

## SITUATED REFLECTIONS ON INTERNATIONAL LABOUR LAW, CAPABILITIES, AND DECENT WORK: THE CASE OF *CENTRE MARAÎCHER EUGÈNE GUINOIS*

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Numéro hors-série, avril 2007

Hommage à Katia Boustany

URI : <https://id.erudit.org/iderudit/1069050ar>

DOI : <https://doi.org/10.7202/1069050ar>

[Aller au sommaire du numéro](#)

Éditeur(s)

Société québécoise de droit international

ISSN

0828-9999 (imprimé)

2561-6994 (numérique)

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Citer cet article

Blackett, A. (2007). SITUATED REFLECTIONS ON INTERNATIONAL LABOUR LAW, CAPABILITIES, AND DECENT WORK: THE CASE OF *CENTRE MARAÎCHER EUGÈNE GUINOIS*. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 223–244. <https://doi.org/10.7202/1069050ar>

Résumé de l'article

Cet article traite de la transformation contemporaine de la normativité du droit international du travail en recentrant le débat entre les droits civils et politiques, d'une part, et les droits économiques et sociaux, d'autre part, par une discussion sur les inégalités sociales. Il retrace l'inégalité persistante du marché du travail à l'égard d'un groupe historiquement marginalisé, la communauté noire du Canada, et l'analyse à l'aune d'une décision récente et particulièrement problématique en matière de droits de la personne. Cet article défend l'idée suivant laquelle les efforts de reconceptualisation du droit du travail comme un droit de nature fondamentalement procédurale s'accompagnent du risque de saper les tentatives visant à protéger les droits économiques et sociaux des travailleurs qui en ont le plus besoin. Il suggère plutôt d'employer les concepts phares d'égalité et de travail décent dans la réflexion sur l'indivisibilité des droits, afin d'assurer que le droit du travail (national et transnational) puisse remplir ses mandats de protection et d'outillage des travailleurs.

## **SITUATED REFLECTIONS ON INTERNATIONAL LABOUR LAW, CAPABILITIES, AND DECENT WORK: THE CASE OF *CENTRE MARAÎCHER EUGÈNE GUINOIS***

*Par Adelle Blackett\**

This article engages the contemporary transformation of international labour normativity by refocusing debates between civil/political rights and economic/social rights on a contextualized discussion on social inequalities. It traces the persistent labour market inequality experienced by one historically marginalized group, the black community in Canada, through the lens of a particularly problematic recent human rights decision. It first contends that efforts to reconceptualize labour law as fundamentally procedural in nature run the risk of undermining attempts to protect the economic and social rights of those most in need of labour law. It adds that neither are economic and social rights a panacea. Instead it suggests that notions of equality and decent work must play a guiding role in rethinking the indivisibility of rights, to ensure that labour law (national and transnational) fulfil both its protection and worker empowerment mandates.

Cet article traite de la transformation contemporaine de la normativité du droit international du travail en recentrant le débat entre les droits civils et politiques, d'une part, et les droits économiques et sociaux, d'autre part, par une discussion sur les inégalités sociales. Il retrace l'inégalité persistante du marché du travail à l'égard d'un groupe historiquement marginalisé, la communauté noire du Canada, et l'analyse à l'aune d'une décision récente et particulièrement problématique en matière de droits de la personne. Cet article défend l'idée suivant laquelle les efforts de reconceptualisation du droit du travail comme un droit de nature fondamentalement procédurale s'accompagnent du risque de saper les tentatives visant à protéger les droits économiques et sociaux des travailleurs qui en ont le plus besoin. Il suggère plutôt d'employer les concepts phares d'égalité et de travail décent dans la réflexion sur l'indivisibilité des droits, afin d'assurer que le droit du travail (national et transnational) puisse remplir ses mandats de protection et d'outillage des travailleurs.

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\* Associate Professor and William Dawson Scholar, Faculty of Law, McGill University. This essay is dedicated to the memory of the late Professor Katia Boustany, one of my first mentors when I left my position as a labour law and labour relations specialist at the ILO to enter the legal academy in Quebec. Katia, a former ILO official as well, cultivated a sophisticated knowledge of and appreciation for the ILO's normative universe, which was recognized and appreciated both within the ILO and in academia. Katia also shared with me her conviction about the openness of Quebec's multicultural society. I am grateful for her guidance, which inspires the reflections in this essay. Also, I gratefully acknowledge the support of the Wainwright Memorial Fund, Faculty of Law, McGill University, and the 2006 Law Commission of Canada's Legal Dimension Initiative. This paper was presented at the LCC's 2006 Legal Dimension Initiative Panel entitled "Social and Economic Rights: Addressing Social Inequalities," Canadian Association of Law Teachers and Canadian Law and Society Association's Annual Meeting. It benefited from insightful comments by Judy Fudge and David Weisman, as well as the research assistance of Alison Adam and Adrienne Gibson. Of course, any errors or omissions remain my own.

Labour law, nationally and internationally, is at a crossroads. The high level debate underway regarding the transformation of international labour normativity is critical to understandings of labour law as embracing both civil and political rights and economic and social rights. I contend in Part I of this paper that contemporary efforts to reconceptualize labour law as fundamentally procedural in nature run the risk of undermining efforts to protect the economic and social rights of those most in need of labour rights.

Yet, this paper does not consider that explicit recognition of economic and social rights constitutes a panacea for redressing social inequalities. Indeed, it seeks to engage the international debate by starting at the beginning, and in concrete terms, with a focused inquiry into the social inequalities that national and international labour regulations are meant to counter. In Part II, it traces the persistent labour market inequality experienced by one historically marginalized group, the black community in Canada. Through the lens of a particularly problematic recent decision, *Commission des droits de la personne et droits de la jeunesse (Cupidon Lumène) c. Centre Maraîcher Eugène Guinois Jr inc.*<sup>1</sup>, it illustrates how the existing economic and social rights were underutilized and abandoned, thereby exacerbating rather than redressing societal inequality. The argument is therefore that we need to grapple with the question of identity as racialized<sup>2</sup> status, and evaluate how rights capture and address the lived experience of members of disenfranchised communities. Labour law is not the terrain of atomized individualism.

In Part III, it argues for the notion of equality to play a guiding role in rethinking the indivisibility of civil/political rights from economic/social rights. It contends that identity (notably, racial status) matters, and that focusing on identity is a critical way to ensure that labour law fulfils both its protection and worker empowerment functions. Arguably, the language of “dignity at work” holds the seeds to ensuring that this dual mandate remains central to labour law in the new economy.

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<sup>1</sup> *Commission des droits de la personne et droits de la jeunesse (Cupidon Lumène) c. Centre Maraîcher Eugène Guinois Jr inc.*, Quebec [2005] R.J.Q. 1315, J.E. 2005-779, D.T.E. 2005T-399, [2005] R.J.D.T. 1087, [2005] R.R.A. 687 (T.D.P.Q.), online: <<http://www.canlii.org/qc/jug/qctdp/2005/2005qctdp10005.html>> [*Centre Maraîcher*].

<sup>2</sup> The language of racialization is introduced through the work of sociologist Robert Miles, *Racism* (London: Routledge, 1989) to capture the changing historical meanings of the categorization of race and, as a result, to detach the focus from biological phenomena. In other words, race is a social construct. Law professor Joanne St. Lewis has applied the language to speak of communities in Canada that were previously referred to as “visible minorities”, seeing the language as an opportunity to move beyond inaccurate geopolitical descriptors to capture how race is constructed in particular places at particular historical moments. The language of racialization, race, and, indeed, blackness, are used with these analytical frameworks in mind. See Joanne St. Lewis, “Virtual Justice: Systemic Racism and the Canadian Legal Profession” in Canadian Bar Association, *Racial Equality in the Legal Profession*, online: (1999) <<http://www.cba.org/CBA/Pubs/pdf/RacialEquality.pdf>>.

