

FAIRNESS AT WORK, AND MAYBE EFFICIENCY BUT NOT VOICE: AN EVALUATION OF THE ARTHURS' COMMISSION REPORT

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I. INTRODUCTION

Against a backdrop of intense competitive pressures in a global economy, employment and labor law reform is on the public policy agenda in many countries. The approach to such reforms is, unsurprisingly, quite diverse. Germany has attempted to reduce unemployment by loosening labor market regulations and lowering unemployment benefits. Australia has similarly tried to promote labor market flexibility by aggressively deregulating its system of workplace law and exempting a number of employees from its unjust dismissal laws. In contrast, China recently enacted new legislation requiring written employment contracts and other employee protections. The United States increased the national minimum wage in 2007 and debates continue over health care insurance, paid family leave, union recognition procedures, strike replacements, and other contentious issues. Similar debates have occurred in Canada, with a number of employment and labor law reforms enacted by various provinces.

The Canadian federal sector has taken a particularly thoughtful approach to the issue of labor standards reform. Specifically, the distinguished law professor Harry W. Arthurs was commissioned in 2004 by the Minister of Labour to review Part III of the *Canada Labour Code*. Along with his expert advisors—Daphne Taras, Gilles Trudeau, and Sherry Liang—and supported by management and labor advisors as well as a number of independent research studies and public consultations, Professor Arthurs has produced a 295 page

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report entitled *Fairness at Work: Federal Labour Standards for the 21st Century*¹ that is valuable for anyone interested in the critical issue of contemporary employment and labor law reform. The *Canada Labour Code* applies only to the eight percent of the Canadian labor force employed in the federal jurisdiction that includes federal government employees and private sector employees in banking, broadcasting, telecommunications, the postal service, airlines, shipping, and trucking. But the problems identified by the report are widely-applicable beyond the Canadian federal sector, and the overall approach to reviewing the existing legislation contains important lessons for academics and policymakers alike.

The *Canada Labour Code* has three parts. Part I pertains to industrial relations and collective bargaining, Part II to occupational health and safety, and Part III to labor standards over hours of work, minimum wages, vacations and holidays, family and sick leaves, individual and group employment terminations, and unjust dismissal. Part III also includes some provisions pertaining to equal pay and sexual harassment, but discrimination and harassment are primarily regulated through the separate *Canadian Human Rights Act*. The Arthurs' Commission report, then, only covers specific issues—namely, labor standards excepting nondiscrimination, income security, safety and health, and industrial relations. Those familiar with employment and labor law will immediately recognize that these are quite significant exceptions. The narrowness of the Arthurs' Commission report is therefore an important concern and is discussed further below, but the approach and lessons of the report are far-reaching.

Any set of policy reforms can and should be evaluated in at least three different ways: analytically, normatively, and pragmatically. The analytical dimension captures whether a policy reform articulates explicit objectives and follows a clear model of the employment relationship such that the policy reform is logically consistent with these objectives and model. In other words, this dimension assesses whether a policy reform is analytically explicit and coherent. The normative dimension examines the extent to which one agrees that the objectives of the policy reform are desirable. The pragmatic dimension considers whether the policy reform can be enacted and would be effective. The remainder of this article considers the

1. Harry Arthurs, *Fairness at Work—Federal Labour Standards for the 21st Century*, HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA (2006), available at http://www.hrsdc.gc.ca/en/labour/employment_standards/fls/final/page00.shtml.

Arthurs' Commission report *Fairness at Work* in these three dimensions.

II. THE ANALYTICAL DIMENSION

The rationale for government regulation of any market-based activity should be rooted in the intersection of explicit objectives for that activity with an explicit model of the operation of that activity. Employment-related public policy reform, then, should be based on beliefs about the goals of the employment relationship and how the employment relationship works.² A reform proposal is only analytically sound if the policy is consistent with the underlying objectives and model of the employment relationship. To take a simple example, if one believes that labor markets are perfectly competitive, that labor is simply a commodity, and that efficiency is the critical objective, then a reform platform highlighting strong minimum wage legislation is analytically misguided because in the competitive market model of the employment relationship, a mandated minimum wage is predicted to reduce rather than improve efficiency.

