

# The International Labour Organization and Freedom of Association: Does Freedom of Association Include the Right to Strike?

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*In its landmark decision in B.C. Health extending protection to collective bargaining under section 2(d) of the Charter, the Supreme Court of Canada relied heavily on international labour law and principles, especially as defined by the International Labour Organization. In particular, the Court treated as a “cornerstone” of the international law in this area the opinions of the ILO’s Committee of Experts and Committee on Freedom of Association (CFA), and cited those opinions in support of its finding that freedom of association under ILO conventions includes a right to bargain collectively. This paper argues that in B.C. Health and other cases involving constitutional labour rights, the Supreme Court has misunderstood and oversimplified the ILO supervisory process. The author points out that neither the CFA nor the Committee of Experts is constituted as an adjudicative or judicial body, and neither has the authority to issue binding interpretations of ILO conventions. Rather, to the extent that the supervisory process contemplates an adjudicative role, it is exercised by the Application of Standards Committee – the central component of the ILO’s tripartite supervisory system. In the author’s view, the differences in the roles of these bodies are particularly important in determining whether and to what extent ILO conventions include a right to strike. Whereas the CFA and the Committee of Experts have interpreted ILO Convention 87 as protecting an expansive right to strike as part of freedom of association, the Application of Standards Committee has repeatedly declared that no consensus exists on whether Convention 87 includes such a right. The author cautions that if the Supreme Court of Canada continues to invoke international labour law in constitutional cases, particularly as regards the right to strike, it will be incumbent on the Court to arrive at a better understanding of ILO institutions and processes.*

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## 1. INTRODUCTION

The Supreme Court of Canada's 2007 decision in the *B.C. Health* case<sup>1</sup> represents a transformative step in the application of international labour law and principles in Canadian constitutional interpretation — a step which was sharply questioned by a minority of the Court in *Fraser*<sup>2</sup> in 2011, but was nevertheless largely affirmed by the majority judgment in that case. As is now well known, *B.C. Health* reversed 20 years of the Supreme Court's own rulings on freedom of association in the labour relations context by finding that the guarantee of freedom of association in section 2(d) of the *Canadian Charter of Rights and Freedoms* “protects the capacity of members of labour unions to engage in collective bargaining on workplace issues.”<sup>3</sup>

Nearly as well known about *B.C. Health* is the fact that the Supreme Court appears to have relied heavily on international labour law standards and principles — particularly as defined by the International Labour Organization (ILO) — in determining that collective bargaining fits within the scope of freedom of association. In doing so, the Court explicitly adopted Chief Justice Dickson's dissenting opinion in the leading case in the 1987 right-to-strike trilogy — the *Alberta Reference*<sup>4</sup> — which placed a heavy emphasis on freedom of association principles derived from the work of two ILO bodies: the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations. The majority judgment in *B.C. Health* agreed with Chief Justice Dickson that the CFA and the Committee of Experts' interpretations of freedom of association constituted the “cornerstone” of international labour law in this area. Moreover, according to that judgment, the CFA and Committee of Experts'

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

2 *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*].

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

4 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 [*Alberta Reference*]. The other two cases in that trilogy were *PSAC v Canada*, [1987] 1 SCR 424 and *RWDSU v Saskatchewan*, [1987] 1 SCR 460.

interpretations of freedom of association not only “supported” the idea that there is a right to collective bargaining in international labour law but also suggested that this right should be recognized in Canada under section 2(d) of the *Charter*.<sup>5</sup> In fact, the judgment said, section 2(d) should be interpreted as providing “at least the same level of protection” as “international conventions to which Canada is a party.”<sup>6</sup> Chief Justice Dickson’s opinion has therefore made an almost complete ascent from two-judge dissent to clear majority position, at least insofar as the application of international labour law principles is concerned. This is a potentially critical development. As interested observers are increasingly asking, how can the Court now avoid extending constitutional protection to the right to strike?

The roots of this question lie in a glaring omission in *B.C. Health*’s affirmation of Chief Justice Dickson’s dissent. As Judy Fudge has noted, Chief Justice McLachlin and Justice LeBel (writing for the majority in *B.C. Health*) referred to the same international instruments as Chief Justice Dickson, and similarly relied on the interpretive guidance of the Committee of Experts and the CFA. But in doing so, Fudge continues, the judgment in *B.C. Health* failed to meaningfully acknowledge what Chief Justice Dickson made explicit: that those international obligations clearly support a right to strike as a crucial element of freedom of association.<sup>7</sup> In light of this, and given that the Supreme Court has accepted Chief Justice Dickson’s position that Canada’s international obligations should effectively instill a minimum level of “protection” into section 2(d), Fudge argues that “it is difficult to see how the Court can find a principled way to avoid opening the door of constitutional protection far enough to allow the right to strike.”<sup>8</sup>

But do Canada’s international labour obligations actually situate the right to strike within freedom of association? Put more narrowly, has the ILO concluded that a right to strike is guaranteed

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5 *B.C. Health*, *supra* note 1 at para 72.

6 *Ibid* at para 79.

7 Judy Fudge, “The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* Case in Canada and Beyond” (2008) 37:1 *Indus LJ* 25 at 43.

8 *Ibid*.

through freedom of association as a matter of international labour law? While the analysis of international labour law advanced by Chief Justice Dickson and the majority in *B.C. Health* would suggest that the answer to this question is a clear “yes,” the real answer is far more nuanced. At a basic level, this has much to do with the fact that the ILO is not a monolithic institution and that as a source of law, it is far from analogous to a court. The ILO has several “supervisory” bodies that play a variety of roles, many of which are not truly legal in nature. Indeed, to imply that the Committee of Experts or the CFA is an authoritative legal body or is “quasi-judicial”<sup>9</sup> along the lines of a court obscures the role of those institutions within the ILO system. This is further highlighted by the failure of the Supreme Court of Canada (and of many observers) to recognize the role of, and the context in which recommendations are made by, the ILO’s Conference Committee on the Application of Standards (Application of Standards Committee), which is the most important component of the ILO’s supervisory mechanism and therefore the preeminent voice within the ILO on the application of conventions.<sup>10</sup> The Supreme Court has overlooked the fact that this key ILO supervisory body has not concluded that freedom of association includes a right to strike.

This paper has two main objectives. The first is to chart briefly the Supreme Court’s treatment of ILO law and institutions in the Court’s major freedom of association decisions, and to provide a more thorough description of the ILO supervisory process, with a focus on the roles of the Committee of Experts, the Application of Standards Committee, and the CFA. The intent is to demonstrate that the Supreme Court has oversimplified and, more consequentially, misunderstood how the ILO supervisory process works. In doing so, the Court has improperly privileged the work of the Committee of Experts and the CFA, and has mistaken their opinions for legal authority.

The second objective of this paper is to discuss the substance of the positions of the Committee of Experts, the CFA, and the

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9 See, for example, Roy J Adams, “The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille” (2008) 14 CLELJ 317 at 321.

10 See, for example, Alfred Wisskirchen, “The Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience” (2005) 144:3 Int’l Lab Rev 253 at 278-279.

Application of Standards Committee on the right to strike. As will become clear, while the Committee of Experts and the CFA believe that a robust right to strike is situated within freedom of association, the Application of Standards Committee has not reached this conclusion, and its employer members have in fact consistently and vigorously opposed such an interpretation. Given the Application of Standards Committee's central role in the interpretation and application of ILO conventions, this suggests that international labour law does not clearly situate a right to strike within freedom of association. It appears that the right to strike as a right founded in international labour standards has a dubious pedigree. At the very least, this remains a deeply unsettled question.

