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Bruce P. Archibald*

Labour Law as a Subset of Employment Law? Up-dating Langille's Insights with a Capabilities Approach

Brian Langille's influential 1981 article entitled "Labour Law is a Subset of Employment Law" is evaluated in the light of changes in the economic, social and political context since its publication and the shifts in the appropriate normative underpinnings for such an exercise. Langille's conceptually radical original version of a unified field for legal governance of the workplace, rooted in liberal constitutional principles, has been accepted in the interim by many. However, four decades later, this schema is no longer an adequate basis for responding to challenges for achieving fairness and justice in a world of precarious employment, globally organized supply chains creating fissured workplaces and increasing levels of inequality. In the meantime, Langille, responding to these new circumstances, has moved to a vision of regulating work in accordance with a capabilities approach to the deployment of human capital. This principle should give workers greater freedom to chose to live lives they have reason to value. The question is: what are the real prospects for implementation of these optimistic notions for governing life at work?

L'article influent de Brian Langille de 1981 intitulé « Labour Law is a Subset of Employment Law » est examiné à la lumière des changements survenus dans les contextes économique, social et politique depuis sa publication ainsi que des nouveaux fondements normatifs appropriés pour un tel exercice. La version originale, conceptuellement radicale, de Langille d'un domaine unifié pour la gouvernance juridique du lieu de travail, enracinée dans les principes constitutionnels libéraux, a été acceptée depuis lors par beaucoup de gens. Cependant, quatre décennies plus tard, ce schéma ne constitue plus une base adéquate pour répondre aux défis en matière d'équité et de justice dans un monde d'emplois précaires, de chaînes d'approvisionnement organisées à l'échelle mondiale créant des lieux de travail fragmentés et des niveaux d'inégalité croissants. Entre-temps, Langille, répondant à ces nouvelles circonstances, a adopté une vision de la réglementation du travail selon une approche du déploiement du capital humain fondée sur les capacités. Ce principe devrait donner aux travailleurs une plus grande liberté de choisir de vivre des vies qu'ils ont des raisons d'apprécier. La question est la suivante : quelles sont les perspectives réelles de mise en œuvre de ces notions optimistes pour gérer la vie au travail?

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Introduction

- I. *Langille's original vision of "labour law as a subset of employment law"*
- II. *Four decades of mixed evolution in Canadian labour and employment law*
- III. *Going beyond standard employment and toward a capabilities/human freedom approach to the normative foundations for regulating personal work relations*
- IV. *Langille's normative turn to the capabilities approach to human development and its implications for his claim that labour law is a subset of employment law*

Conclusion

In 1981, near the beginning of the end of the post-World War II commitment of Western liberal democracies to the full-blown welfare state,¹ Brian Langille's path breaking essay entitled "Labour Law is a Subset of Employment Law" was published in the University of Toronto Law Journal.² It had a lasting and positive impact on the way law teachers, legal scholars and some practitioners conceptualized the academic and practical discipline devoted to the understanding of how the Canadian legal system organizes and regulates activity at work.³ Until that perceptive article's appearance, most observers had accepted that employment relations in

1. See Allan Moscovitch & Jim Albert, eds, *The "Benevolent" State: the Growth of Welfare in Canada* (Toronto: Garamond Press, 1987); Thomas J Courchene, *Social Canada in the Millennium: Reform Imperatives and Restructuring Principles* (Toronto: CD Howe Institute, 1994). Note the widely repeated French notion of the "Thirty Glorious Years" of the welfare state following the Second World War: Jean Fourastié's *Les Trente Glorieuses, ou la révolution invisible de 1946 à 1975* (Paris: Fayard, 1979) at 300 (Rééd. Hachette Pluriel no 8363). See also Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge: Belknap/Harvard University Press, 2014) at 96-99.

2. (1981) 31 UTLJ 200 [Langille, "Subset"].

3. See The Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials and Commentary*, 9th ed (Toronto: Irwin Law, 2018), which goes back to the mid-1970s but which, for many successive editions, has been organized in accordance with the principle that "labour law is a subset of employment law." The current editorial group includes 20 professors of labour and employment law from across the country, and historically has involved most of the leading labour law scholars in Canada.

Canada's workplaces were governed by two alternative sets of legal rules: (a) employment law, rooted in the common law of "master and servant," with an increasingly important overlay of statutory labour standards, regulating individual employees⁴; and (b) labour law, patterned on the American "Wagner Act Model," regulating unionized employees under a highly decentralized system of workplace union certification.⁵ Both of these regulatory schemes were built upon what came to be known as the "standard contract of employment" (ie full-time, long-term employment by, usually, male, family breadwinners).⁶ Langille effectively debunked this simplistic and inaccurate traditional bifurcation between labour and employment law, at least in the eyes of the scholarly community (even if its debilitating influence continues in the world of practice driven by convenient, if mindless, adherence to precedent). Of course, Langille's analysis applied to the "industrial sector" in an economic world increasingly dominated by vertically and horizontally integrated multinational corporations,⁷ where union density in the private sector in Canada had attained roughly 30 per cent,⁸ and in an intellectual world where mainstream socio-legal normative analysis in western constitutional democracies was coming heavily under the healthy liberal influence of Rawls,⁹ and Dworkin.¹⁰

In the decades since the publication of Langille's *Subset* article, the economic underpinnings to which labour and employment law continue to be applied have altered dramatically: industrial production has been shifted from the "developed" to the "developing" world by enterprises that outsource and command global supply chains in what often emerged from processes of corporate "vertical and horizontal disaggregation"¹¹; the significance of both service and financial sectors has increased in

4. Stacey R Ball, *Canadian Employment Law* (Aurora: Canada Law Book, 2010) (loose-leaf 2016, release 65); Geoffrey England, *Individual Employment Law*, 2nd ed (Toronto: Irwin Law Inc, 2008).

5. George W Adams, *Canadian Labour Law*, 2nd ed (Aurora: Canada Law Book, 1993) (loose-leaf 2016, release 58). This is different to the sort of national and sector bargaining that one finds in Europe: see Roy Adams, *Industrial Relations under Liberal Democracy: North America in Comparative Perspective* (Columbia: University of South Carolina Press, 1995).

6. Gillian Demeyere, "The Contract of Employment at the Supreme Court of Canada: Employee Protection and the Presumption of Employer Freedom" (2015) 38:1 Dal LJ 1.

7. Kari Levitt, *Silent Surrender: The Multinational Corporation in Canada* (Montreal: McGill-Queen's University Press, 2002) (a reprint of the 1970's original edition).

8. Langille, "Subset," *supra* note 2 at 213, citing WD Woods & Pradeep Kumar, eds, *The Current Industrial Relations Scene in Canada* (Kingston: Industrial Relations Center, 1979) at 303.

9. John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971).

10. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

11. Hugh Collins, "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws" (1990) 10:3 Oxford J Leg Stud 353.

advanced economies¹²; and there has been a rise of part-time and casual employment as well as the contracting out of “services,” which has led to precarious employment for increasing numbers of workers.¹³ This fissuring of workplaces has been accompanied by a dramatic decrease in union density in the private sector,¹⁴ even while public sector union density has dramatically increased.¹⁵ It is not surprising that traditional normative justifications for labour and employment law have been criticized, from left, right and centre, as no longer being up to their regulatory tasks.¹⁶ It is in this context that this paper re-assesses whether Langille’s seemingly simple proposition that “labour law is a subset of employment law” is a helpful way to think our way through the complex issues of how to justify and regulate work relations and labour markets.

This paper begins with a short commentary on Langille’s original 1981 *Subset* article, to put the subsequent remarks in context. It then summarizes key developments in what many Canadian practitioners continue to label “employment law,” before engaging in a similar exercise in relation to “labour law.”¹⁷ The article ends with two sections on where and how we might go from here. The first deals with new dimensions of the key generic issues about how to identify appropriate definitions of employees and employers in the new world of precarious employment and fissured workplaces. The second references Langille’s more recent writings, which abandon Rawls and Dworkin as the primary sources for normative principles to explain work relations in favour of a capabilities approach to the development of human freedom, as evidenced by the work of Amartya Sen and Martha Nussbaum. These approaches, which identify human capability development as foundational to a proper understanding of labour and employment law, are ones with which I am in substantial agreement.¹⁸

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

13. Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2006).

14. 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).

15. Allen Ponak & Mark Thompson, “Public Sector Collective Bargaining” in Morley Gunderson, Allen Ponak & Daphne G Taras, eds, *Union Management Relations in Canada* (Toronto: Addison Wesley Longman, 2001) 414.

16. Harry W 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 VW Stone & Harry Arthurs, eds, *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (New York: Russel Sage Foundation, 2013).

17. Terminology outside North America tends to use the labels “labour law” and “employment law” interchangeably, but they have distinctly different meanings in Canada and the US: see the companion pieces by Mark Freedland & Alan Bogg in this volume as well as the discussion, *infra*.

18. See Bruce P Archibald, “Capabilities Approaches and Labour Law through a Relational and

The upshot for me is that, paradoxically, the diversity in the sources of law governing labour market regulation both reinforce and destabilize the traditional and limiting bifurcation of labour law and employment law in Canada. The common law and employment standards legislation, which predominate in employment law, are simultaneously bound by restrictive notions of the standard contract of employment, while also containing elements that occasionally allow adjudicators to transcend such limitations and, potentially, allow human capability theory to be seen as a helpful way to unify a broader conceptual field. Labour law has been progressively cracked open, like employment law, by human rights standards; however, only labour law has benefitted in Canada from expanded constitutional protections, which may protect a relatively autonomous sphere for the elaboration of an understanding of how a human development approach can explain and justify progressive evolution of the field. Current legal prospects for restorative regulation of labour markets based on notions of equality, mutual concern, respect and flex/stability elaborated through the lens of a capabilities approach are thus hedged about with structural and normative uncertainty—particularly when democratic politics has become more and more dominated by illiberal populism.

