

Restatement of Canadian Labour Law Symposium

Allard School of Law, UBC

July 20-22, 2024

Context

Canadian labour law occupies a position of tension between the orthodoxy of “form” and the progressiveness of “values”. While the legal form is a legacy of the logic (and institutions) of industrial revolution, universalized by means of colonialism-led capitalist modernization agenda, the values continue to emerge from the *sui generis* Canadian experience. Evidently, the legal form—contractual basis—of labour law is not neutral (i.e., value independent); it is a forcible imposition of a European idea of progress (the capitalist modernization project) through the political agenda of colonization. And because of its colonial heritage the legal form of labour law in Canada developed without any participatory deliberation of the citizenry. On the other hand, Canadian values emerged—still emerging—out of the diverse cultural-social-economic-political experiences of Canadians (Indigenous, European settlers, and later immigrants). Unsurprisingly, *the* Canadian experience is remarkably heterogeneous, constitutive of the multitude of worldviews coexisting in the political-economic space. This experience is simultaneously dynamic with our increasing acknowledgement of the continued harm of colonial domination over legal knowledge and institutions. It is by means of colonization that the European expansionist project (capitalist progress) has received a universal stature at the cost of alternative values constituting relationships among human beings and between human beings and non-human nature (“properties” generally), which underpins the foundation of labour law. Because of this domination-induced universalism, the legal form of labour law is exclusionary, only able to take cognizance of the logic of market exchange based on autonomous individuals’ self-interested transactions at arm’s length. It excludes transactions (and relationships) that are communal and non-competitive. The latter are the ways in which several Indigenous peoples in Canada understand “labour” and its contribution. Such legal form is also exploitative since it is blind to socio-political factors (outside the market exchange) that determines who gets to participate in labour market exchanges.

In *Saskatchewan Federation of Labour*, Justice Abella noted that the arc of Canadian labour jurisprudence has bent towards “workplace justice.”¹ While Justice Abella’s immediate concern was to emphasize the role of a meaningful collective bargaining process in promoting justice in “[Canada’s] system of labour relations,” she understood workplace justice to mean “[an] individual’s self-fulfilment and the collective realization of human goals, consistent with

¹ *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. at para 1.

democratic values [...].”² She endorsed a labour relations framework —an idea of normative regulation— that is built on the Charter values of human *dignity, equality, liberty, individual autonomy, and extensive democracy*.³ These values collectively constitute the formative principle of labour law in Canada.⁴ Collectively they give rise to a thick (holistic) consequential (outcome-focused) notion of individual and collective freedom (to self-fulfilment) as the normative aim of labour regulation.

The Supreme Court noted that meaningful labour relations cater to these formative values “by giving [workers] the opportunity to influence the establishment of workplace rules and thereby gain some *control over a major aspect of their lives, namely their work* [...].”⁵ Equal access to this right to work and unconstrained freedom to choose one’s livelihood are also foundational values of the Canadian labour law.⁶ Equitable treatment of diverse categories of workers is, however, not only an access (i.e., entry) issue; equity and non-discrimination are integral (i.e., pervasive) components of Canadian workplaces. A worker’s right against non-discriminatory treatment at workplace is a claim not only against employers but also against coworkers.⁷ In this sense, equitable treatment and non-discrimination are foundational ethos of Canadian workplaces. Equitable freedom of choice and agency are not only important individual values, they also further public interest.⁸ While individual freedom of livelihood is an end in itself for a society based on liberty and autonomy, such freedom is also a means for promoting market competition, which serves a broader public interest. The Canadian Supreme Court is emphatic on the integral nature of private and public interest in the normative regulation of labour relations. Although livelihood activities are conceived as expressions of individual autonomy and avenues for self-fulfilment, economic contribution and social treatment of workers are conceived as part of the overall social fabric, necessitating public reflection and engagement.

Although the Supreme Court, is emphatic in noting that normative regulation of labour is not exclusively a private affair but a part of a larger political agenda, the market-based logic of the Canadian labour law militates against such judicial observation. In this logic, workers are understood to be undertaking contractual tasks rather than engaging in social cooperation through their livelihood activities. Consistent with this imagination of workers as contractors,⁹ legal rights and entitlements are conceived as legitimately individual claims. Even in the Court’s outrage

² Ibid at paras 3, 30 (emphasis mine). In these broad strokes, Justice Abella identified the values of not only collective labour law, her immediate subject of concern, but also the ideal underlying individual employment relationships.

³ Ibid at paras 53-54.

⁴ *Health Services and Support v. B.C.*, [2007] SCC 27 at para 80.

⁵ Ibid at para 82.

⁶ See Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report, October, 1984* (Ottawa: Canadian Government Publishing Centre, 1984).

⁷ See *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, [2006] SCC 1; also see *BC Human Rights Tribunal v. Schrenk*, [2017] SCC 62.

⁸ *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, [2008] SCC 54 at paras 39-40.

⁹ John Gardner, ‘The Contractualisation of Labour Law’ in Hugh Collins, Gillian Lester and Virginia Mantouvalou eds, *Philosophical Foundations of Labour Law* (New York: Oxford University Press, 2018) 33.

against corporate manipulations inimical to societal values, one finds the justificatory rationale of private contractual exchange.¹⁰ This market-based contractual justification of labour law is based on the rationale of Western European societies at the dawn of industrial revolution. As labour law's numerous exclusions throughout its history and well into the present day testify, the formative contractual rationale of labour law, instead of consolidating the discipline, has become its major burden. The rationale is, in fact, a weak link in the narrative based on foundational values of labour law. If Canadian labour law's principal commitment is to the foundational values rather than the juridical structure through which such values unfold, there is no reason, in principle, as to why Canadian jurisprudence couldn't reinvent its labour law, to become one that is more inclusive for a diverse economy and society.

