2015

Rights at Work: Fairness in Personal Work Relations and Restorative Labour Market Regulation

Bruce P. Archibald
Dalhousie University, bruce.archibald@dal.ca

Rights at Work: Fairness in Personal Work Relations

and Restorative Labour Market Regulation

By

Professor Bruce P. Archibald
Dalhousie University
Schulich School of Law

Bruce.Archibald@Dal.Ca
Tel: +1(902) 494-1015
Fax: +1(02) 494-1316

April 27, 2015
Paper based on a Presentation at the Conference, Rights at Work
Faculty of Law, Western University, London, Ontario, October, 2013

Electronic copy available at: http://ssrn.com/abstract=2762976

Rights at Work: Fairness in Personal Work Relations

and Restorative Labour Market Regulation

Introduction*

1. By desire or necessity, virtually all of us work for a considerable portion of our lives. Work defines our social status, determines our degrees of health and happiness and underpins our sense of self.[1] The productivity, efficiency and economic significance of the work we do, in aggregate terms, are critical to the prosperity of the societies in which we live. Moreover, fair treatment in our workplaces is an important aspect of our individual well-being and a mark of the civility and decency of our communities. Many of us expect the law to ensure fairness in our work relations; but increasingly, legal arrangements governing labour market regulation are not up to the task. In developed economies, legal rules dealing with rights at work vary dramatically in terms of their institutional context, substantive content and breadth of applicability across varying forms of productive or remunerated personal activity.[2] However, a widespread current concern in many jurisdictions, including Canada, is that "rights at work" often hinge upon a worker's status as an "employee" in a "standard employment contract" and do not inure to the benefit of those personally performing work for others in a broad range of other legal arrangements, and who are thus left vulnerable to exploitation.[3] In the globalized new economy, legal regulation to support or ensure fairness through domestically legislated rights at work has become increasingly problematic.[4] There has also developed a full blown scholarly crisis about the scope and content of labour and employment law,[5] which has engulfed the global academy in the wake of the

* The author would like to acknowledge the invaluable research assistance and dedication of Mr. Macduy Ngo, Dalhousie University, School of Law, JD, 2015 in preparation of this article, as well as the financial support of the Schulich Academic Excellence Fund, Dalhousie University

[1] Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: December 2012) [*LCO Report*]; *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 91, [1987] SCJ No 10, Dickson CJ.

[2] P Hall & D Soskice, eds, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001); Shelley Marshall, Richard Mitchell & Ian Ramsey, eds, *Varieties of Capitalism, Corporate Governance and Employees* (Melbourne: Melbourne University Press, 2008).

[3] See Mark Freedland & Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: Oxford University Press, 2011), an important if demanding text and a sterling example of applied comparative law; as well as Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Sydney: Federation Press, 2012) for an Australian approach to the issues; and Brian Langille, "Labour Policy in Canada: New Platform, New Paradigm" (2002) 28(1) Can Pub Pol'y 133 [Langille, "Labour Policy in Canada"] for a seminal Canadian take on the issue. See also Judy Fudge, Erick Tucker & Leah Vosko, "Changing Boundaries in Employment: Developing a New Platform for Labour Law" (2003) 10 CLELJ 329 [Fudge, Tucker & Vosko, "Changing Boundaries in Employment"].

[4] This is linked to the fact that labour, as a factor of production, is not nearly as mobile as capital, goods or technology. See Morley Gunderson, "Changes in the Labour Market and the Nature of Employment in Western Countries" in Katherine Stone & Harry Athurs, eds, *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (New York: Russel Sage Foundation, 2013) 23; and Robert Kuttner, "Labour Market Regulation and the Global Economic Crisis" in Katherine Stone & Harry Athurs, eds, *Rethinking Workplace Regulation: Beyond the Standards Contract of Employment* (New York: Russel Sage Foundation, 2013) 42; and Richard M Locke, *The Promise and Limits of Private Power: Promoting Labour Standards in a Global Economy* (Cambridge: Cambridge University Press, 2013).

[5] For collections of readings on this topic, see Joanne Conaghan, Michael Fischl & Karl Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2001); Catherine Barnard, Simon Deakin & Gillian Morris, eds, *The Future of Labour Law: Liber Americorum Bob Hepple QC* (Oxford: Hart Publishing, 2004); Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing,

Electronic copy available at: http://ssrn.com/abstract=2762976

collapse of the post-war economic, political and social consensus over the welfare state.[6] Finding ways around the apparent problems is not simple or easy – conceptually, economically, socially or politically. In part, this is because the values which underpin rights at work are contested terrain. But in large measure also, because this context requires a re-conceptualization of worker rights along the full gamut of personal work relations with a commensurate effort to understand how such thinking connects to broader labour market regulation.[7] A myriad of legal structures regulate labour markets which are outside the confines of traditional labour and employment law as understood by most lawyers. That wider playing field is provides the background parameters for this paper.

2. The paper's purpose is to explore schematically ways to improve the fairness of the legal construction of personal work relations within an integrated, efficient and restorative approach to labour market regulation. Part I sets out the shifting contexts for reflection on rights at work as they have evolved in recent decades. It focusses on changing labour market realities, the collapse of the post-World War II welfare state, the abandonment of the intellectual consensus in which labour and employment law were imbedded, and the new normative tensions over rights at work in the globalized, post-modern economic, social and political environment. It highlights the prevalence of precarious employment, and its attendant devaluation of rights at work and benefits gained through work, as a potential precursor to significant political instability. Part II identifies ways of rethinking fair work relations and improved labour market regulation. It reviews advances in human capability development theory which provide a new normative framework for re-casting work relations and labour market regulation. It outlines the value of a relational understanding of rights in moving beyond the standard employment contract as the primary legal construct for the regulation of personal work relations. It then tackles principles of responsive or restorative regulation as procedural approaches for achieving integrated labour markets which enhance economic competitiveness while respecting fair work relations. Lastly, it contemplates possibilities for stability and social justice through greater rights at and through work, and for competitive but fair labour market regulation. If these ambitions are to be attained, it will involve harnessing both public and private means at national and international levels in the context of deliberative democracy.

Part I - Shifting Contexts for Reflection on Rights at Work & Labour Market Regulation

A. Changing Labour Market Realities

2006) [Davidov & Langille, *Boundaries and Frontiers of Labour Law*]; John DR Craig & Michael Lynk, eds, *Globalization and the Future of Labour Law* (New York: Cambridge University Press, 2006); Brian Bercuson & Cynthia Estlund, eds, *Regulating Labour in the Wake of Globalization: New Challenges, New Institutions* (Oxford: Hart Publishing, 2008); Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) [Davidov & Langille, *The Idea of Labour Law*]; International Labour Organization, ed, *The Global Crisis: Causes, Responses and Challenges* (Geneva: International Labour Office, 2011); and Stone & Arthurs, *supra* note 4.

[6] For a trenchant analysis of the impact of globalization and the collapse of communism on employment and labour relations in the western world, see Alain Supiot, *The Spirit of Philadelphia: Social Justice versus the Total Market*, translated by Saskia Brown (London: Verso, 2012) [Supiot, *The Spirit of Philadelphia*].

[7] See Christopher Arup et al, eds, *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets* (Sydney: The Federation Press, 2006) for a comprehensive survey of the notion of labour market regulation and its relationship to labour and employment law.

1. The Demise of Labour Market Conditions in "Old Modern" Welfare States

3. For Western Europe and North America, the cataclysmic events of World War I[8] and the sometimes horrifying technological advances of World War II,[9] which bracketed the hardships of the Great Depression, saw the emergence of an optimistic version of modernity[10] founded upon beliefs in the capacities of the sciences and social engineering.[11] Keynesian economics, in the hands of politicians dedicated to notions of social justice, led to the emergence of the welfare state.[12] The goal was to use economic policies, adopted by democratic governments, to achieve full employment and economic prosperity for all. This commitment to full employment, for those willing and able to work, had certain corollaries.[13] Universal primary and secondary education was deemed a requisite public investment for a productive democracy[14], as was access to technical training for those interested in entering the industrial workforce, and state subsidized university education for those who could access it.[15] Publicly funded unemployment insurance systems allowed workers to transition through periods of joblessness, though Keynesian economics was expected to moderate, if not eliminate, the rigours of business cycles.[16] For those unable to work, welfare or social assistance would be available to maintain the vulnerable in a state of basic material comfort and human dignity which, as a form of income redistribution, would also help maintain a strong consumer market for goods (largely produced within a domestic market).[17] Publicly funded universal pension plans would provide basic security to enjoy a dignified retirement, at levels calibrated to a considerable degree on the success of one's participation in the workforce. Universal, publicly funded health care was gradually adopted in virtually all advanced western economies, with the notorious exception of the United States of America, to ensure a happy, healthy and

[8] Margaret MacMillan & Richard Holbrooke, *Paris 1919: Six Months that Change the World* (New York: Random House, 2002).
[9] The atomic bomb and its use against Japan, is only the most obvious of these technological developments, see David S Landes, *The Unbound Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to Present*, 2d ed (Cambridge: Cambridge University Press, 2003).
[10] Tony Judt, *Ill Fares the Land* (New York: Penguin Books, 2010) at 55 – 63.
[11] See Supiot, *The Spirit of Philadelphia*, *supra* note 6 at 1 – 14.
[12] See Ross Cranston, *Legal Foundations of the Welfare State* (Cambridge: Cambridge University Press, 1985); and Robert E Goodin et al, *The Real Worlds of Welfare Capitalism* (Cambridge: Cambridge University Press, 1999).
[13] Unlike countries of the Soviet bloc, there was no constitutional commitment to a "right to work", which in the minds of some found its expression if forced under-employment in state-owned enterprises. On the other hand, in the free-enterprise west, the goal of full employment was rarely, if ever met, while in times of "stag-flation" high unemployment was sometimes combined with the scourge of high inflation. See Paul Krugman, *End this Depression Now* (New York: WW Norton and Company, 2013) at 22-40, 209-222.
[14] Judt, *supra* note 10 at 44-54; Martha C Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Cambridge: Harvard University Press, 1997).
[15] The class-based nature of technical colleges, while almost never acknowledged, was there for all to observe, see William Richardson & Susanne Wiborg, *English Technical and Vocational Education in Historical and Comparative Perspective* (London: Baker Dearing Educational Trust, 2010).
[16] In Canada, the creation of a national system of unemployment insurance was deemed to require an amendment to the Canadian constitution, accomplished in 1940 through action by the Imperial Parliament at Westminster, see *Constitution Act, 1940*, 3-4 Geo VI, c 36 (UK). See also Leslie A Pal, *State, Class, and Bureaucracy: Canadian Employment Insurance and Public Policy* (Montreal: McGill-Queen's University Press, 1988).
[17] See Allan Moscovitch & Jim Albert, eds, *The "Benevolent" State: the Growth of Welfare in Canada* (Garamond Press, 1987) and Thomas J Courchene, *Social Canada in the Millennium: Reform Imperatives and Restructuring Principles* (Toronto: CD Howe Institute, 1994).

productive populace.[18] The welfare state was thus intended to establish the capacity for all citizens to participate relatively equally, productively and with both security and dignity, in what was assumed to be a future of growing economic prosperity. In the 1950's and 60's this appeared to be an attainable and sustainable vision.

4. For labour and employment law, an early and optimistic embodiment of this comforting vision of modernity may be thought to have emerged with the establishment of the International Labour Organization in 1919. A creature of the Treaty of Versailles, the ILO is a tripartite organization representative of labour, management and government from each of its member states.[19] The ILO was founded on the principle that labour is not simply a commodity,[20] and that social peace requires recognition of industrial as well as political citizenship if capitalism was to be saved from its own excesses and from the spectre of Bolshevism.[21] A key tenet of the ILO was that no nation should gain competitive advantage over others by allowing labour and employment standards to fall to such a level that wage-slavery in some countries could prevent populations in others from earning a living wage under fair conditions.[22] Despite ILO conventions aimed at creating and maintaining global labour and employment standards, the inter-war period of the ILO's efforts seemed grounded only in pious hopes. However, as WWII drew to a close, the Allies at an important conference in Philadelphia re-committed themselves to the idea that the social, economic and political conditions which gave rise to World War II should never be allowed to re-emerge. In this regard, re-affirmation of the principles of the underlying the ILO and support for its continued existence as a part of the emerging United Nations system were high on the agenda.[23] Fair labour standards and social justice were deemed essential pre-requisites for world peace.

5. Canada and the United States emerged from WWII with economies which had been strengthened by the war effort, and spared the ravages suffered by Europe. The United States had become the world's economic and military superpower, while the economy of its smaller Canadian ally had largely been transformed from an agrarian to an industrial one.[24] In the two decades after the war,

---

[18] World Health Organization, *The World Health Report 2000: Health Systems – Improving Performance* (Geneva: World Health Organization, 2000).
[19] Albert Thomas, "The International Labour Organisation: Its Origins, Development and Future" (1996) 135 No 3 – 4 International Labour Review 261; Antony Alcock, *History of the International Labour Organisation* (London: MacMillan, 1971) at 18-37; Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Oxford: Hart Publishing, 2013).
[20] See Judy Fudge, "Labour as a 'Fictive Commodity'" in Davidov & Langille, *The Idea of Labour Law*, *supra* note 5, 120.
[21] The Russian Revolution of 1917 had not yet revealed all of the extremes of Stalinism, which were yet to come, but Communism was on the rise not only Western Europe but also in North America. See Thomas, *supra* note 19 at 254-67.
[22] *Ibid* at 266
[23] Indeed, the Declaration of Philadelphia, which revived the ILO, preceded the adoption of the Universal Declaration of Rights by the U.N. General Assembly by some four years. See Alcock, *supra* note 19 and Supiot, *The Spirit of Philadelphia*, *supra* note 6. For the text of the Declaration of Philadelphia, see Supiot's book.
[24] William L Marr & Donald G Paterson, *Canada: An Economic History* (Toronto: The Macmillan Company of Canada, 1980) at 22; Kenneth Norrie & Douglas Owram, *A History of the Canadian Economy* (Toronto: Harcourt Brace Canada, 1996) at 375- 95.

Canadian federal and provincial governments introduced for their respective jurisdictions many of the essential elements of the welfare state,[25] although some might argue that in the U.S. federal system, despite the enormous impact of President Roosevelt's New Deal, the trappings of the welfare state never gained sufficient political popularity to fundamentally transform the economy's free enterprise fundamentals.[26] However, in the matter of labour legislation, the American New Deal following the Great Depression altered the legal underpinnings of labour relations in both the United States and Canada. In 1935, the U.S. Congress adopted the National Labour Relations Act under the leadership of Senator Wagner, following some decades of industrial unrest which boiled over in the Depression.[27] The "Wagner Act" gave a newly created National Labour Relations Board authority over a system regulating unionized labour relations in the private sector across the country in an assertion of the inter-state commerce clause of the U.S. Constitution.[28] Its main elements consisted in labour board certification of unions as sole bargaining agents for local plant bargaining units, the imposition on employers of a duty bargain collectively and in good faith with the union their employees had chosen, sanctioning by the labour board of any unfair labour practices by either employer or union in the certification process, and the restriction of strikes and lockouts to periods of collective bargaining, with disputes during the term of collective agreements to be resolved through arbitration without any work stoppages.[29] In its early days, there were considerable numbers of certifications under the Wagner Act and significant segments of the American industrial workforce were unionized.[30] In Canada, ramped-up industrial production during WWII had wrought widespread industrial conflict, and the Dominion Government in response implemented the Wagner Act scheme through Regulation P.C. 1003 under the *War Measures Act.*[31] After the war, virtually all Canadian provinces and the federal government adopted some variant of the Wagner Act model as the basis for unionized labour relations in the private sector.[32] Meanwhile, in the post-war period, Canadian jurisdictions, like their American counterparts, tended to consolidate and improve legislation regulating the non-unionized sectors of labour markets in order to set floors for child labour, maximum weekly hours of work, minimum wages, statutory holidays, vacations entitlements, and other such core issues in what often became known as employment standards codes.[33] However, the

