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The Significance of the Systemic Relative Autonomy of Labour Law

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The extent to which labour and employment law form an autonomous subsystem within the legal order is a significant matter in labour relations scholarship. Human capability theory helps explain how open legal constructs for structuring personal work relations are emerging in a relatively autonomous manner. Similarly, concepts of relational rights and relational contract theory assist in understanding the relatively autonomous development of restorative labour market regulation, with both substantive and procedural dimensions. Moreover, dramatic changes in freedom of association doctrine under the Charter, which now procedurally protect collective bargaining, the right to strike and the independence of unions from management, provide space for relatively autonomous regulation of the unionized economic sector. However, there is far less constitutional protection for substantive norms governing workplace relations. Nonetheless, the relative autonomy of labour and employment law may constitute a barrier against illiberal, populist distortion of labour market regulation.

La mesure dans laquelle le droit du travail forme un sous-système autonome à l'intérieur de l'ordre juridique est une question importante dans les études en relations de travail. La théorie de la capacité humaine aide à expliquer l'émergence de manière relativement autonome de concepts juridiques ouverts pour structurer les relations de travail. De même, les concepts de droits relationnels et la théorie des contrats relationnels nous aident à comprendre le développement relativement autonome de la réglementation restaurative du marché du travail et ses dimensions substantive et procédurale. De plus, des modifications profondes au principe de la liberté d'association sous le régime de la Charte, qui protège aujourd'hui efficacement, sur le plan procédural, la négociation collective, le droit de grève et l'indépendance des syndicats face aux gestionnaires, créent un espace pour la réglementation relativement autonome du secteur économique syndiqué. Toutefois, la protection constitutionnelle des principes régissant la substance des relations en milieu de travail est beaucoup moins forte. Néanmoins, l'autonomie relative du droit du travail peut constituer un obstacle à la distorsion populiste et attentatoire de la réglementation du marché du travail.

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Introduction

The idea of the autonomy of labour law as a regulatory sub-system within the legal governance structures of western democracies has recently received renewed interest.¹ The debate over the autonomy of labour law has to do with the degree to which the values, institutions and rules which regulate activity in the workplace are, or should be, separate or different from the general legal rules which govern other private or public activities, particularly economic markets, in accordance with the rule of law. The topic is both broadly theoretical and intensely practical, and it engenders a wide range of views from observers in many jurisdictions.²

1. See Alan Bogg et al, eds, *The Autonomy of Labour Law* (London: Bloomsbury Publishing, 2015), which elaborates on ideas famously discussed by Lord Wedderburn, “Labour Law: From Here to Autonomy” (1987) 16:1 *Indus Rel LJ* 1 and which was rooted in comparisons between then-autonomous aspects of labour law in France as contrasted with Wedderburn’s views on the situation in the UK; Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford: Oxford University Press, 2014), asserts the potential theoretical and practical importance of a virtual “labour constitution” in western democracies which was first identified by the German jurist Hugo Sinzheimer during the Weimar Republic, and which represents a singular notion of the autonomy of labour law. Of course, Otto Kahn-Freund, a former student of Sinzheimer, introduced to British labour law scholarship the notion of collective *laissez-faire*, which captured significant aspects of autonomy prevalent in UK labour relations and law in the immediate post-war period and beyond: see Mark Freedland, “Otto Kahn-Freund, the Contract of Employment and the Autonomy of Labour Law” in Bogg et al, *supra*. In North America, ideas related to the autonomy of labour law have been discussed under the label “industrial pluralism”: see Katherine Van Wezel Stone, “The Post-War Paradigm in American Labor Law” (1981) 90:7 *Yale LJ* 1509 for the United States and Harry W Arthurs, “Understanding Labour Law: The Debate Over ‘Industrial Pluralism’” (1985) 38 *Current Leg Probs* 83 for Canada (with its origins in his “*Without the Law*”: *Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985)), though for Arthurs’ most forceful exposition of the autonomy of labour law, see his “Labour Law without the State?” (1996) 46:1 *UTLJ* 1. For a good overview of the theoretical synergies between British collective *laissez-faire* and North American industrial pluralism, see Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford: Hart Publishing, 2009). From a broader sociological approach, the autonomy of labour law can be seen as an example of legal sub-system autopoiesis: see Niklas Luhmann, *Law as a Social System*, translated by Klaus A Ziegert (Oxford: Oxford University Press, 2008); and from a still broader theoretical perspective, the autonomy of labour law is arguably the embodiment of “law as a category of social mediation between facts and norms” embedded in a communicative theory of action: see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: MIT Press, 2001), especially Chapters 1 through 4. For a recent analysis of this European theoretical literature in relation to labour law, see Ralf Rogowski, *Reflexive Labour Law in the World Society* (Cheltenham, UK: Edward Elgar Publishing, 2013). It is beyond the scope of this paper to make explicit links between its observations on the relative autonomy of Canadian labour and employment law and the foregoing theoretical literature, but it is hoped that the Canadian legal phenomena identified herein may facilitate that exercise in the future.

2. See Mark Freedland & Jeremias Prassl, eds, *Viking, Laval and Beyond: EU Law in the Member States* (Oxford: Hart Publishing, 2014), which provides an important example of working through questions of autonomy and interdependence of labour market and general economic regulation in the context of analysing the relationship between the European Union internal economic market and the domestic labour market regulation of its member states—an exacting and rare exercise in comparative law, which reveals multiple points of view on the issues.

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In this context, I would assert that Canadian labour law is characterized by considerable autonomy, and that this autonomy provides opportunities for significant experimentation with various approaches to the regulation of individual work relationships, collective labour relations and labour markets at large. However, this autonomy is relative in the sense that it is bound by overarching legal, political and economic constraints, some of which are appropriate and others of which ought to be relaxed.

There are several structural dimensions which have historically given rise to this Canadian phenomenon of relatively autonomous labour law. First, the Canadian constitution has decentralized legislative and governmental authority over labour law, giving primary jurisdiction to the provinces, and only residual jurisdiction to the federal government to regulate labour law in the core sense.³ Secondly, substantive and procedural rules governing the law of the workplace are scattered among the common law,⁴ labour standards codes (governing the non-unionized private sector),⁵ and labour relations statutes (governing unionized labour relations),⁶ to say nothing of the legislation covering unionized and non-union employees in the public

3. This is not the place to engage in a detailed discussion of Canadian Constitutional law as it applies to labour and employment law topics: see Part II, *infra*, for discussion on some aspects of this topic. Suffice it to say that the words “labour law” or “employment law” appear nowhere in the *Constitution Act, 1867*, *infra* note 142, which lays out the legislative authority of Parliament as opposed to provincial legislatures. Judicial interpretation largely imposed on the Canadian polity in the 1920s by the Judicial Committee of the Privy Council (UK), as Canada’s then-highest court of appeal, awarded primary authority over labour relations as a matter of “property and civil rights” to the provinces, and by implication left the federal government to legislate matters of labour and employment law in only those areas of economic activity over which it has specific authority: *Toronto Electric Commissioners v. Snider*, [1925] AC 396, 2 DLR 5 (PC). This is very different from the United States, where the interstate commerce clause was used to justify federal primacy over the regulation of labour and employment relations in the private sector. See Harry Arthurs, “Labour and the ‘Real’ Constitution” (2007) 48 C de D 43 [Arthurs, “Constitution”] and Brian Langille, “Who Governs Labour Market Policy in Canada?” (2009) 71 *Bulletin of Comparative Labour Relations* 245 [Langille, “Who Governs”]; see discussion below in Part III of this paper which presents some further reflections upon the Canadian constitution and economic and labour market regulation. This may, however, be an appropriate place to note that throughout this article, I will, in accordance with global practice, use the label “labour law” to refer to the legal rules which govern the workplace whether their source be in the common law, legislation, or constitutional documents, and whether these rules apply to sectors where collective bargaining is in place or where individual contracts of employment predominate. However, since the focus here is on the situation in Canada, I will be forced from time to time to revert to the North American convention of using “labour law” to apply to the rules surrounding collective bargaining and “employment law” to apply to non-unionized labour relations rules.

4. Geoffrey England, *Individual Employment Law*, 2nd ed (Toronto: Irwin Law, 2008) at 49-102.

5. Stacey R Ball, *Canadian Employment Law* (Aurora: Canada Law Book, 2010) (loose-leaf release 65, 2016), ch 21.

6. George W Adams, *Canadian Labour Law*, 2nd ed (Aurora: Canada Law Book, 1993) (loose-leaf revision 58, 2016), ch 2 [Adams, *Canadian Labour Law*].

sector.⁷ Some might add international law to this list.⁸ This plurality of sources adds both legal “wobble-room” and heterogeneity to the system. Thirdly, though Canadian courts of general jurisdiction dominate the common law,⁹ specialized labour tribunals apply the regimes covered by labour and employment law statutes,¹⁰ in addition to occupational health and safety rules,¹¹ workers’ compensation regulations, and the like.¹² Recently, the courts, through administrative law, have given increasing deference to labour tribunals in the exercise of their statutory mandates, and to labour arbitrators handling grievances under collective agreements.¹³ In addition, these labour boards and arbitration panels have received the authority to apply constitutional law, human rights provisions, general statutes and even common law principles applicable to the workplace in the course of adjudicating disputes arising out of conduct at work.¹⁴ Indeed, courts of general jurisdiction have begun reciprocally to adopt the “jurisprudence” of these labour adjudicators in the elaboration of the common law or in statutory and indeed constitutional interpretation.¹⁵ Fourthly, collective agreements, in the American-style, plant-level bargaining adopted in each Canadian jurisdiction, as well as frequently broader agreements in the

7. Allen Ponak & Mark Thompson, “Public Sector Collective Bargaining” in Morley Gunderson, Allen Ponak & Daphne Gottlieb, eds, *Union Management Relations in Canada* (Toronto: Addison Wesley Longman, 2001) 414. Labour rights in the public sector do not have the same historical origins, nor the same modern challenges, as those in the private sector. In their dual role as employer and legislator, and subject to their own needs and interests, governments of varying levels and jurisdictions have developed differing approaches. Generally speaking, there are at least three important distinctions between legislation in the public sector and that in the private sector: (1) there is less discretion for labour boards in certification and recognition of public sector bargaining units; (2) there is a tendency to restrict the scope of bargaining for public sector bargaining units; (3) there are different, and often more restricted, dispute resolution procedures available to public sector bargaining units. Importantly, the differences have been challenged in recent years with the Supreme Court of Canada’s latest rulings on s 2(d) of the *Charter of Rights and Freedoms*, *infra* note 18. For a more detailed discussion on these changes see Part III, *infra*.

8. See for example the role of Canada’s international obligations in *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health*].

9. Donald D Carter et al, *Labour Law in Canada* (The Hague: Kluwer Law International, 2002) at 62-70.

10. *Ibid.*

11. Ball, *supra* note 5, ch 30 at 1-20.

12. England, *supra* note 4 at 199-203.

13. *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

14. *Weber v Ontario Hydro*, [1995] 2 SCR 929, [1995] SCJ No 59 (QL) [*Weber*]; *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union (OPSEU)*, *Local 324*, 2003 SCC 42, [2003] 2 SCR 157 [*Parry Sound*].

15. *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34, [2013] 2 SCR 458. In respect to the expansion of common law remedies with deference to labour arbitrators, see *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 SCR 616.

public sector,¹⁶ create loci of “law-making” authority which give rise to a certain amount of locally autonomous regulatory variation.¹⁷ Fifthly, while the Canadian Charter of Rights and Freedoms applies only to state action, both federal and provincial, a very activist Supreme Court of Canada has led the way in asserting that the common law ought, where appropriate, to be infused with “Charter values,” and this has lent a degree of suppleness to the evolution of the common law in Canada.¹⁸ Finally, unlike the United States, where there are separate federal and state judicial hierarchies, the Supreme Court of Canada is at the apex of a unified court system, which applies both federal and provincial laws.¹⁹ In terms of autonomy, this unified system of appellate review can cut both ways. The upshot of these parallel and interlocking institutional dimensions of labour law is that it is both relatively autonomous and varied, even if it is regularly subjected to constitutional and administrative law review proceedings in the general courts. The system is one of reciprocity, where relatively autonomous labour law, rooted in common law, statutory and constitutional sources, is being both influenced by and contributing to the evolution of the general legal system. There are fourteen Canadian jurisdictions (federal, provincial and territorial) working out the details of labour law within this relative autonomy, along often similar, yet sometimes divergent, paths. However, given the constitutional and administrative review jurisdiction exercised by the general courts, one might be tempted to draw certain parallels between the Canadian situation and some visions of the European Union’s “open method of coordination.”²⁰

16. Adams, *Canadian Labour Law*, *supra* note 6, ch 1 at 11-16.

17. This is very different from the sort of national and sector bargaining which one finds in Europe: see Roy Adams, *Industrial Relations under Liberal Democracy: North America in Comparative Perspective* (Columbia: University of South Carolina Press, 1995). In this respect the North American system of labour relations is an international outlier.

18. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter]. See, e.g., *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 SCR 500 [Potter]; *Pepsi-Cola Beverages (West) Ltd v REDSU, Local 558*, 2002 SCC 8, [2002] 1 SCR 156; *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, 126 DLR (4th) 129; see *Dagenais v Canada Broadcasting Corp*, [1994] 3 SCR 835 at 911-912, 120 DLR (4th) 12 for a general discussion on the early application of the Charter to the common law.

19. Janet Walker & Lorne Sossin, *Civil Litigation* (Toronto: Irwin Law, 2010) at 7-16.

20. Roger Blanpain, *European Labour Law*, 12th ed (Alphen aan den Rijn: Kluwer Law International, 2010) at 29-33; Manfred Weiss, “Industrial Relations and EU Enlargement” in John DR Craig & Michael Lynk, eds, *Globalization and the Future of Labour Law* (Cambridge: Cambridge University Press, 2006) 169.

The current tensions associated with globalization,²¹ the new economy,²² continuing revolutions in communications and productive technologies,²³ the collapse of the welfare state,²⁴ the decline of reliance on collective labour relations,²⁵ the rise of precarious employment in the “fissured workplace”²⁶ and the growing chasms of economic and social inequality²⁷ are all being played out in Canada in the context of the above-described relatively autonomous system of labour law. Canadian labour law is caught up in this web of increasingly familiar, interconnected problems, which have created an intellectual crisis concerning the purpose and the role of labour law, its values and its institutions.²⁸ But the relative autonomy, or perhaps the multiple relative autonomies, of Canadian labour law have forced open interesting new juridical spaces for experimentation. I wish to explore Canadian developments in relation to what I consider to be the three most important sets of interrelated legal themes arising out of the regulatory morass in which global labour markets, including those of Canada, find themselves. The first area is to link theories of human capability development, as an overarching justificatory narrative for labour law, with the idea of personal work relations, as the central analytical foundation on which to build work-related legal entitlements and obligations, by contrast to the standard contract of employment. The second area is to apply concepts of relational rights, and particularly relational contract theory, to the emerging legal category of contracts

21. Bruce C N Greenwald & Judd Kahn, *Globalization: n. the irrational fear that someone in China will take your job* (Hoboken: John Wiley and Sons, 2009).

22. Doug Henwood, *After the New Economy* (New York: The New Press, 2003).

23. 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).

24. Rosalie Chappell, *Social Welfare in Canadian Society*, 4th ed (Toronto: Nelson, 2009) at 88-112.

25. Judy Fudge, “The New Workplace: Surveying the Landscape” (2009) 33 Man LJ 131.

26. Guy Standing, *The Precariat: The New Dangerous Class* (New York: Bloomsbury Academic, 2011); a recent report finds that 44% of workers in the greater Toronto area and Hamilton (combined), which represents the industrial heartland of a de-industrializing Province of Ontario, find themselves in precarious employment of one sort or another: Wayne Lewchuk et al, *The Precarity Penalty: The Impact of Employment Precarity on Individuals, Households and Communities—and What to Do About It*, (Hamilton: Poverty and Employment Precarity in Southern Ontario, 2015), online: <pepsoc.ca> [Precarity Penalty]. For an excellent discussion on the notion of the precariat under the expanded concept of the fissured workplace see David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge: Harvard University Press, 2014).

27. Chrystia Freeland, *Plutocrats: The Rise of the New Global Super-Rich and the Fall of Everyone Else* (Toronto: Doubleday Canada, 2012); Thomas Piketty, *Capital in the Twenty-First Century*, translated by Arthur Goldhammer (Cambridge: The Belknap Press of Harvard University Press, 2014); Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization*, (Cambridge: Harvard University Press, 2016).

28. Brian Langille, “Labour Law’s Theory of Justice” [Langille, “Labour Law”] in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (New York: Oxford University Press, 2011) 101 [Davidov & Langille, *Idea*].

for personal work in order to elaborate the basis for what can be called restorative labour market regulation. The third area is to look at evolving Canadian constitutional values and norms to see how they impact upon or condition the relatively autonomous values, norms and institutions of labour law. These three themes structure the three main parts of this paper. In all these areas, there are common law, statutory labour law regimes and constitutional developments bubbling up in the interstices of the Canadian labour law system. By highlighting the experience of certain Canadian institutions and actors in relation to these three themes, one can explore both the potential and the limits of labour law's relative autonomy.

I. *Human capability development and open legal constructs for personal work relations*

Human capability development theory in various guises is gaining traction as a normative framework, embedded in an empirically supported view of reality, which can provide a justificatory narrative for fair and efficient labour law. However, the connection of human capability development to labour market regulation arguably requires an open and flexible approach to the legal construction of personal work relations which goes beyond the standard employment contract—the traditional foundation upon which labour law has been based in the post-WWII era. Making the theoretical link between these lines of thought, illustrating their potential for practical implementation, and using some positive and negative examples which have emerged from the relatively autonomous sphere of Canadian labour law are the aims of this section of the paper.

1. *Human capability development theory and the foundations of labour law*

Amartya Sen argues convincingly that the development of human capabilities makes freedom possible.²⁹ Freedom is defined as the situation where people have capabilities (personal abilities and contextual opportunities) to choose to “lead the lives they have reason to value.”³⁰ He identifies five instrumental freedoms enhancing personal capabilities and functionings: (1) political freedoms, including freedom of association and expression, as well as democratic institutions; (2) economic facilities, including a reliable legal system, functioning markets, and access to credit; (3) social opportunities, including education, health care, and employment possibilities; (4) transparency guarantees, including government openness and integrity, and political trust; and (5) protective security, including

29. Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999) at 3-11.

30. *Ibid* at 293.

unemployment benefits, social and old age security.³¹ These instrumental sources of freedom clearly have relevance to discourses aimed at ensuring balanced political, legal, social and economic conditions in democracies, writ large.³² However, the point here is to see how these notions relate specifically to labour law and labour market regulation. A considerable and valuable literature is evolving on this question. Brian Langille's views are perhaps the most expansive. He argues that the protective rationale for labour law, which encourages both the view that substantive and procedural rules improving working conditions constitute a cost or a tax on production, and promoting the race to the bottom in global regulatory terms, should be abandoned in favour of a rationale which accepts that the development of human capabilities should be at the conceptual core of labour law.³³ So conceived, Langille sees development of human capabilities as an investment in the most essential aspects of a productive and competitive economy, while more importantly being at its core a theory of justice for labour law and labour regulation.³⁴ The more narrowly focused view of Simon Deakin, in some measure, builds capability theory upward from capacity as a legal concept basic to contracts of employment which are the foundation of labour market.³⁵ However, Deakin and his collaborators³⁶ see labour and employment law standards not necessarily as a constraint on competitive economic development, but rather as "providing solutions to coordination problems arising from the presence of transaction costs and externalities, which would otherwise tend to limit the scope of markets."³⁷ There is North American corroboration for this latter view in the conclusions of Kevin Banks. Banks argues that

31. *Ibid* at 38-40.

32. See generally Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: The Belknap Press of Harvard University Press, 2011).

33. Brian Langille, "Labour Policy in Canada: New Platform, New Paradigm" (2002) 28:1 *Can Pub Pol'y* 133 [Langille, "Labour Policy"].

