

# Can We Rely on the ILO?

Brian A. Langille\*

*In its ruling in B.C. Health Services, the Supreme Court of Canada relied on Canada's obligations under international law, and specifically ILO law, to hold that s. 2(d) of the Charter of Rights and Freedoms on freedom of association not only protects the right of unions to engage in collective bargaining, but also imposes on employers a duty to bargain. The author is critical of the Court's reasoning in advancing the latter proposition, particularly because Canada has not ratified the ILO convention on collective bargaining and therefore is not bound by its provisions. Moreover, he points out, the central tenet of that convention is that ratifying states are required to encourage voluntary — not compulsory — negotiations between employers and workers. The author goes on to note that Canada, in virtue of its membership in the ILO, is covered by that body's 1998 Declaration, which identifies freedom of association as a "core labour right," and also can be the subject of a complaint before the Committee on Freedom of Association (CFA). However, he explains, neither the Declaration nor the CFA procedure results in conventions being binding on non-ratifying states. Furthermore, the Declaration's purpose is merely to "promote" key principles, such as freedom of association; while the CFA is not a judicial body, and its decisions are considered neither binding nor authoritative. In the result, the Supreme Court, partly as a consequence of its misreading of Canada's international law obligations, has constitutionalized a particular model of labour relations — one that is peculiar to North America, even though that model is only one of many ways in which the international law norm of freedom of association can be instantiated and made enforceable. Ultimately, the author concludes, the problem with B.C. Health Services, as with earlier decisions, lies in the Court's refusal to apply the Charter guarantee of equality under s. 15, thus forcing s. 2(d) to do a job for which it is not suited.*

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\* Faculty of Law, University of Toronto.

## 1. INTRODUCTION

This paper is part of a larger assessment of the Supreme Court of Canada's decision in *B.C. Health Services*.<sup>1</sup> The holding in this very important case is summarized in para. 19 of the majority opinion, written by Chief Justice McLachlin and Justice LeBel:

At issue in the present appeal is whether the guarantee of freedom of association in s. 2(d) of the *Charter* protects collective bargaining rights. We conclude that s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining," as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the *Charter*: *Dunmore*. We note that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association.

In para. 20, the majority of the Court articulates four propositions upon which its holding is based:

Our conclusion that s. 2(d) of the *Charter* protects a process of collective bargaining rests on four propositions. First, a review of the s. 2(d) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(d) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2(d) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values.

The larger project of which this paper is a part confronts all four of those propositions. Proposition 1, in my view, is correct on its face, but the reasoning behind it is not. The validity of propositions 2, 3, and 4 depends upon the substance and content of the right to

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<sup>1</sup> *Health Services and Support-Facilities Subsector Bargaining Ass'n v. British Columbia* (2007), 283 D.L.R. (4th) 40 (S.C.C.).

collective bargaining which the Court ends up articulating. This articulation is not offered until after all of the propositions have been deployed and defended, and have done their duty in support of the Court's holding. But when the Court later reveals its understanding of the content of the right (most importantly, that it includes an employer duty to bargain), it becomes clear that propositions 2, 3, and 4 are all false. The structure of the reasoning in the case is thus unsound and is subject to the criticism that the decision involves a sleight of hand, or more abstractly, that it elides critical steps in the reasoning. One cannot move from the general claim that international law, or Canadian labour law history, or *Charter* values, include *some* notion of a right to collective bargaining flowing from freedom of association, to the more specific idea that international law, or Canadian law, or *Charter* values, include this particular conception of the right to collective bargaining. This criticism would be true if international law, or Canadian law, or *Charter* values, were merely unclear on the matter. It is all the more true in light of the fact that neither international law, nor Canadian law, nor *Charter* values, includes that very conception.

In this paper I show how that criticism applies to the Court's third proposition, that "collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees." My basic point is this. Canada's international labour law obligations may or may not support the idea that freedom of association includes some notion of a right to collective bargaining. But even if they do support it, that will be of no significance whatsoever if we specify the content of the right in such a way that our international law obligations clearly cannot, and should not, be called on in support of it. This is the essence of the argument presented here. If it is right, then the third proposition upon which *B.C. Health Services* is based cannot bear the weight placed upon it. (In the larger project I argue that the other propositions, regarding Canadian labour history and *Charter* values, contain the same structural flaw.)

There are other important lessons to be taken from *B.C. Health Services* — more general lessons about the difficulty and danger of using international law, and specifically ILO law, in support of constitutional conclusions. One of these is that there is a limit to how much we can rely on international labour or human rights norms, and

on domestic constitutional norms such as freedom of association, in reaching those conclusions.

## 2. INTERNATIONAL LAW IN THE SUPREME COURT OF CANADA

In *B.C. Health Services*, the Supreme Court of Canada said: “Canada’s international legal obligations can assist courts charged with interpreting the *Charter*’s guarantees . . . . Applying this interpretative tool here supports recognizing a process of collective bargaining as part of the *Charter*’s guarantee of freedom of association.”<sup>2</sup> Monitoring and commenting upon the use of international law by domestic courts is a global growth industry. In Canada, the Court’s use of international norms in *Charter* cases has given birth to a prolific local branch plant of the global legal enterprise.

I do not here try to place the use of ILO norms and jurisprudence in *B.C. Health Services* in the context of wider debates about the Court’s reliance on international norms as interpretive aids. Rather, I try simply to show some of the dangers inherent in this sort of exercise — dangers which are put on detailed display in the *B.C. Health Services* decision. I do not and cannot comment upon the reliance placed by the Court on other treaties and their associated processes. I do not know enough about the complexities of other international norm-generating and norm-interpreting institutions to be able to say whether ILO norms are particularly difficult for domestic courts to use. In any event, ILO norms are the fullest expression of the values at stake in *B.C. Health Services*, and it was to them that the Court rightly directed most of its attention when discussing Canada’s international labour law obligations.

## 3. ILO LAW IN THE SUPREME COURT OF CANADA

### (a) ILO Law: A Primer

Here is a basic outline of the ILO legal world. The ILO constitution is about law.<sup>3</sup> It first establishes a legislative and administrative

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2 Para. 69.