## I. The Indivisibility of Labour Rights as Civil/Political and Economic/Social Rights

Labour rights provide a critical starting point for discussions of the interface between civil/political and economic/social rights. Indeed, labour rights have traditionally straddled the divide between civil and political rights on the one hand, and economic, social and cultural rights on the other hand. Labour law is both procedural and substantively re-distributional, and is a reminder that the two functions are mutually enhancing. Labour law is, in this regard, a distinct form of market regulation, which by its nature challenges the view that the labour market alone provides an efficient and socially acceptable sorting of human resources. Through the “productive” process, people enter the market system in their capacity as a factor of production. However, their subordinated participation is expected to be other than that of a commodity merely bought and sold in relation to supply and demand. Labour law, therefore, mediates their access, infusing it with the dignity that the market alone cannot provide.<sup>3</sup>

Since the dual purpose of labour law is to provide worker protection (through legislation on minimum wage and minimum labour standards, as well as basic human rights norms against discrimination in the workplace) and worker agency through democratic participation (traditionally understood through access to collective bargaining mechanisms),<sup>4</sup> the divide between civil/political rights and economic, social and cultural rights is difficult to sustain. Labour rights, particularly as they were historically articulated and supported through the normative framework of the International Labour Organization (ILO), had avoided, in an integral way, the polemic surrounding the argued distinction between enforceable, priority covenants on civil and political rights and programmable, aspirational economic and social rights, imagined as social outcomes. The ILO, by contrast, simply created ratifiable conventions and non-ratifiable recommendations (somewhat cafeteria style, as Alain Supiot apparently characterized it)<sup>5</sup> that took little account of the civil/political and economic/social divide, reinforcing in practice the view that as far as labour rights were concerned, they were indivisible.

Contemporary labour law, however, at both the national and international levels, has not escaped hard questions about its role in a context of shifting labour law paradigms. If labour law is indeed where the role of market ordering and public policy is traditionally mediated, then in light of changing production and trade patterns, the relative role of labour regulation in an increasingly interdependent economic environment (the “new economy”) is at the forefront. And while the debate

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<sup>3</sup> Adelle Blackett, “Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct” (2001) 8:2 *Ind. J. Global Legal Stud.* 401 at 418.

<sup>4</sup> See *ibid.* at 419, for a succinct description of the traditional industrial relations account of collective bargaining. See also Harry W. Arthurs, “Labour Law Without the State?” (1996) 46 *U.T.L.J.* 1, for a critical account arguing that the unraveling of the welfare state in a post-Keynesian era calls for this paradigm to be reconsidered.

<sup>5</sup> See Francis Maupain, “Revitalization Not Retreat: The Real Potential of the 1998 ILO *Declaration for the Universal Protection of Workers’ Rights*” (2005) 16 *E.J.I.L.* 439 [Maupain, “Revitalization”].

on labour rights has in an era of liberalization and privatization been characterized as one of trade offs (simply put, greater labour rights with fewer jobs, according to the European model, or fewer labour rights with more jobs, according to the American model), the interface is much more complex and harnesses within it a vision about the role of the state in mediating the role of the market, as it relates to people's entitlements as they have traditionally been mediated through the work relationship.<sup>6</sup> This has invariably led to a re-prioritization, which at the international level has arguably reinforced the civil and political, to the detriment of the economic and social. An atomistic vision of labour law has taken over the debate concerning international standard setting and the articulation of fundamental principles and rights at work.

Yet, the inexorable thrust toward the civil and political is not without contestation. Indeed, it became apparent that in a real world that tolerates working conditions that make a mockery of the ILO's goal of social justice, the ILO needed to extract from the 400 odd paper conventions and recommendations a small set of fundamental principles and rights at work that would be prioritized. The question is how the prioritization was undertaken and what it means. In its 1998 *Declaration on Fundamental Principles and Rights at Work (ILO Declaration)*, the ILO isolated four key principles: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination with respect to employment and occupation.<sup>7</sup>

This turn has been heavily critiqued most ardently (and as he admits somewhat polemically) by human rights scholar Philip Alston.<sup>8</sup> The critique sweeps across a number of political and institutional issues that are beyond the scope of the paper, but the sharply diverging visions on the role of labour law are at the heart of the discussion on economic and social rights. And, indeed, it is in the virulent response to Alston's critique that an official institutional vision of the anticipated meaning of this policy shift can be most readily appreciated. Both Canadian labour law scholar Brian Langille, a visitor at the ILO's International Institute for Labour Studies during 2004-05 and the ILO's former legal advisor during the drafting of the 1998 *ILO Declaration*, and current special advisor, Francis Maupain, argue fervently

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<sup>6</sup> Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001).

<sup>7</sup> *Declaration on Fundamental Principles and Rights at Work*, 18 June 1998, 37 I.L.M. 1233, art. 2 [*ILO Declaration*].

<sup>8</sup> Philip Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime" (2004) 15 E.J.I.L. 457 [Alston, "Core Labour Standards"]; Philip Alston and James Heenan, "Shrinking the International Labor Code: An Unintended Consequence of the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*?" (2004) 36 N.Y.U.J. Int'l L. & Pol. 221 (Alston and Heenan acknowledge the intentionally polemical tone at p. 224). See also Philip Alston, "Facing Up to the Complexities of the ILO's Core Labour Standards Agenda" (2005) 16 E.J.I.L. 467 [Alston, "Complexities"].

for a vision of “fundamental” labour rights that emphasizes their procedural, enabling character.<sup>9</sup>

Certainly, Langille accepts “the objective of labour law to be justice in employment, or at work, or perhaps most broadly in productive relations.”<sup>10</sup> The problem, for Langille, is that there is a bargaining power disadvantage in the free market contract of exchange. Langille acknowledges the procedural and substantive dimensions of labour law, yet relegates the substantive to the level of outcomes (standards) rather than rights :

[L]abour law responds in two ways. The first way to secure justice in the face of this problem is by simply rewriting the substantive deal (mostly by statute) between workers and employers – providing for maximum hours, vacations, minimum wages, health and safety regulations, and so on. This is substantive intervention and the results are compendiously called labour standards. Labour law’s second technique of responding to the perceived problem is not via the creation of substantive entitlements, but rather by way of procedural protection: in short, protecting rights to a fair bargaining process. [...] The ethic of substantive labour law is strict paternalism and the results are standards imposed upon the parties whether they like it or not. The ethic of procedural labour law is freedom of contract and self-determination – what people call industrial democracy – and its results are basic rights, which, it is believed, lead to better, but self-determined, outcomes.<sup>11</sup>

The core is redefined to become a set of “fundamental” procedural rights. Therefore, “by removing barriers to self-help”<sup>12</sup> like discrimination, forced labour and child labour, labour law can “unleash the power of *individuals* themselves to pursue their own freedoms.”<sup>13</sup>

Maupain, bearing the hat of the “practitioner” of law,<sup>14</sup> makes comparable arguments with an attempt to ground them in ILO practice. He, therefore, points concretely to the case of occupational safety and health, which may be theorized as a concrete incarnation of the principle of the right to life and security of the person.<sup>15</sup>

<sup>9</sup> Brian A. Langille, “Core Labour Rights – The True Story (Reply to Alston)” (2005) 16 E.J.I.L. 409 at 428-433; See also Maupain, “Revitalization”, *supra* note 5 at 448-449.

<sup>10</sup> Maupain, “Revitalization”, *ibid.* at 428. Interestingly, there is no reference to the deeply gendered divide between productive and “reproductive” relations. For a discussion, see Adelle Blackett and Colleen Sheppard, “Collective Bargaining and Equality: Making Connections” (2003) 142 Int’l Labour Rev. 419 at 424 [Blackett & Sheppard, “Making Connections”].

<sup>11</sup> Langille, *supra* note 9 at 428-429.

<sup>12</sup> *Ibid.* at 434.

<sup>13</sup> *Ibid.* [emphasis added]. On this vision of fundamental enabling labour rights, the free movement of persons (a political non-starter, a paler version to which migrant workers rights was alluded in the 1998 *ILO Declaration’s* preamble), is omitted. See also Alston, “Core Labour Standards”, *supra* note 8 at 487.

<sup>14</sup> See the excellent analysis by Isabelle Duplessis in this issue of the Q.J.I.L.

<sup>15</sup> See Adelle Blackett, “Mapping the Equilibrium Line: Fundamental Principles and Rights at Work and the Interpretive Universe of the World Trade Organization” (2002) 65 Sask. L. Rev. 369. See also Bob Hepple, *Labour Law and Global Trade* (Cambridge: Hart Publishing, 2005).

For Maupain, while occupational safety and health is “vital” in the strict sense, it is not “‘fundamental’ in the sense of enabling rights.”<sup>16</sup> In other words, once enabling rights are secured, then *individuals* may seek to secure other “capabilities”.

