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Unifying the Field: Mapping the Relationship Between Work Law Regimes in Ontario, Then and Now

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Since the mid-20th century in Canada, labour and employment law have been treated as two separate but related fields. In 1981 Brian Langille argued in "Labour Law is a Subset of Employment Law" for the unification of the fields, so that all forms of waged work were understood as matters of public policy, rather than leaving some types of work to private law regulation. Taking up Langille's argument, this paper argues that employment contracts, individual and collective, are structured through the overlap, interaction and gaps between work law regimes. The creation of a unified field moves from studying the regimes in isolation to studying the relationship between them, particularly the common law, labour law and minimum standards legislation. Adopting such a focus leads us backward to retell the historical story of the relationship between the regimes in the mid-20th century. It also points us forward towards new questions about how the regimes interact to structure employment contracts, and how their gaps and interactions are acting to build and sustain inequalities in the context of changing forms of work.

Depuis le milieu du XXe siècle au Canada, le droit du travail et le droit de l'emploi sont traités comme deux domaines distincts mais liés. En 1981, Brian Langille a plaidé dans « Labour Law is a Subset of Employment Law » pour l'unification des deux domaines, afin que toutes les formes de travail salarié soient comprises comme des questions d'intérêt public, plutôt que de laisser certains types de travail à la réglementation du droit privé. Reprenant l'argument de Langille, nous soutenons dans le présent article que les contrats de travail, individuels et collectifs, sont structurés par le chevauchement, l'interaction et les lacunes entre les régimes de droit du travail. La création d'un domaine unifié permet de passer de l'étude isolée des régimes à l'étude des relations entre eux, en particulier la common law, le droit du travail et la législation sur les normes minimales. L'adoption d'une telle approche nous amène à revenir en arrière pour raconter l'histoire des relations entre les régimes au milieu du XXe siècle. Cela nous amène également à nous poser de nouvelles questions sur la manière dont les régimes interagissent pour structurer les contrats de travail, et sur la manière dont leurs lacunes et leurs interactions contribuent à créer et à maintenir des inégalités dans le contexte de l'évolution des formes de travail.

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Introduction

Several different legal regimes regulate waged employment in Canada, most notably the common law of employment, statutory labour law, and minimum standards legislation.[1] In Canada, these three regimes are typically apportioned between two separate, if related fields. One field is labour law, which regulates unionized employment through labour relations statutes and arbitral case law. The second field is employment law, which regulates individual non-unionized work through the common law and minimum employment standards statutes.

The conceptual division between the fields of labour and employment law first emerged in the mid-20th century Fordist era.[2] The common law of employment contracts had loosely regulated the work of high-status

1. Minimum standards statutes include all statutes that impose a floor of rights into the employment contract. Under this rubric typically falls provincial employment standards acts (ESAs), human rights codes (HRCs) and occupational health and safety statutes (OHSAs). Although all three create a floor of rights, they do so in different ways. For the most part the ESAs provide material entitlements—they primarily set out what the parties must *give* each other. The HRCs, by contrast, mostly impose behavioural obligations—they set out what parties may and may not *do* towards one another. OHSAs are composed of both types of standards but lean more towards behavioural obligations.

2. See Michael Piore & Charles Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (New York: Basic Books, 1984) at 19-20. Piore and Sabel define Fordism, or mass production, as the substitution of skilled labour for highly specialized machinery operated by semi-skilled workers on assembly lines, capable of producing large quantities of goods. Liepetz argues that Fordism can be analyzed along three vectors: first as creating an industrial paradigm built around Taylorist methods of production; second as a macroeconomic structure designed, amongst other things, to extend workers' purchasing power, and third as a "system of rules (or mode of regulation) [that] implied a long-term contractualization of the wage relationship, with rigid controls over redundancy, and a monitored increase in salaries indexed to prices and general productivity," combined with the creation of a welfare state. See Alain Liepitz, "The Post-Fordist World: Labour Relations, International Hierarchy and Global Ecology" (Annual lecture of the Review of International Political Economy, Durham, 7 November 1995) published in (1997) 4:1 Rev Intl Political Economy 1.

professional employees since the turn of the 20th century.[3] A new system of labour law was enacted in the aftermath of the Second World War, representing a grand bargain between labour, capital and the state. This new system was to introduce democracy into the blue-collar workplaces of the country.[4] It was labour law, therefore, that was the focus of academics, lawyers, and government policymakers. A body of minimum standards legislation also existed by the mid-century. It initially emerged in the early 20th century to regulate the work of women and children but was slowly expanded in content and extended to all genders as of the mid-century. Although minimum standards legislation applied to both unionized and non-unionized work, it was placed under the aegis of employment law, where the common law of employment already resided. The field of employment law thereafter held a dual role, regulating both the work of higher-income employees through the common law and the growing numbers of precariously employed workers through minimum standards legislation.

In the early 1980s scholars like Innis Christie and Brian Langille began to speak about a field of "employment law" as distinct from labour law. Employment law was defined in opposition to labour law—as comprising all the law that did not regulate unionized workers: the law of the unorganized.[5] Langille explained that employment law consisted of "the sum of the archaic common law under the odious rubric of the 'the law of master and servant,' which consist[ed] of assorted relics of a dead social order, along with a number of statutes of more or less modern vintage dealing with topics such as a minimum wage."[6] Still, because of its gender-based origins, the statutory laws of non-unionized work remained peripheral to policy and academic discussion until the turn of the 21st century, treated, in the famous words of Judy Fudge, as "labour law's little sister."[7] Over the last decades, employment law and precarious work have

3. I say "loosely" because, in Ontario at least, only a few employment contracts claims were litigated until the 1960s. To what extent the common law of employment's principles helped structure employment relationships during this period is unknown. See Claire Mummé, *"That Indispensable Figment of the Legal Mind": The Contract of Employment at Common Law in Ontario, 1890–1979* (PhD dissertation, Osgoode Hall Law School at York University, 2013) [unpublished].

4. Harry W Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century" (1967) 45:4 Can Bar Rev 786.

5. Christie notes that defining employment law in opposition to union status was somewhat arbitrary: Innis Christie, *Employment Law in Canada* (Toronto: Butterworth & Co, 1980) at 1; Brian Langille, "Labour Law is a Subset of Employment Law" (1981) 31 UTLJ 200 at 200 [Langille, "Subset"].

6. Langille, "Subset," *supra* note 5 at 200, drawing on the language of Roger Rideout, *Principles of Labour Law* (London: Sweet and Maxwell, 1979) at 3.

7. Judy Fudge, "Reconceiving Employment Standards Legislation: Labour Law's Little Sister and

taken on greater policy and academic significance, thanks to the efforts of key academic and activist leaders, but precarious workers continue to enjoy lesser rights than other employees.

In 1981 Brian Langille argued that labour lawyers should expand their field of vision beyond the law of unionized work to include the legal regulation of non-unionized employees. He famously declared that "labour law is a subset of employment law" in an eponymous paper.[8] Langille's idea can be interpreted in different ways. One reading of "Subset" suggests that individual rights ought to take primacy over collective rights; that employment law is the central phenomenon and labour law simply one of its animating parts. But one can also read "Subset" as arguing for the creation of a single field that studies the regulation of all types of waged work relationships—for the abandonment of any hierarchy amongst work law regimes.[9] Langille makes both arguments at different points in "Subset," but this paper focuses on the second interpretation.[10] In "Subset" Langille emphasized that bifurcating the field between labour and employment law had important policy implications. Most notably, the separation served to relegate non-unionized work into the private law sphere of contracts, formal legal equality and self-regulation, cloaking the socioeconomic power differential between parties and impeding the development of strong statutory protections for non-unionized workers. Langille therefore argued that the laws regulating both types of work should be considered through a unified lens—that they should form a single legal field concerned with regulating waged employment, all of which was to be a matter of public policy.

David Doorey recently took up Langille's challenge and devised an analytical framework that examines the overall operation of the laws of work in Canada.[11] This paper also follows Langille's directive but takes

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the Feminization of Labour" (1991) 7 JL & Soc Pol'y 73. In Ontario precarious employment began receiving policy attention as a result of the efforts of dedicated activists and scholars, such as Mary Gellatly, Deena Ladd, Judy Fudge and Leah Vosko, amongst others.

8. Langille, "Subset," *supra* note 5.

9. "Subset" can be read as putting forward different arguments in part because it uses "employment law" to refer both to the specific law of non-unionized employment and to the general law of waged work (*ibid*). Langille explains the field of employment law as consisting of the law of the unorganized, including the common law and employment-related statutes. But in other places, he describes employment law as "the area of law aimed at securing justice in the employment relationship" (*ibid* at 201). Here he does not refer to specific legal mechanisms for doing so, but rather defines "employment law" as all law designed to achieve this specific goal. Finally, Langille argues for a unified field of study and regulation. It follows that maintaining a hierarchy of regimes but swapping one for the other does not meet his stated goal of creating a broad lens of inquiry.

10. *Ibid* at 230.

11. David J Doorey, *The Law of Work: Complete Edition* (Toronto: Emond Montgomery, 2020) at 20-30.

a slightly different approach. This paper argues that at the core of any unified field is an understanding of *the relationship between* work law regimes.[12] Focusing on the relationship between the regimes leads us backwards to a retelling of the history of Fordist work law regulation—one that covers a broader swath of the population than unionized work. It also points us towards new questions about how their current interactions operate to segment the labour force, questions we need answered so that we can properly understand how inequalities are being built into the labour market in the context of changing forms of work.

In brief, a study of the relationship between regimes offers the following story. In the post-war era, the legal regulation of waged employment in Canada was primarily structured around three legal regimes: the common law, labour law, and a growing body of minimum standards legislation. These regimes were organized into a hierarchical pyramid. A single regime sat at each level of the pyramid, which played the primary role in regulating designated occupations. Those occupations then roughly correlated with particular classes, gender and races of workers. The common law of employment was at the top layer, labour law was in the middle, and minimum standards law was at the bottom of the pyramid. But the regimes also interacted between levels, as the content of their rights were often devised in reaction, comparison and rejection of the others. At the centre of the pyramid was labour law and unionized white, male, blue-collar workers employed in what is known as the Standard Employment Relationship (SER).[13] Through the family wage, further explained below, unionized work was intended to provide for all but the highest and lowest status workers. In practice, however, a significant number of workers did not receive the benefits of the SER and were pushed into work at the bottom of the pyramid. The Fordist era came to an end in the 1980s, as production methods, political ideologies and law were restructured in transnational and deregulatory ways. Since that time more and more workers have been employed in precarious positions, while unionized work has declined and labour law has decreased in regulatory significance, particularly in the private sector. The majority of the Canadian workforce is now non-unionized and regulated by a mix of the common law and minimum standards legislation. The question is how these two legal regimes, one built for the most powerful workers and the

12. This paper forms an early part of a larger research project currently in design that explores the history and current operation of the relationships between work law regimes in Canada. That project investigates work law across Canadian jurisdictions and includes human rights and occupational health laws, as well as the regimes discussed in this paper.

13. See *infra*, n 49 for a definition of the SER.

other for the least, are interacting to structure post-Fordist employment contracts and the labour market.

The rest of the paper fleshes out this story and is structured as follows. Section I examines the meaning and consequences of the separation of labour and employment law in Canada. Section II offers a simplified retelling (as much as can be accomplished in a paper of this size) of the relationship between work law regimes in mid-20th century Canada when they took on their current configuration. Section III then examines what has happened to the operation of the mid-20th century work law pyramid in the post-Fordist era specifically in Ontario, faced with changing forms of work and demographic transformations. Section IV places all three Ontario regimes on one canvass and identifies the holes in our current knowledge about how the regimes are interacting to structure individual employment contracts. The paper ends with some thoughts on the overall functioning of work law in Ontario.

