

# Law Firm Partners and the Scope of Labour Laws

*Brian Langille<sup>1</sup> and Pnina Alon-Shenker<sup>2</sup>*

*In this article, we argue for purposive interpretation of statutory labour laws when issues of their “scope” or “range of application” arise. While this purposive approach has been rhetorically dominant, it often fails to fulfill its promise in our case law. Drawing on Tussman and tenBroek’s work, this article calls attention to the structure of thought involved in legislative “classifications”, which is not a new idea but has been absent from current discussions. We stress that determining appropriate coverage of labour laws requires rational and pragmatic reasons for treating people differently which go beyond legislative classifications to the purposes of the specific law. This article critically reviews the Supreme Court of Canada’s recent decision on the application of human rights laws to law firm partners in *McCormick v Fasken Martineau DuMoulin LLP* in an effort to show how the purposive approach is invoked, how it is then either ignored or applied incorrectly, and how the purposive approach ought to have been deployed if we had remained faithful to its structure and demands.*

---

<sup>1</sup> Professor of Law, University of Toronto.

<sup>2</sup> Associate Professor, Department of Law & Business, Ted Rogers School of Management, Ryerson University.

*Dans cet article, nous soutenons qu'il convient d'adopter une interprétation téléologique des lois relatives au travail lorsque surviennent des questions relatives à leur champ d'application. Bien que l'approche téléologique semble prédominer du moins en paroles, son potentiel ne s'est souvent pas concrétisé dans la jurisprudence. S'appuyant sur les œuvres de Tussman et tenBroek, cet article attire l'attention sur la structure de la pensée qui intervient dans les « classifications » législatives, une idée qui, bien qu'elle ne soit pas nouvelle, est absente des débats actuels. Nous faisons valoir que pour déterminer la portée appropriée d'une loi relative au travail, il faut que le traitement inégal des personnes soit justifié par des motifs rationnels et pragmatiques qui dépassent le cadre des classifications législatives et rejoignent les objectifs de cette loi. Cet article propose un examen critique du récent arrêt de la Cour suprême du Canada dans l'affaire McCormick c Fasken Martineau DuMoulin SENCRL/srl, portant sur l'application des codes des droits de la personne aux associés d'un cabinet d'avocats, afin de démontrer comment l'interprétation téléologique est invoquée, comment elle est par la suite ignorée ou mal appliquée, et comment elle aurait dû être appliquée afin de respecter sa structure et ses exigences propres.*

## I. Introduction: The Idea of Purposive Interpretation

In *McCormick v Fasken Martineau DuMoulin LLP*,<sup>3</sup> the Supreme Court of Canada was asked to determine whether a law firm partner was an “employee”, and whether the partnership was an “employment”, under the British Columbia *Human Rights Code*.<sup>4</sup> To this end, the Court engaged, as it had to, in purposive interpretation of that statute, but something went wrong along the way. The holding in *Faskens* is that law firms are now almost entirely free to discriminate against their partners on grounds explicitly prohibited by our human rights laws. This is, in our view, an extraordinary result. In this article, we wish to show how *Faskens* went off the rails. We argue that *Faskens* presents a failure in purposive statutory interpretation and that this failure is a failure of a certain sort and with a particular structure. We believe that in *Faskens*, specific statutory purposes were wrongly sacrificed on the altar of an all too familiar and general account of the purpose of our labour law as a whole. We argue for adherence to the various and specific purposes of our various and specific labour laws.

When issues of scope or range of application of statutory labour laws arise, purposive interpretation is a very familiar academic argument<sup>5</sup> and one often invoked by courts.<sup>6</sup> Indeed, one might say it is the rhetorically dominant argument or approach. Unfortunately, it is an argument or approach which also often fails to be employed and to realize its full potential in our case law. We therefore try to add to the common understanding of this purposive approach by showing the structure of thought involved in interpretation of terms such as “employee”, “employer” and “employment” in statutory labour laws. We believe that calling attention to the structure of thought involved in such legislative “classifications” is important. This is not an original idea,<sup>7</sup> but it is a valuable one that often seems to be absent from current discussions and one we believe strongly should now be retrieved. To illustrate our argument, we critically review several labour law cases, and specifically *Faskens*, in an effort to show how the purposive approach is invoked; how it is then either ignored or applied incorrectly; and how the purposive approach ought to have been deployed if we had remained faithful to its structure and demands.

This article proceeds as follows. In Part II, we explain how the issue of classification and scope of application of labour laws has become a serious

<sup>3</sup> *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 SCR 108 [*Faskens*].

<sup>4</sup> *Human Rights Code*, RSB 1996, c 210 [Code].

<sup>5</sup> See e.g. Brian Langille & Guy Davidov, “Beyond Employee and Independent Contractors: A View from Canada” (1999) 21:7 *Comp Lab L & Pol’y J* 7 [Langille & Davidov, “Beyond Employee”]; Guy Davidov, “A Purposive Interpretation of the National Minimum Wage Act” (2009) 72:4 *Mod L Rev* 581.

<sup>6</sup> See e.g. *Jantunen v Ross* (1991), 5 OR (3d) 433, 85 DLR (4th) 461 (Div Ct).

<sup>7</sup> See especially Joseph Tussman & Jacobus tenBroek, “The Equal Protection of the Laws” (1949) 37:3 *Cal L Rev* 341.

concern for the legal community against the background of the ever-growing problem of “segmentation” of labour markets and labour laws, and why purposive interpretation is (and should be) often invoked. We also introduce the idea that there are, however, two levels of purpose: the specific purpose of the specific legislation in question and the more general purpose of labour law as a whole. These two levels of purpose are often mixed and inappropriately applied in our case law. The basic idea is that a certain view of labour law’s general purpose can obstruct a specific statutory purpose. This is what happened in *Faskens*. In Part III, we provide several examples from our case law to illustrate the point that issues of scope or range of application should be addressed through purposive interpretation which properly articulates the specific purposes of the specific legislation in question rather than some notion of the general purpose of labour law as a whole. Most notably, we provide an extensive review and critique of the *Faskens* decision. In Part IV, we first take a step back and delve into the structure of thought involved in legislative classification, i.e. the interpretation of terms such as “employee”, “employer” and “employment” in statutory labour laws. We then return to the *Faskens* decision to illustrate how the Court could have done this right if attention was drawn to this structure of thought.

## II. The World as We Now Find It, and the Idea of Two Levels of Purpose

This familiar issue of the proper application of our various labour laws is particularly acute in the world as we now find it. Labour lawyers these days are often concerned about “atypical” employment, the dependent self-employed, disintegrated firms and production chains, reduced returns to labour, lower unionization rates, the rise in inequality, the problem of globalization and the “hollowing out” of the nation state’s ability to come to grips with these real problems – all drivers of segmentation of labour law.<sup>8</sup> Judges and adjudicators spill jeroboams of ink trying to figure out how to “classify” these new and different forms of deployment of human labour.<sup>9</sup> Academics try to help them.<sup>10</sup> But the result seems to be more and more difficulty, disagreement

---

<sup>8</sup> See e.g. Judy Fudge & Leah F Vosko, “Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law, Legislation and Policy” (2001) 22:2 *Econ & Indus Dem* 271; Judy Fudge, “Self-Employed Worker: A Canadian Perspective on the Scope of Employment Standards, Labor Rights, and Social Protection: The Good, the Bad and the Ugly” (2010) 31 *Comp Lab L & Pol’y J* 253; Simon Deakin, “Addressing Labour Market Segmentation: The Role of Labour Law” (2013) International Labour Organization Working Paper No 52, online: <[www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/publication/wcms\\_223702.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_223702.pdf)>.

<sup>9</sup> See e.g. *Belton v Liberty Insurance Co of Canada* (2004), 72 OR (3d) 81, 189 OAC 173; *McKee v Reid’s Heritage Homes Ltd*, 2009 ONCA 916, 256 OAC 376.