34. Langille, "Labour Law," *supra* note 28.

35. Simon Deakin, "Capacitas: Contract Law, Capabilities, and the Legal Foundation of the Market," in Simon Deakin and Alain Supiot, eds, *Capacitas: Contract Law and the Institutional Preconditions of a Market Economy* (Oxford: Hart Publishing, 2009) 1.

36. Simon Deakin & Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005).

37. Simon Deakin, "The Contribution of Labour Law to Economic and Human Development" in Davidov & Langille, *Idea*, *supra* note 28, 156 at 162 [Deakin, "Contribution of Labour"]. This view challenges the notion that more fulsome labour standards protecting workers is at odds with competitive economic development and leads to a "race to the bottom" among different jurisdictions. This "race to the bottom" phenomenon is sometimes referred to with reference to environmental and labour market regulation. See, e.g., Ronald B Davies & Krishna Chaitanya Vadlamannati, "A Race to the Bottom in Labor Standards? An Empirical Investigation" (2013) 103 *J Development Economics* 1; but see also Bob Hepple, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005).

Canada need not adjust its workplace law to compete with the apparent internal U.S. race to the bottom among its states, because the regulatory environment in which Canadian labour and employment laws operate provides competitive advantages not available in the United States, at least when properly designed.³⁸

Capability theory leads inexorably to the conclusion that an adequate analysis of labour law and its potential for enhancing human capability must occur within a contextual, comprehensive and integrated understanding of labour market regulation.³⁹ But legal thinking about labour and employment regulation in common law Canada has, since the advent of modern labour in the aftermath of World War II, been dominated by a conceptual focus on the standard employment contract as the legal platform upon which labour and employment obligations and benefits are built.⁴⁰ While the Canadian common law relating to the regulation of work relations was, and to a great extent still is, biased toward hirers of labour rooted in the English law of master and servant,⁴¹ the post-war collective bargaining regimes and labour standards codes for non-unionized workers, based on the “protective rationale” and intended to right the power imbalance, were explicitly articulated in terms of the language of the relationship between “employers” and “employees.” However, these terms were legislatively defined in an entirely circular manner, which led labour and employment tribunals and courts alike to rely initially for their interpretation on the common law distinction between contracts of service (employment) and contracts for services (commercial purchases of services from independent contractors).⁴² Moreover, the working assumption, and the broad empirical reality, during the three decades following WW II, was that the norm for employment relations was full-time, or at least regular part-time, employment in both the unionized and non-unionized sectors.⁴³

38. Kevin Banks, “Must Canada Change Its Labour and Employment Laws to Compete with the United States?” (2013) 38:2 Queen’s LJ 419.

39. For a critique of this labour market analysis see Dukes, *supra* note 1.

40. Langille, “Labour Policy,” *supra* note 33.

41. England, *supra* note 4 at 49-102.

42. Brian A Langille & Guy Davidov, “Beyond Employees and Independent Contractors: A View from Canada” (1999) 21:1 Comp Lab L & Pol’y J 7 [Langille & Davidov, “Beyond Employees”]; Judy Fudge, Eric Tucker & Leah Vosko, “Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada” (2003) 10 CLEJ 193.

43. There was, of course, a gendered dimension to this in the years after WW II where explicit labour market policies were dedicated to returning women to domestic labour from the industrial employment that many had during the war, and ensuring a family income to be provided by the male “family bread winner”: see 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. The “family allowance,” paid to *mothers* by the federal government and calculated on a per child basis, was a key

Of course, the demographics of the labour market have been totally altered in the last three to four decades. Many employers, particularly in the non-union sector, have been unable to resist the temptation to reduce labour costs by dividing available work among part-time and casual employees to whom they are not required to pay the full range of benefits under labour standards legislation.⁴⁴ Employers with strong bargaining power in the unionized sector have been able resist the efforts of unions to prevent the contracting out of jobs through collective bargaining.⁴⁵ Moreover, some employers regularly label regular workers as independent contractors rather than employees in order to avoid payment of benefits and also avoid the inconvenience of the alternative strategy of “casualization” of their work force, which along with contracting out and other methods by employers has led to the segmentation, or “fissuring,” of the workplace.⁴⁶ This segmentation of the labour force has currently reached a calamitous crescendo in Canada where a huge percentage of the labour force, and particularly among vulnerable groups such as youth, women, people of colour, and both legal and illegal immigrants, are engaged in such precarious employment.⁴⁷

Such labour market segmentation, founded upon the distortion of the standard contract of employment, in an economy oriented to shareholder primacy rather than stakeholder (including employees) balance, is the

element in this strategy.

44. Geoffrey England, *Part-time, Casual and Other Atypical Workers: A Legal View*, Research and Current Issues Series No 48 (Kingston: IRC Press, 1987); Harry Arthurs, *Fairness at Work: Labour Standards for the 21st Century* (Ottawa: Federal Labour Standards Review, 2006) at 109-110 [*Arthurs Report*].

45. Whether contracting out was a standard right in the hands of management, which could be exercised unless prohibited by the collective agreement, was once a contested issue among Canadian arbitrators. However, in a comprehensive decision reviewing the arbitral jurisprudence, Harry Arthurs, then a young arbitrator, sealed the death warrant on arguments that contracting out was presumptively not a management right unless bargained for, and set the tone for a dominant jurisprudence which put employers in a privileged position on the issue: *Re United Steelworkers of America and Russel Steel Ltd* (1966), 17 LAC 253 (OLRB).

46. This problem of disguised employment seems to be distributed throughout a wide income spectrum, and is not confined to stereotypical vulnerable employees: see Weil, *supra* note 26. Works of this sort, of course, tend to emphasize official reports and statistics which may underrepresent the problems of the phenomenon connected to the underground or informal economy.

47. Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2006); Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: December 2012), online: <lco-cdo.org> [*LCO Report*]. In response to these growing concerns the Liberal Government of Ontario commissioned Special Advisors C Michael Mitchell and John C Murray to conduct the Ontario Changing Workplaces Review which reported on 23 May 2017, and which was promptly followed on June 1 with draft legislation from the Government intended to implement some aspects of the Report: Ontario Ministry of Labour, News Release, “Ontario Introduces Legislation to Create Fair Workplaces, Better Jobs” (1 June 2017), online: <news.Ontario.ca>.

antithesis of a contextual, comprehensive and integrated approach to labour market regulation. This is true regardless of the justifications advanced for labour law. One might expect better from the implementation of the protective rationale of labour standards, or a human rights rationale based on principles of equality, to say nothing of the obvious negation of labour and employment law founded upon the development of human capability.⁴⁸ In response to this situation, which of course is paralleled in many western, high-wage economies, there is a search for a new way to conceptualize the legal regulation of personal work relations which is not governed by what have turned out to be the dysfunctional manipulations of the standard contract of employment in relation to other forms of hiring labour services.⁴⁹

2. *Regulation of personal work relations through capability-related open legal constructs*

The most promising analysis of the suppression of capability development through labour market segmentation, based on manipulation or avoidance of the standard employment contract through other exploitative work arrangements, is presented in the work of Mark Freedland and Nicola Kountouris.⁵⁰ They set about the task of providing a conceptual basis for the reform of this situation through the elaboration of a concept of the “personal work relation.” This they define as: “an engagement [or] arrangement ... for the carrying out of work or the rendering of a service ... by the worker *personally*.”⁵¹ 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’...”⁵² 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

48. 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 [Langille, “Chains”], which underscores the value of human capability theory.

49. See Paul Davies & Mark Freedland, *Towards a Flexible Labour Market* (Oxford: Oxford University Press, 2007); and Weil, *supra* note 26.

50. Mark Freedland & Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: Oxford University Press, 2011). This is a sophisticated text that employs a comparative methodology and provides empirical examples of how personal work relations are variously treated in the UK and continental European legal systems.

51. Freedland & Kountouris, *ibid* at 22 [emphasis added].

52. *Ibid* at 31. For a discussion of some of these situations in the Canadian context see Ball, *supra* note 5.

managers, workers for employment agencies, casual workers, trainees or apprentices, employment interns,⁵³ individual franchisees, and certain bailees.⁵⁴ The idea is to focus on the relations between those who hire workers to do work personally and those who do the work, in order to determine whether they should receive parallel treatment in terms of labour and employment law regulation.

This question of whether a broader category of personal workers than those in standard employment contracts should be similarly governed by labour law must be answered by reference to the purpose one attributes to the particular labour regulation at issue and the circumstances of the hiring arrangement. The protective rationale for labour law—namely, that there must be rules to protect the vulnerable—would seem to apply to individuals doing the same work in similar circumstances whether they are hired or labelled as employees or in/dependent contractors. Similarly, if fundamental or human rights protection is seen as the dominant rationale for labour law then it is hard to justify inequality or discrimination based on whether one is employed under a standard employment contract or some other arrangement if one is personally doing the same work as others in the same way. Finally, if one sees human capability development as the underlying basis for labour laws and regulations, why should rights to pensions, parental leave entitlements, educational leave opportunities and the like be differently distributed in accordance with whether one is in a standard employment contract or some other hiring arrangement? There is a massive socio-legal dysfunction in this failure to address the problem of labour segmentation through the lens of how the law may arbitrarily construct personal work relations. This leads to pervasive problems of precarity and systematic barriers to the development of human capabilities on a huge scale. How these purposive insights about the legal construction of personal work relations can be employed to improve the situation is a matter which depends on the particular contexts of the socio-legal, economic, political and cultural circumstances of jurisdictions where such an effort might be undertaken.

Hugh Collins has recently re-asserted his view that the crucial problem for the Freedland/Kountouris concept of the personal work relation is that “it is not a legal concept” and that “it is not possible to organize a legal subject around a legal institution or a legal concept that

53. Freedland & Kountouris, *supra* note 50 at 42, 348, 356.

54. The latter two examples are drawn from protective legislation in Australia: Richard Johnstone et al. *Beyond Employment: The Legal Regulation of Work Relationships* (Sydney: Federation Press, 2012) at 47-76.

does not exist.”⁵⁵ Clearly, the personal work relation is not a recognized nominate contract at common law or a precise definition given legal effect by statute.⁵⁶ However, with all due respect, one may argue that the personal work relation is indeed a legal concept which is helpful for organizing and thinking about the interpretation and application of labour law rules, in much the same way that the notion of fault or *mens rea* in criminal law, or negligence in the law of torts, assist in organizing and giving content to doctrinal rules and applying them in individual cases. In the Canadian context, the concept of the personal work relation has powerful explanatory value in demonstrating the in/coherence of certain legislative policy choices, common law decisions and, perhaps most importantly, approaches to statutory interpretation in labour law matters. Canadian methods of statutory interpretation are particularly significant in this regard. The Supreme Court of Canada has abandoned a narrow, common law “mischief rule” orientation to statutory interpretation,⁵⁷ and has enjoined the lower courts and administrative tribunals to adopt a “purposive approach” to this adjudicative activity. The words of an act are to be “read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the [legislature in question].”⁵⁸ This is consistent with Interpretation Acts in virtually all Canadian jurisdictions which provide that every act “shall be deemed to be remedial” and direct that every act shall “receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.” These injunctions, along with the preambles to certain Canadian labour and employment statutes⁵⁹ and

55. Hugh Collins, “Contractual Autonomy” in Bogg et al, eds, *The Autonomy of Labour Law*, *supra* note 1 at 71. It does seem odd to hear this static view of legal rules from the pen of a jurist of Collins’s sophistication and stature.

56. Although statutes which use the label “worker” rather than “employee” as the basis for allocating protections or benefits may come closest to doing this. See, e.g., occupational health and safety statutes in Canada, which cast the net even more broadly than personal workers to include owners, etc. See also the *Equality Act 2010* (UK), c 15.

57. John Willis, “Statute Interpretation in a Nutshell” (1938) 16:1 Can Bar Rev 1.

58. *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27, 154 DLR (4th) 193 at para 21, citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87. This approach is also being advocated in a comparative context for its value in helping to resolve various interpretive issues in the field; see Guy Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016).

59. The preambles to both the *Canada Labour Code*, RSC 1985, c L-2 and the *Nova Scotia Trade Union Act*, RSNS 1989, c 475, for example, state the purpose of labour relations as the promotion of “the common well-being” of citizens through “the encouragement of free collective bargaining and the constructive settlement of disputes,” the recognition of “freedom of association and free collective bargaining” as the bases of “effective industrial relations” and “good working conditions,” and the support of “labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices” for the benefit of all. The implications of this broad

Supreme Court encouragement to infuse the interpretation exercise with “*Charter* values” where appropriate, allow for considerable creativity in adjusting statutory words to evolving legal needs.⁶⁰ Canadian statutory interpretation is far from the venerable teleological or “free scientific research” orientations of certain European civilian jurisdictions,⁶¹ but it would seem equally distant from mechanical variants of “originalism” in some American jurisdictions.⁶² In other words, in dealing with such questions as who falls within the definition of an “employee” or who is an “employer,” who is a “casual” employee, or who is an in/dependent contractor, for the purposes of labour statutes, Canadian adjudicators are not bound by the dead hand of ancient common law definitions, but must seek an interpretation appropriate to the Act and the circumstances to which it must be applied. The concept of the personal work relation is a useful tool in this exercise. The purpose of the next section is to show how this “autonomy-encouraging” legal environment has, or can, create space for a labour law which enhances human capability development.

3. *Relatively autonomous labour law and Canadian responses to labour market segmentation*

There are interrelated issues, around contracting out (now called “outsourcing”), casual employment, and industry-specific forms of non-standard employment, that illustrate differing Canadian legislative and adjudicative responses to issues of labour market segmentation.⁶³ Some of the decisions considered below could have been different if they had benefited from analysis based on the concept of personal work relations connected to a human capability development rationale for employment

wording in the Nova Scotia context were discussed by the Nova Scotia Labour Relations Board in *Egg Films*, *infra* note 84 at paras 43-48, and applied in that same case, as discussed below.

60. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014). See also *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*], as well as the jurisprudence, *supra* note 18.

61. François Génay, *Méthode d'interprétation et sources en droit privé positif*, 2d ed (Paris: Librairie générale de droit et de jurisprudence, 1954); see also Louis Josserand, *Les mobiles dans les actes juridiques du droit privé* (Paris: Dalloz, 1928).

62. Miguel Schor, “Contextualizing the Debate Between Originalism and the Living Constitution” (2011) 59 Drake L Rev 961. American Originalism finds perhaps its most famous support in the work of the late Justice Antonin Scalia of the Supreme Court of the United States. See, e.g., Antonin Scalia, “Originalism: The Lesser Evil” (1989) 57:3 U Cin L Rev 849; Antonin Scalia, “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws” in *A Matter of Interpretation*, Amy Gutman, ed (Princeton: Princeton University Press, 1997); Antonin Scalia, “Constitutional Interpretation the Old Fashioned Way” (remarks delivered at the Woodrow Wilson International Center for Scholars in Washington, DC, 14 March 2005), online: <www.bc.edu>.

63. On the general problem, see Simon Deakin, “Addressing Labour Market Segmentation: The Role of Labour Law” (2013) International Labour Organization Working Paper No 52.

standards or collective labour relations. Others demonstrate concern for the issues raised by the conceptual shift to an understanding of the legal construction of personal work relations, and reach solutions consistent with the thrust of a personal work relations approach, regardless of the underlying theory justifying the particular instance of labour regulation. In at least one case, there is an explicit recognition of the personal work relations approach as an aspect of the solution adopted. However, a point of clarification may be in order before turning to the specifics of the examples. There is no serious dispute in Canada that small business, and indeed own-account self-employment, is an important and legitimate economic activity. There is no serious dispute that many individuals may wish to earn a living by running their own businesses, whether as a sole-proprietorship or as an incorporated entity, where the principal may be the only worker or service provider. There is no dispute that these operations may be governed by the general rules of commercial contracts, regulations to ensure fair competition in commerce and, where appropriate, the application of particular tax regimes for businesses, etc. However, there are disputes over circumstances where persons engaged in providing goods or services personally are perceived to be involved in disguised employment, and are thought to be denied the benefits or entitlements which would flow from employment status, were it properly recognized.⁶⁴

During the Great Depression, there emerged a Canadian common law decision which can still be projected today onto the concept of the personal work relation. In 1936, the Ontario Court of Appeal was asked to decide whether a commission sales arrangement of an indefinite term was a master and servant relationship (with a right to notice of termination, normally of six months) or a commercial contract between principal and agent (which could be terminated at will).⁶⁵ The court held it was *neither*, saying:

There are many cases of an intermediate nature where the relationship of master and servant does not exist, but where an agreement to terminate the arrangement upon reasonable notice may be implied. This, I think, is such a case. The mode of remuneration points to mercantile agency pure and simple, but the duties indicate a relationship of a more permanent character. The choice of sub-agents and their training, the recommendation of them to the company for appointment, the supervision of these men

64. See Fudge, Tucker & Vosko, *supra* note 42. The broader economic context for these phenomena is the fissured workplace, in which companies maintain market share and brand loyalty by spinning-off core functions through the mechanisms of contracting out, franchises, or the use of employment agencies, seeking to keep their workforce competitive: see Weil, *supra* note 26.

65. *Carter v Bell and Sons (Canada) Ltd*, [1936] OR 290 at 295, 2 DLR 438 (CA) [*Carter*].

when appointed, all point to this more permanent relationship. The fact that the plaintiff was entering a new territory as representative of the defendant and was endeavouring to create a market for the defendant's products and that to their knowledge he was taking his wife and children with him to the West indicate a relationship that could not be terminated at will by either party.

This arrangement of an "intermediate nature," being neither a master and servant relationship nor a standard commercial agency deal, can be seen as an early prototype of the legal concept of the personal work relation. The court's reading of the implied obligation of the duty to give notice bespeaks a concern for the relational nature of the arrangement and the vulnerability of the plaintiff—both are significant in connection with capability theory and the legal construction of personal work relations.

A common example of labour market segmentation through disguised employment, from the 1970s to the present, has occurred in relation to transportation services in various industries in different parts of Canada. Instead of contracting out to independent trucking firms, some employers even created arrangements whereby they leased or sold their vehicles to "former employees" and reimbursed them on a fee for service basis as "contractors" rather than providing wages and benefits to "employees."⁶⁶ These arrangements usually down-load costs to the drivers, while prohibiting them from working for other customers to enhance their "profits." These vulnerable workers were recognized as being victims of disguised employment, and were labelled *dependent* rather than independent contractors, who thus warranted the protections of access to collective bargaining.⁶⁷ Some labour relations tribunals and courts were unwilling to go behind the façade of the "commercial" contractual arrangements to provide a remedy.⁶⁸ Several jurisdictions therefore amended their collective bargaining legislation to assimilate such dependent contractors to the status of employees in order to allow them to unionize.⁶⁹ Tribunals in other jurisdictions simply achieved the same

66. Langille & Davidov, *supra* note 42 at 22-23.

67. *Ibid* at 23-25. Taxi drivers have also been found to fall within the dependent contractor category and assimilated to the status of employee for purposes of employment standards act protections: see *Imperial Taxi Brandon (1983) Ltd v Hutchison* (1987), 46 DLR (4th) 310, 50 Man R (2d) 81 (Man CA). Compare *Nash et Green Crescent Holdings Limited*, 2013 NSLB 141, Eric K Stone, Alternative Chair. It is of interest to note that the illegal operation of taxis by the complainant affected the board's decision in the latter case.

68. Langille & Davidov, *supra* note 42 at 26.

69. *Ibid* at 25-27. See, e.g., *Labour Relations Act*, SO 1995, c 1, Schedule A, s 1(1); *Labour Relations Code*, RSBC 1996, c 244, s 28; *Canada Labour Code*, *supra* note 59, s 3(1). Some commentators argued that recognition of dependent contractors at common law by labour boards preceded the legislation and adoption of the term in the 1970s, and as such the latter was unnecessary (at the

result be interpreting the statutory words “employee” and “employer” in a purposive and expansive manner to rectify the problem.⁷⁰ The protective rationale for labour and employment regulation was invoked regularly to justify such ends. The concept of the “personal work relation” had certainly not been invented at the time, but the truck drivers, divested of their employment benefits, were doing the same work they had carried out previously. The legal construction of their personal work relations had changed, usually not in accordance with the workers’ desires or interests. In a recent case, an Alberta judge found that a couple running a small trucking company together, doing deliveries for 16 years on behalf of Woolworth Canada (bought out by Wal-Mart), were involved in an “intermediate category” closer to a contract of employment than to an independent contractor arrangement.⁷¹ The court awarded the plaintiffs substantial damages in lieu of nine months’ notice of termination of the contract. In doing so, it relied, among other legal sources, upon *Carter*, principles from collective bargaining legislation, and the scholarship of Judy Fudge.⁷² The implications for human capacity development in these circumstances might be analyzed in different ways. Be that as it may, the foregoing situations demonstrate how a relatively autonomous system of labour relations is able to respond to what one might now see as problems of attempted labour market segmentation, and to resolve them by what seems to be the “intermediate concept of the personal work relation.”

