169.

² *Omega Driving School,* supra, note 402. See also *Bell Air Conditioning* (Re), May 15, 1987 (Fraser) ESC 2242; and
*WG Wilson Transportation Inc.* (Re), August 25, 1987 (Aggarwal) ESC 2259.
In *Texas Longhorn Cafe Inc.*, referee Waceyk held that "determining who has the "chance of profit" and "risk of loss" involves an inquiry into the "entrepreneurial nature" of the work done." Where a worker does not otherwise appear to be "in the business" of doing the work in question, the work relationship may not be sufficiently entrepreneurial to characterize the worker as an independent contractor. This reasoning appears to circular, however. On the fourfold *Montreal Locomotive* test, the existence of "chance of profit" and "risk of loss" are factors which point towards an entrepreneurial relationship with an independent contractor. If we are not able to assess whether the profit loss factors exist except by first determining whether the relationship is entrepreneurial, then we have lost two of our four tools specifically designed for determining whether the relationship is in fact entrepreneurial.

Referee Gray's decision in *Sooters Studios Ltd.* is somewhat more coherent. There, the Referee held that where the "chance of profit" in a work relationship merely resembles an opportunity to make earnings on a commission basis, then this factor is not inconsistent with

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"*Texas Longhorn Cafe Inc.* (Ref), October 8, 1992 (Waceyk) USC 142 92-A.

 Ibid

 In *Texas Longhorn Cafe*, a waiter had been asked by his employer to paint a mural in the restaurant for a certain agreed-upon sum. The waiter’s status as an employee in respect of his work as a waiter was not in question. However, the worker took the position that he was also an employee in respect of his mural painting, while the restaurant owner argued that he was an independent contractor in this respect. In assessing the "entrepreneurial nature" of the work, the Referee stated that the worker’s work on the mural did "not share the characteristics of a "business" which is typically associated with an independent contractor, as it was the only "commercial" artwork he ever did. In other words, he was not in the business of commercial artwork, and agreed to do the mural because he was asked to do so by his employer." Ibid. See also *Kitchen World Kitchen’s Inc.* (Ref), September 21, 1990 (Boscarelli) USC 2751 where the Referee refers to "risk of loss" and the "chance of profit" as "the hall-marks of any independent and entrepreneurial entity."

 Supra, note 399.
an employment relationship. Two other cases, *Shem-Tov*⁴⁰⁹ and *Entertainment Associates*⁴¹⁰ similarly held that making remuneration dependent upon actual performance on a profit-sharing or commission basis is typical in the employment of salespersons in particular, and not inconsistent with the existence of an employment relationship. With respect to the “risk of loss”, where the existence of this factor is merely the product of uneven bargaining power, then it cannot be assigned much weight in determining employee status.⁴¹¹

As noted above, the extent of control which is exercised by a putative employer over his workers has been emphasized as the most significant indicator of the existence of an employment relationship. What seems to be important on the case law in order to establish an employment relationship is that control exists. The form which such control takes is not particularly significant.

Control is a relative matter. In considering the question of “control” one must take into account such factors as the degree of supervision in respect of deciding what specific functions are to be performed, the method of performing the function, the location of providing services, the time when the services are provided, the freedom of the person providing the services to delegate, the way in which the contractual arrangement can be terminated, the degree of accountability on the part of the person performing the functions, and the degree of economic dependence upon the person for whom the functions are performed.⁴¹²

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⁴¹⁰ *Entertainment Associates (Re)*, September 23, 1991 (Cumming) ESC 2916.

⁴¹¹ *Souter Studios, supra*, note 399. Referee Gray’s decision in this regard is no doubt closely related to his reliance upon other tests, such as the “economic dependence” and “statutory purpose” tests, discussed *infra* notes 466 to 472 and accompanying text, where inequality of bargaining power is prominent as a factor attracting the application of the Act.

⁴¹² *Entertainment Associates, supra*, note 410. In this regard, see also *Re Telegram Publishing, supra*, note 397, at 184; and *Ready Mixed Concrete (South East Ltd v Minister of Revenue and National Insurance* [1968] 2 QB 497 at 515.
Though supervisory control over the manner in which work is performed will certainly be indicative of an employment relationship, the absence of such supervisory control will not nullify the existence of an employment relationship where other types of control exist. Thus, in *Canadian Diversified*, the absence of day-to-day supervisory control over construction work was not fatal to the worker’s claim that he was an “employee”, since there was ample evidence to support the conclusion that the alleged employer exercised managerial control over his work. Similarly, in *Texas Longhorn Cafe*, the fact that there was no direct supervision over the painting of a wall mural did not negate the existence of an employment relationship where the alleged employer had the ability to terminate the working relationship summarily.

Nor need control be actually exerted by a putative employer over its workers in order to give rise to an employment relationship. In this regard, certain employment standards referees have been prepared to find that alleged employers “controlled” their workers in a manner consistent with the existence of an employment relationship where there was power to control.

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44 *Re Telegram Publishing Co Ltd*, *ibid*.

45 *Canadian Diversified Construction and Development Ltd v Re* June 10, 1992, (Stewart) ESC 5022(A). “In this instance, managerial control was exerted by virtue of the terms of the contract between the applicant [the alleged employer] and its client. Any deviation from the terms of the contract between the applicant and its client had to be approved by [the president of the applicant]. In my view, there was clear managerial control in the relationship between the applicant and [the alleged employee].” On the general point that managerial control is sufficient to establish an employment relationship even in the absence of supervisory control, see also *Lyle v Intervisual Ltd*, January 25, 1983 (Aggarwal) where it is stated: “[M]ere lack of supervision does not mean lack of managerial control. In my view, direct or immediate supervision is not an essential element of [the] employment relationship. It is the power of control rather than day to day exercise of supervisory control that is significant in this regard.” As cited in *Canadian Diversified*.

46 *Supra*, note 405. “[W]hile no direct supervisory control was evident with regard to the work on the mural, this is not the only form of control that an employer has over an employee. The ability to terminate the employment relationship summarily is another type of control... The fact that the work on the mural was summarily terminated indicates that [the alleged employer] did have control over the work to the extent that it could and did terminate the project.” In this regard, see also *Borshov’s Garage Ltd*, February 7, 1978, (Carter) ESC 474; and *Sooters Studios*, *supra*, note 391.
Even if such control was not actually exercised.\textsuperscript{416}

Further, it appears that the reasons an alleged employer may have for maintaining control over its workers will not militate against the conclusions which would ordinarily be drawn from the existence of actual control or the power to control. In one employment standards decision, which may have particular relevance in the prison work context, \textit{MacAulay Child Development Centre}.\textsuperscript{417} the Referee found that the Centre's substantial control over its care providers was indicative of an employment relationship notwithstanding the fact that such controls were required by the \textit{Day Nurseries Act}. the Ministry of Community and Social Services licencing criteria, and the requirements of a funding agreement with the Municipality of Metropolitan Toronto.

... [T]he issue is not whether there is a rational reason for the control, but rather the degree and nature of control which exists. In this instance, I find that the substantial degree of control exercised by MacAulay, and the detailed scope of that control, is indicative of an employment relationship.\textsuperscript{418}

The four-fold test in \textit{Montreal Locomotive} was developed as a means of determining whether an employment relationship could be said to exist so as to give rise to vicarious liability on the part of the "employer" for the harm caused to a third party by its "employees".\textsuperscript{419} In light of the differing reasons for needing to ascertain the existence of an employment relationship in the \textit{Montreal Locomotive} situation and in the employment

\textsuperscript{416} \textit{Canadian Diversified}, supra, note 414; \textit{Souters Studio}, \textit{ibid}

\textsuperscript{417} \textit{MacAulay Child Development Centre (Rev.)}, February 12, 1993 (Wacey) ESC 25 93.

\textsuperscript{418} \textit{Ibid}

\textsuperscript{419} \textit{Supra}, note 402.
standards context, at least one Employment Standards Reference has questioned the appropriateness of the four-fold test set down in Montreal Locomotive as a means of determining employee status for the purposes of the ESA.\footnote{120}

Although the common-law tests used to determine "master-servant" relationships in vicarious liability cases are helpful as analogies to be considered when it comes to labour cases, the limitations of such analogies must be noted:

Whether the "control" or the "fourfold" test is the more appropriate for identifying the "master-servant" relationship is not here material. The pertinent question is whether the factors in an employment relationship which invoke vicarious liability bear any relation to those which invite a regime of collective bargaining. The very terminology "master" and "servant" evokes a nostalgic Victorian image of authoritarianism which is collective bargain's antithesis. More important, any rationale of vicarious liability focuses ultimately on the allocation of loss as between employer and injured third party and employers, \textit{inter se}. The control test and its modern successor, the fourfold test, are thus intended to identify those features of the employment relationship which will permit the employer to escape liability if he falls outside the rationale of vicarious liability. Control may be important if vicarious liability is based on a desire to discourage negligent work practices; use of the employer's tools or financial dependence upon him may be important if vicarious liability is based on a desire to reach the employer's "deep pocket", or on a "loss spreading" rationale. But the relevance of any of these considerations to situations where no third party is present is purely fortuitous. The rationale of labour relations legislation is that the public interest is best served by the promotion of their employees. Surely any meaningful definition must be formulated in the light of this statutory purpose.\footnote{121}

\footnote{\textit{120} Majestic Maintenance Services Ltd (Rei. February 8, 1977 (Burkett) ESC 479 at 23.}

\footnote{\textit{121} Ibid. Citing Professor HW Arthurs, "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965) 16 UTLJ 89.}
While not entirely rejecting the *Montreal Locomotive* test as relevant to the determination of employee status, recent employment standards decisions have tended to conclude that there is no *one* test which will be appropriate for determining employment status in every given case. In support of this conclusion, a number of cases have relied upon the following passage from MacGuigan in *Wiebe Door Services Ltd. and Minister of National Revenue*,\(^{122}\) where MacGuigan J. stated that "what must always remain of the essence is the search for the total relationship of the parties..."

"It is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones. The plain fact is that in a large number of cases the court can only perform a balancing operation, weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. In the nature of things, it is not to be expected that this operation can be performed with scientific accuracy."\(^{123}\)

This sentiment was echoed in the following passage by Cooke J. in *Market Investigations Ltd. v Minister of Social Services*,\(^{124}\) referred to by Referee Gray in *Belgoma Transportation*\(^{125}\) as the "best synthesis" found in the authorities of the common law tests for distinguishing employees from independent contractors.

\(^{122}\) [1986] 2 CTC 200 (FCA).


\(^{124}\) [1968] 3 All ER 732.

\(^{125}\) *Supra.* note 399.
[The fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes" then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk be taken, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.  

Accordingly, while employment standards decision-makers have continued to rely upon the four-fold control test in *Montreal Locomotive*, at the same time, they have applied other tests in determining whether particular individuals are "employees" for the purposes of the Act. Where one of the available tests is inconclusive as to a worker’s status, a finding of employee status under another test, has often been sufficient to place the worker within the protective scope of the Act.

c) Organizational Test

One of the tests which has gained prominence as a means of assessing the existence of an employment relationship in the *Employment Standards Act* context is the "organizational" test. First propounded by Lord Denning in *Stevenson, Jordan & Harrison Ltd. v*

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42b *Supra.* note 424, at 738.
the organizational test attempts to distinguish between contracts of service (where an individual is an employee) and contracts for service (where an individual is an independent contractor) by addressing the extent to which an alleged employee is integrated into the business of her putative employer:

One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.\footnote{\textsuperscript{428}}

More than a decade after Lord Denning had endorsed it, the Supreme Court of Canada accepted and applied the organizational test as a means of determining employment status in \textit{Co-operators Insurance Association v Kearney},\footnote{\textsuperscript{429}} a negligence action brought by a “servant” against his “master”.\footnote{\textsuperscript{430}} In that case, Spence J. cited with approval the following passage from Fleming on \textit{The Law of Torts}:

Under the pressure of novel situations, the courts have become increasingly aware of the strain on the traditional formulation [of the control test], and most recent cases display a discernible tendency to replace it by something like an “organization” test. Was the alleged servant part of this employer’s organization? Was his work subject to coordinational control as to “where” and “when” rather than the “how”?\footnote{\textsuperscript{431}}

\footnote{\textsuperscript{427}} \textsuperscript{1952} TLR 101.

\footnote{\textsuperscript{428}} \textit{Ibid.} at 111.

\footnote{\textsuperscript{429}} (1964) 48 DLR (2d) 1 (SCC).

\footnote{\textsuperscript{430}} Specifically, in \textit{Co-operators}, a servant brought an action against his master in respect of injuries caused by the negligence of a fellow servant while the latter was driving a motor vehicle owned by their common master. \textit{Ibid.} at 9.

Although tacitly endorsed by Professor Carter in Re Telegram Publishing in 1973, the "organizational" test received express approval in an employment standards context by the Ontario Court of Appeal in Mayer v Conrad Lavigne Ltd. There, then Chief Justice MacKinnon described the organizational test as an "enlargement" of the four-fold control test in Montreal Locomotive. In Mayer, the issue was whether a salesman of broadcast time for a television station who was paid on a commission basis was an employee for the purposes of the labour standards provisions of the Canada Labour Code. In finding that he was, the Court stated:

The respondent's work was a necessary and integral part of the appellant's business. It supplied the financial lifeblood of the appellant, and his work was subject to the coordinational control of management. His work was clearly integrated into the business and not merely accessory to it.

Since the adoption of the organizational test in the employment standards context by the Court of Appeal in Mayer, decision-makers under the Ontario ESA have frequently incorporated the

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132 While Professor Carter did not specifically refer to the "organizational" test as such in his decision, it is clear that he did in fact rely on this test, among others, in order to determine that newspaper circulation managers were employees of Telegram Publishing. Supra, note 397 at 186, where he refers to the "symbiotic nature of the relationship between the [alleged employees] and the [company]" and to the "significant organizational dependency" on the part of the alleged employees as "evidence that the [newspaper circulation] managers were not carrying on their own business" and therefore employees for the purposes of the Employment Standards Act.

133 (1979), 27 OR (2d) 129 (CA) at 132.

134 Ibid. In this regard, see also the Ontario Court of Appeal's decision in Re Telegram Publishing Co. Ltd. and William Imm. (1979) 23 OR (2d) 103 at 108, dismissing an appeal from the decision of the Divisional Court dismissing an application for judicial review in Re Telegram Publishing Co. Ltd. and Director of Employment Standards (1977), 77 CLLC 77 14,095 (Ont Div. Ct.), where the Court of Appeal held that in placing "emphasis on the economic dependency test and on the organizational test ... [Professor Carter] was relating them to the classic tests set out by Lord Wright in Montreal v Montreal Locomotive Works Ltd. ... and, particularly, to the "control" test."

135 Supra, note 433 at 133.
test into their determinations of employment status under the Act.\(^4\)\(^{16}\)

One important caution regarding the manner in which the organizational test is to be applied has been sounded by the Federal Court of Appeal in _Wiebe Door Services Ltd._\(^4\)\(^{17}\) In that case, according to Justice MacGuigan, in order to ensure the fair application of the organizational test, it must be considered from the perspective of the alleged employee, since from the perspective of the alleged employer, any work performed for it can be characterized as integral to its business:

Lord Denning's test may be more difficult to apply, as witness the way in which it has been misused as a magic formula by the Tax Court here and in several other cases cited by the respondent, in all of which the effect has been to dictate the answer through the very form of the question, by showing that without the work of the "employees" the "employer" would be out of business... As thus applied, this can never be a fair test, because in a factual relationship of mutual dependency it must always result in an affirmative answer. If the businesses of both parties are so structured as to operate through each other, they could not survive independently without being restructured. But that is a consequence of their surface arrangement and not necessarily expressive of their intrinsic relationship. We must keep in mind that it was with respect to the business of the employee that Lord Wright addressed the question, "Whose business is it?"

It is interesting to note that certain employment standards referees seem to have

\(^{16}\) For example, see _Kitchen World Kitchen's_, supra, note 407; _Germ-Lane (v. Moh MG1, Publishing) (Re), January 22, 1993 (Novick) ESC 12/93; _Soaters Studios_, supra, note 598; _Belozova Transportation_, supra, note 599; _Lewis Longhorn Cafe, supra_, note 405; _Shem-Fox_, supra, note 409; _5986-42 Ontario Inc. (v. Mac Kay Rail & Adjustment Inc.) (Re), February 7, 1992 (Haefling) ESC 2979; _Granub (Re), November 26, 1992 (Novick) ESC 203 92; Entertainment Associates_, supra, note 410; _Macdonald Child Development Centres, supra_, note 417; _Canadian Universties, supra_, note 414.

\(^{17}\) _Supra_, note 422.

\(^{18}\) _Ibid_. at 205-206. MacGuigan J is referring to the following statements of Lord Wright in _Montreal Locomotive_, supra, note 402, at 169: "In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."
determined whether particular workers were employees or independent contractors under the “organizational” test by asking the question: what does the worker bring to the business?

Where the only contribution the worker makes to the business enterprise is her own labour, then it is unlikely that she will be considered an independent contractor for employment standards purposes. Thus, in Belgoma Transportation, Referee Gray held that drivers of Checker Cabs were not independent contractors because the “driver [brought] only his or her labour to the enterprise; the enterprise is essentially Belgoma’s.” Similarly, in Entertainment Associates, the Referee found that sales agents were an integral part of Entertainment’s business because “all they brought was their labour to the relationship.”

The only thing the [sales agents] brought to the relationship was their knowledge of the entertainment business, their sales ability, and a calculator. They were not entrepreneurs in any sense.

The conclusion that workers are employees under the Employment Standards Act and not independent contractors where the only thing they bring to a given enterprise is their labour seems consistent with the general rule that workers will be “employees” for the purposes of the Employment Standards Act where they are specifically engaged to provide those services which their alleged employer is in the business of supplying. In MacAulay Child Development Centre, for example, the fact that the child care providers supplied precisely those services

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179 Supra, note 399.

180 Ibid. The Referee goes on immediately to say: “On the evidence before me, Belgoma is not just engaged in the business of renting taxi cabs to drivers. It is in the business of delivering taxi services to cab users... The drivers function as part of a single organization supplying taxi services. They are encouraged to see themselves that way and to identify with the interests of Belgoma...”

181 Supra, note 410.

182 Ibid
which MacAulay was in the business of providing led to a finding that the providers were employees under the *Employment Standards Act*.

It is clear from the evidence that without the services of the providers, MacAulay would not be able to provide a home care service. While it is MacAulay that is licenced to provide the service, and which maintains the ongoing relationship with the parents, ComSoc [Ministry of Community and Social Services] and the Municipality, it is the providers who actually render the service being licenced, paid for, and funded. I find, therefore, that the providers are an integral element of the service being provided at MacAulay and not merely an accessory to it.\footnote{Supra. note 417.}

While the organizational test has undoubtedly been regarded as helpful in determining employees from independent contractors, the fact remains that the organizational test does not specifically take the remedial purpose of the *Employment Standards Act* into account in making this determination. Thus, many of the criticisms specifically directed at the *Montreal Locomotive* fourfold test could equally be levelled at the organizational test. In an attempt to ensure that the legislature’s intent in passing the *Employment Standards Act* is realized, employment standards decision-makers, while continuing to use the common law tests, have increasingly relied upon tests which incorporate the underlying purpose of the *Employment Standards Act* in determining whether an individual is an employee within the meaning of the *Employment Standards Act*. It is to these tests that I now turn.
d) "Statutory Purpose" Test

In Majestic Maintenance Services Ltd. Employment Standards Referee Burkett developed what has come to be known as the "statutory purposes" test for employment, now commonly applied by employment standards decision-makers in determining employee status under the ESA. In Majestic Maintenance, Referee Burkett held that, while common law tests, such as the fourfold Montreal Locomotive test and the organizational test, may be helpful in terms of determining employee status, they should not be paramount in assessing the scope of remedial legislation, such as the Employment Standards Act, which was designed to expand upon the common law. Rather, he held that the definitions of "employer" and "employee" under the Act should be assessed in accordance with the underlying purposes of the statute.

The Legislature has decided that it is in the public interest that all persons who perform work or supply services to an employer be entitled to minimum standards of employment. The Act implicitly recognizes the inherent inequalities which may exist in a modern industrial society and redresses the inequality between the individual and his employer to the extent that the employer is required by statute to comply with the minimum standards. Whereas the Act is not designed to protect or underwrite the independent businessman ... it must be said ... that it is intended to protect those who are dependent in their employment.

In support of his "statutory purposes" test, Referee Burkett relied upon the decision of the US

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444 Supra. note 420.

445 Ibid. See Referee's Burkett criticism of the common law test, supra. note 420 to 421 and accompanying text.

446 Ibid.
The mischief at which the [National Labor Relations] Act is aimed and the remedies it offers are not confined exclusively to "employees" within the traditional legal distinctions separating them from "independent contractors." Myriad forms of service relationships with infinite and subtle variations, blanket the nation's economy... Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation... In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise, with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.\footnote{In this regard, note has been made elsewhere that the Act defines the terms "employee" and "employer" to "include" certain classes of persons. The language is thus open-ended. The use of the word "includes" in the definitions of "employee" and "employer" is to be contrasted with the use of the more restrictive defining term "means" which is used in every other definition in section 1, with the exception of the definition of "contract of employment" which again "includes" a collective agreement. For a commentary on the contrast between the defining terms "includes" and "means", see \textit{v}2.\textsuperscript{80} \textit{Ontario Inc. v. midland Rd. v. Nippany (Re)}, April 21, 1993 (Novick) ESC 93-69.}

Ultimately, Referee Burkett concludes that since the definition of "employee" in the Act is inclusive and not exhaustive.\footnote{Supra. note 420.}
The type of dependence as to the terms and conditions of employment which will attract the application of the ESA is also elaborated upon in *Majestic Maintenance*.

There is no doubt that the statute is remedial and is intended to provide certain minimum benefits to person who, by reason of their economic dependence or lack of "bargaining power" in the market place, might otherwise have to work on terms below the basic minima established in the Act.\(^4\)

Not only did Referee Burkett set down the basic principles which give life to the "statutory purposes" test, in *Majestic Maintenance*, he also formulated a three part test which he felt would result in the extension of the Act's protections to those whom the ESA was intended to protect:

1. Does the person claiming to be an employee perform any work or supply any services to the person alleged to be his employer for wages?

2. Is the person alleged to be the employer, the owner, proprietor, manager, superintendent or overseer of any activity, business, work, trade, occupation or profession?

3. Does the person alleged to be the employer have control or direction of, is he directly or indirectly responsible for, the employment of the person claiming to be an employee?\(^5\)

According to Referee Burkett's decision, if the answer is "yes" to these three questions, then an employment relationship exists for the purposes of the *Employment Standards Act*.\(^6\)

\(^4\) *Ibid*.

\(^5\) *Ibid*.

\(^6\) *Ibid*. Although the majority of employment standards decisions which have applied Referee Burkett's statutory purposes test have had resort primarily to the principles articulated in *Majestic Maintenance*, certain decision-makers have expressly adopted the three part test developed in *Majestic Maintenance* in order to determine the issue of employment status. For
It is interesting to note that Referee Burkett's approach to the manner in which the
definition of "employee" in the ESA should be interpreted is in accord with section 10 of the
*Interpretation Act,* which provides:

Every Act shall be deemed to be remedial, whether its immediate purport is to
direct the doing of any thing that the Legislature deems to be for the public
good or to prevent or punish the doing of any thing that it deems to be contrary
to the public good, and shall accordingly receive such fair, large and liberal
construction and interpretation as will best ensure the attainment of the object of
the Act according to its true intent, meaning and spirit.

Certain referees have referred to the above section of the *Interpretation Act,* in echoing their
support for an interpretation of the definition of "employee" which best assures the attainment
of the underlying objectives of the ESA.

The statutory purpose test has been regularly applied by employment standards
decision-makers in determining employee status for the purposes of the ESA. In *Texas
Longhorn Cafe,* for example, the Referee relied in part on the statutory purposes test laid down
in *Majestic Maintenance* to conclude that the worker who was engaged to paint a mural at the

example, in *Kay Bailiff & Adjustments Inc,* supra, note 436. Referee Haefling asked the same three questions originally posed
by Referee Burkett to determine whether certain individuals engaged as "bailiffs" in the task of recovering chattels secured
to bank and lending agency clients of the alleged employer were "employees" for the purposes of the ESA. The first two
questions posed in *Majestic Maintenance* were easily answered in the affirmative by the Referee. "I find on the evidence that
the claimants, and each of them, throughout their tenure in the Applicant's business performed work for or supplied services
to the Applicant as assistant bailiffs or bailiff or officer manager and in turn were paid a fixed level of remuneration for their
services as determined by the Applicant." The Referee also found that the alleged employer exercised "control and direction"
over the alleged employees and had responsibility for their employment, within the meaning of the third question of the test,
since the authority for effecting the seizure of vehicles by the workers in question was granted to the alleged employer by its
creditor clients and the warrants which legally and technically authorized the seizures by the workers in question were
prepared by the alleged employer. The three questions originally formulated by Referee Burkett having been answered in the
affirmative, the bailiffs in *Kay Bailiff* were concluded to be "employees" within the meaning of the ESA.

*4* RSO 1990, c. 1, 11.

*4* See *Great Atlantic & Pacific Tea Co of Canada Ltd v. Workor Stores* (Re), June 9, 1993 (Gorsky) ESC 2003D; and Derme
(Re), supra, note 401.
restaurant where he normally worked as a waiter was an "employee" within the meaning of the
ESA. It is worthy of note that the application of the organizational test\(^{146}\) and statutory
purposes test led the Referee to reach this conclusion even though the application of the four-
fold test in *Montreal Locomotive* was held to be inconclusive as to employee status.\(^{157}\) In
resolving the question of the worker's employee status, the Referee chose not to rely
exclusively on the common law tests, stating that she "found it of greater assistant to weight
the totality of the evidence in relation to the purpose of the Employment Standards Act."\(^{158}\)
Thus, finding that the worker was "economically dependent" on the alleged employer, in a way
which placed him in "the same position of vulnerability" as any other employee," the Referee
determined, on a statutory purposes analysis, that the worker should have access to the
protections and remedies contained in the ESA.\(^{159}\)

In *Majestic Maintenance*, Referee Burkett indicates that the "economic dependence" of
workers on those for whom they supply work or services is a key indication that the ESA was

\(^{146}\) "I also find that all the work performed by [the alleged employee] was inextricably linked, although the work performed
was not of the same nature. This was most clearly indicated by the fact that his opportunity to complete the mural ended when
his employment as a waiter was terminated." *Supra*, note 455.

\(^{157}\) "An application of the four-fold test in the instant case shows that, as is often the case, the evidence fails to point
conclusively in one direction or the other." *Ibid.* The referee found that both the alleged employer and the alleged employee
supplied tools to do the work in question. While no direct supervisory control was exercised over the work on the mural, the
Referee concluded that the employer's power to terminate the work relationship was a type of control which could satisfy the
four-fold test. In terms of the "chance of profit" and "risk of loss" factors, the Referee assessed these in light of the
entrepreneurial nature of the work done. Since the mural work was the only type of commercial artwork performed by the
alleged employee, the Referee indicates that the "risk of loss" and "chance of profit" factors which are ordinarily the hallmarks
of independent business were not present. Although the manner in which the Referee assesses the existence of the four factors
could conceivably result in a finding of employee status, she ultimately finds the test to be inconclusive, and indeed goes on
to state, "[I]t cannot be denied that by applying the same fourfold test, an equally strong argument could be made that the
relationship between the parties is more consistent with a contractual arrangement for the services of an independent contractor

\(^{148}\) *Ibid*

\(^{158}\) *Ibid*
intended to govern their work relationship. The type of "economic dependence" which will attract the application of the Act has been fleshed out in a number of subsequent cases. In particular, it seems that the inability of a worker to provide work or supply services to a party other than his alleged employer will be indicative of a relationship of "economic dependence" within the meaning of Majestic Maintenance. For example, in MacAulay Child Development Centres, Referee Wacyk held that child care providers were economically dependent on the Centre, their alleged employer, because the Centre exercised significant control over the ability of providers to provide child care services to other clients.

The right to provide services to other clients would in many instances be a sign of economic independence and would be indicative of a relationship other than one of employment. However, in this instance, I find that this right is greatly diminished because of the control exercised by MacAulay over the number and type of children the providers can take into care, and the requirement that any placements be approved in writing by a provider's field worker. As a result, the providers' bargaining power in the marketplace is proportionately diminished with the result that the providers are rendered dependent on MacAulay in a manner in which a contractor would not be.\(^{11}\)

Similarly, in Canadian Diversified, one of the factors leading the Referee to conclude, on a purposive interpretation of the Act, that the construction worker in that case was an "employee" was that he was not in a position to work for anyone other than his alleged employer. Thus, the worker was "economically dependent" on his alleged employer in a manner which would attract the application of the ESA on a "statutory purposes" analysis.

The relationship was clearly one of economic dependence on the part of | the

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\(^{11}\) See notes 420 to 421, supra, and accompanying text.

\(^{12}\) Supra, note 417.
worker]... [The nature of the duties undertaken by [the worker] for the [alleged employer] appear, realistically, to have precluded the possibility of other work.\textsuperscript{462}

Referee Burkett’s “statutory purposes” test has the benefit of ensuring that those individuals who are in a relationship of economic dependence with those to whom they supply work or services are not excluded from the protective scope of the \textit{Employment Standards Act}. In this way, the test is aligned with the legislature’s intention that those who lack sufficient bargaining power to achieve at least the minimum standards established in the Act through bargaining power alone are nonetheless protected by entitlement to the statutory minima.\textsuperscript{463} Moreover, Burkett’s test seems consistent with the requirement in section 10 of the \textit{Interpretation Act} that statutes should be largely and liberally construed in order to ensure the attainment of the legislature’s objectives in passing the statute.\textsuperscript{464}

On the other hand, Burkett’s statutory purposes test may be overly inclusive. While Burkett maintains that the \textit{Employment Standards Act} was not intended to protect independent business persons,\textsuperscript{465} in making the inability of individuals to achieve at least the minima established in the Act by reason of their economic dependence or unequal bargaining power determinative of employee status, he may well be extending the Act’s protection to those who would traditionally be characterized as independent contractors under the common law tests.

\textsuperscript{462} \textit{Supra.} note 414.

\textsuperscript{463} “The legislature has decided that it is in the public interest that all people who perform work or supply services to an employer be entitled to minimum standards of employment.” \textit{Majestic Maintenance, supra}, note 420.

