

**“That Indispensable Figment of the Legal Mind”:  
The Contract of Employment at Common Law in Ontario,  
1890-1979**

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### ABSTRACT

“The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by the indispensable figment of the legal mind known as the 'contract of employment'.”

-Otto Kahn-Freund , *Labour and the Law* (London: Stevens, 1977)

This study examines the legal evolution of the common law of employment contracts in Ontario between the 1890s and the 1970s. It focuses on the changing relationship between notions of property and contract in employment, as visible through the judicial discourse of reported common law cases.

I argue that between the 1890s and the end of the 1970s Ontario saw the emergence and consolidation of two different conceptual paradigms for regulating work at common law. The common law of employment contracts was framed and reframed over different eras of the 20th century through what the courts understood of the nature of the exchange between the parties, the property interests involved and the legal tools necessary to manage that exchange. Contrary to the traditional narrative in the field, the courts of Ontario first conceptualized employment as a matter of exchange at the turn of the 20th century. This first paradigm emerged in tandem with the province’s second industrial revolution and sought to regulate the discretionary nature of white collar professional work. The second paradigm was entrenched in the 1960s and 1970s. It is over these years that workers in Standard Employment Relationships (SER) first began to bring employment-related claims to the common law courts, a few decades after it emerged as the paradigmatic form of work over Ontario's mid-century. The basic premises of the SER - of long-term employment, job security and internal career advancement - fundamentally changed the psychosocial and economic terms of employment. But faced with workers’ claims for recognition of these new work terms in law, the courts instead chose to entrench a limited legal framework which denied job security as an enforceable contract term.

## DEDICATION

I dedicate this project to my parents, John and Carla, and my great-aunt Ruth. My great-aunt Ruth is a woman who never got to make her own choices, so she made sure that I would. My parents are the only people who have read this dissertation as often as I have. They brought me up in a household surrounded by books, politics, debates and picket lines. They make their own rules and they live by them, because, as my mother often says, “the cause is a river, and it flows through time”. They have been my intellectual companions since always.

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I would also like to thank the faculty and staff of Osgoode Hall Law School, so many of whom have helped me through the years of my doctoral studies. My thanks in particular go out to Peer Zumbansen and Sonia Lawrence, who have both invested so much time and energy into helping Osgoode graduate students develop as scholars, going above and beyond with all of us to lend an eye and a hand. It has been very much appreciated. Thanks also to Osgoode’s wonderful librarians who have been of great assistance. Their warmth made the library a fun place to visit.

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## Introduction

# The Contract of Employment: The Bedrock Legal Institution of the Laws of Work

### (1) Introduction

The employment contract is often referred to as the 'bedrock' legal institution for the regulation of waged work, the defining legal concept that provides access to the legal regimes of labour and employment law.<sup>1</sup> Amidst the changing forms of labour market arrangements, corporate structures and production methods of the early 21<sup>st</sup> century however, the continued viability of the contractual approach to work regulation has become a source of anxiety and debate amongst scholars. Because of the similarities in origins and conceptual approaches to employment regulation, and because of the global nature of the technological and economic developments of the 21<sup>st</sup> century, this is a conversation occurring across common law and civilian legal systems.<sup>2</sup> In this study I will focus on one understudied aspect of the regulation of work, the common law of employment contracts.

The contract of employment can be thought of as the legal instantiation of the waged work relationship. Otto Kahn-Freund described it as the "the corner-stone of the edifice of labour laws".<sup>3</sup> It is a legal structure with a dual nature: "on the one hand, it [has] underpinned the common law of 'managerial prerogative' through the open-ended duty of obedience, while simultaneously supporting the edifice of social legislation aimed at providing the individual with protection against the economic risks."<sup>4</sup> In this manner, the contract of employment has taken on an institutional shape, joining "the enterprise to the welfare state, just as it [connects] the common law of contract

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<sup>1</sup> Otto Kahn-Freund, "Legal Framework" in A. Flanders and H.A. Clegg, eds. *The System of Industrial Relations in Great Britain* (1954) at p.45. Note however that this statement by Kahn-Freund is also variously cited to "Blackstone's Neglected Child: The Contract of Employment" (1977) 93 LQR 508; *Labour and the Law* (London: Stevens, 1977); "A Note on Status to Contract", (1967) 30 (6) MLR 635; "Introduction" to Karl Renner's *The Institutions of Private Law and their Social Functions* (1949); "Labour Law and the Individual: Convergence or Diversity?" in Lord Wedderburn, *Labour Law and Freedom Further Essays* (1995) at 295.

<sup>2</sup> Nicola Countouris, *The changing law of the employment relationship: comparative analyses in the European context* (Ashgate Publishing, Ltd., 2007)

<sup>3</sup> Kahn-Freund, "Legal Framework", *supra* note 1 at p.45

<sup>4</sup> Simon Deakin. "The Contract of Employment: A Study in Legal Evolution" (2001) ESRC Centre for Business Research WP203 at p.32

and property to social legislation”.<sup>5</sup> The contract of employment serves as the foundational concept of the laws of work in a number of ways. It does so firstly by playing a gatekeeping function. Despite the theoretically ‘contractual’ nature of the employment relationship, there are in fact separate, although interrelated, rules that govern the employment relationship as compared to general commercial contractual relationships. So as to be able to access the legal duties, rights and protections of the laws of work, one must be considered to be working under a contract of employment, and thus to be an ‘employee’. An employment classification displaces some of aspects of the general law of contract, such that the parties are regulated instead by a hybrid amalgam of contract law and statutory interventions, which impose a variety of minimum standards on the parties and provide them with substantive entitlements. In this sense, employment is a ‘quasi-status’, as Guy Mundlak argues, in the sense that the origin of the status “[...] is in the contractual relationship, but the rights and obligations that follow from it are only partly contractual”.<sup>6</sup> The second reason for the employment contract’s centrality to the law of work is that it is thought to provide the legal foundation for the normative content and substantive orientation of other legal regimes that regulate the waged work relationship.

In Canada, as elsewhere, concerns over the continued benefits of the contract of employment focus on two aspects of its foundational role: firstly, on whether the employment relationship can continue to play a central role in linking public welfare entitlements with labour market participation<sup>7</sup>, and secondly, whether it is still an effective ‘gatekeeper’ for the laws of work.<sup>8</sup> In other words, there is widespread concern over whether the concepts of ‘employee’ and ‘contract of employment’ continue to be effective mechanisms for locating people in economically vulnerable

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<sup>5</sup> Simon F. Deakin. “The Many Futures of the Contract of Employment”, in Joanne Conaghan, Richard Michael Fischl and Karl Klare, eds., *Labour Law in an Era of Globalization* (Oxford: Oxford University Press, 2002) at p.186.

<sup>6</sup> Guy Mundlak, “Generic or Sui-Generis Law of Employment Contracts?” (2000) 16 Int’l J. of Comp. Lab. Law & Ind. Rel. 309 at 311.

<sup>7</sup> Alain Supiot, et al, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press, 2001)

<sup>8</sup> Mark Freedland and Nicola Kountouris. *The Legal Construction of Personal Work Relations* (Oxford, New York: Oxford University Press, 2011); Mark Freedland, “From the Contract of Employment to the Personal Work Nexus” (2006) 35(1) Ind. L.J. 1; Guy Davidov, “The Reports of My Death are Greatly Exaggerated: ‘Employee’ as a Viable (Though Overly-Used) Legal Concept” in *The Boundaries and Frontiers of Labour Law*, Davidov and Langille eds. (Hart, 2006); Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2005); Guy Davidov. “The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection” (2002) 52 U.T.L.J. 357–418; Brian Langille and Guy Davidov, “Beyond Employees and Independent Contractors: A View from Canada” (1999-2000) 21 Comp. Lab. L. J. 7.

positions that require legal protection. At a deeper level, however, is a series of concerns over the basic premises and purposes of work law regulation in the 21<sup>st</sup> century.<sup>9</sup> As trade union membership rates and density continue to decline in Canada and across the Western world<sup>10</sup>, as legal forms of corporate organization become increasingly malleable, with production chains and locations transferable worldwide<sup>11</sup>, and types of labour market arrangements proliferate<sup>12</sup>, the use of labour and employment law as a method of aggregating a countervailing force against the power of capital, or as a location for spreading the risks of economic loss off the shoulders of workers, seems increasingly uncertain.

As the fundamental building block of work law regulation, the contract of employment is therefore increasingly in the spotlight. Research on the contract of employment is proceeding in a few ways. One strand focuses empirically on changing forms of work and their divergence from existing social welfare and work-related legislative regimes.<sup>13</sup> A second strand of research engages normatively in

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<sup>9</sup> Guy Davidov and Brian Langille, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011); Guy Davidov and Brian Langille, *Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time has Now Come?* (Oxford: Oxford University Press, 2011); Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell, *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Sydney: The Federation Press, 2006); Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (Oxford: Oxford University Press, 2005); Karl Klare, Joanna Conaghan, and Michael Fischl, *Labour Law in an Era of Globalization: Transformative Practices & Possibilities*. (Oxford: Oxford University Press, 2002).

<sup>10</sup> OECD StatExtracts, Trade Union Density, 1999-2010, [http://stats.oecd.org/Index.aspx?DataSetCode=UN\\_DEN](http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN)

<sup>11</sup> Valerie de Stefano, "Smuggling-in Flexibility: Temporary Work Contracts and the 'Implicit Threat' Mechanism – Reflections on a New European Path (Geneva, ILO, 2009); Katherine Stone, "Flexibilization, Globalization and Privatization: The Three Challenges to Labor Rights in Our Time" (2005) 44 OHLJ 77; Katherine Stone, "Policing employment contracts within the nexus-of-contracts firm" (1993) 43(3) UTLJ 353; Hugh Collins, "Independent contractors and the challenge of vertical disintegration" (1990) 10(3) Ox. J. of Legal Stud. 353.

<sup>12</sup> The literature on non-standard work is vast. For some notable examples see: Law Commission of Ontario, *Vulnerable Workers and Precarious Work, Final Report*, December 2012; Guy Standing, *The Precariat: The New Dangerous Class* (London: Bloomsbury Academic, 2011); Leah Vosko, *Precarious Employment: Understanding Labour Market Insecurity* (Mtl & Kingston: McGill-Queen's University Press, 2006); Judy Fudge, "Beyond Vulnerable Workers? Towards a New Standard Employment Relationship," (2005) 12(2) CLELJ 145; Gerhard Bosch, "Towards a New Standard Employment Relationship in Western Europe" (2004) 42, 42 Brit. J. Ind. Rel. 617; Jean-Claude Barbier, Angelina Bryggo, and Frederic Viguier, *Defining and Assessing Precarious Employment in Europe* (European Commission, 2002); Brendan Burchell, Simon Deakin and Sheila Honey, "The Employment Status of Individuals in Non-Standard Employment", Department of Trade and Industry, UK, 1999; Gerry Rodgers, "Precarious Work in Western Europe: The State of the Debate" in G. Rodgers and R. Rodgers, eds. *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (Geneva: ILO, 1989), Ulrich Mückenberger, Simon Deakin, "From Deregulation to a European Floor of Rights: Labour Law, Flexibilisation and the European Single Market" (1989) 3 Zeitschrift für ausländische und internationales Arbeits- und Sozialrecht 153

<sup>13</sup> For instance, Law Commission of Ontario, *ibid*; Judy Fudge and Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labor" (2009-2010) 31 Comp. Lab. L. & Pol'y J. 5; Deirdre McCann, *Regulating Flexible Work* (Geneva, ILO, 2008); Harry W. Arthurs, *Fairness at Work:*

re-examining the economic, social and political purposes of labour and employment laws, and labour market regulation writ large.<sup>14</sup> A third strand of research engages with both the empirical and normative projects, by examining the historical construction of the constitutive elements of the current legal order within the broader frame of the law of the labour market.<sup>15</sup>

The research project I present here falls within this third approach. In this study I examine the legal evolution of the common law of employment contracts in Ontario between the 1890s and the 1970s. In particular, I seek to chart the origins and development of the legal concepts that structure the current boundaries of the common law of employment contracts. I envisage the common law of employment contracts as one regulatory strand amongst a number that have together organized the law of the labour market over the 20<sup>th</sup> century. Integrating the study of work-related regimes requires a fundamental reorientation in perspective for legal scholars. Over the 20<sup>th</sup> century, scholarship on the law relating to employment focused primarily on collective labour law. Whether because of a normative opposition to work law as an individual endeavour, or because of the limited regulatory coverage that the common law of employment actually provided, individual employment law remained “labour law’s little sister”, in the words of Judy Fudge.<sup>16</sup> But as collective approaches to work regulation recede in centrality and as trade unionism suffers from political vilification and dropping membership rates, scholars can no longer afford to ignore the law that

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*Federal Labour Standards for the 21<sup>st</sup> Century*, (Ottawa: HRSDC, 2006) 61-65; Judy Fudge and Rosemary Owens, *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006); Katherine Stone, “Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employers Without Employees”, UCLA School of Law, Law & Economics Research Paper Series, 06-12, 2006; Stephanie Bernstein, Katherine Lippel, Eric Tucker, and Leah Vosko, “Precarious Employment and the Law’s Flaws: Identifying Regulatory Failure and Securing Effective Protection for Workers” in Leah Vosko, ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill-Queen’s University Press, 2005); Kenneth Dau-Schmidt, “The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force” (2005) Wash. & Lee L. Rev 879; Rafael Gomez and Morley Gunderson, “Non-Standard and Vulnerable Workers: A Case of Mistaken Identity?” (2005) 12 C.L.E.L.J. 178; Maurice Emsellem and Catherine Ruckelhaus, *Organizing for Workplace Equity: Model State Legislation for ‘Nonstandard’ Workers*, National Employment Law Project, 2000.

<sup>14</sup> See the chapters in Davidov and Langille, *The Idea of Labour Law*, *supra* note 9; Davidov and Langille, *Understanding Labour Law*, *supra* note 9; Klare, Conaghan, and Fischl, *supra* note 9; Supiot, *supra* note 7.

<sup>15</sup> Harry Arthurs, “Charting the Boundaries of Labour Law: Innis Christie and the Search for an Integrated Law of Labour Market Regulation” (2011) 34 Dal LJ 1; Arup, Gahan, Howe, Johnstone, Mitchell and O’Donnell, *supra* note 9; Deakin and Wilkinson, *supra* note 9.

<sup>16</sup> Judy Fudge, “Reconceiving Employment Standards Legislation: Labour Law’s Little Sister and the Feminization of Labour” (1991) 7 J.L. & Pol’y 73. See also Brian Langille’s earlier piece, calling for a broadening of the lens of analysis. Brian Langille, “Labour Law is a Subset of Employment Law” (1981) 31 UTLJ 200.

regulates the non-unionized. Such a change in focus is not primarily about searching for alternatives to labour law. Although some may conceive of the ‘law of the labour market’ approach as abandoning the project of developing countervailing power, I view it instead as providing a broader descriptive lens that allows us to break out of isolation the separate regimes of work law, and to examine the ways in which different regulatory regimes have impacted one another and workers’ socioeconomic position.<sup>17</sup> Such an approach provides on the one hand a prescriptive forward-oriented program of research, in which the “primary aim would be to chart the plate tectonics of dynamic labour markets [...] because labour markets are regulated by powerful forces of political economy that are invisible, or at least unmarked on conventional maps of labour law”, in the words of Harry Arthurs.<sup>18</sup> It also suggests the need for research that focuses on interweaving the histories of separate strands of work law to examine the ways in which the overall structure was constituted and is currently breaking down. So far this type of research has focused on the contract of employment as an institutional vehicle for labour market organization over the 20<sup>th</sup> century. The project of those studies has been to chart the constitutive boundaries built into the contract of employment to differentiate it from other contractual forms, and the use of the employment relationship as a bridging mechanism between public statutory regimes and private productive relationships.<sup>19</sup> What has been less frequently examined is the historical development and role of the common law of employment contracts in structuring of the labour market.<sup>20</sup> Historical studies

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<sup>17</sup> In ‘Renorming Labour Law’ Eric Tucker undertakes an important examination of the recurrent dilemmas that characterize the project of regulating the employment relationship within a capitalist market system. As part of his analysis Tucker engages with Deakin and Wilkinson’s study of the law of the labour market in England, *supra* note 9, and their concluding suggestion that the regulatory focus should shift towards a ‘human capabilities’ approach, based on the work of Amartya Sen. Tucker suggests, along with Hugh Collins, that an approach that focuses on regulating the labour market without a commitment to protective regulation may supplant labour law’s fundamental concern with counteracting unequal bargaining power. However, as the above comment suggest, if one takes the ‘law of the labour market’ approach as a descriptive one, I believe it can be used without a normative move away from a concern for countervailing power. See Eric Tucker, “Renorming Labour Law: Can we Escape Labour Law’s Recurring Regulatory Dilemmas?” (2010) 39(2) Ind LJ 99; Hugh Collins, “Labour Law as Vocation” (1989) 105 LQR 468.

<sup>18</sup> Arthurs, *Charting the Boundaries*, *supra* note 15 at p. 14.

<sup>19</sup> Deakin and Wilkinson, *supra* note 9, Deakin, “The Many Futures of the Contract of Employment”, *supra* note 5 at p.179.

<sup>20</sup> Most research does not in fact specify which iteration of the contract of employment is being studied, whether it be the institutional operation of the contract of employment, its statutory construction, or in fact the Standard Employment Relationship, rather than any issue particular to a legal form. The employment contract is therefore often presented as a unitary concept. There are different meanings ascribed to the concept of ‘unitary’ in regards to employment. Mark Freedland, in the *The Personal Employment Contract*, *surpa* note 8 at p. 15-17 argues against a unitary approach which suggests a clear separation between contracts of service and contracts for

of the contract of employment at common law tend to focus solely on the creation of its definitional boundaries (the binary divide), that is, on the process by which the contract of employment was differentiated from own-account, self-employment contracts.<sup>21</sup> Thus although the contract of employment is commonly imbued with ideological and normative significance for the systems of labour laws that operate in common law jurisdictions, there remain important holes in our understanding of its historical evolution.

As we shall see, the common law of employment contracts is generally regarded as the originating point for modern work law regulation.<sup>22</sup> The traditional narrative in the field holds that employment moved from the status-based statutory regulatory frame of master and servant law in the 19<sup>th</sup> century in England as part of the generalization of modern contract principles, and in response to the political and economic changes in production brought on by the Industrial Revolution.<sup>23</sup> The new common law contractual frame for work law regulation is then assumed to have been exported across the British colonies, and to have arrived in Canada in this manner.<sup>24</sup> Most accounts suggest that the shift from status to contract was never fully completed in the employment context because notions of subordination from the previous master and servant system were maintained within the new contractual form.<sup>25</sup> Yet very little direct research has been done on the content and process of

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services, or as between independent contractors and dependent employees. When I speak of a unitary approach to the employment contract, however, I am concerned with the lack of differentiation in the analysis of the contract of employment at common law, under minimum employment standards legislation, as an institution, as a relationship, etc. See *infra* chapter 1, section 1(c) for a description of different forms of employment contracts in Canada.

<sup>21</sup> Countouris, *supra* note 2.

<sup>22</sup> Freedland, *The Personal Employment Contract* *supra* note 8 at p.2

<sup>23</sup> A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, 2<sup>nd</sup> ed. (London, 1914) at p. xxx-xxxii; Henry Sumner Maine, *Ancient Law*, (London: John Murray, 1920) at p. 319; Daphne Simon, "Master and Servant", in John Saville, ed., *Democracy and the Labour Movement* (London 1954); R. W. Rideout, "The Contract of Employment" (1966) 19 CLP 111; Kahn-Freund, *Blackstone's Neglected Child*, *supra* note 1; Patrick Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford, Clarendon Press, 1979), xi, 791 pp. (repr. in paperback with corrections, 1985).

<sup>24</sup> In fact, most authors do not address where or when the common law of employment contracts emerged in Canada. Most writers move from a description of English master and servant legislation to the modern Canadian law of work and newer statutory legislation. See eg Geoffrey England and Roderick Wood, *Employment Law in Canada 4<sup>th</sup> Edition* (Markham, Ont: LexisNexis Butterworths, 2005) at 1-1. After presenting the English tale, England and Wood state in footnote 1 that the Canadian courts have drawn heavily from English employment law.

<sup>25</sup> Alan Fox, *Beyond Contract: Work, Power and Trust Relations* (London: Faber and Faber Limited, 1974) at p. 181-184; Philip Selznick, *Law, Society and Industrial Justice* (USA: Russell Sage Foundation, 1969) at p. 133-135. See *infra* chapter 1, section 2(a) for more on this issue.

this shift in the 19<sup>th</sup> century, or on the common law evolution of the contract of employment prior to the 1970s, in Canada and across Anglo-American jurisdictions.

Stories about the common law contract of employment tend to be highly politicized. As the so-called founding legal concept of modern work law, narratives about its origins, about its public or private law character, about its free-will basis or its subordinating nature, and about its relationship to liberal law, are deployed to shape arguments about the nature of the law of work and its role in organizing market relationships. Indeed, the story of the contract of employment's evolution is invoked in many of the overarching narratives of the development of liberal capitalism over the 19<sup>th</sup> and 20<sup>th</sup> centuries. From across the political spectrum, the history of the contract of employment has been told as a story of the 19<sup>th</sup> century: as part of the rise of liberal capitalism and classical contract theory,<sup>26</sup> of the public/private divide and the commodification of labour<sup>27</sup>, of changing corporate forms of organization, production methods and labour processes<sup>28</sup>. It has also been told as a 20<sup>th</sup> century story: as provoking the collective organization of workers to escape from classical contract's commodification of the wage-work exchange<sup>29</sup>, as creating the need for state intervention into the market to protect workers from the risks of economic insecurity<sup>30</sup>, and as

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<sup>26</sup> From very different political perspectives: Dicey, *supra* note 23; Morton Horwitz, "The Historical Foundations of Modern Contract Law" (1974) 87(5) Harv. L. Rev. 917 at p.953-955. See also Jay Fineman, "The Development of the Employment at Will Rule" (1976) 20(2) Am. J. Legal Hist. 118 at 132-133.

<sup>27</sup> Morton Horwitz, "The History of the Public/Private Distinction" (1982) 130 U. Pa. L. Rev. 1423; Gerald Turkel, "The Public/Private Distinction: Approaches to the Critique of Legal Ideology" (1988) 22 Law & Soc'y Rev. 801; Ken Foster, "From Status to Contract: Legal Form and Work Relations, 1750-1850", 3 Warwick Law Working Paper 1 (1979) at 23-24; Isaac Balbus, "Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law"(1977) 11 Law & Society Review 571-588; Karl Marx, *The Economic and Philosophic Manuscripts of 1844* (New York: International Publishers, 1964).

<sup>28</sup> Sidney Pollard, *The Genesis of Modern Management* (Baltimore: Penguin Books Ltd., 1968); Harry Braverman, *Labor and Monopoly Capitalism: The Degradation of Work in the Twentieth Century* (New York: Monthly Review Press, 1974) ; Alfred Chandler, *The Visible Hand* (Belknap Press, 1977); Oliver Williamson, "The Organization of Work: A Comparative Assessment" (1980) 1 J. Behaviour Economic Behavior and Organization 5; Sanford Jacoby, *Employing Bureaucracy: Managers, Unions and the Transformation of Work in American Industry, 1900-1945* (NY: Taylor and Francis, 1985).

<sup>29</sup> Otto Kahn-Freund stated that: "The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be in inherent in the employment relationship". See Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (3<sup>rd</sup> ed., London, 1983) at 18 ; Manfred Weiss, "Re-Inventing Labour Law?" in *The Idea of Labour Law*, Brian Langille & Guy Davidov eds. (Oxford: Oxford University Press 2011) at 44; Paul O'Higgins, "'Labour is not a Commodity' – an Irish Contribution to International Labour Law" (1997) 26(3) Ind LJ 225; Harry W. Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century" (1967) 45 Can. B. Rev. 786 at 788-789.

<sup>30</sup> See Ruth Dukes' description of Sinzheimer's early theorizing on the purposes of labour law and collective organization. Sinzheimer's work has not as yet been translated to English. Dukes, "Hugo Sinzheimer and the



acting as a bridging mechanism between public and private markets<sup>31</sup>. More recently, it has re-emerged to centrality as 21<sup>st</sup> century analysts contemplate the global economic effects of the deregulation decades of the 1980s to the 2000s, the effects of technological innovation and the dissolution of vertical integration in corporate form, the growth of transnational production chains, employment and unemployment's role in macroeconomic policies and the conceptual crisis in labour and employment law. But despite its cameo appearance in most tales of modern legal regulation and political governance, the history of the contract of employment at common law has rarely been the story in its own right.

There is a tendency, regardless of political orientation, to portray the contract of employment at common law as the 'non-interventionist' approach to labour market regulation. The reason for this conceptual slippage may be the close normative relationship between free will contract and the "free market", but that slippage often results in a depiction of the common law employment contract as regulated simply by the market, as if the market is not formed by a legal architecture, and as if the law of employment contracts was not constructed through political choices. Equating market, contract and non-interventionism therefore tends to pre-empt questions on the particularized evolution of the common law of employment contracts, and to sidestep question about its historical. And without a fuller understanding of the conceptual historical trajectory of the common law of employment contracts, our picture of the operation of the 20<sup>th</sup> century labour market is simply incomplete.

Our lack of knowledge of the evolution of the employment contract at common law is particularly acute in regard to three outstanding questions. The first is the degree to which the common law of employment contracts presaged the development of other forms of workplace regulation, or whether it was actively developed in tandem and in reaction to statutory legal regimes. This question is of significance because despite the frequent rhetorical recognition that there is nothing

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Constitutional Function of Labour Law" in *The Idea of Labour Law*, Brian Langille & Guy Davidov eds. (Oxford: Oxford University Press 2011); Muckenberger and Deakin, *supra* note 12 at p. 157. In other words, the common law contract of employment was thought of as the legal embodiment of labour commodification which provoked the creation of differing welfare state mechanisms. See Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press, 1998) at chapter 2.

<sup>31</sup> Deakin and Wilkinson, *supra* note 9 at p. 16-17.

inherent to the contractual form, the idea that the common law of employment is of ancient contractual descent remains prevalent and shapes the perceived paths of its jurisprudential development. Following from this first question, the second is when and how the common law of employment contracts was institutionalized as the residual category for work regulation. The common law of employment contracts provides both the normative contours of other work-related statutes, and in Ontario, the common law wrongful dismissal claim is the sole cause of action that is theoretically available to all workers. If the common law of employment contracts developed in tandem with statutory regimes, rather than as the original starting point for work regulation, how did it come to take on such a central normative role? The third question is how and to what extent the common law of employment contracts played a role in segmenting labour markets by creating procedural and substantive limits to its access for all but higher status workers.

Academic writing on the common law of employment contracts in Canada began to appear with some frequency in the 1970s, mirroring an upsurge in common law employment claims at that time, as demonstrated in Chapter 4.<sup>32</sup> In the 1960s and 1970s, the Ontarian courts began drawing on case law from the 19<sup>th</sup> century and early 20<sup>th</sup> century to address the new labour market questions provoked by the emergence of the Standard Employment Relationship. Despite the frequent judicial claims of its ancient origins, the common law of employment contracts appears only to have taken modern form since the 1960s and 1970s. But what occurred in this area of law between the 19<sup>th</sup> century and the 1970s remains something of a mystery. Studies on the contract of employment in the 1970s across the common law world tended to trace back the origins of (then) current doctrines in the 19<sup>th</sup> century, and then proceeded to their (then) current application.<sup>33</sup> Similarly, the first academic textbook on Canadian employment law published in 1980 by Innis Christie drew primarily from case law in the 1970s, with the odd reference to earlier cases in which foundational principles were elaborated, from Canada or England.<sup>34</sup> There is therefore a gap in time surrounding knowledge of the contract of employment at common law. There is some sense of the development of particular doctrines in the 19<sup>th</sup> century in England, although no general history of common law employment claims over that period exists. But there is almost no knowledge of what

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<sup>32</sup> See *infra* p. 14 for a breakdown of reported cases per decade between 1890 and 1979.

<sup>33</sup> Mark Freedland, *The Contract of Employment* (London: Oxford University Press, 1976)

<sup>34</sup> Innis Christie, *Employment Law in Canada* (Toronto: Butterworths, 1980)

the common law of employment contracts consisted of over the first half of the 20<sup>th</sup> century. The image that is often painted is of an area of law that sprang fully formed into existence sometime in the 19<sup>th</sup> century, and that has continued to apply in the same manner ever since.

Recent studies on the influence of 20<sup>th</sup> century welfare statutory regimes on the English evolution of the binary divide suggest that not only is this not the case, but in fact that statutory developments had a significant influence on the development of common law doctrines.<sup>35</sup> And in Canada it appears as though there was little opportunity to develop the substantive content of the contract of employment at common law prior to the 1960s and 1970s, simply because of the paucity of reported cases.<sup>36</sup> This then is the second reason for the lack of research on the contract of employment at common law. It is a regulatory regime of profound normative significance but one formally invoked before the courts primarily by one class of workers. Because it relies on individual workers to bring claims, because it is substantively oriented towards higher income workers, and because it is interpreted and enforced by the civil courts, with all of their attendant costs, there are few reported decisions prior to the 1970s, and most concern the work of higher income employees.<sup>37</sup> What this implies is that, contrary to the judicial belief in the ancient nature of the contract of employment at common law, it is in fact an area of law of relatively recent substantive provenance. It is only as of the 1970s that a significant number of cases were brought to the courts regarding employment contracts, which then tripled in size as of the 1980s, and that specific rules regarding the rights and obligations of employment were fleshed out at common law.<sup>38</sup>

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<sup>35</sup> Deakin and Wilkinson, *supra* note 9.

<sup>36</sup> Christie, *supra* note 34 at p.3.

<sup>37</sup> It is unclear whether the relatively low number of reported decisions concerning the employment contract at common law indicates that it was of significant regulatory purchase in the 19<sup>th</sup> and early 20<sup>th</sup> centuries between employers and employees, or that it had little effect on the employment relationship. This is a question of significant importance, which while beyond the scope of this study, is one I hope to take up in future research.

<sup>38</sup> See also Arthurs, *Charting the Boundaries*, *supra* note 15 at p. 4.

Table 1: Summary of Reported Employment Contract Cases, Ontario 1890-1979<sup>39</sup>

Decade	Wrongful Dismissal	Property-Related Claims	Miscellaneous	Total
<b>1890-1899</b>	5 2 of which appealed <sup>a</sup>	1	0	6
<b>1900-1909</b>	18 2 of which appealed	7 3 of which appealed	11	36
<b>1910-1919</b>	22 2 of which appealed	6 3 of which appealed	5 1 of which appealed	33
<b>1920-1929</b>	15 3 of which appealed	4 1 cross-claim for WD	7	26
<b>1930-1939</b>	7	6 1 of which appealed 1 cross-claim for WD	3	16
<b>1940-1949</b>	5	1 1 of which appealed	2	8
<b>1950-1959</b>	6 1 of which appealed	6	4	16
<b>1960-1969</b>	19 4 of which appealed	10 4 of which appealed	6	35
<b>1970-1979</b>	56 5 of which appealed	33 4 of which appealed	5	94
<b>Totals</b>	153	68	43	270

<sup>a</sup> The cases are organized by decade of decision. The ‘appeals’ category denotes the number of cases decided within each decade that were then appealed upwards. Cases that were appealed are only counted once, in the decade in which the first reported decision was made.

<sup>39</sup> The “wrongful dismissal” category includes reported motions and decisions concerning wrongful dismissal at common law. It includes cases that involved statutes, so long as the wrongful dismissal claim was decided on the basis of common law principles. It also includes cases for both wrongful dismissal and wages owing, and cross-claims for wrongful dismissal from cases brought by employers on other grounds. The ‘property-related’ category includes reported motions and decisions regarding requests for interim and interlocutory injunctions, and damages for breach of restrictive covenant in employment, including contracts for sales of businesses that also included a separate employment restrictive covenant. It also includes trade secrets and confidential information cases, accountings for wages and income earned outside employment, and cases concerning ownership over work-related tools. It does not include copyright and patent cases, because they were decided based on statute. Where there was a wrongful dismissal cross-claim the case was counted in the wrongful dismissal category. In the miscellaneous category are cases such as employer claims against workers for quitting without notice, contractual claims wages owing, cases concerning whether a worker was partner or employee, interpretation and application of contractual terms, etc. Claims for wages that were decided on the basis of quantum meruit were not included. For all categories cases that were appealed are counted once.

Given that the common law of employment contracts is formally invoked in the courts primarily by the least vulnerable workers, why should it be the focus of study? Why not study areas of law that are used by workers more in need of protection? My reason is simple. As we seek to redesign legal structures to meet the changing nature of work and production in the 21<sup>st</sup> century, we need to better understand the ways in which the legal regimes of employment operated together over the 20<sup>th</sup> century, so as to fully understand how they are breaking down. The common law of employment contracts is assumed to play a foundational role in charting the legal boundaries of the individual waged-work exchange. We need to test this assumption and find out more about this process. And there are many outstanding questions, questions that are not limited to legal developments in Ontario and in Canada. How have the courts conceived the content of the wage-work exchange over the 20<sup>th</sup> century? What aspects of workers' labour were alienated through employment, and what property entitlements, if any, were exchanged through contract? Why and when did the implied duties that afford the employer a managerial prerogative come to be cast in contractual terms? Were those duties all remnants of the old master and servant law, or only some of them? When did the employment relationship take on an open-ended form within a contractual frame? Where does the doctrine of reasonable notice come from? Was this area of law one that has always been used primarily by upper status workers? What does it mean to say that work was contractualized, and when did this contractualization take place? In what order and in what relationship to one another did these foundational principles and doctrines emerge? What influence did statutory work law regimes have on the evolution of the common law of employment? All of these questions matter because each one of these common law developments and broader conceptual shifts has been determinative in setting the institutional boundaries which construct the content of other statutory regimes and popular understanding of what work consists of, who is a worker, what duties one owes, what one owns, how one may be dismissed, and what one may then recover.

To begin to answer these questions I have therefore undertaken a study of the genealogy of legal ideas and concepts as they emerge from the judicial discourse of reported common law decisions concerning employment contracts between 1890 and 1979 in Ontario. I attempt to trace the lineage of ideas that were embedded into the legal form of the employment contract in its common law incarnation over the 20<sup>th</sup> century, focusing on changing conceptions of what was exchanged in

an employment contract and the legal tools by which to actuate and protect the interests so created. This examination is set in the context of public law and statutory interventions into the regulation of work over the time period under study, so that the common law of employment contract can be reintegrated into the story of work law in Canada over the 20<sup>th</sup> century. The project is set in Ontario, so as to both amplify the historical understanding of the particular legal evolution of the law of work in Canada's largest province, but also as a case study of the employment contract at common law more generally.

## **(2) Project Contours**

### **(a) Scope, Sources and Methods**

This study focuses on the history of the common law of employment contracts. It is concerned with that area of law that is viewed as the intellectual source of modern work law regulation in Canada – as its originating point. The project is, then, an intellectual history of legal evolution, rather than a history of work practices. The project covers three eras of the 20<sup>th</sup> century, organized in chronological fashion. It begins in the 1890s, as Ontario's second industrial revolution gets underway. I begin at this moment in time because, as I will argue, it is between the 1890s and the end of the 1930s that ideas of property, time, and the tools of managerial control of employment were organized around an emerging class of white collar workers in Ontario. It is through these decades that the common law of employment shifted from a purchase of labour power and worker obedience over periods of months or years, to a contractual idea of work as a specific exchange of labour services for wages over a working day. The second era of study spans the 1930s to the 1950s, covering the tumult of the Great Depression and the Second World War, and the reorganization of Ontario's labour market and economy around Fordist production and the Standard Employment Relationship. The final era under study is the 1960s and 1970s, when writing in the field first became common in Canada, and just before common law claims regarding employment begin to proliferate in numbers during the 1980s.

The primary source material for this project is common law cases reported in print and electronic reporters regarding employment contracts from Ontario.<sup>40</sup> The project studies reported wrongful

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<sup>40</sup> Reported decisions include decisions in print law reports and, occasionally, decisions available on Quicklaw and Westlaw that were not also available in print reporters.

dismissal cases, cases regarding the contractual interpretation and enforcement of employment agreements, and cases dealing with the property entitlements exchanged through contract (restrictive covenants, confidential information, property entitlement, etc.). It does not include cases where the decision is based on a relevant statute, unless some aspect of the decision relies on the common law. It does include claims for wages at common law, but does not include quantum meruit cases. A quantum meruit claim permits a worker to recover for services rendered that were intended to be remunerated, but where there was no express agreement between the parties on the amount to be paid.<sup>41</sup>

There are limitations to the ways in which the reported case law can be used as primary source material. Firstly, analyzing reported decisions does not capture the variety of legal disputes workers may face in employment. Because workers are vulnerable to dismissal, most may not raise legal issues with their employers, or seek aid from the courts during the course of employment, instead simply 'lumping it' and finding alternative employment.<sup>42</sup> Moreover, the cost involved in bringing a claim to the civil courts means that cases that are litigated are likely to be brought by higher status workers, who are more likely to have the financial ability to retain a lawyer and sustain the costs of litigation. Even where workers did, and do seek to use the law, most 19<sup>th</sup> and early 20<sup>th</sup> century workers were more likely to make use of the wage recovery mechanisms of the master and servant statute or the Divisional Courts, neither of which were courts of record, rather than bring a common law claim.<sup>43</sup> Since the late 1960s, it seems likely that non-unionized workers tend to make use of the administrative process under the *Employment Standards Act* to adjudicate workplace disputes, rather than litigating before the common law courts.

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<sup>41</sup> See for example *Chalk v. Wigle* (1907), 10 O.W.R. 146 (Ont. H.C. J. T.D.) [*Chalk*]; *Dixon v. Garbutt* (1907), 10 O.W.R. 838 (Ont. H.C.J. Weekly Ct.) [*Dixon*]. There is longstanding disagreement as to whether quantum meruit claims are contractual or restitutionary in nature. See GHL Fridman, "Quantum Meruit" (1999) 37(1) *Alta L Rev* 38. It should be noted that in not including this body of case law, a significant amount of the common law's treatment of work done by women is not accounted for, because many quantum meruit claims arose from relationships of care - housekeeping, nursing, etc.

<sup>42</sup> Richard Abel, William Felstiner and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...", (1980-1981) 15 *L. & Soc'y Rev.* 630

<sup>43</sup> See *infra* chapter 2 at notes 46, 47, 50 for more information on the terms of recovery under different wage recovery mechanisms prior to the mid-20<sup>th</sup> century.

There are also a series of structural biases involved in which cases are reported. There are many more claims filed than reported. We do not have records on how many employment-related claims were filed, and how many were settled or otherwise withdrawn, and why. Moreover, first instance decisions are often unreported, and they tend to contain a fuller factual record of the relationship between the parties. Those lower level decisions that are reported are generally selected by a law report editor, and are therefore subject to the personal priorities of the editor and their understanding of what constitutes a significant legal issue. While almost all appellate level decisions in Ontario are now reported, whether or not cases proceed to an appellate level court involves factors such as the complexity or novelty of the legal claim made, which claims can be appealed as of right and which cases appellate courts must accept for consideration, and the financial ability of the parties to sustain protracted litigation. Workers will often not have the financial ability to appeal unfavourable decisions to an appellate level court, such that there is a bias within reported decisions in favour to those workers with the financial ability to maintain litigation, as well as to questions that the legal community considers of general significance. For all these reasons a focus on reported decisions does not speak to the typical legal problems workers faced in employment in a given time period, nor to the total volume of cases brought to the courts in any given period of time, nor to the social history of workers' interaction with law or experiences in employment.<sup>44</sup>

What reported decisions can provide is material through which to trace the intellectual history of legal decision-making in the courts. I use reported decisions as a lens through which to deconstruct the relationships and linkages built between legal concepts and ideas that defined what the judiciary and legal practitioners understood as constituting the wage-work exchange at common law at different periods of time. Using the recorded cases of different eras allows us to decode the nexus between different legal ideas at different historical moments.<sup>45</sup> I hope that this focus will provide insight into the intellectual trajectory of the common law of employment, its relationship to the political and economic contexts in which that trajectory unfolded, and provide sufficient details

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<sup>44</sup> For a general description of the relationship of disputes to legal claims before courts, see Abel, Felstiner and Sarat *supra* note 42; Marc Galanter, "The Radiating Effects of the Courts", in *Empirical Theories about Courts*, K.O. Boyum & L. Mather (New York: Longemans, 1983) 117 at p.118-121.

<sup>45</sup> Simon Deakin. "The Contract of Employment: A Study in Legal Evolution" (2001) ESRC Centre for Business Research WP203 at 1-2.



on the scope of the “law on the books” so as to aid with projects that investigate its relationship with the “law in action”.

As noted, the primary source material for this study is the reported decisions of the Ontario courts and the Supreme Court of Canada. I utilize a sample of approximately 270 reported cases over the 80 years span of the study. For the period prior to 1900<sup>46</sup>, I manually searched all published cases in Ontario related to waged work<sup>47</sup> from the Court of Common Pleas from 1877-1899<sup>48</sup>, the Queen’s Bench from 1877-1899<sup>49</sup>, the Chancery court from 1881 to 1889<sup>50</sup>, and the Court of Appeal from its creation in 1881 to 1900<sup>51</sup>. I also consulted the Annual Report of the Inspector of Division Courts for the Province of Ontario (1880, 1882-1900).<sup>52</sup> From 1900 until 1970 I searched Quicklaw online for all cases in Ontario and at the Supreme Court of Canada under the search terms: “master and servant”, “employment contract”, “employment and contract”, “wrongful dismissal”, “employment and dismissal”, “reasonable notice”, “covenants not to compete”, “confidential information”, “trade secrets”.<sup>53</sup> In terms of secondary sources, for the period between 1875 and 1900 I consulted the Upper Canada Law Journal and Local Courts Gazette, the Upper Canada Law Journal and Municipal Courts’ Gazette, the Upper Canada Law Journal (new series), the Canada Law Journal, and the Canada Law Times. I also consulted magistrates’ handbooks and treatises of the era, primarily

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<sup>46</sup> I began systematically collecting cases in 1877, the year the criminal provisions of the *Master and Servant Act* were repealed. But I consulted cases, where available, beginning in 1847, when the *Master and Servant Act* was first enacted in Ontario.

<sup>47</sup> I consulted cases regarding dismissal from work, contract interpretation, work and labour claims, seduction, negligence, railway-related claims, interpretation of master and servant law, mechanic’s liens, statutory labour, and wages. There was little consistency in the manner of their indexation over the 19<sup>th</sup> century. For this study, however, I used only cases that were common law contractual claims regarding employment and did not rely on a statute or other area of private law.

<sup>48</sup> Reported in the Report of Common Pleas, the Upper Canada Common Pleas Reports, the Digest of Cases at Errors and Appeals, QB, Common Pleas and Chancery, and the Ontario Reports.

<sup>49</sup> Reported in the Upper Canada Queen’s Bench Reports (Old Series); Queen’s Bench and Practice Reports 3<sup>rd</sup> series); and Ontario Reports.

<sup>50</sup> Reported in the Ontario Reports.

<sup>51</sup> Reported in the Ontario Court of Appeal Reports and the Ontario Practice Reports.

<sup>52</sup> Annual Report of the Inspector of Division Courts for the Province of Ontario, (Toronto: King’s Printer, 1875-1920). Division Courts were not courts of record, although they were likely to be a primary venue for hearing employment contract cases because they held a jurisdiction to hear civil claims for no more than 40 shillings as of the 1840s. The Annual Report does not break down the nature of the claims, other than in regards to torts and replevin claims, and so provides little indication of the degree to which the Division Courts were used for work related claims.

<sup>53</sup> I then excluded cases that were not directly related to the contract of employment at common law. In some instances, where cases elaborated under different regimes were then utilized in regards to the contract of employment, they were then included in the study.

from England. There were no Canadian treatises on the law of employment in the 19<sup>th</sup> century, although a Canadian edition of a British treatise was published in 1906 (with notes on Canadian cases).<sup>54</sup> English case law and treatises were consulted to the extent that they informed the development of Ontario jurisprudence. Research on 19<sup>th</sup> century English common law of employment cases was primarily accomplished by locating cases discussed in leading treatises and more modern recent writing on the period. Where appropriate, American case law and commentary were also consulted, either as a doctrinal source or as a comparative tool for charting Ontario's legal evolution. To the extent that the courts of Ontario used case law from other provinces, they were also examined.

(b) Legal Genealogy and Social Change

A study focused on the evolution of the common law of employment contracts necessarily involves broad questions about the relationship of law to the social and economic development of employment practices for the period of time under study. Put more concretely, it engages questions of law's relationship to social change, and the impact on law of social change. The relationship of micro-level doctrinal legal change to meta-level historical shifts is notoriously difficult to pin down.<sup>55</sup> In long time frames and at a high level of analysis, it is possible to discern characteristic elements of liberal law that align with the socioeconomic formations that constitute a system of capitalist production. This instrumental understanding of the law's development, however, does little to explain the day-to-day legal decisions that are often inconsistent with the interests of capitalist needs.<sup>56</sup> There are not, in my opinion, any current theoretical approaches which convincingly resolve the causal relationship between the meta- and micro- levels of legal and

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<sup>54</sup> Charles Manley Smith, *Treatise on the Law of Master and Servant, including Therein Masters and Workmen in Every Description of Trade and Occupation; with an Appendix of Statutes* 6th ed. with notes on Canadian law by A.C. Forster Boulton (London : Sweet & Maxwell, 1906). The first Canadian treatise on workplace law was published in 1919. See Walter Lear, *Labour Laws: or the right of employer and employed* (Toronto: Law Books, 1919)

<sup>55</sup> Eric Tucker suggests that it is possible to distinguish between an abstract level series of elements that characterize a liberal legal order while also understanding that their micro-level formation are the processes of historically specific contestations between classes and different social orders. See Eric Tucker, "Who's Running the Road? Street Railway Strikes and the Problem of Constructing a Liberal Capitalist Order" (2010) 35(2) *Law & Soc Inquiry* 451 at 456.

<sup>56</sup> Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge University Press, 1993) at 294.

social change.<sup>57</sup> The relative autonomists perhaps come closest, but for the reasons shortly explained, I cannot entirely adopt their analysis. Relative autonomists tend to view the legal order as taking on high level characteristics conducive to capitalist market relations. They also recognize, however, a certain degree of autonomy in law's evolution.<sup>58</sup> In this sense relative autonomists reject an older form of Marxist theorizing that presents the law as simply a mirror of class relations and a tool of class oppression. Rather, they argue, the law's autonomy is qualified because the state needs to act beyond the interests of the capitalist classes to legitimize itself and the legal system.<sup>59</sup> Where I share the relative autonomist description of liberal law at a meta-level, I tend to view less obvious alignment between the needs of capital and the specifics of doctrinal change at a micro-level of analysis. It is also for this reason that I am unable to speak definitively as to the causal relationship between micro- level and meta- level legal or social change.

Instead, for the purposes of this study I focus on micro- and meso-level interactions. I argue that common law change occurs in a reciprocal relationship with the socioeconomic context in which it operates. On the one hand, common law legal change (as distinct from legislative change) follows from the circumstances of the parties that use it. In this sense the background and existing context of parties are likely to provoke the types of legal claims they make. At the same time as legal change is initiated by the needs of parties who invoke it, those parties will use the categories of existing legal thought to shape the manner in which they ask for their needs to be met. The existing

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<sup>57</sup> The main schools of thought about the relationship of law to social change are Weberian-inspired "autonomists", such as David Trubek, "relative autonomists", such as Isaac Balbus, who draw on Nico Poulantzas' theorizing on the relationship of the ruling classes to the state, and "instrumentalists", such as Lawrence Friedman. The debate here generally revolves around the question of whether and to what extent law is a separate and autonomous sphere of action than social and economic relations, or whether the law is simply a mirror of social and economic relations. See David Trubek, "Max Weber on Law and the Rise of Capitalism" (1972) 720; Balbus, *supra* note 27; Lawrence Friedman, *A History of American Law* (New York: Simon & Schuster, 1973). See also Christopher Tomlins, "How Autonomous is Law?" (2007) Annual Rev Law Soc Sci 45, for a deeply engaged overview of legal debates over the law's autonomy and the current state of theorizing on the question.

<sup>58</sup> Balbus, *supra* note 27; Mark Tushnet, "Perspectives on the Development of American Law: A Critical Review of Friedman's 'A History of American Law'" (1977) Wis L Rev 81; Eric Tucker, "The Law of Employers Liability in Ontario, 1861-1900" (1984) 22 OHLJ 213 at 267-269.

<sup>59</sup> This description of the partial autonomy of the state from class relations, and of the state's law, bears some resemblance to EP Thompson's analysis of the role and rule of law in *Whigs and Hunters* (Markham: Penguin Books, 1975, reprinted 1985). The two approaches diverge, however, insofar as Thompson viewed law's need for legitimation as providing leverage to those otherwise oppressed by its content and process. Relative autonomists, however, tend to view the law's legitimating needs as central to its oppressive power. See Adrian Merritt, "The Nature and Function of Law: A Criticism of EP Thompson's 'Whigs and Hunters'" (1980) 7(2) British J Law & Soc'y 194.

categories of legal concepts therefore tend to shape what directions and changes appear available, both at an imaginative level, and in terms of the plausibility of the argument advanced. In this way parties appear to operate within the existing boundaries of the concepts as they are then understood, even as they seek to change their application and/or meaning. As micro-level legal change occurs, some elements of the intellectual structure of the older rationale often therefore stay in place, embedding itself into the adapted rule. As Simon Deakin argues, “[c]onceptual adaptations are piled on top of each other, with the result that the structure of legal thought at any given point in time incorporates forms which, although in some sense superseded, nevertheless continue to shape the path of the law.”<sup>60</sup> Thus the content, as much as the request for change itself, will be highly path dependent, relying on individuals with the need, motivation or capacity to pursue a legal claim, on the arguments devised by counsel, on the background, approach, and mood of the judiciary.

Christopher Tomlins suggests that the contradiction between the law’s seeming micro-level response to context and its meso-level need for ongoing consistency can be explained by the legal system’s operation as a modality of rule.

Concern for consistency demonstrates law’s sensitivity to its social context, but as a discursive practice in itself consistency is also the foundation upon which is built law’s potent ‘ideology-effect’ of legitimation. The pursuit of consistency thus demonstrates law’s responsiveness to its context, the achievement of consistency simultaneously reinforces law’s claim to authority over that context – its claim to tell the truth.<sup>61</sup>

This process of micro-level adaptation solidifies certain mid-level legal understandings into shared institutional norms and practices. These shared norms come to represent the assumed bases of entitlements, as well as the boundaries of conceptual categories that are deployed in broader social, economic and political discourse. But as legal practices take on this institutional shape, the contingent nature of the boundaries built into the contours of the conceptual categories often become invisible, presented as naturalized products of common sense. The contingency of their emergence and of their content is often lost from view. The fact that legal forms hold no intrinsic meaning – that they are given different content at different moments in time – becomes

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<sup>60</sup> Deakin, *Legal Evolution*, *supra* note 45 at p. 6

<sup>61</sup> Tomlins, *Ideology* *supra* note 56 at p.294.

obscured.<sup>62</sup> As Marxists and Critical Legal Scholars remind us, line-drawing is not a politically neutral activity: categories not only legitimize but naturalize concepts, masking the normative implications of the boundaries devised, adding and subtracting relationships from the arena of legal contestation. As stated by Karl Klare:

The peculiarity of legal discourse is that it tends to constrain the political imagination and to induce belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate. The modus operandi of law as legitimating ideology is to make the historically contingent appear necessary.<sup>63</sup>

A study of the way micro-level change solidifies into conceptual frames of understanding within the realm of the common law serves to elucidate the previous histories of existing concepts, the reasons and methods for their evolution, emphasizing those concepts that remain and those that have been lost from view. Such a method is particularly logical in regards to an area of law of which many claims are made, but little is known, as is the case with the contract of employment at common law.

### **(3) The Central Argument and Chapter Breakdown**

Rather than a static, 19<sup>th</sup>-century based area of law, the following chapters will depict the law of employment contracts as one that took on modern form in the 20<sup>th</sup> century, a product of slowly evolving concepts that were deployed for different purposes in different socioeconomic contexts. It is an area of law that was constructed by amalgamating previous doctrines and concepts and redeploying them within changing circumstances, rather than forging radically new paths where the context of their operation shifted. The boundaries of what was exchanged in the wage-work contract were negotiated and re-negotiated over time. Over the 20<sup>th</sup> century that negotiation occurred primarily between notions of contract and property, and over two main periods of time. Between the 1890s and the end of the 1920s, and then between the 1960s and the 1970s, in property-related and wrongful dismissal claims workers and employers struggled over the property interests exchanged by contract. As the boundaries of the exchange were contested in the different eras under study, the legal tools with which to manage the content of that exchange were

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<sup>62</sup> Karl Renner *The Institutions of Private Law and their Social Function* (Originally published London: Routledge & Kegan Paul 1949, reprinted by Transaction Publishers, 2010) at 51-53.

<sup>63</sup> Karl Klare, "The Public/Private Distinction in Labor Law" (1981-1982) 130 U Pa L Rev 1358 at 1358.

simultaneously adjusted, based on the changing nature of the labour process and the elements of the labour force regulated by the common law of employment at any given moment in time.

Thus although most of the current doctrines that organize the law of employment contracts are of 19<sup>th</sup> and early 20<sup>th</sup> century origins, many of them had altogether different uses than they do currently. This is particularly true of the law in Ontario. As we shall see, prior to the 20<sup>th</sup> century the Ontario judiciary took relatively little initiative to adapt the emerging law of employment contracts in England to the needs of a newly expanding post-colonial economy. The particularities of the local context instead made themselves felt by the nature of the claims asserted, which in turn reflected the socioeconomic context of local relationships of production. By the 20<sup>th</sup> century, however, there was an almost simultaneous evolution of the common law of employment contracts in Ontario. While the courts of England only began to hear claims that revealed the changing social and economic realities of work some decades after their second industrial revolution, the judiciary in Ontario did so just as the province underwent its own transition to industrialization.<sup>64</sup> This meant that while the law adapted slowly in England, it was simultaneously applied in Ontario in a manner that seemed to mirror the rapid socioeconomic changes of the early 20<sup>th</sup> century in Ontario.

Chapter One begins by looking closely at what the contract of employment *is* in law, and what has been written on its origins in England, the United States and Canada. To understand the origins of Ontario law, I then draw together existing sources to detail the evolution of the common law of employment contracts in England in the 19<sup>th</sup> century. We then turn to Ontario, providing an overview of 19<sup>th</sup> century common law of employment claims and work regulation, set in the context of a colonial society and economy.

Chapter Two addresses the period of Ontario's second industrial revolution, 1890 to 1929. During this era, in response to its own second industrial revolution, a new nexus of ideas began to emerge at common law in England, which was simultaneously applied in Ontario. This nexus was created through three significant legal developments in the law of employment contracts over the turn of the 20<sup>th</sup> century. The first change was to notions of property rights in employment through the

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<sup>64</sup> Service sector employment was on the rise in Britain as of approximately the 1850s, but appears to have grown more slowly than in Ontario. In 1856 30.1% of the population was employed in service sector industries, in 1873 service sector employment was 36%, and in 1913 it was 44.6%. See Norman Gemmill and Peter Wardley, "The Contribution of Services to British Economic Growth, 1856-1913" (1990) 27 *Explorations in Economic History*, 299 at Table 1(i) p. 301.

commodification of different forms of labour power that could be exchanged through an employment contract. The second change was to the tools of managerial control, which moved beyond the older master and servant duty of obedience to include principles absorbed from the law of agency into the common law contractual frame, with an increasing focus on controlling workers' exercise of discretion. The last change was to legal understandings of employment duration. Over this period the presumption of annual hire, which was so central to the early construction of the wrongful dismissal claim, was displaced so as to set the scene for the emergence of indefinite duration employment. Together this nexus of ideas entrenched the first contractual analysis of employment at common law, which was substantively oriented towards higher status white collar workers.

Chapter Three focuses on the emergence of the Standard Employment Relationship in Ontario between the 1930s and the end of the 1950s. It is through this period that internal labour markets grew within corporations, and job classification systems, seniority principles and career long employment began to mark the Canadian and Ontarian labour markets. Although the labour market was in the midst of significant structural change, the number of employment-related claims dropped dramatically over the mid-century. The reasons for the lack of claims are examined, as are hints of the new issues that would come before the courts from the social, psychological and economic investment of workers in SERs.

Chapter Four examines the employment relationship at common law between 1960 and 1979. It is over these decades that the modern law of employment contracts was forged, amidst the changing economic and psychological expectations of workers in SERs and the emerging realities of more precarious service sector work. Over these decades workers and employers engaged in a new round of struggle over the property rights they exchanged in employment and what rights were created by that exchange. These struggles were visible both in property-related and wrongful dismissal claims of the era. The result of such claims was the entrenchment of a limited analysis forged around the wrongfulness/damages nexus, in Freedland's terminology, which limited workers' entitlements into an ever shrinking frame.<sup>65</sup> At the same time as courts limited workers claims for greater property entitlement in the work relationship, decisions under other employment-related statutory regimes

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<sup>65</sup> Freedland, *The Personal Employment Contract*, *supra* note 8 at chapter 7.

served to reinforce the position of the common law of employment contracts as the residual frame for regulating non-unionized work in Ontario.

Chapter Five provides some concluding reflections on development the common law of employment contracts over the 20<sup>th</sup> century. This chapter begins by synthesizing the results of this study, examines the shifting relationship between property and contract over the 20<sup>th</sup> century, before suggesting directions for future research. Finally, a concluding postscript challenges the claim that there has been a “return” to contract since the 1980s in the regulation of work.



## Chapter 1

# What is the Employment Contract and What Do We Know of its Anglo-American Origins?

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## (1) What is the Contract of Employment?

Before beginning a historical study of the development of the contract of employment at common law, we must pause to ask what in fact *is* the contract of employment, and what does it *do*? What is its relationship to waged work? What is the current state of debate on its operation, and what do we know of its origins? Answering these questions is the project of this chapter.

In legal terms, the contract of employment at common law is usually explained as a negotiated exchange between two parties equal in law, who determine mutually beneficial terms and conditions for organizing their relationship. It is thought of as a relationship of ongoing duration and open-ended in nature. It is open-ended in the sense that while some basic elements of the relationship will be set *a priori*, many are likely to shift over time<sup>1</sup> Because of the shifting nature of this long term relationship, John Commons suggested that employment is not one contract, but rather “[...] is a continuing implied renewal of contracts at every minute and hour”.<sup>2</sup> Mark Freedland, however, described it as a single continuing contract, which is often described as relational.<sup>3</sup> The concept of the managerial prerogative is the legal mechanism which allows the employer to unilaterally change some aspects of the work relationship over time.<sup>4</sup> As part of employers’ right to make decisions about the organization of their businesses, the managerial prerogative permits employers to direct and allocate work, and to adjust job tasks and schedules.<sup>5</sup> The employer’s power of direction is an implied contractual term of employment. “In return for the payment of wages, the employer bargains for the right to direct the workforce to perform in the

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<sup>1</sup> This is because the legal regulation of employment is built around a paradigm of long-term, ongoing employment, often referred to as the Standard Employment Relationship (SER).

<sup>2</sup> John Commons, *Legal Foundations of Capitalism* (Clark: The Law Book Exchange, Ltd., 2006) at p.285. Note that the legal foundations of the contract of employment are very different in Canada and England than in the United States because of the presumption of at-will employment in the United States. Contrast Commons’ explanation at p.284-286 of the labour contract in the United States to the employment contract I describe here.

<sup>3</sup> Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2005) at 20; Ian MacNeil, “Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law” (1977-1978) 72 Nw. U.L.Rev. 854 at 890.

<sup>4</sup> Innis Christie, Roderick Wood and Geoffrey England, *Employment Law in Canada, 4<sup>th</sup> edition* (Markham: LexisNexis Butterworths, 2005) at s.1.7.

<sup>5</sup> Rebecca Loudoun, Ruth McPhail, and Adrian Wilkinson, *Introduction to Employment Relations*, (Pearson: Frenchs Forest, 2009) at p 26

most productive way.”<sup>6</sup> But of course an employer’s right to manage the workforce is rarely explicitly bargained for. It is instead presumed to exist, and is given effect in law through a series of implied contractual duties that the employee owes the employer, such as the duties of obedience, loyalty, fidelity, good faith and confidence.

(a) The Contractual Nature of the Employment Contract

Analysis of the nature of the contract of employment tends to focus either on its origins in a bilateral exchange, or on its broader labour market operation. For some the regulation of employment through contract is an exercise in individual freedom. Others view employment’s contractual form as less benign. For those critical of the contractual regulation of work, a significant amount of commentary proceeds from the idea that the description of waged work as a contractual relationship between two equal parties is either incomplete, and/or intentionally obfuscates the structural inequality of the relationship.

From one perspective the employment contract is viewed as an institution of individual freedom. Neoclassical economists, for instance, suggest that a system of individual contracting over wages and working conditions, based on supply and demand, is best suited for producing overall economic efficiency and for protecting individual freedom of choice.<sup>7</sup> This line of analysis tends to focus on aggregate outcomes regarding economic prosperity and job creation in order to justify the regulation of waged work through a legal system that protects individual property rights and freedom of contract. The justification is one of liberty, where the exercise of free contracting rights is viewed as a method of maximizing individual choice. For analysts such as Richard Epstein, inequality of bargaining power is inescapable in any context of scarcity, including labour markets.<sup>8</sup> Individuals are better off, the argument runs, as a result of the choices they make, even through the simple choice to enter or abstain from an employment relationship.<sup>9</sup>

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<sup>6</sup> Hugh Collins, *Employment Law* (Oxford: Oxford University Press, 2010) at p.10.

<sup>7</sup> Bruce Kaufman, “Labor Law and employment regulation: neoclassical and institutional perspectives” in *Labor and Employment Law and Economics*, Kenneth G. Dau-Schmidt et al eds. (Northampton, MA: Edward Elgar, 2009)

<sup>8</sup> Richard Epstein, “In Defense of the Contract at Will” (1984) 51(4) *Uni Chi L. Rev* 947 at 951.

<sup>9</sup> Richard Epstein, “Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, A”(1982) 92 *Yale LJ* 1357 at 1372.

Others, however, are more critical of the contractual regulation of work. One argument focuses on the extent to which the common law contractual rules governing the employment relationship differ from those governing other types of contracts, such that the former should be treated as a *sui generis* area of law rather than as a subset of contract. Some commentators suggest that the employment relationship was never completely contractualized because certain features of the older master and servant system were absorbed into the contractual frame for work regulation in the 19<sup>th</sup> century in England. Philip Selznick argues that older master and servant notions of control and hierarchy continued to be applied at common law to the work relationship.<sup>10</sup> The employment relationship was contractualized only insofar as it moved from a prescriptive approach, in which the law actively specified the terms of the relationship and oversaw its day-to-day existence, to an interpretational and reactive approach, in which the law allowed the parties the freedom of day-to-day control over the relationship and intervened only upon its dissolution. Alan Fox argues that full contractualization never occurred in the 19<sup>th</sup> century because it would have displaced the employer's ability to direct the daily administration of the relationship.<sup>11</sup> Instead, the duty of obedience that grounded the feudal legal system of master and servant law was infused into the contractual form, providing the employer with the power to exert workplace control.<sup>12</sup> Ulrich Muckenberger and Simon Deakin state that "the principle of an open-ended managerial prerogative to organize work and set the terms and conditions of employment [was] grafted on to the concept of contract" in the 19<sup>th</sup> century.<sup>13</sup> The fact of subordination and the ability to control the workforce became the definitional hallmark of the employment relationship, distinguishing it from other forms of commercial exchanges and bringing it under the legal auspices of the laws of work.<sup>14</sup> The result, according to Fox, is a "[...] legal construction [...] put upon the contract of employment which left it virtually unrecognizable as contract".<sup>15</sup>

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<sup>10</sup> Philip Selznick, *Law, Society and Industrial Justice* (USA: Russell Sage Foundation, 1969) at 132

<sup>11</sup> Alan Fox, *Beyond Contract: Work, Power and Trust Relations* (London: Faber and Faber Limited, 1974) at 184

<sup>12</sup> Selznick, *supra* note 10 at p.132

<sup>13</sup> Ulrich Muckenberger and Simon Deakin, "From Deregulation to a European Floor of Rights: Labour Law, Flexibilisation and the European Single Market", (1989) *Zeitschrift für Ausländisches und Internationales Arbeits und Sozialrecht* 153 at p. 157.

<sup>14</sup> Otto Kahn-Freund, "Servants and Independent Contractors", (1951) 14(4) *MLR* 504. In Canada the legal test surrounding the definition of 'employee' has evolved beyond the strict application of the control test, but it remains a significant part of the conceptual inquiry. See Judy Fudge, Eric Tucker & Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers*, (Ottawa: Law Commission of Canada, 2002) at chapter 4.

<sup>15</sup> Fox, *supra* note 11 at p. 183

The idea that central features of the employment contract emerge from the law of master and servant, and were recast as implied contractual terms, is central to the analysis of the extent to which employment law is fundamentally contractual in nature. The employment contract continues to be characterized by a large number of terms implied by law, rather than agreed to by the parties. These terms either stand as presumptions of law unless contractually waived, or are considered so central to the relationship that they may not be displaced even with party consent.<sup>16</sup> Here we usually think of the managerial prerogative and the implied duties that workers owe their employers – the duties of obedience, good faith, fidelity, loyalty and confidentiality – as well as the implied term of reasonable notice of dismissal in Canadian law. Not only is the number of implied terms unusual, but most are implied by law as a matter of policy, regardless of the intent of the parties, as opposed to those terms designed to give business efficacy to the contract, as is typical in commercial contracts.<sup>17</sup> Theoretically, summary dismissal at common law is justified by workers' violation of the implied contractual duties, but throughout its history there has been little attempt to correlate an implied duty to the worker's breach, such that the bases for cause are often unmoored from any explicit obligation owed by workers to their employers.<sup>18</sup> Finally, employment contract damages are entirely different from commercial contract damages. The only claim available for workers is a claim for wrongful dismissal. This claim is framed around what Freedland calls the wrongfulness/damages nexus, in which the only wrong is the failure to provide reasonable notice of termination and the only loss relates to the wages and contractual benefits that would have accrued over the reasonable notice period.<sup>19</sup> While in principle workers are able to sue for other violations of the employment contract by their employers, for which presumably expectancy damages would be available, in practice this almost never happens. Further, specific enforcement is not available as a remedy, such that reinstatement in employment is not permitted at common

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<sup>16</sup> The existence of the implied contractual terms is often explained as based on the intentions of the parties, or that the parties would have presumed their existence and contracted on that basis, such that the courts are simply giving effect to the parties' assumptions. It is an open question whether the implied terms were initially so notorious because of their wide industry acceptance, or whether the courts asserted their existence for so long that they came to be accepted by industries and parties.

<sup>17</sup> John McCamus, *The Law of Contracts* (Toronto: Irwin Press, 2005) at p. 732-746.

<sup>18</sup> This trend is less pronounced in Canada since the Supreme Court's decision in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161. Before that however treatises would set out implied duties owed by workers, and then a separate section of permissible causes for dismissal (misconduct, negligence, etc.) without linking them to any obligation the worker held under the contract.

<sup>19</sup> Freedland, *Personal Employment*, *supra* note 3 at p. 355.

law.<sup>20</sup> And in Ontario at least, unlike the standard approach to concurrent contract and tort liability, the courts have sometimes sought to limit workers' ability of workers to sue in negligence for tort violation by their employers, on the basis that to do so would be to circumvent the contractual regime for work regulation.<sup>21</sup>

For all these reasons, many argue that the employment relationship is in effect entirely different from other contract law regimes. But if some analysts focus on the effects of incomplete contractualization, others argue that it is the contractual form itself that plays a deformative role in the legal analysis of the employment relationship. From this perspective, conceiving of employment as a contractual relationship serves to legitimize an inherently unequal exchange. While the parties to the employment contract are theoretically equal in law, that very same legal equality, according to Otto Kahn-Freund, serves to mask the economic disparity between the parties that skews the bargaining process.<sup>22</sup> With trademark eloquence Kahn-Freund argues that:

[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. *In its inception it is an act of submission, in its operation it is a condition of subordination*, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment'.<sup>23</sup>

Similarly, Lord Wedderburn argues that the contractual model that "emphasizes the personal and voluntary exchange of freely bargained promises between two parties equally protected by the civil law alone [...] is of course suffused with an individualism which necessarily ignores the economic reality behind the bargain".<sup>24</sup> If the contract of employment masks the economic inequality between the parties, it also obscures their social inequality, which is rooted in the bureaucratic power held by the employing organization.<sup>25</sup> As Hugh Collins has argued, even where workers are able to exert some market leverage in their contractual bargaining, they are likely unable to exert significant bureaucratic power, and are thus subject to the role allocation and institutional rules of hierarchy which have developed within the employing organization.<sup>26</sup> The ongoing social power of

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<sup>20</sup> See Geoffrey England, *Individual Employment Law in Canada*, (Toronto: Irwin Law Inc., 2008) at p.414-415.

<sup>21</sup> *Piersferreira v. Ayote*, 2010 ONCA 384.

<sup>22</sup> Otto Kahn-Freund, *Labour and the Law* (London: Stevens & Sons Ltd, 1972) at 8.

<sup>23</sup> *Ibid* at p. 8.

<sup>24</sup> K.W. Wedderburn, *The Worker and the Law* (Harmondsworth: Penguin, 1971) at 77.

<sup>25</sup> Hugh Collins, "Market Power, Bureaucratic Power, and the Contract of Employment" (1986) 15(1) *Ind Law J* 1.

<sup>26</sup> *Ibid*.

the employer is deployed through the managerial prerogative, which legalizes the employer's ability to direct the work relationship.

For many therefore, the contract of employment is designed to legitimize an exchange that is structurally unequal. It is unequal in economic and bureaucratic terms, and indeed, to the extent that one party has the unilateral power to change some of the terms of the exchange during the contract's term, it is also unequal in law.<sup>27</sup> For Ken Foster, the contradictions between equality and subordination in law exist by design and are integral to the employment contract form. "The contract of employment constitutes the employee both as equal partner and obedient subject at one and the same time. The contract has both formal equality and subordination."<sup>28</sup> Arguing from a Marxian perspective, Foster suggests that the continued existence of the managerial prerogative is not simply an issue of inherited historical remnants but rather that "the duality of the contractual form reflects the dual nature of the labour process under capitalism itself".<sup>29</sup> This argument is an emanation of a broader Marxian critique of liberal law.<sup>30</sup> The common law contract of employment in its idealized form represents an almost paradigmatic example of liberal law. By framing the employment relationship as one of contract, individual and formal equality is prioritized as the basis for the law's application. Formal equality constitutes workers and employing entities as commensurable, hiding from view the differences in lived experiences, economic needs and desires of the parties by rendering them into simple objects of formal freedoms and political equalities.<sup>31</sup> Socioeconomic questions are separated from the interests of the law, relegated to a private zone of market activity in which the law takes no content-oriented role.<sup>32</sup> Understood in this way, there is a parallel between the formal equality of the wage-work exchange, which makes individual lives exchangeable and experiences quantifiable, and the broader process of commodity fetishism

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<sup>27</sup> Most commentators do not characterize the contract of employment as one that is unequal in law, and are instead concerned with understanding the relationship between the theoretical equality of the parties in law to the inequality of the relationships on the market. But, cf Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge University Press, 1993) at 227-228.

<sup>28</sup> Ken Foster, "From Status to Contract: Legal Form and Work Relations", 1750-1850, (1979)3(1) *Warwick Law Working Papers* at 6

<sup>29</sup> *Ibid*

<sup>30</sup> Isaac Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law" (1977) 11:3 *Law & Society Review* 571.

<sup>31</sup> *Ibid* at p. 575-576

<sup>32</sup> *Ibid* at p.578

occasioned by capitalist production, which strips away the labour basis of productive power so as to commodify labour as exchangeable through money.<sup>33</sup>

(b) The Employment Contract as an Exchange of Property

A Marxian analysis reminds us of the centrality of questions of property to the boundaries and operation of the contract of employment. David Beatty describes the employment relationship, or waged work<sup>34</sup>, as a “device for arranging our production relationships”.<sup>35</sup> In Marxian terms, waged work involves a worker’s sale of his or her labour power to an employer in exchange for wages.<sup>36</sup> Contract is the legal mechanism by which that exchange occurs. Property rights are heavily bound up with the contract of employment. For the employer, capital production in the form of goods, services, relationships and ideas is the goal of the employment relationship. But the ways in which property rights are apportioned between the employer and the worker, in terms of workers’ time, skills and knowledge, and of the product of the work itself, also have a significant role in determining the bargaining power between the parties, as well as the social reproduction of the inequality of bargaining power between them. Contract thus acts as the vehicle for the transfer of property exchanged through the wage-work bargain.<sup>37</sup>

The issue of property rights in employment has been studied primarily in regards to whether and to what extent employment endows workers with property rights in their jobs, whether they are entitled to compensation for loss of job security upon dismissal, and what rights they might retain over their work-product. At common law the focus of such arguments has concerned whether workers are entitled to compensation for mental distress and/or reputational harm that arises from the fact or the manner of dismissal. In the collective labour context, trade unions have bargained for entitlements such as severance to recognize long-term service, which some have argued

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<sup>33</sup> *Ibid.*

<sup>34</sup> I use the terms “waged work” and employment interchangeably. This is to be distinguished from the general concept of work, which includes many activities that have been framed in law as non-work, or non-waged activities, such as child care, parental care, etc.

<sup>35</sup> David Beatty, “Labour is Not a Commodity”, in *Studies in Contract Law*, Barry Reiter and John Swan eds. (Toronto: Butterworths, 1980) at 318.

<sup>36</sup> Karl Marx, “Wage Labour and Capital” in *The Marx-Engels Reader*, Robert Tucker ed. (WW Norton & Company, Inc., 1972) at 169-172.

<sup>37</sup> Robert Lee Hale, “Coercion and distribution in a supposedly non-coercive state” (1923) (38) *Political Science Quarterly* 470 - 494 .



constitutes a property entitlement which vests in the worker.<sup>38</sup> There has been relatively little consideration of whether workers bargain for more than job security through their employment contracts however, such as for skills development or knowledge accumulation. More recently, scholars have sought to analogize workers to corporate shareholders by arguing that workers have property interests in the firm that arise by virtue of their investment in their employers' enterprises throughout the life of the employment relationship. In this way, such scholars suggest, workers become stakeholders in the corporation, akin to shareholders, whose interests must be considered by corporate directors in making decisions about the enterprise.<sup>39</sup>

The stakeholder theory of the firm relies on analysis of the long-term investment of the parties to an employment contract. This research focuses on the operation of the standard employment relationship (SER) that undergirded the mid-century Fordist production model.<sup>40</sup> The SER has been defined as employment "which is continuous, long-term, fulltime, in at least a medium sized or large establishment [...]"<sup>41</sup>. It was an exchange, in the words of Alain Supiot, of security for subordination.<sup>42</sup> Rather than recognizing an employee's property interests in the employment relationship, protections for both parties were built through a series of legal, economic and psychological structures that reinforced a norm of long-term work. According to David Marsden

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<sup>38</sup> For example, see the holding of the Designee regarding severance in his unreported decision, as explained on judicial review in *Re Telegram Publishing Co. Ltd. and Zwelling et al.* (1973) 1 O.R. (2d) 592 at para 25.

<sup>39</sup> Wanjiru Njoya, *Property in Work: The Employment Relationship in the Anglo-American Firm* (Ashgate Publishing, 2007); Simon Deakin et al., "Partnership, Ownership and Control: The Impact of Corporate Governance on Employment Relations" (2002) 24 *Employee Rel.* 335; Janis Sarra, "Corporate Governance Reform: Recognition of Workers' Equitable Investments in the Firm" (1999) 32 *Can. Bus. L.J.* 384; Margaret M. Blair, "For Whom Should Corporations be Run? An Economic Rationale for Stakeholder Management" (1998) 31 *Long Range Planning* 195; Thomas Donaldson & Lee E. Preston, "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications" (1995) 20 *Academy Mgmt Rev.* 65; Katherine Stone, "Policing Employment Contracts within the Nexus-of-Contracts Firm" (1993) 45 *U.T.L.J.* 353; Jonathan R. Macey & Geoffrey P. Miller, "Corporate Stakeholders: A Contractual Perspective" (1993) 43 *U.T.L.J.* 401; "Symposium: Corporate Malaise-Stakeholder Statutes? Cause or Cure: Appendix" (1991) 21 *Stetson L. Rev.* 279; Marleen A. O'Connor, "Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers" (1991) 69 *N.C.L. Rev.* 1189; Katherine Stone, "Employees as Stakeholders Under Non-Shareholder Constituency Statutes" (1991) 21 *Stetson L. Rev.* 45.

<sup>40</sup> 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. Michael Piore and Charles Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (New York: Basic Books, 1984) at 19-20.

<sup>41</sup> Ulrich Muckenberger, "Non Standard Forms of Work and the Role of Changes in Labour and Social Security Regulation", (1989) 17 *Intl. J. of Soc'y of Law* 387 at 389.

<sup>42</sup> Alain Supiot et al., *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press, 2001) at 1

workers accepted the open-ended employment arrangement, despite its exploitative potential, because it created a number of incentive mechanisms which matched the psychological expectations and economic interests of workers. This was not primarily a matter of law, but of economic, social and psychological norms which reinforced each other and operated within a loose contractual framework.<sup>43</sup> The SER offered workers wage stability to offset market fluctuations and changes in the level of individual output over a long period of time.<sup>44</sup> In return, it provided employers with workforce stability and protection for their training investments, allowing for future planning of complex production schemes within vertically integrated firms. These implicit economic contracts were supported by psychological beliefs about job norms and professional expectations regarding performance, and finally, were reinforced by the legal structure of the employment relationship.<sup>45</sup>

In legal terms, the long-term nature of the employment relationship was provided for by the two-tiered structure of the contract of employment. According to Freedland, the first tier involves an exchange of wages for services.<sup>46</sup> The second tier contains an ongoing and mutual expectation that the employment relationship will continue. “The second level – the promises to employ and be employed – provides the arrangement with its stability and its continuity as a contract”.<sup>47</sup> The expectations exchanged at the second tier receive legal expression in the form of a claim for wrongful dismissal. If the contract is only one of wages for service, or only the first tier, it would be dissolvable at any time, as it is deemed to be under the at-will doctrine in the United States.<sup>48</sup> But the second tier promise allows the worker recourse if the implied undertaking to retain in employment is not met.<sup>49</sup> The open-ended nature of the employment contract, and the layers of economic and psychological expectations that guide its ongoing operation, create a legal structure that operates as a framework for cooperation rather than as a precise delineation of the terms of

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<sup>43</sup> David Marsden, *The Employment Relationship: Theory of Employment Systems* (New York: Oxford University Press, 1999).

<sup>44</sup> See *infra* chapter 4, s. 3(a) for a further discussion on the operation of implicit contracts in employment.

<sup>45</sup> David Marsden, “The ‘Network Economy’ and Models of the Employment Contract” (2004) 42(2) BJIR 659 at 665-669; Stone, Policing the Employment Contract, *supra* note 39 at p. 363-366.

<sup>46</sup> Mark Freedland, *The Contract of Employment* (London: Oxford University Press, 1976) at p.20.

<sup>47</sup> *Ibid.*

<sup>48</sup> Foster, *supra* note 38 at p.7. Freedland suggests that this two-tiered structure emerged in the mid-19<sup>th</sup> century as the English courts struggled to enunciate the actual nature of the waged exchange in law and the basis for a wrongful dismissal claim. See Freedland, *The Contract of Employment*, *supra* note 46 at p. 20.

<sup>49</sup> Freedland, *ibid* at p. 20.

the relationship.<sup>50</sup> In Marsden's terms, the contract of employment is an 'incomplete contract', such that the law focuses only on particular key events or terms, such as dismissal.<sup>51</sup> Hugh Collins describes it as "incomplete by design", in the sense that the contract is left intentionally incomplete to allow the employer to adjust the requirements of the job tasks to suit its needs through the operation of the managerial prerogative.<sup>52</sup> This type of long term, open-ended flexible contractual arrangement is often referred to as relational, as an ongoing series of exchanges within the framework of an explicit bargain, whose adjustment is mediated by an array of social norms.<sup>53</sup> The loose contractual framework of the relational employment contract therefore supported the psychological and economic norms of the SER, and, according to analysts like Marsden, allowed both workers' interests and employers' interests to be protected.

In addition to structuring an employment relationship that provided long term investment protections and incentives to workers and employers, the SER and its contractual incarnation<sup>54</sup> were able to take on an important structural role within the broader regulatory system of the 20<sup>th</sup> century welfare state. Muckenberger and Deakin depict the welfare state as a series of regulatory layers, with the waged work relationship at the pinnacle, as the demarcator of socially productive activity.<sup>55</sup> The employment relationship operated as a site of public welfare benefits distribution, funnelling social welfare benefits from the state to remunerated individuals through private market relations. Employers also operated as a delegate of state authority, collecting state levies in the form of payroll deductions. Underneath the employment relationship, and supporting it, were state-sponsored regulatory schemes designed to provide short term emergency income replacement. Such schemes, such as social insurance, were often tied to work status (and thus so-called 'socially useful' activity) through qualifications periods based on the length and continuity of waged work. That type of regulation sat on top again of a set of state-sponsored schemes to

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<sup>50</sup> Marsden, *Network Economy*, *supra* note 45 at p. 668.