“Casualization” of employment over the last few decades has been seen in Canada as an increasing problem which is closely linked to the scourge of precarity.⁷³ But episodic legal arrangements for performance of work on a short-term basis have been with us for centuries, though

time): see Michael Bendel, “The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law” (1982) 32:4 UTLJ 374.

70. In Nova Scotia, for example, see *Retail Wholesale and Department Store Union, Local 1015 and Sobey’s Stores Limited (Warehouse)* (10 May 1976), No 2276 (NSLRB) (where truckers who owned their own trucks in a “broker” arrangement were held to be employees and not independent contractors); and *Bakery, Confectionary and Tobacco Workers International Union, Local 446 and Baxter Foods Limited* (7 February 1996), No 4321 (NSLRB) (where truck drivers and largely self-directing merchandizers were deemed employees rather than independent contractors). Those cases considered Part I of the Nova Scotia *Trade Union Act*, *supra* note 59, but similar issues have arisen in the construction industry under Part II of the *Act*: see *United Brotherhood of Carpenters and Joiners of America, Local 83 and Fitzgerald and Snow Ltd* (13 January 1997), No 1753C (NSLRB); and *United Brotherhood of Carpenters and Joiners, Local 83 and Mainland Development Limited* (1997), [1998] 48 CLRBR (2d) 189 (NSLRB).

71. *JKC Enterprises Ltd v Woolworth Canada Inc*, 2001 ABQB 791, 96 Alta LR (3d) 129, Coutu J.
72. *Carter*, *supra* note 65; Judy Fudge, “New Wine into Old Bottles? Updating Legal Forms to Reflect Changing Employment Norms” (1999) 33:1 UBC L Rev 129. See also *Keenan v Canac Kitchens*, 2015 ONSC 1055, 2015 CLLC 210-025.

73. *Supra* note 26.

how they are perceived and how they relate to the institutions of labour regulation in Canada has changed over time and has been regulated in different ways.⁷⁴ In the halcyon days of the early post-WWII period, casual employment, at least in the urban setting, was seen by policymakers and labour adjudicators as outside the presumptive norms of the new welfare state's statutorily regulated labour market. Such nominally transient casual work was not deemed sufficiently significant to need anything more protective than common law's contract of employment rules. Thus, in the collective bargaining sector, casual employees were regularly excluded by labour boards from bargaining units of full and regular part-time employees of the sort usually organized by unions.⁷⁵ This was done on the theory that casuals, only rarely present in the workplace, should not be allowed to distort bargaining in units where regular employees could readily demonstrate a true community of interest. Similarly, in the non-unionized sector, casual employees were disqualified from access to certain statutory benefits available to full- or regular part-time workers in standard employment contracts.⁷⁶ The resulting legal construction of casual employment as being outside the main protective regimes of labour law created incentives for employers to engage in opportunistic and profitable "casualization" of their workforces. However, certain casuals working within particularly sensitive industries have traditionally benefited from, or been subjected to, special forms of labour market regulation. Thus, at the federal level, a special collective bargaining regime for stevedores on Canada's coasts and inter-provincial waterways has been put in place to enable regulated collective bargaining and thus reliable shipping in relation to multiple "maritime employers" in various ports.⁷⁷ This is at odds with the "industrial plant-based bargaining" which is the norm under the Canadian variants of the Wagner Act model. Similar multi-employer and multi-trade or craft bargaining has been widely established by statute in the construction industry, or at least its commercial and industrial sub-sector.⁷⁸ This too is at odds with the standard, industrial model of collective

74. See James W Fox, "Relational Contract Theory and Democratic Citizenship" (2003) 54:1 Case W L Rev 1. See also Standing, *supra* note 26; *Prearity Penalty*, *supra* note 26; Weil, *supra* note 26; Deakin and Wilkinson, *supra* note 36.

75. See Adams, *supra* note 6, ch 7 at 4-20.

76. The policy rationale for this situation is less apparent. Administrative convenience and economic advantage for employers is a likely candidate to explain this political inertia.

77. *Canada Labour Code*, *supra* note 59, s 34.

78. See, e.g., *Nova Scotia Trade Union Act*, *supra* note 59, Part II, which is relatively typical of such Canadian legislation, although each jurisdiction has its peculiarities. See Joe Rose, "Interest Arbitration and the Canadian Construction Industry" (2011) 62:4 Lab LJ 217; Alan M Minsky, "Some Labour Relations Issues in the Construction Industry" (2001) 9 CLR (3d) 115; Richard M Brown, "The Reform of Bargaining Structure in the Canadian Construction Industry" (1979) 3:3 Indus Rel LJ

bargaining. Underlying these legislative initiatives were synchronous claims from vulnerable workers in militant unions seeking protection against exploitation and from agitated employers facing disruption of their business activities by wildcat strikes.⁷⁹ One might characterize these special regimes for the regulation of casuals as an effective balancing of the protective rationale from one perspective and the economic efficiency rationale from the other. Surely both perspectives should be thought consistent with certain notions of human capability development.⁸⁰ Both have grown up within the relatively autonomous sphere of Canadian labour market regulation.

The problem of regulating casual employees' personal work relations arises in other work settings as well. Free-lance journalists or broadcasters, workers in hospitality industries, entertainers, musicians, stage hands and film industry crews can all be required to work simply on an "as needed" basis.⁸¹ Sometimes these people will be hired for the various purposes when there are no permanent or regular part-time people working in these same classifications.⁸² In the context of unionization, this has lately given rise to problems which are illustrated by the film industry. Not unlike the construction industry, the film industry is characterised by project-based, short periods of employment where workers engaged in specialized crafts will move from one location to another and where film-makers incorporate a new employing entity for each project. The industrial model of plant-based certification does not function well in this context. Actors, camera operators and technicians have different unions which are often sufficiently well organized to assert enough pressure on film industry employers to require the latter to sign voluntary recognition agreements and negotiate collective agreements without the necessity for certification by labour boards. However, tension and confusion can arise in film industry labour relations. For example, British Columbia, in an effort

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79. H D Woods, *Report of the Commission of Enquiry into Industrial Relations in the Nova Scotia Construction Industry* (Halifax: Commission of Enquiry into Industrial Relations in the Nova Scotia Construction Industry, 1970).

80. For example, unions in such industries usually provide benefits plans, and also provide craft or trade training.

81. Historically, that is, before the emergence of the Wagner Act model in North America in 1935, many employees in such industries were organized successfully in occupational unions: see Katherine VW Stone, "The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law" (2001) 48:3 UCLAL Rev 519; Langille & Davidov, "Beyond Employees," *supra* note 42.

82. For contrasting common law decisions in this area, see *Ceccol v Ontario Gymnastic Federation* (2001), 55 OR (3d) 614, 204 DLR (4th) 688 (Ont CA) and compare *Van Mensel v Walpole Island First Nation*, 2010 ONSC 6463, [2010] OJ No 5094.

to establish a balance between film employers and film unions, has used its trade union council bargaining provisions to regulate film industry labour relations.⁸³ There is no such specialized regulatory scheme for the film industry in Nova Scotia; however, in a case known as *Egg Films* the Labour Board in that province was persuaded to certify a bargaining unit of film technicians, all of whom were employed on a casual basis.⁸⁴ Moreover, the certification in that case covered workers who were found to be non-self-dependent contractors, and thus employees for the purposes of the *Trade Union Act*,⁸⁵ even though some operated through personal corporations and charged sales tax on the invoices for their services. While the film technicians were not completely dependent for their livelihood on the certified employer, they were found to be dependent on the film industry of which the employer and they themselves were all a part. The Labour Board relied upon the notion of personal work relations in construing the provisions of the statute⁸⁶ to conclude that the heterogeneous group of unionized film technicians were not only employees under the statute, but that they all also shared a community of interest as workers in the film industry, which justified their having a separate bargaining unit in contrast to the employer's regular part-time and full-time employees. The Board relied on the preamble to the statute⁸⁷ and Supreme Court of Canada jurisprudence on freedom of association, in an explicit form of purposive statutory interpretation to achieve this result.⁸⁸ The Board balanced the protection of workers' freedom of association against the

83. British Columbia *Labour Relations Code*, *supra* note 69, s 41. This has not been without its difficulties and has led to various inquiries and reports, which have had varying degrees of success: see Michael Fleming, *A Report Regarding a Section 41 Inquiry into Labour Relations in the British Columbia Film Industry* (5 March 2012), online: <www.acfcwest.com/pdf/Section%2041%20Inquiry%2020120320.pdf>.

84. *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. The author must disclose that he was the Vice-Chair of the Labour Board panel which made this decision.

85. *Supra* note 59.

86. *Ibid* at paras 52-54.

87. *Ibid* at paras 55-59, 43-48. The Preamble asserts, among other things, that "the Government of Nova Scotia is committed to the development and maintenance of labour legislation and policy designed for the promotion of common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes," and that "Nova Scotia employees, labour organizations and employers recognize and support freedom of association and free collective bargaining as the bases of effective labour relations for the determination of good working conditions and sound labour-management relations in the public and private sector of Nova Scotia": *Trade Union Act*, *supra* note 59. These aspirational phrases could be interpreted as a commitment akin to recognizing, or at least being consistent with, the human capability development principles outlined above.

88. See the discussion of constitutional principles from this new Supreme Court jurisprudence in Part III, *infra*.

employer's interest in economic sustainability, in ways that are arguably consistent with human capability development. However, the Board was careful to point out that it was adopting a historically recognized "craft unit model" which had not been ousted by adoption of the Nova Scotia version of the Wagner Act.⁸⁹ It might be thought that this approach could be advocated for use in other industries as an aspect of integrated labour market regulation.⁹⁰ At any rate, the Supreme Court of Canada's refusal to grant leave to appeal in the *Egg Films* decision may be viewed as an interesting example of the application of administrative law principles to protect the relative autonomy of Canadian labour law and its decision-making institutions.

There is one final and controversial example, from a "liberal professional context," of work-related problems in drawing the boundary lines between even relatively autonomous labour law principles and general, commercial and economic law. In *McCormick v. Fasken Martineau Dumoulin LLP*⁹¹ McCormick, an equity partner with an ownership interest in his law firm, sought to challenge the rule in the partnership agreement that he was obliged to retire at the age of 65. The British Columbia Human Rights Tribunal found that McCormick was an *employee* for the purposes of the B.C. *Human Rights Code*, and that he was thereby protected against such age discrimination. In the Supreme Court of Canada, Abella J. used the protective rationale of labour law to *deprive* McCormick of protection against age discrimination in the circumstances.⁹² She stated for a unanimous court (at para 39):

applying the control/dependency test, based on his ownership, sharing of profits and losses, and the right to participate in management, I see him more as someone in control of, rather than subject to, decisions about workplace conditions. As an equity partner, he was part of the group that controlled the partnership, not a person vulnerable to its control.⁹³

89. *Egg Films*, *supra* note 84 at paras 64-66.

90. The work of Katherine Stone is relevant here: see Katherine Stone, *Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press, 2004) [Stone, *Widgets*]. For a parallel development to that in *Egg Films*, *supra* note 84, see *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner* (2015), 362 NLRB No 186, 204 LRRM 1154 [BFI]. In the latter decision, the US National Labor Relations Board conceptualised the joint-employer in ways similar to those advocated by Weil, *supra* note 26.

91. *McCormick v Fasken Martineau Dumoulin LLP*, 2014 SCC 39, [2014] 2 SCR 108.

92. It may be of more than passing interest to note that Abella J is a former Chair of the Ontario Labour Relations Board and member of the Ontario Human Rights Commission.

93. *Ibid* at para 39.

The court cites American and British common law authorities for its decision, and distinguishes present U.K., Australian and New Zealand law as containing statutory reversals of this common position. One might suspect that some vestige of the identity theory of corporate criminal liability, which views managers as the controlling mind of the company,⁹⁴ rather than current analysis that sees managers as its employees (and thus potentially vulnerable personal workers),⁹⁵ may be driving this thinking. The irony of using the protective rationale from labour law to trump human rights protections against discrimination is striking, and a skeptic might be forgiven the thought that the result would have been different had racial or gender discrimination been at issue.⁹⁶ The Court even noted that human rights commissions have had their decisions upheld where they have, in reliance on labour law decisions, interpreted the provisions of human rights legislation to give protection to “independent contractors.” Be that as it may, the Supreme Court was not willing in this particular instance to apply a “personal work relations” analysis rooted in any sort of human capability development theory to uphold the application of labour law principles to a “partner” who had been assimilated to the category of manager.⁹⁷ The autonomy of Canadian human rights law, as applied in a workplace context, is thus seen to be relative and subject to corrective review by general courts. So too is the autonomy of broader labour market regulation, as illustrated by some of the decisions to be canvassed below.

II. *Relational rights, relational contract theory and restorative labour market regulation*

Relational rights theory, including relational contract principles, is particularly useful in thinking about how personal work relations can be regulated in what one may regard as integrated and restorative labour market regulation. Personal work relations are seen in Canada as governed by long-term contracts which have particular characteristics. These continuing relational contracts can be understood as in need of a major overhaul to improve restorative labour market regulation in both substantive and procedural dimensions, though piecemeal progress is occurring in some quarters. The relative autonomy of Canadian labour law

94. *Canadian Dredge and Dock Co Ltd v R*, [1985] 1 SCR 662, 19 DLR (4th) 314. That decision is now superseded by amendments to the Canadian *Criminal Code*: RSC 1985, c C-46 as amended by *An Act to amend the Criminal Code*, SC 2003, c 21.

95. Robert Flannigan, “The Employee Status of Directors” (2014) 25:3 King’s LJ 370.

96. Douglas Branson, *No Seat at the Table: How Corporate Governances and Law Keep Women Out of the Boardroom* (New York: New York University Press, 2007).

97. This is despite the fact that certain levels of supervisors or managers have frequently been found to be unionizable employees by many Canadian labour relations boards.

seems to have sheltered and enhanced these useful developments, which are best understood as an embodiment of human capability development theory. Such are the concerns of this portion of the paper.

1. *Relational rights or values and relational contract theory*

The confluence of two streams of relational theory can assist in thinking about why and how personal work relations can be regulated and integrated in restorative ways. The first body of relational theory emerges from public law analysis, and the second from the private law of contract. Each merits brief explication. Relational rights theories in the public law context have emerged in some measure from the common sense empirical proposition that all of us are literally the product of relationships, and live in and through the totality of our relations with others.⁹⁸ This important insight is often lost in the rhetoric of neo/liberal political theory which would have us believe that we are all simply individual rights-bearers exercising ir/rational choices in the various arenas to which our daily life takes us. But we exercise our personal autonomy in the context of relationships which enhance, limit, condition and structure the choices we have available to us.⁹⁹ Our autonomy is relational in a fundamental sense, although it may be exercised in concert or in conflict with those to whom we are “related.” Most importantly, relational rights theorists like Nedelsky see rights not as trumps to be played against those whom we encounter, but rather as values which structure our relationships.¹⁰⁰ Relational theorists argue that social relationships are best founded on the values of equality, dignity, mutual respect and mutual concern.¹⁰¹ Compare this with Freedland and Kountouris who suggest that personal work relations rest on the key values of dignity, capability and stability.¹⁰²

Elsewhere I have suggested that these sets of values can be integrated and adjusted so as to see appropriate personal work relations as rooted in values of equality, dignity, mutual concern and respect, capability and flex/stability.¹⁰³ It is also important to note that this relational view of rights and work is entirely consistent with human capability development

98. Jocelyn Downie & Jennifer Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law and Policy* (Vancouver: UBC Press, 2012). In particular, see their Introduction.

99. Jennifer Nedelsky, “The Reciprocal Relation of Judgement and Autonomy: Walking in another’s shoes and which shoes to walk in” in Downie & Llewellyn, *ibid* at 35.

100. Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) [Nedelsky, *Law’s Relations*].

101. *Ibid* at 241; see also Downie & Llewellyn, *supra* note 98.

102. Freedland & Kountouris, *supra* note 50 at 369-382.

103. Bruce P Archibald, “Rights at Work: Fairness in Personal Work Relations and Restorative Labour Market Regulation” (2016), SSRN online: <<http://ssrn.com/abstract=2762976>> [Archibald, “Rights at Work”].

theory. Sen's five "functionings," that is, political freedoms, economic facilities, social opportunities, transparency guarantees, and protective security,¹⁰⁴ are ways to analyse, in the abstract, certain categories of key relationships which can enhance development and freedom in general, or productive and appropriate personal work relations in particular. They are the relational context in which many important decisions are, or ought to be, made. Sen describes sensible labour market regulation as harnessing individual human agency through supportive "functionings,"¹⁰⁵ which relational theorists would surely recognize as the exercise of relational autonomy in the context of healthy and productive institutions operating on the basis of the relational values outlined above. We move thus toward a theoretical basis for relational labour market regulation.

If linking relational theory as described above to personal work relations could be thought a "top down" theoretical exercise, then the use of relational contract theory in this context might be thought of as a pragmatic "working from the bottom up" with theoretical consequences. Classical contract theory tends to see the contracting process as a moment in time surrounding offer, acceptance and consideration—a conception that works well for the simple purchase and sale of a chattel. Relational contract theorists, on the other hand, assert that many contracts are intended to create long-standing relationships.¹⁰⁶ These relational contracts, such as insurance, long-term supply arrangements, corporate law, contracts in family law, and the like, are said to give rise to forms of interpretation and institutional development which differ from standard commercial contracts.¹⁰⁷ Common law courts have sometimes seen the world of employment as similarly constituted by individual, generic contracts created at a point in time, but renewing themselves constantly as the relationship between hirer and worker continues.¹⁰⁸ However, relational contract theorists have viewed the contract of employment as an archetype

104. Sen, *supra* note 29 at 38-40.

105. *Ibid* at 18.

106. See Ian R Macneil, "Relational Contract Theory: Challenges and Queries" (2000) 94:3 Nw UL Rev 877. For a magisterial treatment of the subject, see Ian R Macneil & Paul J Gudel, *Contracts: Exchange Transactions and Relations—Cases and Materials*, 3rd ed (New York: Foundation Press, 2001).

107. Paul J Gudel, "Relational Contract Theory and the Concept of Exchange" (1998) 46:3 Buff L Rev 763.

108. Even, or perhaps especially, unions were regarded as a web of individual contracts: see *Orchard v Tunney*, [1957] SCR 436, 8 DLR (2d) 273. The Supreme Court of Canada put a stop to this by holding that, as a matter of policy related to their statutory role under collective bargaining legislation, unions were to be found legal entities which could sue and be sued in their own name: *Berry v Pulley*, 2002 SCC 40, [2002] 2 SCR 493 [*Berry*]. A statutory exception to this still holds sway in Ontario: see the *Rights of Labour Act*, RSO 1990, c R-33, ss 3(2), 3(3).

of the relational contract, since the standard employment contract brings about a relationship of indefinite duration which often changes and evolves throughout its course.¹⁰⁹ Moreover, the employment contract has been argued to be not only relational, but intimately connected to public law because of its significance as a potential instrument for democratization of the workplace.¹¹⁰ These propositions will be examined in the light of Canadian labour law below. Relational contract theory nonetheless fits nicely in with the concept of the personal work relation and its various possible applications to hiring arrangements other than the standard contract of employment. One might regard personal work relations as comprising a broad range of relational contracts which ought as a matter of law to embrace values of equality, dignity, mutual concern and respect, capability and flex/stability, and which have the potential to constitute the foundational concept underpinning a unified field for restorative labour market regulation in the interests of human capability development.