[25] Norrie & Owram, *supra* note 24 at 428-35.
[26] Mario R DiNunzio, *The Great Depression and New Deal* (Santa Barbara: ABC Clio, 2014).
[27] *National Labor Relations Act*, NLRA 29 (1935).
[28] Mark Weinstein & Thomas Kochan, "The Limits of Diffusion: Recent Developments in Industrial Relations and Human Resource Practises in the United States" in Richard M Locke, Thomas A Kochan & Michael J Piore, eds, *Employment Relations in a Changing World Economy* (Cambridge: MIT Press, 1995) 1 at 2-5; Cynthia Estlund, *Regoverning the Workplace* (New Haven: Yale University Press, 2010) at 27-31.
[29] The contours of these main features and many other details, have of course, been the subject of some early and rare legislative refinement (generally regarded as unhelpful to unions) and sustained litigation over the subsequent decades, but the essence of the Wagner Act is still in force in the United States, despite some celebrated and failed attempts to revise the system: see Estlund, *supra* note 28 at 27-35; Thomas A Kochan, Harry C Katz & Robert B McKersie, *The Transformation of American Industrial Relations* (New York: Basic Books Inc, 1986) at 21-46.
[30] Estlund, *supra* note 28 at 29.
[31] George W Adams, *Canadian Labour Law*, loose-leaf (consulted on 22 July, 2014), (Toronto: Canada Law Book, 2014), ch 1 at 11-16 [G Adams, *Canadian Labour Law*]; Donald D Carter et al, *Labour Law in Canada* (The Hague: Kluwer Law International, 2002) at 53-55.
[32] G Adams, *Canadian Labour Law*, *supra* note 31 ch 1 at 11-16.
[33] In some jurisdictions, non-union and unionized sectors were regulated under a single statute, such as the *Canada Labour Code*, RSC 1985, c L-2 [*Canada Labour Code*], while in others the common law tradition of separate legislation for different

Canadian constitutional division of powers mandated a far more decentralized version of North American labour relations than that of the United States.[34]

7. An important caveat is in order at this point concerning the adoption of the Wagner Act model in the United States and Canada. This model was mainly intended to regulate labour relations in the industrial context where large unions associated with the Congress of Industrial Organizations (CIO) were predominant.[35] These unions organized workers on a generic, industrial basis and represented large numbers of employees at a plant who might work in many different job classifications.[36] Such unions differed from trade, craft or occupational unions which represented traditional groups of specialized workers, such as millwrights, wheel-rights, boilermakers, masons, metal workers and the like, who were members of the American Federation of Labour.[37] In fact these craft, trade or occupational unions predated the industrial unions, often tracing their roots medieval guilds.[38] In the early days of industrial manufacturing, these specialist craft and trade unions bargained with factory owners for their members, in whom they had often imbued the esoteric knowledge of their specialization through long apprenticeship. By virtue of their specialized knowledge, craft and trade unions wielded tremendous power in the factories of early mass production industries. After notable craft union and employer confrontations in the latter part of the Nineteenth Century,[39] Frederick Winslow Taylor originated his principles of "scientific management" which were intended to break down manufacturing tasks into their essential processes and coordinate them in Fordist production-line schemes[40] to ensure that managers could understand and control whole manufacturing systems. This was meant simultaneously to make manufacturing more efficient and to break the hold of craft unions over industrial production, in process later known as "de-skilling".[41] The increasingly widespread nature of this management phenomenon, of course, enhanced the role and value of industrial unions from the perspective of labour. The important point for this paper, however, is to understand that, while industrial unions came to predominate in many sectors of the economy, such as steel and automobile manufacturing, mining etc., they did not eradicate craft, trade or occupational unions. These latter unions still predominated in such industries or occupations as construction, stevedoring, the restaurant industry, entertainment and the arts, and films,

---

purposes predominated with trade union or labour relations acts governing unionized sectors, labour standards codes for the non-unionized sectors, and eventually the emergence of occupational health legislation which tends to cover both sectors. See *Fairness at Work*: *Federal Labour Standards for the 21st Century* (Gatineau: Publication Services Human Resources and Skills Development Canada, 2006) [*Fairness at Work*]; Task Force to Review Part I of the Canada Labour Code, *Seeking a Balance* (Ottawa: Public Works and Government Services Canada, 1995) [*Seeking a Balance*].

[34] Roy Adams, *Industrial Relations under Liberal Democracy: North America in Comparative Perspective* (Columbia: University of South Carolina Press, 1995) at 34-62 [R Adams, *Industrial Relations under Liberal Democracy*].

[35] John T Dunlop & Walter Galenson, *Labor in the Twentieth Century*, (New York: Academic Press, 1978) at 33 – 36.

[36] R Adams, *Industrial Relations under Liberal Democracy*, *supra* note 34 at 50-56.

[37] Katherine Stone, *Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press, 2004) at 18 – 22 [Stone, *Widgets to Digits*]; R Adams, *Industrial Relations under Liberal Democracy*, *supra* note 34 at 36-56.

[38] Alan Fox, *History and Heritage: The Social Origins of the British Industrial Relations System* (London: Allen & Unwin, 1985) at 7-11, 63-67.

[39] Stone, *Widgets to Digits*, *supra* note 37 at 24-26.

[40] *Ibid* at 33-35, 44-48.

[41] *Ibid.*

to name only a few. Craft, trade and occupational unions often lived on the margins of the North American Wagner Act model through the mechanism of voluntary recognition, but sometimes were of sufficient economic and political importance to merit their own statutory schemes of regulation.[42] Unlike their industrial cousins who negotiated collective agreements for full-time, long-term employees concerned with wage rates for classifications, seniority, internal promotions and company sponsored benefit and pension plans, the craft, trade and occupational unions largely represented casual or part-time employees who likely worked for a series of employers contacted through union hiring halls, such that seniority with the employer (as opposed to with the union) was not an issue, and collective bargaining was oriented to minimum pay levels and joint employer/employee contributions to union sponsored benefit and pension plans.[43] While the early rivalry between craft and industrial unions formally ended with the merger or their parent affiliation bodies into the AFL-CIO, the different modes of organization and bargaining of the two traditions, may have significance for the evolution of labour relations and labour market regulation in the globalized new economy.[44]

8. The global upshot in terms of comparative labour relations was that in the three to four decades following WWII, labour markets in advanced capitalist economies were regulated to protect workers and encourage unionization, if in very different ways.[45] The European approach accepted national union centrals, national employers' organizations and governments as "social partners" in state-wide bargaining for regulation of labour[46] markets following the principles of the ILO, while in North America the predominantly plant level industrial collective bargaining and decentralized labour standard setting made for fragmented, localized and, arguably incoherent, labour market regulation.[47] Interestingly enough, somewhat different systems had evolved in Australia and New Zealand which might be thought to have had more in common with the European than the North American approach to labour market regulation.[48] The key, however, is to see that "free market" nation states which could afford it in the decades following WWII were committed to the fundamental parameters of the welfare state, and that these were essential to sustain the effective operation of the regulatory regimes governing labour and employment. Employers did not have to worry overly about periods of unemployment for

[42] Especially in the Canadian construction and stevedoring industries, and latterly in the arts. See e.g. Alan Minsky "Some Labour Relations Problems in the Construction Industry" (2001) 9 CLR (3d) 115; and Elizabeth MacPherson "Collective Bargaining for Independent Contractors: Is the Status of the Artist Act a Model for Other Occupational Sectors?" (1999) 7 CLEJ 355.

[43] Stone, *Widgets to Digits*, *supra* note 37 at 15 – 26, 61-63.

[44] Carter et al, *supra* note 31 at 55; Kochan, Katz & McKersie, *supra* note 29 at 28.

[45] French commentators often refer to "Les Trente Glorieuses" or the "Thirty Glorious Years" of prosperity following WW II, see Maupain, *supra* note 19 at 23-27, Supiot, *The Spirit of Philadelphia*, *supra* note 6.

[46] R Adams, *Industrial Relations under Liberal Democracy*, *supra* note 34 at 29-33; Roger Blanpain, *European Labour Law* (Alphen aan den Rijn: Kluwer Law International, 2010) at 123-140.

[47] R Adams, *Industrial Relations under Liberal Democracy*, *supra* note 34 at ch 4.

[48] Labour is typically viewed as a "social partner" in both Australia and New Zealand, and national economic strategies have often included pro-labour protectionist measures. Collective bargaining is conducted on a sectoral basis through a system of "awards" which extend collective agreements beyond the enterprise level (much like the *erga omnes* extensions commonly found throughout continental Europe). See Andrew Stewart, *Stewart's Guide to Employment Law*, 3rd ed (Sydney: The Federation Press, 2011) and Gordon Anderson, *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* (Wellington: Victoria University Press, 2011).

workers, or a paucity of other benefits, or to engage in expensive internal training, when the state was there to provide.

9. As time went on, there were elements of this welfare state system which were clearly revealed to be unsustainable or even objectionable by subsequent events or in the light of evolving social values. The dark legacy of colonialism helped maintain the competitive edge of the developed over the developing world,[49] but particularly for Europe, colonialism would come home to roost in the form of disaffected populations from former colonies who turned out not to be entirely welcome in the "motherlands".[50] Former colonies among the developed nations (Australia, Canada and New Zealand) were not necessarily welcoming to immigrants from non-European (read non-white) backgrounds or acknowledging the needs of their own denizens of aboriginal origins.[51] Despite the political advances of the suffragettes of the 1920's and the contributions of women to the industrial workforces of advanced economies during WWII, explicit post-war policies in European and North American welfare states were oriented to putting women back in the home as "mothers" to liberate jobs for returning servicemen, rather than tap women's newly demonstrated creative and productive capacities in the workforce.[52] In North America, union jobs and unions themselves became largely the preserve of white males in the industrial sector, in forms of business unionism bent on improving the lives of their members as consumers rather than industrial citizens.[53] Moreover, unions tended to limit their activities to traditional, easy to organize industrial sectors of the economy, where they could most easily benefit their members, rather than work to organize and better the circumstances of large numbers of people in other walks of life.[54] Nonetheless, the gold standard underpinning national currencies, the Bretton-Woods agreement, and continuing national tariff barriers meant that dominant Western nation states maintained high standards of living[55] through regulation of their own domestic economies, since economic, political and juridical space was still largely under the effective control of national governments.[56]

2. "Post Modern" Labour Markets of the Globalized 21st Century

[49] Adelle Blackett, "Emancipation in the Idea of Labour Law" in Davidov & Langille, *The Idea of Labour Law*, *supra* note 5, 420; Andre Gunder Frank, *Dependent Accumulation and Underdevelopment* (New York: Monthly Review Press, 1979) at 172-199.
[50] Frantz Fanon, *The Wretched of the Earth*, translated by Richard Philcox (New York: Grove Press, 2005); Adelle Blackett "Trade Liberalization, Labour Law and Development: a Contextualization" in Tzehainesh Teklè, ed, *Labour Law and Worker Protection in Developing Countries* (Oxford: Hart Publishing, 2010) 93.
[51] *Ibid* at 94. See also Keith Thor Carlson, *The Power of Place, the Problem of Time: Aboriginal Identity and Historical Consciousness in the Cauldron of Colonialism* (Toronto: University of Toronto Press, 2010).
[52] Judy Fudge & Leah F Vosko, "Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law, Legislation and Policy" (2001) 22 Economic and Industrial Democracy 271 at 271-83.
[53] David Beatty, "Ideology Politics and Unionism" in Kenneth P Swan and Katherine Swinton, eds, *Studies in Labour Law* (Toronto: Butterworths, 2001) 299 at 314-16.
[54] *Ibid* at 308-14.
[55] See Judt, *supra* note 10 for a readable account of what he calls "the revenge of the Austrians" (von Mises, Hayek, Schumpeter, Popper and Drucker).
[56] Harry Arthurs, "Labour Law without the State?" (1996) 46 U Toronto LJ 1.

10. It took several decades for the welfare state to unravel, but by the end of the 1970's the writing was on the wall, even if it was not yet legible to all observers. Neo-liberal economists had been hammering away at the excesses of the welfare state and preaching the virtues of the unregulated "free" market for some decades.[57] The most trenchant of these critics regarded labour market regulation for minimum terms and conditions of employment as an unjustifiable drag on competitive economies (to say nothing of the perceived negative impact of unions), and called for massive de-regulation of economies on multiple levels.[58] These views were then translated into government policies in key western democracies by governments under Thatcher, Reagan, and even Giscard d'Estaing, among others.[59] Meanwhile there were changes in economic realities and attendant policy at the international level. Multinational corporations, whose economic strength out shadowed many nation states, had been on the ascendance in the international economy by the 1960's.[60] At first, national commercial and industrial elites, as well as parties of the left, raised opposition to the practices of "multi-nationals" whose "branch plants" could undermine tariff-protected national economies, avoiding taxation and other regulation through internal transfer mechanisms, even if their full impact on labour markets had yet to be revealed.[61] However, the logic of free trade and the so-called Washington Consensus carried the day.[62] The gold standard had been abandoned, and the World Bank and World Monetary Fund were now in place.[63] The General Agreement on Tariffs and Trade (GATT) in its many rounds, with the support of regional arrangements such as the North American Free Trade Agreement and the European Union, led to the gradual reduction of tariffs and the freeing up of capital flows for foreign direct investment, now touted as a virtue not a vice.[64] The World Intellectual Property Organization was put in place to protect patents and the proprietary technologies which underpinned much of the transition to what was now being called the "new economy".[65] That new economy was based on computers and communications systems which could allow decentralized, just-in-time production that improved productivity, reduced inventories and eventually led to the demise of manufacturing in large vertically and horizontally

[57] Friedrich Hayek, James M Buchanan and Milton Friedman to name a few.
[58] James M Buchanan, *Liberty, Market and State: Political Economy in the 1980s*, (New York: New York University Press, 1986); Friedrich A von Hayek, *Individualism and Economic Order* (Chicago: University of Chicago Press, 1996); Milton Friedman & Rose Friedman, *Free to Choose: A Personal Statement* (New York: Harcourt Brace Jovanovich, 1980).
[59] George W. Bush, John Howard, Stephen Harper, David Cameron and Tony Abbott are among the recent proponents of this ideological inheritance.
[60] Kari Levitt, *Silent Surrender: The Multinational Corporation in Canada* (Montreal: McGill-Queen's University Press, 2002).
[61] Walter Gordon, Liberal federal Finance Minister commissioned the Task Force on the Structure of Canadian Industry, *Foreign Ownership and the Structure of Canadian Industry: Report of the Task Force on the Structure of Canadian Industry* (Ottawa: Queen's Printer, 1968). As to social democrats, see TC Douglas and Laurier LaPierre, eds, *Essays on the Left: Essays in Honour of TC Douglas* (Toronto: McClelland and Stewart, 1971).
[62] Brian Langille, "Imagining Post 'Geneva Consensus' Labor Law for Post 'Washington Consensus' Development" (2010) 31Comp. Labor Law & Pol'y Journal 523.
[63] Richard Kozul-Wright & Paul Rayment, *The Resistible Rise of Market Fundamentalism* (London: Zed Books, 2007) at 66-78.
[64] The logic of free trade seems to be moving ahead inexorably with Canada's agreements with South American countries, the European Union, Korea and the prospective Trans-Pacific Partnership, see Kevin Banks, "Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law" (2011) 32 Berkley J Emp & Lab L 45.
[65] Shahid Alikhan, *Socio-Economic Benefits of Intellectual Property Protection in Developing Countries* (WIPO Publication, 2000).

integrated firms in many industries.[66] By the mid-1990's, particularly after the fall of the Berlin Wall, the collapse of the Soviet Union and the rise of state capitalism in the "Peoples Republic" of China, it was clear to all that global capitalism had the wind in its sails and that the claims of neo-liberalism seemed to have won the day.[67]

11. There were and are, however, the undeniable and uncomfortable negative aspects to this apparent triumph of relatively un-regulated capitalism. Increasing social and economic inequalities emerged in most high wage economies.[68] This is connected to the "de-industrialization" of such economies as traditional manufacturing industries moved to low-wage developing countries.[69] Employment in high technology, advanced manufacturing and in the service sector, broadly defined, was beginning to dominate in developed economies, but labour force adjustments were difficult for those left behind after the closure of many traditional industries.[70] Globalization, to some degree in the hands of what are now called "transnational corporations" (TNC's), is frequently demonized as the exporting of jobs to countries which not only allowed "poor wages" but tolerated un-safe working conditions.[71] There are fears voiced, often with justification, that countries are competing with one another for foreign direct investment, or supporting local economic elites, by lowering labour standards in what is often called a regulatory "race to the bottom". [72] While the negative effects of globalization in the developed world may be exaggerated[73] and while its benefits to many workers in developing countries are undeniable,[74] the fact remains that the impact of globalization in its most recent incarnations has been uneven and sufficiently problematic to many voters in developed countries to become a politically pressing issue. In this globalized new economy, characterized by free-flowing capital, transnational corporations shifting industrial production to low wage economies, contracting-out, just-in-time production, multiple jurisdiction commodity/value chains and the like, legal regulation to support or ensure fairness through a

[66] The negative effects of this capitalist concentration on "core competencies" has revealed stunningly negative consequences not only for employment, but also economic innovation – problems unwittingly and ironically promoted by such agents as teachers' pension funds. See Suzanne Berger, "How Finance Gutted Manufacturing" *Boston Review* (1 April 2014), online: Boston Review <http://www.bostonreview.net/forum/suzanne-berger-how-finance-gutted-manufacturing>; Hugh Collins, "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws" (1990) 10 no 3 Oxford J Legal Stud 353 [Collins, "Vertical Disintegration"].

