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PROTECTION OF TRADE UNION
FREEDOM OF ASSOCIATION
UNDER THE
INTERNATIONAL LABOUR ORGANISATION
AND UNDER THE
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

by

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Thesis presented to the School of Graduate Studies
of the University of Ottawa
in view of obtaining a Master of Laws in Public Law



Louis Lemire, Ottawa, Canada, 1990



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INTRODUCTION

Much has been said about the profound effect of the Canadian Charter of Rights and Freedoms following its enactment in 1982. There is no doubt that it will continue to dominate discussion among jurists and practitioners for years to come. However, not enough attention appears to have been focussed on the effect of international conventions on the interpretation of its provisions. Canada has adhered to a large number of multilateral treaties that relate specifically to human rights. The question has arisen as to what incidence they will have on the Charter since there is little, if no, Canadian precedent to rely on in arriving at a proper interpretation.

This thesis will center on the definition of freedom of association as it applies to trade unions. Since trade unions are a major component of our democratic society and within other nations around the world, they constitute a large constituency upon which international law has conferred special protection. As well, since the guarantee of freedom of association encompasses many forms of association, a detailed analysis of the guarantee would be very far-reaching and extend well beyond the confines of this thesis. As a result, I have limited this study to freedom of association as it applies to trade unions and, specifically, what is encompassed within its definition. Our system of industrial relations has since come under scrutiny following a number of cases that have invoked the Charter. It is not the intention to

delve into every aspect of this system, nor into its constitutionality, but to examine those principal features which have come to be synonymous with trade unions, i.e. the right to bargain collectively and the right to strike. The approach will be two-fold. We will first examine the origins and evolution of freedom of association under international human rights law, more specifically as it applies to trade unions under the International Labour Organisation (ILO), and Canada's relationship to the ILO. Secondly, freedom of association under the Canadian Charter of Rights and Freedoms in relation to trade unions will be considered in light of the evolution of this concept from the repeal of the nineteenth century restraint of trade laws to the brief experience under the Canadian Bill of Rights as well as the effect of Canada's obligations under the ILO and other international obligations with respect to freedom of association. The possible effect of Canada's international obligations on the interpretation of the Charter has already been discussed in some measure at the time of its adoption, but their implications were not fully examined following a series of notable court cases. We will limit our study to these two primary sources since they represent essentially the principal sources of law that directly affect the Charter, i.e. the international human rights law binding on Canada and the Canadian historical, social and legal evolution of trade union freedom of association.

Since, as stated earlier, this thesis cannot reasonably encompass every aspect of freedom of association as it applies to

trade unions, we will not be examining the validity of union security provisions and compulsory union dues under the Charter. As well, the issue of picketing in relation to trade unions will not be examined as it falls within the ambit of freedom of expression. It would also require an analysis of the law of injunctions. This issue would require a more thorough analysis than this thesis can provide. Therefore, we will be examining the most fundamental aspects of freedom of association, primarily the scope of this fundamental freedom and whether it includes the right to bargain collectively and the right to strike.

The mechanism established by the International Labour Organisation (ILO) for the adoption, the supervision and the enforcement of international labour standards is unique in international law. It is one of the oldest international organisations in existence and has been innovative in many respects. Its role and function have evolved considerably since its foundation, but its fundamental purpose, the international protection of trade union freedom of association, has always remained at the forefront since its foundation. Canada has been an active participant in the ILO since its foundation and has ratified and implemented several of its Conventions. Specifically, Canada has ratified the all-important Convention No. 87 on Freedom of Association and Protection of the Right to Organise. As well, Canada has been subjected to the supervisory mechanism of the ILO, submitting periodic reports on the state of compliance of Canadian legislation with the ILO Conventions. Finally, several complaints

made against Canada have been adjudicated under the ILO's enforcement mechanism. All of these factors must necessarily influence how freedom of association will be interpreted under the Charter as it applies to trade unions.

In the first part, the structure and functioning of the ILO will be studied. It is important to examine the roots of the ILO in order to fully understand the implications of Canada's involvement with the organisation. The origins of the ILO and the international mandate it received to secure and protect trade union freedom will be discussed in some measure. Freedom of association lies at the core of the ILO's foundation. It was its fundamental goal. It has been reaffirmed at more than one instance. From its very beginnings in 1919 to the present, the ILO has worked steadfastly to fulfill its mandate. Its jurisdiction was affirmed on more than one occasion by the International Court of Justice. Tripartism, a unique feature among international organizations, has played a key role in the development of the ILO. The participation of employers and workers in the standard-setting process adds a greater dimension to the work of the ILO. As a result, the outlook has not been solely determined by national or political considerations. Canada's participation in the ILO, from its very beginnings, will also be noted.

The mechanism designed to supervise and enforce the implementation of ILO Conventions is multi-faceted. This mechanism will be reviewed. Member States are required to report

regularly on the state of implementation within their jurisdictions and may be asked to account for discrepancies. Furthermore, a myriad of complaint mechanisms exists whereby worker organisations, employer organisations or other Member States, depending on the procedure, may make complaints against Member States in cases of non-compliance with ILO Conventions. The most prominent complaint procedure among these is the special procedure of complaint for the protection of freedom of association before the Committee on Freedom of Association. Since its inception in 1951, the Committee on Freedom of Association has amassed a vast amount of case law on the question of trade union freedom of association and how its parameters are defined. It has defined in a uniform manner the fundamental principles of freedom of association that the ILO was established to protect. It has also recognized a number of limitations on freedom of association. This entire mechanism will be reviewed, along with Canadian compliance with ILO Conventions and a number of complaints made against Canada, in order to demonstrate the authority of the ILO on the question of protection of trade union freedom of association and how it should influence the interpretation of freedom of association under the Canadian Charter of Rights and Freedoms.

In the second part, the interpretation of freedom of association under the Canadian Charter of Rights and Freedoms will be discussed. This will be preceded by an analysis of the origins of trade union freedom of association in Canada from the

repeal of the restraint of trade laws in the nineteenth century as they applied to trade unions to the establishment of the first legislative framework protecting trade unions and regulating the exercise of their right to strike and to bargain collectively. This evolution is very important, in that it demonstrates there is also foundation in Canada for recognizing trade union freedom of association which includes the right to strike and the right to bargain collectively and which conforms with ILO Conventions. It will be argued that since there is little jurisprudence in Canada, even under the Canadian Bill of Rights, regarding the interpretation of this fundamental freedom, recourse must necessarily be made to these sources in addition to the interpretation of freedom of association by the Committee on Freedom of Association of the ILO. It will also be argued that certain values have come to be accepted as forming part of trade union freedom of association within Canada's own historical and legal traditions along with a number of limitations. It will be further argued that this definition of trade union freedom of association, including its limitations, is in accordance with the ILO's definition and should be recognized as being protected under s. 2 (d) of the Charter.

This part will conclude with a review and critical analysis of the court decisions interpreting freedom of association under the Charter. The final decisions rendered by the Supreme Court of Canada rejected the broader definition of freedom of association, as recognized under international law by the ILO and its institu-

tions, and opted for a more restrictive definition which merely protects a worker's right to join with other workers in order to defend common interests. No consideration or weight was given by the majority decision to the ILO Conventions or to the mandate and authority given to the ILO to protect trade union freedom of association. The dissenting views expressed in the first of these decisions by Chief Justice Dickson and Madam Justice Wilson, as will be demonstrated, are more in keeping with the ILO definition of trade union freedom of association and the history, traditions and underlying philosophies of Canadian society.

PART I - PROTECTION OF TRADE UNION FREEDOM OF ASSOCIATION
UNDER THE INTERNATIONAL LABOUR ORGANISATION (ILO)

Part I will examine how freedom of association as it applies to trade unions is protected under the authority of the International Labour Organisation (ILO). Chapter 1 begins with a brief retrospective of the origins of the ILO as well its structure and functioning and concludes with an examination of Canada's relationship with the ILO. Chapter 2 reviews the overall ILO standard-setting machinery, including the establishment, supervision and enforcement of ILO standards through its procedures of complaint. Chapter 3 examines the case law of the ILO Governing Body Committee on Freedom of Association specifically with reference to the right to strike and the right to bargain collectively. Chapter 4 assesses the large number of complaints made against Canada before the ILO Governing Body Committee on Freedom of Association in light of the principles it has established in previous cases. Chapter 5 discusses the legal status of the decisions of the ILO Governing Body Committee on Freedom of Association. Finally, Chapter 6 takes into account Canada's other international obligations with respect to freedom of association.

Chapter 1 - The International Labour Organisation (ILO):
An Overview

We will first examine the origins of the ILO by providing a brief history of the events that led to its foundation. The mandate of the ILO with respect to freedom of association will then be discussed along with the structure and functioning of the

ILO. We will then assess Canada's relationship with the ILO in light of the foregoing.

Section 1 - Brief History of the ILO

In order to fully understand the importance of the International Labour Organisation (ILO) and its place in the realm of international law, it is necessary to delve into its origins to determine the reasons for its foundations.

The establishment of the International Labour Organisation (ILO) in 1919 was the culmination of a number of events that had served to heighten awareness among nations over the state of labour conditions around the world. Europe had endured the trauma of the First World War. As well, the advent of the Russian Revolution of 1917 had served to reinforce cries for social reform aimed at improving working conditions.¹ The concept of "international labour legislation" had existed since the beginning of the nineteenth century.² During World War I, labour organisations around the world increased their pressure on governments to adopt measures that would end the exploitation of workers. The desire for international labour legislation also

¹ David A. Morse, The Origin and Evolution of the ILO and its Role in the World Community, (Ithaca, New York: New York State School of Industrial and Labor Relations, Cornell University, 1969), pp. 4-8; and Antony Alcock, History of the International Labour Organisation, (London: Macmillan, 1971), p. 17.

² See John W. Follows, Antecedents of the International Labour Organisation, (Oxford: Oxford University Press, 1951); see also Alcock, supra, note 1, pp. 5-15.

stemmed from the need to prevent the use of national labour laws as a means of influencing international competition.³

Prior to the First World War, international conferences on labour legislation had been held in Berlin in 1890 and in 1905, 1906 and 1913 at the initiative of the governments of Germany and Switzerland.⁴ An International Association for Labour Legislation, created by private initiative in 1900 on the occasion of the Paris Exhibition, had established an International Labour Office at Basel to collect and distribute information. This effort was short-lived due to the lack of strong participation on the part of representatives of workers, employers and governments.⁵

During the First World War, worker organisations, along with socialist movements, intensified their efforts to ensure themselves a voice during the forthcoming peace talks. Their demands were two-fold: participation in the peace talks and the inclusion of clauses within the peace treaty enshrining fundamental rights of workers along with the creation of institutions geared at developing international labour legislation.⁶ Governments responded by elaborating various clauses covering working

³ Nicolas Valticos, Droit international du travail, 2ième éd., (Paris: Dalloz, 1983), p. 27.

⁴ Clarence W. Jenks, Social justice in the law of nations: the ILO Impact After Fifty Years, (London: Oxford University Press, 1970), p. 7; see also Follows, supra, note 2, pp. 144-176.

⁵ Ibid. and Valticos, supra, note 3, p. 26.

⁶ Alcock, supra, note 1, pp. 15-17.

conditions that could form part of a peace treaty.⁷ At the outset of the peace talks, a 15-member commission was appointed to examine the question of international labour legislation, which, for the first time in any diplomatic conference, included representatives from organized labour.⁸ After difficult deliberations covering various aspects, including the rights of workers and employers to be included in the treaty and the establishment of an international body to oversee the implementation of the standards, the commission submitted its report to the Peace Conference.⁹ The provisions that they recommended eventually became Part XIII of the Treaty of Versailles. The principles enshrined contained, among others, a number of minimum standards governing working conditions and recognition of freedom of association for workers and employers.¹⁰

On April 11, 1919, the Peace Conference gave its approval of the proposed project and established an organising committee to prepare for the first ILO Conference, which was later held in

⁷ *Ibid.*, p. 18.

⁸ *Ibid.*, p. 26.

⁹ *Ibid.*, p. 34.

¹⁰ *Ibid.*, p. 35; The minimum standards included the following: the payment of a wage adequate to maintain a reasonable standard of life, an eight-hour work day or forty-eight-hour work week, a weekly rest day, the abolition of child labour and the imposition of limitations on the labour of young persons and the principle that men and women should receive equal remuneration for work of equal value. See Article 427 of the Treaty of Versailles, 1919 in The Consolidated Treaty Series, edited and annotated by Clive Parry, (1919) Vol. 225, (Dobbs Ferry, New York,), at p. 385.

Washington. The Treaty of Versailles, which embodied the provisions creating the ILO, was signed on June 28, 1919.

Section 2 - Structure and Functioning of the ILO

A. The mandate of the ILO

The ILO has been called one of the first and most effective systems of international supervision.¹¹ Since it was established, more than 160 Conventions and 170 Recommendations have been adopted which now comprise a wide body of internationally-accepted labour standards.¹²

The ILO was established in 1919 as an autonomous partner of the League of Nations and later became a specialized agency of the United Nations in 1946.¹³ An agreement between the ILO and the UN, concluded in accordance with the terms of the UN Charter, governs their relationship. The ILO operates by virtue of, and derives its legal existence and powers from, its own constitution.

The recognition of trade union freedom of association is one of the objects set forth in the original Preamble to the Constitution in its original form (i.e. Article 427 of the Treaty of Versailles). Singled out as being of special and urgent

¹¹ E.A. Landy, The effectiveness of international supervision: thirty years of ILO experience, (London: Stevens, 1966), p. 4.

¹² Jenks, supra, note 4, p. 15.

¹³ Ibid., p. 16.

importance was "the right of association for all lawful purposes by the employed as well as by the employers."¹⁴ As well, it is important to note that when the aims and purposes of the ILO were restated in the Declaration of Philadelphia in 1944, the principle that "freedom of expression and of association are essential to sustained progress"¹⁵ was reaffirmed by the International Labour Conference as one of the fundamentals on which the Organisation is based. The Conference also reaffirmed that "labour is not a commodity"¹⁶ and recognised as one of the "solemn obligations" of the International Labour Organisation "the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures".¹⁷ The terms of the Declaration of Philadelphia were later incorporated in the ILO Constitution of 1946.

As has been demonstrated, securing the recognition of trade union freedom of association was set down as one of the fundamental goals of the ILO. However, it would not be until the post-

¹⁴ Treaty of Versailles, *supra*, note 10.

¹⁵ See Declaration Concerning the Aims and Purposes of the International Labour Organisation in Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference, (Geneva: International Labour Office, 1986), pp. 22-24, at p. 23.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 24.

War era that the international protection of trade union freedom of association would assume a greater importance with the establishment of an effective enforcement mechanism to protect this fundamental right.

The general jurisdiction of the ILO over international labour law was affirmed at several instances by the International Court of Justice. From 1922 to 1932, the Court was called upon four times to rule on the jurisdiction of the ILO.¹⁸ These rulings noted that the wording of Part XIII of the Treaty of Versailles, along with the terms of the Declaration of Philadelphia and the Constitution of the ILO, was comprehensive and encompassed a wide jurisdiction, thus rejecting contentions that it could not cover such areas as agricultural workers and non-manual labourers. As well, the ILO's jurisdiction was also meant to encompass matters of social policy which have comprised a major part of its work with Member States and other international organisations.¹⁹

Thus, the mandate of the ILO to secure the international protection of trade union freedom of association was judicially

¹⁸ The cases referred to are the following: Reference Concerning the Issue of Agricultural Labour (1922), Permanent Court of International Justice (P.C.I.J.), Series B, nos. 2 & 3, p. 9; Reference Concerning Agricultural Production (1922), P.C.I.J., Series B, nos. 2 & 3, p. 49; Reference Concerning Work Performed by Employers (1925), P.C.I.J., Series B, no. 13, p. 6; and the Reference Concerning Women in Supervisory or Management Positions (1932), P.C.I.J., Series A/B, no. 50, p. 365; for commentary of these cases see Valticos, *supra*, note 3, pp. 184-190.

¹⁹ Valticos, *supra*, note 3, p. 83; and Jenks, *supra*, note 4, pp. 14-16.

and unequivocally affirmed. As will be discussed later, when the special procedure of complaint for the protection of freedom of association was being developed in the post-war era, the ILO assumed a dominant role with respect to questions relating to trade union freedom of association emanating from other international instances.²⁰

B. Tripartism in the ILO

The tripartite nature of the ILO has been credited with maintaining the dynamics which helped foster its growth and survival throughout the post-war years and up to the present. It has been noted that since its inception within the ILO, tripartism represents a difference in approach in the field of international law-making. The comments made by Justice Lauterpacht illustrate this very clearly:

"...The Constitution of the Organisation thus signifies a limited but important departure from the principle generally obtaining in International Law, namely, that States only may take part in the process of creating new rules of International Law and that only the interests of States as such are entitled to direct representation in the international

²⁰ Abdul-Karim Tikriti, Tripartism and the International Labour Organisation, (Stockholm: Almqvist & Wiksell International, 1982), pp. 308-309; Valticos notes that after other international systems were established to protect human rights, various channels of co-operation and collaboration were set up to facilitate the work of the ILO and the organisations involved (supra, note 3, p. 642).

sphere..."²¹

The Declaration of Philadelphia put forth the fundamental basis of tripartism unequivocally:

"...the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare..."²²

The principle of tripartism is reflected at all levels of the ILO's operations.²³ Employers and workers are thus actively involved with governments in every stage of the ILO's standard-setting and enforcement process. C. Wilfred Jenks, a former Director-General of the International Labour Office, notes that although the ILO's tripartism represents a "bold innovation" in comparison to the Covenant of the League of Nations or even the Charter of the United Nations, it still nevertheless falls short of a federal framework for a world society.²⁴

In enshrining the principle of tripartism, the authors of the Constitution of the ILO wished to associate with the representatives of governments, those principal agents of production directly interested in the regulation of labour issues--workers and employers. The desire was also to inspire confidence among

²¹ Cited in C.W. Jenks, The International Protection of Trade Union Freedom, (New York: Frederick A. Praeger Inc., 1957), p. 86.

²² Supra, note 15.

²³ For further discussion on the issue of tripartism within the ILO, see Tikriti, supra, note 20, pp. 3-175.

²⁴ Jenks, supra, note 21, p. 86.

representatives of workers and employers by giving them certain responsibilities and associating them in a common goal of social justice.²⁵ More than fifty years ago, such close participation by worker and employer representatives on an equal level was more advanced at the international level than at the national level.²⁶ Perhaps this reflected a reluctance on the part of national governments to experiment with one of the component parts of corporatism, which was part of the fascist ideology and had been implemented in Italy under Mussolini.²⁷ Nevertheless, tripartism has had, and continues to have, a great influence on the characteristics of the instruments adopted by the International Labour Conference.²⁸ The result has been that the outlook has not been determined solely by national or political considerations and many issues have been approached from a broader viewpoint.²⁹ It is these dynamics, created by tripartism, that distinguish the ILO from other international bodies in the development of international law. The participation of workers and employers along with the governments in the ILO standard-making process demonstrates the great extent to which the Organisation has sought to fulfill the mandate it was entrusted in 1919, which

²⁵ Valticos, *supra*, note 3, p. 194.

²⁶ *Ibid.*

²⁷ On corporatism see Lyman T. Sargent, Contemporary Political Ideologies: A Comparative Analysis, 3rd ed., (Holmwood, Illinois: The Dorsey Press, 1975), pp. 116, 126-127.

²⁸ Valticos, *supra*, note 3, p. 194.

²⁹ Landy, *supra*, note 11, p. 181.

granted special treatment to the protection of trade union freedom of association. In addition, tripartism has served to attribute a greater authority to the decisions of the ILO due to the fact that they took into consideration the views of all interested parties.³⁰

Canada remains loyal to the tripartite spirit at the national level. Annual tripartite meetings on ILO questions were initiated in 1975 involving federal/provincial/territorial Deputy Ministers of Labour and representatives from employer groups and trade unions and since 1980 they have become an annual event.³¹

C. Basic structure of the ILO

The International Labour Conference is the supreme body of the ILO.³² The Conference brings together all of the Member States and meets at least once a year.³³ Its principal functions are to discuss and debate the general social policy, adopt conventions and recommendations, admit new Members and approve the budget of the ILO.³⁴

The Governing Body coordinates the activities of the organ-

³⁰ Valticos, *supra*, note 3, p. 195.

³¹ Kalmen Kaplansky, Canada and the International Labour Organisation, (Ottawa: Labour Canada, 1981), p. 105.

³² Article 2(a) of the Constitution of the ILO.

³³ Article 3 (1) of the Constitution of the ILO.

³⁴ Valticos, *supra*, note 3, p. 205.

isation.³⁵ It has important functions in relation to the convocation of the Conference, supervision of the preliminary study of questions to be discussed at the Conference, the fixing of the agenda of the Conference and the supervision of the application of ratified conventions.³⁶ In addition, the Governing Body also controls the work of the International Labour Office.