I. *Langille's original vision of "labour law as a subset of employment law"*

The jumping-off point for Langille's initial analysis of labour law as a subset of employment law is part of an effort "to explicitly acknowledge the pre-eminence of public over private values in the industrial sector" so as to take a "unified view," which will begin to "consciously integrate collective bargaining and other social policies instead of pretending they exist in separate worlds."¹⁹ This language might lead one to think that Langille was proceeding from a European mindset that understands labour/employment law to be a subset of "social law" that can include social welfare provisions, employment insurance, pensions, protections against job redundancy, workforce training, and the like.²⁰ But while Langille made references that demonstrate an awareness of this larger

Restorative Regulatory Lens" in Brian Langille, ed, *The Capability Approach to Labour Law* (Oxford: Oxford University Press, 2019).

19. This language from Langille, "Subset," *supra* note 2 at 201 is taken from a quote by Harry Arthurs in his "Free Collective Bargaining in a Regulated Society" in *The Direction of Labour Policy in Canada* (Montreal: Industrial Relations Centre 1977) at 112.

20. To get a flavour for the European perspective, see Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (New York: Oxford University Press, 2001); Roger Blanpain, *European Labour Law* (Alphen aan den Rijn: Kluwer Law International, 2010) at 29-33; or 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) at 169.

context, he asserted in the end that “[e]mployment law is aimed at securing a minimum level of concern and respect within the employment relationship.”²¹ His focus remained on showing that employment law is the “proper subject for study” as opposed to simply concentrating on labour law, which is a subset of the former. However, Langille eschewed the notion that he was simply making “a cry for individual over collective rights” but rather was emphasizing consideration of “the proper impact of our publicly expressed values upon private arrangements.”²² This was an important observation at a time when employer counsel, and indeed many judges, were advancing arguments that individual employment and even collective labour law relationships were matters of private contract to be determined by the parties, and that statutory incursions on these private arrangements were to be interpreted restrictively.²³

The sources of what Langille viewed as “our publicly expressed values” are consistent with propositions from Rawls and Dworkin, at least in the broadest sense. Langille accepted the Rawlsian notions that “[m]odern democratic states are concerned to provide and protect the liberties of its citizens while at the same time providing a minimum set of social conditions.”²⁴ Furthermore, in terms of specific normative principles, Langille then adopted Dworkin’s complementary goals that “society is concerned to see that its citizens are treated with *respect*, that is ‘as human beings who are capable of forming and acting upon intelligent conceptions of how their lives should be lived’” and “*concern*, that is ‘as human beings who are capable of suffering and frustration.’”²⁵ For Langille, the purpose then was not to establish economic and social equality among citizens, but rather to avoid “gross forms of exploitation.”²⁶ The public intervention through employment law is to establish a “floor of basic standards,” although Langille acknowledged the relativity of this exercise by a cute reference to the then popular Paul Simon song in the famous lyric: “one man’s ceiling is another man’s floor.”²⁷ The basic floor is not merely to ensure economic survival, but rather to ensure that workers can express themselves as citizens in other activities.²⁸ However, in the end, Langille

21. Langille, “Subset,” *supra* note 2 at 230.

22. *Ibid.*

23. The present author recalls encountering these arguments as a young arbitrator in the 1980s with surprising regularity.

24. Langille, “Subset,” *supra* note 2 at 201, citing Rawls.

25. *Ibid* at 201, citing Dworkin.

26. *Ibid* at 202.

27. *Ibid*, n 14.

28. In this, Langille picks up (*ibid* at 202) on the influential article by David Beatty, “Labour is not a Commodity” in Barry Reiter & John Swan, eds, *Studies in Contract Law* (Toronto: Butterworths,

in 1981 adopted the orthodox protective rationale for employment/labour law (redressing inequality of bargaining power as between employers and employees), while hedging it about with qualifications, such as the need for human rights protections against irrational considerations, eg discrimination on the grounds of sex or race.²⁹ This is an important matter, to which we will return in the penultimate segment of this paper.

The "Subset" article hints at, but does not make explicit, any reference to Langille's later mantra that there are two basic public policy options to counter inequality of bargaining power between employees and employers: one is to allow for unionization, which enables workers to "turn up the dial" on their bargaining power and achieve better conditions of employment through collective action—a procedural mechanism; the other is to change the content of the terms and conditions of employment contracts through statutory standards—a substantive mechanism.³⁰ The 1981 article describes unionized workers as the "haves" who, with the assistance of their union, can negotiate terms of employment that rise above the statutory labour standards employment floor, while non-unionized workers are "have-nots" who may be forced to put up with those minimum standards. But Langille's premise was that the statutory minima constitute an advance over "the archaic common law under the odious rubric 'the law of master and servant,' which consists of the assorted relics of a dead social order."³¹ Subject to what will be said below about subsequent evolution in Canadian common law, Langille was surely right. He described the "new content of employment law" which, in statutory reforms to the common law by 1981, contained not only the long-standing minimum terms on such issues as wages, vacation entitlements, limits on employment of children, minimum notice on termination and provisions regulating group terminations, but also, in three jurisdictions (Nova Scotia, Quebec and the federal level), a right against unjust dismissal (upon achieving a certain length of employment tenure) with reinstatement as a remedy. This latter phenomenon was a radical departure from the common law. Langille describes how the just cause provisions in these three jurisdictions led to the adoption, from arbitration in the unionized sector, of the notion of "progressive discipline," which was unknown at common law. The "new content" of employment law also included two other areas of radical statutory innovation: occupational health and safety legislation and human

1980). This is an important link to Langille's current thinking too, as will be pointed out below.

29. Langille, "Subset," *supra* note 2 at 204.

30. Brian Langille, "Labour Law's Back Pages" in Guy Davidov & Brian Langille, *Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing, 2006) 13.

31. Langille, "Subset," *supra* note 2 at 200.

rights acts, the latter applicable well beyond the realm of employment law. These areas not only established standards, but also involved proactive investigative agencies with separate enforcement tribunals as hallmarks of the interventionist welfare state. Of course, these new supplementary branches of “employment law” applied to the unionized sector as well, forming an important justification for Langille’s claim that labour law had become a subset of employment law. Moreover, the reach of human rights processes moved early on into equality claims, which had pension and benefit implications and sometimes involved controversial affirmative action initiatives. The blending of employment law with labour law was proceeding at a steady pace by the end of the 1970s and the early 1980s.

In turning his attention to how parties governed by collective bargaining related to employment standards regimes, Langille’s *Subset* article addressed both substantive and procedural concerns. A key focus of the *substantive* analysis was the question of whether parties to collective bargaining could adopt collective agreement provisions that derogated from employment standards minima. Langille’s conclusion concerning this, then highly contested, area was that, despite comments in the 1968 Woods Task Force report to the contrary, such an approach was not appropriate: “if, as argued, employment standards are aimed at securing a bare minimum of concern for employees in order to secure important social policies reflecting basic value judgments, then there is little force in the argument that employees should be able to choose to freely bind themselves contractually to work below that floor.”³² But, in a pragmatic though principled analysis, Langille admitted that parties to collective bargaining could, like others, apply to labour standards officials for exemptions that would allow them to obtain relief from general employment standards, which caused difficulty for publicly justifiable bargained outcomes.³³ Langille’s arguments about the *procedural* impact of employment standards legislation on the collective bargaining sector are directed to issues concerning the jurisdiction of labour arbitrators deciding disputes under collective agreements and concerning a union’s duty of fair representation. On the first issue, Langille, writing only five or six years after the Supreme Court of Canada’s decision in *McLeod v Egan*,³⁴ supported an expansive interpretation of that case, advocating that arbitrators should be held to have jurisdiction, in interpreting and applying collective agreements, to apply statutes governing work relationships (as

32. *Ibid* at 216.

33. *Ibid* at 217.

34. [1975] 1 SCR 517, 46 DLR (3d) 150.

was then statutorily authorized in Nova Scotia and British Columbia) regardless of the private intentions of the parties.³⁵ This vindicates the “general law of employment” representing public values of concern and respect for employees as applicable to unionized labour relations. Similarly, Langille waded into the treacherous stream of the union’s duty, as the holder of employee access to arbitration, to represent all members of the bargaining unit fairly. Langille’s controversial position was that unions have a duty to take an employee’s grievance to arbitration where it involves a breach of a statutory employment standard, and that such claims of a publicly valued nature cannot be traded off against other individual or collective interests by the union. Thus, in both these procedural contexts, Langille argued that labour law institutions are subordinated to the publicly and democratically (that is, legislatively) endorsed values of concern and respect for individual employee rights as instantiated in statutory employment law.

II. *Four decades of mixed evolution in Canadian labour and employment law*

It might be said that in the almost four decades since “Subset” was published, little has changed in terms of the structural relationship between labour law and statutory employment law, and that the subset notion still has formal validity. But there have been developments in relation to both that are important to consider for a reassessment of the original Langille thesis. A brief overview of the evolution in Canadian employment law in its common law and statutory variants is in order, before engaging in the same exercise in relation to labour law and collective bargaining. Only then can one turn to an analysis of why this relative stasis in the relationship between labour and employment law has contributed to the seismic shift in the underlying economic and social conditions that have largely rendered traditional labour and employment law to be impediments, rather than supports, in the attainment of social and economic justice for the vast majority of Canada’s working people.

