CHAPTER 1

Canadian Law of Work in a Nutshell

LEARNING OBJECTIVES

After reading this chapter, you will be able to:

- Describe the three regimes that compose the law of work in Canada.
- Describe the two branches of the common law that regulate work and employment.
- Understand the levels of courts in Canada.
- Define *precedent* and the principle of *stare decisis*.
- Describe the role of the courts, governments, and expert administrative tribunals in the law of work.
- Recognize how the concepts of freedom of contract and inequality of bargaining power have influenced the development of the law of work in Canada.

CHAPTER OUTLINE

I. Introduction

At the beginning of a long journey, it is useful to survey a topographical map of the terrain to come—to study the forest canopy before entering the thicket. We can see patterns from above not apparent from the forest floor. It helps to have a sense of where we are going so that we can anticipate what is to come. Therefore, we will begin our journey by looking down at a map of sorts: a map of the law of work in Canada. This map charts the manner in which our legal system regulates labour markets and the buying and selling of labour.

Scholars have studied these laws for over a century. In truth, though, they have mostly been interested in work performed through one specific organizational form: **employment**. Workers can of course sell their labour through arrangements other than employment. I once contracted with a company called High Park Building Services Inc. (or HPBS) to build me a backyard deck. It turned out that HPBS was really just a guy named Jason Phillips who was between jobs and who had set up a company so that he could use his carpentry skills to earn some money. Whether I hired Jason as my employee or contracted with a company called HPBS is crucially important to how the law treats our relationship. If Jason is my employee, then all the laws that govern employment considered in this book apply to our relationship. But if my contract is with the company HPBS, maybe none of them do. It's the same work in either case, but the legal rules that govern the work are fundamentally different depending on how our relationship is characterized.

Whether so much should depend on this fine distinction between employment and *not* employment is one of the great debates in our legal field.[1] The debate has played out in

employment: An organizational form through which a person (employee) sells their labour power to a buyer of labour (employer) in exchange for value and in which the relationship is governed by an employment contract.

controversies over whether **gig workers**, like Uber drivers, should be treated as employees and therefore, be protected by labour standards legislation. We will revisit this debate at various points throughout this book, and in Chapter 4, we will explore how the law draws the distinction between an employee and a worker who is not an employee. The reason for mentioning the "employment" versus "not employment" distinction at this early stage is to explain the boundaries of our map of the law of work set out in this chapter. It is primarily a high-level map of how Canadian law governs the employment relationship. It does so through three distinct legal regimes: (1) the common law of employment, (2) regulatory law, and (3) collective bargaining law. This book examines all three of these regimes.

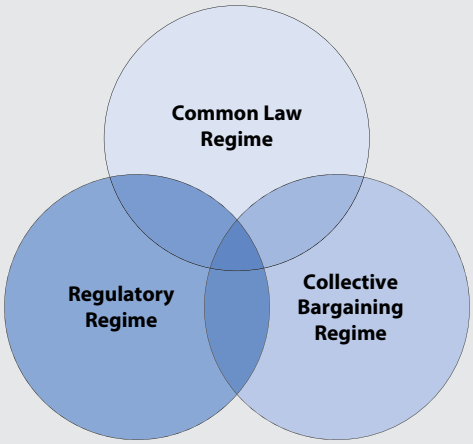
This chapter provides an overview of the key components of the legal system that governs employment in Canada, except Quebec. Quebec is a special case because its legal system, including much of the law that governs the employment relationship, is based on the French model of civil law rather than the British-based common law system applied elsewhere in Canada. Therefore, while we will occasionally consider cases and regulations originating in Quebec in this book, our focus will be on the legal system that governs throughout the rest of Canada.

II. The Three Regimes of Work Law

As noted above, the system of laws that governs employment in Canada (except Quebec) consists of three distinct yet overlapping regimes (see Figure 1.1):

1. the common law regime (covered in Part II),
2. the regulatory regime (covered in Part III), and
3. the collective bargaining regime (covered in Part IV).

FIGURE 1.1 Mapping the Three Regimes of Work Law



What follows is a brief introduction to each of these regimes. The remainder of the book is devoted to filling in the details.

A. The Common Law Regime (Part II of This Book)

The common law regime comprises both the *law of contracts* and the *law of torts*.

gig worker: A worker who accepts work on a job-by-job or freelance basis, often of short duration, with no promise of ongoing or future work from the person or organization providing the work.

1. The Law of Contracts

The cornerstone of the common law regime is the **contract** and, in particular, **employment contracts** between employers and individual (non-union) employees. A *contract* is a legally binding agreement in which two or more parties make promises to provide benefits to one another. In a typical employment contract, the employee promises to provide labour power in exchange for monetary compensation in the form of a wage paid by the employer and sometimes other benefits, such as health benefits and pension contributions. The two parties discuss, or negotiate, what the terms of the contract will be, and their agreement becomes a contract, a source of legal rules by which the parties are to be governed.