The International Labour Office is the permanent secretariat of the organisation. The Director-General, appointed by the Governing Body,³⁷ heads the Office and is responsible for the international civil service that runs the organisation. Its functions include providing assistance to governments in connection with the framing of laws and regulations on the basis of the decisions of the Conference.

Both the Conference and the Governing Body are composed on a tripartite basis.³⁸ In both cases, each member delegation is composed of four representatives: two representing government, one representing workers and one representing employers.

The basic structure of the ILO has been likened to how a legislative assembly functions. Conventions and recommendations are adopted following debate and discussion in an open assembly among representatives of workers, employers and governments, as

³⁵ Article 7 of the Constitution of the ILO.

³⁶ Jenks, supra, note 21, p. 68.

³⁷ Article 8 of the Constitution of the ILO.

³⁸ Articles 3 (1) and 7 (1) of the Constitution of the ILO.

opposed to diplomatic negotiations between nations.³⁹

Section 3 - Canada's relationship with the ILO

The period surrounding the First World War has often been associated with Canada's coming of age as a nation. Before the war's end, Prime Minister Robert Borden had insisted during the sessions of the Imperial War Cabinet in 1918 that the Dominions be represented at the Peace Conference by their own national delegations considering their contribution to the war effort.⁴⁰ With the support of the prime ministers of Australia and South Africa, Canada won the right to send its own delegation, headed by Borden, to the Peace Conference. In addition, Canada obtained, along with other Dominions, distinct and individual membership in the newly-established League of Nations.⁴¹

In relation to the ILO, Canada experienced a similar struggle before being accepted as a member of the Governing Body.⁴² At the outset, Canada was granted a government representative and in 1922 was given a seat as one of the nations

³⁹ Valticos, supra, note 3, p. 129.

⁴⁰ William Morton, The Kingdom of Canada, (Toronto: McClelland and Stewart, 1969), p. 429.

⁴¹ Ibid.

⁴² John Mainwaring, The International Labour Organisation: A Canadian View, (Ottawa: Labour Canada, 1986), pp. 37-44.

of chief industrial importance.⁴³ Canada maintained its link with the ILO during the twenties by appointing in 1924 a permanent Canadian Advisory Officer to remain in Geneva to "ensure greater permanency and continuity of representation."⁴⁴ During the ILO's difficult early years of growth, Canada was also undergoing its own period of adaptation with this new international system. Nevertheless, Canada was able to maintain a presence with the organisation throughout the thirties.

During the years of the Second World War, the ILO found refuge in Montreal where it established temporary headquarters at McGill University with the approval and support of the Canadian government.⁴⁵ From this new vantage point, the International Labour Office continued its work, although on a somewhat limited scale, while the organisation itself remained dormant. It was from its Montreal base that the ILO began planning its role in the development of the post-war world. The ILO gained more autonomy when it became an agency of the United Nations, and Canada continued to be a participant.⁴⁶ The presence of the ILO in Canada during these war years is said to have had an effect on the country's renewed involvement and interest in the organis-

⁴³ Bryce M. Stewart, Canadian Labor Laws and the Treaty, (New York: AMS Press, Inc., 1968), p. 46.

⁴⁴ Mainwaring, supra, note 42, p. 50.

⁴⁵ Ibid., p. 108; See also C. Wilfred Jenks, "The ILO in Wartime", (Part I), Labour Gazette, Labour Canada, May 1969, pp. 277-281.

⁴⁶ Ibid., p. 113.

ation's work in the years that followed.⁴⁷

Thus, from the very beginnings of the ILO, Canada has always been an active participant and supporter of the organisation in its goal of protecting the exercise of trade union freedom of association and securing social justice. It can thus be affirmed that Canada has unequivocally endorsed the ILO's authority in relation to trade union freedom of association. In addition, the participation of worker and employer representatives from Canada in the ILO process adds a further dimension to this recognition in that their direct involvement alongside government representatives implies support and acceptance of the fundamental nature of trade union freedom of association as applied and protected under the ILO Conventions.

Chapter 2 - The ILO Standard-Setting Machinery

In this Chapter, we will examine the ILO's standard-setting machinery beginning with the establishment of ILO standards through the adoption of Conventions and Recommendations, their supervision by means of reports submitted by Member States and their enforcement through the procedures of complaint established by the ILO.

Section 1 - Establishment of ILO Standards

Conventions and Recommendations are the two types of instruments that the ILO uses to implement its international

⁴⁷ Ibid., p. 121.

labour standards. The Conventions create international obligations for States who ratify them, whereas Recommendations are meant to define standards designed to guide the action of governments.⁴⁸

Conventions and recommendations are adopted by the International Labour Conference by a two-thirds majority.⁴⁹ The decision to place a proposed Convention or Recommendation on the agenda is made by the Governing Body. In making that decision, the Governing Body is bound to consider any suggestion made by governments of Member States, by organisations representing workers or employers, and even by public international organisations.⁵⁰

Once a Convention has been adopted, it is open for ratification.⁵¹ Each Member State undertakes to bring the Convention before the "competent authorities" for the enactment of legislation or other action.⁵² When a Member State ratifies a Convention, it agrees to "take such action as may be necessary to make effective the provisions of such Convention."⁵³

With respect to Recommendations, each Member State must bring them before the competent authority for "enactment of

⁴⁸ Jenks, *supra*, note 21, pp. 75-77.

⁴⁹ Article 19 (2) of the Constitution of the ILO.

⁵⁰ Article 14 (1) of the Constitution of the ILO

⁵¹ Article 19 (5) of the Constitution of the ILO.

⁵² Article 19 (5) of the Constitution of the ILO.

⁵³ Article 19 (5) (d) of the Constitution of the ILO.

legislation or other action."⁵⁴

In the case of federal States, the Constitution obliges federal governments to submit Conventions and Recommendations to their appropriate constituent units for action.⁵⁵

Section 2 - Supervision of ILO standards

The ILO supervises the implementation of its standards through the review of reports submitted by Member States on the state of compliance of their legislation with ratified Conventions. The obligation by Member States to report is undertaken upon ratification of the Conventions. Although the Constitution of the ILO provides that this must be done on an annual basis⁵⁶, since 1976, the rule, in its application, has somewhat been modified.⁵⁷

With respect to unratified Conventions, a Member State may be asked by the Governing Body to report to the Director-General on the position of its law and practice in regard to these Con-

⁵⁴ Article 19 (6) (b) of the Constitution of the ILO.

⁵⁵ Article 19 (7) of the Constitution of the ILO.

⁵⁶ Article 22 of the Constitution of the ILO.

⁵⁷ Detailed reports are required every four years, whereas reports on Conventions of particular importance are required every two years. General reports on the state of compliance continue to be required on an annual basis (see Valticos, *supra*, note 3, p. 571). Member States are also required to send copies of their reports to the representative organisations of workers and employers (Article 23 (2) of the Constitution of the ILO).

ventions.⁵⁸

The reports are subjected to a screening process by two bodies of the ILO: the Committee of Experts on the Application of Conventions and Recommendations (commonly referred to as the Committee of Experts) and the Conference Committee on the Application of Conventions and Recommendations. Both Committees were created in 1926. The Committee of Experts is composed of twenty independent legal experts appointed by the Director-General,⁵⁹ whereas the Conference Committee is set up by the International Labour Conference at the beginning of each regular session and is composed of over one hundred representatives from employers' and workers' organisations as well as from governments.⁶⁰ The Committee of Experts meets annually to examine reports of Member States on the implementation of ratified Conventions.⁶¹ Their function is to examine the conformity of national legislation and practices with the ILO Constitution and Conventions. The findings of the Committee of Experts are

⁵⁸ Article 19 (5) of the Constitution of the ILO.

⁵⁹ Tikriti, *supra*, note 20, p. 287. The Governing Body's practice is to include on the Committee persons from every part of the world with first-hand experience of different legal, economic and social systems. They are appointed for renewable three-year terms (see Landy, *supra*, note 11, pp. 21-22). There is currently no Canadian representative on the Committee.

⁶⁰ Valticos, *supra*, note 3, p. 587.

⁶¹ These are the annual reports on the measures taken by Member States to give effect to Conventions they have ratified, and the information furnished by Member States concerning the results of inspection (Article 22 of the Constitution of the ILO). See also Articles 19 and 35 of the Constitution of the ILO.

included in its annual report to the International Labour Conference. Their report forms the basis of the work of the Conference Committee which may invite selected Member States to appear before it to explain reasons for non-compliance.⁶² The report of the Conference Committee is in turn submitted to the plenary session of the International Labour Conference for discussion.⁶³

However onerous these procedures may appear, they nevertheless serve to provide a large measure of accountability.⁶⁴ As well, the practice has evolved whereby the Committee of Experts conducts a more exhaustive study of the reports and the Conference Committee will only delve into the more serious cases, thus avoiding a duplication of discussion. Since 1927, the Committee of Experts has elaborated a vast body of opinion on the interpretation of compliance of domestic legislation with ILO standards.⁶⁵

⁶² *Ibid.*, p. 590.

⁶³ Valticos, *supra*, note 3, pp. 588-602.

⁶⁴ Landy, *supra*, note 11, pp. 31-34; See also Ernst B. Haas, Beyond the Nation State: Functionalism and International Organization, (Stanford, California: Stanford University Press, 1964), pp. 257-259.

⁶⁵ Valticos, *supra*, note 3, p. 135.

Section 3 - Enforcement of ILO standards

A. General procedures of complaint

The general procedures of complaint under the ILO Constitution consist of representations made by workers' or employers' associations and complaints of non-observance by another Member State.

Representations may be made by an employer or worker association against a Member State that "has failed to secure in any respect the effective observance...of any Convention to which it is a party."⁶⁶ It should be noted that this procedure has only been used on rare occasions and since other complaint procedures have been established, it has fallen into disuse.⁶⁷

A Member State is entitled to make a complaint against another Member State if it is dissatisfied that the latter is not securing the "effective observance" of any Convention which both have ratified.⁶⁸ This procedure has rarely been used during the existence of the ILO, but has nevertheless served as a kind of sword of Damocles, often brandished but never thrust.⁶⁹

Thus, it is an exceptional and rare occasion when these general procedures of complaint are used. The advent of the special procedure of complaint for the protection of freedom of

⁶⁶ Article 24 of the Constitution of the ILO.

⁶⁷ Tikriti, *supra*, note 20, pp. 299-302.

⁶⁸ Article 26 of the Constitution of the ILO; the Governing Body may initiate this procedure also on its own motion or on receipt of a complaint from a delegate to the Conference.

⁶⁹ Valticos, *supra*, note 3, p. 612.

association has rendered them less effective.

B. Special procedure of complaint for the protection of freedom of association

Considering the great importance placed upon trade union freedom of association by the ILO, as discussed earlier, a special mechanism was established to deal with the enforcement of standards adopted in relation to this fundamental right. These standards are primarily set forth in two Conventions: the Freedom of Association and the Right to Organise Convention, 1948 (No. 87),⁷⁰ and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).⁷¹

The special machinery was set up in 1950 in agreement with the Economic and Social Council (ECOSOC) of the UN following considerable debate over the most effective means of safeguarding freedom of association subsequent to the adoption of the above-mentioned Conventions.⁷² In January 1950, the Fact-Finding and Conciliation Commission on Freedom of Association was established in accordance with the agreement.⁷³ In November 1951, the Governing Body decided to modify the procedure somewhat by

⁷⁰ See Appendix A at p. 174.

⁷¹ See Appendix B at p. 177.

⁷² Tikriti, *supra*, note 20, pp. 308-309.

⁷³ *Ibid.*, p. 315.

creating the Committee on Freedom of Association.⁷⁴

The Committee on Freedom of Association is composed of nine members chosen by the Governing Body from among its own members. The composition of the Committee is, of course, tripartite. The Committee is presided by an independent person appointed by the Governing Body.⁷⁵ It is important to note that this procedure also applies to Member States that have not ratified the Conventions on freedom of association since both the Constitution of the ILO and the Declaration of Philadelphia recognize the principle of freedom of association. As well, this special procedure is only meant to supplement, not substitute, the supervisory machinery described earlier.

The Committee was originally established to perform the preliminary examination of complaints submitted by governments, workers' or employers' organizations in order to ascertain whether to recommend to the Governing Body that they be submitted to the Fact-Finding and Conciliation Commission for further in-

⁷⁴ Ibid., p. 309; Presently, the Fact-Finding and Conciliation Commission on Freedom of Association only examines exceptional or especially controversial cases of alleged infringement of trade union rights referred to it by the Governing Body or by ECOSOC. For an in-depth analysis of the functioning of the Commission see: Dénétré C. Yiannopoulos, La protection internationale de la liberté syndicale: la Commission d'Investigation et de Conciliation en matière de liberté syndicale de l'Organisation Internationale du Travail, (Paris: Librairie générale de droit et de jurisprudence, 1973).

⁷⁵ Valticos, supra, note 3, pp. 614-615. Valticos notes that it was generally felt that the tripartite composition of the Committee would ensure a certain balance with respect to the examination of complaints and would lead to opinions that would more likely be widely accepted.

depth study. However, before too long the Committee began to examine the substance of the complaints presented to it and submitted its recommendations to the Governing Body. It is not necessary to discuss here the procedure before the Committee in detail for the purpose of this analysis.⁷⁶ It is sufficient to note that the Committee's decision is based on the written documents submitted, i.e. the complaint and the response from the government involved. The Committee may choose exceptionally to hear the parties involved.⁷⁷ The Committee may also have recourse to "direct contacts" whereby a representative of the ILO is sent to the country involved in order to meet with representatives of government and labour especially when the case has reached an impasse or when there are urgent questions to be resolved.⁷⁸

It is interesting to note that this procedure does not require the prior exhaustion of domestic remedies. However, the use of internal legal procedures, whatever the outcome, is a factor that will be taken into consideration.⁷⁹

When deciding on the merits of each case, the Committee bases its conclusions on the general principles of freedom of association essentially embodied in Convention No. 87 (Freedom of

⁷⁶ For a description of the procedure before the Committee see Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, (Geneva: International Labour Office, 1985), pp. 4-18; see also Jenks, *supra*, note 21, pp. 460-476.

⁷⁷ Valticos, *supra*, note 3, p. 615.

⁷⁸ *Ibid.*, p. 616.

⁷⁹ Digest, *supra*, note 76, p. 10, par. 33.

Association and the Right to Organise, 1948) and Convention No. 98 (the Right to Organise and Collective Bargaining, 1949). However, the Committee has not felt strictly bound by the provisions of these Conventions.⁸⁰ Thus, in examining more than 1400 cases during its existence, the Committee has developed significant international body of case law which has defined the standards set out in Conventions 87 and 98. This flows directly from the mandate it was given by the Governing Body when the Committee was established.⁸¹ The Committee then noted that the "purpose of the whole procedure is to promote respect for trade union rights in law and in fact".⁸² The Committee determined its approach when it received its first complaints:

"In examining the cases that are pending before it, the Committee has been impressed by the extent to which the same questions constantly recur in different cases. It therefore proposes to submit to the Governing Body in general terms certain criteria by which, in applying the mandate conferred upon it by the Governing Body, it has been guided in considering individual cases and will, subject to any views which the Governing Body may express, continue to follow in examining further cases. It will, if the Governing Body agrees, continue in future to formulate in the same manner such further criteria as its experience may show to be necessary to enable it to discharge its task".⁸³

⁸⁰ Valticos, supra, note 3, p. 617.

⁸¹ First Report of the Governing Body Committee on Freedom of Association, Sixth Report of the International Labour Organisation to the United Nations, (Geneva: International Labour Office, 1952), para. 25.

⁸² Ibid., para. 31.

⁸³ Ibid., para. 26.

As will be noted later, the Governing Body has endorsed this approach to the examination of complaints by approving the recommendations submitted by the Committee.

In its conclusions, the Committee on Freedom of Association has frequently asked governments to amend its legislation or change its practices and even to take other measures to remedy certain situations.⁸⁴ In a fair number of cases, the record of compliance with the Committee's recommendations has been good.⁸⁵ In some cases, the parties involved have sought to remedy the situation rather than bring attention to the problem at an international level.⁸⁶ The Committee does submit to each session of the Governing Body a progress report on all cases which they have determined warrant further examination.⁸⁷

⁸⁴ Tikriti, *supra*, note 20, p. 313.

⁸⁵ Valticos, *supra*, note 3, p. 617; See also A.J. Pouyat, "The ILO's freedom of association standards and machinery: a summing up", (1982) 121 International Labour Review, 287-302, at p. 289, and Haas, *supra*, note 64, pp. 415-423.

⁸⁶ G. von Potobsky, "Protection of Trade Union Rights: 20 Years Work by the Committee on Freedom of Association," (1972) 105 International Labour Review, 69-83, at p. 82; See also Jean-Michel Servais, "ILO standards on freedom of association and their implementation", (1984) 123 International Labour Review, 765-781, at p. 770-771.

⁸⁷ *Digest*, *supra*, note 76, p. 8, par. 22.

Chapter 3 - Freedom of Association as defined by the
Committee on Freedom of Association of
the Governing Body of the ILO

In this Chapter we will examine the case law of the ILO Governing Body Committee on Freedom of Association. Beginning with the general principles it has established, we will then examine the principles developed by the Committee concerning the right to strike as an essential component of freedom of association and acceptable restrictions which may be imposed on this right. Finally, the right to bargain collectively as interpreted by the Committee will be reviewed.

Section 1 - General principles

As indicated earlier, the Committee on Freedom of Association of the Governing Body of the ILO has amassed a vast body of case law on freedom of association since its inception. Its decisions have dealt primarily with the interpretation of standards set out in Conventions No. 87 and No. 98. In setting down the basic principles it has applied over the years, the Committee has had to take into account the varying contexts in which they have been applied and the results have varied.⁸⁸

Convention No. 87 on Freedom of Association and Protection of the Right to Organise was adopted in 1948 following a request to examine the situation of freedom of association from ECOSOC,

⁸⁸ Nicolas Valticos, "The future prospects for international labour standards", (1979) 118 International Labour Review, 679-697, at p. 693.

which had received briefs from two international labour federations the preceding year.⁸⁸ An earlier attempt to adopt such a convention in 1927 had faltered.⁸⁹ Convention No. 87 is meant to be a "comprehensive charter of freedom of association against interference by the state".⁹¹ It provides essentially that workers and employers without distinction have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without prior authorization (Article 2). It also provides for certain rights and guarantees enabling these organisations, and any federations or confederations they may establish, to draw up their own constitution and rules, to organise their administration and activities, and to formulate their programmes without any interference from the public authorities which could restrict this right or impede its lawful exercise (Article 3). The Convention also provides that Member States who ratify it must take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise (Article 11).

Convention No. 98 on the Right to Organise and Collective

⁸⁸ Valticos, *supra*, note 3, p. 244.

⁸⁹ Alcock, *supra*, note 1, pp. 67-80; the primary reason for the failure of this attempt was apparently the political interference from totalitarian regimes in Europe and elsewhere at the time.

⁹¹ C. Wilfred Jenks, Human Rights and International Labour Standards, (London: Stevens & Sons Ltd., 1960), p. 51.

Bargaining was adopted in 1949 to complement Convention No. 87.⁹² Whereas Convention No. 87 provides primarily for the protection of freedom of association against interference by the state, Convention No. 98 provides primarily for its protection against interference by the employer.⁹³ It is aimed at protecting workers against anti-union discrimination and also at protecting workers' and employers' organisations from acts of interference by each other or their agents or members in the establishment, functioning or administration of these organisations (Articles 1 and 2). Convention No. 98 also promotes the full development and utilization of machinery for voluntary collective bargaining (Article 4).

The Committee has continuously emphasized the point that the function of the ILO with respect to trade union rights is to contribute to the effectiveness of the general principle of freedom of association as one of the primary safeguards of peace and social justice.⁹⁴ Although the decisions of the Committee are not binding in the strict sense, the Committee does exercise a quasi-judicial function when it responds to legal questions relating to the implementation of the ILO's international labour standards.⁹⁵ As well, the complaint procedure is not meant to be

⁹² Valticos, supra, note 3, p. 245.

⁹³ Jenks, supra, note 91, p. 55.

⁹⁴ Digest, supra, note 76, p. 14, para. 53.

⁹⁵ Valticos, supra, note 1, p. 623; See also Haas, supra, note 64, pp. 396-397.

construed as dealing with private disputes and "grievances" in the strict sense of the word, but is rather based on the collective interest in seeing that these international obligations are respected and that the fundamental aims of the ILO are achieved.⁹⁶

It is not the intention of the following analysis to endeavour to cover every aspect of freedom of association as interpreted by the Committee, but only to deal with its most fundamental aspects which relate directly to the interpretation of Canada's definition of freedom of association under the Canadian Charter of Rights and Freedoms. It must be noted that the Committee's jurisdiction extends not only to legislation adopted by Member States, but also to any action taken by them that would be considered a violation of freedom of association.⁹⁷

The Committee has determined that fundamental human rights must be fully respected and guaranteed in order to allow a free and independent trade union movement to develop.⁹⁸ In this respect, the Committee has attached great importance to the fundamental principles enunciated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.⁹⁹ The Committee has also pointed out the fact that the International Labour Conference has recognized the right

⁹⁶ Ibid.