2. *Personal work relations and restorative labour market regulation*

Restorative labour market regulation refers to an integrated concept of labour market regulation based on relational values described above, as well substantive and procedural principles drawn from restorative approaches to justice. The latter, as applied to personal work relations, are consistent with human capability development theory. Explanation is in order. Regulatory approaches to law have gained currency over the last two decades.¹¹¹ Top-down, command-and-control regulatory models have been shown to be largely ineffective, whether in the context of totalitarian communism or in the welfare state. However, the unbridled de-regulation in western economies in the 1980s and 1990s has revealed itself to be inadequate in environmental, financial, and other domains, to say nothing of labour and employment law.¹¹² Rather than return to alienating bureaucratic formalism, alternatives variously labelled smart regulation, reflexive regulation, responsive regulation, or meta-regulation have emerged in a vast literature.

109. See Robert C Bird, "Employment as a Relational Contract" (2005) 8:1 U Pa J Lab & Employment L 149; and Tamara Cohen, "The Relational Contract of Employment" in Rochelle le Roux & Alan Rycroft, eds, *Acta Juridica 2012: Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (Claremont: Juta, 2012) 84.

110. To say nothing about its having been associated with the end of slavery in the United States. See Fox, *supra* note 74.

111. See the work of Hugh Collins, Robert Baldwin, Julia Black, John Braithwaite, Christine Parker, Malcolm Sparrow cited below, as well as a host of others.

112. Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York, Oxford University Press, 1992); Weil, *supra* note 26.

Central to almost all these proposals is the involvement of regulated stakeholders in the elaboration and enforcement of regulatory regimes, while avoiding subversive capture of the system by those intended to be regulated in the public interest.¹¹³ Braithwaite's restorative regulatory pyramid envisages a graduated response to regulatory failure with restorative methods of warnings, training or other soft sanctions in relation to well-intentioned and cooperative regulatory targets, ascending through deterrent fines and sanctions of rational, calculating defaulters, and license withdrawals, closures or other definitive sanctions for flagrant or abusive recidivists.¹¹⁴ Meta-regulation is about arms-length state supervision of private industry or professional regulatory bodies, with use of inspectorates and prosecutions as a last resort. Responsive regulation based on this sort of approach has been skilfully advocated by Cindy Estlund in the labour and employment law context as will be discussed below.¹¹⁵ However, the label restorative labour market regulation has been adopted here to emphasize the notion that the process ought to be characterized by the values of equality, dignity, mutual concern and respect, capability and flex/stability set out above which are broadly associated with the notion of restorative justice.¹¹⁶ The question is whether the institutional framework for implementing these values for the purposes of human capability development can be worked out on the ground through integrated and restorative means.

While Canada is certainly not a coordinated market economy in the European sense, it might be thought to sit somewhere between the United States as the most free-wheeling liberal market economy and some of the more welfare-oriented liberal market economies of the Commonwealth.¹¹⁷ However, in recent decades, effective labour market regulation has declined in Canada—not, for the most part, because of

113. Julia Black & Robert Baldwin, "Really Responsive Risk-Based Regulation" (2010) 32:2 Law & Pol'y 181

114. Australian Council for Safety and Quality in Health Care, *The Governance of Health Safety and Quality*, by John Braithwaite, Judith Healy & Kathryn Dwan (Commonwealth of Australia, 2005).

115. Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven: Yale University Press, 2010) [Estlund, *Regoverning*].

116. 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.

117. 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). The latter describes aspects of labour market regulation in Australia which is more comprehensive than that of Canada, despite the attempts by the Howard government to introduce American-style employment at will, which was ultimately rejected by Australian voters: see Andrew Stewart, *Stewart's Guide to Employment Law*, 5th ed (Sydney: Federation Press, 2015).

the formal repeal of legislative protections from the era of the welfare state, but rather because of the shifting nature of the private and public economic, social, ideological and political environments in which labour law is applied.¹¹⁸ In some cases, the fragmented nature of the partial and jurisdictionally divided Canadian labour markets has always been problematic and in need of integrated labour market responses. In other areas, the phenomenon of de-industrialization in the face of global competition, the rise to predominance of the hard-to-organize service and the western Canadian resource sectors, and the retrenchment of the broadly organized public sector through privatization of services, have all led to greater precarious employment of the type described above, and this calls for integrated solutions. But there have been mixed Canadian experiences with respect to how policy-makers, courts, legislatures and labour boards have responded to the restorative labour market possibilities in both substantive and procedural regulatory dimensions. Substantive areas include varied responses to outmoded common law thinking, vertical and horizontal disintegration or fissuring of the management of private production, and regulatory fragmentation at the administrative and governmental levels. Some of the latter can be characterized in relation to three of Sen's "functionings": economic facilities, social opportunities and protective security. Procedural areas include the consolidation of administrative jurisdiction among bodies responsible for labour market regulation, the move to restorative adjudicative processes in relation to individual employment disputes, and possibilities for the extension of the participatory occupational health and safety model to other workplace issues. Positive and negative examples from recent Canadian experience in relation to some of these areas will be presented in the next section. There are potentially different assessments about whether the relative autonomy of Canadian labour and employment law is a good thing or a bad thing in these contexts.

118. Harry Arthurs, "What Immortal Hand or Eye?—Who Will Redraw the Boundaries of Labour Law?" in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing, 2006) 373; see also Katherine Stone & Harry Athurs, eds, *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (New York: Russel Sage Foundation, 2013). The only stark legislative repeal of labour rights might be thought to be the gutting of the decree system in the Province of Quebec: see Macduy Ngo, "Revisiting Quebec's Decrees: Can Juridical Extension Address the Issue of Precarious Work in Canada?" (2015) 19:1 CLEJ 287. In addition, one might view the underfunding of inspectorates in the labour standards area as a functional equivalent at the hands of governments: *LCO Report*, *supra* note 47; *Precarity Penalty*, *supra* note 26. With regard to the rise of the "new economy" see the *Arthurs Report*, *supra* note 44 at 16-39, 229-250, and Weil, *The Fissured Workplace*, *supra*, note 26.

3. *Relative autonomy for labour law and Canadian issues in restorative labour market regulation*
 - a. *Substantive autonomy for labour market regulation: Common law and statutory regimes*

Canadian common law now embodies the critical principle that the contract of employment represents more than a simple agreement to provide services for remuneration, and ought not simply to be interpreted in accordance with the principles of commercial contract.¹¹⁹ It is clearly accepted that, at common law, the contract of employment differs from commercial contracts because the assumption of equality of bargaining power between the parties is not likely to be valid.¹²⁰ It is now recognized that “[w]ork is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society” and that “[a] person’s employment is an essential component of his or her sense of identity, self-worth and emotional wellbeing.”¹²¹ This latter proposition goes some way to accepting that personal work relations involve relational contracts. While employees have long been subject to duties of good faith and loyalty,¹²² it appears that the Supreme Court of Canada is now giving its imprimatur to the proposition that the common law of employment imposes on employers a “duty of good faith and fair dealing.”¹²³ It is not clear the extent to which this might be seen as a matter of autonomous labour law, since the Court has also recently held in a commercial agency context that it was necessary “to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance.”¹²⁴ But in

119. See *Machtiger v HOJ Industries Ltd.*, [1992] 1 SCR 986, 91 DLR (4th) 491.

120. *Wallace v United Grain Growers Ltd.*, [1997] 3 SCR 701 at para 92, 152 DLR (4th) 1, citing P Davies & M Freedland, *Kahn-Freund’s Labour and the Law*, 3rd ed (London: Stevens, 1983) at 18.

121. *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 95, 38 DLR (4th) 161.

122. *RBC Dominion Securities Inc v Merrill Lynch Canada Inc.*, 2008 SCC 54, [2008] 3 SCR 79.

123. *Potter*, *supra* note 18 at para 84. The case involved a finding of constructive dismissal in relation to a public office holder. The endorsement of the duty of good faith and fair dealing was made with reference to D J Doorey, “Employer ‘Bullying’: Implied Duties of Fair Dealing in Canadian Employment Contracts” (2005) 30:2 Queen’s LJ 500, which relies heavily on English decisions concerning the implied “duty of mutual trust and confidence.” For a recent review of the concept and cases discussed in this section, see Claire Mummé, “A Comparative Reflection from Canada—A Good Faith Perspective” in M Freedland et al, *The Contract of Employment* (Oxford: OUP, 2016) 295.

124. *Bhasin v Hrynew*, 2014 SCC 71 at para 33, [2014] 3 SCR 494. This case was about financial services agencies, and might be viewed as an “intermediate category case” as per *Cartier*, *supra* note 65, although it was not characterized as such by the Court.

the employment context, this has been held to mean that “[a]t a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid, and forthright.”¹²⁵ These principles may prove to be important when dealing with disguised employment and other mechanisms for avoiding responsibilities under the common law of employment which distort labour market regulation otherwise based on sound principles.

In terms of integrative or even restorative labour market regulation, another Canadian common law development of some note is the willingness of courts to accept a common employer doctrine.¹²⁶ Common employer holdings have been available in employment standards legislation and collective bargaining legislation for some time.¹²⁷ However, the recent common law articulation of the rule would appear to be very broad:

As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound by contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings and inter-locking directorships. The essence of that relationship will be the element of common control.¹²⁸

While these common law developments might be thought to bode well for the emergence of a more integrated form of labour market regulation based on restorative values, parallel developments are mixed in the interpretation of statutory labour and employment law legislation.¹²⁹

Canadian observers with high hopes for the application of a common employer doctrine in circumstances of global outsourcing had them dashed in the heavily criticized case of *Lian v. J. Crew*,¹³⁰ which might charitably be described as a failure to adopt purposive statutory interpretation. *Lian*,

125. *Potter*, *supra* note 18 at para 99.

126. In *Potter*, *ibid* at para 51, in a terse and oblique holding, the majority applied the common employer doctrine as enunciated by the Ontario Court of Appeal in *Downtown Eatery (1993) Ltd v Ontario* (2001), 54 OR (3d) 161, [2001] OJ No 1879 [*Downtown*].

127. See, e.g., *Nova Scotia Trade Union Act*, *supra* note 59, s 21; *Canada Labour Code*, *supra* note 59, s 35.

128. *Sinclair v Dover Engineering Services Ltd* (1988), 11 BCLR (2d) 176 at para 18, [1987] BCJ No 60 (BCSC), *aff'd* [1988] BCJ No 265, 49 DLR (4th) 297, as cited in *Downtown*, *supra* note 126 at para 30.

129. The real problem faced by those who wish to vindicate their labour rights at common law is the prohibitive cost of civil litigation.

130. *Lian v J Crew Group Inc* (2001), 54 OR (3d) 239, [2001] OJ No 1708. For a discussion and analysis of this decision, see Langille, “Chains,” *supra* note 48.

an immigrant to Toronto, sewed garments at the bottom of a subcontracting chain, where the products were sold at the top of the chain in the defendants' retail establishments. Links in this value chain went through Hong Kong, among other jurisdictions. Lian sought minimum wage and vacation entitlements, as well as class action certification for a group of similarly situated homeworkers. Her request was given short shrift on the grounds that while she worked in an integrated garment industry she did not work for an integrated business which could be brought within the applicable statutory common employer rule. Privity of contract was held to trump the common employer provision of the Ontario *Employment Standards Act*.¹³¹ Whether a purposive approach to statutory interpretation, in the light of restorative labour market values underpinning a human capability development orientation, might hold sway in a different Canadian court is a matter of some speculation. However, insofar as agency employment is concerned, a more restorative note was struck by the Supreme Court of Canada in the case of *Pointe-Claire (City) v. S.E.P.B., Local 57*.¹³² An employment agency supplied an office worker to the City of Pointe-Claire. She was there for some time, and sought to be included in the city's clerical bargaining unit by its union. Her salary and benefits were paid by the employment agency in accordance with labour standards legislation, but the direction and control of her actual work was in the hands of the City's managers. The City paid a sum to the agency for its services in finding, providing and paying the employee. The Quebec Labour Court

131. RSO 1990, c E.14.

132. *Pointe-Claire (City) v SEP, Local 57*, [1997] SCR 1015, 146 DLR (4th) 1 [*Pointe-Claire*]. The US case of *BFI*, *supra* note 90, is of interest here. It is summarized on the US Labor Relations Board website as follows: "In a 3-2 decision involving Browning-Ferris Industries of California, the National Labor Relations Board refined its standard for determining joint-employer status. The revised standard is designed "to better effectuate the purposes of the Act in the current economic landscape." With more than 2.87 million of the nation's workers employed through temporary agencies in August 2014, the Board held that its previous joint employer standard has failed to keep pace with changes in the workplace and economic circumstances. In the decision, the Board applies long-established principles to find that two or more entities are joint employers of a single workforce if (1) they are both employers within the meaning of the common law, and (2) they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the Board will—among other factors—consider whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so" (National Labor Relations Board, "Board issues Decision in Browning-Ferris Industries," (27 August 2015), online: <<https://www.nlr.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries>>). This decision is viewed by many American labour relations observers as a potential "game changer," although it is assumed that the subsequent certification and collective bargaining processes as regulated by the NLRB will be subject to appeal. Sometimes American developments have an influence in Canada. Whether Canadian labour relations boards might follow the NLRB lead and reverse decades of jurisprudence in analogous situations is far from a foregone conclusion.

concluded that the City was her employer and that she was a member of the bargaining unit *for purposes of collective bargaining*. The majority of the Supreme Court of Canada acknowledged that the governing labour relations legislation was clearly intended to be applied to bipartite relationships between a unitary employers and employees, but that where the traditional characteristics of the employer are shared by two separate entities, administrative tribunals are within their jurisdiction to use their expertise to “fill the gap” in the legislation and provide an enforceable protective right against the employer entity within reach.¹³³ This decision, in contrast to *Lian v. J. Crew*, vindicates the employee’s rights to collective bargaining in circumstances where the employer’s efforts to segment the personal work relation in fragmented employer structures can defeat that outcome. It thus represents an example of integrated and restorative labour market regulation, knitting together elements of regulation from both the labour standards provisions governing non-unionized employment (with the agency) and unionized employment (with the host employer). It also constitutes a remarkable example of the relative autonomy of Canadian labour law through the Supreme Court of Canada’s willingness to give deference to the expertise of labour boards in creative approaches to labour market regulation.¹³⁴

There are other examples of substantive developments which have emerged from the relatively autonomous sphere of Canadian labour law and market regulation which reflect its relative and restorative dimensions, but which are rooted in general human rights provisions. There have been ferocious political battles on the gender front concerning equal pay for work of equal value which has led to legislated pay equity norms in many Canadian jurisdictions.¹³⁵ This development has been enhanced in the

133. *Pointe-Claire*, *supra* note 132 at para 63. The Court noted that this “gap filling” exercise has limits since “[i]n the final analysis ... it is up to the legislature to remedy those gaps” (*ibid*). Moreover, there are practical issues to be worked out. The Court suggested that the “agency would [have to] adjust her wages to take account of the wage rate determined by the collective agreement...,” but while the Court also suggested that “a grievance could [be] filed” to deal with disagreements over the meaning of the collective agreement (*ibid* at para 60), it said nothing about how any disagreement between the City and the agency should be resolved. For a sophisticated scholarly analysis of how such issues might be resolved, see Jeremias Prassl, *The Concept of the Employer* (Oxford: Oxford University Press, 2015).

134. The value of this case as a precedent has not gone unnoticed by labour boards: see, e.g., *Egg Films*, *supra* note 84, and another Nova Scotia Labour Board decision, *Re RU Safe Inc and UBJCA, Local 83* (2015), LB-0667 (NSLB). Once again, the parallel with the US decision in *BFI*, *supra* note 90, is instructive.

135. Peter Barnacle et al, *Employment Law in Canada*, 4th ed (Markham: LexisNexis, 2005) (loose-leaf release 62, 2016), ch 8 at 334.2. Three “levels” of equal pay legislation interact: employment standards, human rights, and in some jurisdictions “pay equity” legislation. See, e.g., Nova Scotia *Pay Equity Act*, RSNS 1989, c 337; Ontario *Pay Equity Act*, RSO 1990, c P-7; New Brunswick *Pay Equity*

public sector due to the applicability of section 15 of the *Charter* on equality rights.¹³⁶ Litigation on the issue has had variable success,¹³⁷ but its threats have sometimes led to significant settlements.¹³⁸ The other significant human rights prodded development of Canadian labour law in the last two decades has been the recognition of the obligation on employers, and indeed unions, to accommodate the special workplace needs and potential of workers with disabilities.¹³⁹ Human rights commissions and labour arbitrators have spear-headed this development,¹⁴⁰ with the courts, particularly the Supreme Court of Canada, providing encouragement through deference to these administrative tribunal decisions, though with substantial enhancement of principles involved, such as the notion of *bona fide* occupational requirements as limits on accommodation.¹⁴¹ This development has dramatically changed human relations practices among virtually all large employers, and is being felt in medium and small business circles as well. Both the pay equity and disability accommodation situations are clearly consistent with notions of human capability development theory and are another important example of the relative autonomy of Canadian labour law.

The final area of substantive labour market regulation struggling toward integration in Canada is the area of Sen's fifth category of supportive functionings: "protective security, including unemployment benefits, social and old age security." By a post-WW II amendment to the Canadian constitution, unemployment benefits (now called employment insurance,

Act, SNB 2009, c P-5.05; *Manitoba Pay Equity Act*, SM 1985-86, c 21; and the *Canadian Human Rights Act*, RSC 1985, c H-6, s 11, and *Equal Wages Guidelines*, 1986, SOR/86-1082.

136. *Charter*, *supra* note 18, s 15. See Dianne Pothier, "The Significance of Entrenchment of Equality Rights" in Joseph Eliot Magnet et al, eds, *The Canadian Charter of Rights and Freedoms: Reflections on the Charter After Twenty Years* (Markham: LexisNexis, 2003) 65.

137. See, e.g., *NAPE v Newfoundland (Treasury Board)*, 2004 SCC 66, [2004] 3 SCR 381; *Dartmouth (City) v Nova Scotia (Pay Equity Commission)* (1994), 134 NSR (2d) 308, 119 DLR (4th) 182 (NSCA), where the pay equity issue led to what was found to be inappropriate contracting out of a public service to avoid the financial implications of a decision of the Pay Equity Commission.

138. See, e.g., *PSAC v Canada (Treasury Board)*, [2000] 1 FCR 146, 180 DLR (4th) 95 (FC), in which the PSAC successfully applied to the Canadian Human Rights Commission to have the Canadian Treasury Board retroactively compensate its female employees with wage adjustments from June 1998 to March 1985. After failing on review, the government reached an agreement on how to implement the ruling.

139. Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada" in The Law Society of Upper Canada, *Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2007) 189.

140. Michael Lynk, "A Hardy Transplant: The Duty to Accommodate and Disability Rights in Canadian Labour Law" (1998) 49:4 Lab LJ 962.

141. *Ibid* at 964. See, e.g., *British Columbia (Public Service Relations Commission) v British Columbia Government and Service Employees' Union (BCGESU) (Meiorin Grievance)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [Meiorin]; *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161.

or “EI”) are a matter of federal jurisdiction.¹⁴² EI benefits have long been extended to include parental leave (a good thing),¹⁴³ but have been the focus of recent ideologically driven changes on the part of the federal government to reduce availability of benefits, particularly to seasonal workers (a problematic thing).¹⁴⁴ However, the larger problem under the Canadian constitution is that the provinces have jurisdiction over social security benefits in general,¹⁴⁵ and that it is difficult to coordinate protective social security policies across these constitutional divides.¹⁴⁶ This constitutional problem extends to the complex regulatory situation of retirement and old age pensions. Most Canadian workers employed in the private sector have no, or inadequate, retirement pensions to cover their needs when they are unable to work, or no longer wish to do so.¹⁴⁷ In the unionized sector, where pension coverage is high, collective bargaining lately has led to frequent impasses where employers are increasingly pressing for the abandonment of post-war “defined benefits” pension plans which provide employees with predictable levels of benefits, in favour of less costly and less burdensome, self-directed “defined contributions” pension plans, which provide employees with less certain retirement benefits.¹⁴⁸

142. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(2A) [*Constitution Act, 1867*] reprinted in RSC 1985, App II, No 5 as amended by the *Constitution Act, 1940* (UK), 3 & 4 Geo VI, c 36.