BOX 1.1 » TALKING WORK LAW

Understanding Legal Terminology

In Canada and the United States, the *common law regime* and the *regulatory standards regime* are commonly grouped together under the label *employment law*.

The legal regime that governs collective bargaining processes, by contrast, is usually referred to as *labour law*.

This book uses the terms *work law* and *law of work* synonymously to refer to the entire system of legal rules composing all three legal regimes.

While the law of contracts has deep roots in the **common law** system, dating back centuries in Britain, the law of employment contracts dates only from the late 1800s in Canada[2] (see Chapter 5). Before that time, the relationship between buyers and sellers of labour was dealt with under a branch of law known as *master and servant law* and through a mix of contract, property, criminal, and tort law.[3] We will learn more about master and servant law later in the book, particularly in Chapter 5, as well as tort law. For now, it is sufficient to note that master and servant law permitted workers ("servants") to recover unpaid wages from their employers ("masters") but also allowed for workers who quit a job to be imprisoned.[4] Legal historians describe master and servant law as a system of rules based on "status," by which they mean that workers were considered subservient to their masters and therefore, subject to their masters' largely unquestioned authority. The master and servant regime was exported from Britain into parts of early Canada, but by the early 1900s, it had been largely supplanted by the emerging common law of the employment contract and the principle of freedom of contract.[5]

"Freedom of contract" is a powerful idea. Its supporters argue that allowing employees and employers to "negotiate" the conditions of employment leads to the fairest and most efficient outcomes for the parties, the economy, and society as a whole. Professor Hugh Collins summarized the central arguments made in favour of freedom of contract as a means of coordinating employment relations as follows:

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contract: A legally binding agreement consisting of reciprocal promises between two or more parties.

employment contract: A contract between an employer and an individual employee that defines the conditions under which the employee will provide labour to the employer in exchange for a monetary benefit (wages, salary) and sometimes other benefits (e.g., health benefits). An employment contract may be written or oral.

common law: A system of judge-made rules originating in England around the 12th century, and inherited by Canada as a British colony, that uses a precedent-based approach to case law. Earlier decisions dealing with similar facts or legal issues guide later decisions in an attempt to create legal predictability. However, common law rules can and often do evolve as social values change.

> The principle of freedom of contract removes the possibility of workers being treated exactly like commodities, because by giving them the power to choose, the principle ensures the elementary respect for the dignity, autonomy, and equality of citizens. So too the principle ensures a measure of justice and fairness by permitting everyone to seek work without discrimination and obstructions to competition. Furthermore, freedom of contract permits the parties to regulate their own relationship in order to deal with the special difficulties presented by the unique combination of characteristics of the employment relationship. The parties are likely to have the best information about where their interests lie, and therefore they should be permitted to forge a compromise between their competing interests without interference by a paternalistic state.[6]

Occasionally, disputes arise between employers and employees in which one of the parties accuses the other of violating the employment contract. Those disputes may end up in a courtroom in front of a judge if one party sues the other party for **breach of contract**. If the lawsuit does not settle (most do), a judge will conduct a trial. At the trial, the parties will present a story to the judge in the form of documentary evidence and witness testimonies, recounting versions of what happened leading up to the disagreement. The judge must then decide whether the contract was breached and, if so, what the guilty party should be ordered to do as a **remedy** for the breach.

BOX 1.2 » TALKING WORK LAW

Learning and Practising Work Law in Canada

Work law is taught to thousands of students each year in dozens of Canadian universities and colleges at law schools but also in programs in business and commerce, human resource management, legal studies, labour studies, industrial relations, and paralegal training. The number of students learning work law in programs outside law schools far outnumbers those in law schools. This is not surprising with so many professions that require knowledge of work laws. Only lawyers who have attended law school and passed the required bar exams can practise work law as a profession. Each province and territory has its own professional legal body, or law society, that is responsible for regulating the legal profession and providing continuing legal education. In Canada, 17 law schools offer a juris doctor (JD) or bachelor of laws (LLB) in the common law model, 4 offer degrees only in the civil law model used in Quebec, and 2 (University of Ottawa and McGill University) offer programs in both legal systems.

Each law school has its own law library. The largest law library in Canada is housed at Osgoode Hall Law School at York University in Toronto, with over 800,000 volumes. In the past, lawyers needed to visit a law library to conduct research on old cases. Today, much, if not all, of that legal research can be conducted electronically through the use of both free (CanLII) and fee-based (Lexis Advance Quicklaw) services.