Starting with the common law of employment, one must acknowledge that, in the post-World War II decades, the predominance of the standard contract of employment, as the platform for the social and economic benefits provided by the welfare state, led Canadian judges to preside over mutations in the common law, which have distanced the common law of employment significantly from the “chaos” of its roots in English

35. Langille, “Subset,” *supra* note 2 at 224.

master and servant law.³⁶ Of course, the common law gave precedence to freedom of action for employers and, as noted above, knew no doctrine of unjust cause for dismissal for employees: employees only had a right to a reasonable period of notice for dismissal.³⁷ The principle was that employment was at the will of the employer alone. Canadian employees began to challenge the harshness of this approach in the 1970s, seeking job security on the assumption that indefinite employment was assumed to be “career long.”³⁸ While a confused case law emerged from the lower courts, it was not until 1992 that the Supreme Court of Canada accepted that, because of inequality of bargaining power between employer and employee, contracts of employment should *not* be interpreted on the principle, widely applicable to commercial contracts, that parties should be *assumed* to be equals.³⁹ In the meantime, there was conflicting litigation over whether damages for mental distress or aggravated damages for the manner of dismissal (either with notice or for cause) could be awarded, a conflict that was not resolved until 2008.⁴⁰ The conclusion was that mental distress damages for an improper manner of dismissal should flow from proof of actual loss suffered,⁴¹ rather than through a process of deeming the reasonable notice period to be extended for such a purpose.⁴² The formal principle was thus maintained that the common law would *not* regulate the fairness of employee treatment *during* the term of the contract, but only the *manner of dismissal*. Nonetheless, in cases of constructive dismissal (where an employee may be found justified in terminating employment where employer conduct fundamentally breached explicit or implied terms in the contract of employment), some cases decided that such a breach might be found where an employer treated an employee without “civility,

36. There are Canadian parallels with the analysis of Simon Deakin & Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005), which suggests that the law of master and servant in the UK was transcended by the standard contract of employment because the latter was thought to be a functional necessity for the delivery of employment-related welfare state benefits, such as employment insurance and pensions. See also Brian Langille, “Labour Policy in Canada: New Platform, New Paradigm” (2002) 28:1 Can Pub Pol’y 1 [“Labour Policy”].

37. *The locus classicus* for this position was *Addis v Gramophone Co Ltd*, [1909] AC 488, [1909] UKHL 1. However, the consolidation in Canada of its notion that contracts of employment are to be based on principles of commercial contract law did not occur until *Addis* was firmly adopted in *Peso Silver Mines v Cropper*, [1966] SCR 673, 58 DLR (2d) 1.

38. See Claire Mummé, “A Comparative Reflection from Canada—A Good Faith Perspective” in Mark Freedland et al, eds, *The Contract of Employment* (Oxford: Oxford University Press, 2016) for an excellent summary of this area.

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

40. For a discussion of these issues, see Mummé, *supra*, note 38.

41. *Keays v Honda Canada Ltd*, 2008 SCC 39.

42. This had been the decision in *Wallace v United Grain Growers*, [1997] 3 SCR 701, 152 DLR (4th) 1.

decency, respect and dignity.”⁴³ For some time, it had been thought that tort law could fill the contract law void where there was separately actionable evidence of intentional or negligent infliction of mental stress on an employee by an employer.⁴⁴ However, that reasoning came under fire when it was held that the recognition of tort remedies for the infliction of mental distress in the employment context was inappropriate, and that these issues should only find remedy in relation to manner of dismissal (constructive or otherwise) under the employment contract.⁴⁵ Most recently, though, the Supreme Court of Canada has finally demonstrated an apparent commitment to regulate the fairness of employer conduct during the term of an employment contract—a potential conceptual revolution.⁴⁶ In a dispute over the non-renewal of a commercial agency arrangement, somewhat akin to an employment situation, the Court in *Bhasin v Hrynew* recognized “good faith” as an “organizing principle” in the law of contract, and that there had been a breach of a consequent “duty to honestly perform a contractual obligation.”⁴⁷ Several months later, the Court applied this doctrine in a case called *Potter*, who was a relatively high-ranking public servant, and whose employing authority failed to inform Potter of the reason for his suspension from employment. The Court held, following *Bhasin*, that “acting in good faith in relation to contractual dealings means being honest, reasonable, candid and forthright” and that failing to give an employee reasons for his suspension was not being forthright.⁴⁸ The upshot of these recent cases for the common law of employment can be characterized by what Langille might have said in 1981 to be the recognition of public values of concern and respect for employees that go beyond the limitations of the common law of master and servant and their “archaic values imbedded in a dead social order.” The problem in invoking these enlightened values of the new common law of employment is that it can only be done through expensive civil litigation. This is truly employment law for the “haves,” that is, senior employees, managers and

43. *Lloyd v Imperial Parking Ltd*, [1997] 3 WWR 697, 192 AR 190 (Alta QB); see also *Shah v Xerox Canada Ltd*, (2000) 131 OAC 44, [2000] OJ No 849 (Ont CA).

44. *Vorvis v Insurance Corporation of British Columbia* [1989] 1 SCR 1085, [1989] 4 WWR 218 (dicta on intentional); *Sulz v Canada (AG)*, 2006 BCCA 582 (recovery re negligence).

45. *Piresferreira v Ayotte*, 2010 ONCA 384, leave to appeal to SCC refused. This reasoning was adopted in *Sanford v Carleton Road Industries Association*, 2014 NSSC 187.

46. Compare the following analysis with the comments on the vicissitudes of the English doctrine of the “continuing obligation of mutual trust and confidence between employer and employee” as discussed Mark Freedland’s companion piece in this volume in the text at footnotes 17 to 20.

47. *Bhasin v Hrynew*, 2014 SCC 71.

48. *Potter v New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10 at para 99.

professionals, and, as such, the common law of employment is beyond the practical reach of the “regular working stiff.”

Shifting focus to Canadian statutory labour standards, acts or codes, one can only conclude that the picture has been less than rosy over the past four decades in terms of their concern and respect for workers. Minimum wage inadequacy has been a flashpoint across the country, with a patchwork of different standards in the various jurisdictions. Certainly, none has established what one might consider a “living wage” as a minimum, and virtually none has kept up with rates of inflation in the economy.⁴⁹ Enforcement has been problematic, in the sense that there has been a general abandonment of pro-active inspections by labour standards officials in favour of complaint-driven models. It appears that most workers are unwilling to make complaints for fear of being fired or otherwise prejudiced, so that complaints are predominantly claims for unpaid back wages or pay in lieu of vacation entitlements by claimants who do not wish to contest their dismissal. In any event, the original three jurisdictions having a remedy of reinstatement for unjust dismissals (Quebec, Nova Scotia and the federal jurisdiction) are still the only ones in which such orders can be made. Levels of financial recovery for non-statutory compliant dismissal are not as generous or flexible as the common law potential in cases of failure to give reasonable notice or constructive dismissal; however, the wage worker who relies on the statutory labour standards system at least has the benefit of enforcement through an administrative tribunal operating on a gratis basis, and thereby avoids the financial risks of common law litigation. There have been occasional government-sponsored independent reviews of labour standards, and the implementation by governments in receipt of the recommendations of such reviews has been uneven.⁵⁰ The most recent recommendations to a provincial government were partially implemented by a relatively “progressive” legislature, but were repealed in short order by an illiberal, populist government which stepped into office shortly thereafter.⁵¹ Other elements of the statutory employment-linked

49. See Nicole M Fortin & Thomas Lemieux, “Changes in Wage Inequality in Canada: An Interprovincial Perspective” in David A Green, W Craig Riddell & France St-Hilaire, eds, *Income Inequality: The Canadian Story* (Montreal: Institute for Research on Public Policy, 2016).

50. See Harry Arthurs, *Fairness at Work: Labour Standard for the 21st Century* (Ottawa: Federal Labour Standards Review, 2006) [*Arthurs Report*], conducted in the last days of a Liberal federal government for recommendations which were then ignored by the subsequent Conservative government, but have gained a more sympathetic legislative implementation under Justin Trudeau’s Liberal tenure.

51. Thus, in Ontario, a Liberal Government commissioned Michael Mitchell and John Murray to conduct the “Changing Workplaces Review,” which received substantial implementation immediately after their Report submitted in May of 2017 but became the subject of repeal in 2018 after the arrival of the “Progressive” Conservative government of Doug Ford.

social safety net still exist much as they did when Langille was writing in 1981: workers' compensation for those who suffer on the job injury continues to evolve in a system involving federal/provincial cooperation from a bygone era⁵²; the Canada Pension Plan still exists, though it is criticized for not being sufficiently generous and recommendations for provincial proposals to enhance pension coverage have fallen on deaf ears⁵³; the federal system of employment insurance has been tinkered with by various governments, but is still there to give some support workers who lose their jobs and maternity leave for women; and a new federal child support program supplements various provincial day-care schemes to assist parents who remain in the workforce.⁵⁴ The continuation of these uneven supplementary programs, of course, applies to both unionized and non-unionized sectors, and sustains the original Langille view that labour is a sub-set of employment law, but nonetheless substantive statutory employment law has remained surprisingly static over the intervening decades.

