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Employment Law Revisited

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This critique of Brian Langille's famous "Subset" article considers the historical and current meaning of "employment law" in Canada and in the UK. In Canada, "employment law" was fashioned by Innis Christie in the 1980s as the law of personal work relations for the non-unionized sector, with "labour law" applying to the unionized sector of the economy. In the UK, "individual employment law" appeared in the 1970s to be a distinct discipline; but since that time it has largely re-merged with labour law, with the terms "employment law" and "labour law" becoming virtually synonymous. An enlarged scope is proposed for the whole subject as "work relations law," in which individual and collective elements are combined; and finally it is argued that Langille's seminal article proposed a similar over-arching framework for the subject as a whole, rather than subordinating its collective to its individual aspect as it initially appears to do.

La présente critique du célèbre article de Brian Langille « Labour Law is a Subset of Employment Law » examine la signification historique et actuelle du « droit de l'emploi » au Canada et au Royaume-Uni. Au Canada, le « droit de l'emploi » a été conçu par Innis Christie dans les années 1980 comme le droit des relations de travail personnelles pour le secteur non syndiqué, alors que le « droit du travail » s'appliquait au secteur syndiqué de l'économie. Au Royaume-Uni, le « droit individuel de l'emploi » est apparu dans les années 1970 comme une discipline distincte ; mais depuis lors, il a largement fusionné avec le droit du travail, les termes « droit de l'emploi » et « droit du travail » étant devenus pratiquement synonymes. Nous proposons un champ d'application élargi pour aborder l'ensemble du sujet en tant que « droit des relations de travail », dans lequel les éléments individuels et collectifs sont combinés; et enfin, nous avançons que l'article fondateur de Langille proposait un cadre global similaire pour l'ensemble du sujet, plutôt que de subordonner son aspect collectif à son aspect individuel comme il semblait le faire initialement.

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Introduction

My agreement to contribute to this Special Issue has had an outcome different from the one I originally imagined. I had contemplated writing a straightforward evaluation of Brian Langille's famous article, "Labour Law is a Subset of Employment Law."[1] Instead, I have found myself involved in a more complex and multi-faceted engagement with the ideas that animate his article. It is an engagement that has required me to revisit the notion of "employment law," to consider what I and others have meant by "employment law," and to explore what "employment law" can and should aspire to achieve. This is an engagement that culminates in a re-consideration and possible re-imagining of the categories both of "employment law" and of "labour law."

The main starting point for this unexpectedly far-reaching exploration was an arrangement to participate in a session of Anglo-Canadian comparative discussion at the Labour Law Research Network conference in Toronto in 2017. Perhaps for all the contributors, and certainly for me, the main point of comparison between the UK system and the Canadian one consisted in their historically and currently different understandings of the relationship between "labour law" and "employment law." In the UK, the two terms have become largely interchangeable: in Canada, by contrast, they denote two distinct legal topics, or even two separate legal disciplines. Canadian labour law is seen as being collective in nature and applicable to the unionized sector of the workforce, while Canadian employment law is seen as individual in character and applicable to the non-unionized sector. No such clear distinction can be made in the law of the UK: the equivalent body of law has some collective aspects and some

1. (1981) 31 UTLJ 200 ["Langille, Subset"].

individual ones, but is nevertheless seen as being an essentially unitary one, applicable both to the unionized and non-unionized sectors of the workforce, which can be equally suitably referred to as "labour law" or "employment law."

It will be noted that I have characterized the contrast between these two visions of the relationship between labour law and employment law as a partly *historical* one. They do indeed reflect two different, though partly interactive, legal evolutions in the domain of work relations as between the UK and Canada. The Canadian system had its origins in that of the UK, but had also been reflective of that of the USA: Canadian labour law had in the decades following World War II taken on many of the features of US collective labour law, which is centred upon a system of compulsory union recognition and collective bargaining, and had therefore replicated that system's sharply defined and maintained restriction to the unionized sector of the workforce. This was its essential state and condition by the beginning of the 1980s; the UK, however, having engaged in a short-lived USA-style legislative experiment in the early 1970s, had ceased to draw any such clear line by the end of that decade.

If we can regard the foregoing description as having captured, with the broadest of brushstrokes, two contrasting pictures of the state of the art in Canada and the UK at a certain historical moment, we can also observe that, at that very moment, Brian Langille as a young and brilliant scholar burst upon this apparently settled scene with a major challenge to the Canadian legal typology as I have described it. This challenge consisted of his deeply provocative suggestion that, far from regarding Canada as having two distinct and parallel legal systems in the domain of labour or employment relations, we should, apparently, regard the one as part of, even in a sense subordinated to, the other. This was his celebrated proposition, nailed to the church door in Dalhousie, that "labour law is a subset of employment law."[2]

This was a provocative proposition because it appeared to identify employment law as being on a trajectory on which it would, and should, not only complement labour law but actually subsume it. This was therefore not just about the relative scope and coverage of the two disciplines but also about their purposes and objectives. Moreover, I believe that it presented a similar set of issues, albeit in a much less stark and obvious form, for UK law as those which it raised for Canadian law. In order to isolate and understand those issues, we need to go back more deeply into the history leading up to "Subset," and then to carry this narrative

2. *Ibid*, title and passim.

and evaluation forward into the present. This enquiry is conducted in three sections, entitled respectively: (I) the construction of employment law, (II) the evolution of employment law, and (III) the re-integration of employment law and labour law.

I. *The construction of employment law*

This section presents Professor Innis Christie as the architect or pathfinder of a process of construction of "employment law" as distinct from "labour law" in Canada, and suggests that a somewhat comparable though less prominent process of construction was occurring in the UK, and furthermore that the latter process had some influence upon the former one. Although there is nothing in the development of British legal scholarship that exactly corresponds to Innis Christie's development of Canadian "employment law," there are significant parallels between his work, and the work that was being done in Britain at that period to develop the exposition of the law of the individual employment relationship; and I think that this conjunction provides an interesting starting point for some comparative reflections upon the subsequent evolutions in both jurisdictions.

The construction of employment law in Canada is inseparably associated with the work and scholarship of Innis Christie, in his time as Professor in and Dean of the Law Faculty at Dalhousie University. It was he who initiated the teaching of Employment Law as a distinct subject at Dalhousie and in Canada at large in the 1970s, and who published the foundational treatise on employment law for Canada in 1980. This achievement has been celebrated in a succession of annual lectures and seminars held at Dalhousie to commemorate Innis Christie and his work; Professor Harry Arthurs gave the first lecture in 2011, and Professor Brian Langille followed with the second lecture in 2012. Harry Arthurs' subsequently published Inaugural Innis Christie Lecture provides an insightful account of Innis Christie's work of the construction of employment law, and of what his aims and methodology had been during that process.[3] I could not equal that account of the beginnings of employment law in Canada; but I can elaborate the comparison with the parallel and somewhat functionally equivalent developments in the UK, and also draw out an interesting thread of historical interaction, at a certain moment in time, between the impulses towards the articulation of "employment law" in Canada on the one hand and in the UK on the other. So I begin by developing more fully the distinction between "labour law" and "employment law" as a matter both

3. Harry Arthurs, "Charting the Boundaries of Labour Law: Innis Christie and the Search for an Integrated Law of Labour Market Regulation" (2011) 34:1 Dal LJ 1.

of concept and of terminology. The main point is that, although we find the same duality of terminology between "labour law" and "employment law" in Britain as we do in North America, the relationship between those two terminologies in British law has been very different from the relationship between the two terminologies in the laws of Canada or the US; and this difference betokens some underlying conceptual or structural differences between those legal systems.