\textsuperscript{464} \textit{Supra.} note 454.

\textsuperscript{465} \textit{Supra.} note 420.
Of course, this is no accident. Indeed, it is precisely the result which Burkett intended, since he criticizes the common law tests as failing, in certain circumstances, to extend the Act's protection to those who are subject to the ills which the Employment Standards Act's attempts to remedy. Conceivably, however, Burkett’s formulation results in the application of the Employment Standards Act to every individual who would be characterized as an independent contractor at common law in circumstances where their working conditions fall below those established in the Act. At its most basic, Burkett’s test may be reduced to the following formulation: if you are in need of the Act’s protection, then you are entitled to it. Presumably, any individual who seeks the enforcement of the Employment Standards Act is in need of its protection - else there would be no need to seek its enforcement. Does this mean that every individual whose terms and conditions of employment in any respect fall below the minimum standards in the Employment Standards Act are in need of the Act’s protection, and therefore are entitled to it? If so, then the determination of employee status under the Employment Standards Act would become a highly perfunctory fact-finding exercise. Upon determining that a given worker’s terms and conditions of employment fall below those set down in the Employment Standards Act, it would follow, on a Majestic Maintenance analysis, that employment standards decision-makers should conclude that the worker is in need of the Act’s protection, and extend it to him. In light of such an approach, the need to distinguish between independent contractors and employees for Employment Standards Act purposes falls away entirely. Those who would be classified as “independent contractors” at common law who are able, through bargaining power, to secure terms and conditions of work more favourable than those contained in the Employment Standards Act are highly unlikely to seek the Act’s
enforcement. Only those whose terms and conditions of work fall below the minima in the Act would seek the Employment Standards Act's enforcement. In the latter case, according to Burkett, the very fact that their terms and conditions of work are below the standards in the Act is indicative of their need for the Act's protections and thus of employee status.

While other decision-makers have indicated that whether workers are economically dependent within the meaning of the statutory purposes test will depend on whether they are in a position to work for enterprises other than their alleged employers, this does not necessarily follow from Burkett's formulation. Rather than using such an external benchmark as a measure of economic dependence, Burkett seems to suggest that economic dependence is evident precisely from the fact that working conditions fall below those set down in the Employment Standards Act.

Perhaps Burkett's formulation is indeed the more appropriate one, ensuring as it does that those in need of the Employment Standards Act's entitlements fall within its protective scope. If this is the case, however, we should be cognizant of the fact that the statutory purposes test allows no room for drawing a distinction between independent contractors and employees, per se. Rather, the test pivots on whether there is need for the Act's protection because a given worker is otherwise unable to achieve standards of work comparable to those in the Act. In this way, the statutory purposes test laid down in Majestic Maintenance significantly enlarges the scope of the application of the Employment Standards Act. Even where an individual may be described as being in business for himself, if such an individual is unable to secure work conditions as favourable as those contained in the Employment Standards Act, then he would likely be regarded as being in need of the Act's protection and
therefore an employee for Employment Standards Act purposes on a Majestic Maintenance analysis. Traditional common law tests would likely lead to the opposite conclusion, and possibly chalk the "independent contractor's" substandard working conditions up to the plain fact that he had happened to enter into a "bad bargain". Where there is insufficient control by an alleged employer over such an individual's work, or where the individual could not be characterized as being integrated into his alleged employer's business, the mere fact that his working conditions fall below those in the Employment Standards Act, on the common law tests, would not lead to a finding of employee status.

While Burkett's statutory purposes test is regularly referred to by employment standards referees in making employee status determinations, the common law tests continue to be applied as well. Perhaps this tendency evinces an unwillingness to completely cast aside the independent contractor employee distinction in favour of making what may essentially be described as a "needs" assessment through strict application of the Majestic Maintenance test. Perhaps it is this same unwillingness which has led at least one arbitrator to formulate yet another test for employee status under the Employment Standards Act, which may be best described as a hybrid of the common law tests and Burkett's statutory purposes test. It is to this hybrid test that I now turn.

e) The Belgoma Transportation Test

Referee Gray, in his decision in Belgoma Transportation, adopts and interprets the

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40 Supra, note 399.
"statutory purpose" test set down in Majestic Maintenance, and combines it with certain other common law tests in order to develop yet another test for employee status. In Belgoma.

Referee Gray reviews the common law four-fold Montreal Locomotive test, as well as the organizational test, in light of the remarks of Referee Burkett in Majestic Maintenance to arrive at the following formulation:

The conclusions I draw from the language of the Employment Standards Act and the decision to which I have referred is that while the features of their relationship which distinguish an employee from an independent contractor at common law can and, perhaps should be, considered in determining whether an individual is some person’s employee under the Act, the purpose of the Act determines the weight to be given those features and others. Having regard to that purpose, the degree to which the performance of work and services by the individual in question is integrated into and organizationally forms part of the enterprise of the person said to be the employer will be a relevant consideration, as will the degree of economic dependence of the individual on the alleged employer under or as a result of their relationship.\textsuperscript{135}

Applying this test to the question of the employee status of taxi cab drivers in Belgoma.

Referee Gray came to the conclusion that the drivers were "employees" within the meaning of the ESA, because the drivers were integrated into the employer’s taxi business,\textsuperscript{136} and demonstrated an inequality of bargaining power with the employer\textsuperscript{137} so as to place them within the remedial scope of the Act.

Similarly, in Gray’s decision in Sooters’ Studios, he applies the test in Belgoma to

\textsuperscript{135} The drivers function as part of a single organization supplying these taxi services. They are encouraged to see themselves that way and to identify with the interests of Belgoma.” \textit{Ibid.}

\textsuperscript{136} “The terms of the agreement Belgoma routinely extracts from drivers, particularly the broad waiver of rights and the agreement to pay any charge Belgoma deems necessary, show a considerable imbalance of bargaining power. The driver is economically dependent on Belgoma to a degree consistent with a relationship of employment.” \textit{Ibid.}
arrive at the result that managers engaged by Sooters' were employees within the meaning of the ESA. In that case, Gray found that since Sooters' dictated the terms of the work relationship through a written agreement, retained rulemaking power under that agreement, and had relied upon the assessments of its supervisors in calculating the managers' right to compensation, the bargaining power of the managers was not equal to that of Sooters. He also found that the managers were integrated into Sooters' business, and not in business for themselves. In support of that conclusion, he cited the fact that the premises of the business and a significant portion of the equipment used in the business were the property of Sooters. Sooters also determined the products and services to be sold and set the prices at which they would be sold. Moreover, it was seen as particularly significant that the only photography business in which the managers were permitted to be engaged, pursuant to their written agreement with Sooters, was the business which they operated on behalf of Sooters.

Thus we see the manner in which the Belgoma test incorporates elements of both the common law organizational test with elements of the statutory purposes test set down in Majestic Maintenance. In emphasizing the extent to which an individual is "integrated into and organizationally forms a part of" his alleged employer's enterprise as a key factor in determining employee status, it is important to bear in mind that Referee Gray does not reject

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470 Supra, note 399.

471 Ibid. For a decision in which application of the Belgoma test resulted in a finding that a franchise owner operator was not an "employee" for the purposes of the ESA, see Ginno, supra, note 436. In that case, the claimant's economic independence negated the existence of an employment relationship. Since the claimant owned all of the equipment and inventory in the store he operated; made key decisions with respect to the purchasing of products and the prices at which they were to be sold; and decided what hours the store would be kept open, as well as which employees would be hired; the Referee concluded that the business in which the claimant was engaged was his own and as a result he was not entitled to the Act's protections regarding termination and severance pay.
as relevant the common law four-fold test in *Montreal Locomotive*. Rather, he adopts the view of the Court of Appeal in *Mayer v. Conrad Lavigne Ltd.* that the organizational test is merely an enlargement of the four-fold test.\(^{472}\) In this way, the four-fold test finds expression through the organizational test, in the test for employee status in *Belgoma Transportation*.

In *Belgoma*, Gray also borrows from Referee Burkett’s test in *Majestic Maintenance* by indicating that, while the common law features which distinguish employees from independent contractors still come into play in determining the application of the *Employment Standards Act*, the weight to be given to these features should be determined in light of the underlying purposes of the *Act*. Moreover, Gray’s consideration of the “economic dependence” of an individual on her alleged employer is in keeping with Referee Burkett’s holding that where “economic dependence” on the part of a worker translates into terms and conditions of work which fall below the minimum standards in the *Employment Standards Act*, the worker should be considered an “employee” for the purposes of the *Act*.

While features of the statutory purposes test are undoubtedly evident in Gray’s formulation, the application of the *Belgoma* test illustrates the manner in which it may leave those whose working conditions fall below those established by the *Employment Standards Act*, and who would therefore likely be “employees” on a statutory purposes analysis, outside the scope of the *Act*.

In *Klein*\(^ {473} \) for example, a benefit plan administrator engaged by a law firm for eight or

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\(^{472}\) *Belgoma, supra*, note 399.

\(^{473}\) *Klein (Re)*, January 27, 1995 (Palumbo) E.S.C. 95-30.
nine hours per month was held not to be an "employee" within the meaning of the Act.

notwithstanding the fact that her work relationship was terminated without notice by the
alleged employer and notwithstanding the fact that she was not paid vacation pay from her
alleged employer. On a statutory purposes analysis, the worker might well have been found to
be an "employee" for Employment Standards Act purposes. Clearly, the worker had been
unable to secure through bargaining protections equivalent to or better than those guaranteed to
employees by the Employment Standards Act. Accordingly, on a Majestic Maintenance
analysis, one might conclude that the worker fell within the category of individuals who by
reason of their "...lack of bargaining power in the marketplace might otherwise have to work
on terms below the basic minima established in the Act." and who was therefore intended by
the legislature to be covered by the Act.

In Klein, however, Referee Palumbo applied the Belgoma test and concluded that since
the claimant worked for the law firm for only eight or nine hours per month and since the
services she provided were not an integral part of the running of the law firm, the claimant was
not an "employee" within the meaning of the Act. Thus we see the manner in which the
organizational aspect of Gray's Belgoma test may be used to defeat the employment-related
claims of workers who might well succeed in establishing their employment status under a
statutory purposes analysis. 274

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274 It should be noted that Referee Palumbo also took the fact that the claimant in Klein worked for only eight or nine hours
per month for the alleged employer as indicative of the fact that she was not "economically dependent" on the law firm. It
is submitted the Referee's reasoning in this regard ought to be rejected. The Referee erroneously relies upon the number of
hours worked by a claimant as indicative of her status as an "independent contractor". If the Referee were correct, then
potentially all part-time employees could be denied the protections of the Employment Standards Act. There is nothing in the
Employment Standards Act which suggests that individuals should not be considered employees for the purposes of the Act
by reason only of the fact that they work on a part-time basis. Indeed, ss. 58(5) of the Employment Standards Act specifically
provides that ss. 58(2), (3) and (4) of the Act apply to regular full time and regular part-time employees. Moreover, s. 25 of
Above, I have considered the various tests for employee status under the Ontario Employment Standards Act. As discussed above, such tests have their most significant application in distinguishing employees from independent contractors, and thus do not answer the whole question with respect to whether inmate workers fall within the definition of "employees" for minimum standards purposes. Specifically, it may be that there is something other than status as an independent contractor which serves to exclude inmate workers from minimum standards legislation. One such possibility is that inmate workers are not "employees" within the meaning of the Act, but rather trainees in rehabilitative training programmes implemented for their own benefit. In the non-prison context, the question with respect to whether participants in rehabilitative training programmes may also be employees for minimum standards purposes has been considered in the jurisprudence, and is helpful in discerning whether the rehabilitative nature of work detracts from its status as employment. It is to this jurisprudence that I now turn.

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the Act, with respect to entitlement to paid public holidays, specifically states that the section does not apply, inter alia, to "an employee" who has not earned wages on at least twelve days during the four work weeks immediately preceding a public holiday." While s. 25 might, thus be seen as limiting the entitlement of part-time workers to receive paid statutory holidays, it is also clear that such workers are considered to be "employees" for the purpose of the general provisions of the Act. In my submission, and by whatever test employee status is to be determined, "economic dependence" should not be a function of how many hours per month a given individual works for an alleged employer. If this were the case, employers would be permitted to essentially contract out of the Employment Standards Act by ensuring that their workforce is comprised entirely of part-time workers. It is worth noting, also, that, in the collective bargaining context, the Canada Labour Relations Board has specifically rejected the notion that the proportion of an employee's total earnings derived from work for a particular employer is relevant to the determination of employee status. (Cascades Radio Canada, I CLRBR (NS) 129 at 220). It is submitted that a conception of the "economic dependence" factor is needed which focusses less on the number of hours worked by an individual worker and more, as Referee Burkett has suggested, on whether or not such a worker has sufficient bargaining power to negotiate terms and conditions of work which are at least as favourable as those contained in the Employment Standards Act.
f) Whether Trainees are "Employees" for the Purposes of the Employment Standards Act

Ontario employment standards decision-makers have addressed the issue as to whether trainees may be considered "employees" for the purposes of the Act. In the prison industry context, it is likely that any attempt to extend employment standards to inmate workers would be met with an objection that such workers are not "employees" within the meaning of the Act, but rather, trainees in programmes implemented for their own benefit. Accordingly, the issue as to whether trainees are employees for the purposes of the Employment Standards Act is worthy of consideration.

Section 1 of the Employment Standards Act specifically defines "employee" to include "a person who receives any instruction or training in the activity of business, work, trade, occupation or profession of the employer." It is thus clear that individuals may not be excluded from the Act merely on the basis of the fact that they are "trainees", per se. The Act distinctly contemplates that "trainees" will be covered by the Act as "employees", provided that the instruction or training received by them is in the activity or business of an employer.footnote

The confusion arises when we attempt to decipher whether a trainee is receiving instruction or training in the activity or business of an employer within the meaning of section one. It is worthy of note that the Employment Standards Branch Interpretation Manual has the following to say with respect to whether trainees are employees for the purposes of the ESA:

footnote 475 As one might expect from the face of the Act itself, a number of employment standards referees have concluded that individuals being trained in the business or profession of their respective employers were employees for the purposes of the Act. See, for example, Sun Realty Ltd. (Re), September 23, 1980 (Aggarwal) E.S.C. 876; Sherone Enterprises Ltd. (Re), November 15, 1993 (Harris) E.S.C. 93-235.
The U.S. Supreme Court case of *Walling v. Portland Terminal Co.* set out six criteria for employer training programs: if all six criteria were met, the trainees were not considered to be employees of the business for the purposes of the American *Fair Labour Standards Act*. The Branch considers these criteria to be useful guidelines in determining whether a trainee is an employee for the purposes of the *Employment Standards Act*. However, it should be remembered that these are guidelines only, as the definitions of employees and trainees in the American legislation are not necessarily the same as those found in the *Employment Standards Act*.

With the above consideration in mind, the 6 criteria are as follows:

1. The training is similar to that which would be given in a vocational school (even though the facilities of the alleged employer are used).
2. The training is for the benefit of the trainees.
3. The employer derives little, if any, advantage from the activities of the trainees.
4. The trainees do not displace regular employees.
5. The trainees are not necessarily entitled to a job at the conclusion of the training program.
6. The trainees understand that they will receive no remuneration for their participation in the training program.

In the 1989 case of *McLaughlin v. Ensley*, a U.S. 4th Circuit Court of Appeals rejected the six point test noted above. It applied a general test of whether the "employee" or the "employer" was the primary beneficiary of the trainee's labour to determine whether a "trainee" was an employee for the purposes of the American *Fair Labour Standards Act*. The Branch has taken the position that this test is too broad for the purposes of the *Employment Standards Act* and continues to use the 6 point test set out above.4

While the *Employment Standards Branch Interpretation Manual* may be of some

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assistance as a means of distinguishing between trainees who are employees and those who are not. The Policy Manual does not, of course, have the force of law and is therefore of limited utility. More helpful perhaps may be two cases which have specifically considered whether individuals receiving training in rehabilitation training programs were employees for employment standards purposes.

In *Kasuba v. Salvation Army Sheltered Workshop*\(^{477}\) the Ontario Divisional Court judicially reviewed a decision of Referee Burkett that a disabled participant in a Salvation Army sheltered workshop was not an "employee" within the meaning of the *Employment Standards Act*.\(^{478}\)

In rendering this decision, Referee Burkett had relied upon a purposive interpretation of the *Employment Standards Act*. He concluded that since the relationship between the claimant and the Salvation Army Sheltered Workshop was rehabilitative in substance, the mischief which the *Employment Standards Act* had been designed to prevent was not present. Accordingly, since there was no mischief to be remedied by the Act, the Referee concluded that the claimant was not an employee, and that the Act did not apply.\(^{479}\)

It is significant that, in his decision in *Kasuba*, Referee Burkett draws a distinction between "employment" and "rehabilitation" and seems to suggest that the two cannot co-exist:

Where, on one hand, a person who claims to be an employee within the

\(^{477}\) 83 O.L.R. 14, 032 at 12142.

\(^{478}\) It is worthy of note that at the time *Kasuba* was decided, the definition of "employee" in the *Employment Standards Act* was identical to the definition we have today. R.S.O. 1980, C.137, s. 116.

\(^{479}\) *Supra.* note 477.
meaning of the Act performs work for payment and is subject to direction and control and, on the other, the organization said to be the employer within the meaning of the Act claims that rehabilitation in the form of a simulated working environment is being provided, it is difficult to determine if the substance of the relationship is employment or rehabilitation.\(^{463}\)

On judicial review, the Divisional Court upheld Referee Burkett’s decision in Kaszuba. While the Court rejected “that the primary purpose of an organization could be the determinative criterion” of employee status, it upheld Referee Burkett’s finding that since the mischief the Employment Standards Act was designed to remedy was purportedly not evident in the case before him, no finding of employee status should have been made.\(^{464}\) The Divisional Court does not rule out the possibility, however, that other sheltered workshops could be found to be employers within the meaning of the Act.

I agree with the reasons given by my brother Reid J. and concurred in by my sister Boland J. as far as this case and this particular workshop are concerned. I would, however, like to observe that all other workshops in Ontario cannot assume that they will automatically be exempted from the operation of the Employment Standards Act and the protection it offers to employees in this province merely because their purpose is to assist disabled persons to perform useful work. Such a purpose, by itself alone, is not sufficient to ensure that the Employment Standards Act does not apply; other factors must also be considered, as has been done in this case, such as, the method and the amount of payment, the profitability of the work, the hours of the work, the various conditions that must be met at work, as well as the amount and type of counselling that is given to the disabled person while at work, the quantity and quality of the recreational facilities and the medical facilities, and any other relevant factors which must be considered in determining whether there is an employment relationship, pursuant to the statute and the definitions contained therein, or whether it is primarily a therapeutic exercise. Consequently, there may well be other workshops in this province that are not outside the

\(^{463}\) As cited by the Divisional Court in Kaszuba, \emph{ibid}

\(^{464}\) \emph{Ibid}
Employment Standards Act.\textsuperscript{482}

Perhaps the most significant principle laid down by Referee Burkett in \textit{Kaszuba}, and tacitly endorsed by the Divisional Court on judicial review, is that where work is rehabilitative, it is not exploitative, and therefore does not give rise to the mischief which the \textit{Employment Standards Act} seeks to remedy. It is far from clear why work which purports to rehabilitate may not also be exploitative. It is even less clear why rehabilitation and employment may not co-exist.

Indeed, in \textit{Fenton v. British Columbia (Forensic Psychiatric Services Commission)},\textsuperscript{483} the British Columbia Supreme Court specifically rejected the notion that a patient in a rehabilitative work program at a psychiatric institution could not also be an "employee" under the British Columbia \textit{Employment Standards Act}.\textsuperscript{484}

The fact that an individual at [Forensic Psychiatric Institute] is a patient does not necessarily mean that he cannot also be an employee. Indeed, a patient could be both. The \textit{Employment Standards Act} is directed at the exploitation of workers. Because of their condition, patients at [Forensic Psychiatric Institute] are held involuntarily for an indeterminate time. Nevertheless, their rights must be protected.\textsuperscript{485}

\textsuperscript{482} \textit{Ibid.} at 12, 143.

\textsuperscript{483} (1989) B.C.J. No. 2222 [unreported].

\textsuperscript{484} Though \textit{Fenton} was decided under the British Columbia \textit{Employment Standards Act}, and not under the Ontario statute, the definition of "employee" in the British Columbia \textit{Employment Standards Act} at the time of \textit{Fenton} was very similar to that in the Ontario Act, especially as regards trainees. "Employee" was defined in the British Columbia statute to "includ[e]" (a) a person, including a deceased person, in receipt of or entitled to wages for labour or services performed for another; (b) a person an employer allows, directly or indirectly, to perform work or service normally performed by an employee; and (c) a person being trained by an employer for the purpose of the employer's business." [Emphasis mine.] SBC. 1980, c. 10, s. 1. In the current British Columbia \textit{Employment Standards Act}, RSBC 1996, c. 113, s.1, the definition of "employee" is the same as in the 1980 statute, except that two additional categories of "employees" have been added, namely "a person on leave from an employer" and "a person who has a right of recall".

\textsuperscript{485} Supra, note 483.
It should be noted, however, that in finding there was nothing inconsistent in concluding that a patient at a psychiatric institution could also be an employee for the purposes of the Employment Standards Act. Davies J. of the British Columbia Supreme Court was unpersuaded that the primary function of patient work in that particular instance was the rehabilitation of patients:

Many patients are able to perform work for which they are not handicapped and from which economic benefit can be derived. I believe that the tasks performed by patients as part of a structured program that provided economic benefit to an institution must be considered to be employment under the Employment Standards Act if the thrust of the programs is either to provide economic benefit or to keep patients busy, with the rehabilitative benefit being incidental. In other words, I do not think it is enough to say that the work programs may have some therapeutic effect. There were no medical evaluations done to determine the value of the work programs to a particular patient with respect to that patient’s rehabilitation. Some of the work programs may be said to be therapeutic to the extent that they provide some sense of accomplishment for a patient. However, in some instances their primary function seems to meet the demands of the Institute. The scullery performs a needed service and the cottage industries group is now a thriving business. As I have already stated, no assessment has been done to determine whether the programs are serving the individual rehabilitative needs of the patient involved. If the programs were instituted as a form of therapy for the patients, surely the benefit to the patient should be the Institute’s first concern.\footnote{Ibid.}

Accordingly, on the basis of the fact that the Forensic Psychiatric Institute derived some economic benefit from the work performed by patients, and since the primary focus of such work did not appear to be rehabilitation of patients, Davies J. held that at least some of

\footnote{Ibid. This was evidenced by the absence of any assessments as to how effective the work programs were as a means of rehabilitating inmates, \textit{ibid.}, and also by the fact that patients could be involuntarily moved from one programme to another as a result of the need for extra labour in other programmes. (\textit{Fenton v. Forensic Psychiatric Services Commission, 91 CLLC \#14, 030 at 12, 314}) Moreover, patients at the Institute were sometimes required to work overtime to keep up with the production requirements of the work programs. "The [cottage industries] group could not keep up with the orders which came in "fast and furiously... The scullery could not be shut down for lack of staff as their orders had to be filled." (\textit{Fenton v. Forensic Psychiatric Services Commission, 91 CLLC \#14, 030 at 12, 315}). If the work programmes at the institution had truly}
the work programmes involving the patients at the Institution created employment relationships\textsuperscript{488} and were covered by the Employment Standards Act.\textsuperscript{489} As a result, patients participating in certain of the Institute’s work programmes were held to be entitled to the minimum wage. \textsuperscript{490}

On appeal from the decision of the British Columbia Supreme Court in \textit{Fenton}, however, the British Columbia Court of Appeal held that the Court \textit{a quo} had erred in determining that the test of employee status was whether any economic benefit was derived from patient work. Rather, the Court of Appeal held that the proper test to be applied was whether there was a “real economic benefit” accruing to the Institute as a result of patients’

been implemented with only the patients’ rehabilitation in mind, it seems likely that the rehabilitative value of such programmes would have been assessed at some point. Moreover, Davies J.’s findings that patients often worked overtime and were unable to shut down certain operations because “orders needed to be filled” point to the fact that the work programmes were primarily intended to meet production, and not patients’, needs.

\textsuperscript{488} The work programmes which were specifically held by Davies J. to create employment relationships were the scullery group, the farm group, and the multipurpose group work programmes. In the scullery group, patients prepared vegetables to be sold to government institutions and some private concerns. Revenues from this group amounted to as much as $120,000.00 per year, which went into the provincial government’s general revenue. Patients in the farm group raised dairy cattle, sheep and pigs as well as a variety of crops, on a 640 acre farm. The revenues thus generated also went into the provincial government’s revenue fund. Patients in the multi-purpose group did fifty percent of the grounds work for the Institute. The balance of the work was done under contracts let by British Columbia Building Corporation. Prior to the patients’ involvement in the multi-purpose work group, all grounds work was carried out by the Building Corporation. \textit{Ibid}

\textsuperscript{489} It should be noted that Davies J. also concluded that patients in Forensic Psychiatric Institution were “employees” under the Employment Standards Act because they satisfied the criteria for employment status set down in what Davies described as the “leading case” on what amounts to a contract of service at common law, \textit{Short v Henderson Ltd.}, (1946) 115 L.J.P.C. 41 (H.L.). The four indicators of an employment relationship were there held to be: (1) The master’s power of selection of his servants; (2) The payment of wages or other remuneration; (3) The master’s right to control the method of doing work; and (4) The master’s right of supervision or dismissal. Since the patients in \textit{Fenton} had well-defined work days, were paid for their work, became entitled to holidays, and were subject to the direction of the Institute’s staff, they were held to be “employees” within the meaning of \textit{Short v Henderson}, and the Employment Standards Act in respect of certain of the work programs. \textit{Ibid}

\textsuperscript{490} Prior to the holding of the British Columbia Supreme Court, patients had received gratuities, ranging from $1.50 to $15.50 per day, in respect of their four hours of work per day, well below the minimum wage. \textit{Supra}, note 487, at 12.315. To some extent, the fact that “the highest amount of money a patient [could] get [was] substantially below the statutory minimum wage” appears to have been a function of the fact that patients who were earning gratuities at the higher end of the scale had the “comfort allowances” they received by virtue of being patients at the Institute reduced accordingly. \textit{Supra}, note 487, at 12.312.
Many programs, undeniably of significant therapeutic purpose and effect might provide some incidental economic benefit to the institution. Indeed, provision of some economical benefit is difficult to avoid. The test should be whether there is real economic benefit flowing to the institution from the work programs.\textsuperscript{491}

In deciding the appeal in \textit{Fenton}, the Court adopted the reasoning in \textit{Kuszuba}, in particular with respect to the fact that a clear line may be drawn between work that is rehabilitation and work that is employment. Moreover, the Court of Appeal reasoned that the line between rehabilitation and employment could be drawn in accordance with whether the alleged employer derived "some economic benefit" as opposed to "real economic benefit" from patients' work.

Where the issue is whether the institution derives merely some economic benefit from the work, as distinguished from real economic benefit, examination of the substance of the relationship may provide the answer. It may show on which side of the line between rehabilitation and exploitation the program lies.\textsuperscript{492}

Ultimately, the Court of Appeal in \textit{Fenton} held that the patients participating in work programmes at \textit{Forensic Psychiatric Institute} were not "employees" within the meaning of the British Columbia \textit{Employment Standards Act} since no "real economic benefit" flowed to the Institute from patients' work. In support of this conclusion, the Court of Appeal stated that the cost of operating the programmes "vastly exceeded" any production associated with them.\textsuperscript{493} However, in calculating the costs and benefits flowing from patient work programmes, the

\textsuperscript{491} \textit{Ibid.} at 12, 320.

\textsuperscript{492} \textit{Ibid.}

\textsuperscript{493} \textit{Ibid.} at 12, 322.
Court of Appeal did not take into account the financial benefit flowing to the provincial government's general revenue fund as a direct consequence of patients' work. Moreover, notwithstanding the fact that it was acknowledged by the Court of Appeal that goods produced in patient work programmes were sold below market value, no attempt was made to calculate the financial benefit which would flow to the Institute if goods were in fact sold at their market value. Also, no value was assigned to the work performed by patients in the multi-purpose group who were engaged in grounds upkeep at the institution, even though half of such upkeep was contracted out to British Columbia Building Corporation, presumably at a cost on the stated grounds that the value of grounds upkeep was "chiefly aesthetic" and any monetary value would be insignificant. Accordingly, it may be that the Court of Appeal's cost/benefit analysis of patient work at the Institute failed to take a number of significant factors into account in determining whether a "real economic benefit" flowed to the Institute by virtue of the patients' work. Had the above-mentioned factors been considered, it may well have been that the financial benefits flowing from patient work would have outweighed the cost of the work programmes, and the Court of Appeal would have been forced to come to the opposite conclusion with respect to the "economic benefit" accruing to the Institute.

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Ibid. With respect to the financial benefits to the government, see note 488, supra.

Ibid. at 12, 315. Indeed, the Court seemed to accept unquestioningly that it "may be necessary to support the market for [cottage industry products] by getting friends and staff to buy. Listing at market price might adversely affect the market." At the very least, this statement seems counterintuitive. The Court goes on to say: "However that may be, it is clear that changes in pricing would not significantly alter the financial picture." Since the Court found that the sale of patient-produced goods generated gross income of $67,657 (Ibid. at 12,322), and since it also found that some such goods were sold "significantly below market value" (Ibid. at 12, 315), it is difficult to see how it could go on to conclude that calculating financial benefit in terms of real market value would not have significantly altered the financial picture.

Ibid. at 12, 322.

Ibid.
C. Federal Minimum Standards Legislation: Part III of the *Canada Labour Code*

The *Canada Labour Code* is divided into Parts I, II and III, dealing with industrial relations, occupational health and safety, and minimum employment standards, respectively. It is with Part III of the Code that we are primarily concerned. Though Part III of the Code is entitled "Standard Hours, Wages, Vacations and Holidays," the minimum employment standards set out therein actually cover a number of other employment-related entitlements. Maternity leave\(^{498}\) and parental leave\(^{499}\) are provided for in Part III of the Code, as are bereavement\(^{500}\) and sick leaves.\(^{501}\) Provision is also made for certain benefits for employees who are subject to mass termination of employment.\(^{502}\) Moreover, Part III of the Code entitles

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\(^{498}\) Sections 204 and 205, in Part III of the Code, provide for the modification of a pregnant employee's job functions or her reassignment to an alternative job if continuing any of her current job functions may pose a risk to her health or to that of the fetus or child, upon delivery of an appropriate medical certificate; as well as the employer's obligations to an employee in the face of such a request. Section 206 provides that every employee who has completed six consecutive months of continuous employment with an employer and who provides her employer with a certificate that she is pregnant is entitled to a leave of absence from employment of up to seventeen weeks.