<sup>10</sup> See e.g. Guy Davidov, “The Three Axes of Employment Relationships: A Characterization of Workers in

and segmentation. As more and new modes of engaging labour confront the variety of our labour laws designed to protect workers, more and more labour laws apply less and less in a uniform way.

All of this is terribly familiar. The idea pursued here is that many of the problems we confront are self-made ones, generated by some basic failures in legal reasoning. These are avoidable if we attend to purposes, but that can be difficult as *Faskens* shows. One of the very real difficulties is that there are two sorts or levels of purpose which can be invoked in the process of purposive interpretation of labour laws. First, there is the specific purpose of the specific legislation in question – human rights, collective bargaining, health and safety, minimum employment standards and so on. In our view, this is the critical level of analysis. Unfortunately, there is a second more general purpose which is often inappropriately brought to bear in labour law decision making. This is a general and well known account of our labour law as a whole.<sup>11</sup> The standard version of this general purpose is that it is the job of labour law to come to the rescue of employees who suffer from inequality of bargaining power in negotiating contracts of employment with employers.<sup>12</sup>

However, a very basic problem in purposive reasoning arises when, as in *Faskens*, this general purpose gets in the way of the specific purpose of the specific legislation in question. Furthermore, the standard version of this general account of labour law as a whole has been increasingly contested in the literature.<sup>13</sup> This is part of a larger argument about how we need to rethink

---

Need of Protection” (2002) 52:4 UTLJ 357 [Davidov, “Three Axes”]; Guy Davidov, “Who is a Worker?” (2005) 34:1 Indus LJ 57; Mark Freedland & Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: Oxford University Press, 2011); Mark Freedland & Nicola Kountouris, “The Legal Characterization of Personal Work Relations and the Idea of Labour Law” in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (New York: Oxford University Press, 2011) 190 [Davidov & Langille, *The Idea of Labour Law*].

<sup>11</sup> This general level purpose of labour law has been employed for many years to distinguish the employment relationship from other kinds of relationships in various common law contexts. For example, courts and tribunals have extensively utilized the ideas of “control” and “dependency” to distinguish between an employee and an independent contractor in vicarious liability and wrongful dismissal cases. The first test (control) was set out in *Regina v Walker* (1858), 27 LJMC 207. The test was adopted by the Supreme Court of Canada in *Hôpital Notre-Dame Théoret v Laurent*, [1978] 1 SCR 605 at 613, 17 NR 593, and was developed and evolved in other cases. See e.g. *Wiebe Door Services Ltd v MNR*, [1986] 3 FC 553, [1986] 5 WWR 450 (CA); 671122 *Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59, [2001] 2 SCR 983; *Braiden v La-Z-Boy Canada Ltd*, [2006] OJ No 2791 (QL), 149 ACWS (3d) 824 (Sup CT J).

<sup>12</sup> See Brian Langille, “Labour Law’s Theory of Justice” in Davidov & Langille, *The Idea of Labour Law*, *supra* note 10, 101 [Langille, “Theory of Justice”]; Brian Langille, “Labour Law’s Back Pages” in Guy Davidov & Brian Langille, eds, *The Boundaries and Frontiers of Labour Law* (Portland: Hart Publishing, 2006) 13 [Langille, “Back Pages”]. See also Paul Davies & Mark Freedland, *Kahn-Freund’s Labour and the Law*, 3rd ed (London: Stevens, 1983) at 18: “[T]he relationship between an employer and an isolated employee is typically a relationship between a bearer of power and one who is not a bearer of power. ... The main object of labour law has always been, and we venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.”

<sup>13</sup> See e.g. Davidov & Langille, *The Idea of Labour Law*, *supra* note 10.

our basic account of labour law which we leave for another day.<sup>14</sup> In this article, we concentrate upon the very idea of statutory purposive interpretation and argue that while we have to think purposively about our labour laws, we also have to properly articulate what specific labour laws aim to achieve, to end up with just the degree of segmentation we want and need. This does not mean that we end up collapsing any distinction between employment relationships and other kinds of economic arrangements. It simply means that drawing this distinction depends on context and could (and should) be different when determining the scope of application of different statutory labour laws.

### III. Some Canadian Illustrations

#### A. When Things Go Right

We refer to Canadian cases from several labour law contexts as a starting point and to cement our basic idea of “purpose” in understanding the proper scope of application of various labour laws. We begin by noting that when determining coverage of labour laws (and thus possible and proper segmentation), Canadian courts, at least in some circumstances, simply think in terms of specific statutory purpose (and have not been tripped up along the way by labour law’s commonly understood overall purpose). In these cases, the concepts with which we have been dealing, such as “employer” and “employee”, even though present, provide no barrier to the protection of those who should be protected, i.e. to the achievement of specific statutory purposes. However, the central and potentially radical import of these cases has gone, as far as we can tell, largely unnoticed.

Our first case example involves a truck driver who was crushed between his own truck and that of a fellow independent contractor. The Ontario Court of Appeal held that under Ontario’s *Occupational Health and Safety Act*,<sup>15</sup> the broker for this group of independent truck drivers had to establish a health and safety committee.<sup>16</sup> Such a committee was required “at a workplace at which 20 or more workers are regularly employed.”<sup>17</sup> The question raised in this appeal was whether the truck drivers, who were from one legal point of view independent truck owner-operators (and thus not employees), were “regularly employed” within the meaning of section 9(2)(a) of the *Act*. The answer is yes. The goal of creating safe workplaces is not to be hobbled or thwarted by passing this

<sup>14</sup> 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 [Langille, “Take These Chains”]. See generally, Langille & Davidov, “Beyond Employee”, *supra* note 5.

<sup>15</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1 [Health and Safety Act].

<sup>16</sup> *Ontario v United Independent Operators*, 2011 ONCA 33, 104 OR (3d) 1.

<sup>17</sup> *Health and Safety Act*, *supra* note 15, s 9(2)(a).

goal through another substantive filter of legal categories having no rational relationship to that objective. The idea of “employer” and “employee” to be deployed in this case is completely filled up by this way of thinking. All that is required is the statute, an understanding of its purposes and a rational line of thought from purpose to “coverage”.

The same logic has been applied to human rights statutes.<sup>18</sup> Our second example involves a cook employed by a catering company who was assigned to a railroad gang in rural Saskatchewan.<sup>19</sup> Soon after his assignment the railroad gang discovered that the cook was HIV positive. Whilst the group had a variety of responses, the roadmaster was seriously concerned and refused to eat food prepared by the cook. The Human Rights Tribunal found that whilst the cook had not explicitly been fired, the inhospitable environment constituted constructive dismissal. The issue on appeal was whether the railroad gang or the roadmaster had “employed” the cook. Canadian Pacific argued that if the cook was not employed by the railroad gang, he could not be constructively dismissed by them. The court disagreed. The terms “employer”, “employ” and “employment” within human rights statutes are to be interpreted to advance the purposes of those statutes. Narrow definitions of these terms defeat those purposes. In the cook’s case, the railroad gang’s “utilization” of the cook was sufficient to find an employment relationship for the purposes of human rights statutes.

These are the sort of cases we wish to explore.<sup>20</sup> The basic ideas we take from these cases are the following. First, that the key idea in these cases is simply that of purposive statutory interpretation. Second, that statutory purpose can take us just about everywhere we need to go in thinking about most labour laws. Third, this means that we will have as much segmentation as we need and should have if we simply apply labour law to whom it should be applied. Fourth, that this does not require the creation of new categories of workers, or new labels – in fact we can use any term we wish as long as we use it sensibly, i.e. purposively. Fifth, and more controversially, the urge to define new categories is a legacy of our starting point, particularly the traditional employer/employee relationship and the idea that labour law emerged as a need to redress imbalances therein. The trick, in short, lies in simply sticking to the statutory purposes at issue in any case. This would help liberate our thinking and enable us to reconceive our account of labour law’s overall purpose in a way which fits with rational legal decision making, and also with much more profound normative thinking than the simple tale of inequality of bargaining power permits.<sup>21</sup>

<sup>18</sup> But see discussion of *Faskens* in Part III B.