I. *The current contours of "labour" and "employment" law in Canada*

As noted above, labour law refers to the law relating to unionization, collective bargaining, industrial disputes, and to the day to day administration of the unionized workplace. In each Canadian jurisdiction, labour law is comprised of a labour relations statute regulating private sector employment, several public sector labour statutes, and labour arbitration case law.[14] Labour law is conceptually based on the power of collective action. It modifies general common law principles of contract and property to allow workers[15] to aggregate their bargaining power so that they can negotiate together on a more equal footing with their employer, who otherwise enjoys greater economic, social, and bureaucratic power.

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14. See eg, the coverage of Donald Carter, Geoffrey England, Brian Etherington & Gilles Trudeau, *Labour Law in Canada* (Markham: Butterworths Canada 2002) updated online through LabourSource in WestlawNext; George W Adams, *Canadian Labour Law,* 2nd Ed (Toronto: Thomson Reuters, 2019) updated online through WestlawNext's LabourSource. Arbitral case law is a body of law developed by labour arbitrators with exclusive jurisdiction over the interpretation and application of collective agreements. See Donald Brown & David Beatty, *Canadian Labour Arbitration,* 5th ed (Aurora: Canada Law Book, 2019) available online through LabourSource in WestlawNext.

15. In this paper I use the terms "worker" and "employee" interchangeably. The concept of a "worker" has no legal meaning in Canada. Rather, Canadian work law regimes tend to distinguish between "employees" to whom the regimes apply, and "independent contractors," who are independent businesspeople and thought not to be in need of additional legal protections than that offered by the common law. Most work law regimes have designated an intermediate status of "dependent contractors," who are treated as employees for the purpose of that law. As noted, in this paper I used the concepts of "worker" and "employee" interchangeably except in instances where the legal classification of employment status is relevant. Note, however, that in some jurisdictions the concept of a "worker" does have legal meaning because it refers to intermediate employment status between "independent contractor" and "employee." For a history of this category in the UK, see Douglas Brodie, "Employees, Workers and the Self-Employed" (2005) 34:3 Indus LJ 253.

Labour law is procedural, rather than substantive, because it changes the common law process of bargaining, but leaves the parties to decide the actual terms of their agreement.[16] Minimum standards statutes, which provide a floor of rights and obligations beneath which unions and employers may not contract, also apply to unionized work. But because they are premised on individual rather than collective rights, the minimum standards statutes are not typically placed at the core of labour law—they are viewed as practically significant but conceptually peripheral to labour law. [17]

Instead, minimum standards legislation is typically considered within the framework of employment law and the regulation of non-unionized work. Employment law is composed of the common law of employment and employment-related statutes, particularly employment standards and human rights law. The work relationships of non-unionized workers are conceptualized through a common law framework that understands the relationship as a contract between two individual parties. This framework is operationalized by background rules from the general law of contract, and a set of implied duties that give substantive shape to the relationship. The common law implied duties impose a series of behavioural obligations as contractual terms, primarily on employees, such as the duty of obedience, fidelity, loyalty, good faith, confidentiality, etc.[18] These terms are implied by law because they are said to arise from the nature of the employment relationship itself.[19] These behavioural obligations, in turn, create the normative foundation of the employment relationship and actuate the

16. According to Langille, there are two regulatory methods to address the inequality of power between employers and employees. The first is a procedural approach, where workers have access to a legal process through which to aggregate their bargaining power, so as to bargain on a more equal footing with their employers. This is the approach of Canadian labour law, which imposes an obligation to bargain in good faith but does not impose the terms that must be included in the collective agreement. The second approach is to legislate employment contract terms. This is the approach of the minimum standards statutes, which read in terms that must be in employment contracts unless the parties agree to provide more than the minimum statutory standard. See Brian Langille, "Labour Law's Back Pages" in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing, 2006).

17. Human rights law is, in particular, recognized as having a large impact on labour-management relations and as being a core part of labour lawyers' jobs. But it is not viewed as founded in the logic of labour law, because of its individual orientation.

18. Hugh Collins, "Implied Terms in the Contract of Employment" in Mark Freedland et al, eds, *The Contract of Employment* (Oxford University Press, 2016), chapter 22. The obligation to provide reasonable notice of dismissal absent cause is the primary implied duty held by employers—see *Carter v Bell and Sons Ltd*, [1936] OR 290, 2 DLR 438 (CA), which is more substantive than procedural. Employers are also subject to the implied duty to dismiss in a good faith manner—see *Wallace v United Grain Growers Ltd,* [1997] 3 SCR 701, 152 DLR (4th) 1, and to perform their contracts in an honest manner—see *Bhasin v Hrynew*, 2014 SCC 71.

19. *Machtinger v Hoj Industries* [1992] 1 SCR 986, 91 DLR (4th) 491.

employer's managerial prerogative, a residual right of control over the day-to-day management of the workplace. The material terms of the contract, the wages, hours of work, etc, are then added into this framework to complete the contract of employment. Beyond the implied terms, the common law does not itself mandate the inclusion of any material terms in employment contracts. These terms thus originate from party negotiations, from employer imposition, and/or from applicable minimum standards legislation. The expression, "the common law of employment," is often used as a shorthand reference not only for the background rules and substantive doctrines of the common law of employment but *also* to terms negotiated between the parties/imposed by the employer, so as to differentiate them from those imposed by statute. As a theoretically private relationship, monitoring the day-to-day administration of the employment contract is left to the parties. Employers have a series of self-help remedies available for employee breach, such as corrective discipline measures and termination. In practice, employees can remedy a breach only after relationship breakdown.[20]

The separation of labour and employment law in Canada is procedural as well as conceptual. The rights of unionized workers are interpreted and applied by specialized labour boards and labour arbitrators, the latter of which operate as a one-stop-shop for issues relating to collective agreements and all employment-related statutes.[21] By contrast, the rights of non-unionized employees are interpreted and applied by the common law courts and a large array of administrative decision-makers, such as the ministries of labour for employment standards, human rights tribunals for human rights law, safety inspectors and labour boards for occupational health and safety, etc.

But of course, the two fields do not actually operate in strict parallel. Individual minimum standards statutes apply to both unionized and non-unionized workers, and some, like employment standards and human rights

20. Because of the imbalance of bargaining power between the parties, employees often fear raising issues while on the job, less they be dismissed for it. In addition, in *Suleman v British Columbia Research Council*, [1990] BCJ No 2707, 52 BCLR (2d) 138 [*Suleman*] the BCCA held that an employee repudiates their employment contract if they commence a lawsuit against their employer while in employment. The Supreme Court declined to speak on the issue in *Potter v New Brunswick Legal Services Commission*, 2015 SCC 10 at para 181.

21. Labour arbitrators have the authority to interpret and apply all employment-related statutes—see *Parry Sound (District) Welfare Administration Board v Ontario Public Service Employees Union Local 324,* 2003 SCC 42. In some cases, arbitrators will in fact have exclusive jurisdiction to apply the statutes in unionized workplaces—see *Weber v Ontario Hydro,* [1995] 2 SCR 929, 125 DLR (4th) 583. But in some other cases, such as with human rights law, labour arbitrators hold concurrent jurisdiction with human rights tribunals: see *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14.

law, have become quite central to the regulation of unionized employment. Moreover, as members of the field well know, workers do not experience work law regimes in silos, or as neatly separated legal regimes. Workers and employers experience the laws of work as a jumble of overlapping and fragmented legal regimes. The practice of separating the fields assists policy discussions and legal analysis but does not represent the reality experienced in practice, where one rarely encounters an employment relationship structured by a single regime. As David Doorey argues, we have divided the fields to be able to manage the complexity of the interaction amongst the regimes but doing so "oversimplifies the complexity of the legal framework that governs the employment relationship in Canada. A closer inspection shows a far more complicated terrain, one that cannot be so neatly compartmentalized."[22] In other words, the compartmentalization allows us to put some order in chaos. But it does not permit for a detailed and nuanced analysis of the actual operation of different types of work relationships or a picture of the entire system of work law regulation in Canada.

The idea of unifying work law fields has been in debate amongst labour lawyers in a few different contexts. In the United Kingdom, for instance, there has been a move to reframe the law of unionized work as based on an individual rights framework—to integrate individual rights concepts into collective labour law.[23] The idea of broadening the field also plays a key role in the "law of the labour market" approach advocated by some scholars, which seeks to expand the field of labour law to include all laws that structure the supply and demand for labour.[24] The proposal in this paper differs significantly from both. It does not seek to merge individual rights into a collective rights framework, nor does it understand waged work as a market organized primarily around supply and demand. Rather this paper offers a normative pitch for a descriptive framework that focuses on the relationship between work law regimes in Canada to better understand and assess how they interact to structure individual employment contracts. It argues that identifying the spaces of their imbrication, overlap, contradiction and gap will further our ability to address the pressing issues faced by working people today.

22. Doorey, *supra* note 11 at 17.

23. The concern is that collective rights may start being shaped in individualist terms.

24. For a history of the "law of the labour market" approach, as well as a critique of its normative foundations, see Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford: Oxford University Press, 2004) at chapter 8. For an argument in its favour, see Simon Deakin & Frank Wilkinson, *The Law of the Labour Market* (Oxford: Oxford University Press, 2005) at chapter 5.

In the next section, I use this approach to tell the story of the birth of modern work law regimes in Canada, with a focus on Ontario, when they were assembled into their current configuration. I concentrate on the relationship between the common law of employment, labour law and collective bargaining, and employment standards legislation. Human rights law is not covered, because its conceptual logic and role in the pyramid raise larger questions than can be canvassed in this short piece.[25]

II. *The relationship between the regimes: A brief history of work law regimes in the Fordist era*

The current work law framework was first assembled during the last years of the Second World War. It was designed around two different concepts of the employment relationship and three different legal regimes. One conceptual framework, the common law of employment, was built on common law principles which envisaged a private relationship based on individual rights. The other framework, labour law, was conceived as a collectivist public law endeavour providing workers with voice and dignity in the workplace. Each framework was primarily built through one legal regime, but a third work law regime, minimum standards law, also existed and applied to both the common law and labour law frameworks. In both cases, the minimum standards statutes created a series of entitlements for workers that operated to set a floor beneath which the parties could not contract. In the labour context, minimum standards statutes acted to shift the balance of power between the parties in collective bargaining. The minimum standards statutes also affected the balance of power between lower-income, non-unionized employees and their employers, but often acted less as a springboard for negotiation, and more as the main source of their employment terms and their workplace rights. The result is that, as the following pages describe, the post-war work law system operated less as a dual parallel system and more as a hierarchical pyramid, with the common law at the top of the pyramid, labour law in the middle, and minimum employment standards statutes at the bottom.

From at least the turn of the 20th century employment was constructed in Canada as a private contractual relationship between two equal parties, subject to the common law. The common law of employment had begun to develop in England in the early 19th century to regulate the work of higher status employees.[26] This developing body of law was theoretically

25. Human rights law is part of the larger research project described above, *supra* note 12.

26. See *Bramwell v Penneck*, (1827) 7 B & C 536, 108 Eng Rep 823. For discussion of this case and issue, see Christopher Frank*, Master and Servant Law: Chartists, Trade Unions, Radical Lawyers and the Magistracy in England, 1840–1865* (Ashgate Publishing, Online Edition, 2010) at 32-36.

structured around newly emerging laissez-faire ideals of market and state, constructing the employment relationship as a private contractual relationship between two parties equal in law, regulated by the general laws of contract.[27] Although this narrative has had remarkable staying power, it was never particularly accurate. From the early 19th century the common law courts of England created special rules for employment contracts that did not apply to other contractual relationships. And more importantly, the common law absorbed into its content some of the status and subordinating features of the previous statutory system of master and servant.[28] The result was to build inequality into the heart of the common

27. AV Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, 2nd ed (London, 1914) at xxx-xxxii; Henry Sumner Maine, *Ancient Law* (London: John Murray, 1920) at 319; Daphne Simon, "Master and Servant" in John Saville, ed, *Democracy and the Labour Movement* (London, 1954); RW Rideout, "The Contract of Employment" (1966) 19:1 Current Leg Probs 111; Otto Kahn-Freund, "Blackstone's Neglected Child: The Contract of Employment" (1977) 93 Law Q Rev 508.