The paper will conclude with some preliminary thoughts on the proposition that the right to strike is protected by section 2(d) of the *Charter*. The approach taken by courts and some academics in respect of the scope of international labour principles on freedom of association appears to be based on a surprisingly superficial analysis of ILO institutions and on misunderstandings about the role of ILO bodies. A proper understanding of the role of the various ILO institutions and of ILO interpretations of freedom of association demonstrates that tripartite support for a right to strike simply does not exist within the Application of Standards Committee, and that the issue of the right to strike in international freedom of association principles accordingly remains unresolved.

## 2. THE SUPREME COURT'S USE OF INTERNATIONAL LABOUR LAW

In the *Alberta Reference*, international labour standards and jurisprudence played no significant role in either the very brief reasons of Justice Le Dain<sup>11</sup> (writing for himself and Justices Beetz and La Forest) or the sole concurrence of Justice McIntyre. Those two judgments combined to form the "majority" position, to the effect

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11 Jamie Cameron has described Justice LeDain's four-paragraph opinion as "irresponsible," because of its very brief treatment of these issues: see "The Labour Trilogy's Last Rites: *B.C. Health* and a Constitutional Right to Strike" (2009-2010) 15:2 CLELJ 297 at 300.

that because of the need for judicial restraint in labour relations and because freedom of association did not extend to collective activities, section 2(d) of the *Charter* did not include a right to bargain collectively or to strike.<sup>12</sup> Indeed, in Justice McIntyre's longer opinion, the international labour realm was invoked only by way of a brief reference to a statement by a former Director-General of the ILO on the "value" of freedom of association in modern society.<sup>13</sup>

However, in Chief Justice Dickson's minority reasons (on behalf of himself and Justice Wilson), in which he took the position that section 2(d) included a right to bargain collectively and to strike, international labour law was addressed in detail. In fact, his analysis of international labour law was a critical basis for his ultimate finding that constitutional protection for freedom of association necessarily extended to the right to collective bargaining and the right to strike because collective bargaining and strikes were the key associational activities of unions. Chief Justice Dickson began his discussion in this area by noting that "[i]nternational law provides a fertile source of insight into the nature and scope of the freedom of association of workers"<sup>14</sup> and that "declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms" were "relevant and persuasive" in the interpretation of section 2(d) of the *Charter*.<sup>15</sup> Moreover, he asserted that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."<sup>16</sup>

After constructing this analytical foundation, Chief Justice Dickson turned to specific international instruments that in his opinion supported the inclusion of collective bargaining and strike action within freedom of association. Among those instruments, he emphasized the importance of ILO Convention 87<sup>17</sup> and its interpretations

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12 Justice Le Dain's reasons are at paras 141-144, and Justice McIntyre's are at paras 145-185.

13 *Alberta Reference*, *supra* note 4 at para 151.

14 *Ibid* at para 57.

15 *Ibid*.

16 *Ibid* at para 59.

17 *Freedom of Association and Protection of the Right to Organise Convention, 1948* [Convention 87].

by various ILO bodies, particularly the CFA and the Committee of Experts. Despite the importance he accorded to the views of these bodies, he dealt with their role within the ILO quite briefly. He noted that the CFA was established “to examine complaints of violations of trade union rights” and the Committee of Experts to “[assess] government reports on the application of ILO standards and conventions in member states . . . .”<sup>18</sup> Further, while he acknowledged that what he called the “decisions” of those two bodies “are not binding,” he quoted one academic who wrote that CFA decisions “comprise the cornerstone of the international law on trade union freedom and collective bargaining.”<sup>19</sup>

Chief Justice Dickson then proceeded to outline the “general principle” that resulted from the CFA’s and Committee of Experts’ interpretations of Convention 87, which in his view was that “freedom to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits.”<sup>20</sup> He also sought to connect this principle directly to the Canadian context, by noting in general terms that the CFA had heard a “number of complaints” involving provincial legislation. Moreover, he emphasized that the CFA had found some aspects of the legislation at issue in the *Alberta Reference* to violate freedom of association principles because too wide a range of services were deemed “essential,” resulting in an overly broad prohibition on striking.<sup>21</sup> Considered together, these factors led Chief Justice Dickson to conclude that “there is a clear consensus amongst the ILO adjudicative bodies that Convention No. 87 goes beyond merely protecting the formation of labour unions and provides protection of their essential activities — that is of collective bargaining and the freedom to strike.”<sup>22</sup>

International labour principles were once more raised by the Supreme Court in 1999, in the *Delisle* case.<sup>23</sup> In their dissenting opinion, Justices Cory and Iacobucci referenced Canada’s international

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18 *Alberta Reference*, *supra* note 4 at para 66.

19 *Ibid* at para 67.

20 *Ibid* at para 68.

21 *Ibid* at para 71.

22 *Ibid* at para 72.

23 *Delisle v Canada (Deputy AG)*, [1999] 2 SCR 989.

obligations, including those under Convention 87. Notably, instead of relying on these international principles of freedom of association to inform section 2(d), they concluded that those principles were not relevant to the content of the *Charter* right, and they shunted this consideration to the section 1 analysis instead.

After the *Alberta Reference*, it was not until the *Dunmore* decision in 2001 that a majority of the Supreme Court again deployed ILO principles in a section 2(d) analysis involving a labour relations context.<sup>24</sup> In retrospect, this is perhaps unsurprising, given that the major section 2(d) decisions which followed the 1987 trilogy — in particular, the *PIPSC*<sup>25</sup> and *Lavigne* decisions<sup>26</sup> — broadly adopted Justice McIntyre's reasoning in *Alberta Reference* with respect to the scope of the *Charter* protection of freedom of association. As John Craig and Henry Dinsdale have argued, after *Lavigne* the Court "remained divided between two camps" established in the *Alberta Reference*: most of the justices believed that freedom of association was "fundamentally individual in nature," while a "persistent minority" sought to expand it to include "protection for collective pursuits."<sup>27</sup> In *Dunmore*, however, the Court ventured beyond the parameters set in the *Alberta Reference* and *PIPSC* by extending the protective scope of section 2(d) to include a "collective dimension."<sup>28</sup> Specifically, *Dunmore* extended section 2(d) to certain collective activities that were not "performable by individuals"<sup>29</sup> but

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24 *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016.

25 *PIPSC v Northwest Territories (Commissioner)*, [1990] 2 SCR 367.

26 *Lavigne v OPSEU*, [1991] 2 SCR 211.

27 John Craig & Henry Dinsdale, "A 'New Trilogy' or the Same Old Story?" (2003) 10 CLELJ 59 at 67. As noted above, a detailed explanation of the Supreme Court's development of the content of freedom of association under section 2(d) is outside the scope of this paper. In short, the broad conceptual division between the majority's "individual" view of section 2(d) and the minority's "collective" vision endured through the 1990s, as the Court struggled, and in the opinion of many observers failed, to reach even a moderately clear consensus on the precise content of freedom of association in the labour relations context. See Cameron, *supra* note 11 and Craig & Dinsdale for detailed analyses of the Court's developing and sometimes incoherent approach to section 2(d) after the *Alberta Reference* and its two companion cases.

28 *Dunmore*, *supra* note 24 at para 16.