\(^{499}\) Section 206.1 of Part III of the Code provides that every employee who has completed six consecutive months of employment with an employer is entitled to a leave of absence of up to twenty-four weeks where the employee will have the actual care and custody of a new-born child, or twenty-four weeks where the employee has legally adopted a child. It is worthy to note that the aggregate amount of leave of absence from employment that may be taken by any two employees in respect of one child is twenty-four weeks.

\(^{500}\) Section 210 of Part III of the Code provides for three days of leave immediately following the death of a member of an employee's immediate family, which leave is paid where the employee has been continuously employed for three months or more.

\(^{501}\) Section 239 of Part III of the Code provides that no employer may discipline or lay off any employee who has completed three continuous months of employment on account of absence due to illness or injury where the absence does not exceed twelve weeks, and upon the provision of adequate medical evidence of illness or injury.

\(^{502}\) Sections 211 to 227 deal with the obligation of an employer who is terminating the employment of fifty or more employees within a four week period or less within a particular industrial establishment to give notice of such termination; as well as the establishment of a joint planning committee made up of employer and employee representatives in order to develop an adjustment programme in order to either eliminate the necessity for the termination of employment, or to minimize the impact of termination on those employees being terminated; and provision for referral of the matter to an arbitrator in order to assist the parties in arriving at an adjustment programme.
employees who meet certain basic criteria to severance pay upon the termination without just cause of their employment.⁵⁰³ One notable way in which Part III of the Code differs from the Ontario Employment Standards Act, for example, and in which it improves upon the common law position of employees who have been unjustly dismissed by their employers, is that s. 242 in Part III of the Code allows for the reinstatement of an employee who has been unjustly dismissed from employment.⁵⁰⁴

Part III of the Code also contains what many would consider the elementary features of minimum labour standards legislation, namely limits on the number of hours which employees work,⁵⁰⁵ minimum hourly wages,⁵⁰⁶ and entitlement to annual paid vacation time,⁵⁰⁷ as well as paid time off on public holidays.⁵⁰⁸ It should be borne in mind that Part III of the Canada Labour Code applies in respect of organized as well as unorganized employees.⁵⁰⁹

⁵⁰³ Section 235 of Part III of the Code provides that, except where termination is by way of dismissal for just cause, an employee is entitled to the greater of two days’ wages in respect of each completed year of employment with the employer: plus five days’ wages.

⁵⁰⁴ Section 240 of the Code provides the procedure for the making of a complaint to an inspector if the employee considers that s/he has been unjustly dismissed. Section 242 provides for the referral of the matter to an adjudicator to determine whether the dismissal of an employee was unjust: and to remedy the dismissal in an equitable manner, by taking whatever measures are appropriate, including, but not limited to, reinstating the employee and/or ordering the employer to pay the money the employee would have been paid but for the dismissal.

⁵⁰⁵ The standard maximum number of hours which may be worked are eight hours in any day, and forty hours in any week, pursuant to section 169 of the Code. There are special circumstances, outlined in sections 169 to 172.2 of Part III of the Code, where the maximum number of hours worked by an employee on a given day or in a given week may exceed the standard maximum.

⁵⁰⁶ Which may be no less than four dollars per hour, pursuant to section 178 of the Code.

⁵⁰⁷ Sections 183 to 188 of the Code.

⁵⁰⁸ Sections 191 to 202 of the Code.

⁵⁰⁹ The fact that Part III is applicable to unionized employees as well as non-unionized is evident from the fact that section 168(1.1) of the Code prohibits the contracting out of the minimum terms of Part III, unless employees covered by a collective agreement have rights or benefits at least as favourable as those conferred by Part III, or unless non-unionized employees have their own arrangements which are more favourable than the standards set down in Part III.
1. Applicability of Part III of the *Canada Labour Code* to Inmate Labour

Section 167(1) of the Code sets out the circumstances in which Part III of the Code will apply:

(a) to employment in or in connection with the operation of any federal work, undertaking or business, other than a work, undertaking or business of a local or private nature, in the Yukon Territory or the Northwest Territories;

(b) to and in respect of employees who are employed in or in connection with any federal work, undertaking or business described in paragraph (a);

(c) to and in respect of any employers of the employees described in paragraph (b);

(d) to and in respect of any corporation established to perform any function or duty on behalf of the Government of Canada other than a department as defined in the Financial Administration Act...

The above section establishes the interlocking manner in which federally regulated employees are covered by the Code in both the private and public sectors. Employees who are engaged by a private sector enterprise whose activities are integral to a federal work, undertaking or business are subject to the Code by virtue of section 167(b), provided that the employees in question are actually performing the work which is integral to a federal work or

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510 *Canada Labour Relations Board and City of Yellowknife*, [1977] 2 SCR 729 at 731.

511 Ibid.
undertaking.\textsuperscript{512} By contrast, employees employed in the federal public sector fall within the scope of the Code if and only if they come within the ambit of section 167(d) of the Code.\textsuperscript{513} Specifically, in order for federal employees to be covered by the minimum standards provisions in Part III of the Code, they must demonstrate that they are employed by a corporation established to perform any function or duty on behalf of the Government of Canada, which corporation is not a "department" as defined in the \textit{Financial Administration Act}.\textsuperscript{514}

Determining Part III’s applicability to inmate workers who are engaged by a private sector enterprise, through an express agreement with CORCAN pursuant to section 107 of the \textit{Corrections and Conditional Release Regulations},\textsuperscript{515} will be a relatively straightforward exercise. Provided that the private enterprise, as a "going concern", is engaged in work which is integral to a federal work, undertaking or business, and provided also that the inmates it engages are actually performing such work, Part III of the Code will likely govern their terms and conditions of employment. This, of course, is subject to the proviso that they must also be found to satisfy the test for employment status under the Code.

The question with respect to whether inmate workers engaged directly by CORCAN

\textsuperscript{512} \textit{Marathon Realty, supra}, note 340 at 499. This limit on the Code’s applicability reflects the fact that Parliament’s constitutional authority to legislate in respect of labour relations matters is limited to those circumstances in which labour relations matters form an integral part of a federal work, undertaking or business within the meaning of the Constitution. See discussion, notes 335 to 345, \textit{supra}, and accompanying text.


\textsuperscript{514} RSC 1985, c. F-11, as amended.

\textsuperscript{515} \textit{Supra}, note 27.
will be covered by the provisions of Part III of the Code is somewhat more complicated. As discussed in the first chapter, CORCAN is an agency of the Correctional Services of Canada, which in turn falls within the federal Ministry of the Solicitor-General. Accordingly, where inmates work directly for CORCAN, it seems clear that if they are in fact "employees", then they must be employees of the federal government.

As employees of the federal government, inmates would only be covered by the provisions of Part III of the Code if they fall within the ambit of section 167(d) of the Code. In other words, in order for inmates working for CORCAN to be covered by Part III of the Code, it would have to be established that CORCAN is a corporation performing a duty on behalf of the Government of Canada, and further that it is not a "department" as defined in the Financial Administration Act.

As things currently stand, it seems more likely than not that prison inmates working directly for CORCAN are not covered by Part III of the Canada Labour Code. Firstly, in order to fall within the ambit of section 167(d), the "corporation established to perform a function or duty on behalf of the Government of Canada" must, in fact, be incorporated. In The Royal Canadian Mounted Police and L'association des Membres de la Division "E", the Canada Labour Relations Board held that the class of corporations which fall within the ambit of section 167(d) must "be constituted as a corporate entity, having corporate status, only by statute or, more rarely, by royal charter - in short, through an explicit act of creation."517

516 Supra, note 513.

517 Ibid. at 69.
that case, the Board held that the Royal Canadian Mounted Police (RCMP) did not fall within
the provisions of the Code since it had not been conferred status as a corporate entity.518

Another case, Retail Clerks Union, Local 1518 and Canadian Forces Exchange System
(CANEX)519 concerned an application for certification in respect of employees of the federal
government who worked in exchange stores, grocery stores, service stations, snack bars, and other
outlets offering services primarily to members of the Canadian Armed Forces and their
families on Department of National Defence Bases. In that case, the Board held that
employees of CANEX were not covered by the collective bargaining provisions of the Code
because CANEX had not been incorporated and therefore could not be a "corporation
established to perform any function or duty on behalf of the Government of Canada."520

As indicated in the first chapter, CORCAN is not incorporated. It has the status of a
Special Operating Agency, but it has not been conferred corporate status by statute or
otherwise. Thus, in light of the Board's decisions in Royal Canadian Mounted Police and
Canadian Forces Exchange System, it seems unlikely that CORCAN would fall within the
ambit of section 167(d) of the Code. Accordingly, we may predict that Part III of the Code
would not apply to inmates working for CORCAN directly.

518 Ibid. at 72. It should be noted that in the RCMP case, the Board was considering the applicability of the
collective bargaining provisions of the Canada Labour Code, and not the applicability of the minimum standards
provisions. However, the provision governing the Code's applicability to employees of the federal government for
collective bargaining purposes was very similar to that contained in section 167(d), and identical in relevant part. That
provision, then section 109(1), stated: "This part applies in respect of any corporation established to perform any
function or duty on behalf of the Government of Canada and in respect to employees of any such corporation, except
any such corporation, and the employees thereof, that the Governor in Council excludes from the operation of this
Part." [Emphasis added.]

519 Supra, note 513.

520 Ibid. at 229.
Moreover, even if an argument could be fashioned that CORCAN was "a corporation established to perform a function or duty on behalf of the Government of Canada" within the meaning of section 167(d), it might still conceivably be excluded from the Code by virtue of being a "department" as defined by the Financial Administration Act. "Department" is the Financial Administration Act is defined in section 2 of that Act to include in relevant part:

(a) any of the departments named in Schedule I.
(b) any of the divisions or branches of the public service of Canada set out in column I of Schedule I.1. ...
(d) any departmental corporation.

"Departmental corporation" is defined in turn to include "a corporation named in Schedule II" of the Act.

Turning to the relevant portions of the Financial Administration Act, we find that the Department of the Solicitor General is one of the departments listed in Schedule I of the Act. Moreover, the Correctional Services of Canada, which falls within the Ministry of the Solicitor General, is specifically identified in Column I of Schedule I.1 of the Financial Administration Act. Accordingly, it would appear that employees of the Ministry of the Solicitor General and the Correctional Services of Canada are not covered by the provisions of Part III of the Canada Labour Code.521 Given its close relationship with the CSC,522 it may well be that CORCAN is

521 On this point generally, see Girard v Canada, [1977] 2 FC 449, where it was held that an employee of the National Film Board of Canada was not covered by the minimum standards provisions of the Code since the National Film Board was a "department" as defined by the Financial Administration Act.

522 In addition to being an agency of the CSC, CORCAN's close relationship with the CSC is evident in the fact that the Commissioner of the CSC is the Chair of CORCAN's Advisory Board, and CORCAN's Chief Executive Officer is directly accountable to the Commissioner. Supra, notes 66 to 69, and accompanying text. Moreover, non-inmate employees of CORCAN involved in the administration of its programmes are paid directly by the CSC. Interview with CORCAN Marketing and Communications Staff, August 1, 1997.
merely a part of the CSC, and therefore similarly excluded from the application of Part III by virtue of its being a “department” as defined in the *Financial Administration Act*. On the other hand, there are certain factors which indicate that CORCAN is sufficiently separate from the CSC to justify its distinct treatment for the purposes of section 167(d) of the Code. Nonetheless, in light of the fact that CORCAN is not a corporation within the meaning of section 167(d), and therefore unlikely to meet the first element of the test for inclusion under section 167(d), arguments regarding whether CORCAN is excluded from the scope of Part III by virtue of being a “department” within the meaning of the *Financial Administration Act* are essentially moot.

It should be noted that the exclusion of certain federal employees from the provisions of the *Canada Labour Code* - namely, all those who are not employed by a corporation covered by the Code by virtue of section 167(d) - was not intended to deprive such employees of employment-related entitlements altogether. On the contrary, such employees are generally intended to be covered by the provisions of the *Public Service Staff Relations Act (PSSRA)*, which enables employees in the public service to organize and bargain collectively in respect of their terms and conditions of employment. Indeed, most employees of the federal government are covered by the terms of the PSSRA.

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123 Such factors include the fact that CORCAN is under a mandate to be financially self-sufficient. To this end, it has access to a revolving fund which it uses in order to fund its prison industry programmes. *Supra*, notes 62 to 64, and accompanying text. Further, costs incurred in respect of CORCAN programmes are not covered by the CSC. Moreover, CORCAN has entered into arm’s length business dealings with the CSC, militating against the conclusion that the two are one and the same body. Interview, *supra*, note 8. Also, while the CORCAN Advisory Board, chaired by the Commissioner of the CSC, advises the CORCAN Management Team on CORCAN programmes and operations, the CORCAN Management Team has ultimate authority and is not bound by the Advisory Board’s recommendations. *Supra*, note 71, and accompanying text.

Parliament has granted collective bargaining rights to most of the employees of Her Majesty in right of Canada but has established two sets of legislative provisions [those contained in the Canada Labour Code and the Public Service Staff Relations Act] and two agencies, the Public Service Staff Relations Board and the Canada Labour Relations Board, for the regulation of collective bargaining. The primary regulatory scheme, administered by the Public Service Staff Relations Board is set out in the Public Service Staff Relations Act. 25

The reason for the differential treatment of employees of the federal government under the two regulatory schemes has been explained by the Canada Labour Relations Board in Canadian Forces Exchange System. 26 Most employees of the federal government are better served by coverage under the Public Service Staff Relations Act, since that statute addresses the “special interests” of employees who work in the public service. 27 However, Parliament has assigned those federal government employees employed by a corporation within the meaning of section 167(d) to the “general regulatory provisions of the Code because their employment is more akin to that of private sector employees and not subject to the special interests that are addressed in the Public Service Staff Relations Act.” 28 In this way, we see that the objective underlying the exclusion of federal government employees under the Canada Labour Code was not intended to deprive such individuals of employment rights. Rather, the exclusion was effected so as to place employees in the public service under a regulatory scheme which would

25 Canadian Forces Exchange System, supra, note 51 at 220.
26 Ibid
27 Ibid at 222. These interests are addressed by special procedures, such as the optional dispute resolution mechanisms of that statute.
28 Ibid
cater to their special needs. As Chief Justice Laskin wrote in City of Yellowknife,\(^{29}\)

Looking at the interlocking effect of ss. 108 and 109 of the Code [the sections then governing application of the collective bargaining provisions to employees in the private and public sector, respectively], covering both the private and the public sector, the latter either under s. 109(1) or under the Public Service Staff Relations Act, ... it would be incongruous to declare a gap in the application of collective bargaining advantages to employees who are employed by a municipality in the Northwest Territories ... any ambiguity or doubt whether the federal statute covers the employees of a municipality, organized in a federal and federally administered territory, and such municipalities in their relations with their employees, should be resolved in favour of inclusion rather than exclusion.\(^{29}\)

In light of the fact that the general notion underlying the exclusion of federal government of employees from the Code is that they will be covered by the Public Service Staff Relations Act, an argument may be made that inmates "employed" by CORCAN and therefore excluded from the Code, fall within the scope of the PSSRA as "employees" in the public service. At first blush, it may seem ludicrous to suggest that prisoners could be public

\(^{29}\) supra, note 510.

\(^{30}\) Ibid., at 731. In light of the above remarks, the Supreme Court of Canada in the City of Yellowknife found that the definition of "federal work" in the Code was sufficiently broad to include within its scope the operation of a municipality within a federally administered territory. \textit{Ibid.}, at 736-738. Accordingly, employees of the City of Yellowknife were covered by the Code by virtue of being employed upon or in connection with the operation of a federal work. This option for inclusion is not available to employees of the federal government, who must be employed by a "corporation established to perform a duty or function on behalf of the Government of Canada" in order to fall within the ambit of the Code. In such cases, decision-makers have been prepared to accept that certain employees do indeed fall within a gap between the provisions of the Canada Labour Code and the Public Service Staff Relations Act where their employers are not corporations established to perform a function or duty on behalf of the Government of Canada, other than "departments" as defined in the \textit{Financial Administration Act}. In the RCMP case, for example, the Canada Labour Relations Board was cognizant of the fact that the RCMP was specifically excluded from the provisions of the PSSRA under the terms of that statute. Nonetheless, it still arrived at the conclusion that employees of the RCMP were not covered by the collective bargaining provisions of the Code, because the RCMP was not a corporation. Thus, the Royal Canadian Mounted Police were left without the right to bargain collectively under either of the two regulatory schemes available to employees of the federal government. \textit{Supra}, note 513. Similarly, in \textit{Canadian Forces Exchange System}, the fact that employees of CANEX had been historically treated as falling outside the scope of the PSSRA did not alter the Board's decision that they did not fall within the ambit of the Code because they did not work for a Crown corporation. \textit{Supra}, note 513.
servants covered by the PSSRA. However, upon examination of the statute, we see that there is no particular reason to conclude that prisoners could not be covered by that statute. Like the \textit{Canada Labour Code}, the rights and protections of the \textit{Public Service Staff Relations Act} apply to "employees". "Employee" is defined in section 2 of the Act as "a person employed in the Public Service."\footnote{There are also a number of exceptions to the definition of "employee", none of which would seem applicable in the prison work context. See section 2 of the PSSRA, supra, note 524.} "Public Service", in turn, is defined in the PSSRA to mean "the several positions in or under any department or other position of the public service of Canada specified in Schedule I."\footnote{\textit{Ibid}} The Correctional Service of Canada is one of the departments covered by the Statute.\footnote{\textit{Ibid}} Accordingly, inmates working for CORCAN, arguably a mere part of the CSC, may be employees within the meaning of the PSSRA, and therefore covered by that statute.

While a plausible argument may thus be made that inmates working for CORCAN are covered by the PSSRA, it seems uncontroversial that prisoners working in CORCAN prison industry programmes do not share in many of the special interests of those whom we commonly think of as public servants. On this basis, it is also conceivable that decision-makers would be reluctant to extend the provisions of the PSSRA to inmate workers. This gives rise to the further possibility that, like the RCMP\footnote{\textit{Supra}, note 513.} and the workers employed by

\begin{itemize}
  \item Schedule I of the PSSRA lists the "Canadian Penitentiary Service" as one of the "departments and other portions of the public service of Canada" subject to the provisions of the Act. The "Canadian Penitentiary Service" was the name of the Correctional Service of Canada, prior to the enactment of the \textit{Corrections and Conditional Release Act} in 1992. Presumably, by reason of legislative oversight, Schedule I of the PSSRA was not updated to reflect the change in name of the Service with the 1992 enactment of the CCRA. At any rate, it seems that the reference in the PSSRA to the Canadian Penitentiary Service serves to bring the Correctional Service of Canada within the scope of the Act. Certainly, this is the case in practice, as (non-inmate) employees of the CSC are treated by the federal government as being covered by the PSSRA, and they are represented for collective bargaining purposes by the Public Service Alliance of Canada. Interview, \textit{supra}, note 522.
\end{itemize}
CANEX, prison inmates working for CORCAN, even if they satisfy the relevant tests for employee status, would not be covered either by the *Canada Labour Code* or by the PSSRA. If this is the case, and if it is true that inmate workers can otherwise be demonstrated to be "employees", then we have identified a group of employees who, either by accident or ignorance on the part of the Legislature, do not enjoy the same employment-related entitlements as other employees in the federal sector. This possibility indicates a need for the Legislature to address itself to the issue of prisoners' employment rights, and to determine whether the *Canada Labour Code* or the *Public Service Staff Relations Act* should govern the employment of CORCAN's inmate employees.

Even if Part III of the *Canada Labour Code* does not apply specifically to CORCAN as an inmate employer, it is still worthwhile for us to consider whether inmate workers fall within the definition of "employee" in the Code. CORCAN has the authority, pursuant to section 107 of the *Corrections and Conditional Release Regulations*,\(^{53}\) to enter into agreements with private sector enterprises for the training and "employment" of inmates. Moreover, it appears that CORCAN is making strident efforts to identify private sector enterprises who are willing to operate prison industries and to employ inmate labour in accordance with its authority under section 107 of the Regulations. Certain of these private sector enterprises may be engaged in federal works or undertakings so as to bring them within the scope of section 167(b) of the Code, provided that their inmate workers are "employees" within the meaning of the Code. Accordingly, it is important to identify whether prison workers satisfy the test for employee

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\(^{53}\) Supra, note 513.

\(^{54}\) Supra, note 27.
status for the purposes of Part III of the Canada Labour Code. It is this test for employee status that I address in the following section.

2. Definition of “Employee” under the Canada Labour Code

a) Role of Part I Jurisprudence in Determining Employee Status under Part III of the Code

Though the minimum labour standards contained in Part III of the Canada Labour Code are consistently extended to “employees”. Part III of the Code does not define the term “employee”. The term “employer” is defined somewhat unhelpfully in Part III of the Code to mean “any person who employs one or more employees”.

Moreover, jurisprudence interpreting the definition of “employee” for the purposes of the minimum standards provisions of the Code appears to be very scarce. What case law does exist is primarily concerned with distinguishing “managers” and those who exercise “management functions” from non-managerial “employees”, since certain provisions of Part III of the Code do not apply to the former.

This paucity in the case law is to be contrasted with the relative wealth of jurisprudence developed under Part I of the Canada Labour Code with respect to the general criteria for employee status in the industrial relations context.

It is worthy of note that the term “employee” has been defined in section 3(1) of Part I of the Code to mean:

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57 Section 166 of the Canada Labour Code, RSC 1985, c L-2, as amended.

58 Specifically, section 167(2) of the Code provides that Division I of Part III regarding Hours of Work does not apply in respect of employees who “are managers or superintendents or exercise management functions.” Section 167(3) of the Code provides that Division XIV regarding unjust dismissal “does not apply to or in respect of employees who are managers.”
any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations.

“Dependent contractor” is defined in turn to mean:

(a) the owner, purchaser or lessee of a vehicle used for hauling, other than on rails or tracks, livestock, liquids, goods, merchandise or other materials, who is party to a contract, oral or in writing, under the terms of which he is

(i) required to provide the vehicle by means of which he performs the contract and to operate the vehicle in accordance with the contract, and

(ii) entitled to retain for his own use from time to time any sum of money that remains after the cost of his performance of the contract is deducted from the amount he is paid, in accordance with the contract, for that performance.

(b) a fisherman who, pursuant to an arrangement to which he is a party, is entitled to a percentage or other part of the proceeds of a joint fishing venture in which he participates with other persons, and

(c) any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that he is, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.

In considering who is an “employee” for the purposes of the minimum standards provisions in Part III of the Code, we may properly have regard to the jurisprudence under Part I which has interpreted the above definition of an “employee”: notwithstanding the fact that Part I of the Code relates to collective bargaining and industrial relations.
This approach is consistent with the decision of the Federal Court of Canada in *Island Telephone Co. v Canada (Minister of Labour)*, where it was held that terms which are used in different parts of the Code should be interpreted in a consistent manner. At issue in that case was whether the exclusion of “managers” from certain provisions in Part III of the Code should be interpreted in a manner consistent with the exclusion of those who “perform management functions” in section 3(1) of Part I of the Code. The plaintiff in *Island Telephone* argued that the differing purposes of Parts I and III of the Code should lead the Court to interpret the word “manager” in Part III without any regard to the jurisprudence under Part I. The Court expressly rejected this argument, however. While accepting that the particular purposes of Parts I and III of the Code differed, MacKay J. emphasized that all of the Parts of the Code serve an overall general purpose:

> [T]he whole of the Code, including Parts I, III, and Part II which concerns occupational safety and health, serves the general purpose of ensuring certain rights and standards in all employment that is subject to regulation by Parliament. [41]

The fact that all Parts of the Code furthered this general purpose led the Federal Court to conclude that it should interpret the managerial exclusion in Part III of the Code in the same manner that the exclusion had been interpreted for collective bargaining purposes in Part I. [44]

Additionally, MacKay J., writing for the Court, relied on rules of statutory interpretation to

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[41] At 168.

[44] Ibid. at 183.

[44] For other cases which have relied upon the definition of “employee” in Part I of the Code for the purpose of making managerial employee status determinations under Part III, see *Stanley v Road Link Transport* (1987) 17 CCEL 176; and *Shakk v Bank of Nova Scotia* (1996) 17 CCEL (2d) 236.
support the Court’s reasoning:

[To interpret the managerial exclusion in Parts I and III of the Code in a different manner] would be contrary to the general principle in statutory interpretation that the same words used in a statute more than once have a consistent meaning unless there be some compelling reason based on the statute that would warrant different meanings.\(^{42}\)

Taking guidance from the Federal Court’s decision in \textit{Island Telephone}, we may conclude that Parliament intended that the term “employee”, used in both Parts I and III,\(^{43}\) would have a consistent meaning throughout the Code. Accordingly, we may examine the tests for employee status developed under Part I of the Code in order to discern those individuals who would be “employees” for the purposes of the minimum standards provisions in Part III. The following section will thus consider the test for determining employee status which has been developed under the collective bargaining provisions of the Code.

b) Test for Employee Status

In interpreting the definition of “employee” in the \textit{Canada Labour Code}, the Canada Labour Relations Board (hereinafter the “Board”) has unequivocally stated that the common law tests for employee status, such as the fourfold \textit{Montreal Locomotive} test\(^{44}\) and the organizational test,\(^{45}\) do not govern the manner in which the term “employee” is to be interpreted.

\[^{42}\text{Supra. note 539 at 183.}\]
\[^{43}\text{As well as in Part II, regarding occupational health and safety, though this Part is not relevant for our purposes.}\]
\[^{44}\text{Supra. notes 402 to 418, and accompanying text.}\]
\[^{45}\text{Supra. notes 427 to 443, and accompanying text.}\]
interpreted for the purposes of the Code. Like Referee Burkett in the Ontario Employment Standards Majestic Maintenance case, the Board has held that the definition of "employee" in the Code is to be interpreted in light of the objectives of the Act, using what is referred to as the "statutory purpose" test for employment status.

The "statutory purpose" test for employment status was established in one of the most important and comprehensive decisions of the Canada Labour Relations Board regarding the criteria to be used for determining who is an "employee" for the purposes of Part I of the Canada Labour Code. Société Radio-Canada Canadian Broadcasting Corporation. In that case, the Board stated its reasons for rejecting the use of the common law tests as determinative of employee status in favour of a purposive interpretation of the definitions in the Code.

The objectives of the Labour Code involve redressing an economic imbalance between two parties which are intimately and necessarily associated with one another in the production of goods and services and "in ensuring a just share in the fruits of progress to all." The objectives on which the civil or common law interpretation of the concept of "employee" are based were designed primarily to compensate the victim of a fault and to protect the person who is not responsible for the fault. These objectives are totally foreign to the Canada Labour Code, and given the existence of a definition within the Code which is to be interpreted in the light of its objectives and in the absence of any express reference to the general law, ... we have no reason to adopt the definition developed in general law. In fact, general law is to be applied only in the absence of statutory provisions, and this is not the case here. Instead, we must

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46 Supra, note 420.


48 Ibid.

49 Citing here from the Preamble to Part I of the Code, which provides in relevant part, "And whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all..."
develop a definition which, as the Interpretation Act and jurisprudence indicate,\textsuperscript{540} will correspond to the objectives of our legislation, that is access to collective bargaining.\textsuperscript{551}

With respect to the purpose underlying the provisions in Part I of the Code, the Board goes on to state:

Collective bargaining is designed to redress the economic imbalance which exists between the owner of capital, the work source or employer, and those who perform work on his behalf, by allowing these individuals to group together to negotiate their terms and conditions of employment. Thus, if we are to implement the legislator's objectives, we must promote access to collective bargaining for as many individuals as possible, who, in their relationship with their employer, are in a position of economic subordination, with respect to establishing their terms and conditions of employment.\textsuperscript{552}

It is interesting to note that, even before the Board in Société Radio Canada expressly adopted its purposive approach to the interpretation of the definition of "employee" in the Code, the groundwork for the statutory purpose test had already been laid. In Midland Superior Express Ltd.,\textsuperscript{553} for example, noteworthy as the first case in which the Board was called upon to interpret the definition of "dependent contractor" in the Code, the Board rejected the use of the common law test of control as a means of determining whether an individual was a dependent contractor and therefore an employee. The Board stated that continued reliance on such tests would return the whole question of employee status to the general law, and render

\textsuperscript{540} Relying here on then section 11 of the Interpretation Act, now section 10, cited note 454, supra, and accompanying text; and also on the principle laid down by various courts that statutes must be interpreted in terms of their overall purpose. In this latter regard, the Board cited Bakery and Confectionary Workers International Union of America, Local No. 486 v White Lunch Ltd., [1966] SCR 282 at 292; Yellow Cab Ltd. v Board of Industrial Relations, [1980] 2 SCR 561 at 768; and the decision of the US Supreme Court in National Labor Relations Board v Hearst, supra, note 447, at 619.

\textsuperscript{551} Supra. note 547, at 218-219.

\textsuperscript{552} Ibid. at 219.

\textsuperscript{553} 74 CLLC ¶16,104 at 869.
the whole definition of "dependent contractor" in the Code itself "virtually nugatory".\textsuperscript{554} Similarly, in Mayer v Conrad Lavigne Ltd.,\textsuperscript{3} in determining that a commissioned salesman was an employee within the meaning of the minimum employment standards provisions of the \textit{Canada Labour Code}, the Ontario Court of Appeal stated that the Code was a remedial piece of "social legislation" which should be given such "fair, large, and liberal interpretation as best ensures the attainment of its objects."\textsuperscript{555}

More recent jurisprudence suggests that the Board has persevered in its rejection of common law tests of employment status as determinative in interpreting the definition of the term "employee" under the Code. In \textit{Brookville Transport Ltd. and the Canadian Brotherhood of Railway, Transport and General Workers},\textsuperscript{37} the Board unequivocally stated that the common law tests of employee status were not determinative for the purposes of determining dependent contractor, and hence employee, status for the purposes of Part I of the \textit{Canada Labour Code}:

... [W]e are still hearing arguments which are based upon the old master-and-servant common law concepts of control and whether contracts are for service or of service. With all due respect, it is our opinion that these tests are no longer determinative ...\textsuperscript{558}

Notwithstanding the fact that the Board has adopted a "statutory purpose" test in order

\textsuperscript{3} \textit{Ibid.} at 877.

