Understanding Labour Market Segmentation and its Solutions: A Comment on *McCormick v Fasken Martineau DuMoulin LLP*

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In this case comment, the author uses the recent Supreme Court of Canada decision in McCormick v Fasken Martineau DuMoulin LLP *as a starting point for addressing the deficiencies of existing regulatory approaches to labour market segmentation in Canada. The author emphasizes that this issue requires greater advertence and a new regulatory approach. The author then surveys three mechanisms for addressing segmentation: contract law, defined intermediate categories and human capability theory. Implied contractual obligations may advance the protective purpose of labour law—offering potentially expansive and homogeneous application. The supplemental nature of implied provisions, however, highlights their own fragility. Another potential, though partial, solution to segmentation is recognizing an intermediate category broader than the "traditional" employment relationship, as seen through the United Kingdom's "worker"-oriented legislation. Lastly, human capability theory calls for a fundamental shift in labour market regulation through an integrated understanding of human capabilities, allowing for greater attention to the purpose of the legislation involved without the need for definitional hurdles.*

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Introduction

Canada's existing regulatory paradigm has attempted to address workplace inequities through a number of formal and substantive mechanisms. Workers may variously be entitled to a raft of supportive interventions. Human rights, occupational health and safety, trade union and workers' compensation legislation are only some of the statutory solutions which have undoubtedly promoted fairness and industrial democracy in the workplace. Shifting conceptualizations of work—caused in no small part by its rising precariousness and a new globalized economy—has increasingly required us to consider the scope and application of these protective mechanisms. Determining who is *in* and who is *out* has occupied jurists, legislatures and labour law theorists alike.

"Labour market segmentation" describes the process in which the labour market becomes separated into distinct niches, with each segment characterized by differing rules and regulations.[1] Within our segmented market, certain individuals (i.e., those in more *standard* employment relationships) are fully entitled to the interventions described above, while individuals on the periphery are often excluded. The rationing of benefits and entitlements based on types of working relationships is highly problematic for jurists and marginalized workers alike. Greater advertence to the issue of labour market segmentation is required.

1. See Simon Deakin, "Addressing Labour Market Segmentation: The Role of Labour Law" (2013) International Labour Office, Governance and Tripartism Department Working Paper No 52.

In this case comment, the Supreme Court of Canada's decision in *McCormick v Fasken Martineau DuMoulin LLP*[2] acts as a starting point for critically assessing the deficiencies in current regulatory frameworks governing employment and their normative underpinnings. Part I of this case comment traces the background and judicial history of the *Fasken* case, which involved an equity partner in a limited liability partnership (LLP) claiming discrimination on the basis of age. The SCC's holding that the claimant was disentitled from seeking protections under the British Columbia *Human Rights Code*[3] (BC *Code*) is one example of problematic labour market segmentation. Part II discusses the implications of the *Fasken* case and the current state of the law in Canada. I argue that a new approach to workplace regulation is needed in order to address the pervasive issue of labour market segmentation. Part III proposes three possible approaches for addressing labour market segmentation in Canada.

The first approach considers general contract law's potential ability to fill the gaps which have been created by case law and our existing statutory landscape. As legislative solutions become increasingly endangered in times of austerity and retrenchment, some commentators have viewed contract law as a viable response. The second approach engages the employee/independent contractor distinction that has traditionally been used by statutes to confer or withhold benefits and protections. It will be submitted that appropriately defined intermediate categories, similar to those used in the United Kingdom, may address the issue of problematic exclusions. The final approach attempts to reimagine the normative foundations of labour law using human capability theory as a basis for labour law's constituting narrative. This proposal would allow for a more worker-oriented approach to the problems which arise in *Fasken* and other decisions.

2. 2014 SCC 39, [2014] 2 SCR 108 [*Fasken* SCC].
3. RSBC 1996, c 210 [BC *Code*].

I. Background and Judicial History

A. The Facts in Fasken

John McCormick was a lawyer and equity partner with Fasken Martineau DuMoulin LLP, a major Canadian law firm with over 200 equity partners worldwide. As an equity partner, Mr. McCormick was subject to the firm's Partnership Agreement, management structure and internal policies. Pursuant to the retirement provisions of the Partnership Agreement (the Agreement), equity partners must retire at age sixty-five and divest their equitable interest in the partnership. Partners wishing to continue their practice with the firm could do so in exceptional circumstances, however they would do so as an "employee or a Regular Partner", according to the language of the Agreement.[4]

Shortly before the mandatory retirement provision came into effect, Mr. McCormick brought an action under the BC *Code*[5] claiming discrimination on the basis of age.[6] Fasken sought a dismissal of the complaint, arguing that Mr. McCormick could not demonstrate a protected practice under the code.[7] According to Fasken, no employment relationship existed between the firm and its equity partners. The British Columbia Human Rights Tribunal (BC HRT) therefore lacked jurisdiction to rule on the substance of Mr. McCormick's complaint.

B. Decision of the British Columbia Human Rights Tribunal

In assessing its jurisdictional competency, the BC HRT adopted a broad interpretive approach and explicitly rejected a formalistic analysis of the relationship between a firm and an equity partner. While the BC HRT acknowledged that Mr. McCormick might not be an employee at common law or under other protective regimes, an analysis under the BC *Code* necessitated a fact-specific inquiry that was sensitive to purpose.[8]

4. *McCormick v Fasken Martineau Dumoulin LLP (No 2)*, 2010 BCHRT 347 at para 14 [*Fasken* HRT].
5. *Supra* note 3.
6. *Fasken* HRT, *supra* note 4 at paras 1, 11, 15.
7. *Ibid* at para 2.
8. *Ibid* at paras 104–05.