28. Alan Fox, *Beyond Contract: Work, Power and Trust Relations* (London: Faber and Faber Limited, 1974) at 182-183; Philip Selznick, *Law, Society and Industrial Justice* (USA: Russell Sage Foundation, 1969) at 132. Master and servant law was a class-based statutory system first enacted in the 13th century to minimize wage competition between employers and ensure them access to an available pool of workers. The hierarchical nature of master and servant law was enforced through employers' almost unfettered right to obedience from their servants, and the use of jail time as sanction for employees who violated its terms. The master and servant system persisted until 1875, when its penal sanctions were repealed. The courts absorbed many of its elements into the common law of employment, despite framing this area as organized around principles of equality before the law. In reality, employers continued to hold a residual right to manage their businesses as they saw fit. To give life to that right, the status-based duties servants had owed their employers were now recast as implied legal terms of employment contracts, terms that arose naturally from the intrinsically hierarchical nature of the employment relationship. In other words, any negotiations between the parties started from a position in which the common law had already endowed the employer with rights of control and direction that could not easily be bargained away. For historical accounts of master and servant law in England, see Simon Deakin, "The Contract of Employment: A Study in Legal Evolution"(2001) ESRC Centre for Business Research Working Paper No 203; Simon Deakin & Frank Wilkinson, *The Law of the Labour Market* (Oxford: Oxford University Press, 2005); Douglas Hay, "Master and Servant in England: Using the Law in the Eighteenth and Nineteen Centuries" in Willibald Steinmetz, ed, *Private Law and Social Inequality in the Industrial Age* (Oxford: Oxford University Press, 2000) ["Using the Law"]; Douglas Hay, "England, 1562–1875: The Law and Its Uses" in Douglas Hay & Paul Craven, eds, *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955* (North Carolina: University of North Carolina Press, 2004); Frank, *supra* note 26; Brian Napier, *The Contract of Service: The Concept and its Application* (PhD Dissertation, University of Cambridge, 1975); Daphne Simon, "Master and Servant" in John Saville, ed, *Democracy and the Labour Movement* (London 1954); Robert J Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870* (Chapel Hill: The University of North Carolina Press, 1991); Robert J Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century* (New York: Cambridge University Press, 2001); Sidney & Beatrice Webb, *The History of Trade Unionism* (London, 1911 edition). For a historical account of Canadian colonial experiences with master and servant law, see Paul Craven, "The Law of Master and Servant in Mid-Nineteenth Century Ontario" in David Flaherty ed, *Essays in the History of Canadian Law*, vol 1 (Toronto: University of Toronto Press, 1981); Grace Laing Hogg, *The Legal Rights of Masters, Mistresses and Domestic Servants in Montreal, 1816-1829* (Masters Thesis, University of Montreal, 1989) [unpublished]; Sean T Cadigan, "Merchant Capital,

law of employment.[29] The Canadian colonies received and/or enacted their own master and servant statutes when the British first claimed Indigenous lands as their own.[30] The colonial courts thereafter also adopted common law principles as they developed.[31] This latter body of law was still referred to as "master and servant law," but now referred to the common law of employment, rather than its statutory ancestor.

The new Canadian Dominion, still in process of formation, entered the 20th century amid its Second Industrial Revolution, a period characterized by sustained economic growth, significant immigration, westward expansion, and the growing dominance of American manufacturing companies and their newly developing ideas of scientific management. The early 20th century was also characterized by a major strike wave, as workers protested the deskilling of the new manufacturing processes.[32] In 1900 the federal government began to enact a series of voluntary processes to address industrial disputes, first through the *Conciliation Act* of 1900, then the *Railway Labour Disputes Act* of 1903, and finally the *Industrial Disputes Investigation Act* of 1907.[33] The voluntary nature of the statutes' processes made them generally ineffective, but some of their characteristics were nonetheless adopted by later labour statutes.[34] By

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the State, and Labour in a British Colony: Servant-Master Relations and Capital Accumulation in Newfoundland's Northeast-Coast Fishery, 1775-1799" (1991) 2:1 Journal of the Canadian Historical Association 17; Ian C Pilarczyk "Too Well Used by His Master: Judicial Enforcement of Servants' Rights in Montreal, 1830–1845" (2001) 46:2 McGill LJ 491; Ian Pilarczyk "The Law of Servants and the Servants of Law: Enforcing Masters' Rights in Montreal, 1830–1845" (2001) 46:3 McGill LJ 779: Paul Craven, "Canada 1670–1935, Symbolic and Instrumental Enforcement in Loyalist North America" in Douglas Hay & Paul Craven, eds, *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955* (North Carolina: University of North Carolina Press, 2004). For a history the early common law of employment, see Steinfeld, *ibid;* Mark Freedland, *The Contract of Employment* (London: Oxford University Press, 1976); Mummé, *supra* note 3; Claire Mummé, "From Control Through Command to Control of Discretion: Labour Time, Labour Property and the Tools of Managerial Control in early 20th Century Ontario" (2016) 45:2 Indus LJ 176.

29. Fox, *supra* note 28; Selznick *supra* note 28; Otto Kahn-Freund, *Labour and the Law* (London: Stevens & Sons Ltd, 1972) at 12-13 [Kahn-Freund, *Labour and the Law*].

30. Different colonies "received" English law at different moments in time, and with different specifications. See Bora Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969).

31. See Mummé, *supra* note 3 at Table 1.

32. Judy Fudge & Eric Tucker, "Law, Industrial Relations and the State: Pluralism or Fragmentation?: The Twentieth Century Employment Law Regime in Canada" (2000) 46 Labour/Le Travail 251; Craig Heron, ed, *The Labour Revolt, 1917–1925* (Toronto: University of Toronto Press, 1998); Greg Kealey & Douglas Cruikshank, "Strikes in Canada, 1891–1950" (1987) 20 Labour/Le Travail 85; Bryan D Palmer, *The Working Class Experience: Rethinking the History of Canadian Labour, 1800–1991,* 2nd ed (Toronto: McLelland & Stewart, 1992) at 170-176.

33. *The Conciliation Act, 1900,* SC 1900, c 24; *Railway Labour Disputes Acts*, SC 1903, c 55; *Industrial Disputes Investigation Act*, SC 1907, c 20.

34. See Judy Fudge & Eric Tucker*, Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900–1948* (Toronto: Oxford University Press, 2001) at chapters 2 and 3 for a

that time Canadian trade unions, along with their British and American counterparts, had experienced the criminalization of trade union activities,[35] the unequal penalties for master and servant law violations by workers and employers,[36] and the judiciary's unwillingness to account for the material realities of unequal bargaining power at common law.[37] In combination, these experiences revealed the common law to be a law of economic and political subordination.[38] Unions and workers responded with a surge of labour activism in the 1920s, which slowed down during the Great Depression.[39] During the 1930s some Canadian jurisdictions enacted statutes that opened the way for the labour relations acts of the postwar era. Quebec enacted the *Collective Agreement Decrees Act*, which allowed certain parts of a collective agreement to be extended across an industry where it was supported by a large number of its members.[40] Ontario, and other common law provinces, passed an *Industrial Standards Act*, which created tripartite boards of governmental employer and employee representatives who were to negotiate agreements concerning wages and working conditions for particular industries in specified geographical zones.[41] Woods and Ostry argue that these statutes serve to legitimize the political role of trade unions and "laid the framework for a system of industrial relations which combined collective bargaining with state regulation."[42] A massive strike wave in the 1940s finally forced the Canadian federal government to enact comprehensive labour relations regulation.[43] It did so in the form of PC 1003, through which the federal government introduced an industrial relations model premised on the American *Wagner Act* of the 1930s. The new labour law system was

history of these regimes [Fudge & Tucker, *Labour Before the Law*].

35. See Paul Craven, "Workers' Conspiracies in Toronto, 1854–72" (1984) 14 Labour/Le Travail 49; and Eric Tucker, "'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837–77" (1991) 27 Labour/Le Travail 15 ["Toleration"] for a debate on the legality of trade union combinations in early colonial Ontario.

36. See Hay, "Using the Law," *supra* note 28.

37. Kahn-Freund, *Labour and the Law*, *supra* note 29.

38. See Fudge & Tucker, *Labour Before the Law*, *supra* note 34 at chapter 2.

39. Craig Heron, *The Canadian Labour Movement: A Short History*, 3rd ed (Toronto: James Lorimer & Co, 2012) at chapter 2**.**

40. *Québec, An Act Respecting Collective Agreement Decrees,* CQLR c D-2.

41. In Ontario, see *The Industrial Standards Act,* 1935, SO 1935, c 28. The Ontario statute was enacted particularly to address issues in the textile industries. See Mercedes Steedman, "Canada's New Deal in the Needle Trades: Legislating Wages and Hours of Work in the 1930s"(1998) 53:3 Relations industrielles/Industrial Relations 535; Marcus Klee, "Fighting the Sweatshop in Depression Ontario: Capital, Labour and the Industrial Standards Act" (2000) 45 Labour/Le travail 13.

42. Horace Woods & Sylvia Ostry, *Labour Policy and Labour Economics in Canada* (Toronto: Macmillan of Canada, 1962) at 22-23, quoted in Mercedes Steedman, *supra* note 41.

43. Heron, *supra* note 39 at 75-78**;** Peter S McInnes, *Harnessing Labour Confrontation: Shaping the Postwar Settlement in Canada, 1943–1950* (Toronto: University of Toronto Press, 2002) at chapter 5.

designed around a specific form of employment that came to represent the norm of male, white and blue-collar employment in the Fordist era referred to as the Standard Employment Relationship (SER). Fudge and Vosko explain that:

> The SER is best characterized as a continuous, full-time employment relationship where the worker has one employer … Its essential elements include an indeterminate employment contract, adequate social benefits that complete the social wage, the existence of a single employer, reasonable hours and employment frequently, but not necessarily, in a unionized sector.[44]

It became, they explain "the normative model of (male) employment in Canada," the paradigmatic employment relationship around which post-war work law was formed.[45]

This new labour relations system was to represent a post-war compromise between capital, labour and the state. At its heart was the following exchange: employers were now statutorily required to recognize trade unions and to bargain in good faith, while unions agreed to limit the strike tool for use only in support of collective bargaining at designated intervals. And it turned the principles of the common law on their head. As opposed to a contract negotiated by two equal parties, statutory labour law built a system of collective, rather than individual rights, to be enforced by industrial relations specialists rather than the common law courts. It recognized the structural inequality of bargaining power between workers and employers. And it framed the regulation of work as a question of public policy, not private law.[46] In doing so labour law created a second framework for the legal regulation of employment.

This second collective framework was not intended to apply to managerial and professional employees, who were typically excluded from the coverage of the labour relations acts.[47] This group of workers,

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44. Judy Fudge & Leah Vosko, "Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law, Legislation and Policy" (2001) 22:2 Economic and Industrial Democracy 271 at 273.

45. *Ibid* at 274.

46. The post-war system of industrial legality also served to forge what Fudge and Tucker have called a system of "responsible unionism": Fudge & Tucker, *Labour Before the Law, supra* note 34. Although in the short-term unions benefitted from the post-war compromise, it also provided the state with the tools to dictate acceptable union behaviour and disincentivize worker militancy. The result was to narrow the focus of trade union attention from general social activism to enterprise-based bargaining geared towards wages and benefits. See Tucker, "Toleration," *supra* note 35 at 53-54; Leo Panitch & Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms* (Garamond Press, 1988).

