How To Think (As Labour Lawyers) About Supply Chains

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Abstract: *Labour lawyers have a standard way of thinking about their discipline as the regulation of contracts between employers and employees. This way of thinking produces well-known problems when applied to supply chains. This article begins by looking at standard labour law analysis of supply chains within a single nation (the example is Canada). It then suggests that there is evidence of a new non-contractual but functional way of addressing such supply chains. The essay finally explores the potential and limits of this alternative way of thinking for international supply chains.*

Key words*: labour law; "the fissured workplace"; supply chains*

Kako (kot delovnopravniki) razmišljati o dobavnih verigah

Povzetek: *Delovnopravniki standardno razmišljajo o svoji panogi kot o panogi, ki ureja pogodbena razmerja med delodajalci in delavci. Ko se ta način razmišljanja uporabi na primeru dobavnih verig, prihaja do dobro znanih problemov. Prispevek najprej poda standardno delovnopravno analizo dobavnih verig v okviru ene države (primer Kanade). Nato izpostavi primere novega, nepogodbenega oziroma fukncionalnega obravnavanja takšnih dobavnih verig. Na koncu razišče potenciale in omejitve, ki jih takšni alternativni načini razmišljanja prinašajo za mednarodne dobavne verige.*

Ključne besede*: delovno pravo, "razgrajeno" delovno mesto ("razpokano" delovno mesto), dobavne verige*

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1. INTRODUCTION

The title of this paper is carefully chosen and signals some basic aspects of my thinking about both labour law and supply chains. My title is meant to "give away" some basic points. The first of these is that how we think about things matters. That is, as it is sometimes put, "ideas matter". This is a basic theme of my work in labour law, both international and domestic. That is why my title begins "How to Think…"

A second point my title gives away is that we, "as labour lawyers", do have our own ideas, our own way of thinking, our own framework of thought. We do because we must - in order to understand what we as labour lawyers are in the world to do. What is our business? What are our issues? What can we do for our clients that other legal talent cannot do? We know the answers to these questions. But, how do we know? Well, we know because we have a shared way of thinking. And this way of thinking lets us know what makes labour law, labour law. What our issues are. What we are here to do (and what the Ministry of Labour is there for. Or the ILO).

Third, our way of thinking "as labour lawyers" is linked to the phenomena of supply chains. In fact, it may have very large implications for the law of supply chains. Indeed, some observers of supply chains argue that the labour lawyers' way of thinking explains a lot about why we have supply chains in the first place. That is, our way of thinking adds a dimension to the economic logic of supply chains.

Fourth, my title implies, at least, that we need to face up to the question: is our current way of thinking, as labour lawyers, about supply chains, the one we need in the world as we now find it? Or must we revise our thinking?[1]

Let me outline how this paper will proceed. I begin by first, taking a brief look at the idea of supply chains, and their importance in our world. Secondly, I very

[1] Answering this question is hard because it requires to carefully examine our basic normative commitments. We need to find time to ask the question: well, what sort of world do we wish to live in? That is not how many of us wish to, or do, spend a lot of time it seems. But that is where we must start - at the beginning. Then we can ask "what does labour law have to do with the kind of world we wish to live in?" The answer is "quite a lot." With this answer in hand we can we turn to the pragmatics of how to concretely move towards that world via labour law. And in this paper our focus will be on supply chains as part of that larger issue. And in doing so we will, I think, find that we need to, and actually may, have at hand a new and better way of thinking about labour law in general.

briefly describe what I believe is our labour lawyers' traditional way of thinking. Thirdly, I then "map" that view onto our specific subject – supply chains. Even though supply chains are often, if not always, thought of as international (global) in nature I point out that this is not always true. And I think it is useful to start with an example within a single state. This is because by starting here we can see clearly how our traditional labour law thinking works – unobscured by any complications of international law, public or private, or other elements of what people now commonly call the transnational legal order. I will use a purely domestic production chain example from a Canadian labour law decision (*Lian v J Crew*). What we see in that example is just our traditional labour law way of thinking "at work" (and producing a very unfortunate legal result). I then use two other and, in my view, superior Canadian cases (*Robichaud* and *Tim Hortons*) to suggest that there is another and better way for labour lawyers to think, at least domestically.

Once we see this possibility of a new way of thinking domestically, we can "go global". First, I will note how our standard way of thinking operates in, and underwrites, our understanding of the problem and thus limits our thinking about potential solutions in the international legal sphere. Then I turn to the basic idea of whether the deficiencies in our standard labour law way of thinking, made clear in our purely domestic example, might not point us to some new ways of thinking at the international level. To demonstrate this point, I turn to yet two other recent Canadian decisions (*Hudbay* and *Daz*) one of which (*Hudbay*) may be doing just that. The other (*Daz*), which arises from the Rana Plaza disaster, may be a very useful but in a rather discouraging way – as a reminder of how hard it is to change our labour lawyers' way of thinking. Even in the positive of these two decisions involving global supply chains we see both promise and limitations. But we can also see that liberation from our standard way of thinking, on display in *Robichaud* and *Tim Hortons* and adoption of a pragmatic and functional approach, unburdened by our traditional labour law thinking, points to a way of understanding much of what we do, and could do, at the international level. And not as a second-best solution (as it will be seen from the traditional point of view). That is, we can map – and see as necessary and useful - what are now several useful international responses – both hard and soft law in nature (I do not undertake that mapping here – I simply point the reader to a recent and well-done ILO summary[2]).

[2] International Labour Organization (ILO), *Decent Work in Global Supply Chains,* April 2016 [ILO].

