TEACHING LABOUR AND EMPLOYMENT LAW IN A CANADIAN LAW SCHOOL
PAPER FOR IALS CONFERENCE,
MAY 20-23, 2010
MILAN, ITALY

Prof. Brian Etherington
Faculty of Law
University of Windsor

Introduction

I have taught labour and employment law in a Canadian law school for almost 25 years[1]. I have also been a member of the Canadian Labour Law Casebook Group since the early 1990's.[2] Both activities have caused me to think about how labour and employment law has been, and should be, taught in Canadian law schools. However, until now I have never attempted to put any of those thoughts on paper.

In this brief paper I will attempt to share my thoughts on what has been done in the past, changes or trends I have observed over the past 25 years, and needs or wants for the future of labour law teaching in Canada.

PAST

Orthodox treatment of labour and employment in Canada views the employment relationship as being regulated by three separate but interrelated legal regimes – the common law of individual employment, the individual statutory regime comprised of

[1] I have been a full time faculty member in the law faculty at the University of Windsor since 1986 but have taught a graduate course at Osgoode Hall Law School and given guest lectures and seminars for courses at a few other Ontario law schools.

[2] This group is a collective comprised of most of the law professors who teach labour and employment law in English speaking Canadian law schools and a few Quebec labour and employment scholars. As far as I am aware this group was started by Professor Harry Arthurs and few other like-minded individuals in the 1960's for the main purpose of preparing a set of teaching materials for labour and employment law courses that could be used at English speaking law schools across Canada. It is perhaps relevant to note here that Canada is a federal state and the regulation of the employment relationship is primarily a matter of provincial jurisdiction such that the employment relationships of approximately 90% of all workers in Canada are governed by provincial law.

employment standards statutes applicable to all individual employment relationships, and the collective bargaining regime. From the 1960's to the mid 1980's most common law faculties of law had a main labour law course which focused on teaching the regulation of collective bargaining. These main labour law courses might, in some schools, also deal with the common law and individual employee statutory regimes in an introductory or cursory fashion, but the main focus and bulk of instructional time was taken up with learning the statutory collective bargaining regime, modeled on the Wagner Act, adopted by the Canadian federal government under its war time emergency powers during the Second World War in 1943, and adopted by all of the provinces in the years immediately following that War.

A few schools, those with more resources, more faculty, and most likely more than one labour law scholar, might have had an additional one or two labour and employment law offerings, most commonly a small enrolment course on labour arbitration, that would focus on grievance or rights arbitration, an institution that Canadian governments, unlike the United States, chose to make a compulsory feature of the Canadian version of the Wagner Act.[3] But there were precious few schools that had any employment law courses that focused on the regulation of the individual employment relationship by common law or employment standards statutes. This seemed to be somewhat at odds with the fact that at their highest point in the 1970's rates of union organization were never higher than approximately 40 percent of the work force and for many years ranged from 30 to 35%. Thus the two legal regimes that provided the day to day regulation of the employment relationship for approximately

[3] There were a few schools that were rightly identified as labour law powers in the 1970's and early 1980's , due to their faculty and course offerings. These were Queen's, Osgoode Hall (York), University of Toronto, and Dalhousie.

65% of the workforce were largely ignored in law school curricula.[4] However, the law school focus on the law of collective bargaining is perhaps easier to understand when one considers that the vast majority of lucrative work for labour and employment lawyers after graduation and call to the bar came from unions and employers seeking advice and advocacy in the area of collective bargaining law.

CHANGES AND TRENDS IN THE LAST TWO DECADES

Beginning in the mid to late 1980's law schools (and individual labour and employment law professors) began to develop additional courses that focussed more on the regulation of the individual employment relationship. These included courses known as Personal Employment or Individual Employment law which dealt broadly with both the common law and individual employment standards regimes. But there was also a growth in courses that focussed on a single area of the individual employment standards statutory regime, courses such as occupational health and safety law or, perhaps even more frequently, courses on human rights or employment discrimination law.

In my view this shift in focus to more course offerings focused on regulation of the individual employment relationship was a natural outcome of several developments

[4] In 1988-89 when I decided to develop a course on Personal Employment Law for the University of Windsor I was only able to find one other common law school that was offering a course focusing on regulation of the individual employment relationship. Queen's University had a course called Individual Employment Law. Within a year or two of starting the course at Windsor I was consulted by a faculty member at the University of Alberta law school who was trying to start a similar course there and several other schools have adopted them in the last twenty years. This apathy towards the teaching of labour and employment law was also reflected in bar admission courses in most provinces across the country. In Ontario where I took the bar in 1983 there was no course or exam on labour or employment law (I think we had a one day voluntary seminar touching on individual employment law during the entire 6 month bar course). I am told by contemporaries from other provinces that this experience was similar to what happened in their bar ad courses.