⁹⁷ Digest, supra, note 76, p. 15, para. 59.

⁹⁸ Ibid., p. 19, para. 68.

⁹⁹ Ibid., p. 19, para. 71.

of assembly, freedom of opinion and expression as constituting civil liberties which are essential for the normal exercise of trade union rights.¹⁰⁰ Nevertheless, pursuant to Article 8 of Convention No. 87, workers and employers, as well as their respective organisations, are bound to respect the "law of the land", provided that this law does not impair the guarantees provided for in the Convention.¹⁰¹

Article 2 of Convention No. 87 is designed to give expression to the principle of non-discrimination in trade union matters. The words "without distinction whatsoever" in Article 2 signify that freedom of association should be guaranteed without discrimination of any kind based on occupation, sex, colour, race, beliefs, nationality, political opinion, etc., not only to workers in the private sector of the economy, but also to civil servants and public service employees in general.¹⁰² It should be noted, however, that Article 9 of Convention No. 87 does provide that the extent to which the Convention's guarantees apply to the armed forces and the police is left to be determined by national laws or regulations. In addition, Article 9 stipulates that in accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the ILO, ratification of the Convention by any Member State is not to be deemed to affect any existing law, award, custom or agreement in virtue of which members of the

¹⁰⁰ *Ibid.*, p. 20, para. 74.

¹⁰¹ *Ibid.*, p. 19, para. 73.

¹⁰² *Ibid.*, p. 44, para. 210.

armed forces or the police enjoy any right guaranteed by the Convention. These are the only categories of workers that the Convention allows each State to decide to what extent they shall benefit from the guarantees of the Convention. Consequently, the Committee has refused to object to legislation banning strikes by such personnel.¹⁰³

The right of workers and employers to form freely organisations of their own choosing is also the right, for the organisations themselves, to pursue lawful activities for the defence of their occupational interests.¹⁰⁴ These activities include, among others: the right to strike and the the right to bargain collectively.

Section 2 - The Right to Strike

A. A Right Inherent to Freedom of Association

The Committee has always recognized the right to strike by workers and their organisations as one of the essential and legitimate means through which they may promote and defend their economic and social interests.¹⁰⁵ This principle is derived mainly from the interpretation of Articles 3 and 10 of Convention No. 87 which protect the right of workers' organisations "to organise their administration and activities and to formulate

¹⁰³ Ibid., p. 46, para. 221.

¹⁰⁴ Digest, p. 70, para. 345.

¹⁰⁵ Ibid., p. 73, para. 362 and para. 363.

their programmes" and recognize the right of trade unions, as organisations of workers, set up to further and defend their occupational interests.¹⁰⁶ This basic principle was enunciated as early as the Committee's second meeting in 1952 on a complaint emanating from Jamaica.¹⁰⁷ The complaint concerned the use of police and soldiers by the Government of Jamaica to break strikes and a one-month prohibition on public meetings. In its conclusions, the Committee emphasized that the "right to strike and that of organising union meetings are essential elements of trade union rights".¹⁰⁸ In a later case relating to India, the Committee reaffirmed this principle.¹⁰⁹ In rejecting for lack of evidence an allegation that the right to strike had been virtually abolished by the actions of the Indian Government, the Committee pointed out that "in most countries strikes are recognised as a legitimate weapon of trade unions in furtherance of their members' interests so long as they are exercised peacefully and with due regard to temporary restrictions placed thereon".¹¹⁰ In a later case also involving India the Committee stated that "the right to strike is generally admitted as an

¹⁰⁶ Servais, supra, note 86, p.777.

¹⁰⁷ Case No. 28 (Jamaica), Second Report of the Governing Body Committee on Freedom of Association, Sixth Report of the ILO to the UN, (Geneva: International Labour Office, 1952), p. 210.

¹⁰⁸ Ibid., para. 68.

¹⁰⁹ Case No. 5 (India), Fourth Report of the Governing Body Committee on Freedom of Association, Seventh Report of the ILO to the UN, (Geneva: International Labour Office, 1953), p. 180.

¹¹⁰ Ibid., p. 181, para. 27.

integral part of the general right of workers and their organisations to defend their economic interests".¹¹¹ The Committee elaborated its position on the right to strike when it examined a complaint emanating from Turkey.¹¹² The labour legislation of Turkey did not recognize the right to strike and the Government of Turkey contended that Convention No. 87 did not prevent it from prohibiting strikes.¹¹³ The Committee, while recognizing that Convention No. 87 does not deal with the right to strike, considered "that the right to strike is generally accorded to workers and their organisations as an integral part of their right to defend their collective economic and social interests, although partial and temporary restrictions are frequently placed on its exercise pending recourse to establish conciliation and arbitration procedures, to which the organisations are parties at all stages".¹¹⁴ The existence of the freedom to resort to strikes was one of the indications accepted

¹¹¹ Case No. 47 (India), Sixth Report of the Governing Body Committee on Freedom of Association, supra, note 109, p. 340, para. 724.

¹¹² Case No. 50 (Turkey), Sixth Report of the Committee, supra, note 109, p. 354, para. 814.

¹¹³ Ibid., p. 362, para. 863.

¹¹⁴ Ibid., para. 864; See also Jane Hodges-Aberhard and Alberto Otero De Dios, "Principles of the Committee on Freedom of Association concerning strikes", (1987) 126 International Labour Review, 543-563, at p. 543. They note that in international law the right to strike is explicitly recognised in Article 8 of the International Covenant on Economic, Social and Cultural Rights, 1966, Article 6 of the European Social Charter, 1961, and Article 27 of the Inter-American Charter of Social Guarantees, 1948. For further discussion on Canada's other international obligations regarding freedom of association see pp. 82-87.

by the Committee that the freedom of the trade union movement had been restored in Peru following a series of repressive measures taken by the Peruvian Government.¹¹⁵ In a case involving Czechoslovakia the absence of a right to strike was one of the factors taken into account by the Committee in reaching the conclusion that the trade union organisation established by the legislation in force in that country was contrary to the principle of freedom of association contained in the Declaration of Philadelphia.¹¹⁶

It should be noted that the Committee on Freedom of Association has reaffirmed the existence of the right to strike as inherent to freedom of association in well over a hundred cases according to its most current Digest of decisions.¹¹⁷ It is also important to note that the Committee of Experts, when considering the application of Article 3 of Convention No. 87 by various countries has consistently reaffirmed, as the Committee on Freedom of Association, the principle of the right to strike, subject to any reasonable restrictions imposed by law.¹¹⁸

¹¹⁵ Case No. 1 (Peru), Third Report of the Committee, *supra*, note 109, p. 232, para. 20.

¹¹⁶ Case No. 14 (Czechoslovakia), Eighth Report of the Committee, Eighth Report of the ILO to the UN, (Geneva: International Labour Office, 1954), p. 165, para. 84 (1).

¹¹⁷ *Supra*, note 76, see references to cases under paras. 362-363 on p. 73.

¹¹⁸ These affirmations may be found in the Committee of Experts' general surveys on freedom of association and collective bargaining, in particular, Freedom of association and collective bargaining, Report III (Part 4B), International Labour Conference, 68th Session, Geneva, 1983, paras. 199-223.

Although the legal definition of strikes varies from one legal system to another, whether national legislation defines strikes as a "right", a "freedom" or a "power" is of secondary importance when applying Convention No. 87 since in the final analysis, what matters, and the issue on which the Committee must decide, is the lawful ability to take strike action in practice.¹¹⁸

While the Committee has always regarded the right to strike as constituting a fundamental right of workers and of their organisations, it has regarded it as such only in so far as it is utilised as a means of defending their economic interests.¹²⁰ Strikes of a purely political nature and strikes decided systematically long before negotiations take place do not fall within the scope of the principles of freedom of association.¹²¹ This interpretation flows basically from Article 10 of Convention No. 87 which, in its definition of "organisation", stipulates "for furthering and defending the interests of workers". These purposes outlined in this provision delimit the scope of the rights and guarantees protected by the Convention. The rights are protected in so far as they are exercised with a view to achieving these purposes.¹²²

¹¹⁸ Hodges-Aeberhard and Odero De Dios, *supra*, note 114, p. 547.

¹²⁰ *Digest*, *supra*, note 76, p. 74, para. 364.

¹²¹ *Ibid.*, p. 75, para. 372.

¹²² Hodges-Aeberhard and Odero De Dios, *supra*, note 114, p. 548.

The Committee has determined that conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and, in any event, not such as to place a substantial limitation on the means of action open to trade union organisations.¹²³ Among the conditions that the Committee has deemed acceptable are the following:

- the obligation to give prior notice to the employer before calling a strike,¹²⁴
- the obligation to observe a certain quorum and to take strike decisions by secret ballot,¹²⁵
- and
- legislation imposing recourse to compulsory conciliation and arbitration procedures in industrial disputes before calling a strike.¹²⁶

Thus the Committee on Freedom of Association has firmly established that the right to strike is inherently part of freedom of association. Although this conclusion is based partly on an interpretation of Articles 3 and 10 of Convention No. 87, the Committee has not felt strictly bound by its provisions since the complaint procedure it administers is based on the recognition of freedom of association contained in the Constitution of

¹²³ *Digest, supra*, note 76, p. 75, para. 377.

¹²⁴ *Ibid.*, p. 76, para. 381.

¹²⁵ *Ibid.*, para. 382.

¹²⁶ *Ibid.*, para. 378.

the ILO and the Declaration of Philadelphia of 1944.¹²⁷ The first decisions of the Committee dealing with the right to strike also appear to rely on the fact that the right to strike was generally recognized as being "an integral part" of the workers' right to defend their interests. The right to strike was therefore a generally accepted practice among nations and its recognition was deemed essential to the protection of freedom of association. The Committee was well aware at the time of the absence of an international text on the subject accepted by both employers and workers and thus approached the problem of the right to strike with caution.¹²⁸ It was through this cautious approach that the Committee developed a vast body of case law which recognized a number of acceptable restrictions to the right to strike.

B. Restrictions on the Right to Strike

The Committee has indicated that it was not "called upon to give an opinion on the question as to how far the right to strike--a right which is not specifically dealt with in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or in the Right to Organise and Collective Bargaining Convention, 1949, (No. 98)--should be

¹²⁷ Valticos, supra, note 3, p. 614 and pp. 616-617.

¹²⁸ Jenks, supra, note 21, p. 369.

regarded as constituting a trade union right".¹²⁹ Nevertheless, the Committee has examined the legitimacy of exercising this right in particular circumstances.¹³⁰

The Committee has emphasized that although a strike may be temporarily restricted by law until all procedures available for negotiation, conciliation and arbitration have been exhausted, such a restriction should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage.¹³¹ The Committee has also accepted as a temporary restriction on strikes provisions prohibiting strike action in breach of collective agreements.¹³²

The Committee has acknowledged that the right to strike can be restricted or prohibited in the civil service--civil servants being defined as those who act on behalf of the public authorities--or in essential services in the strict sense of the term to the extent that the strike could cause serious hardship to the national community, and provided that the limitations are accompanied by certain compensatory guarantees.¹³³ These

¹²⁹ Case No. 60 (Japan), Twelfth Report of the Committee, Eighth Report of the ILO to the UN, *supra*, note 116, p. 202, at p. 211, para. 53.

¹³⁰ Jenks, *supra*, note 21, p. 372.

¹³¹ Digest, *supra*, note 76, p. 76, para. 390.

¹³² *Ibid.*

¹³³ *Ibid.*, p. 77, para. 386 and p. 78, para. 393; The Labour Relations (Public Service) Convention, 1978 (No. 151) deals with the settlement of labour disputes in the public service.

restrictions must therefore be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.¹³⁴

With respect to public servants, the Committee took its inspiration from the understanding reached in the drafting of Convention No. 87 that recognition of their right of association "in no way prejudices the question of the right of such officials to strike".¹³⁵ Nevertheless, as indicated earlier, it has determined that if public servants are not allowed to strike, they should be given adequate guarantees to protect their interests. In recent years the Committee's principles regarding the definition of public servants have undergone an evolution characterised by the use of stricter criteria to determine which categories may be excluded from recourse to strikes.¹³⁶ As a result, the categories in question have been narrowed down to only those who act as agents of the public authority.¹³⁷ Thus, the fact that public service legislation may apply to certain categories is not the determining factor, but rather the nature

¹³⁴ Ibid., para. 397.

¹³⁵ Freedom of association and industrial relations, Report VII, International Labour Conference, 30th Session, Geneva, 1947, pp. 108-109.

¹³⁶ Hodges-Aeberhard and Odero De Dios, supra, note 114, p. 550-551.

¹³⁷ Ibid., p. 551.

of their functions.¹³⁸ The Committee on Freedom of Association has, in considering complaints so far, stated that certain categories of public servants were not acting as agents of public authority, for example: employees in petroleum undertakings, in banks, in metropolitan transport or in the teaching sector, and, more generally, those working in public corporations or state enterprises.¹³⁹ Nevertheless, some of these excluded categories may well come within the realm of essential services.

The Committee has defined "essential services" as services whose interruption would endanger the life, personal safety or health of the whole or part of the population.¹⁴⁰ The Committee's definition of essential services in the strict sense of the term has also become more narrow over the years. In the past, the Committee had defined such services as those whose "interruption may cause public hardship" or "serious hardship to the national community".¹⁴¹ In 1979, the definition was narrowed to those

¹³⁸ *Ibid.*

¹³⁹ See for example Case No. 1225 (Brazil), International Labour Office, LXVII, Official Bulletin, (Series B, No. 1 1984), para. 668 [cases hereafter cited as ILO, vol. no., O.B., page, series, no. year and para.], and Case No. 1166 (Honduras), ILO, LXVI, O.B. 80 (Series B, No. 2 1983), para. 343.

¹⁴⁰ Digest, *supra*, note 76, p. 79, para. 400; See for example: Case No. 719 (Colombia), ILO, LVI, O.B. 114 (Supp. 1973), para. 72; Case No. 874 (Spain), ILO, LXI, O.B. 113 (Series B, No. 3 1978), para. 479; and Case No. 1068 (Greece), ILO, LXV, O.B. 84 (Series B, No. 1 1982), para. 364.

¹⁴¹ See for example: Case No. 179 (Japan), ILO, XLIV, O.B. (Series B, No.3), para. 55; Case No. 753 (Japan), ILO, LVII, O.B. 165 (Supp. 1974), para. 151; Case 935 (Greece), ILO, LXII, O.B. 59 (Series B, No. 3 1979), para. 285; and Case No. 1024 (India), ILO, LXIV, O.B. 136 (Series B, No. 3 1981); see also Digest,

"whose interruption would endanger the existence or well-being of the whole or part of the population".¹⁴² In 1983, the Committee made its definition consistent with that of the Committee of Experts, which had reviewed its definition of essential services in the context of a general survey on freedom of association and collective bargaining, and defined them as "services whose interruption would endanger the life, personal safety or health of the whole or part of the population".¹⁴³

Thus, the exception of essential services is meant to be given a narrow interpretation. However, what is deemed essential may vary depending on the context as has been noted:

"Obviously, what is to be understood by essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a given country. Moreover, the circumstances surrounding a "non-essential" service may become essential if a strike continues beyond a certain scope, endangering the life, personal safety or health of the whole or part of the population. Such considerations, however, have not prevented the Committee from concluding that in general a number of specific services are not to be considered essential."¹⁴⁴

In accordance with this definition, the Committee has

supra, note 76, p. 78, para. 393.

¹⁴² Case No. 908 (Morocco), ILO, LXII, O.B. 68 (Series B, No. 2 1979), para. 289.

¹⁴³ Case No. 1173 (Canada/British Columbia), ILO, LXVI, O.B. 170 (Series B, No. 3 1983), para. 577.

¹⁴⁴ Hodges-Aeberhard and Odero De Dios, *supra*, note 114, p. 551.

determined that the hospital sector, the supply of water, telephone and electricity services as well as air traffic controllers are considered essential services.¹⁴⁵ In addition, when minimum services are maintained, they must be confined to operations that are strictly necessary to avoid endangering the life, personal safety or health of the whole or part of the population, and workers' organisations should be able to participate in defining such a service in the same way as employers and the public authorities.¹⁴⁶ The Committee has, however, refused to give an opinion on the levels of minimum services established in specific cases presented to it, but has stressed the importance of joint consultation on this issue.¹⁴⁷

In accordance with the same criteria, the Committee has determined that the following types of work do not constitute "essential services":

- general dock work,
- aircraft repairs,
- banking,
- agricultural activities,
- the metal industry,
- teachers,
- the supply and distribution of foodstuffs,
- the Mint,

¹⁴⁵ Digest, supra, note 76, p. 80, paras. 409-410.

¹⁴⁶ Ibid., para. 415.

¹⁴⁷ Ibid.

- government printing services,
- state alcohol,
- salt and tobacco monopolies,
- petrol-producing installations,
- mining and
- transport in general, including metropolitan transport undertakings.¹⁴⁸

It is worth noting that the Committee, on examining a complaint that did not involve an essential service, maintained that the serious long-term consequences of a strike for a national economy did not justify its prohibition.¹⁴⁹ The Government of Norway had adopted ad hoc legislation prohibiting strikes by oil production workers after negotiations had reached a deadlock and imposed compulsory arbitration. The Committee thus considered that the legislation was "inconsistent with the principles of freedom of association". This would seem to rule out the argument that a strike in a non-essential service is legitimate only if the damage caused to the economy is not disproportionate to the benefits gained by the workers from a successful outcome, to say nothing of the fact that the disproportion may be difficult to establish.¹⁵⁰

The above-mentioned examples do not constitute an exhaustive

¹⁴⁸ Digest, *supra*, note 76, pp. 79-80, paras. 402-408.

¹⁴⁹ Case No. 1255 (Norway), ILO, LXVII, O.B. 51 (Series B, No. 2 1984), para. 190; See Hodges-Aeberhard and Odero De Dios, *supra*, note 114, p. 552.

¹⁵⁰ Hodges-Aeberhard and Odero De Dios, *idem*.

list of what are and what are not "essential services". The reason there have not been further examples is that the Committee has not been called upon to decide on specific cases dealing with this matter since it is rare that it receives complaints which relate to prohibition of strikes in essential services.¹⁵¹

These restrictions to the right to strike reflect the cautious approach by the Committee which we referred to earlier. Once again it appears to have taken into account the general practice of Member States in arriving at their criteria. Their emphasis on adequate and equitable alternatives to the right to strike when restrictions apply demonstrates to what extent the Committee considers it an essential part of freedom of association. Restrictions may be imposed only in exceptional circumstances and must fulfill certain criteria. The fact that some of the criteria, such as those dealing with the public service and essential services, imply a narrow interpretation serves to underline the exceptional nature of these restrictions and affirm the importance of protecting the right to strike. We believe that this protection is well founded given the restrictions the Committee has established. It is in keeping with the principle that human rights are not absolute and are subject to certain restrictions.¹⁵² As well, the right to strike is concomitant with the right to bargain collectively.

¹⁵¹ Ibid.

¹⁵² See Walter S. Tarnopolsky, The Canadian Bill of Rights, Second ed., (Toronto: Macmillan of Canada, 1978), pp. 87-88.

Section 3 - The Right to Bargain Collectively

The Committee has considered that the trade union's right to bargain collectively with employers with respect to conditions of work constitutes an essential element of freedom of association.¹⁵³ After all, the main purpose for workers to join together in a trade union is the pursuit of collective bargaining. The significance and importance of collective bargaining as an element in freedom of association has been recognised by the Committee in a number of cases. The Committee has described "the development of procedures for the voluntary negotiation of collective agreements" as being "an important aspect of freedom of association".¹⁵⁴ It has mentioned the development of collective bargaining as an indication of the restoration of trade union rights.¹⁵⁵ As one of the fundamental trade union rights, collective bargaining has been examined from various angles by the Committee, with a special emphasis on the problems arising in connection with the voluntary character collective bargaining should have by virtue of Convention No. 98.¹⁵⁶

With respect to relations between the parties involved in collective bargaining, the Committee has expressed the view that, since under the terms of Convention No. 98 a government is not

¹⁵³ Digest, *supra*, note 76, p. 108, para. 583.

¹⁵⁴ Case No. 55 (Greece), Sixth Report of the Committee, Seventh Report of the ILO to the UN, *supra*, note 109, p. 364, at p. 371, para. 923.