<sup>51</sup> *Ibid.*

<sup>52</sup> Collins, *Employment Law*, *supra* note 6 at p. 9-10.

<sup>53</sup> MacNeil, *supra* note 3 at p.900-901.

<sup>54</sup> Discussions on the labour market function of the employment contract tend to move back and forth between references to the 'contract of employment' and to the "employment relationship", so that particular attention is needed to decipher what is being attributed to the legal form of contract, and what concerns the SER more broadly.

<sup>55</sup> Muckenberger and Deakin, *supra* note 13 at p.156-162. One can also describe the Canadian labour market as founded upon a 'liberal welfare state', in Esping-Andersen's terminology. Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press,1990) at p.26-27.

provide longer term income replacement independent of work status, such as welfare or disability benefits.<sup>56</sup> The employment relationship thus operated over the second half of the 20<sup>th</sup> century in Canada as a “bridge between the modern business enterprise and the welfare state”.<sup>57</sup>

However, if the contract of employment facilitated the operation of the SER, its foundations are becoming increasingly chimerical. What allowed the SER to take on this central function was its long-term nature, which was maintained by interlocking mechanisms both internal and external to the legal regulation of waged work. As employment relationships become of increasingly short duration, however, the premise which allowed the SER to perform an institutional labour market function collapses. Without a long-term basis to the relationship, the incentive mechanisms, the security, the second tier of the employment contract, can no longer be relied on, such that the substantive entitlements that workers theoretically received in exchange for subordination are now fading away. And just as the internal benefits of the SER atrophy, its role in linking workers to labour market protections is undercut. As forms of labour market arrangements proliferate which diverge from the SER, and increasing numbers of people earn a living through multiple short term contracts, agency work, temporary foreign and migrant work, part time contracting, etc., they are no longer able to access the legal protections of the laws of work, either because they do not fall under traditional definitions of ‘employee’, or because they do not meet the markers of labour market participation that were designed in function of the norm of long term employment over the 20<sup>th</sup> century.<sup>58</sup> The contract of employment therefore loses its centrality as a labour market institution, and cannot deliver the security that incentivized acquiescence to subordination in the manner that it achieved over the 20<sup>th</sup> century. Operating increasingly without interaction with other labour market regimes, the contract of employment now serves as a legal mechanism that transfers all economic risks on to the worker.

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<sup>56</sup> Muckenberger and Deakin, *supra* note 13 at p. 160.

<sup>57</sup> Simon Deakin. "The Contract of Employment: A Study in Legal Evolution" (2001) ESRC Centre for Business Research WP203 at 32.

<sup>58</sup> Stephanie Bernstein, Katherine Lippel, Eric Tucker and Leah Vosko, "Precarious Employment and the Law's Flaws: Identifying Regulatory Failure and Securing Effective Protection for Workers" in *Precarious Employment: Understanding Labour Market Insecurity in Canada*, Leah Vosko ed. (Montreal: McGill-Queen's University Press, 2005) at p. 203.

### (c) The Many Lives of the Contract of Employment

Analyses of the nature, function and purpose of the contract of employment such as those described above tend to describe it in unitary terms, as if there is a single concept of such a contract independent of the various different legal regimes that regulate waged work. In particular, there is often conceptual slippage between the employment *contract* and the employment *relationship*. This is important, because, at least in Canada, the different legal regimes that regulate employment construct several different types of employment contracts.

The first type of employment contract is the collective bargaining agreement of unionized workers, or Contract Type 1. In Canada, unionized workers, although hired through a bilateral contract-like exchange of promises, are governed entirely by the terms of the collective bargaining agreement between the union and the employer, and the laws relating to collective labour representation; there is no room for individual variation, derogation or additional terms, unless authorized by the collective bargaining agreement itself.<sup>59</sup> The collective bargaining agreement is interpreted and applied by labour arbitrators rather than the civil courts. For non-unionized workers, there is in theory only a single type of employment contract. The prevailing description of this employment contract presents it as comprised of terms negotiated by the parties and requirements implied at common law, all circumscribed by a statutory floor of rights that sets the legal baseline of entitlements above which the parties may bargain.<sup>60</sup> Although we have no empirical studies on the question, anecdotal evidence suggests that in practice this type of employment contract, Contract

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<sup>59</sup> In Canada the existence of a collective bargaining agreement displaces any pre-existing individual employment contracts. *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718.

<sup>60</sup> The contract of employment in a non-unionized setting is considered a freely negotiated exchange, in which the terms are set by bargained agreement between the parties. Minimum employment standards legislation exists to set a floor of entitlements beneath which the parties may not contract, and therefore the boundaries of permissible negotiations. In Ontario the operation of employment standards as a floor of right was legislatively set when first enacted. *The Employment Standards Act*, SO 1968, c. 35, s. 4 [ESA] specified that that “the standards for rates of wages and vacations with pay required under this Act are minimum standards only and nothing in this Act affects any rights or benefits an employee under any law, custom, agreement or arrangement that is more favourable to him than his rights or benefits under this Act”. In the current version of the Ontario *Employment Standards Act*, SO 2000, c. 41, the first provision explaining that terms of the Act are minimum standards has been removed but the latter part provision remains, at s.5(2). See also *Machtinger v. Hoj Industries Ltd.*, [1992] 1 SCR 986 at 18. In addition to the minimum standards, a series of substantive obligations and entitlements exist at common law that are implied into the contract of all non-unionized workers. Thus, as Mundlak explains, “[...] the negotiable sphere of the employment relationship is defined by the contours of the non-negotiable provisions” provided by statute (and at common law). See Guy Mundlak, “Generic or Sui-Generis Law of Employment Contracts?” (2000) 16 Int’l J. of Comp. Lab. Law & Ind. Rel. 309 at 314.

Type 2, exists for only a small percentage of the workforce. Workers under Contract Type 2 are those who are able to negotiate some entitlements above the statutorily imposed minimums, and/or have the financial ability to bring a civil claim rather than having only access to the administrative enforcement process of the employment standards' regimes. The terms of their employment contracts are usually an amalgam of negotiated terms, employer-imposed terms, and common law implied obligations, which are interpreted and applied by the common law courts. The law enforced at common law is designed to afford greater entitlements to higher status workers.

Many workers, however, because of an asymmetry of economic, bureaucratic and legal power, are likely to have employment contracts that contain terms which are set unilaterally by the employer. Although we have no empirical evidence about the typical content of such contracts, it is likely that Type 3 contracts will usually either be silent about the workers' legal entitlements, or contain only those terms required by minimum standard legislation such as the *Employment Standards Act* in Ontario.<sup>61</sup> In contrast to Contract Type 2, workers in Canada under Contract Type 3 are likely to have their rights adjudicated (if at all) before the enforcement arm of the minimum standards regime rather than before the courts.<sup>62</sup> Thus, these two latter types of employment relationships – Type 2 and 3 – provide different substantive baseline legal rights, tend to be regulated by different, if overlapping legal regimes, and are enforced by different adjudicative bodies. In this sense, they constitute two analytically overlapping but separate employment contracts.

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<sup>61</sup>ESA, *supra* note 60. A study by the Canadian Policy Research Network in 2001 found that while a majority of paid workers in Canada have formalized work relationships which are set out in written contracts of employment, a written contract of employment exists for 97% of unionized workers, compared to 43% of non-unionized workers. 17% of the paid working population surveyed are working only under a verbal employment agreement, and are primarily employed by small businesses of less than 10 employees. Interestingly, however, according to this study, 69% of workers in temporary work arrangements hold written contracts of employment which contain specific terms and conditions of employment, although the likelihood that they included any negotiated terms, or that the workers can afford to use the civil courts, seems minimal. This is bolstered by the finding that workers with lower levels of education and low weekly earnings have the lowest level of formalization in their employment relationship, while professional, semi-professional and technical workers report the high levels of employment formalization. The study also found, somewhat unexpectedly, that managerial employees tended to have less formalized employment agreements than other professional employees. See Graham Lowe and Grant Schellenberg, *What's a Good Job? The Importance of Employment Relationships*, CPRN Study, No. W|05, 2001 at p.21-27.

<sup>62</sup> England, *supra* note 20 at p.115. Most workers with only the minimum employment standards are unlikely to claim their rights at all. Even where they do bring a claim under the Employment Standards Regime in Ontario, there is such a woeful failure of order enforcement that plagues the province that one commentator has called Employment Standards 'rights without remedies'. See Leah Vosko, "'Rights without Remedies': Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs" presented at the *Voices at Work Conference*, Osgoode Hall Law School, Toronto, March 16<sup>th</sup> and 17<sup>th</sup> 2012.

Despite the differences in content and administration between Contract Types 2 and 3, there is no easy line of separation between them, because aspects of the procedural and substantive law that governs them sometimes overlap. In theory employment standards legislation creates a minimum floor of entitlements, above which people can contract. One might have thought, therefore, that the common law of employment contracts would consist only in procedural rules for the interpretation of the terms negotiated about the legislative minimums. But the common law of employment contracts, like employment standards regimes, also creates its own substantive entitlements. The substantive obligations of the common law of employment take the form of implied contractual terms, which provide a generic structure to the employment relationship at common law, some of which can be contractually waived, but some of which cannot. The rights created by statute do not displace those created at common law, such that common law rights and available to all non-unionized employees. This means that workers may have rights both at common law and under employment standards legislation, which are of a similar conceptual nature but different in scope. For example, unless an employment contract endows a worker with a notice period greater than reasonable notice or the statutory notice period, that worker may be entitled to common law reasonable notice of termination is available. At the same time, employment standards legislation provides statutory notice for those to whom it applies. Thus both statutory notice and common law reasonable notice purport to act as minimum entitlements, but reasonable notice tends to provide greater compensation than does statutory notice. This means that those who can afford to sue at common law enjoy enhanced recovery; those who cannot depend on the statutory enforcement mechanism and receive much less. Thus the differences between Contract Types 2 and 3 operate at a socioeconomic level based on bargaining power differentials, which in turn impacts the legal source of their terms of employment, and suggests which employment law regime they will be able to access to determine their employment contract entitlements.<sup>63</sup>

The common law of employment contracts applies beyond Contract Type 2 in another way. It also provides the intellectual, normative and interpretive shape to other employment-related legal regimes, and in this sense applies to all three types of employment contracts. This is manifest in two

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<sup>63</sup> The *ESA*, *supra* note 60 is adjudicated at first instance by decision-makers of the Ministry of Labour. A worker may instead elect to enforce the Act's terms before the civil courts, but the costs of bringing a civil claim suggests this will be done infrequently. *Boland v. APV Canada Inc.*, 2005 CanLII 3384 (ON SCDC), 38 C.C.E.L. (3d) 95 (Ont. Div. Ct.)

ways. Firstly, the common law of employment contracts is regularly used as a substantive source to fill interpretive gaps in statutory regimes. Thus, where employment-related statutes are silent on definitions, or on the scope of concepts, such as, for instance, the definition of ‘employee’ and ‘independent contractor’, or the conceptual boundaries of constructive dismissal, the common law will be used to give such concepts meaning and to determine the nature of their statutory application.<sup>64</sup> Secondly, the legal skeleton of the common law of employment contracts continues to organize all other employment-related regimes, except to the extent that it is specifically displaced by statute or, in some cases, by negotiation in a collective bargaining agreement. What this means is that certain basic assumptions about the boundaries and content of the employment relationship, assumptions that are thought to be of common law origin, manifest themselves across employment-regimes. Here I have in mind the idea of employment as a contractual exchange of wages for work, superimposed on an exchange of mutual obligations regarding ongoing work; that employment provides the employer with ownership of the worker’s labour power during the hours of work; that the employer owns the property rights over the products created by the worker’s labour power – physical and sometimes intellectual; and that by virtue of its property entitlements and the purchase of labour power, the employer holds the managerial prerogative to direct the relationship and workers owe a duty of obedience. The fact that these ideas have normative purchase across employment law regimes is one of the reasons that some scholars have begun to discuss the employment contract as an institution, having both analytical and normative content.<sup>65</sup>

## **(2) Research on the Origins of the Employment Contract at Common Law**

As the description so far demonstrates, the contract of employment is a legal, economic and social relationship that is replete with contradictions. It is considered the bedrock institution in the legal governance of work<sup>66</sup>, but common law protections are usually invoked only by a small segment of the workforce. It is a relationship understood as regulated by the general principles of contract, but

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<sup>64</sup> Innis Christie, *Employment Law in Canada* (Toronto: Butterworths, 1980) at 3.

<sup>65</sup> Mark Freedland and Nicola Kountouris, “Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe”, (2008) 37(1) *Industrial L.J.* 49; Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (Oxford: Oxford University Press, 2005) at 1-18; Simon Deakin. “The Many Futures of the Contract of Employment”, in Joanne Conaghan, Richard Michael Fischl and Karl Klare, eds., *Labour Law in an Era of Globalization* (Oxford: Oxford University Press, 2002) at 179.

<sup>66</sup> Otto Kahn-Freund, “Legal Framework” in A. Flanders and H.A. Clegg, eds. *The System of Industrial Relations in Great Britain* (1954) at 45.



one that was arguably never fully contractualized.<sup>67</sup> It is ostensibly a legal arrangement that promotes individual liberty, allowing the parties to establish a relationship on terms of their choosing, in a manner that promotes overall market efficiency<sup>68</sup>, but for many workers it is a relationship of legal, economic and social subordination<sup>69</sup>, or at most an institution of *both* subordination and wage security.<sup>70</sup> How to square all of these conflicting roles and attributes of the contract of employment? To investigate these questions, let us take a further look at the literature on the contract of employment's emergence at common law.

(a) England

The traditional narrative holds that the law of work moved from status to contract in England in tandem with the growth of the industrial revolution of the 19<sup>th</sup> century and the rise of laissez-faire notions of market and state.<sup>71</sup> In the words of Philip Selznick, “[t]he waning of legal supervision of the master-servant relation is the most striking feature of the law of employment in the early nineteenth century.”<sup>72</sup> Most available commentary from the second half of the 19<sup>th</sup> century viewed the legal nature of the employment relationship as evolving jointly with the general emergence of unitary principles of contract law. In 1765 Blackstone described work as a matter of private domestic law, inferring that contract had not yet risen to dominance as the pre-eminent form of waged-work legal regulation.<sup>73</sup> A century later, however, Henry Maine asked in 1861 “whether the only relation between employer and labourer which commends itself to modern morality be not a relation determined exclusively by contract”.<sup>74</sup> In this view, English law was on a trajectory from the distribution of legal rights and duties under master and servant laws on the basis of social status and the household economic unit, towards a system of freely assumed individual obligations determined by agreement, supervised by the law only on breakdown.<sup>75</sup>

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<sup>67</sup> Fox, *supra* note 11 at p. 181-184; Selznick, *supra* note 10 at p. 133-135

<sup>68</sup> Richard Epstein, In Defense of the Contract, *supra* note 8; Epstein, Common Law, *supra* note 9.

<sup>69</sup> Kahn-Freund, *Labour and the Law*, *supra* note 22 at 8; Judy Fudge, “New Wine into Old Bottles?: Updating Legal Forms to Reflect Changing Employment Norms” (1999) 33 UBC LRev 129

<sup>70</sup> Deakin and Wilkinson, *supra* note 65; Supiot, *supra* note 42 at p.1.

<sup>71</sup> R. W. Rideout, “The Contract of Employment” (1966) 19 CLP 111 at 112.

<sup>72</sup> Selznick, *supra* note 10 at p. 131. Selznick is an American author, but was commenting on English law with this statement.

<sup>73</sup> William Blackstone, *Commentaries on the Laws of England (1765-1769)*, Book 1, ch. 14

<sup>74</sup> Henry Sumner Maine, *Ancient Law*, (London: John Murray, 1920) at 319.

<sup>75</sup> *Ibid.*

The “status-based” system of work regulation that was said to be displaced by contract in the 19<sup>th</sup> century emerged from the law of master and servant, a statutory regime first enacted in England in the wake of the Black Death of the 14<sup>th</sup> century.<sup>76</sup> The law of master and servant was a penal system of compulsory labour, designed to regulate labour mobility and wage rates. It applied to the waged-work relations of servants in husbandry (agricultural workers and household servants), labourers, and artisans.<sup>77</sup> In the 16<sup>th</sup> century the system was reorganized with enactment of the Statute of Artificers in 1543, and was thereafter interwoven with the Laws of Settlement and the Poor Laws in the 17<sup>th</sup> century.<sup>78</sup> Together these statutes created a comprehensive system for regulating the labour market, through centralized wage-setting, prohibitions on wage competition amongst employers, control of labour mobility and parish poor relief.<sup>79</sup> While statutory in nature,

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<sup>76</sup> *The Ordinance of Labourers and Servants*, 23 Edw. III; *The Statute of Labourers*, 25 Edw. III, stat.2; L.R. Poos, “The Social Context of Statute of Labourers Enforcement” (1983) 1(1) *Law & Hist. Rev.* 27.

<sup>77</sup> The statutes applied to three types of workers - conceptual classifications that have had long term implications. The statutes purported to regulate the work of the crafts, also referred to as artisanal workers, servants in husbandry, and labourers. Craft workers were skilled trade workers, whose work was also heavily regulated by the guilds, and over time, municipal regulation. Servants in husbandry and labourers, on the other hand, were both types of agricultural workers. The distinction between servants and labourers was less about the nature of the work and more about the relationship to the master and his household. Agricultural and domestic ‘servants’ were usually unmarried, living within their masters’ households, and hired annually. They therefore had more personal relationships with their masters, and could be made to work at any time of the day or night. Service in husbandry was usually transitional, a position assumed as one left one parents’ home, seeking to amass enough resources to marry (or to meet someone to marry). ‘Labourers’, on the other hand, were usually married, hired daily or weekly, and could work for multiple employers, as well as engaging in subsistence farming. ‘Labourers’ were conceived of as more independent workers, even if of lower social status, with less of the heavy strain of familial paternalism than was imbued in the legal conception of a ‘servant’, and with specifically delimited tasks. Artificers were highly skilled trades people, regulated by the guild and municipal rules. They could be masters, engaging journeymen and apprentices. See Ann Kussmaul, *Servants in Husbandry in Early Modern England* (New York: Cambridge University Press, 1981). See in particular appendix 1 for a consideration of the various meanings of servant and labourer, and what type of work was considered under each term. This has been the subject of ongoing dispute since C.B. Macpherson’s discussion on the Putney Debates and the position of the Levellers on the free franchise. See C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962) at chapter 3. See also Robert Steinfield, *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) at p. 17-22; Douglas Hay, “England, 1562-1875: The Law and Its Uses” in Douglas Hay and Paul Craven eds., *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (North Carolina: University of North Carolina Press, 2004) at p. 63.

<sup>78</sup> *The Statute of Artificers*, 5 Eliz. c. 4 [Artificers].

<sup>79</sup> What, together, Karl Polanyi called the Code of Labor. Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 2001) at p. 91. As of the Elizabethan era labour mobility was regulated by the interplay between the Statute of Artificers, the Laws of Settlement and the Poor Laws. The Statute of Artificers specified that work was mandatory for the able bodied, and, once employed, workers could not leave their parishes without their master’s permission. They thus could not travel to find employment. These requirements were integrated with the 17<sup>th</sup> century Laws of Settlement, which specified that parish officers could remove people not born to a parish if they were likely to become chargeable it, meaning that the parish became responsible for their upkeep under the Poor

the laws of master and servant were bolstered by a complex body of case law, as well as particular customs and practices from different industries. The enforcement of master and servant law was the jurisdiction of justices of the peace. Worker violations of their employment contracts could be punished by penal sanctions, while employers were subject to civil fines for mistreatment.

Towards the late 18<sup>th</sup> century and into the early 19<sup>th</sup> century a series of newer statutes were enacted to regulate the work of emerging industrial occupations, just as other central features of the master and servant system began to fall into disuse. These newer statutes were mostly designed to extend and clarify the coverage of master and servant law to artisanal craft work,<sup>80</sup> but they also increased the disciplinary and punitive aspects of the system.<sup>81</sup> Robert Steinfeld argues that the statutes of the 18<sup>th</sup> and 19<sup>th</sup> centuries were innovative because they stripped away the paternalist obligations of the Elizabethan system and left only a contractual scheme that used punitive sanctions for the enforcement of its terms. The purpose of these statutes, according to Steinfeld, was to forcibly inculcate the new values of free-will contracting – to force impecunious workers to respect their contractual promises.<sup>82</sup> Deakin and Wilkinson similarly argue that the

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Laws. As of 1691, however, servants hired and serving under a yearly hiring contract were permitted to stay beyond the year in a parish not of their birth, and could not be removed from the parish even if they became destitute. As of the late 17<sup>th</sup> century the question of whether or not a servant was hired under an annual hire contract thus became a central point for litigation between parishes trying to minimize their relief obligations. See generally Deakin and Wilkinson, *supra* note 66 at chapter 3; Norma Landau, “Who was Subjected to the Laws of Settlement? Procedure under the Settlement Laws in 18<sup>th</sup> Century England” (1995) 43(2) *Ag. Hist. Rev.* 139.

<sup>80</sup> *Wollen Manufactures Act* 12 Geo.I, c.34 (1725) and amended in 1740, 1756 and 1809; *Hats etc. Manufactures Act*, 17 Geo. III, c.56 (1777); *Journeyman Tailors Act*, 7 Geo. I, Stat.1, c.13 (1720) amended in 1768; *Silk Manufacturers Act*, 13 Geo. III, c.68 (1773) amended in 1792; *Cotton Mills Act*, 59 Geo. III, c.66 (1819) amended in 1825 and 1831.

<sup>81</sup> 20 Geo. II, c.19 (1747); 31 Geo. II, c.11 (1758); 6 Geo III, c. 25 (1766); 4 Geo. IV; c.34 (1823).

<sup>82</sup> For Steinfeld, the new statutes of the 18<sup>th</sup> and 19<sup>th</sup> century had a two-fold, related purpose: firstly, employers sought to hold workers to their employment obligations in an era when the social structures that had impeded labour mobility began to recede. Secondly, these statutes were designed to aid in the project of free market creation, to bolster the use of executory contracts and the doctrine of consideration. The expansion of modern contract theory’s dependence on the protection of promises was thought to be jeopardized by the lack of property amongst the working class. For the modern industrial economy to function on a contractual basis, legal protection had to be afforded to promises, as promises provide the mechanisms by which legal protection could be provided to interlocking chains of goods production. This was thought to necessitate a fundamental change in market mentality and behaviour amongst workers and the lower classes, who needed to be convinced of the importance of respect for the legal promises in market transactions. With little property, many could not afford to pay a damage award for breach, and therefore without something more than a financial order, there would be insufficient incentive to uphold economic promises. For this reason penal sanctions and hard labour were thought necessary, as a method to physically and forcibly convince workers of the consequences of violation for contractual promises. Robert Steinfeld, *Coercion, Contract and Free Labor in the Nineteenth Century* (New York: Cambridge University Press, 2001) at chapter 2.

statutes of the 18<sup>th</sup> and 19<sup>th</sup> centuries were enacted amidst the active dismantling of the pre-industrial corporatist system of production.<sup>83</sup> The purpose of these statutes was to enforce industrial discipline over the work of industrial labourers and artisans, as well as agricultural workers.<sup>84</sup>

The coverage of these new statutes was the subject of litigation at the turn of the 19th century.<sup>85</sup> In a series of cases the courts declared that the laws of master and servant did not apply to the work of certain occupations, such as domestic servants, menial clerks, and higher status professions.<sup>86</sup> Such workers therefore only had access to the common law courts for their work-related claims. It is on the basis of these claims that the common law of employment contracts is said to emerge. The traditional story of the emergence of the common law of employment contracts suggests that it came to eclipse the law of master and servant in the early 19<sup>th</sup> century, even though the penal sanctions of master and servant law remained in force until 1875. According to Sidney and Beatrice Webb, and later, Daphne Simon and Brian Napier, central elements of the master and servant regime, such as wage fixing, rules for trade entry, and the compulsion to work, were no longer actively applied by the early decades of the 19<sup>th</sup> century.<sup>87</sup> Simon argues that by the mid-18<sup>th</sup> century, commercial practices had shifted sufficiently towards a capitalist model of production that wage fixing was no longer necessary to keep wages low, and trade entry rules acted to retard the aggregation and expansion of commercial ventures. Thus by the early 19<sup>th</sup> century, the provisions of the Statute of Artificers concerning the regulation of the work day, the limitation of wages, and “general compulsion to labour” had been abandoned in practice, and “only one thing remained, namely the punishment of the servant for leaving or neglecting his work”.<sup>88</sup>

The penal sanctions for contract breach were repealed in 1874, the product of a long fought battle begun by trade unionists in the 1840s against the brutality of the penal sanctions and against the

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<sup>83</sup> In this context corporatism refers to the organization of society into groups based on common status and interests, such as agricultural, business, military, patronage groups, etc.

<sup>84</sup> Deakin and Wilkinson, *supra* note 65 at p. 62.

<sup>85</sup> 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 31-37.

<sup>86</sup> See *infra* fn 169 and 170 for a discussion of these cases.

<sup>87</sup> Daphne Simon, “Master and Servant”, in John Saville, ed., *Democracy and the Labour Movement* (London 1954) at 197-198; Sidney and Beatrice Webb, *The History of Trade Unionism* (London, 1911 edition) at p. 52-53. See also Brian Napier, *The Contract of Service: the concept and its application* (D.Phil., University of Cambridge, 1975) at p.59 & 72 .

<sup>88</sup> Simon, *ibid* at p. 198.

presumption of annual hire that was integral to the law of master and servant.<sup>89</sup> The annual hire presumption held all employment contracts to be of annual duration unless explicitly fixed otherwise, such that neither party could end the relationship in the absence of cause, or three months notice prior to the end of the term. In the 19<sup>th</sup> century the notice requirement was used as a strike-breaking tool, permitting employers to fire workers who went out on strike.<sup>90</sup> According Daphne Simon, in testimony before House of Commons W.P. Roberts, “the miner’s lawyer”, argued for equality of treatment for workers with their employers. When asked if he “would treat labour as you would any other commodity”, “merely as an article to buy and sell”, he replied simply, “Yes”.<sup>91</sup> To be treated as any other commodity would require bringing work regulation onto a contractual model, which would provide at least formal equality between the parties.

Under the master and servant system employment was considered a private domestic relationship.<sup>92</sup> As Steinfeld argues, employers’ right of control over their workers was understood in law as founded in familial jurisdiction over their person, in the sense that workers were considered part of the employer’s household, as well as in a property right over worker’ services.<sup>93</sup> The transition from status to contract therefore required the commodification of workers’ labour, such that workers could own and sell their labour separately from themselves. Writing in 1867 Marx explained that:

[The worker] and the owner of money meet in the market, and deal with each other as on the basis of equal rights, with this difference alone, that one is buyer, the other seller; both,

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<sup>89</sup> Sidney and Beatrice Webb, *The History of Trade Unionism* (London, 1911 edition) at p. 232-233. What was repealed in 1875 were the penal sanctions of the statutes, effectuated by the amendments introduced with the *Conspiracy and Protection of Property Act 1875*, 38 & 39 Vict., c.86. See Simon, *supra* note 87 for a description of the campaign that led to their repeal. *The Employers and Workmen’s Act*, 38 & 39 Vict., c.90 (1875) was enacted to take its place. See Deakin, *The Contract of Employment*, *supra* note 57 at p. 24.

<sup>90</sup> When workers went on strike, they were considered to have left their employment without providing the three months’ notice prior to the end of the annual term. They faced prosecution under master and servant laws for failure to provide notice, and unions and union activists could be sued for the tort of inducement to contract breach. Sanford Jacoby, “The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis” (1982) 5 *Comp. Lab. L.J.* 85 at 96-97.

<sup>91</sup> Simon, *supra* note 87 at p. 199.

<sup>92</sup> Blackstone identified master and servant relationships as one of the three great relationships of private economic life. The other two were the relationship between husband and wife, and the relationship between parent and child. See Blackstone, *supra* note 73 at chapter 14.

<sup>93</sup> Robert Steinfeld, *The Invention of Free Labor* (Chapel Hill: University of North Carolina Press, 1991) at p.55-57. As Steinfeld notes on p.67, an employer’s property right over his or her servant’s services existed against all the world.

therefore, equal in the eyes of the law. The continuance of this relation demands that the owner of the labour-power should sell it only for a definite period, for if he were to sell it rump and stump, once for all, he would be selling himself, converting himself from a free man into a slave, from an owner of a commodity into a commodity.<sup>94</sup>

Marx's analysis relied on the idea that the worker could sell his or her labour, but also on the assumption that the employer owned the product of a worker's labour.

From the instant [the worker] steps into the workshop, the use-value of his labour-power [...] belongs to the capitalist. By the purchase of labour-power, the capitalist incorporates labour, as a living ferment, with the lifeless constituents of the product. From his point of view, the labour-process is nothing more than the consumption of the commodity purchase, i.e. of labour-power; but this consumption cannot be effected except by supplying the labour power with the means of production. The labour-process is a process between things that the capitalist has purchased, things that become his property.<sup>95</sup>

As production increasingly moved into factories owned by employers, and workers used employers' tools and raw materials to produce a tangible good, the employer's right to the final product seemed to arise by virtue of his or her ownership of all of the product's inputs (including the necessary labour power). In this context analysts conceived of the employment contract as the employer's purchase of the worker's physical labour over his or her time in the workplace.<sup>96</sup>

The traditional story is that just as central features of the master and servant system fell into disuse in the early 19<sup>th</sup> century, newer occupations began to emerge that were now organized by the law of contract. Some viewed this process as a natural evolution which was part of the general rise of individualism in law and political opinion that accompanied the economic developments of the Industrial Revolution.<sup>97</sup> The legal transformations of the period brought the will theory of contract to the centre of the organization of state and market, just as the common law of employment emerged as a subset of general contract law over the 19<sup>th</sup> century.<sup>98</sup> Adoption of a contractual model of employment provided individual freedom and choice to workers and employers, thus

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<sup>94</sup> Karl Marx, *Capital* Volume 1 (Marx-Engels Internet Archive, 1995, 1999) at chapter 6, available at <https://www.marxists.org/archive/marx/works/1867-c1/ch06.htm>

<sup>95</sup> *Ibid* at chapter 7.

<sup>96</sup> Nicola Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Hampshire: Ashgate, 2007) at p.19.

<sup>97</sup> A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, 2<sup>nd</sup> ed. (London, 1914), lectures iii and iv. Dicey views the 1820s to the 1860s as the heyday of English individualism in law and public opinion, which was then undermined by the growth of collectivism and socialism in legislation as of the mid-1860s.

<sup>98</sup> *Ibid* at p.44 and lecture iv; Maine, *supra* note 74 at p. 319.

dispatching the formal inequality of master and servant law. Others viewed the transition as less benign. By the mid-20<sup>th</sup> century members of the industrial relations Oxford School, such as Allan Flanders, Hugh Clegg, Otto Kahn-Freund and Alan Fox, viewed the common law regulation of work as a system of economic subordination.<sup>99</sup> It was the common law's antagonism to workers' rights that necessitated the legislative interventions at the turn of the 20<sup>th</sup> century, and provoked the general English move away from law towards the system Kahn-Freund termed collective *laissez-faire*.<sup>100</sup> Alan Fox argued that the employment relationship was never fully contractualized because master and servant notions of obedience were read into the contractual form during the 19<sup>th</sup> century, repackaging the hierarchical notion of a managerial prerogative into the language of contract, which has been fundamental to its development ever since.<sup>101</sup> Nonetheless, for critical writers, just as for those who viewed contractualization as emancipatory, the contract of employment at common law, "[was] a product of the Industrial Revolution, and nineteenth-century *laissez-faire* its principal justification."<sup>102</sup>

#### (b) Challenges to the Traditional Narrative in England

Challenges to the traditional narrative of the employment contract's 19<sup>th</sup> century origins have emerged more recently. The initial objection to the traditional narrative focused primarily on the idea that the 19<sup>th</sup> century was a period of unimpeded contractual regulation of work.<sup>103</sup> This objection was not concerned specifically with the contract of employment, but rather with the extent to which other legal regimes existed and were of significant force in regulating work through the 19<sup>th</sup> century. Karl Polanyi in the 1940s described the extent of 19<sup>th</sup> century social legislation in

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<sup>99</sup> Allan D. Flanders and Hugh Armstrong Clegg, *The system of industrial relations in Great Britain: its history, law, and institutions* (B. Blackwell, 1954); Kahn-Freund, *supra* note 22 at p. 7—9.

<sup>100</sup> Otto Kahn-Freund, *Selected Writings* (London: Stevens, 1978) at chapter 1.

<sup>101</sup> Fox, *supra* note 11 at p.181-184. A similar argument was made contemporaneously by Philip Selznick in the United States. Selznick, *supra* note 10 at 122-135.

<sup>102</sup> R. W. Rideout, "The Contract of Employment" (1966) 19 CLP 111 at 112.

<sup>103</sup> There is another line of revision to the traditional narrative which challenges the idea that the law of master and servant existed as one body of law from the time of the Black Death until the late 19<sup>th</sup> century. For some the argument is that there was no generalized notion of waged-work prior to the 18<sup>th</sup> century. See Tomlins, *supra* note 27 at p.232-238. For others the argument is that a new series of statutes were enacted in the 18<sup>th</sup> century which were different in kind than the older system of master and servant law because they were focused specifically on worker discipline while divorced from the more comprehensive system of labour market regulation put in place in the Elizabethan era. See Brian Napier, *The Contract of Service: the concept and its application* (D.Phil., University of Cambridge, 1975) at p.103; Steinfeld, *supra* note 82 at p. chapter 2; Deakin and Wilkinson, *supra* note 65 at p.62. Because this debate does not speak directly the narrative I present here, it has not been included in detail.

England, refuting the idea of a 'natural' self-regulating market that existed without legislative aid.<sup>104</sup> Harry Arthurs pursued this idea further in the 1980s, tracing the growth of English legislation on conditions of work in the early 19<sup>th</sup> century, and the administrative regulatory apparatus that was created to enforce such statutes.<sup>105</sup> Central to Arthurs' argument is that rather than withdrawing from the active administration of the work relationship in the 19<sup>th</sup> century as master and servant laws receded, the British government was instead highly interventionist over that period.<sup>106</sup> In a similar vein, Douglas Hay's research counters the idea that the master and servant system had fallen into effective disuse in England by the beginning of the 19<sup>th</sup> century. Instead, Hay traces the persistent rise in master and servant criminal prosecutions in England throughout the 19<sup>th</sup> century, right up until the repeal of the penal sanctions in 1875.<sup>107</sup> Robert Steinfeld traces the continuity between employers' property rights over workers' labour from the law of master and servant into the 19<sup>th</sup> century. Even as central elements of the master and servant system were stripped away in the early 19<sup>th</sup> century, Steinfeld argues that the law continued to treat employment as the lease of workers' labour to their masters for the entire duration of the employment contract. Steinfeld argues that an employer's property interests under the law of master and servant remained relatively unchanged within the emerging contractual paradigm of the 19<sup>th</sup> century. The employer

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<sup>104</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Mass: Beacon Street Press 2001) at 145 and chapter 7.

<sup>105</sup> Harry W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in 19<sup>th</sup> Century England* (Toronto: Toronto University Press, 1984).

<sup>106</sup> *Ibid.*

<sup>107</sup> Hay, *The Law and Its Uses*, *supra* note 77 at 106-116; Douglas Hay, "Master and Servant in England: Using the Law in the Eighteenth and Nineteen Centuries", in W. Steinmetz (ed.). *Social Inequality in the Industrial Age* (Oxford: Oxford University Press, 2000) at 243-244. Hay reports that around the mid-19<sup>th</sup> century the use of the statutes increased during times of economic growth, and dropped off in periods of stagnation. In terms of regional diversity in levels of prosecution, the spread seems most related to the specific structure of individual trades, which tended to operate based on ingrained local/trade practice and engage with the formal law of master and servant to varying degrees and in varying ways. Preliminary empirical results suggest that areas with concentrations of competing high wage industries tended to have significant numbers of prosecutions, presumably used by masters to retain skilled workers in situations where they otherwise would have commanded wage bargaining strength. Some degree of annual predictability can also be detected in levels of prosecutions, and in regards to particular offences. For instance, prosecutions for absconding tended to increase in the early months after the traditional beginning of the annual hire year in October, as workers would have less in the way of wages owing that they would lose if they left during the annual term. The length of average incarceration also appears to have increased in the 19<sup>th</sup> century, two weeks being the average in Middlesex and Westminster in the 17<sup>th</sup> and early 18<sup>th</sup> century, but one month was the average sentence in the 19<sup>th</sup> century. While available sources make the issue unclear, there is some indication that whipping was increasingly used over the 19<sup>th</sup> century. On a general level, after the 1830s, in regions where the law was heavily used, it appears to become increasingly unequal, as only 20% of cases are brought by workers in the 1860s, and of the 80% brought by masters, 20% resulted in imprisonment in the 1860s.



could still “control, use and enjoy the [worker’s] energies” but the legal ability to do so was “reimagined as the product of a voluntary transaction between two separate and autonomous individuals”.<sup>108</sup>

Another direct challenge to the traditional narrative of the emergence and development of the contract of employment was mounted by Adrian Merritt in a 1982 article.<sup>109</sup> Rather than viewing the contract of employment as a 19<sup>th</sup> century issue, she argues that the process of employment contractualization is one of very recent origin, and ongoing. Merritt argues that up until the 20<sup>th</sup> century there were three types of waged-work relationships, quasi-servile relationships of household service (“servants”), principal-independent contractor relationships between manufacturers and artisans, farmers and skilled farm-workers, purchasers and tradesmen, and finally, an emerging notion of employment between employer and employee.<sup>110</sup> What occurred over the 19<sup>th</sup> century was the extension of master and servant concepts from quasi-servile relationships outwards to transform independent contractors and agricultural workers into ‘hands’.<sup>111</sup> “[T]he notion of a ‘contract of employment’”, Merritt tells us, “was created to allow the imposition of the old master-servant relationship on an area of work until then occupied largely by the ‘independent’ contract.”<sup>112</sup> She concludes that despite the change in nature of the sanctions for contract breach from penal to civil, the “underlying content of the employee’s obligations today parallels very closely the duties imposed by [master and servant] legislation”.<sup>113</sup>

Merritt raises a number of interesting questions about the relationship between master and servant statutes and the contract of employment. In particular she highlights questions about the relationship between the common law of employment and collective labour law, about the nature of different legal categories of waged-work in the 19<sup>th</sup> century, about the political purposes of contractualization, and about the ongoing jurisprudential confusion within the common law of employment contracts throughout the 20<sup>th</sup> century. The problem, however, is that Merritt does not

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<sup>108</sup> Steinfeld, *supra* note 77 at 80.

<sup>109</sup> Adrian Merritt, “The Historical Role of Law in Employment” (1982) 1(1) *Aus. J. L & Soc’y* 56.

<sup>110</sup> *Ibid* at p. 57.

<sup>111</sup> Merritt formulates her argument as a refutation of the traditional narrative of the historical evolution of employment law provided by Freedland and Davies and their 1979 *Labour Law - Text and Materials* (1979) 2nd edition (Weidenfelds 1984).

<sup>112</sup> Merritt, *supra* note 109 at p. 58.

<sup>113</sup> *Ibid* at p.67

satisfyingly answer many of the questions she raises. It is not clear from her analysis *how* the contractual form served to bring broader categories of waged-workers into the conceptual sphere of master and servant relations. At some points she suggests contractualization was the end point of the extension of master and servant concepts, but at others she suggests that was the laws of master and servant that expanded to cover previously independent contractors.<sup>114</sup>

The most express challenge to the traditional history of the contract of employment was recently issued by Simon Deakin and Frank Wilkinson in 2005.<sup>115</sup> Deakin and Wilksinson reconstruct the historical trajectory of the legal regimes that came to organize the modern labour market from the 18<sup>th</sup> century onwards. As part of this project they examine the history of the contract of employment, focusing on the process by which it took on a central institutional role in structuring the labour market in the mid-20<sup>th</sup> century. They argue that contrary to the usual focus on the 19<sup>th</sup> century, the contract of employment existed as one legal approach to work among many until the mid-20<sup>th</sup> century. Rather than a homogenous legal definition of contractual employment, the different master and servant statutes defined their coverage on the basis of lists of occupations, which were subject to different legal rights, obligations and customs.<sup>116</sup> Over the late 19<sup>th</sup> and early 20<sup>th</sup> centuries a general notion of employment began to take shape at common law amongst those occupations not regulated by statute, but it was only in the 1940s that the contract of employment was adopted as the general category of work regulation, as part of the social insurance initiatives of the Beveridge Report. In so doing, a unified concept of a contract of service was adopted for all waged work, in contrast to contracts for services with independent contractors.<sup>117</sup> The construction of a general legal notion of employment in England occurred in tandem with other social, political and economic changes that affected the work relationship, such as the growth of collective bargaining, the emergence of vertical integration of production processes within enterprises, and the growth of the SER.<sup>118</sup> Together the combination of vertical integration and the growth of long term employment relationships served to standardize and stabilize the employment relationship in

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<sup>114</sup> Merritt, *supra* note 109 at p. 58.

<sup>115</sup> Deakin and Wilkinson, *supra* note 66.

<sup>116</sup> *Ibid* at p. 62-63.

<sup>117</sup> Deakin. *supra* note 65 at p.180 .

<sup>118</sup> Deakin and Wilkinson, *supra* note 65 at p. 95-100.

mid-20<sup>th</sup> century England, allowing the long-term open-ended employment contract to emerge and the Standard Employment Relationship to dominate the structure of the labour market.<sup>119</sup>

Although the doctrinal evolution of the common law of employment is not the focus of their study, Deakin and Wilkinson do attend to the broader question of the contractualization of employment. They argue that contract of employment cases first emerged at common law in the 1830s and 1840s, in regards to middle class and professional employment, and it is in only in regards to such occupations that one can properly say that work was contractualized in the 19<sup>th</sup> century.<sup>120</sup> For Deakin and Wilkinson, ‘contractualization’ has a particular meaning: it is a process of transforming the employment relationship into one of mutual obligations, in which some limitations were placed on the employer’s ability to direct the relationship.<sup>121</sup> This process was not applied to industrial workers in the 19<sup>th</sup> century, who continued to be regulated by the master and servant acts, and the *Employee and Workmen Act* after the repeal of criminal sanctions.<sup>122</sup> It was only in the early years of the 20<sup>th</sup> century that the contractual model of middle class work was extended to industrial, agricultural and domestic workers, under the influence of the growing welfare state of the 1930s and 1940s.<sup>123</sup> Contractualization was therefore complete when the doctrinal process of imposing limitations on the employer’s legal right of command merged with the growing institutional use of the employment relationship “as a vehicle for channelling and redistributing social and economic risks, through the imposition on employers of obligations of revenue collection, and compensation for interruptions of earnings”.<sup>124</sup>

Deakin and Wilkinson provide a very different history of the employment contract than the traditional picture. The key to contextualizing their argument is that they concentrate more on the institutional evolution of the contract of employment than its doctrinal evolution. They do not argue that the work relationship was not intellectually recast in broad contractual terms over the 19<sup>th</sup> century as one of individual exchange, or that there were no common law claims regarding employment during that time. Rather, they argue that emerging notions of free-will contract were applied only to some workers and not others, and that contract did not serve as the pre-eminent

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<sup>119</sup> *Ibid* at p. 105-109.

<sup>120</sup> *Ibid* at p. at 78-82.

<sup>121</sup> *Ibid* at p. 14-15.

<sup>122</sup> *Ibid* at p. 74-78.

<sup>123</sup> *Ibid* at p. 80

<sup>124</sup> Deakin. *The Many Futures*, *supra* note 65 at p. 185.

regulatory frame for waged work in the 19<sup>th</sup> century. According to Deakin and Wilkinson, the emergence of a general concept of contractual employment was completed as part of the project of the 20<sup>th</sup> century welfare state, when the common law principles developed for higher status workers were extended to the entire waged workforce. Because Deakin and Wilkinson focus on the treatment of workers under statutory regimes in the early 20<sup>th</sup> century, however, what the common law of employment contracts consisted of before the 1940s remains unclear.

(c) The United States

American scholarship on the history of the contract of employment starts from different premises than English research. In the late 19<sup>th</sup> century American and English approaches to the legal regulation of employment took sharply different tracks. At the end of the 19<sup>th</sup> century the United States adopted the at-will model of employment, which permits either party to end the employment relationship at any time, for any reason, without warning. The rule provides such a starkly different conception of the employment relationship than exists in other legal systems that most American scholarship on the contract of employment focuses on its particular history. Because of the focus on the emergence of at-will employment, historical research in the United States has tended, with some notable exceptions discussed below, to deal primarily with the late 19<sup>th</sup> century onwards, when the rule was first enunciated.

The work of Christopher Tomlins, Robert Steinfeld and Karen Orren provides most of the research on the legal regulation of non-unionized work in the United States before the end of the 19<sup>th</sup> century.<sup>125</sup> As their studies detail, the relationship between master and servant law and contractual approaches to work regulation in the United States was different than in England. In England the law of master and servant was a body of statutory law, around which a significant body of case law developed, adjudicated and enforced at first instance by magistrates and justices of the peace. Common law employment claims only began to take shape in the early 19<sup>th</sup> century, still heavily premised on the substantive content of master and servant law. But in the United States the evolution of the employment contract seems to have taken a different track. Christopher Tomlins

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<sup>125</sup> Christopher Tomlins, *Freedom, Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (Cambridge and New York: Cambridge University Press, 2010); Steinfeld, *Coercion*, *supra* note 82; Tomlins, *Ideology*, *supra* note 27; Steinfeld, *The Invention of Free Labor*; *supra* note 77; Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991).

argues that English master and servant law, although received in the American colonies during the 17<sup>th</sup> century, was used selectively and recalibrated to local practices over the course of the 18<sup>th</sup> century, largely dispensing with the use of penal sanctions.<sup>126</sup> Where they were used, penal sanctions were deployed around social status structures, targeted at indentured servants and slaves, rather than at ‘free’ white wage workers. White wage earners were instead subjected to a civil system of contract, although one in which the damage awards were severe.<sup>127</sup> In the 18<sup>th</sup> century the only workers treated as ‘servants’ in relationships of direct social subordination were indentured servants.<sup>128</sup> Those in other forms of waged work were regulated at common law prior to the 19<sup>th</sup> century. However, for reasons that are unclear, in the early 19<sup>th</sup> century the courts began to extend the application of master and servant principles, previously reserved for indentured servants, by applying English common law doctrines to individuals who were previously in customer/supplier or independent contractor relationships. In the result, the master and servant legal regime that had been crafted around a particular type of work was extended to a broader range of relationships of a commercial nature, and ultimately came to represent a general model for waged work, vesting in “the generality of nineteenth-century employers a controlling authority over their employees founded upon the preindustrial master’s claim to property in his servant’s personal services”.<sup>129</sup> Thus, for Tomlins, the English common law contractual approach to employment was reinterpreted and reframed by the American judiciary by applying master and servant principles to the contract of employment.<sup>130</sup> American treatise writers and judges constructed a heavily hierarchical general model of employment over the 19<sup>th</sup> century through the use of English master and servant concepts, but they did so utilizing language of contract. By “representing employment relations in the voluntarist language of contract”, Tomlins argues, “the existence and exercise of power in the employment relationship was [mystified]”.<sup>131</sup> If Tomlins’ thesis is correct, then there was a different trajectory in the United States to that of England. Although beyond the scope of my own study, there is work to be done in comparing the impact of the development of master and servant law and the common law of employment contract in the

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<sup>126</sup> Tomlins, *supra* note 27 at chapter 7 and 8. This is also echoed by Jacoby, *supra* note 90 at p. 104.

<sup>127</sup> Tomlins, *ibid* at 240; Steinfeld, *Coercion*, *supra* note 82 at 253.

<sup>128</sup> Tomlins, *ibid* at chapter 7.

<sup>129</sup> *Ibid* at p. 230.

<sup>130</sup> *Ibid* at chapter 8

<sup>131</sup> *Ibid* at p. 269-270.

same judicial venue in the United States, in comparison to their more separate evolution in the United Kingdom. Even if the difference in legal venue turns out to be an artificial distinction, it suggests that caution be exercised when using American and English research interchangeably.

Robert Steinfeld's research emphasizes the thinness of the distinction between free and unfree labour.<sup>132</sup> By tracing continuities in property notions over workers' labour along a spectrum from slavery to contract, he demonstrates the continuing coercion central to the contractual frame for employment regulation. Steinfeld and Karen Orren tie the contractualization of employment in the United States to workers' claims for political equality and citizenship.<sup>133</sup> As owners of their own labour, workers challenged property limitations on voting rights and political participation. Steinfeld notes, however, that in presenting themselves as the owners of commodities, of their own labour, workers entrenched a system of market inequality which the law could not attack under a system of liberal capitalism.<sup>134</sup> Finally, the evolution of property rights in employment has received greater attention in the United States than in England. Catherine Fisk details the emergence of intellectual property rights in employment, a key element to understanding the property exchanged in employment outside of manufacturing work. She argues that in the United States, corporate ownership in employee knowledge emerged in tandem with the contractualization of employment. Prior to the 19<sup>th</sup> century 'knowledge' was not something to be owned, rather skill was an attribute of a craftsmen, and inventions the property of their personal inventors. Fisk and Katherine Stone argue that rather than a move from "bondage to freedom", the contractualization of employment represented a shift from "entrepreneurship to dependence" for highly skilled craftspeople and inventors.<sup>135</sup> Thus, Fisk argues, over the turn of the 20<sup>th</sup> century employers turned to the law to gain property rights over their workers' knowledge and skill, utilizing the language of contract to do so.<sup>136</sup>

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<sup>132</sup> Steinfeld, *Invention* and Steinfeld, *Coercion*, *supra* note 82.

<sup>133</sup> Orren, *supra* note 125 at chapters 3 and 4.

<sup>134</sup> See Steinfeld, *Invention*, *supra* note 82 at the conclusion.

<sup>135</sup> Catherine Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800-1930* (Chapel Hill: University of North Carolina Press, 2009) at p. 2; Katherine Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (West Nyack, NY: Cambridge University Press, 2004) at p.22-23.

<sup>136</sup> Fisk, *ibid*. See also Stone, *ibid* at p.22-24.

As mentioned, however, most American research on the history of the employment contract begins in the late 19<sup>th</sup> century, with the adoption of the at-will employment rule. The first enunciation of the rule is commonly attributed to treatise writer Horace Wood's description of the state of the law in the late 19<sup>th</sup> century.<sup>137</sup> In 1877 Wood stated:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.

Much of the debate in the literature focuses on the accuracy of this statement. Some agree with Wood that the at-will rule was firmly entrenched by the 1870s.<sup>138</sup> Others suggest that he overstated the degree to which at-will employment had become the norm, and have very different ideas about the state of the law regarding employment dissolution at the time.<sup>139</sup> Finally, another body of research focuses on the interests that sought the rule's adoption and on its socioeconomic effects.<sup>140</sup> Jay Feinman argues that the effect of the at-will employment rule was to subject a growing class of salaried middle class workers to increased wage insecurity, so as to ensure that this increasingly important group of actors could not rival employers' workplace authority.<sup>141</sup> Katherine Stone, however, notes that the adoption of the rule had different effects on different groups of workers. Focusing on industrial workers, she argues that the adoption of the rule was beneficial for semi-skilled and unskilled workers, because it operated to displace the 'entire contract' doctrine which precluded wage recovery for services already rendered if workers left prior to the end of the contract's term. Moreover, it did not immediately affect higher skilled workers, who maintained their power on the basis of their membership in craft unions.<sup>142</sup> At a broader level, she argues, the adoption of at-will employment had the effect of increasing job mobility, but also in providing

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<sup>137</sup> Horace Gray Wood, *Master and Servant* (1877) at s.134.

<sup>138</sup> Deborah Ballam, "Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine" (1996) 17(1) Berkeley J Empl & Lab L Rev 91; Andrew Morriss, "Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will" (1994) 59 Missouri L Rev 679.

<sup>139</sup> Ballam, *ibid*; Morriss *ibid*.

<sup>140</sup> Jay Feinman, "The Development of Employment at Will Rule" (1976) 20(2) Am J Leg Hist 118.

<sup>141</sup> *Ibid* at p. 132-133

<sup>142</sup> Stone, *Widgets*, *supra* note 135 at p. 24.

employers with the incentive to adopt internal labour markets in the early 20<sup>th</sup> century to build worker loyalty and address the growing problem of worker turnover.<sup>143</sup>

American literature on the history of the employment contract in the 19<sup>th</sup> century is of particular interest to the evolution of the law of employment contracts in Ontario because of the social and economic similarities between colonial Ontario and some of the Northern American states.

Twentieth century historical studies of the social and economic structures of the workplace are also significant for comparative purposes, given the dominance of American industrial branch plants in Ontario as of the early 20<sup>th</sup> century, and the resulting similarities in labour processes and human resource strategies.<sup>144</sup> Research on the modern contract of employment at law, however, is of less direct relevance, because of the divergence between the at-will model of employment contracts in the United States and the Canadian model of wrongful dismissal which, as I will recount, was being put into place by the turn of the 20<sup>th</sup> century.

As the province of Ontario drew on the laws of England in the context of a society and economy increasingly tied to the United States in the early 20<sup>th</sup> century, so too does this study of the history of the employment contract in Ontario. What then is known of the historical trajectory of the contract of employment in Ontario?

#### (d) The Canadian Literature on the Laws of the Work

The British colony of Upper Canada was created under English law in 1791, comprised of one section of the new colony of New France, joining the colonies of Nova Scotia, New Brunswick, Newfoundland and the newly created colony of Lower Canada as the British North American colonies. The colony of New France was split in two in 1791, formally creating Upper Canada by the *Canada Act*.<sup>145</sup>

English law was statutorily received at the creation of each of the Canadian colonies, but with different exceptions and specifications. The cross-colony disparity in reception and development of

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<sup>143</sup> *Ibid* at p. 48-49.

<sup>144</sup> See *infra* chapter 2 for more on this relationship.

<sup>145</sup> *An Act to repeal certain Parts of an Act, passed in the fourteenth Year of his Majesty's Reign, intituled, An Act for making more effectual Provision for the Government of the Province of Quebec, in North America; and to make further Provision for the Government of the said Province* (1791), 31 Geo. 3, c. 31. See Gerald Craig, *Upper Canada: The Formative Years, 1784-1841* (Toronto: McLelland and Stewart, 1963) at 9-12.



English law is particularly evident in the history of master and servant law in Canada. The original Canadian colonies had very different economies, settlement histories and political cultures. The regulation of work in the different colonies reflected these regional variations. The colony of Upper Canada appeared to receive English master and servant law in 1791, but that reception was later brought into question in the mid-19<sup>th</sup> century, after which a local statute was enacted.<sup>146</sup> The law relating to trade union activities, prohibitions on combinations to raise wages in master and servant legislation, prohibitions on combinations in statutes, and the common law relating to criminal conspiracy, were also of uncertain application in the colony in the early 19<sup>th</sup> century, until legislation was enacted in the 1870s.<sup>147</sup> The colony never received the Poor Laws, but did receive the general English common law, which included the common law of employment contracts, then in its formative years in England itself.<sup>148</sup>

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<sup>146</sup> At its imperial creation in 1791 the colony of Upper Canada theoretically received English master and servant law under the terms of its reception statute. By the 1830s and 1840s, however, the local judiciary began to question its reception, concerned with its effects and applicability to a colonial economy. Drawing on their discretion to avoid application of laws that were incompatible with local conditions, the Ontario judiciary in the 1830s and 1840s began to suggest that master and servant laws, and in particular, their apprenticeship requirements, might not be useful to a colonial economy still being settled by Europeans. In response, the local assembly enacted a domestic statute in 1845, largely modelled on the English statutes of the 18<sup>th</sup> and 19<sup>th</sup> centuries. But even after a local statute was passed, Craven's research suggests that the levels of prosecution were comparatively lower than in England and in other colonies over this period. Craven suggests that master and servant law existed as a symbol of material power, rather than as a practical tool. Paul Craven, "The Law of Master and Servant in Mid-Nineteenth Century Ontario", in D. Flaherty (ed.), *Essays in the History of Canadian Law*, Vol. 1 (Toronto: University of Toronto Press, 1981)

<sup>147</sup> In England an administrative system of wage fixing existed under master and servant law. Combination to raise wages did not constitute a criminal conspiracy at common law, but rather combination was rendered illegal by virtue of statutory prohibition under master and servant laws. The degree to which the wage control aspects of master and servant law were received in Ontario, however, has been the subject of some debate, as has the legal status of combinations in Ontario in the 19<sup>th</sup> century. Craven suggests that combination to raise wages was not viewed as per se illegal, and that instead most convictions occurred where other unlawful means of raising wages were alleged. Tucker, by contrast, argues the legal position on combinations was more ambiguous in 19<sup>th</sup> century Ontario because many of the English prohibition on wage fixing and combination were enacted after the 1792 reception date, and thus were not in force in Ontario. As such, the local judiciary could only rely on English case law from before 1792 to regulate claims in the colony, which allowed local lawyers a zone for legal argumentation and innovation on the scope of common law prohibitions, before the provincial legislature enacted the *Trade Union Act*, S.C. 1872, c. 30 and the *Criminal Law Amendment Act*, S.C. 1872, c. 31. to regulate union activity in 1872. See Paul Craven, "Workers' Conspiracies in Toronto, 1854-72" (1984) 14 *Labour/Le Travail* 49; Eric Tucker, "'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837-77" (1991) 27 *Labour/Le Travail* 15.

<sup>148</sup> Nickalls, ed., *Statutes of the Province of Upper Canada*, 29 (1831) at s.3-5. The reception statute specified that "all matters of controversy relative to property and civil rights" were to be resolved based on the laws of England, except those in regards to the bankruptcy and the maintenance of the poor.

Research on the early work law history of Ontario has focused on controversies over the reception and application of the law of master and servant in the first half of the 19<sup>th</sup> century. Master and servant law has also been examined across many of the Canadian provinces.<sup>149</sup> Bolstered by studies of the social history of trade unionism and the changing labour process over the second half of the 19<sup>th</sup> century, significant research on the history of criminal conspiracy laws and labour law has also been undertaken,<sup>150</sup> as well as studies relating to shareholder, director<sup>151</sup> and employer liability for wages<sup>152</sup>, the enforcement of factory legislation<sup>153</sup>, the common and statutory law of industrial accidents<sup>154</sup>, and poor relief<sup>155</sup>. Jeremy Webber has sought to provide a general history of the law of work in 19<sup>th</sup> century Ontario, Justice Randall Echlin has produced an overview of the law relating to individual work relationships over the 19<sup>th</sup> and 20<sup>th</sup> centuries, Mark Thomas has studied the political evolution of minimum employment standards in Ontario, and Margaret McCallum has provided an overview of early 20<sup>th</sup> century statutory regulation of the employment relationship.<sup>156</sup> At a general

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<sup>149</sup> Jerry Bannister, "Law and Labor in Eighteenth-Century Newfoundland," in Douglas Hay and Paul Craven, eds., *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill: University of North Carolina Press, 2004); Paul Craven, "Canada 1670-1935, Symbolic and Instrumental Enforcement in Loyalist North America," in Douglas Hay and Paul Craven eds., *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (North Carolina: University of North Carolina Press, 2004); Ian Pilarczyk, "The Law of Servants and the Servants of Law: Enforcing Masters' Rights in Montreal, 1830-1845" (2001) 46 McGill LJ 779; Ian Pilarczyk, "'Too Well Used by His Master: Judicial Enforcement of Servants' Rights in Montreal, 1830-1845" (2001) 46 McGill LJ 491; Sean Cadigan, "Merchant Capital, the State, and Labour in a British Colony: Servant-Master Relations and Capital Accumulation in Newfoundland's Northeast-Coast Fishery, 1775-1799" (1991) *Journal of the Canadian Historical Association* 17; Grace Laing Hogg, *The Legal Rights of Masters, Mistresses and Domestic Servants in Montreal, 1816-1829*, Unpublished Thesis University of Montreal, 1989; Craven, *supra* note 146.

<sup>150</sup> Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Toronto: University of Toronto Press, 2004); Judy Fudge and Harry Glasbeek, "The Legacy of PC 1003," (1995) 3 C.L.E.L.J. 357; Craven, *Conspiracy*, *supra* note 147; Tucker, *Indefinite Area of Toleration*, *supra* note 147.

<sup>151</sup> Eric Tucker, "Shareholder and Director Liability for Unpaid Workers' Wages in Canada: From Condition of Granting Limited Liability to Exceptional Remedy" (2008) 16(2) *Law & Hist Rev* 57.

<sup>152</sup> Eric Tucker, "The Law of Employers' Liability in Ontario 1861-1900: The Search for a Theory" (1984) 22(2) *OHLJ* 213.

<sup>153</sup> Eric Tucker, "Making the Workplace 'Safe' in Capitalism: The Enforcement of Factory Legislation in Nineteenth Century Ontario" (1988) 21 *Labour/Le Travail* 45; Lorna Hurl, "Restricting Child Factory Labour in Late Nineteenth Century Ontario" (1988) 21 *Labour/Le Travail* 87.

<sup>154</sup> Eric Tucker, *Administering Danger in the Workplace: The Law and Politics of Occupational Health and Safety Regulation in Ontario, 1850-1914* (Toronto: University of Toronto Press, 1990); RW Kostal, "Legal Justice, Social Justice: An Incursion into the Social History of Work-Related Accident Law in Ontario, 1860-86" (1988) 6(1) *Law & Hist Rev* 1.

<sup>155</sup> Russell Smandych, "Colonial Welfare Laws and Practices: Coping Without an English Poor Law in Upper Canada, 1792-1837" (1995) 23 *Man LJ* 214.

<sup>156</sup> Randall Scott Echlin, "From Master and Servant to *Bardal* and Beyond: 200 Years of Employment Law in Canada 1807-2007" (2007) 26(3) *Advocates' Soc J.* 11; Mark Thomas, *Regulating Flexibility, The Ontario Employment Standards Act and the Politics of Flexible Production*, 2003, Unpublished Dissertation, chapter 2; Jeremy Webber, "Labour and the Law", in Paul Craven, ed., *Labouring Lives: Work and Workers in 19<sup>th</sup> Century Ontario* (Toronto:

level, since the 1970s significant research has been done on the nature of industrial workplaces and changes in labour processes, on the origins of labour organizing in Ontario and Canada, and on the emergence of a working class consciousness in Ontario.<sup>157</sup>

As in other Anglo-American jurisdictions, however, studies on the common law treatment of employment contracts have been limited. Where it has been described tangentially, it is presented as a conceptual whole, already in existence by the 19<sup>th</sup> century. Paul Craven, for instance, describes the outlines of the English common law of employment as it was applied in the early 19<sup>th</sup> century. He suggests that the common law of employment contracts changed little in Ontario between the 1820s and 1870s.<sup>158</sup> Eric Tucker provides an overview of legislative proposals designed to offset the common law regime in the last quarter of the 19<sup>th</sup> century.<sup>159</sup> Because his study broadly sketches the evolution of individual work law regulation, Tucker delves into specific questions of legislation and common law doctrine, but leaves the general contours of the common law of employment contracts slightly unclear.<sup>160</sup> Jeremy Webber similarly provides an overview of the laws of work in

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University of Toronto Press/Ontario Historical Studies Series, 1995); Margaret McCallum, "Labour and the Liberal State: Regulating the Employment Relationship, 1867-1920," (1995) 23 Man. L. J. 574.

<sup>157</sup>This literature is vast. See, for instance, Gillian Creese, *Contracting Masculinity: Gender, Class and Race in a White-Collar Union, 1944-1994* (Toronto: University of Toronto Press, 1999); Robert Storey, "The Struggle for Job Ownership in the Canadian Steel Industry: An Historical Analysis" (1994) 33 Labour/Le Travail 75; Bryan Palmer, *Working Class Experience: Rethinking the History of Canadian Labour, 1800-1991, 2<sup>nd</sup> Edition* (Toronto: McLelland & Stewart Inc., 1992); Craig Heron, "The Second Industrial Revolution in Canada, 1890-1930" in Deian Hopkin and Gregory Kealey, eds. *Class, Community and the Labour Movement: Wales and Canada, 1850-1930* (St. Johns: Society for Welsh Labour History; Canadian Committee on Labour History, 1989) 48-66; Bettina Bradbury, "Women's History and Working-Class History (1987) 19 Labour/Le Travail 23; Paul Craven & Tom Traves, "Dimensions of Paternalism: Discipline and Culture in Canadian Railway Operations in the 1850s" in Craig Heron & Robert Storey, eds., *On the Job: Confronting the Labour Process in Canada* (Mtl: McGill-Queen's University Press, 1986); Graham Lowe, "Mechanization, Feminization and Managerial Control in the Early Twentieth Century Canadian Office", in *On the Job: Confronting the Labour Process in Canada*, Craig Heron and Robert Storey, eds. (Mtl and Kingston: McGill-Queen's University Press, 1986); Craig Heron and Robert Storey, "Work and Struggle in the Canadian Steel Industry", in *On the Job, Confronting the Labour Process in Canada*, Heron and Storey eds., (McGill-Queens, 1986); Gregory Kealey, "1919: The Canadian Labour Revolt" (1984) 13 Labour/Le Travail 11; Ruth Bleasdale, "Class Conflict on the Canals of Upper Canada in the 1840s (1981) Labour/Le Travail 35; Craig Heron and Bryan Palmer, "Through the Prism of the Strike: Industrial Conflict in Southern Ontario, 1901-1914" (1977) 8(4) The Canadian Historical Review 423; Craig Heron and Bryan Palmer, "Through the Prism of the Strike: Industrial Conflict in Southern Ontario, 1901-1914" (1977) 8(4) The Canadian Historical Review 423; Stewart Jamieson, *Times of Trouble: Labour Unrest and Industrial Conflict in Canada, 1900-1966* (Ottawa: Queen's Printer 1968).

<sup>158</sup> Craven, Master and Servant, *supra* note 146 at 176-177.

<sup>159</sup> Eric Tucker, *Constructing the Liberal Voluntarist Employment Regime: 1850-1879*, unpublished manuscript on file with the author.

<sup>160</sup> Tucker, *ibid.*

Ontario over the 19<sup>th</sup> century, but focuses more on standard work practices and the content of typical employment contracts rather than on the common law itself.<sup>161</sup>

There is also a large gap in academic research on the contract of employment at common law between the turn of the 20<sup>th</sup> century and the 1970s. Significant research on collective labour law was being produced as of the 1940s, and studies of new work-related statutory regimes began to emerge as of the 1960s.<sup>162</sup> But the contract of employment at common law was rarely studied before the 1970s, except for a few law journal articles, usually focused on the development of particular doctrines.<sup>163</sup> Research on the contract of employment became more frequent in the 1970s. Most studies were concerned with the relationship between the common law of employment and statutory work regimes, such as between income tax and dismissal, or labour law and the common law of employment.<sup>164</sup> The first law school course on employment law was

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<sup>161</sup> Webber, *supra* note 156

<sup>162</sup> There was a smattering of treatises on labour laws in Canada prior to the passage of PC 1003, such as that of Walter Lear, *Labour Laws: or the right of employer and employed* (Toronto: Law Books, 1919); Bryce Stewart, *Canadian Labor Laws and the Treaty* (New York: Columbia University Press, 1926). In the 1940s there were a number of governmental publications on labour law, and the decisions of various labour boards were increasingly reported. After that the following texts and case books appeared: Bora Laskin, *A Selection of Cases and Materials on Labour Law* (Toronto: Law Society of Upper Canada, 1947); Alfred Crysler, *Labour Relations and Precedents in Canada: A Commentary on Labour Law and Practice in Canada* (Toronto: Carswell, 1949); Harold Fox, *The Law of Master and Servant in Relation to Industrial and Intellectual Property* (University of Toronto Press, 1950); AWR Carrothers, *Labour Arbitration in Canada* (Toronto: Butterworths, 1961). From the mid 1960s onwards writing proliferated on the topic, particularly as the work of the 1966 Federal Government Task Force on Labour Relations (Woods Taskforce) got underway.

<sup>163</sup> CB Labatt, "Master and Servant: The Right to Terminate a Hiring, the Duration of Which is Not Expressly Provided for By the Parties" (1898) 34 Can LJ ns 587; "Liability of an Employer for the Torts of an Independent Contractor" (1904) 17 & 18 40 Can LJ ns 529; GS Holmsted, "Domestic Servants" (1904) Can LT 123; CB Labatt, "Service Distinguished from Tenancy" (1905) 41 Can LJ ns 673; CB Labatt, "Legacies to Servants" (1905) 41 Can LJ ns 425; CB Labatt, "Character of Servants – Blacklisting" (1906) 42 Can LJ ns 289; CB Labatt, "Patent and Copyright Law, Considered with Reference to the Contract of Employment" (1906) 42 Can LJ ns 529; CB Labatt, "Allowance of Special Damages in Actions for Wrongful Dismissal of Servants" (1907) 43 Can LJ ns 593; CB Labatt, "What Persons are Within the Purview of Statutes Affecting the Enforcement of Claims for Services" (1908) 44 Can LJ ns 369; "Master and Servant: A Hiring By the Month" (1908) 44 Can LJ ns 139 – reprinting article from the Central Law Journal; CB Labatt, "Liability of Master, Apart from Contract, For Tortious Acts Done by a Servant While in Control of Vehicles and Horses" (1911) 47 Can LJ ns 521; DA MacRae, "Servants Own Private Ends" (1923) 1 Can Bar Rev 67; JA Corry, "The Custom of a Month's Notice" (1932) 10(6) Can Bar Rev 331; WF O'Connor, "Restraining Breach of Contract" (1937) 15(3) Can Bar Rev 121.

<sup>164</sup> Donald Johnston, "Dismissal Notice in Employment Contracts" (1963) 9 McGill LJ 138; JM Robinson, "Canadian Pacific Railway Co. v. *Zambri*: How Long Does a Striker Remain an Employee, and What is the Nature of the Employer-Striking Employee Relationship?" (1964) 22 Fac L Rev 161 at 171; Rowland Harrison, "Termination of Employment" (1972) 10 Alta L Rev 250; George Finlayson, "Personal Service Contracts" in *Current Problems in the Law of Contracts, Special Lectures of the Law Society of Upper Canada* (Toronto: Richard De Boo Limited, 1975) at 355; Sydney Robins, "Historical Treatment of the Employer-Employee Relationship" in *Employment Law, Special*

offered at Dalhousie University in the 1970s,<sup>165</sup> but it was not until after Dalhousie's Innis Christie published the first academic textbook on employment law in 1980, the date at which this study ends, that research on the employment relationship at common law became relatively widespread.<sup>166</sup> Christie noted in *Employment Law in Canada* that commentary on the employment relationship outside of collective labour law was sparse, and that in fact the case law itself was relatively undeveloped prior to the 1960s. Nonetheless, in articles from the 1970s and 1980s little mention is made of the relative youth of this area of law and legal scholarship. As scholars amassed and analyzed the case law of the 1960s, 1970s, and 1980s, their results were presented as if the field was fully formed, with little indication of its evolution, or of the changing contexts in which existing doctrine was now being applied. There is therefore a large gap in our knowledge of the development of the common law of employment contracts in Ontario, of the changes over time in the reported decisions, and the relationship between the common law of employment and other legal regimes regulating the workplace. Even where scholars acknowledge the lack of research in the field, the standard approach has been to refer to English and American studies to suggest what the Canadian trajectory may have looked like.

This is an insufficient approach to understanding the history of the waged work relationship at common law in Canada and Ontario, its largest jurisdiction. As I indicated earlier, a number of general questions remain outstanding in terms of the historical evolution of the contract of employment at common law in England and in the United States. We therefore cannot rely on English and American analyses to answer questions about the evolution of this area of law in

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Lectures of the Law Society of Upper Canada (Toronto: Richard De Boo Limited, 1976) at 1; Geoffrey England, "The Legal Response to Striking at the Individual Level in the Common Law Jurisdictions of Canada" (1976-1977) 2 Dal LJ 440; Vern Krishna, "Characterization of Wrongful Dismissal Awards for Income Tax" (1977) 23 McGill JL 43; Peter Harris, "Taxation of Damages for Wrongful Dismissal and Retiring Allowances" (1977-1978) 1 Advoc. Q 464; Geoffrey England, "Recent Developments in Wrongful Dismissal Laws and Some Pointers for Reform" (1978) 16 Alta L Rev 470; John Dingle, "Jack Crewe v. Jorgenson – Taxation of Damages for Wrongful Dismissal" (1979-1981) 2 Advoc Q 476; Peter Harris, "Taxation of Damages for Wrongful Dismissal – An Update" (1979-1981) 2 Advoc. Q 120. Douglas MacTavish, "Injured Feelings and the Fired Executive: *Delmotte v. John Labatt Ltd.*" (1979-1981) 2 Advoc Q 203; David Harris, "Wrongful Dismissal – Some Recent Developments" (1979-1981) 2 Advoc Q 149; David Harris, *Wrongful Dismissal* (Toronto: Richard De Boo Limited, 1978); David Beatty, "Labour is Not a Commodity", in *Studies in Contract Law*, Barry Reiter and John Swan eds. (Toronto: Butterworths, 1980) at 318; Katherine Swinton, "Contract Law and the Employment Relationship: The Proper Forum for Adjudication" in *Studies in Contract Law*, Barry Reiter and John Swan eds. (Toronto: Butterworths, 1980) at 358.

<sup>165</sup> Harry Arthurs, "Charting the Boundaries of Labour Law: Innis Christie and the Search for an Integrated Law of Labour Market Regulation" (2011) 34 Dal LJ 1 at 4.

<sup>166</sup> Innis Christie, *Employment Law in Canada* (Toronto: Butterworths, 1980).

Canada. But further, what we know of the legal history of the Canadian colonies in the 19<sup>th</sup> century, and of Canadian socio-economic development through the 20<sup>th</sup> century, indicates significant differences from the trajectories of the United States and England, and a highly uneven historical evolution across the country itself. Given the differences in the legal contexts of the Canadian colonies, and given the general questions that remain to be answered about the evolution of the common law of employment contracts, in this study I shall focus on the legal history of one Canadian province, Ontario, and seek to delineate its changing contours and context, between the turn of the 20<sup>th</sup> century and the end of the 1970s as regards the employment contract at common law. First, however, I will briefly describe the emergence of common law employment claims in England in the 19<sup>th</sup> century – legal principles which theoretically applied in Ontario in its first century – before outline the content of common law claims in the colonial context of Ontario.

### **(3) The Doctrinal Content of Common Law Employment Cases in 19<sup>th</sup> Century England**

As mentioned, although common law claims regarding employment are assumed to have emerged in the early 19<sup>th</sup> century in England, and thereafter exported across its colonies, there has been little sustained examination of their content. The common law of employment contracts has either been treated as part of a general description of employment law in the 19<sup>th</sup> century, obscuring the differences between master and servant claims and common law claims, has occurred tangentially as part of discussions of other work-related legal regimes, or has focused on the evolution of particular doctrines. Assembling the research that has been produced, however, as well as secondary treatises of the time, nonetheless allows for a preliminary description of the emergence of common law employment claims in England in the 19<sup>th</sup> century. The following account draws in particular from the work of Mark Freedland, Robert Steinfeld Simon Deakin and Frank Wilkinson, and Sanford Jacoby, as well as secondary texts from the 19<sup>th</sup> century.<sup>167</sup>

At the turn of the 19<sup>th</sup> century certain types of employment were excluded from coverage of master and servant laws. In the 1806 case of *Lowther v. Earl of Radnor* it was established that the master and servant acts applied to all servants, labourers and workmen, except for domestic and menial

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<sup>167</sup> Deakin and Wilkinson, *supra* note 65; Steinfeld, *Coercion*, *supra* note 82; Steinfeld, *Invention*, *supra* note 93; Jacoby, *Indefinite Employment Contracts*, *supra* note 90; Freedland, *Contract*, *supra* note 446; Napier, *supra* note 87

servants.<sup>168</sup> By the 1830s the courts also held that higher status workers were exempt from its coverage.<sup>169</sup> Common law claims were therefore not the main source of law for workers in the 19<sup>th</sup> century, and indeed prosecutions under master and servant law increased in number through the 19<sup>th</sup> century until the repeal of the penal provisions in 1875. In 1813 Lord Ellenborough explained that common law claims regarding employment contracts were designed to secure “the adjustment of differences between parties of equal rank in trade”, as compared to the law of master and servant, which was “meant to secure the disciplining and subordination of the wage-earner”.<sup>170</sup> But in fact workers at both ends of the social spectrum were excluded from the coverage of master and servant law, from domestic servants, to clerks, to bankers, to professionals, and these workers brought their employment-related claims to the common law courts. Up until the mid-19<sup>th</sup> century there was little visible conceptual difference in the law of master and servant and the legal principles applied at common law regarding employment. The courts of England applied the principles developed under the laws of master and servant at common law, and treatises of the era made no distinction between claims made before magistrates and those brought to the courts. To what extent the common law related to employment and master and servant law should be considered different bodies of law is therefore an open question.

In the early 19<sup>th</sup> century the courts applied the master and servant presumption of annual hire at common law.<sup>171</sup> Under the law of master and servant, an employment contract of indefinite duration, often referred as a general hire contract, was presumed to be of annual length. The presumption of annual hire was a requirement under the Statute of Artificers, and its origins are said to relate to the agricultural seasons. Blackstone described it as based on equitable ideas – to ensure that the servant would work, and the master would maintain him or her “throughout all the

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<sup>168</sup> *Lowther v. Earl of Radnor* (1806), (8 East, 113)

<sup>169</sup> *Branwell v. Penneck*, (1827) 7 B & C 536, 108 Eng Rep 823. Robert Steinfield explains that the decision in *Lowther* represented a highwater mark of coverage for the master and servant acts of the 19<sup>th</sup> century. Thereafter the English courts began to reconsider the scope of the decision, increasingly restricting the application of the acts to those they considered to be in ‘master and servant’ relationships, as opposed to those hired for a specific sum. The distinction appeared to turn on the exclusivity of service, meaning that the worker could be employed only by one master. In *Branwell* Justice Holryod of the King’s Bench noted that if the acts could go so far as to provide a magistrate jurisdiction over someone engaged by a lawyer to keep certain goods for the lawyer, then how would they not also apply to bankers and merchants, and others of that class? See Steinfield, *Coercion*, *supra* note 82 at p. 125-131; Frank, *supra* note 85 at p.32-36

<sup>170</sup> *R. v. Heywood*, (1813) 105 ER 233.

<sup>171</sup> *Beeston v. Collyer* (1827), 172 E.R. 276 [*Beeston*].

seasons".<sup>172</sup> But as of the 17<sup>th</sup> century it was also central to the system of poor relief devised by the Poor Laws and Laws of Settlement. As Sanford Jacoby explains, each parish was responsible for the maintenance and support of its poor and infirm. An indigent worker outside his or her parish of birth could be removed for the purposes of poor relief, unless they could demonstrate that they were hired in the parish under an annual hire contract (settlement by hire). The existence of an annual hire contract was therefore a heavily litigated issue between parishes, as they each sought to minimize their support obligations.<sup>173</sup> Steinfeld explains that an annual hire contract provided an employer with the right of control and possession over the worker's labour for the entire year. Workers who were permitted evenings and weekends off were not considered to be under annual hire contracts, even if employed for multiple year contracts. These were referred to as exceptive hire contracts and could not establish a settlement by hire.<sup>174</sup> In *R v. St. John Devizes* in 1827 the Queen's Bench explained the situation thus:

In order to constitute a yearly hiring the contract must be such that the relation of master and servant will subsist during the whole of the year, and during the whole of every day in the year. That is generally so, as a matter of course, in the case of domestic servants; but in the case of servants employed in factories it is frequently not so, for there the contract often is, that the servant shall work so many hours in the day. [...] It seems to me, that unless by the terms of such a contract there is an express exception, which must necessarily prevent the relation of master and servant from subsisting during the whole of the year, or during the whole of every day in the year for which the contract is made, it is a yearly hiring.<sup>175</sup>

It was therefore the employer's right to continuous possession and control over their workers' time and labour that determined the length of the relationship in law.<sup>176</sup>

Deakin and Jacoby argue that after the settlement by hire was abolished in 1834 the presumption of annual hire lost its centrality and was rarely applied under the law of master and servant to

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<sup>172</sup> Blackstone, *supra* note 73, Book 1 at 425. For a few decades there was an open question as to whether the master was obligated to provide actual work, or simply to maintain the relationship. See Freedland, *Contract supra* note 46 at p. 21-23.

<sup>173</sup> Deakin, *Contract of Employment, supra* note 57 at 12-14

<sup>174</sup> In *R v. St John Devizes* (1829) M. & R. 680 (QB) [St John Devizes] Justice Bayley explained that "[w]here a contract of hiring contains an express exception of any particular time, so that during that time the servant is free from the control of the master, that is not a hiring for a year, and service under it will not confer a settlement."

