

# The Right to Strike in an International Context

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*In the first part of this paper, the author reviews the historical development of the right to strike in international instruments. In his view, that process was shaped during the Cold War by an artificial distinction between socioeconomic rights and civil and political rights, resulting in a narrow interpretation of freedom of association. The author argues that while workers' rights have more recently been conceived of as fundamental human rights, an emphasis on social justice is equally necessary. In this context, the right to strike is critical to maintaining an equilibrium of power between labour and capital, and thus to protecting the dignity and human rights of workers. Turning to the challenges posed by globalization, the author suggests that countries can gain a "comparative institutional advantage" by pursuing a program of rights-based regulation or "regulated flexibility." On this view, employment rights — including the right to strike — are beneficial to economic development. The question, then, is whether constitutionalizing the right to strike is the best way to ensure Canada's comparative advantage. In considering this question, several issues arise, including whether constitutionalization would lead to excessive limitations on the right to strike; whether it would undermine the majoritarian character of our collective bargaining system; and whether the application of abstract constitutional principles by judges is a suitable way of settling labour disputes.*

## 1. INTRODUCTION

The Supreme Court of Canada relied heavily on international labour law to justify its decision in *B.C. Health*<sup>1</sup> to overturn the

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1 *Health Services and Support-Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] 2 S.C.R. 391.

so-called “labour trilogy.”<sup>2</sup> The Court held that rights conferred by the *Canadian Charter of Rights and Freedoms*<sup>3</sup> are intended to provide at least as good a level of protection as is found in international labour and human rights instruments that Canada has ratified.<sup>4</sup> Although ILO Convention 87 on Freedom of Association (1948), which Canada ratified in 1972, does not explicitly refer to the right to strike, the ILO’s Freedom of Association Committee and its Committee of Experts on the Application of Conventions and Recommendations have consistently held that the right to strike “is one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests.”<sup>5</sup> In his paper in this issue of the Journal, Jean-Michel Servais reviews that important jurisprudence in detail.

I want to focus on two broader questions. The first is the underlying values which have led to international recognition of the right to strike. The second is whether, in the modern world of globalization and free trade, there is any comparative institutional advantage in constitutionalizing the right to strike.

## 2. ECONOMIC OR POLITICAL VALUES?

The right to strike is capable of a variety of interpretations, which have tended to change over time. One of the main lessons to be drawn from international experience is that no two countries are alike when it comes to regulating strikes. There is no systematic and clear international code on the right to strike.<sup>6</sup> The international

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2 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] S.C.R. 313; *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424; *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460.

3 *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Sch. B to the *Canada Act 1982* ((U.K.), c. 11.

4 *B.C. Health*, *supra*, note 1, at paras. 69-79.

5 Committee on Freedom of Association, *Freedom of Association: Digest of Decisions and Principles*, 5th (revised) ed. (Geneva: ILO, 2006), at paras. 520-521. See the paper by Jean-Michel Servais in this volume for a discussion of this important jurisprudence.

6 See N. Rubin, ed., *Code of International Labour Law*, vol. I (Cambridge: Cambridge University Press, 2005), which collects the case law of the ILO supervisory bodies on the right to strike, at pp. 202-237.

standards are flexible and open-ended, and provide rich justifications for restrictions on the right to strike. The use that each country makes of these standards, and the restrictions it adopts, are the outcome of the particular political, social and economic struggles that have led to demands for a right to strike.