¹⁵⁵ Case No. 1 (Peru), *supra*, note 115.

¹⁵⁶ von Potobsky, *supra*, note 86, p. 77.

under the obligation to make collective bargaining compulsory, a refusal by an employer to bargain with a particular union is not deemed to be an infringement of trade union rights.¹⁵⁷ As well, the attitudes of each party to one another's demands is a matter for negotiation between the parties in accordance with the law of the land.¹⁵⁸ However, in several cases the Committee has stressed the need for employers to recognise the organisations representing the workers they employ for bargaining purposes.¹⁵⁹

The intervention of the State in the collective bargaining process have given rise to problems concerning the effects of legislation on collective agreements and the effects of government economic policy measures on the autonomy of the parties. In cases falling within the former category, the Committee has considered that a legal provision which supersedes or modifies the conditions of work laid down in collective agreements or which prevents the workers from negotiating such conditions constitutes an infringement of the rights of the persons involved to bargain collectively.¹⁶⁰

In cases involving limitations imposed on wage negotiations

¹⁵⁷ *Digest, supra*, note 76, p. 113, paras. 614-615.

¹⁵⁸ *Ibid.*, p. 109, para. 589.

¹⁵⁹ See for example: Case No. 605 (Jamaica), ILO, LIII, O.B. 59 (Supp. No. 4 1970), para. 75; Case No. 690 (United Kingdom/British Honduras), ILO, LV, O.B. 153 (Supp. 1972), para. 95; and Case No. 922 (India), ILO, LXIII, O.B. 45 (Series B, No.3 1980), para. 217.

¹⁶⁰ *Digest, supra*, note 76, p. 115, para. 628; See Case No. 541 (Argentina), 106th Report, paras. 12-16, 19.

as part of a strict wage policy resulting from economic restraint measures, the Committee has stated it would be difficult to establish an absolute rule.¹⁸¹ This is largely because of varying circumstances in which governments might feel that the economic position of their countries called at certain times for stabilisation measures which would restrict collective bargaining. The Committee has, however, set acceptable limits on State intervention as follows: restrictions should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by safeguards to protect workers' living standards.¹⁸² The Committee has gone further by suggesting that the parties should strive to achieve a wage policy consensus under such circumstances in order to take into account the government's economic and social policy and the general interest during their negotiations and has also stressed the importance of consultation among the parties to

¹⁸¹ *Digest, idem.*, pp. 116-117, para. 639; See for example: Case No. 55 (Greece), *supra*, note 154, and Case No. 551 (Cuba), ILO, LIII, O.B. 102 (Supp. No.2 1970), para. 107.

¹⁸² *Digest, idem.*, p. 117, para. 641; See for example: Case No. 385 (Brazil), ILO, LV, O.B. 73 (Supp. 1972), para. 65; Case No. 1147 (Canada), ILO, LXVI, O.B. 24 (Series B, No. 1 1983), para. 117; and Case No. 1180 (Australia), ILO, LXVI, O.B. 15 (Series B, No. 3 1985), para. 55; On the question of "reasonable time", the Committee has accepted a 12-month duration and in one instance and did not object to a two years' wage restraint policy, see Alfred Pankert, "Government influence on wage bargaining: the limits set by international labour standards", (1983) 122 *International Labour Review*, pp. 579-590, at p. 587.

reach agreement on this general interest.¹⁸³

Since most of the policies that the Committee has had to consider are highly complex, it has always attempted to assess these policies as a whole.¹⁸⁴ Also, the Committee does not normally probe deeply into certain issues such as seriousness of the economic situation or the nature and effectiveness of the measures adopted.¹⁸⁵ This is due probably to the fact that such issues are largely a matter of opinion and could give rise to endless difficult debate and discussion.¹⁸⁶

Once again, the Committee has demonstrated a cautious approach to protecting collective bargaining and imposing limitations to its exercise. The basic difference with the question of the right to strike is the fact that protection of the right to bargain collectively is expressly provided in Convention No. 98. Nevertheless, as we indicated earlier, Member States who have not ratified this Convention are bound to respect collective bargaining as an essential element of freedom of association which is enshrined in the Constitution of the ILO and the Declaration of Philadelphia. The manner in which the Committee has approached State intervention in collective bargaining is similar to its

¹⁸³ Digest, idem., para. 644; See for example Case No. 559 (Trinidad and Tobago) ILO, LIII, O.B. 30 (Supp. No. 4 1970), para. 122; Case No. 691 (Argentina), ILO, LV, O.B. 144 (Supp. 1972), para. 28; and Case No. 1173 (Canada/British Columbia), ILO, LXVII, O.B. 24 (Series B, No. 2 1984), para. 86.

¹⁸⁴ Pankert, supra, note 162.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

approach to restrictions on the right to strike. Collective bargaining is also deemed essential to freedom of association and interference with its process should be an exception measure that is accompanied by adequate safeguards. We consider that the principles of the Committee with respect to collective bargaining are well founded and represent an equitable balance between the rights of workers and the right of the State to act in the general interest.

Chapter 4 - Complaints Against Canada before the ILO Committee on Freedom of Association

A. Introduction

Having examined the supervisory and enforcement mechanism established by the ILO and the interpretation of its international labour standards by the ILO's Committee on Freedom of Association, it is now important to examine Canada's experience in relation to the ILO and the conclusions reached on Canadian labour legislation submitted to this mechanism. At present, Canada has ratified twenty-six ILO Conventions¹⁸⁷ including Convention No. 87 on Freedom of Association and Protection of the Right to Organise. Canada has not ratified Convention No. 98 on the Right to Organise and Collective Bargaining.

Ironically it was the ratification of early ILO Conventions which provoked a constitutional debate that would determine

¹⁸⁷ See Appendix C, p. 179.

jurisdiction over treaty-making and the implementation of treaties in Canada. In the Labour Conventions¹⁶⁸ case, the Judicial Committee of the Privy Council ruled that the treaty-making power resides with the federal executive authority, whereas treaty implementation is divided between the federal and provincial governments. A curious practice has nevertheless evolved in relation to ILO Conventions whereby the consent of the provinces is sought by the federal government before proceeding to ratification.¹⁶⁹ Implementation of ratified ILO Conventions, as stated previously, is a shared responsibility between the federal government and the provinces depending on whether the subject matter of the Convention is a federal/provincial responsibility or exclusive to one jurisdiction.¹⁷⁰

The present Canadian policy with respect to the ratification of ILO Conventions provides that prior to obtaining the consent to ratify from the provinces, a Convention deemed relevant is studied in order to determine whether Canadian legislation is in compliance.¹⁷¹ This reverse approach to international conventions (i.e. verifying compliance prior to ratification) explains why Canada has not ratified Convention No. 98. In 1972, Canada presented a report to the ILO, in accordance with Article 19 of

¹⁶⁸ Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 326.

¹⁶⁹ Kaplansky, *supra*, note 31, p. 93.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

the ILO Constitution, explaining that the fact that certain categories of professional and agricultural workers were excluded from collective bargaining in some provinces prevented Canada's ratification of Convention No. 98. At the time, these reservations appeared to have been accepted by the Committee of Experts as constituting the only barrier to full compliance with Convention No. 98 without providing further clarification.¹⁷² Nevertheless, as indicated earlier, this would not prevent the Committee on Freedom of Association from applying Convention No. 98 to Canada when examining complaints considering the scope of the Committee's jurisdiction.

With respect to Canadian compliance, a current report to the ILO on Convention No. 87¹⁷³ indicates that every jurisdiction in Canada has legislation to guarantee workers the right to organise through the formation of trade unions. This is accomplished by a system of certification whereby a trade union is granted the exclusive right to engage in collective bargaining on behalf of the employees in a bargaining unit for which that trade union is certified.¹⁷⁴ Employers are also guaranteed the right to form organisations of their own and to participate in their lawful

¹⁷² Ibid., p. 94.

¹⁷³ Report for the period July 1, 1984 to June 30, 1986 made by the Government of Canada, in accordance with Article 22 of the Constitution of the International Labour Organisation, on the measures taken to give effect to the provisions of the Freedom of Association and Protection of the Right to Organise Convention, 1948, ratification of which was registered on March 23, 1972, International Affairs Branch, Labour Canada.

¹⁷⁴ Ibid., p. 23.

activities. In addition, various prohibitions of interference by one party in the organisation of the other party are set out in the legislation. Since there have been no objections raised by the ILO supervisory system, we may generally assume that Canada is in compliance with Convention No. 87.

Since the procedure was established in 1951, twenty-nine complaints have been filed against Canada before the Committee on Freedom of Association. A review of the relevant cases will serve to illustrate how the principles of freedom of association discussed earlier have been applied to Canadian legislation. It is important to note that a sufficient number of complaints emanating from Canada have led the Committee on Freedom of Association to determine compliance with the ILO's definition of freedom of association. The fact that Canada has been a long-time participant in the ILO's standard-setting, supervisory and compliance machinery is a strong and definite indicator of its acceptance of the ILO's role and authority in the field of international labour law standards. We will now review the cases and then assess their general implications.

B. Review of the Cases

Most of the complaints have dealt with government intervention in collective bargaining and the imposition of restrictions on the right to strike. The earlier cases dealt with legislation comprising such measures. One of the first complaints concerned

the adoption of restrictive legislation by the Government of Newfoundland.¹⁷⁵ The complaint concerned the Labour Relations (Amendment) Act, 1959¹⁷⁶ and the Trade Union (Emergency Provisions) Act, 1959¹⁷⁷ which, among other things, empowered the Lieutenant Governor-in-Council to revoke certifications and dissolve trade unions on his own motion, authorized the courts to dissolve trade unions if a "substantial number" of their officers had been convicted of various crimes, and prohibited all strikes. In accordance with its principles the Committee was critical of the legislation, especially its sweeping prohibition of strikes. After the government indicated it would introduce amendments, the Committee was pleased to note later that the offending legislation had been repealed.¹⁷⁸

Emergency back-to-work legislation in Saskatchewan and Newfoundland was the basis of a later complaint.¹⁷⁹ Saskatchewan had adopted the Essential Services Emergency Act¹⁸⁰ which was designed to end a strike by employees of the Saskatchewan Power Corp., and Newfoundland had adopted the Hospital Employees

¹⁷⁵ Case No. 211 (Canada/Newfoundland), ILO, XLIV, O.B. 170-183 (No. 3 1961).

¹⁷⁶ S.N. 1959, c. 1.

¹⁷⁷ S.N. 1959, c. 2.

¹⁷⁸ Labour Relations (Amendment) Act, 1963, S.N. 1963, c. 82; See ILO, XLVII, O.B. 6-8 (Supp. No.1 1964).

¹⁷⁹ Case No. 523 (Canada/Newfoundland and Saskatchewan), ILO, LI, O.B. 66 (Supp. No. 4 1968); ILO, LII, O.B. 35 (Supp. No. 2 1969).

¹⁸⁰ S.S. 1966 (2d session), c.2.

(Employment) Act to end a strike by hospital employees.¹⁸¹ The Committee concluded that the Saskatchewan legislation provided acceptable arbitration procedures to compensate for the denial of the right to strike, whereas the Newfoundland legislation did not. Subsequent complaints dealt with further emergency back-to-work legislation which brought into play once again the Committee's principles concerning the right to strike and essential services. Two complaints arose from the "common front" strike in the Québec public sector in 1972. The first complaint concerned the arrest and imprisonment of trade union leaders for defying an injunction obtained by the Government of Québec to order a return to work in the hospital sector.¹⁸² The Committee requested further information on the complaint.¹⁸³ In a subsequent decision relating to the same actions, the Committee concluded that they were not in violation of freedom of association.¹⁸⁴ A further complaint was made concerning the back-to-work legislation adopted by the Québec Government concerning this dispute.¹⁸⁵ The Committee reaffirmed its principles that strikes may be prohibited or restricted in essential services and in the

¹⁸¹ S.N. 1966-67, c. 11.

¹⁸² Case No. 699 (Canada/Québec), ILO, LV, O.B. 140 (Supp. 1972).

¹⁸³ *Ibid.*, para. 216.

¹⁸⁴ ILO, LV, O.B. 181 (Supp. 1972).

¹⁸⁵ ILO, LVII, O.B. 85 (Supp. 1974); An Act to ensure resumption of services in the public sector, S.Q. 1972, c. 7 and An Act to amend the Act to ensure resumption of services in the public sector, S.Q. 1972, c. 8.

public service provided that adequate guarantees to safeguard the interests of the workers are included.¹⁸⁶ It concluded that the impugned legislation was in violation since it did not provide for adequate conciliation and arbitration procedures in accordance with its principles.¹⁸⁷ In 1976, a temporary ban on strikes by teachers imposed by the Government of Québec¹⁸⁸ was deemed valid by the Committee.¹⁸⁹

Labour relations in the construction industry in Quebec were the subject of a few complaints before the Committee. Violence and corruption in the industry, particularly in 1974 at James Bay, prompted the Québec Government to take legislative action. Certain locals of the Québec Federation of Labour were placed under trusteeship by An Act respecting the placing of certain labour unions under trusteeship,¹⁹⁰ and persons with criminal records were prohibited from holding union office by An Act to amend the Construction Industry Labour Relations Act.¹⁹¹ In deciding on a complaint concerning this legislation, the

¹⁸⁶ Ibid., para. 367.

¹⁸⁷ Ibid., paras. 368-373.

¹⁸⁸ An Act respecting the maintaining of services in the sector of education and repealing a certain legislative provision, S.Q. 1976, c. 38.

¹⁸⁹ Case No. 845 (Canada/Québec), ILO, LX, O.B. 8 (Series B, No.2 1977).

¹⁹⁰ S.Q. 1975, c. 57.

¹⁹¹ S.Q. 1975, c. 50.

Committee was critical of both statutes.¹⁸² The Committee noted that Article 3 of Convention No. 87 provided that public authorities should refrain from interfering with the right of workers' organisations to elect their representatives and to organise their administration.¹⁸³ Governments may only do so when the law or union rules are violated as determined by the relevant judicial authority and such intervention should be temporary and aimed solely at permitting the organisation of free elections.¹⁸⁴ In addition, the restrictions on holding trade union office were also deemed a violation of Article 3 of Convention No. 87 since they included offences the commission of which would not necessarily be prejudicial to the proper exercise of trade union functions.¹⁸⁵ Finally, the Committee affirmed that the right to strike was an essential element of freedom of association and considered the limitations imposed on strikes by the legislation had the potential to undermine the exercise of this right.¹⁸⁶ The Committee later noted with approval the lifting of trusteeship on certain locals.¹⁸⁷ Legislation affecting the construction

¹⁸² Case No. 818 (Canada/Québec), ILO, LIX, O.B. 40 (Series B, No. 3 1976).

¹⁸³ *Ibid.*, para. 216.

¹⁸⁴ *Ibid.*, paras. 217 and 222.

¹⁸⁵ *Ibid.*, para. 227.

¹⁸⁶ *Ibid.*, para. 230.

¹⁸⁷ See ILO, LXI, O.B. 4 (Series B, No. 2 1978).

industry in Québec was the subject of a further complaint.¹⁹⁸ The Québec Government had adopted An Act to ensure the resumption of construction work¹⁹⁹ to end a strike and lock-out in the industry. The Act ordered the workers to resume work and prohibited strikes for a three-year period. The Committee was critical of the prohibition on strikes and reaffirmed the principle that the right to strike is one of the essential means through which workers defend their interests.²⁰⁰ It added that the legislation could not be justified on the basis of the possible long-term negative effects on the Québec economy because the strike did not endanger the life, personal safety or health of the population.²⁰¹ Since a collective agreement had been reached and the right to strike had been restored following the complaint, the Committee considered that no further action was necessary.²⁰²

Nova Scotia's controversial so-called "Michelin Bill"²⁰³ was the subject of a complaint before the Committee.²⁰⁴ The

¹⁹⁸ Case No. 1394 (Canada/Québec), ILO, LXX, O.B. 27 (Series B, No. 3 1987).

¹⁹⁹ S.Q. 1986, c. 11.

²⁰⁰ Supra, note 198, para. 138.

²⁰¹ Ibid., para. 138.

²⁰² Ibid., para. 141.

²⁰³ An Act to Amend Chapter 19 of the Acts of 1972, the Trade Union Act, S.N.S. 1978-79, c. 78.

²⁰⁴ Case No. 964 (Canada/Nova Scotia), ILO, LXIV, O.B. 5 (Series B, No.2 1981).

legislation allowed employers with more than one business location to apply to the Labour Relations Board for a determination that it be certified for collective bargaining purposes on a multi-plant basis, i.e. a union must organise all employees of a company and not just one plant before it can apply for certification.²⁰⁵ The complainant union alleged that it was adopted to prevent the unionising of the Michelin Co., itself a multi-plant employer in Nova Scotia.²⁰⁶ The union argued that the legislation violated Article 2 of Convention No. 87 in that workers were prohibited from creating bargaining units of their own choosing.²⁰⁷ The Committee considered that the problem raised was essentially one of the level of collective bargaining and that the legislation in question did not constitute an infringement of the right to free collective bargaining since the decision on this point is left up to the Labour Relations Board.²⁰⁸

The Committee's principles concerning freedom of association and the public service were applied in a number of cases. Alberta's Public Service Employee Relations Act²⁰⁹ was the

²⁰⁵ *Ibid.*, para. 24.

²⁰⁶ *Ibid.*, paras. 23 and 27.

²⁰⁷ *Ibid.*, para. 25.

²⁰⁸ *Ibid.*, para. 36.

²⁰⁹ S.A. 1977, c. 40.

subject of a complaint before the Committee.²¹⁰ The main complaint involved the Act's general prohibition of strikes by public employees. While reaffirming that freedom of association in the case of public officials does not necessarily imply the right to strike, the Committee also noted that any prohibition or restriction on this right should be accompanied by adequate, impartial and speedy conciliation and arbitration procedures, but added that no allegation was made regarding the procedure within the Alberta legislation.²¹¹ As well, applying its principles concerning essential services, the Committee concluded that the legislation could not extend its scope to include the Alberta Liquor Commission and requested the Government of Alberta to restrict the prohibition to services which are essential in the strict sense of the term.²¹² The Committee reexamined the case following the government response to its conclusions.²¹³ The Government of Alberta indicated that:

"although some services might be more essential than others, the public service generally provides to the people of Alberta services for which, in the main, there is no reasonable alternative...[I]t would not seem advisable to set up a process whereby different dispute-resolution mechanisms would apply to different

²¹⁰ Case No. 893 (Canada/Alberta), ILO, LXI, O.B. 124 (Series B, No.3 1978).

²¹¹ *Ibid.*, para. 534.

²¹² *Ibid.*, para. 537.

²¹³ ILO, LXII, O.B. 22 (Series B, No.1 1979).

groups of employees of a single employer."²¹⁴

The Committee was not persuaded by this reasoning and reiterated its conclusions.²¹⁵ The complainants later informed the Committee in 1980 that the Government of Alberta had failed to comply with its recommendations.²¹⁶ The Government responded by referring to a decision of the Alberta Court of Queen's Bench which had affirmed the validity of the Act and rejected the conclusions of the Committee as non-binding.²¹⁷ While noting the Alberta court decision, the Committee nevertheless felt that:

"it must recall that Canada, in ratifying Convention No. 87, undertook to give effect to its provisions and gave this undertaking with the unanimous consent of the provincial governments."²¹⁸

The Committee reiterated once more its previous conclusions regarding this case.²¹⁹ As Michael Bendel has noted, the Alberta Court of Queen's Bench decision in this case, rendered by Chief Justice Sinclair, was erroneous in that it failed to consider whether Alberta could legislate in violation of international law

²¹⁴ Ibid., para. 111.

²¹⁵ Ibid., para. 118.

²¹⁶ ILO, LXIII, O.B. 25 (Series B, No.3 1980), para. 126.

²¹⁷ Ibid., para. 129; see *A.U.P.R. v. Alberta*, (1980) 120 D.L.R. (3d) 590 (Alta. Q.B.).

²¹⁸ Ibid., para. 132.

²¹⁹ Ibid., para. 133; For commentary on this case, see Michael Bendel, "The International Protection of Trade Union Rights: A Canadian Case Study", (1981) 13 Ottawa L.R. 169-198, at pp. 177-180; The same legislation was the subject of a complaint before the UN Human Rights Committee, see p. 84.

and, in turn, substituted its own interpretation of Convention No. 87 which differed from that of the ILO Committee on Freedom of Association.²²⁰

Another case involved Nova Scotia's Civil Service Collective Bargaining Act, 1978.²²¹ The complaint alleged that the Act violated Convention No. 87 by, among other things, prohibiting strikes.²²² In arriving at its conclusions, the Committee referred to its decision in the previous case involving Alberta.²²³ The Committee concluded that the prohibition on strikes could only apply to the public service and to government agencies which provide essential services in the strict sense of the term.²²⁴

Québec's legislative mechanism to ensure essential services in the public and para-public sectors also came under scrutiny.²²⁵ The Government of Québec had adopted An Act respecting the process of negotiation of the collective agreements in the public and para-public sectors,²²⁶ which modified the framework for collective bargaining in the sectors of education,

²²⁰ Bendel, *idem.*, pp. 180-185.

