Labour Codes and Standards: Benefactors or Beneficiaries?

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Labour Codes and Employment Standards are synonymous terms attached to labour legislation that is found in all jurisdictions, both federal and provincial. Regardless of the term used, these respective statutes and their accompanying regulations tend to have similar inherent themes in terms of standards, and similar procedural and institutional designs. Presumably, these similar themes and designs reflect the intent of each legislature to contribute to social justice in their respective jurisdictions. Perhaps some also intend to be viewed as leaders by the nature and scope of their legislation. Perhaps others are content to follow.

Meaningful labour codes require key elements of fiscal responsibility. First, this type of legislation should create a vehicle for justice and substantive rights. The vehicles's machinery ideally should be fine-tuned for meting out corrective and distributive justice and assume responsibility within its design to correct and resolve conflicts and contradictions.

Second, labour codes should have institutional and procedural design that provide fairness in the administration and enforcement of the legislation, and accountability by government for those designs. Those charged with the internal administration of labour codes should be held accountable for legal propriety and fairness. Lawyers and judges have the external responsibility to monitor and enforce that accountability.

Labour codes should also provide the third element of applied ethics within the design of the structure for administration of the legislation. This element contemplates that the legislature, and those charged with administrative and enforcement procedures, will ensure the removal of ambiguity and abstract interpretation. It also contemplates an honest interpretation of the legislation in the day to day administration of the legislation.

Labour codes and employment standards legislation should provide service based on need. But the need must be assessed and supported before the fact. Unfortunately, this assessment is too often ignored or cast aside for other political priorities. If legislation is properly conceived, it can actually control the need. If improperly conceived, it will create and manipulate needs indicative

only of the values and ethics imposed by the legislation and not necessarily the common law. Improperly conceived legislation also fails to balance with employer and employee perceptions of need.

All of these elements are interrelated and play a key role in the administration of justice. However, it is painfully obvious that our legislators, and indeed our society, have not reached a consensus on employment standards or the key elements of fiscal responsibility in creating such legislation. Labour codes and employment standards have traditionally taken the rear seat to other areas of legal concern. This is apparent through any examination of the jurisprudence, legal texts and law school curriculum.

Although labour codes have many similar inherent themes, standards and procedural provisions, the similarity of these themes and procedural provisions may end quickly upon an examination of the specific wording of the legislation. A comparison of similar provisions also indicates the disparate values imposed by legislation separated only by provincial boundaries. Two models have been selected for comparison and discussion.

I. MODEL I - GREATER RIGHT OR BENEFIT

The Ontario's Employment Standards Act contains the following provisions:

> *4(2) A right, benefit, term or condition of employment under a contract, oral or written, express or implied, or under any other Act or any schedule, order or regulation made thereunder that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard.*[1]
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> *5(1) Where terms or conditions of employment in a collective agreement as defined in the Labour Relations Act confer a higher remuneration in money or a greater right or benefit for an employee respecting holidays than the provisions of Part VII, the terms or conditions of employment shall prevail.*

5(2) Where the Director finds that terms or conditions of employment in a contract of employment oral or written, express or implied, that are not in a collective agreement confer a higher remuneration in money or a greater right or benefit for an employee respecting holidays than the provisions of Part VII, the terms or conditions of employment shall prevail.[2]

Comparators are found in other provincial jurisdictions and can be generally characterized as follows :

BRITISH COLUMBIA - a collective agreement is to prevail where it contains provisions relating to hours of work, overtime, vacation pay, termination or layoff, maternity and parental leave.[3]

NEW BRUNSWICK - the statute applies except where a collective agreement expressly states that a benefit, privilege, right or obligation was agreed to in lieu of a statutory employment standard.[4]

NOVA SCOTIA - the statute does not affect rights or benefits under any law, custom, contract or arrangement more favourable than the rights or benefits under the statute.[5]

QUEBEC - an agreement or decree may grant an employee a more advantageous condition of employment than required in a standard prescribed by the *Labour Standards Act.*[6]