47. The occupational classification system used by Statistics Canada at the time defined "managerial" to include owners operating or managing their own business and paid managers, except in agriculture,

therefore, remained employed under individual employment contracts regulated by the common law. Owing to their status and professional training, many such workers held a reasonable degree of bargaining power with their employers and were able to negotiate some of the terms of their employment contracts. In some instances, the existence of a unionized workforce might provide a net economic benefit to white-collar employees, insofar as their entitlements would be pegged to exceed that of blue-collar workers. Women accounted for almost half of employees in the professional fields, but typically earned half of their male counterpoints' income and thus had less bargaining power.[48] In general, the employment contracts of workers in this category operated within the common law framework of background contractual rules and implied terms, supplemented by a mix of material terms bargained between the parties and unilaterally imposed by the employer. Disputes over the interpretation and implementation of the terms of employment contracts could theoretically be resolved by litigation to the civil courts. But despite the superior bargaining power of these workers compared to others, few employment contract claims were litigated in Ontario until the 1960s.[49] This suggests that even the most powerful of non-unionized employees were not able to access the law to enforce their employment contracts while remaining on the job.

Once a workplace was unionized, its workers were no longer regulated by the common law. Rather, unionized employees were now regulated by the collectivist framework of labour law and collective bargaining. In the decades after the Second World War, the unions' membership grew steadily in manufacturing, the resource sector, and the transportation industry, resulting in the growth of a blue-collar middle-class.[50] In mid-century

forestry and fishing. "Professional occupation" included workers who "perform tasks which usually require training in a specific scientific or other professional field, at a university, technical institute or similar establishment or which require creating ability in literature or art." Included in the professional category were architects, engineers, nurses, judges and magistrates, lawyers, physicians, but also artists and art teachers, librarians, teachers, etc. Noah M Meltz, *Manpower in Canada 1931–1961 Historical Statistics of the Canadian Labour Force* (Ottawa: Queen's Printer, 1968) at 27.

48. Women made up almost half of all employees in professional employment. Most professional women earned at the mid-range of wage scale, closer to men engaged in manual work, but received significantly less than their male counterparts in the same professions. For instance, in 1951 male nurses made an average annual wage of $2205.00, while female nurses made $1724.00. In 1961, male teachers in the same year made $5527.00, while female teachers made an average of $3397.00. Meltz, *supra* note 47 at 242 (Table B1). See also Sylvia Ostry, *The Occupational Composition of the Canadian Labour Force* (Ottawa: Queen's Printer and Controller of Stationery, 1967 at 76-79). Race-based data was not kept at this time, nor were other types of social markers typically recorded, other than age, but given the demographics of the country and the common discriminatory beliefs, we can assume that most workers in this category were white.

49. Mummé, *supra* note 3.

50. Heron, *supra* note 39 at chapter 2.

Canada, that blue-collar workforce was primarily composed of white male employees. Between the mid-1940s and the 1960s, collective bargaining provided unionized workers with career-long employment, internal job ladders for promotions, loyalty-incentive benefits such as private pensions and extended medical coverage, and of course, a family wage capable of supporting a married couple with children.[51]

Another body of law also applied to unionized workers—minimum standards legislation.[52] In the early 20th century Canadian governments had enacted minimum wage and maximum hours of work statutes for women.[53] Some jurisdictions also enacted fair wage statutes and policies that provided a living wage to government contractors (primarily men).[54] These statutes operated within the common law framework by imposing minimum and maximum terms into employment contracts, in other words creating a zone of permissible contract entitlements for those subject to the legislation. Before the mid-century, trade unionists often portrayed legislated employment standards as dangerous to their interests, appropriate only for the work of women owing to their special vulnerability.[55] But

51. Katherine VW Stone, "Policing Employment Contracts Within the Nexus-of-Contract Firm" (1993) 43:3 UTLJ 353 at 363-369.

52. The concept of minimum standards was developed by the International Labour Organization (ILO) early in its existence, although the terminology itself was not used until the 1930s. The first recorded use I have located is by US Secretary of Labor Frances Perkins in *Record of Proceedings,* International Labour Conference, Twenty-Sixth Session, Philadelphia, 1944 (Montreal: ILO) at 23. Conceptualizing minimum terms as a "floor of rights" was the innovation of Lord Wedderburn, who first used the term in his 1972 edition of *The Worker and the Law*. See KW Wedderburn, *The Worker and the Law* (Harmondsworth: Penguin, 1971) at 16.

53. See eg, the Manitoba *Minimum Wage Act,* SM 1918, c 38; Saskatchewan's *The Public Works Act*, SS 1916, c 9; and British Columbia's *Male Minimum Wage Act,* SBC 1925, c 32. Typically a board or commission was created, which often set minimum wages for women on an industry by industry basis. Rates were also sometimes differentiated by age or experience. Enforcement was an ongoing problem and in Ontario at least, the Department of Labour typically refused to prosecute for ongoing violations. See JW MacMillan, "Minimum Wage Legislation in Canada and Its Economic Effects" (1924) 9:4 Intl Labour Rev 507; Margaret E McCallum, "Keeping Women in their Place: The Minimum Wage in Canada 1910-25" (1986) 17 Labour/Le travail 29; Gillian Creese, "Sexual Equality and the Minimum Wage in British Columbia" (1991) 26:4 Journal of Canadian Studies/Revue d'Études Canadiennes 120.

54. See Bob Russell, "A Fair or a Minimum Wage? Women Workers, the State, and the Origins of Wage Regulation in Western Canada" (1991) 28 Labour/Le travail 59 for a fascinating analysis of the differences between "minimum wages" for women, and "fair wages" for men.

55. They worried that it created a dependence on the state rather than their own economic power, and that the standards set could become maxima rather than minima and create a ceiling instead of a floor. See, eg, "Minimum Wage for Women," *The Voice,* Winnipeg, (9 May 1913) at 3. Many unions nonetheless supported a legislated minimum wage for women, owing to their perceived vulnerability. Edith Lorentsen & Evelyn Woolner, "Fifty Years of Labour Legislation in Canada" in Canada, Department of Labour, *Labour Gazette* L:9 (Ottawa: Queen's Printer, 1950) 1412 at 1423. On the relationship between women's minimum wage and the labour movement, see Jane Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: The Women's Press, 1992) at 77-80; Gillian Creese, "Sexual Equality and the Minimum Wage in British

increasing support for legislated work standards emerged in the 1930s and 1940s. In the 1940s and 1950s Canadian governments began to extend minimum wage and hours of work regulation to men, and to enact newer minimum employment standards, such as vacations with pay and anti-discrimination legislation.[56] In the late 1950s, and throughout the 1960s and 1970s, Canadian jurisdictions began to amalgamate the separate statutes into single consolidated acts, typically referred to as labour or employment standards legislation (ESA).[57]

Minimum standards statutes had two lives in the post-war era. In Ontario managerial and professional employees were excluded from most of the ESA's coverage,[58] but the statutes did apply to both individual employment contracts and to collective bargaining agreements. In the labour context, the ESA operated to set and/or increase the starting point for bargaining.[59] If an agreement was silent on an issue that was statutorily regulated, the statutory minimum would be read into the collective agreement. In the next round of bargaining, the union could then argue to increase it or could structure the give and take of negotiations around other priorities. The impact of minimum standards on collective bargaining was well illustrated by employers' reactions to the inclusion of an employee

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Columbia" (1991) 26:4 J Can Studies 120 at 121-125; Veronica Strong-Boag, "The Girl of the New Day: Canadian Working Women in the 1920s" (1979) 4 Labour/ Le Travail 131 at 148-164.

56. British Columbia was the first province to enact a minimum wage statute for men in 1925: *Male Minimum Wage Act*, SBC 1925, c32. Between the 1940s and 1960s many other provinces did the same. For example, *Minimum Wage Act*, *1945*, SNB 1945, c 42; *Minimum Wage for Men Act*, SPEI 1960, c 27; *Hours of Work and Vacations with Pay*, SO 1944, c 26; *The Annual Holidays Act*, *1944*, SS 1944, c 65; *An Act to Promote Fair Employment* Practices, SO 1951, c 24; *The Fair Employment Practices Act*, SM 1953, c 18.

57. *Minimum Employment Standards Act*, SNB 1964, c 8; *Canada Labour (Standards) Code Part III*, SC 1964–1965, c 38, *The Employment Standards Act, 1968,* SO 1968, c 35 [*ON ESA*]; *The Labour Standards Act, 1969*, SS 1969, c 24. In Ontario the first ESA amalgamated the *Hours of Work and Vacations Act*, the 1963 Minimum Wage Act that applied to men and women, and the *Factory Act*, and amended the Ontario Human Rights Code to transfer equal pay protections to the ESA. The Act for the first time provided employees with a right to refuse overtime work and raised the minimum wage level from $1.00 to $1.25 per hour. The content of the Act was not met with significant trade union support, who were particularly upset by the ongoing availability of employer permits to be exempted from hours of work regulations. Mark Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (Montreal and Kingston: McGill-Queen's University Press, 2009) at 68.

58. *ON ESA, supra* note 57, s 7(2); *Employment Standards Act Regulations*, OReg 366/68, s 2-3 [*ON ESA Regs*].

59. See eg, Letter from DS Keen, Manager of the Ontario Division of the Canadian Manufacturers' Association, to Minister of Labour Dalton Bales (2 August 1968) Minister of Labour Correspondence, Toronto, Archives of Ontario (7-1-0-1408.2 Box 38446) at 7; Letter from DA Michum, Vice-President of the Algoma Steel Corporation, to Minister of Labour Dalton Bales, (21 June 1968) Minister of Labour's General Correspondence and Subject Files, Toronto, Archives of Ontario (7-1-0-1407.2 box B388446); Letter from Peter Ribotto, Vice-President of Caland Ore Company, to Minister of Labour Dalton Bales (17 July 1968) Minister of Labour's General Correspondence and Subject Files, Toronto, Archives of Ontario (7-1-0-1407.2 box B388446).

right to refuse overtime in Ontario's 1968 ESA. Before the ESA created this new right, employers held the residual right to require employees to work overtime, arising from their managerial prerogative. They understood the new right to significantly change the balance of power between the parties. D Lord, President of the Ontario Mining Association, opined to then Minister of Labour Dalton Bales that the new employee right to refuse overtime "effectively grants to unions a perennial demand which many employers have not conceded."[60] The statute gave the unions something they would usually have to fight for, and in doing so changed the toolbox of benefits that could be traded off between the parties. At a general level, therefore, the employment contracts of unionized workers were populated by terms collectively bargained, and in some cases, read in from employment standards legislation. Disputes over the interpretation and/or implementation of the collective agreement was resolved by labour arbitrators, thus providing unionized workers with a method of addressing workplace issues while remaining in employment.

Minimum standards legislation also applied to non-unionized, non-managerial and non-professional employees.[61] When labour law was enacted it was expected that it would provide for all non-managerial non-professional workers, but over the post-war decade it became increasingly clear that there were numerous people left out of its gains. The segmented nature of the post-war labour force was no accident. Jane Ursel explains that the job stability, wage protections, pensions and additional benefits of the male unionized employees in core industries required the availability of labour in the secondary sectors, where product demand was unstable and fluctuating, requiring a temporary workforce with little to no job security or benefits.[62] Some workers in the peripheral sectors were white male "[b]lue collar workers in small-scale industry [who] continued to eke out a living at wages far below those in the unionized sector and with far less job security."[63] Some were Indigenous, Black and immigrant men working in smaller enterprises. But most were women: white, Black, Indigenous

60. Letter from D Lord, President of the Ontario Mining Association, to Minister of Labour Dalton Bales, (5 July 1968) Minister of Labour Correspondence, Toronto, Archives of Ontario, (7-1-0-1408.2 Box 38446) at 2.

61. In Ontario, as in many other provinces, managerial and professional employees were excluded from the coverage of minimum standards statutes: see sources *supra* note 58.