29 *Ibid.*



were nevertheless fundamental to an association. For unions, this might include activities such as “making collective representations to an employer, adopting a majority political platform, [or] federating with other unions . . . .”<sup>30</sup>

In his majority reasons in *Dunmore*, Justice Bastarache used principles drawn from the international labour context as reference points, primarily in an effort to demonstrate that reading a collective dimension into section 2(d) was “consistent with developments” in international labour and human rights law.<sup>31</sup> He briefly noted and relied on unspecified “developments in international human rights law, as indicated by the jurisprudence of the Committee of Experts on the Application of Conventions and Recommendations and the ILO Committee on Freedom of Association,”<sup>32</sup> to assist him in justifying the expansion of the scope of section 2(d) in this manner. In his formulation, the “jurisprudence” of these bodies not only “illustrate[d] the range of activities that may be exercised by a collectivity of employees,” but also demonstrated that “the International Labour Organization has repeatedly interpreted the right to organize as a collective right . . . .”<sup>33</sup> As authority for the latter proposition, Justice Bastarache quoted the following from an early address by a workers’ delegate to the International Labour Conference: “freedom [of association] is not only a human right; it is also, in the present circumstances, a collective right, a public right of organization.”<sup>34</sup>

Justice Bastarache went on to cite specific ILO conventions to support his second key finding with respect to section 2(d), which was that the underinclusion or exclusion of an association or class — in this case, agricultural workers — from state action can infringe freedom of association. Again, his narrow goal in referencing international labour law was to demonstrate that the *Charter* principle he

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30 *Ibid* at para 17. Notably, in this paragraph, Bastarache J. observed (without further comment) that the Supreme Court had previously excluded the right to strike and bargain collectively from the scope of section 2(d). The clear implication was that these activities did not fit within his conception of freedom of association.

31 *Ibid* at para 16.

32 *Ibid*.

33 *Ibid*.

34 *Ibid*.

was articulating was “consistent with international human rights law.”<sup>35</sup> To do this, he pointed to the language of several ILO conventions, but he did not refer to interpretations of these conventions by ILO bodies or other adjudicative forums. For example, he saw the reference in Article 2 of Convention 87 to the right of workers “without distinction whatsoever” to “join organizations of their own choosing” as evidence for the proposition that “discriminatory treatment” implicates “basic freedom of association.”<sup>36</sup> Interestingly, he also referenced Convention 11, which requires that agricultural workers enjoy the same rights of association as industrial workers, but at the same time he pointed out that Canada is not bound by that convention. Although noting that Canada had not ratified Convention 11, because it relates to an area of provincial jurisdiction, Justice Bastarache argued that Conventions 11 and 87, taken together, “provide a normative foundation for prohibiting *any* form of discrimination in the protection of trade union freedoms . . . .”<sup>37</sup> In his view, this conclusion was “fortified” by the existence of Convention 141, which sought to extend the freedom to organize to persons engaged in agriculture<sup>38</sup> and which Canada had also not ratified.

Judging from the relative brevity and generality of most of the Court’s references in *Dunmore* to ILO instruments and principles, it does not appear that international labour law played a determinative role in that decision. However, Justice Bastarache clearly saw it as providing strong support for a new interpretation of section 2(d).

In *B.C. Health*, the Court went further than it had gone in *Dunmore* in its use of international labour law to the same end. In their majority opinion in *B.C. Health*, Chief Justice McLachlin and Justice LeBel found that the interpretation “in Canada and internationally” of the *International Covenant on Economic, Social, and Cultural Rights*, the *International Covenant on Civil and Political Rights*, and most importantly, Convention 87, “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

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35 *Ibid* at para 27.

36 *Ibid*.

37 *Ibid* [emphasis in original].

38 *Ibid*.

the Canadian context under s. 2(d).<sup>39</sup> Chief Justice McLachlin and Justice LeBel, explicitly adopting Chief Justice Dickson's use of international law in the *Alberta Reference*, repeated his observation 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>40</sup> This was taken to mean that the content of international labour law will not only provide support for an interpretation of a *Charter* provision in a context in which the Court had not previously applied that provision, but will also support a departure from an existing interpretation.

This interpretation of the ILO's conception of the content of freedom of association provided a key basis for the determination in the majority judgment in *B.C. Health* that section 2(d) of the *Charter* protected a process of collective bargaining. The discussion of this issue by Chief Justice McLachlin and Justice LeBel began with an endorsement of Chief Justice Dickson's statement in the *Alberta Reference* that Convention 87 supported "the principle that the ability 'to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits.'"<sup>41</sup> Then, in a very brief paragraph, the majority judgment cited one writer who had described the CFA's and Committee of Experts' interpretations of Convention 87 "as the 'cornerstone of the international law on trade union freedom and collective bargaining.'" It went on to approve Justice Bastarache's view in *Dunmore* to the effect that although those interpretations are not binding, "they shed light on the scope of s. 2(d) of the *Charter* as it was intended to apply to collective bargaining . . . ."<sup>42</sup>

Chief Justice McLachlin and Justice LeBel then quoted a summary of ILO principles on collective bargaining from an article written by three ILO staff members — a summary which represented the authors' distillation of general principles formulated by the Committee of Experts and the CFA. However, the judgment provided

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39 *B.C. Health*, *supra* note 1 at para 72.

40 *Ibid* at para 70.

41 *Ibid* at para 75.

42 *Ibid* at para 76.

no analysis of those principles, and no direct indication of how they applied in the *Charter* context. Instead, the majority judges quickly and obliquely referenced the *Declaration on Fundamental Principles and Rights at Work*, which was promulgated by the ILO in 1998, and asserted that the *Declaration* “crystallized” a “global consensus” on the meaning of freedom of association. The judgment said, without significant further elaboration, that the *Declaration* constituted a current international law commitment that was a “persuasive source” for interpreting the *Charter*.<sup>43</sup> Finally, the judgment summed up its analysis of international labour law as follows:

In summary, international conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining, as part of the protection for freedom of association. It is reasonable to infer that s. 2(d) of the *Charter* should be interpreted as recognizing at least the same level of protection: *Alberta Reference*.<sup>44</sup>

In the Supreme Court’s decision in *Fraser*,<sup>45</sup> the role of international labour law was far more contentious within the Court than it had been in *B.C. Health*. In his concurring reasons in *Fraser*, Justice Rothstein (writing for himself and Justice Charron) launched an all-out assault on the Court’s reasoning and findings in *B.C. Health*, and mainly on its determination that collective bargaining was entitled to some constitutional protection. Indeed, Justice Rothstein argued that *Fraser* provided the Court with an opportunity to overturn *B.C. Health*, despite the fact that none of the parties to the *Fraser* appeal had asked the Court to do that. He harshly criticized most aspects of the reasoning in the majority judgment in *B.C. Health*, including its treatment of international labour law, and in that regard he made two primary points.

First, he argued that the majority in *B.C. Health* had “conflated two distinct ILO Conventions”<sup>46</sup> — Convention 87 and Convention 98,<sup>47</sup> the latter of which specifically addresses collective bargaining. For Justice Rothstein, this conflation was highly problematic; since

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43 *Ibid* at para 78.

44 *Ibid* at para 79.

45 *Supra* note 2.

46 *Ibid* at para 248.

47 *Right to Organise and Collective Bargaining Convention, 1949* [Convention 98].

Canada had not ratified Convention 98, it was, in his view, inappropriate to use that convention to elucidate the *legal* scope of freedom of association under section 2(d) of the *Charter*.<sup>48</sup> In effect, Justice Rothstein took the position that *B.C. Health* had found that Canada had legal obligations under Convention 98 when in fact it had none.