If we take the mid-to-late 1960s as our chronological starting point, at the time when the academic discipline was taking shape, the structure and terminology of the law concerning collective and individual labour or employment relations was more hard-edged in Canada than in Britain. In Canada, there was a highly-regulated and structured regime for labour relations and collective bargaining that applied to the unionized sector of the labour market, similar to the National Labour Relations Board/*Wagner Act* system in the US. That legal regime was known as "labour law" and was the subject of well-developed theoretical and practical exposition. But outside that sector and that regime, there was an absence of structured or focused legal regulation of employment relations, a hardly charted territory in which the prevailing legal norms were those of the common law, characterized by a scarcely questioned stereotype coming fairly close to that of the "contract at will," which was undoubtedly the dominant paradigm in the US.

In Britain at that time, against the background of a vigorous system of voluntary collective bargaining, there was a much less highly regulated and structured legal regime for collective labour relations, or "industrial relations" as they were then styled. There was a body of legal regulation of individual employment relations that was primarily governed by the norms of the common law of the contract of employment (still often known as the "master and servant contract"), but upon which was gradually being superimposed a "floor" of statutory protections for employees, enforceable in a new body of embryonic labour courts known as "industrial tribunals." This body of law, previously known as "industrial law" or "the law of master and servant," did not formally differentiate between a unionized and a non-unionized sector, though its practical outcomes for workers differed greatly as between those two sectors. As the academic study of that body of law in Britain gathered pace through the 1960s and 1970s, it did so increasingly under the title of "labour law"; this was very much, as we shall see, under the influence of the undoubted *doyen* of the subject,

Otto Kahn-Freund, for whom this terminology of "labour law" was always the preferred one.[4]

So by the late 1960s the terminology of "labour law" prevailed both in Canada and in Britain; but it referred to differently structured legal regimes with different spheres of application. There was then an interesting twist in the story, whereby the idea and terminology of "employment law" came onto the scene in both systems but did so in rather different ways, each contingent upon its own existing national legal context as I have described it. In both systems, there was an increasing impulse to enhance and rationalize the legal protection of individual workers, at the levels both of practical law-making and theoretical exposition, the activity at those two levels being mutually complementary. This was essentially an attempt to chart and develop the worker-protective potential of the law of the contract of employment, and, where that was lacking or deficient, which was in large measure the case, to build a legislative (and in part constitutional, especially in Canada) superstructure of employment rights and employment equality law upon those often shaky foundations. In Canada, this pursuit was fairly conceived of under the heading of "employment law." This was the intellectual and practical activity in which Innis Christie was undoubtedly engaged, presenting that work as the introduction of a new academic and practical discipline. At the outset "employment law" represented, and I believe still represents, a distinctive pursuit from that of collective labour law, still basically applying to a distinct cohort of workers—those in the (increasingly large) non-unionized sector.

However, from the vantage point of the present day, the evolution of the terminology and of the disciplinary or pedagogical structure can be seen to have been a very different one in the UK. It is true that, in the course of the 1970s in particular, there were signs that "individual employment law" might be emerging as a distinct pursuit from that of "labour law," with much the same prospectus as that which I have identified for Canadian "employment law." But it is now apparent that the separation between the two was never anything like as complete as it has been in Canada, either in terms of legal subject-matter or in terms of a sectoral division between the unionized and non-unionized workforces. And moreover, even that partial

4. One of the first occasions on which Kahn-Freund used the terminology of "labour law" (in the English language) in published work was in an Anglo-Canadian comparative context, namely when giving the WM Martin Lectures in the University of Saskatchewan in 1967, published as Otto Kahn-Freund, *Labour Law: Old Traditions and New Developments* (Toronto: Clarke, Irwin & Co, 1968). He would later go on to deliver his Hamlyn Lectures, his classic exposition of the subject, under the title of "Labour and the Law," published as Otto Kahn-Freund, *Labour and the Law* (London: Stevens, 1972).

disjunction between "labour law" and "employment law," which seemed to be presenting itself in the 1970s, has tended to fade away, so that the two terminologies have become largely synonymous, both settling down into being names for a single legal subject or discipline embracing both collective and individual employment relations. If one chooses the name "labour law" there is still a slight implication that the emphasis might be on the collective aspects, with the opposite, individual, emphasis for "employment law"; but, like the Cheshire Cat, this distinction has virtually evaporated, leaving only a grin.

All that said, it is still useful to hark back to that time in the 1970s when "employment law" was being cultivated as a distinct legal discipline in Canada and showed some signs of becoming so in the UK. This process of cultivation in Canada is recognized as having been the special work of Innis Christie, and it is clear that he planted a tree that took root and grew apace. There was something going on in the UK that was loosely parallel; I think we can specially associate it with the work of Bob Hepple and Paul O'Higgins. It now appears as a somewhat ephemeral phenomenon, at least in the sense that "employment law" did not become a discipline distinct from that of labour law in the UK; but it was a significant tendency in its own way, and moreover it was one that, I now believe, had an influence on the work of Innis Christie in Canada. This argument merits a fuller exposition.

The story of "employment law" in the UK provides an interesting study of the way in which legal disciplines or sub-disciplines evolve within legal systems generally, and in particular in the domain of labour, employment, or work relations. I venture two general preliminary observations, which seem specially applicable in this instance. Firstly, these evolutions are typically much less clearly determined from the outset than hindsight makes them appear. Indeed, it is often far from obvious when the outset occurred; and even when that is reasonably clear, we have to allow for an often long period of subsequent indeterminacy during which the epistemology of a legal discipline or sub-discipline, and its relationship with other disciplines or sub-disciplines, has not yet become settled.

My second preliminary observation is that the construction of a legal discipline or sub-discipline tends to be driven by two kinds of purpose, and that these two kinds of purpose operate in many different degrees of combination with each other. We normally find that a process of formation of a legal discipline has on the one hand a general purpose and on the other hand a specific one, which shape the process in various different degrees. Where a new legal discipline or sub-discipline is being constructed, it will usually be for the general purpose of providing a well-developed and well-

reasoned legal exposition and analysis in an area where such exposition and analysis is perceived as deficient. However, the process of construction may also be driven by some more specific normative purpose, that is to say some perception that a specific goal could be achieved, or at least more nearly achieved, by means of the formation of a new distinct legal discipline or sub-discipline.