3 All ILO documents are available on the ILO website, <http://www.ilo.org>.

structure in the form of the International Labour Conference (the legislature), the Governing Body (the executive), and the Office (the secretariat). Almost every other word of the ILO constitution is addressed to the issue of how those organs will go about creating laws and then overseeing their implementation. Its logic is a legal one. The primary mode of action is to create international treaties called conventions. These conventions will then, it is hoped, be ratified by member states and, depending on domestic constitutional rules, become binding domestic law through one legal avenue or another. This domestic law will then be effectively implemented, thus resulting in the desired end-product — a better world. Such a result is to be achieved, in common theorizing, in two ways: directly, through the virtues of the laws themselves, and indirectly, because all member states would play by the same rules. This is standard international legal thinking, and the virtues of these legal processes and their “logic” (the rule of law) are not to be underestimated. International rules or treaties lead to domestic rules, which are applied, enforced, or otherwise made effective. In this chain of reasoning, international legal change is a necessary precursor to domestic legal change, and is the conduit through which it occurs. Domestic legal change, in turn, is the vehicle through which real-world change will ultimately take place.

After providing for the creation of conventions by the International Labour Conference and their (voluntary) ratification by member states, almost all of the remainder of the ILO’s constitutional text addresses itself to the issues of implementation, enforcement and compliance. Because it is a two-step process (international law → domestic law → real-world implementation), member states can default upon their obligations under ratified conventions in two ways, both of which are addressed by the ILO constitution. First, they can fail to bring domestic law into conformity with a ratified convention, resulting in *de jure* failure. Second, even if there is *de jure* conformity, member states can fail to implement or apply the law effectively, resulting in *de facto* failure. The constitution captures both types of failure by speaking of “failure to secure in any respect the effective observance within its jurisdiction of any convention to which it is a party” (Article 24, and see also Article 26). The logic of the constitution then proceeds in a very straightforward way. It provides for legal processes for filing

complaints<sup>4</sup> against alleged defaulting states; for the making of authoritative findings of fact; for authoritative judicial interpretation of legal obligations (in the end, under Article 37, by the International Court of Justice (ICJ)); for the articulation of “recommendations” (by Commissions of Inquiry or by the ICJ); and, ultimately, for remedies (“action”) to be recommended by the Governing Body to the Conference, the object of which is “to secure compliance” (Article 33). This is the basis of Canada’s international obligations insofar as they emanate from the ILO.

This looks, at first blush, like a standard legal set-up aimed at securing both *de jure* and *de facto* compliance by member states through an authoritative adjudicative procedure. If the ILO constitution were the only evidence on these matters, the ILO’s basic strategy would appear straightforward in legal process terms. Its constitution provides for the creation of binding legal rules, independent judicial interpretation of those rules, adjudication of complaints of their violation, and remedies aimed at securing compliance in cases where a violation is established.

There is, however, much more than just the text of the constitution to be considered in assessing the current ILO legal strategy on the “enforcement” of conventions. The process just described would not be recognized by knowledgeable observers as the main tool deployed by the ILO in what has come to be called the “supervision” of ILO standards. In practice, the central mechanism for supervising the conduct of member states that are bound by the conventions is not to be found in the articles of the constitution underpinning the legal regime (Articles 24-37). Rather, it has been administratively constructed out of, or been discovered within, the sparse wording of Articles 19, 22, and 23. The legal differences between the constitutional process and these articles, while often ignored, have important consequences. The latter provisions impose obligations upon a member state to report to the ILO “on its law and practice” regarding matters dealt with in conventions which it has not ratified (Article 19(5)(e)),<sup>5</sup> and “on the measures which it has taken to give effect to

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4 Actually there are two such procedures — “representations” under Article 24, and “complaints” under Article 26. Nothing of importance for our purpose here turns on this.

5 See L.R. Helfer on this innovative idea (reporting obligations regarding un-ratified conventions), in “Monitoring Compliance with Un-Ratified Conventions: The ILO Experience” (2007), 70 *Law & Contemp. Probs.*

the provisions of Conventions” which it has ratified (Article 22). They also instruct the Director General to place a summary of such reports before meetings of the International Labour Conference (Article 23). Two institutions are now charged with implementing the “supervisory processes” to which these provisions have given birth — the Committee of Experts on the Application of Conventions and Recommendations (the “Committee of Experts”), and the Committee on the Application of Standards of the International Labour Conference (the “Conference Committee,” also known as the “Applications Committee”). These two institutions, which I will discuss later, are nowhere mentioned in the constitution. Yet they have become the “pillars”<sup>6</sup> of the ILO’s processes for “supervising” the application of its international labour standards. In addition, there is a special complaints procedure before the Committee on Freedom of Association, also discussed below.

In *B.C. Health Services*, what was at stake was the relationship between the *Charter* guarantee of freedom of association and the idea of collective bargaining. On this matter, the ILO has in fact generated two key conventions. One is Convention 87 (Freedom of Association and Protection of the Right to Organise, 1948), which Canada ratified in 1972. The other is Convention 98 (Right to Organise and Collective Bargaining, 1949). Canada has *not* ratified Convention 98. This is important.

Under the ILO constitution, it is as clear as it possibly can be that ratification is a purely voluntary matter and that a member state’s sole obligation is to place a newly created convention before the relevant domestic authority for possible, voluntary, ratification. After that, in the words of the constitution, “*no further obligation shall rest upon the Member.*”<sup>7</sup> It is absolutely clear under the ILO constitution that member states cannot be bound by the provisions of conventions which they have not ratified. This rather important point is often misunderstood, particularly in relation to Conventions 87 and 98.

Two of the ways in which this misunderstanding has come about are as follows. First, the 1998 ILO Declaration on Fundamental Principles and Rights at Work has caused confusion. This is the

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6 A term used by the committees too: see Report of the Committee of Experts 2007, Report III (Part 1A), at p. 2.

7 Article 19(5)(e). Except the obligation, also under Article 19 and noted above, to report periodically on its practice respecting un-ratified conventions.

Declaration in which, controversially but in my view significantly,<sup>8</sup> the ILO articulated a list of the subject-matters of four “core labour rights” — freedom of association and collective bargaining, and protection against child labour, forced labour and discrimination. It is often said that in connection with these four core rights, there are eight “core conventions.” This is true; there are eight ILO conventions which are highly relevant to the four core rights. These include C87 and C98. But those conventions are legally binding only upon countries that have ratified them. The idea of the Declaration was precisely *not* to bring about the constitutional contradiction of treating non-ratifying members as if they had ratified and were bound by the conventions. The key idea was precisely not to focus on the details of conventions, the supervisory committees set up to monitor them, or the jurisprudence of those committees. The idea was a completely different one, and one which was consistent with the ILO constitution. It was to declare that, simply by virtue of membership in the ILO, all member states were bound to recognize and “*promote*” the “*principles*” underlying the four core rights. This idea may be fuzzy (because of the need to set a consensus), but it has one clear edge: it cannot mean that non-ratifying member states are bound by the provisions of any of the eight conventions, or by the reporting and supervisory mechanisms triggered by ratification, or by any of the detailed jurisprudence developed by those mechanisms. As the ILO Legal Advisor explained at the time: “The Declaration and its follow-up does not and cannot impose on any member state any obligation pursuant to any convention which the state has not ratified.”<sup>9</sup> Moreover, the Declaration, including its follow-up reporting procedure, is a purely “promotional” instrument; it is not a complaints or enforcement or “supervisory” procedure at all.