The BC HRT subsequently considered the indicia of employment developed in *Crane v British Columbia (Ministry of Health Services)*: utilization, control, financial burden and remedial purpose.[9] Attention to these factors required the BC HRT to carefully evaluate the relationship between the parties and, in particular, the governance structure established within the partnership. The firm's Partnership Board consisted of thirteen equity partners who were elected for three-year terms.[10] Daily operations were the responsibility of the Board, in addition to the administration of the firm's compensation scheme and the appointment of the Managing Partner.[11]

After considering the factors, the BC HRT ultimately concluded that Mr. McCormick was an employee for the purposes of the BC *Code*. Utilization was present insofar as Fasken made use of Mr. McCormick's legal services and the intellectual property produced by him for the firm's benefit.[12] The BC HRT also identified several indicia of control and found compelling a number of specific and general functions exercised by the firm. For example, lawyers were required to comply with policies concerning file acceptance, file management, retirement, competition and conflicts of interest.[13] Although the BC HRT acknowledged that Mr. McCormick had some ability to influence policy through participation in various committees or boards, it emphasized that the firm continued to exercise significant control over work and remuneration.[14] This reality also informed the BC HRT's analysis of the third *Crane* factor: financial burden. Despite the fact that partners did not receive wages but rather a portion of profits, the firm was ultimately responsible for determining and administering compensation.[15] The remedial purpose of the BC *Code*, which aims to address discrimination and provide redress to victims, militated in favour of a finding that Mr. McCormick was employed by Fasken.[16]

9. *Ibid* at para 111, citing 2005 BCHRT 361 at para 7.
10. See *Fasken* HRT, *supra* note 4 at para 22.
11. See *ibid* at paras 22, 35.
12. *Ibid* at para 116.
13. *Ibid* at para 119.
14. *Ibid* at para 121.
15. *Ibid* at para 126.
16. *Ibid* at paras 132–35.

C. Decision of the British Columbia Court of Appeal

In contrast to the BC HRT, the British Columbia Court of Appeal (BCCA) adopted a highly formalistic analysis.[17] Justice Levine's judgment highlighted the tension between the BC *Code*'s broad remedial purpose and the strictures of Canadian company law. Although Levine JA recognized that remedial statutes attracted liberal and purposive interpretation, she placed considerable emphasis on the legal nature of partnerships under Canadian law. After engaging in an analysis of the relevant statutes and case law, Levine JA concluded that a partnership could employ other persons (such as administrative staff or associates) but not its own partners.[18] The fact that a partner is not a separate entity from his partnership rendered the notion of employability a "legal impossibility".[19] Mr. McCormick could not show a protected practice and was therefore precluded from seeking recourse under the BC *Code*.

D. Decision of the Supreme Court of Canada

Although ultimately agreeing with the BCCA's result, the SCC offered a slightly more nuanced analysis of the relationship between partner and partnership. Much like the decisions below, Abella J reiterated the philosophical underpinnings of human rights legislation, referring to the generous interpretive approach required by their aspirational and remedial nature.[20] In furtherance of this remedial purpose, the Court reasoned that

> [w]hile the structure and protections normally associated with equity partnerships mean they will rarely be employment relationships for purposes of human rights legislation, this does not mean that form should trump substance. In this case, for example, the Court of Appeal appeared to focus exclusively on partnership as a legal concept, rather than examining the substance of the actual relationship and the extent to which control and dependency played a role.[21]

17. See *Fasken Martineau DuMoulin LLP v British Columba (Human Rights Tribunal)*, 2012 BCCA 313, 34 BCLR (5th) 160 [*Fasken* CA].
18. *Ibid* at paras 50–51.
19. *Ibid* at para 51.
20. *Fasken* SCC, *supra* note 2 at paras 17–19.
21. *Ibid* at para 38.

Following its analysis of the actual relationship between the parties, the SCC concluded that insufficient dependency or control existed in order to support a finding that Mr. McCormick was an employee within the meaning of the BC *Code*. The firm's governance apparatus was both directly and indirectly accountable to the partnership as a whole, of which Mr. McCormick was a party.[22] While he was subject to administrative rules and firm policies, these restrictions did not encroach upon his autonomy such that Mr. McCormick was in a subordinate position.[23] Additionally, equity partners were capable of participating in the management of the firm through internal voting and election processes.[24]

According to the SCC, the relationship between the firm and Mr. McCormick also did not exhibit any signs of dependency. The Court acknowledged that while partners were exclusively remunerated through the partnership, they participated in profit sharing and were not the recipients of wages.[25] A committee determined compensation criteria, and remuneration was tied to performance and contribution. Due to the nature of the partnership, Mr. McCormick "was not working for the benefit of someone else, as the Tribunal's reasons suggest, he was, as an equity partner, in a common enterprise with his partners for profit, and was therefore working for his own benefit".[26] Absent any genuine control or dependency, the Court held that no employment relationship existed and that the BC HRT therefore lacked jurisdiction.

II. The Lessons and Implications of *Fasken*

The *Fasken* case offers an interesting vantage point from which we can perceive labour market segmentation and critically assess current approaches to labour market regulation. Using the *Fasken* decision as an exemplar might initially seem surprising considering the surrounding circumstances giving rise to the initial claim, as the language of human rights has often been located at a certain register. According to the SCC, human rights legislation "is often the final refuge of the disadvantaged

22. See *ibid* at paras 39–43.
23. See *ibid* at para 40.
24. See *ibid* at para 41.
25. *Ibid* at para 42.
26. *Ibid*.

and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed."[27] Human rights themselves incorporate high-minded ideals which are embedded in Canada's collective consciousness.[28] Co-opting the language of rights to advance *interests* can be, and has been, significant due to their discursive power.[29]

The fact pattern in *Fasken* arguably does not reflect the public imagination and our vision of rights, disadvantage, compensable claims and redress. A wealthy partner refusing to divest his equity interest hardly garners much sympathy, and lawyers in general have rarely sought to enforce or demand greater statutory protections for themselves (although recent developments might challenge this assumption).[30] Claiming discrimination within a LLP also seems incongruent with more "traditional" rights claims—LLPs are the realm of accountants, lawyers and other professionals after all.[31] On this point, it is worthwhile to note that the UK has expressly extended anti-discrimination protections to partnerships and LLPs under the *Equality Act 2010*.[32] Prior to the *Equality Act 2010*, limited coverage existed for partners under various incohesive regimes.[33]

27. *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321 at 339, 93 DLR (4th) 346 [citations omitted].