2. SUPPLY CHAINS

I worry that labour lawyers, like most citizens of the modern world, are insufficiently aware, or in wonder, of the ways in which almost every aspect of their lives is so deeply dependant upon complex chains and networks of production. Although the word "supply chain" has entered common discourse it may have entered the way other wonderful and complex issues have – such as "DNA" or "climate change". That is, we are aware of the existence and importance of the phenomena, indeed we read about it almost everyday, but we have very little understanding of the pervasive complexity of the actual processes and mechanisms involved. We know they are important but unless we are a trained genetic or climate change scientist we are largely in the dark. I am afraid the same may be true about supply chains – unless we have undertaken advanced study in supply chain management from a good business school[3], subscribe to the leading journals in the field[4], belong to the relevant professional associations[5], and attend related professional meetings[6] (similar to this one for labour lawyers) we are unlikely to be able to have even a preliminary grasp of their significance. Lacking this sort of professional knowledge (I certainly lack it) I tend to simply see the phenomenon from the perspective on the world about which I do know something – labour law. One dimension of this truth is that I see supply chains only when they light up on the labour law screen – as they do spectacularly and mostly unfortunately, from time to time. One such example was the collapse of the Rana Plaza in Bangladesh in which 1,130 garment workers died and 2,520 were injured. That showed up on labour lawyer's screens around the world, including Canada, because one of many supply chains linked Bangladesh to a Canadian lead firm with well known clothing brand.[7] Many other chains led to other countries around the world via other labels.[8]

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3 Consult any well-known business school's website – for example, http://mitsloan.mit.edu/.

4 For an article ranking such journals see Kevin Watson & Frank Montabon, "A ranking of supply chain management journals based on department lists" (2014) 52:14 International Journal of Production Research 4364-4377.

5 For example, The Supply Chain Management Association of Canada – see http://scma.com/en/

6 For a list and ranking of such events see Nicole Pontius, "Top Supply Chain Management Conferences: 50 Events on Supplier Management, Risk Mitigation, and More to Attend in 2018" (31 January 2018), *Industry Resources* (blog), online: < https://www.camcode.com/asset-tags/supply-chain-conferences/>.

7 Joe Fresh – see infra at p. 229

8 For example, to the United States of America via brands JC Penny and Wal-Mart – see the

But as a labour lawyer I am much less likely to ponder the marvel of the complex supply chain that lies behind almost everything I use or consume – behind, for example, the arrival on my table of the fish I will buy and cook for dinner this evening. Or the table and chairs, and cutlery, and class ware, my stove, pots and pans, and cleaning up liquid. Or my kitchen sink. Or the aircraft I will see passing high overhead as I look out the window, or the computer I listen to (or the "cloud" which it makes it possible) as I wash the dishes. If they could speak, what tales they could tell.[9]

Much of what we would marvel at is simply the complexity of the evolving chaos of modern capitalist production, something we have had around to marvel at for some time. But there seems no doubt that in our times the economics of modes of production, and as a result the structure of firms, have changed dramatically. Globalization, deep economic integration via freer trade, mobility of capital, goods and ideas, the emergence of new sources of both supply and demand, combined with once unimaginable technological, communications, and transportation revolutions have altered the familiar empirical terrain of labour law. Supply chains are a dramatic, evolving and ubiquitous manifestation of these truths about the world as we now find it. They are a wonder. They are one of the vital mechanisms which have lifted many people out of extreme sovereignty and projected them into the global world of production and consumption.[10]

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discussion of these cases in Smits, "Enforcing Corporate Social Responsibility Codes" (2017) 24 Indiana Journal of Global Legal Studies 99 [Smits].

[9] For a glimpse see Alain de Botton, *The Pleasures and Sorrows of Work*, Emblem ed (Toronto: McClelland & Stewart Ltd, 2009), see especially ch. 1 (Cargo Ship Spotting and ch. 2 Logistics. See also The Box (the revolution made possible by the invention of the shipping container). See also ILO, *supra* note 2 at para 13: "**A night at the movies.** Imagine that you are in a cinema watching a popular animated movie. Now imagine all the people that made the experience possible. The movie itself was made by a company in the United States, using subcontractors in India and the Republic of Korea. The popcorn you are eating was harvested by workers in Argentina, prepared with palm oil from a Malaysian plantation and produced in machines assembled in Italy. The seat you are sitting on was made in Poland. The car you drove to the cinema was assembled in Spain, with parts from Austria, France, Japan, Mexico and Thailand, and was transported on a container ship owned by a Greek national through a Liberian company, which was built in Japan and powered by Finnish engines. Indeed, the two hours you spend watching the film may have required the labour of thousands of people in dozens of countries in global supply chains."

[10] For a great read in this point see Hans Rosling, *Factfulness*: *Ten Reasons We're Wrong About the World and Why Things Are Better Than You Think*, 1st ed (New York: Flatiron Books, 2018). See also Steven Pinker, *Enlightenment Now*: *The Case for Reason, Science, Humanism, and Progress* (New York: Penguin Random House LLC, 2018).

3. A NOTE ON TERMINOLOGY

The more one reads about supply chains the more one realises that there are a lot of closely related terms bandied about – and that there is not a universally agreed upon taxonomy to which they might be applied. Nonetheless, intelligent conversation is possible, and I will simply follow the ILO's lead on terminology:

"Global supply chains are complex, diverse, fragmented, dynamic and evolving organizational structures. A broad range of terms exist to describe them, including global production networks, global value chains and global supply chains. All of these terms focus on the same basic issues of cross-border production and trade, but with slightly different perspectives. For the purposes of this report, they are used synonymously.

Here, the term "global supply chains" refers to the cross-border organization of the activities required to produce goods or services and bring them to consumers through inputs and various phases of development, production and delivery. This definition includes foreign direct investment (FDI) by multinational enterprises (MNEs) in wholly owned subsidiaries or in joint ventures in which the MNE has direct responsibility for the employment relationship. It also includes the increasingly predominant model of international sourcing where the engagement of lead firms is defined by the terms and conditions of contractual or sometimes tacit arrangements with their suppliers and subcontracted firms for specific goods, inputs and services."[11]

4. A MAP

In addition to following the ILO lead on keeping our terminology simple I will borrow what I see as a very useful map for providing an overview what I have to say.[12]

In what follows I will identify the examples and cases I use as occupying one of these 4 quadrants and I have placed the abbreviated names of 4 cases to which I will refer below (*Tim Hortons*, *Hudbay*, *J Crew*, *Das*) in each of those quadrants.