Thus, in the domain of labour, employment, or work relations, the initial formation of an over-arching legal discipline from the middle of the twentieth century onwards, increasingly under the title of "labour law," had the general purpose of proving a clear exposition and doctrinal analysis of a body of a law that was growing in substance, complexity and practical importance. This has typically been combined with a more specific purpose, which has tended to be in the nature of providing protection, security, or justice to workers in their relations with their employers. But there have been a great variety of views about how far and how best to pursue those specific purposes, and how to combine or reconcile them with other goals such as that of maximizing the economic efficiency of employing enterprises.

Moreover, there has been a divergence as to whether those purposes should be perceived as collective or as individual ones, to be pursued by the creation and enforcement of collective or individual rights and obligations. This has been a source of tension which gives rise and helps to explain divergent approaches to the relationship between "labour law" and "employment law." It enables us to identify and understand how "employment law," or more specifically "individual employment law," seemed to be crystallizing as a distinct sub-discipline in the UK during the early 1970s, and why that crystallization in the UK exerted a crucial influence upon Innis Christie's construction of employment law in Canada.

When recounting that episode in the history of "employment law," it is important to remind ourselves that the emergence of an overarching legal discipline in the domain of industrial relations, labour relations, or employment relations, was still very recent; it was a discipline that took shape in the UK in the course of the 1960s—and as I have indicated, it did so mainly under the banner of "labour law," which quickly supplanted the names of "industrial law" or "the law of master and servant." At one point it seemed possible that the whole territory might be described as that of "employment law"; in 1963 Gerald Fridman published an encyclopaedic treatise on the subject, under the title of "The Modern Law of Employment," which enjoyed a moment in the sunshine as the leading

work of reference for practitioners in the field.[5] This was not, however, destined to become the prevailing terminology during that period; when Bill Wedderburn, pursuing at the London School of Economics a path which Otto Kahn-Freund had been opening up since the 1950s, became a principal protagonist of this newly emerging academic discipline, he did so firmly in the name of "labour law."[6] Roger Rideout, my first teacher of the subject at University College London, adopted the same nomenclature when he presented his outline of the principles of the subject in 1972.[7]

I think that for these founders of the discipline in the UK, the insistence on the terminology of "labour law" expressed their normative concern that it would maintain a collectivist orientation, and a real anxiety, or at least ambiguity of feeling, about the way in which it seemed to be taking on an individualist one. Kahn-Freund had inculcated, and Wedderburn had inherited, the profound conviction that the essential task of the law of the UK in the domain of industrial relations was to sustain and uphold the collective voice and power of workers as expressed by the trade union movement. They would always struggle with the paradox that, given the underlying anti-collectivistic disposition of the common law judges of the UK and its Parliament at most times, the role of the law needed to be a very limited one—indeed a minimal one—if that normative goal was to be achieved.

As the power of the trade union movement and the coherence of the system of collective bargaining began to fragment and decline in the 1960s, they could see that the "method of legislation" would need to be increasingly relied upon to take up this collective worker-protective function. This was quite a bitter pill to swallow and the source of a continuing regret at the need for an increasing juridification of work relations. I think they particularly struggled with the accurate but painful perception, which had been evident to Kahn-Freund for a very long time,

5. GHL Fridman, *The Modern Law of Employment* (London: Stevens, 1963). Gerald Fridman's academic career was itself an interesting cross-over between the UK and Canada. His legal education took place at St John's College Oxford, and *The Modern Law of Employment* was written while he was a Lecturer in the Law Faculty of Sheffield University, itself a leading early centre of labour law studies in the UK. He later emigrated to Canada, specializing in private law and becoming in due course a Professor in the Law Faculty of Western University, Ontario and a Fellow of the Royal Society of Canada.

6. Thus in the original edition of "The Worker and the Law"—KW Wedderburn, *The Worker and the Law* (London: Penguin Books, 1965) at 7—he said of that book that "[i]t sketches the development and current state of our 'Labour Law'" (*ibid* at 7, Preface). And the first chapter has the title "The Foundations of Labour Law." Two years later, he published his highly influential book of cases and materials, KW Wedderburn, *Cases and Materials on Labour Law* (Cambridge: Cambridge University Press, 1967).

7. Roger W Rideout, *Principles of Labour Law* (London: Sweet & Maxwell, 1972).

that in the British legal context this juridification would have to be located in the individual employment relationship and centred upon that dubious and suspect legal institution, the individual contract of employment. They duly set about the task of performing and commissioning a modernization of the law of the individual employment relationship and individual employment contract: but they were I think never free from collectivist misgivings as they did so.

At all events, this juridification of employment relations in the UK continued apace from its point of departure in the *Contracts of Employment Act 1963*; around that legislation and the *Redundancy Payments Act 1965*, there was a rapid build-up of employment litigation in the newly-created industrial tribunals and in the higher courts on appeal from them. Moreover, it soon became apparent that the new legislation was placing heavy demands upon the law of the contract of employment, in the sense that the new statutory "floor of rights" was often dependent upon an elaborate interaction with the common law of the contract of employment. In that sense, it could be said that there was a rapidly developing body of individual employment law, which was constructed around two central pillars that were essentially inter-connected——that of the common law of the contract of employment, and that of the statute law of individual employment rights.

All this would not alone have been sufficient to bring about a splitting-off of "individual employment law" from "labour law" in the UK. A further crucial event occurred in 1971, consisting of the enactment of the *Industrial Relations Act*. This was an ill-fated and short-lived experiment in a kind of comprehensive juridification of industrial relations and employment relations. Collective industrial relations were subjected to a regime of statutory regulation which was somewhat similar to those of the USA and Canada, but which was perceived and experienced by the British trade union movement as an intervention that was intentionally hostile to trade unions and their memberships. On the other hand, in a counter-balancing move, the *Industrial Relations Act* had been fashioned so as to improve quite radically the employment rights of individual workers by introducing a new right of employees not to be unfairly dismissed from their employment.

At this juncture, in a highly significant doctrinal development, Bob Hepple and Paul O'Higgins evidently decided that it was appropriate to demarcate and develop a distinct discipline to be named "Individual Employment Law," and they implemented that intention by publishing

a short treatise under that title.[8] In so doing, they were animated by the idea that, in the environment of the *Industrial Relations Act*, individual employment law was going to be the best if not the only legal resource for securing the protection of the rights and interests of workers.[9] Moreover, they would have had it in mind that there was now going to be an intensifying need for expert exposition of the complex interaction between the common law of the contract of employment and the statute law of individual employment rights—a need which would be enhanced by the onset of statutory employment equality rights, already manifested by the enactment of the *Equal Pay Act* in 1970. Thus "individual employment law" was constructed as a distinct legal discipline in the UK.