Second, Justice Rothstein held that even if Convention 98 were applicable to Canada, the majority in *B.C. Health* had erred in finding that convention to support a system of “compulsory” collective bargaining (i.e. a duty to bargain in good faith). Rather, Convention 98, and the principles developed by ILO bodies in relation to it, “conceives of collective bargaining as being a process of ‘voluntary negotiation’ ”<sup>49</sup> which does not impose duties on an employer. In Justice Rothstein’s view, the majority in *B.C. Health* therefore misconstrued what international labour law implied for freedom of association in the Canadian context.<sup>50</sup>

The majority reasons in *Fraser* (written, as in *B.C. Health*, by Chief Justice McLachlin and Justice LeBel) spent much time addressing Justice Rothstein’s numerous arguments against *B.C. Health*, but did not deal extensively with his attack on that decision’s treatment of international labour law. The *Fraser* majority did, however, briefly affirm *B.C. Health*’s treatment of international labour law, reiterating that the latter case had “discussed both ‘Canada’s *current* international law commitments and the current state of international thought on human rights.’ ”<sup>51</sup> The majority judgment then went on to imply that both of those elements could serve as interpretive tools in the *Charter* context.<sup>52</sup> Notably, however, it did seem to back away from the tacit assumption in *B.C. Health* which was targeted by Justice Rothstein, namely that Convention 98 *required* a system of collective bargaining that included some type of duty on an employer to bargain in good faith. On this point, the *Fraser* majority acknowledged that “voluntariness is a component of the international model of collective bargaining,” but explained that the ILO

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48 *Fraser*, *supra* note 2 at para 249.

49 *Ibid*.

50 *Ibid* at para 250.

51 *Ibid* at para 92 [emphasis in original].

52 *Ibid*.

Committee of Experts “has not found compulsory collective bargaining to be contrary to international norms.”<sup>53</sup> As a result, the majority implied, the interpretation of international labour law and principles articulated in *B.C. Health* remained legitimate.<sup>54</sup>

Justice Rothstein’s reasons in *Fraser* raise serious questions about how Canadian courts should use international labour law instruments and principles as interpretive tools in future *Charter* cases. It is clear, however, that a majority of the Supreme Court continues to see principles emanating from the ILO and from other international bodies as important legal authorities in this regard, albeit ones that can be dealt with in a fairly cursory manner. The *Fraser* majority’s approach thus reflects the relatively settled way in which the Court has come to view and apply international labour law and principles in its analysis of freedom of association in the labour relations context.

### 3. THE ILO AS A SOURCE OF INTERNATIONAL LAW

#### (a) The “Two Pillars” of the ILO Supervisory Process: The Committee of Experts and the Application of Standards Committee

Pursuant to Article 2 of the ILO Constitution, the main components of the ILO are the annual International Labour Conference (the Conference), the Governing Body, and the International Labour Office. The Application of Standards Committee is a standing committee of the Conference, established pursuant to Article 7 of the Standing Orders of the Conference, and must report in writing to the plenary of the Conference.<sup>55</sup> The Committee of Experts was established pursuant to the instructions of the Application of Standards Committee.<sup>56</sup> While the Committee of Experts and the Application of Standards Committee are considered to be “the two pillars of the ILO

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53 *Ibid* at para 95.

54 *Ibid*.

55 International Labour Conference, 8th Sess, 1926, First Record, Appendix V at 395.

56 *Ibid* at 396 and 398.

supervisory system,”<sup>57</sup> this formulation obscures the fact that both of those bodies play specified roles within what can best be described as a single supervisory process with two distinct stages.

The Committee of Experts operates at the first stage of the supervisory process. It is composed of 20 legal experts appointed in their personal capacity by the Governing Body of the ILO to carry out an “independent technical examination” of ILO member states’ domestic labour laws and practices in the context of their ILO obligations.<sup>58</sup> The Committee of Experts meets for two weeks each fall, and examines information provided by ILO member states pursuant to their reporting obligations under the ILO Constitution.<sup>59</sup> More specifically, as the Committee of Experts explained in its 2010 Annual Report, its “principal task consists of the examination of the reports supplied by governments on Conventions that have been ratified by member States . . . .”<sup>60</sup> As a technical committee, the Committee of Experts is to advise the International Labour Conference and the Application of Standards Committee “as to the facts.”<sup>61</sup> It produces “observations,” which contain “comments” on “fundamental questions” related to the practical application of a member state’s domestic labour law and practice in the context of the particular conventions it has ratified.<sup>62</sup> These observations are compiled in the Committee of Experts’ annual report, which in 2010 contained over 800 of them. It is the opinions set out in these observations that were pointed to by the Supreme Court of Canada in decisions such as the *Alberta Reference* and *B.C. Health* as “cornerstones” of ILO “law” on freedom of association.

However, it must be emphasized that while the Committee of Experts’ observations certainly set out that committee’s legal opinion on member states’ compliance with conventions, those observations are not the ILO’s last word on the matter but go to the Application of

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57 International Labour Conference, 99th Sess, 2010, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A) at 2 [Committee of Experts Report].

58 *Ibid* at 2-3.

59 Arts 19, 22 and 35.

60 Committee of Experts Report, *supra* note 57 at 11.

61 *Supra* note 55 at 398.

62 See, for example, Committee of Experts Report, *supra* note 57 at 2.

Standards Committee for further deliberation. As was noted in the report that established its mandate, the Application of Standards Committee has the responsibility to “decide upon its attitude and upon what appropriate action it might take or indicate.”<sup>63</sup>

In contrast to the Committee of Experts, the Application of Standards Committee is tripartite, and it meets annually at the International Labour Conference. In 2010, for example, it had 220 members (107 government delegates, 20 employer delegates, and 93 worker delegates).<sup>64</sup> The Application of Standards Committee’s function is to consider member states’ compliance with ratified conventions. To this end, its “primary role” is to select and examine approximately 25 cases from the hundreds of observations submitted to it each year by the Committee of Experts.<sup>65</sup> In doing so, it invites government representatives to provide further information and explanation, to describe steps towards compliance taken or proposed since the last meeting of the Committee of Experts, and to point to any difficulties raised by compliance.<sup>66</sup> Ultimately, when the Application of Standards Committee considers a specific case for the purpose of reaching a “conclusion,” government, worker, and employer representatives from the state concerned (as well as the employer and worker vice-chairs) may make submissions on the case. In addition, government, worker and employer delegates from other states may make submissions to the committee during the general debate.

After the hearing of submissions, the final step in the process is the formulation of the committee’s conclusion, which is submitted in draft form by the chair to the worker and employer vice-chairs for their comments. The chair then determines the final conclusion and presents it to the committee. A conclusion may contain a variety of comments, including remarks on a state’s failure, its progress, or the need for it to modify its labour law or practice to bring it into

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63 *Supra* note 55 at 398.

64 International Labour Conference, 99th Sess, 2010, *Report of the Committee on the Application of Standards*, Part One, at 3 [Conference Committee Report].

65 Committee of Experts Report, *supra* note 57 at 4.

66 *Ibid* at 3.



compliance with the convention in question.<sup>67</sup> If a state has egregiously and repeatedly violated a convention, the committee may so conclude in a “special paragraph” in its report to the International Labour Conference.