28. See *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 at 88, 40 DLR (4th) 577.

29. Jennifer Nedeksly's relational theory of rights, which conceptualizes rights in terms of certain values as opposed to litigational "trumps", offers another interesting perspective. See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (New York: Oxford University Press, 2011) at 236–39.

30. At the time of writing, lawyers working for Deloitte LLP have applied for class certification on the basis that they were mis-classified as independent contractors as opposed to employees (and consequently unable to seek entitlements under employment standards legislation). The plaintiffs' lawyers also claim that document review does not constitute a legal service, and therefore any relevant statutory exemptions do not apply. See Jillian Kestler-D'amours, "Deloitte Sued for $384 Million in Lawyer Class Action", *The Toronto Star* (13 March 2015), online: <www.thestar.com>.

31. The SCC's conclusion that partnership structures will not typically give rise to employment relationships is also relevant to general partnerships. General partnerships are far more prolific and, unlike LLPs, their existence can be infered. See e.g. *Beaudoin-Daigneault v Richard*, [1984] 1 SCR 2, 51 NR 288; *Boudreau v Pierce*, [1986] NSJ No 500 (QL), 1986 CarswellNS 594 (WL Can) (SC (TD)).

32. (UK), c 15, ss 44–46.

33. See e.g. *Sex Discrimination Act 1975* (UK), c 65, s 11 (which targeted discrimination

Age discrimination has also been viewed somewhat differently compared to other statutorily protected grounds.[34] Many stereotypes persist that view discrimination on the basis of age as being more legitimate, especially when countervailing socio-economic considerations are at play.[35] These assumptions have led to further differential treatment of elders and insufficient scrutiny of discriminatory practices.[36] Virtually all Canadian human rights statutes allow for some age discrimination in the realm of employment, as long as a bona fide occupational requirement can be demonstrated.[37] The scope of these exemptions continues to attract criticism and academic commentary.[38]

The *Fasken* decision provides valuable insight into the deficiencies of Canada's current regulatory landscape that should not be obscured by the above perspectives and controversies. Statutory protections in the workplace—whether they be human rights, employment standards or workers' compensation legislation—are traditionally premised on the notion that employees are members of a core entitled group, while non-employees or marginal employees are conversely disentitled from accessing whatever relevant protective regime.[39] The employee versus non-employee dichotomy has long served as a gatekeeper function, effectively

against women in partnerships); *Race Relations Act 1976* (UK), c 75, s 10 (which prevented firms from discriminating on the basis of race, ethnicity or national origin).

34. One might speculate that the *Fasken* decision would have generated considerably more controversy had a partner been expelled from a partnership on the basis of sex, ethnicity, sexual orientation or another protected ground.

35. Mandatory retirement, for instance, is often driven by assumptions about the productivity, capability or learning capacity of elder workers. See e.g. Pnina Alon-Shenker, "'Age is Different': Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting" (2013) 17:1 CLELJ 31 at 32–35.

36. See *ibid.*

37. See e.g. BC *Code*, *supra* note 3, s 13(3). See also Anthony Sheppard, "Mandatory Retirement: Termination at 65 is Ended, but Exceptions Linger on" (2008) 41:1 UBC L Rev 139 at 147–54.

38. See Sheppard, *supra* note 37.

39. See Brian A Langille & Guy Davidov, "Beyond Employees and Independent Contractors: A View From Canada" (1999) 21:7 Comp Lab L & Pol'y J 7 at 7 ("casual" employees are often excluded from certain labour standards rights and collective bargaining systems, but will not be the focus of this discussion) [Langille & Davidov, "Beyond Employees"].

limiting the scope of potential claimants.[40] Mr. McCormick's ultimately unsuccessful claim was imperiled by this dichotomy from the outset.

Labour law scholars and practitioners are well acquainted with this reality and its shortcomings have attracted volumes of commentary. Employment, as both a social and legal construct, has been notoriously open textured and attempts to define the relationship have eroded at their brittle edges.[41] Modern workplaces, and in particular the inexorable march of globalization, challenge our standard understanding of both employees and employers.[42] Employers themselves have also made concerted efforts to circumvent existing legislated protections.

"Vertical disintegration" is one example in which employers attempt to externalize workers from the firm (by outsourcing, subcontracting, etc.), thereby maximizing flexibility while minimizing liabilities and other costs.[43] The convergence of shifting socio-economic realities and a stagnant regulatory apparatus has led to increasing segmentation within the Canadian labour market: segmentation between "core" workers and marginalized workers, and segmentation between those with full access to

40. See e.g. Langille & Davidov, "Beyond Employees", *supra* note 39.

41. In regards to the legal definition of employment, courts and tribunals have often attempted to extend coverage by broadly interpreting the term "employee". See e.g. *Winnipeg Free Press and Media Union of Manitoba, Local 191* (1999), 51 CLRBR (2d) 111 (Man LB); *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts, Local 849 v Egg Films Inc*, 2012 NSLB 120, aff'd 2014 NSCA 33, 343 NSR (2d) 2014, leave to appeal to SCC refused, 35917 (25 September 2014). Some legislatures have also offered guidance, for instance by including "dependent contractors" as a category of worker entitled to protection. See e.g. *Labour Relations Code*, RSBC 1996, c 244, s 28; *Occupational Health and Safety Act*, SNS 1996, c 7, s 3(o).

