THE 20TH CENTURY'S FIRST NEXUS OF IDEAS: THE COMMON LAW OF EMPLOYMENT CONTRACTS IN ONTARIO, 1890-1930

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(1) Introduction

In Canada, as across the common law world, 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.[1] The common law contract of employment is described as the "original" form of modern work regulation, and its conceptual features are said to create a normative framework that applies across work-related regimes.[2] In Canada these conceptual features include employers' managerial prerogative to direct workforce, and workers' implied contractual duties of obedience, confidentiality, fidelity, loyalty and good faith.[3] Breach of these duties by a worker constitutes cause for summary dismissal. In the absence of cause workers are entitled to reasonable notice of dismissal, which is an implied term of indefinite duration employment contracts.[4] The only available claim for termination is a claim for wrongful dismissal, and the only wrong is the breach of the reasonable notice provision. Damages are limited to wages and contractual benefits over the reasonable notice period.[5] The contract of employment is relational in form, or incomplete by design, and presumed to be of ongoing duration.[6]

These features of the employment contract together constitute what Mark Freedland describes as a nexus of ideas that "mutually support and validate each other".[7] This complex draws together the 'unrestricted notice rule', a conception of wrongful dismissal as denial of reasonable notice, and the

[1] 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.

[2] See for instance, Innis Christie, Roderick Wood and Geoffrey England, *Employment Law in Canada, 4th edition* (Markham: LexisNexis Butterworths, 2005) at s.1.2.

[3] *Ibid* at s.1.7.

[4] *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290 (C.A)

[5] *Bardal v. Globe and Mail Ltd.* (1960), 24 DLR (2d) 140 (SC HCJ); *Wallace v. United Grain Growers Ltd,* [1997] 3 S.C.R. 701 at para. 115; *Honda Canada Inc v. Keays*, 2008 SCC 39 at para 50.

[6] Hugh Collins argues that the contract of employment is intentionally left incomplete to allow the employer to adjust the requirements of the job tasks to suit its needs through the operation of the managerial prerogative. Hugh Collins, *Employment Law, 2nd Edition* (Oxford: Oxford University Press, 2010) at 9-10.

[7] Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2005) at 349-351.

limits on remedies for dismissal. This nexus is assumed to have been inherited from England, arriving in Canada during its colonial era.[8] Canadian courts and Canadian commentators often comment on the ancient nature of the common law of employment contracts, presenting this nexus as of longstanding duration.[9] But despite its reputed pedigree and normative centrality, the common law of employment contracts and its organizing doctrines have not received significant historical research attention in Canada. When this nexus of ideas emerged, and whether others presaged it, has not been the focus of study. Canada is not alone in this regard. From across the political spectrum, the history of the employment contract features in many tales of modern legal regulation and political governance, but is rarely the story in its own right. Some significant inroads have recently been made in research on the institutional development of the contract of employment and its labour market function in England, but the historical trajectory of the common law regulation of work has so far not received similar attention, in England or abroad.[10] In this paper I attempt to address this gap by describing the doctrinal evolution of the contract of employment at common law at the turn of the 20th century in one jurisdiction, Ontario, Canada's largest province - a tale that may reveal hints for trajectory of the common law of employment contracts in other jurisdictions. I argue that in Ontario the period between the 1890s and 1920s was a pivotal moment, a period of time in which a first 'contractual' nexus of ideas was constructed for the common law regulation of work, one which differs in important ways from the one that current presides.

[8] The origins of the common law of employment in Canada are not usually explicitly addressed by scholars. In one of the leading Canadian textbooks in the area, Christie, Wood and England, for instance, move directly from a discussion of English 19th century contractual approaches to work to 20th century Canadian principles. See Innis Christie, Roderick Wood and Geoffrey England, *Employment Law in Canada, 4th edition* (Markham: LexisNexis Butterworths, 2005) at s.1.2-1.7.

[9] For instance, in *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 the Supreme Court of Canada explained that "the employer/employee relationship (in the absence of collective agreements which involve consideration of the modern labour law régime) *has always been* one where either party could terminate the contract of employment by due notice, and therefore the only damage which could arise would result from a failure to give such notice" (my italics). In *Machtinger v. Hoj Industries Ltd*. [1992] 1 S.C.R. 986, the Supreme Court explained, incorrectly, that "[t]he history of the common law principle that a contract for employment for an indefinite period is terminable only if reasonable notice is given is a long and interesting one, going back at least to 1562 and the Statute of Artificers, 5 Eliz. 1, c.4."

[10] 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).

Over the turn of the 20th century Ontario's economy moved from the dominance of agricultural production to growing employment in manufacturing and service sector white collar work. At the same time a complex of ideas was emerging in England and applied in Ontario, constructed around changing notions of property in employment, employment contract duration, and the tools of managerial control. Together these changes solidified the first nexus of ideas in Ontario, reorienting the doctrinal analysis of the contract of employment at common law away from an employer's property purchase of labour service, towards a relationship loosely premised on exchange at common law, and substantively oriented towards the nature of white collar work.

(2) The Traditional Narrative and Revisionary Efforts

The traditional narrative in the field positions the Anglo-American contract of employment as a product of England's 19th century Industrial Revolution and the rise of laissez-faire notions of market, state and contract law.[11] English law was said to be on a trajectory from the laws of master and servant, which distributed legal rights and duties based on social status and the household economic unit, towards a system of freely assumed individual obligations determined by contractual agreement, supervised by the law only on breakdown.[12] This English legal trajectory, the narrative holds, was then exported across its empire.

The status-based system of work regulation said to be displaced by contract in the 19th century originated in the law of master and servant, a statutory regime first enacted in England in the wake of the Black Death of the 14th century.[13] The law of master and servant was a penal system of compulsory labour, overseen by magistrates and justices of the peace. It was designed to regulate labour mobility and wage rates by imposing criminal sanctions for workers' breach. It applied to the waged-work relations of servants in husbandry (agricultural workers and household servants),

[11] R. W. Rideout, "The Contract of Employment" (1966) 19 CLP 111 at 112. Rideout tells us that the contract of employment at common law, "[was] a product of the Industrial Revolution, and nineteenth-century laissez-faire its principal justification." Philip Selznick similarly says that "[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." Philip Selznick, *Law, Society and Industrial Justice* (USA: Russell Sage Foundation, 1969) at 131.

[12] Henry Sumner Maine, *Ancient Law*, (London: John Murray, 1920).

[13] *The Ordinance of Labourer 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; Robert Palmer, *English Law in the Age of the Black Death, 1348-1381: a Transformation of Governance and Law* (Chapel Hill: University of North Carolina Press, 1993).

labourers, and artisans.[14] In the 16th 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 Law.[15] 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 through the laws of settlement, the annual hire rule and parish poverty relief.[16]

The traditional story is that central features of the master and servant system had fallen into effective disuse in the early 19th century. By the time the penal sanctions of the laws of master and servant were repealed in 1875, therefore the system was almost entirely anachronistic.[17] Newer occupations which emerged in the early 19th century were now regulated solely by the law of contract, even if a law of contract which retained central features of the older master and servant system, such as workers' duty of obedience towards their employers.[18]

Key elements of this traditional narrative have been questioned, however. Until recently the revisionist target has been the idea that the 19th century was a period of unimpeded common law contractual regulation of waged work. In the 1940s Karl Polanyi challenged the idea that there was a free market moment in the regulation of work in 19th century England, seeking to refute the idea of a 'natural' self-regulating market which existed without legislative aid.[19] In the 1980s Harry Arthurs traced the growth of English legislation on working conditions in the early 19th century, and the administrative regulatory apparatus that was created to enforce such statutes.[20] Rather than withdrawing from the active administration of work in the 19th century, Arthurs argued that the

[14] The statutes applied to three types of workers. The statutes purported to regulate the work of the crafts, also referred to as artisanal workers, servants in husbandry, and labourers.
[15] *Statute of Artificers*, 5 Eliz. c. 4; *The Settlement Law of 1662,* 12 and 14 Chas II c.12 (1662).
[16] What, together, Karl Polanyi called the Code of Labor. Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 2001) at p. 91. *See* generally Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (Oxford: Oxford University Press, 2005) at chapter 3; Norma Landau, "Who was Subjected to the Laws of Settlement? Procedure under the Settlement Laws in 18th Century England" (1995) 43(2) Ag. Hist. Rev. 139.
[17] Daphne Simon, "Master and Servant", in John Saville, ed., *Democracy and the Labour Movement* (London 1954).
[18] Alan Fox, *Beyond Contract: Work, Power and Trust Relations* (London: Faber and Faber Limited, 1974) at 181-184; Philip Selznick, *Law, Society and Industrial Justice* (USA: Russell Sage Foundation, 1969) at 122-135.
[19] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Mass: Beacon Street Press 2001) at 145 and chapter 7.
[20] Harry W. Arthurs, "*Without the Law": Administrative Justice and Legal Pluralism in 19th Century England* (Toronto: Toronto University Press, 1984).

