**RECONSTITUTING EMPLOYMENT REGULATORY STRATEGIES
IN ONTARIO: THE *EMPLOYMENT STANDARDS ACT 2000***

by

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A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of the requirements for the degree of
Master of Arts

Institute of Political Economy

Carleton University

Ottawa, Ontario

06 September 2002

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The *Employment Standards Act 2002*

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Abstract

This thesis considers the recent amendments to the *Employment Standards Act* in terms of the privatization and deregulation of minimum employment standards in the new infrastructure. It suggests that the move to enhance flexibility in the individual employment contract has been accompanied by a reconstitution and a re-regulation of minimum employment standards. When viewed within the larger context of domestic regulatory reform and regional economic integration, it is apparent that the Ontario government responded to influencing factors beyond its control, however, the *Employment Standards Act 2000* is not wholly a product of exogenous pressures. This thesis argues that the rhetoric of economic integration opened political space for the state to embark upon mass regulatory reforms. In this regard, the state is seen to be dynamic and activist in pursuing desired domestic strategies that are congruent with its political institutions and governing philosophies.

Acknowledgements

Admittedly, the urge to rework and revise entire sections of my work were often so great, I thought that I would never finish. But I did and I have many people to thank (which I will do privately) for their efforts towards the completion of this thesis.

For now, I would like to acknowledge several individuals who provided invaluable expertise and guidance. In particular, I would like to extend a special thank-you to my co-supervisors, Professor H. Armstrong and Professor R. Warskett, for their patience, insights and confidence in my abilities. I am especially grateful for the editing support they graciously provided. I would also like to thank my external examiner, Professor D. Swartz, for his time and comments, which have contributed towards an intellectually stronger thesis.

Finally, I would like to thank my partner, Keen-Man Fong, for the incredible amount of love, support and encouragement he has given me over the many years. I'm finally done!

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Chapter 1 Introduction

Prior to and since the signing of the North American Free Trade Agreement (NAFTA), fears of the forced harmonization of labour and employment laws to the lowest common denominator have often been voiced (see for example Lynk 1988). Capital's strategy of seeking the highest return on investment is thought to facilitate a "race-to-the bottom" where various protections, including labour rights, will be eroded or completely discarded. In this competitive global environment, which is itself undergoing rapid changes, states are forced to make strategic choices in labour policy as well as in other areas.

Protective labour legislation is factored in heavily in investment decisions. The owners of capital scrutinize them for compatibility and ease of accumulation. Labour market institutions may be viewed as either a barrier or an asset to future profits and competitiveness. It was not surprising then, that the government of Ontario, in announcing to the world "Ontario is opened for business", recognized the *Employment Standards Act* (ESA) as "a foundation for increased productivity, job creation, growth and investment" (Ontario 2000d: par.16).

As workers face declining rates of unionization, increasing job growth in contingent work¹ as well as jobs usually labelled as "bad jobs" or jobs in the "low-wage ghetto", protective labour legislation is increasingly relied upon to circumvent

¹ Also known as 'non-standard' workforms, this is defined as part-time, casual and temporary work (Betcherman 1996: 253).

exploitation and abuse in the age of “jobless recovery.”² Workers’ situations are further exacerbated by reductions in the state sponsored social wage.³ Throughout Canada, social safety nets for unemployed and underemployed workers are becoming increasingly limited thus reducing alternative sources of income outside of wage labour.

The situation is further complicated with the prevailing discourse of political fatalism and the accompanying doubts of the state’s autonomy in implementing desirable policies. In the Canadian context, the prevailing political discourse claims that fiscal restraint policies are necessary to strengthen the competitiveness of the economy. Along with deficit elimination, the neo-liberal policy regime entails monetary policy, reduced public spending and taxation, deregulation, and privatization. The failure of national fiscal and monetary policies to support capital accumulation, it is argued, will result in the relative impoverishment of its citizens. Implicit in these assertions are the economic determinism of global integration and the eroding power of the state to pursue alternative courses of action. Furthermore, economic integration is regarded as inevitable – the products of structural and technological transformation. In short, economic integration is seen as the “new reality”.

Purpose of the study

This thesis explores the subnational state’s autonomy and its ability to fashion strategies that are congruent with domestic policy objectives. This approach is premised

² The growth in jobs is relatively weak in comparison to the growth in productivity (Massé 1995: online, chap. 2).

³ This is composed of social transfers from the state that is in addition to or an alternative to wage income (Standing 1997: 10).

on an understanding of economic integration and neo-liberalism as an “experiment ... created by people” and on an understanding that these processes are “not a force like gravity but a totally artificial construct” (George 1999: 2). Given the context, this thesis will critically examine recent changes to the Ontario *Employment Standards Act 2000*. In an analysis of Ontario’s political economy, two key factors emerge: 1) domestic regulatory reform strategies and 2) the influence of economic integration. The Ontario government argued that an increased competitive environment necessitated a reformation of domestic regulatory reform strategies which were designed to encourage *market* regulation of the economy. There was no other alternative to what was presented as the structural challenge of economic integration. This thesis rejects that domestic regulatory reform strategies were wholly a product of economic integration. By situating the Ontario employment regulatory regime within the regional political economy, we can explore the linkages between the subnational state and international capital. A consequence, this thesis argues, is that regionalization impacts upon subnational state autonomy, however, this can be mediated by various domestic strategies. Furthermore, economic integration, it will be argued, opens political space for states to embark upon mass domestic regulatory reforms (Keohane and Milner 1996; Weiss 1997; Gamble 2000). This is a different approach from most of the current literature on the impacts of economic integration which have limited the state’s coping strategies to privatization, deregulation and the marketization of social welfare. These policies are presumed to flow from a chain-reaction initiated by economic integration that is passively accepted by the state. The state, in other words, has no other alternative but to follow the dictates of

corporate globalization. This thesis hopes to expand and contribute to this literature through an examination of the internal processes of the Ontario government, which is conceived as dynamic, responsive and activist.

The argument

Regionalization, while facilitating the movement of capital, remains largely incompatible with the domestic institutions and frameworks of subnational states such as Ontario. In this regard, the subnational state is proactively constructing compatible domestic frameworks for capital accumulation thus linking the subnational economy directly with the global and regional economy. The policy decisions that bridge this disconnection, however, are political ones. This thesis will focus on the direction of reform in employment regulation and its utility in creating domestic regimes of greater market competitiveness.

The case study will centre on employment regulation in Ontario under the second term of the Ontario Progressive Conservative Party (1999-present). However, since the ESA 2000 was introduced within a year of the party winning its second mandate, significant background material from 1995-1999 will be used to contextualize employment regulation in the political economy of Ontario. During this period, major policy reforms were undertaken and were often justified under the banner of making Ontario more competitive. Employment and labour regulation was also a major point of contention for the Conservatives and, not surprisingly then, a major site of reform.

Analyses in this area have characterized reforms as anti-labour and attributable to the furthering of the corporate agenda.⁴ Such analyses highlight the interconnections between class, power and capitalism, but we must also acknowledge and work towards drawing connections to the broader political economy and its role in shaping the political economy of governance in Ontario.

The Ontario government identified an outdated ESA as one of many barriers to economic growth, job creation and the competitive environment in general. The government's strategy for modernizing the ESA was to introduce flexibility into various clauses whereby employers and workers entered into agreements over various aspects of the individual employment contract. The significance of this move has often been understated; the focus has largely been on amendments to specific provisions rather than the possible longer-term impacts. The reformed ESA is mainly composed of general laws that provide a flexible framework for the regulation of the employment contract rather than specific provisions and rigidly applied orders. This transition raises several questions: Why and how is employment regulation is being reconstituted? What is the scope of regulation? and What is the role of employment regulation in subnational accumulation strategies? These questions are based on the assumption that the building of Ontario's competitive environment with flexible employment clauses was the result of political and institutional changes to employment regulation. In order to understand the institutional frameworks of employment regulation in Ontario, we need to understand

⁴ For a general discussion on the Ontario government's corporate agenda, see Ralph et al. 1997.

how domestic and regional institutions, and paradigmatic shifts intersect to reconstitute regulatory strategies.

The ESA 2000 presents an important opportunity to examine the political economy of employment regulation in Ontario. This thesis argues that the ESA is the result of interactions between the Ontario state, the regional economy and the prevailing ideology. It serves as an example of how the state is reconstituting governance in the face of regional economic forces. Salter and Salter's (1997) regulatory framework, "the new infrastructure", is used to illustrate the politically guided institutional changes to the regulation of the individual employment contract. In other words, the transformation of the employment regulatory regime is part of a larger dynamic as the province positions itself to proactively respond to global economic challenges. Reconstitution of employment regulation is one of the many measures introduced in building a regime of greater market competitiveness.

Methodology and theoretical framework

Document analysis of primary government records will be employed. Analyses of press releases, documented legislative debates of Hansard, committee reports, government publications and relevant legislative bills will be used to support the arguments of this thesis. The limitation of this method of data collection is that public government records do not give its readers direct access to the decision-making process - from conception to completion - thus making it difficult to ascertain the 'true'

motivations. The final accessed versions tend to be exercises of communication worked on and over by strategists and public relations consultants. This thesis does not attempt to ascertain the 'true' motivations of the key actors, rather, it focuses on the implications of the actions, whether they were intended or not. Where the thesis does document government action, the focus is on stated policy objectives or objectives documented through primary and secondary sources. Policy submissions from interested parties as well as policy papers from non-governmental sources, such as international organizations (e.g. Organization for Economic Co-operation and Development (OECD)) or think tanks, were also consulted although to a limited degree. In this case, the biggest limitation of these sources is their biased starting points. In the case of international bodies, reports are commissioned to legitimize certain courses of action or decisions and in the case of think tanks, publications are intended to persuade with one-sided arguments. Despite the limitations, these publications are nonetheless invaluable sources of insight and information as governing bodies often consult these sources or use them as sources of authority to legitimate certain courses of action. The Ontario government, for example, draws on sources from both the Fraser Institute and the OECD to legitimize its actions in the area of regulatory reform.

Secondary sources, both print and electronic, were utilized extensively in contextualizing and framing the theoretical arguments. In addition to books, journal articles (refereed and non-refereed) and newspaper clippings were referred to. Printed editions as well as electronic versions of journal articles and newspaper clippings were utilized.

This thesis intersects a number of disciplines including political economy, law, public administration and policy studies. Conceptually, this thesis privileges a political economy analysis of three main themes: (1) economic integration and the “hollowing of the state”, (2) reconstitution and restructuring of state power and (3) the construction of markets: “fictitious commodities” and the social embeddedness of economic institutions. The merging of these themes will illustrate that the state remains relevant and decisive in constructing domestic regimes of accumulation. The starting point of this thesis assumes the permeability of international and domestic economic and political processes. In other words, the actions of the Ontario state are a reflection of both the state as a single actor as well as the cumulative interactions of international processes and actors. This thesis argues that it is important to understand the political and economic context, regionally and domestically, in which the reconstitution of employment regulation occurred.

In privileging a political economy perspective, this thesis conceptualizes the political and economic domains as a whole. The separation of the two conceals the integrated and intimate relationship. Orthodoxy found in today’s society assumes that politics and the economy are operating in different realms; their dynamics at the best of times incompatible, at the worst contradictory. When politicians invoke “there is no alternative” arguments (as the Ontario government has done), it is accepted that tough decisions have to be made where fiscal responsibilities override social responsibilities.

By analyzing the political and economic domains as a whole, it becomes clear that economic structures are political constructs rather than composed of independent economic agents engaging in spontaneous interactions. Recognizing this leads to an

understanding of how political interactions and conflicts work to alter economic structures; similarly, alterations in the economic structure work to alter the market restraints on political agents. Needless to say, the asymmetries of political economic power dictate *who gets what, where, when and how*.

Following in the same path, labour institutions cannot be assumed to have simply fallen out of the sky. The structures of the labour market are not prior to the social relations of production. Their formations are conceived as being influenced and (re)formed by ideology and the state. A political economy analysis of employment regulation is premised on the idea that regulations are political constructs used to embed economic institutions and behaviour.

Overview

Over the course of this thesis, I will argue that regulatory reforms, precipitated by the Ontario government represent structural transformations to the subnational system of governance. Economic integration provided exceptional opportunities for the restructuring of labour market regulation in Ontario. In the area of employment regulation, the ESA 2000 reflects some of the influences of economic integration, but it cannot explain it. The change in state governance of the individual employment contract needs to be understood with additional concepts. This thesis will examine economic integration along with ideology in interrogating Ontario's new infrastructure of

employment regulation where *statutory* regulations are seen to be weakened by *market* regulations in the ESA 2000.

The outline of this thesis will be as follows:

Chapter Two is a review of the relevant literature. It begins with a discussion of economic integration and state autonomy. This will lead into Salter and Salter's concept of the new infrastructure. The new infrastructure will be used to explore regulatory responses to challenges found in Ontario's political economy. From this discussion, the following concepts will emerge: the social construction of markets and regulations as political instruments for modifying and influencing economic behaviour. This chapter introduces the reader to the key concepts of this thesis.

Chapter Three introduces the reader to the Ontario *Employment Standards Act*. This chapter will note amendments found in the ESA 2000. These amendments will be continually referred to throughout the thesis.

Chapter Four will explore the domestic regulatory strategies of the Ontario government. This chapter analyzes how the Ontario government is institutionalizing new forms of governance. This exploration is centred on the role of the Red Tape Commission within the provincial structure of governance.

Chapter Five places the ESA 2000 and Ontario within the regional political economy of NAFTA. Linkages between Ontario and the regional economy will be explored. This is done to gauge the extent of subnational state autonomy in fashioning domestic regulatory strategies.

Chapter Six places the ESA 2000 within the new infrastructure of employment regulation. Deregulation and privatization is said to characterize the new infrastructure. To this extent, this chapter will explore whether *market* regulation of the individual employment contract can be said to represent a reconstitution of employment regulation.

Chapter Seven is the conclusion. In this chapter, the main themes will be drawn together to conclude: (1) the Ontario state is dynamic, transformative and interventionist. The political climate of economic integration opens political space for Ontario to embark upon mass policy reforms, thus highlighting the linkages between the domestic and regional economies; and (2) employment regulatory strategies are increasingly embracing *market* regulations which promote pro-individualistic behaviour. Both these conclusions reconstruct labour market institutions – within a political economy framework – and place it within the process of economic integration.

Chapter 2 Theoretical analysis

Analytical theme (1): economic integration and the “hollowing of the state”

Globalization is a term often used to describe the increased interconnectedness of global finance, culture, art and religion – virtually all aspects of contemporary society. This all-encompassing usage of the term and the lack of a precise definition have led some to ponder whether it is the “cliché of our times” (Held et al. 1999: 1). The discourse of globalization has permeated policy discourse, even though the term itself often lacks consistent conceptual clarity. Nonetheless, the many concepts of globalization do reflect what is intuitively felt. Within academia two dominant conceptualizations of economic globalization – *hyper-globalists* and *skeptics* – have emerged to capture and understand the current milieu (Held et al. 1999). In discussing the two perspectives, I will only draw on aspects that are relevant to state autonomy.⁵

Hyper-globalists

Termed as “hyper-globalists”, scholars such as Susan Strange and Kenichi Omae argue that global integration is facilitating the “hollowing of the state”. For Strange (1995), it is a matter of the retreating state whereas Omae (1995) goes further and declares the end of the state. Strange, while claiming that states “are still the most influential and therefore critical sources of authority in the world system” nonetheless argues that globalization has forcefully caused state authority to “[leak] away, upwards, sideways, and downwards. In some matters, it seems even to have gone nowhere, just

⁵ Given the scope and complexity of globalization discourse, I will focus mainly on economic globalization.

evaporated” (1995: 56 -57). In the hyper-globalists’ accounts, the processes of globalization are something that is happening *to* the state that is leading to the erosion of authority. In one account, the “borderless” world of transnational networks of production, trade and finance is supplanting state authority with economic actors (e.g. transnational corporations (TNCs) and international organizations and institutions) and non-economic actors (e.g. non-governmental organizations (NGOs) and professional associations) (Strange 1995). In the more extreme account, the discipline of the global marketplace is supplanting the traditional state authority (see Omae 1995).

According to the hyper-globalists, markets and production processes are being globalized on an unprecedented scale and the era of national economies and corresponding domestic state policies are being rendered increasingly irrelevant as national economies increasingly merge into one global marketplace. As markets are globalizing, so too, are production processes. In order to utilize the economies of scale and facilitate efficient resource use, firms are adopting “a global perspective and [creating] transnational production structures that cut across national borders” (Giles 1996: 5). Multinational corporations⁶ (MNCs) and TNCs⁷ engaging in these processes account for 25% of world production with internal transfers (trade in immediate goods) accounting for 40% of world trade (Giles 1996: 6). As global market forces increasingly dictate national economies, it is believed that MNCs and TNCs are at the helm. Thus,

⁶ MNCs have a predominant national base and are controlled or constrained by particular domestic policies (Hirst and Thompson 1996).

⁷ TNCs are said to be “genuine footloose capital”. TNCs do not identify with an specific nation-state. True TNCs will be willing to (re)locate anywhere on the globe in search of an economic advantage that is secure and offers the highest returns (Hirst and Thompson 1996).

global market forces will sideline national fiscal and monetary policies that fail to support capital accumulation.

In summary, the hyper-globalists' contend that global processes may be subverted by nation-states, but it is done at their own peril. The rogue state that rejects or delays the adoption of neo-liberal policies (monetarism, reduced public spending and taxation, deregulation, privatization and deficit elimination) does so to the relative impoverishment of its population. In general, the nation-state is seen as authoritative enough to facilitate and adopt the neo-liberal agenda, however, they are powerless in pursuing alternative directions for economic development (Omae 1995).

Skeptics

While some have viewed globalization as described above, others have strongly disputed that such a case exists at all. Numerous theorists have disputed the nature and extent of globalization. Hirst and Thompson (1996) have been the most forceful in their arguments to debunk the myth of globalization. Hirst and Thompson, while forwarding their own thesis on internationalization, claim that the "great bulk" of globalization analysis is rooted in a set of "untenable assumptions" (1996: 3). Essentially, they argue that the phenomenon of globalization is a "myth" and global market forces can be subjected to control and regulation by the major advanced nations that dominate the internationalized economy (Hirst and Thompson 1996: 3). A similar process of integrating nations and economic actors characterizes the internationalized economy. However, this is largely confined to certain global areas making economic integration a

question of degree. National economies are seen to be the principal entities from within which companies continue to be embedded in and trade from. National policies are not seen as futile, rather they are critical for providing the unique national infrastructure which advantages domestic companies in trade (Hirst and Thompson 1996).

This school of thought rejects the “hollowing of the state” thesis, although it does accept that the state’s policy-making powers are constrained by the structural and ideological forces of globalization. Where structural and ideological forces have compromised state autonomy, they argue it is attributed more to political voluntarism than technological or economic inevitability. Tabb, for example, argues

The idea that “globalization” has weakened the state and ignores the continuous technical ability of the state to regulate capital. Money can flee to tax havens and to offshore banking centers only if the core countries allow it to do so. If the United States penalized banks (and depositors) in jurisdictions which do not allow regulators access to information necessary to tax capital transfers, most tax haven banks would shut down. There is no reason regulators cannot impose transfer taxes and other regulations (1997: online).