42. Normative understandings that are reflected in our regulatory landscape are typically premised on the "standard employment relationship". This "standard" relationship internalizes a number of assumptions: a manufacturing economy, a largely male-dominated workforce, full-time employment, work taking place "on-site" and defined hierarchies (to name only a few). See generally Manfred Weiss, "Re-Inventing Labour Law?" in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 43.

43. For one of the seminal works in this area, see Hugh Collins, "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws" (1990) 10:3 Oxford J Leg Stud 353.

statutory protections and those without.[44] This trend is largely driven by legal regimes that provide status-based entitlements and benefits.[45]

If at first we assume that the identification of an employment relationship remains a legitimate basis upon which to grant or deny statutory safeguards,[46] then a number of exclusions remain problematic and an improved approach is needed. The *Fasken* decision is a convenient example in the context of human rights. While current interpretations of the employment relationship may be justifiable under certain types of legislation (tax legislation might be an example), employment status as a gatekeeper in the human rights context has led to a gap in the regime's remedial capabilities. If human rights statutes are informed by values such as dignity and providing redress to victims of discrimination, it is difficult to see the relevance of employment status, especially when human rights protections already apply in the area of commerce.[47] Indeed, as mentioned above, the UK Parliament deemed it necessary to provide explicit coverage for certain groups (including partners) under equality legislation.

On the other hand, if we accept that the prevailing focus on employment status is outmoded and at odds with marketplace realities, then a fundamental reimagining of labour law's constituting narrative is required. This commentary will examine both perspectives in the sections below.

44. The issue of labour market segmentation is not unique to Canada. See generally Deakin, *supra* note 1. For general research on the state of Canada's workforce, see Law Commission of Ontario, *Vulnerable Workers and Precarious Work*, Interim Report (Toronto: Law Commission of Ontario, 2012); Federal Labour Standards Review, *Fairness at Work: Federal Labour Standards for the 21st Century* (Gatineau: Human Resources and Skills Development Canada, 2006).

45. See Deakin, *supra* note 1 at 2.

46. This assumption is decidedly not endorsed by many academic commentators. See Judy Fudge, Eric Tucker & Leah F Vosko, "Employee or Independent Contractor?: Charting the Legal Significance of the Distinction in Canada" (2003) 10 CLELJ 193. See also the discussion of Brian Langille's work at Part III.C, *below*.

47. See Brian Langille, "'Take these Chains from My Heart and Set Me Free': How Labor Law Theory Drives Segmentation of Workers' Rights" (2015) 36:2 Comp Lab L & Pol'y J 257 at 259–61; Fudge, Tucker & Vosko, *supra* note 46 at 211–12.

III. New Approaches to Combatting Labour Market Segmentation

The first two approaches are concerned with expanding protection through more traditional vehicles: the common law, contract law and the employment relationship. These prescriptions can be contrasted with the third approach, which is located at an entirely different register as it proposes a worker-oriented model informed by human capability theory. In order to be effective, each approach must be alive to the realities of our increasingly disjointed and segmented regulatory regime.

A. The Regulatory Role of General Contract Law

Dissatisfaction with the common law's laissez-faire ethic largely accounts for the myriad labour protections brought into existence through statutory interventions.[48] Nonetheless, it is worth asking: To what extent can incremental changes in the common law enhance and supplement existing regulatory regimes? Although the SCC in *Fasken* foreclosed the possibility of a successful human rights claim, Abella J emphasized that "the fact that a partner like Mr. McCormick has no remedy under the [*Human Rights*] *Code* does not necessarily mean that partners have no recourse for claims of discrimination".[49] She elaborated by carefully suggesting in *obiter dictum* that "the duty of utmost good faith in a partnership may well capture some forms of discrimination among partners that represent arbitrary disadvantage", although chose not to rule on the issue.[50]

While the principles of fiduciary obligations and good faith have long been a feature of partnership law (under both common law and statute),[51] broader application of the good faith principle could equate to broader protections if given adequate content. Recent decisions may signal a culture shift in this direction. Earlier judgments interpreting employment

48. See Geoffrey England, *Individual Employment Law*, 2nd ed (Toronto: Irwin Law, 2008).

49. *Supra* note 2 at para 47.

50. *Ibid* at para 48.

51. See e.g. *Aas v Benham*, [1891] 2 Ch 244 (CA); *Partnership Act*, RSBC 1996, c 348, s 22.

contracts only implied the duty of good faith in limited circumstances, for example when bad faith in the manner of dismissal was alleged.[52] These judgments recognized the unique nature of employment contracts and the power imbalance often present in the employer-employee relationship.[53] In the commercial context, good faith performance (or its antithesis) has been generally regarded as non-justiciable, although not without significant controversy.[54]

The SCC's decision in *Bhasin v Hrynew* represented an important and incremental shift in the existing jurisprudence.[55] In *Bhasin*, the Court explicitly recognized the duty of good faith as a "general organizing principle" of contract law that flowed into a general duty of honest performance implied into all agreements, including both commercial and employment contracts.[56] Properly defined and developed duties could potentially fill certain voids created by existing workplace protections.

In assessing this approach, one must first ask: To what extent can private contract law internalize inherently social values such as rectifying power imbalances or promoting anti-discrimination beyond existing equitable doctrines? Professor Emily Houh offers one possible response and attempts to bridge the public/private divide by deploying feminist, critical race and legal realist perspectives.[57] Although Houh's critique is partially directed at shortcomings in American civil rights statutes, her analysis is instructive and provides a useful exercise for Canadian readers. She recognizes that implied contractual obligations already prescribe

52. See e.g. *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, 152 DLR (4th) 1 [*Wallace* cited to SCR]; *Honda Canada Inc v Keays*, 2008 SCC 39, [2008] 2 SCR 362.