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8 See B. Langille, “Core Labour Rights – The True Story” (2005), 16 E.J.I.L. 1; and B. Langille, “The ILO and the New Economy – New Developments” (1999), 17 Int’l J. Comp. Lab. L. & Ind. Rel. 229.

9 ILC, 86th Session 1998, “Report of the Committee on the Declaration of Principles,” at para. 352. The Legal Advisor is often called upon to offer opinions on matters critical to the substance of matters being considered. These opinions are viewed as authoritative in the sense that any consensus rests on their acceptance. This opinion lies at the heart of the consensus underlying the acceptance of the Declaration in 1998.



The second source of confusion is even more profound and long-standing. It concerns the well-known Committee on Freedom of Association (the CFA). The CFA is a “tripartite” committee established in 1951 by the ILO’s Governing Body. Like the Committee of Experts and the Conference Committee, it is not mentioned in the ILO constitution. But there is a little-known truth about the CFA: it is *not* the committee that was set up to hear freedom of association complaints. That body is actually the Fact Finding and Conciliation Commission on Freedom of Association (the FFCC). The FFCC was formed in 1950 as part of a deal struck between the ILO and the UN Economic and Social Council.<sup>10</sup> Through it the ILO sought to retain exclusive jurisdiction within the UN system over freedom of association complaints. In the original plan the ILO Governing Body was to receive and refer complaints to the FFCC, which would be made up of independent and eminent legal experts, along the lines of the Commissions of Inquiry contemplated by the ILO constitution. Then, in 1951, the Governing Body established the CFA to receive and process such complaints on its behalf. The CFA’s terms of reference were limited to a “preliminary examination with a view to informing the Governing Body as to whether a complaint was sufficiently well founded to warrant its submission for detailed examination by the Fact Finding and Conciliation Commission on Freedom of Association.”<sup>11</sup> Subsequently, the Governing Body effectively permitted the CFA to emerge as the *de facto* complaints committee. It makes recommendations to the Governing Body, one of which, at least in theory if not often in practice, is that the Governing Body should seek the government’s consent to establish a Fact Finding and Conciliation Commission. But the real result, over time, is that the “filter” or “screening” committee (i.e. the CFA) has in effect become the complete process. The FFCC still exists, but it does almost no work. It is said that in order for the FFCC to hear a complaint of violation of freedom of association principles, the state concerned must consent, or must have ratified the relevant conventions. But it also

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10 See C.W. Jenks, *International Protection of Trade Union Freedoms* (London: Stevens, 1957), at p. 180.

11 G. von Potobsky, “Protection of Trade Union Rights: Twenty Years’ Work by the Committee on Freedom of Association” (1972), 105 Int’l Lab. Rev. 69.

seems to be true that the ILO Governing Body saw the virtue of having the CFA accomplish an informal “takeover” of the FFCC. The FFCC has now heard six cases, the CFA over 2,500.

How this administrative innovation came about is difficult to uncover from the relevant ILO documents, which are, as always, diplomatically bland about interesting and innovative legal matters. Geraldo von Potobsky, perhaps as eminent a name as one can find in the area of freedom of association at the ILO, says simply that “it was not long before the [CFA] came to the conclusion that while certain complaints did not call for further action, it was desirable for certain reservations to be expressed in regard to law and practice concerning trade unions in the countries in question.”<sup>12</sup> This history contains important lessons.<sup>13</sup> The CFA makes its way in the world precisely because it is not the FFCC. Because it is not a judicial process at all, but “a preliminary review by a committee advising the Governing Body,”<sup>14</sup> the CFA avoids the FFCC requirements of either ratification or consent by the state concerned. Therefore, it does not require the consent of a country, such as Canada, which has not ratified C98 (Collective Bargaining).

In an important way, the CFA process is the ILO’s internal “precedent” for the 1998 Declaration. The idea underlying the CFA’s general jurisdiction is the same as that underlying the 1998 Declaration — that simply by virtue of membership in the ILO, though not bound by the provisions of any non-ratified convention, member states are nevertheless bound to “*promote*” the “*principles*” underlying the core ILO value of freedom of association. But the CFA process is very different from the Declaration process. It is a complaints process, and it does hear cases brought against ratifiers and non-ratifiers. However, the key point, as we have seen, is that the ILO constitution makes it clear that an ILO member state has no obligations under a convention it has not ratified. If the CFA can receive a complaint of a violation of the “principle” of freedom of association by a non-ratifying member, it must have an independent constitutional basis for doing so. As we have noted, the constitutional basis

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12 *Ibid.*

13 For more detail, see GB267/LILS/5 (November 1996), and Jenks, *supra*, note 10, at pp. 195-200.

14 Jenks, *supra*, note 10, at p. 196.

is the “logic,” shared by the Declaration, that this process is part of ILO efforts (constitutionally legitimate efforts) to “promote” respect for the value or “principle” of freedom of association. In hearing complaints against ratifiers and non-ratifiers, the CFA may refer to conventions relevant to that principle, but it is not limited to them.<sup>15</sup> And the one thing that the CFA cannot do is impose obligations under those conventions upon non-ratifying members. It can only draw attention to the “principles,” in a constitutional effort to “promote” them. Elusive as the distinction is, the CFA is careful to attend to it, because this distinction is the key to the CFA’s constitutional legitimacy.<sup>16</sup> These points were explicitly made, defended, and

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<sup>15</sup> *Ibid.*, at p. 200.