143. See, e.g., *Employment Insurance Act*, SC 1996, c 23, s 23.

144. Judy Fudge, “Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers” (2012) 34:1 Comp Lab L & Pol’y J 95; Kerry Preibisch, “Development as Remittances or Development as Freedom? Exploring Canada’s Temporary Migration Programs from a Rights-based Approach” in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 81; see also *Fraser*, *supra* note 60.

145. *Constitution Act, 1867*, *supra* note 142 ss 92(13), 92(16); see also *Re Adoption Act*, [1938] SCR 398 at para 3, [1938] 3 DLR 497.

146. An example of this difficulty is the creation of what would become the Canadian Pension Plan. Initially, in the late 1920s, pensions were administered by the provinces with cost contributions by the federal government. When the federal government decided to establish its own scheme, two issues arose: division of powers (provinces controlled labour relations and therefore employer/employee voluntary contribution schemes) and taxation (provinces could not finance their share through levying indirect sales tax). The proposed solution was “inter-delegation,” wherein the provincial and federal (Dominion) governments delegate their power to the other jurisdiction. In a reference case some years later, this arrangement was found to be unconstitutional. The lasting solution was more extreme and demonstrates the inter-governmental coordination issues: a series of amendments to the *Constitution Act, 1867* in order to give the federal Parliament power to make laws in relation to old age pensions and supplementary benefits under section 94A: Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf supplement 2015), ch 14 at 17-19, ch 33 at 8-11.

147. Expert Commission on Pensions, *A Fine Balance: Safe Pensions, Affordable Rules, Fair Rules* (Toronto: Queen’s Printer for Ontario, 2008) [Expert Commission on Pensions]; Pension Review Panel, *Promises to Keep* (Halifax: Nova Scotia Department of Labour and Workforce Development, 2009) [Pension Review Panel]; Elizabeth Shilton, “Employee Pension Rights and the False Promise of Trust Law” (2011) 34:1 Dal LJ 81

148. Bob Baldwin, “The Economic Impact on Plan Members of the Shift from Defined Benefit to Defined Contribution in Workplace Pension Plans” (2015) 19:1 CLELJ 23.

There is a public Canada Pension Plan (CPP), to which both employees and employers contribute, if operating within the framework of standard contracts of employment.¹⁴⁹ The CPP maxima do not provide benefits which will keep recipients above the poverty line,¹⁵⁰ and a supplemental federal old age security system does not usually fill the gap.¹⁵¹ Provincial and regional pension studies have recommended creation of government sponsored multi-employer pension plans which cover the self-employed and other categories of non-standard “personal work relations.”¹⁵² Others advocate the expansion and extension of the CPP.¹⁵³ However, cooperative federalism broke down under the Harper federal government and it may be too early to tell whether under the Trudeau federal government the proposed coherent solutions to the pension problem are within the current grasp of Canadian politicians at the various levels of government.¹⁵⁴ In this pension morass, the common law courts have sometimes taken tentative steps toward integrated and restorative steps to support worker needs.¹⁵⁵ However, it is clear that the goal of integrated and restorative labour market regulation in the interests of human capability development is far from being attained in the area of protective social security. Canada has

149. *Canada Pension Plan*, RSC 1985, c C-8.

150. The current maximum yearly pension under the CPP is less than CAD 13,000. For cultural and political reasons, the Province of Quebec has asserted its right to establish its own pension plan.

151. *Old Age Security Act*, RSC 1985, c O-9.

152. See, e.g., Expert Commission on Pensions, *supra* 147; Pension Review Panel, *supra* note 147.

153. The labour movement in particular: see Canadian Union of Public Employees, “Submission to the Department of Finance Canada’s Consultation Paper Entitled ‘Voluntary Supplement to the Canada Pension Plan’” (email submitted 10 September 2015), online: <cupe.ca>; Canadian Union of Public Employees, “Top 10 Reasons it’s Time to Expand the Canada Pension Plan” (3 May 2013), online: <cupe.ca>; United Steelworkers of America, “Re: Consultations on a Voluntary Supplement to the Canada Pension Plan” (email submitted 10 September 2015), online: <usw.ca>.

154. An exception to this dismal picture of federal-provincial antagonism in labour market regulation are the long standing relations with respect to workers’ compensation schemes where workers in federally regulated industries obtain workers’ compensation benefits from the provincial system in the province where the worker is hired. Constitutional competency over workers’ compensation is discussed in a trilogy of cases decided by the Supreme Court of Canada, which dealt primarily with occupational health and safety: *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 have substantive workers’ compensation benefits administered by the provinces. This is done through incorporation by reference and federal/provincial administrative inter-delegation. Federally regulated employees may seek recourse under provincial workers’ compensation schemes, though any provision within a provincial compensation statute which regulates occupational health and safety will be limited to provincial undertakings.

155. See *King v 1416088 Ontario Ltd. (Danbury Industrial)*, 2015 ONCA 312, 2015 CLLC 210-045, where the court found that the common law “common employer” doctrine applied to protect the pension rights of an employee of 38 years’ service whose pension entitlements had been denied after a corporate reorganization.

a considerable distance to go before a scheme such as a “social drawing fund” of the European sort, arising out of an understanding of labour law as a part of “social law,” could be implemented, though it is not beyond the realm of contemplation.¹⁵⁶

b. *Procedural autonomy in restorative labour market regulation*

As is implicit in the above discussion of substantive labour market regulation, its procedural aspects are shared among a plethora of institutions drawing their jurisdiction from a variety of sources of law. The general courts of the provinces draw their authority from the constitution and from Judicature Acts which grant to provincial superior courts the inherent powers of English common law courts plus those of courts of English courts of equity.¹⁵⁷ The common law of employment, substantive elements of which were described above, is the default paradigm, applicable to those who choose not to invoke the limited remedies of the administrative system under employment standards legislation¹⁵⁸ or who are not governed by collective bargaining legislation, which ousts virtually all of the common law of employment.¹⁵⁹ In essence the common law of employment is the preserve of affluent employers and employees, mostly managers and professionals, who wish to litigate high-stakes employment disputes and who have the financial wherewithal to do so.¹⁶⁰ The only exception to this is the recent popularity of class action litigation undertaken by groups of non-unionized, ordinary employees who wish to tackle questionable employment practices by major employers, such as the national banks.¹⁶¹ Employment standards tribunals, which deal with minimum standards of employment, have inspectorates and administrative staff who can assist complainants of lesser means, whose complaints may relate to failure to pay minimum wage, vacation entitlements and the like. Recent research indicates that understaffed inspectorates, lack of legal knowledge on the part of many vulnerable employees, and inadequate remedial clout

156. Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (New York: Oxford University Press, 2001).

157. Hogg, *supra* note 146, ch 5. Quebec is an exception given its *Civil Code* and civilian tradition in private law: *Civil Code of Québec*, SQ 1991, c 64; Henri Kélada, *Code civil du Québec: texte annoté* (Montreal: Carswell, 1993).

158. Barnacle et al, *supra* note 135, ch 1 at 1-8; Ball, *supra* note 5, ch 1 at 1-7.

159. *McGavin Toastmaster Ltd v Ainscough*, [1976] 1 SCR 718, [1975] SCJ No 51.

160. *Arthurs Report*, *supra* note 44 at 171-172.

161. See, e.g., three class actions claiming overtime pay by federal employees regulated under the *Canada Labour Code*, RSC 1985, c L-2: *McCraken v Canadian National Railway*, 2012 ONSC 6838, [2012] OJ No 5716; *Fresco v Canadian Imperial Bank of Commerce*, 2012 ONCA 444, 111 OR (3d) 501; leave to appeal to SCC refused, 34987 (20 March 2013); *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443, [2012] OJ No 2885, leave to appeal to SCC refused, 34932 (20 March 2013). It appears that this litigation may be handled by counsel paid, in part, through contingency fee arrangements.

has meant that employment standards enforcement in Canada is highly problematic.¹⁶² It is largely used by former employees trying to wrestle entitlements from employers who may have cheated or wrongfully dismissed them, but does not seem to be effective to protect employees who wish to improve their ongoing employment circumstances.¹⁶³ In other words, most employees are afraid to invoke employment standards unless their employment relationship has become moribund. This is hardly a system characterized by effective support for values of equality, autonomy, mutual concern and respect, and flex/stability, or even economic efficiency and productivity. There is thus a sense in which Canadian labour standards systems are a relatively autonomous subset of the legal system, but a relatively ineffective one from a procedural perspective.

The situation of unionized employees who wish to vindicate their rights under collective agreements is markedly better than those confined by the procedural limitations of the common law or the labour standards system. All labour relations legislation across the country has a requirement that disputes as to the proper administration of collective agreements are to be settled by arbitration, that is, through the adjudication of grievances by an arbitrator chosen jointly by union and employer, or appointed by the minister of labour in the absence of a privately agreed choice.¹⁶⁴ Since unions recognized under Canada's Wagner Act systems get exclusive authority over the conduct of grievance procedures on behalf of their membership, they are bound by a duty of fair representation in relation to all members of the bargaining unit.¹⁶⁵ Should a unionized employee feel that he or she is not getting a fair deal out of the union in the handling of his or her grievance, there is a right to make a duty of fair representation complaint to the labour board, which normally has broad authority to require unions to rectify their failures with remedies that may affect other employees and the employer.¹⁶⁶ This duty of fair representation is an example of the evolving autonomy of Canadian labour law. In the early days of the Wagner Act model in some Canadian jurisdictions, labour

162. *Arthurs Report*, *supra* note 44 at 178-185; Leah Vosko, Eric Tucker, Mark P Thomas & Mary Gellatly, *New Approaches to Enforcement and Compliance with Labour Standards: The Case of Ontario, Canada* (2011) Comparative Research L & Political Economy 31/2011, online: <digitalcommons.osgoode.yorku.ca/clpe/69>.

163. Kyle Buott, Lary Haiven & Judy Haiven, *Labour Standards Reform in Nova Scotia: Reversing the War Against Workers* (Halifax: Canadian Centre for Policy Alternatives, 2012).

164. Adams, *Canadian Labour Law*, *supra* note 6, ch 12 at 13-23.

165. *Ibid*, ch 13. The duty of fair representation involves, among other things, the requirement of union officials to act in good faith, in ways that are neither discriminatory, arbitrary, nor negligent: *ibid* at 21-40.1. See also *Judd v CEP, Local 2000* (2003), 91 CLRBR (2d) 33, [2003] BCLRBD No 63.

166. *Ibid*, ch 13 at 72-74.

boards had no authority to handle duty of fair representation complaints and dissatisfied employees would have to seek a remedy in the general courts. This was regarded as impractical and unsatisfactory to employees, unions and employers alike, and has now generally been replaced by the labour board process, where complainants have the investigatory assistance of labour board staff.¹⁶⁷ Duty of fair representation problems have thus been brought within the relatively autonomous sphere of labour law and labour board regulation, with deference from the courts under the general principles of administrative review.¹⁶⁸ Given the union's ability to stand up to the superior power of most employers on behalf of employees, the system is more effective than the remedial deficiencies of the labour standards system, though it is not without its critics.¹⁶⁹

There are interesting developments concerning the jurisdiction of Canadian labour and employment law tribunals which resonate with issues of both integrated labour market regulation and the autonomy of labour law. Labour market regulation in Canada, not untypically for a country in the common law tradition, evolved through piecemeal statutory responses to perceived problems with the common law. As the welfare state gathered strength, workers compensation legislation, collective bargaining statutes, labour standards legislation, occupational health and safety regulation, social security schemes and human rights protection systems emerged. However, each was traditionally established under a separate statute with separate, independent administrative tribunals to implement each statutory scheme. Under pressures for de-regulation, government down-sizing and purported administrative efficiency in the last two decades, there have been initiatives across Canada to amalgamate tribunals with mandates to govern these aspects of labour market regulation. So-called "super-boards" have been created, which have authority to regulate some or all of the above mentioned subject areas. At first blush, one might have thought this presaged an integrated approach to labour market regulation. Perhaps a tribunal dealing with employment standards and collective bargaining

167. See, e.g., Nova Scotia *Trade Union Act*, *supra* note 59, s 56A; British Columbia *Labour Relations Code*, *supra* note 69, s 12; Ontario *Labour Relations Act*, *ibid*, Schedule A, ss 74 and 96.

168. Adams, *Canadian Labour Law*, *supra* note 6, ch 4. Many Canadian statutes establishing labour boards contain "privative clauses" that claim to severely limit judicial review of labour board decisions. The current approach finds its core in *Dunsmuir*, *supra* note 13, in which the Supreme Court of Canada reduced the judicial standards of review to correctness and reasonableness. It also held—with particular reference to labour relations—that administrative tribunals ought to be accorded appropriate deference in relation to their expertise.

169. Bernard Adell, "Collective Agreements and Individual Rights: A Note on the Duty of Fair Representation" (1986) 11:2 *Queen's LJ* 251. See also the work of Clyde Summers, e.g., "Unions without Majority: A Black Hole?" (1990) 66:3 *Chicago-Kent L Rev* 531.

might be expected to adopt similar definitions of “employment,” establish parallel legislative entitlements for casual employees, or create compatible approaches to tactical corporate fragmentation or disguised employment in relation to each area which was formerly administered by separate tribunals. However, this has not necessarily been the case. Board amalgamation seems to have been almost entirely the product of the political desire to reduce government budgets or create perceived administrative efficiencies rather than to engage in integrated labour market regulation. Amalgamated boards have often simply been given the mandate to administer the previous statutes and apply previous policies, rather than been encouraged to take an integrated approach to labour market regulation. However, as understanding of the need to view problems of personal work relations in context becomes more widespread, and as the personnel staffing these super-boards gain more experience in dealing with analogous problems across parallel statutory schemes, integrated approaches to restorative labour market regulation may emerge from the ground up.¹⁷⁰ Time will tell.

One of the most significant procedural aspects of Canadian labour law, in so far as its autonomy is concerned, is the particular role of labour arbitrators in labour markets dominated by collective bargaining. There are two types of labour arbitration in Canada. The first is interest arbitration where neutral third parties are asked to resolve issues in collective bargaining and to “settle” a collective agreement where the parties have reached an impasse in bargaining.¹⁷¹ This differs from conciliation or mediation by public or privately appointed neutrals who may assist the parties themselves to “get to yes.”¹⁷² By contrast, interest arbitrators will hear argument from the parties and then determine the substantive content and wording of provisions of the collective agreement on issues where the parties were unable to agree. Interest arbitrators in this sense actually write critically contested parts of collective agreements in a process of adversarial adjudication. There will be further discussion below on interest arbitration in connection with the new constitutionally recognized right to strike. The second form of labour arbitration in Canada is rights arbitration, more commonly known as grievance arbitration, which arises

170. 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).

171. *Adams*, supra note 6, ch 11 at 72-72.2.

172. See Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, revised ed (New York: Penguin, 2011).

in relation to the administration of existing collective agreements.¹⁷³ Where one of the parties, usually the union rather than the employer, alleges that there has been a violation of a provision of the collective agreement, a grievance will be entered, and labour arbitrators rather than courts will have jurisdiction to adjudicate the matter.¹⁷⁴ This second form of arbitration will be the immediate focus of the discussion here, although both interest and rights arbitration may correctly be considered important aspects of Canadian labour law which contribute to its relative autonomy from other aspects of the legal system.

Grievance arbitration, as mentioned above, is a mandatory aspect of the administration of collective agreements in the unionized sectors of every jurisdiction in Canada. Every collective agreement must, by law, contain a dispute resolution clause negotiated by the parties, failing which a statutory arbitration clause will be deemed to be a part of the collective agreement.¹⁷⁵ Labour arbitration, when introduced in the post-WW II era under Canadian Wagner Act models, was intended to be a quick, cost effective and expert means to resolve disputes in the workplace over the interpretation and application of collective agreements.¹⁷⁶ The decisions of arbitrators, while formally binding only upon the parties, began to be seen as helpful examples for the resolution of analogous cases under the collective agreements of other parties. Parties and their counsel began to collect arbitration awards, as the decisions of arbitrators are known, and use them as precedents.¹⁷⁷ Legal publishing houses saw a commercial opportunity and began to market labour arbitration reports series.¹⁷⁸ Legal academics, many of whom acted as labour arbitrators, organized and analyzed these arbitration cases in textbooks on labour arbitration.¹⁷⁹ This

173. There are at least four well-respected Canadian textbooks on this topic: Donald J Brown & David M Beatty, *Canadian Labour Arbitration*, 4th ed (Aurora: Canada Law Book, 2006); Ronald M Snyder, *Collective Agreement Arbitration in Canada*, 5th ed (Markham: LexisNexis, 2013); Morton Mitchnick & Brian Etherington, *Labour Arbitration in Canada*, 2nd ed (Toronto: Lancaster House, 2006); and in the French language, see Fernand Morin et al, *Droit de l'arbitrage de grief*, 6th ed (Montreal: Yvon Blais, 2012).

174. Union grievances tend to allege employer failure to extend collective agreement rights to individual employees, where employer grievances tend to be about alleged wrongful collective union activities, such as wild-cat strikes. For the latter, see, e.g., the decision of then-arbitrator Bora Laskin in *Re Polymer Corp and Oil, Chemical & Atomic Workers* (1959), 10 LAC 51.

175. *Adams*, *supra* note 6, ch 12 at 13. See, e.g., *Nova Scotia Trade Union Act*, RSNS 1989, c 475, s 42.

176. *Adams*, *supra* note 6, ch 1 at 11-16.

177. Donald J Brown & David M Beatty, *Canadian Labour Arbitration*, 4th ed (Aurora: Canada Law Book, 2006) (loose-leaf release no 49, 2016), ch 1 at 12-18; Carter et al, *supra* note 9 at 74.

178. See, e.g., *Labour Arbitration Cases* (Canada Law Book), which were first published in Toronto in 1948 by the Industrial Relations Institute.

179. *Supra* note 173.

body of jurisprudence began, in some quarters, to be called the “common law of the workplace.”¹⁸⁰ Arbitrators, in interpreting collective agreements, would not only refer to this non-binding but increasingly persuasive arbitral case law in their reasons for decisions, but began to assert that the parties in collective bargaining must be taken to be aware of well-settled principles of labour arbitration when negotiating their collective agreements.¹⁸¹ As mentioned above, Canadian administrative law treated labour arbitrators as expert decisional tribunals worthy of deference by courts. The courts defer to arbitrators on a standard of reasonableness in their interpretations of collective agreements and labour related statutes, though the courts assert willingness to intervene to “correct” arbitrators who go astray on general propositions of law or non-labour statutes.¹⁸² This of course occurs in a context where labour arbitrators have been given jurisdiction to adjudicate workplace disputes which may require the interpretation and application of the constitution, human rights legislation, and even the common law, in order to achieve what the arbitrator considers to be a just result.¹⁸³ The upshot of all this has been a procedural “legalization and professionalization” of arbitration. Labour arbitration has become an autonomous sphere of specialized dispute resolution, but it has also become more and more dominated by lawyers presenting the cases for unions and employers, rather than lay union representatives or managers and human relations consultants. It is more and more costly, time-consuming and formalistic as a result.¹⁸⁴ Arbitrators are now writing decisions with an eye as much to the possibility of judicial review as to the practical needs of the parties—in recognition that their autonomy is only relative and not complete. Respected observers complain that labour arbitration is no longer fulfilling its original role of giving quick, cost-effective justice in the unionized workplace.¹⁸⁵

180. See generally the work of Harry Arthurs.

181. Brown & Beatty, *supra* note 177, ch 1 at 16. For an overview of these principles, see Snyder, *supra* note 170 at 21-55.

182. See *Dunsmuir*, *supra* note 13, and see also the discussion in note 165.

183. Brown & Beatty, *supra* note 177, ch 1 at 18-32. See also *Weber*, *supra* note 14; *Parry Sound*, *supra* note 14.

184. 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), online: <irc.queensu.ca>; Bruce P Archibald, “Progress in Models of Justice: From Adjudication/ Arbitration through Mediation to Restorative Conferencing (and Back)” in Ronald Murphy & Patrick Molinari, eds, *Doing Justice: Dispute Resolution in the Courts and Beyond* (Montreal: Canadian Institute for the Administration of Justice, 2007) 129 [Archibald, “Progress”].