<sup>19</sup> *Canadian Pacific Ltd v Canada (Human Rights Commission)*, [1991] 1 FC 571, 120 NR 152 (CA).

<sup>20</sup> See also *Pannu v Prestige Cab Ltd* (1986), 73 AR 166, 31 DLR (4th) 338 (CA); *Yu v Shell Canada Ltd*, 2004 BCHRT 28, 49 CHRR D/56; *Canada (Attorney General) v Rosin*, [1991] 1 FC 391, 131 NR 295 (CA); *Mans v British Columbia Council of Licensed Practical Nurses* (1990), 14 CHRR D/221.

<sup>21</sup> See Langille, “Take These Chains”, *supra* note 14.

These cases set an example for, and issue an invitation to, all of our labour laws. In a case such as that of the Ontario health and safety committee, there are statutory “definitions” but they do no “work”. They are on their face “empty”.<sup>22</sup> The real work has to be done by thinking about what the statute is trying to do. Our courts and tribunals have generally done so with no difficulty, but unfortunately not always.

## B. When Things Go Wrong

*Faskens* is a striking example of how things can go wrong if we ignore these basic points. The case is one of overt discrimination on the basis of age. The facts are as follows. McCormick was a partner in the Vancouver office of a large (by Canadian standards), law firm which we will refer to simply as “Faskens”.<sup>23</sup> About 650 lawyers worked for the firm and of these, 260 were “equity partners” who had an ownership interest in the firm. McCormick was an equity partner. The Partnership Agreement at Faskens contained a mandatory retirement policy at age 65. McCormick complained, not unreasonably, that this violated the *Code*,<sup>24</sup> which prohibits discrimination in employment on the basis of, among other grounds, age. There is no denying that this was age discrimination. It was not sophisticated, covert or “adverse effect” based. There was no “facially neutral rule” which had an “impact” upon a protected group here.<sup>25</sup> *Faskens* is simply a case of overt, intentional discrimination against an individual which cost him his job. It was as if Faskens had simply said you have to go because you are a Catholic or a Jew or black or a woman.<sup>26</sup>

Given this obvious point, Faskens’ legal escape route was to argue that the *Code*, in its entirety, did not apply to the relationship between law firms and their partners. Their argument, unattractive as it may be, was that law firms can legally discriminate against partners of the firm. This means that partners of law firms can be forced out of the firm not simply on the basis of age, but also on the basis of sex, or religion, or race. That is quite a striking claim. The idea that one group of Canadians, no matter whether rich lawyers or poor agricultural workers, were somehow carved out of these sorts of basic human rights protections is, on its face, quite an extraordinary one.<sup>27</sup> Yet this

<sup>22</sup> Innis Christie used to quote *Re Telegram Publishing Co Ltd and Amm et al* (1977), 16 OR (2d) 93, 77 DLR (3d) 369 (Div CT) [*Re Telegram*] per Hughes J at 377, who observed that most labour law statutory definitions of terms such as “employee” and “employer” are exercises in “striking circumlocution”.

<sup>23</sup> In Canada, law firms are generally structured as partnerships.

<sup>24</sup> *Code*, *supra* note 4, s 13(1).

<sup>25</sup> See e.g. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1.

<sup>26</sup> This may be testimony to our mental ability to think of age discrimination as “different”. See Prina Alon-Shenker, “‘Age is Different’: Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting” (2013) 17:1 CLELJ 31 [Alon-Shenker, “Age is Different”].

<sup>27</sup> Even lawyers have human rights – that is why they are human rights, and not industry specific, or sectorial, or regional, or local, or reserved for certain income groups, whether at the top or the bottom. It

is the claim which Faskens made. Faskens asserted that the legal basis for this most unattractive legal conclusion was the idea that McCormick was not an “employee” of Faskens. Because McCormick was a partner, he could not be an employee under the *Code*. Since the *Code* protected only employees, the protections were not applicable to him.

This was the argument which the British Columbia Court of Appeal accepted.<sup>28</sup> Human rights codes do not apply to law firms in their relations with their partners. The law firms are immune from human rights law. That is quite a “knock out” result. By contrast, the Supreme Court rejected the notion that “a partner in a firm can never be an employee under the *Code*”.<sup>29</sup> But it also admitted that “the structure and the protections normally associated with equity partnerships mean they will rarely be employment relationships for purposes of human rights legislation”.<sup>30</sup> That is, while the Court of Appeal focused on partnership as a legal concept which cannot be reconciled with an employment relationship,<sup>31</sup> the Supreme Court examined “the substance of the actual relationship” and reached very similar results. How did the Supreme Court get there?

First, the Court expressed its view of the issue before it as follows:

The issue before this Court, therefore, is how to characterize Mr. McCormick’s relationship with his firm in order to determine if it comes within the jurisdiction of the *Code* over employment. That requires us to examine the essential character of the relationship and the extent to which it is a dependent one.<sup>32</sup>

No rationale or explanation was offered for this requirement which turns out to be critical to the Court’s conclusion.

Second, and in our view surprisingly, the Court began not with the *Code*, but with a long explanation of how law partnerships, in this case at Faskens, actually work. At Faskens, the 260 equity partners<sup>33</sup> run the firm through a Partnership Board of 13 partners from across the firm’s various offices. The Board appoints the Managing Partner. There were about 60 partners in Vancouver and the British Columbia region sent three partners to the Board. Board members are elected by the partners and at one point, McCormick himself had served on the Board (under its previous form as the Executive

---

is an important part of what equal dignity means – as Robbie Burns put it “a man’s a man for a’ that”.

<sup>28</sup> *Fasken Martineau DuMoulin LLP v British Columbia (Human Rights Tribunal)*, 2012 BCCA 313, 352 DLR (4th) 294 [Faskens BCCA].

<sup>29</sup> *Faskens*, *supra* note 3 at para 46.

<sup>30</sup> *Ibid* at para 38.

<sup>31</sup> *Faskens BCCA*, *supra* note 28 at para 3. The court held that “the fundamental and well-established principle of law” is “that a partnership is not, in law, a separate entity from, but is a collective of, its partners, and as such, cannot, in law, be an employer of a partner.”

<sup>32</sup> *Faskens*, *supra* note 3 at para 4.

<sup>33</sup> We will simply use the word “partner” going forward.

Committee).<sup>34</sup> The “constitutional” basis for all of this was the Partnership Agreement (which also contained the mandatory retirement policy of which McCormick complained). The Partnership Agreement could be amended only by vote of the partnership as a whole.<sup>35</sup> (Thus, McCormick was in fact “fired” under the mandatory retirement policy by a majority vote, or perhaps non-vote to change the policy, of his partners). Partners such as McCormick have an “ownership” interest in the firm and a share of the equity. The mandatory retirement policy took the form of requiring that all equity partners divest their share of ownership at 65. It was theoretically possible under the policy to make an arrangement to continue working for the firm after having ceased to be an equity partner, but the Partnership Agreement stated this was to be “the exception rather than the rule”.<sup>36</sup> Basically, once you cease to be an equity partner, you are out. This is what happened to McCormick.

Third, and eventually, the Court turned its attention to the *Code*. It began its treatment with the almost ritual invocation of the ideas that the *Code* is “quasi-constitutional” legislation and that it “attracts a generous interpretation to permit the achievement of its broad public purposes”.<sup>37</sup> But after their incantation, these ideas exit the judgment.