62. In the 1970s Piore and Doeringer argued that the labour market was segmented in two, a primary and secondary sector ("dual labour market" theory). The primary sector was characterized by stable employment in large corporations organized around internal job ladders, offering strong job security. The secondary sector consisted of low-waged low-skilled jobs lacking job permanence or consistent hours. See Michael J Piore & Peter B Doeringer, *Internal Labor Markets and Manpower Analysis* (New York: ME Sharpe Inc, 1971) at 164-181.

63. Heron, *supra* note 39 at 83.

Women of Colour and immigrant women, earning at or below minimum wage, often working part time in smaller enterprises.[64] Entrenched in the SER was the idea that women would receive the benefits of collective bargaining not as workers, but through their husband's family wage. Women were expected to work only a few years before marriage and to thereafter return to the home and take care of the children. Indeed, in the aftermath of the Second World War, it was explicit government policy to push women out of the jobs they had taken up during the war and convince them to go back to the work of the home, freeing up jobs for the returning male soldiers.[65] Minimum standards law was the primary legal regime regulating these workers.

Starting in the 1960s the government of Ontario began to recognize that not all workers enjoyed the benefits of the post-war Golden Age.[66] The ESA, and particularly its minimum wage, was understood as a tool for poverty reduction and market planning. In a draft backgrounder to Cabinet by Ontario's Minister of Labour in 1968, the Minister explained that "the minimum wage remains one of the most important instruments in the Province's efforts to prevent the economic exploitation of our human resources."[67] Its principal purpose, he explained, was to prevent exploitation:

> [It] ensure[s] that employees with little or no bargaining power are paid hourly rates that give them sufficient income to obtain the necessities of life. In this context a minimum wage is intended to prevent severe exploitation in both the social and economic meanings of that word; to serve as pressure upwards toward the elimination of unfair wage competition, and to support money incomes and demand in periods of economic slack. It is a floor beneath which wages cannot legally fall.[68]

64. Ursel, *supra* note 55 at 239-241

65. Ann Porter, "Women and Income Security in the Post-War Period: The Case of Unemployment Insurance, 1945–1962" (1993) 31 *Labour/Le Travail* 111 at 114; Ruth Roach Pierson & Marjorie Cohen, "Educating Women for Work: Government Training Programs for Women before, during, and after World War II" in Michael S Cross & Gregory S Kealey, eds, *Modern Canada 1930–1980's: Readings in Canadian Social History*, vol 5 (Toronto: McClelland & Stewart, 1984) at 223-228.

66. Ontario Department of Labour, *Labour Standards and Poverty in Ontario* (22 November 1965) at 6-7; *Legislation Affecting Women's Work*, Labour Gazette, Department of Labour, 29 July 1967 at 672-672. Ontario Ministry of Labour officials noted that in 1963, approximately 6.5% of workers in non-agricultural and salary workers earned less than $1.00 per hour, of which two-thirds were women. The majority of people working for less $1.00 per hour were employed in the services and retail small establishments. The Case for a $1.25 Minimum Wage, Minister of Labour's General Correspondence and Subject Files, Toronto, Archives of Ontario (7-1-0-1407.1 Box B388446).

67. Labour Standards Act 1968 Background Memorandum (25 January 1968) Correspondence with the Deputy Minister of Labour, Toronto, Archives of Ontario, (RG 7-12-0-3431 box 354049).

68. *Ibid.*

At the same time, the standards were not intended to reshape the relationship between capital and labour. Rather, they were to operate only to "fix a starting point after which the forces of the market place [sic] can begin to take effect."[69]

For more precarious workers, therefore, the minimum standards statutes were the main source of rights and many of their contract terms.[70] The common law created the framework for their employment contracts, organized around the implied employee terms and the managerial prerogative, but the terms of their contracts were a combination of terms unilaterally imposed by the employer on non-statutory matters, and minimum standards read into their contracts. In other words, for lower-waged non-unionized workers, minimum standards legislation did not so much increase the baseline for bargaining, but rather served to populate the content of their employment contracts. And because the minimum standards statutes also built rights enforcement mechanisms outside the civil courts, they ended up providing the main site for rights enforcement for lower-waged workers.

Although theoretically intended for employees with low bargaining power, the Ontario ESA excluded some of the most vulnerable workers in the province. Women employed in domestic service, who, in the post-war era were almost exclusively Black and Indigenous women, often experienced significant inequality of bargaining power but were not extended the benefits of the ESA.[71] Several portions of the ESA were also not afforded to many agricultural workers who, starting in the 1970s, were increasingly workers from Latin American and Caribbean countries imported through state-run seasonal temporary labour programs.[72]

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69. The Case for a $1.25 Minimum Wage, Minister of Labour's General Correspondence and Subject Files, Toronto, Archives of Ontario (7-1-0-1407.1 box 38446).

70. These workers were entitled, in theory, to common law remedies for wrongful dismissal but the cost of a bringing a civil claim, and the common law's predisposition towards higher status workers, made the common law an unlikely source of remedies for lower income workers.

71. *ON ESA Regs, supra* note 58, s 1(f). During the Second World War most women were able to move into fields other than domestic service, due to labour shortages. After the war, however, some white women were able to remain in those occupations, while Indigenous, Black, Women of Colour and other new immigrants were pushed backed into domestic work. See Dionne Brand, "'We Weren't Able to Go into the Factories Until Hitler Started the War': The 1920s to the 1940s" in Peggy Bristow, ed, *We're Rooted Here and They Can't Pull Us Up: Essays in African Canadian Women's History* (Toronto: University of Toronto Press, 1994) at 180-181; Linda Carty, "African-Canadian Women and the State: Labour Only Please" in Peggy Bristow, ed, *We're Rooted Here and They Can't Pull Us Up: Essays in African Canadian Women's History* (Toronto: University of Toronto Press, 1994) at 212-215; Adele Perry, *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849–1871* (Toronto: University of Toronto, 2001); Mary Jane Logan McCallum, *Indigenous Women, Work, and History: 1940–1980* (Winnipeg: University of Manitoba Press, 2014) at chapter 1.

72. See eg *ON ESO Regs, supra* note 58, s 3*; The Employment Standards Act,* 1957 SMB c 20, s 2(h)(ii); *The Alberta Labour Act, 1973*, SA 1973, c 33, s 2(d). For a history of temporary agricultural

As the above story tells us, the practice of dividing work law between labour and employment law first occurred when statutory labour was born in Canada. Labour law was the new law of industrial democracy, while employment law was the old law of master and servant, the purview of highly-paid managerial employees. While employment standards applied to both unionized and non-unionized employment contracts, over time it was placed within the sphere of employment law because it was most directly significant to lower-income non-unionized workers.

The actual picture of post-war work law was, of course, a lot more complicated than this. The Fordist era constructed two conceptual frameworks for regulating waged work, the contractual common law framework for non-unionized workers, and the collectivist framework of labour law. Employment standards operated within both frameworks. But minimum standards also operated as the primary regime regulating lower-waged work. Thus rather than two parallel systems, the post-war work law system operated as a hierarchical pyramid, with each layer representing a particular legal regime regulating a particular class of worker. At the top of the pyramid was the common law of employment, which primarily regulated high-income managerial and professional white male employees. The terms of their employment contracts were a mix of negotiated terms and terms unilaterally imposed by the employer, all operating within the common law framework of background rules and implied obligations. The content of their entitlements was typically above the minimums set by statute. At the second, and largest, level of the pyramid was labour law and collective bargaining, regulating the work of white male blue-collar unionized employees. The employment contracts for these workers were derived through collective bargaining with the employer, as shaped by employment standards' floor of rights. At the third level of the pyramid was minimum standards legislation, which operated within a common law framework but provided direct entitlements and rights to those with the least bargaining power. Each of these legal regimes interacted with one another, but also apportioned different rights and remedies to workers along with class, race and gender lines. It worked something like this:

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labour programs in Canada, see Vic Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada since 1945* (London and New York: Routledge, 1991).

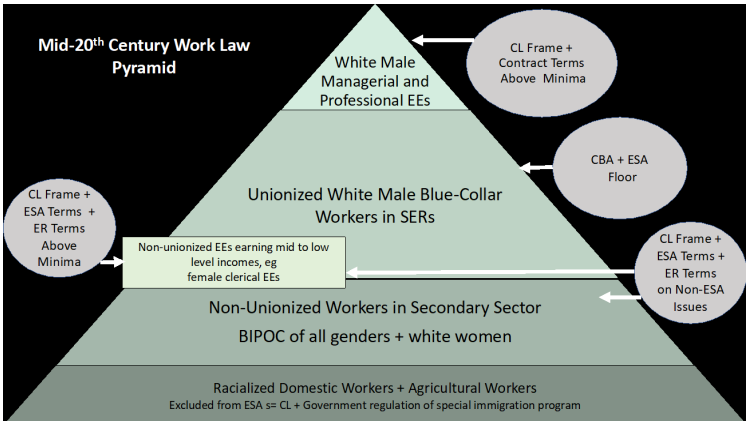

Figure 1: Mid-20th Century Work Law Pyramid

III. *The current operation of the Canadian work law system*

Since the 1980s global trade policies and communication technologies have eased the ability to move capital and production across the globe. Many countries of the Global South have increased their manufacturing capacities, while countries of the Global North have shifted towards the services, financial, and in Canada, resource sectors. Transnational production and consumption have increased global competition, decreasing companies' ability to predict demand for their product, thus placing downward pressure on wages. Businesses have responded by outsourcing, domestically and abroad, shedding employment relationships in favour of buying from others so as to flexibilize their production and staffing practices.[73] As a result, many companies no longer maintain a full complement of permanent employees, but rather staff up and down depending on immediate production needs. In combination, these factors have led to the rise of non-standard employment—work which typically does not possess central features of the Fordist SER.[74] Swayed by recessionary pressures and neoliberal ideas of governance and efficiency, governments have also adopted downsizing practices, outsourcing and selling off public institutions and services, eliminating government support programs, implementing wage freezes in the public service, and starving adjudicative tribunals and enforcement agencies of funding.[75]

73. David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge: Harvard University Press, 2014) at chapter 1.
74. *Ibid.*
75. See Bryan M Evans & Carlos Fanelli, eds, *The Public Sector in an Age of Austerity: Perspectives from Canada's Provinces and Territories* (McGill-Queen's University Press, 2018); Tribunal Watch Ontario, *Statement of Concern about Tribunals in Ontario* (shared on twitter by Wade Poziomka on 20

Occupational distribution has changed significantly in the post-Fordist era, as has Canada's population. In 1961, 47.1% of the Canadian workforce was employed in goods-producing occupations, but by 2019 manufacturing accounted for only approximately 20% of the Canadian workforce.[76] 79% of the Canadian workforce is currently employed in the service sector.[77] The Canadian population has also changed considerably. The Canadian population is ageing, due to the advancing years of the baby boomer generation, and workers are remaining in employment for longer periods of time.[78] Immigration is the primary source of population growth in Canada, diversifying the ethnic and racial makeup of the population, accompanied by significant growth in the Indigenous birth rate.[79] Women now account for almost half the number of workers in Canada, and dual-income families are the norm rather than the exception.[80]

Unionization levels have dropped consistently since the 1980s. The rate of unionization reached its all-time high in 1984 in Canada at 34% and now hovers around 30%.[81] Currently, the majority of the unionized

May 2020), online: <https://www.yumpu.com/en/document/read/63407869/tribunal-watch-ontario-statement-of-concern> [https://perma.cc/J77Z-MLXP].

76. The 2012 North American Industry Classification System used by Statistics Canada in the Labour Force Survey defines the "goods-producing" sector to include the agricultural, utilities, and manufacturing sectors. A different classification system was used for the 1961 census, so the figure of 47.1% was derived from adding together the equivalent classifications from the 1961 census data analyzed by Sylvia Ostry in *The Occupational Composition of the Canadian Labour Force* (Ottawa: Queen's Printer and Controller of Stationery, 1967) Table 2 at 50; Statistics Canada, *Labour force characteristics by industry, annual*, Table: 14-10-0023-01 (formerly CANSIM 282-0008) (Ottawa: Statistics Canada, 2019), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=141000230> [https://perma.cc/R277-9A5L] [*Labour Force Characteristics*].