<sup>175</sup> *Ibid.*

<sup>176</sup> Steinfeld, *Invention, supra* note 77 at 85-86, 157.



manual and industrial workers.<sup>177</sup> Nonetheless it continued to be applied at common law.<sup>178</sup> The annual hire presumption constructed the employment contract as one of fixed term duration, either by express agreement or by legal presumption. It could only be dissolved with three months' notice by either party prior to the end of the term, or during the term for cause. In the absence of notice or cause the contract renewed itself annually, operating in a manner akin to a modern tenancy.<sup>179</sup> Indeed, employment contracts sometimes used the language of lease, with workers stating that they were 'letting themselves' to their employer for the duration of a set term.<sup>180</sup> It is not clear whether employers' held the same property-based rights of possession and control over their workers' for the entire year at common law. This seems likely in the context of domestic and menial servants, who lived and worked in the home, but less clear in regards to business clerks, sales people, journalists, gardeners, etc., who might work during set hours and live apart from their employers. Moreover, unlike the industrial model of employment, many workers in the 19<sup>th</sup> century provided services other than the production of physical goods. In the context of employment contracts to provide intangible goods, it is unclear how the law conceptualized what the employer bought or leased through an employment contract (time, skill, knowledge, etc.), and what were the respective property rights that arose from employment in the 19<sup>th</sup> century.

General employment practice at the turn of the 19<sup>th</sup> century saw most workers paid annually, or in quarterly instalments, so that when they left or were dismissed from their employment within the annual term, there would likely be wages outstanding for services already rendered within the pay period. Because the annual hire presumption operated to preclude the parties from dissolving an employment contract within its term, absent cause, if so dismissed workers in the first half of the 19<sup>th</sup> century could bring claims to recover wages before the common law courts. Such claims were styled assumpsits for wages, and the existence of cause was central to their determination. But workers who quit their employ within the contract's term were usually precluded from claiming

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<sup>177</sup> Deakin, *Contract of Employment*, *supra* note 57 at 14, Jacoby, *supra* note 90 at 97-98. As Wanjiru Njoya notes, the Webbs argued that workers' freedom was better served by short-term employment contracts and shorter term notice obligations, because the annual hire rule was used as a strike-breaking tool and was therefore "incompatible with collective bargaining". Njoya, *supra* note 39 at p. 33, quoting from Sidney and Beatrice Webb, *Industrial Democracy* (Edinburgh: R & R Clark Limited, 1898) at 431-432

<sup>178</sup> Jacoby, *Indefinite Employment*, *supra* note 90 at 100.

<sup>179</sup> *Artificers*, *supra* note 78 at s.1, 4. 9, 10.; *William v. Byrne*, (1837) 7 Ad. & El. 177 112 E.R. 438 [*Byrne*].

<sup>180</sup> Steinfeld, *Invention* *supra* note 77 at p.85-86.

wages owing on the basis of the “entire contract” doctrine. The doctrine was the product of the House of Lords’ 1795 decision in *Cutter v. Powell*, which specified that all the obligations under a contract had to be performed before the contractor could recover payment owing. This acted as a bar on labour mobility, incentivizing workers to remain in their current positions so as not to forfeit the wages they had already earned.

By the 1840s, however, the English courts began to suggest that workers were entitled to more than just wages owing if wrongfully dismissed – that they also had an action for breach of contract. Although it had been suggested from the 1810s onwards that some form of contractual action lay for dismissal without cause within the contractual term, the conceptual basis for such a claim was in flux across the first half of the 19<sup>th</sup> century.<sup>181</sup> The question was whether the contract consisted only of the master’s promise to pay the worker over the term of the contract, or whether the master contracted to maintain the employment relationship over the course of the contract’s duration.<sup>182</sup> The conundrum in these cases was this: if a worker was dismissed within a fixed term contract (as all were presumed to be) without cause, and the contract amounted solely to one for remuneration, then the worker could theoretically simply affirm the contract, remain willing and able to work for the duration of its term, and then sue for the entire wages owed over the term. The idea that a worker could recover for the whole contract without performing their services, and without an obligation to mitigate his or her damages, offended the courts’ idea of socially productive behaviour.<sup>183</sup> But, if the contract was one that included an implied obligation on the employer to maintain the worker’s employment for the duration of the term, this suggested, at least to the minds of the judiciary, that the employer was covenanting to stay in business for the duration of the contract.<sup>184</sup> This type of promise seemed one that business people were unlikely to make, and thus could not be construed as the intent of the parties.

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<sup>181</sup> Freedland states that the case of *Robinson v. Hindman* (1800), 3 Esp 235 was the first one to establish a claim for wrongful dismissal. In that case a domestic servant was dismissed without notice and claimed a month’s wages. The court held that the servant’s negligence had been established so the worker could not recover, but that “[i]f a master turns away a servant, without a previous notice or warning, the servant is entitled to a month’s wages”. This case was styled an assumpsit claim for wages. See Freedland, *Contract*, *supra* note 46 at p. 21

<sup>182</sup> Freedland, *ibid* at p. 21-23.

<sup>183</sup> *Emmens v. Elderton* (1853) 13 CB 495 (HL) [*Emmens* at the HL] at p. 644 .

<sup>184</sup> “The Contract of Hiring” (1855) 3(11) *The American Law Register* 651, reprinted from the *London Jurist*, 1855.

The question was litigated before the House of Lords over the 1840s, culminating in the decision in *Emmens v. Elderton* in 1853.<sup>185</sup> In *Emmens* the House of Lords reversed previous case law and held that a contract for hire of a specified duration included an implied obligation to maintain the worker in employment, unless expressly contracted against. The House of Lords' express motivation was to avoid what they perceived as worker idleness, where a worker could collect wages without working and without having to mitigate their losses. Lord Crompton J. stated that "[i]t would be much to be lamented if a servant or agent who was dismissed should be able to say, 'I could easily get another situation as good, or better, but I shall not do so, and instead of claiming the real damage I have sustained by the inconvenience and temporary loss of situation, I will bring an action for every instalment of salary, till the contemplated period has elapsed'".<sup>186</sup> For Baron Parke, who first heard the claim for the Exchequer Court, this would be a "pernicious consequence".<sup>187</sup> Motivated to avoid worker idleness, the House of Lords opted to construct a contract for hire as a promise to maintain the employment relationship by payment of wages (although not the provision of actual work) over the term of the contract in exchange for services for its duration.

[W]herever there is a contract for hiring or employment on the one part, and service for wages or salary on the other, for a specified time, there is an engagement on the part of the employer to keep the employed in the relation in question during that time, and not merely to pay him the wages for the services at the end; and that, in none of these cases, does the obligation to keep retained and employed necessarily import an obligation on the part of the master to supply work.<sup>188</sup>

An action for wrongful dismissal, as of 1853, was thus available for breaching the promise to maintain the employment contract over its specified or implied duration.

In both claims for wages owing and claims for wrongful dismissal, an employer could defend by arguing that they had in fact dismissed the worker for cause such that the worker could not recover, as they could under master and servant law<sup>189</sup>. In wrongful dismissal claims employers could also

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<sup>185</sup> *Emmens* at the HL, *supra* note 183.

<sup>186</sup> *Ibid* at p. 644.

<sup>187</sup> *Emmens v. Elderton* (1848) 6 CB 160 at p. 178.

<sup>188</sup> *Emmens at the HL*, *supra* note 183 at p. 506.

<sup>189</sup> Until 1817, however, however, an employer could not unilaterally dismiss his or her employee under master and servant law, but rather had to demonstrate cause before two justices of the peace. This was changed with the decision in *Spain v. Arnott*, (1817) 2 Stark. 256 [*Spain*], which now left the matter to the employer. This shift seemed to fit within the broader attempt of the judiciary to remove the courts from active administration of the

raise arguments regarding the length of the contract, and that industry custom permitted them to dismiss with the appropriate notice, so as to minimize the period over which they had to pay wages in the absence of cause. Cause was therefore central to determining the rights between the parties at dismissal. At common law the ability to dismiss for cause was sometimes treated as an implied term of the employment contract, but was generally implied as an incident of law in the 19<sup>th</sup> century.<sup>190</sup> What constituted sufficient cause to justify dismissal, however, was an open question over the course of the century.<sup>191</sup>

From the early 19<sup>th</sup> century it was clear that disobedience was sufficient cause for dismissal. Under the law of master and servant workers owed their employers a broad duty of obedience, which, coupled with the employer's possessory rights over his or her workers throughout the annual term, allowed masters almost unfettered control over the worker's actions. This was not a duty founded in contract or any type of negotiated agreement, but one implied by law from the subordinated nature of the relationship. Matthew Bacon in fact defined the master and servant relationship as one in which one party may force obedience of the other.<sup>192</sup> In the early part of the century, the obedience requirement was very broad, and the orders given did not need to be reasonable or fair. Thus in *Spain v. Arnott* a servant in husbandry brought a claim after being dismissed within the annual term for refusing to work over his regular dinner hour. The master argued that, as the contract was an annual hire and the plaintiff had not performed the entire year's service, he could not recover the wages owing to him, presumably referencing the entire contract doctrine. Lord Ellenborough concurred, and then went on to state that if a servant disobeys his master's orders, the master is entitled to turn him away, as the "question really comes to this, whether the master or the servant is to have the superior authority".<sup>193</sup>

In addition to disobedience the court added the grounds of gross moral misconduct, (pecuniary or otherwise), habitual neglect in business, or conduct calculated to seriously injure the master's

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employment relationship, entrusting it instead to the managerial direction of the employer, to be periodically assessed by the courts upon challenge.

<sup>190</sup> *Callo v. Brounker* (1829) 2 Man. & Ry 502 [*Callo*] at p. 504. This case is sometimes spelled Callow, instead of Callo, and there are a variety of different citations and reporters available for it that put it at different dates

<sup>191</sup> *Arding v. Lomax* (1855), 10 Ex. 734.

<sup>192</sup> Matthew Bacon, *A New Abridgement of the Law*, 7<sup>th</sup> edition (London: A. Strahan, 1832) at 333.

<sup>193</sup> *Spain supra* note 189 at p. 258. *Turner v. Robinson*, (1833) 5 B & Ad 789; John Macdonell, *The Law of Master and Servant* (London: Stevens, 1883) at p.225.

business in the 1829 case of *Callo v. Brounker*.<sup>194</sup> Though the grounds for cause were sometimes presented as implied contractual terms<sup>195</sup>, for the most part prior to the 1870s they were simply seen as obligations that were “implied by law from the relationship of master and servant,” as explained by treatise writer Charles Smith in 1852. According to Smith, such duties consisted of the following: a servant had a duty to enter the service he had contracted for; a duty to continue the work for the duration contracted for; a duty to obey all lawful orders; a duty to be honest; a duty to be diligent in the master’s business; a duty to take good care of the master’s property (failing which the servant may be liable in negligence); and a duty to respect one’s master as befitted his station in the world.<sup>196</sup> Breach of any of these duties justified the worker’s summary dismissal.

At a general level, however, the courts did not hold tightly to these categories throughout the 19<sup>th</sup> century. What constituted cause sufficient to justify dismissal was held to be a matter of fact<sup>197</sup>, and, until the 1870s, employers were given broad scope in determining what constituted sufficient cause.<sup>198</sup> Indeed, the courts held that an employer need not state the grounds of dismissal at the time of termination, nor need know of sufficient cause at the moment of dismissal, so long as such cause was in existence at the time the courts were asked to assess it. Lord Denman, Chief Justice of the King’s Bench, stated in *Ridgway v. Hungerford* that it was “not necessary that a master, having a good ground of dismissal, should either state it to the servant, or act upon it. It is enough if it exist, and if there be improper conduct in fact.”<sup>199</sup>

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<sup>194</sup> *Callo supra* note 190.

<sup>195</sup> In *St John Devizes, supra* note 174 in an obiter comment, Parke J. noted that the law implies into every contract for hire a requirement that the servant respect the orders of his or her master. The other judges simply explain the duty as a legal incident of the master and servant relationship.

<sup>196</sup> Charles Smith, *A Treatise on the Law of Master and Servant* (Philadelphia: T. & J.W. Johnson, 1852) p. 68-69.

<sup>197</sup> *Amor v. Fearon* (1839), 9 A. & E. 548 [*Amor*].

<sup>198</sup> Freedland, *Contract, supra* note 46 at p. 195-196.

<sup>199</sup> *Ridgway v. Hungerford* (1835) 3 Ad. & E. 171. The plaintiff served as clerk to a company, which had decided to dismiss him. He was instructed to enter the decision of the directors to dismiss him in the company’s minute book, which he did, along with a protest against the decision. He sued for wrongful dismissal, requesting the rest of the year’s salary, based on *Beeston, supra* note 171. Lord Denman, CJ. held, however, that the fact that the event occurred after the decision to dismiss was immaterial, because as “*Turner v. Robinson* (1845), 5 B. & Ad. 789 [*Robinson*], and many other cases, have shewn, that if a party, hired for a certain time, so conduct himself that he cannot give the *consideration* for his salary, he shall forfeit the current salary, even for the time during which he has served (my italics)”. For two of justices in this case’s the rationale was clearly disciplinary. Patteson J. explained that “[i]f we were to hold that it was necessary to trace the dismissal to the act which is to justify it, it would follow that a master, who had made up his mind to dismiss a servant, would give the servant, if he discovered his master’s intention, licence to act just as he pleased afterwards. We cannot dive into the meaning of parties. If the cause exist, and the master know of it (for on this occasion we need go no further than that), it is a

Over the course of the 19<sup>th</sup> century, as increasing numbers of middle class and professional workers began bringing suit, a bifurcated standard of cause seemed to emerge. For domestic servants, who were to be available to their masters at all times of day, the master's discretion was considerable on issues of cause. The general standard of misconduct, disobedience or neglect from *Callo v. Brounker* was applied, conceived of in explicit terms of social subordination and industrial discipline.<sup>200</sup> The scope of employer's control was clear for industrial workers, who worked outside of the home, and were in relationships of general social subordination but not relationships of personal proximity to their masters. Their employment was not regulated at common law, however.<sup>201</sup> By the mid-century, the question began to arise in regards to the work of middle class and higher status workers. In the 1861 case of *Price v. Mouat*, a lace-buyer refused to fold some lace on cards, which he viewed as beneath his station, and was dismissed for that refusal.<sup>202</sup> The plaintiff argued that, given that the order was one unrelated to the position he was hired for, he was not obligated to obey it. The jury at first instance agreed, and on appeal the court upheld the jury's decision, holding that at issue was the question of whether the order given was related to the normal tasks of the position, and this was a matter of fact for the jury.<sup>203</sup> This case, in 1861, is in sharp contrast to decisions like that of *Turner v. Mason*, where a domestic servant was dismissed for visiting her dying mother at night because her employer had expressly refused her request to do so.<sup>204</sup> After the mid-century, and particularly as of the last quarter of the 19<sup>th</sup> century, the notion of obedience was

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good ground for the dismissal." For, as Coleridge J. stated: "the act of entering the protest on the minute book was inconsistent with his service; a servant of this kind, if allowed to do such acts, would be useless".

<sup>200</sup> Freedland, *supra* note 46 at p. 214. *Callo supra* note 190 at p. 504.

<sup>201</sup> The question of hours of work began to be regulated by statute for children at the turn of the 19<sup>th</sup> century, *Health and Morals of Apprentices Act*, (1802) 42 Geo.III, c.73, and by the 1840s for women, *Factories Act 1844*, 7 & 8 Vict., c.15. See B.L. Hutchins & A. Harrison Spencer, *A History of Factory Legislation* (London: 1903)

<sup>202</sup> *Price v. Mouat* (1861) 11 C.B. (N.S.) 508 [*Price*].

<sup>203</sup> *Ibid*

<sup>204</sup> *Turner v. Mason* (1845) 53 E.R. 411 [*Mason*]. In this case a domestic servant was denied permission to visit her dying mother at night, and upon disobeying this order, was dismissed without the one month's notice contracted for. Plaintiff's counsel argued that to deny her a reasonable request, and be able to retain her in the master's service without limitation for the entire year term was akin to slavery, not service. "The contract of hiring and service must be construed, like all other contracts, reasonably. Suppose the plaintiff herself had been in peril of death, and had requested a day's absence for medical advice, would the defendant have been entitled to refuse that? He did not allege that her excuse was false, or that her absence was inconvenient." But the justices were unmoved. The master had given an order and she disobeyed. A domestic servant was to be available to her master day and night. Thus the dismissal was upheld in this assumpsit for wrongful dismissal. Alderson B. replied: "If the mother be very poor, is the daughter to absent herself from her service to work for her, to prevent her from starving?" Pollock C.B. chimed in: "Or, if she has a right to go the death-bed of her mother or father, why not of any other near friend?"

reformulated and narrowed in regards to upper status workers. For Deakin and Wilkinson, it is this process of circumscribing the duty of obedience to the specifics of the position that is the hallmark of the contractualization of work relations for higher status workers in the last quarter of the 19<sup>th</sup> century.<sup>205</sup>

Other than a demonstration of cause, the only other way to dismiss a worker within the term of their contract was if an industry custom of dismissal by notice could be demonstrated. This argument first emerged from the work of domestic service. Early in the 19<sup>th</sup> century employers of domestic servants began to argue that it was customary in that industry for annual hire contracts to be dissolved on the basis of one month's notice by either party, or wages in lieu.<sup>206</sup> This argument was first raised in the case of *Robinson v. Hindmann* in 1800, where the practice was considered sufficiently well established for the courts to accept its existence as customary, and thereafter applied by judicial notice.<sup>207</sup> Three months notice was also later accepted as industry custom for clerks, and the courts permitted evidence of custom to be introduced in other industries.<sup>208</sup> In such cases the courts examined evidence of usual practice in the industry, but also used the one month notice for domestic servants as a yardstick, comparing the relative social status of the industry to domestic service, to determine the likelihood of the suggested custom.<sup>209</sup> Thus a custom of termination by notice served either to eliminate liability, where such notice had been given, or reduce damages owed, where the notice was shorter than the unexpired term of the contract.

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<sup>205</sup> Deakin and Wilkinson, *supra* note 65 at p. 79-81.

<sup>206</sup> James Barry Bird, *The Laws Respecting Masters and Servants, Articled Clerks, Apprentices, Manufacturers, Labourers and Journeymen 3rd ed.* (London: W. Clarke, 1899) at p. 2. Bird explains that this practice arose because in large urban areas it was quite difficult to "learn the character of a servant". Dismissal by a month's notice allowed employers to hire domestic servants without being bound to the annual term.

<sup>207</sup> *Robinson v. Hindman* (1800), 170 E.R. 599 The argument for one month's notice for dismissal or wages in lieu was first raised by a worker, not an employer, but was subsequently deployed as a defence by employers where the 'customary' notice period was shorter than the remaining term of the contract.

<sup>208</sup> *Beeston*, *supra* note 171; *Fawcett v. Cash*, (1834) 5 Barnewall and Adolphus 904, 110 E.R. 1026 [*Fawcett*]; *Byrne*, *supra* note 179; and *Nowland v. Abblett*, (1835) 2 Compton, Meeson and Roscoe 54, 150 E.R. 23. In this last case the claim for notice was not rejected altogether. Instead the court held that the gardener was a menial servant, despite not residing directly within the household, and so gave him one month's notice, instead of the quarter year wages he requested.

<sup>209</sup> In *Beeston*, *supra* note 171, the Court rejected the argument of an industry custom of one month for dismissal of a clerk. In so doing, however, they commented on the comparative nature of the work of domestic servants and clerks, suggesting that one month's would anyhow be insufficient because clerks such as the plaintiff would have greater trouble finding new employment. "A man in this class is not likely to be able to get a situation so soon as a butler or a footman can", said Best C.J. He went on, on appeal, to state that "it would be, indeed, extraordinary, if a party, in his station of life, could be turned off at a month's notice, like a cook or scullion"

While some lower status workers could be dismissed by notice (which was then also the measure of their damages), as of the 1860s, higher status workers could not be dismissed without cause during the annual or express term of the employment contract.<sup>210</sup> As Deakin and Wilkinson note, the courts demonstrated a clear concern that higher status workers receive greater legal protection in regards to dismissal.<sup>211</sup> In the 1852 case of *Todd v. Kerich*, for example, the court distinguished between the situation of a governess and a domestic servant. The court stated that “the position she holds, the station she occupies in a family, and the manner in which such a person is usually treated in society certainly places her in a different situation from that which mere menial or domestic servants hold”.<sup>212</sup> The measure of damages for a wrongful dismissal claim for workers under an annual hire contract was not entirely clear however. In some cases the courts stated that a worker under an annual hire contract was entitled to the wages owing over the rest of the year’s term, where dismissed without cause.<sup>213</sup> But in other cases the courts stated that damages constituted the measure of actual loss from dismissal, being the amount of time necessary to find comparable employment within the annual term, subject to the duty to mitigate.<sup>214</sup> Because damages were a question of fact for the jury, the details of what and how damages were assessed is not visible often on the face of 19<sup>th</sup> century reported decisions. Nonetheless, under either approach the implied or express fixed length of the contract in law guided the damage assessment.

By the 1860s the courts of England began to suggest that the question of contract duration for general hires was not a presumption of law. Rather, in some industries, custom as to annual hire contracts was so well known as to be applicable by judicial notice, such that it resembled a presumption of law.<sup>215</sup> In stark contrast from the traditional common law position, for instance, in the 1860 case of *Fairman v. Oakford* Baron Pollock stated that: “there is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend upon its own

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<sup>210</sup> *Beeston, ibid*; *Fawcett supra* note 208; *Buckingham v. Surrey & Hants Canal Co* (1882) 46 LT 885.

<sup>211</sup> Deakin and Wilkinson, *supra* note 65 at p. 79-80.

<sup>212</sup> *Todd v. Kerich* (1852), 8 Exch 215.

<sup>213</sup> *Beeston, supra* note 171. See also Charles Manley Smith, *A treatise on the law of master and servant : including therein masters and workmen in every description of trade and occupation* (Philadelphia, 1886) at 81, commenting on English law.

<sup>214</sup> *Beckham v. Drake* (1849), 9 E.R. 1213 [*Beckham*]; *Emmens at the HL, supra* note 183 at p. 508.

<sup>215</sup> It was suggested in two cases in the first half of the 19<sup>th</sup> century that the presumption of annual hire was a presumption of fact and not law. This idea was resuscitated in the 1860s. *Byrne, supra* note 179; *Baxter v. Nurse* (1844), 6 M. & G. 935 [*Baxter*].



circumstances.”<sup>216</sup> But if there was no presumption of annual term for a contract without a delineated duration, how long should a general hire contract last, and how and when could it be dissolved? With increasing frequency in England in the last quarter of the 19<sup>th</sup> century employers argued that their contracts were not of annual length but were rather dissolvable by reasonable notice. To resolve such arguments, the courts would investigate the frequency of wage payments and the terms of employment, to determine the intended duration of the parties.<sup>217</sup> But if there was no clear intention, and no industry practice, towards the end of the 19<sup>th</sup> century the courts began to agree that dismissal could occur if reasonable notice was provided.<sup>218</sup> The presumption of annual hire was finally abandoned in England in the 1890s. Nonetheless, in the late 19<sup>th</sup> century, reasonable notice remained only the period of warning that a worker was to receive of impending dismissal. Damages were a separate issue.

Just as workers began to bring contractual claims regarding employment to the common law courts, beginning in the 1830s industrial workers also sought to make use of emerging negligence doctrines to claim that employers held a duty of care to ensure workplace safety.<sup>219</sup> The English courts in the 19<sup>th</sup> century relied on status-based notions to determine workers’ entitlement to unpaid wages, damages for wrongful dismissal, and cause for termination, and dwelled little on contract principles to do so. But they took a different approach in regards to employers’ negligence. Drawing on broad

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<sup>216</sup> *Fairman v. Oakford* (1860), 157 E.R. 1334 .

<sup>217</sup> Labatt, Right to Terminate a Hiring, *supra* note 163 at p.597-605

<sup>218</sup> In *Creen v. Wright* (1876), (1875-76) L.R. 1 C.P.D. 591 [*Creen*], a ship master sued a ship owner for wrongful dismissal, when dismissed just prior to the journey. The worker argued that he was entitled to notice of dismissal, but the employer argued that in that industry dismissal without notice was customary. The Court of Common Pleas held at first instance that there was no evidence of a particular industry custom regarding notice for this type of position, unlike with clerks and servants, and therefore the plaintiff was not entitled to any notice. The Divisional Court overturned this decision, holding that the plaintiff was entitled to reasonable notice, despite the lack of evidence of any particular custom for his type of position. The court’s reasoning was based on an idea of mutual obligation - that if the plaintiff could be dismissed without notice on the eve of the journey, then the plaintiff could equally have left his employ without notice at that time. Given the damage the owner would suffer in such a circumstance, this could not have been the intentions of the parties. Instead, given that only under very unusual circumstances could the plaintiff have been dismissed during the voyage and while at sea, he was entitled to reasonable notice if dismissed within the country. This was built on in cases over the 1880s and 1890s . In *Vibert v. Eastern Telegraph Co.* (1885) Cab. & El. 17 [*Vibert*], a clerk employed on an annual salary (which previously would have been indication of its annual duration), was held dismissible by reasonable notice. And in 1886 in *MacDowall’s Case*, which concerned a claim for 3 months notice for a higher status clerk, Chitty J. discussed “the notice which the law in an ordinary case allows and requires for a person in the position of [this employee]”. See Freedland, *Contract*, *supra* note 46 at p. 152.

<sup>219</sup> *Priestley v. Fowler* (1837), M & H 305 [*Priestley*]

contractual notions of employment as a contract between two equal parties, the courts used the defence of voluntary assumption of risk, and crafted the “fellow servant” and “common employment” doctrines to depict workers as autonomous individual who voluntarily assumed the risks involved with their workplace.<sup>220</sup> Until the 1880s, workplace safety claims by industrial workers were rejected on the basis that workers’ exercised their own will and informed decision-making in choosing to work, and that they could contract for increased wages as compensation for potential dangers.<sup>221</sup>

Thus, as this description suggests, over the 19<sup>th</sup> century the law of employment contracts was in the midst of its early development in England. The courts tended to treat workers as equal contracting parties in the decision to enter employment, and in enforcing any explicit contract terms, but used their own understanding of status to determine implicit obligations between the parties, and to permit for different levels of entitlements on the basis of workers’ social class. The courts sometimes suggested that obligations emerged from the implicit intentions of the parties or by virtue of implied contractual terms, but for the most part, even after the common law of employment contracts began to take its own shape, the courts continued to rely on social status notions of subordination and class hierarchy to state obligations at law, without seeking to present them in negotiated terms or the language of contract. As the next chapter will detail, however, as of the 1890s significant changes were made to the conceptual foundations of the common law of employment contracts, which would set in place a nexus of ideas that persisted throughout the 20<sup>th</sup> century, although utilized and deployed in changing circumstances.

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<sup>220</sup> *Ibid.* See generally C.G. Addison, *Wrongs and their Remedies*, (London : V. and R. Stevens and Sons, 1860) at p. 92-94; M.A. Stein, “Victorian Tort Liability for Workplace Injuries” (2008) U. Illinois L. Rev. 933.

<sup>221</sup> The American case of *Farwell v. Boston & Worcester Railroad Corp.*, , 45 Mass. 49 (Mass. 1842) was followed by the House of Lords in *Bartonshill Coal Company v. Reid*, (1858) 3 Macq 266 at 316. In *Farwell* the court stated that:

“The general rule, resulting from considerations as well as justice as of policy is, that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which would except the perils arising from the carelessness or negligence of those who are in the same employment. [...] They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others.”

The *Employers’ Liability Act* was enacted in 1880, 43 and 44 Vict., c.42, followed by the *Workmen’s Compensation Act*, (1897) 60 & 61 Vict., c.37, which slowly began to limit the availability of the defences.

#### (4) 19<sup>th</sup> Century Common Law Cases in a Colonial Context: Ontario

The developing common law of employment contracts described above was theoretically available to workers in Ontario in the 19<sup>th</sup> century. But the social and economic context of a settler colonial society suggests that it was not formally invoked with great frequency prior to the 1890s. To understand why not, it is necessary to describe something of the social and economic environment of colonial Ontario.

Until the 1840s Ontario's economy was overwhelmingly agricultural, and its social culture built around the needs and practices of agricultural production.<sup>222</sup> There was high labour mobility, both geographically and in terms of occupational change. Immigrants to the colony did not primarily seek waged work, but instead worked for the time necessary to accumulate enough capital to purchase their own lands. Until the mid-19<sup>th</sup> century farm owners moved in and out of waged relationships, depending on their cash-flow needs and debt load, and focusing instead on the development and sustainability of their agricultural production. This meant that a farmer-employer could himself be a wage earner at different points in the year, perhaps needing to pay off a debt to the local general store.

People took casual, occasional or seasonal work to clear a debt or complete a purchase; their long-term attachment was not to paid employment but to clearing or improving the family farm and acquiring property to settle their children. Labour market development was quite uneven, constrained by a double scarcity, of workers and of the capacity to pay them, although there was no shortage of potential work.<sup>223</sup>

Many tasks, primarily in the agricultural field, were accomplished outside of waged relationships, through the use of family members, the pooling of labour by neighbours, or by payment in kind and sharecropping.<sup>224</sup> In particular, much of the domestic work in the colony was performed by family members, rather than paid servants. What waged labour did exist was usually in the form of short term contracts, often of daily or monthly duration. The colony thus experienced an enduring labour

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<sup>222</sup> Gerald Craig, *Upper Canada: The Formative Years, 1784-1841* (Toronto: McLelland and Stewart, 1963) at chapter 3.

<sup>223</sup> Craven, *The Law of Master and Servant*, *supra* note 146 at p. 179

<sup>224</sup> Webber, *supra* note 156 at p. 188-123.

shortage until roughly the 1840s, particularly in regards to the skilled trades.<sup>225</sup> Whereas in England the master and servant laws strictly regulated apprenticeships and entry into craft fields, because of the skill and population shortages in Upper Canada crafts were not so strictly separated, nor formally organized, particularly in rural areas.<sup>226</sup> Starting in the 1830s and 1840s a growing number of unskilled workers began to immigrate to the colony, seeking work on construction gangs, railways and public work projects, and providing the first pool of stable waged workers.<sup>227</sup> The period between 1840 and 1860s saw the first expansion of manufacturing work in Ontario, with some household production moving into central locations owned by employers. The burgeoning industrial manufacturing sector was based around a growth in trade in the province's natural resources, such as agriculture and forestry, as well as related transportation infrastructure, and agricultural implements.<sup>228</sup>

Labour market organization in early Upper Canada was, therefore, of much greater fluidity than in England, which mirrored the attenuated nature of social and class differentiation in the early years of the colony. Webber suggests that this period was marked by a lack of recourse to law, where parties instead relied on "self-protection – payment by the job, relatively short employment contracts, and the ability to leave and find other work, even physical intimidation".<sup>229</sup> Indeed, R.C.B. Risk states that in general during the first forty or so years' of the colony's young life "the courts decided the disputes that were brought to them, but the surviving records and the slim published reports suggest that they did not decide a representative, large, and continuing volume of disputes about commercial transactions and economic issues, and they decided only a few cases involving major issues of principle".<sup>230</sup>

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<sup>225</sup> Craven, *The Law of Master and Servant*, *supra* note 146 at p.179-180; W.C. Pentland, "The Development of a Capitalistic Labour Market in Canada", (1959) 25(4) *Canadian Journal of Economics and Political Science*, 450; Craig Heron "Factory Workers," in Paul Craven, ed., *Labouring Lives: Work and Workers in Nineteenth-Century Ontario* (Toronto: University of Toronto Press 1995) at p. 500. But *cf*, see Allan Greer, "Wage Labour and the Transition to Capitalism: A Critique of Pentland" (1985) 15 *Labour/Le Travail* 7 for a criticism of Pentland's explanation of the timing and causes of the emergence of a waged labouring class in Canada.

<sup>226</sup> Even in England the apprenticeship regulations for entry into the skilled trades had stopped being strictly followed, although the legal regulation remained on the books exist until 1814.

<sup>227</sup> Pentland, *supra* note 225; Heron, *Factory Workers*, *supra* note 225.

<sup>228</sup> Heron, *ibid* at p. 486-487.

<sup>229</sup> Webber, *supra* note 156 at p. 115.

<sup>230</sup> R.C.B. Risk, "The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective" (1977) 27 *U.T.L.J.* 403 at p. 406. Risk explains that the five largest types of cases in the early 19<sup>th</sup> century were (1) the internal

The primary legal regime for the terms of employment by the 1840s was the law of master and servant. After some judicial doubt as to whether master and servant law was properly received in the colony, the local legislature passed a domestic statute in 1847, in tandem with the growth of a local wage-labouring class.<sup>231</sup> The new Upper Canadian master and servant statute was modeled on the English statutes of the 1820s. It did not contain wage fixing or apprenticeship regulations, and focused instead on policing employment contracts. Thus, as in England, it created an expedited wage recovery mechanism for workers<sup>232</sup>, whose contract would be dissolved if they could demonstrate employer abuse or substantial wages owing. It also, however, continued to criminalize worker breach, imposing jail time for absence or misconduct, as compared to the civil penalties imposed on employers. The Act purported to apply to all ‘servants and labourers’, instead of the detailed lists of occupations that characterized the 18<sup>th</sup> century English acts. Importantly, it also included domestic workers, which were excluded in England, and was amended to include the skilled trades in 1855.<sup>233</sup>

According to Paul Craven the passage of the domestic master and servant statute was part of a concerted effort at building and controlling a local waged-labouring class.<sup>234</sup> Expanding public works projects and manufacturing endeavours were creating an ever greater need for low skilled labour, but the shape of the colonial economy had provided no incentive to work in that capacity. Immigrant workers to Upper Canada thus had held a certain amount of bargaining power. Depictions of domestic workers in particular discussed the ‘effrontery’ of their independence and assertiveness, their demands for higher wages and respect.<sup>235</sup> Indeed, Robert Baldwin suggested

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management of the work of the courts, (2) property, (3) the market, (4) enforcement of claims against debtors, and (5) municipal institutions.

<sup>231</sup> *An Act to regulate the duties between Master and Servant, and for other purposes therein mentioned*, S. Prov. Can. 1847, c. 23; S. Prov. Can 1851, c.11. The preamble to both acts stated that there was no statute then in force for regulating the relations of master and servant, and master and apprentices.

<sup>232</sup> Paul Craven notes that in fact this mechanism was widely used for wage recovery. See Craven, *Symbolic and Instrumental Enforcement*, *supra* note 149 at p.177.

<sup>233</sup> By amendment to the *Ontario Master and Servant Act of 1855*, 18 Vict. c.136, the Act was extended to “journeymen or skilled labourers in any trade, calling, craft or employment, and to their masters, that is to the tradesmen or persons employment them such as journeymen or skilled labourers [....]. See Webber, *supra* note 156 at p. 136-138, and Craven, *Master and Servant*, *supra* note 146 at p. 196, for a general discussion on the coverage of the Act. Heron, *Factory Workers*, *supra* note 225 offers an analysis of the transformation of craftsmen from commercial contractors to wage-earners, but does not discuss the effect of the Act on that process.

<sup>234</sup> Craven, *Master and Servant*, *supra* note 146.

<sup>235</sup> *Ibid* at p.188-189.

that the whole master and servant statute was aimed at household servants, and female labour.<sup>236</sup> Thus as the colony's first industrial era got underway in the 1840s, and a concerted effort was made at forming a local waged labour force to aid in the expansion of nascent industry, the *Master and Servant Act* appears intended to try and curb the potential power of a newly emerging class of waged workers – as a tool for the maintenance of social order and industrial discipline.<sup>237</sup>

While the law of master and servant appears to have been the primary method of work regulation in mid-19<sup>th</sup> century Ontario, because of the reception of the general English common law at the colony's creation, the common law of employment contracts was also available. Decisions of Ontario's courts began to be reported in the 1830s. Contractual claims regarding employment at common law were few and far between through most of the century. It was only as of the 1890s that the superior courts began to actively adjudicate questions of employment contracts, and that it can be said that a domestic body of case law began to emerge regarding the contract of employment at common law.

The cases that were litigated in the 19<sup>th</sup> century were guided by the relatively strict application of English precedent.<sup>238</sup> The Ontario judiciary viewed itself bound to English precedent not just at the level of institutional principle but as a matter of constitutional requirement.<sup>239</sup> What change could be brought to the law was a matter for the English courts or for the local Legislature in regards to the common law, and for the Ontario Legislature on issues of statute. This led to rote, formal application of existing precedent, often without explanation for the justification behind a given

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<sup>236</sup> Cited by Eric Tucker, *Constructing*, *supra* note 159 at p.18.

<sup>237</sup> Whether in fact the statute was used in this fashion is less clear. Paul Craven's research suggests that the Act was used steadily, if not in high volume, between its enactment in 1847 and the repeal of most criminal sanctions in 1877. Craven states that of approximately 13 000 summary convictions between 1847 and 1877 (when most of the criminal sanctions for breach were repealed) 1000 concerned master and servant claims. In its early years the statute was used mostly for wage recovery claims by workers and for desertion prosecutions by employers. Three quarters of the claims were wage recovery claims, twenty percent concerned desertion by workers, and the remaining five percent were comprised of claims of worker disobedience or employer ill-treatment. Craven's research also suggests that imprisonment was rare; the most frequent penalty for desertion was a fine. While the types of use may have fluctuated regionally, with intensified use of prosecution in areas with more volatile employment relations, the Act does not appear to have been used as a significant tool of social control until into the 1860s and 1870s, as trade union action became increasingly pronounced. Craven, *Symbolic and Instrumental Enforcement*, *supra* note 149 at p. 197-201. But cf Gregory Kealey, *Toronto Workers Respond to Industrial Capitalism, 1867-1892* (Toronto: University of Toronto Press, 1980) at p. 148-149.

<sup>238</sup> R.C.B. Risk, "Sir William R. Meredith C.J.O.: The Search for Authority" (1982-1983) 7 Dal. L.J. 713

<sup>239</sup> *Trimble v. Hill* (1879) 5 App.Cas. 342; Bora Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969) at 60-63.

principle, or any deep analysis of the consequences of its application to the facts. Indeed, in some cases, no description of the technical claim brought is provided, no case law is cited, no explicit explanation of the conceptual principles at stake is given, and the facts are sparsely recorded on the face of the decisions.<sup>240</sup>

The Upper Canadian judiciary clearly understand that the law was not settled in all areas, and that the conditions of a young frontier colony would raise questions to which English law did not attend. R.C.B. Risk describes innovations wrought in the area of corporate contracting not under seal (which played an important role in employment law cases), but also the unease the judiciary felt in striking out completely on their own.<sup>241</sup> While they did in some instances turn to American case law on questions particular to colonial life, American law seems to have had more resonance for the Legislative Assembly and in the creation of new statutes than in regards to the common law. According to Risk, American cases were considered only infrequently because Upper Canadian jurists viewed them as impermissibly innovative.<sup>242</sup> In employment contract cases, American cases were infrequently cited in the 19<sup>th</sup> century. At an overall level, the particularities of employment in a colonial context were dealt with less by judicial innovation, and more simply by the types of cases that presented themselves before the courts. Thus, as we shall see, certain types of claims and certain types of claimants who were central to the development of the employment contract at common law in England did not emerge until the end of the 19<sup>th</sup> century in Ontario.

Over the course of the 19<sup>th</sup> century there were two types of non-contractual cases relating to employment that were frequently before the courts. The first are “work and labour” claims, which concerned claims for payment by service providers who were not considered employees, such as architects, builders, etc. Starting in the 1860s Ontarian workers also brought negligence claims regarding workplace accidents.<sup>243</sup> The courts of Ontario strictly applied English common law precedents to bar recovery for workplace accident through the “common employment”, “fellow

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<sup>240</sup> For instance, in many cases it is not clear on what basis a claim is brought, whether it is a claim for *indebitatus assumpsit* for work and labour or a claim from wrongful dismissal, what type of damages are sought, etc.

<sup>241</sup> R.C.B. Risk, “The Golden Age: The Law about the Market in Nineteenth Century Ontario” (1976) 26(3) U.T.L.J. 307 at p.414-415.

<sup>242</sup> Risk suggests that the Upper Canadian judiciary admired the law-making tendencies of some of their American counterparts, but viewed themselves as constitutionally incapable of following suit. See Risk, *The Golden Age*, *supra* note 241 at p.414.

<sup>243</sup> Eric Tucker, “The Law of Employers Liability in Ontario, 1861-1900” (1984) 22 OHLJ 213 at p.221.

servant” and “voluntary assumption of risk” doctrines, depicting workers as equal contracting parties to the employment relationship, until the 1880s when the province enacted the *Workmen’s Compensation for Injuries Act*.<sup>244</sup> Although the local courts used broad classical contract notions to deny workers’ negligence claims, there were few cases brought in contract regarding employment in Ontario over the 19<sup>th</sup> century. Those claims that were brought between the 1830s (when Upper Canadian cases began to be reported) and the 1890s generally fell within a few classes of cases. The first type of employment contract was quite particular, and concerned the power and formalities of contracting by municipal corporations in regards to their workers.<sup>245</sup> The second, and related to that of municipal employment, was whether corporations who hired workers by contracts not under seal could be held accountable for their lack of performance.<sup>246</sup> The third concerned work disputes amongst family members. These cases were of three types: firstly, claims by an individual for wages for services rendered to a member of their family.<sup>247</sup> Secondly, claims for wages for services rendered within the family when the promised inheritance of land was revoked<sup>248</sup>, and thirdly, seduction claims by parents for the lost wages of female family members who became pregnant out of wedlock.<sup>249</sup> Indeed, seduction, and work and labour claims (discussed below), appear to have been the most frequent work-related claims brought in the 19<sup>th</sup> century.<sup>250</sup> By and large, on the basis of English precedents, work amongst family members was presumed not to constitute an

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<sup>244</sup> *Workmen’s Compensation for Injuries Act*, S.O. 1884, 47 Vict. C.39. For a general history of workplace safety claims in Ontario see Tucker *ibid*; R. W. Kostal, “Legal Justice, Social Justice: An Incursion into the Social History of Work-Related Accident Law in Ontario 1860-1886” (1988) 6(1) L. & Hist. Rev. 1.

<sup>245</sup> This line of cases concerned whether a municipal corporation could only contract under seal in regards to executory contracts, and what were the effects of the ‘at pleasure’ nature of municipal employment by virtue of Municipal Corporations Act of 1866. See *Broughton v. The Corporation of Brantford*, [1869] 19 U.C.C.P. 434 (Ct CP) [Broughton]; *Hickey v. Corporation of County of Renfrew*, [1870] 20 U.C.C.P. 429 (Ct CP); *Willson v. York*, (1881) 46 QB Rep 289; *The Corp of the County of Bruce v. McLay*, (1883) 3 OR 23.

<sup>246</sup> For example, *Ellis v. The Midland Railway Company (1882)* 7 O.A.R. 464 [Ellis]. See R.C.B. Risk, “The Nineteenth-Century Foundations of the Business Corporation in Ontario” (1973) 23 .U.T.L.J. 270 at p. 284

<sup>247</sup> Where services were rendered without an express contract or discussion as to terms, the general presumption was an intention to pay for services rendered. This presumption was reversed in the case of services rendered within the household or amongst family members. In such cases the claimant had to demonstrate on the facts that the relationship was intended to be one of waged service. See *Redmond v. Redmond*, (1868) 27 UCQB 220; *Henricks v. Henricks, Administrator* (1868) 27 QB Rep 447; *Wilkinson v. Lawson*, 41 Vic 1878, 28 UCCP 603; *Peckham v. Depotty* (1890) 7 OAR 273.

<sup>248</sup> *McClarty v. McClarty* (1869), 19 UCCP 311; *Morris v. Hoyle* (1878), 28 UCCP 598.

<sup>249</sup> For example, *Cromie v. Skene* (1869), 19 U.C.C.P. 328

<sup>250</sup> Making quantitative and comparative quantity claims is difficult, as we have no catalogue of the number of reported cases in Ontario over the course of the 19<sup>th</sup> century. This statement is impressionistic, on the basis of my examination of reported decisions over the course of the century. My unscientific sense is that there was at least one, if not up to four or five seduction claims reported per year, in comparison to potentially one or two other work-related claims.



employment relationship, and claims for wages in such circumstances were almost invariably defeated. Given the centrality of family work in the first half of the 19<sup>th</sup> century, this presumption likely acted to remove a significant portion of the population from the law's application in regards to employment, and elided, as did the seduction cases, the overlapping institutions of work and family in the colonial economy.

The fourth set of cases concerned the proper interpretation of terms of written contracts of employment, almost invariably brought by workers, and relatively strictly interpreted, as Craven notes.<sup>251</sup> Such contracts usually appeared to be particularly negotiated between the parties, and concerned different types of professional employment. They also sometimes concerned the effect of the Statute of Frauds on oral employment contracts.<sup>252</sup> Finally, there were claims for wrongful dismissal<sup>253</sup> and claims for wages<sup>254</sup>. The courts faithfully applied English precedent to decide such cases, but many issues that were frequently before the courts in England simply did not arise in Ontario. The presumption of annual hire, for instance, was rarely litigated.<sup>255</sup> What evidence exists suggests employment contracts were of short term duration, at least until the last quarter of the 19<sup>th</sup> century, given the scarcity of waged relationships and the high degree of labour mobility.<sup>256</sup> Prior to the 1890s there was sporadic judicial mention of the annual hire, where the courts suggested that the presumption existed in the province, but little consideration of its import.<sup>257</sup> Claims for industry custom of dismissal by notice, interestingly, did not arise until the 1890s. There

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<sup>251</sup> Craven, Master and Servant, *supra* note 146, For instance, *Elmore v. Hind*, (1864) 24 QB Reps 136; *The Bank of BNA v. Simpson* (1874), 24 UCCP 354.

<sup>252</sup> *Booth v. Prittie* (1881), 7 OAR 680 [*Booth*]; *Davies v. Appleton et al.*, (1875) 25 UCCP 376 [*Appleton*]; *Dickson v. Jacques et al.* (1871), 31 UCQB 141 [*Dickson*].

<sup>253</sup> For example, *Tibbs v. Wilkes* (1876), 23 Gr. 439 [*Tibbs*]; *Patterson v. Scott*, (1876) 37 UCQB 642 [*Patterson*]; *Griggs v. Billington* (1868) 27 QB Rep 520 [*Griggs*]; *Hunter v. Foote* (1862), 12 UCCP 175 [*McGuffin v. Cayley* (1846), 2 UCQB 308.

<sup>254</sup> See, for example, *Shanly, Executrix of Shanly Junction Railw. Company*, (1883) 4 OR 156 [*Shanly*]; *Pickering v. Ellis*, (1868) 28 QB Reps, Ct of Errors and Appeals, 187 [*Pickering*]. Many of such cases were in fact family work cases. See discussion *supra* notes 247, 248, 249.

<sup>255</sup> This seems to reflect work practices, in which most work contracts were for less than a year. Jeremy Webber explains that shorter term contracting was motivated by a few factors: first, because employers may not have been able to provide a year's worth of work; second, much of the work was seasonal in nature; finally, most workers did not want long term commitments, given that they held some measure of bargaining power in the early colonial labour market. Webber suggests that "employees might be kept throughout the year, but the contracts were generally by the month, tacitly renewed". He concludes that most workers were not presumed to work under annual hire contracts, although he appears to rely only the shape of colonial work practices for this conclusion. See Webber, *supra* note 156 at p.122 and 152.

<sup>256</sup> Webber, *supra* note 156 at p. 122-124; 152.

<sup>257</sup> *Broughton*, *supra* note 245.

were also no claims by employers to enforce non-competition covenants in employment contracts before the turn of the century. At a broad level, contract claims in Upper Canada were brought almost solely by middle class and professional workers in the colony, almost exclusively by men, except in regards to family work claims. This stands in contrast to English cases during this time, which did see claims from lower status workers and from female servants (primarily domestic servants) throughout the 19<sup>th</sup> century. In contrast to English cases over the 19<sup>th</sup> century, in Ontario there were no cases from domestic workers (other than the family work cases)<sup>258</sup> and no contractual cases from agricultural labourers or lower level factory workers.<sup>259</sup>

Thus at a broad level it appears as though the common law of employment contracts was simply not invoked with any frequency in Ontario prior to the 1890s. The content of English principles in the area differed from the nature of employment practices in the colony. Unlike the situation in the American colonies, where the local judiciary self-consciously adjusted the content of the law to local circumstances, in Ontario the specificity of the domestic economy was visible in the types of claims that were brought and those that were not, which reflected the nature of the local workforce and economy. As the next chapter will explore, the common law of employment contracts emerged to greater centrality in Ontario as of the 1890s, as the province underwent its Second Industrial Revolution. Major changes occurred in the social and economic structure of the province between the 1890s and the 1930s, which brought increasing numbers of claims to the common law courts, and in turn effectuated adjustments to the content of the common law of employment contracts in England and Ontario. It is to this topic we now turn.

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<sup>258</sup> I assume that this is because domestic workers were covered by the Master and Servant statute, unlike in England. This is given support by empirical evidence from Quebec, although both the legal and socio-political situations between the two colonies were very different. Nonetheless, Hogg argues that in Lower Canada, in the early 19<sup>th</sup> century claims from domestic servants accounted for about 1/7<sup>th</sup> of all cases for wages. See Hogg, *supra* note 149

<sup>259</sup> There are some claims from factory supervisors and engineers however. For instance, *Rettinger v. MacDougall* (1860), 9 UCCP 485 [*Rettinger*]; *Griggs v. Billington* (1868) 27 QB Rep 520 [*Griggs*]; Shanly, *supra* note 254.

## Chapter 2

### The Common Law Employment Contract's First Nexus of Ideas in Ontario - The 1890s to the 1930s

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## **(1) Introduction: The Emerging Nexus of Ideas on the Law of Employment Contracts at the Turn of the 20<sup>th</sup> Century**

Between 1890 and 1930 Ontario underwent a profound economic, social and political transformation. Over this period the province experienced one world war, the beginnings of the Great Depression, the first significant entry of women into the workforce, and its second industrial revolution.<sup>1</sup> The 1890s started on a recessionary note in Ontario, but a period of significant economic growth began as of the turn of the 20<sup>th</sup> century. Economic expansion was provoked by changes in technology, through advances in hydro electric power, new manufacturing production machinery, and a significant influx of American direct investment.<sup>2</sup> American direct investment became a major political and economic force in the province, which was increasingly re-oriented towards its southern neighbours and away from the United Kingdom. The focus of production shifted from the dominance of family-based agrarian work to waged-labouring in the manufacturing, resource, transportation and finance sectors.<sup>3</sup> With economic growth came the spread of the modern business enterprise that had first emerged in the United States in the mid-19<sup>th</sup> century in the railway industry, and a significant capital consolidation movement. Business ventures grew in size and scope, with the formation of large-foreign financed “megaprojects”, in the words of Craig Heron, and with company mergers.<sup>4</sup> The province’s population grew

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<sup>1</sup> Craig Heron, “The Second Industrial Revolution in Canada, 1890-1930” in Deian R. Hopkin and Gregory S. Kealey, *Class, Community and the Labour Movement*, (Wales:Llafur/CCLH, 1989) at 48-66.

<sup>2</sup> For general statistics on the transformation and rapid growth of the Canadian economy over the early 20<sup>th</sup> century, see O.J. Firestone, *Canada’s Economic Development, 1867-1953* (London: 1958); Robert Craig Brown and Ramsay Cook, *Canada 1896-1921: A Nation Transformed* (Toronto: McClelland & Stewart, 1991) at chapter 5; Heron, *The Second Industrial Revolution*, *supra* note 1 at p.50-53

<sup>3</sup> Gordon Bertram, “Economic Growth in Canadian Industry, 1870-1915: The Staple Model and the Take Off Hypothesis” (1963) 29(2) *Can J Eco & Pol Sci* 159 at 176-177, 182. Ontario was the primary location for wood resource extraction, for resource processing and for the growth of financial intermediary businesses.

<sup>4</sup> H.G. Stapells, “The Recent Consolidation Movement in Canadian Industry” (unpublished MA Thesis, University of Toronto, 1922); Heron, *The Second Industrial Revolution*, *supra* note 1 at p. 550-41; Brown and Cook, *supra* note 2 at chapter 5; Craig Heron and Bryan Palmer, “Through the Prism of the Strike: Industrial Conflict in Southern Ontario, 1901-1914” (1977) 8(4) *The Canadian Historical Review* 423; Paul Craven, *An Impartial Umpire: Industrial Relations and the Canadian State*, (Toronto: University of Toronto Press, 1980) 90-110; Graham Lowe, *The Administrative Revolution: The Growth of Clerical Occupations*, 1979, Unpublished Dissertation; Alfred Chandler, *The Visible Hand* (Belknap Press, 1977).

significantly, as did non-Anglo-American immigration.<sup>5</sup> This was also a period of labour unrest and union organizing, of centralized government intervention into the economy, the labour market and labour regulation, and of serious political challenges to liberal capitalism, in Ontario and across the country.<sup>6</sup>

The changing structures of economic activity, of production and of the labour process over the early 20<sup>th</sup> century provoked the growth of a waged professional class in Ontario, and these workers brought their employment claims to the common law courts with a new degree of frequency. A significant white collar workforce had begun to emerge in England as of the 1850s through its second industrial revolution, but English employment contract law only began to reorient towards this type of work at the turn of the 20<sup>th</sup> century.<sup>7</sup> In the early 20<sup>th</sup> century English law was applied in Ontario just as the provincial economy and labour market were in the midst of the transformations described above, and as the expansion of professional work was underway. Thus, if the law of employment contracts was slow to respond to the differences created by professional work in England, it occurred almost instantaneously in Ontario.

What did this substantive legal reorientation consist of in the early 20<sup>th</sup> century? As outlined in the last chapter, claims relating to waged employment contracts first emerged at common law in England at the turn of the 19<sup>th</sup> century. The courts applied the substance of master and servant law to determine such claims until the mid-19<sup>th</sup> century, when the common law of employment contracts branched out on its own to provide distinct legal claims and remedies, even if ones that were still heavily conditioned by master and servant notions of status and subordination. These doctrines were applied in Ontario when common law employment claims came before the courts, but this did not happen often in the 19<sup>th</sup> century. At the turn of the 20<sup>th</sup> century, however, the common law of employment was more frequently litigated and was substantively reoriented around white collar work. This occurred through three significant legal changes in notions of

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<sup>5</sup> Bryan Palmer, *Working Class Experience: Rethinking the History of Canadian Labour, 1800-1991*, 2<sup>nd</sup> Edition (Toronto: McClelland & Stewart Inc., 1992) at p. 157-159.

<sup>6</sup> Gregory Kealey, "1919: The Canadian Labour Revolt" (1984) 13 *Labour/Le Travail* 11. Craven, *Impartial Umpire*, *supra* note 4 at p. 90-110; Brown and Cook, *supra* note 2 at chapter 6: Labour and the New Society; Brian Bercusson, *Confrontation at Winnipeg: Labour, Industrial Relations, and the General Strike* (Montreal 1974); Ross McCormack, *Reformers, Radicals and Revolutionaries: The Western Canadian Radical Movement, 1897-1919* (Toronto: 1977).

<sup>7</sup> Norman Gemmill and Peter Wardley, "The Contribution of Services to British Economic Growth, 1856-1913" (1990) 27 *Explorations in Economic History*, 299 at Table 1(i) p. 301.

property and time, and in the tools of managerial control in employment. Through this period the courts began to think about the property parameters of labour power, viewing employee time, employee skill and knowledge, and the physical and intellectual outputs of workers' labour as separate commodities in law exchanged through contract. The second shift over this period was an expansion of the disciplinary tools of the managerial prerogative. As the property parameters of the wage-work exchange were narrowed in scope, and as some higher status workers were recast as waged-employees instead of independent business people, the courts began to draw on principles born of the law of agency to provide employers with new legal tools to control worker discretion. Employers continued to use the duty of obedience to manage the work of task-oriented employment, but the courts now also developed legal rights that were designed to tie the exercise of worker discretion to the needs of the enterprise. Finally, the third legal shift that occurred between the 1890s and the 1930s concerned legal notions of employment duration. Over the turn of the 20<sup>th</sup> century the legal presumption of annual hire was abandoned, and such that the employment contract was no longer constructed as one bounded in time. This served to alter the boundaries of the property purchased through an employment contract, provoking questions about how employment contracts could be dissolved and how to determine the loss from dismissal, paving the way for the emergence of employment contracts of indefinite duration. Together, these three legal changes established a nexus of ideas that created the legal foundations for the contractualization of the employment relationship at common law in Ontario.<sup>8</sup>

This chapter will examine the emergence and deployment of this new nexus of ideas between 1890 and 1930. The first part will provide a brief overview of the changing nature of the economy and labour market in Ontario, with an examination of the growth of a professional waged class of workers. The second part will discuss changing notions of property in employment, looking at employer attempts to control workers' time, property and competition, during and post-

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<sup>8</sup> In the *Personal Employment Contract* Mark Freedland argues that there is a nexus of ideas between the unrestricted notice rule (the right to dismiss with the provision of reasonable notice) and the limited damages rule (damages as limited to wages and contractual benefits over the reasonable notice period), which currently dominates the conceptual understanding of the employment contract at common law. He argues that this nexus obscures a series of doctrinal choices which "systematically minimize the protection accorded to personally employed workers in a way that is neither doctrinally inevitable nor neutral in policy terms". What I attempt to lay out in this chapter is the nexus of ideas which predates and was formative of the current wrongfulness/damages complex. See Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2005) at chapter 7.

employment. The third part will discuss the emergence of new tools of managerial control aimed at worker discretion, which was achieved by expanding existing grounds of cause for dismissal and through the migration of implied duties from the law of agency. Finally, the last part will present changes to the legal principles regarding employment duration, its effects on wrongful dismissals claims and on the understanding of work as a contractual endeavour. Particular attention throughout this analysis will be paid to the ways in which the changing composition of the workforce affected the law's understanding of its content. It is through this era that the common law of employment contracts, contract type 2, properly became the law of professional workers.

## **(2) Ontario's Second Industrial Revolution, the Emergence of White Collar Work and the Managerial Revolution**

Ontario underwent its second industrial revolution over the turn of the 20<sup>th</sup> century. Its economy was increasingly enmeshed with the economies of the rest of the Dominion's provinces. Canada's gross national product more than doubled between the 1900s and 1910s, with Ontario providing the driving force.<sup>9</sup> During this period Ontario experienced a sustained growth in manufacturing industries, which began to rival agriculture as a source of employment, while changes in its labour processes provoked the growth of professional class and managerial work.<sup>10</sup> Large-scale corporations became regular features of the economic and political landscape.<sup>11</sup> In this context the content of the common law of employment contracts was oriented towards professional work within medium and large scale firms.

Ontario had undergone its first industrial revolution over the mid-19<sup>th</sup> century.<sup>12</sup> The period between 1840 and 1880 saw the first significant expansion of manufacturing work in Ontario, based around a growth in trade in the province's natural resource products, primarily in the area of

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<sup>9</sup> Firestone, *supra* note 2 at section 3.

<sup>10</sup> John Baldwin and Alan Green, "The Productivity Differential Between the Canadian and U.S. Manufacturing Sectors: A Perspective Drawn from the Early 20<sup>th</sup> Century" (2008) *Canadian Productivity Review*; O.J. Firestone, *Canada's Economic Development, 1867-1953* (London: Bowes and Bowes, 1958) at table 67 and 68.

<sup>11</sup> Brown and Cook, *Canada*, *supra* note 2 at chapter 5; Lowe, *The Administrative Revolution*, *supra* note 4 at chapter 4.

<sup>12</sup> Gregory Kealey, "Toronto's Industrial Revolution, 1850-1892", in *Canada's Age of Industry, 1849-1896*, Michael Cross and Gregory Kealey, eds. (Toronto: McClelland and Stewart, 1982); Craig Heron "Factory Workers," in Paul Craven, ed., *Labouring Lives: Work and Workers in Nineteenth-Century Ontario* (Toronto: University of Toronto Press 1995), 479-590.

agriculture and forestry, transportation, and agricultural implements.<sup>13</sup> Although Ontario remained primarily an agricultural subsistence economy, with endemic labour shortages and only the beginnings of a relatively permanent wage-labouring pool, significant changes were nonetheless observable in regards to skilled crafts work.<sup>14</sup> Between the 1840s and the 1880s manufacturing work was increasingly moved out of household production into central locations owned by employers. Some manufacturing enterprises grew to significant size over this period, with increasing managerial attention paid to changing labour processes. Within factory employment employers began to subdivide and specialize the tasks of skilled workers, just as machinery became a bigger facet of the production process.<sup>15</sup> In the mid-19<sup>th</sup> century some industrialists in Ontario began to seek methods to increase work output. They did so through task specialization. This involved both a reduction in the number of products a skilled craft worker focused on, and then the separation of skilled, semi-skilled and unskilled tasks necessary to produce a single good. In this manner there was an increasing subdivision of tasks and specializations, allowing for non-skilled workers attracting lower wages to take on tasks that had previously have been done by a single skilled crafts worker. This began a process of skill dilution, slowly diminishing the independence of skilled craftsmen, transforming them from independent producers working in direct contact with clients to waged employees of industrial manufacturers.<sup>16</sup>

Through the same period, management techniques slowly began to shift. For most of the first industrial revolution, industrial enterprises were typically owned by a single owner, or two or three partners, and run by their male family members. Thus a single entrepreneur or small group of owners would personally preside over large enterprises, forging close relations with their workers,

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<sup>13</sup> Heron, *Factory Workers*, *ibid* at p. 486-487.

<sup>14</sup> W.C. Pentland, "The Development of a Capitalistic Labour Market in Canada", (1959) 25(4) *Canadian Journal of Economics and Political Science*, 450; Heron, *supra* note 12 at p. 500. But *cf.*, see Allan Greer, "Wage Labour and the Transition to Capitalism: A Critique of Pentland" (1985) 15 *Labour/Le Travail* 7 for a criticism of Pentland's explanation of the timing and causes of the emergence of a waged labouring class in Canada.

<sup>15</sup> Heron, *Factory Workers*, *ibid* at p. 503; 506-508, 510. See Sidney Pollard for a detailed description of the shifting labour process and managerial changes in England through the 18<sup>th</sup> and 19<sup>th</sup> centuries. Sidney Pollard, *The Genesis of Modern Management* (Baltimore: Penguin Books Ltd., 1968). See Alfred Chandler, *The Visible Hand* (Belknap Press, 1977) at chapters 1-4, for a discussion on these processes in the United States.

<sup>16</sup> Heron, *Factory Workers*, *ibid* at p.500-516; Bryan Palmer, *A Culture in Conflict: Skilled Workers and Industrial Capitalism in Hamilton, Ontario 1860-1915* (Montreal, 1979) at p. 71-95.



and directing their operations based on a mix of material care, loyalty, command and punishment.<sup>17</sup> Day-to-day discipline was either directly exercised by the owner or a family member, or, in larger enterprises, entrusted to a salaried foreman. Foremen held a significant amount of power in this context, undertaking labour recruitment, wage setting, production setting, day-to-day supervision and discipline over particular branches of operations. But, other than foremen “ [...] with only rare exceptions (notably the railways) we find no large new class of professional factory managers in the province’s industries before the end of the nineteenth century.”<sup>18</sup>

In the 1880s and 1890s, however, traditional approaches to workplace management began to change as the size of individual business enterprises grew. Alfred Chandler argues that the modern business corporation began to dominate economic activity through this period, at least in the United States.<sup>19</sup> These were enterprises which operated through multiple units, usually in multiple locations, whose interactions and activities were administered by a hierarchy of middle and top salaried managers “to coordinate the work of the units under its control”.<sup>20</sup> In tandem with the growth in the size of business enterprises and manufacturing processes, towards the end of the 19<sup>th</sup> century American businesses began to think strategically about ways of improving labour profitability by systematizing manufacturing processes.<sup>21</sup> Discussions over the changes necessary to

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<sup>17</sup> Heron, *ibid*; Paul Craven and Tom Traves, “Dimensions of Paternalism: Discipline and Culture in Canadian Railway Operations in the 1850s” in *On the Job: Confronting the Labour Process in Canada*, Craig Heron and Robert Storey eds., (Canada: McGill-Queen’s University Press, 1986).

<sup>18</sup> Heron, *Factory Workers*, *supra* note 12 at p. 536.

<sup>19</sup> The modern business enterprise was characterized by “many distinct operating units and is managed by a hierarchy of salaried executives”. Such an enterprise was one in which vertical and horizontal integration could occur. But as Chandler has argued, the advantages of such vertical integration could not occur until a “managerial hierarchy had been created”, because a “[...] multiunit enterprise without such managers remains little more than a federation of autonomous offices”. See Chandler, *The Visible Hand*, *supra* note 15 at p.7. While it is clear that the size of business enterprises grew dramatically over the early 20<sup>th</sup> century in Ontario we do not have complete statistical information about the legal forms such businesses over this period. We have some statistics for the pre-Confederation era. See R.C.B. Risk, “The Nineteenth-Century Foundations of the Business Corporation in Ontario” (1973) 23 U.T.L.J. 270 at p. 304-305. Brown and Cook indicate that in 1900 53 companies were formed under Dominion Charter, while in 1911-912 there were 658. See Brown and Cook, *supra* note 2 at chapter 5 at p. 91. See AW Currie, “The First Dominion Companies Act” (1962) 3(2) Can J Eco & Pol Sci 387 and Eric Tucker, “Shareholder and Director Liability for Unpaid Workers’ Wages in Canada: From Condition of Granting Limited Liability to Exceptional Remedy” (2008), 26(1) Law & Hist. Rev. 57, for a history of the American and Canadian debates, *inter alia*, over incorporation and limited liability.

<sup>20</sup> Chandler, *The Visible Hand*, *supra* note 15 at p.7

<sup>21</sup> Much of the early discussions over reforms to management methods were undertaken by engineers in trade journals. Some of their suggestions were for “cost accounting systems to promote vertical integration; production and inventory control plans to facilitate horizontal integration; and wage payment plans to stimulate production and reduce unit costs”. Daniel Nelson, *Managers and workers: origins of the twentieth-century factory system in*

modernize management emphasized that the traditional 'rule of thumb' approach to manufacturing organization was chaotic and wasteful, that it led to difficulties in maintaining managerial control over manufacturing operations, and that coordination between activities and in managerial relations was necessary. Whereas the day-to-day control over production had previously resided either with owners or with factory foremen, in the 1880s and 1890s conversations began in the United States about how to restructure the production process, culminating in the 1920s in the ideas of 'scientific management' popularized in particular by Frederick Taylor.<sup>22</sup>

Systematic and scientific management came to Canada a little later than in the United States. While the trade journals and digests informing the American debate in the late 19<sup>th</sup> century were in circulation in Canada, it was not until the early decades of the 20<sup>th</sup> century that Canadian industrialists began to contribute to that conversation and to implement systemized production procedures designed around the 'thrust for efficiency'.<sup>23</sup> Heron and Palmer argue that in the early 20<sup>th</sup> century in Southern Ontario 'efficiency' reorganization of the labour process in the steel industry was at the core of industrial disputes.<sup>24</sup> This reorganization was closely followed by a major wave of direct foreign investment by American companies in Canada, and by the opening of American manufacturing branch plants, particularly in Ontario and Quebec.<sup>25</sup> It was also during this period that the first wave of significant mergers and acquisitions took place in Ontario, consolidating capital such that only very few large companies controlled many major Canadian industries by 1920.<sup>26</sup>

Amongst the "eclectic collection of managerial reforms and innovations" of the early 20<sup>th</sup> century were some of the following: cost accounting and vertical integration methods, the study and control of work time, task simplification and standardization, and experiments with payment

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*the United States, 1880-1920* (University of Wisconsin Press, 1995) quoting Litterer at p. 50; Leland Jenks, "Early Phases of the Management Movement" (196) 5(3) *Administrative Science Quarterly* 421 at p. 428-430.

<sup>22</sup> Taylor's ideas were of important significance in changing thinking on production organization and management techniques, even if perhaps not as widely adopted in the details as is sometimes suggested. Nelson, *supra* note 21 at chapter 4; Bryan Palmer, "Class, Conception and Conflict: The Thrust for Efficiency, Managerial Views of Labor and the Working Class Rebellion, 1903-1922" (1975) 7 *Review of Radical Political Economics* 31 at p. 32.

<sup>23</sup> Craven, *Impartial Umpire*, *supra* note 4 at p. 94-100; Palmer, *ibid*; Heron and Palmer, *supra* note 4; cf Michael Bliss, *A living profit: studies in the social history of Canadian business, 1883-1911* (Toronto, 1974) at 11.

<sup>24</sup> Heron and Palmer, *ibid* at p. 434-456.

<sup>25</sup> Michael Bliss, "Canadianizing American Business: The Roots of the Branch Plant" in *Close the 49<sup>th</sup> Parallel etc: The Americanization of Canada*, Ian Lumsden ed. (Toronto: University of Toronto Press, 1970).

<sup>26</sup> Heron and Palmer, *supra* note 4 at p. 426-427. See generally Stapells, *supra* note 4.

methods and bonus systems.<sup>27</sup> All were designed to gain more productivity from workers and remove perceived inefficiencies from the labour process.<sup>28</sup> But such an approach required coordination of discrete tasks through additional layers of supervisors. The traditional zone of a foreman's discretion under the older factory system was divided into separate jobs that were increasingly centralized and undertaken by professional office staff.<sup>29</sup> The result was the creation of a longer, larger, more hierarchical and more impersonal managerial chain. The breakdown of manufacturing work into more discrete units also created a need to track production, sales, and worker input/output, all of which created an information explosion.<sup>30</sup> This served to promote administrative offices to a more central role in businesses' structures, and led to a major increase in the amount of clerical work and the number of clerical workers. Routine clerical work, previously a mid-level skilled trade, was refashioned as an unskilled area for women's employment, to be supervised by male managers.<sup>31</sup>

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<sup>27</sup> Palmer, *The Thrust for Efficiency*, *supra* note 22 at p. 32.

<sup>28</sup> Heron and Palmer, *supra* note 4 at p. 430.

<sup>29</sup> In so doing foreman lost their control over hiring and firing, wage setting and production rates setting. Control over employment recruitment and training was also centralized, instead of left to the foreman's discretion, as employers sought to stave off industrial unrest through the enactment of work 'welfare' programs. Nelson, *supra* note 21 at p. 51 concluded that: "In short, the supervisor under systematic management ceased to be the all-round manager that he had been under the traditional form of management." Craig Heron and Robert Storey's study of the steel industry in Canada suggest that there skilled workers played the primary managerial role on the shop floor in the 19<sup>th</sup> century, rather than foreman. As such, the institution of scientific management practices in that industry served to reduce their autonomy and control over wage levels. See Craig Heron and Robert Storey, "Work and Struggle in the Canadian Steel Industry, 1900-1950", in *On the Job: Confronting the Labour Process in Canada*, Craig Heron and Robert Storey eds., (Canada: McGill-Queen's University Press, 1986) at p 219.

<sup>30</sup> Lowe, *The Administrative Revolution*, *supra* note 4. According to Braverman, over this period the office was organized as an effective replica of the shop floor, where "every activity in production [was required] to have its several parallel activities in the management centre: each [to] be devised, precalculated, tested, laid out, assigned and ordered, checked and inspected, and recording throughout its duration and upon completion". Over the first thirty years of the twentieth century a variety of specialized administrative and managerial positions emerged to take on the centralized planning of tasks necessary to coordinate and track the production process. Lowe's figures suggest that between 1911 and 1931, approximately 150 000 new clerical jobs were created in Canada, of which 34.5% emerged from manufacturing, and 21% from the finance sector. See Harry Braverman, *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century* (New York: Monthly Review Press, 1974) at p.125; See also, Historical Statistics of Canada, *Section E: Wages and Working Conditions, Annual Earnings in Manufacturing Industries, Production and Other Workers, By Sex, Canada, 1905, 1910, and 1917 to 1975*, Table E41-48 (Statistics Canada)

<sup>31</sup> Through this period, women increasingly took on clerical and administrative tasks, and remained in those positions at the end of the First World War. Clerical positions lost some of their 'skilled' basis in this process, and men returning from the war took on managerial positions within administrative units, supervising the work of the female labour force. Graham Lowe, "Mechanization, Feminization and Managerial Control in the Early Twentieth Century Canadian Office", in *On the Job: Confronting the Labour Process in Canada*, Craig Heron and Robert Storey,

This was not an uncontested process. Adjustments to the labour process, managerial initiatives to diminish the independence of craftsmen, and the abandonment of the mutual obligations of a paternalist system of employment were a primary cause of labour unrest over the 1880s, and again between 1901 and 1914. Urban craftsmen had begun to organize themselves into craft unions in the 1850s, but organized trade unionism expanded across the province during the recession of the 1880s, over a period known as the Great Upheaval.<sup>32</sup> Led by the Knights of Labour, skilled and unskilled workers, men and women engaged in collective action.<sup>33</sup> Labour unrest once again intensified in Southern Ontario in the early 20<sup>th</sup> century, with industrial action combining with broader political agitation over the distribution of income and economic resources, in the midst of increasing capital consolidation.<sup>34</sup> In this context the federal government began to take a more active hand in regulating industrial disputes. In 1900 the *Conciliation Act* was passed, in 1903 the *Railway Labour Disputes Act* was enacted, and then in 1907 the federal government created a Labour Department in tandem with the *Industrial Disputes Investigations Act* (IDIA).<sup>35</sup> The social and economic impact of economic growth, industrialization and the changing nature of work relationships also stimulated provincial forays into minimum labour standards protection, in the areas of factory legislation, wage protection, and the regulation of child and female labour.<sup>36</sup>

Statistics on the nature of the Canadian workforce suggest that between the 1910s and 1930s the percentage of low skilled and managerial classes expanded at either end of the wage scale. Green

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eds. (Mtl and Kingston: McGill-Queen's University Press, 1986) at chapters 6 and 7. See p. 174 for a statistical breakdown of gender divisions in clerical work between 1891 and 1971.

<sup>32</sup> Gregory Kealey and Bryan Palmer, *Dreaming of What Might Be: The Knights of Labour in Ontario 1880-1900* (Cambridge, Cambridge University Press, 1982); Heron, *Factory Workers*, *supra* note 12 at p. 554-557.

<sup>33</sup> Kealey and Palmer, *ibid.*

<sup>34</sup> Heron and Palmer, *supra* note 4; Kealey, 1919, *supra* note 6.

<sup>35</sup> *Conciliation Act of 1900* (63-64 Vict., c.24); *Railway Labour Disputes Act of 1903*, 2 Edw. VIII, c.20; *Industrial Disputes Investigations Act of 1907*, 6-7 Edw. VII, c. 20 [IDIA]. As Fudge and Tucker describe, the federal government of the era undertook a dual-pronged strategy: on the one hand, its voluntarist conciliation system legitimized certain forms of collective behavior and representation, bringing 'acceptable' unions into the policy and political fold. On the other hand, those unions that did not choose to participate or that disobeyed the conciliation board's orders were not spared the hand of the law or the force of state. Judy Fudge & Eric Tucker, "Law, Industrial Relations and the State: Pluralism or Fragmentation?" (2000) 46 *Labour/Le Travail* 251 at 257-259; Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Don Mills: Oxford University Press, 2001) at Chapter 2.

<sup>36</sup> See Mark Thomas, *Regulating Flexibility, The Ontario Employment Standards Act and the Politics of Flexible Production*, 2003, Unpublished Dissertation, at chapter 2; Eric Tucker, "Putting Liberal Voluntarism to Work, 1880-1900", unpublished manuscript on file with author, at p.6-20 for an overview of protection work legislation enacted across the country in this period.

and Green's research suggests that in 1911 2% of the Canadian workforce was employed as a manager or foreman.<sup>37</sup> By the beginning of the 1930s, 3.8% of the workforce was so employed. In the manufacturing sector, there were 35 000 supervisory and office employees in 1905 in Canada, compared to 347 700 production workers. In 1930 there were 84 600 office and supervisory workers in manufacturing, compared with 529 800 production workers.<sup>38</sup> Coomb's figures on white collar work in Toronto suggest that in 1881 12% of the workforce was engaged in clerical work, which rose to 22% by 1911.<sup>39</sup> Green and Green's national figures indicate that in 1922 5% of the workforce worked in clerical positions, which grew to 12% by the beginning of the 1930s.<sup>40</sup> Similarly, Paul Craven calculates that between 1901 and 1911 there was a significant national increase in the ratio of administrative workers to "productive staff", but only in certain sectors and in large industries.<sup>41</sup> Managerial and professional workers' wages ranked primarily in the 90<sup>th</sup> percentile and above.<sup>42</sup> Skilled manufacturing workers ranked in the 50<sup>th</sup> to the 75<sup>th</sup> percentile generally, with tailors, artists, physicians and surgeons, along with skilled metal workers in the 75<sup>th</sup> to the 90<sup>th</sup> percentile.<sup>43</sup> At the lower end of the wage distribution were hotel service workers, labourers, barbers and cooks, non-metal skilled and semi-skilled workers, sailors, etc. At the bottom of the wage distribution were servants and people involved with cleaning services.<sup>44</sup> Green and Green's research suggests that the wage differential between skilled and unskilled work expanded significantly in Canada between 1911 and 1931, unlike the American evidence for the same period.<sup>45</sup>

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<sup>37</sup> Alan Green and David Green, "Canada's Wage Structure in the First Half of the Twentieth Century (with comparisons to the United States and Great Britain)", UBC, Department of Economics, 2007 at p. 29-34.

<sup>38</sup> M.C. Urquhart and K. Buckley, *Historical Statistics of Canada* (Toronto: The Macmillan Company of Canada, 1965), Series D280-287 at p.99. The population of Canada in 1905 was roughly 6 million people, which increased to 10 208 000 by 1930. See MC Urquhart and K Buckley, *Historical Statistics of Canada* (Toronto: The Macmillan Company of Canada, 1965), Series A1 at p.14

<sup>39</sup> David Coomb, *The Emergence of a White Collar Workforce in Toronto: 1895-1911* (Unpublished Dissertation, University of Toronto, 1978) at p. 12

<sup>40</sup> Green and Green, *supra* note 37 at 14.

<sup>41</sup> Paul Craven's quantitative study of the ratio of administrative to productive staff (AP ratio) in industrial organizations in Canada in the early 20<sup>th</sup> century suggests that only in some industries was there a significant increase in administrative work between 1901 and 1911. His research suggests that a smaller number of very large industries saw a significant expansion in their AP ratio during this time. See Craven, *Impartial Umpire*, *supra* note 4 at Appendix.

<sup>42</sup> Green and Green, *supra* note 37 at p.14

<sup>43</sup> *Ibid* at p. 29-34

<sup>44</sup> *Ibid*

<sup>45</sup> *Ibid* at p. 3-4.

Thus, over the first decades of the 20<sup>th</sup> century in Canada and Ontario, the nature of economic and social relations was in profound transition. Of greatest importance for the story told here was the expansion of a professional class of workers, whose wage levels were likely higher than the maximum recovery levels under its wage recovery mechanism.<sup>46</sup> At the turn of the 20<sup>th</sup> century Ontario's *Master and Servant Act* was available to recover wages of \$40.00 or less.<sup>47</sup> The average national wage of industrial workers in 1905 was \$375.00 per year. Given that \$40.00 would represent more than a month's earning, the Master and Servant wage recovery process was likely the more affordable and faster route for industrial production workers.<sup>48</sup> The annual national wage average of supervisory employees in 1905 was \$846.00 however.<sup>49</sup> They were therefore more likely to bring claims to the Divisional and County courts, which permitted claims ranging between \$40.00 and \$200.<sup>50</sup> As the number of professional workers grew in size, they brought their employment-related claims to the common law courts, such that the number of common law employment-related claims increased in number, and the substance of the law was reoriented to focus primarily on professional work.

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<sup>46</sup> As first enacted in 1847 the Act applied to "servants and labourers", and was subsequently amended in 1855 to make clear its application to "journeymen or skilled labourers in any trade, calling, craft, or employment". There was very little jurisprudence on the scope of the Act's coverage over the second half of the 19<sup>th</sup> century. Eric Tucker suggests that the decision *In re Joice* (1861), 19 UCQB 197, in which a teacher was found not to be covered by the Act, was likely motivated by a status-based conception of what constituted a servant. I have not located any cases that directly examine the question before the 1964 case of *Winkler v High-Test Electrical Manufacturing Ltd.*, [1964] 1 O.R. 386 (H.C.J.) [*Winkler*]. There were, however, a number of cases on the differences between servants and partners for the purposes of the Master and Servant Act. See, for instance, *Washburn v. Wright*, [1913] O.J. No. 808 See also Eric Tucker, *Constructing the Liberal Voluntarist Employment Regime: 1850-1879*, unpublished manuscript on file with the author, at p.52.

<sup>47</sup> The 1897 revision to the Master and Servant Act permitted masters or servants to bring a complaint to a Justice of the Peace regarding the terms of their engagement after its end, including regarding wages owing. See *Master and Servant Act*, RSO 1897, c.157, s.7 and 11. No more than \$40 of unpaid wages could be recovered. Justices of the Peace were found not to have jurisdiction to award damages for wrongful dismissal in *Swanick and Kotinsky (Re)* (1909), 19 OLR 407.

<sup>48</sup> Urquhart and Buckley, *supra* note 38 at p.99.