In this regard, we note that Langille stakes out his claim on the basis of liberal theory, citing Nobel laureate Amartya Sen<sup>17</sup> at length as the guiding inspiration for his reflections. It is fair to state, though, that Langille shows a marked preference for the language of human freedom over Sen’s intertwined use of the language of capabilities. Maupain’s analysis is similar, positing none the less that his vision of individual freedoms is broader than a Rawlsian account.<sup>18</sup>

Simon Deakin’s engagement with both the uses and limits of Sen’s capabilities approach assists the mapping of capabilities onto the social and economic rights landscape.<sup>19</sup> For Deakin, the capabilities approach enables accounts to move beyond “purely formal guarantees of market access of the kind provided by contract and property rights;”<sup>20</sup> the approach problematizes a demarcation of only civil and political rights as natural, market-enabling prioritizations. Deakin adds that:

a capability-oriented perspective helps us to see that social rights are not different in their essence from the civil and political rights [...] [S]ocial, civil, and political rights, far from being in fundamental opposition to each other, are to be found at different points along a single continuum.<sup>21</sup>

Even if we were to accept that the list of rights should be prioritized, there remains deep contestation as to whether they can (or more importantly should) be considered simply procedural rights. To require as does the *ILO Declaration* that governments must ensure the “*effective* recognition of the right to collective bargaining”, and “the *elimination* of discrimination in respect of employment and occupation” is to place positive obligations on the state to act to attain a substantive result.<sup>22</sup> In addition, there is much debate as to whether they can (and again more importantly should) be considered rights that are held by “individuals” in the abstract sense, divorced from the contexts in which they exist.<sup>23</sup> And, it is through these contestations, through an insistence upon the embodiment of rights,<sup>24</sup> that an attempt

<sup>16</sup> Maupain, “Revitalization”, *supra* note 5 at 449.

<sup>17</sup> Amartya Sen, *Development as Freedom* (New York: Random House, 1999) [Sen, “Development as Freedom”].

<sup>18</sup> See Francis Maupain, “L’OIT, la justice sociale et la mondialisation” (1999) 278 Rec. des Cours 201 at 395-396. Maupain also argues that the ILO does not either pretend to express an abstract, disembodied vision of social justice as reflected in the Rawlsian veil of ignorance (*ibid.* at 392).

<sup>19</sup> Simon Deakin, “Social Rights in a Globalized Economy” in Philip Alston, ed., *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005) at 25.

<sup>20</sup> *Ibid.* at 58.

<sup>21</sup> *Ibid.* at 59.

<sup>22</sup> See Blackett & Sheppard, “Making Connections”, *supra* note 10 at 419-420.

<sup>23</sup> One need look no further than the Supreme Court of Canada’s decision in *A. G. (Ont.) v. Dunmore* [2001] 3 S.C.R. 1016, to identify the diverging positions on whether a collective rights framework is necessary to understand collective bargaining.

<sup>24</sup> See Lucie Lamarche, *Perspectives occidentales du droit international des droits économiques de la personne* (Bruxelles: Bruylant, 1995) at 169.

to rethink the prioritization in terms of *individual* access to procedural freedoms raises cause for concern.

In many ways, this is the shift that defenders of the indivisibility of international human rights decry. Social and economic rights are argued to move us beyond a hierarchy of norms, beyond a vision of the economic and social as mere outcomes that the state need not guarantee, and beyond liberal values (freedom of contract) as the starting point for articulating sustaining core values, which should be facilitated with liberal rights. While Langille acknowledges that “there is much room for and need of other laws and institutions to make for a just workplace,”<sup>25</sup> Langille’s faith rests in the individual. That faith alone, however, may be viewed as deeply challenging a vision of labour law, industrial democracy and citizenship at work that places the collectivity (notably, the union) at the centre (and not without challenge from equality-seeking groups), as the basis through which rights can be meaningfully attributed (i.e. collective bargaining).<sup>26</sup>

In contrast, Deakin cautions, alongside Supiot, against an exclusively individualized-capabilities approach to social rights, affirming that “little will be gained if individualized claims to access to resources are used to undermine still further the principal institutions of the welfare state.”<sup>27</sup> This is not a new debate, and has at times unnecessarily pitted equality-seeking groups against solidarity-seeking groups in the labour law context, and by extension, workers in the North against claims of need from global redistribution to benefit the South.<sup>28</sup> But, Deakin’s distinction could hardly be more timely :

It will therefore be important, in any discussion about social rights and capabilities, to insist on a distinction between the empowerment of persons that results from an extension of their *individual* capability sets, and the *collective* mechanisms through which this empowerment is achieved.<sup>29</sup>

In this regard, a focus on labour rights that moves beyond its liberal, “enabling” character toward one that identifies how institutions may be marshalled to

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<sup>25</sup> Langille, *supra* note 9 at 433.

<sup>26</sup> See Harry Arthurs, “Developing Industrial Citizenship: A Challenge for Canada’s Second Century” (1967) 45 Can. Bar Rev. 786; Michel Coutu, “Industrial Citizenship, Human Rights and the Transformation of Labour Law: A Critical Assessment of Harry Arthur’s Legalization Thesis” (2004) 19 C.J.L.S. 73.

<sup>27</sup> Deakin, *supra* note 19 at 59-60.

<sup>28</sup> Nancy Fraser, “Rethinking Recognition” (2000) 3 New Left Review 107. As Nancy Fraser argues, “insofar as the politics of recognition displaces the politics of redistribution, it may actually promote economic inequality... Such reactions are understandable: they are also deeply misguided” (*ibid.* at 108). Amartya Sen’s new work, *Identity and Violence: The Illusion of Destiny* (New York: W.W.Norton, 2006) will hopefully garner comparable attention. (“There is a compelling need in the contemporary world to ask questions not only about the economics and politics of globalization, but also about the values, ethics, and sense of belonging that shape our conception of the global world” *ibid.* at 185).

<sup>29</sup> Deakin, *supra* note 19 at 60. See also Hepple, *supra* note 15 at 256-257.



foster human capabilities<sup>30</sup> resonates with Craig Scott and Patrick Macklem's poignant affirmation in the South African context, that civil and political rights alone "[project] an image of truncated humanity. Symbolically, but still brutally[,] it excludes those segments of society for whom autonomy means little without the necessities of life."<sup>31</sup> In other words, a vision of labour rights that privileges social rights would put the emphasis not only on questions of "empowerment and mobilization"<sup>32</sup> but, as Deakin argues, on achieving empowerment through collective mechanisms.

This paper suggests that the incorporation of the social must go yet one step further. An analysis of the relationship between civil/political and economic/social rights must grapple with identity. Collective institutions for empowerment may still privilege those groups who hold relatively more entrenched bargaining power, leaving out those equality-seeking groups most in need of dignity at work.<sup>33</sup> An approach that is attentive to identity offers a more robust vision of the relationship between strands of human rights law that should be understood as indivisible, is in keeping with the ILO's historic labour rights tradition, and should reflect its human rights direction. The two strands must act in concert. It is because of this need to understand the connections between fundamental principles and rights at work that I argue for identity to be an integral part of the ILO's recent normative and technical cooperation focus on the notion of "decent work". It requires, in Dianne Otto's words, "an ethical commitment to address the *material* aspects of human dignity, and thus to promote global economic justice and substantive equality."<sup>34</sup> That materiality requires attention to the lived experience of particular communities, notably communities that have had the most difficulty attaining the decent work objective. In Canada, the black community and a recent case involving some of its most precarious members is an important starting point for these discussions.

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<sup>30</sup> Sen, "Development as Freedom", *supra* note 17. One notes, strikingly, that Sen's work includes a rather deep systemic critique of (in)equality, drawing frequently on references to African Americans, which leads one to question whether freedom can stand inequality. Martha C. Nussbaum engages this relationship in her different but related use of the capabilities approach in *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000). See also Martha C. Nussbaum, "Women and Equality: The Capabilities Approach" (1999) 138 *Int'l L. Rev.* 227 [Nussbaum, "Women and Equality"] (drawing on human dignity as a starting point for cross-cultural applications of the capabilities approach to the question of equality).

<sup>31</sup> Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *U. Penn. L. R.* 1 at 29.

<sup>32</sup> Alston, "Complexities", *supra* note 8 at 473; Philip Alston and Mary Robinson, eds., *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005).

<sup>33</sup> See David Beatty, "Ideology, Politics and Unionism" in Ken Swan and Katherine Swinton, eds., *Studies in Labour Law* (Toronto: Butterworths, 1983) 299.

<sup>34</sup> See Dianne Otto, "Rethinking the 'Universality' of Human Rights Law" (1997) 29 *Colum. H.R.L. Rev.* 1 at 34.

## II. New Economy Labour Market Inequality in the Black Community in Canada

### A. The Literature

As a colonial society, Canada was explicitly founded on the premise that a white settler nation would be established. In other words, an overseas replica of Britain (and France) would be created and maintained, despite the original, aboriginal inhabitants, and through restrictive immigration policies.<sup>35</sup> This has important implications for the “place” of members of the black population in the domestic labour market.

