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**IS THE INTERNATIONAL LABOUR ORGANIZATION
USEFUL TO UNIONS? AN ANALYSIS OF THE CANADIAN
LABOUR MOVEMENT'S INTERNATIONAL JUDICIAL
STRATEGY**

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ABSTRACT

With increasing vigor, unions are championing the claim that “labor rights are human rights.” This is especially true in Canada and is aided by a Supreme Court of Canada ruling in 2007 that affords constitutional protection to the right to bargain collectively. Constructing labor rights as human rights relies on a judicial-based strategy at both the national and the international level, including the use of the International Labour Organization (ILO). This article seeks to determine how useful the ILO is to the Canadian labour movement. It finds that the ILO is of little use to Canadian unions in and of itself, but that it is more useful when Canadian courts apply the provisions of international law to domestic legislation. As a recent case history shows, however, there is no guarantee that the Supreme Court will elect to adopt the provisions of international law.

INTRODUCTION

In November 2010, the International Labour Organization (ILO) found that legislation in the Canadian province of Ontario, which prevents agricultural workers from engaging in collective bargaining, violated Canada’s obligations under international law. Commenting on this decision, Wayne Hanley, the

president of the United Food and Commercial Workers (UFCW) Canadian Division, the union that launched the appeal, asserted that “the ILO has sent a clear message to the Canadian and Ontario governments that Ontario must end its blatant abuse of the rights of the workers who grow and harvest our food” (UFCW, 2010). Despite this supposedly “clear message,” in April 2011 the Supreme Court of Canada ignored the ILO’s ruling, determined that the Ontario legislation was in fact consistent with the Canadian Charter of Rights and Freedoms, and found that agricultural workers in Ontario do not possess a constitutional right to bargain collectively (*Ontario (Attorney General) v. Fraser*, 2011; hereafter, *Fraser*). In light of the Court’s decision in *Fraser* and the questions that it raises in regard to the impact of the ILO on labour law in Canada, it is important to ask the following question: is the International Labor Organization useful to Canadian unions?

In recent years, Canadian unions have increasingly relied upon a legalistic strategy to defend their members against legislation passed by the federal and provincial governments that has restricted the ability of workers to join a union, to bargain collectively, or to withhold their labour during a legal strike. This sort of legislation is often passed as a response to some sort of impending financial “crisis.” It is often portrayed as being “exceptional” in the sense that it is framed as a short-term response that is necessary for the financial viability of the provincial or national economy and does not reflect any broader attack on the labour movement.

However, these supposedly “exceptional” laws are passed with increasing frequency and are extended for lengthy periods of time, prompting scholars to refer to these measures as examples of “permanent exceptionalism” (Panitch & Swartz, 2003: 25). Since the so-called “exceptional” situations in which these laws are passed are routinely identified by governments as being problematic and are relatively easy for them to point out (even if they aren’t *real* threats), a government can always claim that its actions are simply “exceptions” to the rule. In short, the way that governments deal with trade unions has been altered to the point at which Panitch and Swartz suggest that Canada has witnessed a move from consensual relations with trade unions (such as including unions in the decision-making process) to coercive relations with trade unions (such as unilaterally imposed legislative restrictions on collective bargaining).

The move from consensual to coercive relations with unions is part of a broader project, rooted in neoliberal ideology, designed to undermine the strength of the labour movement (McNally, 2010). Neoliberalism, according to David Harvey (2010: 10), is “a class project that coalesced in the crisis of the 1970s, [and ,] masked by a lot of rhetoric about individual freedom, liberty, personal responsibility and the virtues of privatization, the free market and free trade, it legitimized draconian policies designed to restore and consolidate capitalist class power.” In response to the various legislative assaults, Canadian unions have become increasingly reliant upon a legalistic strategy to defend their members against the ill-effects of neoliberalism.

This strategy includes both a domestic and an international component. The domestic component consists of unions filing appeals under the Canadian legal system that will eventually be heard by the Supreme Court of Canada, while the international component consists of unions filing complaints to the International Labour Organization against the federal or provincial governments, alleging that the government has failed to honour its commitments and obligations under various ILO conventions and declarations that Canada has promised to protect and promote. In short, these unions assert that there is a dissonance between domestic and international law and that governments are failing to uphold domestically what they have promised to uphold internationally.

Canadian unions have used this strategy with increasing frequency, and the results—at first glance—appear to be promising. For example, between 1982 and 2010, in total, 81 complaints were filed with the ILO against the Canadian federal and provincial governments for various violations of workers' rights, notably the right to freely join a trade union, the freedom to bargain collectively, and the freedom to withhold labour during a legal strike. The ILO has reached a decision in 78 of these cases, and has found that freedom of association principles were violated in 71 of them (Canadian Foundation for Labour Rights, 2012a).

While the ILO has condemned the Canadian government on many occasions, it is important to understand the implication of these condemnations for Canadian workers. Although the ILO seeks “to promote rights at work” and is based on the worldview “that universal, lasting peace can be established only if it is based on social justice,” it is important to determine how well its provisions are promoted in actuality at the domestic level (ILO, 2012b). In other words, is there a distinction between simply promoting rights at work on the international level and having those rights actualized at the domestic level? Does the Canadian state actualize on the domestic level what it preaches on the international level? In short, is the International Labor Organization useful to Canadian unions?