The exercise at the end of this chapter gives you the opportunity to practise finding common law case law using CanLII (<https://www.canlii.org>), which provides free online access to Canadian case law and legislation databases.

The Great Library at the Osgoode Hall Courthouse in Toronto.

breach of contract: A party to a contract violates one or more terms of a legally binding contract.

remedy: The means by which a court or tribunal enforces its decision, such as by ordering the guilty party to pay monetary damages or take such further action the court deems appropriate to compensate victims for loss or deter future wrongful conduct.

The judge writes a decision that is distributed to the parties and then published in legal case digests and, now, electronic case databases. At that point, the decision becomes part of the *common law of employment contracts*, a large body of legal decisions about employment contracts dating back to the beginning of the employment model in 19th-century Britain. The common law of employment contracts in Canada now comprises hundreds of thousands of decided cases.

Lawyers research case law in search of decisions and reasoning that support their arguments. They also must be prepared to **distinguish** cases that do not support their argument—to explain to the judge why a previous decision relied on by their opponent is different from the case they are dealing with now. This process is necessary because the common law system operates on a **precedent**-based system known as ***stare decisis***, a Latin phrase meaning, loosely, "to stand by a previous decision." Guided by a desire for the law to be predictable, the principle of *stare decisis* instructs judges to follow the reasoning and outcomes in earlier cases that dealt with similar legal issues and facts.

If the earlier decision was decided by a *higher level of court* from the same **jurisdiction** (see Figure 1.2 for the levels of Canadian courts), then the reasoning in that decision is a **binding precedent**. This means that a lower court judge who later deals with a lawsuit involving the same, or very similar, factual and legal circumstances must apply the same legal reasoning applied by the higher court, even if they do not agree with it. Decisions that are not binding precedents can still have "precedent" value. Since the common law system prefers predictability, judges usually follow earlier decisions, even those that are not issued by a binding higher court, unless they distinguish the facts or legal issues decided in the earlier decision or they rule that the earlier decision was just plain wrong.

2. The Law of Torts

Torts are the second branch of the common law. A tort is a legal wrong defined by judges to allow a person to recover damages for harm caused by the actions of another person when the harm caused does not violate a contract or government **statute**.[7] Many of the torts that are applied in Canada were initially developed years ago by British judges. You have likely heard of some of them, even if you did not know they were called torts: *nuisance*, *trespass*, *deceit*, *negligence*, *conspiracy*, *defamation*, and *assault and battery*. All these torts have potential application to the relationships that structure work in our society. Other less well-known yet important torts with application to work include *intentional infliction of mental suffering* and *negligent misrepresentation*. Chapter 16 explores some of the most important applications of tort law to the workplace in the common law regime.

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distinguish: To explain how a prior legal decision dealt with facts or legal issues that are different from the facts or issues in the current case.

precedent: An earlier decision by a judge that dealt with the same, or very similar, facts and legal issues as those before a judge in the current case.

***stare decisis*:** A Latin term meaning "to stand by a previous decision." It is a guiding principle in the common law regime.

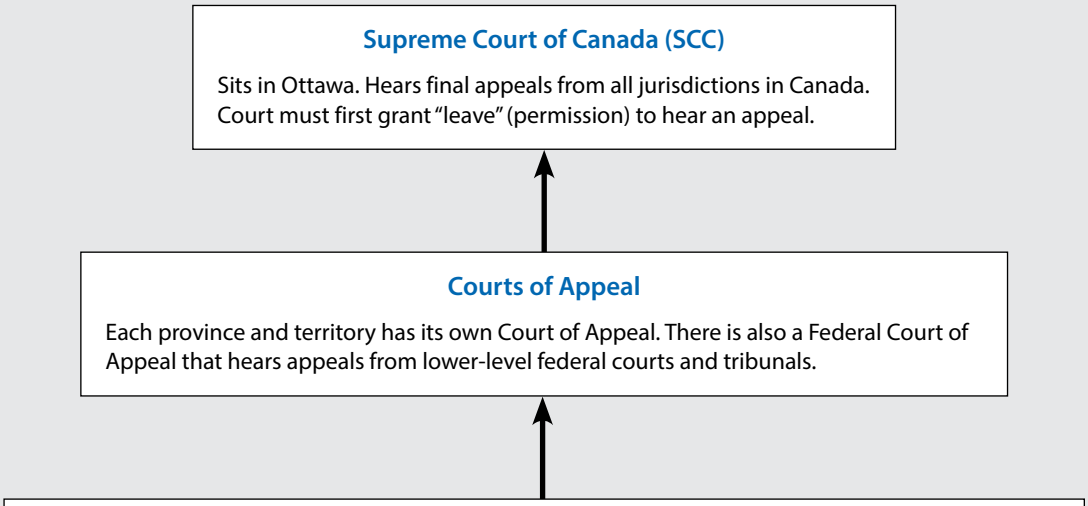
jurisdiction: The scope of authority over which a government, a court, or an expert administrative power has the power to govern.