53. See *Wallace*, *supra* note 52 at paras 90–94.

54. See e.g. *Transamerica Life Canada Inc v ING Canada Inc* (2003), 68 OR (3d) 457 at paras 41–54, 234 DLR (4th) 367 (CA).

55. 2014 SCC 71, [2014] 3 SCR 494.

56. *Ibid* at paras 32–93. In the employment context, courts have arguably treated good faith performance as a given, notwithstanding *Wallace*, *supra* note 52. Although *Wallace* focused on bad faith in the manner of dismissal, courts have often considered employer conduct before and after termination when assessing bad faith. The doctrine of constructive dismissal also suggests that employers are to some extent bound by an obligation of good faith performance. See Manitoba Law Reform Commission, *Good Faith and the Individual Contract of Employment*, Report 107 (Winnipeg: Manitoba Law Reform Commission, 2001) at 15–17, 20–24.

57. Emily Houh"Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law" (2005) 66:3 U Pitt L Rev 455.

societal and cultural norms between parties, and therefore function as de facto public obligations.[58] As a result, she argues that these implied obligations should strive to internalize public law norms.[59]

If there is a role for general contract law, how might we advance labour law's protective purpose through existing implied obligations? Can novel obligations also be recognized? The doctrine of good faith, which attempts to give definition to the reasonable expectations of the parties, might be expanded in order to serve as a contractual basis from which to address various workplace or contractual issues including discrimination,[60] as alluded to by Abella J. Houh argues that contracting parties "may reasonably expect *not* to be bound to perform in a certain way based on pre-existing racial and/or gender stereotypes".[61] A potentially aggrieved party might be required to advance their claim by proving the existence of a stereotype, demonstrating a link between identity and performance, demonstrating adverse actions or impacts, and establishing causation.[62]

Beyond the doctrine of good faith, obligations which are traditionally statutory in nature, such as the duty to accommodate under human rights codes,[63] could also be instantiated in the private context through implied contractual terms. For example, the duty to accommodate might be framed as a negative duty that prevents employers from insisting on occupational requirements that are not reasonably necessary for job performance. The employment contract could be understood as a trade-off between employee submission to managerial authority and a limitation of that authority to the work itself and not the worker.[64] It would then follow that an exercise of employer discretion that is not a bona fide

58. *Ibid* at 474–85.

59. *Ibid*.

60. See *ibid* at 495–505.

61. *Ibid* at 496 [emphasis in original].

62. *Ibid* at 495–505.

63. See *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at paras 62–68, 176 DLR (4th) 1.

64. See e.g. Gillian Demeyere, "Human Rights as Contract Rights: Rethinking the Employer's Duty to Accommodate" (2010) 36:1 Queen's LJ 299 at 319–27 (although the duty to accommodate is a negative duty, it often manifests itself through positive prescriptions on behalf of courts or administrative tribunals).

occupational requirement seeks to control not only the work done but additionally seeks to arbitrarily control the worker, constituting an abuse of contractual rights.[65]

General contract law as a regulatory mechanism has the advantage of potentially expansive and undifferentiated application.[66] Public law obligations would exist without requiring a further inquiry into the substance or form of a particular relationship. Although the potential content of contractually implied duties might ultimately prove to be limited, the above examples indicate how partners, entrepreneurs, independent contractors or other relationships on the periphery might make reference to implied duties in the context of discrimination and human rights.

In light of global trends towards deregulation and statutory retrenchment, the general law of contract has been increasingly viewed as a possible source of further protections.[67] It must of course be borne in mind that parties may contract out of implied obligations through express language to the contrary (raising concerns of mutuality), a reality that undermines the usefulness of general contract law as a substantive or complete regulatory response. Indeed, the general duty of fairness would have been irrelevant in *Fasken* to the extent that the partnership was relying on the express terms of its partnership agreement. In many respects, the supplemental nature of general contract law returns us to square one. This fragility leads us to consider possible statutory solutions, such as a reimagining of employment's gatekeeper function in the context of protective legislation.

B. The Regulatory Role of Statute: Re-Calibrating the Binary Divide between Employee and Entrepreneur

The result in *Fasken* provides only one example of the difficulties associated with "employment" as a predominant organizing concept, and denial of statutory protections on the basis of employment status

65. See *ibid.*

66. See e.g. Andrew Stewart, "Good Faith and Fair Dealing at Work" in Christopher Arup et al, eds, *Labour Law and Labour Market Regulation* (Sydney, NSW: Federation Press, 2006) 579 at 579–80.

67. See generally Joellen Riley, *Employee Protection at Common Law* (Sydney, NSW: Federation Press, 2005).

has been effectively exploited by employers in order to cut costs and limit liabilities.[68] Common law tests which have been used to categorize employees and independent contracts have looked at factors such as "(1) control; (2) ownership of the tools; (3) chance of profit; [and] (4) risk of loss".[69] As can be seen from the SCC's decision in *Fasken*, this examination, in essence, assesses the degree of control and dependence existing in the relationship.[70]

There have been several attempts to recalibrate the binary conceptualization of employee/non-employee in order to better capture disguised employment relationships.[71] These definitional exercises tend to be premised on the notion that sensible reasons exist to differentiate between employees and entrepreneurs for certain purposes. The "grey zone" in-between, however, has led to unprincipled exclusions.[72] This grey zone is most troubling where the legal regime in question promotes social justice, such as human rights or occupational health and safety legislation. Recalibrating the employment test has taken several forms,[73] though the formulation has been significantly difficult. One jurist articulates the difficulty clearly: "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."[74]

One solution has been to recognize an intermediate category of working relationship that is broader than the *traditional* employment relationship. In the UK, many statutes refer to "workers" as opposed

68. See Collins, *supra* note 43.

69. *Montreal v Montreal Locomotive Works Ltd et al* (1946), [1947] 1 DLR 161 at 169, 1946 CarswellQue 231 (WL Can) (PC).

