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Statutory Regulation of Employment

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Chapter 11: Statutory Regulation of Employment

11:100 INTRODUCTION

In this chapter and the two that follow, the focus shifts to statutory regulation of the employment relationship. Chapter 12 looks at employment standards legislation, which deals (among other things) with minimum wages, hours of work, maternity leave, and termination of employment. The subject of Chapter 13 is human rights, pay equity, and employment equity legislation. Other employment law statutes, not considered in this book, include those on unemployment insurance, occupational health and safety, workers' compensation, and pensions. All of these statutes generally apply both to employees engaged under individual contracts of employment and to employees covered by collective bargaining. Although statutory regulation of the employment relationship has a very long history, much of the legislation discussed in Chapters 12 and 13 is of relatively recent origin.

Statutory regulation and its institutions are probably the least well-known part of our law of employment. Until fairly recently, law school courses in this area tended to focus exclusively on collective bargaining law, and the practice of labour and employment law mainly involved collective bargaining and the common law action for wrongful dismissal. As we have seen, the common law approach to employment consisted of regulation through the device of the contract of employment, although it was a very special type of contract. A principal objective of employment law is to secure justice in the employment relationship, and a prevalent view is that for most employees justice is not achieved through the negotiation of individual contracts of employment, because of inequality of bargaining power (see above, section 2:100). Collective bargaining is a procedural technique designed to redress this inequality.

Direct statutory intervention attacks the perceived problem of unfairness not through the procedural device of regulating the negotiating process, but by directly enacting standards to govern the employer-employee relationship. The normative justification for such intervention overlaps to some extent, but not entirely, with the justification offered for collective bargaining law. The following excerpt offers a historical overview of the battle between advocates of statutory regulation and proponents of a free labour market.

Barry Reiter, "The Control of Contract Power" (1981) 1 Oxford J. Legal Stud. 347 at 348–53

It is important to appreciate at the outset the implausibility of a claim that society should be organized on the basis of private contracting behaviour. The claim advocates apparent anarchy and amorality. Never before the birth of faith in markets had gain been advanced as an inherently worthy motive. Nor had economic structures ever been sharply

differentiated from social structures and relations. But in an effort to throw off feudal and religious shackles, to release energy and to give vent to new theories of social justice, a broad coalition was forged over the sixteenth through the nineteenth century. The coalition, including economic liberals, utilitarians, and classes rising in power politically and intellectually, adduced powerful arguments in support of the market. The central benefits they attributed to organization in this form included the following. First, the market would provide powerful incentives motivating individuals to work and to produce wealth in society. The resultant gain would improve the lot of all (or of most, depending on the economist) individuals in society. The notion of incentives could be, and indeed was, pushed to the point of urging the necessity of a substantial level of poverty in society and of starvation as a sharp stick to keep the incentive structure keen.

Second, market organization offered promises of efficiency. The consumer would determine what society produced: the cheapest mode of production of the right quantities of goods and an efficient distribution network were explicit outcomes of the model. Third, market organization would allow for innovation. This was a particularly critical attribute given the substantial barriers to innovation that had been erected by the guilds and other local protective arrangements. Fourth, the market meant freedom from imposition by governmental or religious authorities. This freedom offered a consent basis to society, a basis seen both as good in itself and as a legitimating force. Finally, the market promised justice. The entire notion of market rewards and failures could be and was linked to a personal merit principle.

The case was powerful, but it was never wholly accepted. Instead, strange and shifting alliances of intellectual and political power combined to prevent the excesses of the market through the assertion of political power. Society reacted in a 'spontaneous outburst' to assert its primacy over economics. The details of the social reaction and the proof of what I assert about its success are provided in Polanyi's classic study, *The Great Transformation* and in Atiyah's interesting and extensive recent work, *The Rise and Fall of Freedom of Contract*. It may suffice to describe the nature of the rejection of market principles in one critical sector only, that of 'the supply of labour.' The commodification of labour was a critical step necessary to establish a market-based economy. Older feudal notions of the relationship between workers and those responsible for them had to give way if mobile labour was to be available to be bought and sold as supply and demand dictated. The commodification of labour was not really achieved even in theory until the repeal of the Poor Laws in 1834. However, as the momentum to turn labour into a commodity grew, the social reaction was already taking shape. It appeared in the form of the reassertion and the continued assertion of values limiting market values in respect of human labour. The force of the social reaction demonstrates that the nineteenth century was anything but an era of *laissez-faire*. The best known reactions involve those associated with the various Factory

Acts, dating from 1833. The Acts dealt with employment of children, hours of work, and safety matters. Similar legislation regulated other important industrial sectors. A bureaucracy was created, industrial inspection Commissions were established, Reports were issued and legislation followed frequently. Combination laws were enacted early in

the nineteenth century and Truck Acts were passed frequently thereafter. All of this social reaction occurred early in the 'era of market economy.'