<sup>49</sup> *Ibid*

<sup>50</sup> *An Act Respecting the County Courts*, RSO 1897, c. 55, s.23; *An Act Respecting the Division Courts*, RSO 1897, c.60, s.72. Between the 1890s and the end of the 1920s, there were 9 reported claims by workers for wages at common law (including by merchant seamen). See *Davieaux v. Algoma Central R.W. Co.*, [1903] 4 O.L.R. 106; *Reaume v. Jubinville*, [1908] 12 O.W.R. 609 (H.C.J. Div. Ct.); *Webster v. Jury Copper Mines Limited*, [1908] 12 O.W.R. 632 (H.C.J.); *Bilow v. Larder Lake Proprietary Gold Fields Limited*, [1908] 11 O.W.R. 573; *Spearman v. Renfrew Molybdenum Mines Limited*[1919] 15 O.W.N. 343; *Mandryx v. Morozuk*, [1924] 25 O.W.N. 714 (S.C. H.C.Div); *Ostrum v. Miyako (The)*, [1924] 2 D.L.R. 200; *Venosta (The) v. Colliers*, [1925] Ex.C.R. 212; *Thompson v. City of Windsor* [1928] 35 O.W.N. 117 (S.C. Ap. Div.) A number of cases were also brought for wrongful dismissal and wages owing, a number in which the court proceeded on the basis of quantum meruit, and a number in which the courts found the work to fall within the family work presumption against remuneration.

### (3) Employment Contract Cases Between 1890 and 1930: A general description

As the 20<sup>th</sup> century got underway, the Ontario bar understood the provincial laws of work to come from domestic statutes and the common law of England. Judges continued to use English decisions to decide the cases that came before them, and English appellate decisions were considered binding. Although American cases had been used in the 19<sup>th</sup> century by the Ontario judiciary in other areas of law, this did not occur with frequency in employment law cases.<sup>51</sup> As of the 1890s there was some upsurge in the use of American decisions, particularly in property-related claims, but generally the Ontario judiciary remained strictly faithful to English legal developments. They relied only sporadically on local decisions, and very rarely used precedents from other provinces.

An increasing number of claims were reported before the common law courts regarding employment as of the 1890s, which paralleled the province and country's economic expansion over this time. Unsurprisingly, it is in the area of tort negligence (vicarious liability and workplace safety conditions) that the greatest number of common law claims relating to work was brought over this era.<sup>52</sup> But common law contractual claims also began to be litigated more frequently as of the

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<sup>51</sup> J.M. MacIntyre, "The Use of American Cases in Canadian Courts" (1964-1966) 2 U.B.C. L. Rev. 478; Bora Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969) at 98-106; R.C.B. Risk, "The Golden Age: The Law about the Market in Nineteenth-Century Ontario" (1976) 26(3) U.T.L.J. 307 at p. 339-340; R.C.B. Risk, "Sir William R. Meredith C.J.O.: The Search for Authority" (1982-1983) 7 Dal. L.J. 713 at p. 720-721.

<sup>52</sup> These claims are beyond the scope of this project, and relatively little research has been conducted into the common law of torts in the workplace between the 1890s and 1930s, although there was a significant amount of contemporary commentary on the topic. See, for instance, "Employer's Liability to Servant: The position of a servant who continues work on the faith of his master's promise to remove a specific cause of danger (note)" (1898) 34 Can. L.J. 289; "Liability of an Employer for the Torts of an Independent Contractor (note)" (1904) 40 Can. L.J. 529; "Liability of a Master, Apart from Contract, for Tortious Acts Done by a Servant While in Control of Vehicles and Horses (notes)" (1911) 47 Can. L.J. 521; D.A. MacRae, "Servants Own Private Ends" (1923) 1 Can. Bar Rev. 67. There have, however, been some significant studies of workplace safety and vicarious liability in the 19<sup>th</sup> century. See Eric Tucker, "The Law of Employers' Liability in Ontario 1861-1900: The Search for a Theory" (1984) 22(2) O.H.J.J. 213; Eric Tucker, "The Determination of Occupational Health and Safety Standards in Ontario, 1860-1982: From the Market to Politics to...?" (1983) 29 McGill L.J. 261 at 269-282; R. W. Kostal, "Legal Justice, Social Justice: An Incursion into the Social History of Work-Related Accident Law in Ontario 1860-1886" (1988) 6(1) Law and History Review 1; Peter Karsten, *Between Law and Custom: 'High' and 'Low' Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia, and New Zealand, 1600–1900* (New York: Cambridge University Press, 2002) at 426. Another area of significant litigation over this period, as over the 19<sup>th</sup> century, was in regards to seduction claims, where a father would claim damages for the income lost by a daughter who was impregnated out of wedlock. The father could claim as master, whether or not the daughter was in fact remitting to the household. For more information on such claims, see Constance Backhouse, "The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada" (1986-1987) 10 Dal. L.J. 45.

1890s. As Table 2 demonstrates, there was a significant increase in reported cases between the 1890s and 1910s, before dropping down in the 1920s.

Table 2: Summary of Reported Employment Contract Cases, 1890-1929

Decade	Wrongful Dismissal	Property-Related Claims	Misc	Total
1890-1899	5 2 of which appealed <sup>a</sup>	1	0	6
1900-1909	18 2 of which appealed	7 3 of which appealed	11	36
1910-1919	22 2 of which appealed	6 3 of which appealed	5 1 of which appealed	33
1920-1929	15 3 of which appealed	4 Including 1 cross-claim for WD	7	26

<sup>a</sup> The cases are organized by date of decision. The ‘appeals’ category denotes the number of cases decided within each decade that was then appealed upwards. Cases that were appealed are only counted once, in the decade in which the first reported decision was made.

Civil claims regarding employment contracts were of two main types between 1890 and 1930: wrongful dismissal claims, and claims from employers seeking property rights and contractual control over the intellectual and physical resources of workers.<sup>53</sup> Over this period claims were brought by sales agents, machinists, engineers, bakers, jewellers, steamship hands and mariners, tailors and seamstresses, managers, superintendents, physicians, etc.<sup>54</sup> Domestic servants and unskilled industrial workers very rarely brought claims at common law regarding dismissal, although they were subject to employer-initiated property claims. Very few women brought claims at

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<sup>53</sup> There were additionally a few claims by employers against workers for leaving within the terms of their contracts, a few claims that were particularly about the interpretation of the written terms of an agreement, and a few claims about whether the claimant constituted a worker or partner, so as to have access to the company’s financial records. For the latter category, section 3 of the *Master and Servant Act*, R.S.O. 1914, c.144 s.3(2) created a presumption against partnership when workers were paid in shares of the profits, and protected employers from having to disclose their financial records to employees.

<sup>54</sup> According to Green and Green’s national weekly occupational wage distribution for 1921, clerks between the ages of 15-24 earned in the 10-25<sup>th</sup> percentile of workers, while those aged 65 and over earned in the 25-50<sup>th</sup> percentile; bakers between 25-65 years of age earned in the 25-50<sup>th</sup> percentile; machinists between the ages of 25-65 were in the 50-75<sup>th</sup> percentile of wage earners; tailors in the 50-75<sup>th</sup> percentile; physicians were in the 50-75<sup>th</sup> percentile of wage earners; managers ranged from the 50-75<sup>th</sup> percentile upwards depending on industry. See Green and Green, *supra* note 37 at p.41-42.



common law regarding work, except occasionally as regards family work.<sup>55</sup> For the most part, the common law of employment contracts was concerned with the employment relationships of skilled craft workers, skilled service workers, sales agents, and managers (from foreman to general managers). All the claims tallied in Table 2 were indexed in legal reports and journals of the time as “master and servant” cases.<sup>56</sup>

#### **(4) What do Wages Buy? Contestation over Property Rights in Employment at the Turn of the 20<sup>th</sup> Century**

Kenneth Vandavelde and Catherine Fisk each argue that over the course of the 19<sup>th</sup> century the courts’ understanding of property rights was profoundly transformed, from an absolute dominion over physical things to a set of relational rights between people over dephysicalized interests of value.<sup>57</sup> This process is visible in the employment-related case law of the early 20<sup>th</sup> century. As argued in the previous chapter, the courts in the 19<sup>th</sup> century understood an employment contract to provide employers with a general right of ownership over workers’ labour power for the duration of the employment contract. This purchase was not solely for working hours, or in regards to a particular form of work. Rather employers purchased a worker’s entire labour for the duration of the express or implied year term.<sup>58</sup> Charles Labatt explained that a master is “viewed as a party who

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<sup>55</sup> There are approximately 3 claims by women between 1890 and 1930.

<sup>56</sup> The indexing system for reported decisions in Ontario was not terribly standardized over the 19<sup>th</sup> century, but became somewhat more so over the early 20<sup>th</sup> century. ‘Master and servant’ was the general heading for all work-related claims, including statutory claims, negligence claims, contract claims, etc. But once the general area was identified, rather than standardized concept terms, a quite precise explanation of the claim might follow. For instance, ‘*Master and Servant -- Claim by Engineer against Mining Company for Arrears of Salary*’. There was rarely a general contract index term heading prior to the early 20<sup>th</sup> century. And wrongful dismissal claims, even of senior managerial employees, were almost always classified as Master and Servant cases instead of contract cases. This analysis is based on my perusal of all printed reported decisions in Ontario between 1845 and 1900. For 20<sup>th</sup> cases I have used a series of Quicklaw searches. Quicklaw’s reference librarians explained that they copied index headings verbatim of all decisions that they have published online.

<sup>57</sup> Kenneth Vandavelde, “The New Property of the Nineteenth Century: The Development of the Modern Concept of Property”, (1980) 29 Buff L Rev 325; Catherine Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800-1930* (USA: University of North Carolina Press, 2009) at p.9.

<sup>58</sup> I have found little in the way of judicial discussion on employers’ property rights over workers’ labour at common law in the 19<sup>th</sup> century. William Roberts, the miners’ lawyer, however, explained the master and servant acts of the 18<sup>th</sup> century as conceiving of the relationship of master and servant as one where the “employer had unlimited control over the whole of [the servant’s] time”. See William Roberts, Testimony before the *Select Committee and Royal Commission Report on Master and Servant Law, 1865-1867* (Shannon: Irish University Press Series of British Parliamentary Papers) at s. 1657 (regarding master and servant laws). Similarly in settlement cases workers who were permitted evenings and weekends off were not considered to be under annual hire contracts,

has acquired by the contract of hiring a proprietary interest, more or less complete according to the circumstances, in the services of the person hired. In other words, the assumed effect of the contract is to vest in the master a right to control for his own benefit the whole or part of the earning capacity of the servant".<sup>59</sup> The master's right of control, and the worker's corresponding duty of obedience, was therefore premised on the employer's general purchase of labour service over the term of the employment contract.

Once the presumption of annual hire was abandoned in the 1890s, as will be discussed below, the judicial approach to determining property rights in employment began to change. This occurred as Ontario underwent its second industrial revolution, during which the province experienced a large growth in industrial manufacturing and service sector employment.<sup>60</sup> Between the 1890s and the 1930 there was an intensification of technological innovation and increasing specialization of industrial manufacturing methods. In this context there was a growing emphasis on the economic value of information, knowledge and job-specific worker training, and an increase in litigation concerning the property entitlements of parties to employment relationships. Employers over this period relied on older master and servant concepts such as exclusive service, and rights of possession and control throughout the duration of an employment contract to assert entitlements to workers' time, workers' skills and information gained on the job, and the physical outputs of their labour, during and post-employment. But once the employment contract was no longer fixed in time, the courts moved away from a general the idea that contracts of hire included workers' sale

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even if employment for multiple year contracts. These were referred to as exceptive hire contracts and could not establish a settlement by hire. See *R v. St John Devizes* (1829) M. & R. 680 (QB); Robert 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) at p. 85-86, 157.

<sup>59</sup> Labatt enunciated this principle in 1913, although, as I argue, in Ontario it was in the midst of reformulation. Labatt explained that there were three lines of cases surrounding employers' interest in workers' earning capacities. One line of cases was premised on the owners' proprietary interest over that earning capacity, entitling an employer to an equitable accounting of any wages earned by the worker outside the job. The second line of cases was based on the same principle but concerned an employer's right to dismiss a servant for extraneous work. The third line of cases resulted in the same equitable remedies as the first, but was articulated on the basis of workers' fiduciary obligations to their employers. See C.B. Labbatt, *Commentaries on the Law of Master and Servant, 2<sup>nd</sup> Edition* (Rochester, Lawyers' Cooperative Publ., 1913). This book was published in Rochester, New York but concerned the laws of England.

<sup>60</sup>According to the Bank of Canada's report to the 1956 Royal Commission on Canada's Economic Prospects, in 1891 24.2% of the Canadian workforce were engaged in service industries, 48.4% in agriculture, forestry and fishing, and 14.8% in manufacturing. By 1931 37.9% of the Canadian population worked in service industries, 31.2% in agriculture et al, and 18.5% in manufacturing. See Bank of Montreal, *The Service Industries*, vol. 17, Report of the Royal Commission on Canada's Economic Prospects (Ottawa, 1956) at p.5-6.

of their whole labour power over the duration of its term, and instead began to present labour power as a series of different economic commodities capable of sale through contract. And as labour service was subdivided into a series of separate commodities, the judiciary increasingly determined claims for property entitlements in employment based on whether the particular activity was intended to be exchanged by the parties. While Deakin and Wilkinson locate the contractualization of employment in the process of limiting the duty of obedience for higher status workers, claims regarding property in employment provided a perhaps even clearer locus for examining the shift towards understanding employment as an exchange in law.<sup>61</sup>

The following section will examine employer claims for property interests over the physical outputs of workers' labour, to all profits gained from their skill and time during the life of an employment contract, and to a right of control over deployment of the knowledge and information gained on the job, both during and after employment.

(a) Property Rights Over Workers' Time and the Physical Products of Labour

Over the early 20<sup>th</sup> century employers and workers fought legal battles over what amount of a worker's skill and time was purchased through a hire contract, and what products of a worker's labour such a contract provided to an employer. Unlike in previous eras, however, as of the 1890s the courts of Ontario increasingly looked to the parties' intentions to determine what property rights were the subject of exchange in employment. This was true in regards to copyright and patent claims over goods produced by workers, regulated by statute.<sup>62</sup> It was also increasingly

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<sup>61</sup> Simon Deakin and Frank Wilkinson argue that the contractualization process was one of transforming the employment relationship into one of mutual obligations, in which some limitations were placed on the employer's ability to direct the relationship. Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (Oxford: Oxford University Press, 2005) at 14-15; 80. This process began for upper status workers in the late 19<sup>th</sup> century. See for instance *Price v. Mouat* (1862), 11 CB (NS).

<sup>62</sup> The law stipulated that the employer was not considered the author of a literary work within the meaning of the *Copyright Act* unless an intention could be inferred from the express or implied term of the employment agreement that ownership should vest in the employer. Charles Labatt noted that where the issue was to determine the intent as implied by the employment agreement, the courts would look not only to its terms but to the nature of the work in question. See C.B. Labatt, "Patent and Copyright Law, Considered with Reference to the Contract of Employment" (1905) 42 Can. L.J. 529 at p.549. See *Sweet v. Benning*, (1855) 16 C.B. 459; *Lawrence v. Aflao*, (1904) A.C. 17; *Lamb v. Evans*, (1893), 1 Ch. 218 [*Lamb*]. By contrast, the general rule in regards to patents was that the employer held proprietary rights to any inventions it hired the worker to investigate and/or create, but anything discovered or invented beyond what was contracted for was generally the employee's property. For

adopted in regards to basic questions of property entitlement over physical objects made on the job. In *Copeland-Chatterson v. Business Systems*, an employer claimed a right to tools a master tool-maker made in the workplace during work hours, but took with him upon leaving the company's employ.<sup>63</sup> The High Court of Justice approached the question as a matter of whether the employer owned the worker's time when the good was produced. The court noted that it was trade custom for tool makers to use their idle time to make tools with materials they had purchased themselves, even if with the employer's machinery. More importantly, there were times of the work day when the machines that the tool-maker supervised required no attention. Given that the tool-maker was free to sit idle during such times, why should he not use it productively to make his own tools? The Court held that "[i]n the absence of a covenant expressly to the contrary, a servant's spare time is his own, and he is not accountable to his master for benefits derived from its use".<sup>64</sup> The only recourse available to the employer was for improper use of the factory's power to make the tool, but this would not grant the employer the ownership rights it sought. This was a sharp contrast to 19<sup>th</sup> century settlement decisions such as *R. v. St John Devizes*, where the court assumed that the employer owned the worker's entire time through the day and night unless an explicit contract term stated otherwise.<sup>65</sup>

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Ontario patent cases see *Piper v. Piper* (1904), 3 O.W.R. 451; *Campbell v. George N. Morang & Co. (Ltd.)* (1905), 6 O.W.R. 901 (Ont. C.A.) [*Campbell*]; *Imperial Supply v. Grand Truck* (1912), 7 D.L.R. 504; *Spearman v. Renfrew* (1919), 15 O.W.N. 343; *Equator Manufacturing Co. v. Pendlebury*, [1926] 1 D.L.R. 1101 [*Equator Manufacturing*]; *Willard's Chocolates Ltd. v. Bardsely* (1928), 35 O.W.N. 92. In *Equator Manufacturing* the court stated at para 16 that:

Generally speaking, the law, I think, is that if a servant makes an invention whilst in the employ of his master, the invention belongs to the servant unless the servant was employed for the express purpose of inventing."

The exception to this rule arose where a relationship of good faith was to be implied "as an obligation arising from the contract of service". In such cases, such as *Willard's ibid* at para. 8, the employee effectively acted as trustee for his employer in regards to the patent. See also Catherine Fisk's description of the evolution of patent ideas in employment in the United States between the 1830s and the 1930s. Fisk suggests that prior to the 1830s the patent system was based on a single-inventor paradigm, but that as production, invention and research became more complex and participatory, the law of patents and of master and servant came into increasing interaction. As of the mid-19<sup>th</sup> century the courts increasingly examined what the worker was hired to do. Where the worker invented during work hours, at an employer's facility using their tools, the suggestion as of the 1880s was that the invention was done for the employer, who therefore held proprietary rights over it. Fisk, *Working Knowledge*, *supra* note 57 at p.39-44 and chapters 3 and 4.

<sup>63</sup> *Copeland-Chatterson Co. v. Business Systems Limited* (1906) 8 O.W.R. 888 (Ont. H.C.J. T.D.) [*Copeland at the TD*] at para. 23, rev'd by (1907), 10 O.W.R. 819 (Ont. C.A.) [*Copeland at the CA*]

<sup>64</sup> *Copeland at the CA*, *ibid* at para 10.

<sup>65</sup> *R v. St John Devizes* (1829) M. & R. 680 (QB) [*St. John Devizes*].

The employer in *Copeland-Chatterson* suggested that it owned anything and everything the employee produced during working hours, or on its premises.<sup>66</sup> And in at least two other cases over the early 20<sup>th</sup> century, employers asserted ownership over the products of *all* an employee's time and efforts, even outside of the job.<sup>67</sup> In the 1900 case of *Jones v. Linde British Refrigeration* the plaintiff employee brought an action to recover a commission he claimed owing to him after the defendant company paid it to his employer instead.<sup>68</sup> His employer claimed that the commission was earned through his employment, such that they were entitled to it.<sup>69</sup> For the Court of Appeal Moss J.A. agreed that the general rule was that enunciated in *Morison v. Thompson*: "the profits acquired by a servant or agent in the course of or in connection with his services or agency belong to his master or principal".<sup>70</sup> But, having originated in the feudal relationship between lord and vassal, and then extended to apprentices and servants, it could not apply to all types of occupations, or to "every class of employee or agent". Justice Moss noted that in the case of partnerships, while partners were bound to devote their time and services for the benefit of the partnership, they were also able to make individual profit outside the scope of the relationship, so long as they were not in competition with it. This principle, Justice Moss held, should also be applied to employees and servants, because "the law is [not] so extreme in the case of employees or servants as to prevent them from engaging their minds in other occupations out of the hours of their service, where the occupation is not inconsistent with or antagonistic to the master's business

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<sup>66</sup> *Copeland*, *supra* note 63.

<sup>67</sup> Catherine Fisk's description of property-related claims in the United States suggests that cases concerning the use of worker's time outside of the job were already well established there in the 19<sup>th</sup> century. See Fisk, *Working Knowledge*, *supra* note 57 at p. 88-89.

<sup>68</sup> See *Jones v. Linde British Refrigeration Co.* (1900), 32 O.R. 191 (Ont. H.C.J. Ch. Div), *rev'd* by (1901), 2 O.L.R. 428 (Ont. C.A.) [*Jones at the C.A.*] [*Jones*] Jones was employed as the managing director of the Cold Storage Company. His employer had asked him to advise one of their clients about changes to their plant because of his side knowledge in this area. He recommended that this client use the Linde British Refrigeration Company, the defendant. Jones had an agreement with the Linde British Refrigeration Company, without his employer's knowledge, for commission on any business he provided to them. But rather than pay him the commission, they paid it to his employer, at its request. The justices of the Chancery Division concluded that because Jones' consultation relationship with the defendant began at his employer's request, the referral occurred as part of his employment. The Court of Appeal, however, disagreed, holding that his employer had simply suggested that he make use of his special skills in regards to an area that he was not called upon to use in their employ.

<sup>69</sup> The legal question here, as had been stated in the English case of *Williamson v. Hine*, [1891] 1 Ch.390 at 393 was whether Jones acted within the terms of his employment in making this referral, such that its benefits belonged to his employer, or whether he acted outside of his employment such that he could receive remuneration for it. *Williamson v. Hine*, [1891] 1 Ch.390 [*Williamson*] at 393, cited by the Chancery Division in *Jones*, *supra* note 68 at para 10.

<sup>70</sup> *Jones at the C.A.*, *supra* note 68 at para 17; *Morison v. Thompson* (1874), L. R. 9 Q. B. [*Morison*].

or interest”.<sup>71</sup> The Court of Appeal concluded that the worker did not intend the services at issue to be for the employer’s benefit, that the employer did not expect to benefit from them, and they imposed no loss on the employer. On this basis, the worker was held entitled to the commission.

If there was no common law prohibition on working on one’s own account outside the hours of service and outside the bounds of the employment agreement, in the 1904 case of *Sheppard Publishing Co. v. Harkins* the question was whether an exclusive service provision in an employment contract could permit an employer to receive an accounting of wages from the worker earned outside of work.<sup>72</sup> The worker had expressly agreed to a contract term prohibiting him from engaging in any other business during the term of the agreement. The employer brought a claim for violation of the exclusive service provision, claiming that the worker had engaged in side projects, but rather than requesting damages, the employer instead claimed an accounting on the employee’s profits from such ventures. Such an argument seemed to rely on older master and servant notions where the employer held the right to control and exclusive possession over the worker for the entire contract. The claim was rejected by the Trial Division in *Sheppard Publishing* however. The court now held that the contractual exclusivity requirements must be read with limitations.<sup>73</sup> The employer was entitled only to nominal damages, not an accounting. This decision was partially affirmed on appeal on the Divisional Court, where the justices took the opportunity to comment further on the employer’s ownership of worker time.<sup>74</sup> The Court noted that the older cases that relied on the maxim ‘whatever is acquired by the servant, is acquired for the master’, would shock the modern mind. While “[n]o doubt the rights of the master over the person as well as the time and labour of his servant were much more extensive formerly than they are today,”<sup>75</sup> such older principles were inconsistent with modern day notions of liberty and citizenship. A covenant to provide all one’s time and attention to an employer’s business must be given a reasonable construction. It could not mean that the worker was bound to provide services at all hours of the day or night, or in times designated for rest and relaxation. Neither could it require the

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<sup>71</sup> *Jones, ibid* at para 17.

<sup>72</sup> *Sheppard Publishing Co. v. Harkins* (1904), 4 O.W.R. 477 (Ont. H.C. T.D.), modified by (1905), 9 O.L.R. 504 (CA) [*Sheppard*].

<sup>73</sup> *Sheppard at the CA ibid*, at p. 510; *Jones at the CA, supra* note 68.

<sup>74</sup> *Sheppard at the CA, ibid*.

<sup>75</sup> *Ibid* at para. 9.

worker to sit in idleness for periods of the work day when no useful work could be provided to one's employer. Anglin J. stated that:

If he is unable to utilize his time for the benefit and advantage of his employer at that for which he is employed, he may, without becoming liable to account for benefits so acquired, make other use of it not inconsistent with the discharge of the duties to his employer which he has undertaken. To hold otherwise would be in effect to place the employee of the present day in a position little, if at all, better than that of the villein of former times.<sup>76</sup>

Justice Anglin went on to consider English case law on a second question. Although employers could not claim an accounting from worker endeavours undertaken during their spare time, could they claim profits or income for work done by the worker during time that should have been dedicated to the employer? Justice Anglin noted that the older English cases would answer this question in the affirmative, because the law provided employers with ownership rights over a worker's entire time and labour, such that the employer could claim its value or proceeds. Although expressing doubt as to its continued soundness, the Court held that the rule remained that the "money obtained by the servant by the sale of time and labour which belonged to his master, [was], in contemplation of the law, the proceeds of his master's property".<sup>77</sup> In other words, the employer owned the worker's labour and all profits from that labour produced during working time.

Inherent in this line of reasoning was the idea that an employer's property rights over a worker's time and/or labour emerged from, and was limited by, the contractual exchange between them.<sup>78</sup> Employers purchased workers' time, and all of their efforts during that time. But the terms of such a purchase would depend on the particular contract. In *Thwaites v. McKillop* a worker staked and acquired mining claims for himself, which the employer then claimed the right to on the basis that

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<sup>76</sup> *Sheppard* at the TD, *supra* note 72 at para. 11.

<sup>77</sup> *Ibid* at para 15.

<sup>78</sup> Catherine Fisk suggests that the move to contract in property-related claims operated to restrict the traditional rights of artisans in the United States. She explains that the traditional rule in the mid-19<sup>th</sup> century was that "each free man control[s] his own labor and own[s] the fruits of his labor except to the extent that he had contracted away both the labor and the results thereof". This analysis seems correct in regards to artisanal work, but less clear in regards to domestic service, and non-skilled and semi-skilled work. Case law from England in the early mid-19<sup>th</sup> century concerning the duty of obedience clearly suggest that there was no concept of 'free' time as regards agricultural and domestic work. And as Robert Steinfeld notes, English settlement cases from the early and mid-19<sup>th</sup> century distinguished between the work of servants and labourers based on whether or not the worker was contractually permitted time outside of the employer's control. See Fisk, *Working Knowledge*, *supra* note 57 at p. 88-89; Steinfeld, *The Invention of Free Labor*, *supra* note 58 at p. 84-87; *Turner v. Mason* (1845) 53 E.R. 411 [*Mason*]; *St. John Devizes*, *supra* note 65.

they were obtained during work time.<sup>79</sup> The Court of Appeal stated that the rule was not simply that “the work done by a servant when in the employ of the master, at least of the character for which he is employed, is work done for the master”.<sup>80</sup> Rather, the principle was that an employer would gain the benefits of work done by an employee where that appeared to be what they had contracted for, as determined by the employment agreement and the surrounding circumstances. In this instance, the Court of Appeal did not think the worker had contracted to obtain the claims for his employer. And though the worker had staked the claims on the employer’s time, the only remedy was damages, not a property entitlement to the claims for the employer.<sup>81</sup>

Over the course of the early 20<sup>th</sup> century the Ontario courts, following English precedents, displayed an understanding of the employment relationship which abandoned the notion that employers owned the totality of a worker’s time, skill and effort, day and night, during the duration of their relationship. As part of a general move away from absolute dominion property rights, the courts crafted an understanding of property rights in employment as a series of limited relational rights between people based on the nature of the job and the nature of the intended services to be exchanged between the parties. In so doing labour power was commodified into a set of different valuable interests which could be exchanged through contract. A contractual logic clearly emerged through property-related cases in this era.

#### (b) Information, Skill and the Control of Competition

At the same time as questions about employers’ ownership over labour time and products were before the courts, employers also sought legal controls over work-related information and competition from current and former employees. At the turn of the 20<sup>th</sup> century, as employers experimented with ‘efficient management’ strategies, innovations in production and business methods were perceived as a source of value. Employers were consequently concerned with protecting information relating to their particular business and production methods from being

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<sup>79</sup> *Thwaites v. McKillop* (1925), 29 O.W.N. 122 (Ont. S.C. Ap. Div.) [*Thwaites*].

<sup>80</sup> *Ibid* at para. 6.

<sup>81</sup> *Ibid*. The Court of Appeal does not appear to have considered the holding in *Sheppard Publishing Company v. Harkins* (1905), 9 O.L.R. 504 (CA). However, the reported decision is not a transcript of the judgment, but a report of the decision as read to the Court, so it is difficult to be sure.



disclosed or used by workers, during and after employment.<sup>82</sup> As will be discussed in the following section, the English courts began to draw on a series of implied duties from the law of agency to elaborate broad duties of confidentiality, good faith and fidelity during employment, which was also applied in Ontario. Use and disclosure of employment-related information was held to be ground for dismissal. But dismissal simply served to remove a worker, not to prevent that worker from subsequently disclosing or using the information gathered on the job. Employers therefore also sought to restrain post-employment use of information and skill, drawing on duties of good faith and loyalty, on a duty of confidentiality recast from tort to contract, and on express contractual covenants to enjoin post-employment competition and use of confidential information. Employers over this period argued that they retained a proprietary interest over work-related information, whether held in physical form or in workers' memories, and also sought to claim a proprietary interest in workers' skills developed through on-the-job training. They requested injunctions to enforce their rights and damages to compensate their breach. As Catherine Fisk argues, the courts over this era struggled over whether "inchoate knowledge [...] could be considered a firm asset".<sup>83</sup>

In the early 1890s in a series of cases the English Court of Appeal held that a worker could not use information gained during employment to their employer's detriment during or post-employment. The courts drew on legal principles from the laws of agency and tort to hold that employment contracts included implied terms of confidentiality and good faith, such that the use or disclosure of confidential information entitled employers to damages and an injunction.<sup>84</sup> Where the employee took information reduced to physical form, in cases such as *Lamb v. Evan*, *Robb v. Green* and *Merryweather v. Moore*, the courts had no difficulty finding a breach of confidentiality, viewing such a taking as dishonest and amounting to theft.<sup>85</sup> Justice Kekewich stated in *Merryweather* that a worker is not to use "the opportunities which that service gives him of gaining information" except

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<sup>82</sup> For an American description of the uses and differences of different unfair competition doctrines (trade secrets, non-compete agreements and trademarks), see Fisk, *Working Knowledge*, *supra* note 57 at p.15-17.

<sup>83</sup> *Ibid* at p. 35.

<sup>84</sup> Prior to the late 19<sup>th</sup> century only workers in agency relationships, including domestic servants, were subject to duties of confidentiality. As the courts began to require such a duty in employment more broadly as of the 1880s, they were initially unsure whether it amounted to the breach of a tort duty, or whether some types of relationships gave rise to an implied contract between the parties to maintain confidentiality. In *Merryweather v. Moore* Justice Kekewich suggested that the duty of confidentiality was really an implied contractual term that existed within all employment contracts. *Merryweather v. Moore*, [1892] M 876 (Ch. Div) [*Merryweather*] at 522.

<sup>85</sup> *Merryweather*, *ibid*; *Lamb*, *supra* note 62; *Robb v. Green* (1895), 2 Q.B. 315 (C.A.) [*Robb*].

for the purposes of that employment relationship.<sup>86</sup> But he went on to suggest that a distinction existed between information physically reproduced, or in Fisk's words, "the tangible embodiments of technological creativity", and information retained in the worker's memory.<sup>87</sup> He noted that while compiling work-related information into physical form was a breach of the implied duty of confidentiality, a worker could not be prevented from using the knowledge he carried away "in his head".<sup>88</sup> The distinction between information in tangible physical form and information retained by memory represented, as Fisk argues, an understanding of property as applying to things, rather than to ideas.<sup>89</sup>

The distinction between physical taking and information retained by memory was used to determine the line between what a worker could use and what belonged to the employer post-employment as of the 1890s in Ontario as well. In the 1906 case of *Copeland-Chatterson v. Business Systems* a group of senior employees decided to leave their employ and start a rival business.<sup>90</sup> The court held that the workers were not in violation of their duty of good faith because although they had solicited clients of their former employer, they did not do so by physically copying any client lists.<sup>91</sup> In the absence of a contractual covenant not to compete post-employment, the Court held that there was nothing legally wrong with workers going out into business for themselves, even if it was a rival business to their former employer. "Competition is itself no ground of action, whether damage it may cause".<sup>92</sup> Because the workers were free to use whatever information they retained by memory to compete against their former employer, the Court of Appeal held that the most the employer could do was to bring a claim for damages alleging that confidential information had been disclosed during employment.

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<sup>86</sup> *Merryweather, ibid* at p. 524. Justice Kekewich went on to note that in some professions it is the practice of the parties to allow the worker to copy and take with him some of the tools of the trade, such as with lawyers' pupils. He suggested that what constituted a breach of confidence would depend on the nature of the work and of the intended exchange between the parties.

<sup>87</sup> Catherine Fisk, "Working Knowledge: Trade Secrets, Restrictive Covenants, and the Rise of Corporate Intellectual Property, 1800-1920" (2000-2001)52 *Hastings L J* 441 at 444

<sup>88</sup> *Merryweather, supra* note 85 at p. 524.

<sup>89</sup> Fisk, *Trade Secrets, supra* note 87 at p.494.

<sup>90</sup> *Copeland* at the TD, *supra* note 63.

<sup>91</sup> *Copeland* at the CA, *supra* note 63 at para 23.

<sup>92</sup> *Ibid* at para 16.

The courts were clear that there was no protection at common law against post-employment competition by a former worker. The most that was available was a restriction on the physical taking of employment-related information in tangible form. The courts took a slightly different approach in interpreting contractual covenants against post-employment competition. Restrictive covenants are contract terms designed to restrain the covenantor from engaging in designated activities in a post-transaction period. Anti-competition covenants had been in use in different types of business transactions for centuries, but were nonetheless generally considered unenforceable as being in restraint of trade prior to the 18<sup>th</sup> century in England.<sup>93</sup> The blanket prohibition was relaxed in the early 18<sup>th</sup> century, particularly as regards the sale of a business or its goodwill.<sup>94</sup> By 1894 the House of Lords in *Nordenfelt v. Maxim Guns and Ammunition Company Ltd* explained the principle as such:

The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.<sup>95</sup>

In the aftermath of *Nordenfelt* the general principle was that reasonable restrictions on competition were valid, so long as they did not afford the covenantee greater protection than was required for protecting his or her business interests.

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<sup>93</sup> *Colgate v. Bachelet* (1602), Cro. Eliz. 872, 78 E.R. 1097 [*Colgate*]. Bars on pursuing skilled trades were particularly suspect, given the existing guild restrictions on entry into the trades, and their potentially violation of the mandatory work provisions of the Statute of Artificers. See Charles Carpenter, "Validity of Contracts Not To Compete", (1928) 76 U Pa L Rev 244 at 244-245.

<sup>94</sup> In such transactions, as part of the contract price, the seller would agree to forgo entering into competition with their former business, as employee, agent or owner. In the 18<sup>th</sup> century there was an increasing judicial perception that failing to give effect to such covenants was unsound policy, because without them the buyer could lose the value of their purchase if the seller set themselves up as rival. Initially the courts moved towards recognition by upholding partial restraints that were limited in time or in geographic reach if given "for good and adequate consideration". See *Mitchel v. Reynolds* (1711), 24 Eng Reps 347 (QB).

<sup>95</sup> *Nordenfelt v. Maxim Nodenfelt Guns and Ammunition Company Ltd.*, [1894] A.C. 535 at p.565.

Restrictive employment covenants only began to be litigated in Ontario in the 1880s, as the province began to move into its Second industrial revolution and the number of businesses grew.<sup>96</sup> Over the turn of the 20<sup>th</sup> century cases in Ontario primarily involved two types of employers, those in sales-related businesses, who depended heavily on client relationships, and those who developed innovative manufacturing processes or products. These cases initially focused primarily on the geographic and time restrictions imposed by the covenants.<sup>97</sup> The courts used the *Nordenfelt* reasonableness analysis to permit restrictive covenants only insofar as they were narrowly tailored to activities that specifically rivaled those of the former employer, and only in the specific geographical area in which the former employee used to work.<sup>98</sup> The courts started from the premise that it was legitimate for employers to contractually protect themselves from post-employment competition in some circumstances. They did not immediately flesh out what these legitimate circumstances might be, except to suggest that solicitation of clients by former employees might justify a non-competition covenant.<sup>99</sup>

As of the 1910s however the courts of England and Ontario began to examine what constituted 'legitimate circumstances' in which a restrictive covenant could be used. The question of what type of information and activities could be restrained arose in *George Weston v. Baird*, which concerned a company that sold cakes and pastries around Toronto.<sup>100</sup> The employer sued to enforce a non-competition covenant for one year across the city of Toronto against a former salesperson. The

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<sup>96</sup> There were a few cases concerning restrictive covenants in agreements for the sale of a business or its goodwill in the late 19<sup>th</sup> century in Ontario, such as *Toronto Dairy Co. v. Gowans* (1879), 26 Gr. 290 (Ont. Ct Ch.) [*Toronto Dairy*]; *Wicher v. Darling* (1885), 9 O.R. 311 (Ont. H.C.J. Ch. Div.) [*Wicher*].

<sup>97</sup> In the 1906 case of *Harvison v. Cornell* (1906), 8 O.W.R. 697 (Ont. H.C.J. T.D.) [*Harvison*] a restrictive covenant was struck down that purported to restrain the employee of a coffee and tea merchant from engaging in a rival business for one year anywhere in Ontario. Given that the business operated only two routes, the Court held that the geographical area was too great to be reasonably necessary.

<sup>98</sup> *Harvison*, *ibid*; *Allen Manufacturing Co. v. Murphy* (1910), 22 O.L.R. 539 (Ont. H.C.J. Div. Ct), *rev'd* by (1911) 23 O.L.R. 467 (C.A.); *Skeans v. Keegan* (1916), 10 O.W.N. 225 (Ont. S.C.D.) [*Keegan*]; *George Weston Ltd v. Baird* (1916) 37 O.L.R. 514 (Ont. S.C. Ap. Div.) [*George Weston*]; *Canadian Steam Boiler Equipment v. MacGilchrist* (1919) 16 O.W.N. 37 (Ont. S.C. H.C.Div.) [*Can. Steam Boiler*]. On one occasion the adequacy of consideration was raised in the 1910s. The court noted that the adequacy of consideration remained an issue in the United States in the context of at-will employment, but was no longer examined under English law. See *Skeans v. Hampton* (1914), 5 O.W.N. 919 (Ont. S.C. H.C.Div.), *aff'd* by (1914), 31 O.L.R. 424 (Ont. S.C. Ap.Div.) [*Hampton*]. In another instance the court considered whether a non-competition clause could be enforced where the worker was wrongfully dismissed. The Court concluded that a wrongful dismissal constituted a repudiation of the contract, and therefore its covenants were not enforceable. See *Deacon v. Crehan* (1925), 57 O.L.R. 597 [*Deacon*].

<sup>99</sup> *Herbert Morris, Limited Appellants v Saxelby Respondent*, [1916] 1 A.C. 688 [*Herbert Morris*] at 702.

<sup>100</sup> *George Weston*, *supra* note 98.

Court of Appeal refused to enforce the covenant on the basis that its geographic scope was too large, but Justice Lennox also commented on whether the employer sought to restrict the use of information over which it had no proprietary right. He noted that the employer did not assert that the worker was exposed to trade secrets, or acquired any knowledge of secret methods of production, but was instead concerned that the worker had developed relationships with clients along his trade route.<sup>101</sup> But Justice Lennox specified, there were limits to what an employer could restrain by restrictive covenant. As explained by the House of Lords in *Herbert Morris*, an employer was allowed to protect his trade secrets, “such as secret processes of manufacture which may be of vast value”, and having his old customers solicited away.<sup>102</sup> “But freedom from competition per se apart from both these things, however lucrative it might be to [the employer], he is not entitled to be protected against. He must be prepared to encounter that even at the hands of a former employee”<sup>103</sup>

Relying on *Mason* Justice Lennox went on to explain that employers’ proprietary interests were limited to what the House of Lords called ‘objective knowledge’:

Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge—these may not be given away by a servant; they are his master's property [...]. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability—all those things which in sound philosophical language are not objective, but subjective—they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself.”<sup>104</sup>

Information about “reasonable mode of general organization and management of a business” fell into the subjective knowledge category, and therefore could not be restrained from post-employment use by a worker. The House of Lords in *Herbert Morris* explained:

The respondent cannot [...] get rid of the impressions left upon his mind by his experience on the appellants' works; they are part of himself; and in my view he violates no obligation express or implied arising from the relation in which he stood to the appellants by using in

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<sup>101</sup> *Ibid* at para 19.

<sup>102</sup> *Herbert Morris*, *supra* note 99 at p. 702, quoted in *George Weston*, *supra* note 98 at para 20. The court did not explain on what basis the enticement of customers was restrainable. In some cases it might constitute a tortious inducement of breach of contract, but not where the relationship was one of repeat discrete transactions.

<sup>103</sup> *George Weston* *ibid* at para. 29

<sup>104</sup> *Mason v. Provident Clothing and Supply Company Limited*, [1913] AC 724 [*Mason*] at p.740-741, quoted in *George Weston*, *ibid* at para 31.

the service of some persons other than them the general knowledge he has acquired of their scheme of organization and methods of business.<sup>105</sup>

Moreover, Justice Lennox noted, as held by the House of Lords in *Mason*, workers' skills developed during employment did not constitute objective knowledge, and so employers could not use a restrictive covenant to say that they would "not have the skill and knowledge acquired in my employment imparted to my trade rivals".<sup>106</sup> Thus, the Court of Appeal concluded in *George Weston*, employers could only claim a proprietary interest over something they had created or produced.

The covenantee can only protect that which is his, the product of expenditure of some kind or what he has acquired by foresight, industry, energy, enterprise, or skill; something paid for in some way by himself or those whose title he has [...].<sup>107</sup>

The Court in *George Weston* therefore found that the covenant was overbroad in geographical scope, and the justices were unmoved by the employer's argument that the worker could move to Montreal or Ottawa to pursue his trade. Justice Lennox stated that the worker "has the right to live and labour here, and the people here have the right to the gain resulting from industry and legitimate competition".<sup>108</sup> The covenant should not be rectified or severed, because, as Lord Shaw stated in *Mason*, "the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master".<sup>109</sup>

In *Herbert Morris, Mason and George Weston v. Baird* the courts sought to delineate those interests over which employers' held proprietary rights from those worker characteristics that were fundamentally inalienable. To do so the courts differentiated activities and interests which were the product of some sort of energy expenditure on the part of the employer from workers' personal capabilities. The courts suggested that there were certain personal features that simply could not be physically separated from workers, or could not be removed from their minds. Moreover, aside from trade secrets and confidential information regarding clients, it was not in the public interest to

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<sup>105</sup> *Herbert Morris*, *supra* note 99 at p. 703-704, quoted in *George Weston*, *ibid* at para 29.

<sup>106</sup> *Mason*, *supra* note 104 at p. 710; quoted in *George Weston*, *ibid* at para 30.

<sup>107</sup> *George Weston*, *supra* note 98 at para. 35.

<sup>108</sup> *Ibid* at para 39.

<sup>109</sup> *Mason*, *supra* note 104 at p. 745, quoted in *George Weston*, *ibid* at para 37.

restrain workers from exercising their skills and trade, even if acquired on the job. In *George Weston* the Court of Appeal stated that an employer will “not be allowed to appropriate or destroy the rights of the State to the benefit which should accrue from the industry, education, skill, capacity, or aptitude of its people” through a restrictive covenant.<sup>110</sup> The courts were cognizant that restrictive covenant cases pitted two liberal freedoms against one another, freedom of contract and freedom of trade. In *Mason* the House of Lords stated:

[C]onflicting considerations are in such cases immediately presented to the mind. Here is a bargain, it is said, between two parties having full contracting power and with their eyes open. It is not void or voidable under any of the familiar categories which justify rescission. Why then should the law decline to hold parties to it? On the other hand, it is said, here is a citizen who has come for a period of years under a restraint which is inconsistent with elementary freedom, namely, the freedom to earn his living as best he can. This is a freedom which it is not alone in his interest, but in the public interest, that the law should protect.<sup>111</sup>

In *Allen Manufacturing Co. v. Murphy* the tension between freedom of trade and freedom of contract was visible in the different decisions before different court levels.<sup>112</sup> At first instance the Divisional Court would have enforced a restrictive covenant against a former employee for three years against post-employment competition in a similar business anywhere in the Dominion. The court felt that the worker was educated in the employer’s special methods and trade secrets, and had used them to start himself up in a rival business. This, the Divisional Court stated, “was a very easy method of evading a contract, which should be discountenanced by the Court”.<sup>113</sup> On appeal, however, the judges were more circumspect. They noted that there was a tension between enforcing contracts deliberately entered into, and the fact that a power differential existed between the parties in employment. The Court of Appeal noted that certain restraints that might be entirely reasonable in the sale of a business or goodwill should not be imposed on employees, “to

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<sup>110</sup> *George Weston*, *ibid* at para 35.

<sup>111</sup> *Mason*, *supra* note 104 at p. 737.

<sup>112</sup> *Allen Manufacturing Co. v. Murphy* (1910), 22 O.L.R. 539 (Ont. H.C.J. Div. Ct), *rev’d* by (1911) 23 O.L.R. 467 (C.A.) [*Allen Manufacturing*].

<sup>113</sup> *Ibid* para 8.

whom the only consideration for their covenant is employment and receipt of wages or remuneration for a more or less certain number of years".<sup>114</sup>

Thus over the early 20<sup>th</sup> century the courts utilized a contractual approach to determining what types of labour service employers purchased through an employment contract. It is in these property-related cases that a contractual logic took the most visible hold over the law of employment relations between the 1890s and the 1930s. At the same time, the courts sought to draw a line between what the employer retained post-employment and what aspects of workers' knowledge and skill could not be permanently alienable. In post-employment restrictive covenant cases, freedom of contract was often trumped by freedom of trade. But in both classes of cases the courts sought to determine the boundaries of employers' purchase of labour power and the proprietary and contractual rights to which it gave rise during and after employment.

#### **(5) New Managerial Tools and Control over Discretion**

In property-related cases over the early 20<sup>th</sup> century the courts abandoned the idea that an employer held absolute property dominion over his or her worker's labour service for the duration of the employment contract. Instead the nature of labour service was refined and subdivided into different forms of property rights which were defined by the nature of the exchange. One effect of this shift, however, was that the duty of obedience could no longer provide employers with the same degree of managerial control as in the 19<sup>th</sup> century. Once employment was narrowed from a general property-based notion of control into a particularized exchange, the duty of obedience now applied only to job-related tasks.<sup>115</sup> And as professional bureaucratic work increased in proportion to the overall labour force – involving work based on the exercise of knowledge and discretion - the notion of obedience became increasingly ill-suited to the exercise of managerial control. In this context, over the early 20<sup>th</sup> century the courts added new tools of managerial control by expanding the categories of cause to capture activities outside of work, and by drawing on principles from the laws of agency to delineate new general obligations in employment. Wrongful dismissal claims were a central site for this shift.

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<sup>114</sup> *Ibid* at para 18.

<sup>115</sup> Deakin and Wilkinson, *supra* note 61 at p.79-81.



As the white collar workforce grew over the turn of the 20<sup>th</sup> century, wrongful dismissal cases increased in number, and were the most numerous of all types of contractual employment claims at common law over this period. In such cases, the Ontario courts applied English precedent and English law to determine the rights between the parties. The common law of wrongful dismissal over the 19th century had been organized around the notion of cause, because cause was required to dismiss workers within fixed term and annual contracts. Up until the early 20<sup>th</sup> century it was not clear whether cause was a question of law or a matter of fact.<sup>116</sup> The former view prevailed until the Privy Council's decision 1905 in *Clouston v. Courry*, when the Privy Council held that what amounted to conduct justifying dismissal was a matter of fact for the jury.<sup>117</sup> The courts of Ontario theoretically followed the decision in *Clouston* in the early decades of the 20<sup>th</sup> century, repeatedly stating that the issue of cause was a matter of fact and evidence, not law.<sup>118</sup> The Ontario judiciary did not, however, always closely adhere to this principle. In cases where the employment contract specified the grounds on which summary dismissal could occur, or where a body of custom had arisen regarding the impugned behaviour, the courts implicitly treated the interpretation of contractual term or custom as a question of law, using precedent to determine the meaning of disobedience or incompetence, for instance.<sup>119</sup> And indeed, even where the employment contract specified grounds for dismissal, the courts did not interpret those grounds as exhaustive but also relied on common law definitions of cause to justify dismissal.<sup>120</sup> In practice the factual issue was therefore only whether the employee's behaviour fell below the legal standard. In this manner the judiciary took a strong hand in developing the cause standard, and forged a new set of tools for managerial control which became visible in the causes for dismissal in England and in Ontario between the 1890s and the end of the 1920s.

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<sup>116</sup> *French v. Lawson* (1905), 5 O.W.R. 217 (ONHCJD) [*Lawson*].

<sup>117</sup> *Clouston v. Courry* (1905), [1906] A.C. 122 (P.C.). [*Clouston*].

<sup>118</sup> *French v. Morton* (1909), 14 O.W.R. 243 [*Morton*], *Robertson v. Northern Navigation Co.* (1906), 7 O.W.R. 476 [*Robertson*]; *Gould v. McCrae* (1907), 14 O.L.R. 194 [*Gould*].

<sup>119</sup> See *Clark v. Capp* (1905), 9 O.L.R. 192 [*Clark*]; *McMaugh v. Hamilton and Fort William Navigation Co.* (1904), 3 O.W.R. 791 [*McMaugh*]. Judges would simply apply their personal sense of what was permissible and non-permissible behaviour for workers. This appears to have happened most often in the decisions of Justice Falconbridge, who did not hesitate to overturn findings of fact from lower courts, or to apply his own sense of morality to determine cause. See *Wilson v. Sanderson-Harold Co. Ltd.* (1913), 4 O.W.N. 1403 [*Wilson*]. For instance, in *French v. Lawson* (1905), 5 O.W.R. 217 (ONHCJD) [*Lawson*]. Justice Falconbridge concluded that a baker who did not maintain a clean kitchen constituted a danger to public health and thus his employer was justified in dismissing him. Falconbridge J. went on to state that the issue in such a case is one fact, not law. He appeared to rely on his own notions of cleanliness in determining the worker's negligence.

<sup>120</sup> *Clark, ibid.*

(a) Cause for Dismissal: A Standard in Flux

The duty of obedience is generally viewed as the conceptual basis for workers' obligations to their employers, and disobedience as the foundational source of cause for dismissal. That duty was at the heart of the master and servant model of workplace discipline, and remained central to the emerging shape of employment contract law throughout the 19<sup>th</sup> century. As Matthew Bacon explained in 1813, the employment relationship was definitionally centred on the power to exact obedience.<sup>121</sup> The general standard of cause in the 19<sup>th</sup> century was enunciated in *Callo v. Brounker* to include wilful disobedience, moral misconduct (pecuniary or otherwise), or habitual neglect.<sup>122</sup>

In the last quarter of the 19<sup>th</sup> century, however, some treatise writers began explaining cause for dismissal beyond its traditional realm.<sup>123</sup> New grounds for cause were asserted that covered a larger set of activities - activities that were not captured by the now more circumscribed duty of obedience, and did not fit within the more command-based cause standard of the 19<sup>th</sup> century. By the 1890s the standard for cause was organized so as to dismiss for three types of behaviours:

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<sup>121</sup> See Matthew Bacon, *A New Abridgment of the Law* (1st American from 6th London ed.) (Philadelphia: Bird Wilson. 1813), at volume 4, section 556. "The relationship between a master and a servant from the superiority and power which it creates on the one hand, and duty, subjection, and, as it were, allegiance, on the other hand, is in many instances applicable to other relationships [...] having authority to enforce obedience of their orders, from those whose duty it is to obey them [...]"

<sup>122</sup> *Callo v. Brounker* (1829) 2 Man. & Ry 502, (1831) 4 C. & P. 518. In *Lomax v. Arding* (1855), 10 Ex. 734 at 736, Parke B. stated that "the question, in what case and upon what grounds an employer has the right to discharge a person employed by him, has only been considered in modern times, and is not fully settled". This continued to be repeated throughout the century. As the century progressed, this standard was restated to include only moral misconduct of a gross nature would justify discharge, and "conduct calculated to seriously injure his master's business" was added to habitual negligence in business. See Charles Manley Smith, *Treatise on the Law of Master and Servant, including Therein Masters and Workmen in Every Description of Trade and Occupation; with an Appendix of Statutes* (Philadelphia: T. & J. W. Johnson, 1852) at p. 73.

<sup>123</sup> Charles Labatt, for example, articulated a series of implied duties and frequent contractual obligations of servants, the breach of which could constitute cause. These were (1) the duty of obedience; (2) duty to perform work with reasonable skill; (3) duty of honesty and other obligations emerging from a fiduciary relationship between master and servant; (4) duty not to act in a manner injurious to the master; (5) immorality. See Charles Labatt, *Commentaries on the law of master and servant : including the modern laws on workmen's compensation, arbitration, employers' liability, etc., etc* (Rochester, N.Y.: The Lawyers Co-Operative Publishing, 1913) at p. 930. Other writers still presented the traditional bases of cause during this time period, however, such as Charles Smith in 1906. He described the traditional standard for cause as (1) wilful disobedience of any lawful order of his master (2) gross moral misconduct, whether pecuniary or otherwise (3) negligence in business, or conduct calculated seriously to injure his master's business (4) incompetence, or permanent disability from illness. Charles Manley Smith, *Treatise on the Law of Master and Servant, including Therein Masters and Workmen in Every Description of Trade and Occupation; with an Appendix of Statutes* 6th ed. with notes on Canadian law by A.C. Forster Boulton (London : Sweet & Maxwell, 1906) at p. 102

issues relating to job performance (negligence and incompetence)<sup>124</sup>, to ignoring employer rules or challenging the employer's authority (disobedience and insubordination)<sup>125</sup>, and for a general category of misconduct. This latter category increasingly included actions outside of work that were viewed as injurious to the employer's business or reputation (general and moral misconduct, disloyalty).

The idea that workers could be dismissed for activities outside the direct scope of their work and outside of their time on the job was also applied in Ontario over the turn of the century. In *Marshall v. Central Railway*, for instance, a railway roadmaster was terminated, along with other co-workers, for drinking whiskey on the job. The trial judge upheld the dismissal, but was overturned at the

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<sup>124</sup> Incompetence and negligence were linked in analysis. The question of incompetence could take two forms: it could involve a simple factual examination of the worker's achievements. *Lawson, supra* note 116; *Bashforth v. Provincial Steel Co.* (1913), 10 D.L.R. 187 [*Bashforth*]. It could also, as in, *Clark, supra* note 119, take the form of a sort of implied warranty, where the issue was whether the worker had held himself out to be of a certain skill by accepting the job description in the contract. In regards to misconduct in the nature of negligence there was no specific standard, although it generally needed to be habitual in nature. The courts also considered that in accepting employment, workers impliedly covenanted that they were in a fit state of health to do so. In *Dartmouth Ferry Commission v. Marks Estate* 1904), 34 S.C.R. 366 [*Dartmouth*] the Supreme Court of Canada held that a contract of employment created a reciprocal set of promises, a promise to pay by the employer, and a promise to perform by the employee. Where a worker was permanently disabled the contract could be dissolved, because the very consideration for the contract, the services to be performed, was unavailable. Illness of a temporary nature, however, would not constitute cause for dismissal. *McDougal v. Van Allen Co. Limited* (1909), 19 O.L.R. 351 [*Van Allen*].

<sup>125</sup> Behaviour that resembled insubordination was the most common justification for summary dismissal in Ontario over the early 20<sup>th</sup> century. Still heavily laden with status and disciplinary notions, the legal understanding of insubordination seemed to concern the manner in which workers spoke and dealt with their employers. Charles Labatt in 1913 explained in no uncertain terms that: "Every servant impliedly stipulates that both his words and his behaviour in regards to his master and his master's family shall be respectful and free from insolence. A breach of this stipulation is unquestionably a valid reason for dismissing the servant [...]". See Labatt, *supra* note 123 at p. 930 section 299. In *Clark, supra* note 119 for instance, the Ontario High Court of Justice declined to find disobedience when the worker retained a lawyer to respond to discipline imposed on him, because, they emphasized, the letter presenting his side of the case had been entirely courteous and without insolence. In a similar manner, in *Dietrich v. Goderich Wheel Rigs Co.* (1911), 3 O.W.N. 401 [*Dietrich*] at para. 4 the High Court of Justice found that the worker's dismissal was justified where he made a complaint to his employer because even if his complaint may have been right in substance, he had used 'unreasonably violent language'. In *Tyler v. Brown's Copper and Brass Rolling Mills Limited* (1922), 21 O.W.N. 342 [*Tyler*] at para.6 the Ontario Supreme Court held that the worker, the general superintendent of a mill, was justifiably dismissed because the worker had imputed to his employer "underhand and dishonourable conduct", and as that imputation was unwarranted, the employer was justified in viewing it as insulting. But where misconduct was admitted to but was not considered wilful, the courts were not necessarily prepared to find cause, as in *Walker v. Booth Fisheries Canadian Co.* (1922), 21 O.W.N. 395 [*Walker*]. Some judges were more lenient on the question of insubordination/disobedience than others: Ferguson J.A. permitted some angry words from a worker, which he found to have been provoked by his employer, and did not hold this to justify dismissal in *Goldbold v. Puritan Laundry Co. Limited* (1913), 12 O.W.N. 343 [*Goldbold*]. By contrast, Justice Falconbridge in *Wilson v. Sanderson-Harold Co. Ltd.* (1913), 4 O.W.N. 1403 [*Wilson*], found that the expression of 'feelings of unrest and dissatisfaction' were sufficient cause to justify dismissal, as they would interfere with the worker's duties to his employer.

Divisional Court, on the grounds that only if it had been demonstrated that the worker could not perform his duties from drinking would the dismissal be justified. The Queen's Bench, however, relied on the recent English decision of *Pearce v. Foster* to hold that employers could discharge for activities that might harm their business interest, beyond the immediate administration of job tasks.<sup>126</sup> In *Pearce* the English Court of Appeal had stated that:

It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant.<sup>127</sup>

Armour J. held that in this case the worker had conducted himself in a manner inconsistent with the faithful discharge of his duty by drinking on the job, which was likely to be prejudicial to the employer, justifying dismissal.<sup>128</sup> The Court did not seek to identify a particular order or work rule disobeyed, it did not argue that the conduct reached the standard of gross moral misconduct or habitual negligence. But on the basis of the holding in *Pearce*, which elaborated a broader, more abstract standard for discipline, this type of 'prejudicial' activity was viewed as an acceptable reason for dismissal.

Similarly, in *Denham v. Patrick* a worker was dismissed for boasting of adultery to his employer. The worker challenged his dismissal on the grounds that he had performed his job tasks well, and thus should not be discharged for something unrelated to his work. Dismissal for moral misconduct could not simply be based on the employer disapproved of; rather it had to affect some direct interest of the employer's or constitute a breach of the work he had contracted to perform.<sup>129</sup> But the Divisional Court disagreed, relying on *Pearce v. Foster* for the proposition that the misconduct need not be in the carrying out of job tasks, so long as it was prejudicial to the employer's interests

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<sup>126</sup> *Marshall v. Central Ontario Railway Co.* (1897), 28 O.R. 24 [*Marshall*] at para. 12 citing the decision of Lopes L.J. in *Pearce v. Foster* (1886) L.R. 17 Q.B.D. 536 (Eng. CA) [*Pearce*]. Drinking on the job was generally prohibited by railway companies in the mid-19<sup>th</sup> century, under their own rules, which were civilly enforceable. See Craven and Traves, *supra* note 17 at p.49-50.

<sup>127</sup> *Pearce*, *ibid* at 542

<sup>128</sup> *Marshall*, *supra* note 126. Armour J. did not speak to whether the drink had incapacitated the worker from performing his job tasks, or suggest that drinking on the job was a safety risk that could injuries that would damage the employer's interest, but nonetheless on these grounds the Court found dismissal justified.

<sup>129</sup> *Denham v. Patrick* (1910) 20 O.L.R. 347 (Ont. H.C.J. Div. Ct) [*Denham*].

or reputation. A single act could constitute such misconduct if there was reason to believe it could occur again, and justify summary dismissal.<sup>130</sup>

Thus over the early 20<sup>th</sup> century new grounds for dismissal were added to the traditional grounds of insubordination, incompetence and neglect, and behaviour designed to seriously harm the employer's financial interests. These new grounds permitted dismissal for behaviour outside of work, even if it did not directly affect employer's pecuniary interests.

(b) The Law of Agency and the New Implied Duties of Confidentiality, Loyalty and Good Faith

At the same time as the courts began to find new bases for dismissing workers for behaviour outside the job that was deemed harmful to employers' interests, they also began to draw principles from the laws of agency to explain employment as a general relationship of fidelity, loyalty and confidentiality.

As businesses grew in size and their management increasingly shifted to salaried workers, the previous line between independent business people, or agents, and waged-workers, or servants, began to falter. Prior to the end of the 19<sup>th</sup> century, most businesses in Ontario were organized as partnerships, and to a lesser extent, as unincorporated joint stock companies.<sup>131</sup> Partners and shareholders were jointly and severally liable for the enterprises' debt, such that there was only a thin separating line between business ownership and employment, and between partners and managerial employees.<sup>132</sup> As explained by Alfred Chandler, "owners managed and managers owned".<sup>133</sup> The legal relationship between business owners, partners, senior executives and the

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<sup>130</sup> *Ibid* at para. 22. The Court did not explain on what basis it was assumed that the conduct would repeat, as it had happened some 7 years prior. The issue of moral misconduct arose again in *McPherson v. Toronto (City)* (1918), 43 O.L.R. 326 (CA) [*McPherson*], when a fireman, who was separated from his wife, was dismissed for living out of wedlock with a woman who was herself separated. The Chief of the fire brigade considered this behaviour to be detrimental to the brigade's reputation, and when the worker refused to change his living arrangement, he was dismissed. Again, there was no issue of poor performance, or disobedience to a job related order. But the Court here, at para. 1., cited *Marshall, supra* note 126, *Pearce, supra* note 126 and once again held that the rule was that conduct which is prejudicial, or likely to be prejudicial to the interests or reputation of the employer is sufficient for dismissal, whether learned of before or after dismissal.

<sup>131</sup> Joint stock companies were effectively large scale partnerships created through a variety of contractual and trust mechanisms. See David Kershaw, "The Path of Fiduciary Law" (2011) LSE Law, Society and Economy Working Papers 6/11, at p. 9-10.

<sup>132</sup> Eric Tucker, "Shareholder and Director Liability for Unpaid Workers' Wages in Canada: From Condition of Granting Limited Liability to Exceptional Remedy" (2008), 26(1) Law & Hist. Rev. 57; Kershaw, *ibid*.

<sup>133</sup> Alfred Chandler, "The Emergence of Managerial Capitalism" (1984) 58(4) Bus. Hist. Rev. 473 at 473.

business enterprise was controlled primarily through the law of agency, which sought to tie the interests of the different actors together and to the company. But in the late 19<sup>th</sup> century the legal and economic form of business ventures began to shift to reflect the growth in capital pooling and coordination needs between larger numbers of people.<sup>134</sup> Joint stock company incorporation was increasingly adopted, creating legal corporate entities separate from its shareholders.

As a result of incorporation and the increasing size of business ventures, the ownership and the control of business enterprises began to separate, such that those who owned companies were less and less often those that ran its day-to-day operations. Instead business direction was undertaken by an expanding professional managerial class, increasingly salaried, and conceptualized as waged workers.<sup>135</sup> Prior to the 1890s only some workers, primarily those engaged with the management of businesses and mercantile agents (but also domestic servants in some instances), were understood to hold agency-based obligations towards their employer.<sup>136</sup> The difference between an agent and a servant was that “[t]he servant acts under command, [while] the agent usually acts at his own discretion [...]”.<sup>137</sup> According to Seavy, the difference was that “[t]he servant sells primarily his services measured by time; the agent his ability to produce results”.<sup>138</sup> But as the administration of

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<sup>134</sup> Chandler, *Visible Hand*, *supra* note 15 at p. 315-344.

<sup>135</sup> Chandler, *The Emergence of Managerial Capitalism*, *supra* note 133. Discussing changing legal controls over workers’ intellectual property in the United States from the 19<sup>th</sup> to 20<sup>th</sup> centuries, Catherine Fisk suggests that one of the major changes that occurred was shifting idea of what constituted middle class independence. “Over the course of the nineteenth century, notions about the middle classes and their independence changed, of course, and so changed the courts’ view that employee control over workplace knowledge was an essential feature of middle-class status. In the mid-nineteenth century, the economic independence enabled by control over one’s own creative products was seen as a foundation of the kind of social independence that would reconcile democracy with economic development. By the second decade of the twentieth century, middle-class independence connoted steady and respectable corporate employment rather than entrepreneurship, and freedom to consume rather than freedom to produce.” Fisk, *Working Knowledge*, *supra* note 57 at p. 8.

<sup>136</sup> The modern law of agency was born of the law merchant of the 17<sup>th</sup> and 18<sup>th</sup> centuries, as a tool in the management of business partnerships, and began to form a distinct area of law as of the early 19<sup>th</sup> century. Its essence was the delegation of authority from the principal to the agent. In an agency relationship, the agent acts “as the instrument of the principal”, such that the agent’s acts are in law those of the principal, and the agent cannot personally profit from any action within the term of the agency agreement. The principal thus benefits, and is liable, for much of the agent’s actions. Charles Ashford Pace, *The Law of Agency* (U.S.: American Law: General Studies) at p. 1. Charles Allen, “Agent and Servant Essentially Identical” (1894) 28 Am. L. Rev. 9 at p. 18-20; Oliver Wendell Holmes, “Agency, Part 1”, (1891) 4(8) Harv. L. Rev. 345. See also *Williamson*, *supra* note 69 at p. 393 for a leading case on agency law, concerning the managing owner of a ship.

<sup>137</sup> Allen, *ibid* at p. 20.

<sup>138</sup> Warren Seavey, “The Rationale of Agency”, (1919) 29 Yale L.J. 859 at p. 866. This distinction is also similar to the one currently made between individuals who are considered independent contractors and employees. The distinction appears to have arisen in England in relationship to vicarious liability law, and has served over the 20<sup>th</sup> century as the demarcating line for access to protective employment legislation. But I suggest that this distinction

business was increasingly undertaken by salaried workers in corporate enterprises, some agents were repositioned in law as waged workers. Their work was not premised on obedience to direct command, but rather in utilizing knowledge, skill and discretion in an employer's service. Thus as the concept of waged employment grew to include both task-based and discretionary decision-making employment, the courts increasingly drew on principles from the law of agency to tie the exercise of worker discretion to their employers.

Over the turn of the 20<sup>th</sup> century duties that had been specific to agency employment, duties of good faith, fidelity, confidentiality and loyalty were now explained as general incidents of the waged work relationship, applicable to all employees.<sup>139</sup> This occurred in a number of cases decided by the English courts starting in the late 1880s, which were then applied in Ontario. In cases such as *Pearce v. Foster* and *Merryweather v. Moore*, described above, and *Robb v. Green* the courts considered the wrongful dismissal of workers in agency relationships.<sup>140</sup> Rather than resting their analysis solely on the specific duties that agents owed by virtue of their agency relationship, the courts described some of those agency-based duties as definitional to all employment relationships. In *Pearce*, for instance, the justices based their analysis of cause for dismissal in misconduct prejudicial to the business, and more broadly, in a duty of faithful service to which the worker was bound, because fidelity inhered in the very notion of employment.<sup>141</sup> Lord Esher laid down the following rule:

The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant *implies necessarily* that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him. (italics added)<sup>142</sup>

In a similar fashion, at the turn of the century the duty of confidentiality was broadened into a

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is also evocative of a change in the law of employment contracts over this period, in terms of ideas about the nature of employment, about how to control employees exercising specialized knowledge and discretion, and how these concepts were to be regulated within the existing subordination frame of the employment contract.

<sup>139</sup> For instance, only some types of employment relationships were considered confidential, and therefore held a duty not to reveal workplace secrets. Fisk, *Working Knowledge*, *supra* note 57 at p. 29. See for instance *Pearce*, *supra* note 126; *Lamb*, *supra* note 62; *Robb*, *supra* note 85; *Merryweather*, *supra* note 84; *Van Allen*, *supra* note 124.

<sup>140</sup> *Pearce* *ibid*.

<sup>141</sup> *Ibid*

<sup>142</sup> *Ibid* at p. 539.

general employment obligation. As Catherine Fisk has argued, the duty of confidentiality was one which had previously only applied to agency relationships, but in the 1892 case of *Merryweather v. Moore* the court stated that the employment relationship was *necessarily* one of confidence between employers and employees, “a confidence arising out of the mere fact of employment”.<sup>143</sup> Finally in 1895 case of *Robb v. Green* the English Court of Appeal considered a request for an injunction and damages for breach of contract, when a business manager copied his employer’s customer list and then used it to set himself up in a similar business on his own account.<sup>144</sup> Lord Escher viewed this as dishonest conduct “and a dereliction from the duty which the defendant owed to his employer to act towards him with good faith”.<sup>145</sup> The trial judge was justified in viewing such conduct as “a breach of the trust reposed in the defendant as the servant of the plaintiff in his business”.<sup>146</sup> He went on to consider whether this constituted a breach of contract, and explained that this “depends upon the question whether in a contract of service the Court can imply a stipulation that the servant will act with good faith towards his master”.<sup>147</sup> Lord Kay answered in the affirmative, holding that the Court must imply such a stipulation, because it would necessarily have been in the contemplation of the parties when they contracted.<sup>148</sup> Lord Justice Smith concurred, stating that he thought it “a necessary implication which must be engrafted on such a contract that the servant undertakes to serve his master with good faith and fidelity”.<sup>149</sup>

These cases were applied in Ontario over the early 20<sup>th</sup> century. For example, in *McDougal v. Allen* in 1909 the court quoted John Macdonell’s treatise on master and servant law that “[a] servant is bound to act with good faith, and to consult the interests of his master, and may be dismissed for misconduct injurious thereto, though such misconduct does not relate to the servant’s particular duties.”<sup>150</sup> The idea that agents acted in their employer’s stead, and effectuated their employer’s will, also justified discharge for behaviour that ruptured the relationship of trust between the parties, whether or not the worker was technically in an agency relationship. In the 1922 case of *Tyler v. Brown’s Copper and Brass Rolling Mills Ltd.*, the Ontario High Court held that the superintendent of a

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<sup>143</sup> *Merryweather*, *supra* note 84. Fisk, Trade Secrets, *supra* note 87 at p.498.

<sup>144</sup> *Robb*, *supra* note 85.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid* at p. 316-317

<sup>147</sup> *Ibid* at p. 317.

<sup>148</sup> *Ibid* at p. 319.

<sup>149</sup> *Ibid* at p.320.

<sup>150</sup> *Van Allen*, *supra* note 124 at para. 24.



mill was dismissed with cause for using violent, insulting and abusive language towards the company's president, imputing deceit to him. Mulock C.J. Ex stated that using this type of language had the "effect of destroying harmonious relations between them and made it unreasonable to expect that they would be able effectively to co-operate to advance the company's interests".<sup>151</sup> This situation, the Court continued, was entirely the worker's fault, because with his language, he violated his duty to promote the company's interests in all reasonable ways.<sup>152</sup> In *Mitchell v. McKenzie* the Ontario High Court of Justice cited *Robb v. Green* for the proposition that a bookkeeper in ordinary circumstances holds, even if not express, an implied duty of confidentiality which prevented him or her from divulging confidential information.<sup>153</sup> Similarly, in *Copeland-Chatterson v. Business Systems*, discussed above, the court stated that "it is a necessary implication of a contract of service that the servant shall serve his master with good faith and fidelity".<sup>154</sup> Finally, in *Cook v. Hinds* the court considered whether the directors of a joint stock company were paid as employees or as directors, on the acknowledged basis that if they were employees, they owed their employer a duty of faithful service, "whether they be servants, agents, employees".<sup>155</sup>

Not only were agency-based duties increasingly described as inhering in the broad notion of employment over the early 20<sup>th</sup> century, but the courts also permitted wrongful dismissal claims to be brought by workers who might have been considered independent contractors or agents under the law of negligence. Between 1890 and the 1930s individuals who were not under direct managerial supervision, who bore the risk of profitability, and in some instances, could hire others to assist in their contractual tasks, brought wrongful dismissal claims at common law.<sup>156</sup> Such workers were also sometimes sued in property and competition-based claims, and again were considered in the light of employment relations, rather than ones of commercial contract.<sup>157</sup>

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<sup>151</sup> *Tyler*, *supra* note 125 at para 6.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Mitchell v. McKenzie* (1905), 6 O.W.R. 564 [*Mitchell*] at para. 5.

<sup>154</sup> *Copeland*, *supra* note 63.

<sup>155</sup> *Cook v. Hinds* (1918) 42 O.L.R. 273 at 292 [*Cook*] at para. 52.

<sup>156</sup> *Glenn v. Rudd* (1902), 3 O.L.R. 422 [*Glenn*]; *Van Allen*, *supra* note 124; *Phillips v. Seale & Co. Limited* (1922), 23 O.W.N. 331 (Ont. S.C. Ap. Div.) [*Phillips*].

<sup>157</sup> In at least one case an employer sought to enforce a non-competition clause against a worker who bought their products wholesale and sold them at retail prices, and therefore bore the risk of profit and loss themselves. The reasonableness of the restrictive covenant was considered in light of his status as an employee. *George Weston*, *supra* note 98.

To recapitulate, therefore, as the category of waged employees increased to include workers previously considered agents in law, agency principles began to seep into the employment law analysis. As this occurred the existing categories of cause were expanded to reach behaviour outside of the direct confines of the work relationship, and notions of faithful service, confidentiality, good faith, loyalty, came to frame the judicial understanding of the work relationship. Over the turn of the century, the legal subordination of the employment relationship increasingly shifted from a command-based approach based on the personal jurisdiction of the master over his workers, to a subordination of workers' interests in law. Thus in contrast to the traditional narrative that locates the origins of the implied contractual duties in the law of master and servant, I argue that it is only as property in employment was recast as a particularized exchange of time and skill, and white collar workers were reframed as waged-workers that the full gamut of implied duties were imported from the laws of agency to define the notion of employment at common law.

#### **(6) The Death of the Annual Hire: The Law's Changing Understanding of Time in Employment**

Paradoxically, just as the tools of managerial control expanded to cover a wider range of behaviour as cause for dismissal, the significance of the "cause" analysis began to recede in importance. Over the second half of the 19<sup>th</sup> century the presumption of annual hire operated very differently for higher and lower status workers in England. As detailed in the previous chapter, the presumption operated at common law to prevent workers from leaving their employment within the annual term without the required notice, absent which they forfeited wages owing and could be sued for breach of contract.<sup>158</sup> Although the presumption of annual hire theoretically applied at common law to domestic servants, menial servants and clerks, by the mid-19<sup>th</sup> century such workers could be dismissed with the notice that was customary in their industry. For higher status workers, however, the presumption of annual hire operated differently. If higher status workers under a general hire

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<sup>158</sup> Under master and servant law workers could be prosecuted for leaving their employment outside of the three month notice window before the end of the annual term, and for inducing breach of contract if involved in strike activities. Craven suggests that employers increasingly used master and servant law as a strike-breaking tool as of the 1870s. See Paul Craven, "Canada 1670-1935, Symbolic and Instrumental Enforcement in Loyalist North America", in Douglas Hay and Paul Craven eds., *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (North Carolina: University of North Carolina Press, 2004).

contract were dismissed without cause within the annual term, they were entitled to wages and benefits that would have accrued over the unexpired portion of the contract. The distinction in the use of the presumption was explicitly class-based, with the English courts expressing concern to provide greater job security to workers of higher status.<sup>159</sup>

For higher status workers, therefore, wrongful dismissal claims revolved around whether cause existed to permit for dismissal within the term of the employment contract. In the absence of cause, the wrong thus constituted the breach of an implied promise to retain in employment over the presumed or express duration of the employment contract. Damages were assessed on the basis of the wages owing over the rest of the term, subject to an employee's duty to mitigate by finding alternative employment. As was the case with other commercial contracts, damages were based on the employee's "actual loss", as stated by the House of Lords in *Beckham v. Drake*.<sup>160</sup> At the turn of the 20<sup>th</sup> century, however the courts began to move away from conceiving of the employment contract in fixed terms, raising a host of new doctrinal questions that moved the wrongful dismissal claim further away from general contractual damage principles. Over the last quarter of the 19<sup>th</sup> century, the question of contract duration was increasingly recast from a legal presumption to a matter of fact in England and then Ontario. This characterization had a profound effect on the doctrinal structure of the employment contract at common law.

#### (a) Employment Duration and the Use of Presumptions

In the 1890s, after some decades of confusion, the English courts discarded the presumption of annual hire. Instead, where there was neither a discernible intention as to contract length nor industry practice, dismissal was now said to require reasonable notice.<sup>161</sup> Although the duration of the employment contract was fundamental to the evolution of the English common law of

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<sup>159</sup> See discussion in chapter 1 *supra* note 206.

<sup>160</sup> *Beckham v. Drake* (1849), 9 E.R. 1213 [*Beckham*]

<sup>161</sup> *Lowe v. Walter*, (1892) 8 TLR 358 [*Lowe*]. At the time of the decision its effects were not clear, although *Lowe* is usually cited as the case that brought the annual hire presumption to an end in England. Treatise writers continued to debate the issue after *Lowe* however. Writing in 1902, Smith explains that the issue of notice is to be established by evidence of trade custom, and does not refer to the termination by reasonable notice. Indeed, as will be discussed shortly, Charles Labatt argued strongly after the presumption of annual hire was also dispatched with in Ontario in 1897 that the Ontario Court of Appeal had misread the weight of authorities, and that *Lowe v. Walter* was wrongly decided. See C.B. Labatt, "Master and Servant: Right to Terminate a Hiring, The Duration of Which is Not Expressly Provided for by the Parties", (1898) 34(16) Can. L.J. 587; Charles Manley Smith, *Treatise on the law of master and servant : including therein masters and workmen in every description of trade and occupation* 5th ed. (London, 1902) at p. 68.

employment contracts in the 19<sup>th</sup> century, the issue of contract length was rarely litigated in Ontario prior to the turn of the 20<sup>th</sup> century, and the courts addressed it explicitly only twice before the 1890s.<sup>162</sup> But in the 1890s two major cases arose in which professional employees unsuccessfully argued that by working past their fixed one year contracts without new agreement with their employers on duration, they were now presumed to work under annual hire contracts, such that they could not be terminated within the second year term without cause.<sup>163</sup>

In *Bain v. Anderson* the Ontario Court of the Queen's Bench took a surprisingly hard stance against the presumption of annual hire, given its lack of legal centrality over the previous decades. *Bain* concerned the dismissal of a factory foreman who was employed on successive yearly hiring contracts over many years.<sup>164</sup> The business was sold in the midst of a year term, but the worker kept working for the new owners beyond the year with no new express contract. He was then terminated for refusing a reduction in salary from the new owners. The worker brought a claim for wrongful dismissal, arguing that his employment with the new owners constituted an annual hire contract, for which he could not be dismissed without cause. The employer argued instead that at the expiry of his last yearly hire contract he worked only under a temporary arrangement as the new owners decided how to reorganize their operations. Though the Ontario Court of Chancery had held exactly such a situation to be an annual hire contract in *Tibbs v. Wilkes*, the Queen's Bench now went in another direction and found the period after the fixed term constituted an indefinite hire contract.<sup>165</sup> The Court noted that although the English courts had once applied the presumption of the annual hire to general hire contracts, modern case law took a different approach. The modern rule, according to the Queen's Bench, did not inflexibly hold that a general hire amounted to an annual hire in law, but instead that the issue was one to be determined on the

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<sup>162</sup> *Rettinger v. MacDougall* (1860), 9 UCP 485; *Tibbs v. Wilkes*, [1876] O.J. No. 268, 23 Gr. 439 (Ont. Ct Chancery) [*Tibbs*]. The modified presumption developed in *Fairman v. Oakford*, (1860) 5 Hurl. & N. 635, 157 E.R. 1334, which suggested contract duration was a question of fact, appeared to receive tangential support from the Ontario Court of Appeal in the decision of *Booth v. Prittie* (1881), 6 O.A.R. 680.

<sup>163</sup> *Bain v. Anderson* (1897), 27 O.R. 369 (QB) [*Bain*]; rev'd by (1897), 24 O.A.R. 296 (C.A.); aff'd by (1898), 28 S.C.R. 481 [*Bain* at the SCC]; *Harnwell v. Parry Sound Lumber Co.* (1896), 24 OAR Page111 (QB); rev'd by (1897), 24 O.A.R. 110 (CA) [*Harnwell*].

<sup>164</sup> Appellant's factum, *Bain* at the SCC *ibid*, on file in the Supreme Court of Canada's record's office.