SASKATCHEWAN - The Act does not affect any agreement, contract of service or customs that ensures more favourable conditions, hours of work or wages than those provided by the Act.[7]

YUKON - The Act is not to be construed as affecting any rights or benefits of an employee under any law, customs, contract or arrangement that are more favourable than rights or benefits under the Act.[8]

The list of comparators is not intended to be exhaustive.[9] Of interest is the differing approaches to a common theme. In British Columbia, a collective agreement shall prevail over the respective employment standards listed to the extent the collective agreement contains such specific provisions. Similarly, in New Brunswick the statute applies except where a collective agreement confers a greater right or benefit and then only where such benefit was agreed to in lieu of a statutory employment standard. Neither the British Columbia statute nor the New Brunswick statute speak to a greater right or benefit arising outside of a collective agreement. This may be a message from both jurisdictions that they will not enforce common law claims or rights exceeding the legislated minimum standards.

The legislation in Nova Scotia, Quebec, Saskatchewan and the Yukon is couched in language that appears to preserve, yet not interfere with, greater rights or benefits arising at common law through custom, contract or arrangement. Again, there is no strong message that the legislation purports to assume jurisdiction to enforce such greater common law rights or benefits.

On the other hand, section 4(2) of the Ontario statute provides that a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard "shall prevail over an employment standard". Those last six words of the provision have been interpreted by the Ontario Employment Standards Branch as providing jurisdiction to enforce a greater right or benefit or lesser hours of work.

The wording of section 4(2) of the Ontario Statute has attracted an array of interpretations by Employment Standards Officers and referees appointed under the Act. For example, it has been held that an employer may not rely on a greater benefit with respect to one standard to offset a lesser benefit with respect to another standard.[10] Yet one case discloses that the *Employment Standards Branch* had twice approved a scheme whereby a non-discretionary bonus was inclusive of both overtime and vacation pay.[11]

In one case the employer had utilized a complex schedule comprising eight-hour shifts, so that in a particular seven-day period, an employee would work fifty-six hours. The union argued that the affected employees were entitled to be paid overtime for all hours worked in excess of forty-four hours in "any" week and insisted that the work "week" means the seven consecutive days that coincide with the "work week" established by the company. The employer argued that the overtime provisions in the collective agreement on the whole provide greater benefits than those imposed by the employment standard under section 25 of the Act respecting overtime, and that the collective agreement provisions must accordingly prevail. In response to the employer's latter argument, the referee held, in part:[12]

> *In the present instance, there is one employment standard directed to one particular overtime situation on the one hand and a series of overtime provisions in a collective agreement on the other. The latter all deal with various applications of overtime rates in different situations. None of the situations, however, have any reference to the employment standard set up under section 25. The company's position is that we should put the accumulated overtime provisions in the scale and weigh them as a whole against the requirements of the standards, and conclude that the collective agreement provisions should prevail over the standard. In my respectful opinion, the Canmore situation does not equate itself with that before me. In Canmore the comparison is between provision and provision where both refer to a number of situations with varying conditions attached, but all related to the subject of general holidays. It was with that provisional scope in mind that an overall comparison of the competing provisions with respect to general holidays was decreed. In the present case, on the other hand, the Act, in section 4, speaks of a right, etc. vs. an employment standard. That is, there is here an employment standard that deals with a specific overtime situation so that, in my view, the collective agreement with which we are dealing must, in order to take advantage of the provisions of section 4, better that particular employment standard; that is to say, the parties to the agreement should have addressed themselves to the seven consecutive work-day situation and provided benefits in that area which are better than those under the relevant employment standard if they wished the agreement to prevail over the standard. The existence of other overtime provisions in the collective agreement which have no reference to the standard cannot relieve the parties to the agreement from meeting the obligations arising under the specific requirement of section 25. I would simply add that it would seem to me to be extremely difficult to conclude, on a comparison basis (assuming that to be a correct procedure) that all the provisions relating to overtime in the collective agreement, in any event, bestow a greater right, benefit, etc. on the employees than does the requirement under section 25.*