²²¹ S.N.S. 1978, c. 3.

²²² Case No. 1070 (Canada/Nova Scotia), ILO, LXV, O.B. 45 (Series B, No. 1 1982), para. 223.

²²³ *Ibid.*, para. 231.

²²⁴ *Ibid.*, para. 232.

²²⁵ Case No. 1356 (Canada/Québec), ILO, LXX, O.B. 22 (Series B, No. 1 1987).

²²⁶ S.Q. 1985, c. 12.

social affairs and government agencies, authorized the Government to establish by decree salaries and salary scales for the second and third years of a collective agreement, imposed severe restrictions on the right to strike and granted to the Essential Services Council, an administrative body, quasi-judicial powers. The Committee concluded that the framework should be modified to allow the parties to determine freely which matters should be negotiated at the local level where such matters are not common to all employees, but found the overall framework acceptable.²²⁷ On the question of salary and salary scales, the Committee concluded that the procedure for initially negotiating their terms was acceptable, but suggested that the parties be entitled to appeal to a mediator or independent arbiter.²²⁸ The Committee also reaffirmed its principles concerning the right to strike and concluded that the Essential Services Council, which is a joint body, was a structure that conformed to its criteria, but nevertheless suggested the Government include recourse to independent binding arbitration should the procedure fail to resolve a dispute.²²⁹ The Committee also reminded the Government of Québec that workers in education establishments should enjoy the right to strike.²³⁰

During the 1970's, economic recession prompted the federal

²²⁷ *Supra*, note 225, paras. 139-140.

²²⁸ *Ibid.*, paras. 141-142.

²²⁹ *Ibid.*, paras. 143-146.

²³⁰ *Ibid.*, para. 147(b).

and provincial governments to adopt fiscal restraint policies which, in turn, engendered restrictive labour legislation. Trade unions affected by these measures responded with numerous complaints before the Committee on Freedom of Association. One of the first of these complaints concerned the adoption by the federal government of the Public Sector Compensation Restraint Act²³¹ which restricted collective bargaining for federal public servants by imposing restraints on wage increases and extending compensation plans for a period of 24 months. The Committee, in accordance with its principles concerning the right to strike and collective bargaining for public officials, concluded that the legislation did not violate freedom of association.²³² It considered that the federal government had provided adequate safeguards to protect the workers' interests, but recommended that consultations take place concerning compensation plans freely negotiated prior to the enactment of the Act to determine the extent to which they can be implemented under its provisions.²³³

Restrictive labour legislation adopted in Québec during this period was criticized by the Committee. The Government of Québec had adopted legislation imposing restrictions on wages and the

²³¹ S.C. 1980-81-82-83, c. 122.

²³² Case No. 1147 (Canada), ILO, LXVI, O.B. 24 (Series B, No.1 1983), paras. 115-118; The same legislation was the subject of a court case under the Canadian Charter of Rights and Freedoms, see pp. 139-142.

²³³ Ibid., para. 117.

right to strike in the public and para-public sectors.²³⁴ As well, it also adopted special legislation to order the return to work of teachers who had waged an illegal strike to protest the restrictive legislation.²³⁵ While noting that the Government of Québec was justified in imposing such restrictions in a period of economic and financial crisis, the Committee considered the period of three years established by the legislation was too long and recommended that the Government resume collective bargaining in the sectors concerned.²³⁶ It also concluded that the two-year suspension of the right to strike for teachers should not be maintained since they do not perform essential services in the strict sense of the term.²³⁷

Restrictive public sector legislation introduced in Newfoundland, Ontario and Alberta during 1982-85 became the focus of a study and information mission sent to Canada by the ILO Committee on Freedom of Association in order to "obtain additional information...which could assist in clarifying aspects of the laws and practices involved". This method is normally used by the Committee in more difficult cases which require greater attention as the result of tensions arising from the dispute in

²³⁴ An Act concerning remuneration in the public sector, S.Q. 1982, c. 35 and An Act respecting the conditions of employment in the public sector, S.Q. 1982, c. 45.

²³⁵ An Act to ensure the resumption of services in the schools and colleges in the public sector, S.Q. 1983, c. 1.

²³⁶ Case No. 1171 (Canada/Québec), ILO, LXVI, O.B. 32 (Series B, No.3 1983), paras. 160-165.

²³⁷ Ibid., paras. 168-170.

question, and to resolve conflicts which are at an impasse or issues of extreme urgency.²³⁸ The consent of the government involved is required before a mission may be sent.²³⁹ Based on the report of the Study and Information Mission²⁴⁰ and the complaints presented, the Committee on Freedom of Association developed its recommendations concerning these complaints. In all instances the Committee found there were violations of ILO standards on freedom of association with respect to temporary restrictions on collective bargaining, the right to strike and the protection of essential services. Ontario's wage restraint legislation²⁴¹ was deemed acceptable by the Committee except with regards to the interruption of already negotiated contracts and restrictions on the negotiation of non-monetary issues.²⁴² The

²³⁸ Valticos, *supra*, note 3, p. 616, N.B. The Committee's first used this method in complaints emanating from Libya and Costa Rica (1962). The recourse to this method grew in the 1970's. Study and information missions have been sent to the following countries: Jordan (1974), Uruguay (1974, 1977, & 1981), Bolivia (1976 & 1980), Argentina (1978 & 1980), Chili (1978 & 1980), Dominican Republic (1978), United Kingdom (Antigua) (1978), Tunisia (1978, 1980 & 1981), Sri Lanka (1979), Ethiopia (1980), Poland (1980, 1981 & 1982), U.S.S.R. (1980) and Turkey (1982).

²³⁹ *Ibid.*

²⁴⁰ Report on a study and information mission to Canada by Sir John Wood, representative of the Director-General of the International Labour Office, ILO, LXVII, O.B. 43-115 (Series B, No.3 1985).

²⁴¹ Inflation Restraint Act, S.O. 1982, c. 55., replaced by the Public Sector Prices and Compensation Review Act, S.O. 1983, c. 70.

²⁴² Case No. 1172 (Canada/Ontario), *supra*, note 240, p. 29, paras. 115-117.

Committee criticized Alberta's legislation²⁴³ as going beyond acceptable limits on the right to strike and recommended it be revised to limit the ban on strikes to services which are essential in the strict sense of the term.²⁴⁴ Newfoundland's legislation²⁴⁵ was considered acceptable except, among other things, access to independent arbitration with respect to the method of designating essential services.²⁴⁶

Similar legislative measures adopted in British Columbia²⁴⁷ were the focus of several complaints before the Committee on Freedom of Association. The Committee considered, as in some of the previous cases dealing with public sector wage restraint legislation, that the interruption of previously negotiated collective agreements was inconsistent with the principle of free collective bargaining.²⁴⁸ In a follow-up complaint regarding the

²⁴³ Labour Statutes Amendment Act, 1983, S.A. 1983 (Spring Sitting), c. 34.

²⁴⁴ Case No. 1234 (Canada/Alberta), *supra*, note 240, p. 34, paras. 131-132.

²⁴⁵ Public Service (Collective Bargaining) (Amendment) Act, S.N. 1983, c. 24.

²⁴⁶ Case No. 1260 (Canada/Newfoundland), *supra*, note 240, p. 39, paras. 149-152.

²⁴⁷ Compensation Stabilization Act, S.B.C. 1982, c. 32, Compensation Stabilization Amendment Act, 1983, S.B.C. 1983, c. 13, Public Sector Restraint Act, S.B.C. 1983, c. 26 and Employment Standards Amendment Act, 1983, S.B.C. 1983, c. 16.

²⁴⁸ Case No. 1173 (Canada/British Columbia), ILO, LXVI, O.B. 170 (Series B, No.3 1983), paras. 574-575 and ILO, LXVII, O.B. 24 (Series B, No.2 1984), para. 87.

same legislation, the Committee reiterated its conclusions.²⁴⁹ When the Government of British Columbia failed to respond to the decisions, further complaints were made and the Committee reaffirmed its principles regarding government intervention in collective bargaining with respect to public officials.²⁵⁰ When British Columbia adopted a sweeping reform of its labour relations legislation in 1987,²⁵¹ it also became the subject of a complaint. The Committee considered that several provisions in the legislation were not in conformity with the principles of freedom of association.²⁵² The legislation violated, among others, principles regarding essential services and voluntary collective bargaining for public officials.²⁵³

C. Conclusion

We have examined most of the complaints that have been made against Canada before the ILO Committee on Freedom of Association.²⁵⁴ All of the principles established by the Committee,

²⁴⁹ Case No. 1235 (Canada/British Columbia), ILO, LXVII, O.B. 100 (Series B, No. 2 1984), para. 325.

²⁵⁰ Case No. 1329 (Canada/British Columbia), ILO, LXIX, O.B. 40 (Series B, No.1 1986), para. 184 and Case No. 1350 (Canada/British Columbia), *idem.*, p. 74, paras. 305-306, 308.

²⁵¹ Industrial Relations Reform Act, S.B.C. 1987, c. 24.

²⁵² Case No. 1430 (Canada/British Columbia), ILO, LXXI, O.B. 37 (Series B, No.2 1988).

²⁵³ *Ibid.*, paras. 183, 185, 187 and 189.

²⁵⁴ The other complaints are: Case No. 841 (Canada/Ontario), ILO, LX, O.B. 75 (Series B, No.1 1977), ILO, LX, O.B. 31 (Series B, No.3 1977) and ILO, LXI, O.B. 1 (Series B, No. 1 1978) [union

which we discussed earlier, concerning freedom of association, the right to strike and the right to bargain collectively were applied in these cases. These cases do serve to demonstrate and to affirm the fundamental principles of trade union freedom of association and to clarify the restrictions that are deemed acceptable under ILO standards. It is important to note that in a large number of the cases reviewed earlier several restrictions imposed by governments were deemed acceptable in accordance with the Committee's principles. They serve to demonstrate how freedom of association would be interpreted under s. 2(d) of the Canadian Charter of Rights and Freedoms in accordance with the ILO definition and what limitations would be justifiable under s. 1 of the Charter. These decisions and the principles derived from the vast international case law of the Committee, serve as a prime source for interpreting freedom of association in the realm of international law. The implications of Canada's involvement in the ILO are significant and have a great effect on the interpretation of Canada's fundamental rights and freedoms as enshrined in the Charter of Rights and Freedoms. Having been a member of the ILO since its founding, Canada has accepted the

raiding]; Case No. 903 (Canada), ILO, LXI, O.B. 11 (Series B, No.3 1978) and ILO, LXII, O.B. 10 (Series B, No.3 1979) [employee reclassification]; Case No. 931 (Canada), ILO, LXIII, O.B. 45 (Series B, No.2 1980) [postal strike declared illegal]; Case No. 886 (Canada/British Columbia), ILO, LXIV, O.B. 17 (Series B, No.1 1981) [voluntary recognition]; Case No. 1055 (Canada/Alberta), ILO, LXV, O.B. 77 (Series B, No.1 1982) [employer designating members of staff association]; and Case No. 1226 (Canada/Ontario, British Columbia, Alberta), ILO, LXVII, O.B. 16 (Series B, No. 2 1984) [union security clauses in the construction industry].

organisation's international mandate to secure the protection of trade union rights in the cause of social justice. Having ratified a number of ILO Conventions, Canada has undertaken international obligations with respect to the protection of freedom of association and has demonstrated to the ILO that it has implemented these Conventions in its domestic legislation. Nevertheless, two questions arise. The first concerns the legal status of the decisions of the ILO Committee on Freedom of Association and the possibility that the decisions of the Committee may well constitute customary international law binding on Canada. The second concerns the influence of Canada's other international obligations with respect to freedom of association. We will consider them in order.

Chapter 5 - The legal status of the decisions of the ILO Committee on Freedom of Association

An objection could possibly be made as to the authority of the decisions rendered by the Freedom of Association Committee and endorsed by the Governing Body. According to Article 37 of the Constitution of the ILO, Conventions are to be interpreted by the International Court of Justice or by a tribunal appointed by the Governing Body for this purpose in accordance with the said Article. Since the text of Convention No. 87 is expressed in general terms, the various organs of the ILO have had to interpret its application over the years. The Committee of Experts, for instance, in carrying out its functions has had to

interpret the scope of application of the Convention in determining whether a Member State's legislation is in conformity with its provisions. Although these pronouncements do not have the same authority as a decision of the International Court of Justice, the "case law" elaborated thus far by the Committee of Experts has acquired considerable moral weight.²⁵⁵ A stronger case exists with regard to the Committee on Freedom of Association. The Committee on Freedom of Association is composed of members of the Governing Body as opposed to the Committee of Experts which is composed of independent legal experts. In a sense, it is thus a more representative body. It also functions like a quasi-judicial body.²⁵⁶ The Committee's decisions have been sanctioned by the Governing Body of the ILO which has approved its recommendations in the more than 1400 complaints which have come before it. As has been noted earlier, the complaints' procedure before the Committee was established pursuant to an agreement with the ECOSOC of the UN after considerable discussion had taken place concerning the most effective means of protecting freedom of association. The Committee is a major component of the ILO's supervisory and enforcement machinery aimed at securing this protection. The Committee recognized, in its First Report, the importance of its role in contributing to the attainment of the aims and purposes

²⁵⁵ Valticos, supra, note 3, p. 587; Jenks, supra, note 91, pp. 62-63; Haas, supra, note 64, pp. 415-423.

²⁵⁶ Valticos, idem., p. 615 and Haas, idem., p. 424.

of the ILO as set forth in the Constitution of the Organisation, the Declaration of Philadelphia and Convention No. 87. Thus, while they may not create legal obligations in the strict sense of the term, the decisions of the ILO Committee on Freedom of Association do bind the Member States of the Organisation in that they represent an important contribution to the international protection of trade union freedom of association to which they are all bound to uphold. The question nevertheless arises as to whether the decisions of the Committee create international obligations.

Since one of the recognized sources of international law is "international custom as evidence of a general practice of law"²⁵⁷ the opinion has been expressed on several occasions that the principles espoused by the ILO's Governing Body, upon the recommendation of its Committee on Freedom of Association, constitute customary rules of international law.²⁵⁸ Paul Ramadier, a former Prime Minister of France and a Chairman of the Committee for ten years, expressed the opinion that the Committee on Freedom of Association had succeeded in laying down the principle that freedom of association was a kind of customary rule in common law, outside or above the scope of any Conventions or even of membership of one or other of the international organisations.²⁵⁸ As well, C. Wilfred Jenks, a distinguished

²⁵⁷ Bendel, supra, note 219, p. 187.

²⁵⁸ Ibid., p. 188.

²⁵⁸ von Potobsky, supra, note 86, p. 83.

international lawyer and a Director-General of the ILO, once commented on the emergence of customary international law on questions of social policy in the following terms:

"[a] generation ago the suggestion that there is any customary international law of social policy would have been treated with a scepticism amounting to scorn. Social policy was at that time a typical example of a matter which, in the then existing stage of development of international relations, was "not, in principle, regulated by international law" and as regards which each therefore remained "sole judge"...Matters have now reached a transitional phase in which we can discern reasonably clearly the makings of a customary international law of social policy.

The process has developed furthest in respect of the international protection of trade union freedom...[The] practical outcome has been that there now exists a quasi-judicial procedure for the examination of such allegations, by means of which, during the ten years from 1952 to 1962, 311 cases involving 67 governments and territories in all parts of the world have been considered and a comprehensive and imposing body of case law touching on virtually all the major aspects of freedom of association for trade union purposes evolved."²⁶⁰

As has been noted, perhaps the issue has evolved beyond the transitional phase described by Jenks and one can affirm unequivocally that the principles set down by the ILO Committee on Freedom of Association are now part of customary international law. However, opinions differ as to what is required to establish rules of customary international law.²⁶¹ According to some of the

²⁶⁰ Cited in Bendel, *supra*, note 219, p. 188. N.B. As Mr. Bendel points out, since Mr. Jenks wrote those words the Committee on Freedom of Association has now examined approximately more than 1400 cases.

²⁶¹ Bendel, *idem.*, p. 190; see also Anthony A. D'Amato, The Concept of Custom in International Law, (Ithaca: Cornell University Press, 1971), pp. 4-5.

more traditional views, States must regard themselves as obliged to give effect to the principles recommended by the Committee on Freedom of Association since custom can probably not constitute a source of law unless compliance with a practice results from an opinio juris, i.e. a belief in its legally binding nature.²⁶² There is evidence of such a practice in the fact that during the thirty-six years of the Committee's uninterrupted existence, all of its decisions, with only one exception, have been reached unanimously and all of its recommendations, although sometimes criticised by defaulting governments and dissatisfied complainant organisations, have been approved and adopted by the Governing Body.²⁶³ A comparison can be made with the Resolutions adopted by the UN General Assembly. A number of opinions have been expressed to the effect that these constitute customary international law since they reflect the practice of States.²⁶⁴ Certainly a parallel can be made with the decisions of the Governing Body of the ILO approving the recommendations of the Committee on Freedom of Association. Furthermore, a resolution adopted by the International Labour Conference in 1970 concerning trade union rights and their relation to civil liberties requested the Governing Body to instruct the Director-General to take action to ensure

²⁶² Bendel, *idem.*, pp. 190-191; D'Amato, *idem.*, pp. 49-54, 66-87.

²⁶³ Hodges-Aeberhard and Odero De Dios, *supra*, note 114, p. 560.

²⁶⁴ D'Amato, *supra*, note 261, p. 50; See also Michael Akehurst, "Custom as a Source of International Law", (1974) 47 *Brit. Y.B. Int. L.*, p. 1, at pp. 5-7 and p. 11.

full and universal respect for trade union rights in their broadest sense and drew particular attention to the right to strike.²⁶⁵ In addition, the right to strike has received attention within the ILO at both the regional and sectoral level in a number of resolutions.²⁶⁶

There is further support for the suggestion that Canada is bound by the principles of the Committee on Freedom of Association as a matter of international law in opinions that the authoritative nature of custom in international law is "reinforced" by the factors of consent and estoppel.²⁶⁷ It is important to note that Canada has also been an active participant in the ILO since its very beginnings. It is also relevant to note that Canada has been a member of the Governing Body of the ILO almost since its foundation and since the establishment of the Committee on Freedom of Association. As well, there is no record of the Government of Canada having protested or dissented from the Governing Body's endorsements of the recommendations by the Committee on Freedom of Association.²⁶⁸ In addition, following the examination by the Committee on Freedom of Association of numerous complaints from Canada, there has not been any protest by the Government of Canada over the legitimacy of the work of

²⁶⁵ Hodges-Aeberhard and Odero De Dios, *supra*, note 114, p. 544.

²⁶⁶ *Ibid.*, pp. 544-545.

²⁶⁷ Bendel, *supra*, note 219, p. 188; D'Amato, *supra*, note 261, pp. 187-215.

²⁶⁸ Bendel, *idem.*, p. 188.

the Committee in general, or as to the validity of particular principles formulated by it.²⁶⁹ Indeed, it may be argued that when Canada consented in 1985 to the ILO Information Mission sent by the Committee to investigate the three complaints discussed earlier, it was reaffirming its acceptance of the ILO supervisory and enforcement machinery of which the Committee is a major component.

Chapter 6 - Canada's Other International Obligations with respect to Freedom of Association

It is also important to note that Canada has contracted other international obligations with respect to freedom of association. The Universal Declaration of Human Rights²⁷⁰ states in its Article 20:

"Article 20.--1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association."

The Universal Declaration of Human Rights did serve as an impetus for subsequent human rights instruments, but as a result of its non-binding nature and the adoption of more detailed instruments, its force, at least in the area of freedom of association, has

²⁶⁹ Ibid., pp. 188-189.

²⁷⁰ Louis B. Sohn and Thomas Buergenthal, Basic Documents on International Protection of Human Rights, (New York: The Bobbs-Merrill Company, Inc., 1973), p. 30.

largely been spent.²⁷¹ Article 8 of the International Covenant on Economic, Social and Cultural Rights²⁷², which Canada has ratified, provides explicit protection for freedom of association for trade union purposes and the right to strike with certain limitations. Article 22 of the International Covenant on Civil and Political Rights,²⁷³ which Canada has also ratified, also provides protection for freedom of association also with certain limitations. It is interesting to note that both Covenants provide explicitly that obligations under ILO Convention No. 87 are not precluded. In both instances restrictions to freedom of association are also recognized. It has been noted that the provisions of the International Covenant on Economic, Social and Cultural Rights constitute only a basis for a "program of action" for States who do not yet have the means to guarantee these rights rather than legally binding obligations.²⁷⁴ Nevertheless, for countries who have the means to do so, such as Canada, they still remain a valid international obligation. The International Covenant on Civil and Political Rights has been ratified (as of December 31, 1983) by some 77 states and includes an Optional

²⁷¹ Michael Bendel, "La liberté d'association dans l'optique de la Charte canadienne des droits et libertés", dans Perspectives canadiennes et européennes des droits de la personne, sous la dir. de Daniel Turp et Gérald A. Beaudoin, (Cowansville (Québec), 1986), pp. 322-349, p. 327.