In response to the “hollowing of the state” thesis, skeptics offer that “the myth of globalization” is a politically convenient rationale for imposing large-scale policy reforms (Keohane and Milner 1996: Keohane and Milner 1996a; Weiss 1997; Gamble 2000). Gamble provides this example:

neo-liberal governments in many countries have attempted to reshape their economic constitution and weaken the influence of organized labour and other domestic lobby groups on economic policy by seeking to re-establish the principle of sound money through the external discipline of the international financial markets (2000: 133).

Moreover, the available evidence stands in contradiction to widely held and professed claims of the inevitability of policy convergence and immobilization of the state (Keohane and Milner 1996, 1996b; Weiss 1997).

The conceptualization of globalization found in this thesis will fall predominantly within the skeptics grouping. The crucial difference, from the perspective of this thesis, hinges on state agency. In the skeptics' camp, the state is conceptualized as active in reinforcing and enhancing the power of the nation-state whereas the hyper-globalists largely view the state as being reactive leading to the erosion of power. Implicit in the skeptics' account is the idea of reconstitution and restructuring of state power. A proactive state that is complicit in structuring the international order is one that is dynamic and responsive and will continually reconstitute and/or restructure itself. In this regard, a major difference between the two perspectives is the source of the process – whether it is initiated from without or from within.

The globalization of socio-economic regimes speaks strongly to the conception of globalization as a political project. Its purpose is to negotiate a political framework (e.g. trade regimes) for the movement of global trade and production. Giles (1996) points out that just as national regulatory frameworks provide stable environments for capital accumulation, so too do international regulatory frameworks. Similarly, they are political responses to the needs of capital for global accumulation strategies. For members of supranational institutions, international regulatory frameworks provide the blueprint for domestic regulatory reform. This, however, does not mean that states have responded to

global pressures in any uniform fashion, although the general direction is to embrace neo-liberal reforms (Keohane and Milner 1996: Keohane and Milner 1996a).

Along with the strengths of the skeptics' conceptualization of globalization are the limitations. It fails to recognize the potential of economic globalization to transform state power instead, favouring the political construction side of the argument. Furthermore, skeptics do not address the relationship between state authority and how this is compromised through international agreements. While the state is sufficiently strong in the construction of such agreements, one needs to ask how the expanding jurisdiction of international institutions reconstitutes state governance. In this regard, while giving primacy to state agency, skeptics fall short on recognizing the structural limitations imposed by global economic processes. The globalization of the state, given the integrated connection between politics and economics extends beyond the economic realm and as Keohane and Milner argue "there is reason to expect profound political effects as well: in particular, domestic politics in countries around the world should show signs of the impact of the world economy" (1996: 3). Domestic institutions may either mediate or refract the impacts of globalization thus preserving or transforming state autonomy to pursue policy preferences. Moreover, the analytical framework used economic statistics to debunk the globalization thesis and was not intended to support an analysis that examines how state power is reinforced or enhanced/ reconstituted or restructured.

The stance of 'nothing new is happening that didn't happen before' places globalization, rightly, within the historical context of the development of capitalism. It

does not, however, work well to address the problematic raised by Piven and Cloward:

“But if the system is basically the same, why is so much changing?” (1998: online).

They point to decline of union membership, the refashioning of leftist parties into facilitators of neo-liberal policies, the demise of the welfare state and the clawing back of state wage support systems in return for “flexible” labour markets (1998: online).

In this aspect, looking to domestic areas of governance offer the most useful framework for analyzing the how state power is being reconstituted or restructured and the effects on the political economy. Domestic regulatory strategies, for example, point to the practice of restructuring strategies with an increasingly outward looking perspective. In this regard, we see globalization as imposing constraints, but also holds out the possibility as an opportunity to empower states as new coping strategies are devised. In this aspect, governance consists of both the actions of the nation-state and the cumulative interactions between global actors and institutions.

The skeptics’ paradigm of globalization as a political project is useful for reconceptualizing the “hollowing of the state” favoured by the dominant paradigm of globalization. In order to pursue this further, a different field of literature will be drawn on to illustrate how globalization creates political space for governance. In generalizing on the changes to British state governance, Rhodes lists these characteristics of the “hollowing of the state”: privatization and deregulation; decentralization of services through contracting-out or use of quasi-markets; vertical power shift to regional institutions (in this case the European Union); and embrace of the ‘3Es’ (economy, efficiency and effectiveness) and value for money of New Public Management (NPM)

practices (1996: 661). According to Rhodes, these processes are resulting in a smaller and more fragmented public sector leading to problems of “fragmentation, steering and accountability” (1996: 661). While Rhodes (1996) views these as hollowing processes, Salter and Salter (1997) offer an alternative analysis that privileges the activist and transformative state that is in part forging new management relationships with civil society, but mostly a dynamic state that is employing new strategies in pursuit of domestic economic goals, while in process, is also reconstituting governance.

Analytical theme (2): reconstituting and restructuring state authority

The New Infrastructure

In 1997, Salter and Salter developed an analysis on the changing nature of the regulatory state. In terming the “new infrastructure”, they argued that state governance of the economy is being transformed in the wake of external and internal pressures. The new infrastructure is premised on the idea that the state is dynamic, responsive and activist as it reconstitutes its role and function in the rapidly changing environment.

Using regulatory strategies as the focus of their study, Salter and Salter (1997) argue that the state is more interventionist than generally accepted. As the state increasingly engages in privatization and deregulation policies, it is assumed that the state is retreating away from the public sphere and the responsibilities traditionally entrusted to it. Salter and Salter (1997) argued that “privatization” and “deregulation” are essentially hollow terms as they fail to adequately explain the transformations and processes guiding the regulatory transitions in the post-welfare state era. Based on their case studies of

regulatory boards, Salter and Salter (1997) determined that privatization, as conventionally understood, does not adequately take into account the processes that mark the transition from public governance to private governance. Implicit in their arguments is a rejection of the orthodox dichotomy that views governance as being either public or private. Rather, Salter and Salter (1997) argue that regulatory processes are a combination of both. From this perspective, the boundaries of public and private spheres are seen as fluid, permeable and shifting.

The state's role, then, is better thought of as being transformed rather than being diminished (Salter and Salter 1997). The relationship between the state and the larger society is being transformed into one where regulatory processes are being shaped through state/civil society partnerships. Furthermore, this new relationship is characterized by a devolution of power away from the state but this by no means represents an independence of government control (Salter and Salter 1997: 68). Two case studies by Salter and Salter will suffice to illustrate the changing nature of economic governance.

Broadcasting and telecommunications

The first case study involves the Canadian Radio-television and Telecommunications Commission (CRTC) in its role as the regulatory body for broadcasting and telecommunications. The CRTC has long been held as a model of government intrusiveness on industry. This is partly due to a legislative framework that mandated the agency to act as an instigator in promoting and maintaining social policy as

it relates to the industry. Given the cumbersome nature of these regulations, the CRTC's mandate was expected to change with the *Broadcasting Act 1991*, especially given the dominant rhetoric of deregulation. This did not happen. Instead, the new Act provided the CRTC with an even broader social mandate. The new legislation, as Salter and Salter (1997) point out, expressively contradicts the prevailing deregulation rhetoric, while introducing "fundamental" changes. First, the CRTC became more politically oriented with direct linkages to the government. The government now has the authority to overturn decisions, guide the agency in its mandate, and "supervise" the CRTC's industrial development strategies (Salter and Salter 1997). Second, the agency was given greater powers and flexibility in the area of regulation. The CRTC can now draw on monetary fines and the courts to force compliance rather than relying on the goodwill of the violators. The agency was also given greater flexibility in carrying out its core mandate; if the agency deems the prevailing environment to be sufficiently competitive then it may withdraw from its duties and responsibilities as the regulator.

Telecommunications is the second major industry that falls under the CRTC's regulatory umbrella. The *Broadcasting Act 1991* was followed shortly by the *Telecommunications Act 1991*, which, incidentally, contained similar content. As was in the case of broadcasting, the new legislation also outlined a comprehensive social mandate for the regulator. For example, within its scope of responsibilities, the agency is to "promote industrial development [and use] telecommunications to curtail regional disparities" (Salter and Salter 1997: 76). In both cases, the CRTC is mandated to discern what is to be regulated and how it is to be regulated. The CRTC was given a proactive

agenda that included the promotion of industrial development through the development and maintenance of competitive and open markets and by encouraging innovation. While the CRTC is “deregulatory in orientation”, having shed some of its traditional regulatory burdens, broadcasting and telecommunications have remained largely regulated sectors. Along with the shedding of the old, in spite of the prevailing deregulation rhetoric, also came new regulatory responsibilities. In summary, the state is not so much concerned with the traditional regulatory target – management of individual firms – rather the state has focused its regulatory eyes on managing the market. Salter and Salter conclude:

In short, one would be hard pressed to describe the situation as one in which state control has been replaced by private control, because neither alternative describes the situation properly.... Something has changed in how the two interact, the roles played, the priorities and agendas manifested through regulation, but this something cannot be properly described as “deregulation” (1997: 78).

Environmental regulation

A change in process marks the new infrastructure in environmental regulation. “Stakeholder mediation” replaces the traditional consultative process of environmental assessment panels. Stakeholder mediation agreements are negotiated according to whichever interest groups are present; final agreements only take into account the interests of the groups represented (Salter and Salter 1997). In this process, decisions are made much faster as stages found in environmental assessment panels such as formal procedures, expert witness testimonies (it is assumed that the stakeholder groups are themselves expert) and sometimes lawyers are excluded as redundant. Salter and Salter argue that stakeholder mediation is in effect “deregulatory” and “a new form of privatization in practice” (1997: 85). Privatization is not used in the conventional sense

here, rather it is to convey the idea that only private interests exist and in actuality, a public interest can be said not to exist at all. The conception of civil society groups as “stakeholders” entails marshalling them into select interest groups thereby denying the presence of an overarching public interest that is generally shared by the public; in stakeholder mediation, if no group comes forward to represent “the public interest”, it is then assumed that one does not exist (Salter and Salter 1997). In summary, stakeholder mediation is not a public process – the meetings are held behind closed doors and negotiations between the government and advocacy groups are confidential.

Salter and Salter (1997) illustrate with their case studies the transformation of state economic governance as changes in regulatory strategies forming the new infrastructure. They identify five key characteristics. First, decentralization of regulation is a dominant trend. Within the new infrastructure, the reconstitution of the state involves redefining the public and private spheres and governance in both areas. The state’s roles and responsibilities are changing, as it is no longer tied to certain expectations developed under the welfare state however these functions have not entirely disappeared. Rather, they have been taken up by other parties, leaving the state to actively engage in other regulatory activities. Second, there is the new emphasis placed on questions of process. The process of reaching a decision – how the decision was made, who was involved and in what capacity – have become as important as the decision itself. However, this does not entail a homogeneous approach to consultation; in some cases, there was a desire for a highly participatory process whereas in others, the process was characterized by its exclusionary nature. Third, there are more direct linkages between the new infrastructure

and the political process. Salter and Salter argue, “those involved [interest groups] work hand in hand with elected officials” (1997: 94). This was evidenced in the case of the CRTC where the state may override the ruling body’s decision. Fourth, the acceptance of co-management as best practice. Co-management entails “extensive negotiations with the regulated industry and client publics and high levels of consultation” (Salter and Salter 1997: 94). Some have speculated that this arrangement leads to the “capture” of regulatory bodies by their clients (the industries to be regulated). Salter (1993) counters these arguments by outlining the potential of co-management as a tool for democratic administration. Fifth, is the regulator’s, as conferred by their legislative mandate, strong preoccupation with industrial development. The core mandate is to “promote industry and competitiveness” and “promote industry-led economic development” (Salter and Salter 1997: 95). These characteristics essentially point to a process that is redefining the way state, civil society and industry interact. As Salter and Salter (1997) have shown in their case studies, the processes of privatization and deregulation are much more complex than what the dominant discourse airs. Essentially, the above studies illustrate a state that is willing and able to use interventionist approaches in regulating the framework for the expansion of capital. Furthermore, privatization and deregulation are exposed as euphemisms for re-regulation. In other words, certain proponents of deregulation and privatization are not necessarily advocating fewer regulations but a different kind of regulation.

While the new infrastructure offers a useful framework for analyzing the various ways governance is being reconstituted, it has thus far been limited to regulatory

strategies that involve the public regulator and sectoral private agencies. In cases that involve non-industry specific regulation, Salter and Salter's framework offer some inroads but needs expanding if we are to dig deeper. Specifically, this thesis will focus on the assertion that privatization is not really 'privatization' and deregulation is not really 'deregulation'. Support for the reconceptualization of both terms comes from Standing (1997) who theorizes on the properties of regulations. Standing's (1997) work supports the observations of Salter and Salter by illustrating how states may potentially use various types of regulations to modify or influence the behaviour of economic actors. Through Standing's (1997) work, we see how the prevailing discourse on privatization and deregulation disguises and confuses the reconstitution of regulations.

Regulations

In recent times, regulations have become a hot topic of debate. On the one side, there are those who argue that regulations represent an excessively bloated, overspent and intrusive welfare state. In defence, others have argued that the cure-all strategies of deregulation and privatization actually represent a "piratisation" of public institutions, the demise of the humane state and the primacy of private accumulation over the public interest. Furthermore, the predominance of regulatory reform policies have added further sources of contention as states pursue strategies to increase economic competitiveness.

The Organisation for Economic Co-operation and Development (OECD) defines regulation as

the diverse set of instruments by which governments set requirements on enterprises and citizens. Regulations include laws, formal and informal orders,

and subordinate rules issued by all levels of government, and rules issued by non-governmental or self-regulatory bodies to whom governments have delegated regulatory powers (1997: 11).

The various forms of government regulation have been traditionally categorized into two groups – economic regulation and social regulation⁸ (Canada 1979; OECD 1997;⁹ Mihlar 1998). Economic regulations, also known as direct regulations, are used to regulate industry practices that involve pricing, marketing and competition. Examples of economic regulation would be the establishment of rates (e.g., utilities, telephone), fostering competition and determining conditions of market entry. Its justifications include greater economic efficiency or increased competitive advantage (Canada 1979; OECD 1997; Mihlar 1998). Social regulation of economic behaviour relates to the welfare of society and is intended to address broad social objectives such as environmental and occupational safety, public health, product safety or social cohesion (Canada 1979; OECD 1997; Mihlar 1998). Social regulation is justified because of the value placed on the product or service (by society) that is being produced and distributed. It is assumed that economic regulation will seriously erode the quality of that particular product or service. The OECD (1997) introduces a third category of regulation – administrative regulation. Administrative regulations are the paperwork or administrative formalities (or hurdles) of the state – the bureaucratic essence of the state. Regulations in this category are commonly referred to as “red tape”, however, both economic and social regulations have been eliminated in the interest of red tape reduction.

⁸ It should be noted that in both cases, it is economic activity that is subjected to regulation as opposed to social or moral behaviour.

⁹ The OECD report identifies another category – administrative regulation. This will be discussed in the next paragraph.

While these categories are useful for distinguishing the intent and purpose of various government regulations, they are not very useful for conceptualizing the changing nature of regulation. In the prevailing climate of regulatory reform and deregulation, a tempting conclusion would be the end of the regulatory state. However, such a claim would ignore a large selection of works, notably that of Polanyi, which have documented the pains governments have went through to construct and secure stable frameworks for production and trade, even during the golden age of *laissez-faire* (Polanyi 1944).¹⁰ Hayek, in his liberal treatise, also acknowledges the need “to create conditions in which competition will be as effective as possible” (1944: 44). Moreover, Dunning argues that one of the historical functions of states was to be

an initiator and overseer of the economic system, which sets the legal and institutional framework within which the resources and capabilities in its jurisdiction are created and deployed (1997: 43).

Put another way, it ignores the social construction of markets; it seeks to disintegrate economics from politics and vice-versa. Central to the construction of markets is the concept economic constitution:

the existence of an economy implies a degree of order, consistency, and predictability in the way in which agents behave. That in turn implies rules, constraints, and norms which agents accept as binding upon them (Gamble 2000: 112).

¹⁰ The irony of this is that classical economists advocating *laissez-faire* was more concerned with restricting the ability of powerful governments to take control rather than allowing efficient markets to work (Dunning 1997: 77).

In constructing the framework for capitalistic markets, state governance¹¹ of the market is not complete but rather represents one site of governance. The state is an enabler that “helps to establish and sustain the institutions in society”, hence, the state “steers” rather than “rows” (Gamble 2000: 111). The state’s role is to provide the conditions for the reproduction of capital however the state itself does not have the power to directly control capitalist production (Gamble 2000). In order to facilitate capitalist reproduction, the state is required to engage or disengage at various points and periods in the development of the economy. Within this line of interrogation into the transformation of the state, Gamble reaches similar conclusions as Salter and Salter. Citing the state’s primary function is now to regulate rather than administer, Gamble repeats:

De-regulation has therefore often been a misleading term. A more accurate term is re-regulation, because the disengagement of the state from direct administrative responsibility for certain economic functions has often been accompanied by an increase in its regulatory responsibilities (2000: 114).

In this respect, Standing (1997) offers a more useful framework for analyzing the changing nature of regulation by offering categories derived from the properties of regulatory instruments rather than the intent. The properties of regulations offer a useful analytical bridge linking regulations as policy instruments and their use in constructing the political framework for economic activity. From the discussion of the new infrastructure and its significance to economic constitution, it follows that regulatory systems embed the economy in society. The Economic Council of Canada, for example, recognized, “it should be emphasized that all economic activity takes place in a

¹¹ Definition of this term is taken from Gamble: “means to influence, shape, regulate, or determine outcomes” (2000: 110).

framework of *general* laws and regulations. Because such laws are woven into the fabric of the economy, they are often overlooked” (Canada 1979: 10).

*Statutory*¹² and *market* regulations are the two categories¹³ defined. Regulations may be pro-collective or pro-individualistic in orientation. By contextualizing regulations within the socio-economic structure, the focus is then shifted to the political aspects of regulations giving rise to questions of *who* benefits, *why* and *how*. In general, regulations act as mechanisms or institutional processes that curtails the freedoms of some people for the purpose of providing security for others (Standing 1997).

Statutory regulations are largely pro-collective regulations that emerged in the post-1945 era. During this time, collective bargaining was promoted and unions and employer organizations were considered legitimate partners in governing the economy (Standing 1997). *Market* regulations encourage the use of market forces to promote economic and social well-being (Standing 1997). Those who advocate *market* regulations tolerate government intervention *only* when it is to reinforce or stimulate reliance on market forces. *Market* regulations are pro-individualistic hence they encourage and reward risk-taking and foster an atmosphere of entrepreneurship where one is free to pursue economic opportunities (Standing 1997).

Labour market regulations may come in five forms (Standing 1997: 10-11):

Protective regulations – rules and procedures to protect workers, and/or to prevent those in strong positions from abusing those in weak positions;

¹² *Statutory* is the term chosen by Standing. This is distinctively different from the legal definition of ‘statutory’ meaning created from statues.