\textsuperscript{3} \textit{Supra.} note 453.

\textsuperscript{554} \textit{Ibid.} at 739.

\textsuperscript{555} (1991) 15 CLRBR (2d) 128.

\textsuperscript{558} \textit{Ibid.} at 135. Similarly, in \textit{DAMCO Transport International Ltee} 92 CLLC 516:055 at 14,427, it was stated by the Board at 14,444, "This Board has already established that the provisions of the Code that it must interpret and apply confer upon it obligations and powers that exceed this common law test [the four-fold test set down in \textit{Montreal Locomotive}].
to determine the meaning of the term "employee" in the Code. vestiges of the common law distinction between independent contractors and employees persist. The Board in Société Radio-Canada held that economic or legal subordination to a business enterprise will ordinarily be determinative of the employee status of those who are so subordinate. However, this will not always be the case. In particular, the Board in Société Radio-Canada held that where an independent business or an entrepreneur is economically dependent on another enterprise, it will not fall within the definition of "employee" in the Code. The Board based this conclusion on the existence of competition law and policy which seeks to avoid the anti-competitive market conditions which would exist if independent companies were permitted to act in concert.

If we consider the aims and objectives of the Code, it is desirable, then, that the term "employee" be defined to include any person who, in his employment relations with his employer, is legally or economically dependent... There is a limitation on that statement, however. This limitation lies at the point where the contradictory objectives of collective bargaining and free competition intersect. We observe, under our economic system, which, while ostensibly based on a free market, is in fact subject to ever increasing levels of regulation, that many people, and indeed many corporations, occupy positions of economic dependence in relation to others. We are living in an era of industrial, financial and commercial giants, and every week we see one takeover or another and the constant creation of such giants, which, with their stranglehold on specific markets, are constantly creating conditions of increasing dependence on themselves. Take, for example, a company like General Motors, which farms out contracts for the manufacturing of auto parts to companies which may themselves employ hundreds of employees. These companies are clearly economically dependent on General Motors. There are thousands of such examples. ... [W]e feel that Parliament did not intend to allow contractors the right to form groups, since it specifically prohibits such groups in the Combines Investigation Act and the Criminal Code. Access to collective bargaining ends, then, where "entrepreneurship" begins, this being an essential concept of competition and of our free market economy, and one established in the public

*** Supra. note 547, at 221.
interest in the *Comines Investigation Act*. This approach enables us to reconcile two fundamental principles of our economic system, collective bargaining and competition. It allows access to the value of public interest which collective bargaining represents, for all those who, in their relations with an employer, are not contractors: a contractor being one who, through his investment in terms of capital and risk, and despite occasional economic subordination to an employer, can demonstrate that he is in business for himself. [Emphasis added.]

Subsequent decisions of the Board have echoed the above sentiment in *Société Radio-Canada*, and maintained that, while the purpose of Code is to empower those who are economically dependent in their work relationships by allowing them to act collectively, economic dependence alone cannot be the sole determinant. lest collective bargaining and competition policies find themselves operating at cross purposes. Accordingly, in both *Canada Post Corporation, Ottawa* and *KJR Independent Truckers Association KJR Associates Ltd.*, the Board relied upon a decision of the Ontario Labour Relations Board in support of its conclusion that employee status must be determined by looking at the “total character of the business”, including economic dependence on an alleged employer.

Accordingly, as in the Ontario Employment Standards context, the test for employee status seems to be a hybrid of common law features used to distinguish independent

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50 ibid. at 221 - 222.

51 (1987) 16 CLRBR (NS) 149.


53 *Canada Post Corporation, supra*, note 561, at 175 -176, where the Board cited the Ontario Labour Relations Board in *Mount Nemo Truckers Association and Canada Crushed Stone*, [1978] 1 Can LRBR 208, to state: "[C]onsideration cannot simply stop with a finding of dependence or its lack. Otherwise, bargaining rights would be extended to contractors who clearly were not meant to associate in order to increase their bargaining strength. The Board used as an example the automotive industry in which suppliers employing hundreds of persons are often in a position of economic dependence." *KJR Independent Truckers, ibid.*, at 450, where the Board also relies on the decision in *Canada Crushed Stone* to come to the conclusion that "relying solely on economic dependence ... would clearly be in conflict with the spirit of the legislation."
contractors from employees, and a statutory purpose analysis, which is geared to extending the protections of the Code to those who are economically dependent in their work relationships. Here, it should be emphasized that while common law elements are evident in the test for employee status under the Code, these elements are only to be relied upon insofar as they relate to and advance the objectives of the Code.

This does not mean that the common law criteria will not apply, accessorially or incidentally... We simply wish to indicate that the emphasis must be placed first on the objectives of the Code in determining employee status. It may be that this definition will be more restrictive or more expansive than the general law. It is possible, and indeed probable, that it will differ from that developed on the basis of the texts and objectives of other statutes. Once again, this is not to say that common law criteria cannot apply in the case of our Code, but rather to define the statutory limits of the said Code in terms of its own objectives. The criteria adopted may correspond to those developed by general law. They may also include others which are specific to the objectives of the Code. The aim, in fact must be to interpret the statute on the basis of what it is and not to attempt to force it to conform at any cost with other legislation directed at different objectives.\(^\text{44}\)

Having thus defined the relationship between the common law criteria for employee status and those specifically formulated in light of the objectives of the Code, the Board in \textit{Société Radio-Canada} offered the following general principles as to where to draw the line at which “access to collective bargaining ends [and] where ‘entrepreneurship’ begins.” Together, these principles represent the test for employee status under the \textit{Canada Labour Code}:

\begin{quote}
The criteria to apply in proving that a person is not an employee will be developed on a case-by-case basis. We can, however, offer the following guidelines. As we have already mentioned several times, the major criterion is that of economic dependence. In fact, the question is whether the person works for the employer concerned ... or whether he is in business for himself. and, to use Lord Wright’s expression in \textit{Montreal Locomotive Works} ... “whose
\end{quote}

\(^{44}\textit{Société Radio-Canada, supra, note 547, at 219.}\)
business it is”. In reaching these decisions, we shall make use of the criteria developed at the common law to the extent that they are compatible with the objectives of the Code and of those known as labour relations criteria. Hence, if the work performed by a person in integrated into the employer’s organization, if he has no other outlet except this employer, if he has not invested capital to produce the work, if he is under the employer’s administrative or other control, if he has no chance of profit or risk of loss, if his risks are limited to the time he has invested, if his income is guaranteed, if he performs work similar to that performed by other employees of the same employer under similar conditions, if the concerted refusal to work by persons in a state of economic dependence performing the same job is capable of seriously disrupting the employer’s operations and if the exclusion of this person is a factor of dissension in the employer’s labour relations, it is unlikely that a person, under these conditions, will be deprived of employee status.”

In applying the above test, it should be borne in mind that none of the criteria articulated by the Board will be determinative by itself. Rather, the criteria will have to be weighed against the particular facts of any given case." It is also worthy of note that the Board has held that, as a general rule, access to collective bargaining is to be encouraged, since it is “the basis of effective industrial relations for the development of good working conditions and sound labour-management relations” and since “the development of good industrial relations [is] in the best interests of Canada in ensuring a just share of the fruits of progress to all.” Accordingly, “there must be a serious reason...for denying a person access to the system.” and the onus of proving that an individual is not an “employee” under the Code will

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"Ibid. at 223.

"" Foisy, supra, note 547.

"" Société Radio-Canada, supra, note 547 at 222, citing portions of the Preamble to Part I of the Code.

"68 Ibid.
fall on the party asserting such claim.\textsuperscript{47}

c) Application of the Test for Employee Status

(i) Economic Dependence

In Société Radio-Canada, the Board was faced with the issue as to whether freelancers hired on contract for specific periods by the Canadian Broadcasting Corporation (CBC) were "employees" within the meaning of the Canada Labour Code and therefore permitted to organize collectively. In applying the above test, the Board found that the freelancers were employees of the CBC for a number of reasons. Specifically, the Board found that the freelancers were economically subordinate to the CBC because Radio-Canada represented a "captive market", freelancers having "few potential outlets for their services."\textsuperscript{48} Moreover, the fact that there was no real negotiation on hiring on or contract renewal" between the freelancers and the CBC was taken as evidence of the fact that the freelancers were economically dependent on the CBC.\textsuperscript{49}

This approach to the economic dependence criterion in Société Radio-Canada accords with the manner in which economic subordination has been considered by the Board in a

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\textsuperscript{47} Ibid at 222-223.

\textsuperscript{48} Ibid. at 238.

\textsuperscript{49} Ibid. at 237-238. This finding followed on the principle laid down by the Board that "economic dependence" is a function of bargaining power in the work relationship. Specifically, in determining economic dependence, the question is whether there is a sufficient balance of power between a worker and her employer to enable her to wring concessions from the employer in negotiating the terms and conditions of the work relationship. Where work conditions are determined on a "take it or leave it" basis by the employer, this fact will be indicative of economic subordination and unequal bargaining power on the part of the worker, and thus point to status as an employee. Ibid. at 220.
number of other cases. In *Midland Superior Express Ltd.*, for example, the Board indicated that where the persons whose status as employees is in question are "obliged to sell their services in a market in which they are economically dependent on a single or a restricted few purchasers," economic dependency consistent with an employment relationship is evident.\(^{72}\)

Moreover, in *KJR Independent Truckers Association*,\(^{77}\) the Board relied on the fact that terms and conditions of the working relationship were established on a "take it or leave it" basis by the alleged employer to conclude that the economic dependence of the alleged employees on the alleged employer was "total and absolute".\(^{71}\) Where individuals are precluded, either by contract or as a direct consequence of their work for an alleged employer, from working for anyone else, they will also be found to be economically dependent in a manner consistent with the existence of an employment relationship.\(^*\)

(ii) Administrative or Other Control of the Employees by the Employer

It is worthy of note that in *Midland Superior Express Ltd.*, the Board specifically rejected that a purposive interpretation of the Code allowed for a consideration of any type of control other than economic control.

Surely the test of control to be applied now to the dependency is of an economic

\(^{72}\) Supra. note 553, at 877.

\(^{71}\) Supra. note 562.

\(^{77}\) Ibid. at 451.

\(^{79}\) Radio Station CIRMI, *Division of Q Broadcasting*, 75 CLLC *16,166* at 1229-1230; *Radio Station Saint-Maurice Inc. and Syndicat Des Employés*, (1990) 15 CLRBR (2d) 81 at 83; *Brookville Transport*, supra, note 557 at 137; *Canada Post Corporation, Ottawa*, supra, note 561, at 166.
nature. Are the persons involved obliged to sell their services in a market in which they are economically dependant on a single or a restricted few purchasers? Is their freedom to contract with any degree of independence so thwarted that they are in fact in a status equivalent to that of individual employees faced by powerful employers? One can envisage situations in which a person would be completely independent from any employer-employee relationship in the common law contractual sense and yet would be absolutely dependant in such an economic sense.

Notwithstanding the Board’s rejection of the relevance of any type of control other than economical control in Midland Superior, a number of other decisions of the Board have been of the view that the exercise of administrative or other control by an alleged employer over its workers is one of the common law criteria which may be used to define the statutory limits of the Code in terms of who is an “employee”.

Thus, in Société Radio-Canada, the Board concluded that the administrative control exercised by the CBC over freelancers was consistent with the existence of an employment relationship. Although the freelancers were specialists in their various areas, and thus, not subject to supervisory control over the content of their work, they were all required by the CBC to be present at set places and times, and they were all subject to general programming policy.576 Interestingly, the Board also suggested that the CBC controlled the freelancers as “employees” insofar as it could refrain from renewing their contracts if it was dissatisfied with their work.577 It is far from clear, however, that this signifies the type of control inherent in an employment relationship, since, presumably, in a contract for services with an independent contractor, one may always refrain from renewing a contract when one is dissatisfied with the

576 Supra. note 547.
577 Ibid at 241.
contractor's work.

The Board’s approach to the “control” factor in Société Radio-Canada reflects its recognition of the fact that there are ever increasing numbers of “specialists” in the workforce whose work is often not of a type which may be subject to direct supervision. Thus, the Board tends to place greater importance on whether an alleged employer controls “where” and “when” an individual will work, as opposed to “how” the work will be performed. In Télévision Saint-Maurice, for example, the Board concluded that the alleged employer controlled salespersons in a manner consistent with the existence of an employment relationship since the employer assigned salespersons territories and clients, set objectives and advertising rates, and approved all contracts with clients before they were signed. The Board reached this finding even though salespersons received no direction as to “how” to sell.578

The issue of what type of control will be consistent with an employment relationship and what type of control will be indicative of a contract for services with an independent contractor becomes somewhat confusing in the face of the Board’s decision in Canada Post Corporation and Canadian Postmasters & Assistants Association (Maureen Copeland).579 In that case, Mrs. Copeland operated a Retail Postal Outlet pursuant to a contract with Canada Post. At issue was whether Copeland was an employee of Canada Post or whether she was an

578 Supra, note 575, at 85. In this regard, see also Reimer Express Lines Ltd. [1981] 1 CLRBR 336 at 346 where the Board held that control by the employer over truck drivers regarding the routes they were to take, the loads they were permitted to carry, and the maintenance of the trucks pointed to the conclusion that the drivers were employees of Reimer. Similarly, in Canada Post Corporation, Ottawa, supra, note 561, at 168-169, the alleged employer’s extensive control over how mail couriers were to deliver the mail, as well as where and when they would deliver it, led the Board to conclude that the Corporation had “total administrative control over the day-to-day performance of the couriers in the same manner that it ha[d] for any perform working for [it].”

579 (1989) 5 CLRBR 79.
independent contractor. Notwithstanding the fact that the contract between Copeland and Canada Post specified the place at which the outlet was to be located, the times during which postal services were to be provided, what services were to be performed, as well as the assets needed to be acquired in the operation of the outlet, the Board held that, rather than being indicative of Canada Post's control over Copeland as an employee, these factors were "simply the terms under which Mrs Copeland [had to] operate her business." *80* Moreover, in the Copeland case, the Board appears to depart from many of its other decisions, in stating that, "[The agreed-to terms governing the relationship between Canada Post and Mrs Copeland] illustrate the inferior bargaining power of Mrs Copeland: however ... this has no bearing on status determinations." *81* It should be noted that here the Board is referring back to its previous remark that inferior bargaining power on the part of a truly independent entity will not be sufficient to place it within the scope of the Code. *82* It seems undeniable, however, that, while perhaps not determinative, control which arises by virtue of inferior bargaining power should always be regarded as one factor pointing to an employment relationship, even if it is ultimately outweighed by other factors. In the Copeland case, the existence of other factors may well have supported the Board's conclusion that Mrs. Copeland was an independent contractor in the final analysis. However, the Board's minimization of Canada Post's extensive control over "where" and "when", and to some extent "how" services were to be performed is at odds with its other decisions where precisely the same type of control has been

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*80* Ibid. at 90-91.


*82* Ibid at 83.
held to be indicative of an employment relationship.

(iii) Integration into the Employer's Business and Labour Relations Considerations

As discussed in the previous chapter, the extent to which an individual is integrated into an employer's business first received approval in the employment standards context as a factor indicative of employee status in *Mayer v Conrad Lavigne.* In *Société Radio-Canada,* the Board indicated that the integration of an individual into an alleged employer's enterprise is one of the factors to be considered in making status determinations, and relied on this factor in support of its decision that freelancers at the CBC were employees for the purposes of the Code. The integration of freelancers was evident in light of the fact that a significant portion of the CBC's programming costs were incurred in respect of work performed by freelancers. In addition, freelancers had access to all the administrative services offered by the CBC within its premises, on the same basis as employees on permanent staff. The Corporation had also developed and issued a policy regarding the use and employment of freelancers, which policy was taken as evidence that the work done by freelancers was far from a negligible portion of the firm's operations. Finally, the Board found that if the freelancers were to withdraw their services, it would be impossible for the Corporation to continue to provide its full

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83 Supra. note 433 and accompanying text.

84 Supra. note 547 at 236.

85 Ibid.

86 Ibid.
programming schedule. Similarly, in Canada Post Corporation, Ottawa, the Board based its decision that mail couriers were "employees" within the meaning of the Code, in part, on the fact that the couriers were "an integral part of the employers overall organization and [could not] be severed from it." In reaching this conclusion, the Board relied primarily upon the fact that, "if the couriers were all to cease their functions as of tomorrow, the National Network Plan [for mail collection and delivery] established by the Corporation would no longer exist..."

It is interesting to note that the Board’s analysis of the "integration" factor in Société Radio-Canada and Canada Post Corporation, Ottawa seems to fly in the face of the common law jurisprudence on this point. In particular, in Wiche Door, the Court emphatically stated that the issue as to whether an individual is integrated into a given employer’s business must be examined from the perspective of the alleged employee, and not the alleged employer, since from the perspective of the employer, all services provided in conjunction with its business will likely always be regarded as necessary and integral." In emphasizing the portion of the CBC’s total programming costs allocated to freelancers, its policy on the use of freelancers, and its ability to carry on without the services of the freelancers, it is clear that the Board in Société Radio-Canada was addressing the integration factor from the perspective of the

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"Ibid. at 237.

"88 Supra, note 561.

"89 Ibid. at 171.

"90 Ibid. at 170.

"91 See note 438, supra, and accompanying text.
employer. Similarly, in *Canada Post Corporation, Ottawa*, in determining that couriers were integrated into the Corporation because of the impact that their withdrawal of services would have on the employer's business operations, the Board clearly looked at the issue from the perspective of the employer, Canada Post.

While the Board in *Société Radio-Canada* does not specifically address itself to this issue of perspective, it may be that labour relations policy considerations led the Board to analyse the integration factor in this manner. The whole notion underpinning collective bargaining is that by joining forces in a group, employees will be able to remedy the economic imbalance between capital and labour, and thereby wring concessions from their employer as to terms and conditions of employment. Thus is social peace ensured. One of the primary tools which employees who have organized collectively have at their disposal as a means of "wringing concessions" from their employer is the ability to withdraw their services, thereby disrupting the employer's operations, and forcing it to bargain with them on equal terms. Thus, it is clear that the whole premise of collective bargaining is undermined if, upon the withdrawal of services by its "employees", the employer has ready access to another group of individuals who do not belong to the collective, and yet who are so "integrated" into its operations as to enable the employer to carry on "business as usual".

Accordingly, there may be sound labour relations policy reasons for concluding that individuals who are integrated into the employer's operation, from the employer's perspective,

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""" *Société Radio-Canada, supra*, note 547 at 217.

""" *Ibid*
are “employees” for the purposes of the Code. To do otherwise - namely to determine employee status according to whether an individual is integrated into an employer’s operations from the individual’s perspective - could result in leaving outside the scope of the bargaining unit individuals whose continued service to an employer during attempts at collective action by the employer’s “employees” would seriously undermine such collective action.

The above analysis is bolstered by the fact that in Canada Post Corporation, Ottawa, the Board expressly stated that the determination as to whether an individual is integrated into an employer’s operations subsumes “a comparison of the work being performed by the contractor and other persons within the organization”.

In Société Radio-Canada, the Board also found the job functions of freelancers were identical to those of permanent employees, though in that case, the Board did not specify why similarity in work function was an important factor to be considered in determining the freelancers’ employee status.

Nonetheless, it is submitted that in light of the following remarks of the Board in Société Radio-Canada, there can be little doubt that labour relations considerations are at the heart of the Board’s determination of employee status, in its treatment of the “integration” factor and elsewhere.

Since the earliest days of unionism at Radio-Canada, announcers and journalists have been recognized as “employees” within the meaning of the Code and have been unionized. Contract workers, on the other hand, have been excluded from these units, not because they were contractors, but artificially, because the traditional control criterion, which, at the time, was the determining factor, did not apply to them. As a result, parallel and artificial jurisdictions have

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*4 Supra, note 561 at 164.

*5 Supra, note 547 at 241.
developed, producing an imbalance of forces, to the benefit of the employer. The employer has thus been able to undermine its journalists' and announcers' bargaining power by giving another group jurisdiction which would normally have belonged to them. By dividing the jurisdiction between two groups, the Corporation was able to play one against the other, since it could create positions in one or the other group at its own discretion. How can a union fully assert its demands if it does not have exclusive control over the functions performed by its members? Why go on strike if the employer can have the same work done by another group?**

The above passage highlights the manner in which determinations of employee status under the Code, while incorporating elements of the common law tests, retain a definite labour relations focus. Moreover, the manner in which Board has interpreted and applied the common law "organizational" test from Mayer demonstrates that common law criteria of employee status may be modified so that they are compatible with the objectives of the Code and thus be used "to interpret the statute on the basis of what it is."**

(iv) Whether Participants in Rehabilitative Training Programmes may be Employees for the Purposes of the Canada Labour Code

In anticipation of the argument that inmates working in Canadian federal penitentiaries are not "employees" within the meaning of the Canada Labour Code, but rather, participants in rehabilitative training programmes implemented for their own benefit, it is worthwhile to consider the labour relations board jurisprudence regarding the employee status of participants in work programmes which have a specifically rehabilitative focus. While the Canada Labour Relations Board does not appear to have addressed itself to this issue, the Labour Relations

**"Ibid" at 242.

**"Ibid" at 219.
Board in Ontario, in particular, has rendered a number of decisions on precisely this question. In the absence of its own jurisprudence on this point, it is likely that the Canada Labour Relations Board would turn to this body of case law if called upon to determine the employee status of inmate workers in CORCAN or CORCAN-authorized prison industry programmes.

a) Whether Rehabilitative Nature of Work Inconsistent with Employee Status

Generally speaking, the express rehabilitative focus of a work training programme will not operate as a bar to employee status. In *Regional Municipality of Hamilton-Wentworth*, the Ontario Labour Relations Board found that individuals selected from the welfare rolls to participate in the employer’s “Helping Hands” programme to provide home maintenance services to elderly citizens were “employees” within the meaning of the Ontario *Labour Relations Act*, even though the programme was geared to “assist some chronically unemployed individuals on the welfare rolls, who, through working... might be able to both provide for themselves through their own efforts and improve their job habits and skills sufficiently so as to be able to compete in the regular job market.” In that case, it was significant to the Board that while “rehabilitation [was] an aspect [of the programme], employment [was] the dominant theme.” Moreover, the Board reached its conclusion in this regard notwithstanding the fact that, when programme participants had no specific duties to perform for elderly citizens, they

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[a] [1982] OLRB 1179.
were kept busy working for related social welfare agencies, and even spent time receiving counselling or learning techniques which would allow them to participate in the competitive labour market.\(^{301}\)

Similarly, in OPSEU v. Elizabeth Fry Society of Ottawa,\(^{302}\) the Ontario Labour Relations Board ruled that the rehabilitative focus of a programme which sought to reduce unemployment among hard-to-employ youth did not preclude the Board from finding that the youth participants in the programme were “employees” for the purposes of the Labour Relations Act. Here, as in Hamilton-Wentworth, the Board concluded that while rehabilitation and training were aspects of the programme, employment - in the form of short-term “make work” projects - was the dominant theme.\(^{303}\)

In one case, the Ontario Labour Relations Board even considered whether prison inmates were “employees” within the meaning of the Labour Relations Act or whether the rehabilitative aspect of their “employment” precluded a finding of such status. In Guelph Beef Centre Inc.,\(^{304}\) the Board found that inmate workers engaged to work at an abattoir located at a provincial prison were “employees” under the Labour Relations Act, notwithstanding the admittedly rehabilitative aspect of the prisoners’ work at the abattoir.

There can be no doubt that the rehabilitative aspect of the work, which the inmates perform while under the direction and control of the respondent, is the primary value of license agreement from the Ministry’s point of view. But from

\(^{301}\) Ibid. at 1181.

\(^{302}\) [1985] CLRBR (NS) 303 (OLRB).

\(^{303}\) Ibid. at 310.

the point of view of the respondent, which is the alleged employer, the services provided by the inmates are an integral and significant part of its meat-packing operation. The Abattoir, as it currently operates, is not in any way, shape or form a sheltered workshop or protected work environment. It is a modern, efficient, well-equipped slaughter-house where each employee is expected to do a full day's work under normal production standards. The services which the inmates provide are not only of substantial benefit to the respondent, they are services which would otherwise have to be obtained from another source. This business reality is reflected in the inmates' rate of pay, which is required by the terms of the Licence to be equivalent to the average rate of pay for various classifications of meat packers in the Guelph area.\footnote{\textit{ibid} at 188.}

The above passage highlights that, where individuals provide services which are of benefit to the employer, they are likely to be considered "employees" for labour relations purposes, even if their work also serves a rehabilitative objective.

b) Benefit of Work to the Employer

As in the \textit{Guelph Beef} case, a number of other cases have applied the reasoning that individuals whose work, whether or not rehabilitative in focus, provides a benefit to the employer, are likely to be considered "employees" for labour relations purposes. However, while the Board in \textit{Guelph Beef} relied on the "substantial benefit" accruing to the respondent as a result of inmate work as a factor pointing to employee status, other decisions have been prepared to conclude that individuals in training programmes were "employees" where their work was only of "some" benefit to their respective employers. Thus, in \textit{Elizabeth Fry Society}, the Board concluded that youth workers were employees under the \textit{Act} in part, on the basis
that the alleged employer derived some benefit from their work performance.

Further, it reached this conclusion even in light of its finding that, in the absence of the youth work programmes, there would be no positions for the workers, and that the employer did not "need" their services, in the sense that they were filling vacancies or performing work which would otherwise have to be done." Indeed, the Board unequivocally stated that "the primary beneficiary of the programme [was] the participant who gain[ed] work experience", and "the benefit to the respondent, if any, [came] only during the final weeks of the programme when the participants ha[d] learned the respondent's routine and [could] work without assistance or supervision." In spite of the relatively minimal benefit of youth workers' services to the respondent, however, the Board still concluded that an employment relationship existed.

As well, in determining that Helping Hands participants were employees of the Regional Municipality in the Hamilton-Wentworth case, it was significant to the Board that "the participants [were] providing services to the elderly which might not [have been] provided otherwise, or would have [had] to [have been] provided with regular social services staff or municipal employees at much higher cost." In that case, the inessential nature of services provided by programme participants was rejected by the Board as a factor inconsistent with employee status, since it could "envisage other municipal services which likewise [were] not

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60 Supra, note 602 at 309.
67 Ibid, at 308.
68 Ibid.
69 Supra, note 598 at 1182.
"essential" to the ongoing operation of the region,"\textsuperscript{10}
but whose workers would presumably be "employees" under the Act.

It is worthy to note that in finding that Helping Hands participants
provided useful services to the alleged employer so as to give rise
to an employment relationship, the Board was likely influenced by
the fact that programme participants, while "chronically
unemployed", were "not chronically unemployable". Indeed, it was on this basis
that the Board in Hamilton-Wentworth distinguished the case before it from
the employment standards decision of Referee Burkett in Kaszuba v. Salvation
Army Sheltered Workshop.\textsuperscript{11} In Kaszuba, Referee Burkett held
that participants in a rehabilitative work programme who were certified
as medically unemployable by reason of mental illness were not "employees"
within the meaning of the Ontario Employment Standards Act.\textsuperscript{12}
The Board in Hamilton-Wentworth concluded that the participants in
the Helping Hands programme differed from participants in the
Salvation Army's Sheltered Workshop programme insofar as they were
employable, and thus capable of providing services of value to the employer.\textsuperscript{13}

\textsuperscript{10} Ibid

\textsuperscript{11} Supra, note 477.

\textsuperscript{12} Supra, note 598 at 1183.

\textsuperscript{13} Certain other cases involving individuals working at hospitals
in satisfaction of educational and licencing requirements
have relied upon the fact that the hospitals in question
derived a benefit from the work of such individuals to conclude that
they were "employees" of the hospitals for labour relations
purposes. In this regard, see St Paul's Hospital and Professional
Association of Residents and Interns [1976] 2 CLRBR 161 at 175,
where the British Columbia Labour Relations Board held
that residents and interns were "employees" and not "students"
on the partial basis that they provided extensive medical care
to the patients at the hospital, which care would have to be obtained
from other sources if the residents and interns were not available.
See also Vancouver General Hospital and Health Sciences,
Association of British Columbia, [1981] 2 CLRBR 382
at 387, where the British Columbia Labour Relations Board held
that a physiotherapist completing a four month residency
requirement at the hospital was an "employee" under the Labour Code
since she performed some useful work for the hospital,
even though the work was not primarily for the benefit of the hospital.
Cf Cranbrook District Hospital, [1975] 1 Can LRBR
42 at 57, where the British Columbia Labour Relations Board concluded
that student practical nurses were not "employees"
of the hospital, on the partial basis that they were "supernumerary"
to the regular nursing staff, and that staffing requirements
c) Normal Indicia of an Employment Relationship

Of course, in determining whether participants in rehabilitative or training programmes were employees for the purposes of the Act, labour relations boards have also considered whether the normal indicia of an employment relationship existed so as to bring the working relationship within the scope of labour relations statutes. In Guelph Beef, the Ontario Labour Relations Board found that "most of the normal indicia of an employment relationship: hiring, control and direction of the workforce, payment of wages, promotion and discipline [were] present in the relationship" between inmates and the abattoir, "although perhaps to a somewhat lesser degree than is normally the case in the industrial setting." The existence of these factors supported the Board's decision that inmates working at the abattoir were "employees" within the meaning of the Labour Relations Act.

Similarly, in Hamilton-Wentworth, applying the "usual legal criteria" to the relationship between Helping Hands participants and the Regional Municipality, the Ontario Labour Relations Board concluded that there was "little doubt" that they pointed to an employer-employee relationship:

The participants are not volunteers, students, or independent contractors. The work for wages. The are interviewed, hired for a job and paid a fixed rate computed hourly, from which the "usual" employee contributions... are deducted... They perform tasks assigned by the respondent and subject to the respondent's express direction and supervision. Those tasks are not generically different from other social service functions performed by the Respondent. The participants are providing services to the elderly which might not be provided otherwise, or would have to be provided with regular social service staff or

at the hospital were maintained without reliance on the student nurses.

14 Supra, note 604 at 188.
municipal employees at a much higher cost. While these services may not be considered essential to the ongoing operations of the region, one may envisage other municipal services which likewise are not “essential” in this sense. Adequate performance by the participants leads to limited advancement, while inadequate performance or misconduct may result in discontinuance or termination.