²⁷² Sohn and Buerghental, supra, note 270, p. 35; see Annex D on p. 181 for the text.

²⁷³ Sohn and Buerghental, supra, note 270, p. 52; see Annex D on p. 182 for text.

²⁷⁴ Bendel, supra, note 271, p. 8.

Protocol under which individuals may present complaints about violations of the Covenant.²⁷⁵ As a result, it has assumed a greater importance. In fact, a recent decision of the United Nations Human Rights Committee, which considers complaints made by virtue of the Optional Protocol, on a case emanating from Canada, decided that Article 22 of the International Covenant on Civil and Political Rights did not guarantee the right to strike and decided the complaint was inadmissible.²⁷⁶ The complainants, members of the Alberta Union of Provincial Employees, had invoked the provision against a strike prohibition for provincial government employees contained in Alberta's Public Service Employees Relations Act.²⁷⁷ The prohibition had also been the focus of a complaint before the ILO Committee on Freedom of Association.²⁷⁸ In reviewing the drafting history of the Covenant, the UN Committee deduced that the drafters had not intended to guarantee the right to strike unlike Article 8 of the International Covenant on Economic, Social and Cultural Rights which provides for it explicitly. Five members of the UN

²⁷⁵ Ibid.

²⁷⁶ J.B. et al. v. Canada, United Nations Human Rights Committee, 18 July 1986, Communication No. 118/1982, in (1986) 3 C.H.R.Y.B. 213-226, at p. 222-223.

²⁷⁷ S.A. 1977, c. 40.

²⁷⁸ Case No. 893 (Canada/Alberta), supra, note 210, the Committee had decided that the prohibition was in violation of freedom of association and the complaint was the subject of litigation before the courts when Alberta failed to comply with the decision in the case A.U.P.E. v. Alberta, (1980) 120 D.L.R. (3d) 590 (Alta. Q.B.). See discussion on pp. 65-68.

Committee dissented and in a separate opinion argued that the drafting history did provide sufficient grounds for protection of the right to strike under Article 22 which is compatible with the ILO's definition of freedom of association.²⁷⁹ It is difficult to accept the validity of this decision. While the UN Human Rights Committee reviewed the decision of the ILO Committee on Freedom of Association in the same matter, it failed to give it any consideration, relying mainly on a textual argument to reject any protection of the right to strike under Article 22 of the International Covenant on Civil and Political Rights. Using a similar textual argument, the dissenting members of the UN Human Rights Committee concluded differently. They found the inclusion of the phrase "including the right to form and join trade unions for the protection of his interests" in Article 22 of the Covenant was a determining factor in concluding that protection of the right to strike was possible without deciding on the merits of the question. In addition, they noted that paragraph 3 of Article 22 provides explicitly that a State party to ILO Convention No. 87 cannot adopt legislative measures which would prejudice the guarantees provided therein. They noted there was room for compatibility between the two international instruments. Both opinions noted the explicit guarantees of the right to strike provided by Article 8 of the International Covenant on Economic, Social and Cultural Rights, but obviously had no jurisdiction to apply it. Canada, nevertheless, still remains bound by

²⁷⁹ *Supra*, note 276, pp. 224-226.

this provision. It is doubtful whether this one decision would carry much weight against the massive body of case law on trade union freedom of association generated by the ILO Committee on Freedom of Association since 1951. Canada still remains bound to respect its obligations under the ILO, as we have discussed earlier, which recognizes a protection of the right to strike subject to certain limitations.

Canada's international human rights obligations should have an enormous bearing on how the rights and freedoms contained in the Charter will be interpreted. In the case of freedom of association as it applies to trade unions, ILO Convention No. 87 and the interpretation of freedom of association by the ILO Committee on Freedom of Association stands as a strong authority. Canada's other international obligations with respect to freedom of association under the International Covenants, which specifically do not preclude ILO Convention No. 87, are arguably compatible. If the Charter is meant to reflect our nation's values, surely these must be assessed in light of our international obligations.²⁸⁰ It is our contention that such a balance must be struck since we submit, as will be demonstrated in Part II, that with respect to trade union freedom of association, a broad conception of freedom of association has already evolved and been accepted over the space of a hundred

²⁸⁰ Maxwell Cohen, "Towards a Paradigm of Theory and Practice: The Canadian Charter of Rights and Freedoms--International Law Influences and Interactions", (1986) 3 C.H.R.Y.B. 47-73, p. 50.

years within Canada, and following the ratification of ILO Convention No. 87 and other relevant international instruments, their conformity to these obligations must be examined. The ILO's Committee of Experts, as was demonstrated earlier, has already had the opportunity to confirm Canadian compliance with Convention No. 87. In addition, a significant number of complaints emanating from Canada have been examined by the Governing Body's Committee on Freedom of Association to allow us to define reasonable parameters of freedom of association under the Charter. There is explicit recognition of this balance to be found in the wording of the preamble included in a federal labour statute²⁸¹ which provides as follows:

"Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;

And Whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

And Whereas the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;..."

The preambles notes the "tradition" of Canadian labour legislation which was born out of an acceptance of certain values and later acknowledged and affirmed by Canada's ratification of

²⁸¹ An Act to amend the Canada Labour Code, S.C. 1972, c. 18.

Convention No. 87 and, therefore, acceptance and reaffirmation of the ILO's role in the promotion and protection of trade union freedom of association. It follows that Canada's constitution must recognize these accepted values as being enshrined in the Charter of Rights and Freedoms. These conclusions will be examined further in Part II when freedom of association under the Canadian Charter of Rights and Freedoms is discussed along with the effect of the ILO's definition on its interpretation.

PART II - TRADE UNION FREEDOM OF ASSOCIATION UNDER THE
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

This Part will deal with the interpretation of trade union freedom of association under the Canadian Charter of Rights and Freedoms. Chapter 1 will probe the origins of trade union freedom of association in Canada from the repeal of the restraint of trade laws in the nineteenth century to the adoption of the Wartime Labour Relations Regulations of 1944 to the post-war evolution of trade union freedom of association. Chapter 2 will examine trade union freedom of association under the Canadian Bill of Rights and its possible effect on Charter interpretation. Chapter 3 will deal with the interpretation of freedom of association under the Charter including a review of the principles of interpretation of the Charter and the sources that may be invoked, including extrinsic material and international law. Chapter 4 will review and discuss the case law dealing with freedom of association under the Charter.

Chapter 1 - The Origins of Trade Union Freedom of
Association in Canada

Freedom of association is protected by Section 2(d) of the Charter. In relation to trade unions, this fundamental freedom has particular significance for them in that many of them feel that this provision of the Charter was meant to enshrine the rights that were gained following a difficult and painful struggle. The evolution of this struggle is relevant to our analysis of the interpretation of freedom of association under the Charter since it demonstrates that the underlying philosophy

of our present collective bargaining system is deeply rooted in that struggle. In addition, it has been argued that the adoption by the federal and provincial governments of a policy of state-controlled collective bargaining--an end product of the struggles of the trade union movement itself--has had the effect of elevating trade unions to a role and a station in the life of Canadian society which has thrust upon them a status of a "fifth estate."²⁸² It is not the intention to provide an exhaustive account of the evolution of Canadian labour law and the collective bargaining system, but rather to focus on the most significant events that relate to the protection of trade union freedom of association.

In the following analysis, we will examine the origins of trade union freedom of association in the nineteenth century when trade unions were first outlawed under criminal law as illegal combinations in restraint of trade. The subsequent amendments to the restraint of trade statutes and the recognition of the trade unions' right of association and its effect will then be studied. Events leading up to the adoption of the Wartime Labour Relations Regulations of 1944 and its subsequent influence on Canadian labour legislation will also be discussed. Within this context, the international protection of freedom of association by the ILO in relation to Canada will be assessed.

²⁸² A.W.R. Carrothers, E.E. Palmer and W.B. Rayner, Collective Bargaining Law in Canada, Second Edition, (Toronto: Butterworths, 1986), p. 12.

Section 1 - Restraint of trade laws

Freedom of association for trade unions came about through a curious evolution of legislative enactments and judicial interpretations that followed a period when their activities were suppressed on the grounds that they were unreasonable restraint of trade.²⁸³ The origins of the first trade unions in Canada can be traced to the eighteenth century when voyageurs working for the North West Fur Trading Company went on strike on August 3, 1794, for higher wages.²⁸⁴ It is believed that the first trade union in Canada was a Quebec City printers' organization founded apparently in 1827.²⁸⁵

The treatment of trade union activity as illegal restraint of trade originated in England during the eighteenth century. The advent of the industrial revolution introduced the factory system and prompted collective action from workers who sought to improve working conditions.²⁸⁶ Up to that time, the State had attempted to control wages and hours of work through the judiciary and later by special legislation.²⁸⁷ At the time, criminal law

²⁸³ Ibid.

²⁸⁴ Charles Lipton, The Trade Union Movement of Canada, 1827-1959, (Montreal: Canadian Social Publications Limited, 1966), p.1.

²⁸⁵ Ibid., p. 3.

²⁸⁶ Carrothers et al., supra, note 282, pp. 12-13, and George W. Adams, Canadian Labour Law, (Aurora, Ontario: Canada Law Book Inc., 1985), p. 2.

²⁸⁷ Carrothers et al., supra, note 282, p. 13 and Adams, supra, note 286, p. 2.

regarded combinations to raise wages against the intent of the statutes as an offence.²⁸⁸ The Combination Acts of 1799 and 1800 reflected the philosophy of "laissez faire" capitalism by forbidding combinations of employers and employees in order to protect free competition and encourage private initiative.²⁸⁹ They had the effect of creating an imbalance in favour of the employer. In 1824, after considerable debate over the role of trade unions and public policy towards them, the Acts were repealed.²⁹⁰ The following year, after considerable industrial unrest, a new Combination Act²⁹¹ was adopted which prohibited acts inducing workmen to join or employers to alter the conduct of business.²⁹² While the Act did not change the common law status of trade unions as bodies acting in restraint of trade, it did provide some recognition for collective bargaining in that members of a trade union were only liable to charges of criminal conspiracy if they were involved in a dispute other than one designed to improve wages or reduce hours of work.²⁹³ As well, Parliament and the courts assumed that combinations to affect the terms of employment were criminal conspiracies at common law

²⁸⁸ Carrothers et. al., supra, note 282, p. 13.

²⁸⁹ Ibid.

²⁹⁰ Carrothers et. al., supra, note 282, p. 13, and Adams, supra, note 286, p. 3.

²⁹¹ (U.K.) 6 Geo. IV, c. 129.

²⁹² Carrothers et. al., supra, note 282, p. 14.

²⁹³ Adams, supra, note 286, p. 4.

except as allowed by the Combination Act of 1825.²⁸⁴ It would not be until the reforms of the 1870's that trade unions would gain better protection for freedom of association. In 1867, the Royal Commission on Trade Unions was appointed and its report formed the basis of the reform legislation.²⁸⁵ Two statutes were adopted in 1871 affecting to trade unions. The first, the Criminal Law Amendment Act,²⁸⁶ refined the terms of the Combination Act of 1825 and freed from the law of criminal conspiracy conduct that might amount to restraint of trade.²⁸⁷ The second, the Trade Union Act,²⁸⁸ declared that trade union members were not liable to prosecution for criminal conspiracy simply because their activities were in restraint of trade.²⁸⁹ In relation to civil liability, it removed restraint of trade as a impediment to the validity of agreements concluded by trade unions. It also established a registration system which brought trade unions under the law, but deliberately kept certain internal affairs of trade unions out of the courts.³⁰⁰

The origins of trade union freedom of association in Canada underwent a similar evolution. In fact, Parliament borrowed

²⁸⁴ Carrothers et. al., supra, note 282, p. 14.

²⁸⁵ Adams, supra, note 286, p. 4.

²⁸⁶ (U.K.) 34 & 35 Vict., c. 32.

²⁸⁷ Carrothers et. al., supra, note 282, p. 16.

²⁸⁸ (U.K.) 34 & 35 Vict., c. 31.

²⁸⁹ Adams, supra, note 286, p. 4.

³⁰⁰ Carrothers et. al., supra, note 282, p. 16.

largely on these last two English statutes in their search for solutions to conflicts that had arisen with the emergence of a trade union movement in Canada in the nineteenth century. The incident that drew attention to the question was the Toronto printers strike in 1872.³⁰¹ The Toronto Typographical Society had been at the forefront of a movement among trade unions to obtain a nine-hour work day.³⁰² The nine-hour movement, as it was termed, became the focal point for the central labour movement which had been established the previous year under the banner of the "Toronto Trades Assembly".³⁰³ Until then, Canadian trade unions had existed either as outlying branches of organizations in England and the United States or as individual native societies.³⁰⁴ On March 25, 1872, the printers' union called a strike to support their demands for increased wages and a nine-hour work day.³⁰⁵ Support for the nine-hour work day had been growing among the various trades that comprised the Assembly. A mass demonstration was held in support of the strike on April 15, 1872.³⁰⁶ The following day, the employers, the Master Printers' Association, secured the arrest of the twenty-four members of the

³⁰¹ Lipton, *supra*, note 284, pp. 28-34.

³⁰² *Ibid.*, p. 29.

³⁰³ *Ibid.*, p. 27.

³⁰⁴ H.A. Logan, Trade Unions in Canada, (Toronto: MacMillan Company of Canada Ltd., 1948), p. 38.

³⁰⁵ *Ibid.*, p. 39.

³⁰⁶ Lipton, *supra*, note 284, p. 30.

Printers' Vigilance Committee (i.e. strike committee) on charges of seditious conspiracy.³⁰⁷ The movement rallied behind the arrested printers and demanded their release. On April 18, 1872, the printers were brought to trial. The Defence argued that the union had been accepted by the community for over twenty-five years and was not illegal.³⁰⁸ The Crown asserted that the common law forbade combinations of labour and that Canada had no exempting regulation.³⁰⁹ Justice McNab ruled that the arrested printers were guilty of being members of an illegal combination.³¹⁰

On that same April 18th, the government of Sir John A. Macdonald introduced legislation to end the prosecution of the printers by borrowing on the preceding English legislation. The Trade Union Act³¹¹, which copied the English statute of the same name, declared that the purposes of a trade union were not unlawful merely because they were in restraint of trade. The

³⁰⁷ Logan, *supra*, note 304, p. 40.

³⁰⁸ In the forty years prior to 1872, the number of trade unions in Canada had grown rapidly and employers appeared to be quite tolerant of their existence until workers began asserting their strength in the trade union movement to make further gains. See Mark Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective", (1984) 16 Ottawa L.R. 267-296, at pp. 269-270.

³⁰⁹ Lipton, *supra*, note 284, p. 32.

³¹⁰ *Ibid.*; see also Chartrand, *supra*, note 308, p. 272.

³¹¹ (1872), 35 Vict., c. 30; however, it only applied to trade unions who had registered under the Act.

Criminal Law Amendment Act³¹², was copied, as well, from the English statute of the same name.³¹³ Macdonald, who was solely responsible for introducing the legislation, noted in his preliminary remarks in the House of Commons that the Acts had been modelled on the British statutes adopted in the previous year which had freed workers from laws which had been "opposed to the spirit of the liberty of the individual".³¹⁴ As a result of the intervening legislation, the prosecutions stemming from the printers strike were stopped.³¹⁵

The legalization of trade unions in Canada in 1872 was far from being without its deficiencies and existing legislation required further amendments before trade union freedom of association was more than adequately protected. The effect of the 1872 legislation was to declare that the purposes of a trade union were no longer unlawful merely because they were in restraint of trade, but the means used by trade unions to pursue these purposes were not.³¹⁶ Further amendments to the criminal statutes would be required to provide protection for other lawful trade union activities such as strikes and peaceful picketing.

³¹² (1872), 35 Vict., c. 31; mod. (1876), 39 Vict., c. 37; See now Section 466 of the Criminal Code, R.S.C. 1985, c. C-46.

³¹³ The provisions of the Act have since been incorporated into Section 423 of the Criminal Code, supra, note 312, which deals with intimidation.

³¹⁴ Chartrand, supra, note 308, p. 267.

³¹⁵ Ibid., p. 272.

³¹⁶ Ibid., p. 278.

The two statutes of 1872 did reflect an important change in the public attitude toward trade unions.³¹⁷ In 1890, an amendment³¹⁸ declared that no one may be convicted of conspiracy for refusing to work with a workman and for an employer.

By 1900, Canadian criminal law recognized the legality of trade unions, their use of strikes and peaceful picketing. It also specifically recognized the closed shop as a legitimate object,³¹⁹ exempted unions from the anti-combines laws, and outlawed the use of violence and the breaking of contracts so as to impair the performance of essential services or as to endanger life or property.³²⁰ Nevertheless, they were not protected from attack, nor was a framework for collective bargaining established. This protection would only come after the Great Depression of the 1930's and the precedent set by the U.S. Wagner Act.³²¹

It should be noted, however, that this legislation did not create freedom of association and the right to strike but instead recognized their existence. In this respect, it is interesting to note the following conclusions reached by Mr. Justice Locke in

³¹⁷ Adams, supra, note 286, p. 5.

³¹⁸ 1890, 53 Vict., c. 37, s. 19, presently Section 467 of the Criminal Code, supra, note 312.

³¹⁹ Carrothers et. al., supra, note 282, p. 30.

³²⁰ Ibid.; see Section 422 of the Criminal Code, supra, note 312.

³²¹ Ibid., p. 31.

the case of Canadian Pacific Railway Co. v. Zambri³²²:

"...I do not agree with the contention of the respondent that the right to strike is expressly given to employees by s. 3 of The Labour Relations Act. That section, saying that every person is free to join a trade union and to participate in its lawful activities, and s. 4 giving a similar right to persons to join an employers' organization, are equally meaningless. No statutory permission is necessary to participate in the lawful activities of any organization. Furthermore, it is not the union that strikes but the employees. The statute, however, implicitly recognizes that employees may lawfully strike by restricting that undoubted right during the currency of collective agreements, during the period in which conciliation proceedings are being carried on and for a defined period after an award. Section 57(2) refers in terms to a lawful strike. The objections to the legality of strikes on the ground that they are unlawful conspiracies or in restraint of trade which might formerly be made the subject of criminal charges have long since disappeared by reason of the provisions of the Criminal Code, and combinations of workmen for their own reasonable protection as such are expressly declared to be lawful by s. 411 of the Criminal Code and the predecessors of that section.

While the right existed at common law at the time of the passing of The Labour Relations Act, that right was limited and controlled in the circumstances I have mentioned and it is expressly recognized after the expiration of these periods..."³²³

Thus, and as will be discussed further, trade union freedom of association and the right to strike do not originate from modern statutory labour legislation. The effect of the 1872 legislation was to recognize these rights from a negative perspective in that the legislator did nothing, or rather ceased from doing anything, to prevent trade union organization and activities, but at the same time did not enact provisions to

³²² [1962] S.C.R. 609.

³²³ Ibid., at pp. 620-621.

promote and protect them.³²⁴

Section 2 - The Wartime Labour Relations Regulations of 1944

The first direct antecedent of our present collective bargaining legislation was the federal Conciliation Act of 1900.³²⁵ Once again, it was an almost complete reproduction of the United Kingdom Conciliation Act of 1896, but unlike the latter which had grown out of existing voluntary practices, the Canadian statute was imposed as government policy.³²⁶ Unlike the previous Trade Union Act³²⁷ the Conciliation Act set about to create a bargaining structure for employers and workers represented by trade unions. It did not succeed because it relied entirely upon the parties' willingness to submit themselves to the procedure of the Act, nor did it oblige the employer to recognize

³²⁴ Claude D'Aoust and Francois Delorme, "The origin of freedom of association and of the right to strike in Canada: an historical perspective," (1981) 36 *Relat. Ind.*, 894-921, at p.916.

³²⁵ S.C. 1900, c. 24; There were some provincial initiatives prior to the adoption of the Conciliation Act, but these were not very significant in that they relied on the voluntary submission of disputes by the parties (Adams, *supra*, note 286, p. 6; and Carrothers, *supra*, note 282, p. 32).

³²⁶ Carrothers et. al., *supra*, note 282, p. 32.