While the black population in Canada is traced back to Matthew da Costa who accompanied the first European explorers, free Black Loyalists enticed by the unfulfilled promise of equal treatment arrived in important numbers.<sup>36</sup> The black population also came in significant numbers to fight in the First and Second World Wars and, in a segregated economy, to work as porters on the railway system. The most significant wave of immigration began with domestic workers’ schemes, notably that of 1956,<sup>37</sup> which became a foot in the door for more open immigration options for racialized immigrants in the 1962 *Immigration Act* (family reunification and admission of skilled immigrants) and the 1967 *Immigration Act*, which introduced a facially neutral points system.

Throughout this segment of Canadian history, evidence of a split labour market has remained.<sup>38</sup> Recent reports on the conditions of racialized workers in the Canadian labour market paint a uniformly troubling picture of “large, disturbing, and growing gaps in economic security and opportunity which are based upon racial status.”<sup>39</sup> Racialized workers are “over-represented in lower paid occupations usually

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<sup>35</sup> See generally Sherene Razack, ed., *Race, Space and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines Press, 2002).

<sup>36</sup> They received one acre of land whereas their white counterparts received one hundred acres.

<sup>37</sup> The first domestic workers’ scheme was in 1910, when 100 women from Guadeloupe were sent to Quebec. It is telling that at the time, the women arrived with permanent resident status; among other reasons, the Minister of Citizenship and Immigration and Minister of Labour referenced the following: “To deprive those coming forward under this plan of the status of landed immigrants would be interpreted by many as an attempt at forced labour and charges of discrimination would inevitably result.” See Canada, Department of Foreign Affairs and International Trade, *Documents on Canadian External Relations*, “Admission of Domestic Workers from the B.W.I.: Memorandum from the Minister of Citizenship and Immigration and Minister of Labour to Cabinet,” (Confidential Cabinet Document No. 131-55, Vol. 21), online: <<http://www.dfait-maeci.gc.ca/departement/history/dcer/detailsen.asp?intRefid=1354>>.

<sup>38</sup> Grace-Edward Galabuzi, “Canada’s Creeping Economic Apartheid: The Economic Segregation and Social Marginalization of Racialised Groups” CSJ Foundation for Research and Education (May 2001) at 62 and note 127, online: Centre for Social Justice <<http://www.socialjustice.org/pdfs/economicapartheid.pdf>>, citing Edna Bonachich’s work [Galabuzi, “Economic Apartheid”]. See also Agnes Calliste, “Sleeping Car Porters in Canada: An Ethnically Submerged Split Labour Market” (1987) 19 *Canadian Ethnic Studies* 1-20.

<sup>39</sup> Andrew Jackson, “Is Work Working for Workers of Colour?” Canadian Labour Congress (April 2005) at 1, online: Canadian Labour Congress <<http://canadianlabour.ca/updir/AJ-paper-Is-Work-Working-for-Workers-of-Colour-ENG.pdf>>. See also Leslie Cheung, “Racial Status and Employment

requiring less education and training, such as semi-skilled and other manual workers, sales and service workers, and clerical personnel.”<sup>40</sup> For example, according to one study 40 % of the harvesting labourers are from racialized groups.<sup>41</sup> They are similarly more likely to experience employment gaps than all other workers, with only 54 % of racialized workers employed for an entire year as compared with 59 % of all other workers.<sup>42</sup> Their jobs are more precarious, requiring dependence on employment insurance that is greater than all workers, but also increasing the likelihood that they will not qualify for employment insurance benefits because they worked an insufficient number of hours.<sup>43</sup>

Three findings are of particular importance, and respond to the kind of critique that suggests that educational attainment and integration into Canadian society do not account for the disparity. First, the levels of educational attainment is not a factor; indeed,

[o]verall, workers of colour are much more highly educated than all other workers, with similarly small proportions who have less than a high school education and a significantly higher proportion (32.5 % vs. 20.0 % or one in three vs. one in five) having a university degree or higher.<sup>44</sup>

Second, while one recent study finds that two-thirds of immigrant populations may earn employment that corresponds with their levels of competency within five years of arrival in Quebec,<sup>45</sup> studies that disaggregate data on the workforce participation of racialized minorities find significant disparities in employment levels, income, and full time versus part time status, not only for

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Outcomes” Canadian Labour Congress (October 2005) at 1, online: Canadian Labour Congress <[http://canadianlabour.ca/index.php/Wokers\\_of\\_Colour/834](http://canadianlabour.ca/index.php/Wokers_of_Colour/834)>.

<sup>40</sup> Jackson, *ibid.* at 4. See also Cheryl Teelucksingh and Grace-Edward Galabuzi, “Working Precariously: The Impact of Race and Immigrants Status on Employment Opportunities and Outcomes in Canada” Canadian Race Relations Foundation (May 2005), online: Centre for Social Justice <<http://www.socialjustice.org/pdfs/WorkingPrecariously.pdf>>. (“The labour market is segmented along racial lines, with racialized group members over represented in many low paying occupations, with high levels of precariousness while they are under represented in the better paying, more secure jobs” *ibid.* at 4).

<sup>41</sup> Galabuzi, “Economic Apartheid”, *supra* note 38 at 55.

<sup>42</sup> Jackson, *supra* note 39 at 6. Racialized women workers were the least likely to be employed all year (*ibid.*). See also Michel Audet, Jérôme Fradette & Aziz Ramzi, “L’intégration des immigrants au marché du travail dans la région de la capitale nationale: bilan et pratiques d’entreprises” (February 2002) ch. 2, online: Chambre du commerce du Québec <[http://www.ccquebec.ca/images/upload/Memoire\\_Immigrant.pdf](http://www.ccquebec.ca/images/upload/Memoire_Immigrant.pdf)>, who note that economic integration in Quebec depends on the country of origin, with the situation for visible minorities being apparently worse; unemployment rates amongst those from sub-Saharan Africa and the Caribbean are notably high (*ibid.* at 44).

<sup>43</sup> Jackson, *ibid.* at 6.

<sup>44</sup> Cheung, *supra* note 39 at 27-28. Moreover, only 9.3 % of the Canadian-born workers of colour have less than high school, while 37.5 % have at least a bachelor degree (*ibid.* at 27). See also Jackson, *supra* note 39 at 1; Galabuzi, “Economic Apartheid”, *supra* note 38 at 59-60 and 65-66.

<sup>45</sup> See Québec, Ministère de l’Immigration et des Communautés culturelles, *Un emploi correspondant à ses compétences? Les travailleurs sélectionnés et l’accès à un emploi qualifié au Québec* by Jean Renaud and Tristan Cayn (Montréal: Ministère de l’Immigration et des Communautés culturelles, 2006) at 10.

racialized immigrants, but also for Canadian-born racialized workers.<sup>46</sup> The latter reports explicitly call the “catch up” theory into question, noting that :

[i]mmigrants used to catch up quickly. But racialized people who came to Canada in the 1980’s have still not caught up. [...] And, racialized workers who are not immigrants, but were born in Canada and educated in Canada, still have lower earnings than comparable Canadian workers.<sup>47</sup>

Indeed, data suggest that “immigrant members of racialized groups have more in common, in terms of unemployment and incidence of low income, with Canadian-born racialized group members than with immigrants from Europe arriving in the same period.”<sup>48</sup>

Third, although unionization can contribute significantly to the rights that workers enjoy, the Canadian Labour Congress study recognizes the disparity that exists between unionized jobs and the participation of workers from racialized communities :

There are some occupations where unionization rates are relatively high, but workers of colour are significantly under-represented. These include teaching, skilled trades in construction, and some transportation occupations such as truck driving. There are other occupations where unionization tends to be low, but workers of colour are very over-represented in the workforce compared to their share of all workers. These include low paid jobs as child care workers, cleaners and janitors, taxi drivers, garment workers, and agricultural labourers.<sup>49</sup>

In other words, the representation gap is symptomatic of the problem of racial discrimination in the workplace and exacerbates it.<sup>50</sup> Indeed, the cultural impact of racism may also account for “the failure of social justice and labour organizations to mobilize effectively to respond to the crisis of racial inequality.”<sup>51</sup> In sum, the fact that Canadian-born and educated, racialized workers face these gaps leads the reports

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<sup>46</sup> See Jackson, *supra* note 39 at 1-2; Galabuzi, “Economic Apartheid”, *supra* note 38 at 60.

<sup>47</sup> Jackson, *supra* note 39 at 1-2. See also Cheung, *supra* note 39 at 24; Department of Human Resources and Skills Development Canada, Applied Research Bulletin “Employment-equity group” (Summer 2001) at 19; Galabuzi, “Economic Apartheid”, *supra* note 38 at 25.