The Divisional Court quashed the referee's decision and held, in part, that the referee had committed an error in the construction which he placed upon section 4(2) of the Act and its applicability to the case before him.[13]

> *Section 25 is the entire statutory provision included under the heading of "overtime" and does not as stated by the Referee, merely set up an employment standard. Section 4(2) required that the Referee compare the rights, benefits, terms, or conditions of the collective agreement (here as in Article 11 of the agreement) relative to overtime, with the provisions of the statute found in s. 25(1). While the language of s. 4(2) speaks in the singular all such rights, benefits, terms and conditions are so included in the comparison required to be made by the Referee. Section 4(2) did apply and the comparison called for should have been made.*

On appeal to the Court of Appeal, it was held:

> *The Divisional Court was of the opinion that the referee also erred in his interpretation of s. 4(2) of the Act. Since I am of the opinion that the Divisional Court was right in its interpretation of s. 215(1), it is unnecessary for me to express an opinion on section 4(2).*[14]

It has been held that there may be no entitlement to the notice of termination contemplated by section 40 of the Act where the employee is protected by the just cause provisions of a collective agreement:

> *Where a collective agreement exists with a no discharge but for just cause provision, the notice provision under the agreement prevails. In such case, the notice under section 40(1) need not be given and sections 40(6)(b) or 7(a) do not apply. Where an employee chooses to forego his/her rights under a collective agreement that does not enable him/her to circumvent the provisions of section 4(2).*[15]

In another case, the same referee concluded that the right of recall provided for in the collective agreement represented a greater benefit to an employee than the statutory right to notice of termination or pay in lieu of notice under the Act.[16] On judicial review the court held:

We think that the referee was required to consider this case under section 4(2) of the Act. We think his decision and his reasons for applying that section were reasonable.[17]

The flavour of these examples may invite creative imaginations. However, they do little to satisfy consistent application and interpretation of the statute. In the interim, the language of section 4(2) remains unchanged and employment standards officers continue to administer that section by following those referee decisions or court decisions that appear to have convenience or immediate utility to closing a file.

II MODEL II - PAY NOW - APPEAL LATER

The second model briefly examines the various statutory provisions used to collect or enforce arrears of wages and the appeal processes. The comparators that follow share identical goals, similar themes, but widely differing procedures.

BRITISH COLUMBIA - as a condition precedent to a review of an order, the employer must pay $100 or 10% of the order, whichever is greater (as a deposit against the order) with the application for review within 8 days of the order.[18]

ALBERTA - the employer must pay the amount ordered, or $300 whichever is less, for each employee covered by the order, with the notice of appeal.[19]

MANITOBA - order by magistrate after trial of issues.[20] - notice of termination - payment required where order issued after hearing.[21]

NEW BRUNSWICK - tribunal may require bond from employer as a condition precedent to appeal of order.[22]

NOVA SCOTIA - right to appeal the Director's order to the Tribunal. The Tribunal has the discretion to require a bond as a condition precedent.[23]

PRINCE EDWARD ISLAND - appeal lies within 15 days of inspector's order, where the inspector has first collected the monies ordered to be paid.[24]

SASKATCHEWAN - right to appeal directors's certificate to judge of Court of Queen's Bench within 14 days of service of notice of filing of certificate.[25]

NORTH WEST TERRITORIES - order of a Justice after hearing.[26]

YUKON - right to apply to Board for review of director's certificate within 21 days of service of notice of issuance of certificate.[27]

ONTARIO - the employer may apply for review of officer's order to pay within 15 days of the date of the order and upon payment of the order, inclusive of penalty.[28]

ONTARIO - the director may appoint a referee for issue determination, in which case, the referee may issue order after hearing.[29]

Only Manitoba, Saskatchewan and the North West Territories provide the protection and safeguards of a hearing on the merits before the courts in the first instance. The courts are granted the jurisdiction to issue an order after a hearing. The Yukon provides the right of review with no other condition precedent except temporal limitations. Nova Scotia and New Brunswick provide the right to appeal but the trier of fact may require a bond as a condition precedent. British Columbia and Alberta require substantial payment as a condition precedent to appeal. Prince Edward Island and Ontario both require full payment of the order as a condition precedent to appeal.