<sup>165</sup> *Tibbs*, *supra* note 162.

facts.<sup>166</sup> Only where there was nothing to qualify the parties' agreement was the proper factual inference that of annual duration. The Court went on to note that some English cases suggested that indefinite term hires could be terminated on reasonable notice, but because no notice had been given to the worker here, it did not pronounce on this issue. The case was taken to the Court of Appeal, which dismissed the claim.<sup>167</sup> The Supreme Court of Canada, however, supported the Queen's Bench's initial summary of law. The Court stated that:

It cannot at the present day be contended that, as a rule of law, where no time is limited for the duration of the contract of hiring and service, the hiring has to be considered as a hiring for a year. The question is one of fact, or inference from facts, the determination of which depends upon the circumstances of each case.<sup>168</sup>

With that, the presumption of annual hire was discarded in Canada.<sup>169</sup>

As *Bain* was moving through the courts, the Ontario Court of Appeal was faced with a similar question in *Harnwell v. Parry Sound Lumber* in 1897.<sup>170</sup> The worker in this case was an assistant bookkeeper engaged for a year but continued working past the end of the one-year term. His employers accepted his services and continued to pay his salary for another five months, when he was given three months' notice of dismissal. The plaintiff argued that his employment was a general hire, and as such was to be presumed annual and therefore he could not be dismissed within the second annual term without cause. For that reason, he was owed his salary over the remaining portion of the second year of the contract. At first instance Chief Justice Meredith canvassed the authorities on the question, citing the numerous cases upholding general hirings as annual, based on a presumption of law. He noted, however, that the proper approach was one long ago suggested by Chief Justice Denman in *Williams v. Byrne* in 1837, which was that while the length of the contract is always a matter of fact, in some instances the length of notice and method of dismissal were so well known as to be presented as questions of law.<sup>171</sup> On appeal the Court of

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<sup>166</sup> *Bain* at the QB, *supra* note 163 at para. 10. The court stated this finding in very certain terms, although commentators of the era were not so clear that English case law was so definite on the question. See, in particular, Labatt, Right to Terminate, *supra* note 161.

<sup>167</sup> *Bain* at the CA, *supra* note 163.

<sup>168</sup> *Bain* at the SCC, *ibid*.

<sup>169</sup> *Ibid*. On the facts, however, the Supreme Court agreed with the Court of Appeal. The justices viewed the worker as being on notice that the new owner who assumed control of the business was not taking on the existing employment contracts, and that changes were to be anticipated. He was on notice from the moment of the sale until he was told of the plan to reduce his salary, and he was not entitled to more.

<sup>170</sup> *Harnwell*, *supra* note 163.

<sup>171</sup> *Harnwell* at the CA, *ibid* at para. 9.

Appeal, after examining the historical roots of the presumption, ultimately agreed that there were no relevant facts to suggest a second yearly hiring, other than the continued relationship between the parties on apparently the same terms. Instead the Court held that “the most that could be said [...] is that it was a contract terminable on reasonable notice. In the absence of any evidence of usage [...] three months notice ought to be held reasonable”.<sup>172</sup>

With these two cases the presumption of annual hire was abandoned in Ontario, just as it was in England. The presumption of annual hire was also discarded at roughly the same time in the United States, where the courts moved towards an at-will employment model such that either party could dissolve the employment contract at any time for any reason.<sup>173</sup> Interestingly, there is some evidence that the Court of Appeal in *Bain v. Anderson* may have held the hiring to have been at-will, such that no notice was due, but the Supreme Court makes no mention of the concept of at-will employment in its decision, nor do other cases of era in Ontario.<sup>174</sup> This is notable because, like the United States, the presumption appears never to have taken a strong legal or practical hold in Ontario. In a comment on the Court of Appeal’s decision in *Harnwell*, Charles Labatt discussed Horace Wood’s description of the American at-will rule.<sup>175</sup> He specified that for the purposes of his commentary he would not refer to American cases, because “for obvious social and economic reasons, a hiring for a shorter period than a year will be more readily inferred in that country than in England. It would therefore be undesirable, in an article designed for Canadian readers, to rely upon the American authorities [...]”.<sup>176</sup> This is intriguing, because his qualifying remarks about the nature of employment duration in the particular socioeconomic conditions of the American states would seem to apply equally to 19<sup>th</sup> and early 20<sup>th</sup> century Ontario. And indeed over the turn of the

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<sup>172</sup> *Ibid* at para.31.

<sup>173</sup> See chapter 1, *supra* notes 137, 138, 140, 142 for an overview of the debate concerning the history of the at-will rule.

<sup>174</sup> *Bain* at the CA, *supra* note 163. The Court of Appeal’s decision was not reported on the merits. We have only the record of their order. The Supreme Court’s summary of the Court of Appeal’s majority decision states that they held the relationship to be of a temporary nature. The appellant’s Supreme Court factum, however, states that the majority of the Court of Appeal held the relationship to be at-will, such that no notice was required. The respondent’s factum does not use the language of at-will employment, and states, in the same terms as the Supreme Court, that the Court of Appeal found the relationship to be of a temporary nature, not intended to be final. See Appellant and Respondent’s Factums, *Bain*, *supra* note 163, on file in the Supreme Court of Canada’s record’s office, and on file with author.

<sup>175</sup> Labatt, Right to Terminate, *supra* note 161 at p. 598. He suggests that Wood’s description of the rule is “too sweeping”, because the English presumption still held favour in some states.

<sup>176</sup> *Ibid*.

20<sup>th</sup> century American investment into the Ontario economy was in a state of unparalleled growth, with branch plants of American firms beginning to dot the Southern Ontario landscape.<sup>177</sup> One might have thought, therefore, that the courts would have sought to align Ontario employment contract law with that of the United States. But instead the courts of the era appeared to simply view the law of Ontario as English law, forestalling any discussion of a move towards American legal principles.<sup>178</sup>

The abandonment of the presumption of annual hire is often viewed as a decisive moment in the history of employment contracts in the common law world. It is the moment when English and American law began to diverge structurally in the common law regulation of work, and it is usually thought of as the moment that ushered in the model of indefinite duration employment that prevailed over the mid-20<sup>th</sup> century.<sup>179</sup> Mark Freedland, Sanford Jacoby and Simon Deakin suggest that the presumption of annual hire had actually begun to wane in importance in England for manual and industrial employment by the mid 19<sup>th</sup> century, as a reflection of changing employment practices and the end of the settlement by hire.<sup>180</sup> Jacoby and Brian Etherington argue that industrial workers sought shorter contracts to free themselves from the strike-breaking role the presumption had played over the mid-19<sup>th</sup> century, while employers sought the greater flexibility of

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<sup>177</sup> See R.T. Naylor, *History of Canadian Business* (Kingston: McGill Queen's University Press, 2006) at chapter XI for a history of the establishment of American branch plants in the first two decades of the 20<sup>th</sup> century and of American investment into the Canadian economy. See also Michael Bliss, "Canadianizing American Business: The Roots of the Branch Plant" in *Close the 49<sup>th</sup> Parallel etc: The Americanization of Canada*, Ian Lumsden ed. (Toronto: University of Toronto Press, 1970).

<sup>178</sup> Other than suggestion that the Court of Appeal in *Bain*, *supra* note 163 (see *supra* note 172 for this discussion), might have ruled the relationship at will, there was no other discussion of a move to the at-will American dismissal principle in Ontario's reported decision in the first decades of the 20<sup>th</sup> century. This is interesting because American law was clearly available to local lawyers and the Ontario judiciary. Both English and American cases were reported in local law journals, and in 1904 Charles Bagot Labatt published the first volume of a multi-volumed series on the law of master and servant. See C.B. Labatt, *Commentaries on the Law of Master and Servant Including the Modern Laws of Workmen's Compensation, Arbitration, Employer's Liability, Etc.* (New York, The Lawyers Co-Operative Publishing Co., 1913).

<sup>179</sup> See Sanford Jacoby, "The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis" (1982) 5 Comp. Lab. L.J. 85 at 100; Simon Deakin, "The Contract of Employment: A Study in Legal Evolution" (2001) ESRC Centre for Business Research WP203 at 27.

<sup>180</sup> Mark Freedland, *The Contract of Employment* (London: Oxford University Press, 1976) at p. 143-144; Jacoby, *Indefinite Employment Contracts*, *ibid* at p.102. Jacoby suggests that both unions and employers were interested in shorter contract terms towards the end of the century – unions to avoid the strike-breaking function of the notice requirement and employers to increase flexibility in dismissal. See Deakin and Wilkinson, *supra* note 61 at p. 72-73.

employment relationships that had no presumed duration.<sup>181</sup> What is less clear is why the presumption was abandoned in regards to higher status workers, given the job protection function it had acquired over the second half of the 19<sup>th</sup> century. Jacoby suggests that reasonable notice dismissal emerged in England through an incremental process of legal change, provoked specifically by the growing importance of the position of clerks. In the mid-19<sup>th</sup> century clerks were held to be terminable with three months' notice, based on industry custom. But as the position of clerk moved from operating within small owner-operated businesses to positions situated within bigger corporate structures, their work became comparable to that of other salaried corporate employees, such that the practice of dismissing clerks by industry custom of notice could apply to a broader range of people. Once dismissal by custom-based notice began to spread, it was only a short step away to move onto a general model of dismissal by reasonable notice.<sup>182</sup> S.C. Churches makes a complementary argument.<sup>183</sup> He suggests that the abandonment of the presumption of annual hire was not specifically because of changing work practices, but was rather driven by legal considerations. He argues that the courts sought to move away from a bifurcated standard for notice between lower and higher status workers. Reasonable notice provided this tool, because one legal concept could be used for all waged workers while retaining the judicial flexibility to provide different levels of entitlement to workers of different statuses.<sup>184</sup> Jay Feinman argues that the annual hire rule may have been abandoned in the United States so as to end its job security function for higher status workers. These were workers who were in the process of being recast as subordinated waged-workers operating under the managerial control of their employers, rather than as business partners or service providers.<sup>185</sup> The loss of the security associated with the presumption of the annual hire, Feinman argues, may have helped place higher status workers into a waged-work frame, who were now dependent on employers for wage stability, like all other workers.

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<sup>181</sup> Jacoby, *Indefinite Employment Contracts*, *ibid*; Brian Etherington, "The Enforcement of Harsh Termination Provisions in Personal Employment Contracts: The Rebirth of Freedom of Contract in Ontario" (1990) 35 McGill LJ 459 at 469-473. Writing in the early 1990s, Etherington in particular emphasized that reasonable notice was not a concept that arose by virtue of classical contractual principles, but was rather rooted in earlier notions of paternalism and control.

<sup>182</sup> Jacoby, *Indefinite Employment Contracts*, *supra* note 179 at p.100-101.

<sup>183</sup> S. Churches, "The Presumption of a Yearly Term in a General Contract of Employment and the Plight of the Modern Manager, or the Black Death and the Malady Lingers On" (1978) 10(2) *Uni. Queensland L. J.* 195;

<sup>184</sup> *Ibid* at p. 201.

<sup>185</sup> Jay Feinman, "The Development of Employment at Will Rule" (1976) 20(2) *Am J Leg Hist* 118. See also Fisk's comments in *supra* note 135.



But while theories abound to explain the abandonment of the presumption of annual hire, outside of the United States less attention has been given its *effect* on legal and work practices in the early 20<sup>th</sup> century. Most legal studies either do not examine the consequences of its abandonment, or skip between the abandonment at the end of the 19<sup>th</sup> century and the modern rules of employment dismissal as they emerged in the 1960s. The suggestion in existing research is that there was a straight transition from annual hires to modern long term indefinite duration employment.<sup>186</sup> But the trajectory was not so clear. While the law allowed for a legal understanding of long term indefinite duration employment once the presumption was discarded, in practice the question of contract length arose infrequently in Ontario before the 1920s.<sup>187</sup> Instead most wrongful dismissal claims over the turn of the century concerned: explicit fixed term contracts; cases where cause was established and so there was no analysis of contract length or; the analysis focused on the workers' mitigation efforts.<sup>188</sup> Where it arose the Ontario courts generally treated the question of employment duration as one of fact, based on the intentions of the parties.<sup>189</sup> There was therefore no legal presumption of either long term indefinite duration employment or annual length work prior to the 1920s. Just as the law moved away from any presumption of employment lengths, in practice contract lengths also appeared to be in flux over the early 20<sup>th</sup> century. We know little of employment tenure in early 20<sup>th</sup> century Ontario or Canada, but labour markets in the United States in the early 20<sup>th</sup> century appear to have been characterized by very high worker turnover for

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<sup>186</sup> For instance, Jacoby, *Indefinite Employment Contracts*, *supra* note 179.

<sup>187</sup> *Glenn v. Rudd* (1902), 3 O.L.R. 422 [*Glenn*]; *Gould v. Michigan Central R.W. Co.* (1905), 5 O.W.R. 583 (Ont. H.C.J. Div. Ct.) [*Michigan Central R.W.*]; *Noble v. Gunn Limited and Gunn, Langlois and Co., Ltd.* (1910), 16 O.W.R. 504; *Jacobs v. Glassco Limited* (1916), 9 O.W.N. 351, *Fort Morgan (The) v. Jacobsen* (1919), 59 S.C.R. 404. The issue received the fullest treatment in *Freeman v. Wright* (1915), 9 O.W.N. 171 [*Freeman*]. The Court in *Freeman v. Wright* noted that the question of duration was a matter of intent between the parties, to be interpreted in the circumstances. As in England, party intent as to duration was heavily influenced by the frequency of wage payments, so that whether one was paid monthly or annually was thought suggestive of the length of contract intended, although that was not determinative.

<sup>188</sup> *Greenlees v. Picton Public School Board*, [1901] 2 O.L.R. 387 (H.C.J. Div. Ct.) [*Greenlees*]; *Laishley v. Gould Bicycle Company* (1902), 4 O.L.R. 350 [*Laishley*]; *Wiswell v. Inglis* [1904] 3 O.W.R. 477 (CA) [*Wiswell*]; *McMaugh v. Hamilton and Fort William Navigation Co.* (1904), 3 O.W.R. 791 [*McMaugh*]; *Robertson v. Northern Navigation Co.* (1906), 7 O.W.R. 476 [*Robertson*]; *Van Allen*, *supra* note 124; *Denham*, *supra* note 129; *McCabe v. National Mfg. Co.*, [1910] 15 O.W.R. 662 (H.C.J.) [*McCabe*]; *Dietrich*, *supra* note 124; *Hayes v. Harshaw* (1913), 30 O.L.R. 157 (Ont. S.C. Ap. Div.) [*Hayes*]; *Jacobs v. Glassco Limited* (1916), 9 O.W.N. 351; *Cockburn v. Trusts and Guarantee Co.* (1917) 38 O.L.R. 396 (Ont. S.C. Ap. Div.) [*Cockburn*]; *Smith v. Campbellford Board of Education* [1917] 39 O.L.R. 323 (SC Ap Div) [*Smith*].

<sup>189</sup> See for instance, *Freeman*, *supra* note 187.

low skilled and unskilled workers, while highly skilled workers tended to have very long employment tenures.<sup>190</sup>

(a) The Slow Emergence of Dismissal by Reasonable Notice

Even though the presumption of annual hire was abandoned in Ontario in the 1890s, and even though the Ontario Court of Appeal had approved of the idea that general hire contracts were presumed to be of indefinite duration, defeasible by reasonable notice, the concept of reasonable notice did not receive significant jurisprudential attention in Ontario until the 1920s, when the issue began to be litigated with greater frequency. The Ontario Court of Appeal spoke to the question in the 1923 case of *Pollard v. Gibson*.<sup>191</sup> There the court characterized *Harnwell* as establishing the principle that:

[I]n the absence of an express provision to the contrary, or evidence of some usage that every one must be considered to know and to contract with reference to, a contract of general, indefinite, or yearly hiring and service may be terminated on reasonable notice, and that there is no law requiring the notice to end with [the] year.<sup>192</sup>

This description framed *Harnwell* as enunciating a presumption of indefinite duration employment, in the absence of any evidence to the contrary.<sup>193</sup> A few years later the Court of Appeal took up the question again in *Messer v. Barrett Corp Ltd*.<sup>194</sup> There the Court found the employment agreement to be an annual hire contract in its first year, but to become an indefinite term contract after that point. Here the Court of Appeal was faced directly with the older approach to contract duration, and ruled against it.

Where there has been a definite hiring for a year and the relationship has continued by mutual agreement beyond that term, what is to be taken as the implied agreement as to the mode of termination of the contract of hiring? Mr. Bristol contends that it was automatically terminated at the end of the second year and each succeeding year, on the anniversary of the hiring, without any notice. The opposite contention is that it would

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<sup>190</sup> Katherine Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (West Nyack, NY: Cambridge University Press, 2004) at 39-40; Laura Owen, "Worker Turnover in the 1920s: The Role of Changing Employment Policies" (1995) 4(3) *Industrial and Corporate Change* 499; Sanford Jacoby, "Industrial Labor Mobility in Historical Perspective" (1983) 22(2) *Industrial Relations* 26; Sumner Slichter, "The Scope and Nature of the Labor Turnover Problem" (1919) 34 *Quarterly J Eco.* 329.

<sup>191</sup> *Pollard v. Gibson* (1923), 54 O.L.R. 419 (Ont. H.C.D.), rev'd (1924), 55 O.L.R. 424 (Ont. S.C. Ap. Div.) [*Pollard*]

<sup>192</sup> *Ibid* at para 10.

<sup>193</sup> In *Pollard*, *ibid* the Court of Appeal held, however, that the worker was an agent terminable at will, and so did not apply the presumption.

<sup>194</sup> *Messer v. Barrett Co. Ltd.* (1926), 59 O.L.R. 566 [*Messer*].

continue so long as the parties mutually agreed and could only be terminated by reasonable notice. We think the latter view is to be preferred.<sup>195</sup>

The court went on to state that if its decision in *Pollard* had not stated so sufficiently clearly<sup>196</sup>, it was willing to do so now: “[w]here the indefinite hiring arises, as here, after the termination of a definite period, then it is clear that the reasonable notice to be given is not required to terminate at the end of the year from the hiring, and that the only method of terminating the hiring is by reasonable notice”.<sup>197</sup> From this moment on reasonable notice was the method of terminating a general hire contract, absent cause.

The length of reasonable notice was held to be a question of fact, however, such that the courts did not explain how it was to be assessed. There were some discernible trends. In cases where workers were paid by monthly or weekly wages, as opposed to annual salaries, the courts sometimes suggested that the pay period was sufficient notice.<sup>198</sup> But for those paid on annual salaries there was no direction as to what constituted reasonable notice. Charles Labatt and John MacDonell, treatise writers of the era, suggested that reasonableness was primarily a matter of industry custom, but that where no custom existed the question was simply a matter for the jury.<sup>199</sup> In non-jury trials judges would often just announce what they viewed as reasonable, which varied considerably.<sup>200</sup> By the end of the 1920s, therefore, there was no clear method of determining what constituted reasonable notice, and as we shall see, it was only slowly becoming the measure of damages for wrongful dismissal.

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<sup>195</sup> *Ibid* at para. 11.

<sup>196</sup> In *Pollard*, *supra* note 191, a sales agent employed by an English commercial firm as their representative in Canada and the United States was employed by a contract with no fixed duration. The plaintiff was to be paid on commission, but was dismissed without cause. The court first considered whether the plaintiff was a commission agent, in the sense of hired by the job, and therefore not entitled notice of dismissal, but felt that there was a greater degree permanence to the relationship. The Court went on to consider what degree of time and permanence the parties intended for the engagement, on the basis of the nature of the work and the provisions of the contract. The court concluded that notice was required for the worker’s dismissal, and that six month was a reasonable length. The case was, however, overturned on appeal, with the Court of Appeal concluding that he was agent and not hired under a contract of hire and service, and therefore not entitled to any notice. See chapter 3 at p. 34-35 for a discussion of this case.

<sup>197</sup> *Messer*, *supra* note 194 at para. 13.

<sup>198</sup> *Deacon*, *supra* note 98, but cf *Kadish v. Thuna Balsam Remedies Ltd.* (1931), 40 O.W.N. 500.

<sup>199</sup> Labatt, *supra* note 59; John MacDonell, *The Law of Master and Servant*, 2nd ed. (London: Edward A. Mitchell Innes, 1908) at p.140.

<sup>200</sup> So, for instance, reasonable notice for a worker who was hired in Toronto to represent and recruit business in England for his employer, was on an annual salary, and who was terminated before a year was out, was awarded only the amount of time necessary for him to return to Toronto as notice. *Baker v. Canadian Tygard Engine Co. Limited* (1922), 23 O.W.N. 81 [*Baker*].

(b) Damages: The Transition from Actual Loss to Reasonable Notice

By the end of the 1920s the courts had begun to frame the issue of contract length as a presumption of indefinite duration employment, which could be brought to an end with the provision of reasonable notice. But it was not yet clear that reasonable notice also constituted the measure of damages. Prior to the 1920s reasonable notice was literally notice – the amount of time that an employer had to provide as notification of impending dismissal.<sup>201</sup> Between the abandonment of the presumption and the 1920s the courts continued to simply examine the actual loss from dismissal.<sup>202</sup> As contracts of service were still understood as agreements to retain and pay based on “the promise of continuing employment”, workers wrongfully dismissed were primarily entitled to loss of wages and other remuneration promised under the contract.<sup>203</sup> The loss was the loss of the ability to continue to earn one’s wages.<sup>204</sup> Wrongfully dismissed workers were therefore entitled to damages for those losses that arose naturally and directly from the employer’s breach.<sup>205</sup> Quantum of damages was a matter of fact, and thus to be determined by the jury. For contracts of fixed term duration, which, as discussed, constituted the greater part of litigated wrongful dismissal cases until the 1920s, the calculation of lost wages was relatively

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<sup>201</sup> Treatises from the era discussed damages and reasonable notice in separate sections. Charles Smith, in his 1906 treatise, deals with notice in relationship to the length of an employment contract, and has a wholly separate section for remedies for wrongful dismissal. Similarly, in his 1913 treatise, Labatt discusses notice in chapter 11, which concerns the termination of the employment contract, and remedies of a servant wrongfully dismissed in chapter 14. Treatises from the era discussed damages and reasonable notice in separate sections. See Smith, *supra* note 123; Industry custom was not in fact industry argued on the face of the reported decisions of the Ontario courts of the early 20<sup>th</sup> century. It is important to note, however, the trial decisions of county courts were not reported, and so it may be that custom and the length of notice was argued at the initial trial, and simply not mentioned on appeal.

<sup>202</sup> In *Beckham*, *supra* note 160 at p. 607-608, the court stated that:

The measure of damages for the breach of promise now in question is obtained by considering what is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, and that the usual rate of wages for such employment can be proved, and that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment.

<sup>203</sup> *Emmens v. Elderton* (1853), 13 CB 495 (HL). See *supra* chapter 1 p. 68-69.

<sup>204</sup> Labatt, *supra* note 59; MacDonell, *supra* note 199 at p. 1132. Were workers entitled to anything other than wages for wrongful dismissal? In England in the 1909 case of *Addis v. Gramophone Company Limited*, [1909] A.C. 488, the House of Lords specified that employees were not entitled to recover for loss of reputation from dismissal, or for injury to feeling (as was previously allowed by the decision in *Beckham*), but *Addis* was not applied in this period, and was mentioned only once in wrongful dismissal claims in Ontario. As such lost wages and lost profits were the main of recoverable heads of damages in wrongful dismissal claims in the first few decades of the 20<sup>th</sup> century.

<sup>205</sup> *Smith v. Bloomfield* (1903), 2 O.W.R. 481 (Ont. H.C.J. D.) [*Bloomfied*] at para. 9.

straightforward: workers were awarded their salaries over the unexpired portions of their contracts, subject to the duty to mitigate, discussed below. If wages were outstanding for work already performed, they could be awarded as part of the damages assessment.<sup>206</sup> If paid by commission, a reasonable projection of anticipated sales and profits over the remainder of the contract term was recoverable.<sup>207</sup> In the early years of the 20<sup>th</sup> century if a worker under a general hire contract was dismissed without cause or notice, the courts would usually assert that a worker was entitled to reasonable notice, would determine the length of the appropriate notice and then still go on to fix damages based on a calculation of actual mitigated loss.<sup>208</sup> In *Cockburn v. Trusts and Estates* the court quoted from an English Queen's Bench decision for the proposition that:

If an action is brought by a servant for a wrongful dismissal soon after the dismissal, the Judge tells the jury they must speculate on the chance of his getting a new place and base their damages on that. If the action is delayed till the man has got a place, what was matter of speculation before becomes certainty then, and the jury calculate accordingly.<sup>209</sup>

The measure of loss was the amount of time it took to find a new position, subject to the duty to mitigate.

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<sup>206</sup> There was some confusion in the early 20<sup>th</sup> century as to the difference between a claim for wages and a claim for damages for wrongful dismissal. In *Hayes v. Harshaw* in 1913, the Appellate Division of the Ontario Supreme Court explained that the difference in claims was primarily based on timing, and whether the worker affirmed or acquiesced to the dissolution of the contract. If a worker was wrongfully dismissed at the end of the pay period, such that their entitlement to wages had accrued, they could sue for wages or damages for wrongful dismissal. These constituted separate causes of action. Both were affirmations of the contract and claims against the employer's contractual breach (one for not paying the money contractually owed, and one for dismissing without cause/reasonable notice). They could otherwise rescind the contract and bring a claim in quantum meruit. But, if the worker was dismissed within the pay period, such that their contractual right to wages had not yet accrued, they could only sue for wages in quantum meruit, or for wrongful dismissal. But based on the holding in *Goodman v. Pocock*, 15 Q.B. 576, in a wrongful dismissal claim, wages owing could be included the damage assessment for wrongful dismissal. See *Hayes*, *supra* note 188.

<sup>207</sup> *Laishley*, *supra* note 188; *Van Allen*, *supra* note 124.

<sup>208</sup> In *Addis*, *supra* note 204, Lord Atkinson commented on the case of *Maw v. Jones*, 25 Q. B. D. 107, where the damages were not limited to the notice period, but were rather the length of time it would take the worker to find comparable employment. He explained a jury charge with approval in the following manner:

The judge at the trial told the jury that they were not bound to limit the damages to the week's notice he had lost, but that they might take into consideration the time the plaintiff would require to get new employment - the difficulty he would have as a discharged apprentice in getting employment elsewhere - and it was on this precise ground the direction was upheld.

*Deacon*, *supra* note 98 at para. 10, 26-27. In this case, the Court concluded that he was entitled to one month's notice, but only nominal damages because he obtained a new position right away.

<sup>209</sup> *Sowdon v. Mills* (1861), 30 L.J.Q.B. 175, quoted at para 16 of *Cockburn*, *supra* note 188.

Starting in the 1920s, however, the courts in Ontario increasingly moved to assessing damages for wrongful dismissal as wages owing over the reasonable notice period.<sup>210</sup> This shift was piecemeal and unremarked upon. Because it was a question of fact, the method of its determination is not visible on the face of decisions of the era, and there was little consistency in the lengths provided in the decided cases.<sup>211</sup> Generally the courts would simply announce what constituted reasonable notice in the circumstances, and then announce the amount of damages owed. Sometimes this was phrased to suggest that damages were wages over the reasonable notice period, but usually it was difficult to correlate the two.<sup>212</sup> The judges would often simply announce a period of notice they deemed reasonable, and then a sum owed.<sup>213</sup> While it was often not possible to correlate the damage awards with wages over the notice period, the courts began to state the award as “damages as wages in lieu of notice”.<sup>214</sup> Thus as the 1930s got underway, reasonable notice was increasingly the length of time over which damages were assessed for wrongful dismissal.

Even as the concept of reasonable notice increasingly assumed the role of determining the loss from wrongful dismissal, the courts over this period never explicitly stated that the breach in a wrongful dismissal claim was the failure to provide reasonable notice. And because reasonable notice was considered a matter of fact, the courts did not enunciate any principles through which it was to be assessed. Nonetheless, it is only once the legal understanding of employment as a relationship of fixed duration was displaced that the complexity of dealing with employment as *contract* becomes visible.<sup>215</sup> It is only after that point that the law had to grapple with how to value

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<sup>210</sup> Thus in *Gould, supra* note 118 the court held that the worker was entitled to reasonable notice prior to dismissal, and because it was not received, he was entitled to damages for wrongful dismissal, suggesting that it was the failure to receive notice that constituted the wrong of the discharge. The court then went on to hold that wages over three months were reasonable damages in lieu of notice.

<sup>211</sup> In cases where workers were paid by monthly or weekly wages, such as *Deacon, supra* note 98 the courts sometimes suggested that the pay period was sufficient notice. Otherwise there were no visible trends. So, for instance, in *Evans v. Fisher Motor Co. Limited* (1915), 8 O.W.N. 19, an employee of a motor company whose annual salary was paid bi-weekly was awarded 3 months notice when terminated after less than a year. In *Pollard, supra* note 191 a commissioning agent, employed to act as a sale agent in Canada and the United States on an indefinite agreement was awarded 6 months notice when terminated in less than a year. This was overturned on appeal, on the basis that the worker was an agent and not entitled to reasonable notice of dismissal. In *Messer, supra* note 194, a sales manager, who worked for a little over two years and was paid annually, received 5 months notice.

<sup>212</sup> *Gould, supra* note 118; *Evans, ibid*; *Freeman, supra* note 187; *Pollard ibid*; *Messer, ibid*.

<sup>213</sup> *Evans, ibid*; *Pollard, ibid*; *Kadish, supra* note 198.

<sup>214</sup> Contrast *Cowper-Smith v. Evans* (1914), 6 OWN 277, aff'd by (1914) 7 OWN 179 (CA) with *Evans, supra* note 211.

<sup>215</sup> There are other obvious and fundamental problems with considering employment within a contractual frame, such as the commodification of labour and the erasure of the market inequality between the parties, but the

the loss of indefinite duration employment, and how to manage the changing terms of the employment relationship over time.

## **(7) Conclusion**

The argument of this chapter is that the common law of employment contracts saw three significant changes to the boundaries and scope of its organizing concepts between the 1890s and 1930s. Together these three changes ushered in a nexus of ideas which ‘contractualized’ the employment relationship in law. These were changes to the property parameters of labour power, changes to the tools of managerial control, and changes to legal notions of time in employment. They occurred in relationship to one another, and were provoked in law by the abandonment of the presumption of annual hire, and in practice by the changing nature of work and the workforce in Ontario through its second industrial revolution. As of the 1890s the courts in England and Ontario abandoned the presumption of annual hire, and with it dispatched the legal understanding of employment as a relationship of fixed duration. This had a significant effect on the analysis of property rights in employment, which moved from an employer’s purchase of a worker’s entire labour power over the fixed duration of an employment contract, to a purchase of particular skill, time, knowledge, and/or physical goods production. The courts increasingly looked to the nature of the job and the nature of intended exchange between the parties to determine what each of them owned. Once the employment contract constituted the purchase of particular time, skill etc., the duty of obedience could no longer reach workers’ behaviour outside the confines of the job. At the same time workers previously understood as agents, who provided knowledge and intellectual skills, were recast as waged-workers in law. In this context the courts expanded the categories of cause for dismissal to worker behaviour outside of work, and drew from the law of agency to infuse the employment contract with a series of implied contractual duties that tied the interests of workers to their employers in law. Through these three legal changes the content of the common law of employment contracts was expressly reoriented towards the nature of white collar work, which encompassed clerical, skilled and managerial work that took place within corporate manufacturing and service enterprises. Although common law claims regarding work were

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problems that mentioned above that arose at the end of the 1920s, are ones that concern the doctrinal implications of regulating work through contract.

theoretically available to lower status workers, very few such workers appear in the reported decisions of the era, such that the effect of these substantive changes on the nature of their employment relationships is not visible from the materials used in this study. What is visible is the courts' idea that waged labour consisted in the purchase of labour power, and that employers held the right to direct and control the workplace remained fundamentally unchanged over the early 20<sup>th</sup> century. What changed was that such entitlements were now placed on a loose contractual footing, understood by the common law courts as premised and limited to workers' acquiescence. In this sense one can say that the employment relationship was contractualized at common law over the early 20<sup>th</sup> century.



## Chapter 3

# The Common Law of Employment and the Institutionalization of the Standard Employment Relationship, 1930-1959

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## **(1) Introduction**

The previous chapter focused on the changing nature of waged work between the 1890s and the end of the 1920s. During this period workplaces became larger and more bureaucratized. A more detailed labour process was put in place in industrial businesses, creating a more finely-tuned hierarchy and increasingly centralized management structures concerned with efficiency and labour productivity. It is also through this time, and partially because of this process, that white collar and managerial work began to expand in Ontario, just as a set of legal changes reoriented the analysis of waged work at common law. Legal notions of property in employment and the tools of managerial control were adjusted to meet the nature of professional work. Workers' labour power was reconceived as a series of property entitlements to be exchanged through an employment contract, and employers were increasingly limited to property rights of control over the content of that exchange. At the same time as property rights in employment were narrowed, the tools of managerial control began to expand. Employee duties relating to fidelity, loyalty and confidentiality that had been primarily features of principle-agent relationships were increasingly generalized and presented as necessary incidents of all employment contracts. The new tools of the managerial prerogative were now available to control worker discretion as well as to enforce direct obedience. As the content of the wage-work exchange was jurisprudentially renegotiated in property and wrongful dismissal claims, the courts also reconceptualised the legal understanding of time in employment. In the 1890s the courts of Ontario discarded the longstanding legal presumption of annual hire, such that the length of an employment existed as a question of fact, rather than a presumption of law, until the 1920s. Through that period the concept of reasonable notice slowly began to emerge to a place of centrality in the wrongful dismissal analysis, as it was increasingly utilized to measure damages for dismissal. The conceptual changes wrought over the turn of the 20<sup>th</sup> century knit together an understanding of employment as premised on an exchange between the parties, such that by the end of the 1920s one can say that employment was 'contractualized' at common law.

In the early 20<sup>th</sup> century the common law of employment contracts seemed to develop in lockstep with the socioeconomic transformations of Ontario's second industrial revolution. The common law of employment contracts was substantively oriented towards white collar workers just as the

number of such workers expanded to make up a greater portion of the labour force. The simultaneous and intertwined nature of socioeconomic and legal changes in the common law of employment contracts came to end by the 1930s however. Between the 1930s and the end of the 1950s Ontario experienced the upheaval of the Great Depression and the Second World War. It also underwent massive transformations to the nature of work and to the composition of the workforce with the emergence of the Standard Employment Relationship (SER) within Fordist vertically integrated enterprises. But transformations in the nature of work were not as directly reflected in the common law of employment contracts over the mid-century as they had been in the early 20<sup>th</sup> century, and the active development of this area of law slowed over this period.

The few claims that were litigated nonetheless revealed the first suggestions of the changes that the advent of the SER and the parallel growth of more tenuous service-sector work would bring to employment and to the shape of the Ontario labour market. As compared to the early 20<sup>th</sup> century, there were only two major types of property-related claims over mid-century: claims regarding post-employment competition and solicitation, often in non-SER small service enterprises, and trade secret and confidential information claims from research-intensive enterprises. Wrongful dismissal claims now entrenched a presumption of indefinite duration employment, which began to shift the conceptual understanding of the nature of the claim and the measure of damages, giving the concept of reasonable notice an expanding analytical role. For the first time the courts began to see claims concerning changing terms of work over long-term employment relationships. Finally, the question of whether and to what extent long-term agents were able to bring wrongful dismissal claims was a subject of judicial investigation.

The 1930s to 1950s can therefore best be understood as a transitional period, marked by a reduction in reported employment contract cases, significant labour market changes, and hints of the important legal questions such labour market arrangements would bring to the courts in the 1960s and 1970s. To examine these developments, this chapter will begin by describing the reorientation of the labour market around the paradigm of the Standard Employment Relationship within vertically integrated businesses, before examining the visibility and impact of such changes on the common law of employment contracts in the 1930s, 1940s and 1950s.

## (2) The Emergence of the Standard Employment Relationship in Mid-Century Ontario and the Reorganization of the Labour Market

The period between 1930 and 1959 began with the massive unemployment of the Great Depression, which at its worst saw one quarter of the Canadian population unemployed, with downward pressure on wages and pernicious employer practices.<sup>1</sup> Through the mid-period Canada experienced the social and economic upheaval of the Second World War, which brought women into the workplace in increasing numbers<sup>2</sup>, saw two periods of full employment<sup>3</sup>, increasing amounts of minimum standards legislation<sup>4</sup>, periods of profound labour unrest and militancy<sup>5</sup>, and the institutionalization of a system of industrial legality<sup>6</sup>. Through this period, white collar work continued to grow, with increasing numbers of workers working in clerical, professional and managerial professions, earning large salaries in comparison to low skilled workers.<sup>7</sup> It is also through this period that the Standard Employment Relationship (SER) emerged to dominate the labour market.

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<sup>1</sup> Marcus Klee, "Fighting the Sweatshop in Depression Ontario: Capital, Labour and the Industrial Standards Act", (2000) 45 *Labour/Le Travail* 13.

<sup>2</sup> Ruth Roach Pierson, *They're Still Women After All: The Second World War and Canadian Womanhood* (Toronto, 1986); Pat Armstrong and Hugh Armstrong, "The Segregated Participation of Women in the Canadian Labour Force, 1941-1971", (1975) 12(4) *Canadian Review of Sociology* 370. Statistics Canada, Series C126-129, Persons with jobs, class of worker, non-agricultural, by sex, 1931-1945.

<sup>3</sup> Statistics Canada, Series D491-497, Unemployment Rates, by region, annual averages, 1946-1975.

<sup>4</sup> Between the 1930s and 1959 the following pieces of legislation were passed or significantly amended: (a) Federally - *Fair Wages and Eight-Hour Work Day*, 1930, S.C., c.30; *Fair Wages and Hours of Labour Act*, 1935, S.O., c.39; *Unemployment Insurance Act*, 1940, S.C. 1940, c. 44.; *Canada Fair Employment Practices Act* S.C. 1952-53, c.19(b) Provincially - *Minimum Wages Act*, S.O. 1937, c.43., *Racial Discrimination Act 1944*, S.O. 1944, c. 51; *Hours of Work and Vacations with Pay Act*, S.O. 1944, c.26. *An Act to ensure Fair Remuneration to Female Employees*, S.O. 1951, c.26. *Fair Employment Practices Act, 1951*, S.O. 1951, c.24. See Paul Malles, *Canadian Labour Standards in Law, Agreement, and Practice* (Economic Council of Canada, 1976); Mark Thomas, *Regulating Flexibility, The Ontario Employment Standards Act and the Politics of Flexible Production*, 2003, Unpublished Dissertation, at chapter 3, for a general description of employment-related legislation passed over this time period.

<sup>5</sup> Bryan Palmer, *Working Class Experience: Rethinking the History of Canadian Labour, 1800-1991*, 2<sup>nd</sup> Edition (Toronto: McClelland and Stewart, 1992) at 278-279; Douglas Cruikshank and Gregory Kealey, "Strikes in Canada, 1891-1950", (1987) 20 *Labour/Le Travail* 85.

<sup>6</sup> Fudge and Vosko, *supra* note 42 at p. 275-277; Judy Fudge and Eric Tucker, "Pluralism or Fragmentation?: The Twentieth Century Employment Law Regime in Canada", (2000) 46 *Labour/Le Travail* 251 at 275-276; Judy Fudge and Harry Glasbeek, "The Legacy of PC 1003", (1995) 3(3/4) *C.L.E.L.J.* 357.

<sup>7</sup> Alan Green and David Green, "Canada's Wage Structure in the First Half of the Twentieth Century (with comparisons to the United States and Great Britain)", UBC, Department of Economics, 2007 at p. 43.

The Standard Employment Relationship has been defined as employment “which is continuous, long term, full time, in at least a medium sized or large establishment [...]”<sup>8</sup>. It is characterized by “the trade-off between high levels of subordination and disciplinary control on the part of the employer and high levels of stability and welfare/insurance compensations and guarantees for the employees”.<sup>9</sup> The emergence of the Standard Employment Relationship as the paradigmatic form of employment occurred amidst three interlinked developments over the mid-century. The first was the rise of vertically integrated corporations utilizing Fordist production methods and “a Taylorist division of labor – extreme task fragmentation in a strict authority hierarchy with no worker input – based on assembly line production of standardized goods”.<sup>10</sup> The second development was an increase in the length of workers’ job tenure with a single employer. The third was the development of the centrally structured workplace, characterized by standardized work policies and job ladders to promote internal mobility.

Over the mid-20<sup>th</sup> century the SER came to operate as the paradigmatic form of employment around which labour market policies, social wage protections and collective bargaining were structured. Medium and large scale workplaces began to design work practices around the frame of the SER, institutionalizing policies and benefits to develop worker loyalty to their employers. Some of these practices had emerged earlier in the 20<sup>th</sup> century under the influence of scientific management policies and with the changes to the industrial labour process, as detailed in the previous chapter. Over the mid-20<sup>th</sup> century, however, these policies were further developed and consolidated, particularly in response to high labour turnover and labour market fluidity. The result was the fundamental reorganization of the labour market, focused at a political and legislative level around a normative picture of long term, stable work for a male family breadwinner with a single employing enterprise.

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<sup>8</sup> Ulrich Muckenberger, “Non Standard Forms of Work and the Role of Changes in Labour and Social Security Regulation”, (1989) 17 Intl. J. of Soc’y of Law 387 at 389.

<sup>9</sup> Alain Supiot et al., *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press, 2001) at 1.

<sup>10</sup> Matt Vidal, “Reworking Postfordism: Labor Process Versus Employment Relations” (2011) 5/4 Sociology Compass 273 at 274, explaining Michel Aglietta’s definition of Fordism. See also Aglietta, *A Theory of Capitalist Regulation: The US Experience* ( London: Verso Classic, 2000 [1979])

(a) Lengthening Job Tenures and Internal Labour Markets

Historical indicators tracing the precise emergence of the SER are somewhat scarce in Canada. There are few studies that analyze the relationship between the rise of scientific management strategies, the lengthening of employment duration, and the emergence of internal labour markets in Canada, but almost all focus on unionized workplaces.<sup>11</sup> Explaining the emergence of the SER in Ontario therefore requires assembling existing research on each of these individual developments and drawing from more extensive American research.

American research on labour markets suggest that labour turnover was very high in the early 20<sup>th</sup> century, but employment tenure began to lengthen in the 1920s, followed by the development of internal labour markets. Jacoby and Sharma argue that prior to the 1920s a small minority of white collar and skilled workers held long-term quasi-permanent jobs, while unskilled and semiskilled workers enjoyed little job stability and were highly mobile, with the labour process organized primarily under the “drive system” and the foreman’s control.<sup>12</sup> In the 1920s, however, the job tenure of semi-skilled and low skilled workers also began to grow.<sup>13</sup> Laura Owens argues that the most significant shift in employment duration in the United States began after 1923.<sup>14</sup> Her research indicates that in 1913-14, 28.9% of the manufacturing workforce in the United States had job tenure of less than one year; 38.2% had between one to five years, and 32.9% had longer than 5 years. By 1927-1928, 21.5% of workers had a job tenure of less than one year, 41.2% had one to five years, and 37.3% had over five years.<sup>15</sup>

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<sup>11</sup> Of these, the application of scientific management practices in Canada has received the most study. See Paul Craven, *An Impartial Umpire: Industrial Relations and the Canadian State*, (Toronto: University of Toronto Press, 1980) 90-110; Graham Lowe, *The Administrative Revolution: The Growth of Clerical Occupations*, 1979, Unpublished Dissertation; Bryan Palmer, “Class, Conception and Conflict: The Thrust for Efficiency, Managerial Views of Labor and the Working Class Rebellion, 1903-1922” (1975) 7 *Review of Radical Political Economics* 31; Craig Heron and Bryan Palmer, “Through the Prism of the Strike: Industrial Conflict in Southern Ontario, 1901-1914” (1977) 8(4) *The Canadian Historical Review* 423. See also, Barton Hamilton, Mary MacKinnon, “An Empirical Analysis of Career Dynamics and Internal Labor Markets During the Great Depression, Olin School of Business Working Paper, 2002; Barton Hamilton and Mary MacKinnon, “Long-term employment relationships in the early twentieth century: Evidence from personnel data” (1996) 3 *Labour Economics* 357.

<sup>12</sup> Sanford Jacoby and Sunil Sharma, “Employment Duration and Industrial Labor Mobility in the United States, 1880-1980” (1992) 52(1) *The Journal of Economic History* 161 at 176-177

<sup>13</sup> Jacoby and Sharma, *ibid* at p. 175

<sup>14</sup> Laura Owens, *The Decline in Turnover of Manufacturing Workers: Case Study Evidence from the 1920s* (Unpublished PhD Thesis, Yale, 1991) at 13.

<sup>15</sup> *Ibid* at p. 23.

A number of reasons have been offered for the increase in job tenure after the 1920s in the United States. The first is that employers explicitly sought to reduce labour turnover. Katherine Stone argues that employers waged a battle against the power and control of craft unions and skilled workers over the labour process at the end of the 19<sup>th</sup> century in the United States.<sup>16</sup> One effect of their successful campaign, however, was an increase in labour turnover and labour mobility. Absent standardized methods of organizing internal mobility within a company, and without guilds or unions to promote training at a craft level, the only advancement method available to workers was job shopping.<sup>17</sup> The transient nature of employment in the early 20<sup>th</sup> century was problematic for employers however, because, according to Owens, the fixed costs of worker training also increased over this period with the adoption of standardized machinery.<sup>18</sup> Firm-specific employee training was required, but there was little reason for existing workers to share knowledge with incoming workers, given the precariousness of their own job tenure. Stone and Owens therefore suggest that employers in the 1910s and 1920s in the United States developed strategies to decrease worker training costs, by incentivizing knowledge-sharing amongst employees and reducing labour turnover rates.<sup>19</sup>

The lengthening duration of employment was accompanied by other innovations in employment practices. As of the 1920s in the United States workplace policies were increasingly institutionalized and managed centrally.<sup>20</sup> American research suggests that internal labour markets began to form immediately prior to the First World War in a few large workplaces, but expanded more fully as of the Second World War, creating “administrative unit[s], such as [manufacturing plants], within which the pricing and allocation of labor [wa]s governed by a set of administrative rules and

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<sup>16</sup> Katherine Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, 2004) at p.38-40

<sup>17</sup> Sanford Jacoby, “The Development of Internal Labor Markets in American Manufacturing Firms”, UCLA Institute of Industrial Relations Working Papers Series, Paper No. 42, 1982 at p. 11.

<sup>18</sup> Laura Owens, “Worker Turnover in the 1920s: The Role of Changing Employment Policies” (1995) 4(3) *Industrial and Corporate Change* 499 at 503-506. Owens argues that in the post-guild era, while the technologies adopted for use on industrial production lines were often general, their use in particular industries, and in particular production lines, were firm specific.

<sup>19</sup> Stone, *Widgets*, *supra* note 16 at 41-42; Owens, *Worker Turnover*, *ibid* at 503-506.

<sup>20</sup> Jacoby, *Internal Labor Markets*, *supra* note 17 at p. 38-40, argues however that the centralization of personnel management dropped off during the Great Depression, and picked up again only during the Second World War under the threat of expanding unionization.

procedures”.<sup>21</sup> In such workplaces, there were “defined career paths, limited ports of entry for each career path, wages tied to the job (rather than personal characteristics), and pay structures that exhibit rigidities across occupations and time”.<sup>22</sup> Job classification schemes, wage grids and internal progressions ladders created incentives to remain with the firm and to progress up the job ladder for increased pay and benefits. Pension and stock option programs, adopted at the turn of the 20<sup>th</sup> century, were now increasingly tied to job tenure to incentivize worker loyalty and longer job tenures.<sup>23</sup> The deferred nature of pension schemes and seniority promotions could also be used as disciplinary tools, so that workers involved in strike actions could be threatened with the loss of pension entitlement.<sup>24</sup>

Jacoby suggests that personnel managers had a significant hand in driving the adoption of such policies. Personnel supervisors and shop-floor foremen had engaged in a protracted internal battle for control over discipline and dismissal on production lines through the 1910s.<sup>25</sup> In the immediate lead up to the First World War, labour supply in the United States began to dry up as immigration was effectively eliminated, providing workers with greater freedom of movement and bargaining power. Faced with difficulties in retaining a stable workforce, employers turned to personnel managers to incentivize firm loyalty.<sup>26</sup> The importance of personnel managers was lessened with the over-supply of labour during the Great Depression, but grew again, and more permanently, in the late 1930s and 1940s under the threat of labour shortages and expanding unionization.<sup>27</sup> At a general level, therefore, Stone argues that by the end of the 1930s, “[t]hroughout corporate America, management reduced the skill level of jobs, while at the same time it encouraged employee-firm attachment through promotion and retention policies, explicit or de facto seniority arrangements, elaborate welfare schemes, and longevity-linked benefit packages”.<sup>28</sup>

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<sup>21</sup> Peter Doeringer and Michael Piore, *Internal Labor Markets and Manpower Analysis* (D.C. Heath and Company, 1971) at 1-2.

<sup>22</sup> Erica Groshen and David Levine, *The Rise and Decline (?) of U.S. Internal Labor Markets*, (Research Paper 9819, Federal Reserve Bank of New York, 1998) at 2.

<sup>23</sup> Jacoby, *Internal Labor Markets*, *supra* note 17 at p. 28-29.

<sup>24</sup> *Ibid* at p. 29.

<sup>25</sup> *Ibid* at p 12-20.

<sup>26</sup> *Ibid* at p.12-31.

<sup>27</sup> *Ibid* at p. 37-38. According to Jacoby, personnel managers tended to approach the issue of job organization with a mixture of older corporatist welfare notions and emerging social progress ideas of general societal organization.

<sup>28</sup> Stone, *Widgets supra* note 16 at p. 47.



To what extent the American analysis is applicable to the Canadian labour market is slightly unclear. Questions of employment duration in the 1920s-1940s have been examined in Canada in greatest depth by Mary MacKinnon and Barton Hamilton, using pension data from the Canadian Pacific Railway (CPR) as of 1903.<sup>29</sup> Their study of job tenures between 1903 and 1938 in the mechanical department of the CPR suggests that the average duration of employment of workers hired between 1919 and 1938 also increased.<sup>30</sup> At the CPR, workers hired between 1903 and 1913 worked for an average of 23.3 months with the company. Workers hired between 1914 and 1918 worked for an average of 26.2 months. Those hired after the First World War, between 1919 and 1921, had significantly higher job tenures, with an average duration of 48.9 months, and a median of 9 months. This dropped for workers hired between 1922 and 1929, whose tenure dropped down to an average of 28.8 months, and 27.1 months for workers hired between 1930 and 1938. Except for workers hired between 1919 and 1921, the median job tenure was six months.<sup>31</sup> The difference in median and average lengths suggests that a few workers may have had very long tenures.<sup>32</sup> As in the United States, there was a significant decrease in quit rates for workers hired between 1903 and 1938.<sup>33</sup> The work patterns at the CPR suggest a steady stream of temporary quits and layoffs. But the company also explicitly sought to develop worker loyalty and to reduce training costs in order to maintain firm attachment despite quits and layoffs. It instituted the first private employer pension plan in Canada in 1903.<sup>34</sup> After 1918 there was a substantial increase in hiring of returning army personnel who were previous CPR employees, and during the Great Depression almost all CPR hires in the mechanical department were rehires from quits and layoffs.<sup>35</sup> In addition, as of the 1920s the number of apprenticeships increased, and in the 1930s virtually all new hires were

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<sup>29</sup> Hamilton and MacKinnon, *Career Dynamics and Internal Labor Markets*, *supra* note 11; Barton Hamilton and Mary MacKinnon, "Quits and Layoffs in Early Twentieth Century Labor Markets", (1996) 33 *Explorations in Economic History* 346; Barton and MacKinnon, *Long-term Employment*, *supra* note 11.

<sup>30</sup> Hamilton and MacKinnon, *Long-term Employment*, *ibid*.

<sup>31</sup> Hamilton and MacKinnon, *Quits and Layoffs*, *supra* note 29 at p. 350. Using point in time cross sectional data, Hamilton and MacKinnon also report that in 1905 there was a 12% chance that a worker's employment with the CPR would last less than a year, a 61% chance that it would last one to ten years, and a 27% chance that it would last more than ten years. In 1925 there was a 9% chance of staying with the company for less than a year, a 33% chance of working there for one to ten year, and a 58% chance of working for CPR for more than 10 years. See, Hamilton and MacKinnon, *Long-term Employment*, *supra* note 11 at 366.

<sup>32</sup> Hamilton and MacKinnon, *Quits and Layoffs*, *supra* note 29 at 349.

<sup>33</sup> *Ibid* at p. 349-351.

<sup>34</sup> Hamilton and MacKinnon, *Long-term Employment*, *supra* note 11 at p. 361.

<sup>35</sup> Hamilton and MacKinnon, *Quits and Layoffs*, *supra* note 29 at p. 51.

apprentices.<sup>36</sup> For a variety of reasons, however, it is not clear that CPR's employment practices are indicative of the norms of the era. Owing to its size and the coordination needs of rail transport, railways were early innovators in management techniques, as well as the provision of corporate welfare and pension programs.<sup>37</sup> Moreover, because CPR's wage rates were above comparable jobs, and given its size and the unionization of its workforce, it is quite likely that its work tenures would have been somewhat longer than elsewhere in the industrial labour force.

There are no general studies of work tenure in Canada over this period, such that it is difficult to pin down the emergence of long-term employment and the growth of internal labour markets in Canada. The studies that exist tend to focus on the emergence of scientific management and corporate welfare strategies in blue collar work. The existing research suggests that worker-retention programs began to emerge in the 1910s and 1920s, particularly in Canadian manufacturing branch plants of American corporations, but also in the growing finance sector.<sup>38</sup> In some industries corporate welfare schemes began a little later, in the 1930s and 1940s, in direct response to the growth of industrial unionism.<sup>39</sup> Trade union membership levels increased significantly during and after the Second World War, a period marked by frequent strikes, as well as legislative enactments requiring trade union recognition and proceduralizing collective bargaining.<sup>40</sup> David Matheson's study of collective bargaining agreements in the 1930s and 1940s suggests that unions began addressing questions of seniority and formalizing dispute resolution mechanisms as of 1940.<sup>41</sup> Judy Fudge and Leah Vosko argue that "the SER became the normative model of (male) employment in Canada in the golden age of rapid growth as workers successfully secured

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<sup>36</sup> Hamilton and MacKinnon, *Quits and Layoffs*, *supra* note 29 at p. 51

<sup>37</sup> Paul Craven and Tom Traves, "Dimensions of Paternalism: Discipline and Culture in Canadian Railway Operations in the 1850s" in *On the Job: Confronting the Labour Process in Canada*, Craig Heron and Robert Storey eds., (Canada: McGill-Queen's University Press, 1986).

<sup>38</sup> Craven, *Impartial Umpire*, *supra* note 11; Margaret McCallum, "Corporate Welfarism in Canada, 1919-1939" (1990). As regards early pension plans in Canada, see Murray Latimer, *Industrial Pension Systems in the United States and Canada* (New York: Industrial Relations Counselors Incorporated, 1932); Elizabeth Shilton, *Gifts or Rights? A Legal History of Employment Pension Plans in Canada* (Unpublished PhD Dissertation, University of Toronto, 2011) at 34-35

<sup>39</sup> Robert Storey, "Unionization Versus Corporate Welfare: The 'Dofasco Way'" (1983) 12 *Labour/Le Travail* 7.

<sup>40</sup> A.W.R. Carrothers, *Collective Bargaining Law in Canada* (Toronto: 1986) at 63-64; Laurel Sefton-MacDowell, "The Formation of the Canadian Industrial Relations System: Some Formative Factors", (1978) 3 *Labour/Le Travail* 175; H.D. Woods and Sylvia Ostry, *Labour Policy in Canada* (Toronto, 1973).

<sup>41</sup> David Matheson, *The Canadian working class and industrial legality, 1939-1949* (M.A. Thesis, Queen's University, 1990).

associational rights and as collective bargaining gained legitimacy”.<sup>42</sup> For Fudge and Vosko, the SER “was the product of an entente between business and organized labour, mediated by the state, which corresponded with the emergence of Fordism as a production regime and endorsed the male breadwinner norm and the notion of the family wage”.<sup>43</sup> Because most studies focus on the changes to blue collar work over the mid-century, we know less about the emergence of standard employment in the white collar workforce over this period. It is unclear whether standardized work practices and internal job ladders were set in place for white collar work earlier, in tandem, or after blue collar work and expanding trade unionization levels.<sup>44</sup> Existing studies do not provide specifics on the terms and conditions of employment, on how and whether one could progress internally, and the standard lengths of employment in the 1930s, 1940s and 1950s.<sup>45</sup> Thus although there is research left to be done on the timing and process by which white collar work was brought onto SERs, nonetheless reported common law employment contract cases do hint that some white collar workers were working in long-term employment by the mid-century, though it would not be until the 1960s and 1970s that the nature of common law employment contract cases would come to be dominated by issues arising from long-term employment.

#### (b) Employment-Related Statutory Enactments and Labour Market Segmentation

The period between the 1930s and the end of 1950s also saw significant legislative intervention into work relationships, which would have lasting impact on the shape of labour market arrangements over the rest of the 20<sup>th</sup> century. In 1944 the federal government adopted PC 1003, which recognized and enshrined the right to freedom of association, proceduralized a system for determining worker support for trade union representation, and required employer recognition and

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<sup>42</sup> Judy Fudge and Leah Vosko, “Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law, Legislation and Policy”, (2001) 22 *Economic and Industrial Democracy* 271 at p. 277.

<sup>43</sup> Fudge and Vosko, *ibid* at p. 274

<sup>44</sup> David Coomb, *The Emergence of a White Collar Workforce in Toronto: 1895-1911* (Unpublished Dissertation, University of Toronto, 1978) at chapter 4; Lowe, *supra* note 11. Studies of white collar employment tend to focus on the decades of the early 20<sup>th</sup> century, when the size of the white collar workforce began to grow.

<sup>45</sup> Ronald Rudin’s study of employment in the Banque of Hochelaga between 1901 and 1921 actually depicts a drop in employment tenure over the decades under study. This appears due to the rapid increase in bank branches over these years, and to the Bank’s quite exacting expectations for its workers, which led to a high rate of dismissal. See Rudin, “Life Behind the Wicket at the Banque d’Hochelaga” (1986) 18 *Labour/Le Travail* 63 at p. 67.

collective bargaining with trade union representatives.<sup>46</sup> In exchange, unions were barred from striking during the term of a collective bargaining agreement or prior to the exhaustion of extended conciliation procedures. During the decade that followed WWII unions were able to extract significant wage increases, and the standardized work practices and internal job ladders discussed above became the norm.<sup>47</sup> Workers in the resource sector, in transportation and in mass production industries were increasingly unionized, as were the skilled trades.<sup>48</sup>

Moreover, in the aftermath of the Great Depression and the Second World War there was a growing realization that an unregulated labour market could not be left to provide for the basic income and social security needs of the population.<sup>49</sup> Between 1930 and the end of the 1950s Canadian governments began to put together a frame for social wage protection and substantive minimum employment standards, passing new statutes and weaving together existing enactments.<sup>50</sup> In so doing, they adopted the waged relationship as the primary location for alleviating the harsher effects of the market, and the contract of employment as a site for legislative intervention. In 1937 the government of Ontario extended to men the minimum wage protection that had once been restricted to women and children.<sup>51</sup> In 1944 maximum hours of daily and weekly work were legislatively fixed, as was annual vacation pay.<sup>52</sup> Equal pay legislation was passed for women<sup>53</sup>, and the *Fair Employment Practices Act* was passed to prohibit discrimination on the basis of race, colour, and creed.<sup>54</sup> *The Labour Relations Act of 1950* also prohibited discrimination on the basis of trade union membership, and specified that any collective bargaining agreement that discriminated on the basis of race or creed was invalid.<sup>55</sup> The British North America Act was

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<sup>46</sup> *Wartime Labour Relations Regulations*, Order-in-Council P.C.1003, 1944 [PC 1003]. Ontario first received labour relations legislation in 1943. *Ontario Collective Bargaining Act*, 1943, c.4. This statute was the first attempt to impose mandatory collective bargaining in Canada. See Bora Laskin, "Collective Bargaining in Ontario: A New Legislative Approach" (Nov 1943) 21(9) *Can Bar Rev* 684; Sefton-MacDowell, *supra* note 40.

<sup>47</sup> Fudge and Vosko, *supra* note 42 at p. 274-276; Matheson, *supra* note 41.

<sup>48</sup> Fudge and Vosko, *ibid* at p. 273-275.

<sup>49</sup> James Struthers, *No Fault of their Own: Unemployment and the Canadian Welfare State, 1914-1941* (Toronto: University of Toronto Press, 1983) at chapter 6.

<sup>50</sup> Thomas, *Regulating Flexibility*, *supra* note 4 at chapter 3.

<sup>51</sup> *Minimum Wages Act*, S.O. 1937, c.43.

<sup>52</sup> *Hours of Work and Vacations with Pay Act*, S.O. 1944, c.26.

<sup>53</sup> *An Act to ensure Fair Remuneration to Female Employees*, S.O. 1951, c.26.

<sup>54</sup> *Fair Employment Practices Act, 1951*, S.O. 1951, c.24

<sup>55</sup> *Labour Relations Act, 1950*, S.O. 1950, c.34 [LRA] at ss. 34(b) and 47

amended to allocate jurisdiction for a national Unemployment Insurance scheme to the federal government, which was then enacted in 1940.<sup>56</sup>

But the form of labour and employment laws adopted in the post-war era served both to limit union strength and to segment the labour market. Professional, managerial and confidential employees, as well as domestic and agricultural workers, were excluded from the protections of labour rights legislation, leaving the common law and minimum employment standards to regulate their employment relationships.<sup>57</sup> At the same time, the system of industrial legality adopted by PC 1003 proceduralized labour conflicts and served to narrowly delineate acceptable forms of trade union activities, while outlawing more radical forms of organizing.<sup>58</sup> At least one effect of the legalization of trade union activity was to restrict the types of workplaces unions could organize. The rules relating to the appropriate bargaining unit, for instance, served to limit the organizing strength of trade unions, by recognizing enterprise level bargaining units, so that industry-wide or sectoral bargaining never became the norm in Canada.<sup>59</sup> With enterprise-level bargaining legally required, smaller workplaces and those with multiple locations were difficult to organize, such that by the mid-1950s, according to Craig Heron, “the typical union member was a relatively settled, semi-skilled male worker within a large industrial corporation”.<sup>60</sup>

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<sup>56</sup> *British North America Act, 1940*, 3 & 4 Geo VI, c. 36, s.1; *Unemployment Insurance Act, 1940*, S.C. 1940, c. 44.

<sup>57</sup> LRA, *supra* note 55, s. 1(3)(a) specified that the Act did not apply to architects, dentists, engineers, lawyers, doctors. Section 1(3)(b) also excluded managers, superintendants, employees exercising managerial functions or employed in a confidential capacity. By virtue of s. 2 the Act also did not apply to domestic employees, workers in agriculture, horticulture, hunting or trapping.

<sup>58</sup> It did so by barring strikes and industrial action during the life of a collective bargaining agreement and until conciliation procedures have been exhausted. For discussions on the deradicalizing effects of labour legalization, see Judy Fudge and Eric Tucker, *Labour Before the Law: Regulation of Workers' Collective Action in Canada, 1900-1948* (Don Mills: Oxford University Press, 2001) at chapter 10; Judy Fudge and Eric Tucker, “Pluralism or Fragmentation?: The Twentieth Century Employment Law Regime in Canada”, (2000) 46 *Labour/Le Travail* 251 at 275-276; Fudge and Glasbeek, *supra* note 6.

<sup>59</sup> Fudge and Tucker, *Labour Before the Law*, *ibid* at 290-297; Jane Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto, 1992) at 249-250; Stuart Jamieson, *Times of Trouble* (Ottawa, 1968) at p. 301-302.

<sup>60</sup> Craig Heron, *The Canadian Labour Movement: A Brief History* (James Lorimer & Company, 1996) at 92.

Enterprise level bargaining, along with governmental labour policies, helped set in place fragmented labour market patterns.<sup>61</sup> Trade unions negotiated wage scales, seniority systems and pension plans premised on notions of the family male breadwinner for their members, enshrining key elements of the SER into collective bargaining agreements. But the persistence of non-unionized workers outside of SER relationships also permitted the continued availability of lower skilled, casual workers, both within larger workplaces and dispersed through less socially valued industries.<sup>62</sup> Non-unionized waged workers tended to be female and/or immigrants, working in smaller workplaces and more occupationally dispersed. Clerical work, in particular, became increasingly feminized at the same time as its wage scale lengthened, demoted from a skilled, male dominated field to one viewed as the purview of temporary and part time semi-skilled work.<sup>63</sup> The construction of female work as a secondary, supplementary form of income within a family unit continued the longstanding paternalist approach to work regulation, seeking to return women to the home and out of the high skilled jobs they had entered during the war.<sup>64</sup> Legislative design and governmental policy explicitly targeted men for full employment, and sought to redirect women into service sector jobs and low-paying part-time manufacturing work. Ann Porter argues that governmental officials viewed the role of women as acting as a labour market reserve, to enter the workforce only “under emergency conditions”.<sup>65</sup> At an aggregate level, as Fudge and Vosko argue, the higher wages earned by unionized workers were sustainable by providing lower wages and less job security to non-unionized workers.<sup>66</sup>

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<sup>61</sup> Arguably labour market patterns in Ontario and in Canada were fragmented from the advent of waged labour in the mid-19<sup>th</sup> century, but new patterns were set in place over this period that would continue to dominate until the 1980s, and continue to have significant effect into the 21<sup>st</sup> century.

<sup>62</sup> Anne Forrest, “Securing the Male Breadwinner: A Feminist Interpretation of PC 1003” (1997) 52(1) *Relations industrielles/Industrial Relations* 91 at 98-1023; Fudge and Vosko, *supra* note 42 at p. 278; Jane Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: The Women’s Press, 1992) at p. 203-204.

<sup>63</sup> Graham Lowe, “Women, Work and the Office: The Feminization of Clerical Occupations in Canada, 1901-1931,” (1980) 5(4) *The Canadian Journal of Sociology* 361, Armstrong and Armstrong, *C* note 2.

<sup>64</sup> The form of equal pay legislation, for example, which required only equal pay within job classifications, encouraged employers to maintain gender segmented jobs to stay right within legislative requirements. Unemployment insurance practice and policy in the 1950s placed greater access restrictions on married women, and disqualified women who refused to take lower waged positions in the aftermath of the Second World War. Ann Porter, “Women and Income Security in the Post-War Period: The Case of Unemployment Insurance, 1945-1962”, (1993) 31 *Labour/Le Travail* 111; Forrest, *supra* note 62; Margaret McCallum, “Keeping Women in Their Place: The Minimum Wage in Canada, 1910-1925” (1986) 17 *Labour/Le Travail* 29; Ruth Roach Pierson and Marjorie Cohen, “Educating Women for Work: Government Training Before, During and After World War II” in *Canadian Social History*, Vol. 5, Michael Cross & Gregory Kealey, eds. (Toronto: McClelland and Stewart, 1984).

<sup>65</sup> Porter, *ibid* at p. 116.

<sup>66</sup> Fudge and Vosko, *supra* note 42 at p. 276.

Thus while the SER became increasingly entrenched as the normative and aspirational basis for both policy and legislative purposes through the mid-1940s and 1950s, the benefits of stable long-term employment, even amongst workers in SERs, took explicit legal form only in unionized workplaces. Upper status workers and the increasingly feminized “reserve” precarious workforce, workers under Contracts Type 2 and 3, would continue to be regulated by an amalgam of the common law and statutory minimum standards.<sup>67</sup>

### (3) The Drop in Litigated Common Law Employment Cases over the Mid-Century

What did the emergence of long-term employment, and of internal labour markets within vertically integrated firms, suggest for the common law of employment contracts in the 1930s, 1940s and 1950s? First and foremost, the number of reported employment contract cases dropped over the mid-century. As Table 3, suggests, this drop was experienced primarily in wrongful dismissal claims, while the level of property-related cases remained relatively constant with the early 20<sup>th</sup> century. There were only seven reported wrongful dismissal cases between 1930 and 1939 in Ontario, only five in the 1940s, and six in the 1950s. The number of reported wrongful dismissal cases appears to have been only half the number reported in the decades of the early 20<sup>th</sup> century.

Table 3: Summary of Reported Employment Contract Cases, 1930-1959

Decade	Wrongful Dismissal	Property-Related Claims	Miscellaneous	Total
1930-1939	7 <sup>a</sup>	6 1 of which appealed 1 WD cross-claim	3	16
1940-1949	5	1 1 of which appealed	2	8
1950-1959	6 1 of which appealed	6	4	16

<sup>a</sup> The cases are organized by date of decision. The ‘appeals’ category denotes the number of cases decided within each decade that was then appealed upwards. Cases that were appealed are only counted once, in the decade in which the first reported decision was made.

<sup>67</sup> See *supra* chapter 1, s.1(c) for a discussion on contract types in Ontario.

The poverty and unemployment of the Great Depression era might explain the decline in wrongful dismissal rates over the mid-century. In 1933, for instance, 20.5% of the national population was unemployed: most people probably could not afford to sue to enforce their work rights.<sup>68</sup> The economic situation of the 1940s and 1950s was very different however. Job growth was slow as Canada entered the Second World War in 1939, but by 1944 jobs were rapidly proliferating, with a growth rate of approximately 50% in the civilian workforce between 1939 and 1944.<sup>69</sup> Unionization rates also began to grow significantly in Canada in the 1940s, such that semi-skilled and skilled workers were able to extract significantly higher wages.<sup>70</sup> By the 1950s, workers in transportation, mass-production, and resource-based industries made up the majority of the unionized workforce.<sup>71</sup> As table 4 demonstrates, such workers experienced rising wage rates through mid-1940s and the 1950s.<sup>72</sup>

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<sup>68</sup> O.J. Firestone, *Canada's Economic Development 1867-1953* (London: Bowes and Bowes Publisher, 1958) at p.58. labour force data p. 58; Alan Green and Mary Mackinnon, "Unemployment and Relief in Canada" in *Interwar Unemployment in International Perspective*, Barry Eichengree and TJ Hatton ed. (Norwell, Mass, Kluwer Academic Publishers, 1988) Table 10.3 at p.366 . According to Green and Mackinnon individuals employed in management, clerical, sales and service work were more secure than others, however. Only 6% of retail store managers, for instance, reported being without a job in 1930-1931, and 10.5% of office clerks, as opposed to 54.5% of labourers, and 61% of carpenters.

<sup>69</sup> Susan Crompton and Michael Vickers, *One Hundred Years of Labour Force* (Canadian Social Trends, Statistics Canada, 2000) at 5-6.

<sup>70</sup> Gary Chaison and Joseph Rose, "The Structure and Growth of the Canadian National Unions" (1981) 36(3) *Relations industrielles/Industrial Relations* 530 at 534. At the beginning of the Second World War in 1939 17.3% of the non-agricultural workforce was unionized. By the end of the war 24.2% were unionized, a jump of 12%. That rate continue to grow through the economic boom time of the late 1940s and 1950s, closing out with a unionization rate of 33.3% in 1959, the majority of whom were employed in industrial work. Workers in small scale industries were generally unorganized however, as were service and clerical workers, who were increasingly feminized and experienced dropping wage rates. In general, because the large scale enterprises and industrial work were the primary basis for unionization in Canada, women were disproportionately unorganized through this era. New immigrants similarly found access to unionized work difficult, and remained primarily within more dispersed, smaller scale industries that were difficult to organize. See Statistics Canada, *Union Membership in Canada*, Series E175-177.

<sup>71</sup> Heron, *The Canadian Labour Movement*, *supra* note 60 at p. 98.

<sup>72</sup> Fudge and Vosko, *supra* note 42 at p. 275.



Table 4: Average annual earnings by decade, 1931-1951 (dollars)

	<b>1931</b>	<b>1941</b>	<b>1951</b>
<b>Labourer</b>	480.00	566.00	1 552.00
<b>Semi-skilled</b>	791.00	933.00	2 132.00
<b>Skilled</b>	1 042.00	1 052.00	2 292.00
<b>Clerical, commercial, financial</b>	1 192.00	11 139.00	2 206.00
<b>Professional</b>	1 924.00	1 553.00	2 944.00
<b>Managerial</b>	2 468.00	2 082.00	3 603.00

Table D232-237, Douglas Hartle, "Wages and Working Conditions", *Historical Statistics of Canada*, MC Urquhart and K. Buckley eds., (Cambridge: University Printing House, 1965 and 1971).

One reason for the decline in wrongful dismissal claims may be that the blue collar middle class was increasingly unionized, just as labour demand increased and dismissal rates appeared to drop. This class of workers saw its terms of work determined by their collective bargaining agreements rather than the common law, contract type 1 as described in Chapter 1, and their workplace disputes primarily decided by labour arbitrators.<sup>73</sup> Thus the middle segment of the workforce had even less use for the common law of employment by the end of the 1950s than they did in the early 20<sup>th</sup> century, while those at the bottom of the wage scale likely could not afford to make use of it. As the 1960s approached, therefore, the labour market was increasingly segmented at the top and at the bottom in regards to both workplace rights and access to legal fora. Those who could afford to sue at common law were workers whose employment contracts contained perhaps some negotiated content and were otherwise determined by the common law of employment contracts - contracts type 2 - adjudicated before the civil courts. Workers at the bottom of the wage scale however, as well as middle income earners in non-unionized industries, worked under contract type 3. Their employment contracts contained terms set by their employers and they had little access to the common law courts to enforce contract rights beyond those provided by the variety of different minimum standards legislation of the era.

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<sup>73</sup> Alan Green and David Green, "Canada's Wage Structure in the First Half of the Twentieth Century (with comparisons to the United States and Great Britain)", UBC, Department of Economics, 2007 at p. 29-34.

#### (4) Employer Property-Related Claims : Control over Information

Although wrongful dismissal claims dropped in number over the mid-century, employers continued to sue workers to enforce property-related rights in employment. But while the numbers remained constant, by the mid-century fewer types of property-related claims were brought with any frequency.

Over the early decades of the 20<sup>th</sup> century employers had sought to use the law to protect their investments in worker training, to claim ownership over workers' inventions, time and earnings outside of work hours, to control post-employment competition and to enforce workers' confidentiality in the post-employment context.<sup>74</sup> By the mid-century, however, employers no longer claimed generalized property rights over workers' time off the job, and rarely sought ownership of the product of workers' skill outside of work. Only one exclusive employment claim was brought during this period.<sup>75</sup> For large scale enterprises that adopted internal labour market structures over the mid-century, the longer job tenures of the SER provided economic protection for their firm-specific training. In this context, property-related claims over the mid-century now arose primarily in only two types of situations: claims against post-employment competition and solicitation in small non-SER service-based employment, and the protection of trade secrets and confidential information in research-based jobs in industrial manufacturing.

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<sup>74</sup> See *supra* chapter 2, s. 4.

<sup>75</sup> In *Bennett-Pacaud v. Dunlop*, [1933] O.R. 246 (C.A.) [*Bennett-Pacaud*] the employment contract held an exclusive employment clause, purporting to bar the worker from any other employment during its term. When the worker violated that clause by taking a second job, his employer sought an accounting for wages earned in the second position because the employer had contracted for exclusive ownership of the worker's time. The employer relied on loyalty and fidelity notions to seek an accounting of the defendant's earnings, even though no tangible damage was demonstrated. The Court of Appeal relied on the 1905 decision in *Sheppard Publishing Co. v. Harkins* in reaching a decision. See *Sheppard Publishing Co. v. Harkins* (1905), 9 O.L.R. 504 (Ont. H.C. Div. Ct.); varying *Sheppard Publishing Co. v. Harkins* (1904), 4 O.W.R. 477 (Ont. H.C. T.D.) [*Sheppard*]. There the Court had held that breach of an exclusive employment clause rendered a worker liable only in damages, not for the wages earned, except where the worker sought to retain profits which he or she earned from a transaction which created a conflict of interest with the worker's duty towards his or her employer. The Court of Appeal in *Bennett-Pacaud* found this exception to apply here, because the employee scouted out mining claims for the employer and a second company at the same time. The worker had lent money to the second company, and the Court therefore thought he was likely to favour them over the plaintiff, creating a conflict of interest. The employer's lawyer argued that the worker had breached a fiduciary duty because he was a director of the company. The Court of Appeal did not speak to fiduciary duties in this case, however, and instead framed the worker's obligation as a general one – the worker could not make a profit from an activity in conflict with his employer. Having done so, the Court of Appeal was of the opinion that the employer was entitled to an accounting of the worker's wages earned from the second employment, despite the fact that no actual loss was proven by the employer.

The most frequent property-related claim asserted by employers between 1930 and the end of the 1950s involved the enforcement of restrictive covenants, primarily in businesses that depended on personal relationships with clients. Eight restrictive covenant cases were litigated between 1930 and 1959 in Ontario (none in the 1940s). Employers sought to enforce contractual clauses restraining the post-employment work of two store managers<sup>76</sup>, a hair dresser-barber<sup>77</sup>, a window and house cleaner<sup>78</sup>, a football player<sup>79</sup>, two doctors<sup>80</sup>, and an insurance agent<sup>81</sup>. Such covenants were struck down or severed in the majority of cases<sup>82</sup>, but as of the 1950s the courts began to expand the types of property interests that could ground a restrictive covenant, providing employers with property rights over some forms of worker knowledge.

In the early 20<sup>th</sup> century the courts had understood work-related property to reside in the physical manifestation of ideas and knowledge – in mechanical drawings, client lists, tools, etc. Workers could not take physical things from their employers and use the information they contained post-employment, because these constituted objective knowledge, which was the property of the employer. On the other hand, any knowledge a worker developed on the job that they retained by memory could be used post-employment, because the courts had deemed this subjective knowledge that was not physically separate from the worker. But over the mid-century the courts began to focus on the value of ideas themselves rather than on their physical manifestation, and consequently to view certain elements of workers' knowledge as employers' property, which workers could not use post-employment.

In the 1930s and 1940s the judicial analysis of restrictive covenants remained effectively the same as in the early 20<sup>th</sup> century. In 1935 in *Maguire v. Northland Drug Company* the Supreme Court again stated that such covenants were enforceable only to the extent that they were reasonable in time and space, and did not seek to protect more than that which an employer was entitled to

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<sup>76</sup> *Maguire v. Northland Drug Co.*, [1935] S.C.R. 412 [*Maguire*]; *Adams Furniture Co. of Toronto v. McKenna*, [1938] O.J. No. 167 (S.C. H.C.J.) [*Adams Furniture*].

<sup>77</sup> *Mayer v. Lanthier*, [1930] 39 O.W.N. 346 [*Mayer*].

<sup>78</sup> *New York Window Cleaners v. Bilyz*, [1936] O.W.N. 260, [1936] 2 D.L.R. 668 1936 CarswellOnt 162 [*New York Window Cleaners*].

<sup>79</sup> *Detroit Football Company v. Dublinksi*, [1956] O.R. 744

<sup>80</sup> *Mills et al. v. Gill*, [1952] O.R. 257-272 [*Mills*]; *Carruthers Clinic Limited v. Herdman*, [1956] O.R. 770.

<sup>81</sup> *R.C. Young Insurance Ltd. v. Bricknell*, [1954] O.J. No. 344 (S.C. H.C.J.) [*R.C. Young Insurance*].

<sup>82</sup> *Mills*, *supra* note 82; *New York Window Cleaners*, *supra* note 78.

protect. The Court cited *Mason* for the proposition that an employer could protect its proprietary rights over secrets of its manufacturing processes, and secret information regarding its customers. But, quoting the English case of *Leng v. Andrews*, “the information and training which an employer imparts to his employees become part of the equipment in skill and knowledge of the employee, and so are beyond the reach of such a covenant”.<sup>83</sup> Unless a worker sought to use or disclose trade secrets or information about manufacturing processes, or to solicit clients away, there was no proprietary interest whose misappropriation could be contractually enjoined. The Court reiterated the position that less latitude was permitted for restrictive covenants in employment than in the sale of a business or its goodwill, because of the power differential between the parties.<sup>84</sup>

These principles were applied in cases throughout the 1930s, and there were no restrictive covenant cases in the 1940s.<sup>85</sup> Beginning in the 1950s however, the courts increasingly began to consider proprietary interests to vest in information and relationships themselves, rather in their physical manifestations, and with this shift judicial concern to protect workers’ ability to compete post-employment began to abate. Prior to the 1950s, absent direct solicitation or the physical taking of workplace information the courts generally did not enforce covenants that would prevent a worker from working in post-employment competition.<sup>86</sup> In *Maguire* the Supreme Court stated that customers were free to leave the initial employer’s business and follow the worker so long as the worker did not solicit them to do so. In the 1938 case of *Adams Furniture Co. of Toronto v. McKenna* an employer requested an interim injunction to prevent a former employee from starting his own business, on the basis that he made use of information in client lists prepared for his former employer.<sup>87</sup> The court denied the injunction on the basis that the employee had retained the client names by memory, which constituted subjective rather than objective information and the worker

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<sup>83</sup> *Maguire*, *supra* note 76 quoting *Leng v. Andrews*, [1909] 1 Ch. 763.