While the collective bargaining regime of Canadian labour law can still be seen as nestled in the broader environment of statutory employment law as described above, from both statutory and constitutional perspectives, labour law has in the past four decades gained a certain weight and legal autonomy that sets it apart as an element of employment law writ large.⁵⁵ This process began before Langille wrote the "Subset" article in 1981. In 1976, the Supreme Court of Canada, speaking through Chief Justice Bora Laskin, a former labour arbitrator, held that while the notion of an employment contract in the narrow sense applies at the moment of hiring when employee and employer agree that the former will work for the

52. Constitutional competency over workers' compensation is discussed in a trilogy of cases decided by the Supreme Court of Canada: *Canadian National Railway Co v Courtois*, [1988] 1 SCR 868, 51 DLR (4th) 271; *Bell Canada c Québec (Commission de la santé et de la sécurité du travail du Québec)*, [1988] 1 SCR 749, 51 DLR (4th) 161; *Alltrans Express Ltd v British Columbia (Workers'/Workmen's Compensation Board)*, [1988] 1 SCR 897, 51 DLR (4th) 253. Federal employees may seek recourse under provincial workers' compensation schemes; however, any provision within a provincial compensation statute that regulates occupational health and safety will be limited to provincial undertakings.

53. *Canada Pension Plan Act*, RSC 1985, c C-8; for various unimplemented reform proposals, see: Expert Commission on Pensions, *A Fine Balance: Safe Pensions, Affordable Rules, Fair Rules* (Queen's Printer for Ontario, 2008); Pension Review Panel, *Promises to Keep* (Government of Nova Scotia, 2009); and Elizabeth Shilton, "Employee Pension Rights and the False Promise of Trust Law" (2011) 34:1 Dal LJ 81.

54. The Justin Trudeau government, in its first mandate, made many adjustments to the *Canada Labour Code* in this regard. See, eg, *Budget Implementation Act, 2018 No. 2*, SC 2017, c 33, s 206.6.

55. Bruce Archibald, "The Significance of the Systemic Relative Autonomy of Labour Law" (2017) 40:1 Dal LJ 1 ["Relative Autonomy"].

latter, thereafter, the substantive content of the employment contract is ruled, virtually entirely, by the collective agreement:

“The common law, as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which...deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principle parties thereto.”⁵⁶

Indeed, unionized employers are prohibited by statute from negotiating with individual employees as opposed to with their union.⁵⁷ As discussed above, arbitral jurisdiction under collective agreements, relatively independent from the courts, began to take on significant dimensions. Langille in “Subset” had pointed to the ability of labour arbitrators to apply employment-related statutes to collective agreements as an indicator of labour law’s subordination to the general law of employment⁵⁸; however, in the last decade of the 20th Century and the first decade of the 21st, arbitrators gained exclusive jurisdiction to rule on *any* “dispute or difference...[which in its essential character] arises from the interpretation, application, administration or violation of the collective agreement.”⁵⁹ This dictum was taken to authorize arbitrators to apply the *Charter of Rights and Freedoms*,⁶⁰ when dealing with a public sector employer, or aspects of common law at large if they relate to the essential character of the dispute.⁶¹ Moreover, this arbitral jurisdiction was held to oust the jurisdiction of common law courts, to say nothing of other administrative tribunals, in relation to such things as workplace torts.⁶²

56. *McGavin Toastmaster Ltd v Ainscough*, [1976] 1 SCR 718, 54 DLR (3d) 1 at para 10. The collective agreement is thus a statutorily authorized contract for the benefit of a third party, a notion unknown at common law, and is not subject to the common law of contract doctrine of repudiation merely because of employees going on an illegal strike.

57. Compare this with the situation in the UK as discussed by Mark Freedland in his companion piece in this volume.

58. This was reinforced with respect to the application of human rights statutes to the interpretation of collective agreements in *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324*, 2003 SCC 42.

59. *Weber v Ontario Hydro*, [1995] 2 SCR 929, 125 DLR (4th) 583 at paras 56-57 [*Weber*].

60. Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11.

61. *Weber*; *supra* note 59.

62. *Ibid.* This development has been the subject of criticism by some who have suggested it is overloading labour arbitration with issues that ought to be before the courts (see e.g. the work of Michel Picher) and others who argue that it inappropriately prevents access to justice in the general courts where an arbitrator may incorrectly deny or refuse to hear the case: See Brian Etherington, “*OPSEU v Seneca College: Deference as a Two-Edged Sword—A Missed Opportunity to Address the ‘Weber Gap’*” (2006-2007) 13 CLEJ 301.

Labour arbitrators, with this ample jurisdiction, have also been held to be the subject of broad judicial deference within their bailiwick, which tends to stave off successful judicial review.⁶³ In this context it is important to realize that the courts in this period were upholding arbitral decisions that determined that management rights reserved by standard recognition clauses in collective agreements must be exercised “reasonably,”⁶⁴ and that arbitrators were entitled to fashion *equitable* remedies befitting their role in providing pragmatic responses to breaches of collective agreements.⁶⁵ But arguably, the most dramatic way in which labour law is “legally different” from the rest of employment law is the extent to which it is protected by the *Charter*. In 2007, the Supreme Court of Canada reversed a line of case law dating back to the early days of the *Charter*,⁶⁶ and held that collective bargaining is a constitutionally protected form of freedom of association under section 2(d).⁶⁷ This was reinforced in a 2015 case, which determined that the right to strike is constitutionally protected as a necessary corollary of collective bargaining.⁶⁸ In that same year another case held that unions, to fill their constitutional role, must be independent of management and democratic in their structure and operation, so as to be able to bargain effectively for their members.⁶⁹ However, this line of constitutional cases also serves to reinforce the conceptual demarcation between labour and employment law highlighted by Langille in 1981: labour law is a constitutionally protected *procedural* mechanism only, while common law and statutory employment law and, even formally “free” collective bargaining, regulate the *substantive* content of employment relations in ways that are *not* constitutionally protected. This analysis flows from the third labour law case decided by the Supreme Court of Canada in 2015, where it was decided that collective bargaining did not mandate any substantive outcome, as long as the procedural aspects of the process were met, and therefore a collectively bargained wage deal for RCMP officers was not to be protected from general wage controls legislated by

63. *Dunsmuir v New Brunswick*, 2008 SCC 9.

64. *Communications, Energy and Paperworkers Union, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34.

65. *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59.

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

67. *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27.

68. *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4.

69. *Mounted Police Association of Ontario v Canada (AG)*, 2015 SCC 1.

Parliament in relation to all civil servants.⁷⁰ It is hard to avoid the conclusion that employment standards will therefore not likely receive constitutional protection, particularly in a context where the Supreme Court of Canada has interpreted *Charter* section 15 as being an anti-discrimination clause, containing equality guarantees, rather than one oriented broadly to the promotion of social and economic equality.⁷¹

This analysis suggests that labour law can still be thought of as a subset of employment law, even if a constitutionally super-charged one, and that to determine the extent to which employment/labour law is fulfilling its role of adequately responding to the social and economic needs for concern and respect for workers in a constitutional democracy, one must look to other dimensions of the matter. Clearly, collective bargaining has failed in its purported purpose of lifting large numbers of workers in the private sector of the economy above minimum labour standards, as apparently assumed by Langille in 1981. In the intervening decades, union density in the private sector has fallen from 30 per cent to something below 16 per cent, even if it is still above 70 per cent in the public sector.⁷² This leaves huge numbers of private sector workers dependent on the common law of employment and statutory employment standards for protection from exploitation by employers and subject to the difficulties in deploying both (as explored above). Thus, it appears that neither employment law in the broadest sense, nor collective labour law in the narrower sense, are attaining their potential, unified though they may still be, under the joined rubric of a broad, publicly regulated “employment law” in the original Langille “Subset” vision. One important reason for the failure of employment and labour law is that both were premised upon notions of the likelihood of career-long, full-time employment with a single, large employer whose economic clout could be relied upon to provide stable income and benefits leading to a reasonable pension in retirement. This stereotype of the “standard contract of employment” is no longer a plausible basis for responding to workers’ expectations of concern and respect from both employers and society at large.⁷³ But deconstructing the “standard contract of employment” and reconstructing a basis for its

70. *Meredith v Canada (AG)*, 2015 SCC 2.

71. See Brian Langille, “Why the Right-Freedom Distinction Matters to Labour Lawyers—And to All Canadians” (2011) 34:1 Dal LJ 143.

72. See Statistics Canada, *Long Term Trends in Canadian Unionization* by Diane Galarneau & Thao Sohn (Ottawa: Statistics Canada, 2013).

73. See Mark Freedland & Nicola Kountouris, *The Legal Construction of Personal Work Relations*, (Oxford: Oxford University Press, 2011) [*Personal Work Relations*]; Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Sydney: Federation Press, 2012) [*Beyond Employment*]; and Stone & Arthurs, *supra* note 16.

replacement requires a revisioning of the regulation of personal work relations beyond the formal legal notion of "employment." Moreover, unearthing an adequate normative framework on which to base such an exercise means pushing beyond the public commitment to civic "concern and respect," as understood by Rawls and Dworkin. As will be described in the final portion of this commentary, Brian Langille is once again at the forefront of the effort to re-align theory and practice in ways that may help revive progressive public policy in this regard.⁷⁴ But, before getting to that, some exegesis is in order concerning the halting steps on the practical front in Canada to move in such a direction.