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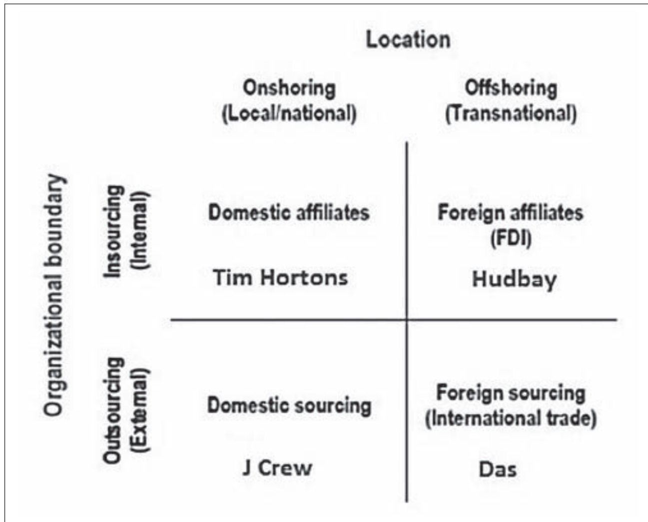
[11] ILO, *supra* note 2 at para 4, 5.

[12] Ibid at para 16.

Figure 2.1. Offshoring and outsourcing



Source: Adapted from: L. Abramovsky and R. Griffith: "Outsorcing and Offshoring of businrss services: How important is ICT?", in *Journal of the European Economic Association)2003, Vol. 4, Issue 2-3), p. 595.*

5. FISSURING - A DOMESTIC VIEW OF SUPPLY CHAINS

We start on the left side of our MAP. Perhaps the most important, influential, and recent book written by a North American about labour law is David Weil's *The Fissured Workplace*.[13] The book is largely domestic (and American) in its orientation. It is famously focussed upon the breakdown of the standard model of employment and its replacement with several new work arrangements – self employment, agency employment, franchising, subcontracting (contracting out, outsourcing) and chain production.[14] A central insight of the book is simply that

[13] (Cambridge: Harvard University Press, 2014) [Weil].

[14] The distinguished Canadian labour lawyer, Harry Arthurs, once suggested that Weil had used the wrong word, "fissuring", because it suggested a natural process whereas the actual process was both very human and intentional, and was better described as "fracking" (the verb used to describe the process of injecting liquid at high pressure into subterranean rocks to cause "fissuring" in order to extract oil or gas).

labour law now often focuses its regulatory attention upon "the wrong parties".[15] (This insight is an important one for this paper because the point I am after is that this inability to focus upon the right parties is a function of our standard labour lawyers' way of thinking). It is an advantage that Weil is an economist and not a lawyer (although he clearly knows a lot about labour law). He is, unlike many labour lawyers, able to both understand the economic logic and benefits of fissuring (the business case for it) but also its costs. On Weil's account, capital markets pressure firms to focus on activities which add greatest value to the firm (the revenue imperative) – the brand, new product design/development, etc. This leads to shedding of non-core activities (the cost imperative). This leads to a tension – by shedding and losing control of these activities the brand can be threatened (think Nike, Rana Plaza, etc.). This the third imperative – the need for "glue" to enable the firm to "have it both ways" – i.e. a fissured workplace but with secure brands - via standards, monitoring, and the detailed level of control now made available by technology (e.g. bar codes, GPS, inspections, constant detailed communication). Weil then makes two critical observations. First, that fissured firms often articulate standards and monitor all aspects of production or service delivery other than workplace law compliance.[16] Second, while there are clearly economic benefits of new modes of production in the form of lower prices for consumers and the liberation of resources for productive allocation elsewhere, there are also externalities (costs of production externalized, i.e. not paid by, the firm and "soaked up" by those outside the firm). He identifies and provides data for 3 such consequences: violation of basic labour standards (minimum wage, hours), real health and safety externalities, and adverse distributional consequences (rising inequality). Of these I see the key one being massive labour standards violations. That is, Weil's best point is that it is too late to avoid the conclusion that fissuring is a sort of "machine" for generating massive labour standards violations. The machine is well described in detail by Weil but also put in succinct form as follows:

> "Activities that are shed by lead firms are often taken up by smaller businesses. Given the competitive markets on which they operate, smaller employers face intense pressure to reduce costs. Non-compliance with a gamut of workplace standards is often the end result."[17]

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[15] Weil, *supra* note 13 at p. 4.
[16] Ibid at p. 14.
[17] Ibid at p.16. And much of the book is taken up with explaining this in detail and marshalling the

And recall Weil's first observation: that, meanwhile the lead firm is ensuring (via its "glue") that all other technical, quality, and delivery standards are set out in detail, monitored, and "rigorously adhered to by those subordinate suppliers".[18]

6. A PERFECT CANADIAN EXAMPLE OF WEIL'S WORLD – *Lian v J Crew*

The facts of *Lian v J Crew*[19] are simple and clear. They perfectly track Weil's account of fissuring and its problems. So too the decision in the case reveals the problems which our labour lawyers' way of thinking produces. "J Crew" is a well known, in North America at least, apparel brand. Ms. Lian was an immigrant to Canada from China, who spoke no English. She was hired by a sub-sub-sub contractor called "Eliz world" to sew garments, at home (in downtown Toronto), and paid by the piece. She claimed that her wages were not fully paid and were also in violation of local labour legislation's minimum wage. She also alleged violation of other standards regarding overtime and holiday pay. As recounted by the judge the chain involved was, rather amazingly, one which stretched to Hong Kong – but began and ended in Canada:

> "J. Crew contracted with Yee Tung Garment Co. ("Yee Tung") of Hong Kong to manufacture "J. Crew shorts". Yee Tung in turn subcontracted with E. Knitted to manufacture the shorts. E. Knitted then subcontracted with Eliz World to do part of the job."[20]

The court also accurately described further facts which track exactly Weil's account of fissuring, the pressure on "smaller businesses" ("Eliz World") as "price takers" in a "buyer centered commodity chain" which is "very sensitive to market demand and production costs, making quick turnaround times and low costs in production attractive".[21] It is also instructive that Eliz World, the sub–sub-sub contractor alleged to be Ms. Lian's employer did not appear to defend the action – although J Crew did. J Crew avoided liability by convincing the court that the

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empirical evidence. See also ILO, *supra* note 2 re international parallel.