77. *Labour Force Characteristics*, *supra* note 76.

78. Statistics Canada, *Canadian Demographics at a Glance,* 2nd ed, by Demography Division, Catalogue No 91-003-X (Ottawa: Statistics Canada, 19 February 2016), online (pdf): <https://www150.statcan.gc.ca/n1/en/pub/91-003-x/91-003-x2014001-eng.pdf?st=ND0ZXUSt> [https://perma.cc/T9AQ-NW9U]. 17.2% of Canadians are 65 and older, and people are remaining in the workforce for an increasing amount of time. Census data from 2016 indicates that 36% of the Canadian workforce was 55 years of age and over. In 1990 this segment of the population accounted for 25% of the workforce.

79. Statistics Canada, *2016 Census of Population*, Catalogue No 98-400-X2016190 (Ottawa: Statistics Canada, 8 February 2017), online: <https://www12.statcan.gc.ca/> [https://perma.cc/QG9V-2NHB]. The main source of population growth in Canada is immigration. In 2011 Canada 20% of the population was composed of people not born in Canada. The population of Canada has diversified in race, ethnic origin and religion. In 1981 4.7% of the population classified themselves as being visible minorities in the Census. Currently 22.3% reported being of the population are of colour, which is projected to reach 34.4% of the population by 2036. The Indigenous communities have the highest growth rate in Canada, with a 42.5% increase since 2006.

80. Statistics Canada, *The Rise of the Dual-Earner Family with Children*, in *Canadian Megatrends,* Catalogue No 11-630-X (Ottawa: Statistics Canada, 30 May 2016), online: <https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2016005-eng.htm> [https://perma.cc/492F-28BP].

81. Statistics Canada, *Union Status by Industry*, Table 14-10-0132-01 (formerly CANSIM 282-0223) (Ottawa: Statistics Canada, 2020), online: <https://www150.statcan.gc.ca/t1/tbl1/en/

workforce is in the public sector. Sixteen per cent of employees in the private sector are unionized, compared to 75.8% in the public sector. If the typical union member of the post-war era was a white male in blue-collar manufacturing employment, it is now a female employee working in the public sector. The public sector jobs are primarily held by women employed in nursing, teaching, and civil service positions, while the smaller number of unionized private sector employees are men working in what remains of manufacturing employment, utilities, and some construction work.[82] The centre of post-war public policy lay in the second layer of the Fordist work law pyramid, regulated by collective bargaining, while the core of the Canadian labour market is now comprised of non-unionized service sector employment regulated by the common law and employment standards.

The economic shifts have combined to create a growing trend towards job misclassification,[83] short-term, casual, fixed-term and part-time employment. The majority of the workforce remains in full-time permanent employment, but the majority of new jobs created are in the service sector and bear the markers of insecurity, as demonstrated by the COVID-19 pandemic.[84] "Compared with the 1980s, proportionately fewer…jobs are now full-time (i.e. without a specific end date), unionized, or covered by a registered pension plan (RPP) or a defined benefit RPP."[85] The number of men in permanent full-time positions in 1989 was 87.7%, dropping down to 80.8% in 2018. The number of women in full-time permanent positions in 1989 was 70.6% and remained relatively stable in 2018 at 69.5%. In the last census of 2016, the average annual income of Canadians was $46 057.00, and the median annual income was $33 683.00.[86] The majority

tv.action?pid=1410013201> [https://perma.cc/4H2E-MZP4].

82. Statistics Canada, *Union Status by Occupation* (x 1,000), Table 14-10-0319-01, online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410031901> [https://perma.cc/6B6Z-HZU2].

83. Job misclassification occurs where an employer classifies a worker as an independent contractor to avoid the obligations of labour and employment law that apply only to employees and dependent contractors.

84. Statistics Canada, *Assessing Job Quality in Canada: A Multidimensional Approach,* by Wen-Hao Chen & Tahsin Mehdi, in *Analytical Studies Branch Research Paper Series,* Catalogue No 11F0019M (Ottawa: Statistics Canada, 10 December 2018), online (pdf): <https://www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2018412-eng.pdf?st=x1K0cKzF> [https://perma.cc/LLA3-JNHR].

85. Statistics Canada, *Changing Characteristics of Canadian Jobs, 1981 to 2018,* by René Morissette, in *Economic Insights,* Catalogue No 11-626-X (Ottawa: Statistics Canada, 30 November 2018) at 1, online (pdf): <https://www150.statcan.gc.ca/n1/en/pub/11-626-x/11-626-x2018086-eng.pdf?st=7ZiGlbn_> [https://perma.cc/L6CR-QGZF].

86. Statistics Canada, *2016 Census of Population*, Catalogue No 98-400-X2016304 (Ottawa: Statistics Canada, 8 February 2017), online: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/dt-td/Rp-eng.cfm?TABID=1&LANG=E&A=R&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=01&GL=-1&GID=1325190&GK=1&GRP=1&O=D&PID=110698&PRID=10&PTYPE=109445&S=0&SHOWALL=0&SUB=0&Temporal=2017&THEME=124&VID=0&VNAMEE=&

of Canadians are clustered around the lower end of the wage distribution, earning at or close to minimum wage.[87] There is a significant gap between the richest and poorest in Canada, a continued income gap between women and men, and racialized and white Canadians.[88] If the labour market paradigm of the post-war era was the Standard Employment Relationship, the paradigm of the early 21st century is the low-waged precarious worker.

The shifting nature of political ideologies, market structures and production processes have not left the laws of work unchanged. In the 1980s and 1990s, governments withdrew their support for labour law and collective bargaining as a central part of labour force policies, in favour of so-called deregulation, efficiencies and individual rights approaches. Private law values re-emerged as the preferred framework for the development of work-related rights. Still, Canadian governments have tended not to eliminate labour and employment laws wholesale. Instead, they simply fail to update the regimes to meet the changing nature of work and production, choosing to leave emerging problems to the economic power of the parties.[89]

In the post-Fordist era, therefore, there has been a decoupling of wages, job and wage stability from occupational types. This means that workers within any given occupation may have very different working conditions and may be regulated by different legal regimes.[90] In the post-war era, the laws of work operated in a hierarchical, pyramidal form because each layer more or less corresponded with occupational categories and wage classes. Occupation and wage class served as a marker of job and income stability, and of the primary legal regime regulating the work. This alignment no longer holds. While there is still a relationship between wages and job permanence, they are no longer directly correlated to one another, as job insecurity now permeates all wage classes.[91] Because

VNAMEF=&D1=0&D2=0&D3=0&D4=0&D5=0&D6=0> [https://perma.cc/V23K-SZHW].

87. Prior to 2018 the minimum wage in Ontario was $11.60, which would provide a full-time employee working a 40-hour week an income of approximately $23 700.00 per year. The current minimum wage rate is $14.00 per hour, providing an annual income of $31 200.00 per year.

88. *Ibid;* Sheila Block, Grace-Edward Galabuzi & Ricardo Tranjan, "Canada's Colour Coded Income Inequality" (December 2019) at 5, online (pdf): *Canadian Centre for Policy Alternatives,* <https://www.policyalternatives.ca/publications/reports/canadas-colour-coded-income-inequality> [https://perma.cc/94EY-8RKL].

89. Canadian governments have also made internal alterations to key legal principles within the statutes so as to readjust the balance of power between workers and employers. Often, after one government is elected it makes changes to the labour relations and employment standards act, which are promptly unmade by the next government.

90. Chen & Mehdi, *supra* note 84 at 13.

91. Trish Hennessy & Ricardo Tranjan, "No Safe Harbour: Precarious Work and Economic Insecurity Among Skilled Professionals in Canada" (2018), online (pdf): *Canadian Centre for Policy Alternatives* <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20

work law regimes have generally not been updated, there are now people who are regulated by legal regimes that do not match their income levels and degrees of precarity. The three work law regimes no longer relate to one another like a pyramid. What we have now is an income hierarchy, a precarity distribution, and legal regime flow chart. In other words, the degree of labour market segmentation is increasing. We therefore cannot use occupation to speculate on the origin of contract terms or to determine their primary applicable legal regime. Instead, we need more granular information about differences within occupations to determine the origins of workers' contractual terms, so as to locate what legal regimes regulate their work.

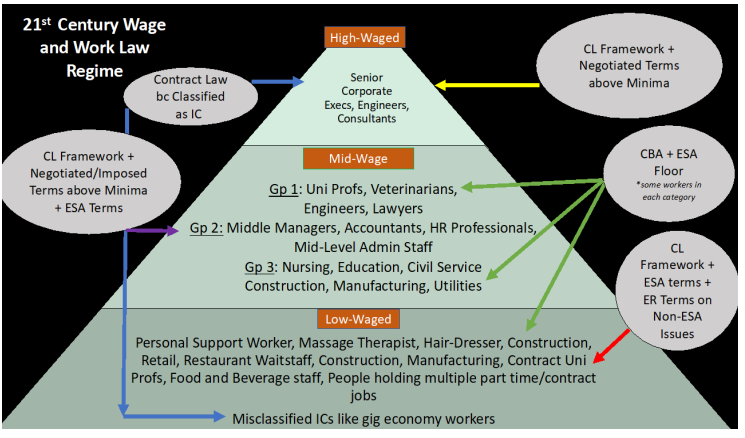

Figure 2. 21st Century Wage and Work Law Regime

The above graph demonstrates that the common law is currently the primary regulatory regime for managerial and professional employees who are not highly paid. This is because managerial and professional employment no longer necessarily provides a high wage or job security. For instance, while some lawyers, some pharmacists and physiotherapists have highly-paid secure jobs, some also work in situations of precarity. And because managerial and professional employees remain excluded from all or parts of the ESA, these workers can have little in the way of bargaining power or available legal remedies unless unionized.[92] The

Office%2C%20Ontario%20Office/2018/08/No%20Safe%20Harbour.pdf> [https://perma.cc/4YB3-68U7].

92. In Ontario, regulated professions, including architects, lawyers, professional engineers, public accountants, surveyors, veterinarians, chiropodists, chiropractors, dentists, massage therapists, medical doctors, optometrists, pharmacists, physiotherapists and psychologists are exempted from the ESA's protections regarding hours of work and eating periods, the three hour rule, overtime pay, minimum wage, public holidays, and vacations with pay. See OReg 285/01, s 2.

terms of their employment contracts therefore originate from negotiation with the employer, where possible, or employer imposition on a take-it-or-leave-it basis.

Also now regulated by the common law are low-waged precarious workers who have been misclassified as independent contractors, and so are also excluded from the coverage of the ESAs and of the common law of employment. These workers are treated as own-account entrepreneurs and regulated by the general law of contract, but because of their low bargaining power, they will not be able to bargain with their "employers." For this reason, their contracts may include terms below the minima, or simply not provide any entitlement to basic standards such as lunch breaks, vacation time, etc. The prime example of this type of work is gig work.[93]

Regardless of income, it is not clear that there are any legal avenues at common law to resolve employment disputes during the life of the contract through law. Many workers will fear that any discussion of legal rights will result in their termination. And at a more technical level, some courts have held that bringing a civil claim against one's employer while in employment constitutes a repudiation of the employment contract.[94] Common law employment rights mostly exist in the breach, enforceable only upon the end of the relationship. But for at least a portion of employees regulated at common law, the cost of bringing an employment-related claim to the common law courts is simply unaffordable, such that they arguably have no recourse to work law at all.