70. See *Fasken* SCC, *supra* note 2 at paras 23–39; Langille & Davidov, "Beyond Employees", *supra* note 39 at 19.

71. Although disguised employment can take many forms, it can generally be understood as an attempt to conceal an employment relationship in order to bypass statutory or other legal protections. This may also be achieved by disguising the identity of the employer. See e.g. International Labour Office, *The Scope of the Employment Relationship*, International Labour Conference, 91st sess, Report V (Geneva: International Labour Office, 2003) at 24–27.

72. See Langille, *supra* note 47 at 259–61; Stewart, *supra* note 66 at 594–95.

73. For judicial and legislative solutions, see examples cited in *supra* note 41.

74. *National Labour Relations Board v Hearst Publications Inc* (1944), 322 US 111 at 121 [footnote omitted].

to employees—a distinction clearly intended to avoid the strict tests associated with traditional employment.[75] Canadian statutes have also recognized intermediate categories. Occupational health and safety legislation in Ontario incorporates the worker terminology, which has been defined as "a person who performs work or supplies services for monetary compensation".[76] In Manitoba, workers include persons who are engaged to perform services, whether under a contract of employment or not.[77] "Dependent contractors" have been recognized as requiring enhanced protections and have been granted intermediate status under several provincial statutes. Under BC's trade union legislation, dependent contractors may unionize irrespective of their employment status or their ownership of tools, equipment, machinery, etc.[78]—typical indicia of autonomy under the common law. The BC *Code*, under which Mr. McCormick attempted to advance his claim, does not clearly broaden its protective scope through intermediate categories when prohibiting discrimination in the realm of employment.

In the UK, the logic of intermediate categories has been to extend protections through "concentric fields of application", with traditional employees near the centre, truly independent contractors on the periphery and workers (or individuals falling into other intermediate groupings) lying somewhere in-between.[79] The theoretical result of this arrangement is that employees receive maximal coverage, while intermediates receive more basic protection based on their grouping. For example, workers might be included in wage legislation and professionals may be entitled to coverage under anti-discrimination statutes, whereas dependent contractors may only have access to health and safety schemes.[80]

75. See e.g. the *National Minimum Wage Act 1998* (UK), 1998, c 39, s 1(2)(a) (an example of a statutory definition of "worker" in the UK context). See also Guy Davidov, "Who is a Worker?" (2005) 34:1 Indus LJ 57 at 57–58.

76. *Occupational Health and Safety Act*, RSO 1990, c O.1, s 1(1).

77. See *Workplace Safety and Health Act*, RSM 1986, c W210, s 1.

78. See *Labour Relations Code*, RSBC 1996, c 244, s 1.

79. See Adalberto Perulli, "Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries" in Giuseppe Casale, ed, *The Employment Relationship: A Comparative Overview* (Oxford: Hart Publishing, 2011) 137 at 159–60.

80. See *ibid* at 160.

While this taxonomy strongly signals an intent to broaden protections in certain contexts, properly interpreting and defining intermediate categories such as workers is crucial, and it requires a meaningful approach, which is responsive to legislative intent. Judicial treatment of intermediate categories has attracted some criticism. Courts and administrative tribunals in the UK have often favoured an analysis that is functionally similar to the "employment" test; however, the threshold has been adjusted downwards in favour of the alleged worker.[81] Professor Guy Davidov has rejected this method for being insensitive to purpose and instead favours an analysis that focuses on dependency as opposed to control or "democratic deficit".[82] According to Davidov, dependency alone can be used to justify various regulatory protections, as in the case of an individual who is own-account self-employed and relies on a single client, for instance.[83] Recent decisions in the UK have in some measure adopted a more nuanced approach—engaging in a holistic analysis without regard for any particular determinative factor.[84]

Although academic commentators have identified certain shortcomings of current interpretive aids, decisions involving workers in the UK have produced interesting results which are relevant to the *Fasken* case. In *Clyde & Co LLP*, the claimant was a lawyer and an equity partner in a limited liability partnership.[85] Concerns of misconduct led the claimant to make a report to the firm's money laundering reporting officers, a move which allegedly resulted in her suspension and expulsion from the partnership. In the ensuing lawsuit, she submitted that she was a worker and was, therefore, entitled to whistleblower protections under the *Employment Rights Act 1996*.[86] A "worker" under subsection 230(3) of the *Employment Rights Act 1996* is defined as

> an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual *undertakes to do or perform personally* any work or

81. See Davidov, *supra* note 75 at 58–60.
82. *Ibid* at 62–68.
83. *Ibid*.
84. See e.g. *Hospital Medical Group Ltd v Westwood*, [2012] EWCA Civ 1005.
85. [2014] UKSC 32 [*Clyde & Co LLP*].
86. (UK), c 18.

> services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly.[87]

Neither party suggested that equity partners were under contracts of employment. The Court of Appeal held that the claimant was not a worker under subsection (b) due to the wording of the *Limited Liability Partnership Act 2000*, which states that "[a] member of a limited liability partnership shall not be regarded for any purpose as employed by the limited liability partnership unless, if he and the other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership".[88] According to the UK Court of Appeal, the *Employment Rights Act 1996* was impliedly modified by the subsequent partnership legislation.[89]

The United Kingdom Supreme Court (UKSC) rejected the Court of Appeal's restrictive reasoning, commenting at first instance that "the immediately striking thing about this case is how much hard work has to be done in order to find that a member of an LLP is *not* a worker within the meaning of subsection 230(3)(b) of the 1996 Act."[90] It was noted that the language of the *Limited Liability Partnership Act 2000* contemplated an "ordinary" employment relationship, one which would fall under subsection 230(3)(a) of the *Employment Rights Act 1996*, but presumably not subsection (b).[91] By making reference to both employment of employees and employment of workers, the legislature must have intended to extend protection beyond the natural and ordinary meaning of the term employment.[92]