[18] Weil, *supra* note 13_at p. 168. See also ILO, *supra* note 2 at p34. These non-compliance externalities are key to Weil's argument against fissuring and in favour of reform. In what follows I suggest that there is a failure of legal imagination at work here as well. If we could solve for that failure, we would have another reason to re-evaluate the fissured workplace.

[19] *Lian v J Crew*, 2001 CanLii 28063, ON SC [J Crew].

[20] Ibid at para 9.

[21] Ibid at para 24.

interesting question was whether they were in an employment relationship with Ms. Lian, and then convincing the court that they were not. J Crew's point was, for labour lawyers, the obvious one: "we have no contract at all with Ms. Lian". She is an employee, but not ours. Her contract and complaint are with (the "fly-by-night") Eliz World (which did not appear to defend the action). We are not her employer. The judge accepted this argument. Wrongly in my view.

This is Weil's fissured workplace in perfect microcosm. The case is even more surprising because the labour standards legislation involved contained a very expansive definition of employer. The relevant statutory provision in the *Ontario Employment Standards Act*[22] read:

> "Separate persons treated as one employer
>
> 4. (1) Subsection (2) applies if, (a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and (b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.
>
> (2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act."

One would have thought that this was a very useful provision aimed exactly at the problem at the heart of Weil's book: while fissuring has advantages it also has disadvantages in that it precisely drives ("effects") the sort of labour law violation we see in *Lian*.

Here is the point I am after. What we see here is a text book version of how labour lawyers think about commodity chains. A powerful example of that thinking trumping a very broadly worded statute aimed, one would have thought, at taking us away from that standard mode of thought.

But what is that standard way of thinking? Briefly, the standard account of the mission of labor law is that it exists to protect employees in their relations with their employers. This protection is required because employment is viewed as a contractual relationship and contracts negotiated between employees and employers are characterized by "inequality of bargaining power". Labor law comes to the aid of the weaker party and does so both procedurally (via protection of collective bargaining) and substantively (via the sort of minimum

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[22] SO 2000, c 41, s 4 (1).

standards legislation in play in *Lian v J Crew.*[23]*)* At the core of this account is a contract and a contract of a certain sort.

Now here is the vital question: why would we deploy that thinking to the question of how best to effectuate the policies of the Employment Standards legislation at stake in *Lian*? The point of that legislation – and one would have thought the extended definitions put in place (but even in their absence) – is to see that persons such as Ms. Lian get paid and at the proper rate. As I have argued elsewhere:

> "The suggestion here is that the purposes of pay protection legislation do not need to be moralised via the standard labour lawyer's story. The question here should be "what is the mischief?" and then "who helped create the problem, who benefited from it, and who is in a position to do something about it?" That is, we need to ask a sensible, purposive, rational, pragmatic, non-moralised question about deployment of responsibility, incentives, and relationships which are fairly remote from any standard notion of "employment". If we ask

[23] For longer accounts of this see Brian A Langille, "Core Labour Rights - The True Story (reply to Alston)", (2005) 16:3 Eur J Intl L 1; Brian Langille, "The Future of ILO Law, and the ILO" in *The Future of International Law* (2007) 394; Brian Langille, "Globalization and The Just Society: Core Labour Rights, the FTAA, and Development", in John D R Craig & S Michael Lynk, eds, *Globalization and thr Future of Labour Law*, (Cambridge: Cambridge University Press, 2006) 274 (; Brian Langille, "Human Freedom and Human Capital; Re-imagining Labour Law for Development", in Tonia Novitz & David Mangan, eds, *The Role of Labour Standards in Development: Theory in Practice?* (Oxford: Oxford University Press, 2012); Brian Langille, "The ILO Is Not a State, Its Members Are Not Firms", in George P Politakis, ed, *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (International Labour Organization, 2007) 247; Brian Langille, "Imagining Post Geneva Consensus Labor Law for Post Washington Consensus", (2010) 31 Comp Lab L & Pol'y J 523; Brian Langille, "Labour Law's Back Pages", in Guy Davidov & Brian Langille, eds, *The Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing, 2006) 13; Brian Langille, "Labour Law's Theory of Justice", in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 2011; Brian A. Langille, "Labour Policy in Canada - New Platform, New Paradigm", (2002) 28:1 Can Pub Pol'y 133; Brian Langille, "Putting International Labour Law on the (Right) Map", in Adelle Blackett & Christian Ldvesque, eds, *Social Regionalism in a Global Economy* (New York: Routledge, 2009) 290; Brian A. Langille, "Re-reading the Preamble to the 1919 ILO Constitution in Light of Recent Data on FDI and Worker Rights", (2003) 42 Colum J Transnat'l L 87; Brian Langille, "A Question of Balance in the Legal Construction of Personal Work Relations", (2013) 7 Jerusalem Rev Legal Stud 99 ; Brian A. Langille, "Seeking Post-Seattle Clarity-and Inspiration", in Joanne Conaghan, Richard Michael Fischl & Karl Klare, eds, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002) 137 (Brian Langille, "What Is International Labour Law For?", (2009) 3 L & Ethics Hum Rts 47.

that question, then it is hard to see why the most effective and just method of enforcement is not to make J Crew jointly and severally liable. And, rather amazingly, this was the rare example in which the statute did not limit its definition of "employer" to terms of striking circumlocution and actually had very broad language on the idea of "employer" – making the court's placing the hurdle of the morality of traditional employer /employee relationships even more puzzling and problematic."[24]

The key point decisions such as *Lian* – and Weil's book – show that we need liberation from our received wisdom, our standard way of thinking. That is the idea pursued here. And there is another way of thinking available. We can see it in other Canadian - the Supreme Court of Canada's decision in *Robichaud*[25] and in a very recent Human Rights Tribunal decision, *Tim Hortons*[26].