binding precedent (or binding decision): An earlier decision by a court of higher ranking dealing with the same legal issue in a case that comes before a lower court judge. The lower court judge is required to apply the same reasoning and legal test applied by the higher court.

tort: A type of wrongful act done by one person to another (or to another's property) that judges have recognized as legally actionable. Examples are nuisance, trespass, negligence, and conspiracy.

statute: A law, or legislation, produced by a government that includes rules that regulate the conduct of business and people. An example is the Ontario *Employment Standards Act, 2000*.

FIGURE 1.2 Levels of Canadian Courts



Courts of First Instance (Lower Courts)

These courts have different names across the country, and, other than in Nunavut, where there is a unified Court of Superior Justice, the courts of first instance are usually further subdivided into inferior and superior courts, which have jurisdiction over different subject matter. Judges in the inferior courts are appointed by the provinces and territories, whereas superior court judges are appointed by the federal government. Superior courts have general authority to hear most private lawsuits and serious criminal matters, while inferior courts are usually assigned less serious criminal matters, traffic violations, and some specialized subject matters, such as many family law matters. Most (though not all) employment-related matters are heard initially in the superior courts of the jurisdiction in which the legal proceeding is launched.

Here is a quick overview of provincial and territorial courts of first instance:

JURISDICTION	INFERIOR COURT	SUPERIOR COURT
Alberta	Provincial Court	Queen's Bench
British Columbia	Provincial Court	Supreme Court
Manitoba	Provincial Court	Queen's Bench
New Brunswick	Provincial Court	Queen's Bench
Newfoundland & Labrador	Provincial Court	Supreme Court
Northwest Territories	Territorial Court	Supreme Court
Nova Scotia	Provincial Court	Supreme Court
Nunavut	Court of Justice	Court of Justice
Ontario	Ontario Court of Justice	Superior Court of Justice
Prince Edward Island	Provincial Court	Supreme Court
Quebec	Court of Quebec	Superior Court
Saskatchewan	Provincial Court	Queen's Bench
Yukon	Territorial Court	Supreme Court

The usual remedy for a tort violation is monetary damages, but judges can also order **injunctions** to remedy a tort. An *injunction* is an order to stop doing something unlawful. As we will learn in Chapter 34, torts and the courts' use of injunctions have played an important role throughout history in restricting collective activities of workers, such as strikes and picketing, aimed at winning better working conditions.[8]

B. The Regulatory Regime (Part III of This Book)

As noted above, the common law regime is guided by the powerful claim that "freedom of contract" advances individual liberty while producing the most efficient and desirable distribution of skills and resources in a society. On this basis, defenders of freedom of contract argue that the courts and governments should limit their intervention in employment relations to enforcing contracts between employers and individual workers.[9] However, this position has long been the subject of intense debate and dissent.

Most of the time, employers enjoy far superior bargaining power as compared with employees and are therefore able to unilaterally fix the terms of the contract. This "inequality of bargaining power" leaves most employees with a simple choice of whether to accept or not accept the terms the employer offers. No negotiation takes place at all. Think about your job, if you have one. Did you engage in negotiations with your employer at the time you were hired, or did you just accept whatever wage rate and other conditions your employer provided? Employees of Walmart or Tim Hortons do not normally negotiate over starting wages or health benefits. Typically, the employers present a standard form employment contract (if they even bother to put anything in writing), and the worker signs it.

Sometimes a person has multiple job possibilities or special skills that are in demand, so they can reject a poor offer by one or more employers. However, often, and particularly in periods of high unemployment and for jobs requiring few specialized skills, far more workers are seeking work than there are jobs available. Since most workers require income from work to survive, the option of not accepting a job is often not a realistic one. In most cases, workers need a job far more than an employer needs any particular worker.