<sup>16</sup> The best review of this point of which I am aware is found in an ILO document prepared for the Governing Body in 1996 (in anticipation of what became the 1998 Declaration, for which the CFA was the precedent). In that document (GB267/LILS/5 (November 1996)), the “logic” of the CFA, and the key distinction between being bound to “promote” the constitutional “principles” as opposed to being bound by the conventions which one has not ratified, was put as clearly as I have seen. In detailing the history of the CFA, the document recounted that in the initial debates in 1950 concerning a special freedom of association procedure, the obvious constitutional objection was given a thorough airing (the objection that such a procedure would contradict the constitution, by binding non-ratifiers to a convention). Wilfred Jenks, the Legal Advisor, and one of the most famous names in ILO history, came to the rescue, as recounted in the 1996 document as follows:

In reply to these objections, in the discussion in the Subcommittee of the Selection Committee set up to examine this question, the Legal Adviser (Mr. Jenks) introduced two elements that were probably of decisive importance. First, he stressed that Article 10 of the ILO Constitution empowered the Governing Body and the Conference to request the Office to conduct such special investigations as may be ordered by the Conference or by the Governing Body. Secondly . . . he drew a very important distinction: “If the aims and objectives of the Organisation can only be enforced by way of ratified Conventions, they can be promoted in other ways, and the establishment of a Fact-Finding Commission according to the procedure adopted by the Governing Body constituted a legitimate way of promoting the aims of the Organisation.” It should be noted that it followed logically from this distinction that consideration was then given to the nature of the measures that the Governing Body can take in the absence of consent. It was stressed that the measures foreseen merely concerned bringing these issues to public attention and had nothing in common with “jurisdictional” measures relating to

ultimately accepted against the backdrop of the creation and operation of both the FFCC and the CFA (and as well, later, the 1998 Declaration), and in the teeth of the constitutional impossibility of imposing on member states obligations under conventions which they have not ratified. In other words, these were, and still are, explicit constitutional understandings, even if they are at times convenient to forget.

We will come to the actual provisions of C87 and C98 in a moment, but it is important to note that as a result of all this, Canada finds itself in the following situation. It has ratified C87 (Freedom of Association). Several results flow from that fact. First, Canada is liable to legal complaints of non-observance of the provisions of C87 made by another member or a constituent, in all likelihood a representative of workers. This leads to mobilization of the full legal machinery described above — Commissions of Inquiry, the ICJ, and remedies under Article 33 of the ILO constitution. This path is rarely taken. Second, regarding C87, Canada is bound by obligations under Article 22 to report periodically to the “supervisory mechanisms” mentioned above, the two pillars of which are the Committee of Experts and the Conference Committee, on the measures it has taken to implement the convention. These reports are reviewed and “commented upon” by the Committee of Experts, and now, in 25 cases per year, by the Conference Committee. The Committee of Experts is a panel of about 20 distinguished jurists (“eminent legal personalities,”

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specific obligations. The Conference adopted the report of the Selection Committee and approved the Governing Body’s establishment of the FFCC.

This is, as I say, as clear an explication of the distinction as one is going to get. At its core is the necessary constitutional truth that while a member state cannot have obligations under conventions it has not ratified, it can be subject to ILO administrative processes designed to “promote” basic constitutional values or “principles” (which are given legal expression, to some extent, by un-ratified conventions). This distinction is vital to the political possibility and constitutional validity of both the Declaration procedure and the CFA procedure. It causes more problems for the CFA procedure precisely because unlike the Declaration procedure, it is not simply “promotional.” The CFA procedure promotes via a complaints process. If it is to maintain its constitutional legitimacy, it must stay attuned to the distinction between enforcing obligations and promoting basic values.

in ILO terms), including respected academics and retired or sitting judges, often from senior courts. The Conference Committee is a tripartite committee and represents, in effect, the final step in the supervisory process in which 25 members are called on at each annual International Labour Conference to explain their conduct. The selection of those 25 is a hotly contested and highly political process, and is actually “negotiated” by employer and worker groups. The ultimate “sanction” meted out by the Conference Committee is to mention a case in a “special paragraph” of its report. It is largely an exercise in public shaming.

Since Canada has not ratified Convention 98 (Collective Bargaining), it has no such obligations under it. Thus, the Committee of Experts makes no “comments” about Canada in connection with Convention 98, and Canada cannot be called on to appear before the Conference Committee in this regard. In short, the main administrative “supervisory mechanism” for ratified conventions does not apply, and neither do the constitutional complaints procedures. There can be no complaints against Canada under Articles 24 or 26 of non-compliance with C98 (Collective Bargaining). A Commission of Inquiry cannot be set up.

Any possible Canadian obligations regarding “collective bargaining” can arise only under the “promotional” logic of the Declaration and the CFA complaints procedure. That is, Canada is “bound” by the Declaration (whatever may be the “bindingness” of a Declaration in international law — it is not a treaty) to “promote” the “principles” of freedom of association and collective bargaining. Canada is also subject to a complaint before the CFA alleging a failure to adhere to the “principles” of freedom of association, insofar as they go beyond the obligations Canada has undertaken by virtue of its ratification of C87 (Freedom of Association).

Several overlooked points flow from all of this. As noted in respect of ratified conventions, there is an Article 22 obligation to report, and these reports are subject to comment by the Committee of Experts. But the ILO constitution makes it clear that even the “comments” of the distinguished Committee of Experts are not, and constitutionally cannot be, “authoritative.” Rather, the constitution, in Articles 36 and 37, allocates to the ICJ the responsibility for authoritative interpretation of conventions. The result is precisely as Jean-Michel Servais explains: “These bodies are not courts of law and

their decisions are not binding.”<sup>17</sup> Nor, he adds, are their interpretations authoritative. In Servais’ words: “This is especially true of the expert committees, usually made up of lawyers, whose weight comes from the moral and professional authority of its members.”<sup>18</sup>

This is even more the case for the CFA. First, as we have pointed out, the CFA does not limit itself to dealing with conventions, but also deals with “promotion” of the “principles” involved. Breen Creighton, a veteran of these matters, writes:

By and large, the principles that have been developed by the CFA are coterminous with, and are described by reference to, the requirements of Conventions Nos. 87 and 98. However, it is important to appreciate that strictly speaking the principles applied by the CFA and the requirements of the two conventions are not one and the same thing. . . . Furthermore, the CFA adopts a more *ad hoc* approach to the issues that are before it in any given case, whereas the Committee of Experts adopts a more juridical and internally consistent approach to the application of ratified conventions.<sup>19</sup>

This distinction between the “promotion” of constitutional principles, on the one hand, and the enforcement of obligations flowing from ratified conventions on the other, is fundamental, and is the key to understanding the CFA procedure and the 1998 Declaration, and to understanding the constitutional validity of both.<sup>20</sup>

Second, it must be emphasized that the CFA is a “tripartite” body, or in ILO language, a “representative” or “political” body, with equal representation of workers, employers, and governments. It is designed to hear concrete cases, often involving very basic and grim violations (murder of union organizers, for example). The CFA is not designed, as is the Committee of Experts, to be a panel of “eminent legal personalities.” Its members are not lawyers. It does not issue purely legal opinions, and it (rightly) pursues a more “*ad hoc*”

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17 J.-M. Servais, “ILO Standards on Freedom of Association and Their Implementation” (1984), 123 Int’l Lab. Rev. 765, at p. 767. The Court in *B.C. Health Services* notes too that the committees’ decisions are “not binding” (at para. 76). See also Dickson J. in *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at p. 355.