¹³ Standing (1999) also lists a third category – voice regulation. Voice regulation entails that parties with conflicting interests come together to negotiate an agreement. The collective bargaining process is considered a form of voice regulation.

Fiscal regulations – taxes and subsidies to encourage certain forms of activity and/or discourage other forms;

Repressive regulations – rules and mechanisms to prevent something that the state, or a dominant interest, does not wish to occur;

Promotional regulations – rules and mechanisms (other than taxes) designed to promote certain developments;

Facilitation regulations – rules and procedures that permit activities to take place, if there is a desire to do so.

Analytical theme (3): constructing markets: “fictitious commodities” and the social embeddedness of economic institutions

Polanyi identifies three fictitious commodities – land, labour and money (1944: chap. 6). In their commodified form, these central inputs of industry are considered fictitious if a commodity is defined as something produced for the purpose of exchange on the market. Rather than being produced for sale, land is simply another term for nature, labour is simply another term for human activity and money is merely a token of exchange (Polanyi 1944: 69). However, the fiction of their production for sale on the market serves as the organizing principle in capitalist society. Their fictitious commodity form is maintained due to their essential role in the market economy. In their commodified form: land generates rent for the possessor – the cost of land use; labour generates wages – the cost of labour power; and money generates interest – the cost of using money (Polanyi 1944: 69).

Commodification of labour

Given its centrality in the employment relationship, from herein, only a focus on labour as a fictitious commodity will be maintained. A general understanding of the

commodification of labour is crucial when examining the employment contract and the regulation of the employment relationship. Of the three fictitious commodities, the commodification of human activity (labour) is perhaps the most destructive as the employment or unemployment of labour power will always affect the human individual who is its possessor (Polanyi 1944: 73). Furthermore, a socio-economic system organized on wage labour has a dehumanizing effect as man will be viewed and treated as a variable factor of production¹⁴ thus leading one to dissociate labour from its human owners (Polanyi 1944). Perpetuating the fiction of labour as a commodity is to subject it to market pricing and the laws of supply and demand.

The state in its role as an enabler of capitalist production reconciles the need to maintain labour as a fictitious commodity while taking into account the social qualities of labour through the regulatory system. The employment contract necessitates, at the very least, labour be treated as a quasi-commodity, thus the simultaneous process of the commodification and de-commodification of labour. This explains why there are various strategies embedding the labour market in society. Indirectly, the state utilizes social welfare programs, the education system, retraining programs and other interventionist measures to influence the functioning of labour markets (Peck 1996). The employment regulatory regime directly regulates the individual employment contract.

Both *statutory* and *market* regulations subordinate the profit-maximizing economic logic to the values of the wider society. They also, however, give legitimacy as well as provide a framework for the reproduction of capitalist social relations of

¹⁴ Variable input implies that labour is not a fixed cost and is hired only when needed, provided that there is a sufficient match of skills to be found in the labour market.

production. In adopting the categories of *statutory* and *market* regulations, we see how these forms embed the economy in society in different as well as complementary ways. *Market* regulations are commonly thought to dis-embed the economy given the rhetoric of deregulation. From the discussion above, we see this is not the case at all. Rather, it is “pro-individualistic (anti-collective) regulations, coupled with some repressive regulations and greater use of promotional and fiscal regulations, intended to prevent people from making particular choices or to encourage, facilitate or promote other types of behaviour” (Standing 1997: 14). Clearly, rolling back protective and pro-collective regulations does not amount to “deregulation”. To echo Standing, “there is no such entity as a ‘deregulated’ labour market” (1997: 8). This is particularly true in labour markets; labour, which is socially produced is not a “true” commodity thus it cannot be regulated using the price mechanism as other commodity markets are. The special nature of labour, given its “fictitious” commodity form, entails that “even the most “marketized” of labour markets are quite evidently social-political constructions” (Peck 1996: 10). The rhetoric of deregulation and the advocating of *market* regulations are, however, potent in calling into question the legitimacy of collective institutions and solutions.

Political construction of regulations

Institutional forces and power relations systematically structure regulations. Regulations must be conceived as much a political tool as an administrative one. One cannot separate the discourse of regulation from the larger political discourse. It is ultimately a political decision, based on value choices that determine the legislative

outcome. Thinking of regulations as constructed (i.e. benefits that advantages one group over another) is useful for understanding the political nature of regulations. In this context, regulatory action and policies require legislators to judge regulatory outcomes as being superior to another within the broader context of socially accepted values.

Regulations establish a framework for mediating the interaction between the state and civil society. The prevailing political climate dictates what state interference is acceptable and to what end. As primacy is given to different goals, intervention strategies will shift accordingly. This is evidenced with a quick historical look at state intervention:

In the mid-nineteenth century, it was largely directed to protecting the emerging industries of the (then) new industrializing nations against the abuses of the factory system from foreign competition. In the late nineteenth century, with the growing power and concentration of big business (especially) in the U.S., attention shifted to anti-trust policy. In the inter-war years, the rationale of government intervention was directed to reducing unemployment, while, in the 1940s, attention switched to the need for social reform. Growing environmental concerns in the 1970s further intensified the plea for government involvement, while in the 1980s and 1990s the role of government fostering competitiveness by a range of market-facilitating and strategically related policies became the flavour of the month (Dunning 1997: 66).

The focus on the political aspects of regulations is not to claim that ideology is the sole guiding factor. In fact, it is not. Regulations are constructed within a web of institutional arrangements that are composed of various interest groups. However, it must also be recognized that ideology guides and limits regulatory and policy action in the ideas and assumptions they embody. It is an important factor in assessing the dominance of *statutory* or *market* regulations as an organizing mechanism in society. The use of *statutory* or *market* regulations is based on a political decision that favours a

specific strategy to pursue collective goals. The use of *statutory* regulations may de-commodify labour by increasing worker security while the use of *market* regulations, relatively, may re-commodify labour by decreasing worker security through an increased reliance on market forces (Standing 1997). In other words, *market* regulation entails an increase on market dependency, whereas *statutory* regulation entails decreased market dependency, but greater dependency on collective institutions (Standing 1997). In the simplest form, regulations are intended to achieve social goals. Those advocating *market* regulations are, generally, as sincere as those advocating *statutory* regulations for the realization of some social good. What is contentious then, is the not the end goal, but rather the embodied assumptions that guide the means to achieve it.

Statutory regulation and the de-commodification of labour

In the post-war era, *statutory* regulations have significantly expanded labour rights and entitlements. This de-commodification of labour entailed the promotion of seven forms of security (Standing 1997: 8): labour market security, employment security, job security, work security, skill reproduction security, income security and representation security. This thesis will focus only on employment security, work security and to a limited extent, income security. Standing (1997: 8-9) defines employment security as “protection against arbitrary dismissal, regulations on hiring and firing, imposition of costs on employers, etc.”; work security as “protection against accidents and illness at work, through safety and health regulations, limits on working time, unsociable hours, night work for women, etc.”; and income security as “protection

of income through minimum wage machinery, wage indexation, comprehensive social security, progressive taxation, etc.”. The seven forms of security de-commodify labour by reducing a workers’ reliance on the market for income through various policies such as social insurance and income supports. The subset of concern to us, employment security, work security and income security contributes to the de-commodification of labour by imposing terms and conditions on the employment contract, which may not have been otherwise obtainable given the social power relationship between labour and capital.

The extent these post-war *statutory* constructions de-commodified labour varied depending on the welfare-state regime. In his typology of welfare-state regimes, Esping-Andersen (1990) contends the extent of de-commodification ranges from high (social democratic) to low (liberal) depending on institutional arrangements. Esping-Andersen argues that the de-commodification of labour, at a minimum “must entail that citizens can freely, and without potential loss of job, income, or general welfare, opt out of work when they themselves consider it necessary” (1990: 23). In this regard, the social democratic regime-type is highly de-commodifying as the welfare state pursued a strategy that sought to “promote an equality of the highest standards” (Esping-Andersen 1990: 27). The liberal regime-type, of which Canada is an archetypical example, is the least de-commodifying as the state encourages a market based society which “minimizes de-commodification effects [and] effectively contains the realm of social rights” (Esping-Andersen 1990: 27).

Although the liberal welfare state is dominated by the logic of the market, Canadian labour still enjoyed a degree of de-commodification in the post-war era. The Canadian employment regulatory regime contained protective regulations that promoted employment, work and income security. However, while the state pursued politically determined norms of social and economic justice through legislation covering collective bargaining, human rights statutes and employment standards, it stopped short of taking labour out of the competitive market. In assessing the post-war employment regime, Fudge and Tucker conclude that “*at its core*”, Canadian government policies in this area rested within the domain of “voluntarism” that embodied the hegemony of contract law associated with *market* regulation (2000: 277; original in emphasis).

Even so, during these years, *statutory* regulation was proclaimed to be superior to *market* regulation. This stands in contrast to the current situation. In the current era of regulatory reform, statutory regulations are utilized to encourage firms to be more “efficient, innovative and competitive” (OECD 1997: 10). *Market* regulations are preferred over *statutory* regulations to “sharpen [the] competitive pressures” (OECD 1997: 10). Use of *market* regulations are justified in the economic theories of the New Right.

New Right Tenets

Before going further, an aside discussion on New Right ideology and the distinctions between neo-conservatism and neo-liberalism will be useful. These terms

have generally been used indiscriminately. For the purpose of this thesis, the distinction is crucial in order to establish state autonomy in pursuing certain policies.

Contained within the rhetoric of the New Right are elements of classical liberalism and liberal conservatism (Gamble 1988; Overbeek and van der Pijl 1993; Vincent 1995). Classical liberalism¹⁵ has four central tenets: “the emphasis on individualism, negative liberty,¹⁶ personal rights and a minimal rule-of-law state” (Vincent 1995: 65). Central to this doctrine is the commitment to upholding the principles of individualism. The desires and interests of the individual are given primacy; individuals, as rational beings, are the best judges of their own interests. Collective and institutional responsibilities are negated as these imply the individual is obligated to provide something, which is, antithetical to the principle of negative liberty. In this sense, “the only good is individual good” (Vincent 1995: 32). Integral to the concept of liberty, according to classical liberals, is the notion of private property. Some liberals, such as Hayek regard “private property [as] the embodiment of individual liberty” (Vincent 1995: 38). The protection of private property is tantamount to the protection of freedoms and is argued, should also be upheld as “freedom from” state harm or intervention (Vincent 1995). Classical liberals adhere to a largely formal understanding of equality both before the law and in the marketplace. In conceiving equality, classical liberals uphold the “equal right of all individuals to equal freedom” (Vincent 1995: 29). The classical liberal conception of equality does not take into consideration the inequality

¹⁵ While recognizing there are a wide range of positions on the following themes, there is a general consensus on their importance and centrality. By and large, the differences tend to arise in their variability.

¹⁶ Freedom from arbitrary coercion (Vincent 1995).

in property ownership and the power that it entails, however, Hayek does in his renewal of liberal thought.

Hayek (1944), while conceding that ownership of property creates inequality in wealth and power, continues to argue that market competition still remains the best mechanism to remedy inequalities as it allows individuals to succeed or fail on the basis of their own efforts. Liberal conservatives generally share the same views as classical liberals, however, the difference lies in the degree of acceptable state interference. Liberal conservatives adhere to the principle of economics as being prior to politics (Vincent 1995). In other words, the economy is privileged as the dominant value. However, while giving primacy to the market, liberal conservatives also believe that “the market needs a stronger, more secure framework of law and order” than is generally acceptable to classical liberals (Vincent 1995: 79).

The neo-liberal New Right advocates “politics constructed from the individual, freedom of choice, the market society, laissez-faire, and minimal government” while the neo-conservative New Right advocates, in addition to the tenets of classical liberalism, “strong government, social authoritarianism, disciplined society, hierarchy and subordination, and the nation” (Overbeek and van der Pijl 1993: 15; also see Gamble 1988; Vincent 1995). This combination has given rise to the term “free economy / strong state” (Gamble 1988). This captures the contradiction of New Right ideology where the state’s role is simultaneously expanding and contracting. The state is redrawing the boundaries of the public and private spheres by actively intervening and centralizing

functions in some areas while withdrawing and decentralizing functions in others (Gamble 1988).

In general, New Right policies can be characterized as neo-liberal as they favour a greater reliance on market forces given the perceived problems of collectivism. In this regard, *statutory* regulations are seen as unnecessary market interventions that stifle markets and therefore represent the greatest impediments to growth. *Statutory* regulations are justified only under very strict conditions. They must promote economic growth and efficiency and cannot be used to protect the public interest – there are alternatives that will “cause fewer job losses and have a less adverse affect on economic growth” (Mihlar 1998: 2).¹⁷

To this end, advocates urge states to “encourage market-driven responses” (Mihlar 1998: 2). This is not so much about less direct government intervention, but about more *market* regulation of economic activity which is seen to produce greater benefits as markets are argued to be politically neutral. While it is accepted that *market* regulations are imperfect, it is argued that society gains more than it loses, as the benefits will exceed the adverse consequences (Irwin 1996). The underlying essence of the New Right doctrine is “to reduce the state and to rely increasingly on market mechanisms and individuals rather than collective approaches to economic and social problems” (McBride and Shields 1997: 18). This transition to market rule requires a reversal of the post-war trend of collectivism hence a neo-conservative strong state is needed to resist challenges

¹⁷ Mihlar is referring to social regulation, however, it can also apply to *statutory* regulation given that both seek to promote the collective interest.

to its authority from major interests and entrenched lobby groups (Gamble 1988). The state must be sufficiently strong to carry out this function.

The New Right ideology is a philosophical critique of the collectivist ethos and is instrumental in justifying and legitimizing policies leading to the downsizing of governments, the marketization of social welfare and the promotion of *market* regulation as a remedy for all ills. Since liberty is seen as an attribute of the individual, the very premise of *statutory* regulations (collectivist approach) equates to the state denying the right of individuals to act voluntarily. *Statutory* regulation of the employment contract is illustrative of this. The state imposes contract terms in regulating the individual employment contract. By imposing minimum standards, it is argued that the state is negating the civil rights of individuals to freely enter into contracts that best reflect their self-interest. From the perspective of governing the economy, imposed contract terms is argued to result in unemployment and wage-based inflationary pressures as markets are prevented from establishing a neutral price for the cost of labour (i.e. the price that both the buyer and seller agree on). In summary, the Keynesian welfare state essentially de-commodified labour through *statutory* regulations and placed it in stronger position than it would otherwise command in a market economy.

While the New Right have put forth a set of policy prescriptions to remedy what they perceive to be structural failures, this by no means represents a coherent or complete ideology. New Right ideology embodies the conflicts and contradictions found within the liberal and conservative streams of intellectual thought. As with any system of ideas, its idealized form often runs into difficulties in its operationalized form. It would be a

mistake, therefore, to view New Right ideology as a comprehensive package of policy reform. Nonetheless, in public discourse, these policy prescriptions are presented as being the only and best option.

Market regulation and the relative re-commodification of labour

Since the market is seen as the most suitable arena for the expression and pursuit of individual self-interest, New Right logic argues that the outcome of market exchanges will reflect the most efficient use of scarce resources. The use of *market* regulations in creating a regime of greater labour market competitiveness assumes that there are a sufficient number of employers and employees, at any given time, so that no one single actor is able to exert significant influence upon the market outcome. In a competitive labour market, theoretically, there will be no unemployment; the supply of labour and the demand for labour will be equal and the natural equilibrium wage will be established. When labour market conditions change, the price mechanism will adjust the natural equilibrium wage accordingly. For example, unemployment exists because the supply of labour exceeds the demand for labour (a tight labour market), thus the natural equilibrium wage rate will fall; similarly if the demand for labour exceeds the supply, then the natural equilibrium wage rate will rise causing in both cases supply and demand in the labour market to move towards a natural equilibrium. Government interference in the labour market seeks to replace the price mechanism, which according to critics cause a disequilibrium. For example, state imposition of minimum wage laws as a means of redistributing income, is said to disrupt the labour market's ability to "clear". By

artificially setting the wage rate – which is generally said to be above the equilibrium rate – the market will result in unemployment as employers reduce minimum-wage jobs, thus decreasing the number of available jobs. *Statutory* regulation outside of the employment contract will also distort the market. It is claimed that social benefits or employment insurance encourage unemployment because they replace the value of lost wages thus insulating workers from the discipline of market forces. This results in increased unemployment and wage-based inflationary pressures as unemployed workers, who have voluntarily withdrawn from the labour market, wait for higher paying jobs. These inflexibilities are barriers to the labour market clearing (i.e. full employment). Thus, unemployment is argued to be the result of voluntary actions by workers and misguided government programs, rather than market failure. Efforts should be made, it is argued, to reinstate the neutral price flexibility of the market.

Regulation of the employment relationship

Capitalist accumulation takes place within social and political frameworks. In Canada, *The Constitution Act, 1867*, gives the provinces jurisdiction over property and civil rights,¹⁸ hence, each of the provinces and territories have jurisdiction over employment regulation within their defined geopolitical region, with the exception of classified employees who fall under federal jurisdiction. This constitutional division of power presents the subnational state, as an enabler of capitalist production, with a dual although contradictory function in regulating the individual employment contract. Its

¹⁸ The right to enter into a contract is considered a civil right.

first function is to determine the extent employment regulation is necessary without interfering or causing undue harm to capitalist accumulation. This function arises, in part, to the state's second function - ensuring the social reproduction of labour.

The Ontario regime for employment regulation uses both *statutory* and *market* regulations. Through regulations, the state establishes what is considered to be acceptable behaviour, standards or processes through the legal system. In regulating the employment relationship, the state is regulating capitalist behaviour and regulating the social production of labour. By invading the private sphere of production, the state limits accumulation strategies individual capitalists may pursue through, for example, legislative bills permitting the use of cheap child labour.

In the past, the courts have played an activist role in safeguarding workers' rights. In this regard, liberal law de-commodifies labour by upholding favourable judgements as well as by influencing the legislative agenda through its rulings. The Supreme Court of Canada, for example, in the verdict of *Slaight Communications v. Ron Davidson*, noted the role of the legislative regime in balancing the unequal power relationship in the employment relationship:

The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation -- legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether -- must be seen in this context. It is an attempt to infuse law into a relation of command and subordination (1989: par.4).

The legal system, however also rationalizes capital's exploitation of labour and according to Marxist scholarship, "embeds and naturalizes" strategic elements in the (re)production of capitalist relations (Glasbeek 1999: 819). The liberal law regime conceals capital's structural advantage under the liberal façade of equality and freedom. The inequalities perpetuated are concealed by the fact that each individual is given equal rights and obligations regardless of their wealth. Through this practice, the law "naturalizes" and normalizes the coercive nature of the employment contract. It is within liberal law that the asymmetries of the employment contract are enforced; wealth owners and non-wealth owners enter into enforceable agreements on the basis of formal equality before the law but on the grounds of substantive inequality as non-wealth owners have only the ability to sell their labour power. By ignoring the structural inequalities between capital and labour (individual and collective), the law will continue to favour capital as long as legal processes embody claims of neutrality (Bartholomew and Boyd 1989: 230).