British government was instead highly interventionist over that period.[21] Douglas Hay's research, moreover, counters the idea that the master and servant system had actually fallen into effective disuse in England by the beginning of the 19th century. Instead, Hay traced the persistent rise in master and servant criminal prosecutions in England throughout the 19th century, right up until the repeal of the penal sanctions in 1875.[22]

Simon Deakin and Frank Wilkinson have recently provided a general revision of the institutional evolution of the contract of employment in England.[23] They argue that rather than a 19th century phenomenon, a unified concept of contractual employment only emerged in England in the 20th century. According to Deakin and Wilkinson, a variety of different legal regimes, both common law and statutory, regulated disparate forms of work in the 19th century, creating different legal rights, obligations and customs for industrial workers, agricultural labourers, craftsmen, domestic servants and a growing class of professional workers. A general, 'unified' concept of employment only fully emerged by the 1940s, through a combination of the growing influence of collective bargaining, vertical corporate integration, and most importantly, the use of long term employment as a site for state welfare intervention.[24]

Deakin and Wilkinson suggest white collar and higher status workers began to be regulated at common law in the early 19th century. Their work relationship was only 'contractualized', however, as of the late 19th century when certain limitations were imposed on the employer's right of command, and the courts began to frame the employment relationship in terms of an exchange between the parties.[25] Deakin and Wilkinson argue that this body of law was slowly expanded to cover the entire workforce over the early 20th century, in tandem with the emergence of a 'unified' notion of employment. But we know little else about the content of common law of employment regulation under development over the early 20th century. If a unified notion of the employment

[21] Harry W. Arthurs, "*Without the Law": Administrative Justice and Legal Pluralism in 19th Century England* (Toronto: Toronto University Press, 1984).
[22] Douglas Hay, "England, 1562-1875: The Law and Its Uses" in Douglas Hay & Paul Craven eds., *Masters, Servants and Magistrates in Britain and Empire* (The University of North Carolina Press, 2004) 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).
[23] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (Oxford: Oxford University Press, 2005)
[24] *Ibid* at p. 80-82; 86-100.
[25] *Ibid* at p. 78-80.

contract emerged in the 1940s in England, when the majority of workers were drawn under the common law contractual regulation of waged work, in what did that common law regulation consist? Is this when Freedland's nexus of ideas first emerged? And did other common law countries follow England's 20th century trajectory? While we know something of the early emergence of common law employment contract cases in England in the 19th century, and on the history of particular doctrines that have survived into the current era, research from across the common law world tends to end in the 1890s when the presumption of annual hire was abandoned, and to resume in the 1960s.[26] Over the following pages I shall attempt to provide some additional details about the common law regulation of employment in early 20th century Ontario.

(3) Ontario at the Turn of the 20th Century

What is now the Canadian province of Ontario was 'created' by English law as the British colony of Upper Canada in 1791.[27] English common law was received at that time, and the local judiciary generally applied English case law as the law of colonial law of Upper Canada.[28] The social and

[26] In his 1978 treatise on the employment contract, for instance, Mark Freedland traced back the origins of then current common law doctrines. This involved a consideration of their 19th century origins, but Freedland would then often move straight to their content in the 1960s and 1970s, leaving their historical evolution unclear. Similarly Sanford Jacoby studied the presumption of annual hire in England and in the United States and the emergence of indefinite duration employment, but again jumped between the 1890s and the 1960s in the portion of his study on English law. Generally American research does not follow this trend, and instead tends to begin its analysis at the turn of the 20th century, because the effect of abandoning the presumption was to install at will employment as the default approach to common law employment contracts. See Mark Freedland, *The Contract of Employment* (London: Oxford University Press, 1976); Sanford Jacoby, "The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis" (1982) 5 Comp. Lab. L.J. 85.

[27] *An Act to repeal certain Parts of an Act, passed in the fourteenth Year of his Majesty's Reign, intitled, 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.

[28] It is less clear whether master and servant statutes were received in Upper Canada in 1791. While justices of the peace proceeded as if they were received in the early 19th century, by the 1830s and 1840s the local judiciary began to question their reception, concerned with effects and applicability of the apprenticeship requirements and wage fixing regulation in the context of a colonial economy with endemic skilled labour shortages. In response, the local assembly enacted a domestic statute in 1845, largely modeled on the English statutes of the 18th and 19th 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 the power of 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). See Eric Tucker for a debate with Craven on the reception of the master and servant statutes and their component parts in "That Indefinite Area of Toleration": Criminal Conspiracy and Trade Unions in Ontario, 1837-77" (1991) 278 Labour/Le Travail 15 at p. 20-23 for a discussion on Craven's analysis.

economic realities of the colony meant, however that the common law of employment contracts was not invoked with frequency prior to the turn of the 1890s.[29] For most of the 19th century the colonial economy was based on subsistence agriculture. Wage labour only became a stable practice as of the 1840s, industrial manufacturing slowly began to emerge at the mid-century, and endemic labour shortages were common across the century, particularly in the highly mobile skilled crafts.[30] Most claims that were brought at common law over the 19th century were not employment claims, but were rather assumpsits for work and labour - for payment of services rendered by independent service providers, such as builders, architects, lawyers, etc. There were also a body of claims concerned with recovering wages owed at the time of dismissal, wages within families and seduction claims. Despite the paucity of wrongful dismissal claims in the province prior to the 1890s, the Ontario judiciary considered the common law of England as the law of Ontario, whether or not it had received local application.[31] What then was that law in regards to the employment contract?

(a) A Prelude: The Importance of the Presumption of Annual Hire to the Common Law Regulation of Work in the 19th Century

Claims regarding contracts of hire began to emerge in England at the beginning of the 19th century[32], and the courts approached these claims by applying many features of the law of master

[29] See 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) at p.176-181.

[30] 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) 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.

[31] I estimate approximately 24 reported cases concerning dismissal between 1846 and 1890, which includes claims with arguments concerning the application of the Statute of Frauds, dismissals from municipal corporations, as well as claims concerning cause for dismissal.