[67] Supiot, *The Spirit of Philadelphia*, *supra* note 6 is particularly interesting on this link between transnational capitalism and the rise of state capitalism in Eastern Europe and China.

[68] OECD, *Divided we Stand: Why Inequality Keeps Rising* (OECD Publishing, 2011); Thomas Piketty & Arthur Goldhammer, *Capital in the Twenty-First Century* (Cambridge: The Belknap Press of Harvard University Press, 2014).

[69] Carter et al, *supra* note 31 at 60 – 61; *Fairness at Work*, *supra* note 33 at 16-31; Gunderson, *supra* note 4 at 23-26.

[70] Carter et al, *supra* note 31 at 60-61; *Fairness at Work*, *supra* note 33 at 16-31; Katherine Stone & Harry Arthurs, "The Transformation of Employment Regimes: A Worldwide Challenge" in Stone & Arthurs, *supra* note 4, 1 at 1-5.

[71] Breen Creighton, "The Future of Labour Law: Is There a Role for International Labour Standards?" in Barnard, Deakin & Morris, *supra* note 5, 254 at 262-67.

[72] A phenomenon referred to with reference to environmental and labour market regulation.

[73] Bruce C N Greenwald & Judd Kahn, *Globalization n. the irrational fear that someone in China will take your job* (Hoboken: J. Wiley and Sons, 2009); also Bob Hepple, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005) at 253-56.

[74] Jagdish N Bhagwati, *In Defense of Globalization* (Oxford: Oxford University Press, 2007). See also the special issue of Comparative Labor Law & Policy Journal (2011) 32:2 on Labor Law and Development.

domestic jurisdiction's framework for "rights at work" has become increasingly difficult.[75] Moreover, the political power of unions to assert claims in relation to rights at work has diminished. Union membership and density of coverage is in retreat.[76] The largely departed traditional industrial sector was the most heavily unionized sector of the economy, at least until the public sector became unionized in the 1970's and 1980's.[77] Unionization in the newly ascendant service sector is weak, and political parties with platforms seeking to reduce taxes and the "privileges" of employees in the unionized public sector are assuming greater prominence.[78] Labour is under siege in a labour market where economic conditions are diminishing the prospects of many workers. But the difficulties for workers are not limited to problems caused by macro-economic conditions. Workers are now more vulnerable because of the prevalence of new legal arrangements governing personal work relations which have developed in tandem with global changes in the organization and location of production.

B. The Overshadowing of "Old Modern" Labour and Employment Law Rights

1. The Centrality of the Standard Employment Contract to the Post-War Welfare State

12. The legal forms that contracts for performance of work may take are a critical aspect of labour market regulation. While what is currently known as the "standard employment contract" may have emerged in the civilian systems of continental Europe in the late Nineteenth Century,[79] it is now argued that the "law of master and servant" in common law jurisdictions did not morph into the regulation of "standard employment contracts" until the mid-Twentieth Century, and did so as a necessary aspect of labour market regulation in the welfare state.[80] A "standard employment contract" refers to a work relationship where the employee agrees to provide work or services to an employer at agreed upon rates of pay, where the performance of the work is directed by that employer, and where the employee agrees to become subordinated to the employer's work arrangements for an indeterminate period, on a full-time

[75] In part, this is because labour, as a factor of production, is not nearly as mobile as capital, goods or technology. See Gunderson, *supra* note 4 as well as Kuttner, *supra* note 4; and Locke, *supra* note 4.

[76] Katherine Stone & Harry Arthurs, "The Transformation of Employment Regimes: A Worldwide Challenge" in Stone & Arthurs, *supra* note 4, 1 at 9-10; *Fairness at Work*, *supra* note 33 at 16-31; Employment and Social Development Canada, *Unionization Rates*, online: Human Resources and Skills Development Canada < http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=17#M_1>.

[77] Mark Thompson & Sarah Slinn, "Public Sector Industrial Relations in Canada: Does it Threaten or Sustain Democracy?" (2012) 34 Comp Lab L & Pol'y J 393 at 393-95; Carter et al, *supra* note 31 at 380-39.

[78] Bryce Swerhun, David Shepherdson & Karla Thorpe, *The Millennial Movement: Younger Workers and Union Renewal* (Ottawa: The Conference Board of Canada, 2014).

[79] Norbert Olszak, *Histoire du Droit du Travail* (Paris: Economica, 2011); Alain Supiot, *Critique du Droit du Travail*, (Paris: Quadrige/PUF, 2007).

[80] Frank Wilkinson & Simon Deakin, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution*, (Oxford: Oxford University Press, 2005). It is suggested that the notion of "employment relations" in a "contract of service" did not formally emerge in the United Kingdom until the *National Insurance Act*, 1946.

basis.[81] In the post-WWII welfare state, this kind of work arrangement not only became "standard" in the sense that it predominated statistically in many sectors of the economy (at least for "male family bread-winners"), but also became the preferred legal platform for structuring work related obligations and benefits.[82] Full-time employees have income tax, as well as state pension plan and employment insurance contributions deducted from their wages and forwarded to the government. These "standard employees" have rights to a minimum wage, limitations on weekly hours of work, vacation pay, various holidays, etc., all by statutory fiat, which may not necessarily be the case for part-time or casual employees.[83] Such employees also have the right to join unions and engage in collective bargaining with their employer, where the purpose of collective agreements is generally thought to be the improvement of terms and conditions of employment over and above the statutory minima guaranteed in employment standards legislation by the welfare state.[84] Collective bargaining in North America, however, has traditionally been denied to many part-time and casual employees who have been though not to have a "community of interest" with those hired under standard employment contracts.[85] But the standard employment contract is perhaps most importantly contrasted with work arrangements which are characterized as commercial or entrepreneurial contracts for services: that is, where the worker is deemed to be in business for him or herself, where he or she is providing work with specific agreed upon outcomes for an agreed price, where the service provider typically uses his or her own equipment and bears the risk of profit or loss, where the hirer will not necessarily supervise the work in any close sense, and where the service provider can employ others to do any or all of the work.[86] In these arrangements, the hirer of this "independent contractor" does not deduct income tax or state benefit contributions, need not be concerned with employment standards legislation covering other benefits, and may be protected against combinations in restraint of trade where such independent business owners might be tempted to fix prices.[87] Thus, collective bargaining by such small business owners is generally thought contrary to public policy prohibiting abusive monopolies or restraint of trade in capitalist economies.[88] The point,

[81] Mark Freedland, "Application of Labour and Employment Law Beyond the Contract of Employment" (2007) 146 No 1-2 International Labour Law Review 3; *LCO Report*, *supra* note 1 at 7-9; Mark Freedland, "Burying Caesar: What was the Standard Employment Contract" in Stone & Arthurs, *supra* note 4, 81.
[82] See Langille, "Labour Policy in Canada", *supra* note 3.
[83] Judy Fudge, Eric Tucker & Leah Vosko, "Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada" (2003) 10 CLELJ 193 [Fudge, Tucker & Vosko, "Employee or Independent Contractor?"]; Leah F Vosko, "Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity" in Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2006) 3 [Vosko, "Precarious Employment"]; *Fairness at Work*, *supra* note 33 at 58-77.
[84] *Seeking a Balance*, *supra* note 33 at Section II; Carter et al, *supra* note 31 at 250-56.
[85] Geoffrey England, *Part-time, Casual and Other Atypical Workers: A Legal View*, No 48 (Kingston: IRC Press, 1987).
[86] Judy Fudge, "Self-Employment, Women and Precarious Work: The Scope of Labour Protection" in Judy Fudge & Rosemary Owens, eds, *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Portland: Hart Publishing, 2006) 201 [Fudge, "Self-Employment, Women and Precarious Work]; Fudge Tucker & Vosko, "Employee or Independent Contractor", *supra* note 83; Brian A Langille & Guy Davidov, "Beyond Employees and Independent Contractors: A View from Canada" (1999), 21 Comp. Lab. L. & Policy J 7 [Davidov & Langille, "Beyond Employees"].
[87] *Ibid*; Fudge, "Self-Employment, Women and Precarious Work", *supra* note 86; Fudge Tucker & Vosko, "Employee or Independent Contractor", *supra* note 83.
[88] The common law forbid such actions well before anti-combines legislation created more complex regulatory structures to inhibit such activities: see *Competition Act*, RSC 1985, c C-34 and *Status of the Artist Act*, SC 1992, c 33 s 9 [*Status of the Artist Act*]. See also Macpherson, *supra* note 42.

however, is that the standard employment contract was the pivotal legal platform for the provision of many protections for workers in the welfare state, despite the continuing existence and importance of small independent contractors or the presence of un-protected non-standard employees at the margins of the economy.

2. The Eclipse of Workplace Rights through the Marginalization of Standard Employment

13. Standard employment is not everyone's cup of tea. Those with heavy domestic responsibilities, students, and people in a variety of other circumstances may prefer the opportunity to take casual or part-time employment. Those of an entrepreneurial cast of mind may prefer the profits or flexibility of running their own business to the limitations of a fixed wage or salary and the confines of standard employment. That having been said, it is clear that employers often have an incentive to hire staff on a part-time or casual basis to avoid the burden of paying benefits under employment standards legislation.[89] Many such employees have to cobble together an income by working at two or more jobs when they would rather have one decent, full-time job with benefits.[90] In some instances, unionized employers may fragment employment opportunities by hiring casual or part-time workers to avoid paying wage rates or benefits to which only full-time employees are entitled under collective agreements.[91] In still other circumstances, both unionized and non-union employers may legally be able to "outsource" certain functions to independent contractors and avoid labour standards obligations or collective agreements where there are "legitimate business reasons" for doing so.[92] Sometimes, such casualization or outsourcing is merely disguised employment where the legal form of the arrangement is nominally a contract for services, but where the worker has virtually no other clients and is a "dependent" rather than an "independent" business person.[93] These sham arrangements, where they are allowed to exist, block worker access to protections available to employees doing identical tasks under a standard contract of employment. Some of these arrangements can be elaborately structured through employment agencies who supply customers not with temporary workers, but rather with on-going staff who are formally in the employ of the agency, but do work under the direction of the agency's customer who bears none of the risks of engaging full-time staff.[94] Sometimes people hired to do piece work in their own homes resemble European cottage workers of the Seventeenth Century, although the process

[89] Jeffrey Sack et al., "Protecting Workers in a Changing Workworld: The Growth of Precarious Employment in Canada, the United States and Mexico" in Giuseppe Casale ed, *The Employment Relationship: A Comparative Overview* (Portland: Hart Publishing, 2011) 233 at 236-40.
[90] *LCO Report, supra* note 1 at 15-19; Statistics Canada, *Reasons for part-time work by sex and age group*, online: Statistics Canada < http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labor63a-eng.htm>; Law Commission of Canada, *Is Work Working: Work Laws that do a Better Job* (Government of Canada, 2004).
[91] Unions with strong bargaining power may be able to force employers to refrain from such practices, but weaker unions may not be able to do this.
[92] Brian Langille & Patrick Macklem, "Beyond Belief: Labour Law's Duty to Bargain" (1988) 13 Queen's LJ 62.
[93] Fudge, "Self-Employment, Women and Precarious Work", *supra* note 86; Fudge, Tucker & Vosko, "Employee or Independent Contractor?", *supra* note 83.
[94] See e.g. the case in *Pointe-Claire (City) v Quebec (Labour Court)*, [1997] 1 SCR 1015, 146 DLR (4th) 1 [*Point-Claire*]; Silvana Sciarra, "National and European Public Policy: The Goals of Labour Law" in Davidov & Langille, *Boundaries and Frontiers of Labour Law, supra* note 5, 245 at 261-62.

can now be put in place through internet communication by transnational corporations working across jurisdictions spread around the globe.[95] In these and other ways, the standard employment contract is being marginalized,[96] and the protections which have traditionally accrued to full-time employees, whether in union or non-union workplaces, are being denied to "non-standard workers".[97] The upshot of this legal segmentation of labour markets is that the standard employment contract as the preferred platform for the provision worker protections and benefits in the post-war welfare state has now become an inadequate and even dysfunctional mechanism for ensuring fairness in the regulation of labour markets by virtue of its marginalization.[98]

3 Fragmented and Uncoordinated Labour Market Regulation: Canada's Awkward Constitution

14. Despite their apparently inclusive labels, "labour law" and "employment law" are far from being the sole legal sources of labour market regulation. There are other domestic regulatory regimes which have significant constitutive impacts on labour markets.[99] Under Canadian federalism, however, these administrative areas are often divided among federal and provincial authorities in configurations which can inhibit coordinated regulatory activity.[100] As mentioned above, some direct regulation of workplace activity, such as human rights guarantees, employment standards, labour relations and occupational health and safety, follows constitutional rules dividing legislative authority over certain industries or occupational activities.[101] Thus all Canadian jurisdictions have such laws operative in their own regulatory spheres. Citizenship and immigration rules set fundamental parameters on labour market entry on the part of every individual in the country, and they are largely in the hands of the federal

[95] This can be true whether it is the physical product of a garment worker (*Lian v J Crew Group Inc et al*, [2001] OJ No 1708, 54 OR (3d) 239) or the intellectual product of the freelance writer or editor, or the quality control monitor phoning the employer's customers to check on their satisfaction. See also Paul Davies & Mark Freedland, "The Complexities of the Employing Enterprise" in Davidov & Langille, *Boundaries and Frontiers of Labour Law*, *supra* note 5, 274; Hugh Collins, "Multi-segmented Workforces, Comparative Fairness and the Capital Boundary Obstacle" in Davidov & Langille, *Boundaries and Frontiers of Labour Law*, *supra* note 5, 318 [Collins, "Multi-segmented Workforces]; Judy Fudge, "The Legal Boundaries of the Employer, Precarious Workers and Labour Protection" in Davidov & Langille, *Boundaries and Frontiers of Labour Law*, *supra* note 5, 296.

[96] *LCO Report*, *supra* note 1 at 10 – 28.

[97] Non-standard workers is a phrase often used interchangeably with the phrase "precarious workers" to be discussed below. See Judy Fudge, Erick Tucker & Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers* (Law Commission of Canada, 2002) at 49-91.

[98] This "platforms" language was first articulated by Brian Langille (Langille, "Labour Policy in Canada", *supra* note 3) and later taken up by Judy Fudge (Fudge, Tucker & Vosko, "Changing Boundaries in Employment", *supra* note 3). See also Gunderson, *supra* note 4.

[99] John Howe, Richard Johnstone & Richard Mitchell, "Constituting and Regulating the Labour Market for Social and Economic Purposes" in Christopher Arup et al, eds, *Labour Law and Labour Market Regulation* (Sydney: The Federation Press, 2006) 307.

[100] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91 – 92, reprinted in RSC 1985, App II, No 5 [*BNA Act, 1867*]. See generally Carter et al, *supra* note 31 at 26-28; Peter W Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 24 July, 2014), (Toronto: Carswell, 2013), ch 5 at 1-47.