<sup>84</sup> *Ibid*

<sup>85</sup> *Kadish v. Thuna Balsam Remedies* (1930), 39 O.W.N 325, *Mayer*, *supra* note 77; *New York Window Cleaners*, *supra* note 78; *Adams Furniture*, *supra* note 76; *Connors v. Connors Brothers Ltd.* [1939] S.C.R. 162. Note that in *Connors* the justices differed as to whether the restrictive covenant should be considered part of the sale of a business or as part of a subsequent employment contract.

<sup>86</sup> *Mayer*, *supra* note 77. But cf the English case of *Amber Size Chemical Company v. Menzel*, [1913] 2 Ch. 239 [*Amber Size*], which was cited with increasing frequency in Ontario as of the 1950s.

<sup>87</sup> *Adams Furniture*, *supra* note 76.

was therefore free to use it.<sup>88</sup> But starting in the 1950s the courts changed track once they began to apply the principles set out in the English case of *Routh v. Jones*.<sup>89</sup>

In *Routh* protection of business goodwill was explicitly recognized as an employer's legitimate proprietary interest, and this goodwill was understood to include relationships with clients. Lord Evershed for the Chancery Division specified that:

[W]here the circumstances are such that the servant has, by virtue of his engagement, been put in the position of learning his master's trade secrets, or of acquiring a special or intimate knowledge of the affairs of the customers, clients or patients of his master's business or of means of influence over them, there exists a subject-matter of contract, a proprietary interest or goodwill in the matter which is entitled to protection, since otherwise the master would be exposed to unfair competition on the part of his former servant--competition flowing not so much from the personal skill of the assistant as from the intimacies and knowledge of the master's business acquired by the servant from the circumstances of his employment.<sup>90</sup>

The English Court of Appeal approved Justice Evershed's decision.<sup>91</sup> It drew a line between workers' acquisition of special or intimate knowledge of the affairs of customers and the means of influencing them, and workers' professional skills and reputation; the former was now a legitimate subject for contractual protection from competition, while the latter was not.

The difficulty with the line drawn was that it now permitted restrictions on post-employment competition from workers who did not *actively* solicit former clients or *use* any transcribed information as a means of influencing them. Beginning in the 1950s the courts of Ontario increasingly accepted the idea that the mere presence of former employees working in a proximate job, either geographically or by job type, could threaten a business' goodwill because former workers might have 'the means of influencing customers'. Thus in 1952 in *Mills v. Gill* the courts enforced a restrictive covenant against a doctor who had promised not to engage in the practice of medicine for five years within five miles of the city of Oshawa after leaving employment with a medical clinic.<sup>92</sup> The employer was a full service medical clinic, and argued that it had a legitimate interest in protecting against the use of personal contacts by the worker and knowledge of the

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<sup>88</sup> *Adams Furniture*, *supra* note 76.

<sup>89</sup> *Routh v. Jones*, [1947] 1 All ER 179 (Ch. Div.), *aff'd* by [1947] 1 All ER 758 (CA) [*Routh*].

<sup>90</sup> *Ibid* at p.181.

<sup>91</sup> *Ibid* at the CA.

<sup>92</sup> *Mills*, *supra* note 80.

persons coming to the clinic.<sup>93</sup> Although there was no evidence that the defendant doctor actually solicited the clinic's customers, the court felt the employer had a legitimate proprietary interest worthy of protection. This was especially so in the medical field because doctors were prohibited from advertising, such that "the essential element in maintaining their practice lay in the personal contact between doctor and patient".<sup>94</sup> The defendant doctor argued that given the large size of the clinic, it was unreasonable to require such a covenant. But the court disagreed, finding that in fact because of the clinic's size, "the capital investment involved and the expenses of operation, the great opportunity presented to the defendant to gain the acquaintance and knowledge of patients and doctors", it was even more reasonable to require protection than in other cases.<sup>95</sup>

On this basis - the possession of the "means of influence", or the simple fact of having had relationships with an employer's clients - the Ontario courts as of the 1950s were increasingly prepared to enforce covenants where the worker would be in competition with their former employer. The courts in the early 20<sup>th</sup> century had suggested that to protect against bare competition was to rob the community of the benefits of workers' skill and efforts – that, as the court stated in the 1916 case of *George Weston v. Baird*, employers should not "be allowed to appropriate or destroy the rights of the State to the benefit which should accrue from the industry, education, skill, capacity, or aptitude of its people".<sup>96</sup> But after the decision in *Routh* they now suggested that achieving the main goal of protecting employers' legitimate proprietary rights in their business methods and client relations unavoidably involved some incidental protection against competition from former employees.<sup>97</sup>

The courts of Ontario also began to protect trade secrets and confidential information, recognizing value in employers' investments in knowledge accumulation, rather in the physical documents in which confidential information was transcribed. Claims regarding trade secrets in employment were not litigated prior to 1949 in Ontario.<sup>98</sup> Protection of trade secrets was an equitable right that had

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<sup>93</sup> *Mills ibid.*

<sup>94</sup> *Ibid*

<sup>95</sup> *Ibid*

<sup>96</sup> *George Weston Ltd v. Baird* (1916) 37 O.L.R. 514 (Ont. S.C. Ap. Div.) [*George Weston*] at para 34.

<sup>97</sup> *Routh* at the CA, *supra* note 89.

<sup>98</sup> The first employment-related trade secrets case in the United States arose in Massachusetts in 1869. See *Peabody v. Norfolk*, 98 Mass. 452, 460 (1868) discussed by Catherine Fisk, *Working Knowledge: Employee*

originally emerged out of relationships of specific confidence, but in England between the 1890s and 1920s it increasingly took on a property-based foundation, and was protected by implied contract.<sup>99</sup> The English case law was invoked in Ontario as of the late 1940s, and thereafter arose with relative regularity, as the development of research-intensive products became more economically significant. In the employment context trade secret claims typically sought to restrain employee use of knowledge of manufacturing processes which the worker had helped develop as part of their job, or which was imparted to them during employment.

In *R.I. Crain v. Ashton* the plaintiff sought an injunction to restrain a former employee from divulging the manner in which certain parts were assembled to produce a type of continuous form press, as well as from building or selling such machines.<sup>100</sup> The defendant had created the particular type of form presses the plaintiffs used while in its employment. He left to set up a business to assemble and sell such presses, on the understanding that he would sell them to the plaintiffs, but they ultimately decided to build them themselves and sought to restrain him from selling the machines.<sup>101</sup> The question was whether trade secrets were embodied in the method of assembling the presses. The court, noting the absence of an authoritative definition of a trade secret in English or Canadian case law, described it as a proprietary right which lasted only so long as the information remained secret. It must be known only by its owner and those “employees to whom it was necessary to confide it”.<sup>102</sup> But what type of information could be a trade secret? The court used the distinction between objective and subjective knowledge from restrictive covenant cases to define.<sup>103</sup> But objective knowledge was traditionally associated with information contained in

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*Innovation and the Rise of Corporate Intellectual Property, 1800-1930* (USA: University of North Carolina Press, 2009) at 94.

<sup>99</sup> Catherine Fisk, *ibid* at p.97-101, describes this shift in England and the United States.

<sup>100</sup> *RI Crain Limited v. Ashton and Ashton Press Manufacturing Company Limited* [1949] O.R. 303, [1949] O.J. No. 455 (H.C.J.), *aff'd* by [1950] O.R. 62-75 (C.A.) [*R.I. Crain*].

<sup>101</sup> Although the defendants had been lent some plans by the plaintiffs after leaving their employ, he made no alterations to them and returned them. It was also relatively clear that he would, in any case, have been able to build the machine from memory.

<sup>102</sup> *RI Crain*, *supra* note 100 at para 19-21.

<sup>103</sup> *Ibid* at para 32. The court provided a definition of a trade secret from American case law. A trade secret was a process, formula, pattern, etc, which forms a proprietary right. It differs from a patent because as soon as it is discovered, “either by examination of the product or in any other honest way, the discoverer has the full right of using it”. Central to the definition therefore was that the information must remain a secret – once available for discovery it lost its protected quality. It must be known only to the owner and to those employees in whom it is necessary to confide, and the onus is on the plaintiff to establish that a trade secret exists. In this case the Court

physical form, whereas in this case the worker used only his personal skill and memory to remake the machines, and therefore took nothing tangible from his employer.

Recognizing that the value was in the idea rather than its physical reproduction, the Court of Appeal now concluded that the distinction between subjective and objective knowledge was separate from the form that knowledge took. Whether or not retained by memory, the worker did more than use his personal skill and knowledge in making the new machines, because he drew on the objective knowledge he developed while making improvements on the presses in the employ of the plaintiffs.<sup>104</sup> These improvements were the thing he was hired to do, and they were recognized “by him as being something which he should preserve solely for his employer”.<sup>105</sup> The fact that the worker could reproduce the devices without the aid of written materials – blueprints, drawings, etc. – did not change the nature of the information which had commercial value and which belonged to his employer.<sup>106</sup>

In *R.I. Crain* the Court of Appeal recognized the proprietary interest of the employer in an idea, rather than its written form. Underlying this analysis was the idea that confidential information was a secret imparted for the purposes of the worker’s employment, and/or developed by him as part of his job. He was paid to produce confidential information, and therefore could not take it with him post-employment. Although described in proprietary terms, the protection of trade secrets in the employment context seemed at least partially designed to protect the value that the employer contracted for in hiring the worker. In a similar manner, two years after *RI Crain* the Ontario High Court cited the English decision of *Saltman v. Campbell in Reliable Toy Co. v. Collins* for the proposition that confidential information was not solely information unavailable to the public, but also included a document that was valuable and therefore confidential by the “the fact that the maker of the document has used his brain and thus produced a result which can only be produced

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accepted that some of the processes for assembling the different presses were done in secret in the plaintiff’s plant, but that once the machines were sold, the methods of their assemblage would be readily discovered upon examination and therefore were no longer secret. Justice Chevrier stated that “[h]aving been exposed to the light of the open market, I must, as I do, find that in whatever shroud of secrecy they may have been held during their making, there is no evidence that that state has been preserved.”

<sup>104</sup> *Ibid* at para 27.

<sup>105</sup> *Ibid*

<sup>106</sup> The Court in *RI Crain, ibid*, concluded however that the secrets of the design of the machines were known in the field before the worker attempted to make use of them, and so could not be enjoined.



by somebody who goes through the same process”.<sup>107</sup> Here the employer had invested in a worker’s expenditure of energy and time to produce a document, and that investment rendered its contents of value, and therefore, confidential.

Thus between the 1930s and the end of the 1950s claims regarding property in employment were increasingly focused on control over work-related information, in both small service-based employment and research-intensive manufacturing enterprises. As companies grew in size and vertical integration became the norm in Ontario, as economic competition centered on specialized production processes in manufacturing and client relationships in the growing service sector, the courts began to recognize that the value of information and knowledge lay in the ideas and relationships themselves, rather than in their physical embodiment. This shift started to become visible in law in the 1950s, and its result was to allow employers to claim proprietary rights over a greater zone of work-related information and employee knowledge than previously permitted.

#### **(5) Wrongful Dismissal: A Time of Transition**

While the number of property-related cases brought by employers was reported at approximately the same levels over the mid-century as they had between the 1890s and 1920s, the number of wrongful dismissal cases dropped significantly over the mid-century. Because of this drop in numbers the development of the law of wrongful dismissal stalled over the mid-century.

Nonetheless, some hints of the legal issues that the emerging SER would create for the common law were becoming visible. Claims over this era were brought by store managers<sup>108</sup>, stock exchange brokers, commission and sales agents<sup>109</sup>, engineers<sup>110</sup>, a railway brakeman<sup>111</sup>, a doctor<sup>112</sup>, a teacher<sup>113</sup>, two general managers<sup>114</sup>, a vulcanizer<sup>115</sup>, and a police officer<sup>116</sup>. Only one wrongful

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<sup>107</sup> *Saltman Engineering Co. Ltd et al v. Campbell Engineering Co. Ltd.* (1948), 65 RPC 203 reprinted in [1963] 3 All ER 413 at p.414 [*Saltman Engineering*] at p.215, quoted at para 79 of *Reliable Toy Co. v. Collins* [1950] O.R. 360 (H.C.J.).

<sup>108</sup> *Kadish supra* note 85.

<sup>109</sup> *Robinson v. Galt Chemical Products Ltd.*, [1933] O.J. No. 114 (C.A.) [*Robinson*]; *Normandin v. Solloway Mills & Co.*[1931] 40 O.W.N. 429 (S.C. H.C.D.) [*Normandin*]; *Carter v. Bell and Sons Ltd.* [1935] O.W.N. 537 (S.C. H.C.J.), varied by [1936] O.R. 290 at 295 (C.A.) [*Carter*]; *Cemco Electrical Manufacturing Co. v. Van Snellenberg*, [1947] S.C.R. 121 [*Cemco*].

<sup>110</sup> *Ord v. Public Utilities Commission of the Town of Mitchell et al.* [1936] O.R. 61 [*Ord*]; *Abbott v. G.M. Gest Ltd.*, [1944] O.J. No. 202 (S.C. H.C.J.), rev’d by [1944] O.J. No. 296 (S.C. C.A.) [*Abbott*].

<sup>111</sup> *Edgeworth v. New York Central Railway Company*, [1935] O.R. 460 (H.C.J.) [*Edgeworth*].

<sup>112</sup> *Norman v. National Life Assurance Co. of Canada*, [1938] O.J. No. 273 (S.C. H.C.J.) [*Norman*].

<sup>113</sup> *Lacart v. Toronto Board of Education*, [1954] O.J. No. 142 (S.C. C.A.) [*Lacart*]

dismissal claim was brought by a woman between 1930 and 1959.<sup>117</sup> Ontario judges continued to draw primarily on case law from England to develop this area of law, but they also began to cite local precedents where possible. Still, they did not cite cases from other Canadian provinces with any regularity, and they only rarely used American decisions. In the 1949 trade secret case of *R.I. Crain v. Ashton* the court explained Ritchie J.'s dictum in *Sherren v. Pearson*, that where an issue had not been considered by the courts of Ontario or England, American cases could be canvassed, particularly in areas of law modelled on the law of England.<sup>118</sup> Such cases, Ritchie J. maintained, were not binding authority, but nonetheless were "entitled to the highest respect; they are important to us, inasmuch as the same principles of law are applied to a state of things similar, to our own, by judges of high character, learning and experience; some, indeed, of very deserved celebrity".<sup>119</sup>

(a) The Presumption of Indefinite Hire and The Eclipse of the Legal Standard for Cause

Although the presumption of annual hire had been abandoned by the Supreme Court of Canada in 1897, it is only as of the 1930s that a presumption of indefinite duration employment came to ground the wrongful dismissal analysis.<sup>120</sup> Between the 1890s and the 1920s the question of contract duration was a matter of fact, to be determined based on the intent of the parties. Claimants continued to argue for the annual hire in the early 20<sup>th</sup> century, so that they would receive compensation for wages owing over the remainder of the contract. But between the 1930s and the end of the 1950s job tenure began to lengthen in large scale workplaces, and indefinite duration employment was increasingly presented as the default legal presumption. As table 5 shows, only four fixed-term contracts were litigated in Ontario between 1930 and 1959<sup>121</sup>, and the courts explicitly considered the question of contract length only twice over those years<sup>122</sup>. Other

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<sup>114</sup> *Campbell v. Business Fleets*, [1954] O.R. 87 (C.A.) [*Business Fleets*]; *Canadian Ice Machine Co. v. Sinclair*, [1955] S.C.R. 777 [*Canadian Ice*].

<sup>115</sup> *Mitchell v. Sky*, [1939] O.J. No. 336 (S.C. C.A.) [*Mitchell*].

<sup>116</sup> *Cowan v. Orangeville (Town)*, [1959] O.W.N. 219 (S.C. H.C.J.) [*Cowan*].

<sup>117</sup> *Lacart*, *supra* note 113.

<sup>118</sup> *R.I. Crain*, *supra* note 100; *Sherren v. Pearson*, (1887), 14 S.C.R. 581 [*Sherren*].

<sup>119</sup> *Sherren*, *ibid* at p. 587.

<sup>120</sup> *Bain v. Anderson* (1898), 28 S.C.R. 481 [*Bain* at the SCC]; *Harnwell v. Parry Sound Lumber Co.* (1897), 24 O.A.R. 110 (CA), reversing (1896), 24 OAR Page111 (QB) [*Harnwell*].

<sup>121</sup> *Ord*, *supra* note 110; *Canadian Ice Machine*, *supra* note 114. There was also one weekly hire, *Hebrew National Association v. Kramer*, [1943] O.R. 49-58 (C.A.) [*Hebrew National*].

<sup>122</sup> *Normandin*, *supra* note 109; *Mitchell*, *supra* note 115.

wrongful dismissal claims either concerned contracts of explicit indefinite duration, or the duration issue was not examined in the decision, with the courts seeming to presume indefinite duration employment if the relationship lasted over several years. Although the issue of duration continued to be framed as a question of fact, in practice where no duration was mentioned in the contract, the courts now tended to assume indefinite duration relationships, terminable on reasonable notice.<sup>123</sup>

Table 5: Employment Duration in Reported Wrongful Dismissal Cases, 1930-1959<sup>a</sup>

	<b>Indefinite Duration Hire</b>	<b>Fixed Duration Hire</b>	<b>Unstated Duration</b>	<b>Total</b>
1930-1939	5	1	1 (but of multiple years)	7
1940-1949	2	3 (1 weekly duration)	0	5
1950-1959	1 (lifetime duration)	1	4 (but of multiple years)	6

<sup>a</sup>This table depicts the length of employment as described in the reported decisions of each decade. Cases that were appealed are only counted once.

As indefinite duration employment became the standard type of employment contract, reasonable notice took on greater significance in the analysis of the wrongful dismissal claim, and cause receded in analytical importance. Cause was now necessary only for summary dismissal without reasonable notice, or to terminate a fixed term contract. Indeed, the legal standard for establishing cause enunciated in *Callo v. Brounker* and applied over the late 19<sup>th</sup> and early 20<sup>th</sup> centuries was almost entirely invisible between the 1930s and the end of the 1950s.<sup>124</sup> The question of cause was only considered in six recorded decisions over this period. Batt, writing in 1937, stated that disobedience, neglect, misconduct during and outside of service, incompetency and illness were grounds for summary dismissal.<sup>125</sup> But as to misconduct, on the basis of the 1906 Privy Council

<sup>123</sup> *Carter, supra* note 109 at 295. This was not the case in all the provinces. In the 1930 case of *Bole v. Pellissier* the Saskatchewan Court of Appeal held that a worker must be presumed to be under an annual hire contract as no duration for the relationship was mentioned. [1931] 1 D.L.R. 483 at para. 18

<sup>124</sup> *Callo v. Brounker* (1829) 2 Man. & Ry 502; (1831) 4 C. & P. 518 [*Callo*].

<sup>125</sup> Francis Raleigh Batt, *The Law of Master and Servant* (Toronto: Pitman, 1937) at chapter 4. In one case over the mid-century it was suggested that there was an objective cause standard that the employer had to meet to dismissal with cause. In *Stilwell v. Audio Pictures et al.*, [1955] O.W.N. 793 the trial judge stated that:

decision in *Clouston v. Corry*, he stated that there was no fixed rule of law defining the degree of misconduct justifying dismissal from service. “It is a question of fact for the jury to say in the individual case whether the misconduct in question is inconsistent with the fulfilment of the implied or express condition of service.”<sup>126</sup> This approach was applied by the Ontario Court of Appeal in *Axelrod v. Beth Jacob of Kitchener*.<sup>127</sup>

Mark Freedland suggests that the *Callo* standard of disobedience or neglect tended to be applied in England to manual workers, while a general test of misconduct was applied to white collar workers, focused on actions incompatible with their duties.<sup>128</sup> In Ontario at the mid-century, however, because almost all claims were brought by white collar and highly skilled workers, cause was generally framed within the general category of misconduct, but a more rigorous standard of evidence was required by the courts for the dismissal of higher status workers. For example, the trial decision in *Abbott v. G.M. Gest* involved the dismissal of a branch office manager; the employer argued dismissal for cause on the basis of misconduct, firstly arguing that the worker had paid insufficient attention to the business, and secondly, for disloyalty. But the court required specific evidence to demonstrate the grounds of cause asserted. The Court of Appeal noted that to demonstrate the first ground the employer could not simply rely on the branch’s decrease in revenue but needed to introduce evidence that the loss was due to the employee’s actions or inactions.<sup>129</sup> As regards disloyalty, the Court suggested that some attitudes might be incompatible “with that loyal service which may rightfully be expected from a servant of the Company” but that in this instance such an attitude had not been displayed.<sup>130</sup> The Court held that there was insufficient evidence of cause for dismissal before it. For lower status workers, however, the courts sometimes suggested that the issue was only a factual matter of determining whether misconduct had occurred, but beyond that the penalty was for the employer to decide. In *Edgeworth v. New York Central Railway* a baggage handler with twenty years seniority was dismissed for playing a trick

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It is only in exceptional circumstances that an employer is justified in summarily dismissing an employee upon his making a single mistake or misconducting himself once. The test in these cases is whether the alleged misconduct of the employee was such as to interfere with and to prejudice the safe and proper conduct of the business of the company, and, therefore, to justify immediate dismissal.

<sup>126</sup> Batt, *ibid* at p. 63.

<sup>127</sup> *Axelrod v. Beth Jacob of Kitchener*, [1943] O.J. No. 303 (S.C. C.A.) [*Axelrod*] at para. 14.

<sup>128</sup> Mark Freedland, *The Contract of Employment* (London: Oxford University Press, 1976) at 214-215.

<sup>129</sup> *Abbott v. G.M. Gest Ltd.*, [1944] O.J. No. 296 (S.C. C.A.) [*Abbott*] para. 8, 15 and 24.

<sup>130</sup> *ibid* at para. 20.

on a customer. There the Court held that though the penalty was harsh, any violation of employer policies constituted misconduct, and because misconduct was cause for summary dismissal, once that was factually determined, it was up to the employer to determine the consequences.<sup>131</sup> The courts therefore appeared to consider the sufficiency of cause for the summary dismissal of higher status workers, while instead examining only its existence for comparatively lower status workers.

(b) Change in Employment Terms and Contract Variation

As long term indefinite employment became increasingly commonplace in Ontario, the courts started to face the question of how to vary the terms of an employment contract over time. It was not an issue that had often been litigated before in Ontario, but it became an increasingly pressing issue as of the 1950s, as job tenures lengthened and workers remained with their employers throughout their careers. Internal job ladders permitted workers to move up within enterprises, such that they changed jobs and responsibilities over time. Even absent changes in formal positions, an employer's managerial prerogative theoretically permitted it to change the content of jobs to suit its production needs. But how was this to be done in law? How were employment contract terms to be changed in relationships that existed over many years? Did each change constitute a new contract, and did it require new consideration? Such questions began to be visible in the wrongful dismissal case law in the 1950s in particular, as the Standard Employment Relationship spread as the paradigm of white collar employment across Ontario.

In a few cases in the 1930s the courts spoke to the question of whether changes to an employment contract required new consideration to pass between the parties, or whether an employer's threat of dismissal was itself sufficient consideration to render the variation mutual and binding. The Supreme Court spoke to this question incidentally in 1935 in *Maguire v. Northland Drug Co*, when an employer insisted on the addition of a restrictive covenant against post-employment competition in an existing contract.<sup>132</sup> The employee understood that failure to accept the variation would lead to his termination. The Supreme Court held that the non-exercise of the employer's

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<sup>131</sup> *Edgeworth v. New York Central Rail*, [1935] O.R. 460 [*Edgeworth*].

<sup>132</sup> *Maguire*, *supra* note 76. The employer insisted that the worker execute a bond under seal to operate as liquidated damages for the new restrictive covenant to be added to the contract.

right to terminate constituted sufficient consideration for the new covenant because it amounted to the employer's agreement to refrain from exercising its right to terminate.<sup>133</sup>

The issue arose more directly in the 1957 case *Hill v. Peter Gorman*. The question was whether unilateral variation of an employment contract constituted constructive dismissal, permitting the worker to claim wrongful dismissal.<sup>134</sup> The worker was employed for an indefinite term as a commission salesman under an oral employment contract.<sup>135</sup> A year later the president of the company instituted a new practice under which 10% would be deducted from the workers' commissions to create a reserve for uncollected accounts. The plaintiff continued to work for the company for another sixteen months, until his retirement. However every month when the commission was deducted he complained of it to his employer. At trial the employee explained that he could not quit, because there was a restrictive covenant in his employment contract, and this was the only trade he knew. The trial judge held that the new deduction policy was not a part of the express agreement, but was instead a new additional term offered to the worker. The question was whether the worker's continued employment constituted implied consent to the variation in employment terms. The trial judge found that there was no such agreement by the employee, and Laidlaw J.A. held that there was no basis for varying the trial judge's finding of fact. Justice McKay agreed, stating that continuance of employment alone could not constitute acceptance of an attempted contract variation. It could not be that an employer "has a unilateral right to change a contract or that by attempting to make such a change he can force an employee to either accept or quit".<sup>136</sup> He stated the law as follows:

Where an employer attempts to vary the contractual terms, the position of the employee is this: He may accept the variation expressly or impliedly in which case there is a new contract. He may refuse to accept it and if the employer persists in the attempted variation the employee may treat this persistence as a breach of contract and sue the employer for damages, or while refusing to accept it he may continue in his employment and if the employer permits him to discharge his obligations and the employee makes it plain that he

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<sup>133</sup> *Maguire*, *supra* note 76. A similar question arose in the 1954 case of *R.C. Young Insurance*, *supra* note 81, but with a different result. There the court stated that no independent consideration moved between the parties for the covenant, and that the employment itself could not amount to good consideration as the worker had already been employed by the plaintiff for some months. The High Court of Justice did not refer to the *Maguire* decision.

<sup>134</sup> *Hill v. Peter Gorman Ltd.*, [1957] D.L.R. (2d) 124 (S.C. C.A.) [*Peter Gorman*]

<sup>135</sup> A written agreement was produced a few months after his employment began, but the parties and the court agreed that its terms did not match the agreement actually reached by the parties.

<sup>136</sup> *Peter Gorman*, *supra* note 134 at para 45.

is not accepting the variation, then the employee is entitled to insist on the original terms.<sup>137</sup>

Justice McKay stated that if the employer wished to make changes to the contract term, the proper procedure was to terminate the employment contract by proper notice, and offer employment on the new terms, but until it was terminated the plaintiff was entitled to insist on the original terms.<sup>138</sup>

(c) Reasonable Notice: Entrenched but Conceptually Undefined

As previously mentioned, indefinite duration employment was increasingly the norm in wrongful dismissal claims over the mid-century, either by explicit agreement of the parties or as found by the courts. Because indefinite duration employment contracts could be dissolved with the provision of reasonable notice, the concept of reasonable notice assumed increasing centrality to the wrongful dismissal analysis over the mid-20<sup>th</sup> century. The obligation to provide reasonable notice was first cast as an implied contractual term in the 1936 case of *Carter v. Bell*.<sup>139</sup> The Court of Appeal explained that the implied obligation to provide reasonable notice of termination was a particular incident of the employment relationship that was based primarily on custom. “The master and servant, when nothing is said, are presumed to contract with reference to this usage and so a stipulation as to notice is implied.”<sup>140</sup> From *Carter* onwards the courts explained indefinite duration employment contracts as including the implied term of reasonable notice of dismissal.

Yet despite the growing significance of the concept of reasonable notice, no definitive legal formulation was provided for its determination over the mid-century. The appropriate length of reasonable notice was considered a question of fact in the circumstances. In *Carter v. Bell* the Court of Appeal stated that six months would usually be sufficient notice for indefinite hire employment contracts<sup>141</sup>, and in a number of cases that followed six months was explained as the maximum

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<sup>137</sup> *Peter Gorman, supra* note 134 at para 44.

<sup>138</sup> *Ibid* at para 46. Justice Gibson dissented in application, on the basis that the employer had provided notice of the new terms, which effectively terminated the old contract and left it to the employee to decide whether he would accept the new terms and remain, or whether to reject them and resign.

<sup>139</sup> *Carter, supra* note 109.

<sup>140</sup> *Ibid* at para 9.

<sup>141</sup> *Ibid*.

permissible notice period. In *Norman v. National Life Insurance* the Court looked at the length of notice awarded by the English courts in other cases, ranging from six months to one year for newspaper editors and a steamship First Officer.<sup>142</sup> But citing *Harnwell, Messer, Carter* and *Normandin v. Solloway*, the court here stated that it seemed to be “well established that six months is the maximum notice required to terminate a contract of indefinite hiring”.<sup>143</sup> In other cases however a variety of periods of reasonable notice were awarded. Most were under six months<sup>144</sup>, but in at least one case, one year was considered appropriate<sup>145</sup>. For the most part, because the question of reasonable notice remained an issue of fact, the judges simply announced what they considered reasonable, and offered no legal benchmark to measure against or rationale to explain their determination.<sup>146</sup>

#### (d) Reasonable Notice as the Measure of Damages

As indefinite duration employment contracts became the norm over the mid-century, and reasonable notice the method by which such contracts could be dissolved, it also increasingly became the measure of damages.

When the wrongful dismissal claim was first crafted at common law the courts considered the loss from dismissal on the same basis as other commercial contracts. As discussed in the previous chapter, in the 1849 case of *Beckham v. Drake* the House of Lords specified that damages for wrongful dismissal were to be calculated based on “[w]hat is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained”.<sup>147</sup> A general contractual analysis of the loss from dismissal was facilitated by the fixed duration that the law presumed for the employment relationship. But even after the presumption of annual hire was displaced at the turn of the 20<sup>th</sup> century, the courts in Ontario continued to explain wrongful dismissal damages in the same manner as commercial contractual damages. The

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<sup>142</sup> *Norman*, *supra* note 112.

<sup>143</sup> *Ibid* at para 12, citing *Harnwell*, *supra* note 120; *Messer v. Barrett Co. Ltd.* (1926), 59 O.L.R. 566 [*Messer*]; *Normandin*, *supra* note 109; *Carter* *supra* note 109.

<sup>144</sup> *Carter*, *ibid* (3 months); *Normandin*, *ibid* (13 weeks); *Robinson*, *supra* note 109 (4 months), *Abbott*, *supra* note 129 (4 months); *Norman*, *supra* note 112 (6 months).

<sup>145</sup> *Campbell*, *supra* note 114.

<sup>146</sup> For instance, *Normandin*, *supra* note 109.

<sup>147</sup> *Beckham v. Drake* (1912), 9 E.R. 1213 (HL) [*Beckham*] at 606-607.



idea was that the courts should examine the length of time before the worker was likely to secure similar employment, which represented the actual loss suffered, and compensate for that period.<sup>148</sup>

In practice, however, the basis of damages for wrongful dismissal was in flux in between the 1930s and 1950s. Starting in the 1920s, in indefinite duration employment contracts the courts began to assess damages based on wages and contractual benefits over the reasonable notice period, rather than investigating when comparable employment could have been secured. This approach was not yet entirely entrenched. On occasion the courts reverted to the old annual hire system and awarded the wages otherwise owing over the balance of the remaining year of the contract.<sup>149</sup> Generally speaking, however, as of the 1930s wages over the reasonable notice period was increasingly considered the measure of loss for wrongful dismissal.<sup>150</sup>

But even as reasonable notice took on a greater analytical role and was recast as an implied contractual right, the courts continued to explain the breach in a wrongful dismissal claim as the failure to retain in employment, as was first enunciated in *Emmens v. Elderton* in the mid-19<sup>th</sup> century.<sup>151</sup> In *Cemco Electrical Manufacturing Co. v. Van Snellenberg* Rand J. (dissenting on other grounds) explained that it was “the loss of earnings resulting from a denial of a right to use or commit his working capacity profitably that is the substance of his claim”.<sup>152</sup> In the context of a contract of employment, remuneration was exchanged either for work done, or for the worker’s commitment to work in the future. A wrongful dismissal was a repudiation by the employer of the obligation to accept the work or the commitment to do so.

Workers still had a duty to mitigate their losses. In *Cemco* Justice Rand went on to explain that mitigation was a necessary corollary to the award of damages. Wrongful dismissal amounted to the employer’s repudiation of the worker’s obligations under the contract, and, because specific performance was not available for employment contracts, “the employee's capacity to work is now released to him to be used as he sees fit”.

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<sup>148</sup> Batt, *supra* note 125 at 186-187. In fact, Batt argued specifically that wages over the period of damages were exactly not the sole measure of damages. See 187-190.

<sup>149</sup> *Cemco*, *supra* note 109.

<sup>150</sup> See, for example, *Normandin*, *supra* note 109; *Abbott*, *supra* note 110 at para 10.

<sup>151</sup> *Emmens v. Elderton* (1853), 13 CB 495 (HL). See *supra* chapter 1 note 183 further discussion of this case

<sup>152</sup> *Cemco*, *supra* note 109 Rand dissent [*Cemco*].

He may decide to waste it or he may demand that the employer make good its full utility. In that event, he must act reasonably in seeking to employ it as he would or might have had the particular engagement not been made. It is the loss of earnings resulting from a denial of a right to use or commit his working capacity profitably that is the substance of his claim, and as he must prove his damages, it must appear that they arose from the breach of contract.<sup>153</sup>

To show that the damage arose by virtue of contractual breach, therefore, the worker had to demonstrate that he or she did what was necessary to secure other employment, or they would be partially responsible for their own losses.<sup>154</sup>

Over the mid-20<sup>th</sup> century therefore the conceptual underpinnings of the wrongful dismissal claim were in flux, and therefore so was the measure of damages. As indefinite duration employment became the norm, and once an entitlement to reasonable notice was stated as an implied contractual obligation in *Carter v. Bell*, reasonable notice became the logical period of time over which to evaluate the loss. This was not, however, how the courts explained the conceptual basis of the wrongful dismissal claim, which was rather concerned with the employer's failure to retain the worker in employment.

(e) The Boundaries of the Wrongful Dismissal Claim: Agents, Employees, and Those in the Middle

Over the mid-20<sup>th</sup> century the number and scope of work-related and social wage statutes increased in Ontario and at the federal level. The coverage of such statutes became a question of litigation over these decades. The issue of who was a servant or employee had arisen in the early

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<sup>153</sup> *Ibid.*

<sup>154</sup> In *Canadian Ice*, *supra* note 114 the Supreme Court considered what type of mitigation was involved when the work was part time. They suggested that the worker need only seek work for the period of time he had promised to the employer under the employment contract. In this case the employee was retained as a consultant after his retirement from the company, and was to make himself available to the company insofar as their demands were consistent with the reasonable leisure and his retirement from active business. This term seemed to affect the degree of mitigation the court thought required. In general, the courts required only that the workers attempt to obtain employment in their particular field of work. Thus, though noting that skilled workers were in high demand in the early 1940s, in *Abbott*, *supra* note 129 at paras 10-11, the court nonetheless held that the worker's field was one with limited amount of work in which he had specialized in for some time, more restricted by the war effort. The worker had attempted to form a partnership unsuccessfully, and thereafter joined the army. The Court considered this a sufficient effort, and awarded him four months notice, minus the wages he earned in the army during the four month period. In *Campbell*, *supra* note 114, concerning the dismissal of a former general manager, the Court found that his sincere, if unsuccessful attempt to start his own business was sufficient, even though he had been unwaged for fourteen months between his dismissal and the hearing. The worker was awarded a full year's notice.

20<sup>th</sup> century in regards to the coverage of older statutes, such as the winding up of corporations<sup>155</sup>, bankruptcy<sup>156</sup> and workmen's compensation<sup>157</sup>. As of the 1940s questions arose over the scope of the federal *Unemployment Insurance Act of 1940* and the *Income Tax of 1948* which created differential tax responsibilities for employees and own account self-employed workers.<sup>158</sup> In the very late 1950s the scope of the *Labour Relations Act* was also the source of litigation.<sup>159</sup> For the most part the courts and decision-makers adopted the control test elaborated in the context of tax and vicarious liability law to determine who was an employee and who was not for the purposes of the different statutes.

The question of who could bring a wrongful dismissal claim was now also presented to the courts over the mid-century. Prior to the 1920s sales agents who might, under current law, be considered independent contractors, were able to bring wrongful dismissal claims without judicial comment at common law. Between 1890 and 1930, five wrongful dismissal cases were brought by workers classified as sales agents or commission agents.<sup>160</sup> In all but one agent-employee case prior to 1923, the status of the work relationship was not raised and did not constitute any part of the determination of wrongful dismissal.<sup>161</sup> The issue did not arise even in regards to a sales agent paid primarily by commission, although the Court spent considerable time determining whether the

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<sup>155</sup> *Re Ritchie-Hearn Co., Ritchie's Claim*, [1905] 6 O.W.R. 474; *Re Parkin Elevator Co. Limited, Dunsmoor's Claim*, [1916] 37 O.L.R. 277.

<sup>156</sup> *Re Eastern Ontario Milk Products Co. Limited*, [1922] 52 O.L.R. 67

<sup>157</sup> *Miller v. Monarch Manufacturing*, [1908] 12 O.W.R. 14 (ON HCJ TD).

<sup>158</sup> *Unemployment Insurance Act*, 1940, S.C. 1940, c. 44; *Income Tax Act, 1948* (Can.), c. 52. The latter statute allowed business-related deductions for own-account workers. The courts were increasingly called upon to determine whether a worker was working under a contract of service or under a contract for services in determining the proper tax deductions. Income tax jurisprudence began to cast doubt on the applicability of the control test to professional employees by the mid-1950s, and often took a broader view of who constituted an employee. See, for instance, *No. 284 v. M.N.R.* [1955] 55 DTC 506; *John Fraser MacPherson v. Minister of National Revenue*, [1955] 55 DTC 376; *No. 129 v. M.N.R.*, [1953] 53 DTC 451; *No. 113 v. M.N.R.*, [1953] 53 DTC 308.

<sup>159</sup> *Labour Relations Act, 1950*, S.O. 1950, c.34. See *Re OLRB, Bradley et al and Canadian General Electrics Co. Ltd.*, [1957] O.R. 316 (CA).

<sup>160</sup> *Glenn v. Rudd* (1902), 3 O.L.R. 422 [*Glenn*]; *Laishley v. Goold Bicycle Company* (1902), 4 O.L.R. 350 [*Laishley*]; *McDougal v. Van Allen Co. Limited* (1909), 19 O.L.R. 351 [*Van Allen*]; *Grocock v. Edgar Allen & Co., Limited*, [1913] O.J. No. 788 (S.C. H.C. T.D.) [*Grocock*]; *Pollard v. Gibson* (1923), 54 O.L.R. 419 (Ont. H.C.D.), rev'd by (1924), 55 O.L.R. 424 (Ont. S.C. Ap. Div.) [*Pollard*].

<sup>161</sup> *Morris v. Dinnick*, [1894] 25 O.R. 291 (Ont. H.C.D.). The decision is confusing, because at para. 14 the court seems to distinguish between agents, and agent-employees.

worker could recover the estimated amount of commission he would have earned over the rest of the contract.<sup>162</sup>

As described in the previous chapter, over the early 20<sup>th</sup> century the concept of “agent”, or of “independent contractor”, was in flux. As independent service professionals, whose work was based on the exercise of knowledge and discretion, were transformed into waged corporate workers, and as clerical work expanded within corporations, the 19<sup>th</sup> century dividing lines between agents and employees began to break down. In this context, the question of whether an agent could bring a claim for wrongful dismissal was first brought to the Ontario courts in the 1923 case of *Pollard v. Gibson*.<sup>163</sup> A worker under an indefinite exclusive contract to act as a sales representative for the employer in Canada and the United States brought a wrongful dismissal claim. The employer argued that the claimant was not entitled to reasonable notice, as he was a commission sales agent terminable at will. For the first time in Ontario the court in *Pollard* agreed that were the plaintiff a mere commission agent, “the defendants’ contention that they had the right to dismiss him without notice is undoubtedly well founded and supported by numerous cases”.<sup>164</sup> In this instance, however, the court concluded that the relationship was not one of a simple commission agent, because the plaintiff was not employed ‘by the job’. The court concluded that aspects of the employment contract “tied the plaintiff to the defendants and placed him under their control, in some respects”.<sup>165</sup> But they also stressed the relative permanence of the relationship, by noting that the defendant company had the ability to cancel the plaintiff’s hiring of employees, that he was in an exclusive representation relationship, and that the defendant company had to confirm all orders placed through the plaintiff. The Court of Appeal came to the opposite conclusion, however. Relying on the English case of *Levy v. Goldhill*, the Court of Appeal held that if there was no obligation on the agent to do work for the defendant, and no obligation on the part of the employer to provide work, then the contract was really just one in which the employer would pay if services were rendered.<sup>166</sup> Based on the nature of the agreement before them the Court of Appeal concluded that the worker did not have an obligation to work, despite the exclusive nature of the

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<sup>162</sup> *Laishley*, *supra* note 160.

<sup>163</sup> *Pollard*, *supra* note 160.

<sup>164</sup> *Ibid* at para 9. The High Court does not cite those cases.

<sup>165</sup> *Ibid* at para. 11.

<sup>166</sup> *Levy v. Goldhill*, [1917] 2 Ch. 297 [*Levy*].

representation agreement, and therefore he was not entitled to notice of dismissal or to a wrongful dismissal claim.

Claims from agents continued to be brought through the 1930s to the end of the 1950s however. In the 1933 case of *Robinson v. Galt* the Court of Appeal allowed a claim for notice from a commission agent, although on slightly confusing grounds.<sup>167</sup> In the 1936 case of *Carter v. Bell* the High Court took on the question squarely.<sup>168</sup> A worker who moved to another province to act as the exclusive sales representative of the defendant for an indefinite duration brought a claim for wrongful dismissal when terminated without notice. One of the questions before the court was whether the plaintiff was a commission agent or whether he was in a master and servant relationship. If he was a commission agent, the court thought he could be summarily dismissed without notice, but required reasonable notice of dismissal if an employee. The court canvassed English decisions on the distinction between agents and servants. The court cited the control test enunciated in *Reg. v. Walker*, which specified that the master must have the right to dictate to the employee both what he has to do and how he is to do it.<sup>169</sup> Because the defendant held such rights of control over the plaintiff's work in this instance, the conclusion was that the plaintiff was an employee, particularly because the defendant retained the right to approve the hiring of each new agent the plaintiff retained.

The Court of Appeal established a more nuanced standard, however.<sup>170</sup> The Court noted that in cases where a mercantile agent worked with many clients, and where the employer "exercises no immediate control over the agent but leaves him to be his own master", there was no master and servant relationship, such that the contract could be dissolved at will by either party.<sup>171</sup> By contrast, in indefinite duration master and servant relationships there was an implied contractual obligation to provide reasonable notice of dismissal. But the Court of Appeal went on to hold that there was

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<sup>167</sup> *Robinson, supra* note 109. The majority appeared to view the plaintiff as an employee, and awarded him four months notice, but said that the contract was a business contract which could not be assumed to continue on *ad infinity*. The only reasonable approach was to have it determinable on reasonable notice. Masten J. dissented, concluding that the worker was an agent and not a servant, given that he chose the manner and time of his work performance.

<sup>168</sup> *Carter, supra* note 109.

<sup>169</sup> *Reg. v. Walker* (1858), 27 L.J.M.C. 207.

<sup>170</sup> *Carter, supra* note 109.

<sup>171</sup> *Carter, supra* note 109 at para 10

also an intermediate class of cases where the relationship of master and servant might not exist, but where there was a degree of permanence beyond the regular type of mercantile agency agreement. For such an intermediate class reasonable notice of dismissal was necessary, and a wrongful dismissal claim was available to enforce it.<sup>172</sup> The Court noted a number of characteristics that indicated the permanence of the relationship before it: the fact that the plaintiff was to recruit and train new agents, that the defendant's approval was required for the subagents' appointment; that the plaintiff was to supervise the subagents on an ongoing basis; that he sought to develop a new market for the defendant's products; that he moved to another province to do this job and moved his family with him. All these factors suggested a relationship that could not be dissolved at will, even if the method of remuneration otherwise suggested a mercantile relationship.

Moreover, the Court of Appeal went on to specify that whether or not reasonable notice of dismissal was necessary could not be determined on the basis of the control test. The Court held that the determination of employment status had a different purpose under vicarious liability law and as regards wrongful dismissal claims.<sup>173</sup> In a vicarious liability case the question was whether the master should be liable for the acts of their servants because the worker was acting in pursuance of their job, executing the employer's orders, such that the act could be imputed to the employer. For wrongful dismissal however, the question was whether there was an implied contractual obligation to terminate the contract only upon reasonable notice. The Court of Appeal made allusion to the control test, but relied more squarely on the concept of 'permanence'.<sup>174</sup> The judges noted that the defendant could not dictate how the worker was to do his work from day to day, so long as he provided faithful service. But they also stressed that there were aspects to the relationship that tied the parties to one another, and that rendered the claimant economically dependent on the employer. These were different questions in law, which necessitated a different approach. In this case the Court of Appeal concluded that the plaintiff was entitled to three months notice. On the basis of this decision, a claim of wrongful dismissal was open to "employees" but also an intermediary class of more permanent agents. What this suggests is that, at least until the end of the 1950s, the courts did not police the availability of wrongful dismissal claims to the same degree

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<sup>172</sup> *Ibid* at para 11.

<sup>173</sup> *Ibid* at para 12.

<sup>174</sup> *Ibid*.

as they did claims under work-related statutes, or as regards vicarious liability. On another level, it also suggests the extent to which the permanence of the relationship, and the ongoing nature of the obligations between the parties had come to define the courts' understanding of the employment contract at common law.

## **(6) Conclusion**

Over the mid-20<sup>th</sup> century the SER came to operate as the paradigmatic form of employment around which labour market policies, social wage protections and collective bargaining were structured. The transformation of the labour market was not immediately visible in common law claims over the mid-century. Nonetheless, suggestions of its impact could be discerned. Whereas employers claimed a broad set of entitlements over workers' labour in property-related claims in the early 20<sup>th</sup> century, by the mid-century only two types of claims were brought with any frequency. These were claims to enforce restrictive covenants against post-employment competition and solicitation by former workers in small service sector enterprises, who did not necessarily have the firm attachment of workers in large mass production companies. The second type of claim was for trade secret and confidential information protection in research-intensive businesses. In the first decades of the 20<sup>th</sup> century legal approaches to notions of property rights in employment initiated a series of conceptual changes to other aspects of employment contract law, in particular to the tools of managerial control. By the mid-20<sup>th</sup> century, however, property-related claims were more specialized and applied only to some types of work.

Wrongful dismissal claims dropped in number over the mid-20<sup>th</sup> century, as the province went through the Great Depression and two periods of full employment, during and after the Second World War. Despite the paucity of wrongful dismissal litigation over this period, certain features of the emerging Standard Employment Relationship started to present themselves to the courts. Indefinite duration employment became increasingly standard and entrenched as a presumption of law. As this occurred, cause for dismissal was asserted less frequently, while reasonable notice of dismissal became the centre of the wrongful dismissal claim, to determine both the method and the damages owing upon wrongful dismissal. For the first time the courts were presented with

questions about how to analyze changes to employment contracts over long term employment. As Ontario entered the 1960s, all of these questions and more would come before the courts as they grappled in law with the changing social, economic and psychological realities of work that reoriented the labour market over the mid-20<sup>th</sup> century.



## Chapter 4

# The Construction of the Modern Law of Employment Contracts in the Era of the Standard Employment Relationship - 1960s and 1970s

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### (1) Introduction: The Construction of the Modern Law of Employment Contracts

The previous chapter described the emergence of long-term employment relationships over the mid-twentieth century. Provoked by the increasing standardization of work practices and the availability of internal mobility through set job ladders, the average job tenure of workers began to lengthen over the 1940s and 1950s in Canada. The move towards internal labour markets was based on a mixture of employer concerns with cutting the costs of worker training through increased employee retention, and the desire of workers and trade unions to institute objective work systems instead of the discretion-based drive system. These changes were only suggested in litigation over employment contracts over the mid-century. But as Table 5 reports, in the 1960s and 1970s workers brought claims to the common law courts in increasing numbers, particularly in the 1970s, when the local effects of the first post-war global economic recession became apparent. Between 1930 and the end of the 1950s, 18 wrongful dismissal decisions were reported at common law in Ontario. Between 1960 and 1979, there were 75. There were also 43 property-related decisions during the latter two decades, compared with 13 between 1930 and 1959.

Table 5: Summary of Reported Employment Contract Cases 1960-1979

Decade	Wrongful Dismissal	Property-related Claims	Miscellaneous	Total
1960-1969	19 4 of which appealed <sup>a</sup>	10 4 of which appealed	6	35
1970-1979	56 5 of which appealed	33 4 of which appealed	5	94

<sup>a</sup> The cases are organized by date of decision. The 'appeals' category denotes the number of cases decided within each decade that was then appealed upwards. Cases that were appealed are only counted once, in the decade in which the first reported decision was made.

The context in which workers brought such cases was now very different to the previous era. Over the mid-century the usual labour market arrangement moved from the early 20<sup>th</sup> century norm of short-term job duration for a highly mobile workforce, towards a norm of stable ongoing and open-ended employment relationships. The paradigmatic Standard Employment Relationship (SER) that emerged in the 1940s and 1950s in Ontario assumed increasing centrality to the legal regulation of the labour market, but also took on a larger social and political role. As relationships spanned longer durations, the workplace became an increasingly fundamental site for the construction of social identity and bonds of community. In this context, workers approached the courts with different

expectations and understandings of what they invested in their careers and in what they stood to lose at termination.

It is over the 1960s and 1970s that the modern law of employment contracts was constructed in Ontario, as new struggles over property entitlements dominated litigated claims. This occurred in the context of increasing service sector employment, and increasing contestation regarding the role, rights and obligations of workers in creating their employers' profits. It also occurred in the context of wrongful dismissal claims, as workers in SERs increasingly sought legal recognition of their psychological, social and economic investments in their employers' enterprise. As the courts considered issues relating to the employment contract in the 1960s and 1970s they were now faced for the first time with claims brought by workers who had spent multiple years with the same employer, many of whom had worked their way up the corporate ladder. The judiciary had to grapple with the evolving nature of the employment relationship, where employees might work in a variety of different capacities over time, and would likely go through at least one promotion, demotion, or transfer over the lifetime of the relationship. As the labour market was refashioned around the SER in the post-war period, and workers spent an increasing numbers of years with particular employers, the courts had to determine whether the nature of job loss, in social, psychological, economic and legal terms, was the same in the 1960s and 1970s as in previous eras of shorter term employment.<sup>1</sup> But faced with such questions, the courts in this era chose to refashion the legal frame that had been slowly assembled over the early 20<sup>th</sup> century to entrench the wrongfulness/damages nexus as the sole basis for determining workers' entitlements upon dismissal, rather than giving legal recognition to the changing property parameters of the work relationship.<sup>2</sup> They did so at the same time as questions surfaced concerning the relationship between the common law of employment contracts and the increasing number of statutory work-related regimes enacted since the mid-century. Together these decisions operated to entrench the common law of employment contracts as the substantive residual category for modern work regulation in Ontario.

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<sup>1</sup> Katherine Stone, "The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law" (2001) 48(3) UCLA L. Rev. 519.

<sup>2</sup> See *supra* chapter 1 at s. 1(a) for further discussion on the wrongfulness/damages complex.

## (2) The Unruly 1960s and 1970s and the End of the Post-War Era of Prosperity

The 1960s and 1970s were a period of social, political and economic transition, marked by profound labour unrest across Canada and the world. The 1960s began in Canada with a sharp spike in unemployment rates, after 15 years of relative full employment.<sup>3</sup> Inflationary pressures began to make their mark in the early 1970s, as two international oil crises destabilized the global economy, raising the prices of raw materials, and throwing macroeconomic policies into turmoil, in Canada and abroad.<sup>4</sup> Labour market composition and demographics underwent a significant change during this period. Agricultural work declined steadily, manufacturing work continued at a stable pace but did not grow to the degree of service sector work, which grew exponentially.<sup>5</sup> In the late 1960s, 8 out of every 10 new jobs came from service industries.<sup>6</sup> By 1971 the service sector accounted for 50.58% of employment in Canada, manufacturing 27.81% and the agricultural sector only 11.7%.<sup>7</sup> The growth in service sector work in the 1960s, but particularly in the 1970s, brought increasing numbers of women into the workforce.<sup>8</sup> A significant amount of service sector work was part time and short term, however, creating whole sectors of work that ran parallel to the SERs of large manufacturing and corporate work.

Unionization rates continued to grow slowly in the 1960s but plateaued in the 1970s.<sup>9</sup> Public sector employment grew significantly over this period and was increasingly unionized. Employment in this sector was overwhelmingly female, such that its unionization brought large numbers of women into

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<sup>3</sup> Noah Meltz, "Manpower Policy: Nature, Objectives, Perspectives" (1969) 24(1) *Relations industrielles/Industrial Relations* 33. Meltz explains at p. 40-41 that there was a rise in unemployment in 1949-1950 and 1953-54, but it only became problematic in 1957-58 and 60-61 when it rose to 7%. W. Craig Riddell, *Canadian Labour Market Performance in International Perspective*, Presidential Address to the Canadian Economic Association, 1999 at 6. Riddell explains that unemployment rose from 4.7% in the 1960s to 6.7% in the 1970s.

<sup>4</sup> Daniel Rogers, *Age of Fracture* (Cambridge: Harvard University Press, 2011) at p. 40-67.

<sup>5</sup> Stuart Jamieson, *Times of Trouble: Labour Unrest and Industrial Conflict in Canada, 1900-1966*, Task Force on Labour Relations (Ottawa: Information Canada, 1968) at p.477-479.

<sup>6</sup> Sunder Magun, "The Rise of Service Employment in the Canadian Economy" (1982) 37(3) *Relations industrielles/Industrial Relations* 528 at p. 530.

<sup>7</sup> Surendra Gera and Phillippe Masse, *Employment Performance in the Knowledge-Based Economy*, Industry Canada Working Paper No 14 (HRSDC, 1996) at Table 1-2, p. 5-6.

<sup>8</sup> Magun, *supra* note 6 at p. 535. Magun notes that "almost all increases in employment are concentrated in community and personal service, finance, banking and insurance".

<sup>9</sup> Statistics Canada, *Historical Statistics of Canada, Section E: Wages and Working Conditions*, Table E175-177.

unions for the first time in Canada and in Ontario.<sup>10</sup> The period was also marked by a visible move towards rank and file militancy within unions and waves of industrial unrest, peaking with the strike wave of 1966, primarily provoked by younger workers.<sup>11</sup> By the very late 1970s stagnation in the manufacturing sector began to slowly diminish the role of the Standard Employment Relationship as the typical form of labour market arrangement. This process was intensified by the growth of employment in knowledge-intensive industries and an expansion in technological development, which, by the late 1970s, began to change the organization of the workplace.<sup>12</sup> Rather than the Fordist value placed on long-term economic planning and stability, by the late 1970s and early 1980s, some businesses began to orient themselves towards short term on-demand just-in-time production, seeking to instill flexibility into their labour costs and labour arrangements.<sup>13</sup>

These economic trends took shape amidst the profound political and social unrest of the 1960s and 1970s across the industrialized world. As elsewhere, the late 1960s were a period of social turbulence, with civil rights, labour and feminist activism mobilizing across Canada.<sup>14</sup> In the midst of this tumultuous era, new regimes of workplace and labour market regulation were enacted in Ontario, and across the country.<sup>15</sup> In Ontario in 1962 existing anti-discrimination statutes regulating discrete private sector relationships were amalgamated into the *Human Rights Code*.<sup>16</sup> Through the 1960s and 1970s tax courts were also increasingly called upon to determine the tax implications of different types of income-producing activities, the contours of Unemployment Insurance and provincial welfare schemes were adjudicated, just as arbitral decisions interpreting collective

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<sup>10</sup> Judy Fudge and Leah Vosko, "Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law, Legislation and Policy", (2001) 22 *Economic and Industrial Democracy* 271 at 283.

<sup>11</sup> J.H.G. Crispo and H.W. Arthurs, "Industrial Unrest in Canada: A Diagnosis of Recent Experience" (1968) 23(3) *Relations industrielles/ Industrial Relations* 237 at p. 243-247; Jamieson, *supra* note 5 at p. 477-483.

<sup>12</sup> Michael Piore and Charles Sabel, *The Second Industrial Divide* (Basic Books, 1984) at chapters 10 and 11.

<sup>13</sup> Anna Pollert, "Dismantling Flexibility" (1988) 34 *Capital & Class* 42. For a more general analysis of the flexibility debate in North America, see Gilles Laflamme, Gregor Murray, Jacques Belanger and Gilles Ferland, *Flexibility and Labour Markets in Canada and the United States* (Geneva: ILO, 1989)

<sup>14</sup> See Bryan Palmer, *Canada in the 1960s: The Ironies of Identity in a Rebellious Era* (Toronto: University Press Inc., 2009).

<sup>15</sup> See Mark Thomas, *Regulating Flexibility, The Ontario Employment Standards Act and the Politics of Flexible Production*, 2003, Unpublished Dissertation, at chapter 3 and 4 for a discussion of minimum employment standards legislation over this period.

<sup>16</sup> *Human Rights Code*, S.O. 1961-62, c.93 [HRC].

bargaining agreements of trade unions members were increasingly subject to judicial review.<sup>17</sup> Of particular significance was the enactment of minimum work standards legislation across the country. In Ontario this took the form of the *Employment Standards Act* in 1968, which amalgamated and expanded existing legislation.<sup>18</sup> Over the 1960s and 1970s, therefore, a growing number of legal regimes regulated the workplace.

### **(3) The Labour Market of the 1960s and 1970s: The SER and Short Term Employment Industries**

#### **(a) Social, Psychological and Economic Functioning of the SER: Employment Contracts without the Law**

In the 1960s and 1970s the courts faced employment cases which now directly raised questions regarding the changes spurred by the growth of the SER over the mid-century. Such work relationships were often built over many years, during which a worker might take on wholly different roles within the same organization for the same employer, such that both parties made substantial reciprocal investment in the relationship. But instead of adapting the common law to meet this changing context, the judiciary chose not to re-conceptualize the law's application to workplace relations. Instead, the courts entrenched an approach in which the day-to-day interactions of the employment relationship continued to operate within a normative frame derived from the implied terms of loyalty, fidelity, obedience and confidentiality, bolstered by job-terms (if any) agreed between the parties or laid down unilaterally by the employer through workplace policies. The common law was to have no other active role.<sup>19</sup> The case law of the era hints at the long term dynamism of these relationships, but the common law dealt with those changes mainly peripherally, as factors affecting the calculation of monies owing between the parties after their relationship came to an end. With these decisions the courts chose a limited role for the law which minimized its intervention in the regulation of the ongoing relations and instead contributed a "framework for cooperation", according to David Marsden, or an "incomplete

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<sup>17</sup> George Adams, "Grievance Arbitration and Judicial Review in North America" (1971) 9(3) OHLJ 443, at p. 488-509.

<sup>18</sup> *Employment Standards Act*, S.O. 1968, c.35

<sup>19</sup> David Marsden, *A Theory of Employment Systems: Micro-Foundations of Societal Diversity* (Oxford: Oxford University Press, 1999).

contract by design”, in the words of Hugh Collins.<sup>20</sup> The common law was to intervene only at certain key moments of the relationship, primarily to pass judgment on rights and obligations upon its dissolution.

As David Marsden has argued, the open-ended employment relationship “relie[d] on a whole system of incentives to secure its effectiveness” built on its long-term duration.<sup>21</sup> Marsden suggests that the employment relationship of the post-war era was built on a set of psychological, economic and legal contracts.<sup>22</sup> The psychological contract was two-fold. At a broad level it rested on a series of tacit understandings of the expected behaviour between the parties and of their respective obligations towards each other. These expectations evolved from workplace rules that delineated the tasks a worker would be expected to undertake, how salary and benefits would be apportioned, and how workers could progress upwards on an internal job ladder. This was buttressed by professional training and social expectations associated with specific skill sets and job titles. These rules and expectations could be counted on to be respected to the extent that there was a relationship of trust between the parties.<sup>23</sup> That trust, in turn, was built on economic incentives that provided a rationale for expecting their implementation, and more broadly on the property parameters of the employment contract set in place over previous eras.

The economic contract, or the SER, was premised on a wage model built over a relationship of long duration within internal labour markets. Labour economic research modelling the career wage trajectory in internal labour markets demonstrates the mutual investment of workers and employers over long periods of time, which incentivized loyalty to the relationship by both parties.<sup>24</sup> The model suggests that at the beginning of the relationship workers and employers invested in the worker’s skill and knowledge development. Some of that investment focused on developing general

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<sup>20</sup> David Marsden, “The ‘Network Economy’ and Models of the Employment Contract” (2004) 42(2) BJIR 659 at 668; Hugh Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1991) at 161. For both these writers, the incomplete nature of the employment contract is what characterizes its long term success, providing employers with sufficient flexibility to manage their business for maximum economic profitability, while allowing workers the benefits of long term security.

<sup>21</sup> Marsden, “‘Network Economy’”, *supra* note 20 at p. 662.

<sup>22</sup> *Ibid*

<sup>23</sup> *Ibid* at 665-666.

<sup>24</sup> *Ibid* at 666-667; Katherine Stone, “Policing the Employment Contract Within the Nexus-of-Contract Firm” (1993) 43(3) UTLJ 353 at 363 ; Ronald Ehrenberg and Robert Smith, *Modern Labor Economics: Theory and Public Policy* (1991) at 452- 430.

skills which the worker could subsequently sell on the labour market, but some was specific to the employer's organization and non-negotiable outside the firm.<sup>25</sup> Compensation for this mutual investment in firm-specific knowledge was spread over time. At the beginning of the relationship a worker was paid at a rate equal to his or her benefit to the firm, as both the worker and the firm invested in the acquisition of general human capital and firm-specific knowledge. In the second phase of the relationship the worker had gained sufficient knowledge to become useful to the employer, but was paid less than the amount of the value they produce for their employer, and also less than they would command on the labour market. The reason to continue in such employment despite underpayment was the workers' expectation that the relationship would be ongoing and that their wages would continue to rise over time. In the next phase of the relationship, phase three, the worker would hold significant firm-specific capital, such that he or she was worth more to their employer than they were to other employers. In this phase the worker was paid more than the amount they would fetch on the labour market, but still less than the value they produced for their employer. In the last phase of the relationship, in the worker's later working years, their productivity might have dropped off, but their compensation did not. Their wage level would continue to rise or level out, and they would be paid more than the value they produced for their employer.<sup>26</sup> The employer was able to spread the cost of training over time, and retained the ability to adjust the content of the work the employee performed to suit the changing needs of the organization. Workers acquiesced to the employer's unilateral control and deferred compensation because they expected to receive a steadily rising wage over time, thereby alleviating the risks associated with fluctuations in demand for the employer's product and their own services, and the elimination of a reduction in salary once their own productivity levels dropped off in later years.<sup>27</sup> Thus, in this model, workers "receive[d] a promise of job security and a wage rate later in their working lives that [wa]s greater than the value of both their marginal product and their opportunity wage".<sup>28</sup> The worker accepted the open-ended nature of the relationship and the development of skills for which they would not receive compensation on the general labour market, in exchange for the implied promise of job security and the continued financial recognition of long-term service. In

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<sup>25</sup> Katherine Stone, *Policing the Employment Contract*, *ibid* at p. 365-366.

<sup>26</sup> Marsden, 'Network Economy', *supra* note 20 at 668.

<sup>27</sup> *Ibid* at p. 667

<sup>28</sup> Stone, *The New Psychological Contract*, *supra* note 1 at 537.



this sense, the long term open-ended employment contract was effectively, in the words of Alain Supiot, the exchange of subordination for security.<sup>29</sup>

The obligations and expectations described above were inscribed in law only for some workers. In unionized environments collective bargaining agreements codified workplace rules, job tasks, pay grids, seniority principles for advancement, and methods of resolving workplace disputes, rendering the structures of internal labour markets legally enforceable under contract type 1.<sup>30</sup> Beginning in 1968 in Ontario with the enactment of the *Employment Standards Act*, non-unionized workers' investment in their employment relationships also received some measure of recognition through the creation of statutory mandatory minimum notice periods, based on the length of employment tenure.<sup>31</sup> Outside the unionized workplace, for workers under Contract types 2 and 3, these general minimum employment terms represented the only legal recognition of the changing employment bargain in the context of long term employment relationships.

#### (b) The Growth of the Service Sector and Short Term Work

While the SER emerged into a position of normative and labour market centrality, short-term part time work also became an important feature of the labour market in the 1960s, but particularly in the 1970s. This was due to the steady growth of service sector employment from mid-century onwards. The service sector provided two very different types of work. At one end of the spectrum, jobs were highly precarious – short-term or temporary, often shift-based or part time, unskilled, often in small and isolated workplaces, rendering them difficult to regulate and difficult to organize.<sup>32</sup> At the other end of the spectrum were professional knowledge-based workers. Such work was highly skilled, developed through post-secondary education rather than on the job or

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<sup>29</sup> Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001) at 1.

<sup>30</sup> Donald Brown and David Beatty, *Canadian Labour Arbitration* (Agincourt: Canada Law Book Limited, 1977). See Innis Christie, *Employment Law in Canada* (Toronto: Butterworth & Co., 1980) at p. 244 for a description of the situation of seniority at common law. See *suprachapter 2*, p.38-41 for a further discussion of employment contract types.

<sup>31</sup> *Employment Standards Act*, S.O. 1968, c.35 [ESA]. The terms of the ESA were also applicable to unionized workers, and, as of *McLeod et al. v. Egan et al.*, [1975] 1 S.C.R. 517 [*McLeod*], enforceable by labour arbitrators.

<sup>32</sup> Judy Fudge and Leah Vosko, "Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law, Legislation and Policy", (2001) 22 *Economic and Industrial Democracy* 271 at p 283-294.

vocational training. It often focused on communications, trade, financial and business sector services, and tended to be highly remunerated.<sup>33</sup>

As compared to manufacturing work, a significant portion of service sector employment was short-term and undertaken by female workers. In 1976, 6 out of 10 Canadian part timers were women working in service sector employment.<sup>34</sup> Magun argued that:

A large segment of service manpower is still only modestly skilled, whereas the proportion of unskilled workers in the goods sector has been shrinking rapidly. In commercial services such as wholesale and retail trade, and banking, there are secondary family workers who receive lower pay and have less permanent tenure than the average work in the goods-producing industries. In addition, service workers have higher rates of unemployment, and their average work experience is, consequently, shorter.<sup>35</sup>

Many have argued that the growth of the SER in the 1940s and 1950s was made possible only by the existence of a complementary precarious labour force.<sup>36</sup> Because enterprises built around the SER did not adjust their permanent workforce to meet fluctuations in production needs, they needed a contingent workforce to meet upsurges in demand, and drew from smaller related enterprises which employed a shorter term workforce to do so. But this was a different phenomenon than what emerged from service sector employment in the 1970s. As of the 1970s whole enterprises began to be built on short-duration employment models instead of the SER. Rather than job segmentation within occupations and enterprises, with the rise of the service sector the Ontario and Canadian economies began to experience significant segmentation of the labour force.

The enhanced segmentation was reflected in the employment contract claims of the 1960s and 1970s. A number of property-related claims over these decades concerned the work of service sector employees, and often regarding workers in short-term high-turnover non-unionized jobs.

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<sup>33</sup> John Baldwin and Desmond Beckstead, "Knowledge Workers in Canada's Economy, 1971-2001" (Statistics Canada, 2003) at 5-8; Surendra Gera and Phillippe Masse, *Employment Performance in the Knowledge-Based Economy*, Industry Canada Working Paper No 14 (HRSDC, 1996) at p. 8-10.

<sup>34</sup> Magun, *supra* note 6 at p. 536

<sup>35</sup> *Ibid* at p. 548.

<sup>36</sup> Fudge and Vosko, *supra* note 10; Jane Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto, 1992); Ulrich Muckenberger, "Non-Standard Forms of Work and the Role of Changes in Labour and Social Security Legislation, (1989) 17 Intl J Soc'y of Law 386; Piore and Sabel, *supra* note 12, discussing industrial dualism at p.26-28.

These were often not workers in SERs, and indeed, it was the very fact of short term employment that created information disclosure and competition concerns for employers in these sectors. By contrast, wrongful dismissal claims in the 1960s and 1970s were brought primarily by workers in longer term employment relationships, and the nature of their work shaped the issues litigated over these decades.<sup>37</sup>

#### **(4) Property Rights in Employment in an Age of Service**

Unlike wrongful dismissal claims in the 1960s and 1970s, property-related claims often involved workers in the growing service sector. Service sector work shifted the nature of the property exchange involved in the employment contract in several ways. The basis of blue collar manufacturing was an exchange of wages for the worker's labour time, time to be used for the production of a tangible good. Employer profit was generated through the sale of such goods. In service work, profit was generated through the development of long-term client loyalty, leading to repeat transactions. For some service companies that loyalty was largely developed through the knowledge and expertise of its employees, whereas for others it was a worker's ability to develop rapport with clients that engendered loyalty. In both contexts, companies' profits were based on the intellectual and interpersonal skills of workers, rather than the tangible goods they produced. Because competition between service-based companies was highly dependent on client relationships, those relationships, and information regarding client preferences, were of significant value for service-based enterprises. For service sector employers that offered SERs, the long-term nature of the employment relationships served to protect the value of the information and client relationships against competition from former workers, even where the law could not. But a significant portion of service industry work was precarious, part-time, short-term work, in which the information-protection function of long-term employment did not operate. As they had in over earlier decades, in the 1960s and 1970s employers with high-turnover work relationships turned to the law to protect information and client-loyalty. Employers argued for recognition of their proprietary interest in client relationships as an element of goodwill, primarily through the enforcement of non-competition and non-solicitation terms in employee contracts.

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<sup>37</sup> *Thorpe v. Sault Star Ltd.*, [1960] O.J. No. 81 (SC HCJ) [*Thorpe*]; *Landwehr v. Lely Ltd.*, [1963] O.J. No. 331 (SC HCJ) aff'd by [1964] O.J. No. 306 (SCCA) [*Landwehr*].

While there was no major increase in the number of property-related claims at common law between the 1950s and 1960s, during the 1960s a number of important precedents were established.<sup>38</sup> Unlike wrongful dismissal claims during this period, however, the case law concerning property rights in employment continued to draw primarily from English case law, with a few isolated references to Ontario precedents, and occasionally those from other provinces. As Table 6 demonstrates, the number of decisions in the 1970s increased, however, from 10 to 33, of which 12 were made between 1978 and 1979. By the 1970s, most claims concerned the interpretation and application of contractual restrictive covenants, rather than implied common law rights and obligations.

Table 6: Property-Related Claims Between 1930-1979\*

Decade	Restrictive Covenants <sup>a</sup>	Restrictive Covenants and WD Counterclaim	Trade Secrets and Confidential Information at CL	Trade Secret/Confidential Info and WD counterclaim	Implied Contractual Duties	Express Contractual Exclusivity	Total
1960-69	3	1	3	2	4	0	12
1970-79	25	0	2	0	6	0	33

\* Cases are listed by decade of decision.

<sup>a</sup> The restrictive covenant cases do not include cases concerning the sale of a business, unless there was a separate employment-related covenant concluded in conjunction with the sale.

In the 1970s claims to enforce restrictive covenants, trade secrets and confidential information usually involved an employer request for an interim or interlocutory injunction to prevent the former employee from soliciting former clients prior to a hearing on the merits, rendering his or her continued employment in a competitive business very difficult.<sup>39</sup> Prior to the mid-1970s, an applicant for an interlocutory injunction had to demonstrate a strong *prima facie* case, that the balance of convenience favoured them, and that they would suffer irreparable harm not

<sup>38</sup> Over the 1950s, 1960s and 1970s there were also a number of per quod servitum cases, where employers sought compensation for the loss of a worker's services due to third party injury. These cases are almost exclusively concerned members of the armed forces and police personnel, but occasionally arose in other contexts. They are not included here because they are not based on contract, but they provide interesting insights into the law's understanding of an employer's property rights over their workers' labour.

<sup>39</sup> See for example, *Eaton Fund Distributors Ltd. v. Poulin*, [1973] O.J. No. 624 [*Eaton*]; *Creditel of Canada Ltd. v. Faultless et al.* (1973), 18 O.R. (2d) 95 [*Creditel*] at para 37.

compensable by way of damages in its absence.<sup>40</sup> As many judges were keenly aware, however, to find that a strong *prima facie* case existed meant that the courts had in effect to pronounce themselves on the merits of the claim without the benefit of a full evidentiary record.<sup>41</sup> Consequently the outcome of such applications was often to end the legal dispute. Of the 33 claims requesting the enforcement of a restrictive covenant in the 1970s, 21 applications for interim or interlocutory injunctions were heard without any further reported decisions on the merits. This was especially problematic because the stakes were so high. The courts struggled with how to balance the interests of the parties. To do so, when an interim injunction was granted it was usually only against client solicitation and use and disclosure of confidential information, rather than the enforcement of non-competition covenants to explicitly preclude the worker from continuing in their competing employment. But a restriction on solicitation could produce the same effect if the worker was employed by a business that depended on soliciting clients of the former employer. For employers, especially in small competitive service-based enterprises, a competing employee in possession of confidential information, a trade secret, or significant client loyalty could seriously damage the viability of the business, particularly over the two to three year hiatus before a trial on the merits. The question was complicated by the mid-1970s, when the general legal standard for interim injunctions began to change, from a “strong *prima facie* case” to a “serious issue to be tried”.<sup>42</sup> This was a lower standard for the applicant to meet, and had the benefit of not requiring the courts to prejudge the merits of the claim to grant the injunction, but given the issues at stake in the employment context, it also made it easier for employers secure injunctions to restrain workers’ post-employment activities.

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<sup>40</sup> See, for instance, *Ian Martin Associates Ltd v. Reale*, [1969] OJ No 498 (SC HCJ) [*Ian Martin*].

<sup>41</sup> See for example, *Management Recruiters of Toronto Ltd. v. Bagg*, [1971] 1 O.R. 502 [*Bagg*] at para 3; *Cantol Ltd. v. Brodi Chemicals Ltd. et al.* (1978), 23 O.R. (2d) 36 (HCJ) [*Cantol*] at paras 11-13.

<sup>42</sup> In *American Cynamid Co. v. Ethicon Ltd.*, [1975] 1 All ER 504 [*American Cynamid*] the English House of Lords enunciated a new standard for determining interim and interlocutory injunctions. Rather than demonstrating a strong *prima facie* case, the applicant would need to show that their case was not frivolous, and that there was a substantial issue to be tried. If this was demonstrated, the courts were to inquire as to the balance of convenience, whether the threatened harm to the applicant would be adequately compensable by way of damages, and the effect of the injunction upon both parties. The courts of Ontario debated whether or not to adopt this standard through the second half of the 1970s, with no clear outcome. Some in particular were concerned with the effect on employment cases of a lower standard, given the inequality of bargaining power between the parties. See *Cantol*, *supra* note 41 at para 13. By the end of the 1970s the matter appeared relatively settled by the Divisional Court’s adoption of the new standard in *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd. et al.* (1977), 17 O.R. (2d) 505 [*Yule*].

(a) Trade Connections and Restrictive Covenants

As discussed in the previous chapter, up until the 1950s the courts had held that workers were free to compete in the post-employment context so long as they did not actively use any information or knowledge that arose from anything over which the employer held a proprietary right, using the concepts of “objective” and “subjective” knowledge to draw a demarcating line.<sup>43</sup> In the 1950s, however, the courts began to suggest that an employer held a proprietary interest in client-related information that a worker was exposed to on the job, regardless of the form it took.<sup>44</sup> This trend continued into the 1960s and 1970s, when the courts articulated the idea that service sector enterprises held a proprietary interest in “trade connections” as an element of goodwill.

In the earlier case of *Herbert Morris v. Saxelby* the House of Lords had specified that while the goodwill of a business was necessarily exposed to competition on the market, a worker should not be able to “take advantage of his employer’s trade connections or use information confidentially obtained”.<sup>45</sup> In the 1960s and 1970s the courts focused in on the concept of trade connections in service sector employment, which, they suggested, was the primary basis for the goodwill of such enterprises. Although the courts had begun to address the proprietary value of client relationships in the 1950s, whether or not they were a legitimate proprietary interest remained jurisprudentially confused in the 1960s. In *Ian Martin Associates v. Reale*, for instance, the High Court of Justice acknowledged that trade connections could establish a proprietary right, but expressed skepticism that such a right could arise solely from the employer’s expenditure of time in assembling information regarding clients.<sup>46</sup> By contrast, in *PCO Services v. Rumleski* the court easily accepted the reasonableness of a restrictive covenant without explicitly examining the existence of a proprietary interest, or the geographical and temporal scope of the covenant. Instead they focused on the employer’s investment in training the worker and permitting him the opportunity to develop client relations. The court explained that the expense and time of training a successor justified the enforcement of the restrictive covenant.<sup>47</sup> By the 1970s, however, the courts had developed an

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<sup>43</sup> *Herbert Morris, Limited Appellants v Saxelby Respondent*, [1916] 1 A.C. 688 [*Herbert Morris*].

<sup>44</sup> *Mills et al v. Gill*, [1952] OR 257-272.

<sup>45</sup> *Herbert Morris, Limited*, *supra* note 43.

<sup>46</sup> *Ian Martin Associates*, *supra* note 46 at para 9.

<sup>47</sup> *PCO Services Ltd. v. Rumleski*, [1963] 2 OR 62 (HCJ) [*PCO Services*]. The court simply stated at para 5:

The plaintiff trained the defendant and imparted the secrets of its business to him. He was paid and covered by insurance during the period he was learning and until he built up a sufficient goodwill to bring

analytical basis for providing a proprietary right over trade connections. There was growing consensus that in some industries a business' value derived primarily from its client relationships, and that those client relations constituted a proprietary interest that was the legitimate source of contractual protection post-employment.

As in previous decades, a restrictive covenant against competition or solicitation could be enforced if the worker took client information in physical form. Rather than focusing on the dishonesty involved in doing so, as in the past, the courts were now more concerned with the effect on business' goodwill and trade connections of using such information.<sup>48</sup> In *Creditel of Canada v. Faultless et al* the court held that the employer had established a *prima facie* special interest in the goodwill that resulted from the rapport built by the employees in their interactions with clients.<sup>49</sup> This was because "the defendant had taken or kept documents of the plaintiff, which were or might be of use to a competing company, with which the defendants took up employment, in obtaining customers from the plaintiff".<sup>50</sup>

Trade connections were also recognized as an element of goodwill permitting for contractual protection in the absence of workers' physical taking of information. In the 1973 decision of *Jiffy Foods Ltd. v. Chomski* a catering truck supervisor with a non-solicitation clause in his employment contract set himself up in competitive business post-employment, calling on his previous customers in the same area as his previous employer.<sup>51</sup> An application for an interlocutory injunction was initially refused, on the basis that the customers had not contracted with the employer, and

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in a return to the plaintiff. The plaintiff assisted the defendant to pass his examinations and to secure a licence as an exterminator. When employment is terminated it takes time to train a successor and for the successor to get to know the customers in an area. Considering the type of business the area is not too wide or the time too long. Under the circumstances, I find that the agreement was reasonable.

<sup>48</sup> The main precedent for this position was *Bagg*, *supra* note 41, where the worker took a series of job orders with him when leaving his employment. The court stated that there was no evidence as to whether he had used or disclosed the information in the job orders, but was prepared to order an interim injunction barring him from doing so until trial. Rather than simply restraining the use of employer property, the court in this case seemed to think that injunction could only be ordered if the relationship was confidential. The court therefore held that the relationship became confidential once the worker physically took information, absent which the employer would not have been able to enforce the restrictive covenant in the employment contract. *Bagg* continued to be used as the main precedent for restrictive covenant cases where there was an employee taking over the 1970s.

<sup>49</sup> *Creditel*, *supra* note 39.

<sup>50</sup> *Ibid*

<sup>51</sup> *Jiffy Foods Ltd. V. CHomski*, [1973] 3 OR 955 (Hcj Div Ct) [*Jiffy Foods*].

therefore the employer did not hold any proprietary rights over them.<sup>52</sup> On appeal the Divisional Court disagreed however. The judges held that there was really no question but that the worker's actions would cause irreparable harm to the employer, because the "appellant's business clearly depends upon the creation and servicing of sales routes".<sup>53</sup> The court agreed that the employer had no proprietary interest over its customers *per se*, but also held that it did hold a proprietary interest in the business' goodwill, which was based on the development of client relationships. Allowing the worker to work for a competitor would threaten that goodwill, because the worker had enjoyed special opportunities to become acquainted with the employer's customers and to acquire intimate knowledge of their needs. He had handled customers' complaints and had personal relationships with them. To allow the worker to work for a competitor would effectively be to permit him to "appropriate [the company's] goodwill unto himself".<sup>54</sup> This, the court agreed, a restrictive covenant could prevent a worker from doing.

In *Herbert Morris* and in *Routh* the courts had focused on whether workers were in a position to take advantage of special information regarding clients collected by their former employers. But the courts now also began to suggest that that the mere presence of former employees in a competitive business could damage the value of an employer's trade connections. The issue was not whether the worker took advantage of special knowledge or solicited former clients, but rather that clients might be tempted to follow the worker based on loyalty alone, even in the absence of direct post-employment client solicitation. In *JG Collins Insurance v. Elsley* the Supreme Court explicitly acknowledged that protecting trade connections might require *per se* prohibitions on workers' post-employment competition.<sup>55</sup> The defendant sold his insurance business and was hired to act as its manager. There was a restrictive covenant in the sale agreement as well as a non-competition clause in the employment contract. By the time the employee resigned from his employment, the sales covenant had expired, but the employment clause remained in force. The worker argued that there may have been grounds for the employer to protect against solicitation of clients, but that this was a bare restraint on competition, of a type that the courts had held unenforceable as in restraint of trade. The Court disagreed however. They held that the employer

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<sup>52</sup> *Jiffy Foods* *ibid* at p. 2

<sup>53</sup> *Ibid* at para 8.