³²⁷ It is interesting to note that during its life span the constitutionality of the Trade Union Act was never put into question. In an obiter dictum in the case of *Starr v. Chase*, ([1925] S.C.R. 495, at p. 508) Justice Duff expressed a doubt about the federal Parliament's authority to enact several of its provisions (Chartrand, *supra*, note 308, p. 288). Nevertheless, since few trade unions chose to be registered under this Act the issue never became critical (Carrothers et. al., *supra*, note 282, p. 23 and 30).

or bargain with a union of his employees.³²⁸ Although it contained many features which were carried forward into subsequent legislation, much like its provincial predecessors,³²⁹ it remained virtually unused.³³⁰ Following a number of major labour disputes, the Industrial Disputes Investigation Act³³¹ was adopted requiring compulsory investigation and postponement of the right to strike and to lock-out, which also meant freezing terms and conditions of employment pending efforts at conciliation.³³² The Act proved to be inadequate in many respects³³³ and did not serve to sufficiently remedy the failings of the Conciliation Act. It was designed more to end a dispute rather than resolve the issues in dispute.³³⁴ Furthermore, this Act was later declared unconstitutional in 1925 by the Judicial Committee of the Privy Council in the case of Toronto Electric Commissioners v. Snider.³³⁵ The Judicial Committee ruled that the Industrial Disputes Investigation Act was concerned with civil rights of employers and employees in the province and coming within the ambit of "Property and Civil Rights" under Section 92

³²⁸ Carrothers et. al., *supra*, note 282, p. 32.

³²⁹ *Supra*, note 325.

³³⁰ *Ibid.*, p. 35.

³³¹ S.C. 1907, c. 20.

³³² Carrothers et. al., *supra*, note 282, p. 36.

³³³ *Ibid.*, p. 37.

³³⁴ Adams, *supra*, note 286, p. 8.

³³⁵ [1925] A.C. 396.

of the British North America Act. As a result, the Act was amended limiting its application to "employment upon or in connection with any work, undertaking or business which is within the legislative authority of the Parliament of Canada."³³⁶ The Snider decision had the effect of destroying the policy of centralization of legislative authority in the area of labour relations and affirming the predominance of provincial jurisdiction over Canadian labour law.³³⁷ Nevertheless, the 1925 amendments to the federal Act did provide that it would apply in a national emergency, in accordance with the "peace, order and good government" power under Section 91 of the British North America Act, and allowed the provinces to make the Act applicable to their jurisdictions.³³⁸ By 1932, all of the provinces, with the exception of Prince Edward Island, had adopted enabling legislation making the federal Act applicable within the provinces.³³⁹ As a result, before the onset of the Great Depression of the 1930's Canadian bargaining law remained unchanged and still was concerned only with state supervision of

³³⁶ An Act to Amend the Industrial Disputes Investigation Act, 1907, S.C. 1925, c. 14.

³³⁷ Carrothers et. al., supra, note 282, p. 38, and Adams, supra, note 286, p. 9.

³³⁸ Carrothers et. al., idem., p. 40, and Adams, idem., p. 10.

³³⁹ Carrothers et. al., idem., p. 40, and Adams, idem., p.10. Adams notes that these enabling statutes were probably unconstitutional as improper delegation of power, but they did provide a transition period between the previous federal control over labour relations and the subsequent affirmation of provincial jurisdiction as a result of the Snider case.

collective bargaining and neglected to protect trade union organization or the administration of collective agreements.³⁴⁰

During the time of these legislative experiments, trade unions recognized the gains they had made since their exemption from the restraint of trade laws, but had to struggle further for the recognition of their right to pursue their aims and purposes. The period since the legalization of trade unions up to the beginnings of the twentieth century was marked by bitter struggles for recognition by a growing trade union movement confronted with recalcitrant employers who used several tactics to combat them.³⁴¹ The most noteworthy of these incidents was the Winnipeg General Strike of 1919.³⁴² One of the major demands of this strike had been recognition by employers and governments of the right to organize and the right to bargain collectively.³⁴³ The advent of the Great Depression in the 1930's brought an increased militancy in the trade union movement. The number of strikes and demonstrations rose dramatically as workers sought once again to secure their rights to organize and bargain collectively.³⁴⁴ At the outbreak of World War II, strong support for the trade union movement had solidified which resulted in the establishment in

³⁴⁰ Carrothers et. al., *supra*, note 282, p. 40.

³⁴¹ Lipton, *supra*, note 284, p. 111.

³⁴² *Ibid.*, pp. 185-217.

³⁴³ *Ibid.*, pp. 192 and 212.

³⁴⁴ *Ibid.*, pp. 256-259.

1940 of the Canadian Congress of Labour.³⁴⁵

During the late 1930's, a number of provinces adopted statutes designed according to the American National Labor Relations Act,³⁴⁶ the so-called Wagner Act, which confirmed the legality of collective bargaining and freedom of association, but nevertheless proved inadequate because they were either declaratory or enforceable through criminal prosecution.³⁴⁷ In addition, an amendment to the Criminal Code in 1939 made it an offence for an employer to dismiss or to refuse to hire a person because of union membership or to use intimidation to prevent a worker from belonging to a union.³⁴⁸

Under mounting pressure from a strong labour movement and faced with a scarcity of labour, the federal government reacted by enacting legislation that would become the foundation of our present collective bargaining framework.³⁴⁹ In 1940, as part of its wartime labour policy, the government issued a statement of principles which were implemented in subsequent orders-in-council and are contained in current legislation.³⁵⁰ First, it declared

³⁴⁵ Ibid., p. 267; The CCL became the Canadian Labour Congress in 1956.

³⁴⁶ (1935), 49 Stat. 449.

³⁴⁷ Carrothers et. al., supra, note 282, pp. 47-48, and Adams, supra, note 286, p. 12.

³⁴⁸ It is now contained in Section 425 of the Criminal Code, supra, note 312.

³⁴⁹ Lipton, supra, note 284, pp. 266-269.

³⁵⁰ Carrothers et. al., supra, note 282, p. 49, and Adams, supra, note 286, p. 12.

that workers should be free to organize into trade unions. As well, it opposed the use by workers of coercion or intimidation of any kind to obtain union members. Second, workers, through their trade union or other representative chosen by them, should be free to negotiate conditions of work with a view to the conclusion of a collective agreement. Third, disputes should be settled, without stoppage of production, through negotiation, conciliation and the machinery of the Industrial Disputes Investigation Act. Fourth, every collective agreement should provide machinery for the settlement of disputes arising out of the agreement.³⁵¹ In December 1940, an order-in-council³⁵² declared a wage policy. Another series of orders-in-council³⁵³ in 1941 established a general system of wage control under the National War Labour Boards. In 1941, an order-in-council declared the right of peaceful picketing.³⁵⁴

In February 1944, the Wartime Labour Relations Regulations³⁵⁵ were proclaimed. These regulations reflected experience, among others, under the Industrial Disputes Investigation Act, the American Wagner Act of 1935 and the two wartime Orders-in-Council establishing the National War Labour Board and creating the Industrial Disputes Investigation

³⁵¹ Carrothers et. al., supra, note 282, p. 49.

³⁵² P.C. 7440.

³⁵³ P.C. 8253, 9514, and 10195.

³⁵⁴ P.C. 8021.

³⁵⁵ P.C. 1003, February 17, 1944.

Commission.³⁵⁶ These regulations have been described as Canada's first comprehensive labour policy, embracing union organization, contract negotiation and contract administration.³⁵⁷ Of all the sources that influenced the contents of post-war legislation, the Wartime Labour Relations Regulations of 1944 had the most direct impact.³⁵⁸ They recognized trade union freedom of association. Employers were prohibited from interfering in union affairs and from discriminating against workers for union activity. In turn, unions were forbidden to meddle in employers' organizations and to use coercion or intimidation to force union membership.

The Regulations established a system of compulsory collective bargaining through the certification of trade unions as bargaining representatives of appropriate bargaining units. Compulsory conciliation intervened when the parties were unable to reach an agreement. Work stoppages were prohibited until the bargaining agent had been certified and the procedure of conciliation was exhausted. The Regulations also required that the parties arrange to settle disputes relating to the interpretation or violation of the collective agreement without stoppage of work. If they failed to establish their own procedure, the Board had jurisdiction to impose a procedure. This feature marked the beginning of compulsory arbitration of

³⁵⁶ Carrothers et. al., *supra*, note 282, p. 50, and Adams, *supra*, note 286, pp. 14-15.

³⁵⁷ Carrothers et. al., *idem.*, p. 50.

³⁵⁸ *Ibid.*

grievance disputes and the changing status of the collective agreement.³⁵⁹

The Regulations applied to the federal jurisdiction and to other industries within provincial jurisdictions where the provinces brought themselves within the ambit of the legislation. The Regulations were made applicable in nearly all of the provinces, thus establishing uniformity of labour policy in Canada.³⁶⁰

Section 3 - Post-War Evolution of Trade Union Freedom of Association

Almost seventy-five years after the legitimacy of their existence had been affirmed, trade unions in Canada had now made significant gains in the realm of collective bargaining. The Wartime Labour Relations Regulations of 1944 recognized three main rights that comprised trade union freedom of association as it had evolved up to then. They recognized freedom of association, the right to bargain collectively with a view to concluding a collective agreement and the right to resort to economic sanctions in the process, i.e. the right to strike, upon the termination of a collective agreement and after government intervention through conciliation.³⁶¹ They also embodied the main

³⁵⁹ Ibid., p. 52.

³⁶⁰ Ibid., and Adams, supra, note 286, p. 15. Quebec and Saskatchewan chose to adopt their own legislation.

³⁶¹ Carrothers et. al., supra, note 282, p. 60, and Adams, supra, note 286, p. 16.

features that were to become the foundation of post-war labour legislation.

These Regulations were continued into 1948 in order to enable the federal and provincial governments to develop the peacetime policies.³⁶² A conference of labour ministers in 1946 agreed on a number of uniform principles which embodied essentially the principal rights described above.³⁶³ Eventually, all of the jurisdictions adopted legislation in accordance with these principles.³⁶⁴ Presently, general labour relations statutes exist in all of the jurisdictions which still reflect and recognize these fundamental principles.³⁶⁵ Although there are differences in Canadian labour law among jurisdictions, they are largely concerned with structure and procedure rather than basic principles.³⁶⁶

³⁶² Carrothers et al., supra, note 282, p. 60.

³⁶³ Ibid., p. 82, and Adams, supra, note 286, p. 16.

³⁶⁴ Carrothers, et. al., idem., pp. 85-86, and Adams, idem., p. 16.

³⁶⁵ Canada Labour Code (Part I), R.S.C. 1985, c. L-2, as amended (Federal); Labour Relations Act, R.S.A. 1980, c. L-1.1, as amended (Alberta); Industrial Relations Reform Act, S.B.C. 1987, c. 212, as amended (British Columbia); Labour Relations Act, S.M. 1972, c. 75, as amended (Manitoba); Industrial Relations Act, R.S.N.B. 1973, c. I-4, as amended (New Brunswick); Labour Relations Act, 1977, S.N. 1977, c. 64, as amended (Newfoundland); Trade Union Act, S.N.S. 1972, c. 19, as amended (Nova Scotia); Labour Relations Act, R.S.O. 1980, c. 228, as amended (Ontario); Labour Act, R.S.P.E.I. 1974, c. L-1, as amended (Prince Edward Island); Labour Code, R.S.Q. 1977, c. C-27, as amended (Québec); Trade Union Act, R.S.S. 1978, c. T-17, as amended (Saskatchewan).

³⁶⁶ Adams, supra, note 286, p. 17.

While it has been surmised that trade union freedom of association, comprising the right to bargain collectively and the right to strike, is a creature of legislation,³⁶⁷ this is not an accurate reflection of the evolution that took place in labour relations from the mid-nineteenth century to the end of the World War II. As has been demonstrated, the trade union movement had been pressuring for recognition of freedom of association for a number of years before obtaining significant gains. The principles that were recognized in the Wartime Labour Relations Regulations represent a "fundamental philosophical statement".³⁶⁸ They represented a compromise between the competing interests of employers and workers.³⁶⁹ The federal government initially intervened to establish this compromise by regulating the exercise of these rights in the national interest. These rights did not flow from the legislation and did not arise from a historical and political vacuum, but rather evolved from national and international events that helped to shape and define them. One must remember that around the time Canadian workers began to intensify their efforts to obtain recognition of their rights, the ILO had been established and mandated to protect freedom of association and, as has been noted in Part I, Canada had been an active player in this process. Although labour relations legislation in Canada has since evolved to encompass a number of

³⁶⁷ Carrothers et. al., supra, note 282, p. 62.

³⁶⁸ Ibid., p. 60.

³⁶⁹ Ibid., p. 57.

other features, nevertheless, the underlying basic and fundamental principles that were recognized by wartime and post-war labour relations legislation became accepted values, which were subsequently recognized and protected by the adoption of ILO Convention No. 87 in 1948, and which have endured up to the present. Their common origin through the Wartime Labour Relations Regulations of 1944 has given them a universal character within Canada.³⁷⁰ It follows, therefore, that these factors must be considered in the interpretation of Section 2 (d) of the Canadian Charter of Rights and Freedoms.

It is also important to reiterate Canada's obligations with respect to the ILO Conventions and their effect on the interpretation of freedom of association under the Charter. Does the mere conformity of Canadian labour legislation to ILO Conventions suffice to fulfill these obligations? It is doubtful that the supreme law of the land could be interpreted without reference to international law considering the virtual lack of Canadian judicial interpretations on the matter.³⁷¹ Nevertheless, as has been demonstrated, certain values have come to be accepted as being part of trade union freedom of association within Canada and have been measured in accordance with international law to a certain extent. It is reasonable to conclude that this broad definition of trade union freedom of association is valid under international law given what the ILO has consistently determined.

³⁷⁰ Adams, supra, note 286, p. 12.

³⁷¹ Bendel, supra, note 271, pp. 324-325.

In addition, the limitations imposed by this definition are arguably also acceptable under the principles elaborated by the ILO and can therefore be justified under Section 1 of the Charter. This relationship between domestic law and international law is reconcilable under the Charter and will be discussed further.

Chapter 2 - Trade Union Freedom of Association under the Canadian Bill of Rights

The Canadian Bill of Rights³⁷² is essentially the only Canadian precursor to the Charter of Rights and Freedoms which could shed some light on the issue. Article 1 of the Bill of Rights provides as follows:

"1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

...

(e) freedom of assembly and association

It is important to note that the Bill of Rights only applies to federal legislation. Since its enactment, there have been relatively few cases relating to the Bill of Rights in relation to freedom of association. Most of the cases that did arise have involved trade unions. The wording of the provision denotes a relationship between freedom of association with freedom of assembly. However, as Tarnopolsky noted, infringements of civil

³⁷² R.S.C. 1985, App. III.

liberties usually involve several rights and freedoms at the same time.³⁷³ Nevertheless, it is important to note that freedom of association has been given separate and independent protection under the Charter.³⁷⁴

In attempting to define freedom of association, Tarnopolsky considered that it:

"...can be said to be an outgrowth of the freedoms of speech and assembly, and the much earlier right to petition, [and it] concerns the right to join in common cause with another or others in the pursuit of lawful objects. It has an important distinguishing characteristic in that it is of a continuing rather than a temporary nature."³⁷⁵

The court decisions shed little light on the scope of freedom of association. In Swait v. Board of Trustees of Maritime Transportation Unions,³⁷⁶ the Quebec Court of Appeal ruled that a federal statute which had placed a maritime union in trusteeship following the recommendation of an industrial inquiry commission did not violate freedom of association and assembly. Without much elaboration, the court ruled that the Maritime Unions Trustee Act³⁷⁷ was intra vires and falling within the ambit of "Navigation and Shipping" under s. 91 (10) of the B.N.A. Act.

³⁷³ Walter Tarnopolsky, The Canadian Bill of Rights, Second Ed., (Toronto: Macmillan of Canada Ltd., 1978), p. 169.

³⁷⁴ Irwin Cotler, "Freedom of Assembly, Association, Conscience and Religion", in The Canadian Charter of Rights and Freedoms, ed. by Walter S. Tarnopolsky and Gerald-A. Beaudoin, (Toronto: Carswell, 1982), 123, at p. 157.

³⁷⁵ Tarnopolsky, supra, note 373, p. 201.

³⁷⁶ (1966) 61 D.L.R. 317.

³⁷⁷ S.C. 1963, c. 17.

With respect to the argument that the Act was infringing s. 1 (e) of the Bill of Rights in that it deprived the members of control over the affairs of the union, the court concluded that "Parliament had sought to manage the Maritime Transportation Unions in the best interests of its members consistent only with the natural and public interests of Canada".³⁷⁸ In addition, the court held that the Act had "as its precise object the protection of democratic liberties, which the provisions of the Canadian Bill of Rights seek to uphold."³⁷⁸

In Whitfield v. Canadian Marconi Co. Ltd.,³⁸⁰ the Quebec Court of Appeal ruled that a clause in a contract of employment which prohibited fraternization or association with the native population while under the employ of the company involved did not violate the plaintiff's freedom of assembly and association under the Canadian Bill of Rights since it was part of a contract to which he had voluntarily entered into. In other words, one could voluntarily assume limitations to freedom of assembly and association.³⁸¹ It is doubtful that this ruling would have a profound influence on the manner in which freedom of association under the Charter is interpreted since the Supreme Court of Canada has already decided in Retail, Wholesale and Department

³⁷⁸ Ibid., p. 321, per Hyde J., Pratte and Rinfret JJ. concurring.

³⁷⁹ Ibid., per Brossard J.

³⁸⁰ (1967) 68 D.L.R. (2d) 251.

³⁸¹ Tarnopolsky, supra, note 373, p. 203.

Store Union v. Dolphin Delivery that the Charter does not apply to private action.³⁸²

There were other notable cases during the pre-Charter period where trade union freedom of association was considered in some manner.³⁸³ In Canadian Pacific Railway Co. v. Zambri,³⁸⁴ the Supreme Court of Canada ruled on the validity of strikes as a lawful activity of the union under the Ontario Labour Relations Act. An employer had dismissed employees who were engaged in a lawful strike under the Act contending that they had to terminate their contracts of employment in order to engage in a lawful strike. Mr. Justice Locke, in rendering his decision, noted that the right to strike existed at common law when the Labour Relations Act was enacted and was not created by the Act.³⁸⁵ The legislation had intervened to restrict its exercise. He also stressed that a strike is a "lawful activity" and that "furthermore, it is not the union that strikes but the employees."³⁸⁶ The other justices, in rejecting the employer's

³⁸² [1986] 2 S.C.R. 573.

³⁸³ Two other cases, Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd., [1963] S.C.R. 584, and Smith and Rhuland Ltd. v. R., [1953] 2 S.C.R. 95, which dealt with government interference in trade union affairs, do not shed any light as to how freedom of association may be interpreted under the Charter with respect to the right to strike and the right to bargain collectively. See commentary by Tarnopolsky, supra, note 373, pp. 48-53, and Cotler, supra, note 374, pp. 170-171.

³⁸⁴ [1962] S.C.R. 609.

³⁸⁵ See excerpt from judgment quoted on p. 98.

³⁸⁶ Supra, note 384, at p. 620.

contention, merely ruled that the strike had been lawful since the statute had been complied with and therefore the employees had been dismissed in breach of the Act. The distinctions made by Justice Locke are nevertheless important and do help to shed some light as to how the right to strike should be construed in relation to freedom of association under the Charter of Rights and Freedoms.

Chapter 3 - Trade Union Freedom of Association under the Canadian Charter of Rights and Freedoms

Section 1 - Interpreting the Charter

The courts have already had the occasion of setting an important number of rules concerning the interpretation of the Charter, including the sources which may be invoked to interpret its provisions. In its first Charter case, Law Society of Upper Canada v. Skapinker,³⁸⁷ the Supreme Court of Canada affirmed the principle that the Charter is a constitutional document and as such cannot be subject to ordinary statutory rules of interpretation. The Court referred to the Charter as a "living tree capable of growth and expansion", words once used by the Judicial Committee of the Privy Council to describe the British North America Act.³⁸⁸ In Hunter v. Southam Inc.,³⁸⁹ the Supreme Court of Canada ruled that the Charter calls for a "purposive"

³⁸⁷ (1984) 9 D.L.R. (4th) 161 (S.C.C.).

³⁸⁸ See Edwards v. Attorney General of Canada, [1930] A.C. 124, at p. 136 (J.C.P.C.).

³⁸⁹ (1984) 11 D.L.R. (4th) 641 (S.C.C.).

interpretation. Chief Justice Dickson, delivering the opinion of the Court, expressed support for "a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects".³⁹⁰ Later in R. v. Big M Drug Mart Ltd.,³⁹¹ the Supreme Court of Canada reaffirmed this view and stipulated that "both purpose and effect" of impugned legislation were relevant in determining whether the Charter has been violated. In addition, it is also important to consider the social, economic and political context in which the Charter was adopted.³⁹² As well, the legislative evolution of the provision being interpreted is an important source for contextual interpretation.³⁹³

With respect to the sources of interpretation one may have recourse to in search of these elements, the courts have expressed varying opinions on their admissibility. The ones that are of primary interest to us are the extrinsic information surrounding the adoption of the Charter and the recourse to international law as a source of interpretation for its provisions.

