LABOUR LAW AS SUBSTANTIVE EQUALITY

Thanks in large measure to Justice Abella's jurisprudence, Canadian labour law is infused with substantive equality principles. It has not, however, escaped critical impasses that emerge in the attempt to reconcile human rights and labour law principles and procedures. This paper explores two responses proffered in Supreme Court case law. It offers a third: an act of memory. Drawing on the legal history of racial segregation and its role in the construction of the core labour law framework through which the relationship between the ‘individual’ and the ‘collectivity’ in Canada and the United States, it nudges Canadian labour law beyond the ‘choice’ and toward a fulsome embrace of substantive equality’s transformative potential.

THE AUTONOMY OF ADMINISTRATION

Justice Abella is closely associated with deference to administrative decision-makers. I will argue that her deferential approach was multi-faceted, much more sophisticated – and, indeed, jurisprudentially controversial – than is typically assumed. Justice Abella’s administrative law jurisprudence is more about administrative autonomy than it is about judicial deference, is based on her profound trust in public administration and was sometimes tempered by her inherent progressivism. But this constellation of features could well lead to the very type of ‘deference as submission’ against which Justice Abella consistently railed.

EQUALITY AND EQUITY

In the United States, the terms “equality” and “equity” have become weapons in polarized political arguments rather than analytic tools. The political volley over words neglects and obscures decades of litigation, policy, and academic work including pioneering writing and thinking by Justice Rosalie Abella. Conceptions of equality and equal treatment can move well beyond simplistic plans to treat everyone alike regardless of historic and current differences and experiences. The hard work calls for a conception associated at times with equality and at times with equity of laws and policies that are responsive to individual and structural differences in people’s circumstances and for navigating truly individualized consideration and approaches attentive to group membership or social structures. Doing so should honor individual choice while staying mindful of systemic patterns.