[32] The workers who brought such claims were those who did not fall under the auspices of the law of master and servant. In the 1806 case of *Lowther v. Earl of Radnor* (1806), (8 East, 113) it was established that the master and servant acts applied to all servants, labourers and workmen, except for domestic and menial servants. By the 1830s the court also held that higher status workers were exempt from its coverage. *Branwell v. Penneck*, (1827) 7 B & C 536, 108 Eng Rep 823. Robert Steinfeld explains that the decision in *Lowther* represented a highwater mark of coverage for the master and servant acts of the 19th 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

and servant at common law. [33] Amongst other features that were absorbed at common law from the law of master and servant was the presumption of annual hire. 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.[34] The presumption of annual hire was applied at common law in England as of the early 1800s. It constructed the employment contract as one of fixed term duration, either by express agreement or by legal presumption. It played two a few key roles in the common law regulation of employment. The first was to determine when an employment contract could be brought to an end. Unless a custom of dismissal by notice existed in the particular industry, an employment contract could only be dissolved with three months' notice by either party prior to the end of the fixed or year term, or during the term for cause. In the absence of a custom of notice or cause, the contract renewed itself annually, operating in a manner akin to a modern tenancy.[35]

The presumption continued to be central even as the courts began to craft the claim for wrongful dismissal at common law. Although the courts in the early 19th century had held that workers in

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on the exclusivity of service, meaning that the worker could be employed only by one master. See Robert Steinfeld, *Coercion, Contract and Free Labor in the Nineteenth Century* (New York: Cambridge University Press, 2001) at p. 125-131; Christopher Frank*, Master and Servant Law : Chartists, Trade Unions, Radical Lawyers and the Magistracy in England, 1840-1865* (Ashgate Publishing, Online Edition, 2010) at 32-36. See also the detailed analysis of Brian Napier, *The Contract of Service: the concept and its application* (D.Phil., University of Cambridge,1975) at p. 106-112/

[33] Master and servant concepts were treated not as a particular body of law, but rather as the 'natural' description of the relationship between masters and servants. Indeed, although the English courts went to some length in the early 19th century to hold that higher status workers were not subject to the statutory laws of master and servant, there was no sense in the treatises of the era or in common law decisions until the mid-19th century there were differences in rights and obligations before the common law courts and before magistrates.

[34] Blackstone described the presumption as based on equitable ideas – to ensure that the servant would work, and the master would maintain him or her "throughout all the seasons". See William Blackstone, *Commentaries on the Laws of England (1765-1769),* Book 1 at 425. It also meant, however, that workers could not leave their employers during the annual term on pain of imprisonment or being returned to their employers. As of the 17th century the presumption was also central to the system of poor relief devised by the Poor Laws and Laws of Settlement. An indigent worker outside his or her parish of birth could be removed back to their parish of origin for the purposes of poor relief, unless they could demonstrate that they were hired under an annual hire contract (settlement by hire). The existence of an annual hire contract was therefore a heavily litigated issue between parishes, as each sought to minimize their support obligations. See Simon Deakin, "The Contract of Employment: A Study in Legal Evolution", ESRC Centre for Business Research, University of Cambridge Working Paper No. 203, June 2001 at 12-14; Sanford Jacoby, "The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis" (1982) 5 Comp. Lab. L.J. 85.

[35] *Statute of Artificers*, 5 Eliz. c.4, s.1, 4. 9, 10.; *William v. Byrne*, (1837) 7 Ad. & El. 177 112 E.R. 438.

fixed and annual duration contracts could not be dismissed within the contract's term without cause at common law, the conceptual basis for doing so was unclear.[36] In *Emmens v. Elderton* the House of Lords finally decided that an employment contract consisted in the exchange of more than wages for services.[37] It also included an implied promise to retain and an implied promise to remain in employment for the duration of the contract's term. Workers could not be dismissed within the contract's term because doing so constituted a breach of employers' implied promise to retain workers in employment for the rest of the contract's term, which gave rise to damages. Damages were the 'actual measure of loss', subject to a duty of mitigation. In *Beckham v. Drake* the House of Lords explained that wrongful dismissal damages were assessed in the same way as commercial contracts.[38] This was accomplished 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". [39]As constructed in the mid-19th century, therefore, the wrongful dismissal claim was premised on the contract's fixed length, as was the breach and the loss. The presumption of annual hire served to provide workers under fixed and general hire contracts with a contractual damages dismissal. By contrast, the courts held that lower status workers could be dismissed within the contract's term where a custom of dismissal by notice existed in the industry, and for such workers the measure of damages was wages over the notice period.[40]

The annual hire presumption also provided the property parameters for the employer's purchase of workers' labour power at common law. 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 year term. As Robert Steinfeld argues, it was this general purchase for the contract's duration which provided an employer with the right of control and obedience over their

[36] *See* Mark Freedland, *The Contract of Employment* (London: Oxford University Press, 1976) at p.21-23.
[37] *Emmens v. Elderton* (1853) 13 CB 495 (HL) [*Emmens*]
[38] Justice Erle stated that "[i]ndemnity for the loss of his bargain in respect of his labour would be settled on the same principle as for the loss of a bargain in respect of common merchandize." *Beckham v. Drake* (1849), 9 E.R. 1213 [*Beckham*] at 606.
[39] *Ibid* at 607-608
[40] *Robinson v. Hindman* (1800), 3 Esp. 235; *Beeston v. Collier* (1827), 4 Bing. 309; Joseph Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal*, 9th American Edition from the 5th London Edition (Springfield, Mass: G and C Merriam, 1855) at p.588-589.

workforce.[41] CB Labatt explained that a master is "viewed as a party who 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".[42] 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 year term of the employment contract.

In England the centrality of the presumption of annual hire to the common law of employment contracts began to wane in the 1870s, and Ontario followed suit in the 1890s.[43] Although the question of contract duration had rarely arisen in Ontario prior to the 1890s, in 1897 in *Bain v. Anderson*, and then in *Harnwell v. Parry Sound Lumber*, the courts of Ontario relied on the English judgment of *Walter v. Lowe* of 1892 to dispatch with the presumption of annual hire.[44] The Supreme Court of Canada in *Bain v. Anderson* held that there was no inflexible presumption that general hire contracts were to last a year, and the Ontario Court of Appeal the following year in *Harnwell* held that indefinite duration contracts were defeasible by reasonable notice of dismissal.[45] In *Bain v. Anderson* the Supreme Court of Canada declared that:

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[41] In settlement cases workers who were permitted evenings and weekends off were not considered to be under annual hire contracts, 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 85-86, 157.

[42] 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 proceeded based on workers' fiduciary obligations to their employers. See Charles Bagot Labbatt, *Commentaries on the Law of Master and Servant, 2nd Edition* (Rochester, Lawyers' Cooperative Publ., 1913). This book was published in Rochester, New York but concerned the laws of England.

[43] It was subject to increasing question as of the 1860s, but seemingly not displaced until the 1890s. See *Fairman v. Oakford* (1860), 5 H&N 635; *Creen v. Wright* (1876), 1 CPD 591; *Vibert v. Eastern Telegraph Co*. (1885) Cab & El 17; *Lowe v. Walter* (1892), 8 Times L. R. 358

[44] *Lowe v. Walter* (1892), 8 Times L. R. 358; *Bain v. Anderson* (1897), 27 O.R. 369 (QB), rev'd by (1897), 24 O.A.R. 296 (C.A.), aff'd by (1898), 28 S.C.R. 481; *Harnwell v. Parry Sound Lumber Co*. (1897), 24 O.A.R. 110 (CA). Interestingly the Ontario courts do not appear to have considered moving on to the American at-will employment system. This is notable because it is exactly over the turn of the 20th century that American branch plants were opening across Ontario, and American management practices started to be applied in Ontario.

[45] *Bain, ibid; Harnwell ibid*. Interestingly, Charles Labatt, a leading treatise writer of the era, wrote a strongly worded article arguing that Harnwell was wrongly decided, that the weight of English precedent remained on the side of a yearly presumption, and that the decision in Lowe v. Walter was not one of a quality to be relied upon.

> 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.[46]

And with that the presumption of annual hire was abandoned in Ontario.