The Canadian Supreme Court's progressive jurisprudence on the regulation of work has aimed at expanding the coverage of and deepening the entitlements under such regulation.¹¹ The Court has aimed at instituting fairness in market capitalism's most exploitative instincts. By imagining labour law in terms of values that are broader than the narrow contractual exchange, the Court aimed at remedying labour law's historical exclusions. What follows from the Court's articulation is that the form or model of normative regulation of labour relations is secondary to the formative principles underlying such regulation. Following this line of inquiry, the proposed Symposium is aimed at brainstorming a restatement of labour law in Canada, taking into account alternative values in doing so. This meeting is, thus, intended to explore alternative foundations of labour law wherein the aim is to conceive of a more inclusive and less exploitative rationale of labour law. Simultaneously, the meeting is also aimed at exploring – and taking seriously – heterogeneous worldviews in imagining work-based relationships and its cognizance by law. This project is, thus, a social justice project of labour law, broadly conceived. Participants in the Symposium are invited to imagine an expansive conceptualization of labour law beyond its market fundamentalism.

The following is the program of the Symposium.

¹⁰ See *Uber v. Heller*, [2020] SCC 16, for a discussion of unconscionability as inequality of bargaining power in standard form contracts.

¹¹ For example, see *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R.; *BC Human Rights Tribunal v. Schrenk*, [2017] SCC 62; *Uber v. Heller*, [2020] SCC 16; *Nevsun Resources Ltd. v. Araya*, [2020] 1 RCS.

Symposium Program

[Webinar Livestream over Zoom for Online Registrants: Zoom link to be send on the day of the event]

JULY 20, 2024

2:00-2:30: Registration & Refreshments

2:15-2:30: Welcome and Opening Remarks by Allard Law School Dean Ngai Pindell

2:30-4:00

Colonial Capitalism & Liberal Legalism: Historical Perspectives

Chair: Douglas Harris

Claire Mummé: Legal Mechanism of Coercion in the British Empire

Heiner Fechner: Long-term effects of colonial labour legislation: A postcolonial analysis of legal segmentation

Ali Hammoudi: The Making of 'Free' Wage Labour Ideology and the 'Question of Native Labour' in a Canadian Context

4:00-4:20: Coffee Break

4:20-5:30

Racial Origins of the Labour Contract

Chair: Brenna Bhandar

Diamond Ashiagbor: Race, Legal Form and the Labour Contract

Vasanthi Venkatesh: Legal Exceptionalism in a Racial Capitalist Order: The Contracts for Foreign Labour in Agriculture from a Historical and Comparative Perspective

6:30: Dinner & Reception

JULY 21, 2024

9:00-10:00: Breakfast

10:00-11:10

Global Justice & Citizenship at Work

Chair: Adam Hofri

Liam McHugh-Russel: Horizons of Concern: Global Justice and Methodological Nationalism in Canadian Labour Law

Renée-Claude Drouin: Decent Work in Global Supply Chains: What Foundations for a Canadian Approach?

11:10-11:30: Coffee Break

11:30-12:40

Labour, Land & Contract: Settler-Colonialism & Reconceptualization of Canadian Labour Law

Chair: Supriya Routh

Amar Bhatia & Adrian A Smith: *Labour, Land, and Contract: Care-fully Developing Multiple Freedoms in the Burning Home of Canadian Labour Law*

Ania Zbyszewska: *Labour law in an ecological key – Rethinking health and safety at work*

12:45-2:15: Lunch

2:15-3:45

Freedom of Association, Strike & Employee Speech: New Approaches to Familiar Ideas

Chair: Robert Russo

Bethany Hastie: The Constitutional Architecture of Freedom of Association

Sabine Tsuruda: The Right to Strike and Substantive Equality

Brishen Rogers: Employee Political Speech in a Democratic Political Economy

3:45-4:05: Coffee Break

4:05-5:35

Expanding Space-Time: Taking Empirical Reality Seriously

Chair: Janine Benedet

Laura Dehaibi: Why do Labour Laws Ignore Location? A Look at Platform Work and the Control of Space as a Means of Subordination and Resistance

Ravi Malhotra & Emily Rasic: Disability Accommodation in the Workplace, Adaptive Technology and Reimagining Labour Law through Crip Time

P Martin Dumas: Labour Law and its Plumbing

6:30: DINNER

JULY 22, 2024

9:00-10:00: BREAKFAST

10:00-11:30

Freedom, Reconciliation & Plural Values of Labour

Chair: Gordon Christie

Bruce P Archibald: Reconciliation, Capability Theory and Restorative Resolution of Workplace Indigenous Identity Issues - Getting to the Basics

Supriya Routh: Market Capitalism, Environmental Spirituality, and the Value of Work: PKFN Case Study

Roberto Fragale Filho: A Glimpse at Labour in the Makuxi Ethnic Group

11:30-11:50: Coffee Break

11:50-1:20

Legal Restatements or Not? Models of Normative Regulation

Chair: Sam Beswick

Gillian Demeyere: Sword, Shield, or White Flag: In Defence of the Contract of Employment

Bruce Curran: Is a Labour Law System Based on Private Contractual Exchange Currently Fit For Purpose? An Analysis of the Evidence

Brian Langille: Grammar and Narrative / Legality and Morality: What are Restatements? How do they work?

1:30: Lunch and Goodbyes!

Allard Law Organizing Team:

Grace Bian

Liam Bryne

Michelle Burchill

Supriya Routh