Today, the dimensions of the reaction are even more apparent. Industrial codes and related legislation govern virtually every aspect of employment: hiring, union rights and responsibilities, hours of work, health and safety standards, compensation for injury, redundancy arrangements (in some cases), minimum or prescribed wage rates (in many cases), terms of payment, pension and unemployment benefits. In modern society, it is a fact that all but the most subsidiary features of the 'labour contract' are determined by institutions other than contract. The labour relationship is governed by political rather than market power. Similarly, the permitted uses of lands and of capital were never and are not now determined by other than a most tightly controlled market. The same may be said of all other significant features of modern life. Contract may be a medium, but as a social directing and organizing principle, it is left well to the margins.

In the face of the powerful case adduced by the 'market coalition' how could this be so? The answer has been provided by students of the social sciences. First, it is important to realize the historical fallacy on which the market economists built their theory. When Adam Smith said that the division of labour in society was dependent on the existence of markets, on 'man's propensity to barter, truck and exchange one thing for another' he was quite clearly historically wrong. This fact is not adduced so much to cast doubt on Smith's historical facility as to point out the striking nature of the theory he advanced. Nowhere before had society been subservient to economics, and a sharp break with the past would have been necessary in order to implement the dramatic change in the relationship between social and economic principles that the classical economists and the utilitarians were, therefore, advocating. Second, it became apparent early on that the classical economic-utilitarian theory did not work even in its own terms: the problem of ignorance among members of the public was a pervasive one and the liberals' hopes for education as the cure proved futile; the problem of monopolies (natural and otherwise) appeared quickly, and posed a major challenge. Third, the problem of inequalities threatened the moral basis of the theory. To the extent that individuals began with different endowments of money, opportunities, or even human abilities, the merit basis of the market system faltered. Fourth, it became apparent that contract was not simply a two-party affair. The market produced externalities of significant proportion: society must be and was concerned about injured workers, ruined social fabric, and ecological chaos. Fifth, the preservation of the institution of the market itself required vigorous suppression of market principles: total freedom had to be limited in order that there could be any freedom. Thus legislation was clearly necessary to prevent the exercise of monopoly power and some action was essential to prevent the enforcement of restrictive covenants that would serve to limit the participation the contract model was designed to foster. Intervention in the market was also necessary to slow the pace of change that might occur too rapidly thereby threatening to bring down the entire structure.

Finally, and most importantly, market theory simply did not take enough account of social values other than those concerned with efficiency and (measurable) net gains. On one hand, *a priori* values could be asserted against the anarchy of contract. Thus it could

be argued that individuals and land were not commodities, or that they were not mere means but were, rather, ends. Or different visions of equality could be asserted. While contract may be said to foster certain forms of equality, it is apparent that other more levelling forms can be advocated in its place. On the other hand, less fundamental but nevertheless conflicting values could be asserted against 'market values.' Paternalistic notions could be advanced in support of the view that the consumer cannot choose best, and that choice by others might be preferable. Health, safety and moral values might claim priority on an other-than-market calculus. From the time of John Stuart Mill onward, it was apparent that classical economics had little to contribute on important issues of distribution though it could say much about efficiency.

Many of these difficulties were appreciated very early in the nineteenth century, and it was clear by the last quarter of that century (if not well before) that arguments founded on 'freedom of contract' would not carry much independent weight. In the end, and in respect of contract as a social organizing principle, we have witnessed a 'death of contract' quite different from that which has been the subject of intense debate of late. We have observed the replacement of the idea that contract alone might be the balance wheel of society by one suggesting that political institutions ought to perform this role instead. 'Contract' has become recognized as in need of extensive political manipulation. Ultimately, 'the market' turns out to have been a short term bridge philosophy carrying society from a period of organization in religious and feudal terms to the modern era of democratic political direction. A contemporary theory of contract must recognize these facts by rejecting 'the market' in favour of an institutionally mixed and discretionary measure of social progress.

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As you read the materials in the next two chapters, consider which of the three legal regimes examined in this book — common law, collective bargaining, and statutory regulation — offers the best approach to regulating the employment relationship. Some commentators argue that the enactment of legislation on such matters as minimum wages, pay equity, and health and safety indicates that both the common law and collective bargaining have failed to protect employees adequately. This argument implies that the terms and conditions of employment established by statute are substantially different from those resulting from individual or collective bargaining. Other commentators have disputed the accuracy of this assumption, at least with respect to some types of legislation. Who is right? Does the answer vary for different types of legislation or different types of employees? Have some groups of employees fared particularly poorly under individual contracts of employment or collective agreements? Which of the three regimes offers employees and employers the greatest opportunity to participate in establishing the terms of their relationship? Also stop to consider to what extent legislated terms and conditions of employment are actually applied in Canadian workplaces, especially non-union workplaces.