As noted, the majority of Canadian workers are currently employed in non-unionized service sector employment. Some of this work provides for a mid-level wage and decent job permanence, while some is highly precarious. The employment contracts for this part of the labour force appear to contain a mix of terms provided by the employer above minimum standards, and terms that are at the minimum level read in from statute. In essence, the majority of the Canadian workforce appears to be regulated

93. A recent Statistics Canada study suggests that there are two distinct classes of gig economy workers: a group of professional employees who are able to earn a decent to high income through gig work, and a group of workers with less educational background who earn in the two lowest quintiles of the income distribution. Many are paid on a piece-rate basis, incentivizing longer hours and faster work practices, without the protections of occupational health and safety legislation and the limitations (such as they are) on hours of work placed by employment standards. See Statistics Canada, *Measuring the Gig Economy in Canada Using Administrative Data*, by Sung-Hee Jeon, Huju Liu & Yuri Ostrovsky, in *Analytical Studies Brach Research Paper Series*, (16 December 2019), online: <https://www150.statcan.gc.ca/n1/pub/11f0019m/11f0019m2019025-eng.htm>; Glyn Jones, "Gig Economy Posing New Safety Risks," *Canadian Occupational Safety*, (6 January 2020), online: <https://www.thesafetymag.com/ca/news/opinion/gig-economy-posing-new-safety-risks/193318> [https://perma.cc/E9NC-S437].

94. See eg *Suleman supra* note 20.

by a hybrid legal regime which imbricates the common law, contractual terms, and employment standards. And there is much we do not know about how this hybrid regime functions.[95]

The following questions would help elucidate how this hybrid regime operates. Are there some ESA terms that operate effectively as a ceiling, because employers simply do not provide above what is required by statute? For instance, do employers provide paid holiday days in addition to those listed by statute, or has the statutory minimum effectively also become the maximum? Second, we need further information about the nature and effect of the mix of statutory and contractual terms. Are there occupational differences in the extent or choice of terms that employers leave to employment standards? How do employers choose what to provide over the minimum and what to leave to the statute? Does the percentage mix of contractual versus statutory terms act to direct an employee towards one legal regime for enforcement? Is it a matter of the particular terms that were breached, or the accessibility of the regimes, or a combination of both? Employment standards terms are typically enforceable in administrative venues, in addition to the civil courts. Do middle-income earners actually make use of the claims process at the Ministry of Labour, or is it primarily utilized by low-income workers? In other words, is there an income level at which people stop using the employment standards claim process? Is there an income level that correlates with employment contracts that possess all terms above the minimum or all terms at the minimum? Given that common law and employment standards rights are difficult to enforce during an employment relationship, what impact does the law have on employer behaviour? Do small and medium size employers know their employment law obligations? Do they make decisions in function of that law? These are important questions because the majority of employers in Canada are small-sized companies.[96]

We also need further research on the accessibility of the civil courts for parties seeking to adjudicate employment-related claims. This issue is relevant not only to those regulated by the hybrid regime, but also those regulated only by the common law and contractual terms, some of whom do not have extensive financial means. The content of the common law of employment has historically provided greater rights and remedies to higher status workers, particularly as regards damages for wrongful

95. I hope to answer some of these questions in the larger research project, see *supra* note 12.

96. Canada, Innovation, Science and Economic Development Canada, *Key Small Business Statistics* (January 2019), online (pdf): <https://www.ic.gc.ca/eic/site/061.nsf/vwapj/KSBS-PSRPE_Jan_2019_eng.pdf/$file/KSBS-PSRPE_Jan_2019_eng.pdf> [https://perma.cc/79GW-PE2D].

dismissal.[97] The historical view was that it was harder for higher status workers to find alternative employment once dismissed because there were fewer jobs of a similar class. Whether or not this was historically accurate, it is clear that it does not represent current labour market realities. The courts have been inching their way towards eliminating the importance of employment status in determining the length of reasonable notice.[98] And appellate level decisions over the last twenty years have attempted to attenuate the inequality of the common law's apportionment of rights and responsibilities. The question is whether these substantive decisions can help workers if the cost of bringing a claim remains high. First, we need to know how much it costs to bring a standard wrongful dismissal claim. The Canadian Lawyer's annual Legal Fees Survey reports a cost of approximately $7,500 to $10,000 as the average national cost of retaining a lawyer to litigate an unspecified employment contract claim.[99] If the average annual income of Canadians at the last census was $46,057.00, and the median annual income was $33,683.00, an employment-related claim would cost approximately a quarter or a third of a person's annual income.[100] But there is more to learn here. For instance, how much does an employee need to earn to be able to afford a lawyer to represent them in a wrongful dismissal claim? How does this differ across the country? How many lawyers provide limited retainer services for employment matters, and what are the associated costs? How many lawyers provide contingency fee retainers? What size damage award must be likely for a lawyer to take a claim on contingency? How does this change by locality? Previous empirical research has found that length of tenure has the biggest impact on determining the length of a reasonable notice award.[101] Can we use the reasonable notice factors to determine who does not possess the

97. See eg *Carey v F Drexel Co Ltd*, [1974] 4 WWR 492 at 12, [1974] BCJ No 604 (BC SC).

98. The historical relevance of social class to determining the length of reasonable notice was made explicit in the 1908 Alberta decision of *Speakman v City of Calgary* (1908), 1 Alta LR 454, 9 WLR 264 (CA). There is now a steady move towards reducing the significance of "character of employment" to assessing the reasonable notice award, but it has not disappeared altogether. The current approach appears to be that employment status is of declining significance and should not be used to reduce the length of notice of lower status positions. See *Di Tomaso v Crown Metal Packaging Canada LP*, 2011 ONCA 469; *Michela v St Thomas of Villanova Catholic School*, 2015 ONCA 801*; Bramble v Medis Health and Pharmaceutical Services*, [1999] NBJ No 307, 175 DLR (4th) 385 (NBCA), but may be used to increase the length of notice of employees in higher status positions. See *Love v Acuity Investment Management Inc*, 2011 ONCA 130.

99. Marg Bruineman, "Steady Optimism – 2019 Legal Fees Survey" (April 2019), online (pdf): *Canadian Lawyer* <https://www.canadianlawyermag.com/staticcontent/AttachedDocs/CL_Apr_19-survey.pdf> [https://perma.cc/2R93-5U7Q].

100. Statistics Canada, 2016 Census of Population, Catalogue No 98-400-X2016304 (Ottawa: Statistics Canada, 8 February 2017).

101. See *supra* note 98.

characteristics necessary to be able to access a civil wrongful dismissal claim? What percentage of cases are appealed, and which of the parties appeal most frequently? Parties to wrongful dismissal claims are subject to cost awards. What impact do cost awards have on an employee's decision about whether to appeal a decision against them? What is the cost impact of a wrongful dismissal claim on a small business owner? Employees in Ontario can bring wrongful dismissal claims requesting less than $35 000.00 damages to Small Claims Court, while the rest proceed to Superior Court. What percentage are filed in each court? Are the parties typically represented by counsel, and does this differ by court level? Are there useful models of expedited processes for wrongful dismissal claims from around the country from which we could learn?[102]

In the post-war era women were the largest occupants of irregular, insecure, and low-wage jobs. Work with these characteristics has expanded in the post-Fordist era and now makes up a much larger percentage of the labour force.[103] Noack and Vosko found in 2011 that single parents, racialized workers, recent immigrants and workers with a high school diploma or less are more likely to be in involuntary part-time employment than other members of the workforce, and part-time temporary jobs had the highest degree of precarity.[104] They also found that the accommodation, food services and agriculture industries offered the most precarious jobs, a finding that was replicated in the 2016 Census.[105] Employees in the food and beverage industries and retail tended to be women working part time with terminal high school diplomas.[106] Racialized and recent immigrant women tend to be overrepresented in the retail sector.[107] Resource extraction jobs also provide precarious work, primarily employing men in seasonal employment in areas such as forestry, primary resource extraction and some agricultural work.[108]

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102. In Ontario there is a Simplified Process for claims for less than $100,00.00 at the Superior Court, which is often used for wrongful dismissal claims. Also, Rule 20 of the Rules of Civil Procedure allows for wrongful dismissal claims to be heard by way of summary judgment where there is "no genuine issue requiring a trial." Ontario summary judgment proceedings appear to have increased over the last years, particularly since Ontario courts have indicated approval for its use in wrongful dismissal claims. Has this process reduced costs for the parties, and if so, by how much? What are the strengths and weaknesses of the process? What similar innovations exist in other provinces?
103. Fudge & Vosko, *supra* note 44 at 290.
104. Andrea Noack & Leah Vosko, *Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context,* for the Law Commission of Ontario's study on Vulnerable Workers and Precarious Work (November 2011) at 18-21.
105. *Ibid* at 24.
106. *Ibid.*
107. *Ibid.*
108. *Ibid* at 26.

Just as in the post-war era, the employment contracts of these workers operate within a common law framework. The terms of their contracts primarily arise from statutory minimum terms, with the rest determined by the managerial prerogative and employer-imposed terms on issues for which the acts are silent. The rights and remedies available to these employees mostly come from the ESA. Although this group of workers is also entitled to reasonable notice of dismissal at common law, the cost of enforcing that right puts it out of reach for the overwhelming majority of workers in this category. What is more, as noted above, the common law principles determining the length of reasonable notice award longer notice periods to workers with long job tenures and arguably higher status workers.[109] As such, both the content and the cost of the common law make its rights illusory for low-waged workers.

Many workers are theoretically covered by the ESA, but because their work no longer holds SER characteristics, many may not in practice qualify for their entitlements. For instance, workers employed on multiple temporary contracts may not accrue sufficient job tenure to qualify for a vacation, or for a right to termination pay.[110] Moreover, since the ESA was first enacted, a large number of exemptions have been added to exclude different types of workers and certain industries from some or all of its coverage. As Vosko, Noack and Thomas recently concluded, women and Indigenous workers suffer a greater impact from the combination of exemptions and gaps in coverage than other workers.[111] As mentioned earlier, Canadian governments have by and large chosen not to update the statutes to include provisions addressing newer labour market issues, nor have they addressed the holes in coverage created by the increase in flexibilized work arrangements. And, many of the minimum standards have barely changed in content since they were first created. In Ontario, there has been only one increase in the length of termination pay since the ESA was first enacted in 1968.[112] There have been relatively few changes

109. *Supra* note 98.

110. At common law the courts will consider an employee on multiple successive fixed term contracts as an employee. See *Ceccol v Ontario Gymnastics*, [2001] OJ No 3488, 55 OR (3d) 614. The question is who can afford to access this right.

111. Leah Vosko, Andrea Noack & Mark Thomas, *How Far Does the Employment Standards Act, 2000, Extend and What are the Gaps in Coverage? An empirical analysis of archival and statistical data*, Research Project Prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review of 2015 (Ontario: Queen's Printer, 2016) at 63-73.

112. Notice of termination was included in the Ontario ESA in 1970: *Act to Amend the Employment Standards Act, 1968*, SO 1970, c 45, s 6(b). From 1970 to 1987 an employee who worked for at least three months was entitled to one week's notice if employed for two years or less, two weeks if employed between two and five years, four weeks if employed between five and ten years, and eight weeks' notice if employment for more than ten years. The current notice entitlement was enacted in

to the vacation provisions since 1944.[113] And, although there have been modifications over the years, the current maximum hours of work are the same amount as in the 1970s.[114] Provincial minimum wages have sorely lagged behind living wage levels, and increasing it has been the main focus of activist pressure regarding precarious work over the last few years.[115] New standards have been added to the statutes over the years, but they change little in content once included.

Research by Leah Vosko, Mary Gellatly and others demonstrate that enforcement of employment standards is a real problem. Proactive spot workplace inspections are chronically underfunded, although they are the best method of ensuring employer compliance with the requirements of the statute. In the absence of proactive inspections, ESA rights enforcement occurs mainly in the breach, because it is left to individual employees to bring claims to the relevant authorities. Although they can, in theory, bring claims while on the job, precarious workers might rightfully worry about their job security if they were to do so. Most claims are for unpaid wages, vacation pay, and termination pay. In the 2000s in Ontario, a large number of leaves were added to the *Employment Standards Act*, but it appears as though these provisions are almost entirely unlitigated outside the unionized context.[116]

1987 in *An Act to Amend the Employment Standards Act 1968*, SO 1987, c 30.