<sup>48</sup> Galabuzi, “Economic Apartheid”, *supra* note 38 at 16.

<sup>49</sup> Jackson, *supra* note 39 at 16-17. The report further notes that racialized workers, “are found in significant numbers in some higher paid but largely non-union jobs, such as computer programmers. Finally, there are a few occupations where workers of colour are well-represented and unionization is high, such as nursing (though women of colour are more likely to be nurses aides than nurses)” (*ibid.* at 17).

<sup>50</sup> For a theoretical analysis of the relationship between collective representation and systemic discrimination, see generally Blackett & Sheppard, “Making Connections”, *supra* note 10.

<sup>51</sup> Galabuzi, “Economic Apartheid”, *supra* note 38 at 19.

to conclude that “[r]acial discrimination is a large contributing factor.”<sup>52</sup> One analyst has gone so far as to refer to this as “Canada’s creeping economic apartheid.”<sup>53</sup>

Although most of the studies speak generally about racialized workers, one study has taken care to note that the black population of Canada is more heavily concentrated in the Canadian-born category than the category of immigrants.<sup>54</sup> It is little surprise, therefore, that in the March 2006 Quebec Task Force Report on the Full Participation of Black Communities in Quebec Society (the Report),<sup>55</sup> access to employment was characterized as one of the main themes raised during the hearings, and that access both to public and parapublic services as well as private enterprises became a central feature of the report’s recommendations. Although it may be considered striking that the Ministry of Labour was not associated with the initiative, the Report specifically called upon the “Minister of Labour [to] make a request that the Commission de la construction du Québec create a position within its organization to oversee the interests and fair representation of Quebecers from visible minorities in construction trades,”<sup>56</sup> where racialized groups have tended to be underrepresented. It also strongly recommended that the Government of Quebec, as a large employer, should set an example to arrive at hiring in the civil service so that it reflects the diversity of the Quebec population.<sup>57</sup> Finally and strikingly for the following discussion in this paper, the Task Force questioned why there is a low number of racial discrimination complaints filed with the Commission des droits de la personne et des droits de la jeunesse and forwarded to the Tribunal des droits de la personne (Human Rights Tribunal).<sup>58</sup>

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<sup>52</sup> *Ibid.* See also Carol Agocs and Harish Jain, *Systemic Racism in Employment in Canada: Diagnosing Systemic Racism in Organizational Culture* (Toronto: Canadian Race Relations Foundation, 2001), who argue that “racial discrimination in employment is a serious problem that prevents the efficient operation of the labor market and causes significant losses for the national economy in terms of underutilized human resources as well as the personal suffering and loss of fair opportunities to a large segment of the society” (*ibid.* at 16). Both the Galabuzi and the Agocs & Jain accounts offer thoughtful, synoptic discussions of the various economic theories of racial discrimination, and their challenges.

<sup>53</sup> Galabuzi, “Economic Apartheid”, *supra* note 38.

<sup>54</sup> Cheung, *supra* note 39 at 6. The black population comprises 15.6 % of all persons of colour aged 15–64, and 29.4 % of whom are Canadian-born (*ibid.* at 7). See also Cynthia J. Cranford, Leah F. Vosko & Nancy Zukewich, “Precarious Employment in the Canadian Labour Market: A Statistical Portrait” (2003) 3 *Just Labour* 6 at 16-17, for an account which disaggregates data on the basis of racial origin, albeit in summary form with racial and ethnic origin sometimes overlapping.

<sup>55</sup> Yolande James (Chair) *et al.*, “Task Force Report on the Full Participation of Black Communities in Quebec Society” Ministry of Immigration and Cultural Communities (March 2006), online: Ministry of Immigration and Cultural Communities <<http://www.micc.gouv.qc.ca/publications/fr/dossiers/CommunautesNoires-RapportGroupeTravail-en.pdf>>.

<sup>56</sup> *Ibid.* at 17.

<sup>57</sup> *Ibid.* at 16.

<sup>58</sup> *Ibid.* at 11. It intimated that it might be appropriate to undertake legislative amendments to ensure that complainants can directly address the Tribunal. See also Carol Agocs, *Surfacing Racism in the Workplace: Qualitative and Quantitative Evidence of Systemic Discrimination* (December 2004), online: Ontario Human Rights Commission Race Policy Dialogue Conference Paper <<http://www.ohrc.on.ca/english/consultations/race-policy-dialogue-papers.shtml>> (noting that few cases on racial discrimination appear before human rights tribunals in part because of the difficulty associated with the evidentiary requirements).

With the paucity of formal complaints in the background, the importance of an analysis of a particular case is even greater. More poignant than any labour market overview is the vision of precarious employment<sup>59</sup> that unfolds through this recent Quebec Human Rights Tribunal decision.

## B. The Case Study of *Centre Maraîcher*<sup>60</sup>

No recent case captures the importance of status as a regulator of labour market segmentation on the basis of race more starkly than *Centre Maraîcher*. In that decision, five Canadian citizens/permanent residents of Haitian origin ostensibly won their human rights complaint alleging particularly blatant racial segregation in their workplace, a multi-million dollar, Châteauguay-based, export-oriented agricultural factory, Canada's largest producer of lettuce.<sup>61</sup> Yet, the decision is shocking for how much it does not address, and for the window that it provides onto how conditions that deny the most basic social and economic rights in Canada can fall through the cracks of the very legal mechanisms set up to eradicate inequalities. It leads us to the conclusion that identity and status continue to matter in the Canadian labour market; legal tools that purport to offer alternative approaches to address societal inequalities must in fact consider the root causes of the societal inequalities. Status is one such pervasive root cause, that predates and postdates industrialization. The *Centre Maraîcher* example is pivotal because it reflects work in an industry that epitomizes both the pre-industrial, feudal period in which "status" was determinative, and the post-industrial workforce of the new economy, in which agro-business commodifies labour as it does goods for production and trade across borders. The persistence of racism is juxtaposed with the new commodification of the global economy.

This case concerns members of the black community working in the agricultural sector just outside of Montreal. Often lost in discussions of this case is the fact that these workers are not migrant workers on temporary schemes that ensure their precariousness and segregation by confining them to the jobs for which they have entered the workforce. Of the four workers profiled in the case, three were permanent residents of Canada for many years, and one was a Canadian citizen. In

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<sup>59</sup> Leah Vosko and Judy Fudge have been leading contributors in efforts to reconceptualize debates away from the language of "vulnerability" or "atypical"/"non-standard" employment toward a concept that both challenges the implied "norm" and emphasizes structural characteristics of labour market inequality. See Leah F. Vosko, "Gender Differentiation and the Standard/Non-Standard Employment Distinction in Canada, 1945 to the Present" in Danielle Juteau, ed., *Social Differentiation: Patterns and Processes* (Toronto: University of Toronto Press, 2003) 25; Judy Fudge and L. F. Vosko, "Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law and Policy" (2001) 22 *Economic and Industrial Democracy* 271.

<sup>60</sup> I offer a more detailed discussion of this decision in Adelle Blackett, "Human Rights at Work, Legal Indeterminacy, and the Black Community in Canada: Critical Reflections on *Centre Maraîcher Eugène Guinois*" in David Divine, ed., *Multiple Lenses: Voices from the Diaspora Located in Canada* (Cambridge: Cambridge Scholars' Press, 2007) [forthcoming]. This section draws heavily on that analysis.

<sup>61</sup> See Power Manager, "Oceans of lettuce in the St. Lawrence River Valley: Largest producer of lettuce in Canada" *Power Manager News Letter* (November/December 2001), online: New Holland <[http://www.newholland.com/na/News/powermanager/issue42/PwrMgr\\_2.htm](http://www.newholland.com/na/News/powermanager/issue42/PwrMgr_2.htm)>.

other words, these workers had no immigration restriction on the kind of work that they could do. And, in a study conducted by the intermediary, the Union des producteurs agricoles (Union of Agricultural Producers or UPA), many of the day labourers are new immigrants, and 25 % of the day labourers had completed a university degree.<sup>62</sup> Yet, these people were required to accept some of the most precarious work that is presumed only to exist in the developing world. In the locally-rooted but export-oriented industries like agriculture, however, cheap labour is used to subsidize production and create “competitive” conditions for export abroad. While temporary labour schemes facilitate the importation of Third World labour, labour market inequality and the stereotypes that feed it, notably in the black community, permit this kind of labour-market condition to be perpetuated.