In determining the usefulness of the ILO to Canadian unions, this article relies on an examination of two case studies: the United Food and Commercial Workers' 16-year struggle against both the Ontario Labour Relations Act (OLRA) and the Labour Relations and Employment Statute Law Amendment Act (LRESLAA); and the Hospital Employees' Union struggle in the early years of the 21st century, against the Health and Social Services Delivery Improvement Act (Bill 29). In both of these instances, the provincial governments—Ontario and British Columbia respectively—passed “exceptional” legislation that impeded access either to joining a union or to collective bargaining. In both instances, the unions argued that these acts violated the freedom of association rights that the Canadian state had pledged to protect and promote in various international treaties, notably ILO Convention No. 87, Freedom of Association and the Protection of the Right to Organize. While in both of the cases the International Labour Organization condemned the actions of the governments—suggesting that the ILO can be useful to Canadian unions in certain situations—there was a meaningful resolution only

where the Supreme Court of Canada ruled against the governments at the domestic level. In short, the rulings of the ILO had no direct impact on these cases.

As a result of these cases, the central argument of this article is that international labour law can—in some instances—be useful to Canadian unions in combating the effects of neoliberal assaults on freedom of association rights, but that the usefulness of international labour law is indirect, slow, and by no means guaranteed. International labour law and the Canadian state's commitments to it are of use to unions only in the realm of the domestic legal system. Admittedly, state sovereignty is the defining feature of the international relations system and there we do not live in a world of supranationalism (Waltz, 1959, 1979). Despite this, Canadian unions still seem to place considerable faith in the ILO and international labour law, although the ILO lacks the ability to mandate Canadian governments to perform or cease to perform any courses of action. International labour law and the various ILO conventions are of use to Canadian unions, however, only when the Supreme Court of Canada utilizes them in its rulings, as was the case in both *Dunmore v. Ontario (Attorney General)*, 2001, hereafter, *Dunmore*) and *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2007; hereafter, *Health Services*). However, as the *Fraser* decision illustrates, there is no guarantee that the Court will interpret Canada's international obligations in a pro-labour light, and the inherent limitations of the ILO conventions are apparent when the Court is able to outright dismiss the application of these conventions to Canadian law.

THE THEORETICAL APPROACH

A starting point in the study of the ILO is the realist approach (for an overview, see Donnelly, 2000; Schuett, 2010; Waltz, 2008). Adherents to this approach assert that “the international human rights regime is worthless, that treaty ratification is little more than cynical expressive support,” and that unless individual states are willing to enforce agreements, they will remain little more than “scraps of paper” (Simmons, 2009: 354–355). On some level, this approach appears to be relevant to an examination of the ILO and its usefulness to Canadian unions. Indeed, while the ILO has found Canadian governments in violation of freedom of association principles in 71 of the 78 cases brought forward by Canadian unions, the offending governments rarely, if ever, take the recommendations of the ILO seriously. For example, in response to a question about amending the Health and Social Services Delivery Improvement Act in light of the ILO's condemnations of it, British Columbia Premier Gordon Campbell (quoted in Savage, 2008: 70) boldly stated, “I feel no pressure whatsoever. I was not participating in any discussion with the UN.” Furthermore, there is little motivation to amend legislation condemned by the ILO, as it can only make recommendations to Canadian governments; it cannot compel them to make any changes.

This argument is supported by Leo Panitch and Donald Swartz (2003: 208), who note that bringing a complaint forward to the ILO can have only “demonstrative effects.” They elaborate on this point, noting that “the ILO is not a body quick to condemn its member states” and that “the tone of ILO rulings [is] invariably diplomatic, expressing ‘concern’ and suggesting appropriate ‘amendment’” but [rulings] do not—and indeed cannot—go much further than this (Panitch & Swartz, 2003: 55–57). Thus, one may be tempted, as many strict realists are, to classify the international human rights regime as “worthless” and view important ILO conventions as mere “scraps of paper.” According to this view, the ILO itself would be of no use to Canadian unions.

Such a reading tells only half the story, however, and the ILO’s usefulness to Canadian unions, while surely limited, cannot be dismissed outright. While the ILO may lack the institutional coercive measures required to compel Canadian governments to engage in or refrain from engaging in certain actions and may only “condemn” the Canadian state when it violates freedom of association principles, the international human rights regime is far from “worthless” and ILO conventions are much more than mere “scraps of paper.” As Özen Eren (2008: 331) notes of the ILO’s Declaration on Fundamental Principles and Rights at Work, “[its] main role is to bring together the labor rights actors around the ILO principles, but it is still up to the hard work of the individual workers, professionals, activists and scholars to ensure that principles will be translated into concrete gains at the workplace level.” To the list of those whose work is capable of bringing about concrete gains at the workplace level, it would surely be fitting to add “Supreme Court judges.”

Even if the Canadian government is not compelled to act by a ruling from the ILO, the hope for many in the labour movement is that an ILO condemnation will carry normative weight and may convince a government that its actions are problematic and should be altered. In this sense, appeals to the ILO may also be seen as “shaming” exercises in which unions hope to embarrass a government by having a branch of the United Nations condemn its actions. However, as Campbell’s quick dismissal of the ILO’s ruling illustrates, the “shaming” technique of a condemnation does little to alter the actions of an offending government. Indeed, rarely does a Canadian government alter its actions after being condemned by the ILO. Whatever faith unions may have in the normative weight of this organization appears to be misplaced, and thus, the “shaming” technique of unions appears to be of little use. That is not to suggest, however, that the ILO itself is useless.

Indeed, the central argument of this article is that the ILO can—and should—be utilized by Canadian unions, but that the unions will be effective only when they are heard by the Supreme Court of Canada, which has the coercive power and the legitimacy that is necessary to mandate Canadian governments to uphold freedom of association principles. The recent work of Gib van Ert, who rightly notes that “Canadian courts play an increasingly important role in enforcing the [Canadian] state’s treaty obligations,” should not be overlooked (2009: 166). However, the

Court's recent dismissal of Canada's obligations under international law in *Fraser* illustrate the inherent weakness of the ILO, which suggests that the ILO is only as useful as the Supreme Court of Canada allows it to be.

