

# The Role and Promise of International Law in Canada's New Labour Law Constitutionalism

Kevin Banks\*

*In the landmark B.C. 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.*

## 1. INTRODUCTION

The Supreme Court's landmark decision in *B.C. Health*<sup>1</sup> inaugurated a new era of labour law constitutionalism by ruling that the guarantee of freedom of association in section 2(d) of the

---

1 \* Faculty of Law, and Director of the Centre for Law in the Contemporary Workplace, Queen's University; B.A., LL.B. (University of Toronto), S.J.D. (Harvard). I would like to thank Erin Collins, Michael Comartin, Michael Edmonds, Jennifer Macko, Kyle Mitchell, Paula

*Canadian Charter of Rights and Freedoms* protects the right to bargain collectively. The Court saw collective bargaining as “the most significant collective activity through which freedom of association is expressed in the labour context,” and concluded that recognizing a constitutional right to bargain collectively would advance human rights values in accordance with Canada’s obligations under international law.<sup>2</sup> The Court also opened the door to the influence of international law in defining that right, by stating that the *Charter* “should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”<sup>3</sup> It went on to find not only that the *Charter* protected the capacity of employees to act in common to reach workplace goals,<sup>4</sup> but also that legislatures must not “substantially interfere” with the ability of workers (through their unions) to “exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith.”<sup>5</sup> However, the Court did not define the contents or even the contours of the right to bargain collectively, other than by relating it to the concept of good faith bargaining developed under Canadian labour law. Nor did it provide an account of how constitutional rights can ensure that such bargaining takes place.

The Court has since affirmed in *Ontario (Attorney General) v. Fraser* that the right to bargain collectively is “a right to a process that permits meaningful pursuit of workplace goals,”<sup>6</sup> and that section 2(d) should be interpreted in accordance with Canada’s international commitments.<sup>7</sup> However, when it came to identifying the specific meaning of the right to bargain collectively, the Court in *Fraser* relied once more on the Canadian concept of good faith bargaining, again without clearly articulating the relationship between the right to bargain and the practice of good faith bargaining. In neither *B.C. Health* nor *Fraser* does the Court carefully

---

Saliba, Joanna Si, Eric Uhlmann and Breana Vandebek for valuable research assistance, and the Law Foundation of Ontario for funding that assistance.

□ *Health Services and Support-Facilities Subsector Bargaining Ass’n v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*B.C. Health*].

2 *Ibid* at paras 70-85.

3 *Ibid* at para 70.

4 *Ibid* at para 89.

5 *Ibid* at para 90.

6 2011 SCC 20 at para 38, [2011] 2 SCR 3 [*Fraser*].

7 *Ibid* at para 32.

canvass or apply Canada's international legal obligations with respect to collective bargaining. Thus, despite a robust appeal to international law in recognizing the right to bargain collectively, and despite repeated statements that section 2(d) should be interpreted in accordance with Canada's international commitments, the Court has yet to make use of international law in the concrete definition of that right.

The key jurisprudential challenge presented by labour law constitutionalism — drawing the line between aspects of worker collective action requiring constitutional protection and those which should be left to government policy-making — has been put off to another day. Meeting this challenge requires a jurisprudential framework that can derive concrete protections from the broad human rights purposes served by the right to bargain collectively, but with no more specificity than is needed to give effect to those purposes. Without such concrete content, the right to bargain collectively will be meaningless in practice. On the other hand, construing its required content in too much detail would intrude unjustifiably into the legislative sphere and take the courts beyond their legitimate role as rights guarantors.

In this paper, I offer what I believe is the first detailed analysis of the legal implications of interpreting section 2(d) in accordance with Canada's international commitments. I argue that the prospects for Canada's new labour law constitutionalism would benefit from (and may indeed be significantly dependent on) a better and fuller use of international labour law by our courts. In Part 2, I describe the efforts of the Supreme Court to define the right to bargain collectively by drawing on Canadian legal concepts, and how the Court appears to be framing that right in a way which is either inadequate to its purposes or does not give it sufficiently predictable content. This, I argue, is a function of the Court's attempt to extract fundamental principles from an idiosyncratic Canadian labour relations law model — a model which resists being deconstructed in that way because its parts are tightly interdependent and because it is not organized around general human rights concepts. In Part 3, I show how the jurisprudence of the International Labour Organization (the ILO) offers a specific human rights framework that is consistent with the purposes of the right to bargain collectively, but that does not constrain Canadian legislatures to adopt or retain a particular model of labour law. I argue that this framework maps well onto the existing Canadian constitutional landscape, and that conflicts

between ILO jurisprudence and Canadian law can be quite readily managed within that framework. Part 4 sums up and draws conclusions.

## **2. THE UNRESOLVED CONTENT AND CONTOURS OF THE CONSTITUTIONAL RIGHT TO BARGAIN COLLECTIVELY**

Section 2 of the *Canadian Charter of Rights and Freedoms* guarantees “fundamental freedoms,” including, in section 2(d), the “freedom of association.”<sup>8</sup> In *B.C. Health*, the Supreme Court of Canada concluded that section 2(d) protects “the capacity of members of labour unions to engage in collective bargaining on workplace issues”<sup>9</sup> — a protection grounded in a broader “right of employees to associate in a process of collective action to achieve workplace goals.”<sup>10</sup> Thus, in the Court’s words, “the legislature must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith.”<sup>11</sup> The Court went on to find that the government of British Columbia had breached section 2(d) by passing a statute<sup>12</sup> which set down rules on contracting out and laying off employees in the context of a planned restructuring of health care and social service delivery.<sup>13</sup> As the Court noted, that statute was passed without any meaningful consultation with the unions representing the affected workers, and purported to invalidate any past, present or future collective agreement terms that were inconsistent with its provisions.<sup>14</sup>

*B.C. Health* represented a decisive break with the Supreme Court’s prior freedom of association jurisprudence. It overruled a line of earlier decisions which began with the 1987 right-to-strike trilogy, and which held that section 2(d) gave no constitutional protection to

---

8 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

9 *B.C. Health*, *supra* note 1 at para 2.

10 *Ibid* at para 19.

11 *Ibid* at para 90.

12 *Health and Social Services Delivery Improvement Act*, SBC 2002, c 2, Part 2, ss 6, 9.

13 *Ibid*, s 10. See also *B.C. Health*, *supra* note 1 at paras 7, 11.

14 *Ibid* at para 11.

collective bargaining rights.<sup>15</sup> Those decisions had turned in part on concerns that such protection would require the courts to draw two types of supposedly unworkable distinctions. The first was the distinction between unions and other associations with economic aims which might also seek constitutional protection for their capacity to exert meaningful influence. In the pre-*B.C. Health* cases, the Court had avoided that distinction by drawing a bright line between the protected right to form an association and what it saw as the unprotected right to pursue the association's objects, one of which was collective bargaining. The second type of distinction that the Court had been reluctant to draw was between those aspects of worker collective action which called for constitutional protection and those which were to be left to legislative policy-making.

In *B.C. Health*, the Supreme Court adopted a “contextual approach” to freedom of association which enabled it to draw the first type of distinction, and thus set it on the path to dealing with the second. Rejecting as formalistic the idea of a bright line between forming an association (in this case, a union) and pursuing the association's objects (in this case, meaningful influence through collective bargaining), the Court endorsed a purposive approach to section 2(d) — an approach which asked whether the associational aspect of the activity in question (in this case, the activity of collective bargaining) was worthy of protection.<sup>16</sup> To answer this question, the Court looked to the historical and current significance of the type of association and the associational activity in question. After a review of various writings on Canadian labour history, the Court said:

By adopting the *Wagner Act* model, governments across Canada recognized the fundamental need for workers to participate in the regulation of their work environment. This legislation confirmed what the labour movement had been fighting for over centuries and what it had access to in the laissez-faire era through the use of strikes — the right to collective bargaining with employers.

---

15 See *B.C. Health*, *supra* note 1 at para 36, holding that the labour “trilogy” and *PIPSC* are not good law: *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, [38 DLR \(4th\) 161](#) [*Alberta Reference*]; *PSAC v Canada*, [1987] 1 SCR 424, [38 DLR \(4th\) 249](#) [*PSAC*]; *RWDSU v Saskatchewan*, [1987] 1 SCR 460, [38 DLR \(4th\) 277](#) [*RWDSU*]; *PIPSC v Northwest Territories (Commissioner)*, [1990] 2 SCR 367, [72 DLR \(4th\) 1](#) [*PIPSC*].

16 *B.C. Health*, *supra* note 1 at paras 31-32.

[H]istorically, [collective bargaining] emerges as the most significant collective activity through which freedom of association is expressed in the labour context.<sup>17</sup>

The Court went on to emphasize the current significance of collective bargaining in advancing the *Charter* values of dignity, liberty, equality, and autonomy, as well as the rule of law and democratic self-government.<sup>18</sup> In so doing, it looked not only to domestic considerations but, importantly for our purposes, also to Canada's international legal obligations under two United Nations covenants — the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights* — and under ILO Convention 87, *Freedom of Association and Protection of the Right to Organise*.<sup>19</sup> “The interpretation of these conventions, in Canada and internationally,” the Court went on, “not only supports the proposition that there is a right to collective bargaining in international law, but also suggests that such a right should be recognized in the Canadian context under s. 2(d).”<sup>20</sup>

Doubts have been expressed about the historical underpinnings of this sort of “contextual analysis” and its workability in other *Charter* contexts.<sup>21</sup> However, the Court's analysis does provide a principled basis for constitutionally protecting collective bargaining rights as the primary means by which Canadian workers have sought voice and influence in workplace governance. The Court treats the right to bargain collectively as a qualified right deriving from freedom of association, because it depends upon and is limited by contextual factors.

---

<sup>17</sup> *Ibid* at paras 63, 66.

<sup>18</sup> *Ibid* at paras 80-86.

<sup>19</sup> *Ibid* at para 71: “The sources most important to the understanding of s. 2(d) of the *Charter* are the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (“*ICESCR*”), the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (“*ICCPR*”), and the International Labour Organization's (ILO's) *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17 (“*Convention No. 87*”). Canada has endorsed all three of these documents, acceding to both the *ICESCR* and the *ICCPR*, and ratifying *Convention No. 87* in 1972. This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.”

<sup>20</sup> *Ibid* at para 72.

<sup>21</sup> See Brian Langille, “The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It” (2009) 54 McGill LJ 177; and Jamie Cameron, “Due Process, Collective Bargaining and Section 2(d) of the *Charter*: A Comment on *B.C. Health*” (2006-2007) 13 CLELJ 233 at 256-260.

Nevertheless, the right can enable workers to realize aims which enhance their human dignity and potential (e.g. workplace gains in equality or due process) and which might not otherwise be attainable.<sup>22</sup> This aspect of collective bargaining sets the activities of unions apart from those of other economic associations. Collective bargaining can adversely affect the interests of others (employers, and at times the general public), and many employers may choose to resist it with all lawful means at their disposal. However, to paraphrase Sheldon Leader, it is sometimes legitimate for one group's freedom to be used to limit that of another group in order to cope with a recognized imbalance in power, and thereby give the weaker group's demands a fair chance to be heard.<sup>23</sup>

**(a) Approaches to Defining the Right to Bargain Collectively: Prospects and Problems**

The Supreme Court again invoked international law, this time less committedly or convincingly, when it turned to the task of defining the content of the right to bargain collectively. Before considering how that task was handled in *B.C. Health*, a few words are in order about its complexities and risks, and about the options available to Canadian courts to deal with them. To define the content of a constitutional right to bargain collectively, the courts need to identify a set of rights that will give workers (through their associations) the ability to “exert meaningful influence over working conditions through a process of collective bargaining.”<sup>24</sup> However, the courts must do so without reaching any further than necessary into the balance of power between employers, workers and the general public, which should remain a matter of legislative policy. In other words, those rights should be defined broadly enough to leave room for a wide range of ways for legislatures to regulate and enable workers to exercise them, yet precisely enough for violations to be readily identified.

Not surprisingly, commentators have noted that even though the Supreme Court is justified in opening up a constitutional right to collective bargaining, it enters dangerous territory

---

22 For a discussion of this concept, see Sheldon Leader, “Can You Derive a Right to Strike from the Right to Freedom of Association?” (2009-2010) 15 CLELJ 271 at 284-286.

23 *Ibid.*

24 *B.C. Health*, *supra* note 1 at para 90.

in doing so.<sup>25</sup> Courts need a principled framework, grounded in human rights norms, to identify aspects of collective bargaining that require constitutional protection. Otherwise they may constitutionalize what is merely a transient model of collective bargaining or may leave too much to legislative discretion. There are essentially three ways to respond to this dilemma.

First, the courts could incrementally develop the right to bargain collectively, inquiring case by case into whether its purposes are being thwarted. This approach would minimize the risk of judicial over-reaching, but would obviously be slow in giving determinate content to the right, thereby generating uncertainty and inviting extensive litigation.

Second, the courts could draw on international law for a human rights-based framework of principles that would delineate the contours of the right to bargain collectively as an aspect of freedom of association at work. While there is little jurisprudence on the right to bargain collectively under either of the UN Covenants,<sup>26</sup> ILO supervisory bodies have developed a framework of the basic elements and necessary incidents to the right to bargain collectively, derived from principles of freedom of association.<sup>27</sup> Those bodies draw on the expertise of an international pool of prominent jurists and experienced worker and employer representatives, and on a tradition of incremental, consensus-based decision-making. Just as importantly, ILO jurisprudence applies general norms of freedom of association across a wide range of domestic legal systems, fashioning principles that are flexible enough to accommodate policy diversity but determinate enough to have been applied concretely in thousands of cases over more than 50 years. While this jurisprudence is not legally binding, it yields well-informed and persuasive guidance that has stood the test of time. The European Court of Human Rights has drawn on it to interpret freedom of association under the *European Convention on Human Rights and Fundamental Freedoms*.<sup>28</sup>

---

25 See e.g. Jamie Cameron, “The Labour Trilogy’s Last Rites: *B.C. Health* and a Constitutional Right to Strike” (2009-2010) 15 CLELJ 297 at 311 [Cameron, “Labour Trilogy”].