[101] Stacey R Ball, *Canadian Employment Law* (Aurora: Canada Law Book, 2010), ch 2 at 1-23; G Adams, *Canadian Labour Law*, *supra* note 31 ch 3 at 1-21.

government.[102] The federal government also has exclusive jurisdiction over employment insurance,[103] and has established the Canada Pension Plan[104] which are both critical to the ability of many Canadian residents to manage their temporary or permanent departures from the labour market.[105] On the other hand, the provinces have jurisdiction over education, including both university and vocational training at the post-secondary level,[106] as well as worker compensation regimes and general social welfare systems,[107] the former affecting levels of effective labour market participation, and the latter cushioning the circumstances of those who are unable to participate fully in remunerative labour market activity. Some areas, such as imposition of income tax and immigration, are shared between the levels of government,[108] and the federal government has exercised influence through its spending power over areas of otherwise provincial jurisdiction, such as workforce training and even health care (both of which can condition levels and degrees of effectiveness of workforce participation). Note that worker's compensation represents an interesting example of federal-provincial cooperation in labour market regulation, where the federal jurisdiction piggy-backs on the relevant provincial compensation scheme for the provision of coverage to workers in the otherwise federally regulated sector.[109] International relations is a matter of federal jurisdiction, so that negotiating membership in the International Labour Organization[110] or participation in free trade agreements (with or without labour market provisions)[111] are conducted by the government of Canada, while the implementation of such agreements may engage areas of provincial legislative authority and require the cooperation of the provinces.[112] During some periods, federal-provincial relations with respect to contiguous areas of labour market labour regulation

[102] Once in the country as a citizen permanent resident, the *Charter of Rights and Freedoms* guarantees individuals mobility under section 6. See Judy Fudge & Fiona Macphail, "The Temporary Foreign Worker Program in Canada: Low-skilled Workers as an Extreme Form of Flexible Labor" (2009) 31:1 Comp Lab L & Pol'y 5.
[103] This jurisdiction resulted from the penultimate amendment made to the *British North America Act* by the Parliament of the United Kingdom, prior to the repatriation of the Canadian Constitution in 1982. Under the amended constitution, the federal government has jurisdiction over unemployment insurance pursuant to s. 91(2A).
[104] *Canada Pension Plan*, RSC 1985, c C-8.
[105] Expert Commission on Pensions, *A Fine Balance: Safe Pensions, Affordable Rules, Fair Rules* (Queen's Printer for Ontario, 2008) [Expert Commission on Pensions]; Pension Review Panel, *Promises to Keep* (Government of Nova Scotia, 2009) [Pension Review Panel]; Elizabeth Shilton, "Employee Pension Rights and the False Promise of Trust Law" (2011) 34 Dalhousie LJ 81.
[106] *BNA Act, 1867*, *supra* note 100 at s 93; Jean Charest "Challenges Facing Workforce Training in Canada: Policy Perspectives for the Future" (2008) 14 CLELJ 1.
[107] See Ball, *supra* note 101 at ch 2 at 1-10.
[108] For taxation see *BNA Act, 1867*, *supra* note 100 at ss 91(3), 92(2). For immigration see s. 95 (*ibid* at s 95).
[109] Constitutional competency over workers' compensation is discussed in a trilogy of cases decided by the Supreme Court of Canada: *Canadian National Railway Co v Courtois*, [1988] 1 SCR 868, 51 DLR (4th) 271; *Bell Canada v Québec (Commission de santé et de la sécurité du travail du Québec)*, [1988] 1 SCR 749, 51 DLR (4th) 161; *Alltrans Express Ltd v British Columbia (Workers'/Workmen's Compensation Board)*, [1988] 1 SCR 897, 51 DLR (4th) 253. Federal employees may seek recourse under provincial workers' compensation schemes, however any provision within a provincial compensation statute which regulates occupational health and safety will be limited to provincial undertakings.
[110] John Mainwaring, *Canada as an ILO Member: Performance and Potential* (Ottawa: International Labour Affairs Branch, 1968); *In re the Regulation and Control of Aeronautics in Canada*, [1931] UKPC 93, [1932] AC 54 PC (Eng).
[111] *North America Free Trade Agreement Implementation Act*, SC 1993, c 44; Lance Compa, *NAFTA's Labour Side Agreement and International Labour Solidarity*, online: (2001) Cornell University ILR School 1 < http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=articles>.
[112] See the special status of Quebec in this regard at some points in Canadian history. See Hogg, *supra* note 100 ch 5 at 45-47, ch 11 at 1-20.

have been harmonious and cooperative,[113] while at other times they have been contentious and confrontational.[114] These relations tend to vary in accordance with the ideological complexion of the governments in question and the economic conditions and issues of the day. The upshot, however, is that integrated labour market regulation is an elusive regulatory target for Canadian governance structures and institutions. Thus, creating coordinated governmental means to respond to the conditions of the global economy is a difficult political and administrative task in Canada.[115] Moreover, this federal constitutional governance structure is replicated in some measure in the private sector, such that trade unions and employers' organizations operate nationally or federally, as well as in provincial contexts, and such private activities at the different levels may or may not be harmonized.[116] This complicated situation, in a country with such a large geographical area and a relatively small population may not augur well for focussed discussion, negotiation or cooperation among the "social partners" in the labour market.[117] However, there ways and means to overcome this constitutional fragmentation for labour market regulation which will be addressed in Part II of this paper.

C. Normative Tensions and Rights at/through Work in Globalized "Post-Modernity"

15. The mechanisms of labour and employment law in the framework of the welfare state were understood to be rooted in the value of protecting vulnerable workers from unacceptable levels of exploitation and the political instability which such inequality spawns. As the welfare state withered, the application of human rights systems in the workplace ascended to prominence. However, both the protective and human rights justifications for labour and employment law are often seen to be in conflict with notions of competitiveness and efficiency in labour market regulation. The tensions among these three critical normative spheres, invoked to justify regulation of relationships in workplaces and labour markets, merit scrutiny.

1. Controversy over the Protective Justification for Rights at Work

16. The protective justification for regulating rights at work has a long pedigree. The English factory acts of the late Eighteenth and early Nineteenth Centuries, as well as their European counterparts, were intended to curb the worst excesses of unhealthy wording conditions of the Industrial Revolution,

[113] See for example the many Labour Market Agreements between Parliament and the provincial legislatures: "Labour Market Agreements", online: Employment and Social Development Canada < http://www.esdc.gc.ca/eng/jobs/training_agreements/lma/index.shtml>.
[114] In the pensions context see Joint Expert Panel on Pension Standards, *Getting our Acts Together: Pension Reform in Alberta and British* Columbia (Governments of Alberta and British Columbia, 2008) [Joint Expert Panel on Pension Standards]; Pension Review Panel, *supra* note 105; Expert Commission on Pensions, *supra* note 105.
[115] Nova Scotia Commission on Building our New Economy, *Now or Never: An Urgent Call to Action for Nova Scotians* (Government of Nova Scotia, 2014) at 52-64. For a recent example of this see *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837.
[116] Gunderson, *supra* note 4.
[117] R Adams, *Industrial Relations under Liberal Democracy*, *supra* note 34.

particularly for women and children.[118] Such politico-legal interventions were based in the manifest inequality of bargaining power between those who, in Marxian terminology, owned the means of production by comparison with those who had only their labour power to sell.[119] This evident social and economic inequality was largely discounted by the liberal, commercial assumptions underlying both the law of contract in the English common law tradition and the civilian legal traditions of continental Europe alike.[120] In other words, the civil law generally assumes that contracting parties are equal, despite empirical conditions to the contrary. Domestic legislation regulating maximum hours of work, minimum vacation entitlement, minimum wages and the like became mirrored in and promoted by conventions of the ILO ratified by many nations in the first half of the Twentieth Century, despite the initial legal resistance embodied in the decisions of common law courts and in continental civil codes in Western legal systems.[121] These statutory minima favoured workers by altering the substantive content of contracts of employment entered into between employers and employees. The other mechanism which emerged as a response to the inequality between employers and employees was, of course, collective bargaining, as described above – a procedural device recognizing the "strength in numbers" possessed by workers who could organize collectively. First repressed by law in the eighteenth and nineteenth centuries, then tolerated in the early Twentieth and finally encouraged in Post-WW II welfare states, collective bargaining gained varying degrees of prominence. For the emergence of both substantive legislative protections and procedural collective bargaining ones, labour movements had a substantial influence in the politics which gave rise to both forms of worker protection in most liberal democracies.[122] However, the very success of the welfare state sowed the seeds of its political demise and of the legitimacy crisis which now besets the protective rational for labour and employment law.

17. The slow decline in union density in the private sector, evident throughout the Western world,[123] appears to be linked to a cultural transition embedded in levels of affluence and an optimistic self-assurance which seems increasingly misplaced in current economic conditions. North American business unionism may rightly be open to the criticism that it has abandoned the vulnerable in society who most need its assistance, but that does not explain the parallel decline in union density in Europe where a different model prevails.[124] Working class solidarity has disappeared as most people self-

[118] A Fox, *supra* note 38; Simon Deakin & Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005) at 226-31.
[119] Karl Mark & Friedrich Engels, *Capital: A Critique of Political Economy* (New York, International Publishers, 1967).
[120] Equality of bargaining power between contracting parties was assumed, and courts lacked authority to intervene where this was not factually the case. See Simon Deakin, "The Comparative Evolution of the Employment Relationship", online: (2005) Centre for Business Research, University of Cambridge Working Paper No 317 < http://www.cbr.cam.ac.uk/pdf/WP317.pdf>; Heinz Koetz & Konrad Weigert, *An Introduction to Comparative Law* (Amsterdam: North-Holland Publishing Company, 1977).
[121] *Application of International Labour Standards 2014 (II): Information Document on Ratifications and Standards-Related Activities*, ILO, 103rd Session, ILC.103/III/2 (2014).
[122] R Adams, *Industrial Relations under Liberal Democracy*, *supra* note 34.
[123] *OECD Statistics on Union Members and Employees*, online: OECD < http://stats.oecd.org/Index.aspx?DatasetCode=U_D_D>; *OECD Statistics on Trade Union Density*, online: OECD < http://stats.oecd.org/Index.aspx?DatasetCode=U_D_D>.
[124] Katherine Stone & Harry Arthurs, "The Transformation of Employment Regimes: A Worldwide Challenge" in Stone & Arthurs, *supra* note 4, 1 at 1-10.

identify as "middle class", a perception which is reinforced by the common rhetoric of politicians.[125] It is likely no mere coincidence that electoral participation rates are also declining.[126] A steady diet of political rights-talk and consumer advertising reinforces a form of individualism which saps confidence in notions of community and collective action.[127] People seem to regard themselves and act as consumers rather than workers or even citizens. Commitment to the public interest and the public sector as means of achieving societal goals has waned as the mantras of small government and tax reduction win the day.[128] Latterly in many jurisdictions, declining industrial production in the developed world, particularly in the wake of the Great Recession of 2008, has meant that advanced economies actually cannot sustain levels of public services which previously seemed affordable.[129] Neo-liberal free-market ideas, dominant since the collapse of the Soviet Empire after 1989, have led to widely shared assumptions that a *marketized society* with minimal governance is a legitimate goal rather than merely the releasing of the potential of a *free market economy in a balanced regulatory state*.[130] In this economic and political context, protecting labour standards, whether in the form of increased minimum wages or advancing collective bargaining, seems increasingly open to the charge that such measures render Western economies globally uncompetitive. In other words, the protective justification for rights at work is being undermined by claims that the West simply cannot afford decent standards in the workplace.[131] Austerity in the public sector is mirrored by pressures for forced belt-tightening for workers in the private sector.[132] Balancing budgets is in some quarters thought to be possible on the backs of working people, with no need to tax the wealthy, who are presumed to be creators of jobs rather than a parasitic class.[133] The protective rationale for rights in the workplace, thought by some to be unnecessary in the context of the welfare state, is now characterized by neo-liberal economic theorists and ideologues as simply unattainable in the globalized economy.[134] Those attempting to resist this alleged need for a race to the bottom in protective labour standards are on the defensive.[135] While human capability theory provides alternative ways to think about these issues which will be explored in Part II, it is important to think first about the role of countervailing human rights developments in the workplace.

---

[125] Harry Arthurs, "Labour Law After Labour" in Davidov & Langille, *The Idea of Labour Law*, *supra* note 5, 1 at 18-22.
[126] Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000).
[127] Putnam, *supra* note 126.
[128] Judt, *supra* note 10; Supiot, *The Spirit of Philadelphia*, *supra* note 6.
[129] Crumbling public infrastructure is now widespread in North America. Pessimists argue that we may be in for a "recovery without jobs", and that Western politicians will have to face an unaccustomed role over the next few decades in "managing decline" in presently developed and affluent economies. See Stanley Aronowitz & William DiFazio, *The Jobless Future: Sci-tech and the Dogma of Work* (Minneapolis: University of Minnesota Press, 1994).
[130] Judt, *supra* note 10; Supiot, *The Spirit of Philadelphia*, *supra* note 6.
[131] Brian Bercusson & Cynthia Estlund, "Introduction" in Bercusson & Estlund, *supra* note 5, 1 at 1-18; Judt, *supra* note 10; Supiot, *The Spirit of Philadelphia*, *supra* note 6.
[132] *Ibid*; Brian Bercusson & Cynthia Estlund, "Introduction" in Bercusson & Estlund, *supra* note 5, 1 at 1-18; Judt, *supra* note 10.
[133] Chrystia Freedland, *Plutocrats: The Rise of the New Global Super-rich and the Fall of Everyone Else* (Toronto: Doubleday Canada, 2012).
[134] Bhagwati, *supra* note 74.
[135] Hepple, *supra* note 73; Hugh Collins, "Regulating the Employment Relationship for Competitiveness" (2001) 30(1) Industrial Law Journal 17.

2. Human and Constitutional Rights as Trumps in the Workplace: A Mixed Blessing

18. The adoption of *Universal Declaration of Human Rights* in 1948 by the new United Nations Organization coincided with the rise of the welfare state and the advances in labour and employment law just described.[136] But human rights enhancement has been sustained on many fronts in the intervening period and continues its forward momentum unabated.[137] The companion U.N. Covenants on Civil and Political Rights, on the one hand, and Economic and Social Rights, on the other, gave not only global prominence to their respective substantive human rights principles but provided mechanisms for their enforcement.[138] The 1960's struggle for civil rights in the United States, with its high profile, indeed heroic,[139] activists and land-mark court cases,[140] were mirrored in other developed countries around the world.[141] By the 1970's all Canadian jurisdictions had human rights legislation with institutions dedicated to enforcement of human rights in both the public and private spheres,[142] while the European Convention on Human Rights provided parallel rights and enforcement mechanisms for millions of people on the European continent.[143] These documents often made reference to freedom of association and sometimes the right to collective bargaining, but rarely to detailed labour standards. Yet in the context of the welfare state, labour standards and collective bargaining generally received protection through political/legislative channels,[144] the products of which may be seen in considerable measure as the instantiation of basic human rights at work. However, there were gaps in the protective coverage of this labour and employment legislation, often related to various forms of discrimination. In response, human rights analysis has gained a certain ascendancy in thinking about the fairness of rights at work.[145]

19. In North America, prohibitions against racial discrimination in the labour relations context sometimes predated the emergence of general human rights statutes.[146] However, once human rights

---

[136] While Eleanor Roosevelt played a celebrated part in the development of the *Universal Declaration of Human Rights*, 10 December 1948, Resolution 217 A (III), Canadian law professor John Humphries did as well.
[137] Public campaigns around gay rights and the Sochi Winter Olympics in 2014 are a striking recent example.
[138] *International Covenant on Civil and Political Rights*, 16 December 1966, Resolution 2200A (XXI); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Resolution 2200A (XXI).
[139] Need one do more than cite the names of Rosa Parks riding the bus in Montgomery, Alabama or Martin Luther King in relation to his famous "I have a Dream" address?
[140] *Brown v Board of Education*, 347 US 483 (1954) of Topeka being the most prominent early example.
[141] Mark Kurlansky, *1968: The Year that Rocked the World* (New York: Ballantine, 2004).
[142] Dominique Clement, Will Silver & Daniel Trottier, *The Evolution of Human Rights in Canada* (Ottawa: Minister of Public Works and Government Services, 2012) at 16-34.
[143] Francis G Jacobs, *The European Convention on Human Rights* (New York: Oxford University Press, 1975).
[144] See the discussion supra in the text corresponding to footnotes.
[145] See Philip Alston, ed, *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005). For a critical assessment of this phenomenon, see Hugh Collins, "Theories of Rights as Justifications for Labour Law" in Davidov & Langille, *The Idea of Labour* Law, *supra* note 5, 137 [Collins, "Theories of Rights"].
[146] *Steele v Louisville and Nashville Railroad Co*, 323 US 192 (1944) in the Supreme Court of the United States was the progenitor of the duty of fair representation in a context of racial discrimination, and gave rise to non-discrimination provisions in Canadian labour relations legislation before general human rights litigation became widespread (see e.g. *Canada Labour Code*, *supra* note 33 at s 37). For an example of the recent jurisprudence, see *Rayonier Canada (BC) Ltd v International Woodworkers of America* (1975), 2 Can LRBR 196.

statutes became prominent, their applicability in the workplace quickly became significant.[147] Indeed, human rights became seen as trump cards which could be played in the workplace to challenge arrangements which were established either by law or collective bargaining or both.[148] Cases before human rights tribunals contested discrimination in the workplace based on race,[149] gender,[150] family status,[151] disability,[152] sexual orientation,[153] and other enumerated grounds.[154] Such litigation, of course, can be effective in both non-union and unionized work places, and can have a salutary impact on the actions of both employers and unions alike to the benefit of various categories of vulnerable workers.[155] Nevertheless, the success of human rights litigation in the workplace has arguably promoted an emphasis on individual remedies rather than collective ones, in so far as unions are largely side-lined in the process, or are sometimes, indeed, targeted in such proceedings. This phenomenon has been reinforced in the United States by the rise of non-union, extra-judicial (and arguably employer-friendly) arbitration as common form of workplace dispute resolution.[156] Moreover, as union density has declined, this search for individual rather than collective remedies has intensified, and has lately found expression in the enforcement of labour standards through class action proceedings where union arbitration is unavailable or deemed less effective than the class action approach.[157]

20. While the success of human rights litigation has emphasized individual as opposed to collective rights in the workplace, some human rights or constitutional litigation has nonetheless enhanced collective bargaining in some jurisdictions. The about-face accomplished by the Supreme Court of Canada in the 2007 *B.C. Health Services* case reversed 25 years of *Charter* jurisprudence and held that