Given the centrality of law in contemporary capitalist societies, one expects the law to influence various aspects of capital accumulation and capital restructuring. However, given time and space constraints, this thesis will limit itself to certain key aspects of law in theorizing the rise of the new infrastructure and employment regulation. One key aspect is liberalism's ideological construction of "free" subjects which sets the foundation of contract law – contracts, to be legally binding, must be freely entered into (Bartholomew and Boyd 1989: 229-231; Glasbeek 1999). In liberal democracies the employment contract is considered to be freely entered into by both workers and their employers. The crux of the employment contract is that the worker's labour as well as

the surplus value produced belongs to the employer through the process of exchange of labour power for wages (Glasbeek 1999: 830). In entering the employment contract, the worker submits to a subordinate position. Furthermore, because the employment contract is incomplete, the worker is required to do all that is asked, as long as the request is within reason.

Glasbeek sums up it: “the starting position of the law encapsulates the coercive aspect of employment contracts” (1999: 830). Hyman notes, “the notion of a free contract between equals has little relevance to the real world” (1975: 23) and Glasbeek stresses “from the worker’s perspective, the contract is *never* one freely entered into” (1999: 830). The employer, as a holder of wealth, is the only party that genuinely enjoys the freedom of choice when negotiating an employment contract. The worker, as a non-wealth holder, must engage in the wage relationship for sustenance. Although some workers, notably those with valued skills, are able to choose between different employers, by virtue of existing in a class society – in a capitalist system – one must sell one’s labour to survive. Furthermore, Marshall illustrates the inherent weak position of labour:

labour is often sold under special disadvantages, arising from the closely connected facts that labour power is “perishable”, that the sellers of it are commonly poor and have no reserve fund, and that they cannot easily withhold it from the market (1920: 567).

Added to this are the comments of the founder of the Australian conciliation and arbitration system who also unmask the guise of the “voluntary” employment relationship:

The power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse labour. Freedom of contract under such circumstances is surely misnamed; it should rather be called despotism in contract ... [t]he worker is in the same position as Esau, when he surrendered his birthright for a square meal, or as a traveller, when he had to give up his money to a highwayman for the privilege of life (cited in Glasbeek 1999: 831).

Deconstruction of the employment contract from one that is freely entered into to one of “despotism in contract” is not new. The Canadian legal system, for example, recognized the employment contract as embodying economic processes as well as relations of power and control as far back as 1887 (Tucker 2000: 672).

The result has been a striking contradiction: the employment contract is predominantly characterized as a freely agreed upon contract between workers and their employers, however, regulation of the employment contract, such as through minimum standards and health and safety legislation deeply embeds the contractarian framework within society. By embedding the contractarian relationship, it (1) makes it easier to enforce the contract, but also, (2) views the employment contract with an oscillating recognition that some are more “free” and “equal” than others in entering the agreement.

Merging the themes

In summary, this thesis will argue that the new infrastructure provides a useful framework for analyzing the political restructuring of domestic institutions and regulatory strategies. Domestically, the state actively procures the conditions for capital accumulation and capital restructuring. Contributing to this effect is “state [definition] and [enforcement] of property rights, [regulation] of money and credit and [regulation of]

the relations between employer and employees” (Piven and Cloward 1998: 4). However, in recognizing the challenges of economic integration, this thesis argues that the state is reconstituting its regulatory strategy, specifically in the area of employment to mitigate possible dislocations. One example is in the area of jobs.

Trade liberalization, an aspect of economic integration, is considered beneficial in that increased exports will result in a higher standard of living. But exports need to go somewhere, thus one country’s exports is another country’s imports. The demand side of this equation points to the adverse impact exports can have on domestic economies. Industries may be displaced, jobs may be lost and wages may decline – all of which point to the need for domestic political restructuring to counter the effects of economic integration.

Trade regimes have largely focused on building international frameworks for the accumulation of capital. While this has had some effect on domestic policies, it has by no means facilitated mass uniform policy convergences as the impacts are mediated or refracted by the state through domestic institutions and policies (Keohane and Milner 1996; Keohane and Milner 1996a; Weiss 1997). Trade regimes also provided the rationale for domestic governments to engage in mass policy reforms in the name of increased competition. The Ontario employment regulatory regime drew on this rationale to introduce a regime of greater labour market competitiveness through the increased use of *market* regulation. In employment regulation, *statutory* and *market* regulation point to ways the economy and economic behaviour are embedded in society. Depending on the types of regulation used, the state encourages pro-individualistic or pro-collective

institutions and behaviour. The next chapter will introduce the ESA 2000 as a backgrounder for the rest of the thesis.

Chapter 3 Employment Regulation

Regulating labour in Ontario

Employment standards are important to all workers; unionized workers build collective agreements over and above the minimum established by the *Employment Standards Act* (ESA) and non-unionized workers depend on the ESA as a legal framework to secure decent working conditions. This central piece of legislation defines workplace “rights and responsibilities” for most workplaces covering the terms and conditions of the hours of work, overtime pay, vacation time, breaks, leaves, holiday pay, termination and severance and minimum wage. The Ministry of Labour employment standards officers enforce the act along with the civil courts, the grievance procedure in unionized workplaces and the Ontario Labour Relations Board.

Given the sheer number of non-unionized workplaces in Ontario, it goes without saying that workplace regulation is a difficult and complicated task; the variation in work forces, management philosophies, workplace cultures, and the different levels of technological advancement, etc. make workplace regulation intrinsically difficult (Kaufman 1997). Regulators are often caught in a catch-22 situation. In trying to take into account all the variability in workplaces, complicated regulations may become infinitely complex to administer, interpret and enforce. Alternatively, simplistic regulations are easily administered but may be inappropriate and ineffective.

Structuring the ESA 2000

In Ontario, the Ministry of Labour is responsible for the regulation of “employment rights and responsibilities” as well as the regulation of occupational health and safety and labour relations. In these core responsibilities, the Ministry is guided by the principles of “flexibility”, “competitive advantage” and “workplace democracy” (Ontario 1999a); in short, principles that support the government’s “pro-growth, pro-jobs agenda” (Ontario 1999a). These terms are often euphemisms for *market* regulation as they encourage the use of or an increased reliance on market forces.

Under the Ontario government, the ESA was amended twice, once in 1996 and again in 2000. In 1996, then Labour Minister Elizabeth Witmer introduced “housekeeping” amendments to the ESA, *Bill 49, An Act to Improve the Employment Standards Act*. These amendments included: a shortened period within which an employee can file a complaint; a reduced time period from two years to six months for Ministry of Labour investigations; a limit on employees’ claims against their employers from unlimited to \$10,000; a shift in the burden of enforcement onto unions by requiring unionized complaints be processed through the grievance procedure; limitations on the capacity of non-unionized workers to seek redress either through the Ministry of Labour or the civil courts; and the introduction of private collection agencies to settle ESA’s claims as well as giving them the right to negotiate claims. According to the government these changes were aimed at improving the effectiveness and efficiency of administering the ESA.

Bill 147, Employment Standards Act 2000 was introduced in the legislature on November 23, 2000. The Act received Royal Assent on December 21, 2000 and came into force September 4, 2001. With the ESA 2000, the government announced that its intentions were to “promote greater compliance by all workplace parties, enhanced protection for workers and a more level playing field for employers” (Ontario 2000d: par.24). The act was to be “flexible, modern, efficient and fair” (Ontario 2000d: par.23).

Working hours

Under the ESA,¹⁹ the standard workweek was 48 hours with a standard 8 hour working day or longer if the regular day was set by the employer. With the approval of the Director of Employment Standards, the daily maximum may be extended to no more than 12 hours per day however the maximum 48 hours per week was not to be exceeded unless a permit was approved by the Ministry of Labour. Within a working day, a rest period of uninterrupted 30 minutes was required for every 5 hours worked and within a seven day workweek, at least 24 consecutive hours of rest must be provided.

The maximum 8 hour day or regular working day as defined by the employer and 48 hour week remains in the ESA 2000. However, Section 17(2) permits an employer to require employees to work up to 60 hours per week as long as the “employee agrees to work those hours” (Ontario 2000). The employee may revoke this agreement two weeks

¹⁹ In this section, ESA will be used for the Act prior to the amendments in 2000. The ESA 2000 will refer to the amended act.

after giving written notice to the employer whereas the employer is obliged to give the worker “reasonable” notice.²⁰

Section 18(1) allows for a daily rest period of at least 11 consecutive hours off in 24 hours²¹ while section 18(3) requires employers give their employees at least 8 hours of non-work time between shifts²² unless both the employer and the employee agree to otherwise. Section 18(4) allows for further flexibility in working schedules by amending the provisions for free time. Under the ESA 2000, workers are entitled to at least 24 consecutive hours of rest or at least 48 consecutive hours within two consecutive workweeks. Both section 17 and 18 may be circumvented in the case of emergencies or unforeseen events that “seriously [interfere] with the ordinary working of the employer’s establishment and operations” (Ontario 2000, section 19).

Workers retain their 30 minutes for eating time. However, the ESA 2000 allows for this time to be split into two smaller time blocks, “if the employer and the employee agree”, so long as the blocks add up to at least 30 minutes within a 5 hour period (Ontario 2000, section 20(2)).

Overtime pay

The ESA provides that overtime premiums of 1½ times the regular rate be paid for time worked past 44 hours. Averaging out of overtime was allowed with a Director’s

²⁰ This term is not defined nor does the ESA 2000 set parameters on what it may or may not entail.

²¹ This excludes “an employee who is on call and called in during a period in which the employee would not otherwise be expected to perform work for his or her employer” (Ontario 2000, section 18(2)).

²² This does not apply if “the total time worked on successive shifts does not exceed 13 hours” (Ontario 2000, section 18(3)).

permit. Both provisions remain in the ESA 2000. However, under section 22(2), the averaging of overtime will no longer require a permit, rather it may be done “if the employee and the employee agree to do so” (Ontario 2000). Overtime incurred may be averaged over a period of 4 weeks, thus allowing for flexible working schedules such as the compressed workweek. This agreement must contain an expiry date that is no more than two years after the day the agreement comes into effect and may not be revoked before its expiry date unless “the employer and the employee agree to it” (Ontario 2000, section 22(3); section 22(6)).

The ESA 2000 allows for time off in lieu of overtime pay at the rate of 1½ hours off for every hour of overtime worked and must be taken within established timelines (Ontario 2000, section 22(7)). Again, this provision is subject to employer and employee consent.

Minimum wage

No changes were made to the minimum wage. The general minimum wage remains at \$6.85 an hour, liquor servers are entitled to \$5.95 and workers under 18 years old receive a sub-minimum wage of \$6.40 if they work less than 28 hours a week during the school year and during school breaks, otherwise they are entitled to the general minimum wage.

Paid time off

Public holidays remain unchanged in the ESA 2000, although eligibility provisions for holiday pay have been amended. Employees are now only required to work their scheduled shift the day before and the day after of the public holiday in order to qualify for either public holiday pay or premium pay. A variety of scenarios are outlined in the ESA 2000 that detail the required monetary compensation or time off in lieu. For time off in lieu of monetary compensation, “an employer and an employee [must] make an agreement” to do so (Ontario 2000, sections 27-30).

Vacation with pay remains at a minimum of 2 weeks after a year’s service. The ESA provisions of taking vacation in one week blocks was amended to allow vacation time to be taken in increments of less than one week blocks provided that the employee makes a written request and the employer agrees to the request (Ontario 2000, section 33(3)). Employees may forgo their vacation entitlements upon the approval of both their employer and the Director of Employment Standards (Ontario 2000, section 41).

Leaves of absences

Pregnancy and parental provisions found in the ESA 2000, sections 46 and 48, mirror the recent changes to the federal *Employment Insurance Act 2000*. The ESA 2000 increases parental leave from 18 weeks to 35 weeks if the employee takes pregnancy leave and 37 weeks if the employee does not. Pregnancy leave remains at 17 weeks. Reinstatement provisions exist for those who decide to take advantage of this benefit.

Those not returning to work at the end of the leave period are required to give 4 weeks of advance notice.

New to the ESA 2000 are provisions for emergency leave. Under section 50, employees are entitled to 10 days of unpaid leave under limited circumstances. Leaves that are taken as part of a day are considered to be a full day leave. This is only applicable to workplaces that have more than 50 employees.

Termination and severance

No substantial amendments were made to this provision. For those who were continuously employed for 3 months or more, a written notice of termination or termination pay is required under the ESA 2000 (Ontario 2000, section 54). Notification of termination and severance is dependent upon the length of employment ranging from 0 weeks of notice for those employed less than 3 months to 8 weeks of notice for those employed for 8 or more years. A mass termination of 50 or more employees requires 4 weeks of notification. In cases where notice was not served, the employee is entitled to termination pay. Employers with a payroll of at least \$2.5 million or who severed the employment of 50 or more people in the past 6 month period are required to offer severance pay to employees who have been employed for five or more years.

Reprisals

A new reprisal provision appears in the ESA 2000. Section 74 states that

no employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so, because the employee, asks the employer to comply with this Act and the regulations (Ontario 2000).

as well as a number of other reasons outlined in the Act. Interestingly, the onus is on the employer to prove that this section of the Act was not contravened.

Complaints and enforcement

The ESA limits workers' avenue of recourse in seeking compensation for violations of their employment rights. Sections 97 and 98 restrict workers to either filing a civil suit or filing a complaint with the Ministry of Labour (Ontario 2000). In doing one, the employee voids the other alternative. The ESA 2000 makes no amendments to these provisions.

Offences and prosecutions

The ESA 2000 introduced an escalating range of penalties for those who contravene the Act. Fines remained at not more than \$50,000 for individual violators however the jail time is doubled from 6 months to 12 months (Ontario 2000, section 132). Corporate fines increased, moving the threshold to not more than \$100,000 for the first offence, not more than \$250,000 for the second offence and not more than \$500,000 for subsequent offences (Ontario 2000, section 132). In addition, failure to comply with a reinstatement order carries a monetary fine of not more than \$2,000 per day for individual employers and not more than \$4,000 per day for corporate employers (Ontario

2000, section 134). Section 137 provides that the onus of proof lies with the employer to prove that the Act was not contravened (Ontario 2000).

New directions

Much controversy has surrounded these amendments as critics argued workers stand to lose rather than gain. The reduced state role in regulating the employment contract, critics argued, means that workers will be coerced into taking vacation days on slow production days; coerced into giving up overtime pay and holiday pay premiums; and coerced into accepting erratic work schedules tied to production needs. At a glance, the amendments overall give the impression that the Ontario state is shirking away from its traditional role in the regulation of the individual employment contract. This is a mistake. The regulatory regime governing the employment contract remains, however, we are witnessing a different kind of regulation characterized by an increased reliance on *market* regulation that promote pro-individualistic behaviour.

An analysis of the ESA reveals a simultaneous linking to and a de-linking from the underlying reality of Canadian labour markets as well as a linking to and a de-linking from the underlying reality of the regional economic environment. The Ontario government's stated goal was to structure a regulatory framework where flexible employment contracts enable businesses to quickly and easily respond to changing processes of production and the integration of markets. However, while building these linkages to external pressures, the government has failed to address, perhaps even recognize, the inadequacies of the ESA 2000 to address core employment regulation

issues that concern domestic workers, mainly, the uncertainty and insecurity that characterizes the current labour market (see for example Canada 1997). In fact, the ESA 2000 exacerbates workers' sense of uncertainty and insecurity. The failure to address these issues calls into question the role and purpose of employment regulation.

In constructing employment legislation, it was recognized that governments could legitimately use state power to redress the inherent uneven balance of power between employers and employees. Dagg asserts, "it is the responsibility of governments to ensure that workers with no collective representation and little power in the labour market have access to some fundamental rights and standards" (1997: 102), thus highlighting the position of individual workers in the employment contract and the role of the state in upholding civil rights. But, when pressed about possible coercion by employers, the Minister of Labour retorted, "if they're [employers] going to break the law, they're [employers] going to break the law" (Ontario 2000b: 1850). In alluding to the pointlessness of the issue, the Minister of Labour's comments signaled a break from the purpose of government intervention from redressing social issues to policing social outcomes. It also indicates a preoccupation with the process of regulation (such as the elimination of "red tape") rather than effective regulation.

The use of employment regulations to redress the imbalance of power between employers and individual workers is now considered a flawed policy tool. When concerns were raised regarding the power asymmetries in the employment contract, the Minister of Labour responded that today's individual employment contract outside of unionized environments is "a good situation" due to "more enlightened employers and

employees” (Ontario 2000b: 1900). The self-evident assumption is one that sees employers’ and workers’ interests as contiguous and hence, regulations that assume otherwise are both self-defeating and inefficient. Thus, state power should be used to “enforce” the rule of the markets that will in turn supposedly produce benefits that satisfy both parties. The need to make Ontario more competitive suggests that the primary role of employment regulation is to facilitate the accumulation process. In this regard, a marketized employment regulatory regime is consistent with the government’s overall scheme of industrial development. The concept of a *market* regulated labour market is intrinsic to a competitive economy. *Market* regulations provide the framework that tries most to simulate perfectly functioning markets whether it is in the commodity or labour market.

Towards an understanding of the ESA 2000

There are two aspects to understanding the ESA 2000 – the technical and the philosophical. Technically, the ESA 2000 needs to be placed within the regional regulatory framework. Employment regulations are socially structured and institutionally mediated. The forces of economic integration define key relations between Ontario and its trading partners. Philosophically, the ESA 2000 needs to be placed within the political economy of Ontario. An understanding of the provincial system of governance and its regulatory strategies are crucial building blocks towards an understanding of the new infrastructure of employment regulation.

Before the technical and philosophical aspects of the ESA 2000 are explored, it will be useful to understand the political economy of governance in Ontario, specifically the role of the Red Tape Commission and the development of the new infrastructure. Once this is established, Chapter 5 will situate Ontario within the regional political economy to examine the extent of the state's autonomy in constructing employment regulatory strategies vis-à-vis international capital. Chapter 6 will argue that a philosophical shift along with economic integration motivated the reformulation of the ESA 2000. This chapter will also offer a model of the new infrastructure of employment regulation in Ontario.

Chapter 4 ‘Free economy / strong state’: the New Right

The focus of this chapter will be the role of the Red Tape Review Commission and the Red Tape Commission in developing Ontario’s industrial strategy through regulatory reform. Regulatory reform strategies also highlight the free economy/strong state political economy of Ontario. The Ontario government displayed a high degree of autonomy in pursuing policies that reinforce a regime of market competitiveness. The reduction of red tape, or as the government terms it, “unshackling business”, was key to this endeavour. According to the Conservatives, Ontario was over-regulated with excess labour, safety and environmental regulations that drove job-creating investments away from the province. Thus, the nerve centre of the government’s strategy is to draw investors in with “lower taxes and a business-friendly climate” (Ontario 1999c: 4).

New Right in Ontario

After winning their election mandate, the Ontario Conservatives declared the inadequacy of the (then) governing framework and introduced New Right policies intended to “*fix government*” (Ontario 1999d: 11; original in emphasis). The Ontario government’s manifesto, the *Common Sense Revolution*, focused on limited government, individual liberty, personal responsibility, economic opportunity and security of the individual and the state. The central unifying point that glues the document together is found in the first line of the introductory paragraph: “government isn’t working anymore. The system is broken” (Ontario Progressive Conservative Party 1995: 1).