WORKERS' RIGHTS AS HUMAN RIGHTS

Although the ILO has, since its founding in 1919, championed the assertion that workers' rights are part of the broader rubric of international human rights, there has long been a disconnect between domestic labour rights and international human rights. Lance Compa (2000) notes that while "international human rights analysts have been slow coming to grips with issues of workers' rights . . . worker representatives have been slow to see human rights aspects in their work." For much of the 20th century, human rights advocates promoted rights such as freedom from oppression, freedom of religion, and democratic rights at the international level, while trade unions and their allies focused on organizing new members and on collective bargaining at the domestic level. Both sides failed to identify any commonalities between human rights and workers' rights, and no alliances between the two were sought. It was not until the rise of neoliberalism and the corresponding attack on free collective bargaining that unions in Canada began to construct workers' rights as human rights. Similarly, Judith Fudge (2004: 448) notes that the combination of being "targeted for restraint" and "faced with unsympathetic legislatures and courts" prompted unions to "[turn] to the ILO to lodge complaints over violations of freedom of association."

At the same time that neoliberalism was becoming the dominant socioeconomic paradigm of governments, the language of "rights speak" became increasingly salient in popular discourse, and many of organized labour's allies—feminist groups, LGBTQ organizations, Aboriginal groups, and ethno-cultural organizations—have successfully used the human rights-based arguments to alter government action (Hein, 2001). These successes have, in combination with the adverse effects of neoliberalism on unionized workers, contributed to the construction of workers' rights as human rights and the increased frequency with which Canadian trade unions make appeals under domestic law and the ILO on behalf of their members (Savage, 2007).

Canadian unions and their allies in the academic community have become particularly attuned to constructing domestic labour rights as part of the broader regime of international human rights. Roy Adams, one of the most forceful advocates of this position, argues that "human beings [must] never be treated as means, but always as ends," adding that "for this imperative to be fulfilled the worker must not be treated as a commodity but instead as a human being with an inalienable right to dignified treatment" (2006: 15). According to this position, long-established statutory rights passed into law at the domestic level, such as the right to join a union, to bargain collectively with an employer, and to engage in strike action, are elevated to the level of international human rights and their

recognition becomes a prerequisite for full human equality. Reformulating workers' rights as human right necessitates a legalistic strategy at both the domestic and the international level. While appeals to the legislature may carry some normative weight, the assaults faced by workers, such as the limitations and outright restrictions on free collective bargaining, either by placing limitations upon it or banning it outright, and the frequent passage of back-to-work legislation to end otherwise legal strikes, are initiated by the legislature, suggesting that rights-based appeals to the legislature to refrain from such action are of limited effectiveness. The Canadian Foundation for Labour Rights asserts that 199 separate pieces of restrictive labour legislation have been passed by Canadian governments between 1982 and September 2012. The restrictive legislation includes back-to-work legislation that sends disputes to binding arbitration (38 instances), back-to-work legislation that unilateral imposes a settlement (50), suspension of bargaining rights (45), restrictions on the union certification process (5), denial of workers' right to join a union (8), and restrictions on the scope of collective bargaining and other union activities (53) (Canadian Foundation for Labour Rights, 2012c).

As a result of this plethora of antiunion legislation, proponents of constructing workers' rights as human rights are forced increasingly to rely upon the judiciary, at both the domestic and the international level, to uphold the basic rights of organized labour. Derek Fudge (2006: 83), for example, argues that the labour movement "need[s] a coordinated national strategy . . . to use the judicial system to advance workers' rights in Canada, including joint legal research, communications strategies and financial support on the key cases." This also entails utilizing the ILO to advance workers' rights in Canada and protect the rights that are ignored by Canadian legislatures. Progressive changes to expand the rights of workers, according to Brian Langille (2008), are facilitated by changes in domestic law, which are in turn facilitated by changes in international law. In other words, international law is the crucial element in the realization of workers' rights at the domestic level.

THE INTERNATIONAL LABOUR ORGANIZATION

The ILO is a specialized agency of the United Nations and has a tripartite governing structure, meaning that a quarter of its Governing Body consists of employee representatives while another quarter consists of employer representatives. The remaining half consists of state representatives. There are three main elements of the ILO: the International Labour Conference (the legislature), the Governing Body (the executive), and the Office (the secretariat) (Langille, 2008).

The ILO's primary ways of instituting societal change are the passage and ratification of international treaties known as conventions. Brian Langille (2008: 367) notes that "these conventions . . . it is hoped, [will] be ratified by member

states and . . . become binding domestic legal law through one avenue or another. This domestic law will then be effectively implemented, thus resulting in the desired end-product: a better world.” While the ILO has been able to pass many important conventions to protect the rights of workers, these conventions have very little meaning until they are ratified by the member states. Since its founding, the ILO has adopted 188 different conventions dealing with a wide range of labour standards. Many member states of the ILO, however, have failed to adopt these conventions, and the ratification of ILO conventions is purely voluntary for member states. Indeed, Canada has ratified only 30 of the ILO’s 188 conventions.

Recognizing the voluntary nature of ratification and the fact that many of its member states do not ratify conventions, the ILO adopted the Declaration on Fundamental Principles and Rights at Work in 1998, which identified the four “core” labour standards—freedom of association and collective bargaining, and protection against child labour, forced labour, and discrimination—which are promoted through eight conventions. The eight “core” conventions are the Forced Labour Convention, 1930 (No. 29), Freedom of Association and the Right to Organize, 1949 (No. 87), the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), the Abolition of Forced Labour Convention, 1957 (No. 105), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Equal Remuneration Convention, 1951 (No. 100), the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182).