26 See *supra* note 19 and accompanying text.

27 See *infra* notes 124, 125, 126, 133, 152, 153, 154, 155 and accompanying text.

28 Keith D Ewing & John Hendy, “The Dramatic Implications of *Demir and Baykara*” (2009-2010) 15 CLELJ 165 at 174-175 and 181-182.



Third, by trying to extract fundamental principles from domestic labour law experience, Canadian courts may seek a path between rigid constitutionalization of the Wagner model and excessive deference to the legislature. Turning to Canadian labour law for guidance draws upon the most accessible repository of insights into how the law can enable meaningful collective bargaining, but it does pose two problems.

First, the labour law model now found in all Canadian jurisdictions — the Wagner model — has many interdependent components and resists the identification of a small number of core elements. The certification of exclusive bargaining agents, combined with the legal duty to bargain, enables employees to require employers to bargain collectively without resorting to strikes or other industrial action. A regulated right to strike (limited to certain times, and restricted by a range of procedural prerequisites) is counterbalanced by the similarly regulated right of employers to lock out employees or unilaterally change terms of employment, permitting parties to exert influence on each other to reach an agreement.<sup>29</sup> The legal enforceability of collective agreements through binding arbitration replaces the right to take industrial action to enforce the agreement.<sup>30</sup> Prohibitions against discrimination and interference protect the independence of the negotiating parties and the freedom of employees and employers to choose to bargain collectively in the first place. The components of this system are closely interconnected, and they cannot be pulled apart without harming the capacity of the system to foster meaningful collective bargaining.<sup>31</sup>

The second problem is that Canadian labour relations law does not articulate the functional components of the collective bargaining regime as basic human rights. Rather it deploys them as tools for attaining the policy goals of maximizing industrial peace and facilitating decentralized collective bargaining.<sup>32</sup> The Ontario *Labour Relations Act* (the

---

29 See generally Judy Fudge & Eric Tucker, “The Freedom to Strike in Canada: A Brief Legal History” (2009-2010) 15 CLELJ 333 at 349-351.

30 *Ibid.*

31 Roy Adams, “Union Certification as an Instrument of Labor Policy: A Comparative Perspective” in Bernard Adell et al, eds, *Labour & Employment Law: Cases, Materials, and Commentary*, 7th ed (Toronto: Irwin law, 2004) at 324.

32 *Ibid.*

OLRA),<sup>33</sup> for example, which is quite typical of such statutes across the country, does not identify the basic freedoms it seeks to protect, beyond simply stating that “[e]very person is free to join a trade union of the person’s own choice and to participate in its lawful activities.”<sup>34</sup> Those “lawful activities” are not defined, but are treated simply as those which the statute expressly permits or does not prohibit.<sup>35</sup> The rest of the statute’s extensive provisions implement a particular model of collective bargaining and the particular policy vision that underpins it.<sup>36</sup> The statute (and the board that interprets it) does not seek to offer guidance as to which human rights aims it might serve. It simply instructs the labour relations board, employers, unions and employees on their rights and responsibilities within Wagner-model labour relations policy.

Nor is there an extensive secondary literature analyzing Canadian labour law as human rights law. Almost all of the existing writing adopts the Wagner perspective. To the extent that basic elements of the right to bargain collectively can be extracted from the literature, they are identified as such because they happen to be essential to making the Wagner model work,<sup>37</sup> not because they help to distinguish basic human rights principles from the products of political compromise or the exercise of policy discretion. In sum, it would call for a great deal of judicial insight and creativity to identify the basic elements of Canadian labour law which enable collective bargaining, and to articulate those elements as broader human rights rather than as specific features of Wagnerism.

---

33 SO 1995, c 1, Sch A [OLRA].

34 *Ibid*, s 5.

35 See generally *CPR Co v Zambri* [1962] SCR 609, 34 DLR (2d) 654 (finding that lawful strikes constitutes a lawful activity of a trade union and that the Act protects the rights of employees to engage in same).

36 OLRA, *supra* note 33. The OLRA sets out in detail the processes for acquiring, terminating and succeeding to bargaining rights. It lays down a legal framework for the negotiation of collective agreements, primarily by imposing a duty to bargain, mandatory conciliation and restrictions on the timing of strikes and other industrial action. It stipulates the minimum content of collective agreements, and provides for their enforcement by rights arbitration.

37 The relatively few exceptions to this rule tend to be inspired by international or comparative law. See e.g. Roy J Adams, “From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining” (2008) 12 *Just Labour* 48; Ken Norman, “ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep” (2004) 67 *Sask L Rev* 591; Roy J Adams, *Industrial Relations under Liberal Democracy: North America in Comparative Perspective* (Columbia: University of South Carolina Press, 1995).

Of the three approaches I have just sketched out, the third one — extracting fundamental principles from domestic labour law experience — is probably the riskiest. Yet, as we will see, it appears to be the approach that the Supreme Court of Canada has begun to follow, however tentatively.

**(b) Two Ways of Looking at How *B.C. Health* and *Fraser* Have Defined the Right to Bargain Collectively: Cautious Incrementalism or Misguided Activism?**

In its analysis of what the right to bargain collectively entails, the majority of the Supreme Court in *B.C. Health* began by focusing on the purposes of the right. In order for *Charter* section 2(d) to be violated, interference with collective bargaining must be “substantial,” in the sense that it interferes with the “very process that enables [employees] to pursue [their] objectives by engaging in meaningful negotiations with the employer.”<sup>38</sup> More specifically, “the intent or effect [of a governmental measure] must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining.”<sup>39</sup> This inquiry, the Court said, “in every case is contextual and fact-specific,” and it must focus on “whether the process of voluntary, good faith, collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.”<sup>40</sup>

These directives are consistent with the first approach outlined above — the incremental and purpose-driven approach. The decision on the facts in *B.C. Health* can be read this way as well. In that case, the impugned legislation — the *Health and Social Services Delivery Act* — had effectively rewritten many of the terms of collective agreements and narrowed the scope of future collective bargaining. The Court’s inquiry focused on whether each instance of the overriding of a particular collective agreement provision significantly interfered with the capacity of union members to engage in meaningful negotiations with their employers and to

---

38 *B.C. Health*, *supra* note 1 at para 91.

39 *Ibid* at para 92.

40 *Ibid*.

pursue their collective goals in concert,<sup>41</sup> and if it did, whether the interference was nevertheless done in a way that preserved a process of good faith consultation and negotiation.<sup>42</sup> The Court's general lines of inquiry flow logically from a focus on whether the government's actions interfered with the capacity to engage in meaningful negotiations with the employer. Those governmental actions did not undermine the more basic capacities that enabled health and social services workers, through their unions, to engage in meaningful negotiations with their employers. The unions continued to have the legal and practical capacity to organize themselves and represent their members, and (except insofar as the legislation limited the scope of collective bargaining) to mobilize and deploy the economic influence of their members. While one can take issue with the Court's conclusions on the facts, its method of inquiry into whether the legislation substantially interfered with collective bargaining was in my view appropriate to the nature and extent of the interference in the particular case. The majority's reasons were sufficient to provide guidance in future cases where legislatures might rewrite collective agreement terms in the context of established bargaining relationships.

The Court's reasoning in *B.C. Health* became most problematic when it went beyond the facts at hand and tried to set out general considerations for the further delineation of the right to bargain collectively. The judgment suggested that the "fundamental precept of collective bargaining" is "the duty to consult and negotiate in good faith,"<sup>43</sup> and that "consideration of the duty to negotiate in good faith, which lies at the heart of collective bargaining, may shed light on what constitutes improper interference with collective bargaining rights."<sup>44</sup> These propositions were purportedly derived from "ILO principles of collective bargaining" and from the fact that "the *Canada Labour Code* and legislation from all provinces impose on employers and unions the right and duty to bargain in good faith."<sup>45</sup> The Court then offered a lengthy discussion of the content of the duty to bargain in Canadian labour law, and repeatedly emphasized how important the "process of good faith consultation" was to collective bargaining.<sup>46</sup> Those passages can be

---

41 *Ibid* at para 93.

42 *Ibid* at para 94.

43 *Ibid* at para 97.

44 *Ibid* at para 98.

45 *Ibid* at paras 98-99.

46 See e.g. *ibid* at paras 107, 129.

read as an attempt to build a theory of the core content of the right to bargain collectively based on Canadian jurisprudence on the duty to bargain, and to draw support from international law in doing so.

On this reading, *B.C. Health* is fraught with problems. Few would dispute that good faith bargaining is an important and desired outcome of the right to bargain collectively. However, it makes little legal, logical or practical sense to see that right as requiring legislatures to impose a legal duty to bargain on employers. First, there is no support in international law for doing so. As Brian Langille has ably and fully argued, one cannot derive a legal duty to bargain from ILO jurisprudence on freedom of association,<sup>47</sup> which treats the imposition of such a duty as an exception, permissible under limited circumstances, to the principle of free and voluntary negotiation.<sup>48</sup> In the ILO's eyes, the duty to bargain is an acceptable but certainly not a required means of facilitating collective bargaining.

More importantly, a legal duty to bargain is neither necessary nor sufficient to protect the capacities that the Supreme Court of Canada identified in *B.C. Health* as being furthered by the right to bargain collectively. That a legal duty to bargain is not *necessary* is shown by the fact that in many countries, collective bargaining functions very well without it.<sup>49</sup> That it is not *sufficient* becomes clear on a closer look at its content and purposes in Canadian labour law. As the Court noted in *B.C. Health*, the “duty to bargain in good faith does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions.”<sup>50</sup> The duty is in fact even more limited than that. It rarely imposes an obligation to change one's negotiating position on any given issue, or indeed on any issues at all,<sup>51</sup> but simply aims to rule out irrational or obstructionist negotiating tactics that could

---

47 Brian Langille, “Can We Rely on the ILO?” (2006-2007) 13 CLELJ 273 at 380-383 [Langille, “Can We Rely”].

48 See *infra* note 153.

49 Roy J Adams, “The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille” (2008) 14 CLELJ 317 at 325-326.

50 *B.C. Health*, *supra* note 1 at para 103.

51 See e.g. *Canada Trustco Mortgage Co and Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local 304*, [1984] OLRB Rep (October) 1356. The Supreme Court has held that an employer's refusal to include basic and standard terms in a

stand in the way of an agreement, such as an employer's refusal to deal at all with a union in the hope that employees will stop supporting it. If a party at the bargaining table cannot "exert meaningful influence over working conditions," enforcing a duty to bargain will not change the situation. That duty can only facilitate meaningful negotiations where workers enjoy basic background rights which enable them to organize and to deploy whatever economic influence lies at their disposal. *B.C. Health* left open the question of how the Court would respond where workers did not already have those rights.

Such a case was not long in coming. In *Fraser*, a group of employees at large-scale farming operations challenged the exclusion of the agricultural sector from the OLRA.<sup>52</sup> In its earlier decision in *Dunmore v. Ontario (Attorney General)*, the Supreme Court had held that this very exclusion from the OLRA violated section 2(d) by discrediting the organizing efforts of agricultural workers, reinforcing interference with those efforts by private employers, and thus having a chilling effect on the right to associate.<sup>53</sup> The government of Ontario had responded to *Dunmore* not by repealing the exclusion of agricultural workers from the OLRA but by enacting the *Agricultural Employees Protection Act, 2002* (the AEPA).<sup>54</sup> The provincial legislature narrowly tailored the AEPA to what the Supreme Court in *Dunmore* had said was necessary in order to respect freedom of association. The AEPA gave agricultural workers the right to join and form an association, to participate in its activities, to assemble, and to make representations on terms and conditions of employment to the employer through their association.<sup>55</sup> It prohibited employer interference in the exercise of such rights, or employer reprisals against any employee who exercised them.<sup>56</sup> It required agricultural employers to allow employee associations to make

---

collective agreement may lead to the inference that it does not intend to reach a collective agreement and is therefore in breach of the duty to bargain. See *Royal Oak Mines Inc v Canada (Labour Relations Board)*, [1996] 1 SCR 369. This does not necessarily mean that an employer must make any particular concessions, or perhaps any concessions at all, at the bargaining table.

<sup>52</sup> *Fraser*, *supra* note 6.

<sup>53</sup> 2001 SCC 94 at paras 43-48, [2001] 3 SCR 1016 [*Dunmore*].

<sup>54</sup> SO 2002, c 16 [AEPA].

<sup>55</sup> *Ibid*, s 1(2)(1-4).

<sup>56</sup> *Ibid*, s 1(2)(5).

representations, and it required employers to listen to or read those representations.<sup>57</sup> It gave the Agriculture, Food and Rural Affairs Appeal Tribunal (AFRAAT) the task of adjudicating complaints and remedying violations of the AEPA.<sup>58</sup>

In *Fraser*, the union led uncontradicted evidence that three separate agricultural employers had simply refused to negotiate with it despite the fact that it represented a majority of their employees.<sup>59</sup> Rather than seeking to enforce the AEPA through the AFRAAT, the union had gone directly to the courts with a challenge to the AEPA's constitutionality. The central question raised by this challenge would eventually become whether *B.C. Health's* recognition of the right to bargain collectively meant that the AEPA was now unconstitutional, despite its compliance with *Dunmore*.