III. *Going beyond standard employment and toward a capabilities/ human freedom approach to the normative foundations for regulating personal work relations*

As stressed above, in Canada as in other post-World War II welfare states, many socio-economic benefits were erected on the platform of the standard, full-time (or at least regular part-time) contract of employment.⁷⁵ This was true in the area of employment law where statutory benefits and entitlements were largely unavailable to temporary or casual employees,⁷⁶ and also in labour law, where temporary or casual employees were commonly excluded from bargaining units composed of full-time or regular part-time employees on the theory that casuals did not share a "community of interest" with long-term employees. These legal structures gave a huge incentive to employers to find both legitimate and disingenuous ways to avoid engaging workers in accordance with standard employment contracts.⁷⁷ An analysis of these forms of slippage in, or undermining of, worker protections in many jurisdictions is often conducted by examining two rather fundamental and usually interdependent questions: (a) who is an "employee" for the purposes of labour and employment law coverage? and (b) who, or indeed what, is an "employer" for these same purposes? The answers to these questions have never been simple, and they involve policy issues that can best be resolved by reference to the normative principles that should underpin the legal dimensions of labour market

74. Brian Langille, "Labour Law's Theory of Justice" in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (New York: Oxford University Press, 2011) at 101 [*Idea of Labour Law*].

75. Langille, "Labour Policy," *supra* note 36.

76. Minimum wage provisions, however, are normally applicable across the board to all employees.

77. 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; and Simon Deakin, "Addressing Labour Market Segmentation: The Role of Labour Law" (2013) International Labour Organization Working Paper No 52.

regulation in current global circumstances.⁷⁸ Exploring these matters will enable an analysis of why the notion of labour law being a subset of employment law, rooted in values of abstract concern and respect for workers, is no longer an adequate understanding of the justifying norms in the field of sophisticated labour market regulation. Even if Langille's original 1981 observations were certainly not "wrong," they can now be transcended, comprehended and re-thought through a capabilities and human development approach.⁷⁹

Looking first to the definition of who is an employee for the purposes of labour and employment law, a fundamental distinction, going back to the traditional common law of master and servant, has long been made between hiring a worker under a "contract of service" (i.e. employment) as opposed to hiring under a "contract for services" (ie a commercial arrangement with an "independent contractor").⁸⁰ The continuing legitimacy of this legal distinction is generally not disputed; however, its abuse by certain employers in the interests of avoiding statutory labour and employment obligations has been a matter of concern since the inception of the post-World War II regulatory regimes. Successorship provisions in the original labour and employment statutes allowed tribunals to declare contracting out of business functions to be illegal where the purpose was to avoid obligations to employees or unions, but such manoeuvres were deemed to be acceptable if there was a "legitimate business reason" to engage in the practice—that is to say, the sub-contractor could do the work more cheaply than an employee entitled to benefits. This Trojan horse regularly became used to trample upon what workers perceived to be their statutory or collectively bargained protective rights. Legislatures responded in some jurisdictions by allowing for the unionization of "dependent contractors" where the legal form of the hiring clearly resembled a continuing work relationship of subordination and control associated with "employment," while similar outcomes were achieved in other jurisdictions by giving purposive interpretations to opaque definitions of the word "employee" in the governing legislation.⁸¹ This contractor versus employee distinction is most difficult to draw when the work is of a temporary nature, since it

78. Some would argue, and perhaps Langille would now agree, that these traditional questions are too limiting a way to conceptualize the problems: see Noah D Zatz, "Does Work Law Have a Future If the Labor Market Does Not?" (2016) 91:3 *Chicago-Kent L Rev* 1081.

79. See the discussion in the next section of this paper.

80. Brian A Langille & Guy Davidov, "Beyond Employees and Independent Contractors: A View from Canada" (1999) 21:1 *Comp Lab L & Pol'y J* 7.

81. Judy Fudge, Eric Tucker & Leah Vosko, "Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada" (2003) 10 *CLELJ* 193.

is easier to find the hiring arrangement to involve an “employee” rather than a “contractor” where the engagement is of a continuing nature.⁸² The other major problem concerning the classification of an employee for the purposes of protective legislation is the segmentation of the workforce by use of casual employees, or what European observers refer to as “zero hours” contract workers, who are called in on an “as needed” basis.⁸³ To the extent that splitting up work among casuals is intended to avoid the duty to provide statutory entitlements that accrue to full-time employees, the problem can be legislatively addressed by requiring entitlements to be awarded to all workers and pro-rating the benefits in accordance with hours worked. Such a process is normal for overtime earned by full-time employees. However, this solution causes administrative and financial burdens for employers and has been successfully opposed by employers in Canadian political arenas. Of course, to the extent that “casuals” are being called in for full or regular hours, but being refused entitlements, tribunals can deem the workers to be regular part-time or even full-time workers.⁸⁴ However, individuals who make such a procedural fuss are likely to be fired, unless they have a union to represent them. It is interesting to note, however, that unions, which once might have accepted the policy that casuals are out of bargaining units because of a lack of community of interest with regular employees, are now seeking to have labour boards include casuals in bargaining units as a matter of solidarity as well as in a self-preserving response to falling union density.⁸⁵ In the final analysis, though, resolution of these problems of defining who is “an employee” for the purposes of entitlement to employment standards benefits or collective bargaining rights is embedded in the normative justifications for such labour market regulation—a complex of issues to be addressed shortly.

82. See, however, where the Nova Scotia Labour Board was willing to find that film technicians who worked for only one day, and had been labelled independent contractors by the employer, were found to be employees for purposes of union certification under the *Trade Union Act: IATSE, Local 849 v Egg Films*, 2012 NSLB 120 [*Egg Films*], aff'd 2014 NSCA 33, leave to appeal to SCC refused, 2014 SCCA No 242; the present author must disclose that he was the Vice-Chair of the NSLB panel which issued this decision.

83. Geoffrey England, *Part-time, Casual and Other Atypical Workers: A Legal View*, Research and Current Issues Series No 48 (Kingston: Industrial Relations Centre Press, 1987); Harry Arthurs, *Fairness at Work: Labour Standard for the 21st Century* (Ottawa: federal Labour Standards Review, 2006) at 109-110.

84. In the unionized context, this can be done by labour relations tribunals in setting or amending the configuration of bargaining units: see *NSGEU v Metro Community Living Support Services Ltd*, 2017 NSCA 15.

85. The Canadian Union of Public Employees has been particularly attuned to this: see NSLRB examples cited in *Egg Films*, *supra* note 82.

Before turning to that latter question, it is essential to provide a glimpse of the increasingly contested question: “who, or perhaps more appropriately ‘what,’ is an employer for the purposes of labour and employment legislation?” The statutory definitions of employer are notoriously circular: “‘employer’ means anyone who employs more than one employee.”⁸⁶ The use of the word “anyone” or “a person” to reference the employer may early on have encouraged tribunals and judges to interpret it with a natural person, or the “master” of a “servant,” in mind, thus encouraging the importation of common law precedent rather than adopting a more purposive or expansive notion when interpreting the definition of employer. This may also have reinforced the tendency to conceptualize the notion of employer in personal, individual terms, and see corporate employers in a unitary or monolithic manner, shielded by a rigid understanding of impenetrable corporate legal personality.⁸⁷ The drafters of Canadian labour and employment law legislation in the post-World War II era were alert to the possibility that managers might play corporate shell games to avoid labour and employment obligations to employees, and drafted common or joint employer provisions to address this problem. These provisions typically allowed tribunals to find the existence of only one employer where “associated or related activities or businesses are carried on by or through more than one corporation, firm, syndicate or association ... under common management or direction, including direction of the workforce”⁸⁸ and thereby thwart efforts to avoid the application of labour standards or claims that the “real employer” is not unionized.⁸⁹ However, these provisions had their scope restricted by a narrow interpretation of “common management or direction, including direction of the workforce,”⁹⁰ which, when combined with contracting out for legitimate business reasons as described above, gave employers a relatively free hand in decentralizing their operations and avoiding both application of employment standards,⁹¹ and unionization.⁹² This has ultimately led to the “fissuring” of workplaces in a global environment where, for example,

86. See *Trade Union Act*, RSNS 1989, c 475, as amended, s 2(1)(l) is typical [*Trade Union Act*].

87. On these tendencies, see Jeremias Prassl, *The Concept of the Employer* (Oxford: Oxford University Press, 2015).

88. *Trade Union Act*, *supra* note 86, s 21 is typical.

89. Canadian common law courts also developed such doctrines to counter employer efforts to undermine obligations on management to provide reasonable notice or compensation in lieu: see *Downtown Eatery*, *infra* note 112.

90. See *White Spot Ltd v British Columbia (Labour Relations Board)*, 171 DLR (4th) 131, [1999] BCJ No 295, for a successful purposive application; See *Centennial Villa Inc v CUPE, Local 3215*, (1991) Order 3739 [NSLRB] [*“Centennial Villa”*], for a narrow interpretation.

91. *Lian v J Crew Group Inc et al*, 54 OR (3d) 239, [2001] OJ No 1708 [*J Crew*].

92. *Centennial Villa*, *supra* note 90.

international brands for footwear or clothing manage planning, marketing and control of their production standards, while subcontracting or outsourcing actual manufacturing of products to suppliers' jurisdictions with low wages and poor labour standards.⁹³ Fissuring also occurs within high-wage jurisdictions through franchising and contracting out, such that one has the spectre of hotel brands or restaurant chains that "own" no commercial retail premises, and where virtually all internal functions can be contracted out so as to destroy any integrated labour market within the business (the core of industrial unionism)—a process that externalizes what becomes a competitive market for separate services.⁹⁴ In these scenarios, current technology allows the lead firm or brand holder to control virtually all aspects of franchisee activities, and those of their subcontractors, while disclaiming any ability to police the labour standards adopted by the subordinate entities.⁹⁵ Economic enterprises have, thus, over the past few decades, and often in the name of concentrating on "core competencies" and "shareholder value," tried systematically to structure themselves in ways that have made identification of the "real" or "controlling" employer difficult. This result provides incentives to immediate or subordinate employers to avoid any obligations under labour standards legislation and to render more difficult any worker efforts at unionization.