The four workers and approximately 92 other workers of Haitian origin worked largely as “day labourers” (a condition that is not supposed to exist any longer with the advent of modern labour laws), and in a few cases as workers paid on a weekly basis to pack carrots. They were not the only workers on this farm, the largest lettuce and carrot farm in Canada, an eight-million dollar per year agro-industrial factory (characterized in the media as a “family farm”) located on 1300 acres of land in Ste-Clothilde de Châteauguay, Quebec, which services both local and export markets. The striking feature is the heavy labour-market segmentation. First, there are the permanent employees, who are the family members and are white. Second, there are the regular employees, referred to in the decision as “local workers”. Yet, there is nothing unifying about the jobs that they perform – they range from mechanics, sales clerks, book-keepers and carrot packers. The regular employees are essentially the white employees who are not related to the permanent employees. Third, there are temporary or seasonal workers brought in on a specific immigration scheme from Mexico, and more recently Guatemala, who reside on the farm in separate accommodations from the others.<sup>63</sup> The Human Rights Tribunal decision mentions these workers but does not elaborate. And finally, there are the workers of Haitian origin – hired ostensibly on a daily basis,<sup>64</sup> through a middleman,

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<sup>62</sup> UPA, Comité sectoriel de main d’œuvre de la production agricole, “Étude sur les conditions de travail en production maraîchère (légumes de plein champ)” (September 2005), online: <<http://www.cose.upa.qc.ca/pages/SerieRapportEtudes.aspx?lang=Fr-Ca>>. According to the report: “Le niveau de scolarité des répondants apparaît relativement élevé compte tenu des exigences de l’emploi. Ainsi, 17 % des saisonniers et 25 % des journaliers ont une formation de niveau universitaire. Il est connu qu’un bon nombre de travailleurs inscrits à Agrijob sont des immigrants récents et que plusieurs d’entre eux ont une bonne formation. Plusieurs de ces immigrants seraient en attente d’une reconnaissance d’équivalence de leur formation. À titre de comparaison, au Québec, le nombre de personnes ayant atteint un niveau de formation universitaire représentait 18,6% de la population des 20 ans et plus en 2001” (*ibid.* at 70).

<sup>63</sup> The particular precarity of the migrant workers is beyond the scope of this paper but has been the subject of significant recent analysis. For a broader policy discussion at the international level, see Ryszard Cholewinski, “International Labour Law and the Protection of Migrant Workers: Revitalizing the Agenda in the Era of Globalization” in John D.R. Craig and S. Michael Lynk, eds., *Globalization and the Future of Labour Law* (Cambridge: Cambridge University Press, 2006) at 445.

<sup>64</sup> The very notion of the “day labourer”, who is subordinated to the employer’s will but offered no employment security and, indeed, often recruited and paid by an intermediary owning little more than a truck and a driver’s license, runs contrary to the theoretical foundations of labour law. Labour law in its most rudimentary protective function is meant to resist the abject commodification of workers’

a professional syndicate called the UPA. These workers congregated at the Longueuil metro station in the greater Montreal area after receiving a boarding pass from the UPA, were “recruited” and transported early in the morning to the various farms,<sup>65</sup> then returned to the metro station late at night. They were responsible, alongside the Mexican and Guatemalan workers, for much of the harvesting, although one of the claimants was transferred to the packing of carrots and, as a result, later paid on a weekly basis. However, the details of the facts suggest that even when transferred to the packing of carrots, the work was segregated by race, as those workers of Haitian origin were the only ones responsible for moving the 50 pound bags once they were full of carrots.

The decision is subject to three forms of compartmentalization that call into question the efficacy of adopting an economic and social rights framework, as opposed to a civil and political rights framework without paying adequate attention to the issue of status. First, the decision focuses exclusively on the inequality of conditions of work between categories of workers without questioning the inherent segregation of the hiring. Strikingly, the Quebec Human Rights Tribunal appears to overlook entirely the blatant evidence of occupational segregation on the basis of race. In language familiar to civil rights litigation, it focuses on the separate but unequal facilities, without actually challenging the separate but unequal distribution of employment. The intrinsic status elements of the hiring practice remain invisible. The common sense understanding of the place of black workers in the agricultural economy is arguably so palpable, that it is simply not seen, and remains unchallenged by the legal body most specialized in recognizing discrimination. Indeed, in one newspaper article, an agricultural industry employer explained the labour market “preference” for black workers by stating that they were naturally more suited to this kind of backbreaking work.<sup>66</sup> The workplace is racialized, and the racialization is so much a part of the common sense in the workplace that it is not even “seen” or challenged in this case.

Instead, *Centre Maraîcher* is considered a human rights case that can be litigated because the agricultural factory had a heated, clean cafeteria and functioning toilet facilities for its white workers only. Black workers were refused access to these spots and were, instead, expected to use an unheated, insalubrious, green shack, an unsuitable place to change and unequipped with a functioning refrigerator, conventional toilet facilities, or even hot running water. At one moment, a sign, which the defendant farm admitted to posting, showing five smiling black people dressed in

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terms of exchange of their human labour on the market. Strikingly though, the status is implicitly accepted at a regulatory level by the « normes du travail ». See Québec, Commission des normes du travail, online: <[http://www.cnt.gouv.qc.ca/en/fiches/salaires\\_agricoles.asp](http://www.cnt.gouv.qc.ca/en/fiches/salaires_agricoles.asp)>.

<sup>65</sup> For a discussion of the transportation of essentially immigrant workers, see Myriam Simard and Isabelle Mimeault, “Exclusions légales et sociales des travailleurs agricoles saisonniers véhiculés quotidiennement au Québec” (1999) 54 *Relations Industrielles* 388.

<sup>66</sup> See Jeff Heinrich, “Migrants backbone of farm labour: Fatal crash shines light on middlemen. Support groups for field workers want rules on who bears responsibility for safety” *The (Montreal) Gazette* (8 July 2005) A12. (“If we didn’t have these people in Quebec, we’d be in deep s—t”, Les Jardins co-owner Simon Le Hesran said: “We’ve hired locals in the past, but they don’t last more than three days” *ibid.* at A12).



suits and ties with the logo of the Centre Maraîcher, was posted in French and Creole and was addressed to “all workers from Longueuil”, making it abundantly clear that there were indeed separate facilities for black workers, irrespective of what work they actually were doing, and that they should not go into the room reserved for “regular” (read white) workers.

The degrading conditions experienced by these workers, including further incidents of harassment, are chronicled at some length in the case and will not be repeated for the purposes of this paper.<sup>67</sup> The Human Rights Tribunal focused on the inequality of the conditions, without considering that the unequal employment itself reflected racism.

Second, the decision identifies and pays damages on the basis of individual wages, without questioning whether those damages correspond to a basic living minimum, and whether they are decent. In this regard, the human rights decision does not seek to consider whether the social and economic rights of the workers have been infringed, and indeed whether its award legitimates the infringements. Yet, arguably, if the human rights norms were being interpreted in a manner that considered both the symbolism of rights as well as the reasons for social regulation, then the damage awards themselves might have become the basis for problematization, rather than blind acceptance, of the status quo. For example, in the case of one of the workers, damages based on wages as limited as \$29.15 a day or \$145.75 a week were calculated. Note that the workers in this decision testified that they rose at 3:30 each morning to get to work and did not leave until the evening.<sup>68</sup>

The damage award in *Centre Maraîcher* only underscores the fact that these workers also fall through the cracks of other laws that are supposed to offer a protective shield, the provincial labour standards legislation.<sup>69</sup> In Quebec, those standards have partially excluded those who harvest, but include those who perform mechanized tasks.<sup>70</sup> In *Centre Maraîcher*, workers cut off the lettuce by hand so prior to 1 May 2003, were excluded from minimum wage protections.<sup>71</sup> Moreover, agricultural workers remain excluded from overtime pay,<sup>72</sup> a legislative exclusion that continues to date. The laws reflect historical forms of exclusion that perpetuate labour market inequality on the basis of race.<sup>73</sup>

<sup>67</sup> For a thorough account of working conditions, see Simard & Mimeault, *supra* note 65.

<sup>68</sup> See also Chris Gramstrom, “Heads Roll by the Millions, Lettuce Heads, That Is” *New Holland News Online* (April 2002), online: New Holland <[http://www.newholland.com/na/news/nhn/Apr02/V48No3\\_1.htm](http://www.newholland.com/na/news/nhn/Apr02/V48No3_1.htm)>. Referring specifically to the Centre Maraîcher Eugène Guinois, the article reports that “[a] normal work day for harvest crews is from 6am to 6pm. If rain is forecast for the next day, they may be asked to put in an extra hour or two the evening before” (*ibid.*).

<sup>69</sup> *Act respecting labour standards*, L.R.Q., c. N-1.1 [Act respecting labour standards].