Although the Application of Standards Committee and the Committee of Experts generally reach similar conclusions, their different structures and activities make it appropriate to see them as constituting two distinct stages within the ILO supervisory process. The Committee of Experts’ role can be viewed as “technical” and not

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67 See, for example, the Conference Committee’s 2010 consideration of Canada’s compliance with Convention 87: International Labour Conference, 99th Sess., 2010, *Report of the Committee on the Application of Standards*, Part Two, at 22-26. Its full conclusions were as follows:

The Committee noted the information provided by the Government representative and the discussion that followed. It noted that the comments of the Committee of Experts related to a number of discrepancies between the laws and practices in various provinces, on the one hand, and the Convention on the other. The Committee noted that the issues that were pending related in particular to the exclusion of a variety of workers from the coverage of the labour relations legislation in a number of provinces. The Committee took note of the information provided by the Government representative that, while it was true that not all workers in Canadian jurisdictions were covered by industrial relations legislation, they were entitled to join associations of their own choosing. In addition, the Government maintained that some inconsistencies raised by the Committee of Experts actually made sense within the Canadian context and had not raised concerns at the national level. The Government representative further referred to a variety of efforts made by the Federal Government to bring the provincial authorities and the social partners together to review the matters raised, on several occasions with the collaboration of the ILO. The Committee recalled that certain legislative texts needed to be amended in some provinces with a view to guaranteeing the full application of the Convention. In particular, it stressed the importance of ensuring to all workers, without distinction whatsoever, the right to form and join the organization of their own choosing. The Committee accordingly expressed the firm hope that all the necessary measures would be adopted in the near future to provide full guarantees of the rights set forth in the Convention for all workers. It noted with interest in this regard the general invitation extended by the Government for continuing ILO advice and assistance. The Committee requested the Government to provide detailed information in its next report to the Committee of Experts on the measures adopted in this connection, including as regards developments on appeals before the Supreme Court of Canada.

judicial, and as being primarily one of providing advice and analysis to the Application of Standards Committee on the information and reports submitted by ILO member states.<sup>68</sup> Insofar as there is an adjudicative role in this process, it is clearly exercised by the Application of Standards Committee. It is that committee which hears submissions from the parties and reaches conclusions on a state's compliance with its international obligations. Moreover, while the Application of Standards Committee generally bases its review of state compliance on the Committee of Experts' observations, it retains a broad and unfettered discretion to reach conclusions in that respect. This is reinforced by the fact that the Application of Standards Committee is a committee of the International Labour Conference (the "supreme organ" of the ILO), while the Committee of Experts is not.<sup>69</sup>

Alfred Wisskirchen has summed up these structural distinctions succinctly:

. . . the two supervisory bodies must be regarded as acting at different stages. The Committee of Experts conducts a kind of preliminary examination. Its observations regularly constitute the starting point, but do not always mark the end, of consultation in the Conference Committee . . . . As already noted, the whole report of the Conference Committee and its conclusions as to specific cases are not just discussed by the full International Labour Conference, but expressly adopted by it. Thus, the findings of the Conference Committee are approved by the highest legislative body of the ILO. [The Conference Committee's] statements and findings clearly take precedence over the observations of the preparatory body. If the observations of the Committee of Experts are not expressly adopted by the Application of Standards Committee, they are more of an internal organizational process without external repercussions. They are never binding.<sup>70</sup>

As Wisskirchen has said, there has been debate within the ILO in recent decades over the role of the Committee of Experts within the supervisory process. The most acute example occurred when the Committee of Experts suggested in its 1990 report that its interpretations of ILO conventions were binding on issues that the

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68 Wisskirchen, *supra* note 10 at 271-272. See also Brian Langille, "Can We Rely on the ILO?" (2006-2007) 13 CLELJ 273 at 284.

69 Wisskirchen, *ibid* at 279.

70 *Ibid* at 278-279.

International Court of Justice (ICJ) had not opined on, despite the apparently undisputed fact that Article 37 of the ILO Constitution gives the ICJ the exclusive authority to render a binding interpretation of an ILO convention.<sup>71</sup> After heated debate at the International Labour Conference in 1990, the Committee of Experts pulled back from its attempt to effectively reconstitute itself as the preeminent legal authority within the ILO. In its annual report in the following year, it explicitly acknowledged that its views did not constitute binding decisions on interpretive matters generally; it also recognized that the Application of Standards Committee had the right to deviate from interpretations expressed in the Committee of Experts' observations.<sup>72</sup>

Notwithstanding this ostensible retrenchment, the Committee of Experts continues to exercise its narrow authority to interpret conventions in a way that, in the view of some observers, occasionally steps beyond its mandate. At the 2010 International Labour Conference, for example, the employer members of the Application of Standards Committee argued that several aspects of the Committee of Experts' report exceeded its authority. This is reflected in the Application of Standards Committee's 2010 General Report, which vividly illustrates the repeated attempts by the employer members during the Application of Standards Committee's deliberations to reassert the primacy of tripartite standard-setting and supervision within the ILO process.

At the 2010 International Labour Conference, the employer members of the Application of Standards Committee appeared to be concerned that although the Committee of Experts' report is now seen by some as authoritative in many respects,<sup>73</sup> it has on occasion

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71 ILO Constitution, art 37. See also Wisskirchen, *supra* note 10 at 273 and Langille, *supra* note 68 at 285. This principle was recognized by Chief Justice Dickson in the *Alberta Reference*, *supra* note 4 at para 67.

72 Wisskirchen, *ibid* at 273.

73 By way of example, the Application of Standards Committee has noted that the ILO uses the Committee of Experts' Annual Report as a key tool to build the ILO's "Country Profiles," and also that the report is frequently "quoted to indicate the ILO's position on the state of compliance by individual countries with ratified Conventions." Conference Committee Report, *supra* note 64 at 16 para 51.

failed to take into consideration the views and interpretive positions reflected in the conclusions of the Application of Standards Committee. In other words, the employer members took the position that because of the perception (both inside and outside the ILO) that the Committee of Experts' report is authoritative, that report needs to reflect the full diversity of opinion of the tripartite members within the ILO supervisory system on the interpretation of conventions.<sup>74</sup>

Notably, the employer members of the Application of Standards Committee drew attention to the fact that the Committee of Experts has consistently included an ever-more expansive right to strike in its recent observations on Conventions 87 and 98. In their submissions, the employer members pointed out that neither the text nor the legislative history of either convention indicated that a right to strike was contemplated, and that no consensus on the matter existed within the ILO's tripartite supervisory process.<sup>75</sup> The employer group emphasized that the Application of Standards Committee had repeatedly found it "impossible" to reach a conclusion in Convention 87 cases where the right to strike was at issue, and that the Committee of Experts' interpretive approach to the right to strike therefore "undermined tripartism in standard setting and supervision."<sup>76</sup> We shall return to these issues below.

The tension described here should be of fundamental concern to anyone attempting to discern the ILO's legal position on freedom of association. At the very least, and if we accept that both the Committee of Experts and the Application of Standards Committee have a role to play in elucidating Convention 87's vision of freedom

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74 *Ibid* at 18. In its *General Report*, the ILO noted the employer members' position as follows:

The Employer members acknowledge that the work of the Committee of Experts, especially its observations on compliance with ratified conventions, was of utmost importance to the work of the Conference Committee, but expressed the view that the Committee of Experts had to show in the written materials that they took account of what was discussed in the Conference Committee. This would be in the interest of maintaining the integrity of the tripartite governance process mandated by Article 23 of the ILO Constitution and Article 7 of the Standing Orders of the Conference.

75 Conference Committee Report, *supra* note 64 at 18 para 57.

76 *Ibid*.

of association, the Committee of Experts' observations cannot in themselves represent the views of the ILO tripartite supervisory mechanism as a whole. While the Committee of Experts does have a legal role within the supervisory process, it clearly does not have an adjudicative or judicial role.

**(b) Committee on Freedom of Association (CFA)**

The CFA is the other ILO body that has been frequently referred to by the Supreme Court of Canada as an authoritative interpreter of freedom of association principles in international labour law. The CFA's actual role within the ILO supervisory system, however, does not clearly support the conclusion that its decisions should be taken as the "cornerstone" of the international law of freedom of association.