As a generalization, one might say that the constitutionalization of the right to strike is most likely to occur when the political or legal power of workers exceeds their economic power. So, in Britain in the 19th century, unions made extensive use of their social and economic power to strike without the need for legal guarantees until the courts — in *Taff Vale* and other cases<sup>7</sup> — imposed common law doctrines to repress strikes. Negative immunities from the common law doctrines were granted by Parliament from 1871 onwards, but (apart from the brief period of the *Industrial Relations Act 1971*, which was in force until 1974) there has never been a positive right to strike in Britain. On the other hand, the explicit constitutionalization of the right to strike in 1946 in France, in 1948 in Italy, in 1976 in Portugal, in 1978 in Spain, and in 1994 in South Africa, was a recognition and reward for the role that labour organizations played in the struggle against authoritarian governments, which repressed the right to strike, and for democracy. This resulted in broad definitions of the right to strike, including a wide range of economic and social objectives, and in some cases even political objectives. In Germany, on the other hand, where workers' power was weak in the immediate post-war period, the Constitution of 1949 (Article 9, para. 3) made no reference to industrial action but only to the protection of freedom of association. The German Federal Labour Court in 1955 gave this a restrictive interpretation. The Court decided that the action had to be complementary to collective bargaining — it is protected only insofar as its purpose was the achievement of a collective agreement, and the action had to be “socially adequate” or proportionate.<sup>8</sup>

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7 *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1909] A.C. 426; see generally, Lord Wedderburn, *The Worker and the Law*, 3d ed. (Harmondsworth: Penguin, 1986), at pp. 16-21, 512-540.

8 M. Weiss & M. Schmidt, “Germany,” in R. Blanpain, ed., *International Encyclopedia for Labour Law and Industrial Relations* (Deventer: Kluwer, 2000), para. 394.

For me, the most fascinating aspect of the current debate in Canada is that it arises from restrictions on collective bargaining and strikes imposed by democratically elected legislatures in a period of globalization and declining trade union strength, when in most countries strikes are relatively rare and short-lived. It is in this period that there has been, in Judy Fudge's words, a "shift from legislative politics to rights litigation [that] mirrors a broader transformation of the justificatory discourse for labour's collective rights from social democracy and industrial pluralism to human rights."<sup>9</sup> A parallel discourse is now taking place in respect of Article 11 of the European Convention on Human Rights, which, like s. 2 of the Canadian *Charter*, guarantees freedom of association but does not explicitly refer to the right to strike. This, too, reflects the decline in the industrial strength of unions and the ascendancy of the liberal culture of individual human rights. That is a question addressed by Keith Ewing and John Hendy<sup>10</sup> in their paper in this issue.

The international and regional instruments each have their own history and are locked into particular political and institutional frameworks. There are two main reasons for the important differences between these instruments. The first is the lasting legacy of the separation of economic and social rights from civil and political rights. In the atmosphere of the Cold War in 1947 and 1948, when ILO Conventions 87 and 98 were being debated, western governments were not enamoured of the idea of enforceable economic and social rights, a sphere in which the communist countries claimed superiority. The Anglo-American tradition, which was dominant in the ILO at the time, saw freedom of association as a civil or political right, while the right to strike was viewed as being socioeconomic.

A second reason for the failure to elaborate an explicit right to strike in the ILO instruments was the fear of the majority of workers' delegates that entrenching the right to strike within the ILO conventions

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9 J. Fudge, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support Case* and Beyond" (2008), *Indus. L.J.* 25, at p. 27.

10 See further K.D. Ewing, "Laws Against Strikes Revisited," in C. Barnard, S. Deakin & G.S. Morris, eds., *The Future of Labour Law: Liber Amicorum Sir Bob Hepple Q.C.* (Oxford: Hart, 2004) 41.

would inevitably require setting limitations on this right. As Tonia Novitz has pointed out:

By the end of World War II, worker organizations had consolidated their *de facto* position and strength in most ILO Member States. Trade unions, use of industrial action, and the political wing of the labour movement had secured workers unprecedented rights (or immunities). Owing to the tripartite structure of the International Labour Conference, worker delegates were often forced to compromise in order to secure the vote of employer and government representatives. If a detailed right to strike were to be incorporated into any Convention, the necessity of compromise meant that this right would be more limited than that already recognized in many States. Therefore, workers' reluctance to see a lesser right guaranteed in the international sphere may account for the failure to incorporate a right to strike into Conventions Nos. 87 and 98.<sup>11</sup>

It was left to the ILO Governing Body's Committee on Freedom of Association (CFA), which examines complaints of breach of the Conventions 87 and 98, to interpret "freedom of association."<sup>12</sup>