*Fraser* was heard and decided at trial before the Supreme Court decided *B.C. Health*. The trial judge in *Fraser*, Farley J., cited dicta in *Dunmore* and in earlier Supreme Court decisions, and concluded that section 2(d) protected the right to organize but not the right to bargain collectively.<sup>60</sup> Since the AEPA did not prevent employees from forming associations, he reasoned, it did not violate section 2(d).<sup>61</sup> He also found that since the applicants had brought no complaints to the AFRAAT, it was premature to conclude that the tribunal could not or would not enforce the right to organize.<sup>62</sup>

Before *Fraser* reached the Ontario Court of Appeal, the Supreme Court decided *B.C. Health*. On the basis of *B.C. Health*, the Court of Appeal (in a decision written by Chief Justice Warren Winkler, who had a great deal of experience as a management-side labour lawyer) reversed Farley J. and held the AEPA to be unconstitutional. Given the vulnerability of agricultural workers and the fact that almost every other class of worker enjoyed the protections

---

<sup>57</sup> *Ibid*, s 5.

<sup>58</sup> *Ibid*, s 2(1) and 11.

<sup>59</sup> *Fraser*, *supra* note 6 at para 108.

<sup>60</sup> *Fraser v Ontario (AG)* (2006), 263 DLR (4th) 425 at paras 15-16, 20, 79 OR (3d) 219 (Sup Ct J).

<sup>61</sup> *Ibid* at para 19.

<sup>62</sup> *Ibid* at para 18.

of the general labour relations statute,<sup>63</sup> Winkler C.J.O. held that the failure of the AEPA to give those protections to agricultural workers had the effect of impairing their right to bargain collectively.<sup>64</sup> He went on to find that in order to protect that right, the Ontario legislature would have to put into place each of the following: (1) a statutory duty to bargain in good faith, because in its absence employers could simply refuse to meet and bargain;<sup>65</sup> (2) exclusive bargaining rights for an employee association which had majority support among a group of employees, because allowing multiple unions would lead to employer influence over those unions, because a unified workers' voice was needed to balance employer bargaining power, and because it would be impractical and unfair to employers to require them to deal with a multiplicity of voices;<sup>66</sup> and (3) a statutory mechanism for resolving bargaining impasses and disputes over the interpretation of collective agreements,<sup>67</sup> to ensure that the parties could bring an end to otherwise fruitless negotiations<sup>68</sup> and that an intransigent party could not block agreement indefinitely. The Court of Appeal did not explain why such a mechanism would have to be statutory, though it did note that the plaintiffs were not asking for a right to strike, without which statutory intervention would be the only alternative to unilateral employer imposition of contract terms.<sup>69</sup> What the Court of Appeal required in *Fraser* thus replicated many of the fundamental elements of the Wagner model.

This outcome was the result of approaching freedom of association and the right to collective bargaining from the standpoint of existing Canadian labour law, organized as it is around a duty to bargain in good faith. The stage was thus set for the Supreme Court of Canada to draw out the implications of the constitutional right to bargain collectively in circumstances where that right might make a real difference to the capacity of a disadvantaged group to exert

---

63 *Fraser v Ontario (AG)*, 2008 ONCA 760 at paras 78, 102-108, 301 DLR (4th) 335.

64 *Ibid* at para 81.

65 *Ibid* at paras 80-85.

66 *Ibid* at para 87-92. The Court of Appeal, at para 88, cites with approval Donald D Carter et al, *Labour Law in Canada*, 5th ed (The Hague: Kluwer Law International, 2002), identifying these first two elements as "common threads running through all Canadian collective bargaining legislation."

67 *Ibid* at paras 80-85.

68 *Ibid* at paras 82-83.

69 *Fraser*, *supra* note 6 at paras 44, 52-62.



meaningful influence over working conditions, and where it might substantially constrain the legislative prerogative to set labour relations policy in the agricultural sector.

In the result, in three different judgments, eight of the nine Supreme Court justices in *Fraser* reversed the Ontario Court of Appeal and held that the AEPA was constitutional. All eight showed an evident concern to avoid constitutionalizing the basic elements of the Wagner model.<sup>70</sup> Two of the eight, Justices Rothstein and Charron, would have gone as far as to overrule *B.C. Health* only four years after it was decided. Another, Justice Deschamps, would have effectively done the same thing, confining *B.C. Health* to its facts and requiring only the limited protections called for by the Supreme Court in *Dunmore*. The majority judgment, written by McLachlin C.J. and LeBel J. on behalf of five of the eight, upheld in general terms the right to bargain collectively recognized in *B.C. Health* but found that the AEPA had not (yet) been shown to infringe this right. The ninth member of the Court, Abella J., dissented. She would have upheld the Court of Appeal's judgment and struck down the AEPA.

The reasons of the five-judge majority are open to multiple readings. In places, they suggest that the challenge to the AEPA failed mainly for a lack of evidence of the concrete infringement of any rights, and not because the AEPA was necessarily constitutional on its face.<sup>71</sup> The majority repeatedly emphasizes, consistently with *B.C. Health*, that the right to bargain collectively protects the capacity of workers to exert meaningful influence in pursuit of collective workplace goals, that this is not merely a paper right, and that the government may not pass a law that makes it impossible to have meaningful negotiations on workplace matters.<sup>72</sup> It reads the AEPA as imposing a duty on agricultural employers not merely to consider employee

---

<sup>70</sup> See generally *Fraser*, *supra* note 6.

<sup>71</sup> *Ibid* at paras 2, 109.

<sup>72</sup> *Ibid* at paras 38, 42, and 46. The Court states that freedom of association “is not merely a paper right, but a right to a process that permits meaningful pursuit of those goals” (at para 38); that “the government may not set up a system that makes it impossible to have meaningful negotiations on workplace matters” (at para 42); and that “[l]aws or government action that make it impossible to achieve collective goals have the effect of limiting freedom of association, by making it pointless” (at para 46). It concludes, at para 117, that “[t]he bottom line may be simply stated: farm workers in Ontario are entitled to meaningful processes by which they can pursue workplace goals.”

representations but to consider them *in good faith*,<sup>73</sup> and it says that a failure to require employers to live up to that duty would be evidence of a failure to meet constitutional guarantees.<sup>74</sup> However, the majority notes that there had been no significant attempt by the union to make the AEPA work, and in particular that the union had not tested the enforcement process established under that Act.<sup>75</sup> The judgment endorses the trial judge's cautious hope that the tribunal would prove effective in vindicating workers' constitutional rights, while noting that further experience might demonstrate the need for legislative amendment in order to attain that goal.<sup>76</sup>

On the other hand, in many places in its judgment the majority suggests, equivocally and without fully defending the proposition, that good faith dialogue between employers and employee representatives is a legal obligation flowing directly from section 2(d) of the *Charter*.<sup>77</sup> At one point the judgment suggests not only that such dialogue is constitutionally required, but that legislation respects section 2(d) if it directly imposes such a requirement.<sup>78</sup> Nowhere does the Court explain why section 2(d) should be taken to impose a duty to bargain in good faith rather than simply protecting the capacity of private parties to engage in meaningful collective

---

73 *Ibid* at paras 101-104.

74 See e.g. *ibid* (the majority says that “what section 2(d) guarantees in the labour relations context is a meaningful process. A process which permits an employer not to even consider employee representations is not a meaningful process”: at para 42).

75 *Ibid* at para 109.

76 *Ibid* at para 110.

77 *Ibid*. The majority says: “Section 2(d) requires the parties to meet and engage in meaningful dialogue” (at para 41); “[Section 2(d)] . . . requires a good faith process of consideration by the employer of employee representations and discussion with their representatives” (at para 43); “Workers have a constitutional right to make collective representations and to have their collective representations considered in good faith” (at para 51); “*Health Services* affirms a . . . right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion” (at para 54).

78 See *ibid* at paras 2-3, where the majority states that section 2(d) “requires a process of engagement that permits employee associations to make representations to employers, which employers must consider and discuss in good faith . . . . The law here at issue, the AEPA, properly interpreted, meets these requirements, and is not unconstitutional.” The majority goes on to interpret the AEPA as requiring good faith consideration by employers of employee association proposals (*ibid* at paras 101-104).

bargaining, or why such a duty would always suffice to protect the ability of employees to pursue workplace goals.

The majority's failure in *Fraser* to set out a jurisprudential framework to guide the development of the right to bargain collectively is reflected in its equivocation on whether good faith bargaining is a factually necessary outcome or a legal requirement that in itself provides adequate protection for freedom of association. *Fraser* either offers insufficient guidance for future cases on statutory exclusions from the coverage of traditional labour relations statutes, or it points to a definition of collective bargaining rights that is inadequate to the Court's stated purposes.

### **3. THE POTENTIAL ROLE OF INTERNATIONAL LAW IN DEFINING THE CONTOURS OF THE *CHARTER* RIGHT TO BARGAIN COLLECTIVELY**

The Supreme Court has yet to canvass international jurisprudence on the meaning of freedom of association in any depth. In *B.C. Health*, the Court gave only one paragraph to this matter, referring briefly to a secondary source summarizing collective bargaining principles in ILO jurisprudence, and without considering under which ILO convention those principles had been developed under or whether Canada was bound by them.<sup>79</sup> In *Fraser*, the majority devotes only five paragraphs to the content of international labour law, and offers them only as a response to the partially dissenting reasons of Rothstein J. rather than to orient its own reasons.<sup>80</sup> The similarly brief discussion of international law by Rothstein J. aims only to refute the majority's claim that international law supports making a duty to bargain a central aspect of

---

<sup>79</sup> *B.C. Health*, *supra* note 1 at para 98.

<sup>80</sup> *Fraser*, *supra* note 6 at paras 90-95. The majority cites the ILO Committee on Freedom of Association's decision on the *Health and Social Services Delivery Act* for the proposition that "the government of British Columbia violated the employees' right to freedom of association" by unilaterally cancelling collective agreements (*ibid* at para 94). The Court further noted that "the ILO Committee of Experts has not found compulsory collective bargaining to be contrary to international norms" (*ibid* at para 95). This is the extent of the Court's reliance on specific norms of international law in *Fraser*.

freedom of association, and does not delve into what international law might require in the way of collective bargaining rights.<sup>81</sup>

The time has come to consider more closely the meaning and consequences of the Court's dictum in *B.C. Health* (echoed strongly in *Fraser*) that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."<sup>82</sup> This part of the paper will discuss what such a consideration might yield.

To be useful in guiding the development of the right to bargain collectively under the *Charter*, a human rights-based jurisprudential framework must be consistent with the purposes that inform the Supreme Court of Canada's interpretation of section 2(d), and must help to identify a set of incidents necessary to effect those purposes while refraining from dictating the details of policy choice. I will argue that ILO jurisprudence interpreting Canada's international obligations under Convention 87 and under the ILO Constitution can provide this sort of guidance.

Before turning to the substance of the argument, it is necessary to say something about the sources of international law — principally the ILO law — which define Canada's international commitments in this area. For practical purposes, there are four such sources. The first source is the text of the international treaties ratified by Canada. They are binding on Canada under international law, and they include ratified ILO conventions and the ILO Constitution. The second source is the ILO's landmark *1998 Declaration on Fundamental Principles and Rights at Work*, interpreting member state obligations under the ILO Constitution.<sup>83</sup> Such interpretive declarations can be read as expressions of the intent of the

---

81 *Ibid* at paras 247-250. Rothstein J. notes only, at para 248, that Convention 87, which has been ratified by Canada, "does not at any point specifically discuss collective bargaining."

82 *B.C. Health*, *supra* note 1 at para 70; and *Fraser*, *supra* note 6 at para 32, stating that freedom of association under the *Charter* "must be interpreted generously and purposively, in accordance with Canadian values and Canada's international commitments."

83 International Labour Organization, *1998 Declaration on Fundamental Principles and Rights at Work*, 37 ILM 1233, 86th Sess (ILO: Geneva, 1998) [*1998 Declaration*]. Article 2 of the

parties to a treaty, and therefore as providing authoritative guidance on the meaning of the treaty.<sup>84</sup> The *1998 Declaration* offers at least a persuasive and quite likely a binding interpretation of Canada's obligations under the ILO Constitution.<sup>85</sup>

---

*Declaration* sets out the obligations of all member states to respect and realize freedom of association and other principles in accordance with the ILO's Constitution. The clearest basis in the ILO Constitution for such obligations lies in Article II of the *Declaration of Philadelphia* (*infra* note 99), which provides in part as follows:

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice, the Conference affirms that:

(a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;

(b) the attainment of the conditions in which this shall be possible *must constitute the central aim of national and international policy*;

(c) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective. [emphasis added]

84 Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 633.

85 It is debatable whether the *1998 Declaration* is binding on all ILO members, binding on some, or simply persuasive. The ILO Constitution does not stipulate a process by which the Conference may interpret its provisions, but only provides for binding dispute resolution through adjudication. It might therefore be argued that such a declaration cannot be treated as conclusive in respect of member states' obligations, since they have not agreed to have the meaning of those obligations determined by a Conference vote. On the other hand, the ILO Constitution empowers the Conference to regulate its own procedures and set its agenda, and it may make decisions by simple majority vote (see arts 14, 16 and 17). Thus, it can be argued that states consent to *ad hoc* voting procedures on matters which include the interpretation of their obligations, and that by not objecting to the *Declaration* on the Conference's agenda they have in effect consented to this method of interpretation. However, even if one were to insist upon individual state consent to the *Declaration's* interpretation of ILO constitutional obligations, Canada could be understood to have given it by voting for adoption. See e.g. International Labour Conference, 86th Sess, *Record of Proceedings*, vol 1 (Geneva: ILO, 1998) at 22/11-22/29. The *Declaration* was adopted by a vote of 273 to 0, with 43 abstentions. See *ibid* at 22/47.