The scholarly ferment over the past two decades in response to the failure of labour and employment law to fulfill the needs of working people for decent working conditions, human rights at work and the concern and respect due to them in the labour market, has given rise to various sensible academic proposals for legal regulatory reform. This is true in relation to the inter-related, and re-framed questions: "which workers should be entitled to procedural and substantive protection in labour markets?" and "which hiring persons or controlling entities should be held publicly responsible for ensuring that labour market regulatory standards for workers are being respected?" While it is not possible in this brief commentary to explore the full academic literature that responds to these questions, it is feasible to point out a number of the most promising avenues for reform to then consider the most fruitful way to assess the best normative framework within which to evaluate some of the options. In answer to the question of which workers ought to be entitled to procedural and substantive mechanisms in labour markets, the

93. Richard M Locke, *The Promise and the Limits of Private Power* (Cambridge: Cambridge University Press, 2013).

94. Weil, *supra* note 14.

95. *Ibid* at 87-91.

Freedland and Kountouris definition of the “personal work relation” holds out the most comprehensive and flexible potential.⁹⁶ They suggest that “the personal work relation consists of an engagement or arrangement or set of arrangements for the carrying out of work or the rendering of service or services by the worker personally.”⁹⁷ The purpose of this boundary concept is to “break the bounds of the contract of employment—both as to the element of ‘contract’ and as to that of ‘employment’—and to extend into a wider realm of ‘relation’ or ‘nexus’ ...of ‘personal work’ rather than ‘employment.’”⁹⁸ Freedland and Kountouris suggest that this definition could be used to set the boundaries for all or merely some labour laws or labour rights, or be used as criteria for the evaluation of such laws or rights, or alternatively become the basis for presumptions about the scope of the application of particular labour laws or labour rights. In practical terms, they see multiple interfaces or contested areas for the application of such approaches, which might include assessment of labour and employment rights in relation to: self-employed persons, freelancers or contractors; holders of public offices; ministers of religion; charity volunteers; liberal professionals; managers of enterprises; employment agency managers; occasional, causal or temporary workers; informal or undocumented workers; trainees, apprentices or work interns; those in work facilitation schemes; and those working for a household or caring for dependents.⁹⁹ To this list could be added certain franchisees or those working under the terms of a bailment.¹⁰⁰ Freedland and Kountouris support their personal work relation concept and its potential range of applications by reference to practices in a wide range of European jurisdictions, including the UK, which instantiate one or more of the applications that they see within the scope of the personal work relation.¹⁰¹ In terms of the normative foundations for judgment calls in the invocation of such an approach, Freedland and Kountouris reference power imbalances in such personal work relations,¹⁰² but argue that protective concerns can be transformed through adopting positive concerns or respect for dignity, capability and stability in personal work relations, a more stable foundation for progress.¹⁰³ The issue of what normative standards ought to be invoked to justify choices about the scope

96. Freedland & Kountouris, *supra* note 73.

97. *Ibid* at 22.

98. *Ibid* at 31.

99. *Ibid* at 35.

100. See Johnstone et al, *Beyond Employment*, *supra* note 73.

101. For an assessment of some Canadian examples, see Archibald, “Relative Autonomy,” *supra* note 55.

102. *Ibid* at 20.

103. *Ibid* at 32, 370-371.

and character of labour or workplace regulation, as mentioned, will be addressed below.

Before moving to the issue of normative standards, some attention needs to be given to certain scholarly and quasi-judicial attempts to address the second question: “which hirers of personal workers or which entities controlling, or having the ability to control, personal work relations ought to be held publicly responsible for ensuring that regulatory standards in labour markets are respected?” Once again, the literature is too vast to review comprehensively here, but some examples will serve to illustrate possible approaches and illuminate aspects of the normative dimensions in question. The Supreme Court of Canada has in two significant cases out of Quebec determined that a unified or monolithic notion of the employer may not respond to the need for fair labour market regulation. In the first, it found in 1997 that an employee provided to a unionized municipality by a temporary employment agency was employed by the municipality for purposes related to coverage by the collective agreement with its union, but also employed simultaneously by the temp agency for certain purposes under employment standards legislation.¹⁰⁴ The Court held that where the traditional characteristics of an employer are shared by two separate entities, labour and/or employment tribunals are entitled to “fill the gap” to ensure employment protection for employees is enforceable against the appropriate employer entity that is within reach.¹⁰⁵ More recently, the Court upheld a decision by a *Comité paritaire*, under the Quebec *Act respecting collective agreement decrees*,¹⁰⁶ which decided that a nominal “franchisee” and “independent contractor” under a contract to provide cleaning services for public buildings was actually an employee of the purported “franchisor” and thus entitled to the minimum wages and benefits to be paid under the applicable collective agreement that had been extended by the relevant decree.¹⁰⁷ The majority of the Court stated:

“The presence of a franchise agreement cannot function to disguise the presence of a relationship between an ‘employee’ and a ‘professional employer’ as those terms are defined in the *Act*.... To the extent that the reality of the relationship between the parties reveals that [the cleaner] did not in fact assume the business risks and had no meaningful opportunity to make a profit, that relationship is subject to the *Decree*.”¹⁰⁸

104. *Pointe Claire (City) v SEPB, Local 57*, [1997] 1 SCR 1015, 146 DLR (4th) 1.

105. *Ibid.*

106. CQLR, c D-2

107. *Modern Cleaning Concept Inc v Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28 (3 May 2019).

108. *Ibid* at para 38.

In some degree of parallel with the previous *Pointe Claire* decision, the majority in *Modern Cleaning Concept* found it significant that Justice Kasirer, in the Quebec Court of Appeal, had “properly characterized this business relationship as being tripartite in nature, since it involves three parties: the client requesting the cleaning services, Modern, which guarantees the quality and provision of the services, and the franchisee who actually performs them.”¹⁰⁹ In this case, the putative franchisor made, under Quebec law, an “imperfect assignment” of the cleaning arrangements to the worker, by retaining its primary responsibilities to the client and tightly circumscribing the conditions under which the cleaner operated.¹¹⁰ The results in these two leading cases indicate a willingness on the part of majorities in the Supreme Court of Canada to take a “purposive” approach to interpretation of relevant employment statutes in order to step behind the formal contractual arrangements made by private parties, which thwarted the interests of workers that the statutes were meant to protect.¹¹¹ However, in each case, the Court avoided the invocation of broad normative principles, which might be said to be instantiated in these decisions, and it avoided any reference to the scholarly analysis that might have justified such outcomes.

The foregoing Supreme Court of Canada cases at least point to a main potential focal point for the rectification of the problems caused for workers as a result of the fissured workplace: that is, a robust purposive interpretation of common employer provisions in labour and employment statutes. There is irony in the fact that the supposedly archaic common law seems in some measure to be in advance of the statutory law in this regard. Where an employer uses multiple corporate entities to conduct its affairs and attempts to avoid obligations to workers by denying control or responsibility on the part of the immediately employing entity under an employment contract, common law courts in Canada have for some decades been willing to pierce the corporate veil and find solvent controlling entities to be liable for its employer obligations.¹¹² While many of these cases

109. *Ibid* at para 39.

110. *Ibid* at para 42. There are echoes here from the global controversies concerning whether “Uber” and other web-based service providers are actually “employing” their purported “contractors”: see Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford: OUP, 2018).

111. While purposive interpretation has in some senses become “old hat” to Canadian lawyers, the Canadian example is being taken up as a progressive approach by labour and employment lawyers in other jurisdictions: see Guy Davidov, *A Purposive Approach to Labour Law* (Oxford: Oxford University Press, 2016).

112. Stacey R Ball, *Canadian Employment Law* (Toronto: Canada Law Book, 2014) § 4-1; *Downtown Eatery (1993) Ltd v Her Majesty the Queen in Right of Ontario*, 200 DLR (4th) 289, 54 OR (3d) 161 (Ont CA) [*Downtown Eatery*].

originated in the era of vertical and horizontal “conglomerate” integration, albeit using different corporate vehicles, there is no reason why the same principles should not apply in the new era of the fissured workplace, which relies upon tightly controlled subcontracting arrangements in complex supply chains to achieve the same ends—the evasion of labour standards. Canadian courts and tribunals have generated some infamous examples of the failure to take such a purposive approach,¹¹³ but there have been some counter examples evolving out of human rights cases in the employment context.¹¹⁴ Perhaps the most interesting examples of the direct use of common employer provisions to counter the evils of the fissured workplace occurred in the USA, where the National Labour Relations Board (NLRB) reversed its narrow interpretation of the *National Labor Relations Act* “joint employer” provision in two cases, which caused considerable stir.¹¹⁵ However, the purposive doctrine developed in these cases by the Obama-appointed majority NLRB was swiftly challenged by the Board when its membership became the fiefdom of Trump appointees.¹¹⁶ In this context, it may be significant to mention the virtually universal Canadian stance on occupational health and safety legislation, where a broad approach to shared or joint liability for industrial accidents is cast over virtually all persons or entities that have some degree of control over workplace safety: employers, sub-contractors, suppliers, employees, self-employed persons, owners, service providers, architects, and engineers.¹¹⁷ There is no reason why a parallel approach to common or joint responsibility could not also be taken in relation to a purposive interpretation of the scope of common employer provisions in labour and employment statutes. However, this begs the question of what normative principles should underpin such an interpretive exercise?

IV. *Langille's normative turn to the capabilities approach to human development and its implications for his claim that labour law is a subset of employment law*

In response to this last question, Brian Langille has, in his most recent writing,¹¹⁸ turned to the “capabilities approach to human development”

113. *J Crew*, *supra* note 91; *Centennial Villa*, *supra* note 90.