<sup>70</sup> See notably *Regulation respecting labour standards*, R.R.Q., 1981, c. N-1.1, r.3, art. 2(6) [Regulation], which excludes employees performing non-mechanized operations linked to the picking of processing vegetables from minimum wage protections.

<sup>71</sup> For example, complainant Célianne Michel had damages based on a salary of \$145.75 per week, or \$29.15 per day. The minimum wage at the time was \$7.00 per hour.

<sup>72</sup> *Act respecting labour standards*, *supra* note 59 art. 54 (5) and (7).

<sup>73</sup> Prior to 1990, agricultural workers were excluded from minimum wage protections. Since 1990, agricultural workers were included, but numerous exclusions remained. On 1 May 2003, many

No expert testimony was called in the decision. Notably, though, industrial relations specialists Simard & Mimeault documented the conditions in the industry, and concluded that they fall below the level of what is legally and humanly tolerable.<sup>74</sup> The UPA itself, in a recent report on the vegetable farms, noted that employers considered the physical demands of the job (43 %) of farms questioned), the poor remuneration (35 %) and the poor working conditions (23 %) as the leading factors explaining why it is difficult to recruit workers.<sup>75</sup> Yet, the large firm employers responded that to resolve these recruitment difficulties, the majority took measures to hire foreign employees (50 %); another 23 % of respondents used intermediaries to find workers.<sup>76</sup> Only 13 % considered mechanization, and an even smaller number (barely 11 %) considered offering better working conditions.<sup>77</sup>

All damage awards considered, the multi-million dollar factory was condemned to pay less than \$65,000, including all moral and punitive damages, meant to underscore the severity of the acts and the seriousness of the Charter in its quest to eliminate racial discrimination.<sup>78</sup> There was no call for ongoing reporting by

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exclusions were removed. The *Centre Maraîcher* facts took place prior to the latest legislative reforms. One of the last remaining exclusion, for hand vegetable pickers, is to be removed from the legislation on 1 January 2007. The Minister of Labour has mandated a committee to examine the question of the appropriate wage standard that should apply to these forms of production. After that date, the only remaining legislative exception to the minimum wage law for agricultural employees will be for raspberry, strawberry and apple pickers; however, the workers are still expected to earn at least the general minimum wage rate if “for reasons beyond the employee’s control and linked to the state of the field or fruit” that worker cannot receive at least the same amount by using the piece rate to calculate the remuneration (*Regulation*, *supra* note 70, art. 4.1 par. 2). See art. 4.1 par. 1 of the *Regulation*, which provides a piece-rate minimum wage for those who manually harvest apples, strawberries and raspberries but is careful to ensure that the piece-rate system does not result in a lower minimum wage than that proscribed for general workers in art. 3 of the *Regulation*. See also Québec, Commission des normes du travail, “Les normes du travail dans les entreprises agricoles” Labour Law Analysis, Human Resources and Skills Development Canada (1 May 2005), online: Human Resources and Development Canada <[http://www110.hrdcdhrc.gc.ca/psait\\_spila/lmnec\\_esic/esic/salaire\\_minwage/intro/index.cfm/doc/english](http://www110.hrdcdhrc.gc.ca/psait_spila/lmnec_esic/esic/salaire_minwage/intro/index.cfm/doc/english)>.

<sup>74</sup> See Simard & Mimeault, *supra* note 65. (“*Notre étude a permis de constater que les conditions de travail offertes sur certaines fermes au Québec sont, par surcroît, en deçà du seuil légalement et humainement admissible*” *ibid.* at 396). The study in question was undertaken in May-June 1995.

<sup>75</sup> UPA, *supra* note 62 at 61.

<sup>76</sup> One notes that the intermediaries themselves may be from immigrant and visible minority communities and may bear a level of precarity of work that has been the subject of recent analyses, truck drivers. See Heinrich, *supra* note 66 at A12. In the case discussed in the article, the middleman is described as “a Punjabi firm in LaSalle” which “negotiates a price for the day’s work with the farmers, collects the workers in the early morning hours from a couple of metro stations in Montreal, takes them to the farm and returns hours later to bring them back to Montreal. The workers are paid cash at the end of each day.” Lines of responsibility are complex and leave room for considerable exploitation.

<sup>77</sup> UPA, *supra* note 62 at 63.

<sup>78</sup> Moral damages were \$10,000 for each of three complainants in *Centre Maraîcher* and \$12,500 for the fourth complainant. By contrast, in *C.D.P. c. Compagnie minière Québec Cartier* (1994) J.T.D.P.Q., no. 24, \$15,000 in moral damages was awarded to each employee for discrimination on the basis of age; \$15,000 in moral damages was awarded for discrimination on the basis of national or ethnic origin in *CDP c. Collège Montmorency* (2004) J.T.D.P.Q. no. 4, where the complainant was not accepted into a multimedia training program; and \$20,000 was awarded in moral damages for discrimination on the basis of handicap, when a boy was not allowed to attend regular classes, in *C.D.P. c. Commission scolaire régionale Chaveau* (1993) R.J.Q. 929.

the company, no investigation into systemic practices in the industry, no educational initiatives, no measures taken with respect to the over 90 remaining “workers from Longueuil” rendered easy targets for reprisals once the decision was rendered and media attention focused (temporarily) on the farm.<sup>79</sup>

Third, in what may be read as a parody of “representation” without equality and “protection” without rights, the decision sidesteps the question of how the panoply of “human rights at work”, including the economic and social, need appropriate regulatory and representational vehicles. In *Centre Maraîcher* and as is strikingly common in the new economy, “soft law” normative instruments are called upon as the basis through which “liability” may be avoided. As a result, another source of law increasingly prevalent in off-shore labour relations surfaces in this case.

The intermediary, the UPA, represents itself as a socially-conscious, representative body, protecting society’s common good through a respect for the land and the farming tradition, and promoting a non-discriminatory society. Yet, as the supplier of this temporary immigrant labour force to its agro-business membership each year, the UPA also assumes responsibility for the conditions under which those workers labour. The UPA is both the employers’ representative and the guardian of certain workplace norms. And, it has lobbied to prevent other representation of agricultural industry workers.<sup>80</sup>

To mediate this inherently conflicting role, the UPA has called upon a form of soft law, a self-regulatory instrument<sup>81</sup>—a “code of conduct”. And, when the indecent working conditions came to light in the decision and the UPA was asked to account for the situation, it sought refuge behind the existence of its *Code of good practices in human relations in the horticultural production sector of Quebec*.<sup>82</sup>

Funded in part by the Québec Ministry of Agriculture, the *Code of good practices* sets out some of the most basic working conditions imaginable; for example, it asks that the employers provide fresh water, functioning toilets, a change room, and a refrigerator. The conditions as listed are so basic that one cannot help but arrive at the conclusion that the UPA, and the government, is aware of the inhuman working conditions faced by day labourers recruited by the UPA. Yet, the UPA representative in this case could brandish the existence of this code.

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<sup>79</sup> It is not surprising that some of these workers sought to denounce the four who had complained and the limited public protest actions that ensued.

<sup>80</sup> See Simard & Mimeault, *supra* note 65, who note that: “*Au Québec, les salariés agricoles n’ont aucun représentant présent à la table du Comité sectoriel de main-d’œuvre de la production agricole ce qui devrait pourtant être le cas, d’après la Politique d’intervention sectorielle d’Emploi Québec. Pour l’heure, ce Comité est formé de 38 membres, tous de l’UPA [...] Il importe donc, dans ce contexte, de questionner le monopole de la représentation accordé à l’UPA en vertu de la Loi sur les producteurs agricoles*” at 405-406.

<sup>81</sup> For a compelling analysis of the use of *soft law* in international law, see Katia Boustany and Normand Halde, “Mondialisation et mutations normatives: quelques réflexions en droit international” in François Crépeau, ed., *Mondialisation des échanges et fonctions de l’état* (Bruxelles: Bruylant, 1997) at 37.

<sup>82</sup> The code, which appears not to be available on the UPA’s website, is available upon request from the UPA.

