

Citation: Banks, Kevin, “The Role and Promise of International Law in Canada’s New Labour Law Constitutionalism” (2012) 16 CLELJ 233

Abstract: In the landmark BC Health and Fraser cases, the Supreme Court of Canada draws upon international law which treats the right to bargain collectively as a key aspect of freedom of association in the workplace, and takes the position that the Canadian Charter of Rights and Freedoms should be understood to give as much protection to that right as is given by international instruments which Canada has ratified. In Fraser, the Supreme Court (in reversing the Ontario Court of Appeal) holds that the core elements of the current statutory framework of Canadian labour law should not be constitutionally entrenched as the only acceptable way to protect the right to bargain collectively. However, the Supreme Court does suggest that a legal duty to bargain, based to some degree on that duty as it exists today in Canada, is an indispensable element of freedom of association. A problem with that view, the author argues, is that the many component parts of the current system of Canadian labour law are too interdependent to allow courts to isolate specific features of it for constitutional entrenchment in a way that would both vindicate freedom of association and leave Canadian legislatures with enough leeway to adopt new policy approaches to the regulation of workplace relations in the light of changing circumstances. Because International Labour Organization (ILO) jurisprudence sees freedom of association and the right to collective bargaining as basic human rights which are able to coexist with a wide range of legal frameworks, it can provide a solid foundation for the development of Canada’s new labour law constitutionalism. Some aspects of the ILO jurisprudence (such as some of its very tight restrictions on the imposition of alternatives to strikes) may, the author suggests, be ill-suited to the Canadian context, but most of it fits quite well with the existing Canadian model, and any problematic aspects can be managed within already established doctrinal structures of Canada’s new labour law constitutionalism.