The CFA is a tripartite body (consisting of three representatives from each of management, governments and unions, under independent chairmanship). The workers' delegates have been the dynamic element gradually persuading the ILO, on a case-by-case basis, to recognize 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."<sup>13</sup> The CFA was able to do this by recognizing that the ordinary meaning of "freedom of association" is ambiguous. This entitled the CFA to look at the context in which the term was used, and the purpose of the relevant international instruments.<sup>14</sup> The CFA's interpretations were later accepted by other ILO supervisory bodies, and endorsed by the ILO's Governing Body and International Labour Conference. At the time, the employer and government delegates were willing to go along with the workers' delegates because they wished to expose the absence of a right to strike in communist countries, which claimed that workers did not need such a right in a "workers' state."

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11 T. Novitz, *International and European Protection of the Right to Strike* (Oxford: Oxford University Press, 2003), at p. 118.

12 *Ibid.*, at p. 196.

13 See *Digest, supra*, note 5.

14 Novitz, *supra*, note 11, at p. 198.

The significance of participation by workers' representatives in the interpretative process is demonstrated by a comparison with the European Committee on Social Rights (ECSR), which monitors the European Social Charter (1961) but has no workers' representatives. For example, while the ILO's supervisory bodies recognize that workers are entitled to strike in "their economic and social interests" so as to challenge economic and social policy, the ECSR requires industrial action to be linked to some kind of "collective bargaining."

The ideological Cold War split is reflected in the instruments adopted by the Council of Europe. The European Convention on Human Rights (1950) is confined to civil and political rights, and makes no reference to the right to strike. This was left to the much weaker European Social Charter (1961, revised 1996), which in Article 6(4) provides that the contracting parties (who now include all EU Member States) undertake to "recognise" "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into." It seems that the drafters of this provision were influenced by the developing jurisprudence of the ILO's CFA. A similar provision was included in Article 11 of the declaratory European Community Charter of the Fundamental Social Rights of Workers, 1989. The EU Charter of Fundamental Rights 2000, now included in the Treaty of Lisbon (which came into force in the EU on December 1, 2009), provides that "workers and employers, or their respective organisations, have in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest to take collective action, and to defend their interests, including strike action."

The Cold War split is also reflected in the difference between the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). The former makes no reference to the right to strike, while Article 8(1)(d) of the latter states, in language reminiscent of the French and Italian constitutions, that states party to the Covenant undertake to ensure the right to strike, provided that it is exercised in conformity with the laws of the particular country. This allows countries to regulate strikes on both procedural and substantive grounds through legislation.

There are several reasons for believing that the narrow interpretations given to “freedom of association” in the past no longer accord with the purposes and spirit of modern international law. The artificial division between civil and political rights and socioeconomic rights is now largely discredited. Until fairly recently, human rights organizations tended to concentrate on civil and political rights, while trade unions focused on local and economic issues, with the use of the strike weapon falling within the trade union sphere. At the international level, the conventions of the ILO were not originally conceived as statements of human rights. However, the ILO’s 1998 Declaration of Fundamental Principles and Rights at Work elevates “freedom of association and the right to collective bargaining” into the category of “fundamental principles” from which rights may be derived. But, as Amartya Sen has pointed out, human rights cannot exist without social justice.<sup>15</sup> For this reason, rights should be formulated in a way which allows them to be integrated within the same overall framework as the goals of social justice. The ILO’s “decent work” programme attempts to do this by stressing the importance both of social dialogue and fundamental rights at work.<sup>16</sup> Rights in this context are defined not simply as a negative means of defence against the state, but also as a positive means to achieve meaningful participation in society. In a pluralist society, where there are conflicting interests, participation of all interest groups is essential to achieve some “balance” of power. Participative democracy can be strengthened by social dialogue. Collective bargaining and other forms of workers’ representation are important examples of such dialogue. One might say that a high incidence of strikes, particularly wildcat strikes, is an indication that social dialogue has broken down. In this sense, the strike weapon as a last resort is an essential safety-valve, a sanction aimed at achieving meaningful participation.