In the case of Ontario, the New Right's preoccupation with limited social spending was accompanied by the "there is no alternative" rhetoric of cutting down the provincial debt. Having inherited a provincial accumulated debt of approximately \$100 billion, on a per capita basis one of the worst, if not the worst fiscal situation in Canada (Woolstencroft 1997: 47) – the government was compelled to act. The sense of urgency culminated in the social contract²³ where fear that inaction would lead to Ontario hitting the 'debt wall', the critical threshold where investors and creditors lose confidence in the government's ability to meet financial obligations resulting in mass capital withdrawals or the denial of additional credit. In attacking the debt, the Ontario government was reacting to the influential assessments of international fiscal managers, such as Standard & Poor's whose credit ratings are based on the obligor's capacity to meet their financial commitment. An unfavourable or bad credit rating sends warning signals to potential investors as confidence in the obligor's fiscal management abilities or policies are called into question.

Workman (1996) cautions us to remain critical to those who invoke the discourse of fiscal crisis, and the fiscal "truths" that framed the debt management discourse. Workman, for example, credits the fatalism of the debt discourse with "rationalizing and legitimizing" neo-liberal policies (1996: 26). Workman's caution is supported by Walkom who exposes the rhetoric behind the debt discourse during the 1995 Ontario provincial elections:

²³ In an effort to save \$2 billion dollars while maintaining the public service, former Premier Rae opened public service collective agreements for wage renegotiations against the strong opposition of public sector unions.

Harris explained before the election that his priority is not deficit reduction but tax cuts... More important, and the forces behind Harris – the business elite, the financial houses, the sophisticated right – don't care that much about deficits, either. They say they do. They've managed to convince much of the public that deficits are the major threat to Canadian society. But they are not bothered to excess by government debt. They want cutbacks to social spending ... because they want to keep wage costs down. They want union rights reduced ... And they want their tax cuts (1995: B5).

Nonetheless, it remains important to acknowledge the institutional constraints created by a large debt. Given the situation, it is difficult to assess the extent the debt posed constraints on the Ontario government. On the other hand, we cannot dismiss Workman's caution. Thus, we also cannot accurately assess the extent to which the Ontario government invoked the "there is no alternative" rhetoric of deficit reduction to pursue an alternative agenda.

What is known, is that the "there is no alternative" rationalization of the debt discourse perpetuates the myth that the *only* alternative for economic development, growth and increased productivity is lower taxes, reduced state social spending, trade liberalization and embrace of monetary policies. In the 1999 Throne Speech, the government, for example cast dire warnings about the "pressures of a global economy", the "competitive and volatile world", the "fragile" nature of "economic progress ... job creation ... and ... standard of living" and concluded, "without improvements, our quality of life is in jeopardy" (Ontario 1999b: 4). Emotional trigger words were used to invoke feelings of intense uncertainty and insecurity. In the same document, the Ontario government presented four key steps that "must" be undertaken to mitigate these pressures: reduce taxes, maintain the province's reputation as an attractive place to invest

and create jobs, eliminate barriers to internal trade and have a clear plan for the future. In charting this course of action, the Ontario government equated a strong economy with the individual's personal aspirations: "a strong economy is the foundation of everything else people want in life for themselves and their families" including "a strong health care system", "a brighter future for our children ... a cleaner environment ... a safer province" (Ontario 1999b: 6).

This serves two purposes. One, in casting the global economy as uncontrollable, unpredictable and unforgiving, the ensuing reaction was to mitigate the effects rather than to question and analyze the dynamics of capital restructuring. Second, in equating the health of the economy with the well-being of citizens, it was assumed that the interests of capital are congruous with that of the general population. Hence, if tax cuts and reduced wages reflect positively on the corporate bottom line, then it must be good for the economy and the province as a whole. Furthermore, this ensures, as Mahon has argued, "that whoever may or may not gain, capitalist interests are least likely to lose" (1977: 172). Both aspects have contributed to the acceptance of the neo-liberal policy package as "conventional wisdom" or "common sense".

If one accepts that capital depends on the state for its reproduction, as this thesis does, then the next line of inquiry is not to question why "there is no alternative" (because we know there are) but rather why does the "there is no alternative" argument continue to persist? The underlying imagery is one of states that are paralysed or severely restrained by the structural forces of global capital.

Work-in-process: making the competitive economy

It is not surprising that Jacek describes the introduction of New Right policies in Ontario as “the most dramatic shift in public policy in over fifty years” (1997: 305; also see Ralph et al. 1997). In Courchene’s study of Ontario’s political economy, he captures the moment best: “Ontario is in the throes of a series of internal socio-economic revolutions” (1999: 13). This suggests that Ontario is experiencing more than a change in government, rather it points to a province that is undergoing political and economic structural change that “transcend” the Ontario Conservative Party (Courchene 1999: 33).²⁴ One cannot assume that should an NDP government returned to Queen’s Park, things will return to “normal”. As Tom Long²⁵ stated, “This is the new centre” (cited in Ibbitson 1997: 73), implying the broad-based acceptance and appeal, hence the normalization of New Right policies.

The Ontario government’s “Common Sense Revolution of practical ideas” was justified using the catchphrases of “increased flexibility”, “improved efficiency” or “reduced costs”. In short, these policies sought to bring Ontario closer to a regime of greater market competitiveness where different policy tools are used to encourage individualistic behaviour and institutions. Much of this was done using the rhetoric of “red tape reduction”.

²⁴ See Clarkson 1999 for an alternative analysis. Clarkson (1999) argues that the Ontario government’s (1995-1999) economic policies were a continuation of predecessor governments. Furthermore, Clarkson argues that key features of the government’s agenda are reversible (1999: 103-104).

²⁵ Tom Long is a long-time Harris advisor. He also ran in the leadership race of the Canadian Alliance Party in 2000.

Red tape reduction

A government full-page ad in *Globe and Mail* screamed: "Ontario is not just open for Business: Ontario is Business" (cited in Clarke 1997: 36). The constant recycling of this message over the years has reinforced the state's support for business as the engine of growth and served as a reminder of its willingness to create the conditions for maximum accumulation. "For years, taxes were too high, the bureaucracy was too big, and -- everywhere you turned -- red-tape was strangling the initiative and innovation of our business people," then Premier Harris said (Ontario 2000e: par.2). "We have moved decisively to fix these problems and to establishing an economic climate that creates jobs and prosperity throughout the province" (Ontario 2000e: par.2).

Much of this was done by encouraging market-driven responses that weakened *statutory* regulations and increased the use of *market* regulations. Part of the rationale was to save \$83.4 billion²⁶ it was estimated that Canadian firms lost to the cost of regulations per year (Mihler 1998: 1). An environmental regulation example illustrates the savings²⁷ in a *market* regulated jurisdiction:

When a mining corporation... shuts down a mine in Ontario, it no longer has to satisfy the government, and thereby the surrounding community, that it has a plan to clean up the toxic waste it has produced. It only needs to tell the government of its plans to meet provincial standards. Meanwhile, [a] new law will replace comprehensive inspection procedures of tailing sites with random spot checks (Clarke 1997: 35).

Clearly, the Ontario government recognizes the value of regulatory reform for "[building]

²⁶ This is an aggregated figure based on 1995-1996 numbers.

²⁷ This refers to the economic costs incurred by capital in the course of doing business rather than the social costs, a majority of which are socialized.

a positive business climate and [helping] businesses keep their costs down” (Ontario 2000f: par.1). To this end, the modernization of the ESA “will help Ontario businesses become more productive and competitive and attract jobs, investment and growth to Ontario” (Ontario 2000d: par.2).

The new infrastructure of regulation

The Red Tape Commission (RTC) is key to the red tape reduction initiative. The RTC is both a response to the broader demands for an increased competitive environment as well as an ideologically conditioned conception of the Ontario government. As Ontario is increasingly integrating into the regional economy, the province increases its exposure to external pressures. In this respect, the RTC is responsible for mitigating these effects by coordinating the government’s strategy to create and maintain a capital friendly environment. The RTC is also a political institution that reflects the policy preference of the Ontario government. The RTC was created to facilitate key aspects of the government’s legislative agenda. Red tape reduction is “at the heart of [the Ontario government’s] agenda” and is “the centre of the government’s economic strategy” (Paleczny²⁸ and Weeres²⁹ 2001: 31). In this aspect, the RTC is integral to the macro-organizational³⁰ restructuring of Ontario.

The RTC is the successor of the Red Tape Review Commission (RTRC). The

²⁸ Tim Paleczny is the current Communications Manager of the Red Tape Secretariat, a body that supports the RTC in carrying out its mandate.

²⁹ Scot Weeres is the current Director of the Red Tape Secretariat.

³⁰ Dunning defines “macro-organizational” as the “policies of governments designed to affect the structure rather than the level of economic activity which is undertaken” (1997: 77).

RTRC reported directly to the Premier and Cabinet. The RTRC was convened in November 1995 and was given a year-long mandate to address red tape issues. The RTRC was claimed to be an “arms-length commission” (Ontario 1997: 9). This was neglected when the Premier appointed eight PC MPPs³¹ to sit on the commission with PC MPP Frank Sheehan as Chair.³² The RTRC presented its final report to the Premier and Cabinet in January 1997. Two key recommendations were presented - the establishment of a permanent “regulatory watchdog committee” mandated to “oversee regulatory reforms and act as a catalyst for change” and the establishment of a regulatory impact test to “be made a permanent part of the government decision-making process” (Ontario 1997a: 4). To this end, a June 30, 1999 Order in Council instructed the RTRC to clarify its recommendations to the Premier and Cabinet on the nature of a regulatory watchdog committee and the establishment of a regulatory impact test. On June 21, 2000, the RTRC was formalized into the Red Tape Commission and given a permanent mandate (Ontario 2000f: Orders-in-council):

- To help businesses, institutions and consumers with red tape problems;
- To evaluate regulatory proposals applying the Business Impact Test;
- To co-ordinate the development of at least one Red Tape Reduction Bill per year;
- To assist ministries in implementing red tape reduction plans; and
- To undertake special red tape reduction projects on behalf of ministries.

The RTC regulates against government regulatory burdens and aims to “eliminate

³¹ Marcel Beaubien (Lambton), Jim Brown (Scarborough West), Barbara Fisher (Bruce), John Hastings (Etobicoke-Rexdale), Tim Hudak (Niagara South), John O'Toole (Durham East) and Joe Spina (Brampton North).

³² Mr. Sheehan, now a former PC MPP, is currently co-chair with PC MPP Steve Gilchrist of the Red Tape Commission.

existing red tape and prevent unnecessary rules and regulations from being created in the future” (Ontario 2000f: What We Do, par.1). Red tape is defined as

government measures that impede job creation and investment opportunities and diminish competitiveness by adding unnecessary, uncoordinated or unjustifiable requirements, restrictions, compliance, implementation or administrative costs to everyday business activities (Ontario 2000f: What is Red Tape?, par.1).

Red tape could include everything from legislation, standards, guidelines or “other measures that are not truly needed” to protect Ontarians (Ontario 2000f: What is Red Tape?, par.2).

Red Tape Review Commission

The starting point of the RTRC, and thus the RTC, assumes that “all governments, left to themselves, tend to over-regulate. Laws and regulations ... destroyed jobs and reduced choice... over-regulation is a major cause of unemployment” (Ontario 1997b: 1). The RTRC argued that the pressures of global competition dictate “the regulatory climate [as] the prime consideration when job creation decisions are made” (Ontario 1997b: 14).

In light of this, the RTRC ominously declared, “Government can no longer afford to regulate to the same extent, or in the same way, it has in the past. To meet people’s needs while controlling costs, the province must set priorities” (Ontario 1997b: 2). What they meant was, the province must set *new* priorities. By employing the RTRC, the Ontario government was able to paint regulations as rampant and out of control. Whereas previously, it was government policy to ensure collective security through

statutory regulation, it has now become one that is expressly concerned with *market* regulation and the promotion of market competitiveness.

Regulations have, by and large, been labelled as “job killers”. In setting new priorities, the RTRC’s advocates a very linear and ahistorical perspective. Rather than acknowledging the utility of regulations in addressing market failures or deficiencies, the Commission attributes the growing regulations to “a regulatory culture... in government that seeks to solve all problems by spending taxpayers’ money and making new rules” (Ontario 1997a: 1). The Commission focused solely on the business agenda and the needs of businesses today without considering the labour-capital struggles that initiated these measures. This was evidenced in the RTRC’s consultations. In the course of preparing their report, members received “presentations by more than 70 *business organizations and firms*, more than 150 written submissions and the results of a survey of 500 Ontario *employers*” (Ontario 1997a: 2; my emphasis).

As noted earlier, in its final report, the RTRC recommended the formation of a “regulatory watchdog committee” that was to be composed of MPPs and representatives from the private sector. Inclusion of only private sector actors will undoubtedly result in biased recommendations. Broad-based representation from other civil society groups would have provided alternative perspectives on existing as well as future regulations. While the Commission advocated for consultations that are “thorough, meaningful, and comprehensive” (Ontario 1997b: 14), the exclusion of large sections of civil society from the committee selection process was not considered worrisome even though it stood in

direct violation of its own recommendation for “over-inclusiveness” of groups who were directly and indirectly affected.

A *Less Paper/More Jobs Test* was also recommended. According to the RTRC, this impact test was “designed to prevent proposed regulations or legislation from introducing new measures that will form a barrier to job creation or better government” (Ontario 1997a: 3). The principles and criteria of the *Less Paper/More Jobs Test* have since been incorporated into the development of the *Regulatory Impact and Competitiveness Test* (RICT). The RICT is essentially a cost-benefit analysis.

Cost-benefit analysis allows political arguments to hide behind a façade of respectable scientific bias (Meier 1982) and is misrepresented as a “neutral tool of rational administration” (Tucker 2000: 692). The appeal of cost-benefit analysis is largely intuitive – it is only rational to want benefits that outweigh costs (Meier 1982). The crux of cost-benefit analysis is “to replicate the allocation of resources that would have resulted in a well-functioning market given the existing distribution of wealth” (Tucker 2000: 692)

In the case of social programs or *statutory* regulation, cost-benefit analysis is used to approximate the monetary values on attributes of human well-being for which no market price exists. Cost-benefit analysis has often been relied upon to reduce the perceived economic burden and complexity of traditional regulatory approaches despite its guess-estimate method of analysis. Decisions, especially those involving complex health or safety problems, must be made in the context of uncertainty and with

incomplete knowledge of the consequences of action and inaction. Moore argues that regulations have:

numerous options and ramifications; have many other detailed alternatives; require numerous assumptions about other conditions affecting the outcome of the analysis; are typically concentrated on specific interests inviting conflict over assumptions, methods, and data; and can involve important considerations beyond concerns about general economic efficiency (1995: 9).

Given the scope of uncertainty, policy makers and regulators are forced to choose one option over others, uphold one set of assumptions while discarding others, and so forth. Essentially, these decisions are political as they determine *who gets what, when, how and why*. The Commission also recognized this conundrum.

As pointed out in the RTRC's report, "values change, needs change, and so must the regulatory system" (Ontario 1997b: 12). Who determines when the values have changed? Who determines which needs take precedence over others? The biases contained in regulations generally disguise who benefits and who loses from their conception through to enforcement. Shifts in the focus of regulations may cause shifts in who benefits or loses as a result. Formulation of regulations are motivated by end goals, but it would be crude to suggest these policy tools can be captured by fractions of the capitalist class. But to deny that regulations are constructed benefits would also be erroneous.

Regulations are as much a political tool as they are a policy tool. Non-scientific methods based upon human judgement, passions and values form the standards upon which regulations are constructed. Meier argues, "in most cases the conclusions of a cost-benefit analysis can be derived from the assumptions rather than the analysis. The

manipulability of the technique and the theoretical biases of the analysts make the results ideologically predictable” (1982: 158). Take, for example, the rigorous application of cost-benefit analysis during the first year of the Reagan administration; only one analysis resulted in a positive benefit-cost ratio (i.e. regulations that are unfavourable to business) – the nine-digit zip code (Meier 1982: 159).

The RTRC and now its successor, the RTC serves to legitimize various government actions by de-politicizing them. Working under the guise of independence, the Commission is seen as non-partisan and neutral drawing on the ‘expertise’ of others (mainly business groups) through extensive consultations. The Commission also applies cost-benefit analysis language to support its case of excess red tape and the unjustifiable costs of doing business in Ontario. The general process portrays professionalism, neutrality and fairness. MPPs are portrayed as rising above the partisanship of politics to genuinely act in the public interest.

The new governing framework

Although the RTC is a fairly recent phenomenon, its comprehensive mandate makes it an important one. The broad mandate of the RTC is “to eliminate existing red tape and prevent unnecessary rules and regulations from being created in the future” (Ontario 2000f: par.3). The RTC boasts that

Since 1995, the government has passed 13 red tape reduction bills, repealed more than 50 unnecessary Acts, amended more than 200 others, and [eliminated] more than 1,700 redundant or unnecessary regulations...[and] helped to investigate and resolve the red tape problems of more than 170 businesses and individuals (Paleczny and Weeres 2001: 32).

The RTC, supported by the Red Tape Secretariat, reports to the Management Board Secretariat, the Ministry responsible for advising and carrying out the directions of the Management Board of Cabinet. The Management Board of Cabinet is a committee of Cabinet that provides central leadership on the management of the government's financial, social and physical resources. The Management Board is also responsible for "[creating] policies, processes and standards of operation for all ministries" (Ontario 2001: par. 1). RTC does not have the status of a statutory regulatory agency as it does not have adjudicative or legislative powers. It is the Chair of the Management Board of Cabinet who introduces the annual Red Tape Reduction Acts (e.g. *Bill 119, Red Tape Reduction Act 2000*) on behalf of the various ministries. The RTC is not a Committee of Cabinet nor is it an ad hoc advisory body external to the executive and administrative structures of the government.

Rather, the RTC's role is described as "integral" and "inextricable" to the Cabinet decision-making process in the area of regulatory review and reform (Ontario 1999: par.3 and par.5). In fulfilling its mandate, the Commission deals with matters that are subsequently reviewed and deliberated on by Cabinet or one of its Committees (Ontario 1999: par.3 and par.5). Thus, the RTC has virtually unparalleled access and influence in realizing specific aspects of the government's legislative agenda. This privileged position should not be underestimated particularly given the "tight political control by the premier and a small, highly trusted staff in the premier's office" thus severely restricting the opportunity to participate in the decision-making process, especially by those outside of Cabinet (Wolfe 1997: 161).

The RTC's function is to advise, administer and co-ordinate the government's regulatory reform strategy. The Red Tape Secretariat coordinates ministry red tape activities with contacts in each of the ministries. The Commission works with the ministries in reviewing all proposed policy, legislation and regulations for red tape implications and applies them to the RICT. The RTC acts as both the gatekeeper and liaison to Cabinet in the area of regulatory reform:

Ministries are asked to appear before the RTC to discuss their policy proposals or draft legislation before they appear before Cabinet or its Committees. Cabinet may also recommend that a Ministry take its proposal before the RTC for review and comment. The RTC reviews policy proposals, draft legislation, Cabinet Submissions, provides Ministries with comments and directly advises Cabinet or its Committees on the proposals it has reviewed. Cabinet Office points out that since the RTC came into existence, it has served as a screening process for Cabinet and its Committees on a wide range of policy items. Cabinet Office explains that after the RTC has reviewed an item, the Chair will usually write the Minister and/or the Chair of the Cabinet Committee, raise any concerns, and provide advice and recommendations on the item. The Chair and members of the RTC are often invited to attend Cabinet Committee meetings in order to provide advice or make recommendations to the Committee on the reviewed items (Ontario 1999: par.3).