The Board applied the same criteria used to determine the existence of an employment relationship in *Guelph Beef* to the relationship between youth workers and the *Elizabeth Fry Society* to find in that case as well, that an employment relationship existed.

Essentially, the same indicia of employee status have been applied by the British Columbia Labour Relations Board in determining whether individuals performing work at certain hospitals in satisfaction of educational requirements were employees within the meaning of the British Columbia *Labour Code*. In *St. Paul’s Hospital*,[67] the Board applied the test to the relationship between medical residents and interns to conclude that they were “employees” of the hospital and not merely “students” as the hospital had argued:

The Hospital appoints its house staff [composed of clinical clerks, interns, residents and fellows], schedules and directs their work and evaluates their performance, and may discipline or even dismiss them. The Hospital pays the residents on a regular two-week basis, subject to standard payroll deductions, provides certain welfare benefits, and allows paid statutory holidays and annual vacations. In return, the house staff provides extensive medical care to the patients, which would have to be obtained from other sources if the house staff were not available to the Hospital. All of the normal indicia of employee status are satisfied in the case of the residents and interns in the Hospital.[68]

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[64] *Supra*, note 598 at 1182.

[65] *Supra*, note 602 at 309.

[66] *Supra*, note 613.

By contrast, the normal indicia of employee status were not found to exist in the relationship between student practical nurses and the hospital at which they worked in the British Columbia Labour Relations Board case, *Cranbrook District Hospital.* In that case, student practical nurses were found to have been selected, evaluated, promoted and eventually graduated from the practicum portion of their course by decision of the College in which they were enrolled, and not the Hospital. Moreover, student nurses were assigned their hours of work, areas of work, and kinds of work by decision of the College and not the Hospital. Work assignments were determined by the College in accordance with educational needs, and not the needs of the hospital. The College also controlled the attendance, supervision, and discipline of the student nurses. Accordingly, the Board reached the "inescapable" conclusion that the student nurses were not employees of the hospital.\(^1\)

It is interesting to note that in considering the existence of the indicia of an employment relationship, the labour relations boards in the above decisions have tended to focus on hiring, control and direction over the workforce, payment of wages, promotion and discipline as those criteria which would be indicative of an employer-employee relationship. The cases have not gone into nearly as in-depth an analysis of the indicia of an employment relationship as we observed in the Canada Labour Relations Board cases discussed in the previous section of this chapter. This is likely a function of the fact that, in deciding whether participants in rehabilitative training programmes were "employees" for the purposes of collective bargaining, labour boards have not been called upon to distinguish independent contractors from

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\(^{1}\) *Supra*, note 613.

employees. Rather, their focus has been on whether work relationships in which workers themselves are often the primary beneficiaries of work because of its rehabilitative or educational nature may be characterized as employment relationships for labour relations purposes. Thus, factors particular to the rehabilitative or educational work relationship have dominated the labour boards' inquiry.

d) Source of Funding for Rehabilitative and Training Programmes

One such additional factor which has been considered by the Ontario Labour Relations Board has been whether the source of funding for rehabilitative or training programmes may affect the determination of employee status. Specifically, it has been argued that where funding is provided from the public purse, specifically to make jobs available to certain classes of individuals who would otherwise have difficulty in obtaining work, such funding arrangements nullify the existence of an employment relationship. This was the position taken by the alleged employer in *Waterloo County Roman Catholic Separate School Board.*\(^{21}\) In that case, the School Board engaged students during the school vacation period, and paid them out of the funds of the School Board and out of funds provided by government assistance programmes geared towards increasing student employment.\(^{22}\) There, the alleged employer argued that, because there was a limited pool of funds with which to employ students, a finding that the students were "employees" would likely result in fewer students being "employed" in

\(^{21}\) *[1977] OLRB 856.*

\(^{22}\) *Ibid.* at 856.
the programme. Finding that the students were employees, the employer argued, would allow them to bargain collectively, and to negotiate higher wages. Thus would there be fewer positions available overall.\textsuperscript{22}

The Board rejected this reasoning, however, and held that "the entitlement of the employees in question to the protection of the Labour Relations Act [was] not altered by the source of the funds which their employer use[d] to pay them."\textsuperscript{24} Moreover, the Board stated that in establishing funding programmes for student employment, the government must have been aware that the students employed through such programmes would be entitled to take advantage of the protections of the Labour Relations Act. Absent "clear and unequivocal language of the legislature or cogent evidence" of the legislature's intention to the contrary, the Board indicated that it would not exclude individuals from the collective bargaining process in which they would normally be entitled to participate on the basis that they were paid, in part, through public funding.\textsuperscript{25}

Similarly, in the Hamilton-Wentworth case, the Ontario Labour Relations Board emphatically stated that it did not "attach much significance to the fact that an arrangement

\textsuperscript{22} \textit{Ibid.}

\textsuperscript{24} \textit{Ibid.} at 857.

\textsuperscript{25} \textit{Ibid.} In this regard, see also the decision of the Ontario Labour Relations Board in 	extit{Guelph Beve}, supra, note 604, at 186, where the Board refused to exclude prisoners \textit{per se} from the scope of the Ontario Labour Relations Act in the absence of clear statutory authority that it should do so and in light of the general policy of the Act, which is to promote collective bargaining. "Prisoners, as such, do not constitute a category of persons specifically excluded from the Labour Relations Act, and the Board is not aware of an external legislation which could be said to exclude them. Accordingly, it must be presumed that the legislature intended to permit this group of people to come under the provisions of the Act, provided that they can qualify as employees."
may be described as a "make work" scheme funded in whole or in part by the public purse."^{26}

Over the years,... many Canadians have derived their wages through work support program... and numerous other schemes for the support of employment through direct channelling of government funds to employers both public and private. The whole purpose of such program is to draw on the pool of unemployed workers in an area or category (e.g. youth), and it is not at all unusual to find that such program give preference to the "hard core" unemployed... Nor is it unusual that such individuals would be employed by a public sector employer to do annual work of a community service character. And, as in the instant case, the number of jobs will be contingent upon funds made available. In today's society, there is nothing particularly novel about employment in a publicly funded "make work" program of limited duration where the participants have no real prospects of advancement. One may question the value of collective bargaining for such persons but that does not mean that they are not employees.^{27}

Certain general principles emerge from the above cases. First, it is clear that the Ontario Labour Relations Board has refused to conclude that individuals participating in rehabilitative or training programmes were not employees within the meaning of the Labour Relations Act because of the consequences that a finding of employee status could have for such programmes. Specifically, in Waterloo County Roman Catholic Separate School Board and Hamilton-Wentworth, the Board tacitly recognized that the workers in those cases were employees could result in fewer positions being available in the rehabilitative and training programmes in question. Nonetheless, this fact did not persuade the Board that it should not find the workers in those two cases were employees under the Act where the criteria for the existence of an employment relationship were otherwise satisfied. Moreover, the Board's remarks in the above cases bolster the claims of individuals in rehabilitative training

^{26} Supra, note 598 at 1184.

^{27} Ibid.
programmes to employee status, insofar as it has expressly recognized that “make work” projects of limited duration and with little chance of advancement may nonetheless give rise to the existence of an employment relationship.

e) Labour Relations Considerations

In examining the jurisprudence under the Canada Labour Code, we observed that certain criteria which specifically arise out of labour relations policy considerations may also influence the determination as to whether a given individual is an “employee” within the meaning of the Code. This trend is also apparent in the jurisprudence regarding whether participants in rehabilitative training programmes may be employees for labour relations purposes.

In the Guelph Beef case, in particular, the Ontario Labour Relations Board based its determination that the inmate workers in that case were “employees”, in part, on the fact that the exclusion of inmates from the bargaining unit in question would be inconsistent with the Labour Relations Act’s purpose of fostering effective collective bargaining. In Guelph Beef, both inmates and non-inmates worked side by side for the alleged employer, and the application for certification by the trade union covered both groups of workers. The Board was concerned that the exclusion of inmates from the bargaining unit could have a negative labour relations impact on the Union and also on the non-inmate workers employed by the respondent.

Turning now to the features of the relationship between the respondent and the inmates which have implications peculiar to collective bargaining, an important consideration here is the degree to which the exclusion of the inmates from the
provisions of the *Labour Relations Act* would dilute the bargaining strength of the applicant, which would then represent only the non-inmate employees of the respondent. As the applicant pointed out, if the inmates were excluded from the scope of its certification(s), that would leave the respondent free to draw on a virtually captive labour market in the event that negotiations for a collective agreement reached an impasse and a strike was called. Moreover, the knowledge that this might occur would undoubtedly become part of the calculus of the parties from the outset, with the result that the balance of economic power would be tipped in favour of the employer. Thus we have, in practical terms, a situation where a decision to deny a particular group of workers access to the collective bargaining process would have the effect of impairing the ability of a union to negotiate effectively on behalf of a group of employees whose right to collective representation is not in dispute. In our view, this is an additional reason for finding that the inmates are employees of the respondent, and thus entitled to participate in the system of collective bargaining provided for in the *Labour Relations Act*.

Thus, the Board concluded that granting employee status to the inmates in question and including them in the bargaining unit at the Guelph Beef Centre was desirable as a means of ensuring against unduly diluting the Applicant Union’s bargaining power. It is worthy of note that this is precisely the type of “dissension in the employer’s labour relations” which the Canada Labour Relations Board identified in *Société Radio-Canada* as a significant factor to be considered in determining whether the freelancers in that case were “employees” for the purposes of the *Canada Labour Code*.

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628 *Ibid* at 189.
IV. RECONCILING PRISONER STATUS AND EMPLOYEE STATUS

The debate with respect to whether inmate workers should be granted the protection of minimum standards legislation attempts to reconcile one essential tension. Inmate workers are prisoners whose liberty has been deprived because of their unlawful acts. At the same time they are workers who, similar to unconfined workers in society, work under the control and supervision of a prison industry "employer". Should individuals who have been deprived of their liberty because they have broken society's laws in a manner which warrants the revocation of their freedom be entitled to the protections normally afforded to workers in our society? Our task is to reconcile the deprivation of liberty *qua* prisoner with the right to minimum standards protections *qua* worker? In determining the relationship between the prisoner's deprivation of liberty and entitlement to minimum standards protection as a worker, we must determine whether one's status as a prisoner is consistent with one's status as an "employee".

Theoretically, there are a couple of ways to approach the interplay between prisoners' deprivation of liberty *qua* prisoners and their right to minimum standards protection *qua* workers. One possibility is that status as a prisoner and status as an employee are mutually exclusive. On this view, the very fact that an individual is a prisoner precludes his entitlement to minimum standards protection as an employee. In depriving prisoners of their autonomy as full participants in society, we also deprive them of any rights which they might also have as employees, notwithstanding the fact that their work is similar to that performed by unconfined workers in society. Here, the focus is on the penological nature of the work performed by workers. That purpose is seen to negate the existence of an employment relationship, which, outside the prison environment, generally depends on a relationship of economic dependence.
Regardless of the prisoner's economic dependence on the prison "employer", he cannot be an employee simply because he is a prisoner. We deprive a prisoner of the right to claim the benefits of minimum standards legislation as part of the deprivation of this liberty.

A second possibility is that status as a prisoner and status as an employee may be reconciled so that the underlying objectives of the penal project and the underlying aims of minimum standards are satisfied. On this view, the prison work relationship may give rise to an employment relationship depending on the precise nature of the work relationship. Here, one might consider the existence of the indicia which ordinarily characterize the employment relationships of unconfined workers to determine whether an employment relationship can be said to exist in the prison context. A prisoner may or may not be an employee depending upon how closely he resembles employees outside the prison context. Here, we do not say that prisoners cannot be employees simply because they are prisoners. Nor do we say that prisoners are employees simply because they find themselves in a relationship of complete dependence with prison authorities. Rather, we analyse the exact nature of the prisoner's deprivation of liberty and the terms and conditions of the prison work relationship in order to determine whether the prison work relationship is sufficiently similar to employment relationships outside the prison context in order to determine whether an employment relationship exists on the facts of a particular case.

We will now turn to the jurisprudence to assess how the two possible ways to regard the relationship between the inmate worker's prisoner status and his status as a worker have been considered by the courts.
A. The Approach in the United States

The issue of prison workers' entitlement to minimum standards protection has been dealt with fairly extensively in the United States. There, we witness a somewhat strange phenomenon. Although the US Courts have paid lip service to the notion that status as a prisoner and status as an employee are not mutually exclusive, the Courts' reasoning in cases involving prisoner Fair Labor Standards Act ("FLSA") claims supports the view that the deprivation of a prisoner's liberty necessarily precludes the existence of an employment relationship.

In *Carter v Dutchess Community College*, the Court of Appeal for the Second Circuit emphatically rejected the notion that status as a prisoner was mutually exclusive of status as an employee for the purposes of the FLSA. Indeed, the Court stated that to categorically exclude prisoners from the scope of the FLSA would be an encroachment on congressional prerogative, in so far as Congress had chosen not to include the class of prisoners on the extensive list of workers expressly exempted from FLSA coverage. Other US Courts have similarly rejected the notion that prisoners are excluded *per se* from the ambit of the FLSA, and have maintained that prisoners' employee status must be determined on a case-by-case basis by assessing the totality of circumstances of the prison work relationship.

In reality, however, US courts have taken pains to devise various and ever-shifting
bases upon which to deny prisoners' FLSA claims in all but one case." Early on in the jurisprudence, the US Courts of Appeal for the Second and Fifth Circuits relied upon the "economic reality" test which had been set down by the Ninth Circuit in *Bonnette v California Health & Welfare Agency* to conclude that inmate workers could be employees for the purposes of the FLSA. The *Bonnette* test focuses on the power of the alleged employer to hire and fire; supervise and control employee work schedules or conditions of employment; determine the rate and method of payment; and maintain employment records as indicia pointing to an employment relationship. By focussing on these factors, it is clear that the *Bonnette* test attempts to gauge the extent of control, and particularly, economic control which a putative employer has over its workers. Where such control is evident, an employment relationship may exist.

In more recent years, however, the *Bonnette* test has been effectively read out of the jurisprudence regarding prisoners' FLSA claims. Beginning with the Court of Appeal for the Seventh Circuit in *Vanskike v Peters*, certain US Courts concluded that the test in *Bonnette* was not useful as a means of determining prisoners' claims to employee status under the FLSA because the test is concerned with the "wrong boundary" of the prison work relationship. Specifically, in focussing only on the extent of control which the putative employer exercises over its workers, the *Bonnette* test fails to pay any heed to the fact that the prison employer's

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611 That case being *Watson v Graves*, *supra*, note 212.

612 *Carter v Dutchess Community College*, *supra*, note 205; and *Watson v Graves*, *ibid*.

613 *Supra*, note 193.

614 *Vanskike v Peters*, *ibid*; *Hake v State of Arizona (Hake III)*, *supra*, note 186.
control over inmate workers arises not only by virtue of the worker's economic dependence on the employer, as is the case outside the prison context, but rather as a consequence of incarceration itself. In the words of the Van skike court, "the control that [a prison authority] exercises over a prisoner is nearly total, and control over his work is merely incidental to that general control." Accordingly, "the Bonnette factors fail to capture the true nature of the [prison work] relationship for essentially they presuppose a free labor situation." It does not address what, in the Courts' view, is the more fundamental issue in dispute, namely whether "a prisoner [may] plausibly said to be "employed" in the relevant sense at all." Here, the Courts are indicating that there is something unique about the prison work relationship which warrants that it be treated differently from the work relationships of unconfined workers. There is something particular to the prison work relationship that is not addressed by the typical test for employee status, but which needs to be addressed, making the Bonnette test unserviceable.

While certain of the US Courts have expressly rejected the Bonnette standard because it fails to pay heed to the unique nature of the prison work relationship, other courts have overtly rejected the Bonnette test because of the result to which it tends. Specifically, certain US Courts have refused to apply the Bonnette test in the prison context because it is biased in favour of a finding that inmate workers are employees for the purposes of the FLSA. Because of the extensive control which tends to be exercised over prison workers by their jailers as a consequence of the prisoners' incarceration, the factors which trigger the existence

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18 Van skike, ibid., at 809.
19 Ibid.
20 Dan nes kjø l d v Haus rath, supra, note 195; Rei m on e v Fot, supra, note 284.
of an employment relationship under *Bonnette* will almost always be present in the prison work relationship. Certain courts have regarded this as an untenable result, and refused to apply *Bonnette* on that basis. In support of their conclusion, these courts have considered it sufficient to state that the literal application of the *Bonnette* test would "render all prison labor ... subject to minimum wage laws." and that such a result could not have been intended.

Where the courts have reasoned that *Bonnette* is inapplicable in the prison context because it has a "natural bias" in favour of a finding that prisoners are employees under the FLSA, they are favouring the view that prisoner status and employee status are mutually exclusive. At its most basic, the reasoning here is that the *Bonnette* test is inapplicable in the prison context because it would lead to the result that prisoners are employees which they cannot be because they are prisoners.

In their rejection of the *Bonnette* test it is clear that those courts that have held that the test is inapplicable in the prison context because it fails to place any emphasis on the custodial nature of the control which is exercised over inmate workers also tend towards the view that prisoner status and employee status are mutually exclusive. Here, the courts seem to be saying that there is something inherent in the prison work relationship which renders it impossible for the courts to regard it as a work relationship like any other. The deprivation of liberty is regarded as being inconsistent with the existence of an employment relationship which can be measured by the normal indicia of an employment relationship set down in *Bonnette*.

The mutually exclusive approach is also apparent in the manner in which the US Courts

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18 *Reimonenq v Font*, ibid, at 475.
have reconciled prisoner status and employee status in FLSA claims after rejecting the
Bonnette standard. Maintaining that the problem with Bonnette was that it did not address the
fundamental issue concerning employee status in the prison context, some of the US Courts
have attempted to discern the elements which lie at the heart of the employment relationship,
but which elements go unmentioned in typical tests of employee status because such tests
presuppose a "free labour" situation. Specifically, certain Courts have indicated that, at its
most basic, an employment relationship is a freely bargained for exchange of labour for wages.

If we dissect it, we see that this "test" - the freely bargained for exchange of labour for
wages - has a number of elements. Firstly, it must be "free", in other words, voluntary.
Secondly, there must be a bargain, which implies that both sides must stand to benefit from the
work relationship. Generally speaking, the benefit to the employer will be access to the
worker's labour; the worker will benefit from the opportunity to earn wages.

Unconfined workers are presumed to voluntarily enter into working relationships with
their employers. Thus, the Courts have arrived at the view that voluntariness is one of the
essential elements comprising the employment relationship. Workers who are forced to work
may not be said to freely enter into a bargain to supply labour for wages. In light of the
Thirteenth Amendment's exemption of prisoners from the prohibition of slavery and
involuntary servitude, however, prisons remain an enclave in the United States where labour
may be legally compelled, and where it often is.

It should be noted that the entire premise underlying the statement that employment
relationships outside the prison context are characterized by a voluntary exchange of labour for
wages may be attacked as faulty. In times of economic recession and high unemployment, in
particular, it is dubious to what extent unconfined workers are really free to enter into employment relationships with given employers. Certainly, there are workers who enjoy relatively greater power in the labour market and who may effectively "pick and choose" with whom they wish to be employed. However, it is equally true that there are vast numbers of workers who lack such bargaining power in the marketplace, and who are effectively forced to accept what employment is offered them. Of course, such workers may not be physically forced against their will to work for a given employer. However, to maintain that the absence of physical coercion in the employment relationship renders the relationship voluntary is overly simplistic, and fails to take into account the economic coercion which often compels workers to accept certain employment only because they have no other options, and which therefore serves the same end as physical compulsion.

Nonetheless, in determining prisoners' FLSA claims, a number of the US Courts have accepted that voluntariness is a key ingredient of the employment relationship, and relied upon the involuntariness of prison labour to conclude that prisoners who are forced to work in prison cannot also enjoy the status of employees. At first blush, it appears that in adopting the voluntariness criterion, the US Circuit Courts are adopting a "middle ground" approach to reconciling prisoner status and employee status under which prisoners may be employees for the purposes of the FLSA if they can demonstrate that they have voluntarily entered into the prison work relationship.

Adopting this approach, one would expect a finding that prisoners had volunteered to

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Footnote: In this regard, see *Morgan v. MacDonald*, supra, note 281; *Mclvaster v. State of Minnesota*, supra, note 195; *Henthorn v. Department of Navy*, supra, note 297; *Hale v. State of Arizona* (Hale II), supra, note 186; and *Hecker v. State Use Industries*, supra, note 196, and notes 293 to 303, supra, and accompanying text.
perform work while incarcerated would tend towards the conclusion that such workers were employees under the FLSA. However, this has not been the case. Indeed, when actually confronted with voluntary prison labour, the Courts have taken pains to conclude that such labour is in fact involuntary. 
  or else, have rejected the voluntariness criterion altogether as irrelevant to the determination of prisoners’ employee status, and gone on to conclude that the prison work relationship does not give rise to an employment relationship because of its overriding penological purpose. 

The manner in which the US Courts have applied the voluntariness criterion in prisoner FLSA claims belies a tendency to regard prisoner status and employee status as mutually exclusive. The jurisprudence reveals that the voluntariness criterion has only been used as an additional method to defeat inmates’ FLSA claims. It has never been relied upon the conclude that a prisoner was an employee for the FLSA. When prison work has been voluntary on the part of the inmate worker, we have witnessed the courts moving the employee status goalposts, and effectively changing the test previously developed in the jurisprudence in order to formulate new tests, emphasizing other factors of the prison work relationship, in order to defeat prisoners’ claims to minimum wage protections.

Although the Courts have purported not to adopt a categorial exclusion of inmates from employee status, the inconsistent and unprincipled manner in which the Courts have attempted to resolve prisoners’ FLSA claims leaves one with the impression that the Courts are prepared

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40 Hale v Arizona (Hale II), ibid. Barker v State Lye Industries, ibid.
41 George v Badger State Industries, supra, note 195; Damesky v Haus Ruth, supra, note 195; Burleson v State of California, supra, note 308. See also notes 304 to 313, supra, and accompanying text.
to identify one factor or another which will best serve as the basis to defeat prisoners' claims to employee status in a particular case. In reality, then, if not in theory, the Courts seem to be of the view that the deprivation of liberty which one endures as a prisoner and the right to minimum standards protection which one is ordinarily entitled to as a worker are mutually exclusive, and may not be reconciled.

A number of US Courts, particularly when confronted with voluntary prison labour, have resorted to the fact that there is a penological purpose underlying prison labour in order to deny inmates' claims to employee status.\(^2\) The reliance on the penological nature of the prison work relationship to defeat inmates' FLSA claims is the most overt evidence of the Courts' adoption of the mutually exclusive view of prisoner and employee status. It is difficult to conceive of any prison work relationship which does not serve some penological purpose. Any number of objectives of prison labour may be described as penological in nature. Whether inmate work is intended as a form of punishment, as is the case of inmates sentenced to "hard time", or as a means of rehabilitating offenders, or merely as a means of reducing inmate idleness, it may accurately be described as serving a penological function. The emphasis of the US Courts on the penological purpose of inmate labour thus serves the function of effecting a

\(^2\) In this regard, see George v Badger State Industries, \textit{ibid} at 588, citing prison industry's rehabilitative penological ends as nullifying the existence of the employment relationship; Dannskold v Hunsbruch, \textit{ibid} at 43, relying on the fact that inmate labour produced goods for the use of the prison and therefore served the same penal functions as forced labour even though the inmates in that case voluntarily entered into the prison work relationship; Burleson v State of California, \textit{ibid} at 314, stating that the freedom to choose among prison work assignments did not detract from the overall punitive penological purpose underlying inmate labour, which purpose nullified the existence of an employment relationship; Morgan v Macdonald, \textit{supra}, note 281, at 1293, stating that the relationship between the prison industry programme and the inmate in that case was "penological, not pecuniary"; McMaster v State of Minnesota, \textit{supra}, note 195 at 980, citing the penological purposes of "training, rehabilitation, and reduction of idleness" as negating the existence of an employment relationship; Remaking v Foji, \textit{supra}, note 284, citing the rehabilitative aim of the prison industry programme in that case as a penological purpose nullifying the possibility that the prison work relationship could be characterized as a freely bargained-for exchange of labour for wages.
categorical exclusion of prisoners from employee status under the FLSA.

As noted above, after rejecting Bonnette and attempting to identify other factors particular to the prison industry context which may be assessed in order to determine whether the prison work relationship is, in economic reality, an employment relationship, the Courts have emphasized that employment relationships are characterized by two essential elements: the voluntariness of the exchange of labor for wages, and the fact that there must be a bargain with benefits accruing to both the alleged employer and employee as a consequence of the bargain. We have seen how the US Courts have distorted the potentially principled approach by applying the voluntariness criterion in an unprincipled and frequently incoherent manner in order to effect in practice what may only be realistically regarded as the categorical exclusion of prisoners from employee status. Similarly, the manner in which the Courts have analysed whether there may be said to be a bargain between inmate workers and the prison employer is indicative of a tendency to regard status as a prisoner and status as an employee as mutually exclusive.

One of the ways in which the Courts have held that there is no freely bargained-for exchange of labor for wages in the prison context has been to state that the labor of inmate workers "belongs" to the institution in which prisoners are incarcerated. The rationale here is that the prison work relationship cannot be characterized as a voluntary bargain since the inmate, his labor already being the property of the institution, cannot enter into a bargain, because he has nothing with which to bargain. The inmate workers can thus not "sell" to the prison employer that which already belongs to it, namely his labor.
Those decisions which have cited the prison institution's proprietary interest in prison labour as nullifying the existence of a voluntary bargain to exchange labor for wages\(^ {643}\) have done so without offering any support for the conclusion that, upon incarceration, a prisoner's labour becomes the property of the institution in which he is incarcerated, to be disposed of as it sees fit.\(^ {644}\) Rather, they have simply stated as a matter of fact that prisoners' labour belongs to the institution. It is clear that the denial of employee status to prisoners on the seemingly groundless premise that their labour belongs to those for whom they perform work is consistent with a mutually exclusive view of prisoner and employee status. Indeed, the proprietary rationale for denying prisoners employee status may well be the epitome of the mutually exclusive approach. We recall that the mutually exclusive approach to reconciling the deprivation of liberty \textit{qua} prisoner on the one hand with the rights to minimum standards protection \textit{qua} worker on the other regards the status of prisoner and employee as mutually exclusive simply because as a society we do not accord prisoners the rights enjoyed by other workers because they are prisoners. We have deprived them of their liberty in many respects. Denying them the entitlement to minimum standards protection in their role as workers is merely an adjunct to this deprivation. A parallel approach is observed in those cases where the Courts state as a matter of first principle that prisoners' labour no longer belongs to them once they are incarcerated. This proprietary interest in one's own labour is the very foundation of the freely bargained-for exchange of labour for wages which characterizes employment.


\(^ {644}\) Hudgins \textit{v} Hart, \textit{ibid.}
outside prisons. Yet, without offering any basis for the proposition, it appears that the courts regard the forfeiture of the proprietary interest in one’s own labour as merely an adjunct to the deprivation of liberty which all prisoners experience when they are incarcerated.

Essentially, the Court’s reasoning proceeds in the following manner. Prisoners do not own their labour because this is part of what it means to be a prisoner. Since prisoners do not own their labour, they have nothing with which to bargain in the prison work relationship. Accordingly, the prison work relationship cannot be characterized as an employment relationship which must necessarily include the ability of both parties to the work relationship to enter into a mutually beneficial bargain. In this way, we see that the first premise of the Courts’ reasoning, that prisoners do not own their labour because this is what it means to be a prisoner, leads to the categorical exclusion of prisoners from employee status under the FLSA. Employee status and prisoner status are mutually exclusive because we take prisoners proprietary interest in their labour away from them and thereby makes it impossible for them to ever attain the status of employees.

On the one hand, the Courts have consistently maintained that prisoners are not categorically excluded from the scope of the FLSA. Indeed, this would appear to be the more sound approach. As indicated by the Court of Appeals for the Second Circuit in Carter v. Duchess Community College, to do otherwise would be an encroachment on Congressional prerogative in light of the fact that Congress has not chosen to exclude prisoners as a class from FLSA protection, notwithstanding that their entitlement to the minimum wage under that

\[\text{Supra, note 205.}\]
Assessing the extent to which the prison work relationship resembles a freely bargained-for exchange of labour for wages as a means of determining prisoners' employee status represents a principled approach to resolving inmate FLSA claims. However, the application of this potentially principled test has been so distorted by the US Courts that they have effectively abandoned the "middle ground" approach they purport to adopt in favour of what can only be viewed as the de facto adoption of a mutually exclusive approach to prisoner and employee status. As noted above, the US Courts have interpreted and applied the voluntariness criterion in an inconsistent and incoherent manner, leaving us with the impression that they are willing to rely on one factor or another to achieve the result of categorically denying prisoners employee status. Moreover, in citing factors which are necessarily part of the prison work relationship, such as the penological purpose underlying such relationship and the presumed proprietary interest of penal institutions in inmates' labour, the Courts are less than honest when they claim that they are not excluding prisoners from

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146 Huntley v Gunn Furniture Co. supra, note 198.
FLSA protection per se, but rather deciding each claim on a case-by-case basis.

In light of the US jurisprudence, it appears that it will always be open for the Courts to declare that the penological purpose of propriety nature of inmate labour negates a finding of employee status. Indeed, the case law indicates that the Courts are not reluctant to resort to such methods of resolving inmates' FLSA claims where the prison work relationship otherwise does resemble a freely bargained-for exchange of labour for wages. In this way, it becomes apparent that the clear tendency in the US is to regard prisoner status and employee status as mutually exclusive.

B. The Approach to be Adopted in Canada

Crossing the border to Canada, we find that there has been very limited consideration of the manner in which the tension between the inmate worker's deprivation of liberty as a prisoner and his right to enjoy minimum standards protection as a worker. Nonetheless, there are a number of good reasons to conclude that Canada should not adopt a mutually exclusive approach to prisoner and employee status.