The equilibrium argument is central to any justification of the right to strike. The concentrated power of accumulated capital can be matched only by the countervailing power of workers acting in

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15 A. Sen, “Work and Rights” (2000), 139 Int’l Lab. Rev. 119; and see generally, B. Hepple, “Rights at Work,” in D. Ghai, ed., *Decent Work: Objectives and Strategies* (Geneva: ILO, 2006) 33.

16 Hepple, *ibid.*; and S. Kuruvilla, “Social Dialogue for Decent Work,” in Ghai, *ibid.*, p. 175.

solidarity. Except in the most mechanistic sense, there is no equilibrium between the right to lock out and the right to strike. Yet even the ILO has allowed the right to strike and the right to lock out to be unfairly equated. While the rights to collective bargaining and to strike are necessary for workers to counteract the greater social and economic power of the employer, employers have a range of other economic weapons at their disposal, including the right to dismiss, to engage replacement labour, to exclude workers from the workplace, and unilaterally to impose new terms of employment. In the words of Otto Kahn-Freund:

The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses that freedom to strike puts the workers at the mercy of their employers. This — in all its simplicity — is the essence of the matter.<sup>17</sup>

Kahn-Freund's justification not only reflects an equilibrium argument, but also places the right to strike squarely in the category of protecting the dignity and hence the human rights of workers who, without it, would be powerless in the face of "strikes" by capital, which can close down or relocate enterprises.<sup>18</sup>

### 3. COMPARATIVE INSTITUTIONAL ADVANTAGE

These arguments, based on social dialogue and fundamental human rights, have assumed centre stage in the light of modern globalization. The orthodox view is that globalization undermines the ability of nation-states to regulate their own employment relations. In this scenario, transnational corporations are able to put pressure on governments and unions to reduce labour costs by threatening to

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17 O. Kahn-Freund & B. Hepple, *Laws Against Strikes* (London: Fabian Society, Fabian Research Series 305, 1972), at p. 8.

18 See the powerful judgment of O'Regan J. in *National Union of Metalworkers of South Africa v. Bader Bop (Pty) Ltd. and Minister of Labour*, 2003 (2) B.C.L.R. 182 (Const. Ct. of S.A.), discussed by D.M. Davis in his paper in this issue of the Journal. See also the decision of the Supreme Court of Canada in *Plourde v. Wal-Mart Canada Corp.*, [2009] S.C.J. No. 54 (QL), 313 D.L.R. (4th) 539, upholding the employer's closure of a workplace following unionization by the employees.



relocate. Trade unions and civil society are too weak to resist. International solidarity action between workers in different countries is frequently unlawful, and in any event is usually impossible to organize because one worker's redundancy in country A may be another worker's gain in country B.<sup>19</sup> In theory, the increased demand for labour in low-cost countries will induce workers to migrate to fill these jobs, and this in turn will lead to higher wages and benefits in those countries. In practice most workers do not migrate for a number of reasons, such as political opposition to immigration and legal restrictions on it. Even when they are legally able to cross borders (as EU citizens can), they are generally unwilling to do so for reasons of family, language, culture and cost. The combination of these factors leads those who argue for the orthodox view to say that deregulation or a severe weakening of employment rights is the necessary and inevitable consequence of modern globalization.

A cause-and-effect relationship is assumed between globalization and the alleged shrinkage of the coverage of employment rights; the growth of more insecure, irregular, non-unionized forms of employment; and the decline of collective representation and collective bargaining. This means that there is a "race to the bottom," the memorable phrase used by Justice Brandeis in 1933 to describe the competition between states to reduce regulatory requirements so as to attract business.<sup>20</sup> Those who agree with this analysis are bound to dismiss constitutionalization of labour rights as a waste of time and effort: firms that find the entrenched rights to freedom of association and to strike to be too costly will simply relocate to developing countries where these rights are not observed in practice.