This was a fairly short-lived construction in the UK, where it did not survive beyond the mid-1970s in such a distinct form. However, it is clear that this initiative, coupled with the work that was being done at that period to develop the law of the contract of employment in the UK, served as a significant exemplar and encouragement to Innis Christie as he pursued his mission of constructing a new discipline of Employment Law alongside that of Labour Law in Canada. Thus in the Preface to the original edition of his "Employment Law in Canada," published in 1980, Innis expressed his gratitude for their contributions:

> I will also take this opportunity to thank two men I have never met and one whom I knew only slightly some years ago. As will be obvious to anyone who reads this book, I owe a considerable intellectual debt to the authors of *Hepple and O'Higgins on Employment Law*,[10] an English text which stresses the importance of legislation in today's law of employment, and to M.R. Freedland, the author of *The Contract of Employment* (1976), for his acute analysis of the contractual elements of the employment relationship, which are common to the law of England and Canada.[11]

I seek to return the compliment by means of this little exercise in the historical exegesis of "employment law," and by considering, in the remaining sections of this paper, what has subsequently become, and what

8. BA Hepple & Paul O'Higgins, *Individual Employment Law: An Introduction* (London: Sweet & Maxwell, 1971).

9. Thus they said: "The aim of this book is to provide an introduction to the law affecting the individual employment relationship. The passing of the Industrial Relations Act 1971 has made it vitally important to re-examine this aspect of Labour Law. Most of the public debate on labour relations has concentrated on the new collective rights and liabilities. The Act is of hardly less significance for the relations between the individual worker and his [sic] employer" (*ibid* at 7).

10. This was accurate; by 1980, their book had been so re-named: BA Hepple & Paul O'Higgins, *Employment Law,* 3rd ed by BA Hepple (London: Sweet & Maxwell, 1979).

11. Innis Christie, *Employment Law in Canada* (Toronto: Butterworths, 1980), Preface at ix.

might in future become of "employment law." In accordance with the brief for this paper, I shall do so with special reference to Brian Langille's famous thesis that "labour law is a subset of employment law."

II. *The evolution of employment law*

In the previous section, I sought to show how and why, by the beginning of the 1980s, "individual employment law" had been marked out and declared an independent legal discipline, in similar though far from identical ways both in the UK and in Canada. In this section, I consider the subsequent destinies of that discipline in those two jurisdictions, concentrating in particular upon the implications of Brian Langille's proposition that "labour law is a subset of employment law." As I have indicated in the course of this paper, the proposition is a provocative one in that, although it appears to be a formal and factual statement about an existing hierarchy of disciplinary categories special to the Canadian legal system, it turns out on fuller examination to be a substantive, predictive, and normative argument that could also apply to the legal system of the UK. Understood as such, it provides a piercing optic through which to survey and evaluate the evolution of "employment law" in both jurisdictions.

So, to clear the ground, we can begin that survey at the formal and factual level by confirming to ourselves that when Langille asserted in 1981 that "labour law is a subset of employment law," he was not making an accurate statement about Canadian law, and that his assertion had no meaningful application in UK law. By that time, Innis Christie had established employment law as a distinct discipline in Canada, but I do not think that he could have claimed, nor would have wished to claim, that employment law enjoyed an hierarchical supremacy over labour law as the prevalent legal discipline for the whole domain of labour and employment relations. And the assertion simply did not make sense with regard to UK law: although "individual employment law," had seemed to shape up as a distinct discipline in the early 1970s, it had in the course of that decade largely merged with "labour law," becoming an aspect of the larger subject[12]; and moreover "employment law" and "labour law" were rapidly becoming interchangeable terminologies referring to the same legal discipline.[13]

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12. The bibliographical history of Hepple & O'Higgins, *Individual Employment Law* is itself illustrative of that evolution: see *supra* note 11 for its subsequent renaming as *Employment Law*; moreover, from the time of its original publication in 1972, it also formed the first part of Hepple & O'Higgins' *Encyclopedia of Labour Relations Law* (London: Sweet & Maxwell, 1972), which became *Sweet & Maxwell's Encyclopedia of Employment Law* under the general editorship of RV Upex from 1992 onwards.

13. That convergence of terminology culminated in the present-day situation in which some of the

However, Brian Langille would I think be perfectly willing to agree with that evaluation of his argument; he would have been the first to concede that his proposition was not really intended to depict a formal hierarchy of disciplinary categories that existed in Canada in 1981, and still less intended to be applicable in the UK in any formal sense. That is because in my view he saw himself as engaged in a different kind of discourse—namely that of making a substantive, predictive, and essentially *normative* argument, primarily for Canadian law but that might as such have some application to other legal systems as well. It certainly represented the view that "employment law" perhaps would, but much more importantly should, become a more important legal genre in the domain of labour or employment relations. Even on the face of it, "Subset" appeared to be a claim that it would be desirable actually to *reverse* the existing primacy of collective labour law over individual employment law in the Canadian legal system by reason of what he saw as the latter's normatively superior substance and content. I begin by taking that reading at its face value, though in the concluding section of this paper I advance a different view of what was ultimately intended, much more to do with a synthesis between individual employment law and collective labour law than with the primacy of the former over the latter.

However, this was, if taken at face value, a much more ambitious claim for the discipline of "employment law" as it was newly emerging in Canada, than its founding father Innis Christie would have made for it, and it is important to understand why Brian Langille advanced that bold and in a sense aggressive proposition. Innis Christie was by all accounts a practical and pragmatic legal scholar who was content for employment law to grow up alongside labour law, gradually gaining a kind of natural parity with, and eventually predominance over, labour law by reason of the steady decline in collective bargaining and contraction of the unionized sector of the workforce; but Brian Langille seemed to want that balance to be shifted further and faster than natural process would allow. It is important to consider the reasons for that special enthusiasm on Brian Langille's part.

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general textbooks that cover the whole subject in both its individual and collective aspects are styled as "labour law"—for example, Simon Deakin & Gillian Morris, *Labour Law,* 6th ed (London and Portland Oregon: Hart Publishing, 2012), while others are styled as "employment law"—for instance, ACL Davies, *Employment Law* (Harlow: Pearson Education, 2015). It is sometimes now the case that the leading British authorities will variously use or be party to the use of either terminology to describe works with a similarly comprehensive scope; compare for example Hugh Collins, *Employment Law,* 2nd ed (Oxford: Oxford University Press Clarendon Law Series, 2010); Hugh Collins, KD Ewing, & Aileen McColgan, *Labour Law* (Cambridge: Cambridge University Press Law in Context Series, 2012).

We might find a sufficient explanation in the fact that Brian Langille had been a student of, and in the school of, Innis Christie; the disciples often become more zealous than the original prophet. Or we might want to reflect on the way in which Brian Langille likes to seek out a challenge or take up a contrarian position in the face of established orthodoxy. However, I think that there was more to it than that; Brian Langille had a special and driving enthusiasm for individual employment law because he judged that it pursued goals and expressed values that he regarded as supremely important, and that it had the potential to do so more directly and effectively than collective labour law was doing or was likely to do in the foreseeable future. He believed in essence that collective labour law had become somewhat exclusive and elitist in its lack of out-reach to the "have-nots" in the non-unionized sector,[14] and that individual employment law had the potential to form the basis of a legal discipline that would secure equal concern and respect for all members of the workforce.