18 J.-M. Servais, *International Labour Law* (The Hague: Kluwer, 2005), at para. 141.

19 B. Creighton, Book Review (2005), 26 Comp. Lab. L. & Pol’y J. 327, at p. 329.

20 See *supra*, note 13.

approach, as Creighton puts it. Servais expands upon this insight as follows:

The CFA for its part has often been asked to consider matters relating to the exercise of trade union rights that are not expressly set down in the conventions on freedom of association. It has been asked to formulate conclusions and propose solutions for the disputes submitted to it, on the basis of ILO standards but by drawing on principles more closely adapted to the situation at hand. It has been widely recognized that it is in the general interest to have alleged violations of trade union rights examined impartially and dispassionately, by an international body. This can help ease both international and social tension. The method employed allows a body made up in such a way as to ensure a reasonable balance between divergent points of view and interests to examine complaints informally: it can in no way be compared to a procedure of inquiry conducted in the context of legal proceedings against a state at which an accusing finger has been pointed. Here the functions of conciliation and mediation must have the upper hand.<sup>21</sup>

Third, there is the oft-forgotten fact that the CFA is in truth not the committee established to undertake this set of functions. It is not the independent body of legal experts which was contemplated, and still exists, in the form of the Fact Finding and Conciliation Commission. As we have seen, the FFCC can act only if there is ratification or consent. The CFA has to operate in the clear light of this legal reality, and must characterize itself as not being a “judicial” process at all. If anything, it is a fact-finding and conciliation service. Recent debates about the Declaration have reminded us of the importance of this distinction between “promotional” activities and legal or judicial activities.

Fourth, even if the CFA was composed of legal personalities, and could and did take a more formal or “legal” approach, its output would have the same status as two of the other committees which *are* composed of legal experts. That is, it would not be binding or authoritative.

The result of all this is that, precisely because the CFA often deals with “principles” rather than directly with the conventions *per se*, and because it is not the formal judicial body which the Commission would be and very occasionally is, but is rather a “tripartite,” “representative,” “political” body not composed of lawyers,

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21 Servais, *supra*, note 18, at para. 1012. See also Jenks, *supra*, note 10, at p. 196.

the CFA has a freer hand. It uses that hand in real-life disputes, often in dramatic circumstances involving physical repression of those seeking to exercise basic freedoms. It draws upon wider notions than those expressed in the conventions, including concepts used at the national level in the industrial relations system of the state in question. This makes sense for a tripartite political body whose role is to seek solutions to actual disputes involving a particular legal system, rather than to issue binding rulings on the violation of legal obligations under ILO conventions.<sup>22</sup>

### **(b) The Use of ILO Law in *B.C. Health Services***

Now we come to the payoff for this long excursion into ILO law and processes, all of which comes home to roost in *B.C. Health Services* in relation to what we in North America call the employer's "duty to bargain." We are now in a position to see that the Court's reliance on the legal output of the ILO in support of this concept is unsound.

Here is how the Court actually used ILO law. In its account of Canada's international law obligations, the Court began with two other, more general human rights treaties to which Canada is a party and which address freedom of association. The Court then added to the list Canada's ratification of C87 (Freedom of Association) in 1972. Nowhere does the Court mention that Canada has not ratified C98 (Collective Bargaining). This is, in my view, an indefensible omission, but one which merely sets the stage for what follows.<sup>23</sup>

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22 Because of common administrative support within the ILO, there is coordination between this sort of exercise and the processing of reporting "files," under ratified conventions, by the Committee of Experts, which (as we have seen) concentrates much more on purely legal and legislative compliance as opposed to "on the ground" solutions. There is also an internal ILO rule that the Committee of Experts will not comment on an issue if there is a relevant CFA complaint outstanding. In this manner, the ILO administrative machinery attempts to maintain order between the two not-quite-parallel and very dissimilar processes.

23 Bastarache J. in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, suggested, at para. 27, that conventions which Canada has not ratified can help provide the normative "foundation" for his conclusions in that case. This is a far-reaching idea that requires some serious rethinking in the ILO context. First, there is the clear wording of the ILO constitution concerning the impossibility of



The Court states that “Convention No. 87 has also been understood to protect collective bargaining as part of freedom of association.”<sup>24</sup> However, without citing a single word of C87,<sup>25</sup> the decision proceeds: “Convention No. 87 has been the subject of numerous interpretations by the ILO’s Committee on Freedom of Association, Committee of Experts and Commissions of Inquiry.”<sup>26</sup> It goes on to quote an academic commentator who described these interpretations as the “cornerstone of the international law on trade union freedom and collective bargaining.”<sup>27</sup> Nonetheless, the Court does not cite a single “comment” of the Committee of Experts about C87, or a single ruling by the CFA. What the decision does instead is turn to a “recent review by ILO staff” which, the Court said, “summarized a number of principles concerning collective bargaining.”<sup>28</sup> The article in question<sup>29</sup> is by Bernard Gernigon, Alberto Odero and Horacio Guido, who are all very experienced current or former ILO lawyers serving the committees on freedom of association. The Court then quotes, selectively, some of the general principles which the authors set out at the end of their article as a way of summing up. (As we will see, one of these conclusions plays a large role in the Court’s justification for imposing a constitutional duty to bargain.)

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substantive obligations resulting from un-ratified conventions. Second, there is the fact that most ILO conventions contain a clause requiring a minimum number of ratifications to become operative. Third, it is commonplace to observe that the ILO produces too many conventions precisely because ratification is voluntary. That is, there would be fewer (and better) ILO conventions if members knew they would be bound simply by virtue of voting in favour of adopting them. Fourth, it must be recalled that ILO conventions, unlike some other international human rights instruments, are not consensus documents — they are adopted by a vote. Fifth, ratification rates are in general very low, and Bastarache J. actually relied on one convention which has but 40 ratifications. All of this should raise real doubts about the idea that unratified conventions can or should have any impact. And even if we were to take Bastarache J.’s suggestion seriously, we would still expect acknowledgment of when we are dealing with a ratified convention and when we are not.

24 Para. 75.

25 Contrast Dickson J. in the *Alberta Reference*, *supra*, note 17.

26 Para. 76.

27 *Ibid.*

28 Para. 77.

29 “ILO Principles Concerning Collective Bargaining” (2000), 139 Int’l Lab. Rev. 33.

But C87 (Freedom of Association) is not the focus of the article by Gernigon, Odero and Guido. As one would expect from its title — “ILO Principles concerning Collective Bargaining” — the article is largely about C98 (Collective Bargaining), and in the critical passages relied upon by the Court, all about C98, which Canada has not ratified. Thus, the article does not provide a summary of Canada’s international law obligations. I cannot offer an explanation for this oversight.