Note that explicitness as well as internal consistency is important here—if the objectives and/or the assumed model of the employment relationship are left unstated, it is difficult to evaluate the analytical soundness of a public policy proposal. Unfortunately, the identification of an *explicit* model of the employment relationship is frequently absent in policy proposals (and in industrial relations and legal research). It is therefore instructive to consider the major alternative models before turning to the Arthurs' Commission report specifically. These alternatives are the egoist, unitarist, pluralist, and critical models (or ideologies, or frames of reference) of the employment relationship.³

The egoist model is the familiar neoliberal paradigm rooted in neoclassical economic theorizing. Employers and employees are seen as pursuing their rational self-interest (hence “egoist”) in perfectly

2. STEPHEN F. BEFORT & JOHN W. BUDD, *INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW AND PUBLIC POLICY INTO FOCUS* (2009). John W. Budd & Stefan Zagelmeyer, *Public Policy and Employee Participation*, in *THE OXFORD HANDBOOK OF PARTICIPATION IN ORGANIZATIONS* (Adrian Wilkinson et al. eds., forthcoming).

3. John W. Budd & Devasheesh Bhawe, *Values, Ideologies, and Frames of Reference in Employment Relations*, in *SAGE HANDBOOK OF INDUSTRIAL AND EMPLOYMENT RELATIONS* (Paul Blyton et al. eds., 2008). John W. Budd & Devasheesh Bhawe, *The Employment Relationship*, in *SAGE HANDBOOK OF HUMAN RESOURCE MANAGEMENT* (Adrian Wilkinson et al. eds., forthcoming).

competitive labor markets. Under convenient assumptions of no transactions costs and perfect information, neoclassical economic theory shows that efficiency is maximized by self-interested agents interacting in perfectly competitive markets. The three other models see labor markets as imperfectly competitive, but differ along other dimensions.

The unitarist model emphasizes a psychological agent conceptualization of workers, and makes the key assumption that the objectives of employers and employees can always be aligned with the correct human resource management policies. The pluralist model combines the economic and psychological conceptualizations of labor while also seeing labor as entitled to human rights in a democratic society, and combines this with a more nuanced vision of employment relationship conflict. Specifically, the pluralist model assumes that some, but not all, employer and employee interests are shared. Basic issues like wages are seen as conflicts of interests. Last, the critical model assumes that employer and employee interests are fundamentally in conflict, and that this conflict is not limited to the employment relationship. Rather, the employment relationship is just one element of a broader a range of socio-political institutions that endow capitalists and the working class (for example) with grossly different levels of power.

These four models of the employment relationship illustrate the key different perspectives on government regulation of the employment relationship (see Table 1).⁴ The egoist model relies on individual self-interest and competitive markets, not public policy, to promote efficiency. Government regulation is seen as interference that distorts free markets, and is therefore favored only in exceptional cases. The unitarist model assumes that the objectives of the employment relationship can be achieved by well-designed human resource management policies. Only a minimal role for public policy is therefore recognized—encouraging cooperative rather than competitive relations between employers and employees, and in the extreme, preventing destructive competition triggered by employers that do not understand that cooperation rather than competition is best. In the literature on comparative regulatory approaches to employment relations, the egoist and unitarist models translate into a market or liberal individualism approach to regulation in which the state's role focuses on protecting property rights, economic exchange,

4. Befort & Budd, *supra* note 2. Budd & Zagelmeyer, *supra* note 2.

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and individual contracts in a freely operating and (perhaps) competitive market system.⁵

Table 1
Models of the Employment Relationship and Government Regulation

Model	View of Labor	View of Labor Markets	View of Employee-Employer Objectives	Resulting View of Government Regulation
Egoist	A commodity; a rational self-interested economic agent.	Perfectly competitive.	Emphasis is on self-interest; exchanges occur when self-interests align.	Minimal. Fix market failures only when regulation does not do more harm than good.
Unitarist	A psychological being.	Imperfectly competitive.	Emphasis is on shared employer-employee interests; alignment occurs with effective human resources policies.	Low. Promote cooperation and prevent destructive competition.
Pluralist	An economic and psychological being; a democratic citizen with rights.	Imperfectly competitive.	Emphasis is on a mixture of shared and conflicting interests.	Essential. Establish safety nets and equalize bargaining power to balance efficiency, equity, and voice.
Critical	An economic and psychological being; a democratic citizen with rights	Imperfectly competitive; part of a broader, unequal institutional structure.	Emphasis is on inherent conflicts of interest; power differentials lead to exploitation.	Mixed. Important for protecting employees. Inadequate because of systemic imbalances inherent in capitalism.