1. The Corrections and Conditional Release Act

First and perhaps foremost, the Corrections and Conditional Release Act (the "CCRA") indicates that prisoners are to be presumed to retain all of the rights which ordinarily accrue to members of society, presumably including the employment-related rights of unconfined
workers, as long as the removal of such rights is not necessary as a consequence of incarceration. Section 4(e) of the CCRA sets out the principles that guide the Correctional Service of Canada in fulfilling its dual mandate to carry out sentences imposed by the Courts through the safe and humane custody of offenders and to assist in their rehabilitation. One of these principles is that:

[O]ffenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence.467

It is clear that the above section creates a presumption in favour of allowing prisoners to retain the rights and privileges which are enjoyed by unincarcerated members of society. Insofar as employment-related rights, including minimum standards protections, presumably fall within the class of rights and privileges of all members of society, it seems clear that there is a presumption that inmate workers should similarly enjoy such rights, subject only to the proviso that such rights are not necessarily removed as a consequence of incarceration.

Section 4(e) of the CCRA indicates that we in Canada should reject the mutually exclusive approach to prisoners’ employee status which has been the \textit{de facto} method of reconciling the deprivation of liberty \textit{qua} prisoner with entitlement to minimum standards protections in the United States. Rather, in directing us to recognize that prisoners retain the rights and privileges of all members of society, except those rights and privileges that are

\footnote{467 \textit{Corrections and Conditional Release Act, supra, note 28, section 4(e). It should be noted that the term “offender” is defined in section 2(1) of the CCRA to mean “a) an inmate, or b) a person who, having been sentenced, committed or transferred to penitentiary, is outside penitentiary i) by reason of parole or statutory release, ii) pursuant to an agreement referred to in subsection 81(1) [authorizing agreements by the Minister with the aboriginal community for the provision of correctional services to aboriginal offenders], or iii) pursuant to a court order.” Thus, while the term offender in section 4(e) clearly encompasses inmates who are working while incarcerated, it is not limited only to inmates.}
necessarily removed as a consequence of their sentence, this section of the CCRA calls for a "middle ground" approach to prisoners' employee status. As noted above, a middle ground approach to inmates' employee status regards the prisoners' deprivation of liberty and the worker's right to minimum standards protection as neither mutually exclusive nor inseparable. Instead, inmate workers, like all other workers of society, may or may not be entitled to minimum standards protection. Whether they are so entitled will depend on whether they can demonstrate that they satisfy the test for employee status applied by decision-makers under minimum standards legislation.

As noted above, however, before we may assert that section 4(e) of the CCRA supports the extension of minimum standards protections to inmate workers we must determine whether the right to be covered by minimum standards legislation is a right which is "necessarily removed or restricted as a consequence of the [inmate's] sentence." Our answer to this question will depend on what we regard as a necessary consequence of incarceration.

One possible view, with which we are already familiar, is that the deprivation of liberty which accompanies incarceration necessarily removes from the offender his ability to enjoy the rights and privileges which are enjoyed by full participants in society. The offender, because he has broken society's laws, is deprived not only of his physical freedom, but also of the liberty to participate in society as a full member. This is precisely the approach to prisoner and employee status which appears to have been adopted in the United States. This approach seems incorrect since if the ability to enjoy the rights and privileges of all members of society recognized under section 4(e) of the CCRA is circumscribed by the fact that we regard incarceration as fundamentally nullifying that very ability, then it would be meaningless to
pursue to extend such rights to prisoners in the first place.

A less restrictive view which removes from prisoners only those rights and privileges which are physically impossible to exercise as those "necessarily removed or restricted as a consequence of the sentence" has more appeal. When an offender is incarcerated, there are many rights and privileges enjoyed by all members of society which it becomes impossible for him to exercise. In the employment context, for example, it is clear that offenders, because they are physically confined in a penitentiary, may not enjoy the freedom to pursue employment anywhere but in the prison environment. Other members of society enjoy the right to move to another city, province, or even country, in order to seek out employment opportunities. However, this is a freedom which the inmate worker could not possibly enjoy: his confinement necessarily restricts his right to seek employment with an employer of his choosing. Similarly, unconfined workers generally enjoy the right to take vacations from their employment, and to travel abroad if they wish to do so. Clearly, this is another right which the inmate worker cannot hope to exercise.

At the very least, section 4(e) of the CCRA, in and of itself, should go a considerable way towards removing any notion that the deprivation of liberty *qua* prisoner and the right to minimum standards protections *qua* worker are mutually exclusive. In enacting section 4(e), Parliament has indicated that inmates are to be granted the fullest possible range of rights which are not necessarily removed as a consequence of incarceration.
2. Jurisprudence Reconciling Prisoner and Employee Status

Though decision-makers in Canada have seldom been called upon to resolve the tension between the inmate worker's deprivation of liberty and right to employment-related benefits, there is one case which has addressed the issue and determined that prisoner status and employee status can co-exist. In *Guelph Beef Centre Inc.* the Ontario Labour Relations Board held that inmate workers at a provincial prison in Guelph, Ontario, were employees for the purposes of the Ontario *Labour Relations Act*, and entitled to bargain collectively with a private sector prison employer.

It is worthy to note that in determining whether the inmate workers in the *Guelph Beef* case where employees within the meaning of the Ontario *Labour Relations Act*, the Ontario Labour Relations Board adopted a "middle ground" approach to determining the prisoners' employee status. Specifically, the Board applied its usual tests for employee status to the inmate workers in *Guelph Beef* in order to determine whether they fell within the scope of the *Labour Relations Act*.

Following the lead of the Ontario Labour Relations Board in the collective bargaining context, we may also adopt this "middle ground" approach to inmate workers' employee status for minimum standards purposes by applying the usual tests for employee status under the relevant minimum standards statutes in order to determine the applicability of such statutes to prisoners working in Canadian federal penitentiaries. Of course, *Guelph Beef* represents only one case in which prisoner and employee status has been reconciled in Canada. However, if

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*Supra. note 604.*
we look to more general jurisprudence regarding rehabilitative work relationships, we find that this body of case law also tends away from a mutually exclusive approach to prisoner and employee status.

3. Reconciling the Rehabilitative Purpose of the Work and the Existence of an Employment Relationship

Though sparse consideration has been given to the issue of prisoners' employee status in Canada, a number of decision-makers have been called upon to resolve the issue as to whether work relationships which are rehabilitative in focus are categorically excluded from employment relationships. In light of the fact that we know that the prison industry in Canada is intended to serve the function of rehabilitating inmates, this jurisprudence may help us to resolve whether prison labour which is rehabilitative in focus is mutually exclusive of the existence of an employment relationship.

Some cases involving rehabilitative work relationships have concluded that such relationships were not employment relationships for the purposes of employment-related legislation. Others have reached the opposite result, holding that rehabilitative work relationships could also be employment relationships, notwithstanding their rehabilitative focus. Assessing the jurisprudence overall, it seems clear that the determining factor in deciding whether rehabilitative work relationships are employment relationships is whether the alleged employer in such cases derives some benefit from the work relationship. **"** Thus,

**"See Fenton v Forensic Psychiatric Services Commission, supra, note 487, at 12,322, where the British Columbia Court of Appeal held that psychiatric patients engaged in rehabilitative work were not employees for the purposes of provincial minimum standards legislation on the stated basis that the alleged employer's cost of operating the programme vastly exceeded**
although not all cases involving rehabilitative work relationships have been found to be
employment relationships for the purposes of employment-related statutes, it is clear that the
rehabilitative nature of work in and of itself does not preclude the existence of an employment
relationship. Drawing upon this body of jurisprudence, we may assert that the rehabilitative
nature of work performed by inmates in Canadian federal penitentiaries does not indicate that
status as a prisoner and status as an employee are mutually exclusive.

Of course, it should be noted that those cases that have determined whether
rehabilitative work relationships could also be employment relationships were not confronted
with rehabilitative work which also served a penological purpose. In the prison context,
rehabilitative prison industry programmes are not merely intended to assist those who might
benefit from work related training and experience with a view to assisting them to participate
more fully in society, though this is also undoubtedly the case. There is a broader penological
purpose which is served by rehabilitating those who have been incarcerated for crime through
work. Specifically, in the prison context, rehabilitative prison industry is hoped to assist
offenders to obtain and hold employment in the community after their release with the ultimate

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any economic benefit accruing from patients’ work: Kasauba v Salvation Army Sheltered Workshop, supra, note 477, where
the Ontario Divisional Court upheld on judicial review a referee’s decision under the Ontario Employment Standards Act that
mentally ill and chronically unemployed patients who were engaged in rehabilitative work were not employees for the
purposes of the Act since they were not being economically exploited by the alleged employer. It should be noted that
subsequent to the decision in Kasauba, the Ontario Labour Relations Board in the Hamilton-Wentworth case, supra, note 598,
supra, and accompanying text, implied that the participants in the rehabilitative programme in that case were not capable of
providing work which was of value to the employer: Lincoln Beet Centre, Inc., supra, note 604 at 188 where the Ontario
Labour Relations Board cited the substantial economic benefit accruing to a private sector prison employer as a consequence
of inmate labour in support of its conclusion that the inmates were employees for collective bargaining purposes: Elizabeth
Fry Society, supra, note 602 at 309, where the Ontario Labour Relations Board held that youth workers hired through a
programme aimed at helping hard-to-employ youth were employees within the meaning of the Labour Relations Act since the
employer gained a limited benefit from their work; and Hamilton-Wentworth, supra, note 598 at 1182, where the Ontario
Labour Relations Board held that welfare recipients who were engaged in a rehabilitative training programme were employees
for collective bargaining purposes in part on the basis that the workers were providing services of some value to the employer.
objective that the offenders will not re-offend. Thus it benefits not only the inmates but society as a whole. We rehabilitate such individuals to help them to help themselves, but the ultimate objective behind prison industry is to enable offenders to succeed through honest work in the community subsequent to their release in order to ensure that they do not recidivate and return to a life of crime. The question becomes whether the penological purpose underlying rehabilitative work in the prison context warrants that we should approach the employee status of inmate workers differently from participants in rehabilitative training programmes outside the prison context.

4. Whether Retributivist Principles of Punishment Justify the Mutually Exclusive Approach to Inmates' Employee Status

One of the most prevalent arguments advanced against the granting of employment status to inmate workers is that prisoners are in prison to be punished, and that their disentitlement to rights held by other free members of society is justified as part of their punishment. In the prison labour context, this view has seen the reintroduction of chain gangs in the United States and the requirement that prisoners do "hard labour" during their sentences as an additional form of punishment. The view that prison inmates are relegated to an inferior class of persons to whom normal employment protections do not apply has perhaps been most fervently stated by Judge Trotter in the Ninth Circuit's decision in Gilbreath v. Cutter Biological, Inc.: [footnote]

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Appellees argue that ... the FLSA does not apply to prison inmates as a class. I believe this argument has merit. A review of the FLSA in the light of its evident purpose and legislative history, conducted with an eye guided by common sense and common intelligence, leads me to the inescapable conclusion that it is highly implausible that Congress intended the FLSA's minimum wage protection be extended to felons serving time in prison. This is a category of persons - convicted murderers, rapists, burglars, armed robbers, swindlers, thieves, and the like - whose civil rights are subject to suspension and whose work in prison could be accurately characterized in an economic sense as involuntary servitude, peonage, or indeed slavery. At first blush, it appears that Judge Trotter's view is consistent with a retributivist theory of punishment, which seeks to inflict on wrongdoers punishment which is commensurate with their crimes, not because of any benefit to either the wrongdoer or society which may flow from such punishment, but simply because such punishment is deserved as a result of the offender's wrongful act. But do retributivist theories of punishment in fact justify the categorical denial of employment rights to inmate workers in the Canadian context? Inmate labourers in CORCAN's prison industry programmes do not enjoy the benefit of legislated labour and employment protections in respect of their work. Many would argue that a retributive conception of punishment which seeks to mete out to offenders their "just deserts" supports this denial of employment rights as a punitive measure during prisoners' period of incarceration. However, while the denial of employment rights to inmate workers in Canada may conceivably be justified on utilitarian grounds, when we consider the nature of the sentencing process in Canada, and the fact that prisoner participation in prison work programmes is not

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"Supra" note 200 at 1324-1325.
universal, it emerges that the denial of employment rights to inmate workers in Canada cannot be justified on retributivist grounds. Indeed, the denial of such rights actually results in overpunishing inmate workers, and thereby violates retributivism's mandate that we punish offenders in accordance with their "just deserts" and no further.

a) The Principles of Retributivism

The retributive principle of punishment, one of "the most widely prevalent and continuously persistent correctional motives," feature in nearly every criminal justice system. At its most basic, the retributivist theory of punishment maintains that those who breach society's rules should be punished in accordance with their "just deserts". While the theory of retributive punishment traces its immediate origins to the eighteenth century German Philosopher, Immanuel Kant, more recently, the concept of retributive punishment has been succinctly stated by John Rawls:

What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.\textsuperscript{42}


\textsuperscript{41} While Kant is generally regarded as the author of retributivism, it is worthy of note that retributivist elements can be observed in the lex talionis of early Roman law (Nigel Walker, supra note 367 at 7 e; as well as in the "eye for an eye" precept in the Old Testament and the Koran. (Richard A Posner, "Retribution and Related Concepts of Punishment (1980) 9 Journal of Legal Studies 71 at 71.)

\textsuperscript{42} John Rawls, "Two Concepts of Rules" (1955) 1 Philosophical Review 3 at 4-5.
Thus, on the retributive conception of justice, punishment is justified because wrongdoing in and of itself warrants punishment, and punishment must be commensurate with the gravity of the wrongdoing it seeks to address. The wrongdoer deserves to be punished, not because of any benefit which may accrue from punishing him, but rather because his wrongful conduct itself cries out for condemnation. Rawls' comment that punishing a wrongdoer precisely because of and in proportion to his wrongdoing is morally better "irrespective of any of the consequences of punishing him" is illustrative of the extent to which retributivism is largely a challenge to utilitarian theories of punishment. Utilitarian concepts of punishment are primarily concerned with punishment's consequences. Unlike retributivism which punishes wrongful conduct for its own sake, and without any regard whatsoever to any burden or benefit which may flow consequentially from the imposition of punishment, the justification and use of punishment under utilitarianism is to be determined in accordance with its utility as a means of achieving a desirable social objective. "Utilitarianism, in its simplest formulation, claims that the morally right act or policy is that which produces the greatest happiness for the members of society." On utilitarian theory, punishment is an evil: it causes pain to those on whom it is inflicted. If punishment were not to result in greater aggregate happiness for the community, it would therefore not be justifiable on utilitarian grounds insofar as it would hinder the goal of maximizing happiness. In other words, utilitarian punishment can only be justified to the extent that its beneficial effects, arising from its deterrent, rehabilitative or

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" W. Kymlicka, Contemporary Political Philosophy (New York: Oxford University Press, 1990) at 9."
incapacitative value, outweigh the human and financial cost of inflicting it on wrongdoers.\textsuperscript{65}

The eighteenth century German philosopher, Immanuel Kant, challenged the utilitarian theory of punishment, and asserted that punishment could only be justified on the basis of desert. According to Kant’s theory of justice, human beings, capable of making rational choices and therefore autonomous, are of value in and of themselves.\textsuperscript{64} Because of their intrinsic value, human beings should be treated always as ends in themselves, and not merely as a means to an end.\textsuperscript{66} Thus, Kant eschews the notion of inflicting punishment for its social utility and develops a justice-based theory of punishment which inflicts punishment in accordance only with desert. This oft-quoted passage from Kant’s Rechtslehre expresses his view on the immorality of utilitarian’s treatment of human beings as means to an end:

Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of real right. Against such treatment his inborn personality has a right to protect him, even although he may be condemned to lose his civil personality. He must first be found guilty and punishable before there can be any thought of drawing from his punishment any benefit for himself or his fellow citizens. The penal law is a categorical imperative: and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the Pharisaic maxim: "It is better that one man should die than the whole people should perish." For it justice and

\textsuperscript{65} von Hirsch, supra, note 655 at 57.


\textsuperscript{67} In the Second Categorical Imperative, Kant expressed the principle thus: Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end." Immanuel Kant, \textit{Groundwork of the Metaphysics of Morals} (originally published in 1787, translated by HJ Paton (New York: Harper Torchbooks, 1964) at 96, as cited in von Hirsch, supra, note 655 at 59.
righteousness perish, human life would no longer have any value in the world.\textsuperscript{600}

The principle of desert in Kantian theory also determines the "mode and manner" of the wrongdoer's punishment. If wrongdoers are to be punished only in accordance with their "just deserts", then it follows that they can be punished no more and no less than they deserve.

But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself. Hence it may be said: "If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself". This is the Right of RETALIATION (justification) and properly understood, it is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain, and on account of other considerations involved in them, they contain no principle conformable to the sentence of pure and strict justice.\textsuperscript{601}

The principle of equality, then, is key to Kant's retributive theory of punishment, stating that the wrongdoer should receive punishment which is equal in manner and degree to the crime for which he is punished. This accords with Kant's view of human beings as autonomous and capable of rational choice. Human beings are moral agents who rationally choose to commit crime. That free and rational decision to commit a crime is the Kantian prerequisite for the justification of punishment. However, just as the \textit{fact} of punishment is justified by reference to the wrongdoer's rational choice - it is the offender's rational choice to


\textsuperscript{601} Ibid at 3.
commit crime which "draws punishment upon himself" - so too does the rational choice of the
offender to commit crime govern the extent of his punishment. In this way, the punishment
which the offender "draws ... upon himself" must reflect not only the fact of the wrongdoer's
choice but also the extent to which he has chosen to disregard society's rules. To inflict a
punishment which did not reflect the extent of the wrongdoer's choice would deny the
wrongdoer's inherent equality as a rational actor, insofar as it would have the effect of
imposing punishment on the offender which he had himself not initiated by his rational choice
to commit crime.

Kant's retributivist theory not only calls for the principle of equality to be applied in
matching punishment to the crime: it also maintains that offenders be treated equally as
amongst each other. Kant's theory that in order to be just, punishment must be imposed
equally on offenders who have committed the same crime grows out of his theory that all
human beings have equal moral worth and should therefore be treated equally. In the sense
that, on Kant's view, all human beings are ends in themselves, all human beings are equal in
value.\footnote{2} Thus, we are obliged to respect all of our fellow human beings equally in recognition
of their intrinsic equality as autonomous, rational beings.\footnote{3}

Just as all human beings are equal in value, wrongdoers who choose to break society's

\footnote{2} Campton, supra, note 658 at 1667.

\footnote{3} While Kant's "end-in-himself" conception of value is the concept of moral worth with which we are here concerned, it is worthy of note that Kant did have an additional view of moral worth which granted that some of us are better from a moral point of view than others. However, insofar as all human beings have equal moral worth by virtue of our status as rational autonomous beings, differences in this latter type of moral worth do not mean that our moral obligations to people increase with their moral virtue. We are rather obliged to respect our fellow human beings equally no matter what the state of their moral character. Ibid. at 1667-1668.
laws are equal in intrinsic value not only to each other but also to every one else in society.

This equality demands that we impose punishment on wrongdoers, since to do otherwise would deny their equal character to us as moral citizens.\(^{\text{64}}\) To refuse to denounce the wrongdoer's crime would thus be tantamount to treating him like a "beast in a circus."\(^{\text{65}}\)

Since Kantian justice requires that we punish all offenders in a manner which thus equals their crime, and since all offenders are equal to each other, then it follows that offenders who have committed the same crime, in similar circumstances,\(^{\text{66}}\) should also receive punishments which are equal to each other.

[The retributive theory of punishment] is a particular application of a general principle of justice, namely, that equals should be treated equally and unequals unequally. This is a principle which has won very general acceptance as a self-evident principle of justice... It is a principle which has wide application and which underlies our judgement of justice in the various areas...\(^{\text{67}}\)

Thus, the principle of equality has two faces. Firstly, it requires that punishment be equal to the crime it seeks to address. Secondly, it requires that equal offenders be dealt with equally. As we shall see below, these two faces of the principle of equality are relevant to our consideration as to whether prison inmates engaged in Canadian prison industry may be denied employment rights in respect of such work in a manner consistent with a retributive theory of

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\(^{\text{64}}\) von Hirsch, supra, note 655 at 67.

\(^{\text{65}}\) Ibid

\(^{\text{66}}\) Although Kant seemed to call for a talionic response to crime, one which exactly matched the wrongdoer's misconduct by revisiting his own misconduct upon him, modern retributivist theory has tended to take into greater account the fact that "just deserts" must also be gauged in reference to the circumstances of a crime. Moreover, this is consistent with the retributive premise of human beings' intrinsic equality as rational actors, since circumstances may presumably be such that the decision to commit a crime in one circumstance may be more or less rational than the decision of another wrongdoer to commit the same crime in another circumstance.

justice.

While Kant's retributive theory of justice may be sound in principle, it is less so in practice, at least in its original formulation. In his *Rechtslehre*, Kant advocated a talionic concept of punishments which matched "in mode and measure" the crimes of the wrongdoer. Thus Kant maintained: "If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you kill another, you kill yourself." While this approach undoubtedly answers Kant's requirement that an offender's punishment equal his crime, it is impossible to put into practice. To establish a criminal justice system, for example, which set about slandering slanderers and stealing from thieves would be unworkable and quite often unenforceable where, for example, the offender did not have a valuable reputation which could be damaged by slander and nothing to steal. As Hegel has stated, "Theft for theft, robbery for robbery, an eye for an eye, a tooth for a tooth - and then you can go on to suppose that the criminal has only one eye or no teeth."\(^{608}\)

Thus, Hegel's theory of retributivism focuses on punishment's ability to impose on offenders a burden which offsets the unfair advantage or benefit which they have gained by breaking society's rules.

The account focuses on the law as a jointly beneficial enterprise: it requires each person to desist from predatory conduct: by desisting, the person not only benefits others but is benefited by their reciprocal self-restraint. The person who victimizes others - while still benefiting from their self-restraint - thus obtains an unjust advantage. Punishment's function is to impose an offsetting disadvantage.\(^{609}\)


\(^{609}\) von Hirsch, supra, note 655 at 65.
Hegel rejected the talionic approach to punishment which had been embraced by Kant, recognizing the impracticality of such an approach. Rather, Hegel formulated a theory of punishment which rejected strict equality in favour of proportional punishments which reflected the seriousness of the crime in the severity of the penalty. In this way, modern retributivism as influenced by Hegel makes:

A rough attempt to equate the size of the fine or the length of imprisonment to the gravity of the particular category of offence as contrasted with offences of other categories (theft contrasted with murder, for example) and the gravity of the circumstance in which the offence was committed as contrasted with those in which other offences of the same category are committed.  

Though much of Kant's theory of retributivism undoubtedly informs the criminal justice system in Canada, the manner and mode of punishing offenders in accordance with their just deserts is more akin to the Hegelian conception of proportional punishment. Thus, retributive punishment in the Canadian justice system does not focus on crude conceptions of equality, but rather attempts to reflect crime's moral significance to the community.

b) Retributivism and the Canadian Justice System

Even a cursory examination of Canada's Criminal Code expunges any doubt that retributivism continues to be a key feature of the Canadian justice system. This is borne out by section 718.1 of the Criminal Code which states:

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679 Rupert Cross, as cited in Nigel Walker, supra, note 367 at 101.
672 RSC 1985 c. C-46, as amended.
A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

The above provision harks back to Kant's theory that punishment should equal the crime of the wrongdoer, the "gravity of his offence." Moreover, the notion of imposing a sentence which is commensurate with the "degree of responsibility of the offender" is consistent with Kant's view that the imposition of punishment is justified by virtue of the offender's status as a moral agent, capable of making rational choices, and therefore deserving of punishment for his decision to hinder another's freedom by committing a crime. Thus, section 718 of the Code expressly incorporates retributive principles into the sentencing process.

The fact that the sentencing provisions of the Criminal Code also refer to the need for sentences to "denounce" offenders' misconduct is also consistent with a retributiv list notion of punishment. Section 718(a) of the Code states that one of the objectives to be considered in sentencing is the denunciation of offenders' unlawful conduct.

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

a) to denounce unlawful conduct:

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71 For a detailed discussion of the Kantian view on how the offender's hindrance of another's freedom justifies punishment, see Pincofs, supra, note 367 at 9.

72 Here, however, I do not mean to suggest that utilitarian principles do not also come into play. In this regard, it is worthy of note that section 718 of the Code also refers to the fact that sentences should take into consideration the utilitarian aims of deterrence, rehabilitation and incapacitation.

73 For Canadian cases which have stated that the goal of denouncing the offender's conduct and expressing society's abhorrence for the offence is a modern-day expression of retributive principles of justice, see R v Atkinson  (1979) 43 CCC (2d) 342 (Ont); and R v Quin and Setali  (1984) 14 CCC (3d) 572 (BCCA).
The Code's direction that denunciation of criminal conduct be taken into account in sentencing reflects retributivism's demand that punishment censure wrongs and express the community's disapprobation of the offence. In "expressive" retributivism, a sanction treats conduct as wrong - that is, it does not merely impose a burden on the offender, but also condemns his conduct - for two important moral reasons. Firstly, denunciation of crime is said to express to the victims of crime that they have been wronged by criminal conduct, and that the offender deserves punishment for infringing their rights. This censuring value of punishment in Canada is quite apart from denunciation's capacity for crime prevention. Certainly, it is conceivable that denunciation of criminal conduct could have the consequence of deterring others from committing crime, and would therefore also serve a utilitarian purpose. However, in light of the fact that section 718 of the Criminal Code goes on to direct judges to take the objective of deterrence into account when sentencing, it seems likely that the denunciation provision contained in section 718(a) is intended to serve a purpose which goes beyond the utilitarian aim of deterrence.

This notion of denunciation as a punitive element is also related to the retributivist view of the offender as a moral agent who has rationally chosen to commit crime. As an intrinsically equal citizen, the wrongdoer has a right to be treated in accordance with his status as a moral agent and to have society's outrage at his conduct expressed to him in recognition of

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*Footnotes:

66 The difference between merely imposing a burden and imposing a burden which also condemns the conduct in respect of which the burden is imposed has been illustrated by the difference between a tax and a fine. "The difference between a tax and a fine, for example, does not rest in the kind of material deprivation imposed: it is money, in both cases. It consists, rather, in the fact that with a fine, the money is taken in a manner that conveys disapproval or censure; whereas with a tax, no disapproval is implied." Von Hirsch, supra, note 655 at 67.

67 ibid
that status. Nor does denunciation here merely satisfy the utilitarian goal of attempting to change the offender's behaviour.

While it is hoped that the actor will reconsider his actions and desist from wrongdoing in the future, the censure is not merely a means of changing his behaviour - otherwise, there would be no point in censuring actors who are repentant already (since they need no blame to make the effort to desist) or who are seemingly incorrigible (since they will not change despite the censure). Any human actor, the [expressive] theory suggests, is a moral agent, capable ... of evaluating others' assessment of their conduct. The repentant actor has his own assessment of the conduct confirmed through the disapproval of others; the defiant actor is made to understand and feel others' disapproval, even if he refuses to desist. Such communication of judgement and feeling ... is what moral discourse among rational agents is about. What a purely "neutral" sanction not embodying blame would deny - even if no less effective in preventing crime - is precisely that essential status of the person as a moral agent.  

Thus, the Criminal Code's express statement that denunciation should be taken into account in sentencing is further evidence that the retributivist theory of punishment informs the Canadian criminal justice system.

An analysis of the relatively recent prisoners' voting rights cases also serves to expunge any doubt that retributive principles are fundamental to the Canadian justice system.

Constitutional challenges brought by prisoners in the 1990's against the Canada Elections Act's  
enfranchisement of prisoners saw the government attempting to deny its exclusion of prisoners from those eligible to vote in Canadian elections on retributive grounds.  

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678 Ibid.


680 In particular, see Belezowski v The Queen, (1992) 90 DLR (4th) 530; Saucy v Attorney-General of Canada (1992) 89 DLR (4th) 644; and Saucy v Chief Electoral Officer of Canada (1995) 132 DLR (4th) 136. In all of the above cases, the court held that the disenfranchisement of prisoners violated the right to vote provision contained in section 3 of the Canadian Charter of Rights and Freedoms, and was not a reasonable limit on the exercise of the right to vote in a free and democratic
analysing these cases, Knopff and Morton have stated that the attempt to exclude prisoners from the voting process evinced the extent to which punishment in Canada extends beyond deterrence and rehabilitation to encompass the traditional function of retribution.

If we punished mainly to deter, we would not bother punishing those who commit serious crimes of passion, such as many murderers, who are notoriously difficult to deter. Similarly, we neither release serious criminals earlier than they would otherwise be eligible for parole because they have been quickly rehabilitated, nor keep petty criminals in prison beyond the sentence imposed on them because they appear not to have mended their ways. These qualifications on the principles of deterrence and rehabilitation stem from the retributive conviction that offenders should "pay" (and be "paid back") for their antisocial actions in approximate proportion to the seriousness of the offence. We have allowed considerations of deterrence or rehabilitation to mitigate this retributive principle, but not completely to overwhelm it. From the retributive perspective, disenfranchisement may be an ingredient in the overall loss of desirable things with which offenders "pay their debt" to society.\footnote{Rainer Knopff and FL Morton, Charter Politics (Scarborough: Nelson Canada, 1992) at 301.}

In light of all of the above, it seems clear then that retributivism is a significant consideration which is taken into account in sentencing offenders in Canada. Having established this fact, we now turn to the question with respect to whether the denial of employment rights to prisoners working for CORCAN or CORCAN-authorized prison industry programmes can be justified on the retributivist basis that such denial is "an ingredient in the overall loss of desirable things with which offenders "pay their debt" to society."
c) Whether Canadian Inmates may be Denied Employment Rights on Retributivist Grounds

When we consider the retributivist principle of equality in the context of the sentencing process in Canada, we see that the punitive denial of employment rights to prisoners working for CORCAN cannot be justified on retributivist grounds. As established above, retributivist principles of punishment are meant to be reflected in sentences in the Canadian justice system. Accordingly, provided that sentencing judges are paying proper heed to the requirement that criminal sentences achieve retributive aims, we may readily assume that offenders will receive sentences which reflect their "just deserts". The question then becomes: what do such sentences consist of?

At the time of sentencing an offender to a prison term, a judge cannot know whether the offender before her will be directed into one of CORCAN's prison industry programmes or not. Whether or not a particular offender will participate in a prison industry programme or in some other type of correctional programme is a matter left to the discretion of the Correctional Service of Canada by virtue of provisions of the Corrections and Conditional Release Act.\(^{82}\) As previously stated, approximately twenty percent of federally sentenced offenders participate in CORCAN programs.\(^{83}\) The majority of inmates participate in a variety of other

\(^{82}\) Supra, note 28. In this regard, we recall that section 75 of the Act provides that the Correctional Service of Canada "shall provide a range of programs designed to address the needs of offenders and contribute to their successful reintegration into the community."