Fourth, the Court then expressed its view about those purposes:

Those purposes include the prevention of arbitrary disadvantage or exclusion based on enumerated grounds, so that individuals deemed to be vulnerable by virtue of a group characteristic can be protected from discrimination.<sup>38</sup>

That sounds reasonable enough. In fact exactly right. And is this not precisely what happened to McCormick?

Fifth, the Court made the very important assertion:

The *Code* achieves those purposes by prohibiting discrimination in specific contexts. One of those contexts is “employment”. The definition of employment must be approached consistently with the generous, aspirational purposes set out in s. 3 of the *Code* and understood in light of the protective nature of human rights legislation, which is “often the final refuge of the disadvantaged and the disenfranchised” and of “the most vulnerable members of society”. This is the philosophical framework for ascertaining whether a particular workplace relationship represents the kind of vulnerability the *Code* intended to bring under its protective scope.<sup>39</sup>

Again, that sounds right – and would give McCormick heart.

Sixth, the Court then turned to the language of the *Code* – it does apply to

<sup>34</sup> *Faskens*, *supra* note 3 at paras 5–7.

<sup>35</sup> *Ibid* at paras 1, 9.

<sup>36</sup> *Ibid* at para 11.

<sup>37</sup> *Ibid* at para 17.

<sup>38</sup> *Ibid* at para 18.

<sup>39</sup> *Ibid* at para 19 [citations omitted]. From a technical point of view and with hindsight, this is where the case begins to go off the rails. See *infra* note 42 and accompanying text.

“employment”. That was the basis of McCormick’s claim. He claimed that he was being forced out of employment at his law firm because he was 65. So the legal issue is just our issue – what does “employment” mean for the purposes of the *Code*? The *Code* itself is singularly unhelpful – as are most labour or employment law statutes – in this regard.<sup>40</sup>

For years, we both have been confident of the view that the *Code* does not concern itself with the niceties, or inadequacies, of the familiar labour law distinction between “employees” and “independent contractors”. Whatever the distinction’s usefulness, say in regards to issues of vicarious liability, it is intellectually and legally useless here because no one cares, and the *Code* does not care, whether you refused to employ a person as an employee or as an independent contractor if the reason you did so was because of sex, race, religion or age. The Court helpfully confirms this “expansive” approach.<sup>41</sup> Again, so far so good for McCormick.

Seventh, unfortunately, the Court then took the following, unexplained tack. Rather than developing the idea of the purposes of the *Code*, it embarked upon a very doctrinal, arid and terribly familiar discussion of “employment” in the abstract – all unrelated to the discussion thus far about the allegedly broad purposes of the *Code*. The Court simply asserted that

[d]eciding who is in an employment relationship for purposes of the *Code* means in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of the worker.<sup>42</sup>

The Court very briefly explained that “the emphasis on control and dependency ... is consistent with approaches taken to the definition of employment in the context of protective legislation both in Canada and internationally”.<sup>43</sup> The Court accepted that “while significant underlying similarities may exist across different statutory schemes dealing with employment, it must always be assessed in the context of the particular scheme being scrutinized.”<sup>44</sup> But control and dependency seems to flow from a large scale notion of labour law’s standard and tired story (of protecting vulnerable workers), which gets in the way of, and defeats everything just said about, the purposes of our human rights laws (of preventing victimization based upon a prohibited ground)<sup>45</sup> and McCormick’s claim.

<sup>40</sup> *Code*, *supra* note 4, s 1: “‘employment’ 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, and ‘employ’ has a corresponding meaning; ... ‘person’ includes an employer, an employment agency, an employers’ organization, an occupational association and a trade union.”

<sup>41</sup> *Faskens*, *supra* note 3 at para 22.

<sup>42</sup> *Ibid* at para 23.

<sup>43</sup> *Ibid* at para 25 [citations omitted].

<sup>44</sup> *Ibid*.

<sup>45</sup> For a full development of this argument, see Langille, “Take These Chains”, *supra* note 14.

The rest of the decision constitutes a meditation upon the ideas of “control” and “dependency”, along with the development of the notion that being a partner is inconsistent with these two ideas.

Along the way to this conclusion, the Court added to our problems in a variety of ways. For example, it seemed at ease with the idea that it is appropriate to look at the jurisprudence under collective bargaining statutes to ascertain the meaning of employment for the purpose of human rights law. Note that the Court cited Guy Davidov’s work to explain its shift to control and dependency tests when examining employment for the purpose of the *Code*.<sup>46</sup> The Court asserted that this move was “consistent with the approaches taken to the definition of employment in the context of protective legislation” and again referred to Davidov’s work.<sup>47</sup> But even labour law scholars who have defended the traditional idea of labour law’s mission must find this move puzzling. Davidov, for example, acknowledged that some laws (such as human rights and health and safety regulations) have broader application. When constructing his test for who is an “employee”, which is built on criteria such as dependency and control, Davidov stressed that his focus was on “the appropriate scope of employment standards and collective bargaining laws”, rather than human rights and health and safety regulations which are quite different.<sup>48</sup>

The Court also suggested that partnership law and the very idea of partnership have relevance to the coverage of our human rights codes. This seems implausible – partnership surely is as irrelevant to the coverage of the *Code* as the idea of “independent contractor”, flowing from vicarious liability law, was to the health and safety committee case discussed above. The Court also stressed the fact that partners have the chance to participate in decision making processes which affect them, but the relevance of this fact remains unexplained. (One might, perhaps, entertain the idea that this would be a relevant consideration if the issue were collective bargaining coverage).

The bottom line is that law firm partners, such as McCormick, have no human rights protection because they do not fit the standard model of an “employee” according to the test of “control” and “dependency”. Rather, because they have some degree of control they look more like the standard narrative’s picture of an “employer”. The most radical statements are the Court’s conclusions that “[i]n most cases, ... partners are not employees of the firm, they are, collectively, the employer”,<sup>49</sup> and that as a partner, McCormick is seen “more as someone in control of, rather than subject to, decisions about workplace conditions.”<sup>50</sup>

<sup>46</sup> *Faskens*, *supra* note 3 at para 23.

<sup>47</sup> *Ibid* at para 25.

<sup>48</sup> Davidov, “Three Axes”, *supra* note 10 at 398. See also (*ibid* at 374, n 64).

<sup>49</sup> *Faskens*, *supra* note 3 at para 33.

<sup>50</sup> *Ibid* at para 39.

Note that no explanation at all was offered for the implicit conclusion that someone cannot be an employer for some purposes and also an employee for another purpose. Nor was there a robust engagement with the obvious point – that, while as a partner McCormick exercised more control and suffered less dependency than many other employees, he was still ousted from the partnership because of his age simply because a majority of his colleagues thought that was a good idea. His lack of control on the very point at issue was the reason for the litigation. The Court seems to be of the view that because he could object and vote against the mandatory retirement policy, he was the author of his own misfortune.<sup>51</sup> So too the Court was of the view, it seems, that because partners have a sort of “tenure” (i.e. are much more difficult to fire), this was a reason to take their removal from the partnership less seriously, rather than more seriously.<sup>52</sup>

On the test the Court adopted, one is left wondering if there are not a lot of other employees who are now no longer covered by human rights law. So, to take an example close to home, tenured university professors exercise a lot of control and suffer much less dependency than most workers. Are they (we) now excluded?

The main point for our purposes is this. The Court elided the idea of the rationale for extending human rights protection to those groups identified by the prohibited grounds (which, as we have just seen and as the Court itself noted, is the idea of their vulnerability in virtue of the group characteristic) with the idea of the various contexts in which the *Code* seeks to protect those so identified as vulnerable, e.g. housing, service provision and employment. Here the Court slid into not only a moralized (vulnerability) account of why we have human rights protections for certain groups (a sound move), but also to a moralized (vulnerability) account of the contexts in which these protections are to be operable (a very unsound move).