The fact that the more powerful party—employers—can almost always fix the terms of the employment contract unilaterally is not a new insight. Adam Smith (1723–1790) knew it, as did Karl Marx (1818–1883), two great thinkers with very different perspectives on the role of markets, law, and work.[10] German sociologist Max Weber (1864–1920) summarized the point as follows:

> The formal right of a worker to enter into any contract whatsoever with any employer whatsoever does not in practice represent for the employment seeker even the slightest freedom in the determination of his own conditions of work, and it does not guarantee him any influence in the process. It rather means, primarily, that the more powerful party in the market, i.e., normally the employer, has the possibility to set the terms, to offer a job "take it or leave it," and given the normally more pressing economic need of the worker, to impose his terms upon him.[11]

The Supreme Court of Canada has recognized that employment contracts are distinguishable from typical commercial contracts by the inherent inequality of bargaining power involved. For example, in the 1992 case of *Machtinger v. HOJ Industries Ltd.*, discussed in Chapter 9, the Court agreed with the following observations by Professor Katherine Swinton:

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injunction: A legal order issued by a judge prohibiting a person from engaging in a particular course of action, such as breaching a contract, committing a tort, or violating a statute.

> [T]he terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.[12]

The claim that employees usually are the weaker party in the employment contract is not very controversial. However, whether this inequality of bargaining power is problematic and creates a need for legislative intervention to protect employees is one of the great debates in work law policy.[13] We will explore it throughout this book. However, it was important to introduce the debate at this early point to understand the origins of the second regime of work law, the regulatory standards regime.

In practice, employers often have not exercised their superior power in a responsible manner deemed acceptable to society. In the early days of industrial capitalism in Canada, for example, before much employment protection legislation existed, working conditions were often horrific, characterized by dangerous practices, long hours, low pay, and verbal and physical abuse at the hands of employers. Consider the following description of working conditions in some late-19th-century Canadian factories, as described by a commissioner in a government inquiry:

> Many children of tender age, some of them not more than nine years old, were employed in cotton, glass, tobacco, and cigar factories. … Some of them worked from six o'clock in the morning till six in the evening, with less than an hour for dinner, others worked from seven in the evening till six in the morning. … The darkest pages in the testimony … are those recording the beating and imprisonment of children employed in factories. Your Commissioners earnestly hope that these barbarous practices may be removed, and such treatment made a penal offence, so that Canadians may no longer rest under the reproach that the lash and the dungeon are accompaniments of manufacturing industry in the Dominion.[14]

The sorts of working conditions described in the preceding passage led governments across Canada to intervene in freedom of contract by enacting legislation (statutes and **regulations**) that regulates working conditions. In fact, there has never been a time in Canada when employment was purely a matter of free contracting; for as long as employment has existed, so too has employment regulation.

Today, employment is among the most regulated of all relationships in society. In Part III, we will examine government legislation that regulates wages and working time, termination of employment contracts, workplace health and safety, human rights and discrimination, workers' compensation, and other forms of legislation that aim to protect employees. Most such legislation that has as its central purpose the protection of vulnerable employees from the superior bargaining power of employers is known as **protective standards regulation**.[15] There are other types of legislation relevant to the law of work that do not specifically target vulnerable workers but nevertheless affect labour markets and the employment relationship in important ways. For example, vulnerable employees are not the focus of intellectual property (IP) legislation, but IP laws affect who owns the product of a worker's labour. Immigration laws determine who is entitled to work in Canada. Legislation governing bankruptcies, privacy, pensions, and global

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regulation: A government-made detailed rule introduced as a supplement to, and pursuant to authority created in, a statute. For example, the Ontario *Employment Standards Act, 2000* requires that employers pay at least "the prescribed minimum wage" but does not say what that wage rate is. That Act gives the government the right to introduce regulations (in s. 141), and one regulation (O. Reg. 285/01) sets out the precise amount of the minimum wage.

protective standards regulation: A government regulation designed primarily to protect employees by imposing mandatory standards, such as minimum contract requirements and safety rules.

trade is not directly or solely directed at the employment relationship, but these laws have important effects on that relationship. Thus, the law of work includes both protective standards regulation and the broader system of legal rules that have important effects on labour markets. We consider both types of legislation in Part III.

Regulation is usually enforced by a combination of government inspections and complaints filed by people who believe their statutory rights have been violated. The task of hearing those complaints falls to **expert administrative tribunals**. Tribunals are created by statutes and are not the same as courts, although they sometimes function in a similar manner. Governments staff tribunals with experts in the field, who help employers and employees resolve disputes through mediation. When settlements cannot be obtained, tribunals hold hearings and issue legally binding decisions. By assigning authority over employment statutes to expert administrative tribunals, governments also limit the volume of employment-related disputes going to the courts.

For example, one of the busiest administrative tribunals in Canada is the Ontario Labour Relations Board, which has authority to interpret several employment-related statutes, including the provincial *Labour Relations Act, 1995*[16] and *Employment Standards Act, 2000*.[17] The adjudicators are known as *chairs* or *vice-chairs*, rather than judges. The adjudicators conduct hearings and issue decisions resolving disputes arising under those statutes. Similar tribunals exist in every jurisdiction in Canada. The courts play a smaller role in the regulatory standards regime than in the common law regime. The role of the courts is limited mostly to reviewing tribunal decisions to ensure that the tribunal does not exceed the authority granted it under its constituting statute, a process known as **judicial review**.