5. COLIN CROUCH, THE POLITICS OF INDUSTRIAL RELATIONS (2d ed. 1982).

In contrast, the pluralist model fully embraces the need for active government regulation of the employment relationship. Because markets are assumed to be only imperfectly competitive, employers are seen as having greater bargaining power than individual employees. With a concern for employment relationship outcomes that are richer than just efficiency and that include various human rights, the pluralist model then sees an essential role for employment and labor law to create minimum labor standards and social safety nets while also promoting unionization in order to balance the varied needs of employers and employees. Human resource management policies can promote shared interests such as an employer's financial viability, but because of assumed conflicts of interests, the pluralist model theorizes that it is unwise to rely solely on employer self-interest to look out for workers' interests. As a result, government regulation is needed to protect employees. This pluralist philosophy is typically implemented in one of two ways. Liberal collectivist (or liberal pluralist) states create basic legal frameworks within which employees and employers and their respective collective bodies can balance their legitimate and potentially conflicting interests by negotiating individual and collective agreements. Corporatist states take a more interventionist approach and involve employer and employee representatives directly in policymaking.

For reasons similar to the pluralist model, the critical model also supports government regulation to protect employees from abuse and substandard conditions. But since employer-employee conflict is not seen as confined to the employment relationship, employment and labor law is seen as ultimately insufficient to advance workers' interests. In fact, the critical model also theorizes that employment and labor law are tools that the stronger capitalist class can use to perpetuate its dominance over the weaker working class.

With these four perspectives as an analytical foundation, we can better evaluate the Arthurs' Commission report. One well-versed in these four perspectives can tease out the pluralist frame of reference that underlies the Arthurs' Commission report. This is revealed in statements such as the following that highlight the pluralist assumptions of unequal bargaining power in imperfectly competitive labor markets and the importance of workers' rights:

- "Given the disparities of power between employers and workers, and the potentially debilitating consequences of a 'race to the bottom' triggered by employers competing on the basis of cheap labour, Part III must continue to provide a

floor of rights and protections, such as minimum wages and limits on maximum hours of work.”⁶

- “There are some workers whom the market will likely never assist. In other words, whatever the power of the market to improve social conditions, it has its limits.”⁷
- “The new economy and the new demography . . . have not eroded the moral foundations of Part III.”⁸
- “Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as ‘decent.’”⁹

The pluralist principle of balancing the interests of employers and employees is also apparent in the Arthur’s Commission report:

- “Labour standards can and should balance the legitimate interests and concerns of workers and employers.”¹⁰
- “Labour standards should be conceived, enacted, and administered in such a way that employers can respect the decency principle while enjoying ample opportunity to meet time-sensitive market demands and to restructure or redeploy their workforces in the face of changing market conditions.”¹¹

The Arthurs’ Commission report, then, is analytically sound in following a consistent intellectual approach to policy evaluation and reform. In other words, its policy recommendations flow directly from a pluralist model of the employment relationship.

Where the report falls short, however, is in making this intellectual foundation explicit. The report is to be applauded for explicitly laying out objectives, but the pluralist theoretical principles are more implicit than explicit. Explicitness, however, is needed to promote a deeper understanding of public policy issues, especially among policymakers and advocates who are not used to thinking this way and who do not adequately understand the regulatory implications of different frames of reference. Being more explicit about intellectual foundations can also promote more constructive discourse. Some employer groups may feel that the recommendations are overly aggressive and some employee representatives may criticize

6. Arthurs, *supra* note 1, at 22.

7. *Id.* at 33.

8. *Id.* at 31.

9. *Id.* at 47.

10. *Id.* at x–xi.

11. *Id.* at 48.

the report for not going far enough. Many of these criticisms are ultimately rooted in different frames of reference embracing the egoist, unitarist, or critical models. Explicitly recognizing the differing theoretical foundations will not magically make these disagreements disappear, but they can help the various participants to these debates understand each other better, and therefore talk to each other constructively rather than rhetorically. When the underlying intellectual foundations are not recognized, participants in policy debates snidely dismiss opposing viewpoints as special interest group politics. This is not a healthy basis for debate. An important lesson from the Arthurs' Commission report, therefore, is not only the importance of having a sound intellectual foundation for policy analysis, but in also being explicit about it. This is a lesson for everyone interested in employment and law labor reform, not just those focused on the Canadian federal sector.