The Declaration went on to state that member states “have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize [its aims], in good faith and in accordance with the Constitution,” even if they have not formally ratified the applicable conventions (ILO, 2012a). Consistent with the ILO’s approach of voluntarism, the ILO’s legal advisor (quoted in Langille, 2008: 367) noted that “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.” Much of the ILO’s constitution is concerned with enforcement of and compliance with the various conventions passed by the ILO and ratified by member states. Of course, if a member state has failed to ratify a convention, the ILO can neither enforce said convention in said country, nor can it mandate said country to comply. Özen Eren (2008: 313) has remarked that in the post-Declaration era, “old rules are in force but considered ineffective; [and] soft law mechanisms are [now] allowed.” However, where a member state has ratified a convention and is accused of violating it, there exists a seemingly straightforward complaint process that allows for fact finding, judicial interpretation (under Article 37 of the ILO constitution, which can include the International Court of Justice [ICJ]), the suggestion of potential remedies, and, under Article 33, the imposition of “such action as it may deem wise and expedient to secure compliance.”

As is the case with many institutions, including the ILO, there exists an important distinction between what *can occur*, under the institution’s written

constitution, and what *does occur* in reality. In referring to the ILO's enforcement and compliance mechanisms, Langille (2008: 368) argues that what may seem "like a standard legal set-up aimed at securing . . . compliance by member states through an authoritative adjudicative procedure" is, in fact, largely smoke and mirrors. He goes on to assert that "if the ILO constitution were the only evidence on these matters, the ILO's basic strategy would appear straightforward in legal process terms . . . 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" (Langille, 2008: 368). Indeed, the use of "hard-law" by the ILO, including but not limited to economic sanctions against member states that routinely and egregiously violate the conventions that they have ratified, is rare. While the ILO does possess the ability to sanction its members, it tends to resort to "soft law," as noted by Özen Eren (2008), that is, to other, less confrontational measures, such as public condemnations and suggested amendments, in its quest to achieve compliance.

In contrast to what may seem like the "standard legal set-up" aimed at securing compliance, the main tool deployed by the ILO to receive and process complaints filed by trade unions representing workers in the ILO's various member states is the Committee on Freedom of Association (CFA) (Langille, 2008), although properly speaking, these complaints should be processed by the Fact Finding and Conciliation Commission on Freedom of Association (FFCCFA). As of 2007, the FFCCFA had heard a mere six cases while the Committee on Freedom of Association has heard over 2,500 (Langille, 2008). It is often this latter committee that advocates of constructing workers' rights as human rights point to when praising the potential of the ILO for effective change (see, for example, Adams, 2006; D. Fudge, 2006). While Canadian unions use the ILO with considerable frequency, the supporters of such action often point to an incorrect institution, in this case the CFA, when promoting the effectiveness of the ILO and rights-discourse (Panitch & Swartz, 2003). Noting this fact, we move on to examine in some detail the intersection of domestic law and international law and the relationship between Canadian unions, the Canadian state, and international labour law in order to determine the ILO's usefulness to Canadian unions.

CANADA AND THE ILO

Canada was a founding member of the ILO in 1919, though its contribution to the organization has, in many respects, been minimal since that time. While Canada did support both Freedom of Association and the Right to Organize (No. 87) and the Right to Organize and Collective Bargaining Convention (No. 98) when they were first developed in 1948, Canada did not ratify Convention No. 87 until 1972, and has yet to ratify Convention No. 98. In addition to Convention No. 98, Canada has yet to ratify two additional "core" conventions: the Forced Labour

Convention (No. 29) and the Minimum Age Convention (No. 138). As noted earlier, Canada has ratified only 30 of the ILO's 188 conventions.

Despite the fact that some conventions remain unratified by the Canadian state, the Canadian labour movement has, with considerable frequency, filed complaints with the ILO alleging violations of Canada's obligations under international law. Indeed, between 1992 and 2001, Canada filed 35 complaints with the ILO, representing 83% of the total (42) complaints filed by countries belonging to the Group of Seven (G7) (Panitch & Swartz, 2003). This should not suggest either that the Canadian government has been any more coercive in its treatment of unions than other similarly situated governments, or that unions in other countries have fared any better under neoliberalism than unions in Canada. As Panitch and Swartz (2003: 55) astutely note, "such complaints reflect a dialectic between state behaviour and the inclinations of trade unions in individual countries to make use of the ILO's capacity for moral suasion against governments" (see also Burkett, Craig, & Gallagher, 2003).

Indeed, the fact that Canadian unions routinely file complaints against Canadian governments (federally and in each of Canada's ten provinces) suggests that they view the ILO in a positive light, believe it to be a useful organization, and see a rights-based strategy as being particularly effective in advancing their members' interests. As Burkett et al. (2003: 253) rightly note of the Canadian labour movement's approach to the ILO and a rights-based strategy more generally, the movement "look[s] to the ILO as a body through which to pursue improved labour conditions, and to challenge Canadian governments and employers."

The important question to ask then, is not "Why does the Canadian labour movement see the ILO as useful?" but, rather, "Is the ILO actually useful?" The first question has been answered by Panitch and Swartz (2003: 55), who note that a labour movement's willingness to utilize the ILO "will depend upon [its] attitude to that body, its general approach to litigation, as well as the availability of other juridical avenues of appeal regarding incursions against freedom of association." This suggests that Canadian unions have a favourable attitude toward the ILO, are supportive of a legalistic, rights-based approach to combating intrusions into their statutory rights, and lack any other effective legal channel to protect and promote their rights. Indeed, following the "Labour Trilogy" of 1987, involving three cases in which the Supreme Court of Canada ruled against the inclusion of collective bargaining rights in the freedom of association guarantees of the Canadian Charter of Rights and Freedoms, the labour movement lacked an ally in the domestic legal arena. While Canadian unions seemingly have a favourable attitude toward the ILO, one must ask whether such an approach is misplaced or meaningful.