(b) An Emerging Nexus of Ideas

Just as the presumption of annual hire was dispatched in the 1890s, the province began a period of economic expansion. Between 1890 and 1930 Ontario experienced one world war, the beginnings of the Great Depression, the first significant entry of women into the workforce, and its second industrial revolution.[47] The focus of production shifted from the dominance of family-based agrarian work to waged-labouring in the manufacturing, resource, transportation and finance sectors.[48] A capital consolidation movement was underway over the turn of the century, characterized by company mergers, the formation of large-foreign finance "megaprojects", and the spread of large business enterprises.[49] American branch plants began to dot the Southern Ontario landscape, and by the 1910s and 1920s they began to implement scientific management practices in their Ontarian subsidiaries.[50] One result of the redesign of production processes was a longer, larger, more hierarchical and more impersonal managerial chain, with a corresponding increase in

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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.

[46] *Bain ibid.*

[47] 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.

[48] 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.

[49] H.G. Stapells, "The Recent Consolidation Movement in Canadian Industry" (unpublished MA Thesis, University of Toronto, 1922); 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 550-41; Robert Craig Brown and Ramsay Cook, *Canada 1896-1921: A Nation Transformed* (Toronto: McClelland & Stewart, 1973) 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).

[50] Paul Craven*, An Impartial Umpire: Industrial Relations and the Canadian State*, (Toronto: University of Toronto Press, 1980) at p. 94-100; Bryan Palmer, *A Culture of Conflict: Skilled Workers and Industrial Capitalism in Hamilton, Ontario, 1860-1914*, (Montreal: McGill-Queen's University Press, 1979); 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; cf Michael Bliss, *A living profit: studies in the social history of Canadian business, 1883*-1911 (Toronto, 1974) at 11.

the number of clerical workers needed to catalogue the growing information produced regarding production.[51] The changing structures of economic activity, of production and of the labour process over the early 20th century provoked the growth of a waged white collar employment in Ontario.[52] Beginning in the 1890s this growing class of white collar workers brought their employment claims to the common law courts of Ontario.[53]

Table 2: Summary of Reported Employment Contract Claims at Common Law– 1890-1929

	Wrongful Dismissal	**Property-Related Claims**	**Misc**	**Total**
1890-1899	5 + 2 appeals	1	0	6
1900-1909	18 + 2 appeals	7 + 3 appeals	4	29

[51] Graham Lowe, *The Administrative Revolution: The Growth of Clerical Occupations*, 1979, Unpublished Dissertation. *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)

[52] David 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. See David Coomb, *The Emergence of a White Collar Workforce in Toronto: 1895-1911* (Unpublished Dissertation, University of Toronto, 1978) at p. 12. National figures demonstrate that in the manufacturing sector, there were 35 000 supervisory and office employees in 1905, compared to 347 700 production workers. In 1930 there were 84 600 office and supervisory workers in manufacturing, compared with 529 800 production workers. See MC Urqurhart 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 Urqurhart and K Buckley, *Historical Statistics of Canada* (Toronto: The Macmillan Company of Canada, 1965), Series A1 at p.14. Paul Craven calculates that between 1901 and 1911 there was a significant increase in the ratio of administrative workers to "productive staff" nationally, but only in certain sectors and in large industries. Craven's research suggests that a smaller number of very large industries saw a significant expansion in their AP ratio during this time. See Paul Craven*, An Impartial Umpire: Industrial Relations and the Canadian State*, (Toronto: University of Toronto Press, 1980) at Appendix.

[53] Workers who brought claims to the common law courts are likely ones who were not covered by the *Master and Servant Act,* and therefore could not access the wage recovery mechanism, or whose wages exceeded the recovery limit under that mechanism. At the turn of the 20th century Ontario's *Master and Servant Act*, RSO 1897, c.157 was available to recover wages of $40.00 or less from any agreement between master and servant or labourer. No definition was provided of these terms. The average national annual wage of industrial workers in 1905 was $375.00. 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. The annual national wage average of supervisory employees in 1905 was $846.00 however. They were therefore more likely to bring claims to the Divisional and County courts, which permitted claims ranging between $40.00 and $200.

1910-1919	22+ 2 appeals	6 + 2 appeals	3	31
1920-1929	15+ 3 appeals	4 (+ 1 cross-claim for WD	2	21

Common law claims regarding employment contracts in Ontario 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.[54] Over this period claims were brought by sales agents, machinists, engineers, bakers, jewellers, steamship hands and mariners, tailors and seamstresses, managers, superintendents, physicians, etc.[55] 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 common law regarding work, except occasionally as regards family work.[56] For the most part, the common law of employment contracts was concerned with the employment relationships of skilled male craft workers, service workers, sales agents, and managers (from foreman to general managers). All such claims were indexed in legal reporters and journals of the time as master and servant cases.[57]

[54] There were additionally a few claims by employers against workers for leaving within the terms of their contracts, a few claims 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 divulge their financial records to employees.

[55] According to Green and Green's national weekly occupational wage distribution for 1921, clerks between the ages of 15-24 earned in the 10-25th percentile of workers, while those aged 65 and over earned in the 25-50th percentile; bakers between 25-65 years of age earned in the 25-50th percentile; machinists between the ages of 25-65 were in the 50-75th percentile of wage earners; tailors in the 50-75th percentile; physicians were in the 50-75th percentile of wage earners; managers ranged from the 50-75th percentile upwards depending on industry. See 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.41-42.

[56] There are approximately 3 claims by women between 1890 and 1930.

[57] The indexing system for reported decisions in Ontario was not terribly standardized over the 19th century, but became somewhat more so over the early 20th 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 20th 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 20th cases I

(i) What do Wages Buy? Contestation over Property Rights in Employment at the Turn of the 20th Century

Under the master and servant system employment was considered a private domestic relationship.[58] 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.[59] 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, 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.[60]

Marx's analysis relied on the idea that workers could lease their labour power, but also on the assumption that that lease provided employers' with ownership over the product of workers' 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.[61]

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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.

[58] 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 Sir William Blackstone, *Commentaries on the Laws of England in Four Books. Book.* (Philadelphia: J.B. Lippincott Co., 1893, first published in 1765-1769) at chapter 14.

[59] 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.

[60] 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

[61] Marx *ibid* at chapter 7.

As production increasingly moved into factories owned by employers, and workers used employer's tools and raw materials to produce tangible goods, 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.[62] The commodification of workers labour power appears to have been a slower process for non-industrial workers, however. Because the annual hire presumption continued to apply at common law to domestic servants, clerks, and white collar workers, the property rights provided by the fixed-duration purchase of labour power also seemed to continue through the 19th century at common law. It was only once the presumption of annual hire was abandoned that the courts began to investigate what in fact workers sold to their employers in exchange for wages.

As Ontario underwent its second industrial revolution, the province experienced a large growth in industrial manufacturing and service sector employment.[63] 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 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. While Deakin and Wilkinson locate the contractualization of employment in the process of limiting of the duty of obedience for higher status workers, claims regarding property in employment provided a perhaps even clearer locust for examining the shift towards understanding employment as an exchange in law. [64]

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[62] Nicola Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Hampshire: Ashgate, 2007) at p.19.

[63] According to the Bank of Canada's report to the 1956 Royal Commission on Canada's Economic Prospects, n 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.

[64] 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

Over the early 20th 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.[65] It was also occurred in regards to basic questions of property entitlement over physical objects made on the job. In *Copeland-Chatterson v. Business Systems*, for instance, 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.[66] The High Court of Justice approached the question as a matter of whether the

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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 19th century. See for instance *Price v. Mouat* (1862), 11 CB (NS).

[65] 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 Charles Bagot 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 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-19th century the question increasingly what the worker was hired to do. Where the worker invented during work hours, at an employer's facility using their tools, as of the 1880s the general rules was that the invention was done for the employer, who therefore held proprietary rights over it. Catherine Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property,* 1800-1930 (USA: University of North Carolina Press, 2009) at 39-44 and chapters 3 and 4.

[66] *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]

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".[67] The only recourse available to the employer was damagers for improper use of the factory's power to make the tool, but this would not grant the employer the ownership rights it sought.