In addition, the Commission also reviews ministries' annual business plans for future red tape reduction strategies. Besides the elimination of red tape, one of the broader goals of the Commission is to "[foster] a cultural shift" away from the "zealous" regulatory culture of the public service.

The RTC's role is a combination of both policy development and policy enunciation. Policy development is defined as a "process of formulating policy options and evaluating their possible consequences" while policy enunciation is the "promulgation of general decision-making rules by the responsible authority" (Canada

1979: 61). In policy development, the RTC's links to the Management Board Secretariat as well as its central role in shaping the competitive environment ensures its influential role in not only giving advice, but also in the shaping of advice to the ministries. In this regard, administratively, the RTC has the power to carry out key aspects of the government's agenda. In policy enunciation, the RTC has a prominent and visible role in rationalizing and normalizing the rhetoric of over-regulation and the need to free the economy of unnecessary red tape. This is done through public consultations, publications and its direct service function.³³ Moreover, the Commission's administration of the ministry-wide RICT screens out potential regulations that do not adhere to established guidelines and thus, are sent back to the ministry for further tweaking. This sends a clear and uniform message of Cabinet's agenda to other parts of the government.

It would be a mistake to view the new infrastructure of regulation within an economic and political vacuum. The RTC is the product of an ideological conditioned response to regulation, but it is also in part a product of trade liberalization. Economically, the Ontario government's regulatory reform strategies must be viewed as an act to enhance the ability of Ontarians and Ontario's businesses to compete in the regional economy *vis-à-vis* their competitors. Politically, regulatory reform strategies are an opportunity to enact macro-organizational changes to the political economy of governance through the introduction of institutions designed to effect structural constraints into the governing framework.

³³ In this function the RTC encourages visitors to their website to "submit a red tape problem", contact the Commission if "you feel you are a victim of red tape" and join an email list to receive updates on the Commission's work (Ontario 2002c: online).

Regulatory Reform

Regulatory reform encompasses the

revision of a single regulation, the scrapping and rebuilding of an entire regulatory regime and its institutions, or improvement of processes for making regulations and managing reform. Deregulation is a subset of regulatory reform and refers to complete or partial elimination of regulation in a sector to improve economic performance (OECD 1997: 11).

Improvement of economic performance is the fundamental objective and its success is measured by the efficiency of national economies and the ability of economic actors to adapt to change to remain competitive. The concept of free economy/strong state is integral to the regulatory reform process. According to the OECD, the state is to embark upon “*comprehensive reforms ... aimed at a single policy area, sector or multiple sectors ... designed to achieve specific goals on a well-defined timetable*” (1997: 32, my emphasis). Clearly, these recommendations are based on the assumption that the state is sufficiently able to impose its will to further economic competitiveness for the purpose of supporting and facilitating capital accumulation. Put the OECD way, “reform that sharpens competitive pressures” will force firms to become “more efficient, innovative and competitive” (1997: 10).

It should be noted that “regulatory reform” is not a new phenomenon in Canada. Canada is a leader in regulatory reform leading Campbell to note, “it is no exaggeration to suggest that the Bush administration’s [(1989-1993)] regulatory policy actually adheres quite closely to Canada’s” (1991: 3). If regulatory reform is not new to Canada and if Canada is a leader in the area, why has it become such a big deal? In part, as Campbell (1991) points out, the agenda was historically pursued largely in stealth. In

Ontario for example, it is largely through the work of the RTC that the issues of privatization and deregulation have been drawn into the public discourse. The other part for this interest, this thesis ventures, is because the focus was on economic regulatory reform and as it shifts towards reform of *statutory* regulations, it has a more direct impact on the well-being of citizens. In this aspect, economic integration highlights the relatively burdensome nature of some *statutory* regulations that may discourage trade and investment. Given the global context, the OECD concluded:

the cumulative impact of such social regulations imposes substantial compliance costs on businesses, and can act as a barrier to competition, innovation, and trade. Reform is based on screening out regulations and formalities that are outdated or ineffective; streamlining and simplification of those that are needed; use of a wider range of market incentives and more flexible and international regulatory approaches; and introduction of greater discipline (1997: 13).³⁴

The reforms advocated range from the innocuous sounding “streamlining and simplification” to others, which this thesis argues, encourages the reconstitution of some *statutory* regulations.

By way of a concluding comment, within the new infrastructure, the RTC - as a political institution - is pivotal in restructuring the governing framework in Ontario as the state reconstitutes its role and function in the rapidly changing environment. The RTC signifies one aspect of the state that is dynamic, responsive and activist. Under the banner of regulatory reform, the RTC has set about weakening *statutory* regulations while promoting *market* regulations. Regulations as a policy instrument and regulations

³⁴ This quote refers to social regulations, however, it can also apply to *statutory* regulations as both generally seek to promote the collective interest.

as a political tool were both utilized by the RTC to shift the promotion of collectivist behaviour and institutions towards one that embraces individualistic behaviour and institutions. This aspect will become clearer with a detailed analysis of the reconstitution of employment regulation in Chapter 6. However, for now, it is sufficient to recall Gamble's "economic constitution" and his understanding of the economy as neither autonomous nor spontaneous. Markets require a framework and structure in order to function. As regulations embed the market in society, their utility in influencing and modifying economic behaviour is immense.

In this chapter, several key aspects of the new infrastructure are evident with the emergence of the RTC. First, the RTC links regulatory strategies directly to Cabinet. Formulation of regulatory reform strategies appears to be closed and highly centralized with high-level linkages between the RTC and Cabinet. The RTC acts as a regulation clearinghouse, reviewing and advising the Cabinet and its Committees on regulatory matters that essentially affect every government department. The RTC acts as a gatekeeper by screening regulatory matters that come before the Cabinet and its Committees and as a liaison between the Ministries and Cabinet. In many ways, the RTC acts on behalf of Cabinet and it is only within the final stages does Cabinet even come into contact with the ministries. Thus, the Commission's views and opinions are highly valued. This direct linkage allows for strict adherence to one of the government's key legislative items – *market* regulation of the economy – which is pursued under the euphemism of red tape reduction. Under this banner, the RTC, through its role in the

internal structures of the Ontario government, is able to ensure uniformity and unanimity to the government's initiatives in this area.

Second, the RTC's consultative process highlights the changing relationship between the state and civil society. In consultations, the RTC claims that it welcomes those directly and indirectly affected by red tape, however, in reality, the RTC appears only to seek out private interests directly affected. This arrangement re-conceptualizes what constitutes a stakeholder. The New Right's construction of the free subject guides the conception of a "legitimate" stakeholder – which happens to generally be an interest that is adversely affected by regulations. In the new infrastructure, the stakeholder is an individual private interest who suffers from a negation of their freedom (freedom from). The private interest is wronged by regulations as it interferes, limits and requires courses of action by the private interest, and in doing so, the state is also subjecting the private interest to its coercive and arbitrary power. Those indirectly affected by red tape may be grouped as the collective public interest. The public interest will most likely benefit from regulations as regulations entail that something must be provided and thus the public interest suffers neither a negation of its negative freedom or is subject to the state's coercive or arbitrary power. Thus, it is not considered a stakeholder.

Third, the RTC's role in industrial development is evident. The government has repeated on numerous occasions the role of red tape reduction in furthering the competitive environment of Ontario. Its role in the elimination and prevention of red tape pushes forward the transition to *market* regulation and a regime of greater market competitiveness. The RTC is essential in bridging the disconnection between the

domestic and international regimes of capital accumulation. As trade regimes detail the needed framework for mobile capital, domestic restructuring to accommodate the restructuring of capital has been slow. The role of the RTC is to facilitate and expedite this process along a particular path informed by specific paradigms. In this sense, the Ontario state has proven to be dynamic and proactive in grasping the opportunities and addressing the challenges of exogenous pressures.

In this chapter, it was shown that the Ontario government is a strong state. The subnational state embarked upon an ambitious process of regulatory reform with the end objective of fostering a competitive environment. This was evidenced by an analysis of the regulatory institutional arrangements, specifically that of the Red Tape Commission and its function within the Ontario government. This undertaking was an ideologically conditioned response to the pressures of regionalization and the internationalization of capital.

This chapter recognized that the restructuring of capital caused a disconnection between international and domestic regimes of accumulation, however, regionalization is a facilitator of domestic restructuring, not the controller. This will be further argued in the next chapter. By placing the ESA 2000 in the regional political economy, this thesis will argue that regulatory strategies, at least in the important area of employment regulation, are not simply reflections of global economic restructuring. Rather they are effectuations of a relatively autonomous state. In this regard, by disingenuously invoking the “there is no alternative” discourse, the Ontario government opened political space to

engage in new regulatory strategies that reconstitute the basis of employment regulation in Ontario.

Chapter 5 Ontario and NAFTA

In 1995, the Ontario Conservative Party came to power with the rallying slogan “Ontario is open for business”. Throughout their first mandate, the Ontario government introduced a regime of greater market competitiveness by reconstituting its regulatory strategy to one that promoted *market* regulations. With the reformation of the *Employment Standards Act* (ESA) 2000, the employment regulatory regime appears as part of a larger strategy to impose a regime of greater market competitiveness. To understand its emergence, one needs to understand the regional political economic context in which the ESA 2000 was conceived.

This chapter will situate Ontario within the regional political economy of NAFTA. This chapter will argue that the mass policy reforms embarked upon by the Ontario government are paradigmatic shifts away from the policy regime of the Keynesian welfare state. This restructuring is placed in the broader context of internationalizing capital which demanded action, although not necessarily the policy regime advocated by the New Right. In this regard, economic integration opened political space for states to pursue their chosen path of action under the guise of “there is no alternative”. In employment regulation, for example, increased economic integration provides the rationale for the restructuring of labour market regulatory regimes. Drawing on the familiar argument of the need for “increased competitiveness”, a 1997 federal report, *Canada 2005: global challenges and opportunities*, identified the labour regulatory regime as one of the key issues facing Canada in 2005. In comparison to the US, labour laws in Canada were considered to “impose a higher regulatory cost on

employers and reduce the flexibility and dynamism of labour markets” (Crane 1997: C2).

There were various sources for Canada’s structural disadvantage in the labour market:

minimum wages tend to be higher and hours of work and overtime regulations tend to be more restrictive, advance notice and severance rules tend to be more stringent and domestic labour laws are more conducive to the formation and retention of unions (Crane 1997: C2).

Calls were made in the report to increase the “efficiency of [the Canadian] regulatory framework” (Crane 1997: C2). This example is illustrative of how *minimum* employment standards and collective institutions may be rationalized as being excessive and thus a threat to Canadian prosperity.

Trade regimes, such as North American Free Trade Agreement (NAFTA),³⁵ disrupt domestic strategies of accumulation by creating a disconnection between the regional framework of accumulation and the traditional domestic framework of accumulation. It is up to the state to reconcile its regime of accumulation with the restructuring of internationalized capital. To this end, Ontario’s regulatory strategies support a policy regime that advances industrial development and job-creation based on the promotion of exports thus directly linking Ontario’s economy to the regional economy.

³⁵ NAFTA is a trade treaty intended to facilitate greater trade between Canada, Mexico and the US. Its provisions provide for the free movement of cross-border goods, services and investments. A labour side accord – the North American Agreement on Labour Cooperation (NAALC) – accompanies the main NAFTA text. While expressing the desirability of labour standards, NAALC only provides provisions for monitoring and enforcing national standards already in place as opposed to creating and enforcing common regional standards (Campbell et al. 1999; McKinney 2000).

Ontario & NAFTA

Since 1995, Ontario exports more to its US neighbours than with its provincial counterparts.³⁶ Under NAFTA, Ontario's economy is increasingly linked to that of the US. Courchene documents that approximately 90% of all Ontario exports to international markets end up in the US (1999: 10). In 1998, exports to the US market accounted for approximately 44% of Ontario's GDP (Courchene 1999: 10). The daily value of Ontario-US trade is approximately \$1 billion daily and supports approximately 2 million jobs in Ontario (Ontario 2001d: par.1).

Ontario's economy is highly dependent on footloose capital for financing and investment to secure its manufacturing and services base (Courchene 1999: 13). This is evidenced in its trade relations with its two largest trading partners; exports to Michigan (US) amounts to approximately \$97 billion annually, supporting approximately 500,000 jobs largely in the automotive industry (Ontario 2002b: par.3) and exports to New York (US), its second largest state trading partner, amounts to approximately \$30.8 billion supporting 182,620 jobs in vehicles and parts, precious metals and stones, electrical machinery and equipment, mechanical appliances and parts, non-ferrous metals and allied products and chemical products (Ontario 2001d: par. 3 and 4). Manufacturing exports, specifically in the auto sector account for 45% of total export, thus representing a key source of economic development and job creation (Ontario 2001d: par.2). In fact, the entire secondary sector generates 31.2 % of Ontario's GDP and supplies 63.4% of total exports of which 93.3% heads to the US (Ontario 2002a). The risk of capital flight,

³⁶ In fact, most other provinces' trading patterns are increasingly north-south rather than east-west (Courchene 1999: 10).

whether real or perceived, forces governments to consider the direction of their reforms.

Keohane and Milner, for example, point out that

the *potential* for international movements of capital, in response to shifts in interest rates or changing expectations about exchange rates, can exert profound effects on national economic conditions and policies even if no capital movement actually takes place (1996: 3; original in emphasis).

Canadian fiscal managers are particularly sensitive to this threat. Wolf documents that since 1996, Canada has been a net outward investor in foreign direct investment (FDI) (2000: 104) and Doran documents the flight of Canadian capital into foreign stocks (2000: 74). The net out flow of FDI and increased foreign investment portfolio holdings weaken Canada's capital base while increasing our vulnerability to the pressures of capital restructuring as the Canadian economy becomes dependent on foreign capital.

Capital withdrawal in the manufacturing sector would be devastating. This was proven during the period of 1989 – 93. During this time, 65% of plant closures in Canada resulted in many permanently displaced workers leading economist Pierre Fortin to term the period, “the great Canadian slump” (cited in Campbell et. al. 1999: 65). During this time, manufacturing industries slashed 20% of their workforce in high- and medium-tariff sectors (Campbell 2001: 22). The heavily industrial economies of Ontario and Quebec were hit especially hard. Dofasco, for example, a major steel-maker in Ontario, cut 40% of its payroll and forced 5,000 workers to seek new employment (Ibbitson 1997: 60). In addition, the thousands of industries supported by steel making such as law firms, advertising firms, and industrial manufacturers also felt the effects (Ibbitson 1997: 59). It is because of the possibility that history may repeat itself, that

Ontario needs to promote itself as *the* place for business by emphasizing its North American comparative advantage within the NAFTA environment (Courchene 1999).

The challenge facing Ontario is twofold: one, Ontario must attract potential investors and second, Ontario must remain attractive enough to keep investments in the province. Ontario competes with “more than 1,200 sub-national jurisdictions” for international trade and investment opportunities (Ontario n.d.: par.2). To this effect, Ontario’s trade policies promote export penetration and increased competitiveness (Courchene 1999: 19). One example, Market Ontario, an initiative launched in November 1996, was specifically designed to target the investment community. The goal is to “[ensure] that domestic and international business decision-makers are aware of Ontario’s improved business climate and view Ontario as a premier location to invest and do business” (Ontario n.d.: par.12). Market Ontario targets five international markets: the US, the United Kingdom, Germany, Japan and France (Ontario n.d.: par.4). These markets are also the five biggest investors accounting for approximately 70% of FDI (Hirst and Thompson 1996: 196). Market Ontario claims to have attracted \$1.485 billion in foreign investment into the province creating or retaining 16,899 jobs (Ontario n.d.: par.12). Another initiative, Ontario Exports, the lead trade agency of the Ontario government, claims to have facilitated \$670 million in trade in 2001 (2001a: 1). Both initiatives point to Ontario’s integrated global strategy of attracting FDI and export development for economic development and job creation.

The second challenge the government of Ontario faces is keeping financial and investment capital circulating in the provincial economy. This challenge is magnified

because of Canada's status as a net exporter of FDI. This means a smaller pool of available finance capital in the economy as a whole. This is essential particularly if the government hopes to maintain its exports base as a foundation for job creation. This is done by giving capital what it needs to thrive, to reproduce - a *local milieu* that is favourable to and for accumulation. This comparative advantage is what Courchene (1999) terms "locational externalities". Locational externalities are specific to a regional economy; they are "inherently untradable – one accesses them by location, not by markets (although one could in some cases use markets to attempt to replicate another jurisdiction's public goods, e.g., a firm in the US could provide medicare for its workers)" (Courchene 1999: 18). For example, a firm choosing to locate in Canada places a higher value on Canadian public goods as opposed to those offered by either the US or Mexico. In choosing to locate to Ontario, the firm is assumed to have chosen the location based on the overall advantages the province has to offer in comparison to the other provinces.

ESA 2000 – technical aspects

The employment regulatory regime was recognized as a key issue in creating a positive climate for business investment; "a key feature of [the Common Sense Revolution] has been the reshaping of Ministry of Labour laws and regulations to encourage investment, growth and jobs" (Ontario 1999a: 1). This objective, no doubt, loomed large in the formulation of the ESA 2000. The value of the ESA was clear when it was proclaimed to be the "foundation for increased productivity, job creation, growth

and investment” (Ontario 2000d: par.16). Clearly the Ministry of Labour recognizes that within North America and within Canada, employment regulatory regimes are “locational externalities”. Neighbouring American jurisdictions, in addition to being Ontario’s largest trading partners are also “ [Ontario’s] biggest competitors for business and jobs” (Flaherty 2001: 4). Two-way trade between Ontario and New York, for example, has a daily value of approximately \$386 million supporting 182,000 jobs (Ontario 2001c: par.4).

First, it should be noted that employment regulatory regimes are not always negative locational externalities. While the common assumption of a race-to-the-bottom scenario³⁷ where protective regulations are dismantled or relaxed prevails in the public discourse, employment regulatory regimes that provide for worker retraining may be valued by some over the cost of cheap labour. The advancement of regimes of *market* regulation arguments should not be construed as supporting evidence for a race-to-the-bottom scenario. Rather, the use of *market* regulation is to recognize the changing nature of regulations and the ways economic behaviour is being influenced. Second, the recognition of the ESA 2000 as a locational externality designed to increase Ontario’s competitive environment does not equate to claiming that it is wholly a product of regionalization. If that were the case, the ESA 2000 should show a high level of convergence with the US regulatory regime. In this regard, it is instructive to compare the ESA 2000 vis-à-vis the US employment regulatory regime. A brief survey of US

³⁷ For an account that rejects the race to the bottom theory, see Drezner 2000 who argues that while the logic may intuitively feel right given the increased mobility of capital, the glaringly lack of evidence speaks louder to the fact that it is not happening.

employment law is necessary for background as well as to contextualize Ontario's reconstitution of employment legislation in relation to its primary trading partner.