In answering this question, it is necessary to look at the Supreme Court of Canada's rulings in three recent cases: *Dunmore*, *Health Services*, and *Fraser*.

In the first two cases, the Supreme Court specifically relied upon Canada's obligations under the ILO and international labour law in expanding the meaning of freedom of association under the Charter, first ruling that legislation prohibiting

agricultural workers from joining a union was unconstitutional and then ruling that the Charter provided workers with a right to engage in collective bargaining. This is notable in that the same obligations under the Charter had been ignored by the Court's rulings in 1987. However, as previously noted, in the most recent case (*Fraser*), the Supreme Court specifically dismissed the suggestion that international law could be used to advance workers' rights in this case, and asserted that the Court had erred in its previous interpretation of the role of the ILO and its conventions in domestic law.

When analyzing the impact of international labour law, it is important to look at domestic law, as the organizations charged with enforcing international laws (such as the ILO) lack the coercive measures to mandate a nation-state to do or refrain from doing anything. In other words, international labour law is "soft law." Furthermore, the implementation of international labour law is a two-step process, in which international law becomes domestic law, which in turn leads to real-world implementation (Langille, 2008). In the event that the real-world implementation of the norms prescribed by international labour law is not achieved in Canadian labour law, unions can appeal to domestic courts and argue either that the government has failed to bring its domestic law into conformity with its international obligations or that it has failed to implement the law effectively. In both *Dunmore* and *Health Services*, the appellant unions were able to successfully argue that governments in the provinces of Ontario and British Columbia failed to live up to their obligations under international law, although this line of argument was unsuccessful in *Fraser* as the Court ruled against the union, highlighting the importance of the relationship between domestic and international labour law.

Dunmore v. Ontario (2001)

While the province of Ontario first developed a framework for collective bargaining in 1943, agricultural workers were always excluded from the Ontario Labour Relations Act (OLRA) and were consequently denied the right to bargain with their employer (Walchuk, 2009a). In 1994, the Ontario government, formed by the social-democratic New Democratic Party, passed the Agricultural Labour Relations Act (ALRA), which gave trade union and collective bargaining rights to Ontario's agricultural workers. The following year, however, the newly elected government formed by the Progressive Conservative Party passed the Labour Relations and Employment Statute Law Amendment Act (LRESLAA), which repealed the 1994 Act and terminated any agreements made under that Act.

In response to the passage of the LRESLAA, a number of agricultural workers, supported by the United Food and Commercial Workers (UFCW), challenged the constitutionality of the new legislation at both the domestic and the international level, arguing that it infringed their freedom of association rights and their equality rights (under domestic law) and showed a government in Canada failing to live up to its obligations under international labour law. While the ILO quickly

condemned the acts of the Ontario government for violating the freedom of association principles specified in Convention No. 87 (to which Canada is a signatory), the Ontario government failed to change the impugned legislation, despite the clear violation of international law (Canadian Foundation for Labour Rights, 2012b). This resulted in the UFCW's relying upon a domestic legal challenge and a finding by the Supreme Court of Canada that the LRESLAA violated freedom of association principles at the domestic level. In short, the ILO's recommendation had no direct effect upon the Ontario government and failed to produce meaningful legislative change.

While the ILO's recommendation may have failed to convince the Ontario legislature, it did have some tangible effect on the Supreme Court of Canada, which ruled in *Dunmore* that the LRESLAA did, in fact, violate the freedom of association rights held by agricultural workers. While much of the Court's rationale in coming to this decision relied upon a purposive analysis of section 2(d) of the Charter (which protects freedom of association), the Court made it clear in *Dunmore* that legislation failing to honour Canada's obligations under international human rights law would be subject to criticism by the Court. Essentially, in coming to the conclusion that the Charter's freedom of association protections included the right to freely join a union of one's choosing, the Court relied—in part—on Canada's obligation under international law, notably ILO Convention No. 87, as well as other ILO conventions to which, interestingly, Canada is not a signatory.

For example, in drawing on ILO Convention No. 87, notably articles 9 and 10, as well as Convention No. 11 (concerning the Rights of Association and Combination of Agricultural Workers), which Canada has not ratified, the Court suggested that “together these conventions provide a normative foundation for prohibiting any form of discrimination in the protection of trade union freedoms” (*Dunmore*: para. 27). In essence, the Court sought to guarantee that Canada's international law commitments were not hollow and endeavored to ensure that what Canada preached at the international level would be realized by workers at the domestic level. Though not saying so directly, the Court seemed to highlight the hypocrisy of promoting meaningful freedom of association rights on the world scale while, simultaneously, denying these same rights to agricultural workers, whom the Court rightly classified as “not only vulnerable as employees but . . . also vulnerable as members of society with low income, little education and scant security or social recognition” (*Dunmore*: para. 189).

In its most forceful connection between international and domestic law, the Court firmly asserted that

The activities for which the appellants seek protection fall squarely within the freedom to organize, that is, the freedom to collectively embody the interests of individual workers. . . . [The activities] are guaranteed by the purpose of s. 2(d), which is to promote the realization of individual potential through relations with others, and by international labour jurisprudence, which

recognizes the inevitably collective nature of the freedom to organize.
(*Dunmore*: para. 30)

The Court's ruling that the ability to freely join a trade union of one's choosing was a human right worthy of protection was an important conclusion to Ontario's agricultural workers' longstanding struggle for workplace justice. However, it is important to note that a full three years prior to the Supreme Court's ruling, the ILO's Committee on Freedom of Association had already come to virtually the same conclusion in the UFCW's original appeal. This ruling, however, was overlooked by the Ontario government, which continued to run roughshod over the rights of the province's agricultural workers. It was only when the domestic court ruled that the government's legislation was unconstitutional that the government made the legislative changes necessary to extend the right to freedom of association to agricultural workers.