Using Ontario as an example, it is the employment standards officer who issues 95% of the orders to pay, along with mandatory penalty. This legislative authority contemplates a full and fair investigation and quasi-judicial decision-making process prior to issuing an order to pay, or in refusing to issue an order to pay.

The Ontario Court of Appeal, in *Re Downing and Gradin,* carefully analyzed the function of the employment standards officer exercising certain specific powers:

> *The Act, by s. 2(3), expressly provides that the* Statutory Powers Procedure Act, *1971 (Ont.) c. 47, does not apply to employment standards officers in the exercise of their powers under ss. 33(4), 47 or 49. As a result, an employee is not entitled to a full evidentiary hearing of the type provided by the* Statutory Powers Procedures Act, 1971. *An employer, however, who considers himself aggrieved by an order made by an employment standards officer may, after paying to the Director of Employment Standards the wages and penalty ordered to be paid, apply, pursuant to s. 50, for a review of the order by a Referee "by way of a hearing". The* Statutory Procedure Act, *1971, would apply to such a hearing. The decision of the Referee is final and binding on the parties.*[30]

The court also held that the powers of an employment standards officer were adjudicative:

> *In the present case, the employment standards officers have the power to adjudicate as well as to investigate. Their investigation is made for the purpose of providing them with information on which to base the decision they must make. The duties of the employment standards officer embrace all the important indicia of the exercise of a judicial power including the ascertainment of facts, the application of the law to those facts and the making of a decision which is binding upon the parties. Whatever the forms and procedures followed, there is no doubt that this process is adjudicative because it interprets the law and declares the rights of parties* [...][31]

As the employment standards officers exercised adjudicative or judicial powers, the specific and well-established requirements of natural justice govern the exercise of judicial powers:[32]

One such requirement is the rule *audi alteram partem* which governs all those who exercise judicial powers.

The court also held:

> *The right of a party to know and reply continues throughout an investigation and it may be misleading to use the maxim audi alteram partem to describe it. When a complaint is filed, as in this case, the decision-making officer is not limited in his inquiry simply to hearing the answer to that complaint from the "other party". He must also advise the complainant of information discovered in the inquiry which is prejudicial to the complainant's interest: De Smith,* supra *pp. 178-80. in simple terms, the complainant had the right not only to complain but also to reply.*
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> *The requirements of natural justice could have been easily met in this case. Both employment standards officers, at the conclusion of their inquiries, made detailed reports of their findings, which were sent to the employer and filed with their department. The reports contained the essential information, which, in my view, should have been disclosed to the appellant. If the text or the substance of these reports had been communicated to her and she had been given a fair opportunity to consider and reply to them, the requirements of natural justice would have been met. After a careful review of the record, I have concluded that this did not occur.*[33]

Presumably the same requirements apply to the investigation and decision-making process of a director and a director's certificate.

Notwithstanding the requirements of natural justice, there is something manifestly wrong in requiring an employer to pay a substantial amount of money in order to obtain a proper hearing on the merits. The system, smacks of "guilty until proven innocent". The quantum involved in the order, at the wrong time in a cyclical business, could render the business insolvent or worse. The concept of buying a right to appeal also smacks of being forced to buy justice. On the other hand, once the monies have been paid over, the rights of the employee(s) are protected. But are they any less protected in a jurisdiction that provides for an employer's appeal as a matter of right?