Here, in the form of a question, is a simple way of putting this point: what if a wealthy black person, say an equity partner at Faskens, were denied accommodation on the basis of race? (Or refused service in a restaurant?) We would not “moralize” the housing market (or provision of restaurant services). We would not say that only those members of protected groups (who are statutorily deemed to be vulnerable) who are *also* weak and desperate for housing (or other services such as food) get human rights protection. That is, you don’t have to be “doubly vulnerable”, once in virtue of membership of a protected group and again in the particular sphere of market activity (services, accommodation and employment) which is at issue. That is what the Court constructed here – a double vulnerability.

---

<sup>51</sup> *Ibid* at paras 40, 43.

<sup>52</sup> *Ibid* at para 41.

A second critical point is this – the idea, and any discussion, of the specific statutory purposes at stake were completely dropped out. As a result, we were never told why these ideas of “control” or “dependency” bear at all on our reflections about “coverage” (i.e. what is an “employment” for the purposes) of our human rights law.<sup>53</sup>

What should have been done? Our suggestion is that we should not moralize, in this case via a familiar account of the general purpose of labour law as a whole, a straightforward legal problem of determining statutory purposes and applying the statute rationally in light thereof. We need to advance a sensible, purposive, rational, pragmatic, non-moralised question about allocation of responsibility, incentives and relationships which are quite oblivious to any standard notion of “employment”. If this view is right, we are able to end up with just the right amount of segmentation, or lack thereof, which our various laws demand.

#### IV. Getting It Right Next Time

There are three parts to a plan to avoid the problem we have identified and which is so well represented by *Faskens*. First, we need to revisit the idea of statutory purposes and explore the structure of reasoning involved in such an endeavor. Second, we need to carefully articulate our statutory purposes and examine concrete cases such as *Faskens* through this lens. Third, which we will defer for another day, we have to offer a new and better account of labour law and its basic purpose, which fits with the specific purposive approach, does not “get in our way”, and thus avoids the unnecessary problems on display in *Faskens*.<sup>54</sup>

<sup>53</sup> Two more critical points about the decision: First, the Court is, it seems, alive to the dramatic impact of its decision. Partners like McCormick, who are not covered by the *Code*, are exposed to racist, sexist and other forms of abuse at the hands of their partners. In the final full paragraph of the decision, the Court tells us that “some forms of discrimination among partners that represent arbitrary disadvantage” may be covered by, of all things, the *Partnership Act*, RSBC 1986, c 348, and its requirement of “utmost good faith”. *Faskens*, *supra* note 3 at paras 47–48. This means that race discrimination against partners is permitted by this reading of the *Code*, but this is not legally obscene because of a general principle of partnership law. Leaving the obvious question (How can race, sex or religious discrimination be prohibited under partnership law, but be legal under the *Code*?), isn’t it the other way around? Isn’t it our ideas about human rights which tell us when someone is acting in bad faith in partnership law?

Second, the final paragraphs of the decision reveal that perhaps the real reason that McCormick’s claim should fail has nothing to do with who is an employee and who is not. It has to do with an idea of fairness and perhaps estoppel. McCormick “financially benefitted for over 30 years from the retirement of other partners” (*ibid* at para 43) and there is nothing wrong with a “partnership ... instituting an equity divestment policy designed to benefit all partners by ensuring the regenerative turnover of partnership shares” (*ibid* at para 48). But this last point is not relevant to the discussion of whether partners are employees for the purposes of the *Code*. Rather it may be relevant to a discussion on the meaning of age discrimination and the legal circumstances which might block an otherwise legitimate claim.

<sup>54</sup> The idea is to call for a reappraisal of the standard narrative of labour law. This is something that one of the authors has written about elsewhere (see Langille, “Theory of Justice”, *supra* note 12; Langille, “Back Pages”, *supra* note 12) and further developed in Langille, “Take These Chains”, *supra* note 14. The very basic idea here is that we could achieve progress in cases such as *Faskens* if we simply abandoned the

## A. Purposes and Classification

Hugh Collins has alluded to the possibility discussed here – that the problem of “coverage” of various labour laws could be solved by thinking about purposes. But he dismissed this possibility, writing:

It is always tempting to urge the courts to adopt a purposive approach, and indeed this was attempted for a brief period in the USA. But without additional guidance this seems highly indeterminate and vulnerable to judicial misconceptions of purpose, and furthermore it seems unlikely that this would overcome the problem of choice described above. If the courts are to engage in the imposition of forms of government over economic relations, they require a firmer set of criteria which both make sense in the world and establish intelligible boundaries to the reach of employment protection legislation.<sup>55</sup>

There are three objections listed here – indeterminacy, misperceptions of purpose and “the problem of choice”. None of these seem, to our mind, to be particularly powerful. The first two can be met by the observation that nothing could be more indeterminate nor misconceived than the type of reasoning we see on display in *Faskens*, which is visited upon us by our current thinking. Collins’ view is that we need “firmer criteria”. Our view is that we have too many criteria which are too firm and too familiar. By the “problem of choice”, Collins refers to his discussion of the courts deferring to the intention of the parties as to the form of the engagement of labour. It is hard to see how this is not the very point in issue – that is, that the issue is one of public policy, not private choice. This is precisely the focus that the idea of attending to purpose is meant to achieve.

As usual, however, Collins has accurately uncovered a real problem. It was one which Tussman and tenBroek laid bare, and provided the basics of a solution to, decades before. In their famous essay “The Equal Protection of the Laws”, the authors provided the intellectual building blocks for rational legal thought about legislative “classifications”.<sup>56</sup> The basics of the approach are as

---

standard labour law narrative which gets in our way in those cases. This requires a demonstration that a new narrative is available, and that it will be “non-obstructive” of our specific labour law purposes in cases such as *Faskens*. That is, that a better overall account of the purposes of labour law would not act as an additional barrier, a hurdle, or a filter to the achievement of specific labour law purposes. Building on Sen’s conception of human freedom (Amartya Sen, *Development as Freedom* (New York: Knopf, 1999)) and the related Capability Approach (Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: Harvard University Press, 2011)), the overall mission of labour law is understood as to advance the cause of human freedom/capital and to liberate human freedom/capital in its own cause in work or productive activity. That is, labour law is viewed as a field of law (among other fields such as health, trade and environment) which structures the creation, mobilization and deployment of human capital, i.e. the lives of human beings when they enter the labour market and are under a legal or economic arrangement or relation of production.

<sup>55</sup> Hugh Collins, “Independent Contractors and the Challenge of Vertical Disintegration to Labour Laws” (1990) 10:3 *Oxford J Leg Stud* 353 at 377. For an example of an American court using a purposive approach, Collins cites *NLRB v Hearst Publications, Inc*, 322 US 111, 64 S Ct 851 (1944) [*Hearst Publications*].

<sup>56</sup> Tussman & tenBroek, *supra* note 7. Their purpose was to achieve clarity of thought about the meaning of

follows. All laws will not apply to all people. Some laws will be general and apply to all, and some will be “special” and apply to some. In the latter case, the law will by necessity “classify” those to whom it does and does not apply. The problem of classification – of the legitimacy of classification<sup>57</sup> – has a structure. To classify is to define a “class” to whom the law applies. To do this involves designation of a “quality or characteristic or trait or relation, or any combination of these, the possession of which, by an individual, determines his membership in or inclusion within the class”<sup>58</sup> (e.g. aliens, all over age 25, foreign corporations). Further, a reasonable classification is one which includes all who are similarly situated and none who are not. But determining who is similarly situated presents a problem. We need some independent point of reference to do this job; it cannot be enough that all in the class possess the trait set out to define the class. That would be tautological and *any* classification would be therefore reasonable.<sup>59</sup> As Tussman and tenBroek observed:

The inescapable answer is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.