The third and fourth sources are the accumulated decisions of the two committees established by the ILO to advise its Governing Body and Conference, respectively, on the application of ILO conventions and constitutional principles: the Committee on Freedom of Association (the CFA) and the Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts). Neither of these committees is empowered under the ILO Constitution to issue legally binding decisions,<sup>86</sup> but they have nonetheless emerged as the primary vehicles for elaborating on the meaning of ILO conventions on freedom of association.

The better known of the two committees is the CFA, which is a tripartite body with government, worker and employer representatives and an independent chair. It examines complaints received directly from worker and employer representatives (mainly worker representatives) around the world. Since its establishment in 1951, the CFA has made recommendations to the Governing Body on more than 2,800 complaints, and it has built up a detailed and coherent set of principles on freedom of association and collective bargaining under the ILO Constitution and under ILO conventions, recommendations and resolutions. The CFA's persuasive authority is based on its specialized, impartial, tripartite and experienced composition, and on the balance achieved through its consensus-based decision-making process.<sup>87</sup>

The other committee, the Committee of Experts, submits comments to the Conference of the ILO<sup>88</sup> on reports provided by member states regarding measures taken by those states to implement ratified conventions.<sup>89</sup> The Committee of Experts consists of about 20 distinguished jurists, including retired and active judges and legal academics. Each year it issues a general survey of its comments on the application of conventions in a particular subject area. It has issued six general surveys on freedom of association and the right to bargain collectively, the last

---

86 That role is reserved to international dispute resolution mechanisms which have seldom been invoked. See Langille, "Can We Rely," *supra* note 47 at 368-374.

87 International Labour Office, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th ed (Geneva: ILO, 2006) at 2-3 [ILO, *Digest*].

88 These comments are submitted through the Conference Committee on the Application of Standards of the International Labour Conference, referred to as the "Conference Committee."

89 States submit these reports pursuant to Article 22 of the ILO Constitution.

in 1994.<sup>90</sup> Like the CFA, the Committee of Experts owes its persuasive authority to its impartiality and specialization, but its expertise is more juridical than that of the CFA.

A remarkable convergence in how the Committee of Experts and the CFA interpret freedom of association and the right to bargain collectively can be seen by comparing the Committee of Experts' 1994 *General Survey* with the CFA's *Digest of Decisions*. The work of each committee informs that of the other; the CFA often cites the Committee of Experts' general surveys,<sup>91</sup> and the Committee of Experts has referred to the accumulated principles of the CFA as "a veritable international law on freedom of association."<sup>92</sup> The juridical authority of the Committee of Experts and the more practical, consensus-based authority of the CFA have thus come to buttress each other.

Nonetheless, one must proceed with some caution in drawing guidance from the jurisprudence of either committee.<sup>93</sup> Because the CFA's mandate is to promote adherence to ILO constitutional principles of freedom of association, it often does not distinguish between principles derived from Convention 87 and from Convention 98. To determine whether a particular principle enunciated by the CFA applies to a state which (like Canada) has ratified one but not both of those conventions, it is necessary to consider whether the ratified convention addresses the principle in question. In addition, the CFA, again consistent with its promotional mandate, will often seek to conciliate disputes. In so doing, it may issue hortatory declarations based not on legal obligations but on ILO recommendations or on what it sees as good practice in light of the experience of its members. For this reason, in reading CFA reports and digests, it is again important to pay close attention to whether the relevant ratified convention imposes obligations which relate to the CFA principle in question. Finally, as both committees have only

---

90 Committee of Experts on the Application of Conventions and Recommendations, *General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No 87), 1948 and the Right to Organize and Collective Bargaining Convention (No 98), 1949*, Report III (Part 4B), 81st Sess (Geneva: ILO, 1994) [Committee of Experts, *General Survey*].

91 See e.g. ILO, *Digest*, *supra* note 87 at para 1038.

92 Committee of Experts, *General Survey*, *supra* note 90 at para 19.

93 See generally Langille, "Can We Rely," *supra* note 47 at 383-386.

persuasive (and not binding) authority, their jurisprudence should yield where the reasoning behind it is not convincing in the context in which it is sought to be applied.

With these considerations in mind, we can proceed to consider whether Canada's ILO commitments serve purposes consistent with those of the right to bargain collectively under the *Charter*, and whether those commitments offer a coherent and workable human rights framework that could inform *Charter* interpretation.

**(a) The Purposes of the Right to Bargain Collectively under the *Charter* and under Canada's International Commitments**

There is a striking similarity between the purposes of the right to bargain collectively recognized in Supreme Court jurisprudence and those recognized in ILO legal instruments by which Canada is bound. In *B.C. Health*, the Court said that “[t]he right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work.”<sup>94</sup> It went on to quote from one of its earlier decisions:

Working conditions, like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives of workers even outside their working hours. Expression on these issues contributes to self-understanding, as well as to the ability to influence one's working and non-working life.<sup>95</sup>

It then added the following:

Collective bargaining also enhances the *Charter* value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees. In 1889, the Royal Commission on Capital and Labour appointed by the Macdonald government to make inquiries into the subject of labour and its relation to capital, stated that “[l]abour organizations are necessary to enable working men to deal on equal terms with their employers”.<sup>96</sup>

---

94 *B.C. Health*, *supra* note 1 at para 82.

95 *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8, [2002] 1 SCR 156 at para 34 [*Pepsi-Cola*].

96 *B.C. Health*, *supra* note 1 at paras 84-85 [citations omitted]



On this understanding, liberty, autonomy, dignity and equality are advanced by protecting the capacity of workers to form self-governing organizations that can participate on equal terms in setting conditions of employment through collective bargaining. The right to collective bargaining thus serves the broader purpose of section 2(d), which (in the words of the majority in *Fraser*) is “the realization of individual potential through relations with others.”<sup>97</sup>

A similar set of purposes informs the ILO treaty instruments to which Canada is bound — the ILO Constitution and Convention 87.<sup>98</sup> The *Declaration of Philadelphia*, which forms part of the ILO Constitution, commits the ILO to the “central aim” of attaining conditions under which it is possible for “all human beings, irrespective of race, creed or sex, to have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.”<sup>99</sup> The ILO Constitution describes the proposition that “freedom of expression and of association are essential to sustained progress” as a fundamental principle on which the organization is based,<sup>100</sup> and commits the ILO to programs which will (among other things) achieve effective recognition of the right to collective bargaining.<sup>101</sup>

The *1998 Declaration* sheds further light on the broader purposes of the right to bargain collectively. It states that “in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate, and to achieve fully their

---

97 *Fraser*, *supra* note 6 at para 29 [citing *Dunmore*, *supra* note 53 at para 30].

98 International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, 31st Sess (San Francisco: ILO, 1948) [Convention 87].

99 This “central aim” in turn serves the ILO’s broadest mandate, stemming from its origins in the Treaty of Versailles, to achieve lasting peace through social justice. See *Constitution of the International Labour Organisation*, 28 June 1919, Can TS 1946 No 48, Preamble [ILO Constitution]; see also *Declaration Concerning the Aims and Purposes of the International Labour Organisation*, 10 May 1944, Can TS 1946 No 48, art II [*Declaration of Philadelphia*].

100 See *Declaration of Philadelphia*, *ibid*, art I(b).

101 *Ibid*, art III(e).

human potential.”<sup>102</sup> The *Declaration* goes on to say that ILO members have a constitutional obligation, by virtue of their membership in the organization, to respect and realize “principles concerning fundamental rights,” including “effective recognition of the right to collective bargaining.”<sup>103</sup>

As for Convention 87, its preamble reiterates the ILO’s constitutional commitment to freedom of association and to furthering effective recognition of the right to bargain collectively.<sup>104</sup> Convention 87 goes on to identify two core sets of worker rights: the right to establish and join organizations of their own choosing, and the right of those associations “to organize their administration and activities and to formulate their programmes.”<sup>105</sup> As we will see below, ILO supervisory bodies have interpreted the latter right broadly, as a right of workers to pursue and defend their interests through lawful dealings (including collective bargaining) between worker organizations and employers.<sup>106</sup>

The strong parallels between the purposes of the protection of collective bargaining in Convention 87 and the ILO Constitution, and those affirmed by the Supreme Court of Canada in *B.C. Health*, should now be clear. The ILO instruments and the *Charter* both see the right to bargain collectively as advancing freedom and the equality of opportunity to achieve human potential, by enabling workers to form organizations that can participate effectively in setting employment terms.

The next question is whether ILO jurisprudence can supply a coherent set of conditions and principles necessary for realizing those purposes in practice, while leaving enough room for member states to pursue legitimate and varying policy objectives.

**(b) Contours and Content: The Right to Bargain Collectively under Convention 87, and the Obligation to Realize its Effective Recognition under the ILO Constitution**

---

102 *1998 Declaration*, *supra* note 83 at para 5.

103 *Ibid*, art 2.

104 Convention 87, *supra* note 98.

105 *Ibid*, arts 2, 3, 10.

106 See *infra* notes 124-126.

(i) *Distinguishing Obligations under Convention 87 from Those under Convention 98*

A proper analysis of Canada's international labour obligations requires a close look at the differences between the obligations imposed by Convention 87 and those imposed by Convention 98 — differences which ILO jurisprudence often does not take into account. As noted above, the CFA frequently does not specify which of the two conventions serves as the basis for its findings. Often there is little need to do so; the content of Conventions 87 and 98 overlaps in places, and they are generally complementary. In addition, in the vast majority of cases the country in question has ratified both conventions.<sup>107</sup> The Committee of Experts, though it organizes its observations on a convention-by-convention basis, has not explained in general terms how it distinguishes between obligations under Conventions 87 and 98, again probably because the difference does not usually matter in practice. Canada, however, is one of only three countries that have ratified Convention 87 but not Convention 98. Brian Langille must be right in arguing that this matters.<sup>108</sup> The ILO Constitution allows states to choose which conventions they will ratify, and stipulates that a state which does not ratify a particular convention has no obligation to implement its provisions.<sup>109</sup> States do have obligations directly under the ILO Constitution to “realize the effective recognition” of the right to bargain collectively — obligations that are also recognized in the *1998 Declaration*.<sup>110</sup> Nevertheless, as Langille points out, whatever those obligations might be (a matter I will return to below), they cannot include all of the specific requirements imposed by conventions dealing with collective bargaining. This would be plainly contrary to the intentions of ILO member states at the time the *Declaration* was adopted.<sup>111</sup>

---

107 Brazil, Guinea-Bissau, Iraq, Jordan, Kenya, Lebanon, Malaysia, Morocco, Nepal, New Zealand, Singapore, Sudan, and Uzbekistan have ratified Convention 98, but not Convention 87. In total, 150 states have ratified Convention 87 and 160 have ratified Convention 98. See ILOLEX, *Ratifications of the Fundamental human rights Conventions by country*, online: <<http://www.ilo.org>>, last visited 12 July 2011.

108 Mexico and Myanmar are the other two. See generally Langille, “Can We Rely,” *supra* note 47 at 383-386.

109 ILO Constitution, *supra* note 99, art 5.

110 *1998 Declaration*, *supra* note 83, art 2.

111 Langille, “Can We Rely,” *supra* note 47 at 370.

While CFA jurisprudence has generally not needed to draw distinctions between obligations under Conventions 87 and 98, the division of tasks between the two conventions emerges readily from their texts. The principal difference with respect to collective bargaining rights lies not in the content of the rights set out in the two conventions but in the obligations assumed by states in relation to those rights. In general terms, Convention 87 protects the right to organize and the right of worker organizations to pursue and defend their members' interests, including the right to bargain collectively. Similarly, Convention 98 protects the rights of workers to establish, join and participate in the activities of trade unions, including collective bargaining, and the rights of worker organizations to operate free of interference.<sup>112</sup> However, all that Convention 87 requires of a state is that it not interfere with or impair the freedoms of workers and their organizations, and that it take necessary and appropriate measures to ensure the free exercise of the right to organize.<sup>113</sup> In contrast, Convention 98 requires that states take positive steps to protect all associational rights and to actively promote the full development of collective bargaining. These steps include not only adequate protection against anti-union discrimination and interference in worker organizations,<sup>114</sup> but also "measures appropriate to national conditions, where necessary, to encourage and promote the full development and utilization of collective bargaining" between employer and worker organizations.<sup>115</sup> The main effect of Canada's failure to ratify Convention 98 is therefore not on the substantive scope of the freedoms Canada has undertaken to respect, but on what positive action it must take to enable workers to exercise collective bargaining rights.

(ii) *The Scope of Freedoms Protected by Convention 87*

---

112 International Labour Organization, *Right to Organise and Collective Bargaining Convention*, 96 UNTS 257 (ILO: Geneva, 1949) arts 1, 2 [Convention 98].

113 Specifically, Convention 87 requires that public authorities not impede the lawful exercise of the right of worker organizations to govern themselves and to defend and pursue their members' interests. It also requires that "the law of the land shall not be such as to impair" those rights. See Convention 87, *supra* note 98, arts 3(2), 8. Finally, Article 11 requires that states must "take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise" (*ibid*, art 11).

114 Convention 98, *supra* note 112, arts 1(1), 2(1), 3.

115 *Ibid*, art 4.

What, then, is the scope of the freedoms that Canada has agreed to respect under Convention 87? What protections against government interference and impairment do they entail? The first thing to note is that the right to bargain collectively is inextricably linked to two other rights needed to make it meaningful — a right to organize and a qualified right to strike.