The *Dunmore* case serves as a telling example of how international labour law can be used to advance workers' rights in Canada. However, the UFCW's lengthy appeal processes suggest that while the ILO can—and routinely does—rule against Canadian governments, its rulings have little or no effect in terms of changing the actions of these governments and bringing their legislation into line with Canada's obligations under international law. It is only when the Supreme Court of Canada utilizes ILO conventions and jurisprudence in its ruling that workers' rights can be advanced in any meaningful way.

Health Services v. British Columbia (2007)

In early 2002, the British Columbia government passed into law Bill 29, the Health and Social Services Delivery Improvement Act, which, among other things allowed for extensive privatization and the elimination of services without consultation with the union (leading to the loss of approximately 8,000 unionized jobs); stripped hard-fought-for anti-contracting-out provisions from collective agreements; greatly restricted successor and bumping rights, which had previously been negotiated into binding collective agreements; eliminated labour force adjustment/retraining programs, which had also been negotiated into collective agreements; and made it illegal for unions even to discuss alternatives to privatization with employers. This Act affected unionized workers with existing collective bargaining agreements in place and effectively denied them the right to bargain over these issues with the newly elected government.

The ILO challenge brought forward by the Hospital Employees' Union [HEU], was part of a broader challenge to the British Columbia (BC) government, which saw six pieces of legislation being appealed against for allegedly violating freedom of association principles (Canadian Foundation for Labour Rights, 2012b). In 2003, the ILO ruled against the government in Case Numbers 2166, 2173, 2180, and 2196, determining that none of the six pieces of legislation were in compliance with the principles of freedom of association (Canadian Foundation for Labour

Rights, 2012b). Despite the ruling of the ILO, the BC government failed to amend any of the legislation in question to ensure that it was consistent with the ILO's ruling. As a result, the HEU launched a legal challenge at the domestic level in early May 2004.

Relying on a 20-year-old precedent from a series of legal challenges in 1987, which determined that the Canadian Charter of Rights and Freedoms' provisions on freedom of association did not contain a right to bargain collectively, both the British Columbia Supreme Court and the British Columbia Court of Appeal dismissed the union's claims and ruled that the government's legislation was constitutional. It was not until the case reached the Supreme Court of Canada, however, that any meaningful discussion of Canada's obligations under international law and their relation to domestic law occurred.

In a surprise ruling in June 2007, the Supreme Court of Canada overturned its own 20-year-old precedent and ruled that the freedom of association right guaranteed by section 2(d) of the Charter included a procedural right to collective bargaining. In coming to this decision, the Court reasoned that the right to bargain collectively is part of the Charter's larger goal of promoting "dignity, personal autonomy, equality and democracy" that is inherent in the country's constitution (*Health Services*: para. 86). In coming to this decision, the Court drew on four main criteria: a reevaluation of past jurisprudence on the issues of collective bargaining and freedom of association; Canadian labour history and the important role that collective bargaining has played in it; an expanded notion of Charter values and freedom of association rights; and, most importantly for the present discussion, international labour conventions that affirm the protection and desirability of collective bargaining, asserting that "collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of Charter guarantees" (*Health Services*: para. 120).

While much of the Court's rationale was informed by an inward look at Canadian law, the Court did not hesitate to draw links between Canada's international commitment to promote and respect collective bargaining and the need to ensure that the same right was afforded to Canadians in the Charter, which they had failed to do 20 years earlier in the Labour Trilogy. In fact, the court asserted that Canada's adherence to international documents that recognize a right to collective bargaining suggests that a similar right should be included in s. 2(d) of the Charter. Favourably citing Chief Justice Dickson's dissenting opinion from the Labour Trilogy, the Court maintained 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" (*Health Services*: para. 70). While the majority of the Court had dismissed this notion in previous jurisprudence, the Court now clearly and forcefully maintained that dissonance between international law and domestic law, at least when it came to the issue of collective bargaining, would be impermissible.

To support the notion that collective bargaining ought to be a right protected by the Charter, the Court drew upon the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and ILO Convention No. 87, all of which have been signed and ratified by the Canadian government, and maintained that any reasonable interpretation of these conventions “not only supports the proposition that there is a right to collective bargaining in international law, but also suggests that such a right should be recognized in the Canadian context under s. 2(d)” (*Health Services*: para. 72). While there was little or no question that these international documents have always protected the right to bargain collectively, this Court’s ruling was notable in that it suggested that these international documents should be “read in” to domestic law and that domestic law should recognize and protect the same rights that Canada has endorsed at the international level.

It appears that the Court was concerned about being restricted by past precedent and having the rights of unionized workers frozen by the narrow ruling from the 1987 Labour Trilogy. The Court maintained that Canada’s obligations under international conventions into which they had freely and willingly entered should be used in determining the interpretation of rights at the domestic level. In so doing, the Court asserted “that 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” (*Health Services*: para. 78). When it referred to “interpreting the scope of the Charter,” the Court was not proposing to do this in a vacuum but rather by juxtaposing domestic law with international law. Indeed, the Court concluded its discussion on Canada’s commitments under international law by asserting that “it is reasonable to infer that s. 2(d) of the Charter should be interpreted as recognizing at least the same level of protection [as offered by international law]” (*Health Services*: para. 79).