Having concluded that a member of an LLP could indeed be a worker for the purposes of the *Employment Rights Act 1996*, notwithstanding any limitations contained in the partnership legislation, the UKSC then

87. *Ibid*, s 230(3) [emphasis added].
88. (UK), c 12, s 4(4).
89. See *Clyde & Co LLP*, *supra* note 85 at para 17.
90. *Ibid* at para 16 [emphasis in original].
91. *Ibid* at para 27.
92. See *ibid.*

considered whether an element of subordination was required in order to qualify as a worker under subsection 230(3)(b).[93] According to Davidov's proposed approach discussed above, the answer to this question would be an emphatic "no". Subordination, to the extent that it relates to indicia of "control" or "democratic deficit", would be subsidiary to dependence as a determinative factor in the worker analysis.

After surveying relevant jurisprudence and considering the role of dependence and subordination, the UKSC ultimately chose to forego the use of any precise "magic tests", favouring instead the words of the statute.[94] The UKSC acknowledged that certain individuals could fall within the worker definition if the relationship in question was characterized by high autonomy on the one hand, but close integration into another party's operations on the other.[95] Subordination can consequently be viewed as a useful indicator, as opposed to a "freestanding and universal characteristic".[96] In the end, it was held that the claimant was a worker and could legitimately pursue her claim.

Despite its broad remedial objectives, the BC *Code* does not make specific reference to any intermediate categories. Employment, as defined by the BC *Code*, includes "the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal".[97] Through the language of employment status and traditional tests of control and dependency, the BC *Code* has attracted a relatively narrow scope of application.[98]

Where legislatures have attempted to advance and promote social justice, as in the human rights context, continuing reliance on the employer/entrepreneur dichotomy serves to reinforce inequities and existing gaps in the regulatory fabric. The purposes of anti-discrimination legislation should arguably militate against a limiting concept of

93. *Ibid* at para 30.

94. *Ibid* at para 39.

95. *Ibid*. This conclusion is presumably in line with Davidov's proposed analysis.

96. *Ibid*.

97. *Supra* note 3, s 1.

98. In Canadian jurisdictions where the social area of employment is more broadly defined, different results can be observed. Ontario, for instance, guarantees equal treatment "with respect to employment", which has allowed a partner to claim discrimination under the Ontario *Human Rights Code*, RSO 1990, c H.19, s 5. See *Swain v MBM Intellectual Property Law LLP*, 2015 HRTO 1011.

employment as gatekeeper.[99] While the expansion of protection through intermediate categories and concentric fields of application certainly does not offer a complete solution, the UKSC's judgment in *Clyde & Co LLP* is an interesting counterpoint to Canada's own *Fasken* decision.[100]

C. The Regulatory Role of Human Capability Theory: The Promise of a Worker-Centred Paradigm

The shortfalls of current regulatory prescriptions have led to calls for a much more fundamental reorientation of Canadian labour market regulation. One important development which has been of interest to labour law commentators is Amartya Sen's human capability theory.[101] The language of human capabilities has been co-opted in the labour law context with continuing potential to influence discourse and the way in which we think about labour interventions. Human capability has been identified as a potentially new basis for labour law's constituting narrative[102] and has alternatively been used in conjunction with relational theory as a means of promoting justice in the workplace.[103]

According to Sen's vision, freedom is the most important touchstone with which to assess and analyze development and is viewed as being both the ends and the means of development.[104] He identifies a number of instrumental freedoms that function to enhance "capabilities": "(1) *political freedoms*, (2) *economic facilities*, (3) *social opportunities*, (4) *transparency guarantees* and (5) *protective security*".[105] Particular attention is paid to the enhancement of freedoms and capabilities through public policy, in addition to the role of freedoms and capabilities in influencing the direction of policy.[106] Institutional actors must focus

99. See Langille, *supra* note 47 at 260–61; Fudge, Tucker & Vosko, *supra* note 46 at 210–13.

100. The UK's equality legislation specifically provides protection for individuals in limited liability partnerships, rendering an inquiry into the "worker" relationship unnecessary in the human rights context. See *Equality Act 2010*, *supra* note 32, s 45.

101. Amartya Sen, *Development as Freedom* (New York: Random House, 1999).

102. See e.g. Langille, *supra* note 47.

103. See Bruce Archibald, "Rights at Work: Fairness in Personal Work Relations and Restorative Labour Market Regulation" (2015) [forthcoming].

104. *Supra* note 101 at 18, 36–37.

105. *Ibid* at 38 [emphasis in original].

106. See *ibid* at 18, 36–37.

not only on freedom as a whole, but on the central role of instrumental freedoms.[107] The provision of certain services such as education and health care, for example, can lead to social opportunities which in turn bolster human capabilities.[108] This analytical framework necessarily gravitates away from the market as the central regulatory institution and instead considers various political, economic and social arrangements in a holistic, balanced and integrated way.[109] Human capability as an intellectual paradigm might contextualize our thinking about issues such as justice, disadvantage, gender, disability and aging.[110] This could be done through a fresh account of social cooperation (perhaps based on decency or altruism) that gravitates away from an emphasis on mutual advantage and the social contract.[111]

What is the role of Sen's intellectual framework in the realm of labour and employment law? Brian Langille views human capability theory as a starting point from which we can develop a new organizing principle of labour market regulation.[112] He submits that the current deficiencies in our regulatory approach, of which the *Fasken* decision is but one example, are due to the lack of a coherent normative basis for labour and employment law.[113] The predominant focus of existing narratives has been on the relational aspects of employment (i.e., identifying the existence of employee and employer), the contractual basis of employment and an understanding of the power imbalance often present in these contractual relationships.[114] Deploying human capabilities in the labour law context can ultimately serve as a method of reimagining and advancing alternative narratives.[115]