This represented a noble ambition on his part, to be esteemed as such. In this he was catching the incoming tide of constitutional equality and human rights law in the employment sphere. This was part of a drive towards equality and fairness of treatment for all workers—eventually towards their human flourishing, so that he is now attracted by the capabilities approach. But while admiring Brian Langille for those aspirations, and for that reason taking seriously the idea that "labour law is a subset of employment law," we may want to question whether "employment law," as formulated by Innis Christie and his followers, or for that matter "individual employment law" as envisaged by Bob Hepple and Paul O'Higgins, was ever going to be the vehicle for the achievement of those high and laudable ideals. In particular, we may wonder whether a legal genre essentially constructed upon and around the common law of the contract of employment was going to have that capacity.

In a sense, we have an opportunity to evaluate that claim by looking at what has happened to "employment law" in the intervening years. For, although "employment law" was never formally advanced to pole position on the starting grid in the way that Brian Langille seemed to be advocating, it did nevertheless come to lead the field in a de facto sense by reason of the social and economic shift to which I have referred, namely the decline of collective bargaining and the contraction of the unionized sector of the workforce. So we can test out Brian Langille's aspirational

14. Langille, "Subset," *supra* note 2 at 200: "There is a tendency to think of our law of the employment relationship as being neatly divided between 'employment law' which is law for the unorganized, and 'labour law' which is law for the organized. The former are the have-nots."

proposal that labour law should be viewed as a subset of employment law in a laboratory of real-world experience in which that proposal was to some extent substantively realized both in Canada and the UK.

In the remainder of this section, I offer such a stocktaking, which is focused mainly upon UK law because I do not presume to do more than suggest general and qualified analogies with Canadian law. This normative stocktaking will eventually try to home in on the relation between the "collective" and the "individual" aspects of labour or employment law. The stocktaking that I undertake here consists of assuming that Innis Christie, Brian Langille, Bob Hepple and Paul O'Higgins, and other proponents of "Employment Law" (Canadian style) or of "Individual Employment Law" (UK style) have been engaged in a certain normative pursuit—with which I associate myself—and of asking whether that pursuit has been successful in its outcomes. This is, therefore, a kind of "cost/benefit analysis" in a broad sense. I earlier identified that normative pursuit, to remind the reader again if I may, as that of "chart[ing] and develop[ing] the worker-protective potential of the law of the contract of employment," and the building of a statutory superstructure of employment rights and employment equality law upon those foundations[15]; so success or benefit will be measured according to an ideal of "worker-protection," which we can think of as being aligned with the traditionally foundational notion for labour law of redressing the imbalance of power which is inherent in the individually bargained contract of employment. I will use the notion of "individual employment law" (IEL) as a convenient—albeit, for all the reasons I have given, controversial—shorthand to identify this common pursuit that we are evaluating.

Let me begin with an optimistic assertion of the achievements of IEL. It has served, over the years of its evolution from the late 1960s and 1970s, to provide an indispensable technical and structural apparatus for a whole aspect of the legal regulation of labour and/or employment relations. In that sense labour law simply could not have managed without IEL and was the richer for its development. I would even go so far as to say that IEL has had some success in developing, in particular, the "worker-protective potential of the law of the contract of employment"—that being one key aspect of the normative claim which I make for IEL, the normative mission which I attribute to its proponents, such as Innis Christie and Bob Hepple. I think that this success, such as it is, has consisted primarily in moves to characterize the contract of employment as embodying a continuing obligation of mutual trust and confidence between employer and employee

15. See this discussion at Part I, above

that conditions the shape, conduct and termination of the employment relationship, and further moves to ensure that a statutory floor of rights complements and supports that essential characterization.

We can and should debate whether and how far that goal was achieved. The UK courts seemed to be developing exactly such a purposive approach[16] to IEL; that development reached its high-water mark in *Malik v BCCI,*[17] in which the obligation of mutual trust and confidence as an implied obligation and inherent feature of contracts of employment was recognized by the House of Lords. This finding meant that the assertion that the corrupt central management of the bank had damaged the reputation and future employability of a branch manager, and other similarly placed employees, could become a contractual claim in the liquidation of the bank. This implied obligation seemed to offer the possibility, among others such as an expanded notion of "constructive dismissal" in the law of unfair dismissal, that the contractual claim for damages for wrongful dismissal could develop so as to circumvent restrictions upon the claim to compensation for unfair dismissal. But there was a major set-back in *Johnstone v Unisys,*[18] where the implied obligation of mutual trust and confidence was limited in its application so that it did not govern the termination of the employment contract, in particular so that it did not enlarge the employer's liability in damages for wrongful termination; although, that "*Johnstone* exclusion zone" was later limited in its scope.[19]

There was what appeared to be a somewhat parallel evolution in Canada, from *Wallace v United Grain Growers Ltd*[20] in 1997 to *Honda Canada Inc v Keays*[21] in 2008, consisting in a rise and partial fall in the idea of the contract of employment as a "good faith contract." The majority in *Honda* did seem to give short shrift to the idea of the employment contract as a "good faith contract," which the Court had recognized in *Wallace* in identifying an employer's "duty of good faith and fair dealing" towards an employee. However, it was not the end of the story, as is demonstrated

16. See *infra,* note 23.
17. *Malik and Mahmud v Bank of Credit and Commerce International SA* [1997] UKHL 23, [1997] AC 20. The question of the nature and scope of the implied obligation of mutual trust and confidence has become central to the exposition of the law of the contract of employment in the UK—see eg Hugh Collins, "Implied Terms in the Contract of Employment" in Mark Freedland, ed, *The Contract of Employment,* (Oxford: Oxford University Press, 2016), chapter 22. This question has become bound up with the issue of whether and to what effect the contract of employment is to be regarded as a "relational contract"—see eg Douglas Brodie, "Relational Contracts" in Mark Freedland, ed, *The Contract of Employment* (Oxford: Oxford University Press, 2016), chapter 7.
18. *Johnson v Unisys Limited* [2001] UKHL 13.
19. *Eastwood v Magnox Electric plc* and *McCabe v Cormwall CC* [2004] UKHL 35.
20. [1997] 3 SCR 701, 152 DLR (4th) 1.
21. 2008 SCC 39.

notably by *Boucher v Wal-mart,*[22] in which the Ontario Court of Appeal based its decision, at least in part, on a finding that Wal-mart had breached its "duty of good faith and fair dealing" towards the employee. In other words the "duty of good faith and fair dealing" seems to have survived, and can serve as a basis for damages, but it is still necessary for a plaintiff to demonstrate and quantify damages rather than have a court extend the notice period.

I shall say more in a moment about the question of how far there has been and is a purposive judicial approach[23] to the positive development of IEL according to the normative goal that I have assigned to it. But even if one thinks that at least the vestiges of such an approach remain, I want to acknowledge some of the costs or inherent problems that attach to the whole development of IEL and its increasing presence as a dominant, even in some ways *the* dominant dimension of labour and/or employment law. There is a series of such costs attaching to the development of IEL, and they can be traced back to an original tension, some might even say an original contradiction, in the aspiration of constructing a worker-protective body of law in the context of the British common-law based tradition on the foundation of the individual contract of employment. There are many such problems. I have touched on one of them as embodied in the *Malik/ Johnson v Unisys* and *Wallace/ Honda v Keays* case law; but I shall concentrate on two such problems, which I shall identify as, firstly, that of labour market elitism and exclusion, and secondly that of individualism and de-collectivization.