In *Robichaud v Canada* a supervisor had sexually harassed an employee, Ms. Robichaud. The supervisor had clearly violated Ms. Robichaud's statutorily protected right to be free from sexual harassment at work. But what of the Department of National Defense who employed both the harassing supervisor and the victim employee? It is not surprising that the Supreme Court of Canada ("SCC") held the employer liable as well. But the reasoning is surprising, and it deserves our attention.

Given that there was no doubt that the supervisor had violated the legislation in question by sexually harassing Ms. Robichaud, the question the Court posed was whether "such actions can be attributed to the employer". Conventional labour law rhetoric compels a court to focus on the various theories supporting the liability of an "employer" for the acts of its "employees" during the "course of employment", such as vicarious liability in tort and strict liability in quasi-criminal context. Such a focus was adopted by the Federal Court of Appeal in this case prior to its review by the SCC. It is worth pointing out that the result of this was that the employer was not held to be liable by that Court.[27]

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[24] Brian Langille, "'Take These Chains from my Heart and Set Me Free': How Standard Labour Law Theory Drives Unnecessary Segmentation of Worker Rights", (2015), 36 Comp Lab L & Pol'y J at 265.

[25] *Robichaud v Canada (Treasury Board)* (1986) [1987] 2 SCR 84 [Roubichaud].

[26] *Tim Hortons v Steelworkers* (2015) [2015] BCHRT 168 [Tim Hortons]. The discussion which follows draws on Langille, "Human Freedom: A Way Out of Labour Law's Fly Bottle" forthcoming in Collins, Lester and Mantouvalou (eds) Philosophical Foundations of Labour Law (OUP, 2018).

[27] [1984] 2 FC 799.

Unexpectedly, and wonderfully, the SCC took a very different approach. The Court stated that "the place to start is necessarily the Act, the words of which, like those of other statutes, must be read in light of its nature and purpose".[28] The statutory purpose, clearly articulated in the text, and condensed by the Court, was "'to give effect' to the principle of equal opportunity for individuals by eradicating invidious discrimination," not merely by punishing offenders, but also by "redressing socially undesirable conditions".[29] The Court rejected the arguments advocating the liability theories previously mentioned, noting that a fault-based orientation would be "completely beside the point".[30] The Court also dismissed the employer's assertion that the impugned act must have been committed "in the course of employment," concluding that such a limitation, having developed in the law of tort, "cannot meaningfully be applied to the present statutory scheme".[31] Having disposed of both vicarious liability and fault oriented approaches, the Court articulated a positive account of the liability imposed on the employer as follows:

> "It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions."[32]

This is a radical and very powerful passage expressing a very important idea. Think of its implications for Ms. Lian. The key to the Court's reasoning is that the remedial purposes of the legislation "would be stultified if the…remedies were not available against the employer".[33] The employer did not itself commit the acts complained of, it was not found liable because of any wrong it committed (failing to supervise the supervisor, negligent hiring, etc.) nor was the liability based on any theory of vicarious liability inherent in the employment relationship. Rather, the employer was found responsible because it was best placed to do what was required to both remedy and prevent the violation of the statute's purposes. In a sentence, the focus in Robichaud is not, as conventional labour law thinking

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[28] Robichaud, *supra* note 25 [7].
[29] Ibid [90].
[30] Ibid [11].
[31] Ibid [12].
[32] Ibid [17].
[33] Ibid [15].

would have it, on who controls another person, but who controls the success or failure of statutory purposes.

Here is a second Canadian labour law case in which the decision departs from the standard thinking on display in *Lian*. *Tim Hortons* is a franchise case and as such is much closer than *Robichaud* to our subject matter – supply chains. In fact, franchise arrangements are best seen as simply as short chain – of only two links: Franchisor – Franchisee – Employee. In *Tim Hortons* we see the new logic of *Robichaud* deployed (along with the abandonment of the traditional labour lawyers' way of thinking). We see a purposive and functional approach to advancing the aims of our various labour laws. *Tim Hortons v Steel Workers*, concerned a human rights complaint filed by the United Steelworkers union on behalf of a group of temporary workers from the Philippines ("the complainant workers"). The complainant workers had been brought to Canada under the Temporary Foreign Worker Program (TFWP) to staff a Tim Hortons coffee shop in Fernie, British Columbia.[34] The complaint workers alleged was a pattern of discrimination, including the refusal to pay overtime premiums, giving the TFWP workers less desirable shifts than other workers, and threatening the TFWP workers with being sent back to the Philippines.[35] The complaint was filed against both the owners of the franchise where the violations took place—the franchisee, and corporate Tim Hortons—the franchisor. In other words, the Steel Workers union sought to hold Tim Hortons, as franchisor, accountable for the harms inflicted by the franchisee upon its employees.

Tim Hortons brought a motion to dismiss the action against it, alleging no reasonable prospect of success claiming Tim Hortons was not the "employer" of the complainant workers, rather, the franchisee was. Tim Hortons argued "that the franchisee is responsible for hiring and training its employees, establishing their terms and conditions of employment, paying WCB premiums and complying with all local labour laws and the Code."[36] Tim Hortons went on to allege that "they were not party to any employment contracts with any members of the Complainant Group, had no control over any terms of employment and had no ability to influence the employment relationship between members of the

[34] Tim Hortons "restaurants" are ubiquitous in Canada, known primarily for selling coffee and donuts, but also other food products.
[35] Tim Hortons, *supra* note 26 [6].
[36] Ibid [52].