185. Winkler, *supra* note 184; 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>.

Necessity being the mother of invention, the parties to arbitration and their counsel, and latterly governments, have gradually fashioned solutions to issues of the slow and expensive nature of formal arbitration. Various types of “expedited arbitration” have been tried.¹⁸⁶ These have involved rules about hearings held promptly after the date of filing the grievance, presentation of evidence through agreed-upon statements of fact, requirements for arbitrators to issue awards within certain times from the date of hearing, and agreements that such “quick fix” awards will not be used as precedents. Such efforts at expedited arbitration appear generally to have failed for a number of reasons, even when enshrined in statute.¹⁸⁷ However, there seems to be agreement across Canada that mediation-arbitration, or “med-arb” as it is known, works to reduce time and expense in the resolution of grievances for a wide range of cases.¹⁸⁸ The practice of med-arb can be seen as a somewhat formalized extension of the common and traditional efforts of arbitrators to assist the parties to achieve an informal settlement of their grievance dispute rather than to engage in a full hearing. In med-arb, the person appointed as an arbitrator will first make efforts to mediate a settlement through standard approaches, such as caucusing with the parties privately, trying to identify common interests, and doing shuttle diplomacy (and perhaps some arm-twisting) with respect to possible solutions. However, the parties will have agreed at the outset that, in the event they are unable to achieve a mediated settlement, the arbitrator will resume his role as adjudicator and decide the matter, giving reasons for his or her decision. There are risks that in the mediation phase the arbitrator may have said or done things which give rise to a perception of bias.¹⁸⁹ However, skilled practitioners of the art are usually able to maintain the confidence of the parties and avoid such pitfalls. Legislators in many Canadian jurisdictions have been persuaded of the value of med-arb and have given it statutory recognition.¹⁹⁰ This

186. Shannon Rae Webb, “Expedited Arbitration: Is it Expeditious? Evidence from Canada” (PhD Thesis, Saint Mary’s University, 2015) [unpublished].

187. Results vary from province to province with the differences in their respective legislative schemes and professional practices. Ontario seems to have been more successful than Nova Scotia: see Webb, *ibid.*

188. See David C Elliott, “Med/Arb: Fraught with Danger or Ripe with Opportunity?” (1995) 34:1 *Alta L Rev* 163; Archibald, “Progress,” *supra* note 184.

189. To some extent, this may be seen as a variant of what is becoming known in some administrative law circles as “active adjudication”: see Michelle Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias” (2015) 38:1 *Dal LJ* 119; Michelle Flaherty, “Best Practices in Active Adjudication” (2015) 28:3 *Can J Admin L & Prac* 291; Lorne Sossin, “Administrative Justice & Adjudicative Ethics in Canada” (2012) 25:2 *Can J Admin L & Prac* 131.

190. See, e.g., Nova Scotia *Trade Union Act*, *supra* note 59, s 43C; British Columbia *Labour Relations Code*, *supra* note 69, ss 74-78; Ontario *Labour Relations Act*, *ibid.*, s 50.

protects med-arbiters against specious allegations of bias merely for having agreed to and conducted such a proceeding, and clothes them with the authority to truncate the evidentiary phase by using information acquired in the process of mediation and by making orders for providing evidence on matters which require further clarification. This innovative practice would appear to be rooted in restorative values which reflect the relational aspects of dispute resolution under collective agreements.¹⁹¹ Med-arb respects the autonomy of the parties in collective labour relations and the cost-effectiveness, efficiency and finality of the dispute resolution processes under collective agreements. To the extent that the system succeeds in keeping labour dispute resolution “in-house” and away from the courts in judicial review proceedings, med-arb enhances the autonomy of Canadian labour law.

Another procedural labour relations innovation receiving recognition in some Canadian jurisdictions is restorative workplace conferencing.¹⁹² This technique, rooted in restorative values and approaches to dispute resolution, goes beyond mediation to identify relational issues which may affect more than individual grievors or the union *per se*. It can be particularly valuable in resolving matters which extend beyond individual bargaining units and which may involve workplace cultural dysfunctions resulting in bullying, sexual harassment, abuse by authoritarian superiors and the like. This approach is also being promoted by certain human rights commissions, and has had application by them in disputes arising out of workplaces.¹⁹³ This innovation, while in its infancy, may benefit from the relatively autonomous spaces created by the heterogeneous procedural patchwork which is Canadian labour law.

The final procedural issue worth considering from an integrated and restorative labour market management perspective is the procedural problem of enhancing the enforcement potential of labour standards regimes in the non-unionized sectors of the economy. There are individual solutions possible, such as presumptive tenure for employees who have been unfairly penalized by their employer, particularly for having asserted their rights under labour standards legislation. However, from the twin observations that in workplaces where there are unions there are fewer

191. George Adams, *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Publishing, 2003); see also John Braithwaite, “Emancipation and Hope” in Valerie Braithwaite, ed, *Hope, Power and Governance* (2004) 592 *Annals of the American Academy of Political and Social Science* (Special Issue).

192. Archibald, “Progress,” *supra* note 184.

193. See, e.g., the Nova Scotia Human Rights Commission’s dispute resolution process, “Restorative Approaches,” online: Nova Scotia Human Rights Commission <<http://humanrights.novascotia.ca>>.

occupational health and safety violations, and that union density across the labour market is in decline, one may draw some inferences concerning enforcement policy improvements. Cindy Estlund has convincingly argued that occupational health and safety regulation in North America, including Canada, provides a better model for labour standards enforcement.¹⁹⁴ At the core of occupational health and safety regulation is not only a set of health and safety standards with inspectors and quasi-criminal enforcement legislation, but also a system of bi-partite occupational health and safety committees. Occupational health and safety committees, composed of equal numbers of employee and management nominees, are now mandatory for employing establishments of a certain size. These committees must meet regularly and are entitled to raise health and safety related issues affecting the workplace, the need for policies and improved practices, etc. These mechanisms have had some success in improving workplace health and safety practices, indicating that collective action or formal strength in numbers and democratic practices in the workplace can improve health and safety. Why not extend jurisdiction of workplace committees to labour standards issues other than health and safety?¹⁹⁵ The lessons of “total quality management” and “quality circles” from recent human-relations management theory and practice reinforce the value of such an approach.¹⁹⁶ Restorative justice theory leads in the same direction. Such reforms would represent integrated and restorative labour market management consistent with human capability development theory as well. Their implementation would have to be informed by rigorous restorative justice or relational theory, but here are indications that such ideas may be gaining a foothold in the corners of some management schools.¹⁹⁷ However, such options can emerge on an experimental basis from the spaces created in the kind of relative autonomy which characterizes Canadian labour law.

194. Estlund, *Regoverning*, *supra* note 115.

195. See also David J Doorey “A Model of Responsive Workplace Law” (2012) 50:1 Osgoode Hall LJ 47.

196. See Stone, *Widgets*, *supra* note 90.

197. Tyler G Okimoto & Michael Wenzel, “Bridging Diverging Perspectives and Repairing Damaged Relationship in the Aftermath of Workplace Transgressions” (2014) 24:3 Business Ethics Q 443; Ryan Fehr & Michele J Gelfand, “The Forgiving Organization: A Multi-Level Model of Forgiveness at Work” (2012) 37:4 Academy Management Rev 664; Susan Hanley Duncan, “Workplace Bullying and the Role Restorative Practices Can Play in Preventing and Addressing the Problem” (2011) 32:10 Indus LJ 2331; Jerry Goodstein & Karl Aquino, “And Restorative Justice For All: Redemption, Forgiveness and Reintegration in Organizations” (2010) 31 J Organizational Behavior 624; Jerry Goodstein & Kenneth Butterfield “Extending the Horizon of Business Ethics: Restorative Justice and the Aftermath of Unethical Behavior” (2010) 20:3 Business Ethics Q 453; Deborah L Kidder, “Restorative Justice: Not ‘Rights’, but the Right Way to Heal Relationships at Work” (2007) 18:1 Intl J Confl Mgmt 4.

III. *The Canadian constitution, fundamental rights, legal autonomies
and labour market regulation*

The notion of autonomy is fraught with ambiguity, and this is particularly acute when looking at labour market regulation through the somewhat distorting lens of the Canadian Constitution. By contrast, the question of the autonomy of labour law has most recently arisen in the context of the current European tensions caused by colliding jurisprudence from the Court of Justice of the European Union (CJEU) on economic rights versus that from the European Court of Human Rights (ECtHR) dealing with social and labour rights.¹⁹⁸ That stark systemic bifurcation is not possible under Canadian constitutional arrangements. It is necessary first to examine the federal/provincial division of legislative authority under the Canadian constitution, which impacts both economic and social interests and/or rights, and then to see how recent decisions from the Supreme Court of Canada, particularly under the *Charter*, are playing out in relation to labour market regulation and its relatively autonomous character.

198. See Mark Freedland & Jeremias Prassl, *supra* note 2 at 3-6. In *Viking*, a ferry operator wanted to reflag its ship in Estonia so that it could essentially avoid an onerous collective agreement covering its crew. A circular was issued in London by the Transportation Workers' Federation in support of the Finnish Seamen's Union (the latter being affected by the reflagging), in which it asked all affiliated unions to not enter negotiations with the operator. Once Estonia joined the European Union, the operator brought an action in the English courts arguing that the circular violated its freedom of movement rights under EU law. The CJEU was asked to rule on a series of questions. The court found on the facts that, while there was a fundamental freedom of establishment under EU law, it had been used disproportionately to limit the operator's free movement rights: *ITWF and FSU v Viking Line ABP*, C-438/05, [2007] ECR I-10779, [2008] IRLR 143. In *Laval*, industrial actions were taken to influence a Latvian construction company into enter collective agreements with Swedish unions to cover its Latvian employees who were working in Sweden. Eventually, the company was forced to stop all work in Sweden. Similar to *Viking* (released a week earlier), the CJEU found that while there was a fundamental right to strike, in this instance it had been employed disproportionately and restricted the construction company's (EU) free movement rights: *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, C-34/105, [2007] ECRI-11767, [2008] IRLR 160. Meanwhile the European Court of Human Rights (ECtHR) has been interpreting the nature of the right to strike under Article 11 of the European Convention on Human Rights (ECHR). In *Demir and Baykara v Turkey* (2009), 48 EHRR 54, the ECtHR found that a government ban on collective bargaining violated the right to freedom of association in Article 11 of the ECHR. The next year in *Enerji Yeepi-Yol Sen v Turkey App* no 68959101 (ECtHR, 21 April 2009) the ECtHR held that the Turkish government's prohibition on industrial action by public sector trade unions was found as well to breach Article 11 which was deemed to include protections on the right to strike. In other words, the ECtHR was taking an expansive view of collective labour rights as fundamental ECHR human rights, in the face of the CJEU's apparent view that such human rights are trumped by economic rights of Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU). Thus, a stalemate between key European judicial institutions was established on notions of labour rights versus economic efficiency. See also Bogg et al, *supra* note 1.

1. *Federal and provincial regulation of economic and labour markets: Fragmented autonomies*

Just as the words “labour and employment law” or the European notion of “social law” do not appear in the *Constitution Act, 1867*, the words “economic law” are also absent. The Fathers of Confederation in Canada seem confidently to have assumed, perhaps unsurprisingly, that the conditions of capitalism under the British Empire in the late Nineteenth Century were a natural and inevitable part of the universe, Karl Marx notwithstanding, and *pace* Charles Darwin.¹⁹⁹ The founding fathers then went about the distribution of powers as between the federal parliament and the provincial legislatures in what, from a comparative perspective, might seem to be a very literal and pragmatic fashion.²⁰⁰ Moreover, as stated above, the Judicial Committee of the Privy Council, which from 1867 to 1949 was the highest court of appeal for Canada, is generally agreed to have “decentralized” Canadian confederation in ways contrary to the expectations of the framers, who are often said to have had the counter-example of the decentralized American constitution and the American Civil War on their minds, when drafting what they thought were strong central powers for what was then the “Dominion of Canada.”²⁰¹ Thus, while under section 91(2) of the *Constitution Act, 1867* the federal Parliament was given legislative authority over “the regulation of trade and commerce,” that phrase has been restrictively interpreted by comparison to the analogous phrase in the American constitution, by virtue of an expansive interpretation of provincial legislative authority over “property and civil rights” under section 92(13). There is also a prohibition on the erection of provincial trade barriers, so that Canada constitutes a customs union.²⁰² The shift of economic and social authority to the provinces began in 1881 with litigation in relation to the insurance industry,²⁰³ and since that time “it has been accepted that, in general, intra-provincial trade and commerce is a matter within provincial power... and the federal trade and commerce power is confined to (1) interprovincial or international trade

199. Friedrich Hayek would perhaps have been comfortable at the Confederation table: see his *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge and Kegan Paul, 1973).

200. Dennis Davis, Alan Richter & Cheryl Saunders, eds, *An Inquiry into the Existence of Global Values through the Lens of Comparative Constitutional Law* (Oxford: Hart Publishing, 2015).

201. John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002); Alexander Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963).

202. *Constitution Act, 1867*, *supra* note 142, s 121. This was thought to be of limited application until a recent case over inter-provincial beer purchases: see *R v Comeau*, 2016 NBPC 3. Leave to appeal to the Supreme Court of Canada has been granted, 37398 (4 May 2017).

203. *Citizens Insurance Co v Parsons* (1881), 7 AC 96 (PC), *aff'd* (1880) 4 SCR 215.

and commerce, and (2) “general trade and commerce.”²⁰⁴ While federal Parliament has specific authority over such structural economic matters as navigation and shipping (now including aeronautics), currency (“money” and “legal tender”), banking, weights and measures, bills of exchange and promissory notes, interest, bankruptcy, patents, copyright, and immigration (naturalization and aliens), and has the residual power to legislate for the “peace, order and good government of Canada,”²⁰⁵ the expansive judicial interpretation of provincial legislative authority over property and civil rights has rendered Canada one of the world’s most decentralized federations.²⁰⁶ One of the most recent examples of this was the Supreme Court’s rejection in 2011 of an attempt by the federal government, after years of public and private studies to say nothing of intense pressure from economic interests, to create a federal securities regulation system which would have given Canada a national capital market rather than the current fragmented ones under provincial jurisdiction.²⁰⁷ The Court refused to eviscerate provincial power over property and civil rights and declared the legislation *ultra vires* the federal Parliament, although it did confirm the existence of some limited federal authority in this context and suggested that a national securities regulation system could be established by agreement between the federal and provincial legislatures in an exercise of cooperative federalism.²⁰⁸

Canadian observers are left with the common assumption, and indeed the *common law’s* assumption, that “free enterprise” is the natural soil out of which economic activity grows: private ownership of property, freedom of contract, and a civil or private law which protects both, are part of the air we breathe.²⁰⁹ Of course, social democracy of the post-WWII era challenged these assumptions by creating a counterbalancing social

204. Hogg, *supra* note 146, ch 20 at 2.

205. The latter category being used to justify the invocation of federal legislative authority over such subjects as competition or “anti-monopoly” law, sale of drugs, and environmental protection.

206. Davis, *supra* note 200.

207. *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837.

208. Currently this option is being pursued by some Canadian governments, in the face of staunch opposition from Quebec and Alberta: The Cooperative Capital Markets Regulatory System, *Capital Markets Stability Act—Draft for Consultation* (January 2016), online: <ccmr-ocrmc.ca>; The Cooperative Capital Markets Regulatory System, *Memorandum of Agreement Regarding The Cooperative Capital Markets Regulatory System* (26 August 2014), online: <ccmr-ocrmc.ca>; Jon C Truswell et al, “Alberta Confirms it Will Not Join Cooperative Capital Markets Regulatory System” (31 March 2016), online: <bennettjones.com>. Quebec refuses to participate as well.

209. The notion that free enterprise is “unregulated” rather than regulated by the common law for its promotion is very much contested terrain: see Simon Deakin, “Concepts of the Market in Labour Law” in Ann Numhauser-Henning & Mia Rönmar, *Normative Patterns and Legal Developments in the Social Dimension of the EU* (Oxford: Hart Publishing, 2013) 141.

dimension to labour market regulation.²¹⁰ Both federal and provincial governments contributed to the rise of the welfare state in Canada, and such participation occurred through legislatures governed at one time or other by political parties of all stripes.²¹¹ Latterly, of course, both Liberal and Conservative governments at both federal and provincial levels have championed the retrenchment of the welfare state through reductions in government services and privatization, and even the rhetoric of the NDP is of the “third way” sort,²¹² which does not challenge the centrality of free enterprise and the market economy, and sensitivity to “taxpayers” (as opposed to “citizens”?).²¹³ These phenomena are given greater impetus through globalization of trade and Canada’s accession to the North American Free Trade Agreement.²¹⁴ The first point flowing

210. See Allan Moscovitch & Jim Albert, eds, *The “Benevolent” State: the Growth of Welfare in Canada* (Toronto: Garamond Press, 1987) and Thomas J Courchene, *Social Canada in the Millennium: Reform Imperatives and Restructuring Principles* (Toronto: CD Howe Institute, 1994).

211. The Conservative Party or “Tories” were the party of Sir John A Macdonald, Canada’s founding Prime Minister, and predominated in the latter part of the nineteenth century, while in the twentieth century the Liberals, of Whiggish origins, are seen by many as the predominant political force. Both of these political formations were in effect centrist “brokerage” parties, and they often alternated in power at both federal and provincial levels. The Great Depression of the 1930s led to the formation of the rightist Social Credit Party (which governed in Alberta and British Columbia) and the social democratic Cooperative Commonwealth Federation or “CCF” (which governed in Saskatchewan): Seymour M Lipset, *Agrarian Socialism: The Cooperative Commonwealth Federation in Saskatchewan* (Berkeley: University of California Press, 1971). Social Credit has disappeared, while the CCF transformed itself into the New Democratic Party (NDP), a labour-based social democratic formation, in 1961. The NDP has formed governments in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia, but never federally, though it became the Official Opposition in the federal Parliament in the last term of the Harper Conservative Government. The Conservative Party is an amalgam of traditional conservatives and neo-liberal, western Reform Party members. It was aggressively dismantling the welfare state at the federal level until the recent election of Justin Trudeau’s Liberals, who seem to be brandishing a version of neo-Keynsianism. Neoliberalism has dominated certain provincial conservative and liberal parties at various times, but usually not the NDP. In Quebec, of course, these left-right tensions are played out in the context of linguistic and cultural dimensions which led to the rise of the separatist Parti Québécois, its federal counterpart, the Bloc Québécois, and its provincial rightist splinter group, Coalition Avenir Québec.

212. See, e.g., Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (Cambridge: Polity Press, 1998). Giddens, of course, was one of the key architects of Tony Blair’s “third way” policies as adopted by the British Labour Government.

213. Many observers attribute the resurgence of the Liberals under Justin Trudeau to the common perception that the NDP under Tom Mulcair, advocating a balanced budget, was to the right of the neo-Keynesian Liberals, a position at least one observer deemed a “surprise stance”: see, e.g., “Tom Mulcair says NDP’s Balanced Budget Commitment was His Idea” *CBC News* (11 October 2015), online: <cbc.ca>.