<sup>54</sup> *Ibid* at para 10

<sup>55</sup> *JG Collins Insurance Agencies Ltd. v. Elsley* (1974), 18 C.P.R. (2d) 187 (SC HCJ), varied by (1977), 13 O.R. (2d) 177, varied by [1978] 2 S.C.R. 916 [*JG Collins*].



held a legitimate proprietary interest in the business' trade connections. While ordinarily a restraint on solicitation would be sufficient to protect such trade connections, the Court explained:

[I]n exceptional cases [...] the nature of the employment may justify a covenant prohibiting an employee not only from soliciting customers, but also from establishing his own business or working for others so as to be likely to appropriate the employer's trade connection through his acquaintance with the employer's customers. This may indeed be the only effective covenant to protect the proprietary interest of the employer. A simple non-solicitation clause would not suffice.<sup>56</sup>

Here the worker was responsible for all client interactions for many years, through which personal relationships were established. Even though he did not solicit their business after leaving the company, at least two hundred clients followed him to his new business. The Court held that a non-solicitation covenant alone would not have been sufficient to protect the employer's interests because of the influence the worker held over the business' clients. On this basis, an injunction was ordered restraining the worker from carrying on, being engaged with or having a concern in a general insurance agency for five years within the geographical ambit in which the employer had done business.<sup>57</sup>

In other cases, however, the courts examined whether the worker had an actual ability to influence the client base before enforcing restrictive covenants.<sup>58</sup> In *Drake International v. Kollar*, the court was of the opinion that the employment agency business at issue was not strongly dependent on client loyalty, because many of its clients simultaneously dealt with their competitors. This differentiated the case from *Jiffy*, and given that there was no particular company loyalty from the clients, there was nothing of value that the worker could interfere with by working for a competitor. On this basis, the court refused the interlocutory injunction.<sup>59</sup> In *Cradle Pictures (Canada) v. Penner*

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<sup>56</sup> *JG Collins ibid*

<sup>57</sup> *Ibid* The employer was also granted damages on the basis of a liquidated damages clause.

<sup>58</sup> *Jiffy Foods supra* note 51,

<sup>59</sup> There were a number of different claims against employees of temporary placement agencies in the 1970s, which achieved different results. In *Computer Centre Personnel Ltd. v. Lagopoulos et al.* (1975), 8 O.R. (2d) 480 (HCJ) [*Lagopoulos*] an interlocutory injunction was ordered to enforce a non-competition clause against employment counsellors. Relying on the 1952 case of *Mills, supra* note 44., and the holding in *Jiffy Foods, supra* note 51, the court concluded that there was a legitimate proprietary interest in customer relations, and ordered the injunction. Succeeding decisions tried to make sense of the differing outcomes in these cases. In *Computer Centre Personnel Ltd. (cob Computer Centre) v. Zari* (1976), 30 CPR (2d) 55 (SC HCJ) [*Zari*] the court found them irreconcilable, and felt bound by the more recent decision in *Lagopolous*, so as to permit the business community some certainty in planning their legal arrangements. The court nonetheless expressed some doubt about whether employment agency employment was of such a nature to allow workers influence over the client base post-

the court came to a similar conclusion.<sup>60</sup> The employer had a business taking baby pictures in hospital nurseries. She employed the defendant to assist her, and to communicate with the various hospitals and troubleshoot problems. There was a non-competition clause in the employment contract. The employer argued that she held a legitimate business interest in trade connections, which the worker could undermine because he was exposed to her specialized know-how and had the ability to influence customers. The court agreed that there was a legitimate interest in protecting trade connections, but quoted the Privy Council's decision in *Stenhouse Australia Ltd. v. Phillips* to explain the difficulties in drawing property lines between worker and employer in trade connection cases.<sup>61</sup> The justices stated that:

Leaving aside the case of misuse of trade secrets or confidential information ... the employer's claim for protection must be based on the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation. For while it may be true that an employee is entitled - and is to be encouraged - to build up his own qualities of skill and experience, it is equally his duty to develop and improve his employer's business for the benefit of his employer. These two obligations interlock during his employment: after its termination they diverge and mark the boundary between what the employee may take with him and what he may legitimately be asked to leave behind to his employers.<sup>62</sup>

On this basis the court in *Cradle Pictures* held that only a non-solicitation clause was necessary to protect the employer's interest in its trade, and that the non-competition clause in the contract was unreasonable in the circumstances.<sup>63</sup>

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employment.. In *Craig Agency of Ontario Ltd et al v. Bennett et al* (1977) 14 OR (2d) 740 (HCl) [*Craig Agency*] the court purported to reconcile the decisions in *Bagg*, *Jiffy*, *Lagopoulos* and *Drake* by suggesting that the distinction was that in *Jiffy*, *Bagg* and *Lagopoulos* the court found an intent to use confidential information and a close relationship between employees and customers. The judge held that these elements were not at play in the employment agency case before him, and generally agreed with the judges in *Zari* and *Drake* that the relationship between employee and customer in the employment agency context did not create a sufficiently intimate or exclusive relationship so as to hold any particular influence over client choices.

<sup>60</sup> *Cradle Pictures (Canada) v. Penner*, [1978] OJ No. 3243 (SC HCJ) [*Cradle Pictures*]

<sup>61</sup> *Ibid* at para 31

<sup>62</sup> *Stenhouse Australia Ltd. v. Phillips*, [1974] 1 All ER 117 [*Stenhouse*] at p.122

<sup>63</sup> *Cradle Pictures*, *supra* note 60. There are some contradictions in the court's decision. In some instances the court states that the worker did not develop any intimacies with the clients, but then states that "[w]hat he did acquire was a valued rapport and relationship with various of those client hospitals; a relationship which, if not made the subject of restraint, he could unfairly have turned to his advantage. Such restraint could have been effected, in my view, by exacting a covenant which prohibited solicitation of those of the plaintiff's clients with which he had dealt during his term as the plaintiff's representative."

Underlying the growing legal recognition of an employer's proprietary rights over its trade connections was the sense that the value the parties' received from their employment contract was also diminished by post-employment worker competition in the service sector. As the Privy Council noted in *Stenhouse*, and as suggested in *Cradle Pictures*, in the service sector workers were specifically hired to develop client relationships and build their employer's goodwill.<sup>64</sup> If workers could control that goodwill and threaten it post-employment, then the employer would lose the value it contracted for through the employment contract. The worker would be able to leave with the very thing the employer had hired the worker to provide. In *Jiffy* the court noted that the worker was the "beneficiary of the goodwill generated by the appellant's efforts in setting up the route".<sup>65</sup> To allow the worker to work for a competitor would effectively be to permit him to "appropriate [the company's] goodwill unto himself".<sup>66</sup> Indeed, in some cases the issue was that the employees themselves constituted the business goodwill.<sup>67</sup> In *DCF v. Gellman* the court considered whether a group of workers could be restrained from starting their own competing company in the absence of non-competition restrictive covenants.<sup>68</sup> Prior to leaving their employer and starting their own company, the workers had come together to make a purchase offer to the employer. The court noted that:

The evidence indicates that the defendants, in offering to purchase the business, deliberately refrained from placing any value on good will because as more than one of them stated in the course of the evidence or on their examinations for discovery, that would in effect be purchasing themselves. In other words, they were fully conscious of the fact that their personal abilities represented the only commodity the plaintiff corporations had for sale [...].<sup>69</sup>

The idea that the employment contract constituted a purchase of a worker's skill and efforts to develop client relationships could have brought restrictive covenant cases in service employment into close alignment with the jurisprudence regarding restrictive covenants in the sale of a business or goodwill. The courts understood such transactions as involving the buyer's purchase of the

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<sup>64</sup> *Stenhouse*, *supra* note 62; *Cradle Pictures*, *supra* note 60.

<sup>65</sup> *Jiffy Foods* *supra* note 51 at para 9.

<sup>66</sup> *Ibid* at para 10

<sup>67</sup> *DCF Systems Ltd. v. Gellman* (1978), 41 C.P.R. (2d) 145 [*DCF Systems*]

<sup>68</sup> *Ibid*. The court concluded that the workers were free to compete, absent direct client solicitation. No mention of *JG Collins*, *supra* note 55 was made in this case, although it would seem relevant, given the court's statements of the value of the employees to the company's goodwill. The court also considered the position of a company director who left with the workers, and found him in breach of fiduciary duty.

<sup>69</sup> *DCF Systems* *ibid* at para 51.

goodwill or client relationships from the seller, for which the seller could negotiate compensation for the agreement not to compete or solicit post-sale. Such a covenant was logical because without it the seller could undermine the value of buyer's purchase. In *JG Collins* the Supreme Court explained that: `

A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.<sup>70</sup>

In employment cases the courts purported to treat restrictive covenants with greater suspicion, on the basis that workers did not receive consideration for the restrictions, and because the effect of a restrictive covenant could be to render a worker incapable of working in their field and in their town of residence, which was a very high price to pay. In *JG Collins* the Court went on to explain that

A different situation, at least in theory, obtains in the negotiation of a contract of employment where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment.<sup>71</sup>

But once the courts began to view the value of service-related businesses as the development of goodwill and client relationships, and to conceive of the employment contract as the purchase a worker's time, skill and service to develop that goodwill and relationships, the suggestion was that post-employment competition, like post-sale competition, undermined the value of the employer's initial purchase, and therefore the concern for workers' ability to work and offer their skills to the community began to abate. While in practice the two areas were on a path to conceptual alignment, the courts nonetheless continued to profess their adherence to the idea that restrictive covenants in employment should be more strictly construed than those associated with the sale of a business.

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<sup>70</sup> *JG Collins*, *supra* note 55 at 923.

<sup>71</sup> *Ibid*

(b) Confidential Information: The Common Law's Protections Against Workers' Competitive Advantage

In the 1960s and 1970s there were five reported confidential information and trade secrets claims at common law<sup>72</sup>, and two reported claims for the enforcement of secrecy agreements<sup>73</sup>. During this period the rules pertaining to protecting trade secrets and confidential information remained largely intact, but their rationale began to change. As with restrictive covenants, the courts were now concerned to prevent workers from taking advantage of opportunities that arose through employment to the detriment of their employers, but also to the detriment of general business interests.

In the 1940s and 1950s the courts in Ontario had provided definitional clarity to the difference between a trade secret and confidential information – a distinction that applied at common law and as regards restrictive covenants. In *R.I. Crain v. Ashton*, the Ontario High Court of Justice held that a trade secret was a process, formula, pattern, etc.<sup>74</sup> The process or formula had to maintain a necessary indicia of secrecy, such that its details were guarded and its confidentiality made clear to employees. A trade secret differed from a patent insofar as it lost the protection of the law once it had been discovered, or could be discovered by examination. Thus, once a product was on the market and the methods for its creation and reproduction were discernible by analysis, it was no longer considered a trade secret. By contrast, protection of confidential information could include information which was in the public domain, but was assembled by some effort of the claimant. In the English case of *Saltman Engineering* the Court of Appeal explained that:

It is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the

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<sup>72</sup>*Electric Reduction Company of Canada Ltd. v. Crane*, [1961] O.J. No 166 (SC HCJ) [*Electric Reduction*], *International Tools Ltd. v. Kollar et al*, [1968] 1 O.R. 669-676 (CA) [*Int'l Tools*], *Cooperheat of Canada Ltd. v. Slater* (1973), 13 CPR (2d) 25 (SC HCJ) [*Cooperheat*], *Bee Chemical Co. v. Plastic Pain & Finish Specialties Ltd.* (1979) 47 CPR (2d) 133 (SCCA) [*Bee Chemical*], *Shauenburg Industries Ltd. et al v. Borowski et al* (1979), 25 OR (2d) 737 (HCJ) [*Shauenburg*].

<sup>73</sup>*Tenatronics Ltd. v. Hauf et al* (1971), [1972] 1 OR 329 (HCJ) [*Tenatronics*], *Control Data Canada v. Sutherland*, [1978] OJ No. 439, (SC HCJ) [*Control Data*].

<sup>74</sup>*RI Crain Limited v. Ashton and Ashton Press Manufacturing Company Limited* [1949] OR 303; O.J. No. 455 (HCJ) (HCJ) [*RI Crain*].

maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.<sup>75</sup>

This was simply a restating of the older notion of “objective knowledge”, which had determined what an employee could and could not use or divulge post-employment, based on their implied duty of confidentiality. After *Saltman Engineering* was decided in 1948 the courts increasingly suggested that confidential information was not solely information that retained value by virtue of its scarcity, or because it was the source of an employer’s proprietary right. Rather, in the 1960s and 1970s the courts began to suggest that confidential information was any information that an employee could use to an employer’s detriment post-employment. The protection of confidential information, by this logic, was less about protecting confidentiality and more about protecting an employer from a former employee’s use of work-related information to develop a competitive advantage.

In the 1966 Supreme Court decision in *Pre-Cam Exploration & Development Ltd. v. McTavish* a worker was employed to inspect certain mining prospects for a client of his employer.<sup>76</sup> In the course of that work he discovered a valuable mining site adjacent to the one he had been asked to investigate. He did not report this to employer, but instead resigned and staked the sites for himself. The Saskatchewan Queen’s Bench held that the worker had perpetrated a fraud on his employer, and therefore that the claims were to be transferred to the employer’s client. The Court of Appeal disagreed. The court focused on what he had been contracted to do. He was engaged to operate certain machinery and record certain readings at particular mine sites. According to the Court of Appeal, he was not hired to find valuable mining sites adjacent to the ones already claimed by the employer. He performed the services he was hired for, and thereafter resigned. The information regarding the mining claims was not confidential in nature, and he was not told to treat it as such. The worker therefore performed his contractual obligations, so that any other duty he might be under to his employer could arise only by way of fiduciary duty, which the Court of Appeal declined to find in this case.<sup>77</sup> The Supreme Court of Canada came to a different conclusion, holding

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<sup>75</sup> *Saltman Engineering Co. Ltd et al v. Campbell Engineering Co. Ltd.* (1948), 65 RPC 203 reprinted in [1963] 3 All ER 413 at p.414 [*Saltman Engineering*] at p.215, quoted at para 79 of *Reliable Toy Co. v. Collins* [1950] O.R. 360 (H.C.J.) [*Reliable Toy*].

<sup>76</sup> *Pre-Cam Exploration & Development v. McTavish*, (1965), 53 W.W.R. 662 (Sask CA), rev’d by [1966] SCR 551 [*Pre-Cam*].

<sup>77</sup> *Ibid.*

that the worker held the mining claims in trust for his employer. The Court held that the employee McTavish was only able to stake the claims on the basis of highly confidential information he had acquired in employment, and that there was an implied term of his employment contract that he could not use such information for himself, during or post-employment. The Court did not explain what information was confidential or why it was so. But the justices clearly felt that the worker had taken advantage of an opportunity that he gained solely from his employment to the detriment of his employer, and this he should not be permitted to do.<sup>78</sup>

The idea that workers should be precluded from taking advantage of opportunities that arose through employment was rendered explicit in the late 1970s. The Ontario courts initially applied the 1960 English decision of *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd et al* in 1979.<sup>79</sup> In *Terrapin* the court granted an interlocutory injunction against the use by former employees of a set of building plans.<sup>80</sup> The employees claimed that the information was no longer confidential because once the plaintiffs built the buildings, their methods were discernible and in the public realm. This argument was in keeping with earlier ideas about confidential information, but was now rejected. Roxburgh J. held that if the information was confidential when acquired, it could not be used by workers even after it became available to the public. The reason to enjoin the use of confidential information was to restrict the holder of the information from using it as a “springboard for activities” to the detriment of its creator. Even where all the features were published and generally ascertainable, “the possessor of the confidential information still has a long start over any member of the public”.<sup>81</sup> Roxburgh J went on to explain that in his view, this was “inherent in the principle

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<sup>78</sup> *Triplex Safety Glass Company v. Scorch*. In *Pre-Cam*, *ibid*, the Supreme Court stated: “Without the information acquired during the course of his employment, McTavish would not have staked the adjoining claims. This was highly confidential information and the purpose for which it was being sought was obvious--the acquisition of other connected claims which would be of advantage to the existing claims.” Whereas the usual claim of this nature was a request for an injunction to stop the defendant from realizing profits through the use or disclosure of confidential information or trade secrets, in this case the employee had already made use of the information in acquiring the mining claims. The Court again did not discuss this distinction, but still ordered that mine shares be subject to a constructive trust for the benefit of his former employer.

<sup>79</sup> *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd. et al.*, [1960] R.P.C. 128 [*Terrapin*] at 130 cited by *Shauenburg*, *supra* note 72 at para. 31.

<sup>80</sup> *Terrapin ibid*.

<sup>81</sup> *Ibid*.

upon which the *Saltman* case rests that the possessor of such information must be placed under a special disability in the field of competition to ensure that he does not get an unfair start”.<sup>82</sup>

Underlying the case law on information and competition over this period was the idea that workers should not be able to damage employers’ client relationships or reap the benefits of an opportunity for knowledge provided through their employment. This was based both on the specific nature of profit making in service sector industries, but also on the idea that the allowing post-employment competition could eliminate the value employers purchased from workers through the employment contract. The focus was wholly on the consideration employers sought through providing employment, with no complementary examination of whether workers bargained for more than wages in service sector employment. A similar process was underway in regards to highly skilled knowledge work and corporate managers, but there the courts increasingly approached the issue through the purview of fiduciary duties, a subject beyond the scope of this research.<sup>83</sup> In general then, the tenuous line that the courts had drawn between employers’ property and workers’ self-ownership of knowledge and skill was all but gone by the end of the 1970s.

### **(5) Wrongful Dismissal**

While property-related claims in the 1960s and 1970s often arose from short-term service sector employment, wrongful dismissal claims over these decades were brought primarily by workers in SERs. Between the 1930s and the end of the 1950s the average length of employment in reported wrongful dismissal claims cases was 2.75 years, with a median of 2 years. As Table 7 documents, in the 1960s, by contrast, the average was significantly higher at 9.6 years, with a median of 5.5 years.<sup>84</sup> In the 1970s the average was 5.4 years, and the median was 2 years.<sup>85</sup> The number of such reported decisions grew over this period, starting slowly in the 1960s, and then rapidly in the 1970s, although the absolute number of claims remained relatively small. Moreover, the approach to

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<sup>82</sup> *Ibid.*

<sup>83</sup> *Canadian Aero Service Ltd. v. O'Malley et al.*, [1974] S.C.R. 592 [*Canadian Aero*]; *Alberts et al v. Mountjoy et al* (1977) 16 OR (2d) 682 (HCJ) [*Alberts*]; *DCF Systems supra* note 67.

<sup>84</sup> Interestingly, there are no claims over the 1960s from workers with less than a year’s employment tenure. By contrast, in the 1970s there is a sharper distribution, with approximately one third of the claimants having less than a year’s job tenure.

<sup>85</sup> This appears to be well below the provincial average job tenure, at least by the mid-1970s, when such figures were recorded by Statistics Canada. In 1976 the male average job tenure in Ontario was 8.32 years. For women the average was 5 years. See Statistics Canada, *Labour force survey estimates* (LFS), Table 282-0038.



adjudication changed over this decade, as the Ontario courts established a number of significant precedents. For the first time they now engaged in-depth analysis of prior cases, and drew from precedents across the country. As a result the jurisprudential approach to wrongful dismissal began to diverge from that of the United Kingdom, in part as well because of its adoption of statutory unjust dismissal legislation in 1971.<sup>86</sup> While wrongful dismissal claims had always been brought mostly by upper status male workers in Ontario, by the 1960s this area of law became the almost exclusive purview of male *managerial* workers.<sup>87</sup> Of the 17 claims reported on the merits in the 1960s, only three were from non-managerial workers. In the 1970s, of 31 claims, eleven were non-managerial.<sup>88</sup> The non-managerial claimants included sales agents, doctors, a radio sports announcer, a television host, but also a shipwright and a pipe fitter. Over these two decades only two claims were brought by women.<sup>89</sup>

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<sup>86</sup> *The Industrial Relations Act of 1971*, c.72 adopted the recommendations of the Donovan Commission of 1968 to include protections for individual employees against dismissal without cause.

<sup>87</sup> The change here may be based on a change in what constituted high status work. Whereas professional employees such as engineers and doctors may have held relatively high social status in the 1920s and 1930s, the growth in education levels and the move away from skilled industrial work as of the 1960s may have changed what constituted high status work as of the 1960s.

<sup>88</sup> In the 1960s, *Pudymaitis v. Sudbury and Algoma Sanitorium Assn*, [1960] O.J. No. 133, (SC CA) [*Pudymaitis*]; *Lazarowicz v. Orenda Engines Ltd.*, [1960] OR 202p (HCJ), aff'd by [1961] O.R. 141 (SC CA) [*Lazarowicz*]; *Ditchfield v. Gilson Manufacturing Co.* (1961), 61 CLLC 254 (SC HCJ) [*Ditchfield*]; *Tracey v. Swansea*, [1964] O.J. No. 307, (SC HCJ) [*Tracey*]. In the 1970s, *Bigelow v. Lockwood Clinic Hospitals Ltd.*, [1972] O.J. No. 767, (SC HCJ) [*Bigelow*]; *Arsenault v. Spruce Falls Power and Paper Co.*, [1972] O.J. No. 895 (SC HCJ) [*Arsenault*]; *Ackerman v. Thomson and McKinnon, Achincloss, Kohlmeyer, Inc.* (1970), 4 O.R. (2d) 240, (CA) [*Ackerman*]; *Markey v. Port Weller Dry Docks Ltd.*, [1974] O.J. No. 1914 [*Markey*]; *Frank Meisl Agencies Ltd. v. Star Slipper Co.*, [1976] OJ No 1151 (SC HCJ) [*Frank Meisl*]; *Magee v. Channel Seventynine Ltd.* (1976), 15 OR (2d) 185 (HCJ) [*Magee*]; *Racine v. CJRC Radio Capitale Ltee* (1977), 17 OR (2d) 370 [*Racine*]; *Canadian Bechtel Ltd. v. Mollenkop* (1978), 1 CCEL 95 (SCCA) [*Canadian Bechtel*]; *O'Keefe v. HF Hayhurst Co.*, [1979] OJ No. 290 [*O'Keefe*]; *Henley v. Peeters Textile Ltd.* [1979] OJ No. 460 (SC HCJ) [*Henley*].

<sup>89</sup> *Cowan v. Sidsamhar Investments Ltd.*, [1975] O.J. No. 473 (S.C. H.C.J.) [*Cowan*]; *Pollock v. Maris*, [1963] O.J. No. 321 (SC CA) [*Pollock*]. Note that it is not entirely clear that the claimant in *Pollock* is female because there is a switch between gender pronouns used in the decision.

Table 7: Summary of Reported Wrongful Dismissal Cases 1960-1979<sup>a</sup>

Decade	Total Claims	Indefinite Duration Employment	Fixed Duration Employment	Unstated Duration	Avg Job Tenure in Years <sup>c</sup>	Avg Length of Notice When Awarded in Months <sup>d</sup>
1960-1969	19 Total (4 appeals) = 17 on the merits 2 procedural WD-related motions	3	0	16 (but multiple year employ)	9.6 years	6.8
1970-1979	56 Total (5 appeals) = 40 on the merits <sup>b</sup> 16 WD-related procedural motions	13	1	42	6 years Median 1.6 years	8.4
<b>Totals</b>	<b>79</b>	<b>16</b>	<b>1</b>	<b>63</b>	<b>7.8</b>	<b>7.6</b>

<sup>a</sup> The cases are organized by decade of decision. The ‘appeals’ category denotes the number of cases decided within each decade that were then appealed upwards. Cases that were appealed are only counted once, in the decade in which the first reported decision was made. A case was classified as being of indefinite duration, fixed, or unstated, based on the court’s explanation of the nature of the relationship.

<sup>b</sup> Decisions “on the merits” include motions which concerned substantive points of law. “WD-related procedural motions” are procedural motions arising out of wrongful dismissal cases, that did not involve a consideration of substantive law relating to dismissal.

<sup>c</sup> “Average Job Tenure in Years” reports the average length of employment in the reported substantive decisions of the decade in question.

<sup>d</sup> “Average notice awarded in months” reports the average length of reasonable notice where awarded in decisions decided in the decade in question.

As workers and employers in SERs came before the courts in the 1960s and 1970s, they now presented the courts with an altogether different employment arrangement than in previous eras. Workers now moved within single enterprises through internal job ladders, and could be promoted, demoted, or transferred. Employers’ ability to unilaterally change elements of the job relationship thus represented a very different managerial prerogative than when employment was of a shorter duration within smaller enterprises. In this context the courts had to resolve tensions between the boundaries of the managerial prerogative and of a commercial contractual analysis of unilateral changes to contract terms. At the same time, in claims for mental distress damages workers asked the courts to acknowledge that job security was a part of the SER bargain. Instead the courts chose to develop an analysis of loss from dismissal that focused solely on the entitlement to reasonable

notice. The only place in which the social, psychological and economic significance of long-term employment would be acknowledged was within the analysis of cause for dismissal.

(a) The (Re)Legalization of the Cause Standard for Dismissal

Cause had been all but ignored in wrongful dismissal claims over mid-century, but re-emerged as a central concern in the 1960s and 1970s. In the few cases in which the courts spoke to cause in the earlier period, they had presented it as a question of fact, and applied it in a relatively categorical fashion.<sup>90</sup> As of the 1960s, however, cause re-emerged as a central jurisprudential concern in the analysis wrongful dismissal. In the 1960s, cause was seriously considered in 9 of the 17 cases decided on the merits. In the 1970s, it was given significant treatment in 12 of out of 33 cases.<sup>91</sup>

The courts continued to cite the 1906 Privy Council decision of *Clouston v. Corry* for the principle that cause amounted to the factual existence of misconduct that was inconsistent with the fulfilment of the conditions of service.<sup>92</sup> Because of the generality of this statement, however, they also began to look more closely at existing case law, and to analogize the impugned conduct to, or distinguish it from previous cases to determine the acceptability of the grounds relied upon for summary dismissal.<sup>93</sup> In the late 1960s the courts began to cite the more specific standard provided by Justice Schroeder's dissenting Court of Appeal decision in the 1967 case of *R. v. Arthurs*.<sup>94</sup> In *Arthurs* Schroeder J. specified that:

If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter

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<sup>90</sup> See chapter 3, *supra* note 128 at p. 164-166.

<sup>91</sup> In many of the reported decisions it was noted that cause was considered at the trial level but was not revisited in the appellate level analysis of the reported decisions. In other cases the employer raised the issue of cause but the issue was simply ignored by the courts. Such cases are not counted in the number of cases where the reported decisions actually considered the issue of cause.

<sup>92</sup> Francis Raleigh Batt, *The Law of Master and Servant* (Toronto: Pitman, 1937) at 63.

<sup>93</sup> The first Canadian treatise on employment law was written by a practitioner, David Harris, in 1978. Harris suggested that the general rules did not offer much guidance on the question of cause or the sufficiency of misconduct giving rise to summary dismissal. David Harris, *Wrongful Dismissal* (Toronto: Richard De Boo Limited, 1978) at p. 31

<sup>94</sup> *Regina v. Arthurs, Ex Parte Port Arthur Shipbuilding Co.*, [1967] 2 OR 49 (CA) [*Arthurs*]. This case was not one that concerned wrongful dismissal at common law, but rather came before the Supreme Court on a motion to quash an arbitration award.

of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee.<sup>95</sup>

This was in fact the standard for cause first enunciated in England in the mid-19<sup>th</sup> century in *Callo v. Brounker*, and applied in Ontario into the early 20<sup>th</sup> century, but was cited by Justice Schroeder without attribution. The courts in the 1960s and 1970s used this standard to begin to flesh out legal principles to determine the existence of different types of cause, but they also, in some instances, suggested that some procedural requirements might be necessary before summary dismissal would be justified. Thus although they continued to characterize “cause” as an issue of fact, in practice the courts in the 1960s and 1970s treated it as a mixed question of fact and law.<sup>96</sup>

Employee disobedience remained one of the primary grounds for summary dismissal. If the employee refused a direct order, further analysis was seldom provided, as the courts shied away from interfering with the employer’s managerial prerogative.<sup>97</sup> In some instances however, the courts were willing to question the reasonableness of the order itself. In *Patrick v. Duplate*, the Court noted the longstanding rule that “wilful disobedience to a lawful and reasonable order constitutes justification for summary dismissal”, and specified that the disobedience must be a wilful and deliberate refusal to do something the employee knows the employer wants him or her to do, rather than a mere act of carelessness.<sup>98</sup> The court noted that there were relatively few reported cases that considered what constituted lawfulness or reasonableness as regards an employer’s orders, but also suggested that:

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<sup>95</sup> *Arthurs, ibid* at para 11. Although Justice Schroeder provided no authority for this standard, it was in fact the one first enunciated in *Callo v. Brounker* in 1829 ( C & P 518). Modifications and additions were made to this standard over time. See Charles Manley Smith, *Treatise on the Law of Master and Servant, including Therein Masters and Workmen in Every Description of Trade and Occupation; with an Appendix of Statutes* (Philadelphia: T. & J. W. Johnson, 1852) at p. 73, and see discussion in chapter 1 at p.44 for more on the origins of this standard. The standard was cited in *Dignan v. Viceroy Construction*, [1979] OJ No. 188 (SC HCJ) at para 20, and in British Columbia in *Burton v. MacMillan Bloedel Ltd.*, [1976] 4 WWR 267 (BC SC). The description of cause provided by Justice Schroeder in *Port Arthur Shipbuilding* is treated by subsequent decisions as having been affirmed by the Supreme Court, but while the Court did affirm Justice Schroeder’s overall decision it did not speak specifically to his summary of cause.

<sup>96</sup> See for example, *Tracey supra* note 88.

<sup>97</sup> *McCausland v. Woodroffe Investments*, [1972] O.J. No. 230 SC HCJ [*McCausland*]. Here the worker disagreed with his employer about the use of credit in purchasing. The court simply held that the worker ought to have taken his employer’s direction on the issue.

<sup>98</sup> *Patrick v. Duplate Canada Limited*, [1976] OJ No. 919 (SC HCJ) [*Duplate*]. The court at para 30 cited a mix of English cases: *Laws v. London Chronicle Ltd.*, [1959] 2 All E.R. 285 (C.A.) [*Laws*]; *Pepper v. Webb*, [1969] 2 All. E.R. 216 [*Pepper*]. It also cited recent Ontario cases and older cases from other provinces, *Markey, supra* note 88; *Smith v. Mills* (1913), 10 D.L.R. 589 (Sask. S.C.); *Charlton v. B.C. Sugar Refining Co.*, [1924] 4 D.L.R. 1182, [1925] 1 W.W.R. 546, 34 B.C.R. 408, *aff’d* by S.C.C. (not reported).

It seems clear that an order is lawful if it requires the servant to perform a task within the ambit of his duties under the contract of employment, or when it goes to the manner in which the servant is to perform his duties.<sup>99</sup>

Given the more impersonal nature of corporate organization, and the nature of professional employment in business and service sectors, direct disobedience was relatively rare.<sup>100</sup> Instead disobedience tended to be cited along with insolence<sup>101</sup> or other misconduct to demonstrate the general problems with a worker's character and his or her attitude towards their work.

The ground of cause that gave rise to controversy most frequently was that of incompetence or inefficiency. The traditional analysis of competency concerned whether the worker misrepresented that he or she possessed the necessary skills to do the job. This was a formulation clearly related to skilled workers in the discrete employment relationships of the late 19<sup>th</sup> century. In the 1960s and 1970s, incompetence was increasingly asserted to dismiss workers whom their employers felt were not sufficiently productive. The courts struggled with the issue because it seemed to pit the managerial prerogative against the long-term and changing nature of the employment relationship. On the one hand, the continued acceptance of the managerial prerogative led the courts to affirm employers' need for business efficiency, and their right to institute policy changes and new methods of work, to which workers would have to conform. As Landreville J. stated in *Ditchfield v. Gibson*, "[i]t is not for the employee to persist in methods which, in the opinion of the new management, may be archaic and inefficient".<sup>102</sup> Nor was it the place of the courts to review the policies of an employer. On the other hand, how was efficiency to be determined in jobs for which no specific professional training was required, and where workers moved laterally and vertically

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<sup>99</sup> *Duplate, supra* note 98. The court at para 31 cited Francis Raleigh Batt, *Law of Master and Servant*, 4th ed., (London: Sir Isaac Pitman, 1950) at p. 154 and *Markey, supra* note 88 for this proposition.

<sup>100</sup> There were three instances of disobedience to a direct order over these decades. *McCausland, supra* note 97; *Duplate ibid*; *Markey ibid*.

<sup>101</sup> In the two cases where insolence was seriously considered, *Tracey, supra* note 88 and *Markey ibid*, the courts considered the nature of the interaction between the parties and the particular context for the alleged incidents of insolence. In both cases the courts cited the English 1860 case of *Edwards v. Levy*, (1860) 2 F. & F. 94 at para 55, applied in the 1917 Ontario case of *Goldbold v. Puritan Laundry Co. Limited*, (1917) 12 O.W.N. 343 [*Goldbold*], cited at para. 56, for the proposition that a single incidence of insolence may not justify dismissal, particularly where the employer provoked the worker. In *Tracey* evidence was presented of an argument between the employer and the employee, but the court noted that the employer was known to be quick-tempered and ready to shout. It was therefore not prepared to find insolence on the basis of the argument alone. In *Markey* a worker refused to follow direction from a senior foreman on how to perform his work. The court found him to have been insolent towards the foreman on repeated occasions, noting, however, that the finding might have been different if it was the foreman, rather than the worker, who instigated the altercation.

<sup>102</sup> *Ditchfield supra* note 88 at para 6.

from position to position within the same organization? Was it to be measured only in regards to the current job assignment of a worker, or on the basis of their overall performance with the employer? The decisions on this issue demonstrated a growing concern for fairness to workers who had spent many years in different positions within an organization.

The case law was clear that the onus was on the employer to establish incompetence. In *O'Keefe v. HF Hayhurst Co.* the court cited from Harris' treatise and from the 1913 case of *Carveth v. Railway Asbestos Packing* that "more than mere dissatisfaction" need be established.<sup>103</sup> The court in *O'Keefe* specified that competence could only be measured based on an objective performance standard. If the employer could not provide evidence of such a standard, or at the very least, a job description, no evaluation was possible and cause could not be found.<sup>104</sup> This approach was applied in *Kelly v. Woolworth*, where a long-serving employee had difficulties delivering the desired results once promoted to general manager of a department store.<sup>105</sup> The court, quoting from an English treatise, stated that "incompetence is obviously a ground for dismissal: indeed, incompetence resulting in failure to perform the duties of the service destroys the whole reality of the contract from the point of view of the master".<sup>106</sup> The author of the treatise noted, however, that the degree of skill and competence required of the employee would vary with the nature of the position, and as regards unskilled or semi-skilled work, incompetence would be more in the nature of neglect or disobedience. He also conceded that "[t]he difficulty lies in establishing the standard and in proving that the servant has failed to attain that standard".<sup>107</sup>

In a number of cases over these decades the courts also attempted to introduce a warning or other procedural requirement before an employee could be dismissed for incompetence. In *Ditchfield v. Gibson*, for instance, the court held that where an employee was found to be inefficient, his or her faults had to be drawn to the employee's attention and an opportunity afforded to correct them prior to dismissal.<sup>108</sup> In *Kelly* the court hinted at the employer's responsibility for not addressing the worker's shortcoming once promoted, given that his lifelong career with the organization had

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<sup>103</sup> *O'Keefe v. H.F. Hayhurst Co.*, [1979] O.J. No. 290 (Co. Ct.).

<sup>104</sup> *Ibid.*

<sup>105</sup> *Kelly v. FW Woolworth Co. (cob Woolco Stores)*, [1979] OJ No 1275 (SC HCJ) [*Kelly*].

<sup>106</sup> *Ibid* at para 29.

<sup>107</sup> Francis Raleigh Batt, *The Law of Master and Servant*, 5<sup>th</sup> Edition (London: Sir Isaac Pitman and Sons Ltd.), 1967 at p.91. Note that Batt offers little in the way of case law in his commentary on incompetence as cause.

<sup>108</sup> *Ditchfield*, *supra* note 88 at para 37. See also Harris, *supra* note 93.

otherwise been unblemished.<sup>109</sup> The court cited a 1972 Manitoba Queen’s Bench case where the court stated that “[i]ncompetence, of course, is a cause for dismissal, but hardly without notice, unless the incompetence be gross to the point where it merges with other factors of greater severity, which I do not find here”.<sup>110</sup> The court awarded the worker twelve months’ notice, even while finding that there were grounds for cause.<sup>111</sup> In a third instance, in *Reilly v. Steelcase Canada* Keith J. suggested that the maxim of *audi alteram partem* might apply to dismissals, obligating the employer to provide some form of procedural fairness mechanism to allow a worker to present their case before they could be terminated.<sup>112</sup>

The general category of “misconduct” also continued to be good grounds for dismissal over this period, which could include behaviour outside of work.<sup>113</sup> The English cases of *Clouston v. Corry* and *Pearce v. Foster* continued to be the leading authorities on this issue, such that any conduct which was prejudicial to the interests or reputation of the employer was considered a violation of the duty of good faith and justified dismissal.<sup>114</sup> The courts over this period, however, generally required proof of some specific impact on the employer’s interests, or a demonstration of actual prejudice, in order to support a finding of cause dismissal.<sup>115</sup>

As this discussion demonstrates, in the 1960s and 1970s the courts were more willing to substantively analyze the behaviour asserted as cause by employers before upholding summary dismissal than they had been in previous eras. Within the wrongful dismissal framework

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<sup>109</sup> *Kelly*, *supra* note 105 at para 27.

<sup>110</sup> *Ibid*, citing *Erlund v. Quality Communication Products Limited* (1972), 29 D.L.R. (3d) 476 at para 21.

<sup>111</sup> *Ibid* at para 35.

<sup>112</sup> *Reilly v. Steelcase Canada Ltd.* (1979), 26 O.R. (2d) 725 (HCJ) [*Reilly*] at para 51-55. The court did not decide on this basis however.

<sup>113</sup> In one instance an employer alleged that the worker had worked for a competitor during the term of his employment. *Dignan v. Viceroy Construction*, [1979] O.J. No. 188 (SC HCJ) [*Dignan*]. In another case, misconduct was asserted where a worker was alleged to have improperly disclosed confidential information. *Rudnicki v. Central Mortgage and Housing Corp.*, [1976] O.J. No 751 (SC HCJ). It is not clear why these were not just framed as violations of the duties of loyalty and confidentiality.

<sup>114</sup> *Clouston v. Corry*, [1906] A.C. 122 [*Clouston*]; *Pearce v. Foster* (1886) L.R. 17 Q.B.D. 536 (Eng. CA) [*Pearce*].

<sup>115</sup> *Duplate supra* note 98 at para 33; *Reilly supra* note 112 at para 83. But cf *Groner v. Lake Ontario Portland Cement*, [1960] O.J. No. 161 (SC CA), *rev’d by Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553 [*Groner*], where the Supreme Court found dismissal for cause even if the misconduct did not directly affect the employer on the grounds that the act in question revealed the worker’s dishonest character.

constructed over these decades, the analysis of cause for dismissal was the main jurisprudential location for engaging with the effects of job loss for long-term employees.

(b) Internal Job Mobility and Changing Employment Terms as Contract Variation

The contractual significance of changing employment terms became more prominent during the 1960s and 1970s. Constructive dismissal and unilateral variations to job terms through demotions, for instance, was found in five reported cases in the 1960s and 1970s.<sup>116</sup> The question of variation was tied to cause, because a change in working conditions by the employer could be viewed either as a reasonable order that required obedience, or as a material change to the terms of the contract requiring new consensus between the parties. More broadly, the issue brought into focus the uneasy relationship between the managerial prerogative and a contractual understanding of long-term employment relationships.

In *Hill v. Peter Gorman* the Court of Appeal in 1957 had held that an employer could not unilaterally amend the terms of an employment contract.<sup>117</sup> The employer instead had to provide notice of a desire to vary the terms of the agreement; the employee could either expressly or impliedly accept, in which case a new contract would be formed on the new terms. If the employee refused, the employer could discharge the worker with proper notice. However, if the employer simply imposed the new terms, the worker could treat that as a breach of contract by the employer, consider him or herself dismissed, and sue for wrongful dismissal.<sup>118</sup> Where employees remained on the job after new terms were introduced, they were usually treated as having accepted the variation, unless they explicitly and repeatedly objected.<sup>119</sup>

This simple contractual analysis belied what was actually a very difficult and conflicted legal question. With the internal labour market structures set in place in the 1940s and 1950s workers increasingly progressed up the ranks within a single employer's organization over the course of their careers, such that the nature of their responsibilities and their compensation changed over time. As corporate size and complexity grew, workers could be redeployed laterally, demoted,

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<sup>116</sup> *Johnston v. Northwood Pulp Ltd. et al*, [1968] 2 O.R. 521-526 (HCJ) [*Johnstone*]; *Gardner v. Rockwell International of Canada Ltd.* [1975], 9 O.R. (2d) 105 (HCJ) [*Gardner*], *Rooney v. Reed* (1978), 20 O.R. (2d) 665 (HCJ) [*Rooney*]; *Annett v. Electrohome*, [1979] O.J. No. 57 (SC HCJ) [*Electrohome*].

<sup>117</sup> *Hill v. Peter Gorman* (1957), 9 D.L.R. (2d) 124 (SCCA).

<sup>118</sup> *Gardner supra* note 116 at para 5.

<sup>119</sup> *Martin v. Woodstock (City)*, [1979] 2 ASWS 18 (SC HCJ) [*Martin*] at para 23-24.



promoted, and transferred to different offices and positions in Canada or abroad. The courts therefore had to determine how to analyze such changes in contractual terms - how to square notions of the managerial prerogative with the contractual requirements of consensus *ad idem*? The courts did so by attempting to delineate the types of job restructuring decisions which were within the ambit of the managerial prerogative, and had to be obeyed, and those managerial decisions which fundamentally altered the terms of the bargain, which required consensus. Interestingly in such claims workers sought the strict application of the contractual principles of consensus *ad idem* to argue for protection of their workplace interests.

The courts addressed the question of contractual variation by drawing a line between demotions and transfers. Transfers were generally considered orders and valid exercises of the managerial prerogative, at least if without significant change to job responsibilities, salary or location.<sup>120</sup> The Supreme Court in *Filion v. City of Montreal* considered the dismissal of a worker who refused a transfer to another division within the same department. The Court held that the employer was entitled to transfer the worker as needed, because “[t]o hold otherwise would be to impose a rigidity upon the administration of the Department which would be unjustifiable and unworkable”.<sup>121</sup> This was echoed in Ontario in *Canadian Bechtel v. Mollonkopf*, where the Court of Appeal held that “[t]he plaintiff had no vested right in the particular job initially given to him. If the employer, although mistaken, acted in good faith and in the protection of its own business interests, the plaintiff would have had no right to refuse the transfer”.<sup>122</sup>

Explicit and implicit demotions, however, were treated as fundamental alterations of the contract which the employee could treat as a dismissal.<sup>123</sup> Demotions need not be express, but instead could flow from organizational changes which adversely affected a worker’s status, even if there was no change to salary or job functions. The Supreme Court of British Columbia in *Burton v. MacMillan Bloedel Ltd* held that a corporate restructuring which placed a department head under the direct supervision of a Vice President effectively amounted to a demotion, rather than an instance of

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<sup>120</sup> *Filion v. Montreal (City)*, [1970] SCR 211 [*Filion*]; *Birnbaum & Hyman v. Lamda Mercantile Corporation*, [1977] 1 ACWS 394 [*Birnbaum*].

<sup>121</sup> *Filion* *ibid.*

<sup>122</sup> *Canadian Bechtel*, *supra* note 88 at para 12.

<sup>123</sup> *Gardner* *supra* note 116.

wilful worker disobedience as was asserted by the employer.<sup>124</sup> Although the worker would not have suffered a loss of income by the restructuring, he would have become effectively subordinate to another executive with whom he had had significant disagreements in the past. The court relied on *O'Grady v. Insurance Corporation of British Columbia*, stating that a substantial loss of prestige, embarrassment and humiliation would have attended this alteration of employment terms, and that the changes to the nature of his role amounted to a fundamental breach of contract.<sup>125</sup> *Burton* was applied in Ontario to a corporate director who was given diminished responsibilities such as to constitute a demotion which he could justifiably treat as a dismissal.<sup>126</sup> The recognition of demotion as constructive dismissal represented a degree of judicial acknowledgment of the significance of social relationships within the workplace, providing workers with a modicum of control over their workplace futures by permitting them the ability to refuse to endure its social stigma and sue for wrongful dismissal. The courts did not, however, elaborate a general rule concerning the scope of the managerial prerogative, nor did they explain the legal basis for its existence over this period.

(c) The Legalization of Reasonable Notice: Re-employability and Fairness

Just as the courts struggled with using a transactional contractual frame to regulate long term, changing employment relationships, indefinite duration employment relationships also created conceptual difficulties for determining the damages that arose from wrongful dismissal. While the older presumption of annual or fixed term employment was abandoned at the turn of the 19<sup>th</sup> century, only in the 1930s did the courts begin to equate the absence of specified duration with indefinite duration employment, for which reasonable notice of dismissal was necessary, absent cause.<sup>127</sup> But prior to the 1960s the length of reasonable notice was considered a question of fact. It is difficult to conclude, therefore, that prior to the 1960s the courts viewed reasonable notice as a form of protection for workers, or as anything other than a contractual assessment of damages. There was no obvious sense in the case law that there was a policy issue at stake in determining its length.

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<sup>124</sup> *Burton v. MacMillan Bloedel Ltd.*, [1976] 4 W.W.R. 267 (BC SC) [*Burton*] at para 6-8.

<sup>125</sup> *Ibid* at para 7 citing *O'Grady v. Insurance Corporation of British Columbia* [1975] BCJ 880 (October 10, 1975) [*O'Grady*]. In this instance the court offered some recognition to the personal nature of the employment relationship, and to the humiliation that could follow changes in employment terms. They did not do so in the in their conceptualization of damages for dismissal however.

<sup>126</sup> *Electrohome*, *supra* note 116.

<sup>127</sup> See chapter 3 *supra* note

This began to change in the 1960s. In the 1960s and 1970s most employment relationships were described by the parties as of indefinite duration, and the analysis now focused on how to determine the length of reasonable notice.<sup>128</sup> Outside of fixed duration contracts, in only *Lazarowicz v. Orenda Engines Ltd*, the first wrongful dismissal of the 1960s, did an employer argue that the worker was not under an indefinite duration contract.<sup>129</sup> After finding against the employer on the question of contract length and concluding that Lazarowicz was hired on an indefinite duration contract, the court also examined how to determine the length of reasonable notice. To do so the judges canvassed the periods of notice awarded in previous cases, comparing the character of their jobs to that of the plaintiff in this case. The court noted that the plaintiff in *Mitchell v. Sky* was a vulcanizer, and received two months' notice.<sup>130</sup> The plaintiff in *Abbott v. Guest* was an engineer like the plaintiff here, and received four months.<sup>131</sup> The court concluded that Lazarowicz should receive more than the vulcanizer, but less than the engineer in *Abbott* because he lacked *Abbott's* managerial responsibilities. The court therefore awarded him three months notice, based on a comparison with workers of lower and higher status. This decision was approved on appeal to the Court of Appeal, but the court also specified that to determine the length of reasonable notice,

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<sup>128</sup> For instance, *Reid v. International Union of Mine, Mill and Smelter Workers, Local 598* [1960] O.J. No. 39; *Bardal v. Globe & Mail Ltd.*, [1960] O.J. No. 149, 24 D.L.R. (2d) 140; *Tracey supra* note 88; *Johnston, supra* note 116; *Bigelow, supra* note 88; *Arseneault, supra* note 88; *Markey, supra* note 88; *Gardner supra* note 116; *Duplate, supra* note 98; *Hublely v. Harrison, Bradford and Associates Ltd.*, [1978] O.J. No. 768; *Rooney, supra* note 116; *Henley, supra* note 88; *Martin, supra* note 119; *Reilly, supra* note 112; *Kelly, supra* note 105; *Dignan, supra* note 113.

<sup>129</sup> *Lazarowicz, supra* note 88. The case concerned the dismissal of an engineer due to plant closure. The High Court of Justice began its inquiry by examining whether the worker was hired on a weekly basis, or whether he was in a relationship of indefinite duration. The employer argued that he was 'an ordinary weekly worker' and therefore entitled only to a week's worth of notice of dismissal, rather than reasonable notice. The employer presented evidence of the weekly payment of his salary, and the fact that he punched a time clock and worked a fixed schedule. The reference to 'ordinary workers' in this case is intriguing. The employer appears to view a distinction between indefinite duration employees and ordinary workers hired by the week. There is no similar discussion in other case law over these decades, although the arguments hint at the idea that indefinite duration employment was reserved for higher status workers. The court, however, concluded that determination of the length of employment was based on the intentions of the parties. Demonstrating that long term stable employment was now understood as the norm in professional employment, the court noted that a skilled engineer such as the plaintiff was not likely to have left stable employment to have taken such an insecure position with the defendant. The court held that the timing of his wage payments was not determinative to the nature of his employment contract, but rather that he was employed on an indefinite duration contract, and was therefore entitled to reasonable notice. The court cited *Carter v. Bell* for the principle that reasonable notice is an implied term of all indefinite term contracts, and that what constitutes reasonable notice is a matter of fact.

<sup>130</sup> *Mitchell v. Sky*, [1939] 4 D.L.R. 712 [*Mitchell*].

<sup>131</sup> *Abbott v. G.M. Gest Ltd.*, [1944] O.W.N. 524; affd [1944] O.W.N. 729 [*Abbott*].

courts should examine what the parties would both have viewed as reasonable if they had turned their minds to the question at the time of contract.<sup>132</sup>

While the Court of Appeal's in *Lazarowicz* took a "contractual intent" approach to determining reasonable notice, the trial court was focused explicitly on social status, suggesting that the more 'important' the job, the higher the notice award due.<sup>133</sup> This approach was consistent with the analysis of notice and damages for dismissal in the early days of common law employment claims. In 19<sup>th</sup> century English cases lower status workers were often dismissible on notice of a length fixed by custom, such as one month for domestic servants, and three months for clerks.<sup>134</sup> Upper status workers were presumed to work on annual duration contracts unless otherwise specified, entitled to contractual damages for loss of employment over the year-term, subject to mitigation. The courts were explicit about the class-based nature of the differential entitlement to notice and damages, with custom in different types of work hierarchically ranked, with one month notice for domestic servants acting as the lowest benchmark.<sup>135</sup> Fixing notice lengths and yearly-hire damages on the basis of status levels in the context of 19<sup>th</sup> century labour markets was premised on the idea that skilled jobs were fewer in number and harder to find than unskilled and semi-skilled work. A focus on the extent of workers' training and skill might serve as a marker for both their social standing and chances of re-employment. In Ontario the length of reasonable notice was an issue of fact until the 1960s, rendering the bases on which it was awarded invisible on the face of decisions of the era. But in Alberta the idea that notice was to be at least partly determined by reference to the worker's social class was clear in the early 20<sup>th</sup> century. In 1908 the Alberta Court of Appeal held in *Speakman v. City of Calgary* that reasonable notice would depend on the position in which a worker was engaged, their class standing in the community, having regard to their profession and

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<sup>132</sup> In the 1980s and 1990s the Court of Appeal's decision in *Lazarowicz* was resuscitated to move towards an analysis of notice lengths based on presumed intent of the parties at the time of contract. Geoffrey England suggests that this was based on a desire to rein in the length of notice awards. See *Bartlam v. Saskatchewan Crop Insurance Corp.*, [1993] 8 WWR 671 and Geoffrey England, *Individual Employment Law in Canada*, 2000, 242-23 for a greater discussion on the issue.

<sup>133</sup> *Lazarowicz*, *supra* note 88.

<sup>134</sup> See chapter 1 *supra* note 207 and surrounding discussion.

<sup>135</sup> In *Beeston v. Collyer* (1827), 172 E.R. 276 [*Beeston*], for instance, the court rejected the argument of an industry custom of one month for dismissal of a clerk, on the basis that "[a] man in this class is not likely to be able to get a situation so soon as a butler or a footman can". The court stated on appeal that "it would be, indeed, extraordinary, if a party, in his station of life, could be turned off at a month's notice, like a cook or scullion"

the probable difficulty they could encounter in finding comparable employment.<sup>136</sup> This case was not cited in the reported decisions of Ontario until the 1970s, but it did suggest an approach to the determination of notice that continued to view class-standing as related to the employability of the worker.

Just after *Lazarowicz* in 1960 the Ontario High Court of Justice articulated what remains the leading statement of law on the determination of reasonable notice in *Bardal v. Globe and Mail Ltd.*<sup>137</sup>

There the court considered what length of notice was appropriate for an advertising circulation manager with 16.5 years of service. The court rejected the rule stated in the Canadian Encyclopedic Digest, based on the 1938 decision in *Norman v. National Life Insurance*, that six months' wages was the maximum recoverable damages in indefinite hire contracts.<sup>138</sup> Instead the court held that there was no fixed rule of law on the length of reasonable notice. In a much-cited passage, Chief Justice McRuer stated that "[t]here can be no catalogue laid down as to what is reasonable notice in particular classes of cases".<sup>139</sup> The courts, he stated, must examine the facts of each specific case, taking into consideration:

[T]he character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.<sup>140</sup>

In applying these factors to the case before him, Justice McRuer noted that Bardal had a lifetime of training in the management of newspaper advertising, of which there were few comparable jobs available in Canada. On that basis, he awarded Bardal one year's reasonable notice.

Justice McRuer did not cite specific authority for his formulation of the reasonable notice factors, nor did he provide an explicit rationale for its purpose. Based on his subsequent statement in the labour case of *R. v. Canadian Pacific Railway* decided a year later, he nonetheless clearly understood the very serious effects of the loss of employment for workers in standard employment relationships. In deciding that workers did not lose their employment at common law while on lawful strike Justice McRuer stated that:

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<sup>136</sup> *Speakman v. City of Calgary* (1908), 1 Alta L.R. 454 (CA) [*Speakman*].

<sup>137</sup> *Bardal v. Globe and Mail Ltd.* (1960), 24 DLR (2d) 140 (SC HCJ) [*Bardal*].

<sup>138</sup> *Norman v. National Life Assurance Company of Canada*, [1938] O.W.N. 509 [*Norman*].

<sup>139</sup> *Bardal*, *supra* note 137 at para 21

<sup>140</sup> *Ibid* at para 10.

If I were to come to any other conclusion [...] an employer will be at liberty to lay down terms that employees could not be expected to accept with the consequence that if they went on strike they would lose all their pension rights, their insurance rights and seniority rights. To so interpret the law would destroy the apparent security built up by old and experienced employees and leave it subject to the will of the employer.<sup>141</sup>

Still, recognition of the vested rights of long-term workers and of their difficulties in finding re-employment was not made explicit in *Bardal*. While it is now often said that reasonable notice is designed as a cushion to ease the financial blow of unemployment<sup>142</sup>, the courts in Ontario made no mention of ‘cushioning’ in the 1960s and 1970s, nor did they provide any other explicit statement of reasonable notice’s purpose.

Courts in other provinces were also faced with questions concerning the purpose of reasonable notice, and how to determine its length. The Alberta Supreme Court addressed the question in the 1966 decision of *Chadburn v. Sinclair Canada Oil Company*, canvassing jurisprudence and treatises on the issue.<sup>143</sup> The court quoted from an 1876 Scottish decision in *Morrison v. Abernathy School Board*, where Lord Deas explained the purpose of notice as such:

The object in both classes of cases is the same,—to give the servant a fair opportunity of looking out for and obtaining another situation, instead of being thrown suddenly and unexpectedly upon the world, with, it may be a wife and family to support, and no means, either from savings or otherwise, of supporting either himself or them.

It is even more necessary that this rule should be applicable to the higher class of servants, such as managers and other officers of banks, insurance offices, railway companies, and many other companies and employers, than to those in an inferior position, because it is much more expedient and much more common that such persons should hold their appointments during pleasure than that servants of an inferior class should do so; and there is a more clear implication in the one case than in the other that a considerable period of employment is reasonably to be expected, although not actually stipulated for.<sup>144</sup>

The court in *Chadburn* also referred to the English decision of *Sowdon v. Mills*, which had been cited in early 20<sup>th</sup> century Ontario, and treatises in the field for the proposition that wrongful dismissal damages were based on the probable amount of time needed before new employment could be

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<sup>141</sup> *R. v. Canadian Pacific Railway*, [1961] O.J. No. 334 [CPR] at para. 31.

<sup>142</sup> For instance, Geoffrey England, “Recent Developments in Wrongful Dismissal Laws and Some Pointers for Reform” (1978) 16 Alta. L. Rev. 470 at 480.

<sup>143</sup> *Chadburn v. Sinclair Canada Oil Company* (1966), 57 W.W.R. 477 (Alta SC) [*Chadburn*]

<sup>144</sup> *Morrison v. Abernathy School Board* (1875-76), 3 S.C. (4th) 945 at p. 950, cited by *Chadburn*, *ibid*, at para 31.

secured.<sup>145</sup> The author Diamond concluded that the primary objective of reasonable notice was “to enable the servant to obtain similar employment elsewhere, or the master to obtain a servant”.<sup>146</sup> The court in *Chadburn* also referred to the factors laid down in *Speakman* in 1908, and to the decision in *Bardal*. But, the court held, “what is reasonable is in part founded on social and economic conditions of the time for the reason that these conditions would govern the opportunity of the employee in obtaining similar employment”.<sup>147</sup> The court cited the Manitoba decision of *Duncan v. Cockshutt Farm Equipment* to hold that current economic factors should be used to give effect to changing economic conditions in calculating the necessary time for workers to find new employment.<sup>148</sup>

Unlike the decision in *Chadburn*, the court in *Bardal* appeared to apply an analysis of the labour market prospects of higher versus lower status workers that dated from the 19<sup>th</sup> century. In the 19<sup>th</sup> and early 20<sup>th</sup> century differential compensation was based on the dual notion that higher income workers were socially superior, and therefore entitled to greater warning of dismissal, and that they faced a more limited job market. A similar analysis underlined the *Bardal* metrics, which appeared to focus on recognition of long-term service, and on using proxy measures for potential re-employability, based on the factors of age, experience, training and qualifications. The *Bardal* standard was not immediately embraced by the Ontario courts, but was applied with increased regularity by the mid-1960s, and implicitly endorsed by the Supreme Court in *DH Howden v. Sparling* in 1970.<sup>149</sup> By the 1970s, *Bardal* was cited in almost every wrongful dismissal case in Ontario where no cause was established.

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<sup>145</sup> *Sowdon (Soudon) v. Mills* (1861) 3 LT 754 at p. 119, cited by *Chadburn ibid* at para 35.

<sup>146</sup> A.S. Diamond, *Law of Master and Servant, 2nd ed.*, (London: Stevens, 1946) at p. 179, cited in *Chadburn ibid* at para 37

<sup>147</sup> *Chadburn ibid* para 41.

<sup>148</sup> *Duncan v. Cockshutt Farm Equipment Ltd.* (1956) 19 WWR 554 (Man.) at p. 557, cited in *Chadburn ibid* at para 42.

<sup>149</sup> The *Bardal* factors, *supra* note 128 were applied by the High Court of Justice in *Tracey v. Swansea*, [1964] O.J. No. 307, SC HCJ, and then in *Johnston supra* note 116. *Johnston* and *Bardal* were cited by approval by the Supreme Court in *Sparling v. DH Howden and Co.*, [1970] SCR 883, but not explicitly on the manner of determining notice. See Randall Echlin, “From Master and Servant to *Bardal* and Beyond: 200 years of Employment Law in Ontario 1807-2007” (2007) 26 Adv. Soc. J. 11 a p. 17-18 for further analysis on this issue.

The courts in the 1960s and 1970s appeared especially concerned to protect the interests of older, long-term managerial employees.<sup>150</sup> The decisions often focused on the degree to which a worker had invested in their employer, helping to build the organization's success, only to be let go after many years of service. Such concerns were an implicit recognition of the nature of the SER, and the delayed investments and entitlements workers accumulated over their years of employment. In the 1974 British Columbia case of *Carey v. F. Drexel*, the court noted that:

An employee who has devoted a large part of his working life to a particular employer, working up through the ranks, developing expertise and knowledge in the affairs of his employer and enjoying the rewards of his efforts is placed in extremely difficult circumstances when he is suddenly released into the labour market. The level he has achieved and the specialized knowledge he has attained may make it extremely difficult for him to obtain other suitable employment.<sup>151</sup>

This statement again reflects an understanding that workers acquired firm-specific knowledge that could not be traded on the open labour market. The courts also appeared to view higher income professional work as operating within smaller and more competitive labour markets than those resorted to by lower income workers. For this reason they suggested that higher status workers faced greater difficulty in finding new employment. This view was apparently shared by the courts in Ontario. In *Johnston v. Northwood Pulp* the Ontario court noted that an interim general manager who spent his entire working life in the lumber industry was entitled to 12 months' notice, as positions similar to that from which he was dismissed were extremely scarce, particularly at the level of responsibility he held.<sup>152</sup> The court went on to state that:

He had been engaged for an indefinite period. In view of the success which he had with Eagle and the esteem in which he was held by the officers of that company, he could reasonably look forward to many years of profitable employment. This was terminated on

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<sup>150</sup> An empirical analysis of reported cases in Canada between 1960 and 1982 found that length of service was the most statistically significant variable in determining length of notice, although it is unclear to what extent that analysis applied to Ontario because the decisions of lower courts were less reported there than in other provinces. See Steven McShane, "Reasonable Notice Criteria in Common Law Wrongful Dismissal Cases" (1983) 38(3) *Relations industrielles/Industrial Relations* 618. This dual purpose for reasonable notice is particular to the common law. Employment standards legislation of the era required that minimum notice provisions be provided to all workers who worked for more than three months. They did so as a straight expression of recognition for service, with a set number of weeks per year of service. See *Employment Standards Act*, S.O. 1968, c.35 [ESA].

<sup>151</sup> *Carey v. F. Drexel Co. Ltd.*, [1974] 4 WWR 492 (BC SC) [*Drexel*] at para 12.

<sup>152</sup> *Johnston*, *supra* note 116.



April 22, 1966, at which time he was approximately 57 years of age. This alone would render it difficult for him to secure a position in any way comparable to that which he had held.<sup>153</sup>

Similarly in *Cowan v. Sidsamhar Investments Ltd.*, a bar manager and head waitress were awarded 6 months' notice after being falsely accused of theft, on the basis that managerial positions were difficult to come by.<sup>154</sup> In *Thiessen v. Leduc*, an influential decision of the Alberta Supreme Court, Justice McDonald held that a municipal chief police constable of three years was entitled to 10 months reasonable notice. This was a lower amount than had been awarded to other managerial employees in cases from the 1960s and 1970s around the country, but the court noted that in those cases the workers all occupied senior managerial positions and had been in the employ of their employers for long periods of time, which justified an increased notice period.<sup>155</sup>

By the end of the 1970s, therefore, *Bardal* was the primary judicial statement on the determination of reasonable notice. While, in Ontario at least, this meant that the courts did not include labour market evidence and factors relevant to the current state of the economy, the *Bardal* factors did permit for some judicial recognition of long-term service, and it became standard to lengthen the notice award for long-serving managerial employees<sup>156</sup>. According to Geoffrey England, this amounted to bringing fairness in the back door.<sup>157</sup> The length of reasonable notice terms ordered lengthened through these decades. Whereas the average length of notice between 1930 and 1959 was 3.9 months in the reported decisions of that era, in the 1960s it rose to 6.9 months in the 1960s, with a median of 6 months. By the 1970s, the average notice period rose to 8.3 months. The 12 months awarded in *Bardal* seemed to operate as a benchmark for the notice periods of senior managerial employees, and the factors enunciated in that case allowed the courts a measure of flexibility in the way they determined what was appropriate in the circumstances.

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<sup>153</sup> *Johnston*, *supra* note 116

<sup>154</sup> *Cowan*, *supra* note 89 at para. 5.

<sup>155</sup> *Thiessen v. Leduc*, [1975] 4 W.W.R. 387 (Alta SC) [*Thiessen*] at para 46

<sup>156</sup> Annette Nierobisz's study of the effects of recession on dismissal lengths in the 1970s suggests that length of service and the fact of being a managerial employee had a statistically significant impact on the length of notice awarded. See Annette Marie Nierobisz, "In the Shadow of the Economy: Judicial Decisions on Wrongful Dismissal in Eras of Economic Uncertainty", Unpublished dissertation, University of Toronto, 2001 at p.108.

<sup>157</sup> England, Recent Developments, *supra* note 142 at p.479

(d) The Changing Nature of the Breach and the Unchanging Nature of the Loss in Wrongful Dismissal Claims.

As a substantive approach to reasonable notice was elaborated in the 1960s and 1970s, a subtle but significant shift in the explanation of the contractual breach for wrongful dismissal occurred. The initial construction of the wrongful dismissal claim in the mid-19<sup>th</sup> century was based on a promise to retain and the promise to remain in employment, or Freedland's second tier of promises, but those promises lasted only over the annual hire-fixed term contract duration.<sup>158</sup> The breach, in the mid-19<sup>th</sup> century, was of the promise to retain, and it was this loss that was compensable. The breach continued to be stated as "not allowing the plaintiff to discharge his duties" after the abandonment of the annual hire rule, and the failure to retain remained central to the depiction of the breach in wrongful dismissal claims into the 1940s.<sup>159</sup> As discussed in the previous chapter, Justice Rand, dissenting on other grounds, explained in the 1947 case of *Cemco Chemical Engineering v. Snellenberg* that "[i]t is the loss of earnings resulting from a denial of a right to use or commit his working capacity profitably that is the substance of his claim [...]."<sup>160</sup>

But as indefinite duration employment became increasingly linked to reasonable notice dismissal, and as employment relationships lengthened in time and grew in socio-economic value, the obligation to retain slowly began to fall out of view. By the 1960s the breach in a wrongful dismissal

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<sup>158</sup> *Emmens v. Elderton* (1853), 13 CB 495 (HL) [*Emmens*]. See *supra* chapter 1, p. 10 for Freedland's explanation of the two tiers of employment contracts.

<sup>159</sup> *Addis v. Gramophone Company Limited*, [1909] A.C. 488 [*Addis*]. Mark Freedland argues that *Addis* served to cement the relationship between the employer's unrestricted notice power, that the wrong of dismissal was only failure to provide notice, and that damages were limited to the remunerative losses suffered over that notice period. My reading of the case suggests this is not entirely correct. Although the law lords in *Addis* specify that remuneration over the notice period is the measure of damages for dismissal, the idea that the wrong is limited to a lack of reasonable notice is interspersed with other descriptions of the wrong flowing from the worker's inability to continue to discharge his duties. Lord Atkinson's statement comes closest to suggesting that the wrong is the failure to provide notice, although it is to be remembered that there was a contractual notice period provided for in this case, such that the analysis concerned the interpretation of the express terms of the agreement. Lord Loreburn, by contrast, states that "there was a breach of contract in not allowing the plaintiff to discharge his duties as manager". Whether this is a general statement, or one also related to the worker's ability to work out the notice period is unclear. Mark Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2006) at p.359.

<sup>160</sup> *Cemco Electrical Manufacturing Co. v. Van Snellenberg* [1947] S.C.R. 121. This statement was quoted with approval in *Canadian Ice Machine Co. v. Sinclair*, [1955] S.C.R. 777, in relation to Justice Rand's description of mitigation and damages for wrongful dismissal, and by the Supreme Court in *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324.

claim was increasingly presented as the failure to provide reasonable notice. In *Bardal* the Court of Appeal stated that:

The contractual obligation is to give reasonable notice *and to continue the servant in his employment*. If the servant is dismissed without reasonable notice he is entitled to the damages that flow from the failure to observe this contractual obligation which damages the servant is bound in law to mitigate to the best of his ability. (my italics)<sup>161</sup>

The court went on to say that the damages to be assessed were those which flowed from “the failure of the defendant to give a year's notice”, without mentioning any breach from the obligation to maintain in employment.<sup>162</sup> The failure to give reasonable notice increasingly displaced the promise to retain as the basis for the breach in a wrongful dismissal claim. However, the same failure also served to narrow the understanding of loss from wrongful dismissal, just as the courts were confronted with increasing worker demands for recognition of the social and economic losses stemming from dismissal from long-service employment. Once the breach was solely from failure to provide reasonable notice of dismissal, the broad and multifaceted social, psychological and economic effects of dismissal were almost wholly obscured in law. Dismissal itself was no longer a legal wrong, and the loss of employment arose only from a failure to provide reasonable notice.

Workers in the 1960s and 1970s also began to claim compensation beyond contractual benefits over the reasonable notice period.<sup>163</sup> This in part reflected the increasing complexity of compensation methods in the era of the SER, particularly for managerial employees. Compensation packages now routinely included such items as fringe benefits (medical, dental, life insurance),

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<sup>161</sup> *Bardal*, *supra* note 128 at para 14.

<sup>162</sup> *Ibid* at para 21.

<sup>163</sup> The courts were selective in *what* they considered a loss arising from the breach however. Compensation was available for salary over the notice period, as well as benefits the worker was explicitly entitled to by contract, and pension entitlements. These usually included any potential increase over the notice term that the worker was contractually entitled to through workplace policies, pension and insurance schemes. See *Rooney*, *supra* note 116. It also included tips, where they constituted a significant part of the worker's remuneration so as to be considered part of the contract. *Cowan*, *supra* note 89. Workers paid on commission or through shares could recover the potential revenue from either over the notice period. Commission income was determined based on estimations of likely future earnings over the notice period, while share income was usually averaged based on the income it produced in previous years. *Sublett v. Facit-Addo Canada Ltd.* (1977), 16 OR (2d) 791 (HCJ) [*Sublett*] at para 15; *Lawson v. Dominion Securities Corp.*, [1975] (SC HCJ) [*Lawson*] at para 23. On the other hand, any form of compensation that was previously received but which the employer was not contractually obligated to provide was ordinarily considered a gift and not recoverable. Bonus payments that were at the discretion of the employer were found not to be recoverable in *Tracey*, *supra* note 88 at para 98. Similarly, any forms of corporate profit sharing or directors' fees that were allotted at the sole discretion of the employer were not viewed as held as of right and therefore were not recoverable. *Bardal*, *supra* note 128 at para 28-29.

pension plans, business expenses, share options, etc. But it also reflected the increased economic, social and psychological loss that workers felt as a result of dismissal. Claims for reputational harm and mental distress as a result of dismissal poured in over the 1970s, and were resoundingly rejected by the courts in Ontario. To justify this rejection the courts resuscitated the 1909 House of Lords decision in *Addis v. Gramophone*, which had not been directly applied in Ontario in wrongful dismissal claims prior to the 1960s.<sup>164</sup> One of the issues before the law lords in *Addis* was whether damages could be awarded for the “abrupt and oppressive” manner in which the worker had been dismissed, and for any losses he sustained by the reputational harm he then faced. Four of the five judges vehemently concluded that these sorts of damages were not available in a claim for contract breach. Lord Gorrell in *Addis* stated that he was “unable to find either authority or principle for the contention that he is entitled to have damages for the manner in which his discharge took place”.<sup>165</sup> The law lords suggested that compensation for reputational harm or for mental distress was punitive in nature and thus properly the subject of tort claims, not contract actions, because, as Lord Atkinson explained, “damages for breach of contract were in the nature of compensation, not punishment”. He went on to state that:

In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages, or what is sometimes styled vindictive damages; but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action.<sup>166</sup>

It was not entirely clear from *Addis* whether what was barred was compensation for losses that arose from the manner of dismissal, or from the fact of dismissal. Lord Loreburn suggested that both were precluded, stating that “[i]f there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it

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<sup>164</sup> *Addis supra* note 159. See *infra* fn 176 for discussion of the two cases in which *Addis* and reputational harm arose prior to the 1960s in employment cases in Ontario. The ‘limited damages rule’ in *Addis* is routinely cited as a foundational principle of employment contract law in common law countries. It is therefore interesting that it was not applied in any wrongful dismissal claim prior to the 1966 case of *Peso Silver Mines v. Cropper* (1965), 56 D.L.R. (2d) 117 (BC CA); aff’d by [1966] SCR 673 [*Peso Silver Mines*].

<sup>165</sup> *Addis ibid.*

<sup>166</sup> *Ibid* The law lords were not expressly clear on the reasons between the distinction of damages in tort and contract in this decision however, but were quite clear that they viewed the distinction as existing. Cf the dissent of Lord Collins.

more difficult for him to obtain fresh employment”.<sup>167</sup> As Mark Freedland has argued, however, none of the other law lords spoke to the losses that arose from the fact of dismissal.<sup>168</sup>

As modern contract law was forged over the first half of the 19<sup>th</sup> century, with its theoretical reliance on individual freedom and privately negotiated terms, liability for breach of contract was said to lie only for those breaches that arose from the terms of the contract agreed to by the parties.<sup>169</sup> This was distinguished from torts law as it developed in the early 20<sup>th</sup> century, where a duty was imposed at law to use care towards one’s neighbour. Based in law rather than in private agreement, torts law could award compensation for both violation of that duty of care, and punitive damages lay as a statement of opprobrium for egregiously wrongful conduct at law.<sup>170</sup> But in the contractual context, where the rights and obligations were deemed to arise only from agreement between the parties, punitive damages were thought to amount to the imposition of a fine for “unworthy conduct”. Such a fine was then remitted to the plaintiff rather than the state, effectively over-compensating the plaintiff.<sup>171</sup> Accompanying this theoretical difference between tort and contract liability was the idea that there was no moral wrong involved in the breach of contract – that contracts were impersonal transactional commercial relationships, and so long as the breach was financially compensated, no residual harm required redress.

Freedland suggests that the House of Lord’s vehemence in *Addis* was motivated, at a narrow level, by a desire to limit the ability of juries to impose large discretionary jury awards for dismissal, as had been suggested by the House of Lords in *Clouston v. Corry*, decided a few years prior.<sup>172</sup> At a broader level, Freedland argues that the decision was based on a move to entrench a transactional, commercial understanding of employment as opposed to a tort-based approach focused on dignity and personal obligation.<sup>173</sup> This certainly complements the trend over the turn of the 20<sup>th</sup> century to formulate obligations between the parties to employment contracts as implied contractual terms

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<sup>167</sup> Mark Freedland, *The Contract of Employment* (London: Oxford University Press, 1976) at p.248-249

<sup>168</sup> *Ibid* at p. 248-249.

<sup>169</sup> *Robinson v. Harman* (1848), 1 Exch. 850 at 855.

<sup>170</sup> John McCamus, *The Law of Contracts* (Toronto: Irwin Law Books, 2005) at 883-884

<sup>171</sup> Stephen Waddams, *The Law of Damages 2nd ed* (Toronto: Canada Law Book, 1983) at 563. This was the rationale applied by the Supreme Court’s majority decision in the later case of *Vorvis Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 [*Vorvis*].

<sup>172</sup> *Clouston*, *supra* note 114 at p. 122. Freedland, *The Personal Employment Contract supra* note 159 at p. 360.

<sup>173</sup> Freedland *ibid* at p.361.

rather than as tort-based duties.<sup>174</sup> But as the courts in Ontario turned to the question of employment damages in the 1970s, they did so in a very different context than had the House of Lords in *Addis*. The application of the limited damages rule in the 1970s occurred in response to a significant legal push towards providing some limited recognition in law of the expanded social, economic and psychological significance of employment that had been set in place during the post-war period.

Considering the issue in the 1970s for the first time in Ontario, the courts refused not only to recognize losses that arose from the manner of dismissal, but also to acknowledge that dismissal itself could cause significant harm to workers' ability to find new employment, even if this was plainly foreseeable and quantifiable. The courts over this period not only minimized the economic harm of dismissal, but by refusing to compensate for anything but loss over the reasonable notice period, they maintained the position that there was no minimal standard of treatment required of employers in the manner of effectuating dismissal. As appellant's counsel later argued in the 1989 case of *Vorvis v. Insurance Corporation of British Columbia*, this effectively meant "that the law requires a higher standard of conduct from the tortfeasor, a stranger, than it does from the parties to an established relationship under a contract".<sup>175</sup> In circumscribing the scope of damages for dismissal in the 1970s, the courts explicitly refused recognition of the relational nature of the modern long term open-ended employment contract, in both economic and social terms. In so doing, they reinforced the legal view of employment as a depersonalized commercial exchange, rather than a highly social institution.

In Ontario the issue of reputational harm and mental distress arose only twice in reported decisions prior to the 1960s.<sup>176</sup> However, there were eight instances of claims for damages for loss to reputation and for mental distress in the 1960s and 1970s, most of which arose in 1978 and 1979.

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<sup>174</sup> See chapter 2, *supra* note 84 for a discussion of this transition.

<sup>175</sup> *Vorvis*, *supra* note 171.

<sup>176</sup> *Rutherford v. Murray-Kay* (1911), 3 O.W.N. 29 [*Rutherford*]. In her statement of claim she alleged harm to her dignity, and to her business' good name and reputation, as well as loss of employment. The employer brought a motion requesting that the plaintiff clarify whether she sought damages for reputational harm and harm to dignity in addition to lost wages, citing *Addis* as enumerating the permissible heads of damages available for wrongful dismissal. The motion was granted for clarification, but no further decision was recorded on the merits of the claim. There was a slight suggestion that damage to reputation occasioned by dismissal might be compensable in

The question first received substantial treatment in *Peso Silver Mines v. Cropper* in 1966, when a worker responded to a claim by his employer for an accounting and payment with a counter-claim for wrongful dismissal.<sup>177</sup> In trial judge in the initial decision found in favour of the employee, and increased the amount of reasonable notice awarded because of the manner in which he had been dismissed. This was overturned by the Court of Appeal, which considered such an increase in notice to be akin to punitive damages, which, they held, were not available in contract except in the case of a breached promise to marry, or in cases where there was an implied agreement not to harm reputation.<sup>178</sup> The Court of Appeal's holding was upheld by the Supreme Court, with very little commentary.<sup>179</sup> Although not explicitly stated in *Peso Silver Mine*, subsequent decisions characterize it as applying *Addis v. Gramophone* to preclude compensation for reputational harm or mental distress.<sup>180</sup>

Damages for reputational harm or mental distress were not expressly claimed after *Peso Silver Mines* until the late 1970s.<sup>181</sup> But in 1978 and 1979 there were 7 reported decisions on the issue.<sup>182</sup> In *McMinn v. Town of Oakville* the High Court considered an appeal from a Master's order to strike out certain paragraphs of a statement of claim for wrongful dismissal.<sup>183</sup> The worker claimed damages for wrongful dismissal and for loss of reputation, because the dismissal was publicized in the local newspapers, which, the worker claimed, harmed his professional reputation. The issue was

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the 1917 case of *Goldbold v. Puritan Laundry Co. Limited* (1917), 12 OWN 343 (SC HCD) [*Goldbold*] at para 8. In considering a dismissed worker's damages, the court stated that "[t]here was nothing in the evidence to suggest that he was not competent, or that his reputation had suffered by reason of the dispute with the defendants, and it was probable that he would secure other employment at a figure more nearly approaching that provided for in the contract".

<sup>177</sup> *Peso Silver Mines*, *supra* note 164.

<sup>178</sup> *Ibid*

<sup>179</sup> *Ibid*.

<sup>180</sup> In *McMinn v. Town of Oakville* (1977), 19 O.R. (2d) 366 (H.C.J.) [*McMinn*], the court stated that "[t]he Supreme Court of Canada had occasion to consider this very issue in the case of *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673. While the issue of whether prejudice to reputation should increase the quantum of damages was a relatively minor one in that case and while *Addis v. Gramophone Co., Ltd.* was not specifically referred to, the Supreme Court of Canada in awarding damages unequivocally recognized the *Addis* principle".

<sup>181</sup> The rule in *Addis*, *supra* note 164 and *Peso Silver Mines*, *ibid* was cited in two cases, but it is unclear whether the plaintiffs claimed reputational harm or mental distress in damages, or whether the courts simply added the rule in their general discussions of applicable principles in determining damages for wrongful dismissal. *Cowan*, *supra* note 89; *Rudnicki*, *supra* note 113.