Complainant Group and [the franchisee]."[37] As such, Tim Hortons asserted that they could not be held liable for the rights-violations committed by the franchisee. All very familiar labour law thinking. *Lian* type thinking.

But the Tribunal dismissed Tim Horton's application, finding that the absence of a direct contract between Tim Hortons and the complainant employees was not determinative of the issue. A finding of discrimination "is not limited to employers or persons who attract vicarious liability."[38] In fact, the Tribunal expressly acknowledged the emphasis in some jurisdictions on establishing a relationship of employment or an employment-like relationship when determining liability, and it noted that such decisions should be approached with caution.[39]

According to the Tribunal, the key question to be decided was whether the franchisor (Tim Hortons) was in a position to monitor and control the success of the purposes of the legislation. Nicely summarizing *Robichaud*, the tribunal affirmed that "liability in a human rights context should not be determined on the basis of principles brought from other areas" but rather it should be found "with regard to the remedial purposes of such legislation".[40]

Robichaud and *Tim Hortons* are simple cases. By focusing on the purpose and object of the labour law statutes in question, the adjudicators effectively advance that purpose and object in the decision they render. Since the statutes in question were enacted to provide protection to workers and others in need of protection, this approach functions to advance that protection above all else. Both decisions make it abundantly clear that the contract of employment is not determinative of the scope of accountability, the traditional conceptual categories of employer or employee are not indicative of the remedial entitlements, and the core normative ambition has little to do with the inequality of bargaining power between employers and employees. What we see instead is a clear and steady focus on the remedial purposes of the legislation and a pragmatic determination of who is best positioned to advance that remedial purpose.

The approach in these cases is remarkable because of its simplicity. The effect of focusing solely on the legislative purpose is that the contract of employment, or any contract, fades from the limelight. Along with it goes the coherence of

[37] Ibid [9].
[38] Ibid [63].
[39] Ibid [65].
[40] Ibid [70].

a normative ambition wholly circumscribed by the injustice arising between an employer and an employee with respect to the contract of employment.[41]

7. GOING GLOBAL – HOW LABOUR LAWYERS THINK ABOUT INTERNATIONAL SUPPLY CHAINS

When I first became a labour lawyer no one I knew thought about international issues – "globalization" was not yet a word. Labour law was overwhelmingly domestic. That has changed over my lifetime. I have spent the last 25 years trying to make the transition from being a purely domestic labour lawyer to be an international one as well. I have spent my fair share of time in Geneva. I have advised the Canadian government on trade and labour issues. I have written and lectured in manty places about international labour law, the ILO, trade and labour, and related matters. In the early going labour lawyers confronting free trade, globalization, and all rest, were transfixed by two core issues: 1) The direct effect of the new world order on jobs here ("at home") and 2) The indirect effect on labour policies here "at home" due to the downward effect of regulatory competition ("social dumping"/"race to the bottom").[42] And labour lawyers often had a very domestic, as opposed to a global, perspective when worrying about labour justice. I do not deny[43] that some labour and human rights lawyers were from the beginning motivated not by these impacts "here" but by the simple facts of human/labour rights violations "there". Nonetheless the domestic concerns were profound and animated much of the trade and labour, social clause, (anti) free trade and globalization debates. Looking back these debates

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[41] But that is exactly how the conventional labour law narrative proceeds – on the basis that labour exists to protect workers from the injustice that is sure to arise from the contract of employment given the inherent inequality of bargaining power between an employer and an employee. This is the mischief that labour law seeks to cure through procedural and substantive means. Yet, *Tim Hortons* and *Robichaud* are clearly not motivated by a normativity having anything to do with the contract or any inequality of bargaining power involved in its negotiation or administration. That being the case, we are left with the following questions: what normative account of labour law can explain these remarkable cases? And what is the reach or scope of a labour law so understood? These questions we can answer – see sources in *supra* note 23 especially Langille "Labour Law's Back Pages".

[42] See Langille, "General Reflections…", *supra* note 23.

[43] Brian Langille, "Eight Ways to Think About International Labour Standards" (1997) J World Trade 27.

have acquired an antique sheen. The data denying the existence of a race to the bottom has been flowing since 1996.[44] The redistribution of jobs globally is now thoroughly embedded, and our conversations have turned to 'reshoring'. Efforts to protect jobs though trade restrictions are now seen as self-inflicted wounds.[45] Perhaps most importantly we have witnessed a global reduction in poverty and the lifting of very large numbers of human beings out of absolute poverty. Debates about labour clauses in trade agreements are increasingly informed by a softer law "capacity problem/building" and "pragmatic locating of incentives" perspectives, rather than a hard law violation/sanctions perspective. The Washington consensus has ended. Dani Rodrik's warnings about the incompatibility of "Hyper Globalization" and nation state democracy are taken increasingly seriously[46]. We have shifted to a "development perspective" on these matters.

This is not to say that we do not have real problems. Large problems – illiberal democracy, xenophobia, what Sen calls "the terrible burden of narrowly defined identities"[47], etc. And Rana Plazas. And while we still have large scale unaddressed labour law non-compliance, debates about how to proceed to address those now proceeds in a different world of understanding. I think we are making progress in our thinking about global development. In what follows I wonder whether our labour lawyer way of thinking has kept up.[48]

Now the rest of this paper has the following form. The international understanding of global supply chains follows the same unfortunate logic of the *Lian* case. That is, it takes our labour lawyers' standard way of thinking and applies it to globally. It is true that life is more exotic in global supply chains as compared to domestic ones – but this does not detract from a fundamental point which is that our standard labour lawyers' way of thinking is carrying a lot of the freight here.