The code contains no complaints procedure. In *Centre Maraîcher*, the UPA representative testified that it inspects the farms only once every three years.<sup>83</sup> Moreover, the code emphasizes its purely voluntary character. The code, as a “soft” form of law that is increasingly prevalent in the new, globalizing economy, is relied upon not to provide these workers with rights that they would not otherwise have, but rather to protect those who defend the status quo from any further liability. In this sense, the “severe degradation” of the quality of legal rules over time, theorized by Boustany and Halde in respect of North-South relations, is paralleled in respect of working conditions that replicate the “South” in the post-industrialized countries of the “North”. For this reason, Boustany and Halde remind readers that those who dismiss soft law as somehow less than law in its quality overlook—at their peril—the time factor, notably the impact over time of the norms that the soft law contains on States and other subjects of law.<sup>84</sup>

### III. Equality, Capabilities and the Decent Work Agenda

The *Centre Maraîcher* decision, particularly in the absence of a systemic, proactive, investigative approach to racial segregation in the industry, is a sobering reminder that both economic and social rights, and the procedural framework associated with the civil and political rights framework, even in the robust labour law field, can be hollow for particular groups of precarious workers. It serves as a pessimistic reminder that neither economic and social rights nor civil and political rights constitute a panacea.

These are the insights of critical theory, which remind us both of the potential and limits of rights discourse. As Patricia J. Williams has eloquently insisted :

To say that blacks never fully believed in rights is true. Yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before; we held onto them, but the hope of them into our wombs, mothered them and not the notion of them. And this was not the dry process of reification, for which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite [...] The making of something out of nothing took immense alchemical fire.<sup>85</sup>

Critical race theory has been at the forefront of capturing both the limits and the potential of rights, recognizing that “the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly

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<sup>83</sup> *Centre Maraîcher*, *supra* note 1 at para. 149.

<sup>84</sup> See Boustany & Halde, *supra* note 81 at 40.

<sup>85</sup> Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, MA): Harvard University Press, 1991) at 163.

apparent need. Rather, the goal is to find a political mechanism that can confront the denial of need.”<sup>86</sup>

A normative framework that assesses the effectiveness of rights on the basis of their actual ability to redress the inequality faced by its most marginalized members is therefore necessary. Of course, critical race theory will deeply challenge the ability of any notion, inherently, to achieve in the abstract a result independent of notions of racial status and other structural factors. Yet, critical race theory insists on the need to reconstruct rights once their fundamental contradictions have been isolated, precisely out of a concern for fostering societal inclusion.<sup>87</sup>

The notion of “decent work”, therefore, despite a need for some caution, is argued to hold the potential to provide an important corrective to abstract articulations (and applications) of rights. The notion, while drawing on the “human dignity” language that emanates from the Preambles of both the *International Covenant on Economic, Social and Cultural Rights*<sup>88</sup> and the *International Covenant on Civil and Political Rights*,<sup>89</sup> is particular to the international labour law universe. And, while human dignity has also been critiqued for its sometimes abstract and potentially reductionist, articulations of rights,<sup>90</sup> cautious optimists who consider the normative reform process underway at the ILO might be inclined to consider the potential that decent work for all may have to root legal and policy prioritizations in the concrete lived experiences of marginalized workers.

The decent work language is not to be found in the *ILO Declaration*. Rather, it is encapsulated in the work of the ILO’s Director General Juan Somavía<sup>91</sup> and has been drawn upon to reformulate policy directions and outcomes throughout the organization, beyond the heavily re-conceptualized standard-setting function.<sup>92</sup>

The emphasis is, at once, on decent work and on “for all”. All is meant to include workers who fall outside of traditional employment relationships and, arguably, productive and reproductive labour. All includes, as well, refocusing attention on ensuring that “people” are not commodified in their work relationships in

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<sup>86</sup> *Ibid.* at 152.

<sup>87</sup> Angela P. Harris, “Foreword: The Jurisprudence of Reconstruction” (1994) 82 Cal. L. Rev. 741.

<sup>88</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 3 January 1976).

<sup>89</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976).

<sup>90</sup> See Susie Cowen, “Can ‘Dignity’ Guide South Africa’s Equality Jurisprudence” (2001) 17 S.A.J.H.R. 34, arguing that the notion of human dignity is irretrievably linked to negative freedom and autonomy, thus discouraging positive, redistributive measures. But see Sandra Liebenberg, “The Value of Human Dignity in Interpreting Socio-Economic Rights” (2005) 21 S.A.J.H.R. 1, for a robust defense of the potential of the human dignity as a value that reinforces human capabilities and equality. See also in the Canadian context Denise Réaume, “Discrimination and Dignity” (2003) 63 Louisiana L. Rev. 645, naming the conceptual difficulties underlying the Supreme Court of Canada’s interpretation of dignity as the principle underlying equality, but offering a fuller vision of dignity for the way forward.

<sup>91</sup> International Labour Conference, “Report of the Director-General: Decent Work” (June 1999) 87th Session, Geneva.

<sup>92</sup> See generally Jean-Claude Javillier and Bernard Gernigon, eds., *Les normes internationales du travail: un patrimoine pour l’avenir: Mélanges en l’honneur de Nicolas Valticos* (Geneva: ILO, 2004).

the new economy as well as the old. Arguably, the focus on decent work for all provides simply a different entry point for thinking carefully about the indivisibility of rights while prioritizing the operation of rights in terms of societal groups that are structurally the most marginalized. It meets the challenge of individualistic, abstract visions of rights in its apparent call to a level of empiricism that would consider the lived experience of workers. Asking whether member States like Canada sufficiently protect the economic and social interests of all Canadians, therefore, entails, in the labour rights context, asking whether labour regulation appropriately bridges the divide between civil/political rights and economic/social rights to ensure that marginalized societal groups reach the promise that decent work offers.

Significantly, though, the decent work aspiration calls upon a broader panoply of “implementation” devices than the civil/political rights versus economic/social rights dichotomy might otherwise allow. Calling them all “rights” does not quite capture the emphasis that even the *ILO Declaration* tries to place on “standard-setting, technical cooperation, and research resources [...] in the context of a global strategy for economic and social development [...]”<sup>93</sup> But, moving beyond the abstract articulation of liberal rights toward a more critical analysis of both the potential and limits of rights with a standpoint that considers societal discrimination from the perspective of disadvantaged groups is critical to harnessing the decent work potential.

I argue that an embodied rather than an abstract vision of decent work comes closer to a vision of human capabilities that sees equality (including the opposable right to equality) at its core.<sup>94</sup> Capabilities particularly as theorized by Nussbaum to ensure attention to equality seeking groups may be understood to lend to the notion of decent work an inherently distributional character.<sup>95</sup>

Decent work for all holds the potential to re-centre the painfully abstract international debate on the lived experiences of marginalized workers and would set normative prioritizations in terms of what human beings are empowered to do. The norm of equality, in particular, would move beyond merely “enabling” status; it would encompass substantive equality as both a process and a goal, substantive equality as inherent to an understanding of work itself as decent. This has transformative implications for fundamental principles and rights at work.<sup>96</sup> And, it calls domestic legislators, when faced with labour standards exclusions that perpetuate the marginalization of precisely those societal groups that require legal

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<sup>93</sup> *ILO Declaration*, *supra* note 7, preamble.

<sup>94</sup> Nussbaum, “Women and Equality”, *supra* note 30 at 240.

<sup>95</sup> *Ibid.* at 241. The late Oscar Schachter argued persuasively that the notion of human dignity requires a minimal distributive justice component, to ensure that the essential needs of everyone are satisfied. See Oscar Schachter, “Human Dignity as a Normative Concept” (1983) 77 A.J.I.L. 848.

<sup>96</sup> See Blackett & Sheppard, “Making Connections”, *supra* note 10, where I have argued that “the term ‘effective’ [in ILO Convention No. 98 on Collective Bargaining] must be understood in a way that is sensitive to the interface between fundamental principles and rights at work. In other words, collective bargaining mechanisms cannot be considered to be effective if they structurally exclude from access to collective bargaining those disadvantaged workers to whom Convention No. 111 guarantees equality” (*ibid.* at 429).

empowerment, to reconsider the legitimacy of their prioritizations. Indeed, how a human rights tribunal in *Centre Maraîcher* might have called attention to the decent work deficit, when faced with a request to calculate damages on the basis of societal marginalization, is only one aspect of how “implementation” may be reconceived. Whether a commission and a tribunal would be galvanized to use their statutory powers to adopt measures beyond an individualized “victory”, with devastating consequences in terms of alleged firing of the remaining workers, would also be a part of this dialectic.

The decent work mandate, if it is understood not only to reinforce the indivisibility of economic and social rights with civil and political rights, but also to enable meaningful prioritizations on the basis of human capabilities, is potentially transformative. But, the architects and foot soldiers of fundamental principles and rights at work need then to be emboldened to imagine those principles and rights in a way that embraces worker empowerment. That notion needs to be infused at its core with a vision of equality that is substantive in character. Focusing on marginalized workers as well as the quality of their lives and the capabilities that they have to enhance it offers a palpable, promising way to ensure that social/economic rights share centre stage with civil and political rights on our understandings of what labour law is all about.