114. *Robichaud v Canada*, [1987] 2 SCR 84, 40 DLR (4th) 577 [*Robichaud*]; and *United Steelworkers v Tim Horton's*, 2015 BCHRT 168.

115. *Browning-Ferris Industries* 362 NLRB No 186 (27 August 2015); and *Miller & Anderson, Inc* 364 NLRB No 39 (11 July 2016).

116. Notice of the proposed rule change was first mooted by the Board on 13 September 2018, and made the subject of controversial consultations; similar action was taken by the US Department of Labour in relation to the Fair Labour Standards Act in 2019.

117. See, for example, *Occupational Health and Safety Act*, SNS 1996, c 7, ss 13-23.

118. See his “Introduction: The Capability Approach to Labour Law—Why are we here?” and his

pioneered by Amartya Sen,¹¹⁹ and supported by the trail-blazing work of Martha Nussbaum,¹²⁰ as the normative touchstone for a pragmatic yet principled foundation for labour and employment law in its largest sense.¹²¹ Moving beyond the 1981 “Subset” article’s reliance on Rawls and Dworkin, Langille has become a leader among an international group of labour and employment specialists who see the capabilities approach as a way out of the apparent dead-end faced by labour law in both theory and practice described above.¹²² Sen’s core insight for the human development approach is that freedom is both the end and the means to development, and that the context for improving people’s capabilities to live lives they have reason to value are instrumental freedoms which Sen identifies as: (i) political freedoms, (ii) economic facilities, (iii) social opportunities, (iv) transparency guarantees and (v) protective security.¹²³ As Langille says: “the focus is on the expansion of capabilities – that is, the improving of human lives by expanding the range of things that a person can do and be.”¹²⁴ Langille emphasizes the Nussbaum anti-utilitarian position that: “the approach takes each person as an end, asking not just about total or average well-being, but about the opportunities available to each person.”¹²⁵ Thus, for Nussbaum, the capabilities approach “is focussed on choice or freedom, holding that the crucial good societies should be promoting for their people is a set of opportunities, or substantial freedoms, which people then may or may not exercise in action: the choice is theirs.”¹²⁶ Langille also highlights Sen’s crucial distinction between a person’s “capabilities” and their “functionings.” While capabilities may represent a person’s real-world opportunities, their functionings are what they have actually chosen to do or be. A useful corollary from Langille’s perspective is the distinction

“Chapter 6: What is Labour Law? Implications of the Capability Approach” in Brian Langille, ed, *The Capability Approach to Labour Law* (Oxford: Oxford University Press, 2019); and his “Human Development: A Way out of Labour Law’s Fly Bottle” in Hugh Collins, Gillian Lester & Virginia Mantouvalou, eds, *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018) [“Fly Bottle”].

119. Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

120. Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: Harvard University Press, 2011).

121. Langille had referred to Sen in his “Labour Policy” article in 2002, *supra* note 36, and it had become central to his thinking by the time of his Chapter 7 “Labour Law’s Theory of Justice” in Guy Davidov & Brian Langille, *Idea of Labour Law*, *supra* note 74.

122. Simon Deakin, Robert Salais, Ricardo Del Punta, Supriya Routh (all represented with chapters in his *Capability Approach* collection) and Alain Supiot, among others, are members of that international group.

123. Sen, *supra* note 119 at 38-40.

124. Langille, “Fly Bottle,” *supra* note 118 at 91.

125. *Ibid.*

126. Nussbaum, *supra* note 120 at 18.

between “fertile functionings,” that is, those which “tend to advance and promote other related capabilities,”¹²⁷ and “deprivations” or “corrosive disadvantages,” which tend to limit other capabilities and therefore reduce a person’s possible range of functionings.¹²⁸ Work, of course, can be either a fertile or a corrosive functioning, and in the view of many economists it is seen as simply the deployment of human capital. For Sen and indeed Langille, it is important to note that work-related capabilities go beyond the notion of “human capital,” but Langille nonetheless asserts that “labour law is best conceived as the part of our law that structures, and thus constrains or liberates, human capital deployment.”¹²⁹ Langille continues, in line with Sen, that “the capability and freedom to work is intrinsically valuable as a substantive freedom in itself, and is also instrumentally valuable in attaining freedoms and choices in other areas of our lives.”¹³⁰ Thus, Langille concludes that, under the new normative framework of the capabilities approach, “labour law’s role can be seen as identifying, and removing, obstacles to the deployment of human capital in ways which optimise its intrinsic and instrumental role in lives lived.”¹³¹ In other words, the purpose of labour law is “the expansion of real capability to lead lives we have reason to value.”¹³² For Langille, then, the use of this normative framework in the purposive interpretation of labour and employment laws can incorporate and transcend their protective and human rights justifications, while aligning with a far reaching understanding of social and economic productivity and effectiveness.¹³³

The foregoing paragraph provides a highly abstract encapsulation of the capabilities approach to labour and employment law from the new Langille perspective. It might be well, therefore, to briefly sketch some of the practical implications of the capabilities approach for the creation of a “new grammar and narrative” by which to understand the subject.¹³⁴ Broadly speaking, the capabilities approach, according to Langille, enables

127. Langille, “Fly Bottle,” *supra* note 118 at 91.

128. For the notion of “corrosive disadvantage,” Langille relies on Jonathan Wolff & Avner deShalit, *Disadvantage* (Oxford: Oxford University Press, 2007).

129. Langille, “Fly Bottle,” *supra* note 118 at 92.

130. *Ibid* at 95. This of course, assumes that the work in question constitutes a relatively “fertile functioning” and is not an exploitative form of “corrosive disadvantage.”

131. *Ibid* at 96.

132. *Ibid* at 97.

133. Langille has long asserted that the protective and human rights justifications for labour law, by themselves, invite neo-liberal critiques that labour law constitutes a burden or tax on economic activity and disturbs natural forms of market competitiveness and efficiency, and that the capabilities approach transcends such limitations: Langille, “Labour Policy,” *supra* note 36.

134. The concept of a “new grammar and narrative” for explaining labour law was first advocated by Langille in his “Labour Law’s Back Pages,” *supra* note 30.

one to avoid problems linked to the contract of employment by using the notion of capabilities and labour law's purpose of removing obstacles to the deployment of human capital (i) to interpret labour and employment law statutes and (ii) to provide a basis for evolution of the common law. The narrow issue for a labour adjudicator using a purposive approach to his or her task must become, in Langille's terms: "which person or entity is best able to remove the impediments to a fertile functioning which best deploys a worker's capabilities." Thus, the questions are not "Is this worker an employee?" or "Who or what entity is bound by a contract of employment?", but rather "which person or entity who benefits from the efforts of the worker and influences the nature and conduct of the work is in the best position to remove the obstacles to effective deployment of the worker's capabilities?" Langille, however, is not throwing out labour and employment law babies with the traditional bath water. He argues that

"the great advantage of seeing 'inequality of bargaining power between two contracting parties' as simply one version of the general problem of (securing) just deployment of human capital is tied to our other main point ... we do not need to tie ourselves to that particular account of employer/employee relationships."¹³⁵

Langille thereby incorporates the protective justification for labour and employment law within the capabilities approach. Likewise, he argues that discrimination in employment is a corrosive disadvantage that inhibits the fertile functioning of work relationships, and that ought to be removed by the person or entity best placed to do so.¹³⁶ From this perspective, the human rights justification for labour and employment law is also encompassed by a capabilities approach. It is thus apparent that Langille has moved well beyond notions of mere respect and concern for working citizens provided by a constitutional democracy in the sense of Rawls and Dworkin, and protection against gross economic exploitation. In this latter context, Langille agrees with Sen that it is fundamental that freeing people to advance their own freedoms is not to create persons who are passive recipients of benefits, but rather ensuring deployment of their capability to "help themselves and also influence the world."¹³⁷ In this regard, Langille, citing Paul Weiler, notes the significant difference between employment law, which externally sets standards to benefit workers, and collective

135. "Fly Bottle," *supra* note 118 at 101.

136. This was done by the Supreme Court of Canada in *Robichaud*, *supra* note 114, a human rights case which is a key focus of Langille, "Fly Bottle," *supra* note 118.

137. Langille, "Fly Bottle," *supra* note 118 at 94, quoting Sen, *Development as Freedom*, *supra* note 119 at 18.

bargaining law, which is intrinsically valuable to workers as “an exercise in self-government” and thus involved in a relational activity of making choices in concert with others.¹³⁸

It is at this point in his recent writing that Langille moves beyond the scope of formal labour and employment law or merely seeing the former as a subset of the latter. He says,

“if we see labour law as underwritten by the idea of human freedom, we not only have a set of reasons for traditional labour law, but also for non-contractual approaches to work relations (informality, for example) and for other non-traditional labour law subjects (unpaid work, education, child care, and so on).”¹³⁹

Once again, one might think that Langille is making common cause with those who see labour and employment law as a subset of what the Europeans see as social law, or others see as a broader notion of labour market regulation.¹⁴⁰ This characterization would bring such areas as immigration law, tax law, social security law, pensions law, population policy laws, and the regulation of professions, to say nothing of occupational health and safety law and workers compensation, and a variety of other potential areas of formal legal regulation that impact workers.¹⁴¹ Langille might not take exception to such a list of subjects as falling within the regulatory sphere of a capabilities approach to labour law in the broad sense. However, that is not where he is going. Pointing to the work of Supriya Routh,¹⁴² Langille asserts that the human development approach “liberates us from contracts of various sorts” and “explicates a comprehension by labour law of the world built on informal work (the way in which the majority of workers throughout the world now find themselves working).”¹⁴³ This opens up a huge area, which comes with its own set of definitional problems: “what is work?”; “who is a worker?”; “who is a controlling beneficiary of productive working efforts by others?” The realm of this inquiry takes us well beyond the “personal work relation” as conceptualized by Freedland

138. “Fly Bottle,” *supra* note at 118, which echoes the quote noted above, from David Beatty in “Subset,” *supra* note 2, that “labour is not a commodity.”