A simple way of making this (rather, perhaps, too obvious a point) is to examine the following non-controversial extract from the ILO's 2017 "Inception Report for the Global Commission on the Future of Work":

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44 *Trade and Labour Standards*. (OECD, 1996). See also the sources cited in Langille "What id International Labour Law for?", *supra* note 23 at p70 .

45 Witness the ongoing efforts to educate Mr. Trump on this matter.

46 Dani Rodrik, *The Globalization Paradox*, (Norton, 2011).

47 Amartya Sen, *Development as Freedom* (Knopf. 1999 at p 8*].

48 See also Brian Langille, "Imagining Post Geneva Consensus Labour Law for Post Washington Consensus Development" (2010), 31 Comparative Labor Law and Policy Journal 523-552.

> **"The organization of work within global supply chains**
>
> In recent decades, international trade and the production and distribution of goods (and services) has become increasingly dominated by global supply chains (GSCs). GSCs operate across many sectors of the economy, including (but not limited to) textile, clothing, retail, footwear, automotive, food and agriculture, seafood, fisheries, electronics, construction, tourism and hospitality, horticulture and transport. GSCs have had a positive impact on job creation, particularly in light of demographic changes such as ageing, urbanization, population growth and the increase in women's participation in the labour market. For instance, GSCs are estimated to account for 450 million jobs worldwide. Participation in GSCs also increases people's chances of getting a foothold in the world of formal work and their ability to support themselves and their families. GSCs have also boosted entrepreneurship and economic growth via technological transfers and the adoption of new production practices. The effects of this dispersed organization in supply chains can be straightforward but, for most products, chains are complex, involving the supply of inputs, their production and their distribution throughout the world. Sourcing and production in this manner can have important implications for work, work quality, governance and income distribution. In particular, in some instances it has led to concerns regarding OSH, wages and working time as well as challenges associated with ensuring labour rights, notably freedom of association and collective bargaining. **Firms that source their goods from entities along the supply chain do not necessarily employ the workers in those enterprises. Thus, they have no legal responsibility for labour violations that may occur in those entities, despite the fact that their sourcing practices have significant impact throughout the chain.** (emphasis added)."[49]

That is a nutshell is the traditional way of thinking we saw deployed in *Lian*. It just is the labour lawyer's standard way of thinking. And it is applied across borders just as easily as it was within the borders of a single state. It may be interesting to note that this was the view taken by Nike in the very early going of the Supply Chain/Labour Law issue. As Locke et al recount:

> "The same strategies that permitted Nike to grow at an impressive rate over the past several decades–taking advantage of global sourcing opportunities

[49] ILO 21 September 2017. See also ILO, *supra* note 2 at para 24.

> to produce lower-cost products and investing these savings in innovative designs and marketing campaigns—have also created serious problems for the company in recent years. As early as the 1980s, Nike was being criticized for sourcing its products in factories and countries where low wages, poor working conditions, and human rights problems were rampant. Then, over the course of the 1990s, a series of public relations nightmares—involving underpaid workers in Indonesia, child labor in Cambodia and Pakistan, and poor working conditions in China and Vietnam—combined to tarnish Nike's image. As Phil Knight lamented in a May 1998 speech to the National Press Club, "The Nike product has become synonymous with slave wages, forced overtime, and arbitrary abuse." At first, Nike managers took a defensive position when confronted with the various labor, environmental, and occupational health problems found at their suppliers' plants. **Workers at these factories were not Nike employees, and thus Nike felt no responsibility toward them.** By 1992, this hands-off approach changed as Nike formulated its Code of Conduct for its suppliers that required them to observe some basic labor, environmental, and health and safety standards." (emphasis added).[50]

This was traditional labour law thinking and the legal advice Nike received was no doubt correct within that paradigm. But as Nike discovered non-lawyers were thinking in a different way. So were Canadian non-lawyers when they learned that Joe Fresh labels were found in the wreckage at Rana Plaza. And as we have just seen Canadian lawyers and judges, as least sometimes, and at the highest level (SCC) depart from this well-known script. And as we now turn to the international version of this story we ask – can we see a parallel movement there?

Could there be, at the global level, a version of *Robichaud/Tim Hortons*' type thinking – a breakthrough along those lines?

Two recent Canadian cases bear reading when considering this question.

Choc v Hudbay[51] is a very interesting and suggestive decision.[52] The structure of the case is simple: Canadian Mining Company in Toronto – Subsidiary in Guatemala – Independent Security Contractors – Complainants (not employees, but indigenous local inhabitants removed forcibly from land they claim.) We are

[50] Richard M Locke, "Does Monitoring Improve Labor Standards? Lessons from Nike" (2007) 61:1 ILR Review 3-31.
[51] *Choc v Hudbay Minerals Inc* (2013) 2013 ONSC 1414.
[52] See also ILO, *supra* note 2 at para 26.

in top right-hand corner of our MAP. The allegations included the shooting and killing of two opponents to the mining project, and gang rapes committed in the course of relocating the indigenous peoples from their village to facilitate a project. The legally innovative claim was that the Canadian company at the top of the chain, Hudbay, had taken actions which in Toronto - not in Guatemala. and that these actions were negligent, and actionable in tort, in Toronto. Hudbay sought to have the claim thrown out on a preliminary motion. The motion was denied. The court held that the plaintiffs had pleaded material facts required to establish the constituent elements of a claim of direct negligence as against Hudbay, separate and distinct from claims framed in vicarious liability for torts committed by others in Guatemala. It was not "plain and obvious" (the test on preliminary motions to strike a claim) that Hudbay did not owe a duty of care to the plaintiffs. If proven at trial, the facts as pleaded established that the risk of violence and rape was reasonably foreseeable from the use of forced evictions by unlicensed security personnel. Public representations concerning. Hudbay's relationship with the local communities and commitment to human rights supported a finding of sufficient proximity between the parties. There were competing policy reasons concerning the recognition of a duty of care between a Canadian mining company and individuals harmed by security personnel at its foreign operations.