The purpose of a law may be either the elimination of a public “mischief” or the achievement of some positive public good. ... We shall speak of the defining character or characteristics of the legislative classification as the trait. We can thus speak of the relation of the classification to the purpose of the law as the relation of the Trait to the Mischief.<sup>60</sup>

Then our authors came to the problem which Collins confronted decades later when addressing the problem of classification in labour law, and they hit the same nail on the head. Tussman and tenBroek wrote that “[a] problem arises at all because the classification in a law usually does not have as its defining Trait the possession of or involvement with the Mischief at which the law aims.”<sup>61</sup>

This seems, at first blush, to be the case. Most statutes do not have a definition section which reads “this act applies to all those tainted by the mischief that this statute aims to cure”. It would make life a lot easier if more statutes did so. This is because if a statute defined the class to whom it applied directly in terms of those who suffer from the mischief to be ameliorated, legal life would be much simpler because “[t]he class, being defined directly in

---

the equal protection clause of the 14th amendment, US Const amend XIV, § 1.

<sup>57</sup> Especially for the idea of equality – but in the argument pursued here, for the ideas of legality and the rational application of the law.

<sup>58</sup> Tussman & tenBroek, *supra* note 7 at 344.

<sup>59</sup> This was the mistake which the Supreme Court of Canada made in its early pre-*Charter* “equality” cases. See e.g. *Bliss v Canada (AG)*, [1979] 1 SCR 183, 92 DLR (3d) 417.

<sup>60</sup> Tussman & tenBroek, *supra* note 7 at 346.

<sup>61</sup> *Ibid.*

terms of the Mischief, automatically includes all who are similarly situated with respect to the purpose of the law.”<sup>62</sup>

The drawbacks of such an approach which Collins identified above, it will be recalled, are just problems with adjudicative “discretion” – i.e. indeterminacy and misconception of purpose and so on. Tussman and tenBroek observed along the same lines that “[t]his procedure requires, however, delegation of considerable discretion to administrators. ... Legislators, reluctant to confer such discretion, tend to classify by Traits which limit the range of administrative freedom.”<sup>63</sup>

So, it seems we are left with the problem of two classes: the mischief (*M*) and the identification of a trait (*T*) which is a sort of proxy for the “ideal” solution of simply one class – the mischief itself. Thus, the law often generates for itself the following familiar problem. The group identified by the Trait, i.e. the non-purposively described class (*T*) to which the law in its attempt to capture the class defined by the statutory purpose (*M*), may or may not in fact overlap with the class (*M*) we seek to help. As Tussman and tenBroek outlined for us:

In other words, we are really dealing with the relation of two classes to each other. The first class consists of all individuals possessing the defining Trait; the second class consists of all individual possessing, or rather, tainted by, the Mischief at which the law aims. The former is the legislative classification; the latter is the class of those similarly situated with respect to the purpose of the law. We shall refer to these two classes as *T* and *M* respectively.

Now, since the reasonableness of any class *T* depends entirely upon its relation to a class *M*, it is obvious that it is impossible to pass judgment on the reasonableness of a classification without taking into consideration, or identifying, the purpose of the law.

There are five possible relationships between the class defined by the Trait and the class defined by the Mischief. These relationships can be indicated by the following ... :

- (1) All *T*'s are *M*'s and all *M*'s are *T*'s
- (2) No *T*'s are *M*'s
- (3) All *T*'s are *M*'s but some *M*'s are not *T*'s
- (4) All *M*'s are *T*'s but some *T*'s are not *M*'s
- (5) Some *T*'s are *M*'s; some *T*'s are not *M*'s; and some *M*'s are not *T*'s

One of these five relationships holds in fact in any case of legislative classification.<sup>64</sup>

We can pause here to say that in our view, the Supreme Court in *Faskens* produced an under-inclusive result (3, probably). Their understanding of *T* (employee) did not reach all in *M* (those in need of and entitled to human rights law protection). This was because their *T* proxy for *M* was really, if anything, a

<sup>62</sup> *Ibid* at 347.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid* at 347–48.

proxy for something else. (And the best account of “control and dependency” is that it is the Trait for identifying those involved in the Mischief of harms caused in circumstances we see as calling for vicarious liability).

Now we face the real problems – and have at least some material to help us do so. Is Collins right in saying that it is preferable to not define *T* as *M*, so that  $T = M$ ? Is it true that we need to separate *T* and *M*? Are we worried more about discretion than irrational definitions (*T*'s)? And is it what our statutes are actually doing?

We can begin by noting that Tussman and tenBroek are, unlike Collins, agnostic on this point. They simply noted that as a matter of fact, legislatures are reluctant to “confer such discretion” on adjudicators and tend to “classify by trait”.<sup>65</sup> They passed no explicit judgment on whether this is a good legislative judgment or sound legal procedure. Yet implicitly, their whole article is testimony to the problems the law gets itself into when we refuse a grant of rationally governed discretion and insist on using both *T* and *M* in an attempt to curb discretion. Their article would not have been necessary without this legislative tendency.

Recall that Tussman and tenBroek were making a point about the constitutional demand of equality. We are not. We are not making a constitutional argument that, for example, *Faskens* is wrong (although such an argument is clearly available). But it turns out that the idea of equality – treating like cases alike and how we know what counts as being alike – is basic to legal thinking. At the root is the idea of having rational reasons for treating people differently, and this is just the key to deciding to whom a statute should apply.

As we have noted, however, most of the time we do not really have a very helpful definition of *T* in our labour law statutes. Most of the time we have, as in *Faskens*, simply the invocation of the word “employee” and perhaps “employer” as one who employs employees. As a result, many of our statutes define, as we have noted, *T* in terms of “striking circumlocution”.<sup>66</sup>

Occasionally we find very awkward attempts to define *T* (such as “dependent contractor”).<sup>67</sup> However, these usually turn out to be unhelpful responses to poor adjudication, under a definition of the “striking circumlocution” variety, in which there has been a failure to equate *T* with *M*.

The point being made here is that in cases where there is no real statutory definition of *T*, there is an obvious tendency to fill this void, by visiting upon this non-defined *T*, the standard and tired labour law narrative. Our point is that this is a large mistake, as *Faskens* shows so well. This is what

<sup>65</sup> *Ibid* at 346.

<sup>66</sup> See *Re Telegram*, *supra* note 22 and accompanying text.

<sup>67</sup> See e.g. *Labour Relations Act*, RSO 1995, c 1, s 1(1). Such provisions are really very difficult and unnecessary attempts to construct a *T* which gets closer to *M* without daring to utter the *M*.

the Supreme Court of Canada did in *Faskens* and the result was, as we have seen, that the Court did not attend at all to the relevant specific purposes of the *Code*. If *Faskens* shows anything, it is that we are always doing purposive interpretation, whether we know it or not. It is better to do it overtly and correctly.<sup>68</sup>

## B. What the Supreme Court of Canada Should Have Done in *Faskens*

Let us now go back to the decision in *Faskens* and see whether this better understanding of classification could have led to a different analysis and perhaps a different result. The central issue in *Faskens* was an issue of classification – to whom the *Code* applied, and whether it applied to McCormick or not. The *Code* prohibits discrimination by a “person” against another “person” (the “complainant”) on the basis of various prohibited grounds, such as race, sex and age in various social contexts, such as provision of services, housing and employment.<sup>69</sup>

The statutory definitions, however, are not very helpful to McCormick nor to *Faskens*. The definition of a “complainant” is completely empty,<sup>70</sup> while the definition of a “person” is circumlocutory.<sup>71</sup> There is no definition of an “employee” or an “employer” (which is listed under the definition of a “person”), and the definition of “employment” tells us absolutely nothing.<sup>72</sup>

An attempt to extract a definition of the class to whom the *Code* applies by various characteristics (*T*) would be completely tautological: it covers those who are discriminated against on the basis of prohibited grounds and those who discriminate against them in various social contexts, such as employment.<sup>73</sup>

An independent point of reference is therefore needed. We need to articulate the mischief (*M*) which the *Code* aims to eliminate, in order to identify all the persons who are similarly situated with respect to the purposes of the *Code*, and whether McCormick is one of them. As noted above, the *Code* does not provide a definition of the class to whom it applied (*T*), and, all the more so, a definition which relates to the mischief to be ameliorated by the *Code* (*M*).