With the Court’s ruling in *Health Services*, unionized workers in Canada were awarded constitutional protections for an important right, one that is central to their very existence, the right to bargain collectively. While both federal and provincial governments have frequently ridden roughshod over that right in past decades, the Supreme Court ruled that such action is impermissible and in violation of freedom of association rights. Importantly, the Court reasoned—in part at least—that the right to bargain collectively was deserving of constitutional protection in Canada because of the various international commitments that the Canadian government has made to ensure both the protection and promotion of that right. As Gib van Ert (2009: 201) has aptly concluded,

The *Health Services* decision is a clear case of invoking and applying the presumption of conformity to a Charter right—with momentous results. Judging by *Health Services*, it appears that the presumption of conformity

with international law has now been admitted into one area of Canadian law [labour law] in which it was previously prohibited.

Ontario v. Fraser (2011)

Although the Ontario government was unwilling to alter the Ontario Labour Relations Act (OLRA) in response to the ILO's condemnation of the fact that the OLRA expressly forbade unionization and collective bargaining for agricultural workers, the government did make a legislative amendment in response to the Supreme Court of Canada's ruling in *Dunmore*. This highlights the fact that while an appeal to the ILO may not force a government to alter its course of action, instances in which the Supreme Court of Canada draws upon the ILO and its various conventions are useful to unions in that the Supreme Court's ruling may lead the government to alter its course of action. The Court's decision in *Dunmore*, however, determined only that legislation such as the OLRA, which denied workers the right to join a union, violated both international and domestic law and was unconstitutional, but the decision did not expressly forbid legislation that denied workers the right to bargain collectively.

Forced to respond to the Court's decision in *Dunmore*, the provincial government passed into law the ironically named Agricultural Employees Protection Act (AEPA). While the AEPA was fully consistent with the Court's ruling, as it allowed agricultural workers to join an association, it failed to provide any meaningful protection for collective bargaining. Furthermore, it did not oblige employers to bargain in good faith with employee associations. This arrangement promoted a scheme of voluntarism and was reminiscent, in many respects, of prewar labour relations. While employees had the opportunity to make submissions to their employers, there was no mechanism available to solve "bargaining" impasses. In the end, even if an employer agreed to any of the workers' demands, there was no mechanism in place to ensure their enforcement. While this law was constitutional in the sense that it met the narrow confines of the Court's ruling, it failed to provide any substantive rights to agricultural workers.

Following the passage of the AEPA, the UFCW was unable to make any meaningful gains for agricultural workers under the voluntary "bargaining" regime, and proceeded to challenge the constitutionality of the new law. While its original case was dismissed by the Ontario Superior Court of Justice, the UFCW appealed the ruling to the Ontario Court of Appeal. Shortly after the Court of Appeal's ruling, the legal precedent regarding the constitutionality of collective bargaining changed, following the verdict in *Health Services*. As a result of the Supreme Court's ruling in this case, which drew on the role of international labour law, the Court of Appeal reversed the verdict of the lower court and ruled that the AEPA was unconstitutional because it failed to respect the constitutionally protected right of collective bargaining. The Ontario government quickly appealed this decision to the Supreme Court of Canada.

In April 2011, the Supreme Court of Canada delivered its verdict in this case and determined that the AEPA was consistent with Canada's constitution. While the Court's ruling was informed by a number of criteria, the Court's discussion of the role of international law—primarily the ILO—is particularly important. In a concurring majority decision, Justice Rothstein (speaking for himself and Justice Charron) argued that the Supreme Court had committed two errors in regard to international labour law in its decision in *Health Services*. First, he concluded that the Court had conflated two distinct conventions (No. 87 and No. 98) and that the Court had erroneously relied on an interpretation of Convention No. 98, which speaks to collective bargaining but has yet to be ratified by Canada. Since Canada had not ratified it, Canada “has no obligation under that Convention” and it is “therefore inappropriate to interpret the scope of Canada's obligations on the basis of that Convention” (*Fraser*: para. 248).

The second error that the Court had made in *Health Services*, according to Justice Rothstein, was that even if Convention No. 98 had been applicable to Canada, it would not have been of any use to the appellant union because “it conceives of collective bargaining as being a process of ‘voluntary negotiation’” and “does not contemplate the imposition of a duty on parties to bargain in good faith” (*Fraser*: para. 249). In short, Rothstein's reading of ILO Convention No. 98 was that it lacked the force to compel a government to bargain and, at best, could only encourage the government to bargain. Pointing out the “soft law” approach of the ILO, Rothstein asserted that the ILO conventions “exclude recourse to measures of compulsion” for unions that feel the government has failed to bargain in good faith (*Fraser*: para. 247).

Although the other concurrent majority decision (delivered by Justices McLaughlin and LeBel for themselves and Justices Binnie, Fish, and Cromwell) asserted that “*Dunmore* and *Health Services* represent good law and should not be overruled,” including the arguments regarding international law that were utilized in these cases, Rothstein's decision speaks to the precariousness of Canadian unions' reliance upon the ILO. International labour law, the various ILO conventions that Canada has ratified, and the Declaration on Fundamental Principles and Rights at Work are useful to Canadian unions only if the judges on the Supreme Court of Canada are willing to apply their principles to domestic law. However, the fact that Rothstein concluded that “it cannot . . . be deduced from the ILO's Conventions on collective bargaining that there is a formal obligation to negotiate or to achieve a [collective agreement]” (*Fraser*: para. 249) illustrates that international labour law is fluid and that Canadian judges may or may not apply its provisions when deciding cases involving Canadian unions. In short, the usefulness of the ILO and international labour law is contingent upon the principles of international labour law being adopted by the Supreme Court of Canada, which, as this article has illustrated, varies from case to case. While at times the Supreme Court may choose to apply the provisions of international labour law, thus providing a victory for workers, at other times it may not apply these provisions.

There are no guarantees that the provisions of international labour law will be applied to domestic law, and this reduces the usefulness of the ILO.