\(^{83}\) CORCAN Annual Report 1995 1996, supra, note 7 at 4
programmes, such as cognitive skills training, parenting skills training, alcohol and drug dependency counselling, and secondary education programs.  

Since judges at the time of sentencing cannot know whether particular offenders will participate in CORCAN's prison industry programmes, then they cannot intend the denial of employment rights in respect of prison industry programmes as a punitive measure to partially satisfy the retributivist requirement that offenders receive their "just deserts". Having said that, the requirement nonetheless remains that sentencing judges hand down punishments which will reflect the retributivist objective mandated by the Criminal Code. By definition, the retributivist sentence must mete out a punishment equal to the offender's crime. Thus, since punishment in the incarceration context is expressed only as a period of time during which an offender will be deprived of his liberty, we are drawn inexorably to the conclusion that the deprivation of liberty inherent in a prison sentence is a punishment equal to the offender's crime and that he therefore deserves no more or less punishment in a retributive sense.

Accordingly, we may readily answer the question posed above with respect to what retributivist sentences consist of by asserting that the offender's "just deserts" are comprised of the deprivation of his liberty during incarceration and that deprivation of liberty alone. Drawing further upon retributivism's principle of equality, we may also state that an offender's completion of his prison sentence will fully expunge his debt to society, and that any additional punishments which are imposed on the prisoner above and beyond the deprivation of his liberty during the incarceration period would have the effect of giving him more than his "just

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*84 Supra. notes 97 to 98, and accompanying text.*
deserts" and overpunishing him. The John Howard Society has similarly expressed the view that the denial of prisoners’ rights during incarceration is overly punitive insofar as punishment should only consist of the deprivation of liberty which necessarily attaches to incarceration:

[Persons who commit serious crimes are put in prison as punishment. When we imprison for this reason, punishment consists of depriving offenders of their individual liberty, their freedom as individuals to come and go as they wish. It also consists of depriving them of the freedom to choose where they will live and who will be their associates. It is worth emphasizing that this is a severe form of punishment... [There is a need for] the community generally and the correctional authorities in particular to accept that people are sent to prison as punishment and not for punishment. [Emphasis in original.]

What application do the above principles have in the context of prisoners’ employment rights? Simply put, where an offender’s "just deserts" are comprised wholly of the deprivation of his liberty during the period of his incarceration, any attempt to deny him employment rights as an additional punitive measure which the offender is said to "deserve" must fail on the retributivist theory of punishment. However else one might attempt to justify the denial of prisoners’ employment rights on utilitarian grounds, one thing is certain: where the period of an offender’s incarceration is designed so as to impose a punishment on him equal to his crime, the punitive denial of employment rights will result in imposing on the prisoner punishment in excess of his "just deserts." and the retributivist principle of equality will have been transgressed.

The strength of the above argument that the retributivist aspect of punishment is reflected in the length of the prison sentence alone depends in large part upon the premise that

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judges are unable to take into account any other type of punishment which may befall offenders during incarceration at the time of sentencing. One conceivable rebuttal to this argument could be that all correctional programmes are punitive in nature and that therefore sentencing judges may properly take the punitive aspects of such programmes into account when sentencing offenders in proportion to their crimes. If it were true that all correctional programmes had universally equal punitive features, and if sentencing judges were aware of that fact, then the retributivist principle of equality would not necessarily be violated by judges taking such punitive features into account when handing down retributive sentences.

In the context of the prisoners' voting rights cases, for example, we observed the blanket disenfranchisement of all federally sentenced prisoners.\textsuperscript{\textsterisk} Given the universality of disenfranchisement under the \textit{Canada Elections Act}, and absent any constitutional considerations, a plausible argument could have been made that depriving prisoners of the right to participate in the electoral process was an ingredient of their punishment which had been taken into account at the time of sentencing. Thus the suspension of prisoners' voting rights could conceivably form part of offenders' "just deserts".

Such arguments do not carry over into the prisoners' employment rights context, however. As noted above, only twenty percent or so of federally sentenced inmates enter into CORCAN's prison industry programmes, and the majority of prisoners are diverted into other CSC programmes, such as educational training, alcohol and drug dependency therapy, as well as parenting skills and cognitive skills training. There is no indication that any of these latter

\textsuperscript{\textsterisk} See note 680, supra, and cases cited therein.
programmes are intended to be punitive, or that they are punitive in fact. Certainly there is insufficient evidence of such to warrant the taking of judicial notice of the fact that all correctional programmes in Canada have punitive features. Accordingly, any argument that the denial of inmate workers’ employment rights in respect of prison industry programmes may be justified on the basis that all correctional programmes are universally punitive and therefore taken into account by sentencing judges as an ingredient of inmates’ “just deserts” is unlikely to hold sway.

The fact that denying CORCAN participants employment rights is inconsistent with the a retributivist conception of justice is also clear when we consider the principle of equality’s requirement that similar offenders who have committed crimes which are deserving of equal punishment should be dealt with equally as amongst each other. Where similar offenders are convicted of equal crimes, the principle of equality indicates that they should receive equal punishments. However, a problem arises if certain offenders are additionally punished by being deprived of employment rights in prison industry programmes. Assume that there are two offenders who are deserving of equal punishment. Where one offender is diverted into a secondary education programme, for example, and the other is placed in one of CORCAN’s prison industry programmes, it is clear that the punitive denial of employment rights to the latter will have the effect of overpunishing him vis-a-vis the first. The principle of equality is violated by such a denial of employment rights to inmate workers insofar as the additional punishment thus imposed on them has the potential to result in equal offenders being treated unequally.

Nor is the overpunishment which could be imposed on inmate workers by denying
them employment rights merely notional. Denying inmate workers the protection of Workers' Compensation legislation, for example - which has as its purpose the compensation of workers outside prisons in respect of work-related injuries - illustrates the extent to which the denial of employment rights may gravely overpunish prison industry participants. Imagine, for example, a scenario in which a prison worker is sentenced to two years' imprisonment during which time he works in CORCAN's manufacturing business line. If the inmate workers were to lose a limb in the course of his employment with CORCAN, he would not be entitled to claim benefits under Workers' Compensation legislation in respect of his future economic loss or his pain and suffering. Moreover, once released into the community, the prison worker would continue to suffer punishment as a result of his uncompensated injury in the form of likely decreased employment opportunities and earning capacity. Where having his liberty deprived him for a period of two years would have fully satisfied the retributivist requirement that the inmate worker receive his "just deserts", it becomes readily apparent that the now injured ex-offender would be severely overpunished in terms of a retributivist theory of punishment, and that the retributivist principle of equality would have been utterly desecrated.

While many might attempt to assert that the denial of employment rights to inmate workers is simply a matter of giving them their "just deserts," I have attempted to show that the principles of retributivism do not support such a measure in the Canadian context. The denial of employment rights as a punitive measure would violate the retributivist principle of equality by overpunishing those who participate in prison industry programmes. This will continue to

[Note: It should be noted that sections 121 to 144 of the Corrections and Conditional Release Act, supra, note 28, do make provision for compensating prisoners injured in prison work programmes. However, since prison workers are not actually entitled to such compensation, but may rather be given it at the discretion of the CSC, this benefit is of dubious value.]

be the case as long as inmate participation in prison industry is not universal, and as long as sentencing judges cannot take the denial of employment rights into account when fashioning a sentence which metes out an offender's "just deserts". Accordingly, it is clear that, properly conceived, retributivist principles do not support a mutually exclusive approach to prisoner and employee status.

5. Minimum Standards Jurisprudence with respect to Employee Status

When we consider the question as to how to reconcile the inmate worker's deprivation of liberty *qua* prisoner with his entitlement to minimum standards protection *qua* worker in light of the general jurisprudence regarding who is an employee for minimum standards purposes, it appears that a mutually exclusive approach to prisoner and employee status is not to be preferred. In both the federal and the Ontario jurisdictions, statutory purposes tests for employee status govern whether minimum standards legislation will apply to a particular individual as an employee. Though other features of traditional common law tests for employee status also come into play in determining whether an individual is an employee, it seems by now well-established that the key factor in determining whether an individual is an employee for minimum standards purposes is whether a particular work relationship gives rise to the type of mischief which minimum standards legislation seeks to remedy. If the work relationship does give rise to such mischief, then minimum standards legislation will apply. If it does not, such as where an individual is actually an independent contractor in business for herself, then minimum standards legislation will not govern the work relationship.
The issue as to whether the mischief which minimum standards legislation at the federal and Ontario levels seek to address exists in the prison work relationship will be discussed in greater detail below. For our purposes, here, it is important to decipher whether a mutually exclusive approach to prisoner and employee status is consistent with the general employment jurisprudence regarding employee status for minimum standards purposes. It seems clear that a statutory purposes approach to employee status does not lend itself to the type of categorical exemption of inmate workers which is embraced by the mutually exclusive approach to prisoner and employee status. It is antithetical to statutory purposes tests for employment status to draw rigid lines around certain classes of persons who are to be excluded from employee status. They were formulated specifically to counteract such rigid tests in the common law which were geared primarily towards differentiating between different classes of workers, namely employees and independent contractors. Rather than making employee status dependent on one's membership in a particular class, statutory purposes tests focus on the underlying objective of the employment-related statutes out of which they arise, and allow these objectives to govern whether status as an employee should be recognized in a particular case.

Accordingly, a mutually exclusive approach to prisoner and employee status would seem to be at odds with the existing tests for employee status under minimum standards legislation, which are concerned less with excluding categories of individuals from the scope of minimum standards protection, and more interested in determining whether the mischief which such statutes seek to remedy arises as a concern in a particular work relationship. In the prison industry context, an approach which would be more consistent with statutory purposes
tests for employee status would be to ask whether the prison work relationship gives rise to the concerns which minimum standards legislation is designed to address. If it does, then, in accordance with the general jurisprudence, minimum standards legislation would apply. If it does not, then such statutes would likely not apply to inmate workers participating in prison industry programmes in Canadian federal penitentiaries. Even if one accepts that inmate workers meet the tests for employee status under minimum standards legislation, there may still be economic considerations which weigh against the application of this legislation. Certain such considerations are considered in the next section.

6. Economic Considerations

An argument may be advanced that inmate workers may not be regarded at one and the same time as prisoners and employees for the purposes of minimum standards legislation because it is economically unfeasible for status as a prisoner and status as an employee, with the full panoply of rights which accompanies such status, to co-exist. It might be argued that it would be far too costly to extend minimum standards protections to inmate workers. Such a move, at the very least, would entail paying inmates the minimum wage, which might escalate the cost of running prison industry programmes. Thus, the increased costs associated with extending minimum wage protections to inmate workers could make it impossible to continue to offer prison industry programmes in federal penitentiaries. In light of the fact that federally sentenced inmates represent a group of individuals who are in dire need of employment-related experience and training if they are to be successfully re-integrated into the community
subsequent to their release from prison. Discontinuing prison industry programmes could have a severe negative impact on the very group of individuals we are attempting to assist, and indeed on the community at large. If inmates emerging from the prison environment are not equipped with the skills they require in order to successfully obtain and secure post-release employment, then they are more likely to return to lives of crime in order to support themselves. Thus, society is also potentially at jeopardy if the costs associated with extending minimum standards protection to inmate workers results in the discontinuation of prison industry programmes altogether.

While there is certainly cause for concern that economic considerations might require us to adopt a mutually exclusive approach to prisoner and employee status, there is simply insufficient evidence to conclude at this point that the costs associated with extending minimum standards to inmate workers would make it impossible to continue to run prison industry programmes in Canadian federal penitentiaries. While it is true that extending minimum standards to inmate workers would undoubtedly result in escalating the costs of prison industry programmes, it is also true that extending minimum standards to prisoners could increase the economic benefits which flow from such programmes. Paying inmate workers the minimum wage, for example, could act as a huge incentive for inmates to be more productive. Currently, prison industry positions are available for approximately 12 percent of the federal inmate population on a full-time basis over the course of a year.\footnote{See note 8, \textit{supra}, and accompanying text.} The fact that participation in prison industry programmes is not universal in the penitentiary setting makes it likely that if inmate workers were compensated at the minimum wage for their work, they
would have an increased incentive to be productive in order to maintain their positions. Similarly, paying prisoners the minimum wage could also act as an incentive for CORCAN on-site supervisors to manage the prison work site in such a way to maximize inmate productivity.

In addition, it is open for the Correctional Service of Canada, pursuant to section 78(2) of the *Corrections and Conditional Release Act*, to recoup up to thirty percent of that portion of inmates' earnings exceeding sixty nine dollars per two-week period as compensation for inmates' room and board. This could also be used as a mechanism by which to lessen the impact which extending minimum standards protections, and in particular, the minimum wage, to inmates would have on the viability of prison industry programmes. In light of the fact that there is insufficient evidence to conclude at this point that the costs of extending minimum standards protections to inmates would necessarily result in making prison industry programmes too expensive to offer, it seems that economic considerations alone are insufficient to lead us to adopt a mutually exclusive approach to reconciling the inmate worker's deprivation of liberty *qua* prisoner and entitlement to minimum standards protection *qua* worker.

7. Conclusion

From the above, it is clear that there are a number of jurisprudential signals and one important statutory indicator in Canada which point to the fact that the mutually exclusive

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*See note 164, supra, and accompanying text.*
approach to prisoner and employee status is not the one to be adopted in Canada. The adoption of such an approach would run counter to Parliament's intention that prisoners are to be regarded as the fullest possible possessors of the rights and privileges enjoyed by all members of society. Further, it does not accord with Canadian jurisprudence which has attempted to reconcile rehabilitative relationships which are often primarily for the benefit of those being rehabilitated, and employment relationships. Finally, it would run afoul of the very underpinnings of minimum standards jurisprudence which has held that categorical exclusions of classes of individuals are to be rejected in favour of a purposive approach which calls for the application of minimum standards legislation where the mischief which such statutes seek to remedy is evident. I have also attempted to demonstrate that while the denial of employee status may possibly be justified on utilitarian considerations, it is inconsistent with retributivism's core principle of equality in the Canadian justice system as it is currently structured.

There is an additional problem with the mutually exclusive approach to prisoner and employee status. Insofar as it makes no attempt to balance the competing objectives of imprisonment and those underlying minimum standards legislation, the mutually exclusive approach to prisoner and employee status threatens to lay to waste social policy objectives animating minimum standards legislation. Essentially, the fundamental objectives of minimum standards legislation are the elimination of unfair competition and the prevention of exploitation of workers by guaranteeing them a minimum standard of living. It may be argued that the mutually exclusive approach to prisoners' employee status legitimately disregards the prevention of exploitation objective for its own internally consistent reasons. After all, on the
mutually exclusive approach, prisoners are not regarded as full participants in Canadian society. They have been reduced in status relative to free members of society. On this view, prisoners may not be exploited, since by their very nature, they do not possess the autonomy and personality which makes such exploitation possible. However, and as shall be borne out below, the mutually exclusive view also threatens minimum standards' fundamental objective of preventing unfair competition among employers and workers. In focusing only on the deprivation of a prisoner's liberty as determinative of his right to minimum standards protection, the mutually exclusive approach allows no room for competing social policy concerns to enter the equation. Accordingly, it utterly ignores the impact that categorically denying prisoners' employee status may have on other members of society who have not been incarcerated, and who should not be punished as a consequence of the wholesale denial of prisoners' employee status. The manner in which the mutually exclusive approach potentially devastates the social policy objectives underlying minimum standards is an additional reason to reject it in favour of an approach that attempts to reconcile these objectives with the underlying objectives of prison industry.

C. Reconciling the Objectives of Minimum Standards Legislation and the Objectives of Prison Industry

Having established that the mutually exclusive approach to reconciling prisoner status and employee status is not the approach to be adopted in Canada, we must determine how to resolve the fundamental tension which exists between the deprivation of prisoners' liberty on
the one hand with workers' entitlement to minimum standards protection on the other. In enacting the *Corrections and Conditional Release Act*, Parliament has made clear the fact that the primary objective of prison industry programmes is the rehabilitation of inmates through work on a financially sustainable basis. We also know that the underlying aims of minimum standards legislation are the prevention of exploitation of workers by ensuring that they enjoy a basic standard of living, and the elimination of unfair competition in the marketplace. If we are able to identify an approach which will allow both of these sets of objectives to be attained, then it would clearly be superior to the mutually exclusive approach which emphasizes the punitive features of the incarceration project, and utterly disregards the competing social policy objectives which animate minimum standards legislation.

It is interesting to note that the federal government has already adopted a scheme which purports to reconcile minimum standards legislation's objective in preventing unfair competition with the objectives of prison industry programmes. Where inmate workers are paid less than the minimum wage, there is a concern that CORCAN's or the private sector prison employer's access to a cheap inmate workforce will enable it to produce its products for much less than the private sector, and to thereby sell its products at significantly lower prices than the private sector. In this way, there is a concern that the prison industry employer's participation in the marketplace could detrimentally impact on private sector enterprises by undercutting their prices and potentially pushing them out of the marketplace. This potential impact on private sector businesses could also detrimentally affect unconfined workers in the labour market. Where the private sector business is pushed out of the marketplace as a result.

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[49] With respect to these objectives, see the relevant portions of Chapter II above.
of having to compete with prison industry, the workers employed by the business find themselves unemployed. In this way, the prison employer's ability to employ inmate workers at less than the minimum wage potentially creates unfair competition in both product and labour markets.

The Correctional Service of Canada attempts to address the unfair competition concern which arises as a result of its access to a cheap inmate workforce by disposing of inmate-produced goods and services at "fair market value." Specifically, CORCAN sets the prices for inmate-produced goods and services in such a way that they "equal private sector fair market value for equivalent products and services in the area where the goods are sold." Although it may be true that selling inmate-produced goods at the same price at which equivalent goods are available from the private sector goes some way towards ensuring that there is no incentive for buyers in the marketplace to prefer CORCAN over other sellers, it does not go far enough.

Upon closer examination, it becomes apparent that CORCAN's approach to reconciling society's interest in preventing unfair competition in the marketplace is overly simplistic and internally flawed. Specifically, CORCAN's approach fails to recognize that its very presence in the marketplace has an impact on the price at which private sector enterprises are able to sell their products. It is a matter of trite microeconomic theory that, holding demand constant, an increase in the supply of a particular product in the marketplace will result in reducing the price

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Footnotes:

1 See note 84, supra, and accompanying text.

2 See note 81, supra, and accompanying text.
at which such a product may be sold. Accordingly, when CORCAN decides to produce a
particular product and to sell it in the marketplace, we may expect that CORCAN's impact on
supply will result in a corresponding drop in the price at which the product may be sold. If
CORCAN is vigilant in adhering to its pricing policy, it will respond to the drop in price by
lowering its price to the "fair market value." CORCAN can effect this adjustment relatively
easily as a result of its low input costs in producing the product in question. As we know,
unlike the private sector employer, CORCAN is able to pay inmate workers as little as fifty
cents an hour to produce goods and services for sale in the marketplace. Moreover, CORCAN
does not pay any rental costs for its prison workshops located at Canadian federal
penitentiaries.\footnote{See note 76, supra, and accompanying text.} Accordingly, where a drop in the fair market value of one of its products
comes about as a result of CORCAN's participation in the marketplace, CORCAN, with its
relatively low input costs, should enjoy a sufficiently wide margin for profitability to enable it
to sell its products at the reduced "fair market value".

This flexibility is likely not enjoyed on the same scale by the independent business.
Where CORCAN's increased supply of a particular product in the marketplace causes a
Corresponding drop in the price fetched by such a product, the independent business producing
the same products as CORCAN will find it difficult to compete at the lowered price. Because
of the independent business's relatively high input costs, and in particular, its obligation to pay
employees at least the minimum wage, it will tend to have a narrow margin of profitability.
Where the price of a given product drops, this margin of profitability is further narrowed. If
the price of a given product drops far enough, the independent businessperson may be forced
out of business altogether. Specifically because she is at a competitive disadvantage with CORCAN.

It is clear that the unfair competition which independent businesses in the private sector suffer as a result of CORCAN’s presence in the marketplace also translates into a detrimental impact on workers outside the prison context. Clearly, when employers go out of business, so too do workers find themselves suddenly unemployed. In this way, CORCAN’s supply of the market and impact on market returns threatens to increase levels of unemployment among unincarcerated workers.

From the above, we see that even if CORCAN were vigilant in adhering to its policy of pricing its products at fair market value, unfair competition would still exist as a direct result of CORCAN’s ability to engage workers at a significantly lower cost than its competitors in the marketplace. There is also a concern that the spectre of unfair competition is raised because CORCAN is not in fact vigilant in adhering to its policy of pricing its products at fair market value. There is anecdotal evidence that CORCAN is selling certain products in given areas at significantly lower prices than those available from private sector competitors producing similar products.\textsuperscript{44} Assuming this evidence to be reliable, we see that allowing CORCAN to be self-regulating in addressing the public policy concerns surrounding unfair competition in the marketplace is an imperfect mechanism by which to ensure that the unfair competition objective is met.

Moreover, even if CORCAN is under an obligation to dispose of inmate-produced

\textsuperscript{44} See note 86, \textit{supra}, and accompanying text.
goods and services at "fair market value", it is not at all clear that the private sector enterprise which enters into an agreement with CORCAN pursuant to section 107 of the *Corrections and Conditional Release Regulations* to operate a prison industry, and to gain access to inmate labour at well below the minimum wage, is subject to the same constraints. We know that one private sector prison employer, Wallace Meats, pays its inmate workers only one dollar per hour, well below the minimum wage which Wallace Meats' competitors must pay their employees. Because it has much lower labour costs than its competitors, Wallace Meats is able to undercut its competitors by selling its products at significantly lower prices. The available evidence moreover indicates that this is indeed occurring. In this way, Wallace Meats' access to a cheap inmate workforce creates unfair competition in the marketplace by creating an incentive for buyers in the marketplace to prefer Wallace Meats over other sellers.

It is submitted that there is an alternative approach which allows the objectives underlying minimum standards legislation, including the unfair competition objective, to be reconciled with the objectives of prison industry. We started this section by saying that the fundamental tension to be resolved in determining prisoners' employee status is to reconcile the deprivation of liberty which the inmate worker experiences *qua* prisoner with his entitlement to minimum standards protection *qua* worker. It is submitted that by extending minimum standards protections to inmate workers if and when they satisfy the applicable tests for employee status has the benefit of ensuring that minimum standards objectives are satisfied while doing no detriment to the objectives which animate prison labour. Thus we find a happy congruence between the two sets of objectives, and what appears at first to be a fundamental

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See note 154, *supra*, and accompanying text.
dissonance between correctional and minimum standards objectives is translated into symbiotic co-existence.

Decision-makers under both the Canada Labour Code and the Ontario Employment Standards Act have attempted to formulate tests for employee status which specifically advance the underlying purposes of such legislation. Accordingly, if the extension of minimum standards to inmate workers would advance the underlying objectives of Part III of the Canada Labour Code and provincial statutes, such as the Ontario Employment Standards Act, we may expect that the purposive tests for employee status under these statutes would result in the determination that inmate workers are employees for minimum standards purposes.

The question then becomes whether granting employee status to inmates under minimum standards legislation would advance the objectives underlying such legislation. As discussed above, one of the objectives which motivates minimum standards legislation is the prevention of unfair competition in the marketplace. Although this specific objective has not been given much consideration in the jurisprudence in Canada, this is because specific fact situations have not arisen to date where a particular employer enjoyed access to a pool of cheap labour, as tends to be the cases where inmate workers are involved. At any rate, since one of the objectives underlying minimum standards is the prevention of unfair competition, it would always be open for decision-makers to take this factor into account in applying a purposive interpretation of the definition of "employee" in minimum standards legislation.

As we have seen above, the current ability of prison industry employers to pay inmate
workers less than the minimum wage raises the spectre of unfair competition in the marketplace, and therefore offends one of the objectives underlying minimum standards. A purposive interpretation of the definition of "employee" in minimum standards statutes might thus be expected to result in a finding that inmate workers of CORCAN and private sector prison employers are covered by minimum standards legislation as a means of remedying the mischief which is otherwise done by allowing prison employers to compete in the marketplace on an uneven playing field.

Minimum standards legislation has as an additional objective the prevention of the exploitation of workers. In Canada, Parliament appears to have rejected the view that inmates are individuals whose rights and privileges have been totally deprived them. Indeed, section 4(3) of the CCRA creates a presumption in favour of granting inmate workers the same rights and privileges enjoyed in respect of work by all members of society, unless such rights and privileges are necessarily removed as a consequence of the inmates' sentences. In light of the fact that we in Canada have rejected the view that inmates as a class of individuals are incapable of enjoying the rights and privileges which accrue to all members of society, it follows that inmates, like other workers in society, are capable of being exploited through work. In the "free world" context, we put minimum standards, and particularly minimum wage levels, in place in order to ensure that workers are not compelled by virtue of their economic dependence to sell their labour for less than what we agree as a society is the minimum acceptable price. In light of the extreme level of control to which inmate workers are subject in the prison system, and in light of their total economic dependence on prison authorities, it follows that our concern that workers should not be compelled, because of their economic
dependence on an employer, to sell their labour below a certain minimally acceptable level is
all the more salient in the prison industry context. The inmate worker's economic dependence
on the prison employer seems likely to be greater than that experienced by unconfined workers
in the "free world" context. Unlike unconfined workers, the prison worker cannot seek
employment with the employer of his own choosing. Though there is limited ability on the
part of inmate workers to choose from among jobs available within his penal institution, if
they wish to be employed at all, they must accept the relatively limited options for employment
within the penitentiary. Moreover, in light of the fact that there are jobs available for a
relatively small portion of the inmate population, inmates are entirely lacking in the bargaining
power which would be required in order to "wring concessions" from the prison employer. If
an inmate will not work for the low incentive rates available through CORCAN and private
sector prison industry, another inmate will be ready to take his place. Thus, it is evident that
prison employment operates even more so on a "take it or leave it" basis than is the case in
employment outside the prison context.

Of course, the obvious rejoinder to the argument that inmate workers are even more
economically dependent in their employment than unconfined workers is that inmate workers,
unlike workers outside the prison environment, need not work at all in order to provide for
their basic standard of living. Regardless of whether an inmate holds a job in prison industry,
he will be fed, clothed, and housed, all at the expense of the State. In this way, it might be
argued that inmate workers do not exhibit the same need for minimum standards protection as
unconfined workers who generally must work in order to provide for the necessities of life.

See note, 127, supra, and accompanying text.
It seems, however, that this is a somewhat myopic view when we take into account not only the inmate worker's short-term need for minimum standards protection, but also his need in the long term. Generally speaking, inmates are a class of individuals with little work experience and poor employment skills. In light of these facts, we may anticipate that when they are released from prison, inmates find it more difficult than the average worker to secure employment. Added to their poor work records and skills is the additional stigma which inmates bear as a result of having been incarcerated. This factor as well likely exacerbates the ex-inmate's difficulties in locating employment. Thus, while inmates do not necessarily need minimum standards protection in order to have their daily needs taken care of while incarcerated, once they emerge from prison, inmates will find themselves suddenly required to provide for the necessities of daily life, and ill-equipped to do so. The inmate worker who is granted minimum standards protections while incarcerated, however, may be able to save sufficient money through his receipt of the minimum wage to support himself while searching for a job subsequent to his release. In this way, granting inmate workers minimum standards protections may lessen the negative impact which long-term absence from the labour market will have on their ability to secure post-release employment. Additionally, it should be borne in mind that society at large would likely derive a benefit from extending minimum standards protections to inmate workers. In this regard, we may reasonably expect that inmates who are able to support themselves upon release until they secure employment are less likely to return to a life of crime. Thus, we see that extending minimum standards protections to prison workers has the potential not only to lessen the negative impact of incarceration on the inmate's

*See notes 31 to 33, supra, and accompanying text.*
ability to provide for himself, but it may also lead to a more secure society.

From the above, it would appear that extending minimum standards to inmate participants in prison industry would advance the underlying objectives of minimum standards legislation. But what of the objectives which animate prison industry? Would the extension of minimum standards protection to inmate workers operate to the detriment of the aims underlying prison labour? As discussed in the first chapter, the primary objective underlying prison industry is the rehabilitation of inmates through work. Rather than conflicting with this aim of prison industry, it is likely that extending minimum standards protection to inmate workers would actually enhance prison industry’s rehabilitative project, and certainly would not do it any detriment.

First, it seems uncontroversial that paying inmates the minimum wage in respect of their participation in prison industry programmes would increase their motivation to work. Many economists in the past few decades have posited that higher wages are correlated with increased motivation and thus reduced "shirking" on the job. Professor Ernie Lightman has indicated support for the proposition that paying inmates "regular" wages can have a positive impact on inmate morale and self-esteem. This effect, in turn, would likely enhance the rehabilitative value of prison industry programmes.

There may also be a substantial self-esteem effect for the inmate himself: he may be able to identify as a member of the labour force, earning "real money" on a regular basis, and perhaps for the first time in his life..."**

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From the above, we also may argue that if inmate workers are treated like regular employees in society, including being extended the protection of minimum standards, it seems likely that they would more readily perceive themselves as capable of obtaining and maintaining regular employment relationships in the community subsequent to their release. Thus, equipped with an image of himself as a worker like any other, the inmate who is released from prison may be more enthusiastic and motivated in his quest to obtain post-release employment than the inmate whose only experience with prison work is to have it regarded as dissimilar to "real" work in the community in the sense that it is undeserving of the minimum standards normally attached to work outside the prison context.

Additionally, it may well be counterproductive to the rehabilitative project not to pay inmate workers the minimum wage insofar as the failure to provide inmate workers with sufficient financial resources to support themselves immediately upon release from prison may make it more likely that they will return to a life of crime in order to survive. As noted above, inmate workers as a class of individuals are likely to have difficulty finding employment in the community subsequent to their release from prison as a result of generally poor work experience and few job skills, in addition to the stigma attached to being an ex-convict. If we are serious about rehabilitating inmates through work in such a way to allow for their ultimate re-integration into society, then it may be argued that we should follow through by ensuring that they leave the penitentiary with sufficient resources to support themselves. Otherwise, the rehabilitative benefits which the inmate gains through prison industry while incarcerated may be lost in the end because inmates are simply unable to provide for themselves from the time of their release until they are able to find employment.
Further, extending minimum wage protections to inmates could also improve the quality of rehabilitative training and work experience which inmates receive in prison industry programmes. Although CORCAN is currently showing promise in terms of its rehabilitative objective, it seems clear that there is room for improvement in the type of rehabilitative training which CORCAN is providing. We know that in many respects, CORCAN engages inmates in jobs which are dissimilar to jobs in the community. With CORCAN's emphasis on goods-producing activities, notwithstanding the fact that relatively few jobs are available in the goods-producing sector of the labour market, and its failure to keep pace with technological developments in the industries in which it is engaged, it appears that inmates participating in CORCAN prison industry programmes are unlikely to be learning the type of job-specific skills which they could offer to prospective employers subsequent to their release.