Zooming in on the context of employment, we have to think about the purposes of the *Code* in order to have a better understanding of the terms

<sup>68</sup> But we do have, for example, some wonderful exceptions – see e.g. *Hearst Publications*, *supra* note 55.

<sup>69</sup> See e.g. *Code*, *supra* note 4, s 13(1).

<sup>70</sup> *Ibid.*, s 1: “‘complainant’ means a person or group of persons that files a complaint under section 21”.

<sup>71</sup> *Ibid.*: “includes an employer, an employment agency, an employers’ organization, an occupational association and a trade union”.

<sup>72</sup> *Ibid.*: “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, and employ has a corresponding meaning”.

<sup>73</sup> Note that the *Code*, *supra* note 4 does not prohibit discrimination in “contracts” as other codes may do. See e.g. *Human Rights Code*, RSO 1990, c H.19, s 3.

“employee”, “employer” and “employment” – those persons who are similarly situated for the purposes of the *Code*. It should be acknowledged that the meaning of “employee”, “employer” and “employment” may be different for the purposes of different acts and even different statutory provisions within a single act.<sup>74</sup>

Probing the purposes of the *Code*, the Court could have started its analysis in *Faskens* with section 3 of the *Code*, which was mentioned only in passing. While the Court correctly acknowledged that “employment” should be interpreted in a way that was consistent “with the generous, aspirational purposes set out in s. 3”,<sup>75</sup> the Court does not go about this analysis. Here is the full text of section 3:

The purposes of this Code are as follows:

- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- (c) to prevent discrimination prohibited by this Code;
- (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
- (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.<sup>76</sup>

Section 3 is only somewhat helpful. It talks about promoting public purposes such as “equality”, “mutual respect” and “dignity” and preventing a public mischief – that is, “discrimination” – without explaining these very big terms. Here our case law and scholarly literature can be auxiliary. Discrimination is often understood as

a distinction, whether intentional or not but based on grounds relating to the personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individuals or groups not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.<sup>77</sup>

Three additional points should be noted. First, discrimination is more

<sup>74</sup> For example, the *Employment Standards Act*, RSBC 1996, c 113 has certain purposes. The definitions for “employment” and “employee”, as well as the scope of coverage, should advance these purposes. These purposes are different from those of the *Labour Relations Code*, RSBC 1996, c 244, and as such so are the definitions and coverage.

<sup>75</sup> *Faskens*, *supra* note 3 at para 19.

<sup>76</sup> *Code*, *supra* note 4, s 3.

<sup>77</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 174–75, 56 DLR (4th) 1 [Andrews].

than just a distinction between individuals. Generally, we are allowed to make a distinction in favour of or against another person on the basis of one's favourite rock band or the colour of one's shirt. Distinction amounts to discrimination when the unequal treatment is based on an enumerated ground, i.e. a personal characteristic, such as colour of skin, race or sex, which is immutable (or constructively immutable), and should therefore not be the basis for the assessment or treatment of individuals.<sup>78</sup> The list of prohibited grounds under the *Code* corresponds to historically disadvantaged groups whose stigmatization and marginalization the *Code* aims at redressing.

Second, treating like people alike may still result in discrimination. The purpose of the *Code* is therefore to promote "substantive equality" rather than identical treatment. Promoting (substantive) equality entails "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."<sup>79</sup>

Many legal and philosophical scholars have attempted to provide substantive content to the concept of equality by identifying several principles that equality aims to protect. While some advanced a single principle or purpose – such as ending oppression,<sup>80</sup> ensuring sufficiency,<sup>81</sup> or protecting the interest of belonging and the benefits of full membership in social, economic and political lives<sup>82</sup> – others took a more pluralistic approach. Sophia Moreau, for example, spoke about the three wrongs of discrimination: unequal

<sup>78</sup> Note that age, as a temporal concept, is different from other personal characteristics. One's age does change; one is growing older every day. But religion can also be changed. Therefore, this requirement is sometimes recast as "constructive immutability", a personal characteristic that is difficult to change or that one should not be required to change (see Dale Gibson, "Analogous Grounds of Discrimination under the Canadian Charter: Too Much Ado about Next to Nothing?" (1991) 29:4 *Alta L Rev* 772 at 786). Indeed, at any given moment, one cannot change his or her age.

<sup>79</sup> *Andrews*, *supra* note 77 at 171. The general understanding is that for a human rights complaint it is enough to show that the complainant was treated less favourably than others on the basis of one of the prohibited grounds. But there is a growing debate as to whether the constitutional framework for analyzing discrimination under s 15 of the *Charter* should be used to analyze discrimination under human rights laws. Some tribunals and courts have recently required complainants to prove some element of disadvantage which perpetuates stereotyping or prejudice at the *prima facie* stage of a human rights complaint similarly to the requirement under s 15 of the *Charter*. See e.g. *Ontario (Director, Disability Support Program) v Tranchemontagne*, 2010 ONCA 593, 324 DLR (4th) 87. This decision relies on Abella J's opinion in *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161 at para 49 that applicants have to establish a sufficient "link between ... group membership and the arbitrariness of the disadvantaging criterion or conduct" at the *prima facie* stage. This growing trend was criticized for imposing a heavy burden on complainants and not conforming with Supreme Court rulings. See e.g. Benjamin Oliphant, "Prima Facie Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence?" (2012) 9 *JL & Equality* 33.

<sup>80</sup> See Elizabeth S Anderson, "What is the Point of Equality" (1999) 109:2 *Ethics* 287. See also Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) (who focuses on the concepts of domination and oppression).

<sup>81</sup> See Harry Frankfurt, *The Importance of What We Care About: Philosophical Essays* (Cambridge: Cambridge University Press, 1988) at 134ff.

<sup>82</sup> See Donna Greschner, "The Purpose of Canadian Equality Rights" (2002) 6:2 *Rev Const Stud* 291.

treatment which is associated with stereotyping and prejudice, oppression and denial of basic goods.<sup>83</sup> Denise Réaume specifically discussed the harms that are associated with discrimination in the private sector as implicit or explicit conduct motivated by stereotypes or prejudice, or by a denial of a fair opportunity to participate in important activities and social institutions.<sup>84</sup> Finally, T.M. Scanlon articulated five diverse reasons for eliminating inequality, including alleviation of suffering, prevention of unacceptable forms of power or domination and elimination of stigmatizing differences in status.<sup>85</sup>

Third, discrimination is prohibited only in various social spheres such as housing, provision of services and employment. Generally, people are autonomous moral agents.<sup>86</sup> They are obliged only to respect others' rights and liberties (including the right to equality) by not restricting or interfering with other persons' freedom to enjoy their rights and liberties. However, in some social spheres, there is a case for imposing broader obligations on private actors. When they are in a position to distribute and redistribute benefits or resources comparable to the State and have the ability to create social change, these actors are subject to a duty to treat people with equal concern and respect.<sup>87</sup>

Accordingly, the *Code* applies to persons who are treated unequally on the basis of personal immutable characteristics (rather than their merits) corresponding to the enumerated grounds (such as black, gay or older people) and are denied certain goods or full participation in economic, social, political

<sup>83</sup> Sophia R Moreau, "The Wrongs of Unequal Treatment" (2004) 54:3 UTLJ 291. See also Denise G Réaume, "Discrimination and Dignity" (2003) 63:3 La L Rev 645, (who articulates three forms of indignity associated with discrimination: prejudice, stereotyping and exclusion from benefits that are significant for a life with dignity).