Using the human capabilities approach situates the labour market in an entirely novel and helpful way. Within an integrated view of social, political and economic institutions, free markets become one of

107. See *ibid* at 53.
108. See *ibid*.
109. See *ibid* at 111–45.
110. See e.g. Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, Mass: Belknap Press of Harvard University Press, 2011).
111. *Ibid* at 149–52.
112. See Langille, *supra* note 47 at 266–68.
113. *Ibid* at 268.
114. See *ibid* at 262, 266–68.
115. See *ibid* at 266–79.

the many institutions that advance instrumental freedoms and human capabilities—a conceptualization which avoids the rhetoric of labour or state intervention versus the total market.[116] According to Langille, this proposed narrative is "not *merely* a story of resisting inequality of bargaining power in the labor market. It is about repositioning the labour market in our thinking along with other dimensions of human freedom."[117] Socio-economic and political institutions as a whole may then work in unison to advance a number of freedoms, including human capacity, maximum self-actualization and the objectives of transparency, social opportunities and protective security.

With the goal of maximizing human capability in mind, Langille proposes a new foundation for labour and employment law by gravitating away from our traditional normative focus of regulating specific relationships and rectifying power imbalances.[118] By shifting focus away from the relationship between contracting parties, a worker-centred regulatory paradigm emerges.[119] Sensitivity to purpose occupies a central role, and purpose itself will be reoriented through an understanding of human capabilities.[120] When confronted with discrimination such as in *Fasken*, proper attention can be given to the aspirations and purposes of human rights legislation without the hurdle of definitional exercises.[121] Objectives such as ensuring equal opportunities, social justice, dignity, equality and fairness for workers (or other claimants) are the centerpiece of any human rights analysis. This focus on *workers themselves* as opposed to *workers' relationships* is far removed from the contractual and statutory regulatory approaches described above and attention to purpose is given an entirely new meaning.

Although Langille's emphasis on worker-centred labour regulation is explicitly non-relational, human capability theory can alternatively be deployed within a regulatory paradigm which remains, in its essence, relational in character. One way of achieving this might be through the concept of "personal work relations"—an idea advanced by Mark

116. See *ibid* at 274–77.

117. *Ibid* at 274 [emphasis in original].

118. *Ibid* at 276–79. For an approach to human capabilities which incorporates more relational perspectives, see Archibald, *supra* note 103.

119. See Langille, *supra* note 47 at 276.

120. See *ibid* at 268.

121. See *ibid* at 278–79.

Freedland and Nicola Kountouris.[122] According to Freedland and Kountouris, personal work relations are "soft boundaries" for labour (and employment) law, and should be understood as loose parameters within which labour interventions might operate.[123] Personal work relations are connections between workers and a person (or organization) during an arrangement wherein the worker carries out work or renders services *personally* (i.e., entirely or primarily by the worker herself).[124] In many respects, this notion of personal work is captured in the UK *Employment Rights Act 1996*'s conceptualization of worker, as discussed above.

Personal work relations animated by capacity building and governed by values such as relational autonomy, equality and dignity could serve as an alternative theoretical underpinning for labour law.[125] The connection between personal work relationships and capability theory allows for a regulatory scheme which can be viewed as improving competiveness through a commitment to cultivating human capital.[126] Whether it be a worker-centred paradigm or a model driven by personal work relations, adopting a "Senian" strand in the labour context carries great promise as an alternative to the *status quo*.

Although the "personal" capabilities of an equity partner are hardly ever at issue, the systems-level implications of the *Fasken* decision are important. Mr. McCormick's situation represents a wider range of circumstances that are relevant to individuals who are prevented from exercising their own capabilities. The protective theory of human rights law (and broader labour market regulation) is obvious in the SCC's *Fasken* decision and represents a limiting vision which ultimately foreclosed Mr. McCormick's claim. A purposive interpretation of employment or work—which emphasizes the enhancement of capabilities and potential—avoids such unduly technical, narrow or literalist approaches.

122. Mark Freedland & Nicola Kountouris, *The Legal Construction of Personal Work Relations* (New York: Oxford University Press, 2011).

123. *Ibid* at 29.

124. See *ibid* at 31.

125. See Archibald, *supra* note 103.

126. See *ibid*.

Conclusion

Using the SCC's decision in *Fasken* as a starting point, this case comment has endeavoured to identify and analyze the shortfalls of existing regulatory approaches. This brief and high-altitude survey does not do justice to the volumes of commentary that have been devoted to the issue of labour market segmentation and regulation. It is abundantly clear that any response to the gaps in Canada's regulatory regime will require novel solutions and perhaps a dramatic re-evaluation of our current understandings.

Three possible responses have been surveyed. The first two can be comfortably situated within labour law's existing narrative and justifications. General contract law may play a supplementary role in addressing inequities which might arise in contractual relations. The law of contract is advantageous due to its possibly broad application and its indiscriminate application to both the commercial and employment context. Select cases from the UK demonstrate that the extension of protections through intermediate categories might also address the plight of workers who have traditionally been excluded from statutory schemes. Although giving content to these intermediate categories has proved challenging, the use of these categories has at the very least required courts to engage in a more purpose-based analysis. The final response engages with the issue of labour market regulation at a much more fundamental level. Human capability theory as an organizing principle has the potential to allow for a consistent theme which can animate our approach to workplace justice. A reimagined narrative might dictate how we view various institutions which impact labour law, and also provide a foundation for a worker-based model of regulation.

Overall, the *Fasken* decision demonstrates that segmentation remains a major obstacle in the quest towards fairness and justice in the workplace. A failure to appropriately respond to these obstacles will only serve to exacerbate the socio-economic realities of precarious work, disenfranchisement and pervasive inequality.