C. *The Collective Bargaining Regime (Part IV of This Book)*

The third regime of work law, the collective bargaining regime, is also primarily a response to the imbalance of power in the employment relationship. However, rather than impose mandatory rules ("pay at least the minimum wage," "do not work more than 48 hours in a week," "do not pay women less than men for the same work") like the regulatory standards regime, the collective bargaining regime addresses the inequality of bargaining power by conferring more power on workers to act collectively so that they can bargain a better deal for themselves. Whereas a single worker acting alone usually lacks sufficient power to bargain with their employer over working conditions, a group of workers acting in combination often does have sufficient power to bargain. If those workers, acting as a collective, can withhold their labour (**strike**) as bargaining leverage, then their bargaining power grows substantially.

The collective bargaining regime is concerned with the processes through which workers act collectively in pursuit of higher wages and better benefits and working conditions. Otto Kahn-Freund (1900–1979), who was a professor of labour law at Oxford University, provided a now often-cited justification for labour (collective bargaining) laws:

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expert administrative tribunal: A decision-making body created by a government statute and given responsibility for interpreting and enforcing one or more statutes and any regulations pursuant to that statute.

judicial review: The process through which a decision of an expert administrative tribunal is appealed to a court on the basis that the tribunal exceeded its authority (or jurisdiction) as defined in the statute that created it or that the tribunal's decision was wrong. How much deference a court must give to the expert tribunal's decision is a complex question that is considered in a field of law known as *administrative law*.

strike: Legislation can assign a particular definition to the word *strike*. In Canada, strikes are usually defined to include both (1) a collective refusal by employees to perform work and (2) a deliberate collective slowdown by workers designed to restrict the output of an employer (commonly known as a *work to rule*).

> In its inception [the employment relationship] is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by the indispensable figment of the legal mind known as the "contract of employment." The main object of labour [collective bargaining] law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.[18]

This idea that collective bargaining produces a "countervailing force" that permits employees to deal with the employer on a more equal footing is central to the collective bargaining regime. Whether law *should* encourage or prohibit collective worker action is one of the great enduring debates in labour law and policy. We will explore these issues in detail in Part IV.

The collective bargaining regime comprises three categories of legal rules:

1. Government-made statutory rules found in labour relations statutes regulate the formation and administration of unions, collective bargaining, and collective bargaining conflict and are enforced by expert administrative tribunals called *labour relations boards*.
2. Collectively bargained rules found in **collective agreements**. Employers and unions usually negotiate these, although in some cases collective agreements are imposed in whole or in part by **interest arbitrators**. Collective agreement rules are enforced by either labour boards or expert **labour arbitrators**.
3. Judge-made rules based in common law torts mostly apply to labour picketing and strikes, which are issued and enforced by the courts.

All three categories of rules function together to create a complex, multi-layered legal model that seeks to balance the sometimes overlapping but often competing interests of workers and employers and their associations, suppliers, consumers, the broader society, and "the economy" in general. Canadian government support for collective bargaining has ebbed and flowed dramatically over the past century, from outright hostility before the 1940s to cautious support in the decades following World War II to resistance again, at least by conservative political parties, since the 1980s.[19] We will discuss these trends in greater detail in Part IV, including ways in which law and labour policy is used by governments to promote or discourage the spread of collective bargaining.

Once workers are covered by a collective agreement, the legal rules of contract interpretation applied by judges to individual employment contracts in the common law regime, introduced above and explored in Part II of this book, no longer apply. The collective bargaining regime replaces the common law of the employment contract for unionized workers. Canadian labour law statutes require that all disputes between unions and employers about the interpretation and application of collective agreements be resolved by labour arbitrators rather than judges. Since the 1940s, labour arbitrators have developed a large body of labour arbitration case law, and many of the rules of interpretation that are applied to collective agreements are different from those applied to individual employment contracts by judges in the common law regime, as we will learn in Part IV of this book.[20]

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collective agreement: A contract between an employer (or employers) and a trade union (or trade unions) that sets out the conditions of employment for a group of employees.

interest arbitrator: An individual or a three-person expert arbitration board tasked with writing the terms of a collective agreement when the union and employer are unable to reach agreement through voluntary collective bargaining.

labour arbitrator: An individual or a three-person expert arbitration panel appointed to decide disputes over the application and interpretation of collective agreements.