(A) THE INTERCONNECTION BETWEEN THE RIGHT TO ORGANIZE, THE RIGHT TO BARGAIN COLLECTIVELY, AND THE QUALIFIED RIGHT TO STRIKE

The ILO committees see freedom of association as enabling workers to pursue and defend their occupational interests by, among other things, organizing unions capable of bargaining collective agreements on wages and working conditions. The qualified right to strike is essential to this purpose. The text of Convention 87<sup>116</sup> specifies that the right to organize includes the right of all workers to freely establish and join organizations of their own choosing, as well as a right to the free functioning of those organizations.<sup>117</sup>

The right to bargain collectively is not stipulated in Convention 87. However, in the CFA's view, the preparatory work which preceded the adoption of Convention 87 clearly indicates that a main object of the guarantee of freedom of association was to "enable employers and workers to combine to form organizations independent of public authorities and capable of determining wages and other conditions of employment by means of freely concluded collective agreements."<sup>118</sup> As noted above, the preamble to that convention recites the ILO Constitution's commitment to further effective recognition of the right to bargain collectively. The CFA has repeatedly determined that the right to bargain collectively is an essential element of freedom of association, one derived from the right of worker organizations to organize their activities and formulate their programs (which *is* stipulated in Convention 87).<sup>119</sup> Similarly, the Committee of Experts has stated that the freedom of worker associations under Convention 87 to formulate

---

116 Convention 87, *supra* note 98, arts 2, 3.

117 ILO, *Digest*, *supra* note 87 at ch 3, 5, 6, 8, 9, 11, 12. This includes the right of worker organizations to draw up their own constitutions and rules, to elect representatives freely, and to organize their administration, activities and programs.

118 *Ibid* at para 882.

119 *Ibid* at para 881.

their programs with a view to defending the occupational interests of their members includes any activity to that end, and has noted that restrictions on collective bargaining are among the most frequent problems encountered in state legislation.<sup>120</sup>

The right to strike is not explicitly provided for in Convention 87. However, the Committee of Experts has noted that this right seems to have been taken for granted in the preparatory work for that convention.<sup>121</sup> The CFA recognized at its second meeting in 1952 that the right to strike is an “essential element of trade union rights,” and it has applied that principle ever since.<sup>122</sup> Both the CFA and the Committee of Experts have long treated the right to strike as “an intrinsic corollary of the right to organize protected by Convention 87.”<sup>123</sup> Both committees also see the right to strike as “one of the essential means through which workers and their organizations may promote and defend their economic and social interests,” and thus as serving the same purpose as the right to bargain collectively.<sup>124</sup> The right to strike is, however, seen as being qualified by its purposes: it is a fundamental right only when used to further or defend workers’ economic interests<sup>125</sup> — which, as noted above, have clearly been held to include efforts to reach a collective agreement.<sup>126</sup>

---

120 Committee of Experts, *General Survey*, *supra* note 90 at paras 128-129.

121 *Ibid* at para 142.

122 *Ibid* at para 146.

123 ILO, *Digest*, *supra* note 87 at para 523; Committee of Experts, *General Survey*, *supra* note 90 at para 151 (the Committee of Experts stated in 1973 that “a general prohibition of strikes constitutes a considerable restriction of the opportunities opened to trade unions for furthering and defending the interests of their members,” and this “prohibition may run counter to Article 8, paragraph 2, of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)”: at para 147). See also CEACR: *Individual Observation concerning Convention No 87, Freedom of Association and Protection of the Right to Organise, 1948* Canada (ratification: 1972) Published: 2004, online: <<http://www.ilo.org>> [CEACR, *Observation*].

124 ILO, *Digest*, *supra* note 87 at para 522; Committee of Experts, *General Survey*, *supra* note 90 at para 147. See also CEACR, *Observation*, *supra* note 123.

125 ILO, *Digest*, *supra* note 87 at para 520; Committee of Experts, *General Survey*, *supra* note 90 at para 147.

126 ILO, *Digest*, *supra* note 87 (The link between the right to strike and the right to bargain collectively is illustrated in the following statement of the CFA: “A provision which permits either party unilaterally to request the intervention of the labour authority to resolve a dispute may effectively undermine the right of workers to call a strike and does not promote voluntary collective bargaining”: at para 566).

(B) THE SCOPE OF EACH RIGHT

The right to organize, the right to bargain collectively and the right to strike have each given rise to a series of protections delineating a significant sphere of autonomy for workers and their associations. An extensive ILO jurisprudence identifies what are seen as the necessary aspects of each of those rights, and distinguishes between permissible and prohibited government limitations on them. Permissible limitations generally serve either to further the purposes of the rights in question or to recognize the priority of higher-order concerns such as avoiding immediate threats to public safety from the disruption of public services. I will now briefly sketch out the scope of each right.

The Right to Organize

Article 3.2 of Convention 87 prohibits a range of state actions that would undermine the autonomy of worker organizations in furthering and defending their members' interests, or workers' freedom to join and participate in such organizations. Prohibited forms of interference include requiring previous authorization for or imposing unduly cumbersome formalities on forming or joining a union,<sup>127</sup> showing favouritism or discrimination as between unions, imposing a union monopoly,<sup>128</sup> over-regulating internal union affairs,<sup>129</sup> and prohibiting or

---

127 See ILO, *Digest, ibid* at paras 272-274, 377; ILO, *Digest, ibid* at paras 325, 360-362 (prohibiting actions that preclude workers from organizing and joining worker associations); ILO, *Digest, ibid* at paras 275-293 (prohibiting governments from imposing legal formalities that unduly delay the formation of organizations or fix an unduly large minimum number of members). See also Committee of Experts, *General Survey, supra* note 90 at paras 45-47, 68-69.

128 ILO, *Digest, supra* note 87 at paras 363-368.

129 *Ibid* at paras 369-371, 375; Committee of Experts, *General Survey, supra* note 90 at para 225. ILO committees have warned against overly detailed, restrictive or discretionary rules concerning the expenditure of union funds (ILO, *Digest, supra* note 87 at paras 466, 485-494) and the process for electing trade union officials or those who may stand for election (*ibid* at paras 388, 391, 405, 429-439; Committee of Experts, *General Survey, supra* note 90 at para 112).

retaliating against union participation in political activities.<sup>130</sup> On the other hand, governments remain free under Convention 87 to pass laws to facilitate orderly collective bargaining,<sup>131</sup> to ensure internal union democracy and accountability,<sup>132</sup> and to avoid conflicts of interest within unions or on the part of senior managers.<sup>133</sup>

---

130 ILO, *Digest*, *supra* note 87 at paras 500, 503, 508, 511-514; Committee of Experts, *General Survey*, *supra* note 90 at para 165.

131 These include laws imposing reasonable legal formalities, such as union registration requirements (ILO, *Digest*, *supra* note 87 at paras 294-296; Committee of Experts, *General Survey*, *supra* note 90 at paras 71-75) and laws imposing a reasonable membership threshold (ILO, *Digest*, *supra* note 87 at paras 282, 292; Committee of Experts, *General Survey*, *supra* note 90 at para 81). They also include laws limiting or expanding the scope of a particular union's representation rights. There can be such limitations if they do not restrict the capacity of organizations to further and defend their members' interests, if they do not impose a trade union monopoly and do not prevent organizations and their members from affiliating with broader federations (see ILO *Digest*, *supra* note 87 at paras 318-324, 337). See e.g. CFA Case No 2403 (Canada/Quebec), Report No 338, ILO Official Bulletin, vol LXXXVIII, 2005, Series B, No 3 (Geneva: ILO, 2005), which considered the Quebec legislature's 2003 restructuring of bargaining units in health care. Three thousand bargaining units at about 400 locations were reduced to only four units per location. Employees with no obvious community of interest were put in the same bargaining unit, largely in the name of administrative efficiency. The CFA found that this was not a violation of freedom of association, as it did not restrict the right of employees to choose their associations and to be represented (see *Procureur-Général du Québec v. Confédération des syndicats nationaux*, 2011 QCCA 1247, 94 CCEL (3d) 1). Without referring to the CFA's views, the Quebec Court of Appeal reached the same conclusion on a *Charter* challenge, at least partly on the basis of the Supreme Court of Canada decision in *Fraser*. Finally, governments may give priority or exclusive representation rights to the unions that are most representative of workers in a particular workplace or industry (ILO, *Digest*, *supra* note 87 at paras 346, 355, 358). The 1994 *General Survey* states that in industrial relations systems which mandate a single bargaining agent to represent all members of a bargaining unit, the exclusive bargaining agent owes a duty of fair and equal representation to all members of the bargaining unit, not just union members (Committee of Experts, *General Survey*, *supra* note 90 at paras 97-99).

132 See e.g. ILO, *Digest*, *supra* note 87 at para 378 (laws requiring secret ballot elections for union office). See also ILO, *Digest*, *ibid* at para 465 (laws allowing authorities to take temporary control of a union in exceptional circumstances, subject to appeal to a judicial body).

133 See e.g. ILO, *Digest*, *ibid* at paras 247-251 (laws requiring managerial and supervisory employees to form or join associations separate from other workers). ILO committees have not considered whether such employees should have access to collective bargaining or the right to strike. See generally Committee of Experts, *General Survey*, *supra* note 90 at paras 66 and 88 (senior managers involved in strategic decision-making, and employees working directly with them in a confidential capacity, can be excluded from trade unions but must be permitted to form associations to further and defend their interests).



## The Right to Bargain Collectively

Article 3.2 of Convention 87<sup>134</sup> also grounds CFA jurisprudence which holds that governments may not interfere with the principle of “free and voluntary collective bargaining” through such measures as excluding important working conditions from the scope of bargaining, directly imposing collective agreement terms, unilaterally extending the duration of collective agreements, or imposing compulsory arbitration where parties do not reach an agreement (except in essential services and in the public service).<sup>135</sup> On the other hand, governments remain free to pursue industrial peace and facilitate orderly bargaining by giving exclusive or preferential bargaining rights to unions that represent a majority or plurality of a group of workers, by setting bargaining structures, or by imposing a legal duty to bargain on employers and worker organizations.<sup>136</sup> Within certain limits, governments may take steps to avoid or resolve

---

134 Convention 87, *supra* note 98. Article 3 reads as follows:

1. Workers’ and employers’ organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

135 In addition, governments may not prevent the enforcement of existing collective agreements, empower employers to unilaterally alter collective agreements, require administrative approval of collective agreements, or preclude parties from bargaining at industry level. See ILO, *Digest*, *supra* note 87 at paras 990, 940, 942-943, 992-994, 1001, 1012-1018, 1050; Committee of Experts, *General Survey*, *supra* note 90 at paras 251-259. Governments may, however, exclude from collective bargaining “matters which clearly appertain primarily or essentially to the management and operation of government business” rather than to conditions of employment. See ILO, *Digest*, *supra* note 87 at para 812. Determining the broad lines of educational policy has been given as an example of matters that can be excluded from collective bargaining. See CFA Case 1928 (Canada), Report No 310, ILO Official Bulletin, vol LXXXI, 1998, Series B, No 2, 117th Sess (Geneva: ILO, 1998) at para 175.

136 Committee of Experts, *General Survey*, *supra* note 90 at para 243.

negotiating impasses through mandatory conciliation<sup>137</sup> or through independent compulsory interest arbitration in essential services.<sup>138</sup>

## A Qualified Right to Strike

Finally, Article 3.2 of Convention 87 has been held to protect the capacity of workers, through their organizations, to take full or partial strike action<sup>139</sup> to further or defend their economic interests.<sup>140</sup> In particular, governments cannot impose sanctions for legitimate strikes, prohibit peaceful picketing, or impose compulsory arbitration except (as explained below) in the case of essential services or employees who exercise state authority.<sup>141</sup>

On the other hand, consistent with the qualified nature of the right to strike, governments need not allow purely political strikes, strikes decided upon long before negotiations take place,<sup>142</sup> or strikes over rights disputes.<sup>143</sup> Strikes may be restricted until reasonable negotiation, conciliation and arbitration procedures have been exhausted,<sup>144</sup> until reasonable strike notice has been given,<sup>145</sup> or until a strike has been approved by a secret ballot of employees.<sup>146</sup> To promote predictability, the right to call a strike may be given to the union rather than to individual workers.<sup>147</sup>

---

137 *Ibid* at para 246 (the *General Survey* clearly contemplates that governments may put in place mandatory conciliation procedures). Compare ILO, *Digest*, *supra* note 87 (the CFA, on the other hand, states that recourse to such bodies “should be on a voluntary basis”: at para 932).

138 *Ibid* at paras 566, 992-997.

139 *Ibid* at para 545; Committee of Experts, *General Survey*, *supra* note 90 at para 173.

140 ILO, *Digest*, *supra* note 87 at para 520.

141 *Ibid* at paras 548, 564-569, 572-574, 628-631, 648-653, 658-666; Committee of Experts, *General Survey*, *supra* note 90 at paras 170-176.

142 ILO, *Digest*, *supra* note 87 at para 528.

143 *Ibid* at para 532; Committee of Experts, *General Survey*, *supra* note 90 at para 167.

144 ILO, *Digest*, *supra* note 87 at para 551.

145 *Ibid* at para 552; Committee of Experts, *General Survey*, *supra* note 90 at para 172.

146 ILO, *Digest*, *supra* note 87 at paras 553-559; Committee of Experts, *General Survey*, *supra* note 90 at para 164.