The CFA was established in 1951 by the Governing Body of the ILO, of which it is a standing committee. It is tripartite in membership, with nine members and nine deputy members drawn from the government, workers', and employers' groups of the Governing Body, and it is led by an independent chairperson. The members of the CFA are not lawyers. It meets three times a year and has heard over 2,500 cases to date.<sup>77</sup> The CFA can receive and hear complaints from an extremely broad range of actors regarding alleged state violations of freedom of association. In fact, governments, as well as national or international organizations of workers or employers, may submit a freedom of association complaint against a state, whether or not that state has ratified the relevant ILO conventions or indeed is even a member of the ILO.<sup>78</sup>

The creation and activities of the CFA — as a body that solely considers complaints concerned with freedom of association — has been supported by the argument that freedom of association is central to the concept of tripartism and therefore to the ILO itself.<sup>79</sup> Because the CFA is concerned specifically with freedom of association, its mandate "stems from the fundamental claims and purposes set out in

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

78 *Ibid* at 2.

79 *Ibid* at 1.

the ILO constitution,”<sup>80</sup> in which freedom of association principles are integral.

It is important to emphasize that the CFA was created by the Governing Body as the second part of a special procedure dedicated to reviewing complaints which invoke freedom of association principles.<sup>81</sup> The first part of this process involves the Fact Finding and Conciliation Committee on Freedom of Association (FFCC), which was created in 1950 and still exists today, although it has been used only six times. Initially, the FFCC was intended to be the adjudicative branch of the special procedure on freedom of association; the CFA was merely intended to conduct a “preliminary examination” of the complaints received, with a view to making recommendations for further action to the Governing Body. As the CFA has recently noted, its recommendations to the Governing Body on specific complaints fall into one of three categories: that the case requires no further examination; that the Governing Body should draw the attention of the government concerned to the problems that have been found, and invite it to take appropriate measures to resolve them; or that the Governing Body should endeavour to obtain the government’s agreement to refer the case to the FFCC.<sup>82</sup>

The preliminary nature of the recommendations that the CFA is tasked with making to the Governing Body reinforces the fact that it is structured to serve as a forum for the initial assessment of freedom of association complaints, rather than for their final determination. In fact, as Brian Langille has emphasized, the third type of recommendation noted above — that the Governing Body should seek the government’s agreement to refer the case to the FFCC — is critical to understanding why the CFA and not the FFCC has become the focal point of the freedom of association complaints process. In large part, the reason is that the FFCC can hear a complaint only if the state concerned has ratified the relevant convention or has otherwise expressly agreed to go before the FFCC,<sup>83</sup> whereas the CFA (because

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80 *Ibid* at 8 para 8.

81 *Ibid* at 2.

82 *Ibid* at 2.

83 *Ibid*. See also Langille, *supra* note 68 at 281.

it serves only as a forum for the preliminary examination of complaints) can hear a complaint whether or not the state has given its consent or has ratified the particular convention.<sup>84</sup>

The FFCC has been hindered by the very fact that it was set up to be the adjudicative body within the special complaints procedure. As the CFA has admitted, “consisting as it does of a procedure which respects traditional procedural, oral and written guarantees, [the FFCC process] is relatively long and costly and has thus only been used in a limited number of cases.”<sup>85</sup> In other words, because the FFCC’s process is akin to a traditional legal or judicial proceeding, it has played almost no role in the development of the ILO’s freedom of association principles. As Langille has explained, “[t]he CFA makes its way in the world precisely because it is not the FFCC [and] is not a judicial process at all . . . .”<sup>86</sup>

This also explains why the CFA can utilize a vast range of principles when examining freedom of association complaints. Not only is the CFA not a “judicial” body; in contrast to the Committee of Experts and the Application of Standards Committee, it is not really even a “legal” body. It is not bound to interpret ILO conventions, nor is it restricted to deploying legal principles in its examination of complaints. Because it draws its mandate and authority from the central tenets of the ILO Constitution rather than from a specific convention, resolution or constitutional provision, it is tasked with examining state behaviour in the light of freedom of association “principles” construed in the broadest terms. As such, it frequently relies on principles that come from sources other than the traditional, binding instruments of international labour law<sup>87</sup> — for example, from non-binding ILO instruments or documents (such as recommendations or resolutions), or from more ephemeral principles deployed to deal on an *ad hoc* basis with novel issues that arise in particular complaints.<sup>88</sup>

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84 Langille, *ibid* at 282.

85 CFA *Digest*, *supra* note 77 at 2.

86 Langille, *supra* note 68 at 282.

87 See, for example, CFA *Digest*, *supra* note 77 at 3.

88 Langille, *supra* note 68 at 286, quoting Breen Creighton, Book Review (2005) 26 *Comp Lab L & Pol’y J* 327 at 329.

The last point is critical. Because of the importance the CFA gives to fostering freedom of association principles, and because it often examines complaints involving entities that are not bound by the international labour law of freedom of association (i.e. by Conventions 87 and 98),<sup>89</sup> the CFA has not conducted itself as an interpreter and promulgator of legal principles on a day-to-day basis. In the CFA's own words, "[t]he object of the special procedure on freedom of association is not to blame or punish anyone, but rather to engage in a constructive tripartite dialogue to promote respect for trade union rights in law and practice."<sup>90</sup>

This is not the type of language typically used to characterize a judicial or quasi-judicial forum. It confirms that the CFA closely fits the fact-finding, mediation, and conciliation service model advanced by Langille and Wisskirchen.<sup>91</sup> As Wisskirchen argues, because the CFA concerns itself with freedom of association issues not only with respect to states that have ratified Conventions 87 or 98 but also with respect to states that have not, "its recommendations cannot be deemed to be 'case law' in the sense of an interpretation of the standards laid down in Conventions."<sup>92</sup> The CFA's description of itself as a forum for "constructive tripartite dialogue" fits the picture which emerges above — that of a body most accurately described as participating in finding practical solutions to freedom of association concerns through principled but non-judicial means.

#### **4. THE ILO, FREEDOM OF ASSOCIATION, AND THE RIGHT TO STRIKE**

Neither Convention 87 nor Convention 98 — nor, for that matter, any other ILO convention — explicitly establishes a right to strike. In fact, the word "strike" does not even appear in either of these conventions. Numerous observers have contended that the failure to articulate such a right in any ILO instrument is a product of the

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89 Wisskirchen, *supra* note 10 at 287. Brian Langille provides a comprehensive consideration of the binding nature of an ILO member state's "obligations": *supra* note 68.

90 CFA *Digest*, *supra* note 77 at 8 para 4.

91 Langille, *supra* note 68 at 287; Wisskirchen, *supra* note 10 at 287.

92 Wisskirchen, *ibid* at 287.



fear of restricting or otherwise derogating from the “freedom of relations” between workers and employers.<sup>93</sup> Others have argued, however, that it is due to the fact that setting out a right to strike has been considered and expressly rejected within the ILO, and specifically during the formative stages of both Conventions 87 and 98.<sup>94</sup> In any event, the absence of an express right to strike has not prevented the CFA, the Committee of Experts and the Application of Standards Committee from pronouncing repeatedly on the extent to which that right is protected by freedom of association in principle, and specifically by Convention 87. In light of the discussion above, it is not surprising that these three ILO bodies do not agree on the matter.

**(a) The Committee of Experts and the CFA**

The Committee of Experts and the CFA both believe that freedom of association as it is defined in Convention 87 necessarily includes a robust right to strike.<sup>95</sup> Generally, the Committee of Experts has concluded that any restrictions on strikes are impermissible and render a member state non-compliant with Convention 87. The Committee of Experts and the CFA also agree in all critical respects on the parameters of that right, insofar as it would, on their reading, restrict a government’s capacity to limit or otherwise intervene in unions’ or workers’ ability to coordinate a work stoppage.<sup>96</sup> Indeed, these committees contemplated what has been described as a “comprehensive corpus of minutely detailed strike law which

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93 Jean-Michel Servais, “ILO Law and the Right to Strike” (2009-2010) 15 CLELJ 147 at 148; Bob Hepple, “The Right to Strike in an International Context” (2009-2010) 15 CLELJ 133 at 136.