in the Canadian legal environment.[5] First, Canada adopted a constitutional charter of individual rights for the first time in 1982, after more than a century of existence as a democracy organized under the principle of parliamentary supremacy without express constitutional protection for fundamental individual rights and freedoms. In my view the adoption of the Charter has resulted in a much greater tendency to approach the regulation of economic and social activity from an individual rights perspective, and those practicing and teaching employment law have not been immune to that tendency.[6] Second, by the 1980's even the most committed industrial pluralist had to admit that rates of union organization in Canada were unlikely to swell to allow the collective bargaining regime to govern the employment relationship of much more than a third of Canadian workers. Early predictions of the organization of a majority or even as many as 70% of Canadian workers based on European experiences with collective bargaining were no longer seen as realistic. In that environment, statutory employment standards regimes for the protection of individual employee rights took on heightened importance. Third, there was a tremendous growth in the scope and application of employment discrimination law in the 1980"s as a result of several statutory and judicial developments. The list of prohibited grounds of discrimination was expanded significantly in many jurisdictions in Canada, with the addition of grounds like disability, family and marital status, and sexual orientation. In addition, the definition of discrimination was expanded both judicially and statutorily by expanding it beyond

[5] I have no objective evidence to support the speculation that follows concerning the reason for the shift.

[6] Perhaps just as importantly, the main labour law Charter cases that offered the potential for Charter protection of collective rights like collective bargaining, those cases that would have made the Charter very relevant to the regulation of collective bargaining, were rejected by the Supreme Court of Canada. See the discussion of the Labour Trilogy, infra, note 13.

intentional or direct discrimination to encompass adverse effect or constructive discrimination and systemic discrimination.[7] The definition of discrimination was also expanded by judicial and statutory recognition that harassment on prohibited grounds constituted discrimination on those grounds as well.[8] All of these developments caused human rights and employment discrimination law to become a central focus for labour lawyers and academics alike.

Another major trend in the content of labour and employment law courses in Canada in the 1990's was the incorporation of material on globalization of the economy and the impact of that development on employment and the ability of governments to regulate the employment relationship effectively. This was the focus of several of the labour law casebook group meetings during the 1990's, and those meetings have resulted in the introduction of a significant volume of globalization materials throughout the casebook and one new chapter devoted solely to that topic.

NEEDS AND WANTS FOR THE FUTURE

In recent years concerns have been expressed by several prominent practitioners and academics that there has been a significant decline in the number of labour law scholars teaching labour and employment law in Canadian law faculties.[9] This matter has become of sufficient concern among labour law practitioners on both

---

[7] See for example *O'Malley v Simpson Sears Ltd.* , [1985] 2 SCR 536.

[8] See for example *Janzen v Platy Enterprises Ltd.* , [1989] 1 SCR 1252

[9] See for example the blog commentary of Dan Michaluk, a labour and employment lawyer with the firm of Hicks Morley LLP found on his September 9/09 blog entry on SLAW.ca (http://www.slaw.ca/2009/09/09/a-comment-on-legal-education-labour-and-employment-scholarship-and-labour-and-employment-practice/) and the comments of Prof. David Doorey of York University in his entry, Employment Law Practice is Booming, But Someone Should Tell the Law Schools (February 26/09 - http://www.yorku.ca/ddoorey/lawblog/?p=811)

sides of the bar that it has resulted in the Canadian Labour Law Association taking on a mandate to revitalize the labour and employment law teaching and scholarship at Canadian law schools. In support of this mandate the Association has resolved to meet with law school deans to encourage more appointments of labour law faculty, promote greater use of visiting labour scholars from other countries, and increased sponsorship of conferences on labour and employment law.[10]

It will be interesting to see how this initiative works out in the years to come in terms of increased presence of labour law scholars on law faculties and more labour and employment law course offerings. Some schools have already engaged on major initiatives to try to increase the presence of labour and employment law in their curricula. For example, in recent years, largely at the instigation of Professor Michael Lynk, the University of Western has formed some unique partnerships with union and management labour law firms to offer several new upper year labour and employment law courses, host an annual labour law conference, and host a competitive labour law moot. Similarly, Queen's University's Faculty of Law has just begun an initiative to create a new Centre for Law in the Workplace which includes among its objectives the funding of a Chair for a Visiting labour law scholar, new course offerings, the hosting of conferences on labour law with a global or transnational perspective, and the funding of research and scholarships for the study of labour law. It is to be hoped that these initiatives will help to improve both the quantity and quality of labour law scholarship and course offerings.