III. Chapter Summary

This chapter introduced the three regimes of work law that regulate the employment relationship in Canada at a general level, as if we were looking down at a topographical map of the law. We can summarize what we learned as follows:

- The *common law regime* is concerned with legal rules found in employment contracts between individual employees and employers, including rules judges have developed over the years when interpreting those contracts, and with another branch of judge-made legal rules known as *torts*. We learn more about this regime in Part II.
- The *regulatory regime* is concerned with rules governing the work relationship—and employment contracts in particular—created by governments and codified in legislation (statutes and regulations). The regulatory regime includes both legislation designed to protect vulnerable employees and legislation that affects labour markets in substantial ways. Those rules are interpreted by expert administrative tribunals created by governments for that purpose. We learn more about this regime in Part III.
- The *collective bargaining regime* is concerned with three categories of legal rules. The first category comprises government-made statutory rules that regulate areas including union formation, collective bargaining processes, and collective bargaining conflict. The second comprises collective bargaining rules found in collective agreements, which are negotiated by unions (on behalf of employees) and employers (and sometimes employer associations). Labour arbitrators decide collective agreement disputes, guided by a large volume of labour arbitration jurisprudence developed since the 1940s. The third comprises judge-made rules based in common law torts that continue to apply within the collective bargaining regime, particularly in relation to picketing and strikes. We learn more about this regime in Part IV.

QUESTIONS AND ISSUES FOR DISCUSSION

1. What two branches of law compose the common law regime?
2. Briefly explain the three regimes of work law. Who (or what) is responsible for resolving disputes that arise under each of the three regimes?
3. What are three levels of courts in Canada?
4. Explain the concept of *stare decisis.*
5. What are some strengths and weaknesses of "freedom of contract" in the context of work law?
6. What three categories of legal rules compose the collective bargaining regime?

EXERCISE

Throughout this book, we will examine a lot of case law decided by courts and expert administrative tribunals. In the past, accessing case law was difficult and mostly the domain of lawyers. It required visiting a law library and conducting complicated legal research using dense legal reporting books and complex legal research skills honed in law school and years of legal practice.

Today, lawyers and non-lawyers alike can access legal decisions on their computers. While the most thorough legal databases require payment of expensive fees, legal decisions are increasingly being posted on free Internet databases. The Canadian Legal Information Institute (CanLII) is a prime example. It is produced by the various Canadian law societies with the mandate "to provide efficient and open online access to judicial decisions and legislative documents."[21]

This book includes a number of exercises that encourage you to conduct your own legal research using CanLII. To give you a sense of how CanLII works, try the following exercise.

1. Go to the CanLII home page: <https://www.canlii.org>.
2. In the "Document Text" search window, type the phrase "wrongful dismissal" in quotation marks. That search should give you over 13,000 legal decisions.
3. Find one decision that sounds interesting to you from the brief description that appears in the search results. Select the link to the decision. Answer the following questions:
   a. What is the name of the case?
   b. What year was the case decided?
   c. In what province or territory did the case originate?
   d. Was the case decided by a court or an expert administrative tribunal?
   e. If it was a court, which court? If it was a tribunal, which tribunal?
   f. Read the case. Can you determine what the dispute was about, and which party won the case?

If this is your first time reading a legal decision, it may be difficult for you to follow what is happening. Don't worry—that is normal. Reading the law takes a bit of practice because the law uses specialized language. We will decipher this language throughout this book.

NOTES AND REFERENCES

1. G. Davidov, "The Reports of My Death Are Greatly Exaggerated: 'Employee' as a Viable (Though Overly-Used) Legal Concept" in G. Davidov and B. Langille, eds, *Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing, 2006) 133 at 133-34; B. Langille, "Labour Law's Back Pages" in Davidov and Langille, ibid. at 13; J. Fudge, E. Tucker & L. Vosko, "Changing Boundaries in Employment: Developing a New Platform for Labour Law" (2003) 10 CLELJ 329; H. Collins, "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws" (1990) 10 Oxford J Legal Stud 353.
2. C. Mummé, *The Indispensable Figment of the Legal Mind: The Contract of Employment at Common Law in Ontario, 1890–1979* (PhD Dissertation, Osgoode Hall Law School, 2013) at 83.
3. P. 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) 175-211.
4. See e.g. *An Act to Regulate the Duties Between Master and Servant, and for Other Purposes Therein Mentioned*, S. Prov. Can. 1847, c. 23, S. Prov. Can. 1851, c. 11; Ontario *Master and Servant Act of 1855*, 18 Vict., c. 136.
5. Sir Henry Maine famously wrote that "the movement of the progressive societies has hitherto been a movement from Status to Contract," and the transition from master and servant law to the employment contract model is often considered an important part of that story. H.S. Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (London, UK: J. Murray, 1861) at 170. However, as we discuss in Chapter 5, employment contracts have always been heavily regulated and subject to special rules of interpretation developed by common law judges. See Mummé, supra note 2.
6. H. Collins, *Employment Law*, 2nd ed (Oxford: Oxford University Press, 2009) at 14-15. Leading works advocating the freedom of contract school of employment law and the common law model that supports it include R. Posner, *Economic Analysis of Law*, 5th ed (New York: Aspen Law and Business, 1998) ch. 8; M. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962); R. Epstein, "In Defense of Contract at Will" (1984) 51 U Chicago L Rev 947; R. Epstein, *Simple Rules for a Complex World* (Cambridge, MA: Harvard University Press, 1995) chs. 8 and 9.
7. On Canadian tort law, see E. Weinrib, *Tort Law: Cases and Materials*, 4th ed (Toronto: Emond Publishing, 2014); A.M. Linden, *Canadian Tort Law*, 6th ed (Toronto: Butterworths, 1997).
8. See the discussion in H. Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001).
9. See e.g. Posner, supra note 6 at ch. 11.
10. A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol. 1 (London, UK: 1776) at 81: "[I]t is not … difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into compliance with their