147 ILO, *Digest*, *supra* note 87 at para 524.

In some circumstances, ILO jurisprudence recognizes that governments can legitimately limit the right to strike in favour of larger public interests. This is true in the case of essential services, which are narrowly limited to those where an interruption poses a clear and imminent threat to the life, personal safety or health of all or part of the population and to those provided by public servants who exercise state authority. In such cases, satisfactory conciliation and arbitration proceedings have to be made available in lieu of a right to strike.<sup>148</sup> Governments may also limit collective bargaining rights for a reasonable time for compelling reasons of national economic interest or economic stability, as long as workers' living standards are adequately protected.<sup>149</sup>

(C) LEVELS OF PROTECTION

As noted above, Convention 87 protects the right to organize, the right to bargain collectively and the right to strike not only from direct interference by the state, but also from indirect impairments. Specifically, Article 8.2 requires that the law of the land not be such as to "impair the exercise" of those rights. This implies that laws must not restrict other civil rights which are necessary to the exercise of Convention 87 rights.<sup>150</sup> It also implies that the law should not empower private actors to undermine those rights, and that a state can be held accountable in international law if this happens. The CFA has said that an employer may not refuse to reinstate some or all of the workers after a strike, unless those workers can challenge the fairness of the

---

148 *Ibid* at paras 572-587, 595-596; Committee of Experts, *General Survey*, *supra* note 90 at paras 156-164. Essential services include hospitals, electricity services, water supply, telephone services and traffic control services. In addition, governments may require that minimum service levels be maintained during work stoppages where "the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population" or where services are "of fundamental importance." See ILO, *Digest*, *supra* note 87 at para 606; Committee of Experts, *General Survey*, *supra* note 90 at para 161. Industries in which minimum service levels can be required include transportation, postal services, education, garbage collection, and petroleum production. See ILO, *Digest*, *supra* note 87 at paras 615-626.

149 See e.g. Case No 1806 (Canada), Report No 300, ILO Official Bulletin, vol LXXVIII, 1995, Series B, No 3 at paras 121-122; Committee of Experts, *General Survey*, *supra* note 1 at para 260.

150 ILO, *Digest*, *supra* note 87 at paras 30-41.

refusal before an independent tribunal.<sup>151</sup> The CFA has also characterized certain employer acts based on private law rights as violations of freedom of association, implying that the law should not enable such acts. Among them are dismissing workers for union membership or activities,<sup>152</sup> and excluding from the employer's premises union representatives who seek to present employee grievances.<sup>153</sup>

In addition, Article 11 of Convention 87 requires states to "take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize," thereby implying that states must take positive steps to protect the right. Such steps would logically include providing redress for actions by private actors which undermine the exercise of the right. These positive obligations also overlap with obligations recognized under the ILO Constitution.

(iii) *Obligations under the ILO Constitution*

Canada's membership in the ILO imposes obligations under the ILO Constitution to protect the exercise of freedom of association. The *1998 Declaration on Fundamental Principles and Rights at Work* states that all member states are to "respect . . . and realize . . . in accordance with the [ILO] Constitution . . . principles concerning . . . fundamental rights [including] . . . freedom of association and the effective recognition of the right to collective bargaining."<sup>154</sup> This obligation clearly extends beyond non-interference and non-impairment, as it requires states to affirmatively give effect to specified principles. The *Declaration* does not go so far as to impose

---

151 *Ibid* at para 853. The Committee has also said that it would not view with equanimity laws that treated virtually all industrial action as a breach of contract, made trade unions liable in damages for such action, or enabled employers to obtain injunctions against it (*ibid* at para 664).

152 *Ibid* at para 789.

153 *Ibid* at para 1107.

154 *1998 Declaration, supra* note 83, art 2. The *Declaration* does not stipulate which provisions of the ILO Constitution ground these obligations. The clearest basis in the Constitution is Article II of the *Declaration of Philadelphia*, which states that "the attainment of the conditions in which this shall be possible *must constitute the central aim of national and international policy*" [emphasis added].

all of the requirements of non-ratified conventions (such as, in Canada's case, Convention 98),<sup>155</sup> but its language is obligatory and cannot be read as imposing no duties whatsoever. Whatever the full content of the obligation to "realize principles concerning the effective recognition of the right to collective bargaining," that obligation must include giving effect to the principles that are fundamental to freedom of association. ILO supervisory bodies have consistently affirmed that "protection against all acts of anti-union discrimination" is fundamental to freedom of association,<sup>156</sup> as is "access to means of redress which are expeditious, inexpensive and fully impartial."<sup>157</sup> Against this background, the *Declaration* must in my view be taken at least to say that by virtue of their membership in the ILO, states are required to make their best efforts to prevent and provide redress against anti-union discrimination.

**(c) General Fit to the Task and Constitutional Structures Facing Canadian Courts**

ILO interpretations of Convention 87, together with the wording of the ILO Constitution, create a human rights-based framework capable of giving meaningful effect to the right to bargain collectively. As CFA jurisprudence makes clear, they impose no particular model of collective bargaining or labour relations, but leave room for many alternative labour law regimes and labour policies. They deploy a set of largely negative obligations of non-interference and non-impairment, supplemented by limited positive obligations to prevent and provide remedies for interference by private actors. Where workers are excluded from a labour law regime, Convention 87 does not demand their inclusion, but insists that they be given "genuinely similar rights and protections" which meet the convention's basic requirements.<sup>158</sup> Taken together, the right to organize, the right to bargain collectively and the right to strike, as interpreted by the

---

155 See Langille, "Can We Rely," *supra* note 47 at 370.

156 ILO, *Digest*, *supra* note 87 at para 799; Committee of Experts, *General Survey*, *supra* note 90 at paras 202-204.

157 ILO, *Digest*, *supra* note 87 at para 820; see also Martine Humblet et al, *International Labour Standards: A Global Approach* (Geneva: International Labour Office, 2001); Bernard Gernigon, Alberto Odero & Horacio Guido, "Freedom of Association" in *Fundamental Rights at Work and International Labour Standards* (Geneva: International Labour Office, 2003) 5 at 17.

158 See e.g. CFA Case 2257 (Canada), Report No 335, ILO Official Bulletin, vol LXXXVII, 2004, Series B, No 3 (Geneva: ILO, 2004) at para 175; CFA Case 2333 (Canada), Report No 340, ILO Official Bulletin, vol LXXXIX, 2006, Series B, No 1 (Geneva: ILO, 2006).

ILO, would suffice to enable workers to act collectively insofar as labour market conditions allow, and would therefore suffice to further the purposes of the right to bargain collectively under the *Canadian Charter of Rights and Freedoms*.

Furthermore, the nature and the extent of obligations imposed upon states by Convention 87 and by the ILO Constitution are broadly consistent with the fact that the reach of the *Charter* extends only to government action. Convention 87 and the ILO Constitution regulate direct state interference with protected rights, as well as state failures to close gaps in protective legislation or to amend other aspects of the law that impair protected rights. To the extent that the ILO Constitution or Convention 87 imposes positive obligations, those obligations will most often call for government action of the sort envisaged by section 32(1) of the *Charter*. In *Dunmore*, a majority of the Supreme Court of Canada held that where a legislative regime excludes certain groups of workers, and thereby substantially interferes with *Charter*-protected activity by “orchestrating, encouraging or sustaining” a violation of freedom of association by private conduct, that exclusion will violate the *Charter* and a court may order positive government action by way of a remedy.<sup>159</sup> Under-inclusive legislation may amount to a *Charter* violation if it licenses or affirmatively permits private actors to violate protected freedoms.<sup>160</sup> In *Dunmore* the

---

159 *Dunmore, supra* note 53 at paras 24-26. See also *Baier v Alberta*, 2007 SCC 31 at para 27, [2007] 2 SCR 673.

160 See *Dunmore, supra* note 53 at para 26:

[T]his Court has repeatedly held that the contribution of private actors to a violation of fundamental freedoms does not immunize the state from *Charter* review; rather, such contributions should be considered part of the factual context in which legislation is reviewed. Moreover, this Court has repeatedly held in the s. 15(1) context that the *Charter* may oblige the state to extend underinclusive statutes to the extent underinclusion licenses private actors to violate basic rights and freedoms. Finally, there has been some suggestion that the *Charter* should apply to legislation which “permits” private actors to interfere with protected s. 2 activity, as in some contexts mere permission may function to encourage or support the act which is called into question. If we apply these general principles to s. 2(d), it is not a quantum leap to suggest that a failure to include someone in a *protective* regime may affirmatively permit restraints on the activity the regime is designed to protect. The rationale behind this is that underinclusive state action falls into suspicion not simply to the extent it discriminates against an unprotected

Court recognized that “history has shown, and Canada’s legislatures have uniformly recognized, that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade,” and that “this forecloses the effective exercise of the freedom to organize,”<sup>161</sup> leaving some workers with no way to protect their interests except by quitting their jobs.<sup>162</sup> In such cases, Canadian jurisprudence, like that of the ILO, implies a right to positive protection against acts of discrimination for associational activity.

The main objection of principle to giving such prominent influence to international law lies in the separation of powers between the executive and legislative branches under the Canadian version of the British parliamentary system. The Canadian constitution allocates treaty-making power to the executive branch, and legislative power to Parliament and the provincial legislatures.<sup>163</sup> Because those powers are in the hands of two different branches of government, Canada takes a dualist approach to international law.<sup>164</sup> International laws applicable to Canada take effect in the domestic sphere only indirectly; they must first be made a part of our law by an appropriate act of domestic lawmaking.<sup>165</sup> Although there is little basis for arguing that the *Charter* directly implements international conventions,<sup>166</sup> Canadian courts do draw upon

---

class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms. [emphasis in original; footnotes omitted]

161 *Ibid* at para 20.

162 *Ibid* at para 41.

163 Lorraine Weinrib, “A Primer on International Law and the Canadian Charter” (2006) 21 NJCL 313 at 319.

164 *Ibid* at 318.

165 *Ibid* at 319. In practice, the federal government does not ratify international labour conventions without the assent of all provincial governments. This practice reflects the federal-provincial division of powers, which gives the provinces the bulk of constitutional jurisdiction over labour and employment matters. While the federal government’s treaty-making power allows it to enter into international labour conventions on behalf of Canada, the preeminence of provincial jurisdiction in labour and employment means that the federal government cannot implement those conventions without the assistance of the provinces. See *Reference Re: Weekly Rest in Industrial Undertakings Act (Canada)*, [1936] SCR 461 at para 46, 1 DLR 673.

166 Weinrib, *supra* note 163 at 322.

international law indirectly in interpreting the *Charter*.<sup>167</sup> The concern rooted in the separation of powers is essentially that courts should not be able to do indirectly (through the process of interpretation) what they cannot do directly — that is, apply international law which has not been implemented by a Canadian legislature.

Despite that concern, there are, as Lorraine Weinrib notes, three types of reasons for drawing on Canada's international human rights obligations in interpreting the *Charter*. The first lies in the fact that international instruments provided inspiration for the wording of the *Charter*, some of which strongly resembles the language in certain of those instruments.<sup>168</sup> Second, international human rights instruments have been used in the domestic law of other countries that are engaged in the post-World War II rights-protecting project, to help resolve particular issues in those countries.<sup>169</sup> The third argument stems from rule of law values — the idea that when Canada assumes a legal obligation on the international stage by ratifying a treaty, the *Charter* should be interpreted to further compliance with that obligation.<sup>170</sup> As Weinrib points out, even before *B.C. Health*, the Supreme Court of Canada used these three types of reasons a number of times to justify looking to Canada's international obligations in applying the *Charter*.<sup>171</sup>

#### **(d) Extent of Conflict with Canadian Law and Practice**

Current Canadian law and practice broadly comply with ILO standards in most respects. Most workers are free to organize their own associations, to bargain collectively, and (in a highly regulated but generally functional way) to exercise the right to strike.<sup>172</sup> In Brian Langille's terminology, the Wagner model, as implemented in Canada, generally instantiates ILO freedom of association principles and is broadly consistent with ILO jurisprudence.<sup>173</sup>

---

167 *Ibid.*

168 *Ibid* at 323-324.

169 *Ibid* at 326.

170 *Ibid* at 320.

171 *Ibid.*

172 See generally Kevin Banks et al, *North American Labour Relations Law – Comparative Guide to the Labour Relations Laws of Canada, Mexico and the United States* (Washington, DC: Commission for Labour Cooperation, 2000) at 40-80 [Banks, *North American Labour*].

173 Langille, "Can We Rely," *supra* note 47 at 388.



It would, however, be pure serendipity if a system of rules elaborated at the global level — even one that is part of an international human rights regime which Canada has helped to develop — happened to correspond perfectly with Canadian law and practice. Three significant aspects of Canadian labour law and government practice have run afoul of Convention 87 jurisprudence and will likely continue to do so: the exclusion of some categories of employees from statutory collective bargaining rights; certain restrictions on collective bargaining in the public sector; and certain restrictions on the right to strike.

Labour relations statutes across Canada expressly do not cover employees who exercise managerial responsibilities,<sup>174</sup> and some also exclude specific occupational groups.<sup>175</sup> As a result, the employment relations of those employees are governed by the common law, or in Quebec by the *Civil Code*, neither of which affords significant protection against interference with freedom of association in the workplace. Most unions are unincorporated associations, which the common law does not recognize as legal persons. Nor does it treat collective agreements as enforceable contracts, presuming instead that the parties to those agreements lack the intention to create legal obligations.<sup>176</sup> De facto enforcement of collective agreements at common law thus depends on the right to strike.<sup>177</sup> While employees who are not covered by Canadian labour relations statutes do not incur liability in tort simply by striking in support of demands made to their employers,<sup>178</sup> they are likely to have no legal recourse if their employer dismisses them for stopping work, and they may face financial liability for breach of their employment contracts.<sup>179</sup> Little if anything in the common law would prevent an employer from discriminating against an employee for associational activity.<sup>180</sup> An employer also remains free under the common law of trespass to

---

174 Banks, *North American Labour*, *supra* note 172 at 40.

175 *Ibid.*

176 *Young v Canadian Northern Railway*, [1931] 1 DLR 645 at para 25, 37 CRC 421 (PC).