[10] These initiatives are discussed by Dan Michaluk in the blog referred, supra , and links to a letter from prominent Canadian labour lawyer and CLLA co-director, Jeffrey Sack can also be found at the Michaluk blog entry. http://www.slaw.ca/2009/09/09/a-comment-on-legal-education-labour-and-employment-scholarship-and-labour-and-employment-practice/#ixzz0kKxr4ZSF

I expect to see another trend in labour law teaching and scholarship develop in the very new future that may well work to reinvigorate interest in the area. In 2007 the Supreme Court of Canada surprised Canadian scholars and practitioners by issuing a decision that reversed twenty years of prior jurisprudence on the issue of whether freedom of association under the Canadian Charter of Rights and Freedoms provided constitutional protection for the right to bargain collectively.[11] The Court's belated recognition of a Charter right to access to collective bargaining holds significant potential for the constitutionalization of other significant aspects of our statutory regulation of collective bargaining activity.[12] This in turn should lead to a significant increase in interest in the study and practice of labour law in the years to come, similar to the increase in interest in labour law that occurred in the early 1980's when the initial introduction of the Canadian Charter of Rights and Freedoms was thought to hold great potential for the constitutionalization of our labour law. That initial wave of interest in the 1980's was largely quashed by the trio of decisions known as the *Labour Trilogy* that was issued by the Supreme Court of Canada in 1987.[13] In those decisions the Court rejected arguments that the Charter freedom of association protected the right to strike or bargain collectively. Even more significantly it basically declared the area of labour law to be a "no go" zone for Charter review, noting that it involved complex policy decisions concerning economic and social activity that courts were ill suited to address.

---

[11] *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*. 2007 SCC 27, released on June 8/07. (hereinafter "BC Health Services")

[12] For a discussion of the implications of this decision, see Etherington, The B.C. *Health Services and Support* Decision – the Constitutionalization of a Right to Bargain Collectively in Canada – Where Did it Come from and Where Will it Lead? (2009), 30 Comp. Lab. Law & Policy J. 715.

[13] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 460; *Public Service Alliance v. The Queen*, [1987] 1 S.C.R. 424; R.*W.D.S.U., Local 544 v. Government of Saskatchewan*, [1987] 1 S.C.R. 313. (Commonly known as the Labour Trilogy)

In my view this set of decisions deflated much, if not most, of the interest in labour law scholarship that existed in the 1980's and led to a significant decline in the amount of academic labour law scholarship that was published in the 1990's and early 2000's. I suspect this loss of interest was also reflected in the number of Canadian graduate students who did graduate work in the area of labour law or labour and constitutional law in that post *Labour Trilogy* era. Now that the *BC Health Services* decision has brought renewed interest to the area, labour law course offerings will need to be altered to address fully the many issues that will arise from its potential to constitutionalize our labour law.[14] But perhaps even more importantly, I expect more students to become interested in labour and employment law, both as an area of professional practice and as an area for graduate study and scholarship. And this should also in turn make for more top graduate students specializing in labour law applying for starting level positions in Canadian law faculties.

Finally, we need more international labour law content both within existing labour and employment law courses and new courses dedicated to this subject in Canadian law schools. A key component in the SCC's reversal on constitutional protection for collective bargaining was its recognition that the Charter should be interpreted in a manner that was at least consistent with Canada's international obligations. The Court went even further to suggest that international "thought on human rights" should also have persuasive influence on the interpretation of Charter rights and freedoms.[15] The

[14] To a certain extent this has already begun to happen. The Canadian Labour Law Casebook Group has recently decided to include, for the very first time, a separate chapter on the impact of the Charter on labour and employment law. This will appear in its new 8th edition to appear in the fall of 2010.

[15] "… Thus Canada's current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter", supra ,* note 9, *BC Health Services*, at para 78

Court's recent acceptance of the importance of international labour law makes it essential that this content finds its way into law school curricula. This of course fits very well with the above noted trend to include material on globalization and its impact on domestic regulation of the employment relationship. [16]

Due to the federal nature of Canada and a division of powers in the area of regulation of employment that favoured provincial jurisdiction, the study of Canadian labour law has always had a very significant comparative law component. However, whereas in the past our comparative focus has been primarily on the law of the provinces, the federal government, and U.S. labour and employment law, recent developments will cause us to look more closely at international labour and employment law norms and the approaches to the regulation of workplace adopted in other countries. [17]

[16] It also fits very well with the increasing tendency of Canadian law schools to develop a transnational perspective on the study of law.For eg., at our Faculty of Law, we have recently amended our curriculum to require all students to take at least one course focussing on transnational or comparative approaches to law.

[17] I don't mean to suggest this is totally novel approach. There has been a strand of work with a comparative focus in our labour law scholarship for quite some time, particularly in the area of collective bargaining. See for example, David Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (McGill-Queen's University Press: 1987). In that work Beatty advocated that the Supreme Court of Canada should interpret freedom of association under the Charter to require adoption of a European style regime for collective bargaining on the basis that the principle of majoritarian exclusivity that is central to the Wagner Act model adopted in Canada is contrary to the freedom of association. What I am suggesting here is that the potential for constitutionalization of our labour law after *BC Health Services* and its acceptance of international obligations as persuasive instruments will cause us in the future to look much more seriously at both international norms and alternative models for collective bargaining adopted in other parts of the world.