III. THE NORMATIVE DIMENSION

Beyond evaluating whether a public policy proposal is analytically sound, one can also evaluate it from a normative perspective—does it pursue the right objectives? There can be many normative perspectives so explicitness is again important. My normative principle is that employment relationship policies and institutions should seek to balance the fundamental employment relationship objectives of efficiency, equity, and voice.¹² Efficiency is attained when workers are productive, organizations are competitive, jobs are created, and a society is economically prosperous. Equity requires fairness, justice, and security in the distribution of economic rewards and the administration of employment policies. Voice entails employees having the ability to provide meaningful input into decisions both individually and collectively. Because workers are not commodities but are human beings in a democratic society, and because work is not a purely economic transaction but is a fully human activity, employment needs a *human* face in which efficiency, equity, and voice are balanced.

The key normative principles in the Arthurs' Commission report are the following (verbatim):

- “Principle 1: Decency at work. Labour standards should ensure that no matter how limited his or her bargaining

12. JOHN W. BUDD, *EMPLOYMENT WITH A HUMAN FACE: BALANCING EFFICIENCY, EQUITY, AND VOICE* (2004).

power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as “decent.” No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.”¹³

- “Principle 2: The market economy. Labour standards ought—so far as possible—to advance the decency principle in ways that allow workers to contribute to, and benefit from, the success of Canada’s market economy. Because successful enterprises are better able to treat workers decently, labour standards should support and, if possible enhance, the competitiveness and adaptability of enterprises.”¹⁴
- “Principle 3: Flexicurity. Labour standards should be coordinated with income security and other adjustment policies to provide protection to workers whose jobs are threatened by changing labour market conditions, employer strategies or job requirements. Labour standards, along with other legislation, should provide a framework for avoiding job losses, if possible; for planning and funding worker transitions to new jobs; and for reducing the impact of job losses on workers.”¹⁵

These principles are eloquent modern restatements of the traditional industrial relations goal of balancing efficiency and equity. Principle 1 emphasizes the minimum labor standards aspect of equity, principle 2 the importance of efficiency, and principle 3 the balancing of the security aspects of equity with the need for flexibility in support of efficiency.

The heart of the Arthurs’ Commission report, of course, is providing specific recommendations for realizing these principles. Some recommendations necessarily pertain to the specific administrative operations of the *Canada Labour Code*, such as recommendation 5.10 dealing with the lack of authority of ad hoc referees in wage non-payment cases, recommendation 9.9 suggesting

13. Arthurs, *supra* note 1, at 47.

14. *Id.* at 48.

15. *Id.* at 49.

the creation of a Chief Compliance Officer, and the twenty technical recommendations in Appendix 9. These are useful reminders that operational details are important. But to most academic readers, the most engaging sections likely pertain to the unique challenges of the twenty first century employment relationship including intense global competition, new information technologies, and changing demographic trends that create intense management and worker pressures for control and flexibility. The managerial drive for flexibility is commonly recognized in practice and in scholarship, but the Arthurs' Commission report demonstrates that today's employees also value flexibility.

In fact, the longest chapter (chapter 7) of the report deals with control over work time. As workers want more control over their working time in order to balance work with family and other non-work needs, and as employers want more control over working time in order to respond to ever-shifting competitive pressures, control over work time is an important policy issue for many countries. The discussion of this policy issue in the Arthurs' Commission report is particularly thoughtful. The chapter first reviews the pros and cons of four models of regulation—a ministerial model, a sectoral model, a workplace model, and a consensual flexibility model (essentially a neoliberal managerialism model). Control over time is currently governed by the ministerial model under Part III of the *Canada Labour Code* and the first set of recommendations are intended to rein in the exceptions to standard and maximum hours that have resulted from the ministerial administration of Part III (recommendations 7.1–7.11). To provide flexibility across sectors and workplaces, additional recommendations suggest the authorization of sectoral councils and, where unions are absent, workplace consultative committees to craft working time arrangements that are responsive to the preferences of specific employees and needs of specific employers. The recommendations are supplemented with other recommendations to give employees greater control over their schedules, such as the right to refuse overtime that would cause them to work more than twelve hours in a day or forty-eight hours in a week (recommendation 7.37) or that would cause conflicts with significant family-related commitments (recommendation 7.38).

Another issue common to many countries that is thoughtfully addressed in the Arthurs' Commission report is the growth of nonstandard work and the exclusion of various nonstandard employees or contractors from employment and labor law protections. Particularly unique in the report is the balanced discussion of why

some workers prefer not being classified as employees¹⁶ and the recommendation to create a category of “autonomous workers” who would be covered by Part III of the *Canada Labour Code* (recommendation 4.2). These autonomous workers are individuals that essentially do the same work as regular employees, but for some legal reason are not technically considered regular employees.