The problem of labour market elitism and exclusion consists in the propensity of IEL to become a body of law that caters increasingly to a wealthy elite of employees and fails to fulfil a protective function for vulnerable or disadvantaged workers—an ironical reversal of the original situation in Canada in which Brian Langille could identify a sector of the workforce who were "the have-nots of labour law"[24] whose needs IEL was designed to address. There are several causes for this reversal, but two in particular stand out. The first cause of labour market elitism consists in a set of access to justice issues that loom increasingly large in the field of IEL. In particular, litigation to enforce contracts of employment has become so prohibitively expensive and hazardous that it has reverted to being largely the province of senior managers and "employed entrepreneurs"; a situation

22. 2014 ONCA 419.
23. As to which, reference should be made to Guy Davidov, *A Purposive Approach to Labour Law* (Oxford: Oxford University Press, 2016).
24. Langille, "Subset," *supra* note 2 at 200; see *supra* note 14.

vividly illustrated by cases such as *Commerzbank v Keen,*[25] and *Société Générale v Geys*[26] in which such claimants became the flag-bearers for the development of the "mutual obligation of trust and confidence." This was a negative effect on access to justice, which was complemented by the introduction in 2013 of conspicuously high employment tribunal fees for claiming statutory employment rights but offset by the abolition (and even repayment) of those fees following the decision of the Supreme Court of the UK in *Unison* in 2017.[27]

The other principal cause of labour market elitism and exclusion, which is a major problem in British law and practice, is the exclusionary operation of the category of the contract of employment as the pre-condition for the enjoyment of many statutory employment rights. This has an exclusionary effect because it requires continuing mutual obligation, which excludes many casual workers. Further, it tolerates both the re-constituting of an increasing proportion of employment relations as relations of self-employment and the triangulation of employment relations by the insertion of an intermediary sub-contractor or employment agency to preclude the existence of a contract of employment with the actual end-user of a worker's services. The UK Supreme Court famously took a strong line against "sham self-employment" in *Autoclenz v Belcher,*[28] but this does not deal with the problems of mutuality of obligation or triangulation of employment arrangements between workers, end-users of their services, and intermediary agencies of various kinds. In short, the doctrine of "sham self-employment" is proving insufficiently robust to control the growth of a "gig economy" constructed on a business model of zero-hours contracting and deeply embedded self-employment arrangements. There is now a great body of case law and literature on this topic. The case law is not mono-directional in this respect; there are real advances, and it is useful to make reference to *Uber BV v Aslam*[29] as a recent example of the UK courts grappling with not merely the legal realities but also the practical realities of the gig economy; here, the Court of Appeal in England decided that the claimant Uber drivers were "workers" and as such entitled to protection under the *National Minimum Wage Act* and the Working Time Directive—a victory of course, but a qualified one by contrast with

25. *Commerzbank AG v Keen* [2006] EWCA Civ 1536.
26. *Société Générale, London Branch v Geys* [2012] UKSC 63.
27. *R (UNISON) v Lord Chancellor* [2017] UKSC 5; see Abi Adams-Prassl & Jeremias Adams-Prassl, "Vexatious Claims: Challenging the Case for Employment Tribunal Fees" (2017) 80:3 Mod L Rev 412.
28. *Autoclenz Ltd v Belcher* [2011] UKSC 41.
29. [2018] EWCA Civ 2748.

their being recognized as acceding to the inner circle of "employees." To somewhat similar effect was the decision of the UK Supreme Court in *Pimlico Plumbers Ltd v Smith*[30] that the plumbers working for Pimlico Plumbers under a markedly independent model of self-employment should nevertheless be regarded as "workers" within limb (b) of section 230(1) of the *Employment Rights Act 1996* (and also as being in "employment" for the purpose of section 83(2) of the *Equality Act 2010*.

However, my second major concern about IEL is that of its propensity to be conducive of individualism and de-collectivization in labour and employment law. I will develop the theme in the context of British law but will also refer to a closely analogous set of issues in Canadian law. I believe that the theory and practice of IEL, by focusing itself upon the individual employment relation, and even more particularly upon the individual employment relation as embodied in the contract of employment, inherently encourages a mindset in which the employment relation is viewed with an individualistic and contractualist disposition. The analysis and regulation of the individual contractual employment relation does not necessarily have to be individualistic or contractualist; but it readily becomes so, especially in the hands of the common law appellate courts, which seem strongly pre-disposed to such an approach. In particular, this can lead to the marginalization and down-grading of the legal protection and support of collective bargaining.

We can see this kind of marginalization going on at various different levels. A significant manifestation of the trend consists in the fact that the exclusionary effect of the narrow scope accorded to the contract of employment may bear just as hard on rights to trade membership and activity as upon more straightforwardly individual employment rights; we could see this happening in the UK appellate courts in cases such as *Consistent Group Ltd v Kalwak,*[31] where the Court of Appeal seemed, in the context of the statutory rights to trade union membership and activity, to draw back from a vigorous development of the doctrine of "sham self-employment."[32] We have subsequently seen an extensive development of this jurisprudence, as mentioned above; this case itself concerned a classic example of the migrant gig-economy agency worker under a zero-hours contract.

30. [2018] UKSC 29.
31. [2008] EWCA Civ 430.
32. See Mark Freedland & Nicola Kountouris, "Some Reflections on the 'Personal Scope' of Collective Labour Law" (2017) 46:1 Indus LJ 52.

I think, however, that we find an even deeper form or manifestation of individualistic and de-collectivizing approaches stemming from the growing prominence of IEL. I think it was a certain IEL mindset that gave rise to the, for many British labour law scholars, quite notorious decision of the House of Lords in *Wilson v Associated Newspapers*.[33] There, the House of Lords ruled that the statutory individual right to trade union membership and activity was not violated by the practice of incentivizing workers to move from contracts with terms determined by collective bargaining to so-called "individual" contracts of employment, which were nominally negotiated with each employee individually, but in reality, were imposed as standard form contracts by the employing enterprise. Infusing the thinking of the House of Lords was not only a very *thin* conception of the right to trade union membership, but also a perception of the contractual employment relationship as in any case an essentially individual one, so that there was nothing violatory of the employee's right to freedom of association in paying her or him a premium for choosing to conduct that relationship outside the umbrella of the collective bargaining process.

I am deeply convinced that this is a thought pattern that is encouraged by the conceptual separation of IEL from collective labour law. In the British context, a corrective was administered by the European Court of Human Rights (ECHR) to which Wilson and Palmer took a case against the UK for maintaining a legal regime that had that outcome. In *Wilson and Palmer v UK,* the ECHR famously held that such a regime failed to give effect to the right of freedom of association, which was conferred by the *European Convention on Human Rights*, and the UK government had to respond by proposing amending legislation.[34]

33. *Associated Newspapers Ltd v Wilson*, *Palmer v Associated British Ports* [1995] UKHL 2, [1995] 2 AC 454.