177 *Ibid* at para 26.

178 *Crofter Hand Woven Harris Tweed Co v Veitchi*, [1942] AC 435, [1942] 1 All ER 147 (HL) [*Crofter*].

179 Ken Foster, “Strike and Employment Contracts” (1971) 34 Mod L Rev 275 at 275-276.

180 It might, however, be argued that such treatment would violate the emerging common law duty to treat employees with civility, decency, respect and dignity, or the common law duty of good faith and fair dealing in the manner of dismissal. For a discussion of these duties,

exclude union representatives from its premises. The CFA has said that the failure of Canadian law to give excluded employees protections genuinely comparable to those offered by labour relations statutes is inconsistent with Convention 87, which states that it applies to all workers “without distinction whatsoever.”<sup>181</sup>

Second, by placing statutory restrictions on the scope and outcomes of collective bargaining, Canadian governments have in recent decades frequently sought to maintain operational control over public services, to limit inconvenience or harm to businesses or individuals due to labour disruptions, and to limit payroll costs in the public sector. Those governments have often enacted legislation limiting the subject matter of public-sector collective bargaining, imposing wage freezes or salary caps, or extending the duration of collective agreements.<sup>182</sup> Such measures have frequently been accompanied by restrictions on the right to strike. Legislatures have also ordered strikers back to work in certain private or parapublic sector enterprises (such as postal services, transportation and public education), and have either directly imposed the terms of collective agreement or have ordered that those terms be settled by

---

see Kevin Banks, “Progress and Paradox: The Remarkable Yet Limited Advance of Employer Good Faith Obligations in Canadian Common Law” (2011) 32 Comp Lab L & Pol’y J 547 [Banks, “Progress and Paradox”].

181 Convention 87, *supra* note 98, art 2. Canadian labour law generally excludes managers from collective bargaining in order to ensure their undivided loyalty to their employer, and to prevent them from dominating or interfering with associational activity by workers over whom they exert influence in the workplace. ILO jurisprudence recognizes that such concerns are valid, but holds that managers (other than those of a high level and in positions of confidence) should be allowed to form their own separate associations to further and defend their interests.

182 See e.g. CFA Case 1806 (Canada), Report No 300, ILO Official Bulletin, vol LXXVIII, 1995, Series B, No 3 (Geneva: ILO, 1995) [CFA, Case 1806]; CFA Case 1859 (Canada), Report No 306, ILO Official Bulletin, vol LXXX, 1997, Series B, No 1 (Geneva: ILO, 1997); CFA Case 1999 (Canada), Report No 318, ILO Official Bulletin, vol LXXXII, 1999, Series B, No 3 (Geneva: ILO, 1999); CFA Case 2196 (Canada), Report No 330, ILO Official Bulletin, vol LXXXVI, 2003, Series B, No 1 (Geneva: ILO, 2003); CFA Case 2349 (Canada), Report No 337, ILO Official Bulletin, vol LXXXVIII, 2005, Series B, No 2 (Geneva: ILO, 2005); CFA Case 2405 (Canada), Report No 343, ILO Official Bulletin, vol LXXXIX, 2006, Series B, No 3 (Geneva: ILO, 2006). See also Leo Panitch & Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms* (Aurora, Ont: Garamond Press, 2003).

arbitration.<sup>183</sup> As noted above, ILO jurisprudence generally holds that governments may restrict the right to strike of public service workers only if they exercise state authority or work in narrowly defined essential services, with a view to ensuring minimum service levels in fundamentally important public services or to avoid an acute national crisis — and even then, only if adequate independent arbitration procedures are provided.<sup>184</sup>

While ILO jurisprudence does permit temporary restrictions on collective bargaining for economic stabilization purposes, it has repeatedly found restrictions imposed by Canadian governments for the stated purpose of fiscal retrenchment to be too long-lasting and too intrusive.<sup>185</sup> ILO Committees have therefore often declared that instances of legislative imposition by Canadian governments of terms and conditions of employment violate freedom of association principles derived from Canada's international obligations.<sup>186</sup> The committees have also made it clear that imposing mandatory arbitration in the education, transportation or postal service sectors would similarly violate those principles.<sup>187</sup>

Finally, the Wagner model's policy emphasis on industrial peace has led Canadian labour relations statutes, courts and tribunals to impose a range of standing restrictions on the right to

---

183 See e.g. CFA Case 1681 (Canada), Report No 286, ILO Official Bulletin, vol LXXVI, 1993, Series B, No 1 (Geneva: ILO, 1993); CFA Case 2025 (Canada), Report No 320, ILO Official Bulletin, vol LXXXIII, 2000, Series B, No 1 (Geneva: ILO, 2000); CFA Case 2196 (Canada), Report No 330, ILO Official Bulletin, vol LXXXVI, 2003, Series B, No 1 (Geneva: ILO, 2003); CFA Case 2305 (Canada), Report No 335, ILO Official Bulletin, vol LXXXVII, 2004, Series B, No 3 (Geneva: ILO, 2004); CFA Case 2324 (Canada), Report No 336, ILO Official Bulletin, vol LXXXVIII, 2005, Series B, No 1 (Geneva: ILO, 2005); CFA Case No 2803 (Canada/Ontario), Report No 360, 311th Sess (Geneva: ILO, 2011).

184 Essential services have been held not to include most transportation, postal or education services. See ILO, *Digest*, *supra* note 87 at para 581.

185 See e.g. CFA Case 1806, *supra* note 182 (three-year imposition of wage freeze excessive).

186 See e.g. Committee of Experts on the Application of Conventions and Recommendations, *CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) Canada* (ratification: 1972) Published: 2010; and *CEACR: Individual Observation concerning Convention No 87, Freedom of Association and Protection of the Right to Organise, 1948 Canada* (ratification: 1972) Published: 2004. See also CFA Case reports cited in *supra* note 183.

187 ILO, *Digest*, *supra* note 87 at para 587; *General Survey*, *supra* note 90 at paras 159-160.

strike that have been held to be inconsistent with ILO jurisprudence, which takes a broad view of the occupational interests that a strike may legitimately seek to advance. Among those interests are challenges to government social and economic policies having a direct impact on the employment, the level of social protection or the standard of living of union members and workers in general.<sup>188</sup> ILO jurisprudence protects sympathy strikes in support of other workers who are engaging in a lawful strike.<sup>189</sup> It also protects strikes for union recognition for collective bargaining purposes,<sup>190</sup> and strikes in support of multi-employer bargaining.<sup>191</sup> By contrast, Canadian labour relations legislation restricts legal strikes to certain periods following an impasse in collective bargaining,<sup>192</sup> thereby leaving little or no room for political protest strikes, sympathy strikes or recognition strikes.<sup>193</sup> Furthermore, because Canadian jurisprudence on the duty to bargain in good faith generally holds that disputes over the scope of bargaining rights and the level of bargaining may not be pressed to impasse, strikes and lockouts are not allowed in support of demands for multi-employer or industry-level bargaining.<sup>194</sup>

**(e) How Conflicts between ILO Jurisprudence and Domestic Labour Law Should Be Addressed under the Canadian Constitution**

Canadian constitutional structures and doctrines provide for three ways to manage conflicts between our labour laws and ILO jurisprudence. First, because the substantial interference test articulated in *B.C. Health* screens out claims against government measures that do not substantially impair the worker capacities protected by freedom of association, legislatures would appear to retain significant flexibility to regulate and channel industrial conflict. Second, although the Supreme Court of Canada treats the common law as not being a product of government action, and therefore as not directly subject to *Charter* scrutiny, the “*Charter* values” doctrine — the idea that the common law should nonetheless be interpreted and applied consistently with the values set out in the *Charter* — may require the courts to lessen

---

188 ILO, *Digest*, *supra* note 87 at para 527.

189 *Ibid* at para 534; Committee of Experts, *General Survey*, *supra* note 90 at para 168.

190 ILO, *Digest*, *supra* note 87 at para 536.

191 *Ibid* at para 539.

192 Banks, *North American Labour*, *supra* note 172 at 65-66.

193 *Ibid* at 67, 70-71.

194 *Ibid* at 53-55, 79.

common law restrictions on the rights of workers not covered by labour relations legislation. Finally, the Supreme Court's approach to section 1 of the *Charter* has evolved in a way that gives legislatures some room — what is known in Europe as a margin of appreciation — to impose reasonable and proportional limits on freedom of association.

(i) *The Substantial Interference Test*

From the standpoint of a Canadian observer, perhaps the only major fault in ILO jurisprudence lies in what I would describe as its insufficient attention to proportionality in delineating the outer limits of the right to strike. At times, the ILO committees take a categorical approach in this regard, giving little consideration to whether the government action at issue really affects freedom of association in a substantial way. In particular, outside of narrow bounds, those committees have tended to treat the replacement of the right to strike with another dispute resolution procedure as a *per se* violation of freedom of association. They rarely look to the actual impact of the procedure on the capacity of the workers in question to pursue and defend their occupational interests. For example, ILO jurisprudence has condemned the imposition of independent mandatory interest arbitration to resolve a negotiating deadlock, even where the parties have reached an impasse after extensive bargaining and a long strike which has affected important public services.<sup>195</sup> In Canada at least, imposing independent arbitration does not necessarily undermine the capacity of workers to pursue collective goals in concert, particularly in light of the fact that a standing statutory requirement for such arbitration has long been a feature of certain well-functioning Canadian public-sector collective bargaining regimes which enjoy the support of the relevant unions.<sup>196</sup> Too readily characterizing the imposition of

---

195 See e.g. CFA Case No 2803 (Canada/Ontario), Report No 360, 311th Sess (Geneva: ILO, 2011) (the Committee deplored the Ontario government's imposition of independent interest arbitration to end an 11-week strike that led to the cancellation of classes for 45,000 York University students).

196 See Brian Etherington, "Does Freedom of Association under the *Charter* Include the Right to Strike after *B.C. Health*? Prognosis, Problems and Concerns" (2009-2010) 15 CLELJ 315 at 325-326. See also Bernard Adell, Michel Grant & Allan Ponak, *Strikes in Essential Services* (Kingston, Ont: IRC Press, 2001). For a discussion of public-sector collective bargaining in Canada, see generally Gene Swimmer & Tim Bartkiw, "The Future of Public Sector Collective Bargaining in Canada" (2003) 24:4 J Lab Research 579.

independent arbitration as a human rights violation risks trivializing the idea of freedom of association, and conflating the method of resolving collective bargaining disputes with the right to engage in collective bargaining itself.

It is understandable that ILO committees would draw bright lines around the right to strike in international jurisprudence, as they are often called upon to apply freedom of association principles in countries where gross violations are common. However, the failure of ILO jurisprudence to sort out relatively minor violations from more substantial ones must be kept in mind when Canadian courts decide whether the ILO's finding of a violation of its standards should lead directly to the striking down of legislation under the *Charter*. Our courts must also keep in mind that ILO jurisprudence is of persuasive rather than binding authority, and that the central goal of the ILO's freedom of association principles is to ensure that workers can form organizations of their own choosing to promote and defend their occupational interests.

The “substantial interference” test adopted by the Supreme Court of Canada in *B.C. Health* can help in this regard. In that decision, the Court held that not every interference with collective bargaining amounts to a breach of freedom of association; only those that “seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating . . . terms of employment with their employer” will amount to *Charter* violations — a formulation which was paraphrased in *Fraser*.<sup>197</sup> The substantial interference test follows directly from the fact that the right to bargain collectively was derived through purposive analysis of freedom of association. To be a substantial interference, an action or inaction must undermine the capabilities that worker freedom of association protects in order to serve its

---

<sup>197</sup> See *B.C. Health*, *supra* note 1, paras 92 and 129 (holding that certain aspects of the impugned legislation which changed collective agreement terms or restricted the scope of collective bargaining did not interfere substantially with the right to collective bargaining, because those aspects of the legislation did not deal with matters important enough to impair the capacity of union members to pursue their collective goals in concert); and *Fraser*, *supra* note 6, at para 50 (noting that the actions of the government in *B.C. Health* violated section 2(d) because they were found to “undermine the ability of workers to engage in meaningful collective bargaining”).

purposes.<sup>198</sup> On that test, most of the forms of regulation of freedom of association permitted by ILO jurisprudence<sup>199</sup> would also be allowed under the *Charter*. In addition, as Brian Etherington has argued, the substantial interference test would enable our courts to recognize as legitimate the legislative substitution of independent interest arbitration for the right to strike in a number of sectors that do not fit the ILO's strict view of essentiality, or in cases of negotiating deadlocks affecting services of major importance to the public.<sup>200</sup>

(ii) *Interpreting the Common Law in Accordance with Charter Values*

Conflicts between ILO jurisprudence and exclusions from Canadian labour relations legislation might be reduced or eliminated by interpreting the Canadian common law in accordance with *Charter* values. In the *Pepsi-Cola* case in 2002, the Supreme Court of Canada endorsed and used that interpretive method in holding that peaceful secondary picketing was immune to injunctive relief unless it amounted to what the Court called “wrongful action.”<sup>201</sup> The common law long ago recognized strikes arising from collective bargaining with one's employer as pursuing a legitimate purpose that does not give rise to liability under the tort of conspiracy.<sup>202</sup> A similar approach might yield interpretations of the common law that treat exercises of the right to organize, to bargain collectively and to strike as legitimate acts that do not breach common law duties of loyalty. Those interpretations might see a dismissal for

---

198 See *supra* notes 94 to 97 and accompanying text (discussing the purposes of the right to bargain collectively, and how it realizes the purposes of freedom of association). It is in this sense that substantial interference “makes it impossible to meaningfully exercise the right to associate” (*Fraser, supra* note 6 at para 47).