The portability and potential universality of the issues addressed in the Arthurs' Commission report are also reflected in the recommendations to adopt non-North American labor policies in the Canadian federal sector. Recommendation 5.1, for example, advocates for mandatory employment contracts in which employees must be given written notices specifying their rates of pay, hours of work, general holidays, annual vacations, and conditions of work. Similar policies exist in China and the European Union. As a second example, recommendation 7.44 draws on the British experience to suggest that employees should have the right to request a different work schedule.

Normatively, I find these approaches to balancing employer and employee interests in efficiency and equity appealing, but this traditional industrial relations emphasis on efficiency and equity overlooks the distinct importance of employee voice. This is not to say that voice is completely absent in the Arthurs' Commission report. The proposed right of individual employees to request a changed work schedule is one facet of individual voice. The proposed committees for consultations over working time arrangements are a mechanism for nonunion collective voice. But the inclusion of employee voice as a defining part of the concept of decent work that the report seeks to achieve could have perhaps spurred additional voice-related recommendations, or at least have placed voice along with efficiency and equity as central aspirational goals.

IV. THE PRAGMATIC DIMENSION

Proposed public policy reforms can also be evaluated pragmatically—will they be enacted and will they be effective? I leave the first of these questions for those with a better understanding of the contemporary Canadian political environment. But it bears emphasizing that intellectually, we should not be held hostage to such pragmatic concerns. Legislative gridlock in the United States, especially at the federal level, causes some academics to be dismissive

16. *Id.* at 62–63.

of policy proposals and related debates, or to make the chances of enactment the major evaluative criterion. This defeatist attitude is counterproductive. New ideas should not be discounted simply because they have a slim chance of being enacted. Rather, debating the analytical and normative dimensions of policy proposals should be a central part of academic discourse on the employment relationship. Such debates can add to our understanding of the employment relationship, and can provide a starting point for creating new societal expectations that are more supportive of policy reforms. Actual reform can lag considerably behind calls for reform. As such, whether the Arthurs' Commission recommendations are likely to be enacted in the short run is, at best, a secondary concern and should not be used to detract from the analytical and normative lessons of the report.

A second dimension of a pragmatic evaluation is whether the proposed recommendations would be effective. In spite of the strong language in the beginning of the report about decency standards trumping business concerns,¹⁷ one can question whether the proposals go far enough in protecting workers' rights. In the recommendation for a right to request policy, the employer must respond in writing, but there is no requirement that the employer have a legitimate business reason for denying such a request. Similarly, the proposals to grant employees the right to refuse overtime should be applauded, but the exceptions should be narrower. In other words, the law should go farther in allowing employees to refuse mandatory overtime.

More fundamentally, the Arthurs' Commission report reveals the problems with piecemeal reform. At least two dimensions of equity are short-changed because of the piecemeal nature of Canadian employment and labor law. One, because of the *Canadian Human Rights Act*, recommendations pertaining to nondiscrimination are mostly limited to encouraging greater cooperation between the various agencies responsible for enforcing discrimination claims (e.g., recommendations 6.3–6.9). Two, income insecurity is largely ignored because unemployment insurance (now “employment insurance”) is not part of the *Canada Labour Code*.

The issue of voice also suffers from the exclusive labor standards focus of Part III of the *Canada Labour Code*. Because traditional collective labor law topics are regulated in Part I, opportunities to explore how labor unions can help achieve the goals of Part III are largely missed. The commission was undoubtedly following its mandate in focusing exclusively on Part III of the *Canada Labour*

17. *Id.* at 47.

Code, but the Canadian government missed a big opportunity for enhancing the effectiveness of its complete set of employment-related public policies.

V. CONCLUSION

The nature of work is almost hopelessly complex in today's modern capitalist democracies. There are almost too many workplaces to count, and they are striking in their diversity. Global competitive pressures further ensure that few workplaces are static. Against this daunting backdrop, the Arthurs' Commission must be applauded for its thoughtful review of labor standards in the Canadian federal sector. The problems tackled by the commission are issues that many countries are struggling with, and scholars, advocates, and policymakers can benefit from the report's eloquent presentation of reform objectives, contemporary pressures, and specific policy proposals. Everyone interested in employment and labor law reform can also benefit from considering the analytical, normative, and pragmatic dimensions of the Arthurs' Commission report. *Fairness at Work* therefore holds valuable lessons even for those of us far removed from the Canadian federal sector.