214. See AFL-CIO, *NAFTA at 20* (2014), online: <www.aflcio.org>; Canadian Centre for Policy Alternatives, *Lessons From NAFTA: The High Cost of ‘Free Trade’* (2013), online: <www.policyalternatives.ca>. Of course, the Trans-Pacific Partnership (TPP) and the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) are now in the cards, and the Liberals look like conservative supporters of free trade, while the NDP are more firm opponents. The Liberals, for example, signed the TPP agreement in Auckland, New Zealand on 4 February 2016, and it is now waiting for parliamentary approval. The working text can be found online: <http://www.

from these observations is to highlight the fact that in Canada the tensions between regulation of a free enterprise market economy on the one hand, and protective or capability liberating regulation of the social side of the ledger on the other, are played out at both the federal and provincial levels. Neither level has predominant control, other than arguably the federal government in times of war or emergency.²¹⁵ Moreover, the game has a shifting cast of characters in terms of political and ideological leadership, which has sometimes led to a rather balanced cooperative federalism, or at other times, such as under the Harper Conservatives, to federal-provincial stalemate.²¹⁶ The second point is to drive home that Canada's constitutional arrangements are built on liberal notions of a free enterprise economy, but have allowed for varied regulation of the balance between economic and social interests, in structures which allow for a broad degree of autonomous action from both public and private actors and institutions. This was the context for the introduction of the *Charter* in 1982, which

international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/index.aspx?lang=eng>. Similarly, the government announced the completion of its legal review of the CETA on 29 February 2016, which is now under translation, and will then be reviewed for implementation into existing regulatory frameworks: see the text of CETA online: <international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng>. Commentators outside of the labour movement have been equally critical of the TPP's potential impact on human rights, the limitations of its potential gains, and its impact on the ability of governments to effectively legislate migration and labour: see e.g. United Nations Human Rights Office of the High Commissioner, "UN expert urges Pacific Rim countries not to sign the TPP without committing to human rights and development" (2 February 2016), online: <www.ohchr.org>; Dan Ciuriak, Ali Dadkhah & Jingliang Xiao, "Better In than Out? Canada and the Trans-Pacific Partnership" (CD Howe Institute, 21 April 2016), online: <cdhowe.org>; and Hadrian Mertins-Kirkwood, "Migrant Workers and the Trans-Pacific Partnership: A Regulatory Impact Analysis of the TPP's Temporary Entry Provisions" (Canadian Centre for Policy Alternatives, April 2016), online: <policyalternatives.ca/publications/reports>. All of this is now water under the bridge since President Donald Trump's successful efforts to torpedo the TPP, though the issues will arise in renegotiating NAFTA.

215. The federal *War Measures Act* (RSC 1985, c W-2, as repealed by the *Emergencies Act*, RSC 1985, c 22 (4th Supp), s 80) was invoked not only during WWII to regulate the war effort (including the *Wartime Labour Relations Regulations*, PC 1003, (1944) 44:2 Labour Gaz 135 which introduced the Wagner Act model of labour relations to Canada), but also during the "Quebec Crisis" of the 1970s, by the Liberal government of Prime Minister Pierre Trudeau, to respond to separatist terrorism (William Tetley, *October Crisis, 1970: An Insider's View* (Montreal & Kingston: McGill-Queen's University Press, 2007)). The *Reference re Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452, however, did recognize emergency conditions arising from other than war, and demonstrated a deferential approach by Parliament to what was deemed an economic emergency in the early 1980s.

216. But it would appear the new Trudeau Liberals are making serious efforts to restore this cooperative federalism, including in the area of labour regulations, see, e.g., Prime Minister Trudeau's mandate letter to the Minister of Employment, Workforce Development and Labour, which states that the overarching goal of the latter should include "working with provinces, territories, municipalities, the post-secondary education system, employers and labour to strengthen [Canadian] training systems to build the human capital that Canadians and employers need" in a "collaborative way": Office of the Prime Minister, "Minister of Employment, Workforce Development and Labour Mandate Letter" (Ottawa: 13 November 2015), online: <<http://pm.gc.ca>>.

subtly, and sometimes not so subtly, changed the constitutional parameters of regulatory autonomy among courts and legislatures in ways which have recently taken some dramatic turns in relation to institutions of labour market regulation.

2. *Constitutional meta-rights and the framework for relatively autonomous labour law*

The *Constitution Act, 1867* declared in its Preamble that the Dominion of Canada is united “under the Crown of the United Kingdom” and with “a Constitution similar in Principle to that of the United Kingdom.”²¹⁷ For our purposes, this meant a system of responsible parliamentary government with the cabinet answering to the legislature, and with federal and provincial legislative sovereignty within the constitutional division of powers,²¹⁸ with no overarching “bill of rights.”²¹⁹ Under the *Constitution Act, 1982*,²²⁰ a constitutionally entrenched *Charter of Rights and Freedoms*, binding on all levels of government was adopted.²²¹ The *Charter* declares the existence of fundamental freedoms (including conscience and religion; thought, belief, opinion and expression; freedom of assembly; and freedom of association);²²² democratic rights;²²³ mobility rights (including the rights to reside in or gain a livelihood in any province, and economic affirmative action programs);²²⁴ legal rights (including rights to life, liberty and security of the person and not to be deprived thereof except in accordance with principles of fundamental justice);²²⁵ equality rights;²²⁶ language rights;²²⁷ and French and English minority educational rights.²²⁸ The *Constitution Act, 1982* also affirms the rights of aboriginal peoples.²²⁹ In addition, it introduced governmental “commitments” to the promotion of equal opportunities for economic well-being and development, and to

217. *Constitution Act, 1867*, *supra* note 142.

218. There is in principle a federal power of disallowance which has long since fallen into desuetude.

219. *Canadian Bill of Rights*, SC 1960, c 44. In 1960, the federal Parliament passed this “Diefenbaker Bill of Rights,” which was applicable within the federal legislative sphere only, and amounted to an enhanced interpretation act.

220. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Constitution Act, 1982*].

221. *Charter*, *supra* note 18. This, of course, was accomplished by the “Imperial Parliament” in Westminster, at the request of the Government of Canada—an action which was the subject of constitutional challenge from the government of the Province of Quebec.

222. *Ibid*, s 2.

223. *Ibid*, ss 3-5.

224. *Ibid*, s 6.

225. *Ibid*, ss 7-14.

226. *Ibid*, s 15.

227. *Ibid*, ss 16-22.

228. *Ibid*, s 23.

229. *Constitution Act, 1982*, *supra* note 220, ss 35-35.1.

reasonably comparable levels of essential public services.²³⁰ An interesting omission from this list, from the perspective of economic regulation, is the absence of a constitutional recognition of property rights or right to engage in commerce *per se*.²³¹ The *Charter* mobility right to “gain a livelihood” has been held to allow a person to move to another province for the purpose of the delivery of services,²³² but subject to general provincial regulations on how a business or occupation is to be carried out or licensed. This includes labour standards regulation and systems of collective bargaining. The mobility rights provision would appear not to disrupt previous holdings that non-residents of a province can be restricted in their rights to hold real estate.²³³ Moreover, the mobility rights provisions do not apply to corporations, which in principle could be prevented by a province from carrying on business there. It would appear that the movement of capital may be protected by the right to gain a living in another province if it is integral to an individual’s establishment there,²³⁴ but as mentioned above, there is no federal power to regulate securities issuance, and provincial legislation can create significant barriers to the mobility of capital in Canada. In addition, the legal right to security of the person in *Charter* has been held *not* to impose on governments in Canada a positive right to provide welfare benefits to those without other sources of income.²³⁵ The upshot, in general, is that the *Charter* has not had a significant direct impact on the regulation of economic rights or the regulation of economic markets in Canada.²³⁶

An interesting exception to the conclusion that the *Charter* does not have a significant impact on “personal work relations” arose with respect to the sex trade. In *Bedford v. Canada*,²³⁷ the Supreme Court of Canada held that the *Criminal Code* provisions prohibiting the keeping of a common bawdy house, living on the avails of prostitution and communicating in public for the purposes of prostitution imposed unacceptable risks on those in the sex trade which constituted a breach of their *Charter* right to

230. *Ibid.*, s 36.

231. Property rights were included, for example, in the aforementioned *Canadian Bill of Rights*, *supra* note 219 s 1(a), which states the right of every individual to “life, liberty, security of the person, and enjoyment of property.”

232. *Black v Law Society of Alberta*, [1989] 1 SCR 591, 58 DLR (4th) 317.

233. *Morgan v Prince Edward Island (AG)*, [1976] 2 SCR 349, 55 DLR (3d) 527.

234. Hogg, *supra* note 146, ch 46 at 14.

235. *Gosselin v Quebec*, 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*], dealing with rights under a “workfare” programme.

236. Indeed corporations, for example, have been held not to enjoy the same *Charter* protections as natural persons: *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927, 58 DLR (4th) 557.

237. *Bedford v Canada (AG)*, 2013 SCC 72, [2013] 3 SCR 1101.

security of the person. At the time, selling sexual services was not illegal.²³⁸ The impugned provisions of the *Criminal Code* were declared to be of no force or effect since they breached the section 7 rights of prostitutes to security of the person in a manner not consistent with principles of fundamental justice, and which could not be saved by section 1 of the *Charter*. This case illustrates an important general methodological aspect of the Canadian *Charter*, namely the nature of the general limitation clause found in section 1. That provision states that the rights and freedoms of the *Charter* are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The Supreme Court of Canada in the early days of the *Charter* held that this section was to be interpreted and applied as involving a two-step process:²³⁹ (1) Is there a “pressing and substantial legislative objective” or “purpose” in a governmental action prescribed by law which warrants overriding a *Charter* right or freedom?; and (2) Is the means used to achieve the purpose proportional? Under the second step, the adequacy of proportionality is to be assessed on three separate dimensions: (a) Is the limiting law rationally connected to its objective? (b) Does the limiting law impair the right or freedom as little as reasonably possible? and (c) Is there overall “proportionality between the deleterious and salutary effects of the measures”?²⁴⁰

In *Bedford*, the *Criminal Code* provisions were found to have a disproportionate impact on the right to security of the person. However, the general impact of section 1 in relation to constitutionally protected labour rights or freedoms is that they *can* be limited by legislative, governmental or judicial action which have a pressing and substantial purpose or objective, and where the means used to attain the objective are proportional along the three dimensions just mentioned. In other words, *Charter* section 1 can be used to override labour rights and thus limit the autonomy of labour law in a relatively open-ended process. As will be seen below, pressing and substantial economic and social interests can be invoked to limit *Charter*-protected labour rights as long as the means used are proportional. Needless to say, this is contested terrain. But it does indicate that, in Canada, there is a unified field of legal battle where the

238. Since this decision, Parliament has criminalized the purchasing, but not the offering for sale, of sexual services. The constitutional validity of this purportedly Scandinavian “punish the johns” approach has yet to be litigated. See especially *Criminal Code*, *supra* note 92, ss 2, 286.1, 286.2, 286.3, 286.4, 286.5.

239. *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719. There follows a description of what is commonly called “the *Oakes* test.”

240. The *Oakes* test has generated a huge jurisprudence. This formulation of the third proportionality dimension was articulated by Lamer CJ in *Dagenais*, *supra* note 18 at 889.

Supreme Court of Canada is the normal sole arbiter of the contest.²⁴¹ As will be seen below, at least in the area of collective labour relations, the kind of institutional stand-off which one sees in Europe between the CJEU and the ECtHR in the post-*Viking/Laval* era can be resolved in Canada, with a clear understanding that the autonomy of labour law in relation to other potential economic and social concerns can only be a *relative* autonomy, conditioned by the constitutional limitation clause.

3. *Collective rights, individual rights and relative autonomy in Canadian labour market regulation*

Recent Canadian case law on freedom of association has led to the constitutionalization of certain collective bargaining rights and the right to strike in four important decisions since 2007, subject of course to proportional limitations. Meanwhile, there is little or no constitutional protection for the employment standards rights of individuals, and this state of affairs is reinforced by a fifth “anti-freedom of association” case in 2015. This is because the new constitutional jurisprudence based on freedom of association is said to extend to procedural rights only, rather than to any substantive outcomes—a dichotomy which has important implications, but which may be difficult to sustain. The relative autonomy of collective bargaining is thus constitutionally enhanced, while the relative autonomy of common law, and other statutory protections or limitations, is less robust and appears vulnerable to unstable changes in the political climate, unless new constitutional arguments emerge. These developments will be summarized and briefly assessed.

a. *Freedom of association and Canada’s new constitutionalized collective bargaining rights*

During the mid-1980s, in a series of cases known as the “Labour Law Trilogy (plus One),”²⁴² the Supreme Court of Canada essentially held that freedom of association is an individual right to join together to achieve

241. There is, of course, the legislative over-ride provision, with a sunset clause of a maximum of five years, in s 33 of the *Charter*, *supra* note 18. This “notwithstanding clause,” while it does not apply to democratic and mobility rights, does apply to freedom of association under s 2(d), legal rights under s 7, and equality rights under s 15. Outside Quebec, the provision has only been used three times (by Saskatchewan, Yukon and Alberta). One of those was in relation to back to work legislation in the Saskatchewan: *The SGEU Dispute Settlement Act*, SS 1984-85-86, c 111, s 9. However, that legislation was passed before the recent freedom of association cases from the Supreme Court of Canada to be discussed below.

242. *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 38 DLR (4th) 161 [*Alberta Reference*]; *PSAC v Canada*, [1987] 1 SCR 424, 38 DLR (4th) 249; and *RWDSU v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277 constitute the “trilogy.” The “plus” was *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*, [1990] 2 SCR 367, 72 DLR (4th) 1 [*PIPSC*].

common purposes, but that particular purposes would not be given specific constitutional protection. Thus, it was held that while workers have the right to join unions, the right to collective bargaining and the right to strike were not constitutionally protected aspects of freedom of association. Royal Canadian Mounted Police (RCMP) officers were therefore denied the right to full and independent collective bargaining in 1999 on the grounds that their associational rights would be sufficient to protect such a professional group in their discussions with the government.²⁴³ This controversial view held sway, under the brunt of scholarly criticism,²⁴⁴ until a crack appeared in 2001. The Supreme Court of Canada then said that vulnerable agricultural workers, statutorily excluded from the right to bargain collectively under Ontario's *Labour Relations Act*,²⁴⁵ had a constitutional right to make collective representations to their employer and be protected from reprisals from the employer for so doing, since, unlike RCMP officers, they did not have the wherewithal to bargain collectively without legislative support.²⁴⁶ The failure to provide these agricultural workers with aspects of a collective bargaining regime was said to be a breach of their right to freedom of association which could not be justified under the limitation clause. The finding that agricultural workers should be afforded some relatively undefined protection parallel to the standard Wagner Act collective bargaining scheme indicated a degree of respect from the Court for the autonomous regime typical of Canadian labour law which involved a notion of collective rights. However, the reasoning of the court in *Dunmore* was very circumscribed and gave no real indication of what was to come.

In 2007, the Supreme Court of Canada repudiated the reasoning which had underpinned the Labour Trilogy cases, and held that the right to collective bargaining was a protected aspect of freedom of association. The matter arose when British Columbia passed legislation intended to reduce costs and increase efficiency in the publicly-funded health care system. The legislation, which was enacted without consultations with health care unions, rolled back previously negotiated protections against contracting out of health care services and, among other things, allowed for lay-offs which ignored seniority and bumping rights under existing

243. *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, 176 DLR (4th) 513.

244. Dianne Pothier, "Twenty Years of Labour Law and the Charter" (2002) 40:3 Osgoode Hall LJ 369.

245. *Labour Relations Act*, *supra* note 69, Schedule A.

246. *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016, Bastarache J for the majority [*Dunmore*].

collective agreements.²⁴⁷ The *Charter* right to freedom of association was said to include the “right to collective bargaining on fundamental workplace issues,” but not a right to any particular system of collective bargaining. It was said to “guarantee a process rather than an outcome.”²⁴⁸ However, collective bargaining was also said to necessarily imply a duty on employers to negotiate in good faith with a representative union.²⁴⁹ The right to freedom of association was said to have been breached because the legislation “substantially interfered with collective bargaining” and the provisions were not salvageable under *Charter* section 1. The government’s concerns about costs and efficiency in the health care sector, while pressing and substantial, were not treated in a proportional manner given the substantial impact of the legislation on collective bargaining. The majority reasoned that collective bargaining was a historically significant and accepted form of freedom of association in Canada, that it was consistent with democratic values, and that it reflected obligations to which Canada had subscribed as a matter of international law.²⁵⁰ The immediate effect of the *B.C. Health Services* case was that governments across the country tightened up on statutory exclusions to collective bargaining regimes²⁵¹ and became nervous about the possibility of a constitutionalized right to strike and its impact on essential public services. Private-sector employers were also alarmed. The Court, however, had stated explicitly in *B.C. Health Services* that it was not addressing the question of whether the right to strike was a constitutionalized aspect of freedom of association.²⁵² Nonetheless, the importance of autonomous collective bargaining had been strongly endorsed by the Court.

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

248. *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 67, 380 DLR (4th) 1 [*MPAO*].

249. A controversial claim about a reciprocal duty based on the Wagner Act statutory model, but certainly not part of the traditional common law: see Brian Langille, “Why the Right-Freedom Distinction Matters to Labour Lawyers—And to All Canadians” (2011) 34:1 Dal LJ 143 [Langille, “Right-Freedom Distinction”].

250. The validity and strength of these propositions has been a matter of controversy: Brian Etherington, “Does the Freedom of Association under the *Charter* Include the Right to Strike after *B.C. Health*? Prognosis, Problems and Concerns” (2009–2010) 15:2 CLELJ 315; Brian Langille, “The Freedom of Association Mess: How We Got into It and How We Can Get out of It” (2009) 54:1 McGill LJ 177 [Langille, “Mess”].

251. In Nova Scotia, for example, classifications of employees excluded from public sector collective bargaining were brought into the fold, and certain issues excluded from public sector collective bargaining were put onto the table, as it were: see *Civil Service Collective Bargaining Act*, RS 1989, c 71. See also *Civil Service Act*, RSM 1987, c C110; *Public Services Act*, RSQ 2009, c F-3.1.1.

252. The right to strike was not in issue in the case because of essential services legislation in BC, which was not being challenged at the time.

Ontario v. Fraser,²⁵³ the next case to go to the Supreme Court of Canada on freedom of association, was a second round on agricultural workers. Despite the opening provided by *Dunmore*, the Ontario legislature did not simply remove the exclusion provision for agricultural workers from the *Labour Relations Act*,²⁵⁴ but rather enacted the *Agricultural Employees Protection Act 2002*, which established a separate system for agricultural employees, doing the minimum possible in accordance with the *Dunmore* reasoning.²⁵⁵ Agricultural workers were given a statutory right to form “an employees association” and to “make representation to their employers,” but the duty on the employer was merely to listen to oral or read written representations from the association and to acknowledge that any written representations had been read.²⁵⁶ On its face, the act put no duty on the employer to make reasonable efforts to negotiate and sign a collective agreement. The act gave jurisdiction over dispute resolution to an agricultural tribunal which had authority over a number of agricultural matters, but was not specialized in labour relations. The act was challenged by a workers’ association (affiliated with a national union), but the claims were denied at first instance in a decision that was rendered before the issuance of the *B.C. Health Services* case. In the Ontario Court of Appeal, the legislation was struck down by virtue of its failure to impose a duty to bargain on the employer, failure to provide for certification of an exclusive bargaining agent, and failure to create access to authoritative dispute resolution processes.²⁵⁷ Chief Justice Winkler, a former labour relations lawyer of high repute, relied upon *B.C. Health Services* as a precedent, but was criticized by some for “constitutionalizing the Wagner Act model,”²⁵⁸ which was explicitly not mandated in *B.C. Health Services*. When *Fraser* reached the Supreme Court of Canada, the Court split badly. Justice Abella would have upheld the Ontario Court of Appeal reasoning. Justices Rothstein and Charron declared in lengthy reasons that *B.C. Health Services* was both wrongly decided and misguided, and that the new legislation should be upheld on the assumption that the notion of the constitutionalization of collective bargaining should be reversed. The majority confirmed that *B.C. Health Services* was good law, but was unwilling to strike down the agricultural legislation. The majority held that, in order to be constitutionally valid per *B.C. Health Services*, the

253. *Fraser*, *supra* note 60.

254. *Labour Relations Act*, *supra* note 69, Schedule A.

255. *Agricultural Employees Protection Act, 2002*, SO 2002, c 16 [AEPA].

256. *AEPA*, *ibid*, s 5.

257. *Fraser v Ontario (AG)*, 2008 ONCA 760, 92 OR (3d) 481.