As discussed above, because of its low labour costs, CORCAN enjoys a wide margin of profitability which allows it make production decisions without giving much consideration to the price which its products will fetch in the marketplace. In this way, CORCAN's situation is to be contrasted with that of private sector enterprises which must make production decisions based upon whether there will be sufficiently high market returns to cover their relatively high labour and fixed costs and still allow them to maintain a narrow profit margin. In this way, CORCAN remains outside the marketplace in the sense that it is free from the constraints

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* See notes 54 to 58, supra, and accompanying text.
* See note 48, supra, and accompanying text.
* See notes 46 to 47, supra, and accompanying text.
* See note 50, supra, and accompanying text.
which normally apply to private sector businesses.

Requiring CORCAN to pay inmate workers at least the minimum wage would serve the function of bringing CORCAN into the marketplace, and placing it under the same constraints which govern private sector production decisions. Following from this, one may expect that decisions regarding the type of products which CORCAN produces and the manner in which it produces such products would parallel the decisions of private sector employers in the marketplace. CORCAN's production decisions being more closely aligned to production decisions in the private sector, one would expect inmate jobs to more closely resemble the jobs of unconfined workers employed by private sector enterprises in the community. In this way, by requiring CORCAN to pay its inmate workforce at least the minimum wage, prison workers are more likely to emerge from prison with relevant job-specific skills which they could offer to prospective employers. Thus, requiring CORCAN to adhere to minimum standards legislation in respect of its prison industry programmes could actually enhance the quality of rehabilitative training which inmates in CORCAN prison industry programmes are receiving.

It is worthy of note that in addition to its rehabilitative objective, CORCAN also operates under a mandate to be financially sustainable. A potential argument against extending minimum standards protections to inmate workers is that requiring CORCAN to pay inmate workers the minimum wage would make prison industry programmes very costly to operate, and could potentially defeat the financial sustainability objective underlying prison industry. As noted above, however, there is simply insufficient information available to conclude that prison industry programmes would necessarily operate at a loss if CORCAN were required to pay prison workers the minimum wage. While requiring minimum wage payments would
undoubtedly increase the costs associated with prison industry programmes. It could also dramatically increase inmates' productivity and have a beneficial impact on CORCAN's management initiatives, thereby resulting in increased prison industry revenues. Although CORCAN operated at a net deficit during its first four years as a Special Operating Agency,\textsuperscript{703} it is rapidly becoming a profitable enterprise and outperforming its financial sustainability objective.\textsuperscript{704} The fact that, even without the potential economic benefits which would flow from paying inmate workers increased wages, CORCAN is performing in excess of its financial sustainability objective is encouraging evidence that even with the added costs associated with having to pay inmate workers the minimum wage, CORCAN would still be able to operate as a financially self-sustaining enterprise.

In the above section, I have attempted to demonstrate that extending minimum standards protections to inmate workers is a superior approach to reconciling prisoner and employee status insofar as it allows both the objectives underlying minimum standards legislation and the objectives of prison industry to be attained. By applying minimum standards protections to inmate workers, minimum standards legislation's interests in eliminating unfair competition in the marketplace and in preventing the exploitation of workers are satisfied. Moreover, applying minimum standards to prison workers would not conflict with prison industry's essential rehabilitative project. Indeed, there is evidence that the rehabilitative value of prison work would be enhanced by extending minimum standards to inmate workers. Moreover, while there is some cause for concern that prison industry

\textsuperscript{703} See note 72, \textit{supra}, and accompanying text.

\textsuperscript{704} See notes 73 to 74, \textit{supra}, and accompanying text.
programmes would become more costly to operate if inmate workers were covered by minimum standards legislation, increased productivity which may flow from paying inmate workers the minimum wage may well be sufficient to offset the increased costs associated with minimum wage payments. On balance, then, it seems that extending minimum wage protections to inmate workers is a desirable way in which to reconcile the competing tension between prisoners' deprivation of liberty *qua* prisoner on the one hand and their entitlement to minimum standards protections *qua* worker on the other. Indeed, by reconciling the question in the manner proposed, the tension essentially dissolves as we come to recognize that the objectives underlying both minimum standards and prison industry can happily co-exist.

D. Whether Prisoners Satisfy the Test for Employee Status

Having resolved that the application of minimum standards legislation to inmate workers has the potential to ensure the attainment of the objectives underlying minimum standards and the aims of prison industry, what remains to be seen is whether inmate workers satisfy the test for employee status under minimum standards legislation. Even if we have determined that it would be socially desirable to apply minimum standards protections to inmate workers, such protections have no application outside the employment context. Accordingly, in order to achieve our ultimate objective of reconciling the objectives of minimum standards and prison industry, we must first be able to demonstrate that inmate workers are "employees" for the purposes of the relevant minimum standards legislation.

In Ontario and at the federal level, we observe that decision-makers under the
Employment Standards Act and the Canada Labour Code do not follow one particular "hard and fast" test in determining employee status. Decision-makers continue to make use of common law distinctions to determine whether a given individual is an employee or an independent contractor within the meaning of minimum standards legislation. Some of the Ontario jurisprudence continues to import elements of the traditional common law tests into the determination of employee status.74 The Canada Labour Relations Board has been more explicit in rejecting common law tests of employee status where to do so would result in denying the Code's protection to individuals who are economically dependent in their working relationships.746 Accordingly, it has imported the common law distinctions between independent contractors and employees into its test for employee status only where such distinctions advance the underlying purposes of the Code. It is clear, however, that even applying the potentially more restrictive common law tests, inmate workers cannot seriously be held out as independent contractors within the meaning of minimum standards legislation. The Montreal Locomotive test, for example, relies on four factors to distinguish between independent contractors and employees: (1) ownership of tools; (2) chance of profit; (3) risk of loss; and (4) the element of control which the alleged employer exercises over the worker.747 In the prison industry context, it is obvious that inmate workers do not own the tools with which they work. Indeed, security measures are taken to ensure that inmate workers do not

74 For cases in the Ontario Employment Standards context which have applied the Montreal Locomotive and organizational tests for employee status, see relevant sections of Chapter V above.

746 See Société Radio-Canada, supra, note 551, supra, and accompanying text.

747 See note 403, supra, and accompanying text.
remove tools from the prison workshop which could be used as weapons. Moreover, inmate workers do not have a chance of profit or risk of loss as a consequence of prison industry. Their wages are generally fixed on an hourly basis. Thus, they have no chance of profit. They invest nothing in the prison industry programmes other than their labour, and they suffer no risk of loss. Moreover, there is no question that they are under the prison employer's control in respect of their work. Similarly, on an organizational test for employee status, first given force in the employment standards context by the Ontario Court of Appeal in *Mayer v Conrad Lavigne*, there is no question that inmate workers are integrated into the prison employer's business, and are not in business for themselves. When we ask the question, "Whose business is it?", it is clear that prison industry is the business of CORCAN or the private sector prison employer, and not the business of the inmate worker who exercises no control over the direction of the business in which they are engaged. Accordingly, even on the more restrictive common law tests, it seems uncontroversial that inmate workers are not independent contractors.

Recently, "statutory purposes" test for employee status have come to the fore as a means of determining employee status for the purposes of the Ontario *Employment Standards Act* and the *Canada Labour Code.* In the Ontario Employment Standards context, Referees

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*8 Interview by the Author of Vocational Training Supervisor, Correctional Service of Canada, Collins Bay Institution, Kingston, Ontario, April 24, 1997.*

*9 See note 147 to 148, supra, and accompanying text.*

*10 See note 433, supra, and accompanying text.*
Burkett and Gray in *Majestic Maintenance*¹ and *Belgana Transportation,*² respectively, incorporated into their tests for employee status the question with respect to whether the individuals claiming employee status were in a relationship of economic dependence with their alleged employers so as to require the application of the *Employment Standards Act* on a purposive analysis. Similarly, in *Société Radio-Canada,* the Canada Labour Relations Board held that the predominant factor to be considered in determining employee status for the purposes of the Code was whether the worker seeking the Code's protection was "in a position of economic subordination [with his employer] with respect to establishing the terms and conditions of employment."³ In adopting "statutory purposes" tests for employee status, decision-makers in Ontario and at the federal level have emphasized that the underlying objective of the *Employment Standards Act* and the *Canada Labour Code,* respectively, is to redress the economic imbalance which exists between the owner of capital, the work source or employer, and those who work on his behalf. In this way, "statutory purposes" tests for employee status specifically call for the application of minimum standards legislation where there is inherent inequality and unequal bargaining power in the employment relationship by virtue of the worker's economic dependence on the employer.

In applying the economic dependence criterion which animates tests for employee status under minimum standards legislation to inmate workers, it seems likely that they fall within the definition of "employee" in the *Employment Standards Act* and the *Canada Labour Code.*

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¹ See note 444, supra, and accompanying text.
² See note 466, supra, and accompanying text.
³ *Supra,* note 547 at 219.
Code. The prison employer clearly "enjoys a position of dominance or superiority" over inmate workers within the meaning of the statutory purposes test. On the jurisprudence, economic dependence on the part of the worker has been found to exist where the worker claiming employee status is unable to sell his services to anyone other than the alleged employer. Thus, it may be argued that, even more so than ordinary workers, inmate workers are completely economic dependent in their work relationships. Inmate workers may only be employed by the prison employer, and may not seek work opportunities with an employer of their choosing. Though there is limited ability on the part of the inmate to choose among jobs in the prison environment, if he wishes to work at all, he must work for a prison industry employer at his institution, usually CORCAN. In response to this, an argument may be made that the inmate’s inability to sell his labour to anyone other than the prison employer arises not by virtue of his economic dependence in the work relationship, but rather as a consequence of incarceration. The reason that inmates cannot work for the employers of their own choosing is because they are physically confined in a penitentiary. It would run counter to the whole penal undertaking to allow inmates to seek employment wherever they chose. When we take into account other factors of the prison work relationship, however, it becomes apparent that inmates, in fact, do exhibit a high degree of dependence in their work relationships. Inmate employment is offered on a "take it or leave it" basis, and inmates lack the bargaining power to deal with the prison employer on anything even remotely resembling an equal basis. This is borne out by the fact that inmates may be subject to institutional discipline, and may even

14 For cases stating the proposition that economic dependence is evident where the worker is unable, by virtue of the alleged employment relationship, to provide work or supply services to a party other than his alleged employer, see note 461, supra, and accompanying text, and notes 570 to 575, supra, and accompanying text.
jeopardize their chances of being granted early parole if they refuse to participate in prison industry programmes where they have been directed to do so by the Program Board of the penitentiary in which they are incarcerated. This would seem to be strong evidence of their employee status for the purposes of minimum standards legislation. Moreover, as a matter of first principle, and on a statutory purposes analysis, it seems unquestionable that inmate workers are "in a position of economic subordination with respect to establishing the terms and conditions of employment." In light of the fact that decision-makers have emphasized that the underlying objective of minimum standards legislation is to redress the economic imbalance which exists between the owner of capital, the work source or employer, and those who work on his behalf, it seems that, on a purposive analysis, it would advance this underlying objective of minimum standards legislation to recognize inmate workers as employees. Having said that, it seems uncontroversial that the problem with determining whether inmate workers are employees for minimum standards purposes does not lie in an assessment as to whether such inmates are economically dependent in their work relationships. This criterion serves the primary function of distinguishing between employees and independent contractors, and, as noted above, it cannot be seriously suggested that inmate workers are the latter.

There is an additional question, however with respect to whether, as participants in rehabilitative training programmes designed primarily for their own benefit, inmate workers are precluded from minimum standards protection, notwithstanding their obvious economic dependence on the prison industry employer. Certain cases have held that participants in rehabilitative training programmes were not employees for minimum standards purposes where the programmes existed solely for the benefit of participants, and did not provide any benefit to
the alleged employer.\textsuperscript{74} In such cases, the potential exploitation of workers which minimum standards legislation attempts to redress was not found to be present. Therefore, on a statutory purposes analysis, application of minimum standards legislation in respect of the rehabilitative work relationship was uncalled for.

In the case of prison industry programmes in the Canadian federal penitentiary system, however, it seems clear that a benefit does accrue to prison employers by virtue of inmate work. We know that CORCAN is rapidly becoming a profitable enterprise,\textsuperscript{75} which may be taken as evidence of the fact that CORCAN is benefitting from the labour of inmates in its prison industry programmes. While we do not know whether private sector prison employers, such as Wallace Meats, are generating profits, we might safely assume that this is the whole motivation behind their involvement in prison industry. The private sector employer, whether in the prison context or otherwise, exists by definition to generate profits. It could not be seriously suggested that such employers have entered into the prison work relationship merely to benefit inmates. In light of the fact that prison employers are gaining an economic benefit from prison labour, it seems clear that those cases which have held that rehabilitative work relationships are not employment relationships because there is no economic benefit to the employer would not serve to exclude inmate workers from employee status for minimum standards purposes. Far more relevant, perhaps, are those cases which have held, as a matter of general principle, that the fact that a work relationship has as its primary objective the

\textsuperscript{74} See Kiszuba, supra, note 477; Fenton v Forensic Psychiatric Services Commission, supra, note 487; and accompanying text.

\textsuperscript{75} See note 74, supra, and accompanying text.
rehabilitation of workers is not inconsistent with the existence of an employment relationship in and of itself. If the employer also stands to benefit from the rehabilitative relationship, then the work relationship will likely be one of employment. Thus, it can be seen that whichever of the above tests is adopted, inmate workers meet the criteria for employee status under minimum standards legislation which have been developed in the case law.

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* See notes 598 to 605, supra, and accompanying text.
VII. CONCLUSION

This project began as an attempt to answer one fundamental question: should inmates who work in Canadian federal penitentiaries be granted the protection of minimum standards legislation? An analysis of the Canadian jurisprudence governing employee status for minimum standards purposes, together with an analysis of the aims underlying the correctional system in Canada, and particularly the objectives of prison labour, have led me to the conclusion that inmate workers should be extended the benefit of minimum standards legislation.

We know that a significant proportion of inmates in Canada are working while in prison on a full-time basis in "a work environment that strives to achieve private sector standards of productivity and quality" with the objective that inmates "will be better able to obtain and hold employment when [they] return[ ] to the community." Despite the fact that the prison work relationship bears a striking resemblance in many respects to regular employment outside the prison context, we also know that inmate workers are currently not being afforded the protection of minimum standards legislation. In view of the apparent absence to date of any serious tackling of the issue as to whether Canadian inmate workers are "employees" for the purposes of minimum standards, either in the legal or academic realms, it seems likely that there is a general perception of inmate workers as so distinct from incarcerated workers that the issue does not cry out for consideration. Specifically, it seems likely that society in general regards the mere fact of prisoner status as necessarily placing inmate workers outside the scope
of employment-related legislation.

On my analysis of the issue as to whether prison workers may be at one and the same time prisoners and employees, the fundamental question seems to be whether the deprivation of liberty which one experiences as a prisoner necessarily precludes the entitlement to employment-related benefits, such as minimum standards, as a worker. As I have argued above, it seems that there are two basic ways in which to resolve this question. We may take the view that prisoners cannot ever be employees in respect of the prison work relationship. On this view, the denial of employment-related benefits to inmate workers is merely one ingredient of the overall loss of desirable things with which offenders pay their debt to society when incarcerated. The denial of minimum standards to inmate workers is thus subsumed in the overall deprivation of liberty to which prisoners are subject. Thus are prisoner and employee status regarded as mutually exclusive. The second way in which we may approach the question with respect to whether the deprivation of liberty qua prisoner necessarily precludes the entitlement to minimum standards protection qua worker is to undertake a closer examination of the principles which animate minimum standards legislation and those which underlie prison industry. On this view, there is nothing inherent in one’s status as a prisoner which makes a finding of employee status impossible. Rather, if the objectives of both minimum standards legislation and prison industry are served by extending minimum standards protections to inmate workers, then such standards should be extended to the inmate working in a federal penitentiary.

The issue of prisoners’ employee status in the minimum standards context has been extensively litigated in the United States. There we see in practice, if not in theory, that the
judiciary has adopted a mutually exclusive approach to prisoners’ employee status. Though paying lip service to the principle that prisoners may not be categorically denied employee status under the *Fair Labor Standards Act*, in the vast majority of cases, the US Circuit Courts of Appeal have held that prison workers were not employees within the meaning of the Act. In reaching this conclusion, the Courts have tended to reject the test normally applicable for determining the existence of an employment relationship, and have chosen instead to focus on factors particular to the prison industry context as those necessitating the denial of inmates’ employee status. As argued above, the reluctance of the Courts to employ the typical test for employee status in the prison context belies a tendency to regard the prison work relationship *per se* as dissimilar from work relationships outside the prison context, and thus some movement towards a mutually exclusive view to prisoner and employee status is perceptible. This approach is made manifest in the manner in which the US Courts have ultimately resolved the issue of prisoners’ employee status. By relying on the existence of penological factors, which may always be said to underlie the prison work relationship, to deny inmates’ FLSA claims, the US Courts have adhered to the view that one’s deprivation of liberty *qua* prisoner, and the penological elements inherent in that deprivation, necessarily preclude entitlement to minimum standards protections *qua* worker.

At first blush, it may seem that this manner of reconciling the deprivation of liberty as a prisoner with entitlement to minimum standards as a worker in the US jurisprudence should be accorded significant weight in the Canadian context if and when we are called upon to resolve inmate workers’ employee status. However, as argued above, there are a number of factors particular to the Canadian context which indicate that we should not adopt the approach of our
neighbours to the South.

Firstly, it is significant that the statute governing the federal correctional system in Canada, the *Corrections and Conditional Release Act*, specifically provides that prisoners are to be regarded as the fullest possible possessors of the rights and privileges which are enjoyed by other members of society. This fact alone would seem sufficient reason to reject out of hand the notion that there is anything inherent in the prison context *per se* which necessarily precludes treating inmate workers as employees for minimum standards purposes. Clearly, we in Canada have eschewed the notion that prisoners are a class of individuals whose ability to participate in society and to enjoy the rights and privileges of its members is entirely taken away as a consequence of incarceration. While there are a number of work-related entitlements which prisoners will not be able to enjoy by virtue of the fact that they are incarcerated, there seems to be no reason to assume that prisoners cannot be afforded the protections of minimum standards legislation within the confines of the penitentiary.

Moreover, there is ample support in Canadian jurisprudence for the proposition that prisoners should not be categorically excluded from minimum standards protection. In the collective bargaining context, one case - seemingly the only one to resolve the issue of prisoners' employee status in Canada - has already held that prison workers were employees for the purposes of the Ontario *Labour Relations Act*. Further, although scant consideration has been given to the precise issue of prisoners' employee status in Canada, at a more general level, the jurisprudence dealing with rehabilitative work relationships is indicative of the fact that prisoners may be employees for minimum standards purposes. As we know, the prison work relationship in Canada is primarily intended to rehabilitate inmates. It seems clear that this
rehabilitative purpose does not preclude a finding of an employment relationship in the prison context, since a number of Canadian decision-makers have demonstrated themselves as willing to find that primarily rehabilitative work relationships may give rise to employment relationships. The categorical exclusion of inmate workers from minimum standards protections would also seem to fly in the face of the principles governing the applicability of minimum standards legislation in Canada. At both the federal and provincial levels, we have observed that statutory purposes tests for employee status dominate the inquiry as to whether a particular individual is an employee for minimum standards purposes. Such tests seek to apply minimum standards protections to workers where the underlying aims of the statute would be served by doing so. Thus, the applicability of minimum standards legislation is not concerned with demarcating rigid classes of workers who are disentitled to minimum standards protections. Such categorical exclusions are antithetical to the statutory purposes approach to employee status which asks only whether the purposes of minimum standards are achieved by their extension to a particular worker or group of workers.

It seems likely that a widely-held objection to the extension of minimum standards protections to inmate workers is that prisoners are in prison to be punished, and as such, should not be entitled to employment-related protections. This objection harkens back to a retributivist view of punishment. Retributivist principles of punishment undoubtedly inform the correctional system in Canada. However, upon closer examination of the precise nature of retributivism and of the Canadian justice system, it emerges that retributivist principles do not justify the denial of employment-related benefits to inmates in Canadian federal penitentiaries as a punitive measure. The principle of equality is key to the retributivist theory of
punishment. As we have seen above, this principle of equality has two faces: it seeks to mete out to the offender a punishment which is equal to his crime, and it also seeks to punish equal offenders equally. As we know, participation in prison industry programmes in Canadian federal penitentiaries is not universal. Less than twenty percent of federally incarcerated offenders are diverted into prison industry programmes. Moreover, at the time of sentencing, the Canadian judge who is charged with fashioning a sentence equal to the offender's crime cannot know whether the offender before her will be one of those offenders ultimately diverted into prison industry programmes. Thus, in determining a sentence which is equal not only to the offender's crime but also to the sentences imposed on equivalent offenders for equivalent crimes, the sentencing judge is restricted to expressing the offender's punishment in terms only of the period of time during which his physical liberty will be deprived him as a consequence of incarceration. The judge must use this as her only tool of meting out to offenders their "just deserts". She cannot intend the denial of employment rights to be an ingredient of the overall loss of desirable things with which the offender will pay his debt to society, since at the time of sentencing, she cannot know whether the offender will even work while in prison. Thus, an offender's "just deserts" must of necessity be comprised wholly in the length of time during which he is to be incarcerated, and any attempt to deny the inmate worker employment rights as an additional punishment while in prison will effectively result in overpunishing the offender, and must therefore fail on a retributivist theory of punishment. In this way, we see that a retributivist theory of punishment does not justify a mutually exclusive approach to prisoners' employee status as long as participation in prison industry programmes is not universal, and as long as the sentencing judge cannot know whether a particular offender will
be deprived employment rights as a punitive measure while in prison.

One might attempt to posit economic arguments against the extension of minimum standards to inmate workers on the ground that it would be too expensive to do so. However, simply too little is known at this point about the manner in which the extension of minimum standards to prisoners, and particularly the right to receive the minimum wage, would impact on the profitability of prison industry programmes. Accordingly, economic considerations cannot lead us to conclude that prisoners should be categorically denied minimum standards protections.

Having established that the mutually exclusive approach to prisoners' employee status is not the one to be adopted in Canada, I have turned to the objectives which animate both minimum standards legislation and prison labour in order to assess how the issue of inmate workers' employee status should be resolved on a purposive approach to the question. On this purposive approach, we see that not only are key objectives underlying minimum standards legislation served by the extension of minimum standards to inmate workers, but that prison labour's rehabilitative objective is not harmed by such a move, and indeed is arguably enhanced.

As discussed above, one of the key aims of minimum standards legislation is to eliminate unfair competition in the marketplace. Currently, the prison industry employer's access to cheap inmate labour places private sector employers in the marketplace at a competitive disadvantage. Specifically, CORCAN's and the private prison employer's ability to pay inmates well below the minimum wage translates into a relatively wide margin for
profitability. This wide margin of profitability, in turn, allows the prison employer greater flexibility in adapting to decreases in the price of goods sold by it than that enjoyed by the private sector enterprise. This is significant since we know, as a matter of trite economic theory, that increased supply of a particular product in the marketplace by the prison employer will result in a decrease in the price at which that product may be sold. Accordingly, the prison employer's presence in the marketplace leads to a decrease in the price of goods supplied by it, which drop in price, while readily adjusted to by the prison employer with its wide margin for profitability, has a detrimental impact on private sector enterprise with its low margin for profitability and corresponding difficulty in competing at the lower price of a given product. In this way, failing to require the prison employer to pay at least the minimum wage to the inmate workforce gives rise to the threat of unfair competition. Since unfair competition is one type of mischief which minimum standards legislation seeks to eliminate, then, on a purposive approach to inmates' employee status, it follows that minimum standards protections should be extended to the inmate worker.

An additional objective of minimum standards legislation is to avoid the undue exploitation of workers by establishing an irreducible floor of rights below which terms and conditions of employment may not sink. In light of the fact that inmate workers, because of their total dependence on prison authorities, are even more economically dependent on their employer than are workers outside the prison context, it follows that minimum standards' concern with preventing undue exploitation is all the more relevant in the prison context. Inmate workers are entirely lacking in the bargaining power necessary to wring concessions from the prison employer. Accordingly, there is cause for concern that the inmate worker will
be taken advantage of by the prison employer precisely because of his high degree of economic dependence. In this way, minimum standards' concern with preventing the exploitation of workers is not misplaced in the prison context, and is perhaps all the more salient.

Conversely, it may be argued that, while in prison, the inmate worker is not economically dependent on the prison employer because his material needs are provided for by the State. Thus, no concern of exploitation arises in the prison context. Here, however, it is important to bear in mind that once released from prison, inmate workers will likely have a significant need to have financial resources at the ready as they undertake the difficult task of locating employment and reintegrating into the community. The extension of minimum standards protections, and particularly the minimum wage, to inmate workers may answer the inmate worker's long-term need to be financially self-sufficient upon release into the community. Thus, if we consider the inmate worker's need not to be exploited not only in the short-term, but also in the long-term, then it seems that the extension of minimum standards to inmate workers is warranted in order to avoid such long-term exploitation.

The concern regarding the inmate worker's need not to be exploited in the long run also has implications for the underlying objectives of prison industry. Specifically, it may well be counterproductive to prison industry's rehabilitative project not to extend minimum standards protections to inmate workers. Where inmates emerge from prison with insufficient financial resources to support themselves, there is an increased likelihood that they will be forced to return to a life of crime in order to support themselves. Thus is the rehabilitative objective of prison labour actually advanced by the extension of minimum standards protections to inmate workers.
There are a number of other ways in which the rehabilitative objective underlying prison industry is arguably enhanced by the extension of minimum standard to prisoners who work. Firstly, it is likely that paying inmates the minimum wage, in particular, would result in increased motivation to work on the part of the inmate. Moreover, if workers in prisons are treated like regular workers in society in respect of their participation in prison industry programmes, then it is more likely that they will emerge from prison equipped with an image of themselves as productive and capable workers like any other, and be more enthusiastic in the quest for post-release employment. Thus is prison industry’s ultimate objective of re-integrating inmates into society subsequent to their release served by the extension of minimum standards to inmate workers.

Moreover, it seems that requiring prison employers to adhere to minimum standards in respect of the prison work relationship could result in actually improving the quality of the rehabilitative training offered in prison industry programmes. Specifically, requiring prison employers to pay inmate workers the minimum wage would serve the function of bringing them into the marketplace, and placing them under the same constraints which govern private sector production decisions. This in turn would likely result in production decisions more closely aligned to those of private sector employers in the marketplace. And if the production decisions of prison employers are more closely aligned with those of private sector employers, we might reasonably expect that inmate jobs would begin to more closely resemble those available in the community. In this way, extending minimum standards protections to inmate workers could advance the rehabilitative objective of prison labour. If inmate jobs are more similar to jobs in the community, then inmates are more likely to emerge from prison with
relevant skills which resemble those in demand in the labour market, and therefore stand a
greater chance of locating post-release employment and being successfully reintegrated into the
marketplace.

In light of all of the above, it seems clear that a purposive approach to reconciling
prisoner status on the one hand and employee status on the other reveals a happy congruence
between the objectives of minimum standards legislation and those animating prison industry.
Accordingly, to the central question as to whether minimum standards should be extended to
inmates working in Canadian federal penitentiaries, the answer, in my view, must be “yes”.
Such a measure would go a long way towards eliminating unfair competition in the
marketplace created by the use of cheap inmate labour. Moreover, it would answer the concern
that inmate workers are currently being taken advantage of in terms of their labour because of
their extreme economic dependence on the prison employer. In terms of the objectives of
prison industry itself, there is no indication that we in Canada should ascribe to the view that
prisoner status and employee status are mutually exclusive. Indeed, there is good reason to
believe that prison labour’s primary rehabilitative project would be significantly enhanced by
extending minimum standards protections to inmates working in federal penitentiaries. In sum,
there appear to be a number of good reasons to extend minimum standards protections to
inmate workers, and no compelling reasons not to extend such protections. Moreover, having
established that it would be desirable from a social policy perspective to extend minimum
standards protections to inmate workers, we see that the framework for effecting such a move
is already conveniently in place. Specifically, applying the typical tests for employee status
under minimum standards statutes, we see that inmate workers in Canada may readily be found
to be employees within the meaning of those statutes, and therefore entitled to the protections afforded by them.

The project undertaken here answers certain questions, and gives rise to others. We have established that prisoner status does not necessarily preclude employee status. Indeed, there is ample evidence that we in Canada have rejected the notion of prisoners as an inferior class of persons who do not enjoy the rights and privileges exercised by other members of society. I have also attempted to argue that a purposive approach to the issue of inmates' employee status indicates that inmate workers in Canadian federal penitentiaries should be afforded the protection of minimum standards legislation. What remains to be seen is whether the extension of other types of employment-related legislation to inmate workers is similarly justified on a purposive approach to inmates' employee status. Are inmate workers entitled, for example, to the benefit of human rights legislation in respect of the prison work relationship? Is the extension of occupational health and safety legislation to prisoners consistent with the objectives of that legislation and with the aims of prison labour? Should inmate workers have the right to organize and bargain collectively pursuant to the terms of labour relations statutes? Employing an analysis similar to the one that I have used in this paper, inmate workers may well be entitled to a whole range of employment-related benefits provided that it is consistent with the underlying objectives of employment-related statutes to include prison workers within their protective scope, and provided also that to do so would do no detriment to the aims of prison labour.

The time is overdue to rethink our approach to prisoners' employment rights. Prisoners are all too often viewed by the public as an expendable class of persons to whom we need not
even consider extending the rights and freedoms which the rest of us take for granted. If we are to take seriously our commitment to rehabilitating offenders through work so as to allow for their ultimate reintegration into society, then we should follow through by focussing greater attention on the question of prisoners’ employee status. Otherwise, our failure to recognize that many prisoners are workers like any other may end by laying waste not only to the rehabilitative value of prison industry programmes, but also to the social objectives which animate employment-related legislation.
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