A reader might respond that Canada is, nonetheless, somehow “covered” by the Declaration’s commitments to collective bargaining, as well as by the CFA’s process. This is true, but it is subject to everything said above. The critical point is that the Gernigon article is a *mélange* (useful, at one level) of the Committee of Experts’ views on C98 and on parallel CFA jurisprudence (which, in any event, is not limited to the convention). So the idea that this article is helpful as a summary of interpretations of C87 (which Canada has ratified) is simply wrong, although it is the only possible reading of the Court’s decision.<sup>30</sup>

There is, I am bound to say, more. We have next the Court’s selective reading of the Gernigon article. A large part of the problem is the failure of the Court to take account of the whole article and confront what it clearly does say. The most important example of this failure concerns the idea that freedom of association not only comprehends the freedom of workers to bargain collectively (which, in my view, it does), but also a duty upon employers to bargain as well (which, in my view, it does not).

C87 and C98 are both short, elegant, and “straight to the point” human rights conventions, expressed in very few and very direct words. As we have noted, the Court nowhere cites any provision of either ILO convention. Perhaps this is understandable, in view of the Court’s lack of clarity on Canada’s non-ratification of C98 and on exactly which convention the Gernigon article had analyzed. With respect to C98 (Collective Bargaining), the convention addresses what we in Canada would identify as unfair labour practices, and sets

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30 See paras. 76, 77, and 79.

out the central demand that ratifying states are to take measures to encourage and promote the full development and utilization of machinery for “voluntary negotiation between employers . . . and workers.”<sup>31</sup>

The key term here is “voluntary.” The interesting question, as becomes clear in *B.C. Health Services*, is how this can provide interpretative support for imposing a legal, indeed constitutional, “duty” to bargain. It cannot. It would have been helpful if the Court had looked beyond the efforts of the Gernigon article to “summarize” at a general level, and had taken account of what it specifically had to say about the critical issues at stake. On the vital question of a duty to bargain, the article says exactly what one would expect, given C98’s central commitment to voluntary negotiation:

The voluntary nature of collective bargaining is explicitly laid down in Article 4 of Convention No. 98 and, according to the Committee on Freedom of Association, is “a fundamental aspect of the principles of freedom of association” . . . . Thus, the obligation to promote collective bargaining excludes recourse to measures of compulsion.

. . .

The Committee on Freedom of Association . . . has stated that nothing in Article 4 of Convention No. 98 places a duty on a government to enforce collective bargaining with a given organization by compulsory means, and that such an intervention by a government would clearly alter the nature of bargaining . . . .

It cannot therefore be deduced from the ILO’s conventions on collective bargaining that there is a formal obligation to negotiate or to achieve a result (an agreement).<sup>32</sup>

One would have thought that these passages have some bearing on the issue of an employer duty to bargain. In fact, footnote 5 to the last

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31 See Article 4. One could also note that C98 excludes public sector employees employed “in the administration of the state.”

32 *Supra*, note 29, at pp. 40-41. To the same effect, and just as bluntly, von Potobsky, *supra*, note 11, at p. 77, puts it as follows: “As regards relations between the parties the Committee has taken the view that, since under the terms of the Convention a government is not under the obligation to make collective bargaining compulsory, refusal by an employer to bargain with a particular union is not to be regarded as an infringement of trade union rights.”

quoted sentence reads, “[t]he obligation to negotiate is imposed in certain countries.” That would include Canada (and the U.S.A.), where a statutory duty to bargain is imposed upon employers. But it would not include the vast majority of ILO members.<sup>33</sup> A duty to bargain is not only not prescribed by the convention, it is inconsistent with the core idea of the convention, which is the voluntariness of collective bargaining.

It is true that the Gernigon article immediately goes on to say: “Nevertheless the supervisory bodies have considered that the criteria established by law should enable the most representative organizations to take part in collective bargaining . . . which implies the recognition or the duty to recognize such organizations.”<sup>34</sup> And in the article’s summary, which is what the Court actually quotes, the authors put it this way:

The principle of good faith in collective bargaining implies recognizing representative organizations, endeavoring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.<sup>35</sup>

A few observations are, however, in order. First, how do we square these latter statements with what is said earlier in the article, and with the actual wording of C98? Second, the assertion about how the “supervisory bodies” view matters is subject to all of the caveats discussed above. Third, the article is very careful to say not that there is a duty to bargain but, rather, a duty to “recognize,” which must be a different idea. Fourth, when one goes beneath the generalities and reads the CFA decisions actually cited to justify them, one finds that the CFA, in its pragmatic approach to solving disputes, never goes beyond encouraging voluntary bargaining with appropriate unions. It never in fact recommends the imposition of a compulsory duty to

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33 As Lance Compa explains in “Author’s Reply” (2002), *Brit. J. Ind. Rel.* 114, at p. 119: “The U.S. concept of the unwilling employer’s coerced ‘duty to bargain’ after workers win an NLRB election is an anomaly compared with most of the world. It exists in Canada and Japan by imitation.” See also Servais, *supra*, note 18, at para. 271.

34 At p. 41.

35 At p. 51.

bargain.<sup>36</sup> Fifth, we need to keep in mind that the summary offered in the article is about C98, not C87.

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36 Here, for example, is what the CFA said about the merits of a complaint brought before it concerning the legislation challenged in *B.C. Health Services*:

The Committee recommends that such full and detailed consultations be held with representative organizations in the health and social sectors; to be meaningful, these consultations should be held under the auspices of a neutral and independent facilitator that would have the confidence of all parties, in particular trade unions and their members whose rights are mostly affected by Bill No. 29.

#### Concluding remarks

304. The Committee notes that all the Acts complained of in these cases involve a legislative intervention by the Government in the bargaining process, either to put an end to a legal strike, to impose wage rates and working conditions, to circumscribe the scope of collective bargaining, or to restructure the bargaining process. Recalling that the voluntary negotiation of collective agreements, and therefore the autonomy of bargaining partners, is a fundamental aspect of freedom of association principles and that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests, the Committee regrets that the Government felt compelled to resort to such measures and trusts that it will avoid doing so in future rounds of negotiations. The Committee also points out that repeated recourse to legislative restrictions on collective bargaining can only, in the long term, prejudice and destabilize the labour relations climate if the legislator frequently intervenes to suspend or terminate the exercise of rights recognized for unions and their members. Moreover, this may have a detrimental effect on workers' interests in unionization, since members and potential members could consider it useless to join an organization the main objective of which is to represent its members in collective bargaining, if the results of bargaining are constantly cancelled by law. The Committee also hopes that, in future, full and meaningful consultations will be held with representative organizations in all instances where workers' rights of freedom of association and collective bargaining are at stake. The Committee brings the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

#### Recommendations

The Committee's recommendations

...