In the US, minimum wage, overtime and child labour statutes are determined and enforced by the federal government through the *Fair Labour Standards Act* (FLSA), which is administered by the Department of Labour through its Wage and Hour Division of the Employment Standards Administration. The FLSA also covers family and medical leave in conjunction with the *Family and Medical Leave Act* (FMLA). Subsequent workers' rights are added and enforced by state governments.

As of September 1, 1997, the minimum wage in the US is US\$5.15. In 2001, there were 11 US states which had a no minimum wage or were below the federal rate. Of these states, only Ohio borders Ontario while the remaining states are located mostly in the southern US.³⁸ This combined with right-to-work³⁹ laws in 22 states⁴⁰ work to "deliberately and artificially suppress wage levels in [their respective] regions" (Stanford 1991: 20). Overtime provisions also fall under the FLSA jurisdiction. Overtime premiums must be paid for work beyond a 40 hour workweek and are to be calculated at, at least 1½ times the worker's regular rate of pay. Overtime pay may not be waived or averaged out. There are no provisions for a maximum workweek or weekly free periods. In addition to the above provisions, the FLSA also enforces the FMLA provisions that

³⁸ States with no minimum wages are: Alabama, Arizona, Florida, Louisiana, Mississippi, South Carolina and Tennessee (US 2001). States with a minimum wage below the federal rate are: New Mexico, Kansas and Ohio (US 2001).

³⁹ Right-to-work laws are found in the US National Labor Relations Act which stipulate that workers are not required to become paying members of the bargaining unit as a condition of employment. Thus, they will benefit from the gains of the union but will not pay union supporting dues.

⁴⁰ Right-to-work states are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming (US 2001).

allow eligible workers up to 12 weeks of unpaid job protected leave for a number of purposes including childbirth, sick leave or to care for a family member. Another relevant statute to employment standards regulation in the US is the *Worker Adjustment and Retraining Notification Act* (WARN) which covers plant closings and mass layoffs. Under WARN, employers must generally give 60 days notice of a plant closing or an anticipated mass layoff. However there is no statutory requirement for severance compensation to workers. In conclusion, the FLSA does not cover vacations, holiday pay, maximum workweek and meal or weekly rest periods.

It is no coincidence that these items happen to coincide with many of the newly flexible articles found in the ESA 2000; recall that vacation time and meal periods may be broken up into smaller time increments and holiday premium pay may be substituted for time off. Following in the same spirit, the ESA 2000 permits work agreements for up to 60 hours per week without government interference and less restrictive weekly free time provisions as requirements are over a two week period. In the ESA 2000, these articles partially form a collection of fundamental rights that is entrenched in the traditional Canadian employment regulatory culture. However, in the US, they are considered supplementary rights, something to be negotiated into the employment contract. For example, only 7 states⁴¹ have statutes covering both rest period and meal time requirements with the remainder states covering just one of those provisions⁴² or have no such provisions at all. In this regard, the Ontario government acted strategically

⁴¹ These states are: California, Colorado, Kentucky, Minnesota, Nevada, Oregon and Washington (US 2001).

⁴² For example, states that only have a minimum length of meal time statute are: Connecticut, Delaware, Illinois, Maine, Massachusetts, Nebraska, New Hampshire, New York, North Dakota, Rhode Island, Tennessee, and West Virginia (US 2001).

in maintaining these rights, while amending them so as to minimize their organizational disruptions.

From a technical perspective, the ESA 2000 appears to be a mediated streamlining of Ontario's employment regulatory regime with its giant counterpart. Both Canada and the US are seen to have highly flexible labour markets relative to continental Europe. In other words, labour markets in Canada and the US are highly deregulated as flexibility-enhancing reforms tend to promote a more disciplined labour market (Stanford 2000: 91). However, on the continuum of high to low labour market flexibility, Canada is seen to be "too close" to the European end (Stanford 2000: 91). Within the employment contract, flexibility-enhancing amendments to the ESA 2000 move Canada's position closer to the US model. Mutual consent amendments limit the use of *statutory* regulations in enforcing specific outcomes in the employment contract while using *market* regulations to facilitate outcomes that may be more in-line with the US model, however, government interventions in the form of *statutory* regulations remain relatively high in the ESA 2000.

The *Constitution Act 1867*, gives the provinces jurisdiction over property and civil rights⁴³ with the exception of workers that fall under federal jurisdiction. Given this, the Ontario government could have instituted legislation that mirrored many of its competitor states, but it did not. Most notable, in this regard, was the keeping of termination and severance pay obligations. In the US, WARN requires that employers give 60 days notice for plant closures and mass layoffs but no provisions for severance pay thus giving

⁴³ The right to enter into a contract is considered a civil right.

capital a high degree of flexibility with minimal financial obligation to workers. Another clear divergence in the two employment regulatory regimes are provisions dealing with leaves of absences. The 12 weeks of protected maternity leave for eligible workers, of which one criterion is that the employer must have more than 50 employees, under the FMLA pales in comparison to the pregnancy and parental provisions under the ESA 2000. The ESA 2000 allows for up to 52 weeks of protected leave. In this case, the government was extremely reluctant to bring this provision in line with the federal government changes to the *Employment Insurance Act 2000*, however, public pressure prevailed. Both examples indicate that the government has much more autonomy vis-à-vis global capital than generally acknowledged.

The technical amendments may be viewed as a concrete example of regulatory strategies linked to industrial development and the dictates of regionalization. However this is to a limited degree. In some cases, the amendments showed convergence with the dominant US employment regulatory regime, however, in other very important ways, there was a marked divergence. This suggests that the role of the Ontario government in directing and controlling the formulation of policies remains strong.

In the next chapter, using the two themes of this thesis – restructuring and reconstitution of state power and, the social construction of markets and the embeddedness of institutions – this thesis will argue that surface manoeuvrings are the effects of structural change rather than the impetus. In other words, the next chapter will situate the ESA 2000 within the new infrastructure of employment regulation.

Chapter 6 The new infrastructure of employment regulation

This chapter will argue that the ESA 2000 represents a reconstitution of employment regulation thus representing one facet of the new infrastructure. The introduction of flexibility articles to various provisions of the ESA 2000 entails a greater mix of *market* regulations in the regulation of individual employment contracts. The addition of this set of *market* regulations makes up the new infrastructure of employment regulation as the flexibility-enhancing provisions are conceived to represent the processes of privatization and deregulation. Modifying the province's employment regulatory regime was central to the government's scheme of industrial development. The concept of a *market* regulated labour market is intrinsic to a competitive economy; *statutory* regulations will counteract or obstruct market-enhancing mechanism in place to facilitate a regime of market competitiveness. Removal of these rigidities *in* the labour market will allow markets to function "properly" and thus achieve optimal benefits and a fair and efficient distribution of resources. In essence, *market* regulation reclaims labour as a commodity from its somewhat de-commodified form under the Keynesian welfare state. What we see with the ESA 2000 is that the undoing of labour market *statutory* regulation with the doing of *market* regulation.

As was seen in the previous chapter, the ESA 2000 embodies both *statutory* and *market* regulations. The very foundation of the ESA 2000 remains a mixture of protective and repressive regulations. By setting a minimum standard, the ESA 2000 continues to promote the three forms of security discussed earlier – employment security, work security and income security. Maternity leave provisions, for example, ensure a

degree of employment security. The Ontario government, although begrudgingly, did bring this provision in line with the federal *Employment Insurance Act* which allows for job protected leave. The general applicability of this provision points to a recognition of the collective interest and value of women's work in the reproduction of labour. The enforcement mechanism of the ESA 2000 represents another site of *statutory* regulation. The state subsidizes the legal costs of workers seeking to recover wages by taking on the cost of inspections and investigations, provided that the worker opt out of civil litigation. This significantly curtails the costs to labour.⁴⁴ The final example is the minimum wage provision which is composed of both *statutory* and *market* regulations. By maintaining the minimum wage provision, the government continues to (reluctantly) shelter workers' wages from market competition⁴⁵ thus providing workers a certain degree of income security. On the other hand, by indefinitely freezing the minimum wage at its 1995 levels of \$6.85 an hour, the minimum wage is subjected to inflation as its value has actually fallen in real terms. From January 1995 to January 2001, the minimum wage in Ontario fell by 11.25% as measured by using total consumer price index figures.⁴⁶ Using the same figures, the value of \$6.85 is actually worth \$6.16.⁴⁷ This seems to indicate that the government realized the heavy political cost of abolishing the minimum wage however the government was determined to subject wages to the discipline of market forces.

⁴⁴ Alternatively, one may view these provisions as limiting the risks to capital as the outcomes will be predictable (i.e. the monetary fines and awards are capped).

⁴⁵ Freezing the minimum wage is a key element in the government's framework for economic growth and the job creation (Ontario 1996b).

⁴⁶ Figures were obtained from the Bank of Canada's *CPI and core CPI data, 1995-present*.

⁴⁷ As of January 2001.

Red Tape Review Commission

The movement towards a marketized employment regulatory regime was largely facilitated by the Red Tape Review Commission and its successor, the Red Tape Commission. Based on survey of 500 businesses, the RTRC found that the employment standards was ranked as a top priority in attracting investments to Ontario and of those sampled, 71% said, “they would be more likely to invest here [Ontario] if red tape was reduced” (Ontario 1997a: 1). Based on these responses and others from consultations, the RTRC tabled recommendations that sought to make Ontario businesses competitive by recognizing

the challenge many companies face in trying to improve productivity and maximize efficiencies so as to compete in a global economy, the need for flexibility in adjusting work schedules in response to market fluctuations is becoming a vital component to success (Ontario 1997b: 72).

To this end, the Commission’s recommendations sought to increase flexibility in the regulation of the employment contract. Generally, this covered hours of work, overtime, holiday pay and vacation pay. The Commission also advocated a major overhaul of termination and severance entitlements. In this case, additional working notice was to replace severance pay. Provisions dealing with the maximum workweek and overtime were amended beyond what the RTRC had recommended. The maximum workweek recommended by the RTRC was 48 to 50 hours per week with the elimination or streamlining of the permit process (Ontario 1997b: 73). The ESA 2000 permits a 60 hour workweek and a permit is required only by those who wish to exceed the legislated maximum. The RTRC recommended that compensation for overtime hours either be

overtime pay or in-lieu of time off. The ESA 2000 offers both these options with the addition of averaging overtime over a four week period.

A key recommendation of the RTRC was a provision dealing with severance pay. A longer termination notice period was recommended as an alternative to issuing severance pay. In addition, the RTRC recommended raising the payroll threshold that would eliminate businesses from severance pay obligations (Ontario 1997b: 74). These recommendations were completely ignored and left as-is in the ESA 2000.

Another key recommendation of the RTRC, the contracting out of minimum standards, was only partly adopted. The recommendation was to

Amend the legislation to reflect that where the provisions of a contract of employment or collective agreement provide greater collective benefits than the Act ... they shall prevail over the Act (Ontario 1997b: 74).

This was to apply to provisions dealing with the hours of work, overtime, holiday pay, vacation pay, and termination and severance entitlements. This provision was introduced as a “flexible standards” provision in *Bill 49, An Act to Improve the Employment Standards Act, 1996*, but was subsequently pulled due to public pressure. The ESA 2000 did not attempted to reintroduce this provision, instead, a variation of it appears throughout the Act in the form of “mutual consent”. Through “mutual consent”, provisions dealing with hours of work, overtime time, holiday and vacation pay may be changed. This has a similar affect, although less drastic, in that it removes important legal obstacles so that employers and workers may negotiate certain standards within the confines of the ESA. This mixture of *statutory* and *market* regulation is due more to political concerns rather than an objection to the principle of freely negotiated contracts.

Nonetheless, the ESA 2000 represents the first few steps towards the competitive model the Commission had envisioned.

Flexible standards give us an idea of the RTRC's preferred direction for reform. This thesis assumes that this would have been the position of the RTC as well. In a span of three years (from the time of the RTRC's final report to the introduction of the ESA 2000), it is difficult to imagine that the Red Tape Commission would no longer support its earlier recommendations. Furthermore, three of the original seven members⁴⁸ remain on Commission with the former chairman, Frank Sheehan, now serving as co- chairman. This is significant. Extrapolating the RTRC's recommendations gives us an insight into the preferred direction of reform the RTC would have liked to pursue. Recalling the discussion in Chapter 4, it was disclosed that the RTC is integral to the process of policy development and inextricably linked to the Cabinet decision-making process. Furthermore, each piece of legislation is politically subjected to a cost/benefit analysis, thus ensuring the final legislation reflects the RTC's objectives and thus convergence with the government's overall objective of securing a competitive environment through the use of *market* regulations.

The focus on the internal decision-making process of the Ontario government in structuring employment regulation is not to deny the impacts of social relations in affecting governance. Rather, it reflects the "closed" process the government employed in this area. The lack of consultations and the speed which it was "rammed" through the legislature was controversial in and outside of the Ontario legislature. Furthermore, if we

⁴⁸ Marcel Beaubien (Lambton), John O'Toole (Durham East) and Joe Spina (Brampton North).

work backwards, we see that the final version of the ESA 2000 does not deviate far from the Ministry of Labour's consultation paper, *Time for change: Ontario's employment standards legislation*. Moving from the consultation paper to the RTRC's final report, we see where key aspects of the ESA 2000 originated.

Market regulation

Implicit in arguments for *market* regulation is the underlying assumption that failures are "occurring *in* the market, not *because of* the market" (Peck 1996: 2). In this regard, the decision to use *market* regulation is a decidedly ideological one. *Market* regulations provide the framework that tries most to simulate perfectly functioning markets whether it is in the commodity or labour market. The use of *market* regulation is intended to create effective forms of competition or to supplement it when needed in the market. *Market* regulations are tools to (re)structure legal systems so as to preserve competition and to ensure that it functions properly.

To this end, *market* regulation in the ESA 2000 utilized promotional regulations that are designed to promote certain developments. What was being promoted with *market* regulation of the individual employment contract is flexibility – flexible work schedules, flexible pay schedules and flexible workers. *Market* regulation of the individual employment contract also contains facilitation regulations. Recall that these types of regulations permit activities to take place, if there is a desire to do so (Standing 1997: 11). Facilitation regulations come in the form of "mutual consent" in the ESA 2000. Competition as the organizing principle in society, Hayek argues, "gives the

individuals a chance to decide whether the prospects of a particular occupation are sufficient to compensate for the disadvantages and risks connected with it" (1944: 42). Hence, it is up to individuals to seek and adjust their behaviour to achieve their desired ends. In the context of the ESA 2000, facilitation regulations are conceived as permitting individuals, acting in a private capacity, to engage in contract making. It is largely through this type of regulation that employment regulation is being reconstituted into processes of privatization and deregulation.

Reconstitution of regulation

The rest of this chapter will deconstruct flexibility within the new infrastructure of employment regulation. Incorporating Salter and Salter's understanding of these terms provides the framework for deconstruction of the central theme – flexibility – from its dominant form as a production process to understanding it as a social process. This exercise will illustrate the reconstitution of regulation in the labour market. The changing employment regulatory regime points to a transition where the state and civil society are interfacing on redefined spheres of governance. This transition can be attributed to a reconstitution of governance facilitated by the many challenges and opportunities presented by economic integration but controlled by the state and ideology.

Privatization is not really "privatization" in the traditional sense of the private sector contracting of state services. In the new infrastructure of employment regulation, privatization is characterized by the contracting of private individuals within a legislative framework that embodies several key social processes. Deregulation is not really

“deregulation” in the traditional sense of the removal of regulations. In the new infrastructure of employment regulation, deregulation is characterized by a combination of state and other regulation.

The value-laden rhetoric of the flexibility debate opened political space for the Ontario government to restructure the individual employment contract. Flexibility, “outside the realm of moral principles, is invariably a good thing and rigidity a bad one” (cited in Hyman 1991: 281). Flexibility is to be embraced as desirable, as it illustrates ingenuity and the ability to adapt to change, as opposed to understanding it as insecurity and uncertainty. Flexibility is juxtaposed with rigidity, which comes to mean stagnation and being against progress as opposed to understanding it as a site of stability. In other words, businesses want flexibility, which is good, but workers and unions want rigidity, which is bad.

When we move away from the dominant rhetoric, we see that flexibility is indeed good for businesses and bad for workers. Flexibility, rather than the unleashing of great individual ingenuity, creativity or the god-like workings of the market, creates uncertainty, insecurity and hence fear for the majority of working people. The flexibility and freedom, promoted through *market* regulation, benefit employers more than workers. The privatization of certain aspects of employment regulation reinforces the power of capital to negotiate favourable terms due to the asymmetric power relationship that the employment contract entails.

Flexibility as privatization

“Flexibility” was considered necessary to make and market the competitive environment of Ontario. It was the key term that many of the changes to the ESA 2000 are centred around. Increased flexibility is achieved by *market* regulation of the employment relationship where individuals have greater ability to engage in agreements based on “mutual consent”. According to the Minister of Labour, amendments to the ESA will increase flexibility for employers and employees to “design workweeks that best reflect their needs as individuals” (Ontario 2000b: 1950). For employers, this meant the ability to respond quickly to market trends by tying work schedules with production needs. For workers, it was the ability to determine working arrangements that may be tailored to family needs and a say in structuring compensation for extra time worked.

Statements such as, “if you and your employer agree and it works out for you” (see for example Ontario 2000b), imply that workers are central to the decision-making process or even equals in their places of employment. It shows the government’s failure to recognize the employment contract as a social power relationship. In Chapter 2, it was shown that in following the norms of contract law, the treatment of the employment contract as an agreement that is freely entered into conceals the power asymmetries between wealth and non-wealth owners. The liberal construction of “free” and “equal” subjects is at best disingenuous and at worst conceals the superior-subordinate nexus of the employment contract. In other words, the equal treatment of unequal subjects produces only inequality.

Ignoring the social power relationship between the employers and workers, leads the state to erroneously assume that each of the parties will get what they bargain for thus maximizing their welfare. This is a flawed assumption.⁴⁹ The starting point should not be whether each party gets what it bargains for (for each party will always get what it is able to bargain for), but whether each party engages in the contractual relationship with adequate bargaining power to negotiate relatively favourable terms. If we begin with this premise, then it is clear that individual workers are neither central to the decision-making process in their places of employment, nor are they equals in the employment contract.

In the first instance, it is the production process that dictates the production schedule and it is the employer who ensures the production schedule is kept. It is inconsistent of the Ontario government to allow for provisions that challenge the employer's authority to manage the work process. In the second instance, it has already been noted that entering the employment contract entails that workers must assume a subordinate position. This is particularly evident in the language used in the ESA 2000. Provision after provision detail what employers "shall give" workers; individual workers are not in a position to demand favourable terms, thus, it has generally been incumbent on the Keynesian welfare state to impose them.