This case sent a shock wave through the international mining community. The core idea – that Hudbay owed a "duty of care" to the indigenous complainants in Guatemala and that decisions made around a boardroom table in Toronto – to embark upon a venture when the risk of these acts of violence by local security contractors was "foreseeable" (as required by Canadian tort law) – lead to liability in Canada under Canadian tort law for a tort committed in Canada, is both remarkably straightforward in legal terms, yet completely new. It is an example of very good lawyering, using very basic arguments. In legal form it shares some of the characteristics of *Tim Hortons* – of short circuiting the chain. (This of course is in the nature of tort liability in the common law. The foundational case in negligence law, *Donahue v Stevenson*[53] had the contractual chain Manufacturer – retailer – consumer. The consumer can sue the manufacture damages caused to her by a defective product). As such it is an important if straightforward legal way in which lead firms can be held to account. [54]

[53] [1932] AC 562 (HL).
[54] For a thoughtful piece about the use of basic legal concepts in the world of CSR see Smits, *supra* note 8.

Rather amazingly for our current purposes *Hudbay* was followed in Canada by a parallel case arising form the Rana Plaza disaster, *Das v George Weston Limited.*[55] Here we are in the bottom right quadrant of our MAP. In that case injured workers who survived the collapse, and relatives of some of the 1,130 killed, commenced a (class) action in Ontario against the Canadian lead company (Loblaws) involved in the production of apparel under the label "Joe Fresh", a well know brand in North America. Unlike *Hudbay*, this was a labour law case. It simple terms it is the global equivalent of Ms. Lian suing J. Crew. But there was even more. The workers also sought to sue Bureau Veritas, the consulting services enterprise that Loblaws had retained to conduct a "social audit" of factories in Bangladesh, including one of the factories in Rana Plaza.

But here the motion to strike the claim, unlike in *Hudbay*, was successful. Although *Hudbay* was relied upon, it was not clear that the judge understood the novel tort claim which succeeded that case. And that failure led to the case being decided on normal private international law grounds for torts committed in Bangladesh – choice of law (Bangladesh) under which the claims were barred. It is unfortunate that the nature of the *Hudbay* claim of negligence in Ontario (as opposed to Bangladesh) seem to have been lost in the application of principles of private international law.

Be that as it may it seems clear that this method of directly fixing responsivity on lead firms, even when successful, has obvious limitations. These were serious tort claims in negligence leading to death and serious injury. Most labour law violations in supply chains involve wages, hours, and other statutory claims. It is not a tort in Canada to violate a Bangladeshi statute, nor a Canadian one. These cases will be rare. And there is also, rightly, no Canadian labour statute applying Canadian law beyond our borders. But what we can expect to see is the ending of the legal ideas on display in *Lian*, and the adoption of the pragmatic approach of *Robichaud* and *Tim Hortons* – at the international level. That is, we need to see that the absence of a contractual link is not a barrier to our *labour law* thinking in many of our labour law cases.

In Canada we can invoke this liberated mode of thought when it comes to interpreting Canadian statutes. We can hold them to apply, if you wish to put it this way, to firms as employers who were not employers on the standard view. At the international level we cannot invoke our new approach in that, direct,

[55] 2017 ONSC 4129.

statutory interpretation, way. But we can invoke this approach, as labour lawyers, in many other ways. That is, we can seek out the actors in the international scheme, in global supply chains, who are (like the employer in *Robichaud*, or the franchisor in *Tim Hortons*) in a position to both prevent abuse and address the consequences when it occurs. That is, we can bring the same purposive approach to bear. Here our purpose is, overwhelmingly, the effective application of local law (and international core labour rights) in global supply chains. Liability is not what we want as an end in itself. We are only interested in placing liability in the right place because it places the incentive/pressure on those liable to take precautions. We don't want enforcement – we seek compliance.

So, if in global supply chains we cannot often (but see *Hudbay*) place liability as our incentive to ensure compliance we will, in our pragmatic spirit, seek other ways of accomplishing the same incentive structure. Or, if you prefer, we will seek and find the right "employer" for the purposes at hand. Those who are in a opposition to prevent and remedy the abuses we face. This is, in my view, not a legal defeat but a legal advance. Having come to doubt the labour lawyers' standard way of thinking we are free to make functional pragmatic progress via whatever means are available.

It is important to rid ourselves of our old way of thinking, both domestically and internationally. This allows us to fix liability and set smart incentives, and remove perverse incentives, in a functional way. To think about an effective law unencumbered by the traditional morality tale of contract, of a certain type. This functional approach is what we need – to find the point at which to put pressure on those who can help achieve our goals.

That is in a sense exactly what is happening in myriad ways – mapped by the ILO.[56] This is not the place to review the responses developed by Nike, Loblaws (the Canadian firm behind the Joe Fresh label), and many other lead firms at the top of global supply chains. These are often viewed as "second class" soft law: codes of conduct, monitoring, ventures often put in place by the lead firms as a substitute for hard legal responsibility - because the standard legal analysis absolved them of hard legal responsibility. Much has been usefully written about those initiatives and other modes of responding to the problem posed by our standard way of thinking. To date the most compelling of these forces which can be brought to bear are market forces – wielded by consumers and investors. My

[56] ILO, *supra* note 2.

main point is that once we shed the limited, traditional and moralized labour law account of the labour law world, and adopt a more modern functional approach, we can see a continuity between international and domestic labour law – not an unhappy discontinuity. The tools available may be different, but our goal constant and our methodology the same.

But by taking up this way of thinking new ideas are made available. A very important emerging, and "doable" strategy, can be seen in supply chain transparency laws. Such laws can be seen to straddle both sides of our MAP. That is, these are enforceable domestic laws (the enforcement of disclosure obligations) but apply pressure at the critical point to improve compliance with foreign laws. But fully exploring, or even mapping, all of the possibilities is a large and ongoing project not attempted here. The point of this essay is that we should not, as labour lawyers, let our standard way of thinking get in the way of that vital project.