(b) As regards the health and social services sectors (Bills Nos. 2, 15 and 29):

(i) the Committee requests the Government to amend its legislation to ensure that workers in this sector enjoy adequate protection measures, to

Also unhelpful is the Court's final word on ILO law:

The fact that a global consensus on the meaning of freedom of association did not crystallize in the Declaration on Fundamental Principles and Rights at Work . . . until 1998 does not detract from its usefulness in interpreting s. 2(d) of the *Charter*. For one thing, the Declaration was made on the basis of interpretations of international instruments, such as Convention No. 87, many of which were adopted by the ILO prior to the advent of the *Charter* and were within the contemplation of the framers of the *Charter*. For another, the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's *current* international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.

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>37</sup>

There is much which could be the subject of comment here. For example, it is untrue that the Declaration crystallized "a global

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compensate them for the limitation placed on their right to strike, in accordance with freedom of association principles;

- (ii) the Committee requests the Government to adopt a flexible approach and to consider amending the relevant provisions of Bill No. 15 so that the bargaining parties may, by agreement, vary the working conditions imposed by the impugned legislation;
- (iii) the Committee recommends that full and detailed consultations be held with representative organizations, under the auspices of a neutral and independent facilitator, to review the collective bargaining issues raised in connection with Bill No. 29.
- (c) The Committee requests the Government to refrain from having recourse in future to legislatively imposed settlements, and to respect the autonomy of bargaining partners in reaching negotiated agreements.
- (d) The Committee requests the Government to ensure in future that appropriate and meaningful consultations be held with representative organizations when workers' rights of freedom of association and collective bargaining may be affected.
- (e) The Committee requests the Government to provide it with the judicial decisions concerning the current court challenges mentioned in the present complaints.
- (f) The Committee requests the Government to keep it informed of developments on all the above issues.
- (g) The Committee draws the legislative aspects of these cases to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

37 Paras. 78, 79 [emphasis in original].

consensus on the meaning of freedom of association” or that it was made “on the basis of interpretations of international instruments, such as Convention No. 87.” Precisely the opposite. The Declaration was based on the fact that no such consensus existed on the concrete definition of freedom of association or on whether the interpretations it had been given were correct. This is what made the Declaration possible and, in my view, necessary. The Declaration was an effort to escape from, and offer an alternative to, that very jurisprudence and the committee processes which created it. This is the view of both its opponents<sup>38</sup> and its defenders.<sup>39</sup>

Nonetheless, these are peripheral matters, and should not draw our attention away from the basic points. First, the relevant ILO law is not what the Court thinks. Second, and in any event, Canada is not bound by that law.

#### 4. CONCLUSION

The bottom line is that it is true, as the Supreme Court says in *B.C. Health Services*, that “s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues.”<sup>40</sup> It is also true, in my view, that international labour law (including some conventions to which Canada is not a party) supports this general conclusion, stated at the level of principle. However, it is not true that international labour law supports the actual understanding of collective bargaining which the Court ends up endorsing. This is important in and of itself. The error in the Court’s reasoning on this point is the same error it makes in deploying the other propositions held out as supporting its conclusion. Its readings of Canadian labour history and *Charter* values are similarly flawed. Thus, the decision in *B.C. Health Services* is unsound.

There are more general lessons here as well. We can begin by noting a growing enthusiasm for international law. But there also seems to be a view that understanding international law is a quite simple exercise, unlike an attempt to understand domestic law or the legal system of a foreign jurisdiction — that one can quote and rely

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38 P. Alston, “Core Labour Standards and the Transformation of the International Labour Rights Regime” (2004), 15 E.J.I.L. 457.

39 Langille, “Core Labour Rights – The True Story,” *supra*, note 8.

40 Para. 19.

upon general observations made by commentators without an independent inquiry into the questions we would normally ask when deploying such legal sources or arguments as they apply to our domestic law. What is the commentator really saying? Is it consistent with the text being interpreted? Is the argument internally consistent? Is it consistent with the decisions relied upon? What do the sources relied upon actually say? Do we agree with the interpretation proffered? Is it safe to rely on a source's abstract summary of the law without reading the law on our own? Are there other, more reflective or authoritative opinions? Who is making the assessment, and what is his or her authority?<sup>41</sup> And what of the bodies whose statements the commentator is interpreting? Are they in the business of articulating legal principles, let alone constitutional principles? Or are those bodies engaged in some other exercise, such as conciliating disputes? And so on.

The lesson of *B.C. Health Services* is that these basic sorts of questions, which we would ask almost naturally about any other source that is put forward to support a legal conclusion, have as much relevance to international law sources as they do to other sources in the world of legal argument. If we are going to rely on international law, and we will and we should, we must do it well.

There is yet another lesson. It is probably a normal human failing that in our efforts to find support for what we believe is a good thing to do, we are prepared to overlook inconvenient data or arguments, or avoid them, or not examine them too carefully. And, as well, we tend to read what seems to be helpful to our cause in the most generous way possible. These are human faults — natural enough, and common in the law. But such over- and under-readings come at a cost somewhere down the road. One lesson of *B.C. Health*

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41 The key article relied upon by the Court in *B.C. Health Services* was written by three very competent ILO lawyers with wide and deep experience in freedom of association matters. But they are not the most likely group to expose gaps or inconsistencies or incoherencies in ILO law, or departures from the texts of the conventions. They are professionals deeply involved in the decisions in question. Moreover, they are ILO officials, whose job is not to critique the institution's output or the constitutional basis for it. Their job is to make the system and its output, which they must take as a given, as good as it can be. That is an honourable task. But it is not the task we needed undertaken in *B.C. Health Services*.



*Services* is that when dealing with international norms, the risks of, and the temptation to engage in, such readings are larger. So too are the costs.<sup>42</sup>

Among these costs are the following. On the domestic side, the result of *B.C. Health Services* is to do exactly what the Court said it would not do: constitutionalize a particular model of labour relations, and in this case, a very peculiar aspect of North American labour relations — the employer duty to bargain. The idea that this duty is an aspect of Canada's international labour law obligations is, as we have seen, just wrong.

This is not simply a technical point. It also says much about what we can expect by way of inspiration from international labour norms. The point is perhaps best captured by reiterating that those norms are international, not North American. I know it is difficult for Canadian and American labour lawyers to see that a duty to bargain is not a necessary part of collective bargaining law. They may well believe that collective bargaining will not succeed in many workplaces without an enforceable duty upon the employer. And in light of the history and the standard view of those who think about these things, that may well be right for Canada and the U.S.A.<sup>43</sup> But there is a reason why *international* labour law does not impose a duty to bargain. That duty represents just one way, deeply embedded in local realities and histories, in which freedom of association and collective bargaining can be structured and carried on. It is not the way this aspect of life is carried on in (most of) the rest of the world. This does not mean that it is not, or at least was not, a good statutory idea for North America. Nor does it mean that such a statutory duty is suspect under international or constitutional law. It is, in my view, neither constitutionally suspect nor constitutionally guaranteed.