---

[147] Canadian Human Rights Commission, *The Right to be Different: Human Rights in Canada – An Assessment*, (Ottawa: Canadian Human Rights Commission, 1988).
[148] For a critique of rights as "trumps" see Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011).
[149] *McKinnon v Ontario (Ministry of Correctional Services) (No 3)* (1988), OHRBID No 10.
[150] *British Columbia (Public Service Relations Commission) v British Columbia Government and Service Employees' Union (BCGESU) (Meiorin Grievance)*, [1999] 3 SCR 3, [1999] SCJ No 46.
[151] *Johnstone v Canada Border Services* (2010), [2010] CHRD No 20.
[152] *Shuswap Lake Hospital v British Columbia Nurses' Union (Lockie Grievance)* (2002), BCCAAA No 21.
[153] *Laessoe v Air Canada* (1996), [1996] CHRD No 10.
[154] *Brossard (Town) v Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279, [1988] SCJ No 79.
[155] Countering the effects of discrimination based on disability in this context is particularly interesting, since remedies oriented to the reasonable accommodation of persons with disabilities can often require both employers and unions to change not only their attitudes and practices but also to negotiate exceptions to things like job descriptions and classification requirements embedded in collective agreements: see Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada", online: (2007) SSRN <http://ssrn.com/abstract=1068403 >; *Meiorin*, *supra* note 150.
[156] Katherine VW Stone "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts of the 1990s" (1995) 73 Denv U L Rev 1017; Richard A Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Ithaca: Cornell University Press, 1997).
[157] In Canada, the chartered banks, who have by and large successfully resisted unionization, have been the target of class action proceedings in relation to their alleged failure to respect labour standards in the *Canada Labour Code*, to the tune of millions of dollars, see e.g. *Fresco v Canadian Imperial Bank of Commerce*, 2012 ONCA 444, 111 OR (3d) 501. Temporary foreign workers have also used class actions in order to enforce contractual and statutory rights, see e.g. *Dominguez v. Northland Properties Corp (cob Denny's Restaurants)*, 2012 BCSC 328, BCJ No 443.

collective bargaining is a constitutionally protected aspect of freedom of association.[158] On its facts, the case struck down critical aspects of legislation which, in the absence of consultation with the parties, had rolled back important elements of collective agreements such as prohibitions against contracting out.[159] The judgment indicated that no particular form of collective bargaining was constitutionally mandated, but that it had to be effective and involved a duty on employers to recognize unions and bargain in good faith.[160] In the subsequent case of *Fraser* in 2012, the Court reaffirmed its ruling in *B.C. Health Services*, by upholding a statute governing farm worker bargaining which it interpreted as complying with the constitutional requirements,[161] even though it contained a watered-down version of North American collective bargaining.[162] Nonetheless, some find in *Fraser* a flexible precedent which could help to release Canada from the narrowest and most confining aspects of the Wagner Act model which has inhibited the effectiveness of unionization and collective bargaining.[163] A parallel evolution has occurred in Europe, though not without different controversies and institutional tensions. In cases arising out of Turkey, the European Court of Human Rights (ECtHR) has upheld not only the notion that the European Convention on Human Rights protects collective bargaining as an aspect of freedom of association, but also that collective bargaining, in principle, must include the right to strike if that form of freedom of association is to be meaningful.[164] This jurisprudence from the ECtHR stands in stark

---

[158] *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health*].

[159] *BC Health*, *supra* note 158 at paras 3-12.

[160] The test set out in *BC Health*, *supra* note 158 at paras 93-94 of the case, reads as follows: "Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation. [para 94] Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(d) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(d) if they preserve a process of consultation and good faith negotiation."

[161] *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*]. Since the completion of the text of this article, the Supreme Court of Canada has confirmed the importance of constitutional rights for collective bargaining. Federal legislation limiting police rights to collective bargaining was struck down for its failure to recognize principles of independence from management and freedom to choose their own bargaining unit: *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, 380 DLR (4th) 1 [*Mounted Police Association*]. Furthermore, provincial legislation removing the right to strike and failing to replace it with an adequate alternate essential services dispute resolution system was found to be unconstitutional: *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 3 WWR 1 [*Saskatchewan Federation of Labour*]. In other words, the constitutional right to freedom of association now includes protection of union status as well as the right to strike.

[162] Judy Fudge, "Introduction: Farm Workers, Collective Bargaining Rights, and the Meaning of Constitutional Protection" in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 1 at 7-29; David J Doorey, "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" (2012) 38:2 Queen's LJ 515 [Doorey, "Graduated Freedom of Association"].

[163] Roy J Adams, "Bewilderment and Beyond: A Comment on the Fraser Case" (2012) 16 CLELJ 313; Doorey, "Graduated Freedom of Association", *supra* note 162. See also the decision *in International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts, Local 849 v Egg Films Inc,* 2012 NSLB 120 [*Egg Films*], aff'd 2014 NSCA 33, [2014] NSJ No 150, leave to appeal to SCC refused, [2014] SCCA No 242.

[164] Note that this right to strike is subject to exceptions in relation to essential services. In *Demir and Baykara v Turkey*, Turkish domestic courts concluded that although civil servants were permitted to join trade unions, there existed no associated right to strike or enter into a collective agreement. The union appealed to the European Court of Human Rights, claiming breaches of the European Convention on Human Rights and Fundamental Freedoms. The Grand Chamber

contrast with jurisprudence from the European Court which adjudicates on the commercial aspects of the European Union treaties. In several cases, the European Court has nullified national labour standards protecting domestic workers and has upheld entrepreneurs from other EU jurisdictions providing services in host states with workers whose terms and conditions of employment would otherwise be in breach of the host state regulations.[165] In other words, the European Court has said that freedom of contract and trade in the provision of services trump employment standards, while ECtHR has imposed on national governments a robust interpretation of freedom of association, collective bargaining and the right to strike which is thought counter to the European Court's free market assumptions.[166]

21. The point here is not to criticize the human rights and constitutional jurisprudence in its various individual or collective guises. Decisions of human rights tribunals which condemn discrimination in both unionised and non-unionised workplaces are clearly welcome, as are decisions of courts which uphold collective labour rights such as collective bargaining and the right to strike in appropriate circumstances. However, controversy remains. The most central, if not the most obvious, problem is the conception of rights as individual trumps to be played against others, rather than as values which structure relationships.[167] This conceptual framework has meant that human rights litigation has contributed to an assumption that individual remedies in private litigation are more efficacious for workers than collective remedies or those which emerge from collective or relational forms of employer voice in the workplace.[168] Perhaps of equal concern are comments on the part of some observers that concentration by labour representatives on human rights and constitutional litigation flows from a position of weakness rather than strength. If unions had enough clout at bargaining tables or in the halls of political and governmental power, recourse to litigation to protect workers' rights would be a secondary strategy rather than, as now often seems the case, to be a primary one. Finally, those advancing the interests of workers in relation to labour and employment rights often make their claims in connection with rhetoric which asserts that you cannot put a price on human rights or the protection of vulnerable workers. As argued below, this assumption, that one ought not to balance rights in the workplace against concerns about productivity, efficiency and competitiveness, takes exaggerated forms which do not comport with reality.

3. Dissonance over Economic Competitiveness & Efficiency in Labour Market Regulation

ultimately found a breach of freedom of association under Article 11 based on narrow grounds. See KD Ewing & John Hendy, "The Dramatic Implications of Demir and Baykara" (2010) 39:1 Industrial Law Journal 2.

[165] *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet*, C-34/105, [2008] IRLR 160; *Dirk Ruffert v Land Niedersachsen*, C-346/06 [2008] IRLR 4467.

[166] Albertine Veldman, "The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR" (2013) 9:1 Utrecht Law Review 104.

[167] This topic will be taken up below

[168] Estlund, *supra* note 28.

22. Media coverage of labour disputes commonly includes statements from union protagonists that one cannot put a price on protecting vulnerable workers or their human rights.[169] This rhetoric sometimes creeps into public policy analysis as well.[170] However, principles of general and firm economics, to say nothing of standard aspects of labour and employment law, human rights law and constitutional analysis, demonstrate that the dichotomy between rights at work and economic considerations is at least partly a false one. Trade-offs in this domain are commonplace, and indeed inevitable. It is a truism to say that acceding to union demands which are so costly as to put an enterprise out of business is self-defeating. Of course, the bargaining claims of an employer that a union's position is catastrophic are also rightly subject to skeptical responses. The question at one level is an empirical one which can be the subject of rational scrutiny in the bargaining context if there is full disclosure of information.[171] Similar patterns of argument and empirical controversy are found in public policy debates about setting statutory minimum wage levels, or other labour standards.[172] At another level, of course, these are normative discussions. Where to set labour standards or appropriate bargaining outcomes is a matter of proportionality in competing claims about social equality, dignity, and standards of living for employees as contrasted with appropriate company profits, share-holder returns and executive compensation. These are political issues in both the large and small "p" senses, to be resolved in a democracy by accepted institutional means, including collective bargaining and party politics as operative in the relevant economic circumstances.

23. A complicating factor in this analysis is globalization, but this is not a new phenomenon.[173] The "race to the bottom" in terms of labour standards is clearly an issue in relation to some industries.[174] The shift of heavy manufacturing from high wage to low wage economies is a reality. Not everyone in Canada can be employed in primary resource extraction, and export markets for resources fluctuate in any event.[175] Tapping into global markets for export purposes is obviously a critical need, particularly for economies in which some essential goods must of necessity be imported.[176] The preferred ameliorative strategy is to develop high tech manufacturing, niche industries or globally required services for export markets which can sustain wage levels commensurate with North American and European expectations, based at least in part on highly educated work forces.[177] Some markets,

---

[169] This suspect motivation is regularly attributed to employers. See, for example, statements from Unifor in relation to disputes between the Greater Toronto Airport Authority and its service personnel: "Unifor calls on airport authority to stand up for job security" (20 March 2015), online: Unifor <www.unifor.org>.
[170] *Seeking a Balance*, *supra* note 33.
[171] Hence the jurisprudence of North American labour boards on the duty of disclosure in collective bargaining is such that full disclosure can avoid successful claims of the failure to bargain in good faith.
[172] See the recent debates on mimimum wage rates and coverage in Ontario and Nova Scotia. Kyle Buott, Larry Haiven & Judy Haiven, *Labour Standards Reform in Nova Scotia: Reversing the War Against Workers* (Halifax: Canadian Centre for Policy Alternatives, 2012).
[173] Manfred Steger, *Globalization: A Very Short Introduction*, 3rd ed (Oxford: Oxford University Press, 2003) at 17-36.
[174] See Greenwald & Kahn, *supra* note 73.
[175] Marcus J Chambers & Roy E Bailey, "A Theory of Commodity Price Fluctuations" (1996) 104:5 Journal of Political Economy 924.
[176] Some foodstuffs, for example, are critical imports for Canada, particularly at certain times of year.
[177] Mats Benner, "The Scandinavian Challenge: The Future of Advanced Welfare States in the Knowledge Economy" (2003) 46:2 Acta Sociologica 132.

particularly in construction and some services such as power distribution and telecommunications, etc. are inevitably local and can sustain labour standards at level which can provide families with a relatively high standard of living. Of course, some resources, such as a favourable environment for tourism, must be exploited locally through value adding services. Thus, the search in high wage economies for balanced and sustained economic development under conditions of globalization is akin to a never ending quest for the Holy Grail. But to the extent that it can be fulfilled, a key component must be integrated labour market regulation. As will be argued in Part II, such comprehensive labour market regulation to ensure a flexible and highly trained workforce, responsive to the changing needs of the economy, is the foundation for labour standards and fair rights at work which can balance concerns about protecting the vulnerable and ensuring respect for human rights at work while not sacrificing efficiency, productivity and competitiveness.

24. Lest the foregoing argument appear simply to be aspirational rhetoric, a reminder of how current labour and employment law balance workplace rights against competitiveness and efficiency may be in order. Mention has already been made of how in litigation over the duty to bargain in good faith, labour boards assess claims from the parties about whether various bargaining claims have economic validity in respect of whether resolution in one direction or another will affect the viability of the enterprise. Interest arbitrators, settling the terms of collective agreements, where such processes have been substituted for strikes or lockouts as impasse regulation mechanisms, regularly assess the cost of bargaining positions which may be cast by labour in terms of protecting the rights of the vulnerable. Similarly, labour boards assessing the implications of collective bargaining rights in successorship applications following the sale or transfer of a business must address economic consequences, as must arbitrators under collective agreements who rule upon the validity of contracting out or "outsourcing" in terms of legitimate business reasons for such actions. None of these adjudicative exercises which balance "employee rights" against "employer economic interests" are easily resolved or likely to be resolved to the mutual satisfaction of all parties.[178] However, they represent trade-offs and compromises which balance interests, sometimes argued to be incommensurable, and demonstrate how labour market regulation must regularly cope with such phenomena. Use of relational notions such as reasonableness and proportionality, which blend normative and empirical claims in the context of the relationships among those affected, would seem to be important aspects of institutional values and procedures by which to manage comprehensive and responsive, or even restorative, labour market regulation.[179]

D. Pervasive Precarity versus Social & Economic Justice: Political Instability & Rights at Work

[178] Langille & Macklem, *supra* note 92.

[179] The literature on the use and extension of the proportionality principle in constitutional and private law systems is growing at a tremendous rate. For the leading Canadian case on proportionality see *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 718. See also: Grant R Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law" (2011) 49(1) Alta L Rev 107; Thomas Poole, "Proportionality in Perspective" (2010) Part II NZLR 369.

25. The forgoing discussion has been oriented to describing the origins and characteristics of current difficulties in giving effect to appropriate rights at work and to outlining critically problematic dimensions of associated labour market regulation. Before turning in Part II to more optimistic prescriptions for improvement in this situation, a word is in order about the urgency of exploring new approaches and the implications of the failure to do so. Many serious observers and policy makers are now concerned about two interrelated problems: the increasingly significant phenomenon of "precarious work" on the one hand, and the widening chasm between rich and poor in terms of both income and wealth, on the other. Precarity is the label often given to the fact that more and more people are now employed in work of a casual or irregular sort, with no extended benefits and little prospect for long term financial security.[180] People occupying such a status are a very heterogeneous lot. They include those on social assistance who may work from time to time, those with a disability who find it difficult to find regular work, or those who might be thought the traditional working poor whose skills, abilities or unemployment rates make it difficult to find regular work but who proudly keep themselves off the welfare rolls.[181] They also include illegal migrants whose efforts to avoid detection increase their vulnerability. However, these stereotypically vulnerable members of society in precarious work have now been joined by educated youth whose knowledge finds no productive outlet[182], by legal immigrants with professional training whose qualifications are not recognized, by those formerly employed in well–paying unionized manufacturing jobs whose employers have moved to lower-waged economies, by managers and those who were well paid executives in operations that have been down-sized in corporate rationalizations. They include retired people who have entered the retail sales work force because their pensions have proved to be inadequate or have failed in the Great Recession of 2008. They also include demobilized members of the military having difficulty finding civilian jobs, and who may or may suffer from post-traumatic stress disorder. In other words, many of those in precarious employment are "middle class" people for whom developed society's post-war promises of affluence now ring hollow. They are people who once had justifiably rising expectations, who may have been doing better than their parent's generation, but who feel they have been discarded and see little prospect for their children in the current circumstances of North America and Western Europe. These are people attempting to gain a living through fractured and marginally remunerative relationships in diverse workplaces.[183]

26. British sociologist Guy Standing has coined the label "precariat" for this heterogeneous manifestation of the economically dispossessed in post-modern advanced democracies.[184] The phrase, of course, harkens back to Karl Marx's analysis of the "industrial proletariat" living under the difficult conditions of the industrial revolution in the Nineteenth Century.[185] Marx and Engels predicted that the proletariat would develop an active political consciousness as a result of its objective situation of

[180] *LCO Report*, *supra* note 1; Vosko, "Precarious Employment", *supra* note 83.
[181] Human Resources and Social Development Canada, *When Working is not enough to Escape Poverty: An Analysis of Canada's Working Poor*, (Ottawa: HRSDC, 2006).
[182] This includes those who cannot find work appropriate to their training, including those drawn into unpaid "internships."
[183] Simon Deakin, "Addressing labour market segmentation: The Role of Labour Law" (2013) Working Paper No 52 (UN, Governance and Tripartism Department International Labour Office).
[184] Guy Standing, *The Precariat: The New Dangerous Class* (New York: Bloomsbury Academic, 2011).
[185] Karl Marx, *Capital Volume 1: A Critique of Political Economy* (New York: The Modern Library, 1906).