In my book on *Labour Laws and Global Trade*,<sup>21</sup> I advance a different view. I argue that nations prosper in the global economy not by becoming more similar in their labour laws but by building their institutional advantages on a floor of fundamental human rights. I try

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19 B. Hepple, *Labour Laws and Global Trade* (Oxford: Hart, 2005), at pp. 186-189.

20 *Liggatt v. Lee*, 218 U.S. 517, *per* Brandeis J., dissenting, at p. 599. For doubts about the validity of the "race to the bottom" theory, see C. Barnard, "Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?" (2000), 25 *Eur. L. Rev.* 57.

21 *Supra*, note 19, chap. 10.

to show that rights-based regulation — or, if you prefer, “regulated flexibility” — is worth pursuing in order to give a developed country such as Canada a comparative advantage in global trade and investment. I will not discuss here the objections to the orthodox theory, such as its overemphasis on labour costs in decisions about relocating and outsourcing, its neglect of the positive gains from free trade that can offset job losses, and its unwarranted assumption that the strategies and structures of firms are similar across states. I simply put forward the notion that firms may concentrate their activities in countries that provide the advantages of certain institutional or regulatory frameworks.

Firms that need to develop a new product quickly so as to get a market advantage — for example, in biotechnology or telecommunications — do not want to inform and consult (or bargain with) workers’ representatives, and they want to weaken the right to strike. On the other hand, firms that place a premium on continuity of production and long-range development need consensus rather than adversarial decision-making. They have a greater incentive to provide job security and in-house training, as well as forms of worker involvement and protections for freedom of association and the right to strike. Accordingly, they will tend to concentrate in countries where there is institutional support for these rights. This has been the case in sectors such as mechanical engineering, product handling, consumer durables and machine tools. From the employer’s point of view, collaboration with works councils and trade unions ensures a long-term relationship of trust and confidence. In reality, of course, strike laws are only one of the factors taken into account in relocation decisions.

This theory of comparative institutional advantage helps to explain why — contrary to many predictions — globalization does not necessarily lead to across-the-board deregulation of labour, or the disappearance of rights to freedom of association and to strike. One of the paradoxes of globalization is that “nations often prosper not by becoming more similar, but by building on their institutional differences.”<sup>22</sup> A rights-based or “regulated flexibility” model of labour

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22 P. Hall & D. Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001), at p. 60.

law is one model, and an increasingly popular one, of institutional arrangements that may confer comparative advantage.

Rights-based regulation sees employment rights as beneficial and necessary to economic development. Because it tends to favour a transfer of resources to enable those who wish to enter the labour market to do so, for example by providing rights to education, training and child care, it is redistributive. It can also encourage high-trust or cooperative workplace “partnership” that leads to superior economic performance. This is the common argument for legal provision for better information, consultation and other forms of workers’ participation in the enterprise, and for the improvement of corporate governance.<sup>23</sup> The right to strike — as a means of redressing the inequality in bargaining power between employer and worker, as a safety-valve, and as a recognition of workers’ dignity — also falls into this category.

#### **4. IS CONSTITUTIONALIZATION THE BEST WAY FORWARD?**

There has traditionally been a strong emphasis on freedom of association and collective bargaining as core values. They have been elevated to the status of “fundamental principles and rights at work” on the international plane.<sup>24</sup> The question, then, is whether, in light of Canada’s political and legal culture, constitutionalization of the right to strike is the best way for it to ensure the comparative advantages of rights-based regulated flexibility. This is not a matter on which I, as an outsider, offer any prescriptions. I simply urge you to consider a series of related issues.

The first of these is whether constitutionalization will result in unacceptable limitations on the right to strike, as the workers’ delegates to the ILO in the 1940s feared in the case of the ILO conventions. The

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23 S. Deakin & F. Wilkinson, “Labour Law and Economic Theory: A Reappraisal,” in H. Collins, P. Davies & R. Rideout, eds., *Legal Regulation of the Employment Relation* (London: Kluwer, 2000) 29, at pp. 56-61.