113. In the first 1944 act employees were entitled to one week's paid vacation. *The Hours of Work and Vacation with Pay Act*, 1944, SO 1944, c 26, s 2(b). In 1966 the Act was amended to provide one week's paid vacation for each of the first three years of employment, and two weeks after an employee had completed thirty-six months of employment. See *An Act to Amend the Hours of Work and Vacations with Pay Act*, SO 1966, c 67, s 1(2). In 1970 the Act was amended to provide two weeks' vacation available after 12 months of work. See an *Act to Amend the Employment Standards Act 1968*, SO 1970, c 45, s 7. This provision remained in place until 2018, when section 3 was amended to provide three weeks of vacation for employees who have been employed for 5 years or more. *Employment Standards Act, 2000*, SO 2000, c 41, s 33.

114. *The Hours of Work and Vacation with Pay Act*, 1944, SO 1944, c 26, s 2(1) established a maximum workday of 8 hours and a work week of 48 hours. The *Employment Standards Act* of 1968 imposed an obligation on employers to pay an overtime rate of time and a half for work after 48 hours, where the employer held a permit to permit for a longer work week. The current provisions were adopted in 1973. See *An Act to Amend the Employment Standards Act*, SO 1973, c 172, s 3.

115. Canadian activists have tended to focus their organizing activities on a few key employment standards that have immediate tangible impact on workers, such as raising the minimum wage, regulating scheduling, providing paid sick days, and on improving the enforcement of the acts. $15 and Fairness Campaigns have grown across the provinces throughout the 2010s. See Workers' Action Centre, *Still Working on the Edge*, Submission to the Changing Workplace Review (March 2015), online (pdf): <https://workersactioncentre.org/wp-content/uploads/2016/07/StillWorkingOnTheEdge-WorkersActionCentre.pdf> [https://perma.cc/6T7H-AEPD]; Employment and Social Development Canada, *What We Heard: Modernizing Federal Labour Standards* (30 August 2018), ss 2.2-2.3, online (pdf): <https://www.canada.ca/content/dam/canada/employment-social-development/campaigns/labour-standards/1548-MLS_WWH-Report_EN.pdf> [https://perma.cc/J22E-QPFP].

116. An informal search of "employment standards act" + "Ontario" + "leaves of absence" returns a list of cases by relevance, the first 20 of which were brought by unionized workers adjudicated at

In Ontario, a worker can bring a claim to the Ministry of Labour, which is investigated by an Employment Standards Officer (ESO), who then issues a first instance decision. Either party may ask for a reconsideration and/or appeal to the Ontario Labour Relations Board (OLRB). There are approximately 15,000 complaints made to the Ministry of Labour annually, 70% of which are assessed by an ESO.[117] ESO decisions are not decisions of record. They are not publicly available and, for anyone other than the parties, a Freedom of Information request (FOI) must be filed to obtain any of the decisions. Approximately 8% of ESO decisions are appealed annually to the OLRB, the majority of which are requested by employers.[118] Of the 8% appealed, 77% are settled by the parties before a decision by the Board.[119] OLRB cases that proceed to a final decision represent the body of reported employment standards decisions available in Ontario. Based on these numbers, only a tiny fraction of cases decided under this statute are publicly available, such that ESO decisions are made effectively without public and legal scrutiny. Consider this situation: a study by Vosko, Noack and Tucker disclosed a particularly low success rate for certain types of violations, including claims regarding reprisals, claims regarding hours of work, minimum wage, severance, overtime, temporary agency rules, and leaves of absence. They posit that these standards may not be well understood by claimants or are difficult to prove to ESOs' satisfaction. But there is no way to further investigate the issue without making an FOI request to receive all cases in which these claims were raised. We know little of what evidence ESOs require to demonstrate a breach for different claims, about what case law they use—if any, etc, beyond what is reported by workers and lawyers from claims in which they are involved. There is no obvious reason why ESO decisions should not be considered decisions of record.[120] And given that legislators have chosen not to update the

arbitration, rather than from non-unionized employees.

117. Vosko, Noack & Tucker, *Employment Standards Enforcement: a Scan of Employment Standards Complaints and Workplace Inspections and Their Resolution Under the Employment Standards Act, 2000,* Research Project Prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review of 2015 (Ontario: Queen's Printer, 2016) at 20, 28.

118. 62% of applications for review are made by employers (*ibid* at 62).

119. *Ibid* at 63.

120. ESO decisions are not considered adjudicative, despite the discretion they hold to determine evidentiary requirements and interpret statutory provisions. Section 3(1) of the *Statutory Powers Procedures Act*, RSO 1990, c S22 states that its requirements, including the obligation to provide written reasons, only apply to administrative decision-makers who are obliged to hold a hearing to determine the outcome of a claim. ESOs, however, are not required to hold a hearing in exercising their powers under the Act. In 2019 the Ontario government enacted the new *Tribunal Adjudicative Records Act, 2019,* SO 2019, c 7, Schedule 60, which requires that certain tribunal records be made available. It applies to tribunals listed in the Schedule of Act. But the Ministry of Labour is not on that list, and the Act does not define "adjudicative." As such, decisions under the *Employment Standards*

content of employment standards as work relationships change, the veil of secrecy over this body of law makes it impossible for lawyers to develop its content, such that it has become an essentially ossified area of law.

Finally, Vosko, Noack and Tucker found that between 2009–2010 and 2014–2015, only 39% of monetary orders were fully paid. 6% were partially satisfied, and 60% were not paid at all.[121] Put together, these facts paint a grim picture of the Ontario employment standards regime. The statutory regime that is intended to provide for the least powerful workers has barely been updated in terms of substantive entitlement since it was enacted in 1968. It has not been modified to address emerging labour market issues, leaving many groups of precarious workers without protection. It is developed in secrecy, away from public and legal scrutiny and is therefore difficult for lawyers to challenge and develop in content. And, finally, if an employee does receive an order of money owing, there is only a 40% chance they will receive what they are owed. These are not the characteristics of a successful legal regime.

What, then, of the operation of labour law and collective bargaining in the post-Fordist era? As noted above, the composition of union members has changed significantly since the 1980s. Since 2006 most unionized workers in Canada are women, the majority of whom work in the public sector, but there are also unionized workers in some male-dominated occupations such as in the utilities, construction and manufacturing sector work. The wage rates of unionized workers include some quite high-earning white-collar unions, but most are clustered at the mid-point of the wage distribution.[122] The tendency of Canadian governments not to update labour legislation has had a tremendous impact on unionization rates in the private sector. The post-war labour relations system was built on employment in mass-producing manufacturing enterprises with large workforces. The Wagner Model enterprise-based bargaining system was viable in that context because each bargaining unit was of sufficient size to hold some bargaining leverage. But the rise of outsourcing has reduced the size of employing entities, such that the majority of Canadians are now employed in small and medium-sized enterprises. Smaller units in large companies represent a fraction of the employer's profits, and smaller units employed by smaller companies tend to be goods and service suppliers whose profit, production, and employment processes are directly or

Act continue to be subject to privacy legislation, and its decisions are not publicly available.

121. Vosko, Noack & Tucker *supra* note 117 at 70.

122. Statistics Canada, 2016 Census, Catalogue Number 98-400-X2016304, online: <https://www150.statcan.gc.ca/n1/en/catalogue/98-400-X2016304> [https://perma.cc/QQ96-ZZHN].

indirectly controlled by their larger clients. In other words, the Wagner Model has made it difficult to organize amongst the most precarious sectors, such as in retail, restaurant and gig economy work.

The terms of unionized employees' employment contracts continue to be the product of collective bargaining, as in the post-war period. Unionized jobs continue to offer higher wages than non-unionized jobs, although the extent of the wage premium appears to have declined through the 2000s.[123] Unionized workers are also more likely to receive private pension plans and other benefit programs.[124] Labour arbitration, the adjudicative forum for interpreting and applying collective agreements, has become more legalistic, however. Hearings now cost more and take longer, the evidence requirements have increased, and the parties are now more likely to be represented by lawyers.[125] Still, compared to rest of the Canadian workforce, unionized members continue to be able to participate in the process of bargaining the terms of their employment contracts, and are able, by way of their union, to ensure that the terms of the collective agreement are applied while employees are on the job.

There are some interesting questions about the current relationship between collective bargaining and employment standards that are worthy of further study. The first is whether bargaining units in some industries are actually able to bargain above the employment standards minimum. Data on whether some unions have been stuck with the statutory minimums, in what industries, and regarding which terms would help evaluate the current relationship between collective bargaining and minimum standards legislation. There is also the sense that some employment standards are litigated almost exclusively in the unionized context, such as layoffs and leaves. Research on whether this is correct and why it is so would be useful to understand what types of legal rights are effectively enforceable only in the unionized context.

Finally, the entire premise of the SER, male family-wage earning blue-collar private sector work, has been inverted. Unionized jobs are predominantly public sector employment and staffed by women. Yet private sector labour laws continue to dominate academic research in the field, if not public debate on unions. Serious debate about the impact of

123. See Tim Bartkiw's summary of recent literature on the topic of wage premiums in Canada: Bartkiw, *Collective Bargaining, Strikes and Lockouts under the Labour Relations Act, 1995*, prepared for the Ontario Ministry of Labour, to support the Changing Workplaces Review of 2015 (Ontario: Queen's Printer, 2015) at 8-11.

124. Noack & Vosko, *supra* note 104 at 12-14.

125. Bruce J Curran, "Event History Analysis of Grievance Arbitration in Ontario: Labour Justice Delayed?" (2017) 72:4 Relations Industrielles/ Industrial Relations 621.

the feminization of labour law needs to occur, so as to learn about: how this shift impacts the conceptual framework of labour law; how it changes the assumptions held about unionized work; how it affects governmental responses to public sector work disputes, both as legislator and employer, etc. This is a broad and important topic for the future of labour law development in Canada.

Conclusion

In 1981 Brian Langille shone a spotlight on the growth of non-standard work and argued that the field's division had to be abandoned for the legal regulation of precarious work to become central to labour lawyers' work. Langille suggested that we move from separated fields to one single field that took as its general concern the legal regulation of all forms of waged employment. Over these last pages, I have offered one way into the project of broadening the field, which is to focus the analysis on the relationship between work law regimes, and on the role their relationships play in structuring contracts of employment. Investigating the points of overlap, of disjuncture, and of gaps between the regimes, probing the boundaries and norms of differing conceptual frameworks, all serve to elucidate how labour market divisions are created and perpetuated by law. This is of paramount importance at this juncture in time, because change is the main characteristic of the post-Fordist era. Policymakers, academics and workers advocates have spent the last 40 years scrambling to simply keep up with ever-changing work arrangements and production methods. It is hard to see what is happening on the ground, let alone study it. In the context of ongoing work transformation, the choice to tinker at the margins of work law reform, to maintain a system designed 80 years ago, is itself a cause of labour market fragmentation. But focusing on the relationship between the regimes may help us identify the places and spaces where law is implicated in the ever-increasing segmentation of the labour force.

The picture painted here suggests that we have one legal regime—the common law—which affords few material terms and substantive rights, provides no mechanism to ensure its rights are enforced and is not affordable for a significant portion of the population. We have a second legal regime—collective bargaining—which remains strong in content and can be used to ensure employment terms are followed while in employment, but is difficult to access for the majority of workers who need it. We have a last legal regime—employment standards—which cannot easily be used while in employment, operates in the shadows beyond public scrutiny and will not often provide a remedy even if one is legally owed. And in between these regimes are workers left out of all coverage, work arrangements that

do not allow employees to qualify for rights because they were designed around Fordist norms of work, and workers regulated by regimes apposite to the extent of their bargaining power. If we had heeded Langille's call in the 1980s, amongst other things, we might not now have to face the reality that many Canadians enjoy no effective workplace rights at all.