terms. … In all such disputes the masters [employers] can hold out much longer." See also K. Marx & F. Engels, *The Communist Manifesto* (London, UK: 1848) at 347; K. Marx, *Capital* (Hamburg: 1867). For a review of Marx and the application of his work to industrial relations and the law of work, see J. Goddard, *Industrial Relations, the Economy, and Society*, 4th ed (Toronto: Captus Press, 2011) ch. 2. See also M. Skousen, *The Big Three in Economics*: *Adam Smith, Karl Marx, and John Maynard Keynes* (Armonk, NY: M.E. Sharp, 2007); E. Tucker, "Renorming Labour Law: Can We Escape Labour Law's Recurring Regulatory Dilemmas?" (2010) 39 Ind LJ 99.

11. M. Weber, "Freedom and Coercion" in M. Rheinstein, ed, *Max Weber on Law in Economy and Society* (Cambridge, MA: Harvard University Press, 1954) at 188.
12. *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986 at 1003.
13. A vast amount of legal literature exists on this debate, dating from the beginning of waged labour. A good summary of some of the leading historical voices in this debate is found in Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials, and Commentary*, 8th ed (Toronto: Irwin, 2011) ch. 1. In particular, see the famous exchange between M. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 12-15, and C.B. MacPherson, "Elegant Tombstones: A Note on Friedman's Freedom" in *Democratic Theory: Essays in Retrieval* (Oxford: Oxford University Press, 1973) 143-56 at 143. Some contributions include B. Langille, "Labour Law's Theory of Justice" in G. Davidov & B. Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 101 at 111; H. Arthurs, "Labour Law After Labour" in Davidov & Langille, 13 at 13; A. Davies, *Perspectives on Labour Law*, 2nd ed (New York: Cambridge University Press, 2009) ch. 2.
14. J. Rinehart, *The Tyranny of Work: Alienation and the Labour Process*, 2nd ed (Toronto: Harcourt Brace, 1987) at 40; G. Kealey, *Canada Investigates Industrialism* (Toronto: University of Toronto Press, 1973) at 14, 22.
15. S. Bernstein, K. Lippel, E. Tucker & L. Vosko, "Precarious Employment and the Law's Flaws: Identifying Regulatory Failure and Securing Effective Protection for Workers" in L. Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal, QC: McGill-Queen's University Press, 2006) at 203.
16. SO 1995, c. 1, Sched. A.
17. SO 2000, c. 41.
18. P. Davies & M. Freedland, *Kahn-Freund's Labour and the Law*, 3rd ed (London, UK: Stevens, 1983) at 18. This passage was quoted with approval by Chief Justice Dickson of the Supreme Court of Canada in *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038 at 1051-52.
19. L. Panitch & D. Schwartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, 3rd ed (Toronto: Garamond Press, 2003); J. Fudge & E. Tucker, *Labour Before the Law* (Oxford: Oxford University Press, 2001).
20. A number of books describe labour arbitration law in Canada, including D. Brown, D. Beatty & C. Deacon, *Canadian Labour Arbitration*, 4th ed (Aurora, ON: Canada Law Book, 2006); M. Mitchnick & B. Etherington, *Labour Arbitration in Canada* (Toronto: Lancaster House, 2006); R. Snyder, *Collective Agreement Arbitration in Canada*, 5th ed (Markham, ON: LexisNexis, 2013).
21. "What Is CanLII" (last visited 19 September 2023), online: *CanLII* <https://www.canlii.org/en/info/about.html>.