24 ILO Declaration on Fundamental Principles and Rights at Work, adopted by the 86th session of the International Labour Conference, Geneva, June 18, 1998.

ILO's jurisprudence permits only limited restrictions on the right to strike.<sup>25</sup> If the Supreme Court of Canada takes a "fundamental rights" approach, based on ILO precedents, the limitations will be predictable and within internationally recognized guidelines. On the other hand, if the Court too readily allows breaches of freedom of association (in the form of restrictions on the right to strike) to be justified under the "minimum impairment" test developed under s. 1 of the *Charter*, the results may be unpredictable and the limitations may be extensive — especially in the public sector, where most strikes now occur.

The second question is whether a constitutional right to strike vested in the individual worker would undermine the majoritarian character of collective bargaining systems as they have developed in Canada under the Wagner model. The ILO jurisprudence recognizes that the right is vested not only in individuals but also in workers' organizations. The Supreme Court in *Dunmore* accepted that freedom of association applies to collective activities — for example, to expression of a majority viewpoint.<sup>26</sup> But the question remains whether Canadian courts will follow the ILO in finding that the principle of majoritarianism is acceptable only so long as minority unions are allowed to exist, to recruit members, and to represent their members in relation to individual grievances. Minority unions should be allowed, according to the ILO, to use collective bargaining and the right to strike to achieve the recognition of shop stewards. Would that be compatible with Canadian labour law?

Finally, would the application of abstract constitutional principles by judges be a suitable way to settle labour disputes? The history of national courts in respecting international labour standards is patchy, and the ordinary courts generally lack the dynamic elements of workers' participation when deciding these issues. A discouraging sign in the Canadian context is the reasoning in the recent *Wal-Mart* decision.<sup>27</sup> The majority of the Supreme Court spectacularly failed to understand the rationale of a right to associate and to strike in the

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25 See Servais, *supra*, note 5.

26 *Dunmore v. Ontario (Attorney-General)*, [2001] 3 S.C.R. 1016.

27 *Wal-Mart*, *supra*, note 18.

modern globalized economy, in which transnational corporations are free to use the threat of closure or relocation in order to intimidate those seeking to organize and to bargain collectively. The union in this case was certified to represent employees at Wal-Mart's Jonquière establishment, but failed to secure a collective agreement. On the very day that the Minister of Labour referred the dispute to arbitration, Wal-Mart announced the closure of the establishment. The Supreme Court rejected a claim by workers for anti-union victimization, on the basis of a doctrine of Quebec law that a worker cannot claim a remedy for victimization when a workplace no longer exists.

Binnie J. said in relation to the principle of freedom of association:

Care must be taken not only to avoid upsetting the balance the legislature has struck in the [*Labour Code*] taken as a whole, but not to hand to one side (labour) a lopsided advantage because employees bargain through their union (and can thereby invoke freedom of association) whereas employers, for the most part, bargain individually.<sup>28</sup>

Wal-Mart “ranks alongside major industrialised nation states when revenues and GDP are compared . . . adds one outlet to its empire per day and is able to cease operations in an entire country” (as it did in Germany).<sup>29</sup> The workers it employs in insecure jobs are often drawn from the most disadvantaged sections of the work force, including women and immigrants, at relatively low wages. The equation of this globally powerful transnational corporation's activities to bargaining with “individual” employers is bizarre, to say the least. Unless the courts are willing to embrace a more realistic view of what a “balance” between capital and labour means in the post-modern globalized economy, and to recognize the comparative advantages of freedom of association and the right to strike, there will be little if any dividend from investing much time and effort into constitutionalization. But strikes will continue to occur. Might not the efforts devoted to legal refinements of the right to strike and

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<sup>28</sup> *Ibid.*, at para. 57.

<sup>29</sup> A. Blackett, “Mutual Promise: International Labour Law and *B.C. Health Services*” (2009), 48 *Sup. Ct. L. Rev.* (2d) 365, at p. 392.

its limitations be more sensibly devoted to engaging more union organizers, and to utilizing mediation, conciliation and arbitration to settle disputes?