34. *Wilson, National Union of Journalists and Others v the United Kingdom,* [2002] ECHR 552. The legislation was somewhat restricted in its scope; a challenge to those restrictions as being in violation of the European Convention on Human Rights has been mounted in recent litigation in a case which has progressed as far as the UK Court of Appeal at the time of writing—*Kostal UK Ltd v Dunkley* [2019] EWCA Civ 1009; [2020] ICR 217. The Court of Appeal rejected the claim on the basis of a narrow interpretation of the amending legislation: a powerful note on the decision by Alan Bogg and Keith Ewing argues that the Court of Appeal's decision places undue weight on the difficult to ascertain intention or mental state of the employing enterprise when it engages in actions disruptive of its recognition for collective bargaining of a union or unions: Alan Bogg & Keith Ewing, "Collective Bargaining and Individual Contracts in *Kostal UK Ltd v Dunkley*: A Wilson and Palmer for the Twenty-First Century?" (2020) 49 Indus LJ .

The Canadian jurisprudence in the cases of *Dunmore,*[35] *Health Services,*[36] and *Fraser,*[37] became equally famous, and indicated that something similar to the doings in the House of Lords in *Wilson & Palmer* was occurring in the Supreme Court of Canada in *Fraser,* namely the implementation of a subtly individualistic retrenchment upon the right to freedom of association and collective bargaining. In *Dunmore* and *Health Services*, the SCC had taken positive approaches to the freedom of association provisions of the Charter of Rights and Freedoms, in the former case to the effect that the absence of a legislative framework of protection of the associational rights of agricultural workers in Ontario violated those provisions of the Charter and its equality provision, and in the latter case, in the context of British Columbia health service provisions, a highly significant revindication of "labour rights as human rights" and a clear declaration of a right to collectively bargain as a "constitutional right" supported by the Charter.

Fraser was another of the many key decisions taken in the context of the freedom of association rights of agricultural workers in Ontario, and the various legislative attempts to maintain those rights without actually bringing those workers within the archetypal framework of the *Labour Relations Act*, ie the *Wagner Act*, model itself. In *Fraser,* the SCC majority reasons clearly reaffirmed the basic conclusion of *Health Services* that "freedom of association" encompasses a right to collectively bargain. However, they did so in a way that emphasised that the earlier case did not give a right to a particular model of collective bargaining. Thus, the Ontario Court of Appeal had been incorrect in finding that a meaningful good faith bargaining right required the importation of Wagner Act model notions of exclusivity of representation and majoritarianism, or a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of any collective agreement. So the SCC took the overall view that the more limited version of collective bargaining rights embodied in the *Ontario Agricultural Employees Protection Act* of 1992 was constitutionally valid, which was a set-back from the ambitions that had been encouraged by *Health Services*.

However, the SCC's decision in *Mounted Police Assn of Ontario v Canada*[38] amounted to a repudiation of at least some of *Fraser*, in particular reinforcing collective bargaining as a constitutional right and emphasizing

35. *Dunmore v Ontario (AG)*, 2001 SCC 94.
36. *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27.
37. *Ontario (AG) v Fraser*, 2011 SCC 20.
38. 2015 SCC 1.

the "choice" of workers to select an "independent" bargaining agent. In that case, very briefly summarized, the RCMP had established a body with representatives elected by RCMP officers. That body was consulted by the employer on a number of issues, but did not (said the majority of the SCC) "collectively bargain" and lacked the necessary independence from the employer to satisfy the employees' rights to freedom of association under section 2(d) of the *Charter*. Hence, it was found that statutory provisions that forbade RCMP officers from accessing collective bargaining rights available to other employees were unconstitutional.

I return to the point that the development of Individual Employment Law does not need to, and preferably should not, give rise to or encourage the marginalization of the collective interest in the overall framework of labour and/or employment law. However, this brief stocktaking has indicated that there have been and are likely to continue to be those costs and downsides to the development of "employment law" as a distinct discipline of "individual employment law." I therefore think that there are real dangers in allowing an ideology of individual employment law to become dominant, or of regarding "employment law" conceived of primarily as individual employment law as the over-arching intellectual discipline, in the domain of labour and employment relations. In the next section, I argue for a way to integrate and balance collective labour law and individual employment law in a unified discipline, and in conclusion I suggest that, despite appearances to the contrary, we could view this as the underlying objective of Brian Langille's proposition that "labour law is a subset of employment law."

III. *The re-integration of labour law and employment law*

In the preceding sections of this paper, I have described the construction of "employment law" in Canada and of employment law in the sense of individual employment law in the UK. I have identified this as the special work of Innis Christie in Canada, and as a movement which was led by Bob Hepple and Paul O'Higgins in the UK, and I have remarked upon the way in which that tendency in the UK was influential upon Innis Christie's thinking in Canada. I have critically analysed Brian Langille's argument for the advancement of "employment law" to the point where it could be said that "labour law is a subset of employment law"; and I have surveyed the actual evolution of "employment law" or "individual employment law" in the UK and Canada to assess the merits of that claim.

This has led me to the view that there needs to be a fundamental integration or re-integration of labour law and employment law in both jurisdictions. In this concluding section I briefly show how Harry Arthurs

demonstrated that need when paying tribute to Innis Christie and his work in 2011. I consider his proposed method of effecting that integration on even terms between labour law and employment law. I then propose somewhat different means of achieving that desirable end; and finally, I argue that such an integration is compatible with, even on a certain interpretation fully in line with, Brian Langille's thinking as initially expressed in his thesis that "labour law is a subset of employment law."

So, as I have begun to indicate, I became convinced in the course of my reflections on the construction and evolution of "employment law" that, valuable in many ways as that original construction had been and encouraging in some ways as the subsequent evolution had been, it was nevertheless very important for there to be a balanced integration or re-integration between labour law and employment law, and that this demanded a different approach from the one apparently proposed by Brian Langille in "Subset." As at many stages of this little voyage of discovery or re-discovery, I was reminded that Harry Arthurs had, like Amundsen preceding Scott to the North Pole, got there before me. In his inaugural Innis Christie lecture, he had identified this necessity. He pointed to the key changes which were occurring in the world of work, the trends away from collective bargaining and towards precarious employment or self-employment, and said, most powerfully and memorably, that a new approach was needed:

> Because of this fluidity in the status and rights of workers, labour law ought to be able to manage transitions, reconcile anomalies and cope with ambiguities. But it can do none of those things well if its administrators, subjects and beneficiaries inhabit multiple policy domains, each regulated by a distinct legal regime.[39]

Harry Arthurs accordingly canvassed alternative ways of mapping out a composite and over-arching legal discipline that could transcend the divisions between "labour law" and "employment law," between the unionized and non-unionized sectors of the workforce, between the domains of "employment" and "self-employment," and so forth. He considered doing so in a sociological genre of legal pluralism, by envisaging the discipline as "the law of the workplace" and concentrating on workplaces as the seats of distinctive multi-layered local regimes.[40] He also considered the trend towards unifying the discipline by constitutionalizing it, that is to say by fashioning it as a composite location of constitutional law and