94 Wisskirchen, *supra* note 10 at 285.

95 See, for example, CFA *Digest*, *supra* note 77 at 109 para 523. The CFA and Committee of Experts both point specifically to articles 3 and 10 of that convention, which protect the rights of workers’ and employers’ organizations to “organize their administration and activities and to formulate their programmes” and the goals of those organizations as “furthering and defending the interests of workers or of employers” respectively. Bernard Gernigon, Alberto Otero & Horacio Guido, “ILO Principles Concerning the Right To Strike” (1998) 137:4 Int’l Lab Rev 441 at 442; Servais, *supra* note 93 at 150.

96 Gernigon, Otero & Guido, *ibid* at 444.

amounts to a far-reaching, unrestricted freedom to strike,”<sup>97</sup> a full discussion of which is beyond the scope of this paper. Instead, we will focus on the key principles that those bodies have developed on the types of strikes that workers have a right to undertake, and on the types of direct limitations on strikes that are seen as permissible. It is these principles that most dramatically challenge existing practices of strike regulation in Canada.

The Committee of Experts and the CFA have generally held that all types of strike action fall within the protective ambit of freedom of association. This means that, as Jean-Michel Servais has put it, “the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement.”<sup>98</sup> In fact, the only type of strike which clearly falls outside the conceptual scope of freedom of association is the “purely political” strike.<sup>99</sup> That categorization is obviously problematic: where is the line to be drawn between what is “purely” political and what is only “partly” political? The CFA has held that freedom of association protects “protest strikes,” which are strikes through which unions seek (in the CFA’s words) to voice “their dissatisfaction as regards economic and social matters affecting their members’ interests.”<sup>100</sup> Strikes directed at protesting a government’s general economic or social policy would usually fall within that category.<sup>101</sup> This highlights the acute practical difficulty in trying to distinguish an unprotected “purely political” strike from one that is protected by freedom of association principles.<sup>102</sup>

“General” strikes also fall within the scope of freedom of association. For example, the CFA has stated that “[a] 24-hour general strike seeking an increase in the minimum wage, respect of collective agreements in force and a change in economic policy . . . is legitimate,”<sup>103</sup> and that a government’s “declaration of the illegality of a national strike protesting against the social and labour consequences

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97 Wisskirchen, *supra* note 10 at 285.

98 Servais, *supra* note 93 at 150.

99 Gernigon, Otero & Guido, *supra* note 95 at 445.

100 CFA *Digest*, *supra* note 77 at 111 para 531.

101 Servais, *supra* note 93 at 150.

102 Gernigon, Otero & Guido, *supra* note 95 at 446.

103 *Ibid.* See also CFA *Digest*, *supra* note 77 at 113 para 543.

of the government's economic policy and the banning of the strike constitute a serious violation of freedom of association."<sup>104</sup>

In addition, the Committee of Experts and the CFA have found that it is a violation of freedom of association principles to limit strike actions which are more closely connected to workplace issues. For example, both have declared that workers are entitled to broad freedom to initiate "sympathy" strikes, as long as the initial strike being supported is lawful,<sup>105</sup> and that it is a breach of freedom of association to proscribe non-traditional or informal types of strike action. As Servais notes, workplace actions such as "demonstrations, wildcat strikes, downing tools, slow-downs, working to rule and sit-down strikes" may be restricted only if the action "ceases to be peaceful."<sup>106</sup>

The two committees have taken a similarly negative view of restrictions on the types of workers that are permitted to strike. They see the right to strike as a general one, and hold that state attempts to exclude workers from its scope are legitimate only in very limited circumstances. This issue has arisen most frequently with respect to limits placed on strikes by "public servants" and in "essential services." The primary circumstance in which governments may prohibit public servants from striking is where they are involved in the administration of justice or the judiciary.<sup>107</sup> More broadly, the Committee of Experts and the CFA have recognized that who is a "public servant" varies across states, and have therefore adopted a strict functional approach that looks to whether a public employee is "exercising authority in the name of the state."<sup>108</sup> This has been found not to include, for example, transport workers or employees in state-owned commercial or industrial concerns.<sup>109</sup>

With respect to "essential services," the Committee of Experts and the CFA have taken an equally strict approach to state attempts to limit the ability to strike. Specifically, the CFA has stated that a service is essential only where a strike would pose a "clear and imminent

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104 CFA *Digest*, *ibid* at 113 para 542.

105 *Ibid* at 112 para 534.

106 Servais, *supra* note 93 at 151; CFA *Digest*, *supra* note 77 at 113 para 545.

107 Servais, *ibid* at 153.

108 CFA *Digest*, *supra* note 77 at 118 para 574.

109 Gernigon, Otero & Guido, *supra* note 95 at 449.

threat to the life, personal safety or health of the whole or part of the population”;<sup>110</sup> moreover, a non-essential service may become essential if a strike lasts long enough to begin to pose a threat to the population.<sup>111</sup> That said, whether a service is essential is typically determined by the type of work being done. Among services found by the CFA to be essential are hospital services; electricity and water supply; telephone services; police and armed forces; firefighting; prison services; provision of food to school children; school cleaning; and air traffic control.<sup>112</sup> In contrast, services in the following sectors are among those that have not been considered essential: radio and television; petroleum; ports; banking; computing for tax collection purposes; transport generally; airlines; fuel production and distribution; railways; postal services; garbage collection; agriculture and food supply; government printing services; and education services (except for the work of principals and vice-principals).<sup>113</sup>

Related to the conception of essential services is the treatment by the Committee of Experts and the CFA of government requirements for the maintenance of minimum service levels during strike action. In practice, the CFA has taken a relatively strict approach to minimum service requirements, holding them to be appropriate only where a service is of “fundamental importance” or of “public utility” (synonymous categories that are notionally a small step below essential services),<sup>114</sup> and requiring that workers’ representatives be allowed to participate in determining minimum service levels.<sup>115</sup>

These examples should give an idea of the vast expanse of protected activities and occupational classes that fall within the Committee of Experts and the CFA’s broad conception of the right to strike.

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110 CFA *Digest*, *supra* note 77 at 119 para 581.

111 *Ibid* at 119 para 582.

112 *Ibid* at 119 para 585.

113 *Ibid* at 121 paras 587-588.

114 Gernigon, Odero & Guido, *supra* note 95 at 452.

115 CFA *Digest*, *supra* note 77 at 125 para 612, 126-128 paras 615-626.

### (b) The Application of Standards Committee

In stark contrast to the Committee of Experts and the CFA, the Application of Standards Committee has found it “impossible” to reach a consensus on whether freedom of association includes a right to strike.<sup>116</sup> As discussed above, this appears to be due to the fact that the tripartite members of the Application of Standards Committee take different positions on the matter. Generally, the worker members are in agreement with the position of the Committee of Experts and the CFA on the existence and scope of a right to strike.<sup>117</sup> Indeed, in response to concerns raised by the employer members of the Application of Standards Committee during the 2010 International Labour Conference, the worker members offered a detailed defence of the Committee of Experts’ position in their concluding remarks on supervisory procedures.<sup>118</sup>

The government members of the Application of Standards Committee, on the other hand, seem to have mixed views on the matter. As Gernigon, Otero and Guido have noted, in the discussion of the Committee of Experts’ *General Survey of Freedom of Association and Collective Bargaining* at the 1994 meeting of the Application of Standards Committee, some government members stated their “general agreement” with the Committee of Experts’ position, while others expressed doubts and pointed to specific issues, especially with respect to the public service. Many others remained silent.<sup>119</sup> This divergence in government positions on the right to strike likely still prevails today.