The employer in *Copeland-Chatterson* suggested that it owned anything and everything the employee produced during working hours, or on its premises.[68] And in at least two other cases over the early 20th century, employers used master and servant concepts of exclusive service to assert ownership over the products of *all* an employee's time and efforts, even outside of the job.[69] 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.[70] His employer claimed that the commission was earned through his employment, such that they were entitled to it.[71] 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

[67] *Copeland-Chatterson Co. v. Business Systems Limited* 10 O.W.R. 819 (Ont. C.A.) at para 10.
[68] *Copeland-Chatterson ibid.*
[69] 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 19th century. See Catherine Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property,* 1800-1930 (USA: University of North Carolina Press, 2009) at 88-89.
[70] 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 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.
[71] The legal question here, as had been stated in the English case of *Williamson v. Hines*, [1891] 1 Ch.390 at 393, in 1891 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 at 393, cited by the Chancery Division in *Jones v. Linde British Refrigeration Co.* (1900), 32 O.R. 191 (Ont. H.C.J. Ch. Div) at para 10.

of or in connection with his services or agency belong to his master or principal".[72] But, having origin in the feudal relationship between lord and villein, and then extended to apprentices and servants, the court now held that 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 or interest".[73]

In the 1904 case of *Sheppard Publishing Co. v. Harkins* the question was whether violation of an express exclusive service provision provided an employer with the right to an accounting of the worker's wages earned from other work.[74] The Court held that it did not, noting 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,"[75] 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 was to be given a reasonable construction. It could not mean that the worker was bound to provide services for all hours of the day or night, or in times designated for rest and relaxation. Neither could it require the worker to sit in idleness for periods of the work day where 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

[72] *Jones v. Linde* (1901), 2 O.L.R. 428 (Ont. C.A.) at para 17; *Morison v. Thompson* (1874), L. R. 9 Q. B..
[73] *Jones v. Linde* (1901), 2 O.L.R. 428 (Ont. C.A.) [*Jones* at the C.A.] at para 17. 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.
[74] *Sheppard Publishing Co. v. Harkins* (1904), 4 O.W.R. 477 (Ont. H.C. T.D.)
[75] *Sheppard ibid* at para. 9

> 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.[76]

Justice Anglin went on to consider English case law on a second question. Although employers could not claim an accounting from workers' endeavours undertaken during their spare time, could they claim profits or income from extraneous 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 ruled remained that the "money obtained by the servant by the sale of time and labour which belonged to his mater, [was], in contemplation of the law, the proceeds of his master's property".[77] 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.[78] 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 it was accomplished during work time. [79] 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

[76] *Sheppard, ibid* at para. 11.
[77] *Sheppard, ibid* at para 15.
[78] 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-19th 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 servants and labourers. Case law from England in the mid-19th century concerning the duty of obedience clearly suggest that there was no concept of 'free' time as regards domestic work and menial work. And as Robert Steinfeld notes, English settlement cases from the early 19th century distinguished between the work of labourers based on whether or not the worker was contractually permitted time outside of the employer's control. See Catherine Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property,* 1800-1930 (USA: University of North Carolina Press, 2009) at 88-89; 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 84-87; *Turner v. Mason* (1845) 53 E.R. 411 [*Mason*]; *R. v. St. John Devizes*, (1829), M & R 680.
[79] *Thwaites v. McKillop* (1925), 29 O.W.N. 122 (Ont. S.C. Ap. Div.)

he is employed, is work done for the master".[80] 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.[81]

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 20th century, as the employers experimented with 'efficient management' strategies, innovations in production and business methods were the source of perceived value. In this context employers were increasingly concerned with protecting information relating to their particular business and production methods from divulgation and use by workers, during and post-employment. [82] As will be discussed further 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 divulgation of employment-related information was held to be good ground for dismissal. But dismissal simply served to remove a worker, not to prevent that worker from divulging 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 confidential information.

As Catherine Fisk argues, the courts over this era struggled with whether "inchoate knowledge […] could be considered a firm asset", and how to determine what types of information were employers' property, and what workers could use after employment.[83] The courts had no difficulty barring workers from using information taken in physical form, such as in *Lamb v. Evan, Robb v. Green* and *Merryweather v. Moore*.[84] This was viewed as theft, and constituted a breach of

[80] *Thwaites ibid* at para. 6.
[81] *Thwaites ibid.* 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 mine claims.
[82] For an American description of the uses of different unfair competition doctrines (trade secrets, non-compete agreements and trademarks), see Catherine Fisk *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property,* 1800-1930 (USA: University of North Carolina Press, 2009at p.15-17.
[83] Fisk *ibid* at p. 35.
[84] *Merryweather v. Moore*, [1892] M 876 (Ch. Div) [*Merryweather*]; *Lamb v. Evans*, (1893), 1 Ch. 218 [*Lamb*]; *Robb v. Green* (1895), 2 Q.B. 315 (C.A.) [*Robb*]. Prior to the late 19th century only workers in agency relationships,

confidentiality. But what of information or knowledge workers retained by memory? In *Merryweather* Justice Kekewich held that a worker was not to use "the opportunities which that service gives him of gaining information" except for the purposes of that employment relationship.[85] 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.[86] 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".[87] 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.[88]

The distinction between physical takings 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 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. [89] The court held that the workers were not in violation of their duty of good faith because although the workers had solicited clients from their former employer, they did not do so by physically copying any client lists.[90] 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

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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 of confidentiality, or whether some types of relationships gave rise to an implied contract between the parties to maintain confidentiality. In *Merryweather v. Moore* at 522 Justice Kekewich suggested that the duty of confidentiality was really an implied contractual term that existed within all employment contracts..

[85] *Merryweather ibid* at 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.

[86] 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

[87] *Merryweather v. Moore*, [1892] 2 Ch 518 (Ch. Div) [*Merryweather*] at p. 524.

[88] Catherine Fisk, "Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920" (2000-2001) 52 Hastings LJ 441 at 494

[89] *Copeland-Chatterson Co. v. Business Systems Limited* (1906) 8 O.W.R. 888 (Ont. H.C.J. T.D.).

[90] *Copeland-Chatterson Co. v. Business Systems Limited* (1907), 10 O.W.R. 819 (Ont. C.A.) at para 23.

of action, whether damage it may cause".[91] Because workers were free to use whatever information they retained by memory post-employment, the Court of Appeal held that the most the employer could do was to bring a claim for damages for disclosure of confidential information during employment, but were not entitled to any form of injunction.

The courts were clear that there was no protection at common law against post-employment competition by a former worker, but they took a slightly different track 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 generally considered unenforceable as being in restraint of trade prior to the 18th century in England, when the blanket prohibition was, particularly as regards the sale of a business or its goodwill. [92] The English courts refined their approach in the 1894 case of *Nordenfelt v. Maxim Guns and Ammunition Company Ltd:* restrictive covenants remained prima facie unenforceable, unless the covenantee could demonstrate that the restraint was reasonable because it did not provide him or her with greater protection than was required to protect a legitimate business interests.[93]

Restrictive employment covenants only began to be litigated in Ontario as of the 1880s.[94] Over the turn of the 20th century cases in Ontario were primarily from two types of employers, employers in sales-related businesses, who depended heavily on client relationships, and employers who developed innovative manufacturing processes or products and were particularly concerned with secrecy. In the 1890s and 1900s the focus was on assessing the geographic and time restrictions imposed by the covenants.[95] The courts used the *Nordenfelt* reasonableness analysis to permit

[91] *Copeland-Chatterson ibid* at para 16.
[92] 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 18th 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).
[93] *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company Ltd.,* [1894] A.C. 535 [*Nordenfelt*].
[94] There were a few cases concerning restrictive covenants in agreements for the sale of a business or its goodwill in the late 19th 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*].
[95] *Harvison v. Cornell* (1906), 8 O.W.R. 697 (Ont. H.C.J. T.D.) [*Harvison*]; *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.)

restrictive covenants where they were narrowly tailored to activities that specifically rivaled that of the former employer, and only in the specific geographical area in which a former employee used to work. [96]