199 See *supra* notes 131-133, 136-138, 142-149 and accompanying text.

200 Etherington, *supra* note 196 at 328. The same sort of argument could be made with respect to substituting certification procedures and the duty to bargain for the right to strike for union recognition. If such procedures were challenged in court, the issue might be whether they facilitated rather than impeded access to collective bargaining. Note that I am considering only whether such measures would constitute substantial interference with the right to bargain collectively. If the right to strike were found to be an independent aspect of freedom of association in its own right, one would have to consider whether it has any freedom of association purposes, distinct from enabling meaningful collective bargaining, that would be undermined by such measures.

201 *Pepsi-Cola, supra* note 95 at paras 109-113.

202 *Crofter, supra* note 178.

associational activity as a breach of the duty of good faith and fair dealing in the manner of dismissal,<sup>203</sup> or as a violation of the emerging obligation to treat workers with civility, decency, respect and dignity during the life of the employment contract, if the discriminatory action is a reprisal for the exercise of freedom of association.<sup>204</sup> Finally, courts might treat employers' attempts to have employees waive such rights as breaches of public policy.

However, such changes to the common law would not necessarily lead to accessible and effective remedies against anti-union discrimination. Actions would still have to be launched in the common law courts, which might prove too costly for many workers and would not in any event lead to a reinstatement remedy. Using the *Charter* values approach to overhaul the common law would therefore be unlikely to fully meet Canada's obligation under the ILO Constitution to give effective recognition to the right to bargain collectively.

(iii) *Section 1 Scrutiny*

Even with the substantial interference threshold in place, some aspects of Canadian labour law (and of government practice in this area) cannot be reconciled with Canada's international legal commitment to freedom of association. Interpreting section 2(d) in accordance with that commitment therefore means that such aspects of our law and practice will be found to violate that provision and will have to be scrutinized under section 1 of the *Charter* in order to determine whether the restrictions they impose on freedom of association are "demonstrably justified in a free and democratic society." Under what is known as the *Oakes* test, this would call for an inquiry into whether the restrictions serve a pressing and substantial purpose, whether they are rationally connected to that purpose, whether they impair *Charter* rights as minimally as is reasonably possible, and whether their beneficial effects are proportionate to their deleterious impact.<sup>205</sup>

---

203 See generally Banks, "Progress and Paradox," *supra* note 180.

204 *Ibid.*

205 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.



Canadian laws which might violate section 2(d), and which might therefore have to be scrutinized under section 1, would include those which impose substantial restrictions on the scope of collective bargaining in the public sector and in key infrastructure industries, and those which end strikes and directly impose important collective agreement terms. The same is true of complete exclusions of particular occupational groups from labour relations legislation, if the common law continues to leave those groups vulnerable to discrimination against associational activity. Courts might also be called upon to consider whether limits on sympathy strikes or strikes for multi-employer bargaining can be justified under section 1.<sup>206</sup>

As Jamie Cameron argues, the application of the *Oakes* test should be approached with a conscious acknowledgement that matters of labour policy are best resolved in the legislative domain.<sup>207</sup> Most often, a government in Canada will be able to demonstrate pressing and substantial purposes for a particular legislative restriction on freedom of association, and the central issues will be whether the measures taken by the government are rationally connected to those purposes and whether they impair the constitutional right only minimally.

In matters of social policy, the Supreme Court of Canada has applied the minimal impairment requirement of the *Oakes* test in ways that show considerable deference to legislative policy-making. As Brian Etherington notes in a recent arbitral award:

While [the minimal impairment criterion] was first stated in *Oakes* as a very stringent requirement that the means impair the right as little as possible, as part of the recognized need to take a more flexible approach referred to above, in cases involving social policy legislation it became more common to state this criterion as, “whether the impugned provision impairs the right no more than is reasonably necessary to attain the governmental objective.”<sup>208</sup>

More than 20 years ago, in *McKinney v. University of Guelph*, La Forest J. observed (on behalf of a Supreme Court majority) that “those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch”<sup>209</sup> in

---

206 Cameron, “Labour Trilogy,” *supra* note 25 at 310-311.

207 *Ibid* at 312.

208 *Chatham-Kent (Municipality of) and ONA* (2010), 202 LAC (4th) 1 at 58.

209 [1990] 3 SCR 229 at paras 104, 76 DLR (4th) 545.

deciding whether social or economic policy infringements on constitutional rights are necessary.

La Forest J. went on to say:

This does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty.

...

... the operative question in these cases is whether the government had a reasonable basis, on the evidence tendered, for concluding that the legislation interferes as little as possible with a guaranteed right, given the government's pressing and substantial objectives.<sup>210</sup>

In that vein, Canadian courts have been called upon to assess the constitutionality of a range of social policies impairing constitutional rights. Among them are provisions of human rights statutes permitting mandatory retirement and discrimination with respect to employment-related benefits on the basis of age,<sup>211</sup> and Quebec legislation restricting access to private health care services in the context of that province's public health care system.<sup>212</sup> No convincing argument has been made that our courts are systematically ill-suited to carry out such a review. There is no reason to believe they could not deal adequately with the issues raised by Canada's international commitments on freedom of association.

Applying section 1 to substantial restrictions on freedom of association in the workplace would thus require governments to provide evidence of pressing and substantial fiscal problems, serious economic disruptions, real risks to safety and security, or similarly weighty concerns. They would have to present good reasons for concluding that the particular restrictions interfered no more with collective bargaining and the right to strike than was reasonably necessary in order to meet those concerns. In concrete terms, a government seeking to impose terms and conditions implementing fiscal austerity, for example, would have to demonstrate a reasonable basis upon which to conclude that the imposed terms were necessary given the nature and severity of its fiscal problems. The government would also need to show that it could not effectively address

---

210 *Ibid* at paras 104-105.

211 *Ibid.*

212 *Chaoulli v Quebec (AG)*, 2005 SCC 35, [2005] 1 SCR 791; *Withler v Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396.

those problems or meet some other pressing and substantial public policy objective if the terms in question were subject to collective bargaining, or if a bargaining dispute concerning them became the subject of a strike or was remitted to independent arbitration.<sup>213</sup> Governments might have to similarly justify excluding groups of workers from collective bargaining laws without giving them alternative protections, and in some cases would probably not be able to do so.

#### **4. CONCLUSION**

In *Fraser*, the project of giving meaning to the right to bargain collectively seems either to have been postponed or to have started down a dead-end road. At best, the majority of the Court makes a fact-specific determination that more evidence is needed to make out the claim that the *Agricultural Employees Protection Act* violates freedom of association. If that Act remains unamended, and if the plaintiff unions can muster the resources, they will probably be back in court before long. While the AEPA does impose some sort of bargaining obligation on Ontario agricultural employers, it is unlikely to lead to collective bargaining in any meaningful sense. Future experience under the AEPA will likely prove that merely requiring an employer to bargain, without more, cannot give most employees the capacity to “exert meaningful influence over working conditions through a process of collective bargaining.” If that is so, a failure by the courts to give more substance to the right to bargain collectively may breed cynicism about their willingness to protect the human rights of workers. In the meantime, *Charter* claims will no doubt be brought by other groups who are excluded from legislative protection or whose collective bargaining rights have been interfered with. The need for a human rights-based jurisprudential framework to give content to the right to bargain will persist.

Delineating the constitutional right to bargain collectively by trying to identify fundamental elements of current Canadian labour relations law is fraught with problems. The components of the Wagner model are interconnected, mutually supportive, and focused on a very

---

<sup>213</sup> See e.g. CFA Case 1722 (Canada), Report No 292, ILO Official Bulletin, vol LXXVII, 1994, Series B, No 1 (Geneva: ILO, 1994) where efforts by the Ontario government to negotiate public-sector salary reductions were treated as mitigating potential violations of freedom of association.

specific approach to achieving industrial peace while promoting decentralized collective bargaining. If the “right to a process that permits meaningful pursuit” of employee goals in the workplace<sup>214</sup> is to be given effect by picking and choosing some of the specific rules that make up contemporary Canadian labour law, it will probably be necessary to include so many elements of the Wagner model that the constitutional right to bargain collectively will begin to look very much like that model itself. This is what the Ontario Court of Appeal did in *Fraser*. The Supreme Court has rejected that approach, but has yet to offer a viable alternative.

Canada’s ILO commitments provide a human rights-based framework that could help to make collective bargaining rights meaningful. In essence, those commitments are not to interfere with or impair the right to organize, the right to bargain collectively or the qualified right to strike, and to provide effective recourse against interference with those rights by private actors. ILO jurisprudence provides persuasive guidance on how to regulate those rights without violating freedom of association. That jurisprudence does need to be read critically, as it does not always distinguish between more and less substantial forms of interference. On the whole, however, Canada’s ILO commitments, as interpreted by ILO committees, do fit quite well with Canadian labour and constitutional law and do not require that any particular legal model be constitutionalized. While there are some conflicts between the ILO jurisprudence and established laws and practices in Canada, existing Supreme Court of Canada doctrine supplies legal tests that are adequate to manage those conflicts.<sup>215</sup>

The Supreme Court has yet to systematically canvass international law on the right to bargain collectively.<sup>216</sup> The reasons for this are not clear. The wording of the majority judgment in *Fraser* points towards, without fully articulating, some ideas about collective bargaining which imply (or at least embody the hope) that it is simply not necessary to go any further than the Court has already gone.<sup>217</sup> In upholding the AEPA, the majority suggests that an enforceable

---

214 See *Fraser*, *supra* note 6 at 38.

215 See *supra* notes 195-212 and accompanying text.

216 See e.g. *Fraser*, *supra* note 6.

217 In no less than three places in its judgment (at paras 33, 103 and 107), the *Fraser* majority refers to employee “submissions” to employers — a term which it substitutes for “representations.” The judgment appears at times to see employers as detached decision-

duty of good faith consideration should be enough to lead employers to receive employee representations with an open mind.<sup>218</sup>

Optimism that this will always be the case does not accord with the experience of most Canadian labour relations practitioners, whether on the employer or employee side. The AEPA offers few protections where an employer does not respond with openness to employee representations. It does nothing to reduce the vulnerability of agricultural employees at common law to employer reprisals for seeking to bargain, or to reprisals and tort liability for taking industrial action to support their demands on workplace matters. That Act therefore permits employer discrimination based on the exercise of rights that international law treats as necessary to meaningful collective bargaining. The Supreme Court recognized in *Dunmore* that such a legal environment exposes most workers to unfair labour practices and legal liabilities that foreclose the effective exercise of associational freedoms. Had the Court in *Fraser* actively interpreted section 2(d) in accordance with Canada's international commitments, it would have found that the AEPA affirmatively permitted a violation of the right of agricultural workers to bargain collectively, in the same way that exclusion from the Ontario *Labour Relations Act* was held in *Dunmore* to violate the more limited set of freedom of association rights recognized in that case.

Assuming a section 1 analysis like that in *Dunmore*, a constitutional remedy would therefore have been required in *Fraser*. The Court could have limited that remedy to a direction to the legislature to amend the law so that it no longer impaired the exercise of the right to bargain collectively. The legislature would have been able to comply simply by removing the common law exposure of employees to reprisals and to tort liability for attempting to engage in collective bargaining or for striking and by providing access to effective remedies against such reprisals — a solution which would have given employees some capacity to bargain collectively

---

makers who can take account of such “submissions” while distancing themselves from economic concerns that might incline them to reject out-of-hand employee demands which would reduce profitability or managerial control. This is perhaps why the Court permits itself (at para 117) the “hope that all concerned proceed on the basis that section 2(d) confirms a right to collective bargaining . . . requiring engagement by both parties.”

218 *Ibid* at para 103.

within a laissez-faire legal framework. However, in light of the vulnerability of many agricultural employers to labour disruptions at harvest time (as recognized in the Supreme Court's section 1 analysis in *Dunmore*), the legislature would more likely have responded by tailoring a collective bargaining regime designed to ensure industrial peace. In doing so, it would have been free to provide (or not provide) for majoritarian exclusivity, a duty to bargain, single-employer or multi-employer bargaining, mandatory conciliation, mandatory independent interest arbitration, and mandatory rights arbitration.

I suspect that such an outcome would have surprised few on either side of Canada's labour bar or labour relations community, where it is quite widely accepted that a right to organize and a qualified right to strike are essential to making collective bargaining meaningful.<sup>219</sup> Most Canadian courts that have fully considered this question have come to the same conclusion.<sup>220</sup> ILO jurisprudence, carefully interpreted and applied, can provide guidance in delineating appropriate boundaries to and limits upon such rights in the Canadian context. A renewed effort to draw on Canada's international legal commitments is probably the best way to meet the central jurisprudential challenge of Canada's new labour law constitutionalism.

---

219 See e.g. A.W.R. Carrothers, E.E. Palmer & W.B. Rayner, *Collective Bargaining Law in Canada*, 2d ed (Toronto: Butterworths, 1986) at 4.

220 See e.g. *SEIU, Local 204 v Broadway Manor Nursing Home* (1983), 44 OR (2d) 392, 4 DLR (4th) 231 (SC); cited with approval in *RWDSU, Local 544 v Saskatchewan*, [1985] 5 WWR 97, 19 DLR (4th) 609 (Sask CA) (the majority in *Broadway Manor* said that “[t]o take away an employee’s ability to strike so seriously detracts from the benefits of the right to organize and bargain collectively as to make those rights virtually meaningless”: at para 197). See also the dissent of Chief Justice Dickson in the *Alberta Reference*, *supra* note 15, and the recent judgment of Ball J. in *Saskatchewan Federation of Labour v Saskatchewan (AG)*, 2012 SKQB 62.