<sup>84</sup> Denise G Réaume, "Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination" (2001) 2:1 Theor Inq L 349.

<sup>85</sup> TM Scanlon, *The Difficulty of Tolerance* (Cambridge: Cambridge University Press, 2003) at 202ff. See also John Rawls, *Justice as Fairness: A Restatement*, ed by Erin Kelly (Cambridge, MA: Harvard University Press, 2001) at 130-31 (who similarly identifies several reasons for regulating social and economic inequalities, including hardship, hunger and oppression).

<sup>86</sup> See Joseph Raz, *The Morality of Freedom* (Oxford: St Martin's Press, 1986) at 108.

<sup>87</sup> See Pnina Alon-Shenker, "The Unequal Right to Age Equality: Towards a Dignified Lives Approach to Age Discrimination" (2012) 25:2 Can JL & Jur 243 at 258. See also (*ibid* at 258, n 76):

According to John Gardner, once one enters a quasi-public sphere, one is an "agent of distributive justice" (which others might view as the state's exclusive responsibility) (John Gardner, "Discrimination as Injustice" (1996) 16:3 Oxford J Legal Stud 353 at 365). This view portrays discrimination law as closer to tort law (strict liability) than to criminal law (strong fault). Individuals and institutions are recognized as discriminators because they are in a good position to distribute goods or services and therefore have a duty of fair distribution. In the employment context, employers are "agents of distributive justice" because, as the distributors of employment opportunities among "the opportunity-advantaged" and "the opportunity-disadvantaged", they are specifically well-placed to repair distributive injustice (*ibid* at 363). No fault is involved but they are still obliged to rectify discrimination (*ibid*; and John Gardner, "Liberals and Unlawful Discrimination" (1989) 9:1 Oxford J Legal Stud 1 at 11).

See also Réaume, *supra* note 84. In the context of age discrimination, see Sandra Fredman, "The Age of Equality" in Sandra Fredman & Sarah Spencer, eds, *Age as an Equality Issue* (Oxford: Hart, 2003) 21 at 62.

and cultural lives. They are those who suffer from the mischief that the *Code* is designed to cure (*M*).

In the context of employment, this includes employees, independent contractors, temporary, contract, seasonal and casual workers, volunteers, interns, co-op students and any person who engages in economic or productive work in the labour market. They are all similarly situated with respect to the purpose of the *Code* because any type of work is “one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.”<sup>88</sup>

The Code also applies to those who are in a position to create or exploit this mischief – those who have the power to bring about social change and redistribute benefits or goods in a way that will repair injustice and social exclusion. In the context of employment, this could include employers, temporary employment agencies, contractors and many more.

Considering that McCormick engaged in productive work (providing legal services to clients on behalf of the partnership) and that Faskens could and had, in fact, affected his ability to have full and meaningful participation in economic and social life by imposing a mandatory retirement policy, the *Code* applies to his relationship with Faskens and generally to the relationship between a law firm partner and a law firm partnership.

Although Faskens’ mandatory retirement policy clearly established a *prima facie* case of age discrimination, the Supreme Court of Canada could have then examined whether it was justified for other reasons – either some sort of estoppel given that McCormick had benefited for years from the arrangement of forcing other partners to retire,<sup>89</sup> or statutory exceptions such as a *bona fide* occupational requirement.<sup>90</sup>

Here an analysis of the meaning of age discrimination and the purposes of anti-age discrimination law becomes relevant. In short, while age-based distinctions are considered “a common and necessary way of ordering

<sup>88</sup> *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 368, 38 DLR (4th) 161, Dickson CJC, dissenting. The Ontario Human Rights Commission, for example, provides a broad definition of “employment” which includes: “paid employment, volunteer work, student internships, special job placements, and temporary, contract, seasonal or casual employment” because “[w]ork, paid or unpaid, is a fundamental part of realizing dignity, self-determination and a person’s full potential in society.” Ontario Human Rights Commission, *Minds that Matter: Report on the consultation on human rights, mental health and addictions* (Toronto: Government of Ontario, 2012), online: <[www.ohrc.on.ca/en/minds-matter-report-consultation-human-rights-mental-health-and-addictions/12-employment](http://www.ohrc.on.ca/en/minds-matter-report-consultation-human-rights-mental-health-and-addictions/12-employment)>. Note that the BC Human Rights Tribunal in the Nixon case held that volunteer activity is covered as both “service” and “employment” under the *Code*. This conclusion was not challenged before the reviewing judge and the Court of Appeal. See *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601, 262 DLR (4th) 360.

<sup>89</sup> See *supra* note 53.

<sup>90</sup> See *Code*, *supra* note 4, s 13(4); Pnina Alon-Shenker, “Ending Mandatory Retirement: Reassessment” (2014) 35 Windsor Rev Legal Soc Issues 22.

our society”<sup>91</sup> – and less harmful than other forms of discrimination – age discrimination might be associated with significant wrongs especially when it comes to older people. As Alon-Shenker has written,

[p]eople of advanced age do represent a historically disadvantaged group, particularly in the workplace. Although seniors may not be a typical “minority group,” and may even include privileged individuals, they have some central characteristics of minority groups such as identifiable physical characteristics and shared social and institutional expectations (including the expectation of retirement). They are often subject to negative stereotypes and they face discrimination in many spheres, including employment, health services and housing.<sup>92</sup>

Accordingly, anti-age discrimination in employment law aims at promoting various purposes to remedy these wrongs, including preventing opportunistic behaviour by employers, who are tempted to dismiss older workers when their labour costs are higher than their marginal productivity; promoting displaced older workers who experience major challenges to reemployment; protecting against ageist stereotypes and ageism; and alleviating social isolation, oppression and economic deprivation among older workers.<sup>93</sup>

Although no categorical answer can be given here, it seems as though Faskens could have provided evidence to establish a claim that its mandatory retirement policy did not involve any of the aforementioned wrongs. For example, the law firm could have argued that the policy was not designed on the basis of a stereotypical belief that older partners were not productive, but rather was designed to benefit all partners by ensuring the regenerative turnover of partnership shares. The result would have been that while the *Code* applied to McCormick (and to law firm partners in general), and the mandatory retirement policy was discriminatory on its face, the policy was justifiable under the *Code*. This would have been perhaps a disappointing result for McCormick, but a promising and sound result for many other people who engage in productive work and are vulnerable, by virtue of a personal characteristic, to discrimination.

## V. Conclusion

In this article we have argued that purpose is the key to the proper understanding of the coverage of our various labour laws. Nonetheless, thinking in terms of purpose can be dangerous, as *Faskens* shows. Legal decision makers need to focus upon the purposes of each specific statute, and not let that inquiry be blocked by resorting to a tired story about the purposes of our labour

<sup>91</sup> *Gosselin v Québec (AG)*, 2002 SCC 84 at para 31, [2002] 4 SCR 429.

<sup>92</sup> Alon-Shenker, “Age is Different”, *supra* note 26 at 37–38.

<sup>93</sup> See Pnina Alon-Shenker, “Nonhiring and Dismissal of Senior Workers: Is it all about the Money?” (2014) 35:2 *Comp Lab L & Pol’y J* 159 at 179–85.

law in general. Building on Tussman and tenBroek's work, we have shown that determining appropriate coverage of labour laws requires rational and pragmatic reasons for treating people differently which go beyond legislative classifications and to the purposes of the specific law. If we remember what it is that we are trying to do, and if we do not try to moralize a straightforward legal problem, surprising and unwanted results like *Faskens* can be avoided.