In the new infrastructure, *market* regulation of the employment contract imposes no such obligation on the state and the privatization of employment regulation is reforming the role of the state. This is evidenced in a glaringly obvious contradiction

⁴⁹ See Schwab who demisses arguments based on unequal bargaining power using a grocery customer/employee analogy (1997: 112). In this scenario, an individual customer in a large grocery store tries to bargain with the store manager over the price and other terms. The store manager refuses, thus the customer leaves for rival stores. Based on this analogy, Schwab claims that the customer is not a victim of unequal bargaining power.

largely disguised by the language of flexibility – how can workers tailor their workweek to meet the needs of their families when businesses want to tie employment to the production process? Flexible work arrangements obviously mean different things to both groups. In this example, the state is no longer overly concerned with addressing the conflicting aspirations of workers and employers. Rather the contradictions are left to be reconciled in the private sphere, through negotiations, under a legislative framework that still mediates the outcome.

The contracting of employment standards within the ESA 2000 removes legal obstacles constraining the private contract and places workers in a position where a number of provisions may need to be negotiated. While the state sets the legislative framework, it remains up to the private parties to negotiate various terms and conditions of employment and it is up to the parties to enforce the numerous contracts reached. As the employment contract moves into the private sphere, states will be less willing to intervene as the private sphere is seen as a private autonomous sphere in which social relations are governed by voluntary agreements between sovereign individuals. In addition, the imposition of positive rights found in employment legislation is antithetical to New Right philosophy. The language of the ESA 2000, for example, details what employers “shall give” or “shall provide” to workers. This is a gross violation of negative rights and the Ontario government sought to circumvent this by reinforcing negative rights through other means such as permitting “mutual consent” agreements in determining certain aspects of the employment contract.

Ontario workplaces, then, will resemble a patchwork of various individually negotiated agreements covering a range of minimum standards in employment regulation. The state's role is that of an overseer of the employment contract even as the distinction between the public subject and private contract blur. Substantive regulation has given way to private bargains even though the reproduction of labour occurs in the public sphere. Reliance on the private contract as the dominant determinant of minimum standards in employment regulation point to the *market* regulation of key aspects of the labour market.

Deregulation

In the case of employment regulation, the embracing of de-centralized regulation is shifting the boundaries between the public and private sphere. By permitting individually negotiated contracts of employment within the ESA 2000, the state is expanding the regulatory triangle to include non-state actors – employers and workers. This points to a decentralized system of governance both by the state and in absence of the state. *Market* regulations are a co-management system of regulation (in the regulation of the individual employment contract) where facilitation regulations permit individuals to engage in contracting making with the state acting as a passive intervening agency.

Non-state actors now have an active role in determining what constitutes minimum standards. Technically, the “mutual consent” clause in many of the amendments mean that should an agreement be made that is within the confines of the ESA 2000 but was not the stated minimum (e.g. the stated minimum employment

standard for overtime pay provisions is overtime pay at, at least 1½ the hourly regular wage, however, this may be circumvented through an employer-employee agreement) effectively replaces that section of the Act. In this regard, employer and worker negotiations may result in a decline of minimum standards. Such conclusions would be difficult to prove, as one would have to compare the monetary with non-monetary values and assess whether the loss of one balances the gain of another. Using the same example above, an agreement to forgo overtime pay premiums in favour of time off may represent a decline in minimum standards, as workers are no longer remunerated at what was historically accepted as an appropriate compensation rate for working beyond the normal workday. This is especially true if workers were coerced into the agreement (which is possible even though it is against the law to do so) or due to a change in circumstances, the worker wishes to revoke the agreement, however, the employer refuses and the agreement stands. Alternatively if the worker valued time off work more than monetary compensation, then this would represent an expansion of minimum standards. This contradiction is tenuously reconciled in New Right ideology. Because *market* regulations promote individualistic behaviour, it is assumed that the agreements reached reflect the self-interest of the individuals involved. The concern is not whether there was an expansion or contraction of minimum standards. Rather, the benchmark is the expansion of individual liberty.

“Mutual consent” is deregulatory in other ways as it points to the state’s disengagement from directly managing the employment contract. A clear indication of this is the elimination of the permit system from the ESA 2000. It was an immediate

intervention tool the government used to mediate the relationship between employers and employees. It was a mechanism used to directly regulate weekly hours of work. The current legislation requiring only a mutual agreement indicates the state's preference for a less intrusive role in employment regulation. According to the government, removal of the permit process "[allows] the opportunity for the employee and the employer to make that agreement" and in the process cut "red tape" by 80-90% (Ontario 2000b: 1850). The government argues that the permit system, in addition to being red tape, was largely ineffective – up to 60 hours, at which point the permit system kicks in again. The permit system, along with other provisions, did not guarantee adherence to the law and the protection of workers' rights. As many have pointed out, regulations are only as effective as the political will to enforce them. However, the presence of the permit system was an important legal protection and legal obstacle for those wanting to do otherwise.

Employment standards enforcement represents another site of state disengagement. In April 1996, the Harris government cut almost half – 46 employment standards officers – from the enforcement branch (Ontario Federation of Labour n.d.: online). These as well as subsequent cuts have

eliminated the Ministry's capacity to protect working people from exploitation and unfair treatment by bad bosses. The cuts have destroyed the capacity of the Ministry to enforce such vitally important worker protection laws (Canadian Centre for Policy Alternatives (CCPA) 2001: 26).

This was done despite the historical wide violation of employment standards (see Fudge 1991; Dagg 1997). Failures in the enforcement of minimum standards have resulted in gross violations – a large clothing retailer "paid" temporary workers – mainly young

people – in clothing coupons only, another retailer required workers to purchase store merchandise to top up their missed sales quotas, and a manufacturing company consistently refused to provide job-protected maternity leave (Dagg 1997: 103). It is no wonder that the Ontario Alternative Budget estimates an additional \$30 million a year is needed for the Ministry of Labour to carry out effective enforcement of employment standards (CCPA 2001: 26).

At the time of the ESA 2000, “effective enforcement” was stated as a priority (Ontario 2000c). To this end, the Minister of Labour committed to increasing the inspection staff by 20% (Ontario 2000b: 1850). It is difficult to assess this development in real terms as the Ministry does not provide a breakdown of staffing numbers in each of its departments, however, one can be assured that this increase does not make up the 46 positions cut in 1996. The ESA 2000 also contains escalating penalties. Besides looking good on paper, the Ministry of Labour has not really done anything it has not done in past to ensure compliance with minimum standards legislation. Based on the figures provided in the Ministry of Labour’s Business Plans, we see that the year prior to the ESA 2000, the employment standards branch consisted of approximately 20% of the overall operating budget with 20% of the total staff (Ontario 1999a); in the year the ESA 2000 was introduced, the employment standards branch consisted of approximately 22% of the overall operating budget with 20% of the total staff (Ontario 2000c); and in the year the ESA 2000 came into effect, the Employment Standards Branch consisted of approximately 22% of the overall operating budget with 22% of the total staff (2001b). In terms of real numbers, between 1997 and 1998, \$8 million was cut from the

Employment Standards Branch (Ontario 1997; Ontario 1998) that was partly restored between 1999 and 2001 when the operating budget increased by \$3 million while staff in the Employment Standards Branch was reduced from 272 to 266 during the same period (Ontario 1999a; Ontario 2000c; Ontario 2001b). While there has been slight increases in the both the operating budget and staff (after mass cuts) we cannot assume that these increases went into enforcement. In fact, the increases in operating budget fall severely short of the estimated \$30 million needed. The incremental increases point more to the cost of doing business as opposed to a change from past practices. In conclusion, the rhetoric of enforcement is there but the actual enforcement is not. The reluctance to intervene is consistent with the Ontario government's philosophical objections. The political will simply is not there.

Concluding remarks

Privatization and deregulation of the employment contract represents the disciplining of labour on the subnational level. Flexibility, when deconstructed into social processes, is the disciplining of labour within the employment contract. At this juncture, the disciplining of labour is crucial to the government's pro-business agenda that seeks to maintain and create jobs. The amendments to the ESA were intended to complement the Ontario government's industrial strategy of *market* regulation of the economy.

The reconstitution of employment regulation represents many avenues from which capital has (re)gained ground lost to labour during the Keynesian era. Flexibility,

within the broader context of welfare state restructuring, was more a euphemism for the disciplining of labour and within the employment contract it disguises the power shift from labour to capital (Stanford 2000). This is an integrated regulatory strategy to reconstitute the subnational regime of accumulation facilitated by regionalization but the processes are largely controlled by the state.

Integral to this strategy is a policy of ensuring a climate of “certainty” for the business community. In identifying “competitiveness challenges” to Ontario, it was found through consultations that Ontario had to “[enact] legislation to provide stability to the business community” in order to “[increase] certainty in making investment decisions” (Ontario 2002: 3). It was determined that the building of a competitive Ontario required that the government provide “certainty” and assurances to the private sector that “the playing field will not change” (Ontario 2002: 4). Instrumental to this endeavour is the role of the Red Tape Commission in integrating *market* regulation into the economy and ensuring that no new regulations adversely affects the competitive environment.

In this regard, amendments to the ESA increase “certainty” by assuring business operators that flexible work schemes will not be subverted to imposed regulatory obligations. Where regulatory obligations have been imposed, they have been to the benefit of business or the effects were minimized: capping the maximum claim amount at \$10,000 that a worker can be compensation for wrongful actions, capping monetary fines,

introduction of the ‘double jeopardy’⁵⁰ principle that reduces the employer’s exposure to financial risk and the contracting of employment standards. Underlying the flexibility measures is a regulatory strategy to limit the scope of *statutory* regulation of the employment contract. The strategy was to undermine *statutory* regulations rather than outright remove them. The use of *market* regulations increased business certainty with a series of structural changes to the welfare state designed to remove a collection of labour market inflexibilities. This led the way for the introduction of the “fear factor”, a disciplinary tool to regulate labour. This was found to be effective in the US where low unemployment did not ease workers’ insecurity and hence, wages and benefits stalled, negating theoretical assumptions that low unemployment will lead to increased labour bargaining power (Stanford 2000). In the US, this meant that increased productivity did not necessitate that capital share the increased profits with labour.

In this light, the state’s regulatory functions are transforming rather than diminishing. While the state’s role in governing the individual employment contract has been reduced, the state remains important and influential in structuring employment regulatory strategies to enforce particular outcomes. In this case, amendments in the ESA 2000 were designed to privatized and deregulate the employment contract to discipline labour. In rejecting the orthodox dichotomy of governance as being either public or private, the ESA 2000 may be seen as a combination of both. From this perspective, the boundaries of public and private governance are seen as fluid, permeable and shifting. Regulations are characterized by a devolution of power away from the state

⁵⁰ This is a concept from criminal law where the accused cannot be tried twice for the same crime.

but this by no means represents an independence of government control (Salter and Salter 1997: 68). In other words, privatization and deregulation of individual employment regulation represent the decentralization, not the displacement of state governance.

Chapter 7 Conclusion

In examining the ESA 2000, we find that it signifies more than a change in regulatory strategies rather it points to institutional changes in the political economy of governance in Ontario. In this light, we see the reconstitution of individual employment regulation where *market* regulation was embraced to facilitate a regime of greater labour market competitiveness. In the new infrastructure of individual employment regulation, the processes of privatization and deregulation mark the reconstitution of employment regulation.

In Ontario, the fatalistic rhetoric of economic integration and debt management justified many policy changes. In the case of economic integration, Ontario's position in the regional political economy, it was claimed, necessitated various actions in order to make Ontario more competitive. Since the institutional rules of trade regimes are seen to narrow the range of expected behaviour, one does expect political impacts to arise from economic integration given the close and complex relationship between politics and economics. This is particularly true in Ontario's case, as economic integration remains (federally) state-implemented. In this regard, it was instructive to examine influencing factors beyond the Ontario government's control. By placing Ontario within the political economy of NAFTA, this thesis found that regional and other global processes are important and influential benchmarks, but they do not alone account for the restructuring of employment regulation in Ontario.

Just as economic integration is beyond the control of the Ontario government, this thesis found that many other factors are within the government's control. It was argued

that the fatalistic rhetoric of economic integration and debt management opened political space for the subnational state to embark upon mass policy reforms. One such example is the state's mass undertaking of red tape reduction pursued under the auspices of the Red Tape Commission (RTC). The RTC is an institution that reflects the state's political preferences in pursuing key aspects of the legislative agenda. In this regard, the RTC represents an explicitly ideological choice.

Instrumental to the movement towards *market* regulation is the role of the RTC in Ontario's structure of governance. Given the market predisposition of the RTC and its role within the policy-making structure of the Ontario government, it is safe to assume that the ESA 2000 conformed to a specific set of philosophical values – various institutional arrangements ensured this. The hierarchy found within the Ontario government policy circles is one that subordinates other values in favour of *market* regulation.

The RTC's mandate shows a complete convergence with the Ontario Cabinet's governing philosophy. This is apparent in the RTC's role in structuring the government's economic strategy – “the removal of barriers to jobs, investment and growth, so that Ontario will remain competitive with the rest of the world” (Ontario 2000h: What we do, par.1). Many government reforms and initiatives were justified in the name of competitiveness and efficiency. In short, “the broad spectrum of public policy making - fiscal, economic, social, environmental, cultural and political - must be subordinated to this principle” (Clarke 1997: 36).

Market regulation of the labour market must be seen in the light of an overall transition to a *market* regulated economy. It is counterintuitive for regulations to impose obligations on capital while it is seeking to allocate resources in the most efficient manner elsewhere. The ESA amendments point to a parallel restructuring of the labour market resulting from the government's pro-growth, pro-business, anti-regulation approach. Recognizing the importance of locational externalities, the government introduced flexible standards and the contracting of certain minimum standards within the confines of the ESA 2000 to promote a regime of greater labour market competitiveness.

Given Ontario's dependence on exports for economic growth and job creation, the competing regulatory employment regimes in the US present serious challenges. Ontario's close proximity to the "hub" of North America requires it to directly compete with large American jurisdictions. Michigan, for example, Ontario's across the lake trading partner and business competitor is the #1 ranked state for attracting manufacturing investment and ranked #2 for attracting non-manufacturing investment (Michigan 2001: 15). From a technical perspective, some amendments of the ESA 2000 reflect a convergence with the US individual employment regulatory regime. This is not surprising given the integrated nature of the economies and reliance of Ontario's economic base on financial and investment capital.

Besides the composition of Ontario's economic base, Ontario's integrated strategy of attracting investments and promoting exports poses other problems. Ontario's global strategy directly links hundreds of thousands of jobs to the international economy. This

increases Ontario's exposure to global economic trends and shocks. Thus, subnational accumulation strategies have entailed a restructuring of the province through various institutional arrangements. This reconstitution is not, however, as far reaching as one might expect. It is tempting to attribute surface tangible changes as forced policy convergence, however a comparison of the two regimes reveal some similarities, but the extent to which convergence is said to occur is contestable.

In this regard, while economic integration facilitated domestic restructuring, it by no means dictated or necessitated the reforms undertaken by the Ontario government. The direction of reforms was also ideologically determined. The Ontario government favoured an approach where the market, not the state, was to be the organizing principle in society. To this end, the Ontario government promoted *market* regulation of the individual employment contract.

The New Infrastructure of employment regulation

In the new infrastructure of employment regulation, the language of flexibility disguises various social processes. *Market* regulation promotes Salter and Salter's expanded version of privatization and deregulation – social processes that are transforming the way the state interacts with society. Thus, the question is not whether the state intervenes in the economy, but how. "Mutual consent" as the basis for employment regulation points to a restructuring of the social relations of production on various levels. (1) In important ways, the state is underwriting capital's control over labour in the production process. The removal of legal obstacles in the ESA 2000 creates

space for bargaining between unequal subjects. (2) The de-centralization of regulation where minimum standards of employment are not directly controlled by the state. Employers and workers have become co-regulators/managers of the employment contract.

The employment contract is being redefined by *market* regulation. As the terms of work are subjected to negotiation, the stakeholders are increasingly viewed as private interests. Thus, employment regulation moves from a public interest, where the state intervened for health and safety reasons (e.g. working long hours cause health problems) to one that is dominated by private interests where both parties are left to bargain rights. The reconstitution of employment regulation highlights: the dynamic nature of the public and private sphere split; the on-going dialogue between individualist and collectivist paradigms and the policy instruments to promote corresponding institutions; and the interaction of regional and subnational regimes of accumulation.

Regulations are social instruments for the control of economic decision-making. *Market* regulation is a specific regulatory choice that promotes individualistic behaviour and the institution of private property. In this regard, the new infrastructure of employment regulation is defined by the negative concept of liberty – free from interference.

Concluding remarks

This thesis concludes that government policy cannot be reducible to ideology nor to economic integration. In the first instance, it is fair to say that the process of

restructuring is guided by New Right ideology, but to analyze the Ontario government on the basis of ideology alone would be a mistake. Such a narrow perspective cannot explain the reality. In the second instance, reducing the Ontario government's policies to trade liberalization is to assume that the state's political and economic interests have converged. This is also narrowly conceived.

The importance of analyzing ideology and economic integration is to recognize them as external conditioning frameworks, a system of ideas, beliefs and practices which compose the internal component of the governing framework. Ideology and economic integration fit along with other social institutional matrixes, into an overarching framework of governing institutions that influence policy formation. It is in these organizations that governments have the capacity to respond to external pressures, including those imposed by global capital. The ESA 2000 was a story about how these two processes – regional and domestic constraints – interacted.

Governance is about making choices. Governments have always had to face constraints in one form or another and their responses, more often than not, have been guided by ideology and economic paradigms. In this regard, others argue, and I am inclined to agree, “in the end, it is the political response to these new constraints, and not the constraints themselves, that will determine the nature of state regulation in a given country” (Noel et al. 1993: 187). NAFTA as a conditioning framework provides a structural barrier to policy developers. It is not only external pressures that form these constraints. The Red Tape Commission, for example, is an imposed endogenous constraint used to legitimize the advancement of *market* regulations. The default position

of the Red Tape Commission is one that is biased against government regulation – an explicitly ideological choice. Red tape reduction became the euphemism for *market* regulation. This was legitimized by the prevailing preoccupation with global competitiveness and job creation.

As social conditions change, so too do regulatory strategies (Dunning 1997). Recognizing that regulations are used to enforce certain outcomes, the use of *market* regulations points to the disciplining of labour within the employment contract. The disciplining of labour, in turn is the euphemism for regimes of market competitiveness (Workman 1996: 37).

In this regard, the possible long-term effects of *market* regulation need to be explored further. One may, for example, look at the effects of *market* regulation of employment regulation through the lens of class, gender and ethnicity. The contracting of employment standards, as noted by the Canadian Auto Workers, will impact workers differently: “women, and men and women who are immigrant workers and visible minority workers face the greatest exploitation... [as well as] workers who are scared of losing their jobs, workers who are new to Canada and young workers” (2000: 2).

In this thesis, the social processes arising from *market* regulation have been to the disadvantage of workers, particularly those in weak bargaining positions. A future study may explore ways that *market* regulation may be more democratic (if it can be at all) and used to benefit workers. In this regard, the state’s multiple roles in the new infrastructure, the blending of public and private spheres and the reconstitution of governance may all play a role.

At this time, the final avenue of research I would like to propose deals with the disconnection between political rhetoric and action. At various stages in this thesis, it was apparent that what was said was not necessary what was done. In this regard, further research should highlight the contradictions of the free economy/strong state with the prevailing rhetoric of the "hollow state" and the "there is no alternative" thesis.

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