exploitation by capital, and thence engage in a social revolution which would transform capitalism into socialism and ultimately into communism.[186] In Marxian terms, the proletariat, objectively "a class in itself" by virtue of its relation to capital, would become radicalized as a "class for itself" as a matter of self-protection, and thus engage in revolutionary transformative action. While things did not work out in accordance with Marx's analysis, it might be said that the evolution of labour unions, social democracy in Western Europe, the New Deal in the United States and perhaps the so-called "communist" states in other parts of the world, vindicate Marxian predictions in some measure.[187] At any rate, Standing's thesis is that the "precariat" is a potentially dangerous class in present-day, advanced capitalist societies. While the precariat may be thought a kind of objectively dispossessed "class in itself", it does not thus far have a political "self-consciousness" or organizational coherence to constitute "a class for itself". Some observers saw the "Occupy Movement" and the "Minimum Wage Movement" as the first stirrings of the precariat as a positive political force, with their broad based constituencies and support from organized labour, environmentalists and the like.[188] However, others have noted that the Tea Party in the United States, the proto-fascist "Golden Dawn" in Greece, or the "Ford Nation" in Toronto represent an ugly side to the rise of the precariat, with populist, totalitarian tendencies which carry significant negative potential for democracy.[189]

27. There is increasing evidence which demonstrates that economic inequality has increased dramatically in the last four decades.[190] While mass unemployment of the sort experienced during the period in the Great Depression following the crash of 1929 has to this point been avoided, continuing high levels of unemployment and the abandonment of progressive taxation and the rigorous income re-distribution policies of the welfare state have had a marked impact on patterns of income and wealth distribution.[191] Some observers have noted the correlation between the rise of income inequality and the fall of union density in North America, inferring a causal relationship between the two.[192] This is the broad context in which the phenomenon of precarity is located, and to which it may be causally linked as well. The cautionary experience with the rise of fascism in Europe in the 1930's taught us that widespread social and economic inequality, linked to the lack of perceived rights at work, or indeed a lack of any work at all, and an absence of forms of labour market regulation which reinforce social

[186] Karl Marx & Friedrich Engels, *The Communist Manifesto* (New York: Simon & Schuster Inc, 1964).
[187] Some elements of the left have been critical of trade unionism, believing that it would blunt prospects for a successful revolution or that trade unions might create an "aristocracy of labour." See HM Hyndman, *The Historical Basis of Socialism in England* (London: Kegan Paul, Trench & Co, 1883).
[188] Charles M Blow, "Occupy Wall Street Legacy", Editorial, *The New York Times* (13 September 2013), online: <www.nytimes.com>; Joanna Slater, "The Comeback of Occupy Wall Street", Editorial, *The Globe and Mail* (14 September 2012), online: <www.theglobeandmail.com>.
[189] Stephen Marche, "The New Fascism in Europe", Article, *Macleans* (19 June, 2012), online: <www.macleans.ca>.
[190] Thomas Piketty, *Le Capital Au XXIe Siècle* (Paris: Éditions du Seuil, 2013), now in English as Thomas Piketty, *Capital in the Twenty-First Century*, translated by Arthur Goldhammer, (Cambridge : Harvard University Press, 2014); C Freedland, *supra* note 133.
[191] See generally, Jonathan Michie & John Grieve Smith, eds, *Employment and Performance: Jobs, Inflation and Growth* (Oxford: Oxford University Press, 1997); Aronowitz & DiFazio, *supra* note 129.
[192] Michael Lynk, "Labour Law and the New Inequality" (2009) 59 UNBLJ 14 at 17 – 26.

injustice, can promote political instability and authoritarian responses.[193] There are those who suggest that the global social, economic and political environment of 2014 has greater parallels with 1914 than many would like to admit,[194] and that the Keynesian prescriptions for reconstruction after the World War II hold greater promise than the conservative prescriptions for reconstruction during the Great Depression, which reflect many of the neo-liberal views currently in vogue among some Western governments.[195] Without trying to suggest that the sky is falling, the lesson is surely that the pervasive precarity and growing inequality combined with inadequate rights at work represent the kind of social injustice which merits careful, creative and urgent responses for labour market regulation.

Part II - Rethinking Fair Work Relations: Human Capabilities, Relational Rights and Restorative Labour Market Regulation

28. A new normative framework for rights at work embedded in an empirical understanding of reality is emerging under the label human capability development theory, which can be buttressed by a relational theory of rights. These positive approaches can be used in tandem to demonstrate how rights in personal work relations can be established which transcend the standard contract of employment creating a unified field for labour and employment law. Such policy changes are best conceived within a responsive, and indeed restorative, analysis of integrated labour market regulation in both its substantive and procedural manifestations. This will require harnessing both private and public resources at the domestic and international levels in the interests of competitive, but sustainable, economic development which promotes social stability. This is the agenda for discussion in the second half of this paper.

A. New Normative Framework for Rights at Work: Human Capability Development

29. The development of human capabilities is now seen by many as the key to the sustainable and positive evolution of societies in the current climate of globalized economic, social and political interaction. Amartya Sen argues that the development of human capabilities makes freedom possible.[196] In this context, he defines freedom as the situation where a citizen has the capabilities (including personal abilities and contextual opportunities) to choose to "live a life they have reason to value". [197] He identifies five instrumental freedoms enhancing personal capabilities and functionings: (a) political freedoms, including freedom of association and expression, as well as democratic institutions; (b) economic facilities, including a reliable legal system, functioning markets, and access to credit; (c) social opportunities, including education, health care, and employment possibilities; (d) transparency guarantees, including government openness and integrity, and political trust; and (e) protective security,

[193] Alan de Bromhead, Barry Eichengreen & Kevin H O'Rourke, "Right-wing Political Extremism in the Great Depression" (2012) National Bureau of Economic Research Working Paper No 17871.
[194] C Freedland, *supra* note 133.
[195] Krugman, *supra* note 13; Matthew Behrens, ed, *Unions Matter: Advancing Democracy, Economic Equality, and Social Justice* (Toronto: Between the Lines, 2014).
[196] Amartya Sen, *Development as Freedom* (Oxford, Oxford University Press, 1999) at 3-11.
[197] Ibid, at 293.

including unemployment benefits, social and old age security.[198] In this context, the voluntary activities of capable human beings in such a supportive environment are seen as both the means to, and the ends of, freedom. Freedom, understood in this way, is the yardstick by which to assess successful development in a society, rather than such aggregate economic measures such as gross domestic product.[199]

30. A valuable discussion has emerged about the implications of this capability theory for labour and employment law in the broader context of labour market regulation.[200] Langille points out that labour and employment law regulation is often wrongly seen as a cost, or indeed a government imposed tax, on production rather than as an investment in the most important factor of production – human capital.[201] Surely this is right in an economy where competitive value added for export markets in high wage economies must relate to investment in high technology manufacturing or sophisticated service industries which employ highly educated personnel. More than this, there is evidence that labour and employment regulation do not constitute simply a limiting function in relation to competitive markets,[202] but can operate to correct market imperfections such as transaction costs, information asymmetries and externalities.[203] The most significant insights are found in systemic approaches "…which view labour market institutions not as exogenous variables acting on a largely self-constituting labour market, but rather as endogenous governance mechanisms which emerge out of particular economic and political contexts."[204] In this view, different approaches to labour market regulation can give rise either to coordination problems or to their resolution, structured by such legal determinants as immigration law, tax law, social security law, employment insurance law, pensions law, corporate law, environmental law, among others, in addition to the familiar legal components of labour market regulation found in labour standards codes, collective bargaining laws, occupational health statutes, workers compensation schemes, trades training regulations and the like.[205] The most elaborate proposal for comprehensive and coordinated regulation of labour markets has been advanced in the European Union[206] where it is common to regard labour and employment law as a subset of "social law" in what are commonly

---

[198] See generally Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: The Belknap Press of Harvard University Press, 2011)
[199] Sen, *supra* note 196
[200] Langille, "Labour Policy in Canada", *supra* note 3; Brian Langille, "Labour Law's Theory of Jusice" in Davidov & Langille, *The Idea of Labour Law*, *supra* note 5.
[201] *Ibid*.
[202] As would be the neo-classical view of Richard A Posner "Some Economics of Labour Law" (1984) 51 U Chicago L Rev 988 at 988-1004.
[203] See A Manning, *Monopsony in Motion: Imperfection Competition in Labor Markets* (Princeton: Princeton University Press, 2003) who represents a strand of "new institutionalist" thinking in economics.
[204] Simon Deakin, "The Contribution of Labour Law to Economic and Human Development" in Davidov & Langille, *The Idea of Labour Law*, *supra* note 5.
[205] See John Howe, Richard Johnstone & Richard Mitchell, "Constituting and Regulating the Labour Market for Social and Economic Purposes" in Christopher Arup et al, *supra* note 7, as well as the 36 other articles in that volume dealing with this topic.
[206]Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (New York: Oxford University Press, 2001) [Supiot, *Beyond Employment*].

labelled as European "coordinated capitalist economies".[207] However, as the Australian literature demonstrates, a systematic understanding of integrated labour market regulation can be elaborated in relation to the more "free market" economies of the English speaking, common law world.[208] The general point to be made, however, as stressed by Deakin, Langille, Mitchell, Supiot and others, is that labour and employment law, as an aspect of integrated labour market regulation, can contribute to both economic and human development - the two need not be seen as simply at odds with one another.[209]

31. While the pragmatic approach to labour market regulation advanced by Australian scholars may provide the most fruitful avenue by which to explore integrated and responsive labour market regulation in North America, the European concept of "flexicurity" is one which is helpful at the level of principle in clarifying one's thinking about responsive labour market regulation.[210] Flexicurity is a neologism referring to market regulation which attempts to provide enhanced security in the labour market to employees while increasing their ability to move flexibly from one employment opportunity to another in relation. This involves support for worker mobility between active work on the one hand and such things as education, training, or time off for domestic responsibilities and retirement on the other, particularly in times of recession or other forms of economic dislocation. It is intended simultaneously to provide employers with the economic security and stability of access to a highly skilled workforce capable of responding more easily to the challenges global competition.[211] In other words, the goal of flexicurity is to improve economic efficiency through responsive security and stability for both employers and employees. The implementation of these principles in relation to labour and employment requires an integrated strategy which conceives of one's career or workforce status as the focus for regulatory intervention and not simply a worker's standard employment contract with a single employer. In the seminal work *Beyond Employment,* Alain Supiot and his European colleagues envisaged the creation of a publicly managed "social drawing fund" into which employers and employees would contribute and which could be accessed by workers for purposes of re-education or re-training in periods of unemployment or redundancy, for family leave when required, and ultimately for old age security. This approach is not far-fetched in the Canadian context. Components of such a system are already in place or are under contemplation: unemployment insurance is currently linked to parental leave for new parents, in the construction industry and its analogues supplementary health, dental and other benefits are carried by unions and are not limited to employee service with a single employer, and task forces on pensions from one coast to the other in Canada have advocated the establishment of multi-employer

[207] Hall and Soskice, *supra* note 2.
[208] For more of the Australian work by Arup, Mitchell and their colleagues, see Marshall, Mitchell & Ramsey, *supra* note 2. For a critique of simplistic assertions about path dependency of economic development by comparisons of experiences in civilian as opposed to common law legal systems, see Simon Deakin, "The Comparative Evolution of the Employment Relationship" (2005) Center for Business Research Working Paper No 317.
[209] The analysis of capability theory and its application in this paper is primarily oriented to high wage economies. However, Sen's theory emerged from an analysis of developing countries with large informal economies. Moreover the analysis of capability theory for labour market regulation in developing economies has its own important characteristics.
[210] Manfred Weiss, "Re-Inventing Labour Law?" in Davidov & Langille, *The Idea of Labour Law*, *supra* note 5.
[211] Not all have been satisfied with the way flexicurity has been implemented, though it does not diminish its value. See Luigi Burroni & Maarten Keune, "Flexicurity: A Conceptual Critique" (2011) 17:1 European Journal of Industrial Relations 75.

pension plans which would make pension benefits entirely portable.[212] A major gap in the Canadian situation is the absence of a comprehensive approach to re-education and/or re-training.

32. The major institutional barrier in Canada to the establishment of a coordinated approach to human capability development as the basis for labour market regulation is the necessity for cooperation among the different levels of government under the Canadian constitution. But the situation is not impossible. The splits in legislative jurisdiction described above can be overcome legally through concurrent delegation of relevant authority by the various levels of government to joint regulatory agencies.[213] The constitutional barriers are thus not insurmountable. However, political will, rooted in a degree of ideological compatibility, is essential to accomplish coordinated labour market regulation among jurisdictions in Canada. Human capability theory and the principle of flexicurity for employers and employees have the advantage of being policy-based, pragmatic notions which can transcend traditional cleavages between left and right grounded in "old modern" socio-political antagonisms. But they do require a commitment to the basic notion that there is a public interest in coordinated and responsive labour market regulation, and that there can be cooperation among the "social partners" to achieve such ends. Those who remain committed to principles of total, societal marketization as the way forward are likely to remain recalcitrant in the face of pressures to move toward a more publicly coordinated model of capitalism. European experience with the implementation of the principle of flexicurity, moreover, raises the specter of distortion as employers enthusiastically embrace flexibility for their own economic security when it rationalizes unrestricted lay-offs or plant closures in response to market pressures, but are evasive when it comes to supporting measures to enhance employee job flexibility or career security when there are short-term costs to be born by employers.[214] If one accepts that, in the long term, human capability development and principles of flexicurity in labour market regulation can lead to enhanced productivity, efficiency and global competitiveness, then efforts must be directed toward fostering broad public consensus on the necessity of taking the longer-term view of integrated labour market management as a political priority.

B. Beyond the Standard Employment Contract: Personal Work Relations and Relational Rights

1. Personal Work Relations as the Central Legal Concept

33. There is an emerging consensus that the idea of the standard employment contract needs to be replaced by a broader conceptual notion of the "personal work relation" as the analytical core for an understanding the proper scope for rights at work. Freedland and Kountouris define the personal work

[212] Joint Expert Panel on Pension Standards, *supra* note 114; Pension Review Panel, *supra* note 105; Expert Commission on Pensions, *supra* note 105.
[213] For cases on this point, see e.g. *Prince Edward Island (Potato Marketing Board) v HB Willis Inc*, [1952] 2 SCR 392, [1952] DLR 146. Canada's workers' compensation scheme is another example of cooperative federalism, wherein provincial governments administer claims and compensation for federal employees under the *Government Employees Compensation Act*, RSC 1985, c G-5, see e.g. *Workers' Compensation Act*, SNS 1994-95, c 19 s 164.
[214] See Burroni & Keune, *supra* note 211.

relation as: "an engagement [or] arrangement … for the carrying out of work or the rendering of a service … by the worker *personally*".[215] The purpose of the definition is to "…break the bounds of the contract of employment…to extend [labour rights and related benefits] to personal work rather than employment…"[216] In addition to full or regular part-time employees in standard employment contracts, other work arrangements which might be regulated under the rubric of personal work relations could include self-employed or own-account in/dependent contractors, public office holders, ministers of religion, charity or volunteer workers, liberal professionals, company managers, workers for employment agencies, casual workers, trainees or apprentices, employment interns, live-in homecare workers,[217] individual franchisees, and bailees.[218] Clearly, the nature and extent to which the kinds of protections and benefits currently available to workers in standard employment contracts should be extended to those in other personal work relations may vary with contexts identified by legislators or regulators of various kinds. Most of the named categories in the above list is excluded from the protective reach of labour and employment regulation in some advanced economies but included within the regulatory sphere in others.[219] Interestingly enough, Canada, with its 12 or more internal jurisdictions, probably has more of the categories of personal work relations sheltered under labour and employment laws than many other states.[220] However, the examples are scattered across the country and there is no coherent or integrated regulatory approach in any Canadian jurisdiction.[221]

34. There are two Canadian phenomena in labour and employment law which represent helpful responses to problems caused by linking rights at work to the standard employment contract. The first is the relatively widespread, though not universal, recognition that self-employed workers ought sometimes to be assimilated to the category of employee for the purposes of statutory labour standards protections[222] or rights to collective bargaining[223] where they are dependent on a single hirer/employer or at least non-self-dependent workers in the context of a particular industry.[224] There is also a continuing debate about whether such workers should be entitled to enroll in publicly funded pension plans.[225] These responses, if generalized, could provide partial protection to vulnerable workers subjected to disguised and precarious employment in the form of outsourcing.[226] The second