139. “Fly Bottle,” *supra* note 118 at 101.

140. Simon Deakin & Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005); Chris Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell & Anthony O’Donnell, eds, *Labour Law and Labour Market Regulation* (Leichhardt, NSW: Federation Press, 2006); and Supiot, *supra* note 20.

141. See the table of contents of Arup et al, *supra* note 140, for a catalogue of potential inclusions to the list.

142. Supriya Routh, *Enhancing Capabilities through Labour Law: Informal Workers in India* (New Delhi: Routledge, 2014).

143. “Fly Bottle,” *supra* note 118.

and Kountouris to say nothing of Langille’s original “labour law as a subset of employment law.” Thus, what is clear from Langille’s latest work, is that he has transcended the normative premises of “labour law as a subset of employment law” with its emphases on “concern and respect” as the twin normative pillars of labour law. Rather the capabilities approach provides Langille with a broad and deep theory of justice underlying appropriate forms of the regulation of work relations. Moreover, in the “Fly Bottle” article, he provides detailed and pragmatic analysis not limited to an articulation of abstract theory, and in his *Capability Approach* chapter he responds respectfully, but pointedly and credibly, to his critics. To revert to a now overworked phrase, Langille has gone well beyond “labour law as a subset of employment law.”¹⁴⁴

Conclusion

In 1981, Brian Langille indeed wrote a path-breaking article explaining why labour law should, quite correctly, have then been seen as a subset of employment law. However, in those halcyon days of the late-welfare state, he could not have foreseen the dramatic changes in the labour market that would, in a certain way, lead to the banalization or unspoken general acceptance of his important insight some four decades later—yet those changes render his initial insight somewhat peripheral to the world of labour and employment law’s new problems. But Langille has, for our benefit, kept his wits about him in the intervening period. He has perfected his craft and evolved his thinking in ways that could be crucial to leading us out of the wilderness into which regulating work has fallen.¹⁴⁵ The “human development through capabilities approach” to labour and employment provides an optimistic but pragmatic vision of how to get us out of “labour law’s fly bottle,” to pick up on Langille’s Wittgensteinian title. The bigger question which bedevils us all is this: how can we move from the realm of workable scholarly ideas to that of concrete social and political progress in entrenching a capabilities approach to work regulation in the Canadian, and global, legal and political environment? Two of my colleagues in this collective endeavour to assess Langille’s, and indeed this country’s, early approach to labour and employment law and its comparative evolution, have recently suggested that, in the European context, “sustainable democratic engagement” is critical to the

144. See Supiot, *supra* note 20; and Johnstone et al, *Beyond Employment*, *supra* note 73.

145. Langille is not simply an “ivory tower academic” should skeptics wish to employ that pejorative label: he has put in his dues at the labour relations “coal-face,” being a respected labour arbitrator and mediator.

improvement of labour law “in the age of populism.”¹⁴⁶ They call for a “re-constituted social contract...for a pluralistic [social] order.”¹⁴⁷ I like to think that Canadians are privileged to live in a society where, at least in formal terms, our citizens have access to many of the constitutional and other arrangements that Bogg and Freedland see as institutional prerequisites to the kind of pluralistic polity which should be capable of re-creating fundamental rights at work, according to the capabilities perspective advanced by Langille.¹⁴⁸ However, in the words of two of my dearest and, sadly now departed, labour law colleagues: “politics tells you more about labour law than law does.”¹⁴⁹

I commenced the conclusion to this paper in late autumn of 2019, at a time when populist provincial governments in two provinces had, in the name of “the people,” reversed labour standards reforms which, to some significant degree, ameliorated the problems addressed in this article; another province had invoked the *Charter* notwithstanding clause to limit the rights of public employees to wear religious symbols; and the leader of a federal “people’s party” had refused to disassociate himself from billboards urging voters to “stop mass immigration”—a specious labour-related issue, presumably raised to inflame and exploit racist sentiments for partisan political gain. Populist bile that was spilling over the 49th parallel from our “Neighbour to the South” seemed to be having an unfortunate political impact in Canada. A Canadian federal election had given the country a minority Liberal government that appeared to be potentially weak and out of touch with many voters, particularly in western Canada and Quebec. I was apprehensive about the growing predominance of illiberal populism, which is anti-worker from a capabilities perspective, while its adherents attempt to govern by exploiting the fears of working people. I said that a human development approach, which is rooted in the removal of obstacles to work as a fertile functioning and can improve the economy, is one that may be lost on neo-conservatives.¹⁵⁰ I opined that evidence-based policies, such as Keynesian economics or carbon pricing as ways to reduce greenhouse emissions, and, dare one say, something as complex as labour market regulation based on a capabilities approach

146. Alan Bogg & Mark Freedland, “Labour Law in the Age of Populism: Towards Sustainable Democratic Engagement” in Julia López López, ed, *Collective Bargaining and Collective Action: Labour Agency and Governance in the 21st Century* (Oxford: Hart Publishing, 2019).

147. *Ibid* at 38.

148. See Bruce P Archibald, “Relative Autonomy,” *supra* note 55.

149. Professors Innis Christie and Dianne Pothier, both respected scholars in the domains of labour law, employment law, constitutional law and human rights, adhered to this adage...

150. Simon Deakin, “The Capability Approach and the Economics of Labour Law” in Langille, ed, *Capabilities Approach*, *supra* note 18.

to human development, seem to be hard sells in the world of politics by “tweet.” But I now feel that I write, to some degree, in a different era.

By the spring of 2020, parts of the world are beginning to believe that the first wave of the COVID-19 Pandemic has flattened and that anti-pandemic lockdowns can be loosened. There has been a stunning sea change in political attitudes and actions in Canada, and it appears that almost all Canadian political “movers and shakers” have been converted to Keynesianism to some considerable degree. The Government of Canada and its provincial and territorial counterparts have re-discovered a kind of cooperative federalism that many thought to be a thing of the past¹⁵¹ in order to present a united “Team Canada” response to the pandemic. The head of the Canadian Labour Congress was reported to have met with the head of the Canadian Manufacturer’s Association to develop joint ideas to put to governments. The failure of international supply chains to be able to deliver emergency medical supplies has undermined support for globalism in economic affairs. Oligopoly in food production has created worrisome domestic shortages, while international travel restrictions have put the spotlight on agriculture’s dependence on migrant labour, for better or for worse. Working “virtually” from home has become so predominant that it may become permanent, transforming the organization of workplaces as we have known them. Dysfunctional labour market regulation linked to precarious employment and its attendant ills has been connected to shocking rates of death among elderly and vulnerable populations in long-term care facilities. Large sections of the public now apparently see that there is a role for the state in regulating not only public health issues, but related economic and labour market issues. Many jurisdictions have demonstrated that successful outcomes can be achieved by careful evidence-based policy implementation. In all of this union and business leadership has come to the fore, but there have been few if any adjustments to the collective bargaining regimes across Canada. The provincial and federal efforts at providing workers with support to get through the pandemic have been accomplished largely through regulatory changes to statutory employment law rules.¹⁵² Labour law specialists around the world are mobilizing to study these kinds of changes.¹⁵³ But those

151. See Donald J Savoie, *Democracy in Canada: The Disintegration of Our Institutions* (Montreal & Kingston, McGill-Queen’s University Press, 2019) for a pessimistic view of the capacity of the Canadian constitution to implement coordinated and sensible social and economic policies in a country fractured by regionalism.

152. See David J Doorey, “COVID-19 and Labour Law: Canada” in (2020) 13 *Italian Labour Law e-Journal*, Special Issue 1, online: <<https://doi.org/issn.1561-8048/10843>> [perma.cc/CCW9-MRW4].

153. See the activities being announced through the global Labour Law Research Network (LLRN)

committed to “sustainable democratic engagement,” even in a time where the Achilles’ heels of populism have been revealed by the ravages of the pandemic, must re-double the efforts required to re-align social policy and labour/employment law with the needs of those hired in vulnerable personal work relations. These efforts are required to overcome the pitfalls of many fissured workplaces, which have shown themselves in the pandemic to be truly dangerous. One of the signal attributes of the Langille approach to capabilities and human development at work is that it transcends the limitations of outmoded left/right rhetoric to say nothing of the sterile platitudes of political debate that dominate the 24-hour news cycle media. Capabilities approaches have potential to be at the core of a new and hopeful politics of human development in a post-populist and post-pandemic era. The political stakes are high: we know that before the pandemic economic and social inequality were at levels not seen since the 1920s and that such work-related inequality contributes to economic and political instability.¹⁵⁴ This situation is exaggerated by the pandemic and the recession that it triggered. The mantra of the capabilities approach, of seeing labour and employment law as support for people by enabling them to choose to live lives they have reason to value, has never been more relevant. We all have reason to value Brian Langille’s evolving and helpful efforts in this regard.

online: <www.labourlawresearch.net> [<https://perma.cc/B7XT-PBZG>].

154. 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); Antony B Atkinson, *Inequality: What can be done?* (Cambridge: Harvard University Press, 2015); and Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Cambridge: Harvard University Press, 2016).