Convenient maxims may appeal to some: "Justice must not only be done; it must be perceived to have been done", or "Justice delayed is justice denied". Should the maxims apply more to the benefactor or to the beneficiary of the legislation? Who are the benefactors of the legislation? Who are the beneficiaries of the legislation? Is it the bureaucracy created for the administration and enforcement of the legislation? Are employees the beneficiaries? Has the growth rate and supply of administrators and enforcement staff exceeded the growth rate of client needs? Has the growth rate of labour standards exceeded the growth rate of need in the general population and employment? Does the growth rate of labour standards indicate values and ethics imposed by legislation but unrelated to true client needs? Do the standards sacrifice the substantive rights of one party in order to preserve or create new rights for another party? How can the basic right of appeal be treated so differently in multiple jurisdictions in the same country? How can the concept of "greater right or benefit" be considered so differently between provinces? More important, why have the employment standards in these two models been treated so differently by our legislators?

Clearly, there are more questions than answers. Some will offer answers faster than others but ultimately the initial answers are left to those charged with administration of the legislation. In the final analysis, lawyers and judges are left with the responsibility to ensure that the administration of legislation, such as the labour codes, remains consistent with our system of administration of justice. Something to think about!

FOOTNOTES

1. *Employment Standards Act,* R.S.O. 1980, c. 137, s. 4.

2. *Ibid.* at s. 5.

3. *Employment Standards Act,* S.B.C. 1980, c. 10, s. 2(2).

4. *Employment Standards Act,* S.N.B., 1982, c. E-7.2, s. 4.

5. *Labour Standards Code,* R.S.N.S. 1989, c. 246, s. 6.

6. *Labour Standards Act.,* S.Q. 1979, c. 45, s. 94.

7. *Labour Standards Act,* R.S.S. 1978, c. L-1, s. 72(1).

8. *Employment Standards Act,* R.S.Y. 1986, c. E-4.5, s. 3.

9. For example, see also *Employment Standards Code,* S.A. 1988, c. E-10.2, s. 9.

10. *Re C. Fasano Food Market* (20 February 1978) (Satterfield) E.S.C. 482. See also *Re Collingwood Shipyards,* (20 September 1988) (Franks) E.S.C. 2378.

11. See *William Beasley Enterprises Ltd.* (23 November 1979) (Betcherman) E.S.C. 669.

12. *Re Falconbridge Nickel Mines Ltd.* (13 July 1981) (Eagan) E.S.C. 1021 and 1021A.

13. *Re Falconbridge Nickel Mines Ltd. and Egan* (18 January 1982) (Ont. Div. Ct.), aff'd (1983), 42 O.R. (2d) 179, (1983), 148 D.L.R. (3d) 474 (C.A.), leave to appeal to S.C.C. refused 52 N.R. 238.

14. *Ibid.* at 201 O.R., at 496 D.L.R., Houlden J.A.

15. *Supra* note 10.

16. Re *Holmes Foundry* (11 September 1986) (Gorsky) E.S.C. 2170.

17. *Re Holmes Foundry and Gorsky* (11 March 1988) (Div. Ct.).

18. *Employment Standards Act,* S.B.C. 1980, c. 10, ss. 12(3) and (4).

19. *Employment Standards Act,* S.A. 1988, c. E-10.2, ss. 94 and 95.

20. *Employment Standards Code,* R.S.M. 1987, c. E-110, s. 15.

21. *Ibid. at* s. 39(14).

22. *Employment Standards Act*, S.N.B. 1982, s. 71.

23. *Labour Standards Code*, R.S.N.S. 1989, s. 21.

24. *Labour Act*, R.S.P.E.I. 1988, s. 90(3).

25. *Labour Standards Act*, R.S.S. 1978, s. 62(1).

26. *Wages Recovery Act*, R.S.N.W.T. 1974, s. 8.

27. *Employment Standards Act*, R.S.Y. 1986, s. 76.

28. *Employment Standards Act*, R.S.O. 1980, s. 50(1).

29. *Employment Standards Act*, R.S.O. 1980, s. 51(1).

30. *Re Downing and Gradin* (1978), 21 O.R. (2d) 292, 92 D.L.R. (3d) 355 (C.A.).

31. *Ibid.* at 305-313 O.R., at 368 D.L.R.

32. *Ibid.* at 307 O.R., at 369 D.L.R.

33. *Ibid.* at 311-312 O.R., at 374-375 D.L.R.