39. Arthurs, *supra* note 3 at 8.
40. *Ibid* at 10.

constitutional principles.[41] However, he rejected those methodologies in favour of a third alternative, namely that of basing the over-arching discipline upon "the deep structures of political economy," and therefore thinking of it as "the law of labour market regulation."[42] This seemed to him to be the best way of creating an overall "map of labour law"—and therefore, to my mind, an over-arching discipline—which would be truly responsive to the underlying dynamics of the evolving world of work, which he styled as "labour market tectonics."[43]

I see the great force of that argument, and as I have indicated, I share Harry Arthurs' view of the importance of the quest for an over-arching and unificatory formulation of our shared legal discipline, which will transcend, in particular, any schism between "labour law" and "employment law." However, I would prefer to pursue that quest not so much by choosing a prevailing methodology for the over-arching discipline and naming the discipline accordingly—I think it should be open to deploying all the methodologies that Harry Arthurs singled out, and others besides—but rather by seeking out and adopting a name for the composite discipline, which is not partisan as between different genres or ways of doing the subject, and which is inclusive of all its categories or sub-categories. This involves seeking a unifying concept that transcends the division between "labour law" and "employment law" in a system like Canada's where those terms denote distinct disciplines—a concept, moreover, that sheds some difficult historical baggage in a system like the UK's, where those terms have become largely interchangeable in denoting a single discipline but still retain some slightly divisive nuances of difference between collectivist and individualist approaches.

The quest for the unificatory formulation, understood in that way, is a difficult one. I cannot hope to find a silver bullet that could pierce a clean hole through a complex accumulation of practically intricate and ideologically charged linguistic history. Any given proposal which came close to fulfilling my objective might easily appear to be at once contrived, anodyne, and evasive. Having made those apologies in advance, I propose "*the Law of Work Relations*" as an over-arching terminology and concept to encapsulate our discipline. This may not command widespread favour, but it does sidestep the rift or remaining cracks between "labour law" and "employment law"; and it does also, deliberately, break the barrier between

41. *Ibid* at 10-13.
42. *Ibid* at 13-16. At 15, n 52, he acknowledges some antecedents of this terminology, such as Simon Deakin & Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005).
43. Arthurs, *supra* note 3 at 14.

"employment" and "self-employment" that still in my view manages to cramp and enclose the body of law that is the subject of our study and scholarship. Moreover, and I say this rather sadly, I think it helps to make another more subtle but also necessary transition in the way that we approach that subject. Just as an earlier generation had to lay the ghost of "master and servant law," so I believe we have to move past the perception that this body of law is constructed on the basis of the common law of the contract of employment, going towards a fuller and more rounded view of its essential sources. I hope this proposed concept and terminology might be slightly conducive in that direction.

Conclusion

I may have appeared to wander some way from Brian Langille's thesis that "labour law is a subset of employment law"; but in conclusion I revert to some further reflection upon it. It could be supposed that, in proposing the category of "the Law of Work Relations," I am squarely repudiating Langille's view of the proper shape of the discipline and of the relationship between its component parts. It might appear that I am proposing a friendly merger on equal terms between "labour law" and "employment law" into a new corporate entity of work relations law, while he was suggesting a hostile takeover of labour law by employment law, a reversal of previous roles whereby employment law would now be the big brother and labour law the new "little sister."[44] But I believe it is not so. It is true that there was some animosity towards "labour law" in Langille's proposal and his rhetoric in support of that proposal; he had come to regard labour law as an apparatus which protected the "haves" in the unionized sector to the neglect of the "have-nots" in the non-unionized sector.[45] However, I think his purpose was not actually that of cutting labour law down to size or demoting it to the ranks and placing it under the officiation of employment law; it was, properly understood, that of achieving something much more like an integration between labour law and employment law on equal terms of the kind which Harry Arthurs was proposing in 2011 and which I am now suggesting.

I now think that the appearance to the contrary, namely that Langille was straightforwardly proposing the hierarchical subordination of labour law to "employment law" as then newly constituted by the work of Innis Christie and others, was a misleading one: and I have formed that view for the following reason. I believe that, in adopting the mantra that "labour law

44. See Judy Fudge, "Reconceiving Employment Standards Legislation: Labour Law's Little Sister and the Feminization of Labour" (1991) 7 JL & Soc Pol'y 73.
45. See *supra* note 14.

is a subset of employment law," Langille was choosing an over-elliptical headline that was somewhat distorting of his real intention. Crucially, I think that he saw the need to merge both "labour law" and "employment law" into a single over-arching discipline with a new and composite identity. If so, it was I think a misstep to use the terminology of "employment law" to denote this new composite discipline. There are signs in the article that he was experimenting with "*the Law of the Employment Relationship*" as a new composite terminology,[46] and we should read the article as if he had boldly gone right down that terminological path. So the slogan "labour law is a subset of employment law" would expand out into the more elaborate proposition that "*Labour Law, as also Employment Law itself, is a sub-set of The Law of the Employment Relationship*." That would have been far too cumbersome to form an arresting title for his article, but I like to think that it would more accurately have expressed its real intention.

I am glad to arrive at that view, because it enables me to celebrate more wholeheartedly the high normative objectives that, as I have indicated, I regard as having animated Brian Langille's article. Even on that view, there is still a debate about how to balance the collective and the individual elements in the composite package, and about whether we need to fear an individualistic bias, which threatens to impose itself in an increasingly de-collectivized socio-economic environment. That is a question, incidentally, that also needs to be asked about the "capabilities approach," and one that is discussed in the recently published symposium volume on that subject, which Brian Langille has edited.[47] However, that is a discussion with which I feel much more comfortable about having with him on the understanding of his "sub-set" thesis as being to the effect which I have now suggested.

I think that this discussion should be held between all scholars and practitioners in the field, on the footing that we are in the business of pursuing an integrated vision of the discipline that combines the pursuit of a strong collective voice for all workers and a humane notion of equal concern and respect for all of them, with a strategic regulation of the labour market towards those aims. In short, there needs to be an inclusive

46. See Langille, "Subset," *supra* note 2 at 200: "There is a tendency to think of our *law of the employment relationship* as being neatly divided between 'employment law' which is law for the unorganized, and 'labour law' which is law for the organized" [emphasis added]; and, at 201: "It is possible and important to take a broader and more unified view of our *law of the employment relationship*. From this view collective bargaining law is a subset of employment law" [emphasis again added].

47. See Brian Langille, ed, *The Capability Approach to Labour Law* (Oxford: Oxford University Press, 2019), especially Brian Langille, "Introduction: The Capability Approach to Labour Law—Why Are We Here?"

out-reach into precarious work relations and towards vulnerable workers in whatever legal, social, or transactional situation they are to be found. If so, the endeavours of all those whose work is considered in this re-visiting of "employment law" will have been reconciled in a productive way.