In the 1910s the courts of England and Ontario moved on to think about what in fact were the 'legitimate circumstances' that gave rise to a reasonable restrictive covenant. The courts suggested that a restrictive covenant could only protect against competition in regards to information or activities over which an employer held a proprietary interest. Here again the courts sought to draw a distinction between workers' inalienable characteristics, from which they could not be separated, and that over which an employer could claim title. In the English 1913 case of *Mason v. Provident Clothing and Supply* a large clothing and supply company argued that it was entitled to say that it would not "have the skill and knowledge acquired in [its] employment imparted to [its] trade rivals".[97] While similar types of contractual restrictions were permissible in the context of the sale of a business, the House of Lords here refused to enforce it in the employment context. The Court held that workers' knowledge and skill were not interests over which an employer could claim proprietary rights post-employment. Lord Shaw explained that:

> 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.[98]

In *Mason* the House of Lords relied on the distinction between objective and subjective knowledge from *Merryweather v. Moore* to suggest that employers retained no residual property rights over workers' skills post employment. In an era of decreasing apprenticeship and significant on the job

[96] *Harvison ibid, Allen Manufacturing ibid*; *Skeans v. Keegan* (1916), 10 O.W.N. 225 (Ont. S.C.D.); *George Weston Ltd v. Baird* (1916) 37 O.L.R. 514 (Ont. S.C. Ap. Div.); *Canadian Steam Boiler Equipment v. MacGilchrist* (1919) 16 O.W.N. 37 (Ont. S.C. H.C.Div.). 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.). 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.

[97] *Mason v. Provident Clothing and Supply Company Limited, [*1913] AC 724 at p.728.

[98] *Mason ibid* at p.740-741.

training, this question was of real importance. The English courts addressed this question directly in the 1916 case of *Herbert Morris v. Saxelby*.[99] *Herbert Morris* concerned an action to enforce a restrictive covenant by a large hoisting manufacturer against a worker who trained on the job and advanced to become a leading engineer with the firm. By the terms of his employment contract, he was precluded from working in a rival business in the United Kingdom or Ireland for a term of 7 years post-employment. By the time he left the company's employ, he was highly skilled in the production of a particular type of hoist, but was unable to find work as a general engineer, and so took a position with a competitor.

The Court explicitly rejected the idea that a company was entitled to say that it would not "have the skill and knowledge acquired in [its] employment imparted to [its] trade rivals".[100] What an employer could protect against was the use of trade secrets, and having one's customers solicited or enticed away. But general business methods were not trade secrets. Information about "reasonable mode of general organization and management of a business" could not be restrained from post-employment use by a worker, as:

> 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 the service of some persons other than them the general knowledge he has acquired of their scheme of organization and methods of business.[101]

In Ontario the question of what type of information and activities could be restrained arose in the case of *George Weston v. Baird* in 1916, just months after *Herbert Morris* was decided.[102] The Court of Appeal relied on *Mason* and *Herbert Morris* to specify what types of activities an employer might legitimately restrain. The Court said that:

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[99] *Herbert Morris, Limited Appellants v Saxelby Respondent*, [1916] 1 A.C. 688 .
[100] This argument was raised by plaintiff's counsel in *Mason v. Provident Clothing and Supply Company Limited*, [1913] AC 724 at 728, but was directly addressed by the court in *Herbert Morris, Limited Appellants v Saxelby Respondent*, [1916] 1 A.C. 688 [*Herbert Morris*].
[101] *Herbert Morris, Limited Appellants v Saxelby Respondent*, [1916] 1 A.C. 688 at p. 703-704. The House of Lords at p. 699 remarked on the conflict between freedom of contract and freedom of trade, and again concluded that the greater public good was in freedom of trade and permitting workers from using their skills for industry. "The general public suffer with him, for it is in the public interest that a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and of all those who desire to employ him."
[102] *George Weston Ltd v. Baird* (1916) 37 O.L.R. 514 (Ont. S.C. Ap. Div.).

> 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; he 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.[103]

As these cases demonstrate, between the 1890s and 1930s the courts of England and Ontario began to address the nature of the property workers provided in exchange for wages, and the limits on that exchange during and post-employment. The courts dispatched with the idea that employers owned the totality of workers' labour service, instead focusing on the nature of the intended exchange in regards to the particular job to determine what an employer purchased of a worker's time, skill and the products of their labour. In cases concerning contractual covenants against post-employment competition, the courts determined property rights not based on the value of an idea, but rather on their physical embodiment. Workers could not take physical things from their employers and use them post-employment, such as tools and client lists. But workers could use any information retained by memory and any general skills they developed on the job after leaving their employment, because, according to the courts, these were simply inseparable from a worker's mind, such that the employer held no title to them once their employment contract had come to an end.

(ii) New Managerial Tools and Control over Discretion

In property-related cases over the early 20th century the courts refined property entitlements in labour service, subdividing them into different forms of property rights which were limited by the nature of the exchange. If the courts seemed strangely protective of workers' rights in property-related claims, they displayed no such inclination in determining the sphere of employers' workplace control. Once the presumption of annual hire was abandoned, and the courts moved to recast property in employment as a matter of contractual exchange, the broad duty of obedience was significantly narrowed in scope, now applying only to those job-related tasks within the working day that were the subject of an employer's labour purchase.[104] And as white collar

[103] *George Weston ibid* at para. 35.
[104] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (Oxford: Oxford University Press, 2005) at p.79-81.

bureaucratic work increased in proportion to the overall labour force –work that was based on the exercise of knowledge and discretion - the notion of obedience became increasingly ill-suited to the exercise of managerial control within large corporate enterprises. In this context, over the early 20th century the courts added new tools of managerial control by drawing on principles from the laws of agency designed to manage workers' discretion. This shift occurred as regards the use and divulgation of workplace information, described above, and within wrongful dismissal claims of the era.

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 19th century. As Matthew Bacon explained in 1813, the employment relationship was definitionally centred on the power to exact obedience.[105] The duty to obey was cast broadly under the master and servant system, and over the first half of the 19th century. The duty of obedience was violated by wilful disobedience, as well as behaviour that constituted moral misconduct (pecuniary or otherwise), or habitual neglect.[106] The broadness of the duty is evidenced in the case of *Turner v. Mason*, where a domestic servant was dismissed for visiting her dying mother at night, after her employer refused her permission to do so. Chief Baron Pollock explained that there was "an order, in itself perfectly lawful, by the master of a servant, that she shall not leave his house for the night; and […] notwithstanding that order, she did leave his house and his service, and staid out all night. She had no right, against his will, to leave his service at all".[107] Moreover, CB Pollock stated, it was "very questionable whether any service to be

[105] *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 [...]".

[106] *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 limited to disobedience to 'lawful orders', to moral misconduct of a *gross* nature, 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.

[107] *Turner v. Mason* (1845) 14 Meeson and Welsby 112.

rendered to any other person than the master would suffice as an excuse: she might go, but it would be at the peril of being told that she could not return."[108]

The standard for cause began to shift in England in the late 1880s and in the 1900s in Ontario, when the courts began to draw from principles from the laws of agency to explain workers' obligations to their employers. Prior to the end of the 19th century, most businesses in Ontario were organized as partnerships, and to a lesser extent, as unincorporated joint stock companies.[109] Partners and shareholders were jointly and severally liable for the enterprises' debt, such that the separating line between business ownership and employment, and between partners and employees was a thin one. [110] As explained by Alfred Chandler, "owners managed and managers owned".[111] The legal relationship between business owners, partners, senior executives and the 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. Workers in agency relationships were understood to hold additional responsibilities from other servants, because "[t]he servant acts under command, [while] the agent usually acts at his own discretion [...]".[112] According to Seavy, "[t]he servant sells primarily his services measured by time; the agent his ability to produce results".[113] Agents' work was not premised on obedience to direct command, but rather in utilizing knowledge, skill and discretion in an employer's service.