<sup>182</sup> *Magee*, *supra* note 88; *Racine*, *supra* note 88; *McMinn*, *ibid*; *Delmotte v. John Labatt Ltd et al.*, [1978] OJ No 3625; *Clancy v. Family Services Bureau*, [1978] OJ No 1017 (S.C. C.A.) [*Clancy*]; [*Delmotte*]; *White v. Triarch*, [1979] O.J. No. 1047 (S.C. H.C.J.) [*White*]

<sup>183</sup> *McMinn* *ibid*.

whether a claim for wrongful dismissal could be joined with a claim for damages for loss of reputation. The claim here was not compensation for the manner of dismissal, but for the effects of dismissal itself, that is, that the dismissal itself diminished the worker's ability to find new employment. The court did not consider this distinction, however, and continued to treat the issue as one of punitive damages. It canvassed the decision in *Addis*, noting that it was still good law, and had found support from the Supreme Court in *Peso Silver Mines*. The court acknowledged that there was a separate category of cases which applied to employment contracts of artists, where the promotion of the artist's reputation could be viewed as a central part of the contract's consideration. In such cases, the claimant could recover damages flowing both from the breach of contract and from the loss of the opportunity to enhance his or her reputation.<sup>184</sup> The court in *McMinn* attempted to distinguish this latter class of cases from ordinary wrongful dismissal claims on the basis that in ordinary cases damages for injury to reputation would not have been considered a part of the contract.<sup>185</sup> Finally, the court considered whether there had been an erosion of the *Addis* principle in regards to compensation for mental distress. In 1976 in *Cox v. Phillips Industries* the English Court of Queen's Bench allowed a worker recovery for mental distress and vexation after a wrongful demotion.<sup>186</sup> The court in *McMinn* held that the *Addis* rule continued to stand. *Cox* was distinguishable because vexation, distress, general disappointment and frustration of the plaintiff were within the contemplation of the parties to that contract, and therefore a legitimate head of damage. The court went on to acknowledge that while there had been a slight erosion on the issue of mental distress, the issue before it was reputational harm, in regards to which the law had not changed. On this basis, the court ordered the paragraphs relating to reputational loss struck from the statement of claim.

The issue of reputational harm continued to be argued and rejected in the wake of *McMinn*. In *Clancy v. Family Services Bureau* the Court of Appeal considered an application to strike paragraphs from a statement of claim for wrongful dismissal.<sup>187</sup> The worker in *Clancy* sought to enlarge the class of cases concerning artists by arguing that his dismissal denied him the opportunity to increase

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<sup>184</sup> *McMinn* *ibid* at para 11-13.

<sup>185</sup> *Ibid* at para 13

<sup>186</sup> *Cox v. Phillips Industries Ltd.*, [1976] 1 W.L.R. [Cox].

<sup>187</sup> *Clancy*, *supra* note 182.



his reputation as a debt/creditor counsellor.<sup>188</sup> The court rejected the claim out of hand, stating that there was nothing on the facts to take this case out of the ordinary type of employment contract and place this worker into the artist category, and therefore loss of reputation was not cognizable as a head of damage. Again the Court of Appeal characterized damages reputational harm not as compensation tangible loss but instead as a form of punishment.

Vindictive damages cannot be given in an action for breach of contract for employment. Damages cannot include compensation for the manner of the dismissal, for the employee's injured feelings, or for the loss the employee may sustain from the fact that the dismissal itself makes it more difficult for him to obtain other employment.<sup>189</sup>

The following year in *White v. Triarch*, however, the High Court refused a similar application to strike.<sup>190</sup> There the plaintiff claimed damages for reputational harm, arguing that on the basis of his relationship with his employer it was an implied term of the contract that neither party would improperly harm the other's reputation. The court refused to strike out that part of the claim. The court noted that there had been a subtle change of late in regards to damages for mental distress, citing *Delmotte v. John Labatt Ltd* and suggesting that the law was not clear in regards to either type of damages.<sup>191</sup> Following closely on the decision in *McMinn* the High Court had considered had a motion to strike out a statement of claim in the 1978 case of *Delmotte*. The court noted that the law was subtly shifting on the issue of mental distress damages in contract, and cited English and Canadian mental distress contract cases that had begun to award damages where the loss was attributable to a reasonably foreseeable consequence of the breach.<sup>192</sup> The court distinguished the case at bar from *McMinn* and refused to strike out the claim, stating that the law was not so clear on the issue of mental distress that it should not be permitted to be adjudicated.<sup>193</sup> The court in *White* used this shift in mental distress damages to suggest that it was in the interest of the common law for appellate courts to "consider afresh whether non-material elements of injury in breach of contract cases, including injury to reputation, may be the subject of compensation in

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<sup>188</sup> *Ibid* at para 12.

<sup>189</sup> *Clancy supra* note 182 at para 13.

<sup>190</sup> *White supra* note 182.

<sup>191</sup> *Ibid* at para 12.

<sup>192</sup> This line of cases emerges from the English Court of Appeal's decision in *Jarvis v. Swans Tours Ltd.*, [1973] 1 All ER 71 [*Jarvis*]. See *Delmotte, supra* note 182 at para 8-13 for a review of cases following this principle in Canada.

<sup>193</sup> *Delmotte ibid* at para 14

awarding damages for the breach”.<sup>194</sup> No reported decision on the merits appears to have followed this case procedural holding however.

What these claims demonstrate is that there was a serious push by claimants and their lawyers in the late 1970s to expand the types of loss compensable for wrongful dismissal. But courts instead sought to entrench a vision of employment as impersonal commercial transaction in the 1960s and 1970s, explicitly refusing to acknowledge the social and psychological losses from dismissal in long term employment relationships, and limiting damages to the failure to provide reasonable notice of dismissal in the absence of cause. But ironically, the refusal to recognize reputational and mental distress damages also required the courts to move the analysis of employment contracts further away from general commercial contractual principles. It required the courts to deny that employment security was a central part of the SER bargain, and to claim that, unlike contracts where peace of mind was the very thing contracted for, mental distress was not a foreseeable consequence of dismissal.<sup>195</sup> Moreover, unlike commercial contracts, specific performance was not available in employment contract claims, such that reinstatement was not available at common law. By the end of the 1970s, therefore, the wrongfulness/damages nexus grounded the wrongful dismissal analysis, rendering it wholly different from commercial contracts. Rather than evaluating the economic, reputational and psychological losses that flowed from the fact of dismissal, rather than ordering specific enforcement to remedy the loss from dismissal, the courts entrenched a limited concept of losses from dismissal based on the failure to warn of impending dismissal.

#### **(6) Rights Segmentation and Entrenching the Many Lives of the Contract of Employment**

With the proliferation of employment-related statutes in the 1960s and 1970s, the courts were increasingly called upon to determine the scope of statutory coverage, and their relationship to the common law of employment contracts. The result of both these processes was the development of general categories of worker-types, entrenching in law the labour market segmentation that had emerged in the mid-20<sup>th</sup> century, and reaffirming the common law of employment contracts as the residual category for regulating the work of non-unionized employees.

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<sup>194</sup> *White*, *supra* note 182 at para 12

<sup>195</sup> *Jarvis*, *supra* note 192; *Elder et al. v. Koppe* (1974), 15 N.S.R. (2d) 688; *Newell et al. v. Canadian Pacific Airlines, Ltd.* (1976), 14 O.R. (2d) 752.

The common law of employment stood as the primary legal regime for determining terms and conditions of work in Ontario after the repeal of the penal sanctions of the *Master and Servant Act* in the 1870s. Work-related statutes enacted as of the 1880s tended to apply to enumerated types of employment, and therefore supplemented or amended the common law for those workers that fell under their coverage, rather than displacing it as the general regulatory frame.<sup>196</sup> The courts tended to determine the scope of statutory coverage by assuming a difference between workers under “contracts of service” and “contracts for services”, a distinction premised on the English “control test” which examined the employer’s right to exercise control over the manner of work.<sup>197</sup> But they also examined the purposes of the particular statute and the wording of the application provisions.<sup>198</sup> The *Workmen’s Compensation for Injuries Act*, for instance, applied to workmen and others engaged in manual work, but not to domestic and menial servants.<sup>199</sup> The courts used the control test to determine whether someone was a workman or an independent contractor, and held that people under the latter status were excluded from coverage under the Act.<sup>200</sup> But that was not the only operating distinction: where the courts thought the claimant was not an independent contractor, they went on to use principles of statutory interpretation to determine whether the claimant was of the type of worker covered by the statute.

Starting in the mid-1940s, however, as the number of work-related statutes increased, the courts began to suggest that there was a “general” common law approach to determining employee status. This general definition was increasingly used to define access to statutory rights and

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<sup>196</sup> See, for example, the Ontario Factories’ Act, 1884, S.O. 1884, c.39; *Workmen’s Compensation For Injuries Act*, RSO 1897, c. 160, *Fair Wages and Hours of Labour Act*, 1935, S.O., c.39

<sup>197</sup> *Saunders v. Toronto (City)* (1899), 26 OAR 265 (CA). The “control test” is often cited to the English decision of *Yewens v. Noakes* (1880), 6 QBD 530 [Yewens]. *Yewens* concerned property taxes rather than vicarious liability. The distinction stated in *Yewens* was that “a servant is a person subject to the command of his master in the manner in which he shall do his work”. See Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (Oxford: Oxford University Press, 2005) at p. 90-95 for a discussion of the revival of the control test to interpret social legislation in England in the early 20<sup>th</sup> century.

<sup>198</sup> *Re Parkin Elevator* (1916), 37 OLR 269 (Winding Up Act).

<sup>199</sup> *Miller v. Monarch* (1908), 12 OWR 14. The court determined that a bookkeeper was not engaged in “manual labour” so as to be covered by the *Workmen’s Compensation For Injuries Act*, *supra* note 196. The court concluded without explanation that she was not a “workman”, which was defined to exclude domestic or menial servants, but include railway servants, labourers, servants in husbandry, miners, handycraftsmen or otherwise engaged in manual labour having entered into or working under a contract of service with his employer.

<sup>200</sup> *Amendola v. Doheny* (1906), 7 OWR 32; *Dallantonio v. McCormick* (1913), 20 OLR 319 at para 53 (whether a company was liable under the *Workmen’s Compensation for Injuries Act* when an independent contractor’s negligence injured the contractor’s servant).

entitlements, while statutory purpose and specific definitions began to recede in interpretive importance.<sup>201</sup> The courts suggested that the general approach to employee status was predicated on the notion of employer control, the 19<sup>th</sup> century English concept, although they also made use of a variety of newer variants, such as the *Montreal Locomotive* four-fold test, or the organization test.<sup>202</sup> The use of a “general” definition of employee status was visible in judicial interpretation of labour rights at mid-century. After initially determining access to the federal Wartime Labour Relations Regulation 1944 based on whether the workers in question would benefit from collective bargaining, by the mid-1940s the courts began to suggest that, in the absence of a statutory definition of “employee”, access to the Regulation should be based on the definition of “employee” under the “general law”.<sup>203</sup> The Ontario *Labour Relations Act* passed in the 1940s also provided no general definition of employee, but excluded managerial and confidential employees<sup>204</sup>, “professionals”<sup>205</sup>, domestic workers, workers in agriculture, horticulture, teachers, firefighters and police officers, and a variety of other governmental employees<sup>206</sup>. With a few exceptions labour boards and reviewing courts in Ontario concluded that independent contractors were not properly within the scope of labour legislation, and closed access to labour rights to all but those who met the *Montreal Locomotive* four-fold test, until the LRA was amended in 1970s to provide bargaining rights to an intermediary class of “dependent contractors”.<sup>207</sup> Similarly, in the 1950s the courts drew on the “control test” and the four-fold to determine tax entitlements and obligations under

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<sup>201</sup> See further Judy Fudge, Eric Tucker and Leah Vosko, “Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada” (2003) 10 CLEJ 193.

<sup>202</sup> *Montreal v. Montreal Locomotive Works*, [1947] 1 DLR 161 (PC) [*Montreal Locomotive*] at 169; *Stevenson Jordan and Harrison Ltd v. Macdonald and Evans*, [1952] 1 TLR 101 (CA) at p.111. The *Montreal Locomotive* four-fold test was enunciated in a municipal tax case, not one related to employment.

<sup>203</sup> *Lunenberg Sea Products Ltd.*, [1947] 3 DLR 195 (NSCA) at para 42. See further Fudge, Tucker and Vosko, *supra* note 201.

<sup>204</sup> *Labour Relations Act*, RSO 1960 c. 202 [LRA], s.1(3)(b)

<sup>205</sup> *Ibid* at s.1(3)(a)

<sup>206</sup> *Ibid* at s.2.

<sup>207</sup> The following cases excluded dependent contractors before the amendment: *Telegram Publishing Co. Ltd.* (1958), CCH LLR P 16126 (OLRB); *aff'd* by (1977), 16 O.R. (2d) 93 (Div Ct) [*Re Telegram Publishing*]; *Seven-Up Bottling Co. Ltd.*, (1962), CCH LLR P 16227 [*Seven-Up*]; *Cima Ltd.* (1963), OLRB May Mthly Rep 100 [*Cima*]; *Jockey Club Ltd* (1963), OLRB May Mthly Rep 112 (OLRB) [*Jockey Club*]. The Act was amended to include collective bargaining rights for “dependent contractors”, in the wake of an influential article written by Professor Harry Arthurs and recommendations by the Federal Task Force on Labour Relations. See Harry W. Arthurs, “The Dependent Contractor: A Study of the Legal Problems of Countervailing Power” (1965-1966) 16 UTLJ 89; Canadian Labour Relations: Report of the Task Force on Labour Relations (Ottawa: Office of the Privy Council, 1969) at p.140; *The Labour Relations Act*, SO 1975, c.76, ss. 1(1) and 3(4).

the ITA.<sup>208</sup> Using treatises on master and servant law, vicarious liability law and the interpretation of early 20<sup>th</sup> century British social legislation, the courts in the 1950s determined what constituted “income from employment” based on the distinction between contracts of service and for services. In the 1960s the courts also considered the availability of the wage recovery processes of the *Master and Servant Act* for managerial workers<sup>209</sup>, and who was an “employee” for purposes of the application of the new *Employment Standards Act*.<sup>210</sup>

The *Employment Standards Act* defined an employee to “include a person who performs any work or supplies any services to an employer, does homework for an employer, receives any instruction, or training in the activity, business, work, trade, occupation or profession of the employer”.<sup>211</sup> It excluded a variety of professionals, as well as agricultural workers, ambulance workers and managerial and supervisory employees from certain of its provision.<sup>212</sup> The scope of the Act’s coverage was first litigated before the Ontario courts in the 1973 case of *Re Becker Milk and Director of Employment Standards of the Ontario Ministry of Labour et al.*<sup>213</sup> There a referee, Professor Donald Carter, canvassed the definition of an “employer”, which specified that it was someone who had “control or direction of, or is directly or indirectly responsible for, the employment of another”. This suggested to the referee that the definition of employment seemed to “contemplate some type of control over the persons rendering service”<sup>214</sup>. Professor Carter stated that the “control test is the traditional test used to distinguish between the employment

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<sup>208</sup> *Income Tax Act*, RSC 1952, c. 148 [ITA]; *Robert G. Bell v. Minister of National Revenue* [1951] 52 DTC 8 (Tax Ap Bd); *No. 113 v. Minister of National Revenue* [1953], 53 DTC 308 (Tax Ap Bd); *John Fraser MacPherson v. Minister of National Revenue* [1955], 55 DTC 376 (Tax Ap Bd).

<sup>209</sup> *Winkler v. High-Test Electrical Manufacturing Ltd* [1965], 1 OR 386-389 (HCJ). The court stated the following factors as the test for determining employment status, citing Batt.

Traditionally, the essential characteristic of the master-servant relation is the employer's power not only to direct what work the servant is to do, but also the manner in which the work is to be done. Although this is the primary test, regard must also be had to a number of other considerations, including the master's power of selection of his servant; the terms of the engagement; the method and frequency of remuneration; and the master's right to suspend or dismiss.

See Innis Christie, *Employment Law in Canada* (Toronto: Butterworth & Co., 1980) at 438-459 for an examination of wage recovery mechanisms and the relationships amongst them.

<sup>210</sup> *Employment Standards Act*, S.O. 1968, c.35 [ESA].

<sup>211</sup> *Ibid* at s.1(c)

<sup>212</sup> *Employment Standards Regulation*, RRO 243, 244, 245 1970.

<sup>213</sup> *An Inquiry Relating to the Becker Milk Co. Ltd.*, (1973), Designee Carter for the Ministry of Labour (Unreported decision on file with author), aff'd *Re Becker Milk Co. Ltd and Director of Employment Standards of the Ontario Ministry of Labour et al* (1974), 1 OR (2d) 739 [*Re Becker*].

<sup>214</sup> *Ibid* at p.4.

situation and the situation where work or services are supplied by an independent contractor."<sup>215</sup> He then applied the fourfold test from *Montreal v. Montreal Locomotive* to determine which status was held by the workers in this case.<sup>216</sup> In a subsequent decision the same referee further explained his approach to the definition of "employee" under the ESA.<sup>217</sup>

The definition of "employer" in the Act is potentially very wide, being couched in terms of control or direction of "employment" or in the alternative responsibility for "employment". A search of the dictionaries reveals that the term "employment" can be given a number of interpretations, including not only the notion of work or occupation but also the notion of a business. Consequently, it might be possible to construe the Employment Standards Act as applying to any situation where one person supplies any work or services to another person.

The subject matter of the legislation indicates that the Legislature did not contemplate the regulation of the supply of services by independent businessmen but, rather, was concerned with those situations where the supplier of services was tied to another by an employment relationship.<sup>218</sup>

Professor Carter's concern was that the Act not be read so broadly as to include people who were not "truly" employees, but rather independent service providers.<sup>219</sup> The Divisional Court agreed, noting somewhat indignantly that the definition of "employee" did not make any "hint of any reference to the well understood legal relationship of master and servant, nor to the similarly familiar distinction between a contract of service and a contract of services".<sup>220</sup> By the end of the 1970s, the courts were relatively clear that the ESA would not apply to independent contractors, but only to those who fell within a jurisprudential definition of "employee".

Under all of these statutory regimes, each designed for a different purpose, administrative decision-makers and reviewing courts in the 1960s and 1970s chose to draw from what was described as a traditional or familiar common law approach to analyzing legal concepts of employment and employee, in contrast to that of an independent contractor. But this "familiar approach" was forged in the interpretation of statutes, and common law doctrines, unrelated to employment, and thus

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<sup>215</sup> *Ibid.*

<sup>216</sup> *Montreal Locomotive, supra* note 202.

<sup>217</sup> *Re Telegram Publishing supra* note 207

<sup>218</sup> *Ibid* at p.12.

<sup>219</sup> Referee Carter specified that "despite the potentially wide definition of employer, the Act was not intended to regulate those who buy services from another who is truly supplying the services as an independent businessman, or independent contractor". *Ibid* at p.12

<sup>220</sup> *Ibid.*

did not emerge from the common law of employment contracts. Indeed, the wrongful dismissal claim was not open solely to “employees”, as defined through the control or fourfold test. As previously detailed, commissioning and sales agents had brought wrongful dismissal in the first decades of the 20<sup>th</sup> century without controversy over their employment status. In fact, the Court of Appeal expressly declined to adopt the control test to determine access to wrongful dismissal claims in the 1930s case of *Carter v. Bell*.<sup>221</sup> The Court explained that vicarious liability and its “control test” were designed to identify situations where employers were responsible for the workers’ acts, but that the question of entitlement to reasonable notice was based on the existence of an implied contractual term. The Court held that an intermediate class of workers might be entitled to reasonable notice of dismissal – a class that looked much like the ‘dependent contractors’ initially excluded from the coverage of the *Labour Relations Act* – workers in long term relationships and economically dependent on a single contract or buyer.<sup>222</sup> But starting in the 1960s the courts began to suggest that the control test might also be the appropriate for determining eligibility to bring a wrongful dismissal claim<sup>223</sup>, although the intermediary class of workers, in long-term relationships with a single firm, continued to be entitled to reasonable notice.<sup>224</sup> Thus by the 1970s the common law entitlement to reasonable notice and the coverage of labour rights statutes were brought more closely into line – both excluding independent contractors but providing rights for dependent contractors. A more restrictive definition continued to apply under employment standards legislation, however, such that those non-unionized workers excluded from statutory coverage, by statutory exclusion or judicial interpretation, were left only with the common law and civil courts for the enforcement of their work-related rights, if they could afford it.

In addition to considering the scope of statutory coverage, the courts in the 1960s and 1970s engaged with the relationship between the substantive terms of work-related statutes and the common law of employment contracts, and the question of which legal forum had the authority to

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<sup>221</sup> *Carter v. Bell and Sons Ltd.*, [1936] O.R. 290 (C.A) [*Carter*]. See chapter 3 *supra* note 139 and surrounding discussion for more on this case.

<sup>222</sup> *Ibid.* The Court of Appeal based its determination on the relative permanence of the relationship between the parties, and the fact that the worker was primarily dependent on the one client for remuneration.

<sup>223</sup> *Overholt v. Memorial Gardens Assn (Canada) Ltd.*, [1960] O.J. No. 283 (S.C. H.C.J) [*Overholt*]; *Frank Meisl supra* note 88.

<sup>224</sup> *Ibid.*

adjudicate and enforce different legal regimes. Together with the decisions determining the scope of statutory application, this line of cases served to entrench general legal categories of workers, and to assign them access to different types of rights regimes.

Just as the scope of coverage of the *Labour Relations Act* was contested through the 1940s and 1950s, the legal status of collective bargaining agreements and their relationship to the common law employment contract was also a matter of dispute. By the 1960s and 1970s the courts finally concluded that a collective bargaining agreement exclusively determined the employment conditions of unionized workers, rather than acting as an “appendage” of the individual employment relationship.<sup>225</sup> By the mid-1970s, it was also clear that labour arbitrators had the power to enforce the provisions of employment-related statutes in unionized workplaces, although there continued to be some scope for claims before the common law courts until the 1980s.<sup>226</sup> The effect of these decisions was to clarify that labour rights were available to “employees” under the supervision and control of their employers, and by statutory amendment in some jurisdictions, to dependent contractors. For such workers, once employed in a unionized workplace the collective bargaining agreement and statutory rights were the sole source of their employment terms, to be interpreted and enforced at labour arbitration. Unionized workers were now removed from direct regulation by the common law of employment contracts and the common law courts.

Judicial decisions concerning the ESA went in the other direction however. A question arose as to whether rights created by the *Hours of Work and Wages Act of 1944*, the precursor to the ESA, could be enforced before the common law courts, rather than through its administrative enforcement mechanism. In the 1968 case of *Stewart v. Park Manor Motors* the employer argued that the statute created rights and remedies not recognized at common law, as well a process for

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<sup>225</sup> *Ainscough v. McGavin Toastmaster Ltd.*, [1976] 1 S.C.R. 718 [*McGavin Toastmaster*]. Until *McGavin Toastmaster*, however, the courts sometimes said that unionized workers covered by collective bargaining agreements could bring claims for unpaid wages to the courts, where determining whether and how much was owed did not require an interpretation or enforcement of the terms of the collective bargaining agreement. See *Grottoli v. Lock and Son Ltd.* (1963), 39 D.L.R. (2d) 128 [*Grottoli*]; *Close v. Globe and Mail Ltd.* (1966), 60 D.L.R. (2d) 105 [*Close*]; *Hamilton Street Railway v. Northcott*, [1967] S.C.R. 3 [*Hamilton Street*]; *Ford v. Trustees of the Ottawa Civic Hospital*, [1973] 3 O.R. 437 [*Ford*].

<sup>226</sup> *McLeod*, *supra* note 31. In some cases the courts continued to allow claims to be brought to the common law courts when determining the outcome of the case did not require interpreting the collective bargaining agreement. The New Brunswick courts also heard claims which they determined were founded solely on the common law, rather than created by the collective bargaining agreement. Both lines of authority were brought to an end in *St. Anne Nackawic Pulp & Paper Co. Ltd v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704.



their enforcement, and therefore that that “procedure [...] was summary and exclusive and ousted the jurisdiction of the established civil Courts”.<sup>227</sup> The Court disagreed however, holding that the effect of the Act was to introduce additional terms of the employment contract, and those terms could be enforced by the civil courts in the same manner as any other term of the employment contract. The Court went on to state that its jurisdiction could not be ousted in this context except by a statutory specification to that effect. In the 1970s a similar issue arose in regards to the new *Employment Standards Act*. When the Act was first enacted in 1968 it too did not contain a statement of its relationship to common law claims, but a provision specified that “no civil remedy of an employee against his employer is suspended or affected by this Act” was introduced in 1974.<sup>228</sup> In *Re Downing and Graydon et al* a worker had claimed to have been denied a fair hearing before an employment standards officer in regards to her equal pay claim. In finding that a full evidentiary hearing was not required before the administrative decision-maker, the court noted that if displeased with the results of the officer’s investigation, the worker retained the ability to seek recourse from the civil courts. The court quoted from *Stewart*, and cited provision of the ESA which specified that no civil remedy was suspended by the Act. The court left for another day the question of whether a decision to proceed in one forum could estop proceeding in another. On review the Court of Appeal appeared to agree that an alternate civil remedy remained available to the employee, but disposed of the case on other grounds.<sup>229</sup>

In *Re Telegram Publishing*, discussed above, the referee considered the opposite claim.<sup>230</sup> The employer argued that the because the workers requested an amount in wages owing beyond the statutory maximum of \$2000 that could be awarded in the employment standards forum, they should only be allowed to proceed if they gave up the right to pursue an alternative claim before the civil courts. The referee concluded instead that the workers were free to pursue their claim in either forum, and that he had no jurisdiction under the Act to preclude access to the courts. Moreover, the mere fact that a decision-maker under the ESA could not award them the full amount of their claim was no impediment to hearing the case. Thus unlike the labour relations statute, the ESA was held not to create a separate holistic regime for regulating work, but rather to

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<sup>227</sup> *Stewart v. Park Manor Motors*, [1968] 1 O.R. 234-242 (CA) [*Park Manor Motors*].

<sup>228</sup> 1974, c.112, s.6.

<sup>229</sup> *Re Downing and Graydon et al* (1978), 21 O.R. (2d) 292 (CA) at para 45-47.

<sup>230</sup> *Re Telegram Publishing*, *supra* note 207 at p.5.

act as a series of minimum standards, qualifying the common law of employment contracts, and interpretable by both administrative decision-makers and common law courts.

Together these types of decisions and legislative choices set in place the tripartite structure that holds today for regulating the employment in Ontario. By the end of the 1970s the employment law of unionized workers was that negotiated through collective bargaining - contract type 1 - interpreted and enforced by labour boards and labour arbitrators. The law of employment for non-unionized workers, however, was bifurcated between contracts type 2 and 3. Workers who met the definition of 'employee' under the ESA and other work-related statutes, and who were not explicitly excluded, theoretically had access to both the rights and obligations of minimum employment standards legislation and the common law of employment contracts under contract type 3. Everyone else - statutorily excluded domestic worker, intermediate agents or professional and managerial employees - all were regulated under contract type 2 and the common law of employment contracts.<sup>231</sup> The common law of employment contracts continued to be only legal regime available to all non-unionized workers, the civil courts the forum in which to litigate all their claims, and the normative and conceptual content of the common law the main source for interpreting other statutory regimes.

Thus over the 1960s and 1970s, by active legislative and judicial decision-making, unionized workers were removed from the direct purview of the common law of employment contracts, while the common law was further entrenched as the residual law regulating the work of non-unionized workers. This was not simply a 'natural' evolutionary process, or a gradual move from a unified common law of employment to a fracturing of regulation through the enactment of statutory regimes. Rather, a disparate set of statutory and common law regimes were unified through the creation of general categories of employment and standardizing the "types" of workers associated with different rights regimes in the 1960s and 1970s. It is through this process, and at this time that contracts type 1, 2 and 3 were set in place in law in Ontario.

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<sup>231</sup> See chapter 2, *supra* section 1(c) for a further discussion of employment contract types.

## **(7) Conclusion: The Hidden Choices of the 1960s and 1970s in the Shaping the Modern Common Law of Employment Contracts**

The 1960s and 1970s are the period in which the current law of employment contracts was born in Ontario. Over these decades the courts chose to entrench and flesh out a structure set in place in the early 20<sup>th</sup> century to regulate a wholly different labour market and economic context. They did so on their own, no longer relying on English jurisprudence, particularly as the United Kingdom moved towards statutory adjudication of unjust dismissal claims. As issues relating to the transience of service-sector employment and the long term duration of the SER were tested before the courts, the judiciary implemented a commercial contractual analysis to regulate the employment contract at common law. As in the early 20<sup>th</sup> century, workers and employers both sought to enlarge the bases of their property entitlements in employment over these decades. In property-related claims questions regarding the commodification of knowledge and service-sector work were debated, which served to grant employers proprietary rights over an increasing zone of workers' intellectual and social knowledge. In wrongful dismissal claims the courts deployed a contractual analysis to depict changing terms of work in long-term relationships, while simultaneously narrowing the conceptual basis of the claim to focus solely on the wrongfulness/damages complex. In this way the courts not only rejected workers' arguments for recognition of an expanded sphere of loss from dismissal, they also narrowed the legal analysis of the loss even beyond its early form. The result was an analytical structure which was entirely divorced from the realities of the exchanges and investments made by the parties to an employment relationship in the 1960s and 1970s. Moreover, despite the proliferation of employment-related statutes over these decades, the common law of employment contracts was further entrenched as the residual framework for the legal regulation of non-unionized work in Ontario, a structure substantively oriented to higher status workers, to be interpreted in the most inaccessible of all legal venues. As Ontario entered the 1980s, the number of common law claims would explode, making employment one of the most litigated areas of civil law.<sup>232</sup> At the end of the 1970s, as this story closes and as the SER began to lose centrality and decades of austerity began, the common law of employment contracts became the focus of

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<sup>232</sup> A preliminary search on Quicklaw of cases containing "wrongful dismissal" & employ! between January 1<sup>st</sup>, 1980 and December 31<sup>st</sup>, 1989 produces 788 cases. Once stripped of duplicates, the number is 616, although this is an approximation because they were not read to determine substantive content.

arguments over the relationship of law to labour market policy, a battle ground for notions of fairness versus efficiency, fought within an increasingly shrinking jurisprudential frame.

## Chapter 5

### Conclusion - Of Contract, Property and Shifting Paradigms in the Common Law Regulation of Waged Work

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The story I have told over these pages concerns the evolution of the common law regulation of work amidst the emergence and entrenchment of white collar work in Ontario, changing forms of business organization, economic growth and periods of recession, the changing role of waged work in the structure of the province's economy, its labour market and the lives of its citizens. It is the story of an area of law which, in Ontario, has been dominated by male higher status workers – managers, executives, professionals and skilled workers. Finally, the last chapters have recounted a doctrinal story about the relationship between notions of property, contract, and time in employment relationships, and the ways in which the Ontario judiciary has given form to the legal regulation of work at common law in different eras of the 20<sup>th</sup> century.

The traditional narrative in the field which presents the contractual regulation of work as a product of the 19<sup>th</sup> century provides too thin a description. Framing the common law of employment contracts as a 19<sup>th</sup> century phenomenon is fundamentally a politicized claim, a way to highlight the continuities in its subordinating features with the law of master and servant, its relationship to classical contract, or simply its degree of rootedness in the legal order. But despite the courts' insistence that the common law of employment contracts is of ancient origin, and that its doctrines are unchanging, this is an area of law that has shifted in significant ways over the 19<sup>th</sup> and 20<sup>th</sup> centuries.<sup>1</sup> As this study demonstrates, while many common law doctrines for regulating work emerged in the 19<sup>th</sup> century, they had fundamentally different premises which have shifted over time and in relationship with one another. The period between the 1890s and the end of the 1970s saw the emergence and consolidation of two different conceptual paradigms for regulating work at common law, and the current frame was assembled only as of the 1960s and 1970s.

### **(1) A Synthesis**

As argued in Chapter 1, before the 1890s the courts in England and Ontario approached the common law interpretation of employment contracts in a manner closely tied to master and servant doctrines. Master and servant concepts were presented not as a particular body of judicially-constructed doctrine, but rather as the 'natural' description of the relationship between employers and workers. As with the 'status' system of master and servant law, this meant that the terms of employment relationships were

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<sup>1</sup> In *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 [*Machtiger*] for instance, the Supreme Court of Canada explained that the doctrine of reasonable notice dates back to the 16<sup>th</sup> century Statute of Artificers. In *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 [*Vorvis*], the Supreme Court stated that the limited damages rule from *Addis* was of longstanding origin in Canada.

primarily determined at common law by legal presumption, rather than agreement by the parties. The move from status to contract was based neither on the venue in which workers' claims were litigated, nor in the source of law used to decide their claims, but rather in a slow process of revamping certain features of the employment relationship towards a loose notion of exchange, a process that had only just begun at common law by the turn of the 20<sup>th</sup> century.

As discussed in Chapter 1, the Ontario bar and judiciary understood the common law of England to be the law of Ontario, such that the 19<sup>th</sup> century analysis of the contract of employment forged at common law in England was theoretically available in Ontario. The courts of Ontario courts drew solely from English precedents to determine the cases before them even after Confederation in 1867, with very little mention of decisions from the other Dominion provinces. Unlike their American counterparts, in the second half of the 19<sup>th</sup> century the local judiciary did not explicitly adapt English law regarding work to the needs of a colonial economy. Rather, the nature of the local economy was visible through the types of cases that were brought before the courts.

As proposed in Chapter 2, a contractual approach to work regulation was constructed at common law in Ontario over the turn of the 20<sup>th</sup> century. This occurred as the province experienced its second industrial revolution, and at the very same time as the federal and provincials governments began to legislate in the area of labour rights and minimum labour standards. Contemporaneously, business growth, the separation of ownership and control of enterprises, and the professionalization of business management led to an increase in male white collar work, and it was this class of workers that brought claims regarding their employment contracts before the courts over the turn of the 20<sup>th</sup> century. As they did so the conceptual framework for regulating the contract of employment at common law underwent a fundamental reorganization.

At a doctrinal level the changes in the common law regulation of work at the turn of the 20<sup>th</sup> century were provoked by the abandonment of the presumption of annual hire in the 1890s, which coincided with changing legal understandings of property, time and the tools of managerial control in employment. The result of these changes was the first contractual paradigm for regulating work at common law in Ontario. Starting in the late 1890s the courts moved from assuming that employers held a broad property right of control over workers' labour for the duration of the contract, to examining what types of labour service workers intended to sell for wages. In this way the courts began to

deconstruct employers' property rights over labour service into a series of discrete interests specifically exchanged through contract. Over the same decades enterprises grew in size and scope, such that their management and administration were less often in the hands of business owners and partners, and were now undertaken by a growing class of male waged white collar employees. As the nature of waged work shifted to encompass a class of workers whose tasks were premised on the exercise of knowledge and discretion, duties that were previously limited to employers' "agents" were now framed as general obligations of waged work. Rather than emanations of master and servant law, the duties of fidelity, loyalty, confidentiality and good faith thus became explicit features of the contract of employment in the early 20<sup>th</sup> century at common law. These new employment duties emerged to bolster the narrower contours of the duty of obedience which followed from the limitations imposed on employers' property rights over labour service. Just as notions of property were in the process of change and the tools of managerial control were expanding, notions of time in employment were also reformulated. The demise of the annual hire rule in the 1890s ended the conceptual understanding of work as a time-bound relationship in law. This was of conceptual significance because employers could now dismiss workers at any time, so long as they provided sufficient notice. In practice however, indefinite duration employment did not immediately emerge as a legal presumption, but rather slowly began to take on conceptual prominence by the 1920s.

By the end of the 1920s, therefore, the courts of Ontario had moved from a property-based understanding of employers' rights of control and ownership over workers' labour for the duration of the employment contract, to an approach based on the presumed terms of the exchange, in a relationship that was slowly recast as of indefinite duration, defeasible by reasonable notice. The basic framework for the employment relationship that was cemented over the turn of the 20<sup>th</sup> century continued to rely on a series of terms implied by law, but many of those implied terms were new to this period, and notions of contractualism arose to determine their limits.

As explained in Chapter 3, by the 1930s the common law development of the contract of employment stalled over the mid-century decades. The number of reported wrongful dismissal claims was very low between the 1930s until the end of the 1950s, as the high unemployment rate of the Great Depression was followed the very low unemployment period of the Second World War and its aftermath. But while the common law of employment contracts was in stasis, by the 1940s the economy itself was once again in the midst of transformation. Ontario's labour market was now characterized by growing unionization



rates, federal and provincial interventions into the labour market and in social welfare programming, the lengthening of employment tenure, the standardization of workplace policies, and the emergence of internal labour markets within single enterprises. All of these changes occurred mainly outside of the common law of employment contracts, which was almost entirely unaffected over the mid-century by the reorganization of the labour market around the Standard Employment Relationship (SER). There were indications in the few cases litigated over this period of the changes underway in the nature of employment, and some suggestion of the legal issues the SER would raise, but the full character of the alterations to the nature of work would only come before the common law courts in the 1960s and 1970s.

The SER can be thought of as a sort of social contract.<sup>2</sup> As discussed in Chapter 3, employers were given a free hand in organizing their operations, while workers in SERs were assured of long-term stable employment. For those in SERs, employment was an exchange of subordination for stability.<sup>3</sup> Employment security in SERs was made possible by the increased length of job tenure, but also by the existence of a more precarious non-SER workforce, upon which enterprises drew to deal with short term fluctuations in their production needs. The relationship between employers, and workers in both SERs and non-SERs shaped the nature of the state's responsibilities for the economic protection of its citizens. Employment would provide the means of long-term economic family support and permit the expansion of worker consumption and business profitability. Theoretically, the state would then assume some measure of support for those who fell outside of the protections of the SER. But when the foundations of this system began to fall apart, slowly in the 1960s, and with increasing impact in the 1970s, those employees in SERs who could afford to began to litigate their employment claims before the courts. The nature of the Standard Employment Relationship presented the courts with a fundamentally different type of arrangement than the shorter-term relationships of the early 20<sup>th</sup> century. Although the judiciary had long assumed that employers had the right to direct the workforce, they had never given that right much jurisprudential definition. But in vertically integrated enterprises operating with internal labour markets, employers' were now moving workers amongst job tasks, across job units, and amongst employment locations. In this context the boundaries of the managerial prerogative were increasingly perceived to conflict with contractual principles regarding the alteration of contract terms.

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<sup>2</sup> Thomas Kochan, "Building a New Social Contract at Work: A Call to Action", Presidential Address, 52<sup>nd</sup> Annual Meeting of the Industrial Relations Research Association, 2000.

<sup>3</sup> Alain Supiot et al., *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press, 2001) at p. 1.

As demonstrated in Chapter 4, the second paradigm for work regulation was thus established in the 1960s and 1970s, which Freedland refers to as the “wrongfulness/damages complex”.<sup>4</sup> More workers and employers brought claims to the common law courts through these decades, at higher levels than previously witnessed in Ontario. Employers were manifestly more successful in this effort, managing to entrench a broad zone of unilateral decision-making in the form of the managerial prerogative. However, the courts did not pronounce on the general scope of that prerogative. Rather, in practice employers made changes to their workforce and operations as they saw fit, which were only challenged where employees occasionally sued for constructive dismissal. The courts purported to utilize a contractual analysis to determine the line between the managerial prerogative and unilateral changes to fundamental terms of the contract, but articulated no over-arching legal basis for the existence of the prerogative.

By contrast, workers were less successful in enforcing their part of the SER bargain. Through legal arguments and the personal stories they told, workers asked the courts for greater recognition in law of the social, economic and psychological investments they made in their employment relationships. They asked the courts to recognize that they had submitted to the managerial prerogative with the expectation of job security, that they put their time and effort into developing their employers’ businesses, and that dismissal consequently represented a loss of investment, identity, and of a valuable interest in job security. The courts responded, however, by narrowing workers’ entitlements upon dismissal. They did so by reframing the analysis of wrongful dismissal to focus solely on the entitlement to “reasonable notice”, which became not only the time at which the relation to be terminated, but also the breach in dismissal, and the measure of damages. Thus, at the very moment when long-term stable employment had become central to the employment bargain, the courts of Ontario abandoned the idea that employers make an implicit promise to retain employees in employment, and that dismissal represents a breach of that promise. The courts also refused to countenance the idea that psychological distress might arise from dismissal, and that it could have a serious impact on employees’ ability to find new employment. The wrongfulness/damages complex forged over this era resulted in an analysis in which workers were presented as contracting only for wages for services rendered, and for the promise of notice of impending dismissal. There was no longer any legal wrong in the loss of the job itself, and no compensation for the socioeconomic costs of termination. At the same time, through a

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<sup>4</sup> Mark Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003) at 355.

series of jurisprudential and legislative decisions of the era, despite the growing number of work-related statutory regimes, the common law paradigm was further entrenched as the residual framework for regulating work for non-unionized workers in Ontario. Thus by the end of the 1970s a wrongfulness/damages complex was constructed in which employers held a free hand in managing their workplaces, and workers' entitlements were conceptualized within a shrinking jurisprudential frame.

Questions relating to property in employment declined in importance after the 1930s. The question of what employers bought through wages had seemingly been resolved by the emergence of long-term white collar employment within corporate firms. As discussed in chapter 3, the concerns voiced by employers in the early 20<sup>th</sup> century about the protection of firm-specific knowledge from disclosure were seemingly alleviated by the expansion of long-term employment starting in the 1940s. The nature of white collar work suggested that employers purchased workers' time during a regular work week, and the product of their skill and knowledge over the work day. The issue was not so clear for work outside of SERs however. The confusion was particularly visible in restrictive covenant cases as of the 1950s, which often arose from service sector work. Service sector work complicated the analysis of the type of labour sold in employment, because it did not necessarily depend on producing tangible goods, nor did it always depend on knowledge, which the courts had increasingly commodified as of the 1950s. In service sector employment workers were hired to develop relationships on behalf of their employers and to build client loyalty. By the 1970s the suggestion was that client relationships were akin to the physical or intellectual output of labour, the thing that workers were hired to produce, such that any worker action that could harm that product could be restrained by contract.

The jurisprudential tale told above is one that has primarily concerned the work of male high status white collar employees. Over the course of the period of time under study, there were almost no claims by women or against female workers.<sup>5</sup> Male managerial employees were the largest group to bring claims at common law over the course of the 20<sup>th</sup> century. Sales agents also often litigated their employment claims before the common law courts, as well as a variety of different professionals and skilled workers, such as physicians, machinists, and engineers. Managerial employees ranged from

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<sup>5</sup> The following claims concerned female workers: *Wall v. McNab & Co.* (1903), 2 OWR 1128 [*Wall*]; *Rutherford v. Murray-Kay* (1911) OWN 29 [*Rutherford*]; *Parkers Dye Works Limited v. Smith* (1914), OLR 169 [*Parkers Dye Works*]; *Lacart v. Toronto Board of Education*, [1954] O.J. No. 142 (SC CA) [*Lacart*]; *Overholt v. Memorial Gardens Assn (Canada) Ltd.*, [1960] O.J. No. 283 (HCJ) [*Overholt*]; *Cowan v. United Investment Services Ltd.*, [1975] O.J. No. 1271 (HCJ) [*Cowan*]; *Cradle Pictures (Canada) Ltd. v. Penner* [1978] O.J. No. 3243 [*Cradle Pictures*]; *MacDonald v. 283076 Ontario Inc.* (1979), 26 O.R. (2d) 1 [*MacDonald*].

senior executives of large companies, to managers of smaller enterprises, such as bar managers and store managers. The only place where lower status workers appeared with consistency was in restrictive covenant cases.

Over the course of the period under study, therefore, the courts developed two separate paradigms for understanding employment at common law, both crafted specifically in regards to white collar work. The first paradigm was premised on loose notions of employment as exchange, a paradigm assembled as the courts shed some of the property-based features of master and servant law that provided employers with their broad right of control in the 19<sup>th</sup> century. The second – the wrongfulness/damages nexus - was constructed in the 1960s and 1970s, and was less concerned with the terms of the parties' exchange, and more on evading the implicit bargain of job security that anchored the SER in practice. The second paradigm, reinforced by a series of judicial and legislative choices, constitutes the residual framework for assessing employment rights in Ontario today, even as the SER continues to erode in terms of its practical significance.

## **(2) Two Methods of Claiming: Property and Contract In Employment**

The doctrinal theme that most clearly emerges from the historical trajectory of the common law of employment is the changing relationship between notions of property and notions of contract in the regulation of work. Employment was framed and reframed through the shifting boundaries of what was sold, exchanged, and created by contract regarding workers' labour. To say that the common law regulation of work is premised on a changing relationship between property and contract is to point towards modes of argumentation, methods of claiming different types of entitlement which shift over time. Since the 19<sup>th</sup> century era of classical contract, a claim to contract was intended to signify two things: a claim to formal equality between the parties, and an assertion that any entitlements between them arise from agreement between them. The claim to a property right represents a deeper claim to an entitlement, usually based on a series of rights of ownership and control that exist prior to contract, and that can be displaced only by the express agreement of the 'owner'. In the context of employment, the entitlements associated with each rhetorical mode have shifted over time and in relationship to one another.

The critiques of regulating employment through contract discussed in Chapter 1 are formulated in a way that places more emphasis on issues of contract than property, but a closer look reveals that questions of contract and property are intertwined.<sup>6</sup> The first critique rests on the idea that contract masks the economic inequality between workers and employers by presenting them as equals in law, as two equal sellers of commodities.<sup>7</sup> The second critique is that the regulation of employment was, from its inception, never fully contractualized because of the baseline assumption that employers had an indefeasible right of control over the workforce.<sup>8</sup> The existence of a managerial prerogative means the parties to an employment contract have never been equals in law, let alone equals in fact. Although not expressly articulated, property is essential to both of these critiques. The idea that workers and employers could be equals in law presupposes a legal recognition that workers hold a property interest in their labour power. The law must transform people's physical and intellectual capacities into legally recognized commodities so that they may exchange them for wages. Property rules define the boundaries of the labour power workers can sell, while contract determines the terms of the sale. Part of the story told here is about the process by which non-manual labour power was transformed into a property interest at common law. How have the courts conceived of workers as separate from their labour, and how did they define the types of labour that could be sold beyond physical work? How did contract facilitate and/or limit that exchange, and what rights did it create for the parties when the relationship broke down? Likewise, whether or not the parties are equal in law depends on whether the managerial prerogative is presented as a right of property or a right of contract. The courts' have extended employers' property interest in their enterprises to provide them with a managerial right of control over the labour they purchase through contract, which in turn has endowed them with the ability to make some unilateral changes to the employment bargain over its duration. But where the managerial prerogative is placed on a contractual footing, existing as an implicit part of the bargain between the parties, it is possible to present the relationship as one of formal equality. The two critiques of the contractual regulation of work are therefore inter-related. Constructing workers and employers as equals in law not only eliminates from view the vast power differential between them, but

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<sup>6</sup> See discussion in chapter 1, *supra* section 1(a) for a discussion on critiques of regulating employment as contract.

<sup>7</sup> Isaac Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law" (1977) 11:3 *Law & Society Review* 571; Otto Kahn-Freund, *Labour and the Law* (London: Stevens & Sons Ltd, 1972) at 8. See chapter 1, *supra* s. 1(a) for more discussion of this critique.

<sup>8</sup> Alan Fox, *Beyond Contract: Work, Power and Trust Relations* (London: Faber and Faber Limited, 1974) at p. 183. See chapter 1, *supra* section 1(a) for more discussion of the incomplete contractualization of employment at common law.

also naturalizes the existence of the managerial prerogative, thereby hiding the constant but shifting tension between the property rights of employers and workers and the limits to their exchange.

Focusing on the inter-relationship of property and contract in the regulation of work at common law is also fundamental to understanding why 'contractualism' has not always favoured employers over workers. Workers have asserted contractual arguments when seeking formal equality in law, usually as against employers' property entitlements. But where workers sought recognition of the power asymmetry between parties, contract acted as a limiting device. This can be seen through most of the debates and doctrinal changes charted over the previous chapters. The adoption of an intent-based approach to determining the property exchange in labour power in the early 20<sup>th</sup> century served to expand workers' rights, by limiting employers' existing property-based entitlements over workers' labour. Similarly, in the 1960s and 1970s workers argued for the application of contractual principles regarding alterations of contract terms to limit the scope of the managerial prerogative. In both these instances workers sought to create equality in law by using contractual doctrines to limit employers' rights of control. Employers have also deployed contractual arguments to insist on the formal equality of the parties, but this has usually been done to eliminate concern for the power asymmetry between them, and to ignore the ways in which that asymmetry affects the content of the terms of the employment contract.

In a similar fashion, property-based arguments have shifted over time. In the early 20<sup>th</sup> century employers claimed rights over the totality of workers' labour service, while workers claimed the right to sell different features of their labour power in exchange for wages. In restrictive covenant cases, moreover, the courts, held that certain aspects of workers' person and capacities, such as skill and knowledge, could only be leased for wages, rather than permanently sold through employment. By contrast, in the 1950s and 1960s the courts sought to protect employers' property in service sector employment by characterizing the development of client relationships as employer property, and as the very service which workers were hired to provide. In venues other than the common law courts workers in the 1950s and 1960s argued that they held a proprietary interest in their jobs, and/or in job-related benefits that accrued over the life of their employment.<sup>9</sup> This analysis suggest that the 20<sup>th</sup> century history of the common law of employment contracts can best be traced by examining the shifting

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<sup>9</sup> For example, see the holding of the Designee regarding severance in his unreported decision, as explained on judicial review in *Re Telegram Publishing Co. Ltd. and Zwelling et al.*(1973) 1 O.R. (2d) 592 [*Re Telegram Publishing*] at para 25.

boundaries and conceptual tensions between employers' and workers' property and contractual entitlements in the context of the work relationship.

### **(3) Questions that Remain and Directions for Future Research**

The research presented here opens up a number of lines for future inquiry. Some of them arise from historical questions that were beyond the scope of this project, while others can build upon its results.

In the first category are questions about the 19<sup>th</sup> and early 20<sup>th</sup> century common law regulation of work, in England and in the Canadian colonies. Because the focus of this project was on the period between the 1890s and the end of the 1970s, I have relied on existing research on the 19<sup>th</sup> century English regulation of work at common law, and on secondary sources from the era, to draw together a coherent background to my analysis. To my knowledge there is no general study of the common law regulation of work in 19<sup>th</sup> century England. Rather, most studies focus on the historical trajectory of specific doctrines<sup>10</sup>, move interchangeably between master and servant and common law cases<sup>11</sup>, or, as I do, rely on 19<sup>th</sup> century treatises to determine the case law of that time. A more general study that examines what issues, and which workers were before the common law courts would help to advance our understanding of the different forms of work regulation in the 19<sup>th</sup> century.

There is also a particularly intriguing question about the category of “agents”, which has potential implications for our understanding of the history of the binary divide between “employees” and “independent contractors”. Studies of the binary divide tend to focus on the ways in which the concept of “employee” was defined under different bodies of law, such as negligence and tax law, as well as different statutory employment regimes. One result of the research presented here is to reveal that the courts have not policed the boundaries of the common law of employment contracts in the same manner as other areas of law, and the question of who is an employee has only arisen as significant since the 1980s in wrongful dismissal cases. The operative distinction in employment contract cases in the 19<sup>th</sup> and early 20<sup>th</sup> century, where it arose, was between “agents” and “servants”. There is more research to be done on the evolution of these concepts, however, particularly in the 19<sup>th</sup> century,

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<sup>10</sup> Mark Freedland, *The Contract of Employment* (London: Oxford University Press, 1976).

<sup>11</sup> Robert Steinfeld, *Coercion, Contract and Free Labor in the Nineteenth Century* (New York: Cambridge University Press, 2001).

because the distinction between them does not appear to neatly map onto distinctions between contracts of service and contracts for services, or employees and independent contractors.<sup>12</sup>

This study has focused on the common law evolution of the contract of employment solely in Ontario. Another area of potential research is to examine the comparative trajectories of other Canadian provinces over the 20<sup>th</sup> century. Were there more or less reported cases in other provinces, did they come from the same class of workers, or was there regional variation in claim levels and the type of workers litigating their employment relationships at common law? Did other provinces also rely primarily on English case law until the 1960s, did they rely on precedents from other provinces, and/or did they innovate earlier in response to their own socioeconomic development? Are there differences in the substantive content of the common law of employment contracts in different eras in the other provinces? Answering these questions would provide a fuller understanding of the development of the overall shape of the common law of employment contracts in Canada over the 20<sup>th</sup> century.

Finally, one of the most noticeable, if entirely unsurprising, aspects of the history of the employment contract at common law is the near total absence of claims by or about female workers.<sup>13</sup> Over the 90 year span examined here there were only eight cases at common law concerning female workers.<sup>14</sup> Instead where one did encounter women's work was in *quantum meruit* claims for services rendered, which were beyond the scope of this study. These claims were brought by women for work within families, sometimes from long-term housekeeping and/or nursing or care relationships. While there is a significant body of research on the law relating women's work and property in the 19<sup>th</sup> century, and after the Second World War, studying *quantum meruit* and wage claims over the first half of the 20<sup>th</sup>

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<sup>12</sup> On a preliminary reading the distinction between agents and servants in the 19<sup>th</sup> century seemed to have two aspects. On the one hand the distinction appears akin to the current class of workers who hold additional fiduciary duties towards their employers, because agents both had special duties but could also still make use of the general employment wrongful dismissal claim. On the other hand, by the early 20<sup>th</sup> century the courts looked to whether the contract required the worker to do any particular work, or simply provided that the worker was free to complete certain tasks and would be remunerate upon completion. In this sense it had shades of the 'independent contractor' analysis.

<sup>13</sup> In the 19<sup>th</sup> century there were no claims by women in domestic service in Ontario, perhaps because of their coverage by master and servant law in the province. This is interesting at a comparative level because of the significance of domestic service for the evolution of the common law of employment contracts in England. Domestic service was often used as a baseline by which the courts measured relevant workers' relevant entitlements. Industry customs of notice of dismissal were often measured in comparison to the one month's notice for domestic servants, with the suggestion that they were at the bottom of the social ladder that came before the courts.

<sup>14</sup> See *supra* note 5.



century may add some insights to the history of the legal regulation of women's work, both within and outside the family, in the early 20<sup>th</sup> century.

There are other holes in our knowledge of the legal regulation of work in the early 20<sup>th</sup> century which may be more easily undertaken with this study now available. One such project would be to investigate how workers used the law prior to the mid-20<sup>th</sup> century. What were the main legal claims workers made over these decades? Workers clearly did not use the common law of employment contracts with a great degree of frequency, but did they make quantum meruit claims, make claims before small courts, or use statutory wage recovery mechanisms, such as that under the Master and Servant Act? Did they instead primarily seek recovery for workplace accidents? Studying the court records of one geographic location might lead to some insights as to what areas of law were most relevant to workers in the early 20<sup>th</sup> century.

A second line of investigation concerns how and whether formal law affected workplace organization over the first half of the 20<sup>th</sup> century. Catherine Fisk has studied the effects on employers' decision-making of common law rules regarding workplace information by studying the human resource documents of certain high technology workplaces in the 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>15</sup> A similar methodology might reveal whether employers were at all concerned with employment rights and obligations at common law in the way they structured their workplace relationships. Similarly, what did workers understand as their workplace rights and obligations over the first half of the 20<sup>th</sup> century, and to what extent did that understanding affect their interactions in the workplace and their relationship to trade unionism? Was there a general perception of lawlessness, or that employment was at-will for lower status workers? Is this perhaps why statutory notice requirements were included in the *Employment Standards Act* in the 1960s? This seems likely, given the persistent discussions of the 'realities' of at-will employment in social histories of trade unionism and in different labour-related decisions in the 1960s.<sup>16</sup>

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<sup>15</sup> Catherine Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800-1930* (Chapel Hill: University of North Carolina Press, 2009).

<sup>16</sup> See for instance, the comment made by CJ McRuer in *R. v. CPR*, [1962] O.R. 108, that at "common law an employer may terminate an employee's employment either at will or with reasonable notice depending on the nature of the employment and the contract". Similarly a majority of a board of arbitration explained workers' position at common law in the following manner: "Today the ordinary employee almost inevitably enjoys only an at-will relationship with his employer, which at common law could be terminated for any reason virtually without notice". The decision is unreported but quoted in *Regina v. Arthurs, Ex Parte Port Arthur Shipbuilding Co.* (1967), 62 DLR (2d) 342 (CA) [*Arthurs*] at p. 346.

This study also intersects with current attempts to map out the law of the labour market in the 20<sup>th</sup> century. As suggested in the introduction, I approach the common law of employment contracts as one regime among many that regulate the terms work. This is a descriptive, rather than a normative claim. A descriptive frame which broadens the lens of study to the multiple legal regimes that affect the employment relationship allows us to examine how the work relationship was imbricated in systems of social wage protection, and how individual employment contracts of type 2 and 3, human rights law and labour law, interacted with one another.<sup>17</sup> A descriptive frame which includes *all* work-related legal regimes would enable us to contextualize their operation and inter-relationship over the 20<sup>th</sup> century, to identify points of conceptual overlap, tension, and/or isolation from one another, and to pinpoint how and where the overall system is breaking down. The study presented here contributes to this project by adding historical knowledge regarding one important body of law that regulated the labour market over the 20<sup>th</sup> century.

#### **(4) Postscript: A Return to Contract, Or A Turn to the Common Law?**

Finally, the decline in unionization levels since the 1980s, the increasing centrality of non-standard work relationships and the dismantling of the welfare state have led to suggestions that we are in the midst of a return to contract in the regulation of work.<sup>18</sup> As fewer and fewer people are covered by collective bargaining agreements, and the nature of non-standard work has rendered access to minimum employment standards more difficult, the common law of employment contracts appears to be an increasingly central vehicle for adjudicating workplace rights in Canada.<sup>19</sup> But if the common law is of increasing prominence, its centrality in no way represents a 'return' to contract. As this and other studies suggest, there was never a moment of pervasive contractual regulation of work in the 19<sup>th</sup> or 20<sup>th</sup> centuries. The common law of employment was first given contractual shape in the early 20<sup>th</sup> century, at the same time as the federal and provincial governments began to actively regulate labour and employment rights in Ontario. Moreover the current common law frame was constructed only in

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<sup>17</sup> See chapter 1, *supra* section 1(c) for a discussion on the type different types of employment contracts in Ontario.

<sup>18</sup> See for instance Massimo D'Antona, "Labour Law at the Century's End: An Identity Crisis?" in *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, Joanne Conaghan, Richard Michael Fischl and Karl Klare, eds. (Oxford: Oxford University Press, 2004) 31 at p.32.

<sup>19</sup> It appears as though more non-managerial workers are bringing common law employment claims than in the past, but empirical work is needed to determine whether this impressionistic assessment is correct. If it is correct, the presence of non-managerial litigants raises questions about if and whether the content of the common law is shifting in relationship to the increased presence of such litigants, or whether it remains substantively oriented towards providing greater entitlements for higher status workers. If it is not changing in content to provide greater protections for non-managerial employees, this suggests that an increasing number of workers simply have no access to any bodies of law relating to their workplace rights.

the 1960s and 1970s, just before political and economic forces emerged in the 1970s and 1980s to ravage the regulatory power of labour law and the welfare state. Furthermore the current 'turn' to the common law is in no way 'contractual'. Rather, the frame developed in the 1960s and 1970s appears designed to cabin workers' entitlements within the conceptual boundaries of reasonable notice, so as to deny that employment security was ever part of the SER bargain.

The judicial desire to preclude entitlements that founded the implicit SER bargain is visible in jurisprudential developments since the 1980s. Through the 1980s and 1990s the effect of corporate restructuring on employment relationships was increasingly before the courts. There was no direct challenge to employers' right to restructure their enterprises; the issue rather arose through decisions concerning constructive dismissal. By the 1990s the courts moved to present the managerial prerogative not as a loose property interest, but rather as a matter of contractual terms bargained between the parties. According the Supreme Court in *Farber v. Royal Trust*, the managerial prerogative was actually an express or implied contractual term, such that determining its scope simply required contractual interpretation.<sup>20</sup> By presenting the managerial prerogative as a matter of contract, the courts both eliminated from the view the underlying property control given to employers by law, and suggested that workers acquiesced in employers' ability to make unilateral changes to the employment relationship. The courts did so, however, without acknowledging what workers might bargain for in exchange for that subordination.

Instead the courts developed an increasingly narrow and conceptually tortured analysis of workers' entitlement upon dismissal. In the 1980s and 1990s, in the midst of two significant recessions, some courts began to discuss the purpose of reasonable notice in policy-based terms, attempting to determine what the *Bardal* factors were intended to measure. Were they designed to provide workers with a reasonable amount of time in which to find new employment?<sup>21</sup> And if so, should employers have to assume the financial responsibility for the difficulty of finding new employment in the context of a recessionary labour market?<sup>22</sup> Determining the purpose of reasonable notice seemed essential because

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<sup>20</sup> *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at para 25 [*Farber*].

<sup>21</sup> *Bohemier v. Storwal International Inc* (1982), 40 O.R. (2d) 264 (H.C.J.) [*Bohemier*] at para 11; *Brown v. Fidinam (Canada) Ltd.* (1980), 23 A.R. 608 (Alta QB) [*Fidinam*] at para 11.

<sup>22</sup> *Bohemier ibid*; *Erskine v. Viking Helicopter Ltd.*, (1990), 35 C.C.E.L. 322 [*Erskine*]. Annette Marie Nierobisz studied the relationship between economic conditions and decisions regarding notice length during recessions in the 1970s, 1980s and 1990s. She suggests that in the 1980s the decisions were split between sympathy over the effects of economic recession on employees and employers. Her study suggests, however, that those judges sympathetic to the effect of dismissal on employees viewed employees as victims of recession and employer decision-making, rather than framing the issue as whether long-term employment was a part of the contractual

it otherwise held no objective meaning and related to no external phenomena.<sup>23</sup> At the same time, there appeared to be an emerging recognition in the early 1980s that some workers did actually bargain for long-term security in employment, such that dismissal would foreseeably cause mental distress.<sup>24</sup> But the Supreme Court pushed back both the attempt to conceptually define reasonable notice and recognition of mental distress damages in *Wallace v. United Grain Growers*.<sup>25</sup>

In *Wallace* a senior worker who was induced to leave stable employment on the promise of ongoing job security was summarily dismissed after nine years of employment. He argued for recognition of an implied contractual obligation of good faith in dismissal, reasonable notice, and for damages for mental distress. The majority of the Court considered the issue of mental distress on the basis of aggravated damages, as required by their decision in *Vorvis*.<sup>26</sup> There the majority of the Court had held that aggravated damages for mental distress would arise only when the aggravating conduct amounted to an independently actionable wrong. The majority of the Court in *Wallace* upheld the decision in *Vorvis*, because, they stated, “an employment contract is not one in which peace of mind is the very matter contracted for”, without which the question of foreseeability of mental distress was not relevant.<sup>27</sup> With this statement the majority explicitly eliminated the idea that workers contracted exactly for the peace of mind provided by long-term employment.<sup>28</sup>

The plaintiff in *Wallace* also argued that the Court should recognize an implied obligation of good faith which would limit employers to termination for cause or for legitimate business reasons.<sup>29</sup> The obligation could be framed as an implied contractual obligation or as a tort. The majority of the Court recognized this as an attempt to limit the managerial prerogative, and so refused the argument. They held that an implied contractual duty of good faith would interfere too greatly with existing principles

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bargain between the parties. See Annette Marie Nierobisz, “In the Shadow of the Economy: Judicial Decisions on Wrongful Dismissal in Eras of Economic Uncertainty”, Unpublished dissertation, University of Toronto, 2001 at chapter 5.

<sup>23</sup> There is a circularity to the wrongful dismissal analysis. What is the breach? Failure to provide reasonable notice. What is the loss? Reasonable notice. What is reasonable notice? Unclear.

<sup>24</sup> *Pilon v. Peugeot Canada Ltd* (1980), 29 OR (2d) 711 (HCJ) [*Pilon*].

<sup>25</sup> *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 [*Wallace*]

<sup>26</sup> *Vorvis*, *supra* note 1.

<sup>27</sup> *Wallace*, *supra* note 25 at para 73.

<sup>28</sup> *Pilon supra* note 24.

<sup>29</sup> Some analysts had suggested that such an implied contractual term or tort could then provide the independent actionable wrong required for mental distress damages, but the Court examined the questions in isolation from one another. See Judy Fudge, “The Limits of Good Faith in the Contract of Employment: From *Addis* to *Vorvis* to *Wallace* and Back Again?”) 2007), 32 Queen’s LJ 529 at para 11-12.

that permitted either party to terminate the relationship with sufficient notice, and would “deprive employers of the ability to determine the composition of their workforce”.<sup>30</sup> Moreover, such an obligation was unnecessary. Although aggravated damages would only be available where the impugned conduct constituted an independent actionable wrong, the reasonable notice period could be lengthened to compensate workers where the employer acted in bad faith in the manner of dismissal. This would permit for compensation for both tangible and intangible injuries that flowed from abusive conduct in the course of termination. This approach, the majority held, would respect the rule in *Addis*, because it would provide compensation not for the fact of dismissal, but for bad faith conduct by the employer in the manner of dismissal.<sup>31</sup> The Court suggested that the *Bardal* factors were not exhaustive, and that other factors should be taken into account in assessing the length of reasonable notice, such as whether the worker had been induced to leave a secure position, and whether the employer engaged in bad faith conduct in the manner of dismissal.

An alternative approach was presented by Justice McLachlin’s dissenting decision.<sup>32</sup> She would have explicitly declared that reasonable notice was designed to help workers find replacement employment, because this rationale united the *Bardal* factors. Explaining reasonable notice as the time needed to find new employment meant that damages for wrongful dismissal would be correlated to the breach; it was the way to put workers in the position they would have been in if the contract had been performed. For this reason the manner of dismissal should only be considered where it affected re-employability. “To include other factors is to consider matters unrelated to the breach of contract for which damages are ostensibly being awarded.”<sup>33</sup> Secondly, according to Justice McLachlin, there were other ways to compensate for mental distress. Defamation and intentional infliction of mental distress claims were available in tort; negligent misrepresentation would be available where a worker was induced to leave secure employment. Moreover, it was time to recognize an implied contractual term of good faith in dismissal. This duty would not be as broad as argued by the plaintiff, and so would not impede employers’ ability to dismiss with the provision of reasonable notice. Rather, it would simply recognize

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<sup>30</sup> *Wallace*, *supra* note 25 at para 75-76. See David Doorey, “Employer ‘Bullying’: Implied Duties of Fair Dealing in Canadian Employment Contracts” (2005) 30 *Queen’s L.J.* 500 at p. 23-31 for an analysis of the implications of *Wallace* on the distinction between bad faith in the manner of dismissal versus in the performance of the contract.

<sup>31</sup> *Ibid* at para 103. As Mark Freedland points out, only Lord Loreburn in *Addis v. Gramophone Company Limited*, [1909] A.C. 488 [*Addis*] specifies that damages cannot be recovered for losses sustained from the *fact* of dismissal. The other law lords appear to base their decisions on the idea that one cannot recover for losses sustained by the *manner* of dismissal. Freedland, *The Contract of Employment*, *supra* note 10 at p.248-249

<sup>32</sup> *Wallace* *ibid*.

<sup>33</sup> *Ibid* at para 120.

that the duty of good faith and fair dealing articulated by the majority amounted to an implied contractual duty, the breach of which was independently actionable and could ground mental distress damages.

The majority decision in *Wallace* resulted in an approach to wrongful dismissal that denied workers any contractual entitlement to employment security or to a contractual analysis of damages for dismissal. By shifting the issue of mental distress damages into the reasonable notice analysis, the majority restated the issue from one of contract - from whether workers bargained for peace of mind and employment stability - into a question of abusive treatment and the feelings it provoked. The majority explained that the employment contract had unique features which distinguished it from other types of contracts; most important amongst them was the inequality of bargaining power between the parties. This inequality rendered workers vulnerable, particularly at the time of dismissal. While the loss of employment was always traumatic, it was especially devastating when accompanied by an employer's bad faith conduct. By framing workers' vulnerability as relating solely to the manner of dismissal and the feelings it engendered, vulnerability was transformed from a structural issue of wage dependence to an issue of employers' conduct in the manner of dismissal. An obligation of good faith and fair dealing would be imposed to ensure that employers were truthful and sincere, "the breach of which will be compensated for by adding to the length of the notice period".<sup>34</sup> At the same time, moving mental distress into the reasonable notice analysis diluted the idea that reasonable notice was designed to provide workers with reasonable time to find new employment. Reasonable notice now included compensation for breach of workers' reliance interests, and for the mental distress caused by poor employer treatment. As Lee Stuesser has argued, adopting this approach meant that the damages for wrongful dismissal were no longer aligned with the legal wrong.<sup>35</sup> The wrong was failure to provide reasonable notice, but the damages now included compensation for losses not caused by the breach. The majority provided no general statement on the purpose of reasonable notice.

The majority decision in *Wallace* has provided the basis for determining wrongful dismissal damages since the late 1990s. Although it seemed like a victory for workers at the time, it served to eliminate central features of the workplace bargain constructed in the SER era, and to narrow the conceptual playing field in which the rights and obligations of the parties could be contested. This narrowed playing field was, moreover, further reinforced as the residual site of workplace regulation in the 1990s. In

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<sup>34</sup> *Wallace ibid* at para 95.

<sup>35</sup> Lee Stuesser, "Wrongful Dismissal – Playing Hardball: *Wallace v. United Grain Growers*" (1997-1998) Man LJ 547 at para 55.

*Machtinger v. HOJ* the Supreme Court explored the relationship between the minimum notice periods required for dismissal under the provincial *Employment Standards Act* and the reasonable notice entitlement at common law.<sup>36</sup> The Supreme Court held that where the parties did not contract for notice, or did so in a manner that contravened the ESA, the worker would be entitled to common law reasonable notice of dismissal rather than the statutory notice period. The reason to do this, according to the Court, was to incentivize employers to follow the law.<sup>37</sup> But the decision also served to frame common law reasonable notice as workers' default entitlement, the standing method of determining loss from wrongful dismissal. The result is that in the absence of a contractual term regarding notice of dismissal, workers under contract type 3 appear to be entitled to two minimum notice periods - one defined by statute and one at common law - but the difficulties such workers face in enforcing their common law entitlements renders the additional protection largely illusory.<sup>38</sup>

The courts' repeated refusal over the 1980s and 1990s to render enforceable the promise of long-term employment was sufficiently successful that by the time the Supreme Court was willing to apply general contractual principles to the analysis of mental distress arising from dismissal in *Honda v. Keays*, it could in good conscience hold that the employment contract could not be one where the parties contemplated job security because dismissal "is a clear legal possibility", given that an employment contract is "by its very terms, subject to cancellation or subject to damages in lieu of notice".<sup>39</sup> The implication was that an employment contract is definitionally ephemeral, and it is thus obvious that parties would not contract with anything else in mind. For this reason the "normal distress and hurt feelings resulting from dismissal are not compensable".<sup>40</sup> The structural limitations of the wrongful dismissal analysis was confirmed in *Keays*, the only entitlement is for an expectation of good faith treatment in dismissal, the breach of which will foreseeably cause distress and is therefore compensable where the worker can prove actual loss.<sup>41</sup>

Given the courts' refusal to enforce key features of the SER through a contractual analysis, since the 1980s workers and scholars have also deployed property-related arguments to anchor claims for

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<sup>36</sup> *Machtinger*, *supra* note 1.

<sup>37</sup> *Ibid.*

<sup>38</sup> See *supra* chapter 1, *supra* section 1(c) for a discussion on the type different types of employment contracts in Ontario.

<sup>39</sup> *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362 at para 56 [*Keays*]

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.* There is some suggestion that the courts are applying this new 'contractual' approach to require workers to provide greater evidentiary proof of distress than occurred under the *Wallace* approach.

employment security, often outside the boundaries of the common law. Some have argued that severance is a property interest that vests with workers on the basis of length of service, independent of contractual terms. In the United Kingdom, for example, unfair dismissal legislation was initially suggested to create a property interest in one's job.<sup>42</sup> Property was also used as a rhetorical device to argue that wrongful dismissal could amount to an improper taking that should be remedied by reinstatement.<sup>43</sup> None of these arguments fared well before the courts, however, nor did they gather much academic or political steam. More recently the question of property in employment has re-emerged in the 2000s in the context of corporate restructuring, vertical disintegration and capital flight. As noted in Chapter 1, over the last decade some scholars have sought to cast workers not as a fixed factor of production, but rather as long-term investors akin to corporate shareholders. This argument rests on labour market analyses, described in chapter 4, that suggest that workers invest in developing firm-specific knowledge for which they will not gain compensation on the labour market, and agree to a lower than opportunity wage at early stages of their careers on the promise of wage stability in their later working years.<sup>44</sup> The argument is that workers' investments render them akin to other residual corporate owners, and that their interests in the firm are on par with those of corporate shareholders.<sup>45</sup> This analysis is used to suggest that corporate directors' fiduciary duties should be exercised for the benefit of workers as much as for shareholders, or that workers are stakeholders in the corporation, entitled to be consulted on large scale decision-making.<sup>46</sup> The idea that workers are investors or stakeholders has largely been deployed within corporate governance and corporate social responsibility conversations. This approach is not designed to alter individual relationships between workers and their employers, but rather to think about corporations' general social and economic role, and to provide

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<sup>42</sup> Paul White, "Unfair Dismissal Legislation and Property Rights: Some Reflections" (1985), 16 *Ind Rel J* 98.

<sup>43</sup> Hugh Collins, *Justice in Dismissal: The Law of Termination of Employment* (Oxford: Clarendon University Press, 1992) at p.88

<sup>44</sup> See *supra* chapter 4, s.3(a) for details of this analysis. See also Wanjiru Njoya, *Property in Work: The Employment Relationship in the Anglo-American Firm* (Ashgate Publishing, 2007); Simon Deakin et al., "Partnership, Ownership and Control: The Impact of Corporate Governance on Employment Relations" (2002) 24 *Employee Rel.* 335; Janis Sarra, "Corporate Governance Reform: Recognition of Workers' Equitable Investments in the Firm" (1999) 32 *Can. Bus. L.J.* 384; Margaret M. Blair, "For Whom Should Corporations be Run? An Economic Rationale for Stakeholder Management" (1998) 31 *Long Range Planning* 195; Thomas Donaldson & Lee E. Preston, "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications" (1995) 20 *Academy Mgmt Rev.* 65; Katherine Stone, "Policing Employment Contracts within the Nexus-of-Contracts Firm" (1993) 45 *U.T.L.J.* 353; Jonathan R. Macey & Geoffrey P. Miller, "Corporate Stakeholders: A Contractual Perspective" (1993) 43 *U.T.L.J.* 401; "Symposium: Corporate Malaise-Stakeholder Statutes? Cause or Cure: Appendix" (1991) 21 *Stetson L. Rev.* 279; Marleen A. O'Connor, "Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers" (1991) 69 *N.C.L. Rev.* 1189.

<sup>45</sup> Blair, *ibid.*

<sup>46</sup> O'Connor, *supra* note 44.



conceptual and legal space to move corporate governance away from its perceived pathology since the 1980s. One effect of this approach, however, is to erase from view the structural tension between the relative property interests of the parties in employment, by framing them as co-owners of the corporation. To the extent that employment is increasingly short term, it is less clear how much workers are investing in developing firm-specific knowledge or making other wage-based investments which will only vest in later working years.

Thus to the extent that the SER is being displaced as the central paradigm for the organization of work, it appears that the implicit terms of employment bargains are also changing in many industries. Most workers no longer assume that they will have long-term jobs, or remain in the same line of work for their careers. Instead, the common wisdom is that workers have shorter employment contracts which permit them to develop skills, knowledge, and professional connections. Katherine Stone refers to this as the boundaryless career.

A boundaryless career is a career that does not depend upon the traditional notions of advancement within a single hierarchical organization. It includes an employee who moves frequently across the borders of different employers, [...] or one whose career draws its validation and marketability from sources outside the present employer, such as professional and extraorganizational networks. It also refers to changes within organizations, in which individuals are expected to move laterally, without constraint from traditional hierarchical career lattices.<sup>47</sup>

The key to this kind of movement, workers are told, is skills development and skills portability. The legal question is how and whether the courts are giving effect to this new bargain. At a narrow level, changes to the implicit employment bargain provoke questions about the analysis of post-employment restrictive covenants. To the extent that workers move in and out of jobs with a greater degree of frequency, and that professional connections and networking are central to workers' career trajectories, it may be more difficult to determine what is employers' property and what workers are entitled to use post-employment. More broadly it raises questions about how the courts understand the services that are contracted for, what is the product of labour power, and how property interests should be divided upon termination of employment.

If the bases on which workers contract for employment are changing, there are also important questions about the types of labour service workers are selling. The centrality of service-sector work to the

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<sup>47</sup> Katherine Stone, "The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law" (2000-2001) 48 UCLA L Rev 519 at p.554.

Canadian labour market, the advent of communications technology, and resulting changes to the labour process since the 1970s raise increasingly significant questions about labour time, as the physical and psychological separation between work and personal life becomes increasingly ephemeral. Work often now takes place outside of traditional office settings and outside of fixed hours of work; many workers are now available to employers, co-workers and clients on an almost 24 hour basis through mobile internet technologies. This not only wrecks havoc with the traditional distinction between contracts of service and contracts for service in terms of managerial control, but it also muddies the analysis of what employers purchase through the payment of wages. For workers who must be available at all hours of the day and night, wages no longer seem like a purchase of time. And if it is not a purchase of time, then how to determine what workers may do on their account? The prevalence of social media and internet technologies also confuses the boundaries between work and private life, because activities outside of work are now more easily visible to an employer. Employers are able to access information about what their workers do on and outside of work. Moreover, workers' activities outside of work are now perceived to have a greater impact on employers' reputation. A worker's online opinions, even if entirely unrelated to the workplace, may be considered negative publicity for the employer, such as to either constitute cause for summary dismissal, or to provoke dismissal with notice.

In this context, there remain fundamental questions about property in employment. The question is not only whether workers have "property" rights to their job, but of the nature of the labour power they sell, given the changing bases of value in late modern capitalism. Writers such as Antonio Negri and Michael Hardt, as well as Mauricio Lazzarato and Nick Dyer-Witherford have undertaken structural analyses of the phenomenon of "immaterial labour" amidst changes to the labour process since the late 1970s.<sup>48</sup> This work dovetails with feminist studies of emotive or affective labour, premised on care and relationship development.<sup>49</sup> In the legal field the question of immaterial labour has arisen primarily

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<sup>48</sup> Hardt and Negri's define "immaterial labour" simply as "labor that produces an immaterial good, such as a service, cultural product, knowledge or communication". This includes three types of immaterial labour: informationalized industrial production that incorporates communication technologies; analytical and symbolic tasks, and the production and manipulation of affect – labour in the bodily mode. See Michael Hardt and Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2000) s.3.4 "The Sociology of Immaterial Labour" at p.290 and 293. See also Mauricio Lazzarato, "Immaterial Labour" in *Radical Thought in Italy: A Potential Politics*, M. Hardt and P. Virno eds. (Minneapolis: University of Minneapolis Press, 1996). For critiques of Hardt and Negri's concept of immaterial labour see *Auðheben*, "Keep on Smiling: Questions on Immaterial Labour" (2006) 14 *Auðheben* 23; Nick Dyer-Witherford, "Empire, Immaterial Labor, the New Combinations and the Global Worker" (2001) 13 (3/4) *Rethinking Marxism* 70.

<sup>49</sup> See for instance, Linda McDowell, *Working Bodies: Interactive Service Employment and Workplace Identities* (Mass: Wiley-Blackwell, 2009); Arlie Russell Hochschild, *The Managed Heart: The Commercialization of Human Feeling* (Berkeley: University of California Press, 1983, 2003).

amongst intellectual property scholars in regards to the commodification of ideas and knowledge.<sup>50</sup> A broader engagement with the law's role in commodifying immaterial labour is necessary however to grapple with its relationship to the current operation of capitalist production, and to understand how the law separates workers from their labour power in non-manual work.

To conclude, therefore, the current turn to the common law represents neither a move to 'contract' nor a 'return'. Rather, the common law of employment contracts continues to be developed just as the nature of work changes around it. The fact that its content is in the midst of change is of significance because the common law of employment is an area of increasing regulatory impact. A narrative of "return" hides the fact that judicial choices are actively being made as to what the common law will provide in the context of work regulation. Such judicial choices are, moreover, of increasing importance, given that falling trade union density means fewer people are covered by collective bargaining agreements, and the growing prevalence of non-standard work renders more difficult access to minimum employment standards. In this context the common law of employment is not only the residual category for regulating work, it is increasingly the main body of law that governs employment relations. For these reasons the development of the common law of employment needs to be subject to greater academic scrutiny. But it is not only the common law's expanded importance as a regime of work regulation that renders it important. Rather, because the common law of employment contracts is primarily used by higher status workers with the most bargaining power vis-à-vis their employers, analyzing its structure is profoundly revealing of the ways the law constructs the employment relationship in Canada. By tracing the historical evolution of the contract of employment at common law we can see the political choices made in the boundaries built around the regulation of waged work, how and where judges sought to rhetorically align the employment relationship with commercial transactions, where property interests have been erased from view, and how the common law was fashioned as both the naturalized framework for understanding the employment relationship in law, and as the residual legal category for assessing workers' entitlements for dismissal. Observing the power disjuncture between higher status workers and their employers renders spectacularly visible the way that waged work has been constructed over the 20<sup>th</sup> century, and continues to be developed, on terms of structural inequality in law.

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<sup>50</sup> See, for instance, Christopher May, "Capital, Knowledge and Ownership: The 'Information Society' and Intellectual Property, (1998) 1(3) *Information, Communications & Soc'y* 246.

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