258. Langille, “Right-Freedom Distinction,” *supra* note 249.

legislation must be interpreted to impose a duty on the employer to bargain in good faith, and to impose upon the agricultural tribunal a duty to vindicate the association's constitutional rights to bargain collectively, should the association make application before it—all this, despite the literal wording of the Act, which did not explicitly mandate these requirements. *Fraser* was welcomed by some who approved of its flexibility²⁵⁹ and criticized by others who felt the majority had undermined labour rights by upholding the legislation.²⁶⁰ The agricultural workers apparently did not have sufficient confidence in the agricultural tribunal (or perhaps the resources or stamina) to continue the litigation. But the decision has been cited, by the Nova Scotia Labour Board at least, as authority for labour tribunals to give a broad and purposive interpretation to labour relations legislation for the purpose of upholding the constitutional collective bargaining rights of employees.²⁶¹ A positive view of the decision might be that it reinforces possibilities within the labour relations sphere for creative administrative decision-making in a constitutionally autonomous space.

The next decision of note is a second round on the issue of collective bargaining between the RCMP and its management. In the wake of *Delisle* in 1999 there was a continuation of RCMP personnel's exclusion from the bargaining regimes for federal public servants. Pursuant to regulations under the *RCMP Act*, RCMP management established a "Staff Relations Representative Program" as the sole mechanism for dealing with labour relations issues, although it excluded discussion of wages. Representatives of civilian and uniformed RCMP staff were elected at all levels of the RCMP hierarchy to liaise on human relations and personnel questions, but decision-making authority resided solely with management. The Mounted Police Association of Ontario challenged this scheme in the light of *B.C. Health Services* and *Fraser*.²⁶² The Supreme Court of Canada, in a decision split along familiar lines, held the Staff Relations Representative Program to be unconstitutional.²⁶³ The majority declared that "freedom

259. Roy J Adams, "Bewilderment and Beyond: A Comment on the Fraser Case" (2012) 16:2 CLELJ 313.

260. Alan Bogg & Keith Ewing, "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada" (2012) 33:3 Comp Lab L & Pol'y J 379; Brian Langille & Benjamin Oliphant, "From the Frying Pan into the Fire: *Fraser* and the Shift from International Law to International 'Thought' in *Charter* Cases" (2011) 16:2 CLELJ 181; see also Fay Faraday, Judy Fudge & Eric Tucker, *supra* note 144.

261. *Egg Films*, *supra* note 84. See also *Re Metro Community Living Support Services Ltd and NSGEU*, 2015 NSLB 87, rev'd *Metro Community Living Support Services Ltd v Nova Scotia (Labour Board)*, 2016 NSSC 123. Once again, it must be disclosed that the present author chaired the panel of the Board in that case.

262. *MPAO*, *supra* note 248.

263. Justice Rothstein delivered the sole dissent, in which he held that the freedom of association

of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests.”²⁶⁴ In that light, the majority in *MPAO* held that “the current RCMP labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management’s influence.”²⁶⁵ In a certain way, this is to constitutionalize a doctrine familiar to the Wagner Act model that, in order to be certified, a union must be free from employer influence in order to be able to carry out its representative functions under the legislation.²⁶⁶ The Court went to some lengths to re-assert that it is not “constitutionalizing the Wagner Act model,” but one might wonder how all this will play out in the context of pressures for more cooperative labour relations in a globalized world.²⁶⁷ Moreover, the Court’s reflections on the necessary democratic characteristics of unions may be perceived as a possible degree of interference in their internal constitutional affairs, where Canadian law has historically had a hands-off approach concerning union, as opposed to corporate, constitutions.²⁶⁸ However, advocates of a human capability development approach may take comfort in the Court’s affirmation of a “generous approach” to the interpretation of freedom of association which in the words of the majority is “centred on the purpose of encouraging the individual’s self-fulfillment and the collective realization of human

does not necessarily mandate an adversarial process in the historical vein of the Wagner Act model: *MPAO*, *ibid* at para 205. This was a similar divide to that in *Fraser*, *supra* note 60, where Rothstein and Charron JJ concurred in the result, but disagreed with the majority that the freedom of association necessarily confers a right to bargain collectively or a duty on employers to meet with employees in good faith for such purposes. The justices argued that *BC Health* was wrongly decided in this respect on several grounds (paras 172-175).

264. *MPAO*, *supra* note 248 at para 5. The majority decision, written by McLachlin CJC and Lebel J was concurred in by Abella, Cromwell, Karakatsanis and Wagner JJ.

265. *Ibid*.

266. See, e.g., Nova Scotia *Trade Union Act*, *supra* note 78, ss 25 and 53.

267. See, e.g., the 2007 case of the Canadian Auto Workers renouncing its right to strike in return for unopposed access to the Canadian plants of the employer, Magna International. To effect this, both parties signed a “Framework of Fairness” document which included internal dispute resolution mechanisms: see Porter Heffernan, “Democracy in a Cooperative Labour Relations Paradigm? The CAW, Magna, and the Framework of Fairness” (LLM Thesis, Dalhousie University, 2008) [unpublished]. The agreement led to controversy and heated disagreement between CAW and other major actors in the labour movement such as the United Steelworkers and the Service Employees International Union: Wayne Fraser et al, “The Magna Sell-out,” *The National Post* (23 November 2007), online: <cupe.on.ca>. The United Steelworkers even made an unsuccessful bid for certification at the plant after the agreement was announced: Carl Bronski, “Canada: Steelworkers and CAW Officials Tussle Over Dues Base at Magna,” *International Committee of the Fourth International* (6 September 2008), online: <wsws.org>.

268. Michael MacNeil, Michael Lynk & Peter Engelmann, *Trade Union Law in Canada* (Aurora: Canada Law Book, 1994) (loose-leaf release 33, 2016), ch 4 at 1-7; compare *Berry*, *supra* note 106.

goals, consistent with democratic values,” as informed by “the historical origins of the concepts enshrined.”²⁶⁹ In addition, the Court was at pains to point out appropriate collective dimensions to rights discourse in the context of freedom of association, which is something of a controversial innovation.²⁷⁰ There seems to be an implicit correlation between the outcome of this case and a notion of the relative autonomy of labour law, but the full implications of the decision have yet to be teased out.

In the fourth recent decision from the Supreme Court on freedom of association, the Court takes the plunge into the turbulent waters of re-assessing the right to strike. In what is known as the *Saskatchewan Federation of Labour* case,²⁷¹ the Court rejected the final anachronistic aspect of the Labour Trilogy, and found that the right to strike is an integral part of the constitutional right to collective bargaining. However, as one might anticipate, it was not without an important analysis of the limitations which may be placed on this right pursuant to section 1 of the *Charter*. The context was a challenge to Saskatchewan essential services legislation which took away the right to strike in a large number of public and para-public workplaces. The legislation in question prohibited strike action by “designated employees,” and required them to keep working under any prior collective agreement. The Court first held that

[t]he right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right... Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals.²⁷²

However, it then held that “[t]he unilateral authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses, justify the... conclusion that the [legislation is not minimally impairing].”²⁷³ The essential services legislation thus infringed the *Charter* right to freedom of association and could not be saved as

269. *MPAO*, *supra* note 248 at para 46.

270. The dissent took a dim view of this approach, as noted, *supra* note 263.

271. *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 [*SFL*]. The numbers of intervenors were legion. The majority decision from 5 judges was written by Abella J, and there were dissenting reasons from Rothstein and Wagner JJ. The decision was rendered in March, following *MPAO*, *supra* note 252 and *Meredith*, *infra* note 272, both rendered in February.

272. *SFL*, *supra* note 271 at para 3, 75.

273. *Ibid* at para 81.

proportional under section 1. The Court was also clear in its view that the right to strike promotes equality. There is a good deal of fascinating analysis in this decision which cannot be reviewed within the confines of this article. However several points ought to be stressed. The first is that essential services legislation of the “designation” type is not the only, or necessarily the most significant, context in Canada for legislative limitations on the right to strike. Ad hoc back-to-work legislation, usually introduced on the eve or in the middle of a strike, is a relatively frequent occurrence in Canada, but it is usually accompanied by interest arbitration as the mechanism for resolving the bargaining impasse between the parties.²⁷⁴ The absence of interest arbitration in *Saskatchewan Federation of Labour* was cited by the Court as a reason why the legislation could not be saved as “minimally impairing” under section 1 of the *Charter*. However, interest arbitration is controversial since it is often criticized for its narcotic and chilling effects on collective bargaining and for its purported tendency to award more to unions/employees than the employer might have done if strikes and lockouts were allowed.²⁷⁵ This is a situation where the rationality or rationale and the relative autonomy of labour law clash with certain perceived imperatives of Canadian politics.

The upshot of the four cases above was that the constitutionalization of collective bargaining rights was given an immunizing shot in the arm. The Supreme Court of Canada seemed to be going down the same road as the European Court of Human Rights in recognizing a robust form of collective bargaining, including the right to strike, as a constitutionally protected aspects of freedom of association. However, on the same day that the Supreme Court issued *MPAO*, it released a companion case brought by two RCMP officers on behalf of their colleagues. This case brought forth no accolades from the labour movement, and garnered little attention in the press. That freedom of association case will, for reasons to become apparent, be discussed in the next section.

b. *The limited opportunity for constitutional rights litigation in individually regulated employment*

The foregoing concentration on dramatic Canadian constitutional rights litigation that has an impact on collective labour market regulation can draw attention away from other needs and concerns. One of those mentioned above is the inefficacy of labour standards legislation in the non-unionized sector. The effective regulation of this sector, in the interests of equality

274. See text above corresponding to footnotes 172 to 175, *supra*.

275. See Robert Hebdon & Maurice Mazerolle, “Regulating Conflict in Public Sector Labour Relations” (2003) 58:4 RI 667.

and efficiency, and in accordance with restorative values that enhance capability development, is particularly important when union density is falling, and when an ever increasing proportion of the workforce has no access to the protections of collective bargaining. Litigation extending the scope of freedom of association to include collective bargaining and the right to strike is of little value to the bulk of those engaged in various other forms of personal work relations. In other words, the domain of what in North America is referred to as employment law continues to be collective labour law's "little sister" or perhaps "poor cousin."²⁷⁶ This despite the fact that human rights litigation over discrimination in the workplace has had a variety of positive impacts and raised awareness about the need for inclusive work environments and those which will not condone bullying and abuse of various sorts.²⁷⁷ In the best of worlds, employment law might be governed by a politics based on an electorate attuned to the importance of human capability development, aware of the pro-efficiency aspects of integrated labour market regulation, and prepared to reject the rhetoric of the race to the bottom from an economically stressed or ideologically short-sighted entrepreneurial class.²⁷⁸ In the absence of such political enlightenment, social and labour activists in western democracies have often turned to courts and tribunals to advance restorative aspects of labour market regulation. However, are there Canadian prospects for constitutional test case litigation which can promote capability enhancing movements in the regulation of the non-unionized sector of the labour market?

The short answer to the foregoing question is "not likely." As noted by Brian Langille, the equality provisions in section 15 of the *Charter of Rights* have been confined by an "anti-discrimination" interpretation, which effectively prevents their use for the general promotion of social

276. See Judy Fudge, "Reconceiving Employment Standards Legislation: Labour Law's Little Sister and the Feminization of Labour" (1997) 7 *JL & Soc Pol'y* 73.

277. For a discussion on the significance of human rights legislation in the workplace, see Canadian Human Rights Commission, *The Right to be Different: Human Rights in Canada—An Assessment*, (Ottawa: Canadian Human Rights Commission, 1988). Human rights tribunals have considered discrimination in the workplace on a number of grounds: see, e.g., *McKinnon v Ontario (Ministry of Correctional Services)* (No 3) (1988), OHRBID No 10 (race); *Meiorin*, *supra* note 141 (gender); *Johnstone v Canada Border Services*, [2010] CHR D No 20 (family status); *Shuswap Lake Hospital v British Columbia Nurses' Union (Lockie Grievance)* (2002), BCCAAA No 21 (disability); *Laessoe v Air Canada* (1996), [1996] CHR D No 10 (sexual orientation).

278. On capability development, see generally Langille, "Labour Law's Theory of Justice," *supra* note 28; Sen, *supra* note 29; Langille, "Labour Policy," *supra* note 33; Deakin, "Contribution of Labour," *supra* note 37; Archibald, "Rights at Work," *supra* note 103. For an alternative view of the significance of the race to the bottom, see Hepple, *supra* note 37.

and economic equality.²⁷⁹ This seems rooted in the same fears which have prevented *Charter* section 7's "security of the person" from being interpreted as a right to security against economic need. Canadian courts see such basic distributional questions as political rather than legal.²⁸⁰ Many scholars see such social and economic issues as non-justiciable because they are "appropriately within the legislative domain."²⁸¹ Others, seemingly in the minority, disagree.²⁸² Nor does section 36 of the *Constitution Act, 1982* with its "commitments" to "promoting equal opportunity for the wellbeing of Canadians," "furthering economic development to reduce disparity in economic opportunity" and "providing essential public services of reasonable quality to all Canadians" provide comfort in this regard.²⁸³ These sections, drafted in the early 1980s like the *Charter*, may have had a plausible ring in the dying days of the welfare state, but they too have been deemed non-justiciable by legal commentators,²⁸⁴ and were ignored by the Harper federal government which largely rejected the fundamental notion of cooperative federalism on which they are based.²⁸⁵ The current federal government seems more ideologically open to such concepts, which are not unlike those found in the *European Social Charter*.²⁸⁶ At any rate, successful constitutional litigation in the interests of promoting human capability development and equality as the basis of labour standards regulation seems a dim prospect. There appears at the moment to be no justiciable right to decent work in Canada.²⁸⁷

The foregoing cautionary assessment of the constitutional prospects for substantive rights to certain labour standards may be thought to be reinforced by the case called *Meredith*,²⁸⁸ issued on the same day as *MPAO* and a month before *Saskatchewan Federation of Labour*. In *Meredith* there were complex facts relating to RCMP labour management consultations over wages and working conditions, and the applicability of the federal *Expenditure Restraint Act*²⁸⁹ to the subjects of these discussions. The

279. Langille, "Mess," *supra* note 247 at 205.

280. Gosselin, *supra* note 235.

281. Hogg, *supra* note 146, ch 36 at 20.3-21.

282. John Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983) 13:4 *Man LJ* 455; Joel Bakan & David Schneiderman, eds, *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992).

283. *Constitution Act 1982*, *supra* note 220.

284. See Hogg, *supra* note 146.

285. Douglas M Brown, "Integration, Equity and Section 36" (2007) 37:1 *SCLR* 285.

286. *European Social Charter* (revised), 3 May 1996, ETS 163.

287. This is, of course, contested terrain globally: see Virginia Mantouvalou, ed, *The Right to Work: Legal and Philosophical Perspectives* (Oxford: Hart Publishing, 2015).

288. *Meredith v Canada (AG)*, 2015 SCC 2, [2015] 1 SCR 125 [*Meredith*].

289. *Expenditure Restraint Act*, SC 2009, c 2, s 393 [*ERA*].

RCMP's Pay Council Recommendations for wage increases of 3/3/2% in 2008 for the next three years were knocked back to about 1.5% per year by the Treasury Board in accordance with the *ERA*, which applied to the whole federal public sector. Meredith and another RCMP officer challenged the 2009 *ERA* as violating their section 2(d) rights, since the government as employer rolled back wages without adequate consultation as required by *B.C. Health Services*. The trial judge held that the *ERA* made it effectively impossible to negotiate in good faith with Treasury Board, and that this breach of *Charter* section 2(d) rights to freedom of association could not be justified under section 1. The Federal Court of Appeal, and the majority of the Supreme Court of Canada, then held that the *ERA* did not "substantially interfere" with RCMP associational activity and consultation, even if that system was concurrently struck down in *MPAO*.

The Supreme Court majority in *Meredith* said that while the *ERA* limited *substantive* outcomes on compensation related issues, RCMP employees had still pursued some collective goals in a *process* that was conducted in good faith. Even in dissent, Abella J. said that the problem was merely *insufficient consultation*, rather than accepting the appellant's arguments that legislating wage controls interfered with the constitutional right to bargain collectively. In this nuanced judgment, the Court made no clear statement that *all* wage restraint is constitutional, and affirmed that governmental interference with such a fundamental condition of employment must clearly leave room for a collective bargaining process on both wage and non-wage bargaining issues.²⁹⁰ A cynic might argue that the upshot of this case is that as long as the public sector employer maintains open discussions with a union, that is respects the union's *procedural* right to discussion and its own duty to "bargain in good faith," the government which holds the purse strings will be able to legislate whatever it believes to be in the interest of the public (aka "taxpayers") in terms of wage constraints.²⁹¹ Will further litigation be required to determine where the Supreme Court might draw the line between procedural and substantive

290. This opening is exploited by a recent case from Ontario, where the court found that none of the three rationales given in *Meredith* to justify interference with the freedom of association were present: *OPSEU v Ontario (Minister of Education)*, 2016 ONSC 2197 at paras 159-161.

291. This certainly appeared to be the case in Nova Scotia under recent legislation imposing public sector wage restraints on both the public sector employers and public sector unions: *Public Services Sustainability (2015) Act*, SNS 2015, c 34. Notably, the legislation was introduced by the Finance and Treasury Board Minister, Randy Delorey, rather than by the Minister of Labour, Kelly Regan, thereby attempting to reinforce the notion that the Government's actions were in the public ("taxpayers'") interest and not simply a matter of an unjustifiable incursion upon the associational rights of public sector employees.

rights in this context? The conclusion might be that there is a good deal of procedural autonomy in terms of collective bargaining, but that a legislature's substantive assessment of the public interest on "affordable" labour standards may trump a robust understanding of the ambit collective bargaining. The scope of relative autonomy of labour and employment in Canadian constitutional terms is clearly an evolving politico-legal project.

Conclusion

"Autonomy"—from the Greek *auto* (self) + *nomos* (law). Certainly Canadian labour law is not a "law unto itself," given the continuing role of the common law of employment regulated by the general courts, the prevalence of statute-based regulation from legislatures, and the strong influence of fundamental constitutional principles imposed by the Supreme Court of Canada, at least in the unionized sector of the labour market. There is, nonetheless, a relatively high degree of functional autonomy in the values, rules and institutions of Canadian legal regulation of labour markets, and there has been for some time. Canadian common law has recognized that the contracts of employment must be governed by rules other than those of commercial contract, given their relational nature and the inequalities of bargaining power between the parties. Statutory regimes for the governance of both unionized and non-union sectors are largely under the authority of specialized and expert administrative tribunals, which are given deference through administrative law by the general courts. These labour tribunals, whether interpreting statutes (labour boards) or collective agreements (arbitrators) have been granted broad jurisdiction to interpret and apply common law, statutory and constitutional principles, out of which they are capable of fashioning rules with remedies applicable to the changing conditions of post-globalization labour market conditions. This relative autonomy, given the decentralized and fragmented nature of jurisdictional law-making authority under the constitutional division of powers, has been exercised in different ways in different provinces and jurisdictions, providing a living laboratory for the creation of alternative solutions to problems in labour market regulation. Implicit and even explicit recognition of the notion of the "personal work relation" can be observed, which may provide openings for labour market regulation based on restorative values of equality, dignity, mutual respect and concern, as well as efficiency, productivity and flex-stability.

There are mixed responses to labour market segmentation (casualization and disguised employment) as well as to the horizontal and vertical dis-integration, or fissuring, of production by employers (various "common employer" doctrines). Labour dispute resolution has taken on

restorative characteristics through the expansion of such processes as mediation-arbitration and restorative workplace conferencing. Labour and employment “super-boards” may have the potential to encourage integrated labour market regulation in both unionized and non-union sectors. The recent recognition by the Supreme Court of Canada of collective bargaining rights and the right to strike as constitutionalized aspects of freedom of association seems simultaneously to be an assertion of broad general authority by the judiciary, while at the same time giving pluralistic room to those in the collective bargaining sector to stretch within a semi-autonomous space—even if within limits. By times, there is recognition by the institutions governing labour law that integrated and restorative labour market regulation, in the interests of human capability development, can be of benefit to all and could be within our grasp, under the right conditions. The problems, of course, are daunting. But it might be argued that the relatively autonomous status of labour law in Canada may constitute a significant bulwark against the kind of non-liberal democratic political pressures and populist deconstruction of worker rights which seem to be on the rise elsewhere.²⁹²

292. See Jane Mayer, *Dark Money: The Hidden History of the Billionaires behind the Rise of the Radical Right* (New York: Doubleday, 2016); and Mark Lilla, *The Shipwrecked Mind: On Political Reaction* (New York: New York Review of Books, 2016).