But in the late 19th 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.[114] 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

[108] *Turner v. Mason* (1845) 14 Meeson and Welsby 112.
[109] 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.
[110] 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; David Kershaw, "The Path of Fiduciary Law" (2011) LSE Law, Society and Economy Working Papers 6/1.
[111] Alfred Chandler, "The Emergence of Managerial Capitalism" (1984) 58(4) Bus. Hist. Rev. 473 at 473.
[112] 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. 345at p. 20.
[113] Warren Seavey, "The Rationale of Agency", (1919) 29 Yale L.J. 859 at p. 866.
[114] Alfred Chandler, *The Visible Hand* (Belknap Press, 1977) at 315-344.

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 administration was undertaken by an expanding professional managerial class, increasingly salaried, and conceptualized as waged workers.[115] In this context the differences between workers who were agents and those who were waged employees began to falter, as waged work grew to include both task-based and discretionary decision-making employment and some of specific agency-based obligations began to be explained as general employment obligation.

Over the turn of the 20th 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.[116] The jurisprudential start to this process was the English 1886 decision in *Pearce v. Foster*.[117] The worker in *Pearce* operated in a confidential capacity and was his employer's agent in matters of business. He was dismissed for speculating on his own account on the market, and claimed wrongful dismissal. Rather than framing its analysis on the basis of the specific nature of agency employment, the court merged his agency obligations with a general analysis of cause for dismissal. They looked to whether there was cause for dismissal based on misconduct prejudicial to the business, but also on whether workers owed a duty of faithful service, because fidelity inhered in the very notion of employment. [118] 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

[115] Chandler *ibid* at 473. Catherine Fisk suggests that one of the major changes over the course of the 19th century in the United States concerned 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." Catherine Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property,* 1800-1930 (USA: University of North Carolina Press, 2009) at p. 8.

[116] For instance, only some types of employment relationships were considered confidential, and therefore held a duty not to reveal workplace secrets. Catherine Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property,* 1800-1930 (USA: University of North Carolina Press, 2009) at p. 29. See for instance *Pearce v. Foster* (1886) L.R. 17 Q.B.D. 536 (Eng. CA) [*Pearce*] *Lamb v. Evans*, (1893), 1 Ch. 218; *Robb v. Green* (1895), 2 Q.B. 315 (C.A.); *Merryweather v. Moore*, [1892] M 876 (Ch. Div); *McDougal v. Van Allen Co. Limited* (1909), 19 O.L.R. 351.

[117] *Pearce ibid.*

[118] *Pearce ibid*

> 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) [119]

The justices in *Pearce* appeared to view the worker's judgment as suspect, and his actions as undermining the firm's reputation in a way that could endanger their business.[120] The Court held that the worker, having 'opened himself open to temptation', could no longer be counted on to perform his position faithfully, and summary dismissal was warranted. In so doing, the justices crafted a standard of good faith and fidelity, which, although elaborated in the context of a confidential agent relationship, was stated so as to apply to the very notion of employment.

Throughout the 1880s and 1890s the principles of agency principles of good faith, fidelity, and acting in the employer's interest were increasingly discussed in English cases in broad and general terms. In the 1892 case of *Merryweather v. Moore*, for instance, the court broadened the applicability of the duty of confidentiality to all workers, making it a definitional component of the employment relationship. Justice Kekewich stated that the employment relationship was *necessarily* one of confidence between employers and employees, "a confidence arising out of the mere fact of employment".[121] As Catherine Fisk argues, no longer was a confidence a duty arising only from agency relationships, it was now fundamental to the very nature of employment.[122] In 1895 the Court of Appeal in *Robb v. Green* 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.[123] 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".[124] 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".[125] He went on to consider whether

[119] *Pearce ibid* at 539.
[120] *Pearce ibid.* This was so firstly because, according to the Court, by 'gambling' on the stock market he displayed poor judgment in regards to large sums of money, which would presumably give clients pause before requesting the firm's financial advice. Secondly, he was no longer a disinterested adviser in the securities market by being himself a large-scale investor.
[121] *Merryweather v. Moore*, [1892] 2 Ch Div 518 at 523 [*Merryweather*].
[122] 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 498.
[123] *Robb v. Green* (1895), 2 Q.B. 315 (C.A.) [*Robb*].
[124] *Robb ibid*
[125] *Robb ibid* at p. 316-317

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".[126] 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, citing *Lamb v. Evans*.[127] 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".[128]

These cases were applied in Ontario over the early 20th century in non-agency relationships. In *McDougal v. Allen* in 1909 the Ontario High Court of Justice 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."[129] 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 mill was dismissed with cause for using violent, insulting and abusive language towards the company's president, imputing deceit to him. This was not solely about disobedience, but rather, as Mulock C.J. Ex explained, 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".[130] 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.[131] 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, a duty of confidentiality which prevented him or her from divulging confidential information.[132] Similarly, in *Copeland-Chatterson v. Business Systems* in 1906 the Ontario High Court of Justice stated that "it is a necessary implication of a contract of service that the servant shall serve his master with good faith and fidelity".[133] Finally, in

[126] *Robb ibid* at p. 317.
[127] *Robb ibid* at p. 319.
[128] *Robb ibid* at p.320.
[129] *McDougal v. Van Allen Co. Limited* (1909), 19 O.L.R. 351 at para. 24.
[130] *Tyler v. Brown's Copper and Brass Rolling Mills Limited* (1922), 21 O.W.N. 342 at para 6.
[131] *Tyler ibid* at para 6
[132] *Mitchell v. McKenzie* (1905), 6 O.W.R. 564 [*Mitchell*] at para. 5.
[133] *Copeland-Chatterson Co. v. Business Systems Limited* (1906) 8 O.W.R. 888 (Ont. H.C.J. T.Dat para. 23, rev'd by (1907), 10 O.W.R. 819 (Ont. C.A.).

the 1918 case of *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".[134]

Not only were agency-based duties increasingly described as inhering in the broad notion of employment over the early 20th century, but the courts also permitted wrongful dismissal claims by workers who might have been considered independent contractors or agents under the law of negligence. Between 1890 and 1930s individuals who were not under direct managerial supervision, and in some instances, could hire others to assist in their contractual tasks, brought wrongful dismissal claims at common law.[135] 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.[136]

Between the 1890s and 1930s, therefore, agency principles began to seep into the employment law analysis. This occurred both through judicial explanations of agency principles as general principles of employment, and from the application of agency-specific case law to decide non-agency employment cases. 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 in law. 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 based on tying workers' interests to their employers 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

[134] *Cook v. Hinds* (1918) 42 O.L.R. 273 at 292 at para. 52.
[135] *Glenn v. Rudd* (1902), 3 O.L.R. 422; *McDougal v. Van Allen Co. Limited* (1909), 19 O.L.R. 351; *Phillips v. Seale & Co. Limited* (1922), 23 O.W.N. 331 (Ont. S.C. Ap. Div.).
[136] 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 Ltd v. Baird* (1916) 37 O.L.R. 514 (Ont. S.C. Ap. Div.) [*George Weston*]

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.

(iii) The Law's Changing Understanding of Time in Employment

The abandonment of the presumption of annual hire over the turn of the 20th century also changed the courts' approach to determining the length of employment contracts, and began to change the assessment of damages for wrongful dismissal. Writers in the field tends to assume that there was an immediate move from the presumption of annual hire to indefinite duration employment, which has been so central to workplace regulation in the second half of the 20th century.[137] Ontario case law between the 1890s and the end of the 1920s suggests however that indefinite duration employment did not immediately become the legal presumption at common law, and reasonable notice did not immediately become the measure of damages for wrongful dismissal.