Finally, the employer members of the Application of Standards Committee appear to disagree with the interpretation of freedom of association advanced by the Committee of Experts and the CFA as it relates to a right to strike. Specifically, the employer members have taken the view that it is not possible to “deduce” a “global, precise

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116 Conference Committee Report, *supra* note 64 at 18 para 57.

117 Gernigon, Otero & Guido, *supra* note 95 at 442; Conference Committee Report, *ibid* at 24 para 74.

118 Conference Committee Report, *ibid*.

119 Gernigon, Otero & Guido, *supra* note 95 at 443.

and detailed, absolute and unlimited” right to strike from Conventions 87 or 98.<sup>120</sup> As described above, this view was articulated at the 2010 meeting of the Application of Standards Committee, where the employer members reiterated their traditional criticism of the detailed and expansive notion of the right to strike developed by the Committee of Experts. Noting that the text and legislative history of Conventions 87 and 98 did not expressly provide for a right to strike, and that “at most” Convention 87 allowed for a “general right to strike,” employer members questioned what they described as the Committee of Experts’ “detailed critique of ratifying countries’ strike policies, especially on ‘essential services,’ applying a ‘one size fits all approach’ and failing to recognize differences in economic or industrial development and current economic circumstance.”<sup>121</sup> Generally, the view of the employer members of the Application of Standards Committee, as reflected in that debate, is that strike activity cannot be “regulated in detail” under Convention 87 because the committee’s tripartite membership has consistently found it impossible to reach a consensus on the issue.<sup>122</sup>

## 5. CONCLUSION

If international labour principles on freedom of association are to be considered in assessing the claim that section 2(d) of the *Charter* includes a right to strike, a few points need to be made. First, neither Convention 87 nor Convention 98 contains an express right to strike. Second, the work of the Committee of Experts and the CFA, while integral to the work of the ILO, is not legal authority. Any binding or persuasive legal authority on the part of the ILO and its supervisory bodies is predicated on tripartite agreement. The practical reality of longstanding tripartite disagreement on whether Convention 87 includes a right to strike counters the argument that such a right must be imported into the *Charter* because it is a right that Canada is legally obliged to recognize as a result of its ratification of Convention 87.

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120 *Ibid* at 443.

121 Conference Committee Report, *supra* note 64 at 18 para 57.

122 *Ibid*.

As Wisskirchen has noted,<sup>123</sup> ILO conventions are widely agreed to be international treaties that must be interpreted according to the *Vienna Convention on the Law of Treaties*.<sup>124</sup> Under Article 31 of the *Vienna Convention*, the interpretation of a treaty hinges on its terms, and on any agreement of the parties or any practice accepted by them with respect to the treaty's implementation. As we have seen, Convention 87 does not expressly articulate a right to strike, and the tripartite partners within the ILO have never reached a consensus that it should be interpreted as including such a right. Further, the profound variation in the ways in which ILO member states actually regulate strike activity — sometimes in spite of recommendations by the CFA and Committee of Experts — underlines the virtual impossibility of arguing that an explicit or implicit consensus has emerged in favour of reading a right to strike into Convention 87.<sup>125</sup>

Moreover, as Wisskirchen has noted, the legislative history of both Convention 87 and Convention 98 is relevant to this analysis by virtue of Article 32 of the *Vienna Convention*, which looks to the preparatory work of a treaty and the circumstances of its adoption when attempting to discern its meaning. Specifically, in the case of Convention 87, he points out that the International Labour Office expressly excluded the right to strike from its preparatory report on the proposed convention after many governments emphasized that although they supported a convention on freedom of association, it should not include a right to a strike. As the record of the 1948 International Labour Conference indicates, the Office decided that in those circumstances it was “preferable” not to include a provision on the right to strike in the convention.<sup>126</sup> Similarly, during the 1949 International Labour Conference proceedings that led to the adoption of Convention 98, two worker delegates and one government delegate put forward proposals to include a right to strike in that convention. The chairman rejected those proposals, on the explicit ground

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123 Wisskirchen, *supra* note 10 at 276.

124 *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS vol 1155 at 331.

125 Wisskirchen, *supra* note 10 at 284.

126 *Ibid* at 285.

that the right to strike was not within the scope of the proposed text.<sup>127</sup>

Significantly, it was not until 1959, in the third *General Survey on Conventions 87 and 98*, that the right to strike was mentioned in the context of freedom of association. Not until its 1973 *General Survey* did the Committee of Experts expand its view of the right to strike (to seven paragraphs) and express opinions on temporary and general prohibitions of strikes, strikes in the public sector, and recourse to state dispute resolution procedures. In the 1994 *General Survey*, the Committee of Experts' views on the right to strike were included in a separate chapter, which included 44 paragraphs of detailed elaboration of the right to strike.<sup>128</sup> The Committee's opinions on that right were therefore elaborated long after the drafting of Convention 87 was complete.

Taken together, these considerations provide the foundation for a strong argument that a right to strike is not embedded in Canada's international labour law obligations under ILO conventions.

A main prong of an argument in favour of a constitutional right to strike is likely to be the persuasive authority of the CFA's and Committee of Experts' detailed and cohesive body of "jurisprudence" on the content of freedom of association. While the Supreme Court of Canada has referred to the opinions of those bodies as the "cornerstone"<sup>129</sup> of the international law of freedom of association, it would be open to the Court to reject the CFA's and Committee of Experts' position on the right to strike without wholly abandoning the laudatory and uncritical approach it took in *B.C. Health* to the freedom of association principles enunciated by those committees. Although both committees are important elements of the ILO's supervisory system, they play specific roles that do not include creating authoritative legal rules. Because the CFA's recommendations are based on the broad concept of freedom of association, and emphasize conciliation and dialogue, they cannot be understood as precise jurisprudence on the interpretation of Convention 87. As for the

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127 *Ibid.*

128 Conference Committee Report, *supra* note 64 at 17 para 57.

129 *B.C. Health*, *supra* note 1 at paras 76 & 84.



Committee of Experts' observations, they form an important foundation for the work of the Application of Standards Committee but such observations must be understood within the overall context of the ILO's supervisory mechanism. It is crucial to recognize that the Application of Standards Committee is the tripartite forum in which Convention 87 (and therefore the concept of freedom of association) is interpreted and applied. As the CFA itself has affirmed, tripartism is "enshrined" in the ILO's Constitution and all of its structures, and is inextricably linked with freedom of association.<sup>130</sup> It is the central component of the ILO's standards-setting and supervisory processes. In that light, it is necessary to take account of the Application of Standards Committee's position on freedom of association and the right to strike, in addition to the views of the Committee of Experts and the CFA. As the Application of Standards Committee's repeated attempts to address this issue reveal, there is no consensus within the ILO on whether a right to strike is protected by Convention 87.

If the Supreme Court of Canada will continue to employ international labour law in its constitutional analysis, it must arrive at a comprehensive understanding of what the ILO's position is on any particular issue — especially on one as important as the right to strike. The analysis set out above reveals that there is no tripartite agreement within the ILO supervisory process on whether freedom of association includes a right to strike. Therefore, international labour law, and the principles derived from Canada's ILO obligations, cannot clearly be said to support the inclusion of that right within the scope of freedom of association. Ultimately, one must question the accuracy of Fudge's assertion that because of the Supreme Court's acceptance of international labour law and principles, it will have difficulty finding a "principled" way to avoid recognizing a constitutional right to strike under section 2(d) of the *Charter*.<sup>131</sup> Rather, a comprehensive and accurate description of ILO law and principles supports a challenge to future attempts to constitutionalize such a right in Canada.

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130 CFA *Digest*, *supra* note 77 at 1.

131 Fudge, *supra* note 7.