[215] Freedland & Kountouris, *supra* note 3 at 22.
[216] *Ibid*.
[217] *Ibid.*
[218] The latter examples are drawn from protective legislation in Australia: see Johnstone et al, *supra* note 3 at 47-76.
[219] Davidov & Langille, "Beyond Employees", *supra* note 86; Freedland & Kountouris, *supra* note 3 at 385-432; Johnstone et al, *supra* note 3 at 97-130.
[220] Although Australia also provides interesting examples in this regard. Particularly striking is the legislation first introduced by the Howard Government giving protection to self-employed franchisees as vulnerable entrepreneurs (not vulnerable workers!) in relation to predatory franchisors: Johnstone et al, *supra* note 3 at 47-96.
[221] See e.g. the case of temporary agency workers in *Pointe-Claire*, *supra* note 94; film technicians in *Egg Films*, *supra* note 163; managerial employees in *Re Québec Téléphone*, [1996] CLRBD No 36; dependent contractors under legislation such as the *Labour Relations Act*, SO 1995, c 1, s 1(1); and special legislation such as the *Status of the Artist Act*, *supra* note 88.
[222] Fudge, Tucker & Vosko, "Employee or Independent Contractor?", *supra* note 83.
[223] See e.g. *Status of the Artist Act*, *supra* note 88.
[224] See *Egg Films*, *supra* note 163.
[225] Expert Commission on Pensions, *supra* note 105; Pension Review Panel, *supra* note 105; Joint Expert Panel on Pension Standards *supra* note 114.
[226] *LCO Report*, *supra* note 1; Collins, "Vertical Disintegration", *supra* note 66.

phenomenon is a recent change in the approach to the rights of casual workers. Workers employed on an unscheduled, on-call basis have traditionally been labelled "casuals" in contrast to "regular part-time" employees who have greater predictability and consistency of employment. Casual employees are usually excluded from vacation, maternity leave and other benefits under employment standards legislation,[227] and on the theory that they lack a "community of interest" with full-time and regular part-time employees, have often been denied the right to collective bargaining under the predominant Wagner Act model.[228] Faced with increasing casualization of employment by employers keen to exploit the economic benefits of reducing their full and regular part-timers in favour of casuals, governmental, and some private, inquiries have recommended that casual employees simply be entitled to all employment standards benefits on a pro-rata basis to reduce their degree of economic and social precarity.[229] Similarly, some unions, watching the decline in union density from casualization, have begun systematically to make applications for certification which contain requests to include casual employees in bargaining units.[230] Some industries where casual employment is structurally endemic have historically been regulated by statute to ensure the rights of such occupational categories,[231] but in other circumstances labour boards have recently acceded to pressures to allow bargaining units incorporating casuals to be certified.[232] Such developments have been given a push by the constitutionalization of collective bargaining in Canada.[233] These changes in attitude to both dependent self-employed and casual workers are trends which are impliedly or sometimes explicitly rooted in an understanding that the legal construction of personal work relations must be adjusted in the light of protective and human rights concerns, and that this can be done in ways which are not inconsistent with economic efficiency and competitiveness.[234]

2. Relational Rights, Values and the Legal Construction and Regulation of Work Relationships

[227] Peter Barnacle, Michael Lynk & Roderick Wood, *Employment Law in Canada* (Markham: LexisNexis Canada, 2005) (loose-leaf revision 54), ch 8 at 250; Geoffrey England, *Individual Employment Law*, 2d ed (Toronto: Irwin Law Inc) at 143-46.

[228] G Adams, *Canadian Labour Law*, *supra* note 31 ch 7 at 4-7

[229] Vicki Schultz & Allison Hoffman, "The Need for a Reduced Workweek in the United States" in Fudge & Owens, *supra* note 86 at 138-41.

[230] G Adams, *Canadian Labour Law*, *supra* note 31 ch 7 at 4-7. See e.g. efforts by the National Union of Public and General Employees to unionize casual employees: "NBU successful in fighting for casual workers' rights" (22 July 2013), online: NUPGE <www.nupge.ca>.

[231] See e.g. *Status of the Artist Act*, *supra* note 88. The *Canada Labour Code* also has special provisions dealing with long shoring, see *Canada Labour Code*, *supra* note 33 at s 34. Construction workers in Nova Scotia are governed by Part II of the *Trade Union Act*, RSNS 1989, c 475.

[232] These casual or part-time employees have often been certified in separate units, see e.g. *Egg Films*, *supra* note 163. Concerns have emerged in some quarters, however, that unions and employers in negotiating collective agreements for bargaining units including casuals have excluded casuals from certain rights and benefits under such collective agreements. Labour boards may find that they have an important new category of duty of fair representation complaints in this regard.

[233] See *BC Health*, *supra* note 158; *Fraser*, *supra* note 161; *Mounted Police Association*, *supra* note 161. The Supreme Court of Canada has emphasized that in constitutionalizing collective bargaining and the right to strike, they have not constitutionalized the Wagner Act model, see *Saskatchewan Federation of Labour*, *supra* note 161 at paras 45-46. Particularly in the public sector, seasonal and other categories of casual and part-time workers formerly excluded from collective bargaining were brought under the umbrella of collective agreements in the wake of the 2007 *Health Services and Support* (or *BC Health*) decision.

[234] See e.g. *Egg Films*, *supra* note 163. See also Judy Fudge, "The New Discourse of Labor Rights: From Social to Fundamental Rights?" (2007) 29 Comp. Lab. & Pol'y J. 29 at 46-49; Collins, "Theories of Rights", *supra* note 145 at 140-44.

35. A relational theory of rights can help to explain why and how various personal work relations need and deserve principled and coherent regulation. Relational rights theories are rooted in the empirical observation that people are not simply isolated individual rights bearers making rational life choices as liberal political theorists would have us believe. Rather, all of us are literally the product of relationships, and we live in and through relationships with others.[235] These relationships contextually enhance, limit, condition and structure the choices we have available to us. Our real autonomy is thus exercised through a complex web of relational circumstances.[236] Finally, relational rights theorists posit that what lawyers call rights are in fact entrenched normative values which structure relationships, rather than simply being trumps that individuals can assert in relation to others (although they clearly work that way too on many occasions).[237] By contrast, labour and employment jurists, sometimes blind to this relational context, often see the world of work as a web of individual contracts, constantly renewing themselves moment by moment, as the basis of determining the rights and duties of hirer and worker.[238] What is largely ignored in such thinking is that these legal arrangements structure continuing working relationships, or in the language of Freedland and Kountouris, they result in the legal construction of personal work relations.[239] Indeed, all workers arguably have a sense of the relational nature of work in its various guises, which transcends the formal structure it may have for legal purposes. Work is almost always as much a social as an economic activity, and the social dimensions can make or break work relationships. Human relations experts know this and trade on this relational dimension of work in various ways intended to boost morale at work in the name of efficiency.[240]

36. Relational theorists such as Nedelsky and Llewellyn assert that social relationships are best founded on values of equality, dignity, mutual respect and mutual concern.[241] Freedland and Kountouris emphasize dignity, capability and stability as key values in the appropriate legal construction of personal work relations.[242] These approaches can be usefully reconciled. In the context of democratic citizenship, dignity is surely found in the recognition of the equality of all persons and in respect for their right to make autonomous decisions in the relational context noted above. In personal work relations, it is essential to incorporate an understanding that the work relationship is an on-going one which may evolve and change within the parameters of the legal construct which governs the work. Inevitably there

---

[235] Jocelyn Downie & Jennifer Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law and Policy* (Vancouver: UBC Press, 2012).
[236] Jennifer Nedelsky, "The Reciprocal Relation of Judgement and Autonomy: Walking in another's shoes and which shoes to walk in" in Downie & Llewellyn, *supra* note 235, 35.
[237] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) [Nedelsky, *Law's Relations*].
[238] This classical view is rejected by relational contract theorists, see Ian R Macneil, "Relational Contract Theory: Challenges and Queries" (2000) 94(3) Nw UL Rev 877. For a general overview of relational contract theory, see James W Fox, "Relational Contract Theory and Democratic Citizenship" (2003) 54 Case W Res L Rev 1.
[239] Freedland & Kountouris, *supra* note 3 at 83-264.
[240] Some this is controversial and there is much talk about "the new psychological contract" where in the new economy one is said not to expect a job/career for one's working life, but rather a series of employment opportunities based on up-skilling and gaining experience which will fit employees for their next job possibility. See Stone, *Widgets to Digits, supra* note 37 at 110-16.
[241] Nedelsky, *Law's Relations*, *supra* note 237 at 241.
[242] Freedland & Kountouris, *supra* note 3 at 369-82.

is a legal construct which provides the opportunity for the worker to exercise his or her capabilities and the hirer of the worker to achieve the economic ends desired for the enterprise in question. This engagement of the worker's capabilities, if based on mutual respect between worker and hirer, will provide for fair interaction between those bound up in the work relationship. Depending on the nature and scale of the enterprise, mutual respect should involve some degree of participatory workplace governance in the interests of both fairness and productivity in the relationship.[243] Stability or security in personal work relations is a value which, of course, must be balanced with flexibility, ideally over the course of a worker's career or in relation to his or her status in the workforce, rather than necessarily in relation to a particular job with a particular employer.[244] The mutual concern which must characterize fair personal work relations will comprehend possibilities for voluntarily or autonomously chosen shifts in labour market participation on the part of hirers and workers alike, which are mindful of the proposition that one's personality or humanity is in some considerable bound up in the succession of work relations which one experiences over time, from the points of view of both managers and subordinate workers.[245] In this sense, perhaps "flexstability" might be seen as an alternate neologism to "flexsecurity" as descriptor of appropriate relational balance of labour market participation characteristics.

C. Responsive and Restorative Regulation of Competitive and Efficient Labour Markets

1. Beyond Command & Control: From De-Regulation to Restorative Meta/Regulation

37. Regulatory theory has made important strides in recent decades, and it too can helpfully be put in a relational context. It is now understood that the "command and control" approach to regulation of spheres of human activity is problematic, whether seen in totalitarian top-down communist economies or in the public welfare variants of capitalism.[246] On the other hand, the excessive de-regulation of the 1980's and 90's in western economies revealed itself to be counter-productive in environmental, financial and other spheres, to say nothing of labour market regulation. More sophisticated regulatory techniques, variously known as smart,[247] reflexive,[248] and responsive[249] regulation, or even meta-regulation,[250] attempt to secure the benefits of coordinated regulatory outcomes without recourse simply to the bureaucratic and alienating regulatory formalism of the magisterial welfare state. The general

[243] Estlund, *supra* note 28.
[244] Supiot, *Beyond Employment*, *supra* note 206.
[245]There are obviously tensions here in relation to the "new psychological contract" advocated by some schools of management where employees are properly thought to have expectations for long term employability in the workforce rather than long term employment with a particular employer: See Langille, "Labour Policy in Canada", *supra* note 3.
[246] Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York, Oxford University Press, 1992).
[247] Malcom Sparrow, *The Character of Harms: Operational Challenges in Control* (Cambridge: Cambridge University Press, 2008.
[248] Marius Aalders & Ton Wilthagen, "Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health in the Environment" (1997) 19(4) Law & Pol'y 415.
[249] Ayres & Braithwaite, *supra* note 246.
[250] *Ibid*; Estlund, *supra* note 28.

principle guiding such post-modern regulatory efforts is consultative involvement of regulated parties in the elaboration and enforcement of regulatory regimes, while avoiding the pitfalls of the subversive capture of regulatory regimes by those meant to be subject to their regulation.[251] Regulatory agencies which may be representative of those in the regulated sector as well as government can establish substantive and procedural rules in the light of the experience of those on the regulated ground concerning their practicality and effectiveness. In terms of enforcement, there is widespread use of the notion of a regulatory pyramid whereby warnings, training, or relatively soft sanctions are brought to bear upon well-intentioned and cooperative regulatees, while mechanisms such as heavy fines and license cancellations are reserved for recidivists and those who flout the regulatory rules in a calculated manner.[252] Restorative meta-regulation, in which there is significant reliance on the cooperative activities of regulated stakeholders with government surveillance and supervision of such private sector regulatory bodies, is perhaps the most subtle and relational of these approaches.[253] However, they all must ultimately rely on sufficient regulatory resources such as inspectorates and prosecution arms to reinforce relational processes and ensure the ultimate protection of the public interest.[254] In relation to labour market regulation, there is a participatory tradition in Canada which can be built on to develop responsive and restorative labour market regulation embedded in an understanding of the relational rights principles outlined above.

38. The labour relations boards which have traditionally regulated unionized labour relations activities in North America have normally been tri-partite tribunals with representation from unions and from the business sector with neutral chairpersons.[255] Even labour standards tribunals have been set up with employer and employee "wingers" and a neutral chair, even in the absence of the stark partisan interests represented in the unionized sector.[256] In other words, they have been relational in a formalistic sense, and endowed with the practical ability to reflect the continuing interests of labour market stakeholders in their sphere of regulatory activity, often in the name of "industrial pluralism".[257] In the last two decades, Canadian administrative tribunals, even in the absence of explicit statutory authorization, have through judicial interpretation been recognized as necessarily possessing the jurisdiction to apply constitutional and human rights principles in the elaboration of policies and the resolution of disputes arising out of the workplace.[258] Latterly this rights orientation has taken on

---

[251] Julia Black & Robert Baldwin, "Really Responsive Risk-Based Regulation" (2010) 32(3) Law & Pol'y 181.
[252] Ayres & Braithwaite, *supra* note 246.
[253] Australian Council for Safety and Quality in Health Care, *The Governance of Health Safety and* Quality by John Braithwaite, Dr Judith Healy & Dr Kathryn Dwan, (Commonwealth of Australia, 2005).
[254] There is a parallel here to the relationship between restorative justice models and formal criminal justice: Bruce Archibald, "Restorative Justice and the Rule of Law: Rethinking Due Process through a Relational Theory of Rights", online: (2013) SSRN < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395224>.
[255] Donald D Carter et al, *supra* note 31.
[256] Elizabeth Shilton & Kevin Banks, *The Changing Role of Labour Relations Boards in Canada: Key Research Questions for the 21st Century*" (Kingston: Centre for Law in the Contemporary Workplace, 2014).
[257] Christopher L Tomlins, "The New Deal, Collective Bargaining, and the Triumph of Industrial Pluralism" (1985) 39:1 Indus & Lab Rel Rev 19.
[258] See *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324 (OPSEU)*, 2003 SCC 42, [2003] 2 SCR 157; *Weber v Ontario Hydro*, [1995] 2 SCR 929, [1995] SCJ No 59 (QL).

relational dimensions through mediational and restorative processes.[259] In the same twenty year time frame, legislators, in the interests of administrative efficiency and reduction in the size and cost of government, have consolidated these labour and employment law tribunals together with occupational health and safety tribunals, sometimes explicitly adding human rights, social services and pensions jurisdiction to boot.[260] Very often these integrated labour boards have simply been asked to administer the various foundational statutes for which their predecessors had been responsible: trade union acts, public service collective bargaining acts, employment standards acts, occupational health and safety acts, human rights acts and social services legislation. However, these institutions now occupy a strategic regulatory space in the labour markets where they operate, and this regulatory space has both substantive and procedural dimensions. Whether these integrated labour boards will emerge as significant players in the development of a unified field for integrated labour market regulation remains a matter of some speculation.[261]

2. Restorative Labour Market Regulation: Integration on Substantive Concerns

39. If the overall purpose for integrated labour market regulation is the maximization freedom to exercise one's human capabilities rooted in values of equality, dignity, mutual respect and concerns for stability and flexibility, and if the immediate goals are protection of workers and their human rights as balanced with economic efficiency and competitiveness for entrepreneurs, then the questions arises as to what degrees of coherence are desirable in basic, substantive regulatory concepts in the domain of labour and employment law, and how might such notions be implemented.[262] As a matter of new legislative guidance or the purposive interpretation of existing statutory language in the light of constitutional and human rights principles, what are the options for the legal construction of personal work relations? Should, for example, similar approaches be taken to regulating independent as opposed to dependent, or non-self-dependent, contractors under labour standards acts, collective bargaining legislation and pensions regimes? Should the parameters governing the manner in which access to work related rights and opportunities for casual workers be similar under labour standards, collective bargaining, and employment insurance legislation? How ought parallel questions to be resolved in relation to rules regulating rights on redundancy of workers and access to training and educational opportunities? What about improved pensions, employment insurance regimes in relation to caregiving responsibilities and the like?[263] The existence of integrated labour boards may present a partial model for thinking about the integrated administration of some of these issues. Moreover, to the extent that the

[259] Bruce Archibald, "Teaching Canadian Labour and Employment Law in the Globalized New Economy: Ruminations of an Aging Neophyte" (2009) 14 CLELJ 139.
[260] Lorne Sossin & Jamie Baxter, "Ontario's Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice" (2012) Osgoode Hall Law School All Papers No 28 <http://digitalcommons.osgoode.yorku.ca/all_papers/28>.
[261] See Shilton & Banks, *supra* note 256.
[262] See Freedland & Kountouris, *supra* note 3, which describes continental European jurisdictions and the adoption of more coordinated or compatible approaches than the UK's traditional fragmented statutory interventions and under common law.
[263] Brian Langille, "'Take these Chains from my Heart and Set me Free': How Labour Law Theory Drives Segmentation of Workers' Rights" (2015) 36:2 Comp Lab L & Pol'y J 257 which underscores the necessity of human capability theory.