CONCLUDING THOUGHTS: THE USEFULNESS OF RELYING ON INTERNATIONAL LABOUR LAW

Reflecting larger developments in the broader literature on labour rights, Canadian unions and allied academics have in recent years advanced the notion that workers' rights are human rights (Adams, 2006; Compa, 2000; D. Fudge, 2006; Gross, 1999, 2003). In line with this notion, many labour unions have elected to pursue a rights-based strategy that involves utilizing both domestic and international law. While the Canadian labour movement has had considerable "success" at the international level, meaning that the ILO has routinely sided with Canadian unions and ruled that the Canadian government has violated the freedom of association principles that it has pledged to uphold, these ILO rulings have failed to provide any demonstrable effect in terms of "shaming" the government into altering its course of action to prevent future violations.

As the *Dunmore* and *Health Services* cases have illustrated, however, international labour law has proven to be useful to Canadian unions in certain instances in which they have launched domestic legal action claiming that their freedom of association rights under the Canadian Charter of Rights and Freedoms have been violated. In determining that a union's freedom of association right had been violated, the Supreme Court of Canada has increasingly relied upon Canada's obligations under international law to protect and promote the freedom of association. Indeed, as a result of the fact that "Canadian courts play an increasingly important role in enforcing the state's treaty obligations," the importance and usefulness of international labour law should not be overlooked (van Ert, 2009: 166). Likewise, the fact that the ILO may be of use to Canadian unions is supported by Burkett et al. (2003: 266). Burkett, Craig, and Gallagher, who are all management-side attorneys representing Canadian employers at the ILO, note that "ILO conventions and principles will be of increasing importance in defining the meaning of freedom of association under s. 2(d) of the Charter." They conclude that, as a result, "organized labour could conceivably increase its complaint activity before the CFA, hoping for favourable rulings to transport to Canada to influence the development of domestic law" (Burkett et al., 2003: 266).

Following the Court's decision in *Dunmore* and *Health Services*, van Ert (2009) was able to state, with confidence, that there appeared to be a growing presumption of conformity with international labour law. In other words, it seemed as if it was increasingly impermissible for the Canadian state to deny under domestic law what it had promised to uphold under international law. However, following the Court's decision in *Fraser*, this presumption is no longer guaranteed. Despite ruling against the labour movements' interests in *Fraser*, the Court's majority was still of the opinion that ILO conventions were applicable to Canada, though for

various reasons the Court did not apply them in deciding the case. Justice Rothstein, however, writing a concurrent majority opinion, departed from his colleagues and suggested not only that ILO provisions did not apply in the *Fraser* case but that they were not of any real force or effect in Canada more generally. This article set out to answer a relatively straightforward question: is the International Labor Organization useful to Canadian unions? This question is particularly relevant during times of economic crisis, when unions are looking for new and innovative ways to protect their members from coercive legislation that violates freedom of association rights. As this article has made clear, the answer to this question is by no means straightforward. The ILO itself is of little use to Canadian unions. Despite ruling against legislation passed by governments in Canada in 71 of the 78 cases that it has decided, the ILO lacks the coercive measures necessary to force governments to respect its rulings. Perhaps not surprisingly, governments rarely respect the rulings of the ILO.

However, the ILO is of more use to Canadian unions in instances in which Canadian courts apply the provisions of international law—such as ILO conventions—to domestic legislation. For Canadian unions, this was done with considerable success in both *Dunmore* and *Health Services*, and it appeared that the Supreme Court was taking Canada’s obligations to working people much more seriously and vigorously enforcing ILO conventions. Following *Fraser*, however, this no longer appears to be the case. While the majority was unwilling to overturn the Court’s decisions in *Dunmore* and *Health Services*, Justice Rothstein’s strongly worded concurrent majority decision illustrates the precariousness of Canadian unions’ reliance upon the ILO. Ultimately, the ILO is useful in the domestic context only if and when Canadian judges think that it is useful. However, as illustrated in *Fraser*, relying on Canadian courts is not a strategy that will necessarily be successful.

In the absence of a straightforward and effective legal strategy, the notion that “labour rights are human rights” has important shortcomings. While the Supreme Court of Canada has illustrated that, at times, it is able to advance the rights of working people and their unions, it has failed to advance these rights in other instances. As such, reliance on the domestic legal system to advance the rights of workers is, at best, a coin toss. When faced with an increasingly hostile neoliberal political climate, a legalistic outlook involving the ILO may be of use, but labour must employ a broader-based strategy to better ensure a successful outcome. In other words, labour must be pragmatic in constructing labour rights as human rights and in dealings with the Supreme Court of Canada (Walchuk, 2009b).

Ideally, organized labour should employ a multifaceted strategy when combating neoliberalism and constructing labour rights as human rights. Labour should utilize the Canadian Charter of Rights and Freedoms, the ILO, and the domestic and international legal system as part of a broad rights-based approach (as it has proven successful in some instances), but should not become over reliant on it. Diana Majury (2002) has referred to this as “Charter pragmatism.” As a

result of the limitations of a rights-based approach, labour also needs to strengthen alliances with political parties (notably the New Democratic Party, which is generally critical of the worst excesses of neoliberalism), increase its lobbying efforts with regard to all political parties and elected officials, undertake workplace action when faced with antiunion legislation, build strategic alliances with progressive social movements that have similarly been negatively impacted by neoliberalism, and engage in creating public awareness of and opposition to government action that is unconstitutional.

While the ILO more specifically and a rights-based approach more generally have provided the labour movement with some success, this approach has also illuminated some important shortcomings of the legal system. Such an approach is surely not the panacea that some have made it out to be. While the construction of labour rights as human rights—and the corresponding appeals to both the international and domestic legal systems—should not be dismissed, working people and the unions who represent them cannot be too wedded to any specific avenue of resistance, and are most likely to be successful in combating the ill-effects of antiunion neoliberal legislation when they employ a diverse and multifaceted approach.

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