We could think of it in this way. It would be odd if we were to believe that there is a universally valid statutory regime of collective bargaining which the global human right to freedom of association

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42 As I said at the beginning, I do not know enough about other international treaties and processes to make this claim generally about international law. But it is certainly true of international labour law.

43 This would, however, be a conclusion worthy of reconsideration if a real constitutional right to strike exists, as I believe it does.

imposes upon all nations of the world. There are myriad ways in which domestic statutory collective bargaining regimes can be, and are, consistent with abstract human rights or constitutional guarantees. There is no direct link between the three words “freedom of association” and the thousands of words in, for example, the Ontario *Labour Relations Act*. This is one of the advantages of seeing freedom of association as an international human right — it makes this point explicit. There are many ways of instantiating the right without violating it. Certainly, some things (for example, the murder of union organizers) are inconsistent with *any* instantiation of freedom of association. Still, there are many, very different, ways of complying with the requirements of freedom of association while making the right concrete and thus legally enforceable in a domestic legal system: compare, for instance, the systems in place in Sweden, Japan, Germany, Canada, and South Africa.

Good international and comparative labour lawyers are attuned to this point instinctively. To quote Jean-Michel Servais once again:

ILO conventions use very general terms that can serve as a basis for various systems of industrial relations. *International labour standards do not seek to impose a specific system*. Since every domestic legal order has to integrate countless political, economic, social and cultural factors, including a historical component, it would be unrealistic to put forward more than minimal rules, basic principles that can be transplanted into most if not all national systems. ILO law therefore aims to reconcile defence of the general principles of freedom with respect for the individual characteristics of each country when it comes to the technical means of incorporating those principles into domestic legislation.<sup>44</sup>

These observations have particular relevance for C87 and C98, and for Canada. They reflect something to which one of the greatest comparative labour lawyers, Otto Kahn-Freund, drew attention some time ago, in identifying obstacles to the “transplantation” of legal ideas on collective bargaining from one system to another. Kahn-Freund wrote:

My point is that those who drafted the conventions [87 and 98] . . . must have been well aware of the obstacles to transplantation to which I have referred. In both cases this is shown by the contrast between the formulation used to give effect to the principle of freedom of organisation which is

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44 Servais, *supra*, note 18, at para. 240 [emphasis added].

expressed in strict legal terms, and that chosen to impose an obligation to promote collective bargaining which is to be implemented by “measures appropriate to national conditions” and only “where necessary.” These are the words of the relevant ILO convention. . . . Nothing could more clearly demonstrate the knowledge of the draftsman that collective bargaining institutions and rules are untransplantable . . . . The distinction between the strict standard of the freedom to organise and the adaptable standard of the right to bargain collectively is all the more remarkable in view of the strong influence exercised on the ILO legislation by that of the United States where these two matters are inextricably intertwined.<sup>45</sup>

This passage says a great deal, especially to Canadian labour lawyers. When I first read C87 and C98, as one steeped in the North American system, I could not understand why there were two conventions. It was as if one had taken a pair of scissors and cut the Ontario *Labour Relations Act* in two. And in ratifying C87 but not C98, it was as if Canada had ratified one half of the *Labour Relations Act* but not the other. This is the point Kahn-Freund made when he talked of the importance of the drafting of C98, in spite of the influence of the U.S.A., whose model we share — a model in which freedom of association and the particular North American scheme of collective bargaining are seen as two sides of the same coin. But much of the rest of the legal world knows nothing of that model.

The lesson, as Servais and Kahn-Freund both took pains to say, is that there are necessary limits to international labour law and to the abstract norms of international human rights treaties (and, we might add, to domestic constitutional rights which embody these norms). One can expect them to do only so much work — the work they are cut out to do. As I try to show in the larger project of which this paper is a part, the central problem of *B.C. Health Services*, as in the earlier *Delisle*<sup>46</sup> and *Dunmore*<sup>47</sup> cases, is that the Court is forced to ask the s. 2(d) guarantee of freedom of association to shoulder too much of the load. It is so forced because, for reasons I find difficult to fathom, let alone accept, it has blocked itself from using the guarantee of “equality before and under the law” in s. 15 of the *Charter* to do the job at hand. By reducing the idea of equality to the narrower concept of non-discrimination, the Court has prevented s. 15 from stepping

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45 “On Uses and Misuses of Comparative Law” (1974), 37 Mod. L. Rev. 1, at p. 22.

46 *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989.

47 *Supra*, note 23.

forward and demanding an answer, in these cases, to the following question: “Why have these workers been excluded from the statutory collective bargaining scheme (instantiating, for Canadians, the fundamental constitutional freedom of association) which has been made available to other workers?” Our constitutional labour law would be better off in so many ways if we were permitted to ask that question. We would have an appropriate relationship between the judiciary and labour policy, in place of the inappropriate relationship that has resulted from the fact that the Supreme Court, by boxing itself *out* of the possibility of using s. 15, has boxed itself *into* the task of designing a set of labour codes. According to *B.C. Health Services*, that code now includes a duty to bargain. In *Dunmore*, we were informed that it includes protections against unfair labour practices, at least if other employees had it. This, to my mind, is not a path we should continue to go down.

If and when the Court can find its way back to the constitutional idea of equality, and I dare to think that it can only be a matter of time, then all it has to do is ask the question posed in the previous paragraph. This would avoid, among other things, the unedifying spectacle of the Court’s involvement in drafting a labour code. In *Dunmore*, the Court appeared to have been terrified by what a straightforward approach to s. 15 would mean. It attempted to avoid that perceived problem by forcing an obvious s. 15 case into s. 2(d). This simply cannot be done, and that is why *Dunmore* is impossible to read. Sometime in the medium term, and with the added burden of *B.C. Health Services*, I think that we will reach a tipping-point in the other direction — the point at which the Court will see that the prospect of carrying on with the task it has set for itself is so daunting and so inappropriate, that it will seek the solace of s. 15’s much simpler way of framing the issues at stake and the solutions to them.

At least for now, the Court refuses to ask the right question and invoke the s. 15 idea of equality. What we get in *B.C. Health Services* is, once again, the press-ganging of s. 2(d)’s guarantee of freedom of association, and our international labour obligations, into a job they cannot and should not do.