Canadian constitution allows for the inter-delegation or joint delegation of authority by different levels of government to the same agency or tribunal, there is a potential model for the resolution of federal/provincial cooperation on administrative means to regulate such substantive issues.[264] Integrated and restorative regulation of labour markets at a substantive level is thus a possibility within the practical grasp of current Canadian policy makers.

3. Relational Rights, Effective Enforcement and Participatory Workforce Governance

40. If, as stated above, the overall purpose for integrated labour market regulation is the maximization of the freedom to exercise one's human capabilities rooted in values of equality, dignity, mutual respect and concerns for stability and flexibility, and if the immediate goals are protection of workers and their human rights as balanced with economic efficiency and competitiveness for entrepreneurs, then questions similarly arise as to relational rights, effective enforcement of integrated labour market regulations and workplace governance in *procedural* terms. In unionised workplaces, the bargaining agent and its officers are able to bring labour standards lapses to the attention of the employer, whether the problems relate to breaches of the collective agreement or of basic labour standards which are incorporated by law into the collective agreement.[265] Indeed, the union is under a legal duty of fair representation to take steps to protect the members of the bargaining unit on a non-discriminatory basis.[266] In non-union workplaces, expanded substantive rights as discussed above may remain of theoretical interest only if employees are afraid to make complaints to labour standards authorities or where inspectorates are not up to the supervisory task. Recent research indicates that deregulation and reductions in inspection personnel can have significant negative effects on the enforcement of labour standards.[267] Furthermore, as union density is on the decline, the effectiveness of labour standards enforcement in the non-union sector is a matter of increasing importance.[268] A number of proposals for improved participatory mechanisms for labour standards enforcement have been made recently which could improve processes in both union and non-union contexts in ways which are consistent with relational theory.

41. In the unionized context, there have been several developments which promote values of equality, dignity and mutual concern and respect, in relational terms, relating to dispute resolution among unions, employers and employees.[269] Depending upon the Canadian jurisdiction, the last twenty years has seen an increasing reliance upon mediation-arbitration, or "med/arb", in the resolution of grievances under collective agreements.[270] This has occurred as arbitration, once touted as an informal,

---

[264] See the discussion of cooperative federalism *supra* note 213.
[265] Estlund, *supra* note 28; David J Doorey "A Model of Responsive Workplace Law" (2012) 50 Osgoode Hall LJ 47 [Doorey, "Responsive Workplace Law"].
[266] Bernard Adell, "Collective Agreements and Individual Rights: A Note on the Duty of Fair Representation" (1986) 11 Queen's LJ 251.
[267] *Fairness at Work*, *supra* note 33; *LCO Report*, *supra* note 1; Vosko, "Precarious Employment", *supra* note 83.
[268] Estlund, *supra* note 28.
[269] See Macneil, *supra* note 238; J Fox, *supra* note 238.
[270] David C Elliott, "Med/Arb: Fraught with Danger or Ripe with Opportunity?" (1995) 34 Alta L Rev 163.

quick, efficient and cost-effective workplace dispute resolution by labour relations experts, has become lengthy, expensive, heavily legalized, burdened with human rights issues and concerned about withstanding possible judicial review.[271] Med/arb allows an arbitrator or arbitration board appointed pursuant to a collective agreement (or statute)[272] to mediate a resolution of the dispute, or failing that, to adopt the role of adjudicator and decide the matter in what may be an hearing abbreviated by the evidence obtained informally in the mediation process.[273] In some measure, this restores to grievance dispute resolution the characteristics of speed, reduced cost and efficiency which were once its hallmarks, and perhaps more importantly gives the parties more control over the outcome and the participants a greater sense of effective involvement in the process. In other words, med/arb can be more consistent with relational values than standard adjudication with all its attendant formality.[274] However, med/arb is still in large measure a dyadic process with the union and the employer having formal control over the process, which may not reflect the complexity of relations on the ground in the workplace. Thus in matters involving harassment, toxic workplace conditions or disputes among employees or representatives from different bargaining units, resort is now sometimes had to restorative workplace conferencing which can balance the interests of more players and respond to broader relational concerns among employers, unions, employees and even customers and shareholders.[275] Thus relational values of equality, dignity and mutual concern and respect associated with restorative justice, rather than formalistic and hierarchical command and control values, are gaining a foothold in unionized workplaces.[276] These developments are now penetrating into the procedural precincts of administrative governmental authority as labour relations boards and human rights commissions adopt mediational and restorative approaches to dispute resolution.[277]

42. The introduction of relational decision making for the benefit of employers and employees in the non-union workplace, may be a harder nut to crack, but there are interesting prospects for change in this context as well. Cindy Estlund correctly identifies the North American procedural innovations in occupational health and safety regimes as having great potential for broader democratic workplace

[271] Michel Picher, "The Canadian Railway Office of Arbitration: Keeping Grievance Hearings on the Rails" (1991) 1 Labour Arbitration Yearbook 37; Andi Balla, "Labour arbitration gone 'off trajectory': Ontario Chief Justice". *Canadian Lawyer Magazine* (2 May 2011), online: <www.canadianlawyermag.com>; Hon Warren K Winkler, "Labour Arbitration and Conflict Resolution: Back to our Roots" (Donald Wood Lecture, delivered at the School of Policy Studies, Queen's University, 30 November 2010) [accessible online].
[272] Mandatory under Wagner Act style legislation, see G Adams, *Canadian Labour Law*, *supra* note 31 ch 12 at 13-23.
[273] See Elliott, *supra* note 270.
[274] Bruce P Archibald, "Citizen Participation in Canadian Criminal Justice: The Emergence of 'Inclusionary Adversarial and 'Restorative' Models" in Stephen G Coughlan & Dawn Russell, eds, *Citizenship and Citizen Participation in the Administration of Justice* (Montreal: Les Éditions Thémis, 2001) 147.
[275] Tyler G Okimoto & Michael Wenzel, "Bridging Diverging Perspectives and Repairing Damaged Relationship in the Aftermath of Workplace Transgressions" (2014) 24:3 Business Ethics Quarterly 443.
[276] Bruce P Archibald, "Let my People Go: Human Capital Investment and Community Capacity Building via Meta-Regulation in a Deliberative Democracy – A Modest Contribution for Criminal Law and Restorative Justice" (2008) 16:1 Cardozo J Int'l Comp L 85.
[277] See e.g. the Nova Scotia Human Rights Commission's dispute resolution process, "Restorative Approaches", online: Nova Scotia Human Rights Commission < http://humanrights.gov.ns.ca/resolution>.

governance in non-union sectors.[278] Typically, occupational health and safety statutes require in large workplaces the establishment of occupational health and safety committees which are equally representative of management and employees.[279] These committees must meet regularly and have a mandate to identify workplace safety problems as well as attendant solutions.[280] These deliberative and relational processes, where they do not result in cooperatively developed corrective strategies, may nonetheless enhance the statutorily protected ultimate sanction of the refusal to do unsafe work, which can be exercised individually or collectively.[281] There is no reason why occupational health and safety committees could not be statutorily endowed with jurisdiction to vet other labour standards issues in a relational and deliberative fashion.[282] Thus the occupational health and safety model, though currently restricted to health and safety matters, provides a template for relational and participatory governance in relation to other issues. Of course, occupational health and safety committees operate in unionized a well as non-union contexts, and the research literature suggests that union leadership on the employee side can make such organizations function more effectively.[283] David Doorey suggests that one might build on such insights to provide statutory assistance to union certification in workplaces which regularly breach labour standards, and reinforce participatory workplace governance through parity committees and/or collective bargaining.[284] However, it is important to note that participatory workplace governance, in whatever form, is in the context premised on a capabilities development concept which accepts that enhancement of labour standards in such a relational manner serves not only protective and human rights values, but can also improve economic efficiency and competitiveness when properly implemented.[285]

D. Stability, Social Justice and Deliberative Democracy: Rights at Work, Deploying Capacities & Labour Market Regulation via Domestic and International Public and Private Means

43. The world has reached a complex juncture in relation to ensuring fairness in personal work relations and integrated labour market regulation. In the last forty years, while capitalism has demonstrated its productive superiority over both communism and command and control welfare states, it has burst the bonds or exceeded the bounds of the kind of regulatory supervision which is necessary to ensure the fair distribution of the fruits of labour and the benefits of technological and other advances,

[278] Estlund, *supra* note 28.
[279] Smaller workplaces must appoint occupational health and safety officers who have statutory responsibilities in relation to workplace safety. See England, *supra* note 227 at 187-196.
[280] *Ibid.*
[281] Doorey, "Responsive Workplace Law", *supra* note 265; Estlund, *supra* note 28.
[282] This might be thought to create a North American analogue to European works councils: on works councils see R Adams, *Industrial Relations under Liberal Democracy*, *supra* note 34 at 34-62; Michael Whittal, Herman Knudsen & Fred Huijgen, eds, *Towards a European Labour Identity: The Case of the European Work Council* (New York: Routledge, 2007).
[283] Doorey, "Responsive Workplace Law", *supra* note 265.
[284] Doorey, "Responsive Workplace Law", *supra* note 265.
[285] Simon Deakin, "Concepts of the Market in Labour Law" in Ann Numhauser-Henning & Mia Ronnmar, eds, *Normative Patterns and Legal Developments in the Social Dimension of the Eu* (Oxford: Hart Publishing, 2013) 141.

while doing so in an ecologically sustainable way.[286] The capitalist genie need not be put back in the bottle, but needs to be harnessed for the benefit of all and not just the inequitably distributed point-one-percent which is currently deriving lion's share of the benefits of the system and distorting its potentially balanced operation.[287] In order to make personal work relations fair and productive by deploying human capabilities in ways which enhance economic competitiveness, regulatory intervention must needs occur at local, national, regional and international levels. It may be too much to expect strictly coordinated actions at these levels in a world which lacks a system of global governance, but it may not stretch the imagination too much to conceive of loosely parallel efforts in multiple contexts which can push forward an agenda for local to global integrated labour market improvements rooted in relational values of equality, human dignity, mutual concern and respect which take into account the need for both flexibility and security on the part of all actors. However, the isolationism and protectionism which characterized the global response to the Great Depression of the 1930's is to be avoided as counter-productive.[288]

44. At the global level, the work of the International Labour Organization is more important than ever. Supiot is surely correct to advocate a return to the spirit of the Philadelphia Declaration: (1) social justice requires recognition that labour is more than just a commodity; (2) freedom of expression and association are essential to sustained progress; (3) poverty anywhere constitutes a danger to prosperity everywhere; and (4) efforts are required within each nation and at the international level where representatives of workers and employers, enjoying equal status with those of governments, promote the common welfare through free discussion and democratic decision.[289] But between now and the centenary of the foundation of the ILO in 2019, the organization needs an institutional renewal as well as the adoption of new approaches such as the invocation of international standards of corporate social responsibility and consumocratic labelling efforts,[290] as well as its traditional tools of labour conventions, recommendations, the promulgation of core labour rights and the deployment of technical advice to help various countries achieve the implementation of international labour standards.[291] Levelling the international playing field for labour standards, though a controversial endeavour,[292] will promote greater fairness and equality in a an efficient and competitive global economy in ways which can benefit both developed and developing economies, while reining in transnational corporations and their allies in corrupt authoritarian governments.[293] The positive developments in the wake of the Rana Plaza tragedy in Bangladesh which put in place an apparently enforceable agreement about labour standards governing international value chains in the garment industry may show one positive way

[286] This is clearly not an article about economic and ecological sustainability, but as a critical background operational necessity, the principles of sustainable development cannot be ignored: see Piya Mahtaney, *Globalization and Sustainable Economic Development: Issues, Insights, and Inference* (New York: Palgrave MacMillan, 2013).
[287] See Pikkety, *supra* note 190.
[288] Krugman, *supra* note 13.
[289] Supiot, *The Spirit of Philadelphia, supra* note 6.
[290] Maupain, *supra* note 19; Locke, *supra* note 4.
[291] For a stunningly subtle and pragmatic approach to renewal at the ILO see Maupain, *supra* note 19
[292] Locke, *supra* note 4.
[293] Supiot, *The Spirit of Philadelphia, supra* note 6.

ahead.[294] In this context, the ILO arguably needs to provide a counter-weight to the IMF, the World Bank and the GATT and work with international consumer, labour, industry and governmental organizations in order to re-balance labour market regulation in the context of international "free trade" in goods, capital and technology.[295]

45. At the regional level, supra-national free trade zones need to take seriously the need for capabilities enhancing fairness and integration in labour market regulation as part of the package. While one cannot advocate a retreat to "Fortress America" or "Fortress Europe" notions in expanded forms of isolationism, the evident difficulties that both the North American Free Trade Agreement system and the European Union have with elevating labour market regulation to an appropriate status in relation to free trade in capital, goods and services are clearly critical to regaining a sense of balance in labour markets in each of these spheres. The North American labour side agreement (NAALC) which has been notoriously ineffective despite minor success in some areas,[296] and the institutional stand-off in the EU over the Viking and Laval cases and their aftermath as described above, are both testaments to the need for re-balancing of labour rights in regional trade arrangements.[297] Whether the Trans-Pacific Partnership negotiators will have learned these lessons is another matter. Pressure from labour groups, progressive employers associations, organizations associated with corporate social responsibility efforts and other NGO's will no doubt be required. Regional agreements can perhaps provide manageable safe-zones for the introduction of integrated trade and labour market regulation in the interests of equality, human dignity, mutual concern and respect for appropriate levels of security and flexibility in the enhancement of human capability and prosperity, while having a positive influence on the global economy.[298]

46. It is perhaps only in the context of the foregoing international and supra-national/regional efforts to reinvigorate labour standards in the interest of fair and cohesive labour markets as an integral part of development that local or national efforts of a similar nature may bear fruit. If politicians are to resist the temptation to engage in the lowering of domestic labour standards in a race to the bottom against other countries in the search for outside investment, there must be evidence that other nations are willing to embark upon a similar path. If this is the case, there may be an opportunity to marshal both public and private resources in the legal, social and political construction of fair personal work relations embedded in integrated and cohesive labour market regulation. Current levels of inequality in advanced economies are certainly pushing politics in such directions, and if levels of employment do not improve under pressures on governments from "the precariat," then social stability and order may be at risk. It does not have to be that way. Lessons can be learned from global experience in the Great Depression of the

[294] See the *Rana Plaza Arrangement*, online: Rana Plaza Arrangement < http://www.ranaplaza-arrangement.org/> [*Rana Plaza Arrangement*].
[295] Kerry Rittich, "Rights, Risk and Reward: Governance Norms in the International Order and the Problem of Precarious Work" in Fudge & Owens, *supra* note 86, 31.
[296] Robert G Finbow, *The Limits of Regionalism: NAFTA's Labour Accord* (Burlington: Ashgate Publishing Company, 2006).
[297] See Mark R Freedland & Jeremias Prassl, eds, *Viking, Laval and Beyond* (London: Bloomsbury Publishing PLC, 2014).
[298] See e.g. the "*Rana Plaza Arrangement*," *supra* note 294.

1930's. A return to a more focussed and nuanced Keynsianism may be required. The spirit of Philedelphia can be re-kindled and inspire actions in deliberative democracies that can turn the situation around. Concentration on advancing human capabilities through enlightened labour market regulation at the local level can contribute to the restoration of fair work relations grounded in values of equality, human dignity and mutual concern and respect for development characterized by both security and flexibility.[299] This requires local entrepreneurs and trans-national corporations alike to abandon neo-liberal cant and adopt a positive attitude toward what might be seen from the business perspective as the development of human capital – the world's greatest resource. Enlightened self-interest may render this possible, though things may have to get worse before they get better. The awakening of a relational understanding of who we are as human beings is essential to this, and may be inevitable if we are to survive as a species.[300] The African notion of *Ubuntu* is relevant here: "People are people through other people".[301] Freedom through the sensible self-directed but coordinated deployment of human capabilities is the way forward, and fair work relations through integrated labour market regulation is part of the larger picture of such a vision of social justice.

[299] Joseph E. Stiglitz, Amartya Sen, an d Jean-Paul Fitoussi, *Report by the Commission on the Measurement of Economic Performance and Social Progress*, www.stiglitz-sen-fitoussi.fr, (commissioned by the then President of the French Republic, Nicholas Sarkozy in 2008)

[300] Otto Scharmer & Katrin Kaufer, *Leading from the Emerging Future: From Ego-System to Eco-System Economies* (San Francisco: Berrett-Koehler Publishers, 2013).

[301] Desmond Tutu, *No Future without Forgiveness* (1999), or his more recent *The Book of Forgiving: The Fourfold Path for Healing Ourselves and our World* (Toronto: Harper One, 2014).