Employment contracts are now presumed to be of indefinite duration, unless fixed otherwise, which, absent cause, may be brought to an end by reasonable notice of dismissal, or pay in lieu. Reasonable notice is an entitlement implied into indefinite duration employment contracts at common law. A claim for wrongful dismissal is a claim for breach of the reasonable notice requirement, and wages and contractual benefits over the reasonable notice period are now the sole measure of loss. But this model did not immediately emerge upon the abandonment of the annual hire rule in Ontario. Although the end of the presumption of annual hire suggested that indefinite duration employment contracts could be brought to an end at any time with reasonable notice, the issue of contract length and reasonable notice arose only infrequently at the beginning of the 20th century in Ontario. Until the mid-1910s most wrongful dismissal claims concerned the

[137] In many cases there is simply a gap in time in such studies, which move from the abandonment of the presumption of annual hire in the 1890s straight to the 1960s. *See* Mark Freedland, *The Contract of Employment* (London: Oxford University Press, 1976); Sanford Jacoby, "The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis" (1982) 5 Comp. Lab. L.J. 85. One notable exception is this piece by 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.

existence of cause for dismissal, arose from fixed term contracts, or focused on mitigation. [138] In this context when wrongful dismissal was established, the courts continued to assess damages in the same way as they had in the 19th century, which was based on the actual loss of employment. The quantum of damages was a matter of fact, which required a jury or trier of fact to assess the length of time in which the worker might be expected find comparable employment. [139] 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.[140]

When the issue of contract length arose prior to the 1920s the courts of Ontario treated it primarily as one of fact in the circumstances, determined on the basis of party intent, the frequency of wage payments, and industry custom.[141] In a few cases the courts reverted to the yearly hire presumption, until the beginning of the 1920s, when the Court of Appeal in *Messer v. Barrett Co.* stated in no uncertain terms that *Harnwell* established a presumption of indefinite duration employment in the absence of evidence otherwise, and that such contracts were defeasible by reasonable notice.[142] But length of reasonable was considered a matter of fact in the early 20th century. 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

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[138] *Glenn v. Rudd* (1902), 3 O.L.R. 422 (hired as agent as long his employer continued to be the sole distributor for a company); *Smith v. Bloomfield* (1903), 2 O.W.R. 481 (Ont. H.C.J. D.) (employed for a ship's voyage or the month); *Foreman v. Davidson* (1908), 12 OWR 521 (fixed 14 month contract); *Noble v. Gunn Limited and Gunn, Langlois and Co Ltd.* (1910) 16 OWR 504 (yearly hire, damages difference between time of dismissal and finding new employment); *Cockburn v. Trusts and Guarantee Co.* (1917) 38 O.L.R. 396 (Ont. S.C. Ap. Div) (started own business so damages mitigated); *Re Bryant Isard & Co*.,(1922) 23 OWN 215 (dismissed by employer bankruptcy, trustees offered him new position which he refused, damages difference between time of dismissal and time trustees restart business). There some cases where the court did not mention contract length, but assessed the damages based on probable time for re-employment. See *Goldbold v. Puritan Laundry Co. Limited* (1913), 12 O.W.N. 343; *Latta v. Acme Cheese* (1923), 23 OWN 611.

[139] For example, *Smith v. Bloomfield* (1903), 2 O.W.R. 481 (Ont. H.C.J. D.) at para. 9; *Cockburn v. Trusts and Guarantee Co.* (1917) 38 O.L.R. 396 (Ont. S.C. Ap. Div).

[140] *Sowdon v. Mills* (1861), 30 L.J.Q.B. 175, quoted at para 16 of *Cockburn v. Trusts and Guarantee Co.* (1917) 38 O.L.R. 396 (Ont. S.C. Ap. Div) [*Cockburn*].

[141] *Gould v. McCrae* (1907), 14 O.L.R. 194 [*Gould*]; *Freeman v. Wright* (1915), 9 O.W.N. 171 ; *Jacobs v. Glassco Limited* (1916), 9 O.W.N. 351.

[142] P*ollard v. Gibson* (1923), 54 O.L.R. 419 (Ont. H.C.D.); *Messer v. Barrett Co. Ltd.* (1926), 59 O.L.R. 566.

question was simply a matter for the jury.[143] There was therefore little in the way of consistency regarding reasonable notice, and no statement of how it was to be determined.[144] Even where dismissal by reasonable notice was permitted, it was not clear prior to the 1930s whether it constituted the measure of damages for wrongful dismissal. The courts of Ontario did not speak to the nature of the breach in indefinite duration cases, although in English cases such as *Addis v. Gramophone Company Limited* it continued to be described as arising from "not allowing the plaintiff to discharge his duties".[145] 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.[146]

By the end of the 1920s, therefore, indefinite duration employment was slowly emerging as a presumption of law in the absence of evidence of intended contract duration, and reasonable notice was more frequently the method by which employment contracts could be brought to an end. Damages for wrongful dismissal appeared to be moving towards wages over the reasonable notice period, but what constituted reasonable notice was not clear, such that its conceptual role was not as yet entirely defined.

[143] 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) John MacDonell, *The Law of Master and Servant,* 2nd ed. (London: Edward A. Mitchell Innes, 1908) at p.140.

[144] In cases where workers were paid by monthly or weekly wages, such as *Deacon v. Crehan* (1925), 57 O.L.R. 597, 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 v. Gibson* (1923), 54 O.L.R. 419 (Ont. H.C.D.) 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. *Pollard v. Gibson* (1924), 55 O.L.R. 424 (Ont. S.C. Ap. Div.). In *Messer v. Barrett Co. Ltd.* (1926), 59 O.L.R. 566, a sales manager, who worked for a little over two years and was paid annually, received 5 months notice.

[145] *Addis v. Gramophone Company Limited*, [1909] A.C. 488. *Addis* was not cited in Ontario prior to the 1960s, but into the 1940s when the courts of Ontario did address the nature of the breach in wrongful dismissal claims, they continued to express it as failure to retain in employment. See Justice Rand's dissent on other grounds in *Cemco Electrical Manufacturing Co. v. Van Snellenberg* [1947] S.C.R. 121.

[146] *Gould v. McCrae* (1907), 14 O.L.R. 194; *Evans v. Fisher Motor Co. Limited* (1915), 8 O.W.N. 19; *Freeman v. Wright* (1915), 9 O.W.N. 171; P*ollard 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.); *Messer v. Barrett Co. Ltd.* (1926), 59 O.L.R. 566.

(4) Conclusion

Thus by the end of the 1920s, just as the Great Depression loomed and the Ontario's turn-of-the-century economic boom began to slow, the courts of province had shaken off the vestiges of the annual hire presumption from the doctrinal analysis of the contract of employment at common law. Between the 1890s the 1930s, as white collar work became an important feature of the labour market, and large vertically integrated corporations were established across the province, the courts of Ontario substantively reorganized the analysis of the employment contract. This reorganization constructed a nexus of ideas premised on the employer's purchase of defined types of labour service, duties absorbed from the law of agency to provide employers with tools to control white collar workers' exercise of discretion and knowledge, and the slow emergence of a presumption of indefinite duration employment.

What this description suggests is that in the early 20th century, as arguably today, the contours of the common law regulation of employment were not solely a matter of contract. Rather, the regulation of employment at common law was as much about the shifting tensions between workers' property interest over their labour, employers' property interests over their enterprises, as about the contractual rights of ownership exchanged through contract. In the early 20th century, in the context of growing white collar corporatized work, the boundaries of the contract of employment were constructed around the increasingly precise commodification of workers' labour service and the changing parameters of employers' property entitlements in the inputs and outputs of production. The emergence of new implied duties were used to manage the changing nature of the type of labour purchased, while contract length slowly moved towards a presumption of indefinite duration employment and the growing centrality of the concept of reasonable notice. Together these changes to notions of property, time and the tools of managerial control constructed the first 'contractual' nexus of ideas regarding employment at common law in Ontario, one which would remain more or less in place until the 1960s.