³⁹⁰ Ibid., p. 650.

³⁹¹ (1985) 18 D.L.R. (4th) 321, at p. 350-351 (S.C.C.).

³⁹² Dale Gibson, The Law of the Charter, (Toronto: Carswell, 1986), p. 73.

³⁹³ E.A. Driedger, Construction of Statutes, Second Ed., (Toronto: Butterworths, 1983), pp. 159-161.

A. Extrinsic Information

Among the various extrinsic sources the courts may have recourse to are the Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution, 1980-81. Canadian courts had, as a rule, been reluctant for a long time to consult extrinsic sources such as legislative debates in order to interpret legislation.³⁹⁴ In the Anti-Inflation Reference,³⁹⁵ the Supreme Court of Canada departed from this rule by consulting, among other extrinsic sources, a governmental white paper relating to the legislation under review. In more recent decisions the Court has demonstrated a continuing willingness to make use of such external sources where suitable.³⁹⁶ However, it must be acknowledged that most of the decisions in which such evidence is admitted continue to stress that it is to be used for purposes other than interpretation.³⁹⁷ In the Reference on s. 94(2) of the Motor Vehicle Act (B.C.),³⁹⁸ the Supreme Court of Canada recognized that in interpreting the Charter the Minutes of the Special Joint Committee on the Constitution are admissible. However, Mr. Justice Lamer, who expressed the opinion for the majority, attached "minimal weight"

³⁹⁴ Gibson, *supra*, note 392, p. 75.

³⁹⁵ (1976) 68 D.L.R. (3d) 452 (S.C.C.).

³⁹⁶ Gibson, *supra*, note 392, p. 75; See also Churchill Falls (Labrador) Corp. Ltd. v. Attorney General of Newfoundland, (1984) 8 D.L.R. (4th) 1 (S.C.C.).

³⁹⁷ *Ibid.*, p. 76.

³⁹⁸ [1986] 1 W.W.R. 481 (S.C.C.).

to the Minutes in view of their "indeterminate nature" and expressed a concern that their use could potentially serve to freeze the rights and freedoms embodied in the Charter at the time of its adoption.³⁹⁹ Although it is not an outright rejection of this source of interpretation of the Charter, the Supreme Court of Canada's position regarding the Minutes appears to be overly cautious by relegating such an important document to such a minor status. As has been noted, there may be times when the historical background they provide may be relevant.⁴⁰⁰

In consulting the Minutes of the Special Joint Committee on the drafting of Section 2(d) of the Charter we find minimal evidence as to what was intended when freedom of association was enshrined, but much of it is confusing and incomplete. When the wording of the Charter was being debated, the question of explicitly including the right to bargain collectively in the freedom of association clause was raised before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada. On a motion by Mr. Svend Robinson, M.P., to amend Article 2 (d) of the Charter to include "the freedom to organize and bargain collectively", a debate ensued as to what was meant to be included in "freedom of association". The Hon. Mr. Robert Kaplan, Acting Minister of Justice, replied as follows:

"Mr. Kaplan: Our position on the suggestion that there be specific reference to freedom to organize and bargain collec-

³⁹⁹ Ibid., at pp. 500-501.

⁴⁰⁰ Gibson, supra, note 392, p. 77.

tively is that that [sic] is already covered in the freedom of association that is provided already... in the Charter; and that by singling out association for bargaining one might tend to diminish all the other forms of association which are contemplated -- church associations; associations of fraternal organizations or community organizations.

If one tears apart that general freedom of association it may diminish the general meaning--freedom to associate.

...

...our view, as I have already indicated, is that this new language adds nothing which is not already provided in the right of association."⁴⁰¹ [Emphasis added]

This demonstrates that the Canadian government was of the view that the freedom to organize and bargain collectively was implicitly included in "freedom of association". Obviously it was felt that any explicit recognition of the right to bargain collectively might risk singling out trade unions at the expense of other forms of association. Nevertheless, it is interesting to note that the affirmation that any special mention would add "nothing which is already provided in the right of association" indicates support for a somewhat broad interpretation of s. 2(d) of the Charter. While it is true that the Canadian government did not unilaterally create the Constitution Act, 1982, these views expressed by a government Cabinet Minister clearly indicate that a purposive construction and a broad interpretation of freedom of

⁴⁰¹ Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (1980-81), Minutes of Proceedings and Evidence, at pp. 43: 69-70.

association was intended.

B. International Law As A Source of Interpretation

During the course of the Special Joint Committee hearings the point was raised of whether the Charter should reflect Canada's international obligations. At the time, Hon. Jean Chretien, Attorney-General of Canada, made the following statement:

"I do think that the rights we have agreed upon in international agreements should be reflected in the laws or in the Charter of Rights that we will have in Canada."⁴⁰²

The statement does appear ambiguous and does not denote a clear purpose. Later, when pressed on the issue of whether Canada's international obligations under the UN Covenant on Civil and Political Rights should be reflected in statutes or in the Charter, Acting Minister of Justice Robert Kaplan replied:

"No, they should--we have an obligation to implement them in Canada but they could be implemented in the federal or provincial legislation, or they could be implemented by other regulation or by direction, or by practice.

In other words, our obligation is not to include the provisions of an international agreement in our constitution. That is one possibility but that is not the only possibility."⁴⁰³

Although the international agreements to which Canada is a party do not require that they be implemented in our constitution, we believe it would be in violation of their spirit if the "supreme

⁴⁰² Ibid., p. 3:28.

⁴⁰³ Ibid., p. 41:15.

law of the land" did not reflect the principles enshrined therein. Since the Charter is meant to protect fundamental rights and freedoms, it is only fitting that they should reflect the international human rights guarantees which are embodied in conventions that Canada has ratified.

As well, one must also remember that there is a presumption at common law that Parliament and the provincial legislatures do not intend to act in breach of international law.⁴⁰⁴ In other words, there is an interpretative presumption, applicable in construing the Charter, that Parliament and the legislatures intend to fulfill Canada's international obligations.⁴⁰⁵ Parliament and the provincial legislatures should not be able to evade international obligations within the context of the Charter what they would otherwise be bound to fulfill within their legislation.

There have been many commentaries on the relevance of international law as a source of interpretation of the Charter. Overall they favour an interpretation which takes into account international human rights instruments, but they vary in their approach.

Professors Cohen and Bayefsky support an interpretation of

⁴⁰⁴ Maxwell Cohen, and Anne F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law," (1983) 61 Can. Bar Review 265-313, at p. 280; See also Daniels v. White, [1968] S.C.R. 517, per Pigeon J. at p. 541-542, and R. v. Secretary of State for Home Affairs and another, ex parte Bhajan Singh, [1975] 2 All E. R. 1081, per Lord Denning at p. 1083.

⁴⁰⁵ Cohen and Bayefsky, ibid., p. 283.

the Charter that reflects Canada's international obligations in accordance with the traditional rules that relate international law and domestic law.⁴⁰⁶ They recognize the difficulties involved in affirming the existence of customary international law, but, nevertheless, find support in Canadian case law for their incorporation in domestic law.⁴⁰⁷ From this assumption, they argue for their recognition under s. 26 of the Charter which preserves "the existence of any rights and freedoms that exist in Canada", while relying also on the presumption at common law which provides that Parliament and the provincial legislatures do not intend to act in breach of international law.⁴⁰⁸ With respect to conventional international law, they propose three possible uses in the interpretation of the Charter. The first use would consider the Charter in part as implementing Canada's international human rights obligations.⁴⁰⁹ The second possible use would be to have recourse to international conventions which Canada has ratified but not implemented as a means of resolving ambiguities in interpretation in accordance with the presumption that Parliament and the legislatures do not intend to act in breach of international law.⁴¹⁰ The third and final use would be to refer to non-binding international human rights conventions as aids in the interpreta-

⁴⁰⁶ Supra, note 368.

⁴⁰⁷ Ibid., pp. 279-280.

⁴⁰⁸ Ibid., pp. 280-281.

⁴⁰⁹ Ibid., pp. 302-305.

⁴¹⁰ Ibid., pp. 305-307.

tion of similar wording contained in the Charter. According to the first approach, our courts would be bound by the terms of international human rights conventions ratified by Canada along with the interpretations by authorized established international bodies. In the case of trade unions, this would involve implementation of Convention No. 87 and the principles applied by the ILO Committee on Freedom of Association. Such an approach would concur with the interpretation we have defended. Freedom of association under s. 2(d) of the Charter would thus be interpreted as protecting the right to bargain collectively and the right to strike. In a subsequent article, Professor Cohen notes the great extent to which the drafting of the Charter was influenced by international human rights law.⁴¹¹ He also laments the fact that the Charter does not include an explicit reference to international law, as do some other constitutions, which would have removed any doubt as to its application.⁴¹² The other two suggested uses of international human rights law proposed by Professors Cohen and Bayefsky could serve to lend support to a broad interpretation of freedom of association to the extent that they would allow for the application of Canada's obligations under ILO Convention No. 87 as discussed earlier in Part I.

Other opinions have been expressed which support a recourse

⁴¹¹ Maxwell Cohen, "Towards A Paradigm of Theory and Practice: The Canadian Charter of Rights and Freedoms--International Law Influences and Interactions", (1986) 3 C.H.R.Y.B. 47-73, at pp. 57-58 and pp. 65-69.

⁴¹² Ibid., p. 64.

to international human rights law. Professor Cotler indicated support for such a recourse while noting that the absence of an express reference to international law in the Charter may inhibit or prevent their application in domestic litigation.⁴¹³ Others disagree that this should be a determining factor. Michael Bendel, a former professor of law, felt that when interpreting freedom of association under the Charter a recourse to international law was not only legitimate but necessary since there is a clear lack of Canadian source material on this concept.⁴¹⁴ He nevertheless stressed the importance of developing a "made in Canada" response concerning acceptable restrictions to freedom of association that reflect the Canadian context.⁴¹⁵ He also emphasizes that Canadian courts should refrain from relying on their own instincts to interpret the meaning of "freedom of association" when the expression clearly has its origins in ILO texts dating back to 1919 which have since been defined through its various organs.⁴¹⁶ He concludes that it isn't free from doubt whether our courts should conclude that freedom of association

⁴¹³ Irwin Cotler, "Freedom of assembly, association, conscience and religion (s. 2(a), (c) and (d))", from the Canadian Charter of Rights and Freedoms, ed. by Walter S. Tarnopolsky and Gerald Beaudoin, (Toronto: Carswell, 1982), at pp. 57-58 and pp. 65-69.

⁴¹⁴ Michael Bendel, "la liberté d'association dans l'optique de la Charte canadienne des droits et libertés", dans Perspectives canadiennes et européennes des droits de la personne, de Daniel Turp et Gérald-A. Beaudoin, 321-349, at pp.324-326.

⁴¹⁵ Ibid., p. 326.

⁴¹⁶ Ibid., p. 345.

includes the right to strike.⁴¹⁷ This lends support to our view that freedom of association under the Charter should encompass the ILO's definition along with limitations that have been accepted as part of the underlying philosophy of our post-World War II labour relations legislation.

Other jurists such as John Humphrey, John Claydon and Errol P. Mendes support the recourse to international law as a source of interpretation for the fundamental freedoms enshrined under the Charter. Professor Humphrey is critical of the fact that the Charter does not reflect adequately all of Canada's international obligations but recognizes that the rights it protects were obviously inspired by international conventions ratified by Canada.⁴¹⁸ Professor Claydon notes that Canada's international human rights obligations provided not only the context in which the Charter was adopted but were also the direct inspiration for amendments designed to strengthen the human rights protection provided.⁴¹⁹ He argues that a number of international sources may be used to interpret many "imprecise concepts" in the Charter, including freedom of association, beginning with the texts of the treaties themselves and leading to, among others, "authoritative interpretations of the treaties emanating from the agencies

⁴¹⁷ *Ibid.*, p. 347.

⁴¹⁸ John Humphrey, "The Canadian Charter of Rights and Freedoms and International Law", (1985-86) 50 Sask. L. R. 13-19.

⁴¹⁹ John Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms", (1982) 4 Supreme Court L.R. 287-302, at p. 287.

charged with their implementation".⁴²⁰ In our case, this would mean the decisions of the ILO Committee on Freedom of Association. He relies, as did Cohen and Bayefsky, on the presumption that governments do not intend to violate international law, and, like Bendel, on the fact that the rights and freedoms embodied in the Charter originated in international human rights treaties.⁴²¹ Once again this would support our view of how freedom of association should be interpreted under the Charter. Professor Mendes makes a similar argument to Claydon's in relation to the Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.⁴²²

Thus, there is overwhelming support for a recourse to international human rights law as a source of interpretation for the Charter. However, others have attached little or no importance to this source. Professor Jean-Denis Gagnon makes passing references to international human rights conventions and their possible effect on the Charter interpretation of freedom of association, especially with respect to restrictions which may be justified under s. 1.⁴²³ He criticizes briefly the interpretation given to

⁴²⁰ Ibid., pp. 293-294.

⁴²¹ Ibid., p. 295.

⁴²² Errol P. Mendes, "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights", (1982) 20 Alta. L. R. 383-400, at pp. 391-392.

⁴²³ Jean-Denis Gagnon, "Les effets de la Charte canadienne des droits et libertés sur le droit du travail", (1984) 18 R.J.T. 131-181, at pp. 136, 148 and 152.

ILO Convention No. 87 by appearing unconvinced that its actual text allows for a guarantee of the right to bargain collectively and the right to strike.⁴²⁴ He fails to recognize the authority and the validity of this interpretation as we have defended earlier in Part I. Nevertheless, he argues that there is support for including collective bargaining in the interpretation of freedom of association in the overall structure of Canadian labour relations law which attaches enormous importance to the existence of a collective agreement as an essential condition for allowing a trade union to exist. Thus, depriving workers in a trade union of their right to bargain would mean putting its existence in jeopardy.⁴²⁵ On the issue of the right to strike, he makes no comment other than to affirm that without the right to strike as an ultimate means to convince an employer to accede to their demands, workers in a trade union would be unable to effectively defend their common interests.⁴²⁶

Others have attached little or no importance to the ILO's definition of trade union freedom of association, preferring instead to arrive at subjective interpretations. One writer, Paul J.J. Cavalluzzo, recognized that the granting of a separate right of freedom of association under the Charter is consistent with international conventions and that this suggested that interna-

⁴²⁴ *Ibid.*, p. 154.

⁴²⁵ *Ibid.*, p. 156.

⁴²⁶ *Ibid.*, p. 152.

tional law was a useful source of interpretation.⁴²⁷ He reviews Canada's international obligations with respect to freedom of association with an emphasis on the ILO's definition. He notes the broad interpretation given by the ILO Committee on Freedom of Association, along with the restrictions it has recognized, and agrees that the Charter should respect it and protect the right to bargain collectively.⁴²⁸ However, he proposes his own approach to a broad interpretation of freedom of association where international law becomes a component among several others.⁴²⁹ He does point out how collective bargaining existed long before legislatures began to regulate it and adds that when the Charter was enacted every jurisdiction in Canada recognized collective bargaining as a legitimate means for workers to participate in the formulation of their working conditions.⁴³⁰

Professor Joseph M. Weiler offers a much different approach, preferring a narrow interpretation of freedom of association. For him, the absence of any specific reference to collective bargaining and the right to strike in the Charter is very telling.⁴³¹ He

⁴²⁷ Paul J.J. Cavalluzzo, "Freedom of Association and the Right to Bargain Collectively", from Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms, ed. by Joseph M. Weiler and Robert M. Elliot, (Toronto: Carswell, 1986), 189-210, at p. 189.

⁴²⁸ Ibid., p. pp. 196-197.

⁴²⁹ Ibid., p. 204.

⁴³⁰ Ibid., pp. 207-208.

⁴³¹ Joseph M. Weiler, "The Regulation of Strikes and Picketing Under The Charter", from Litigating the Values of a Nation, supra, note 427, 211-244, at pp. 212-213; He considers

nevertheless expresses the view that collective bargaining is a "valuable, indeed an essential, democratic institution in Canadian society".⁴³² However, he disagrees with Cavalluzzo's view that it should receive protection under s. 2 (d) of the Charter.⁴³³ He invokes three reasons for not having such a protection. The first reason relies on an interpretation of s. 2 as protecting political and democratic interests rather than purely economic interests.⁴³⁴ This view appears to be solely subjective and seems to forget that workers associate to defend more than just economic interests nor does it take into account the definition recognized under international law, particularly under the ILO. The second reason refers to the possible consequences of constitutionalizing a "model of collective bargaining" which would require governments to defend restrictions under s. 1 of the Charter while providing few guidelines for judges to apply.⁴³⁵ Had Prof. Weiler considered the recourse to international human rights law as a source of interpretation he would have found legitimate reasons for justifying restrictions to collective bargaining in the principles enunciated by the ILO Committee on Freedom of Association. He never makes reference to

the trade union movement was negligent by not pressing for this explicit protection during the hearings on the Constitution and may now have to bear the consequences (pp. 213 and 216).

⁴³² Ibid., p. 216.

⁴³³ Ibid., p. 223.

⁴³⁴ Ibid., pp. 224-225.

⁴³⁵ Ibid., p. 225.

this source and thus has nothing to rely on in his attempt to determine what is "reasonable" and "justifiable" under s. 1, nor does he refer to the historic compromise we discussed earlier which allowed for acceptable restrictions to trade union freedom of association. Finally, his third reason submits that it is dangerous to require judges to make "sophisticated policy judgments" under s. 1 of the Charter on the scope of collective bargaining since this would risk upsetting the balance of competing interests established by labour legislation which he feels should remain in the hands of the legislators.⁴³⁶ There is no justification for excluding labour legislation from the ambit of the Charter on the basis that a balance determined by law should remain the responsibility of legislators. The Charter was enacted to protect fundamental rights and freedoms and is meant to apply to all legislation. Already we are witnessing a number of challenges to legislative enactments which have long existed and affected these rights and freedoms. The position put forward by Prof. Weiler is reminiscent of the attitude of restraint our courts exhibited under the Canadian Bill of Rights. It is not appropriate to adopt this approach with respect to the Charter since it is a constitutionally entrenched document.

Peter A. Gall sides with Prof. Weiler in adopting a narrow interpretation of freedom of association which only protects the right of an individual to join with others to pursue common

⁴³⁶ Ibid., pp. 226-227.

interests, but without protecting these interests.⁴³⁷ He considers that freedom of association is an individual right and not a collective right.⁴³⁸ While it is true that the Charter indicates that "everyone" enjoys freedom of association, one cannot deny that it can only be exercised in concert with others. Any reference to international human rights law is noticeably absent in Mr. Gall's analysis. A protection that does not extend beyond mere association for common purposes will not go far in ensuring that individuals are able to benefit to the fullest extent from joining together to achieve these purposes. The international definition of freedom of association under the ILO does not support such a narrow approach. Surely such a restrictive interpretation was not intended by the drafters of the Charter.

Thus, we have demonstrated that there are ample and well-founded reasons supporting a recourse to international human rights law as a source of interpretation for the Charter. In the case of trade unions, the ILO's definition of freedom of association as developed by its Committee on Freedom of Association would serve to establish the scope and the limits of the guarantee provided under s. 2 (d) of the Charter.

⁴³⁷ Peter A. Gall, "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword", from Litigating the Values of A Nation, *supra*, note 427, 245-260, at p. 246.

⁴³⁸ Ibid.

Section 2 - Charter Cases on Freedom of Association

In the cases that have come before Canadian courts which were concerned with the interpretation of freedom of association, two different positions have emerged. The first position considers that freedom of association as it applies to trade unions also protects the right to bargain collectively and the right to strike. The second position rejects this broad interpretation, contending that freedom of association only protects the right of individuals to join together to pursue common interests. In the first section, we will review the decisions of the lower courts and the Supreme Court of Canada. In the second section, we will provide a critique of the current position of the Supreme Court of Canada with respect to freedom of association in light of the arguments we have made concerning the application of international law and the historical and legal evolution of trade union freedom of association.

A. Review of the Charter cases on freedom of association

i) The decisions of the lower courts

The leading case which supports a broad interpretation of freedom of association is Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home et al.,⁴³⁸ (hereafter referred to as the Broadway Manor case). In this case, the Ontario High Court of Justice (Divisional Court) supported

⁴³⁸ (1983) 4 D.L.R. (4th) 231 (Ont. Div. Ct.), overruled on non-Charter grounds 13 D.L.R. (4th) 220 (C.A.).

the broad interpretation of freedom of association. The case involved, in part, a challenge to the provisions of the Inflation Restraint Act⁴⁴⁰ which removed the right to strike and to bargain collectively by extending existing collective agreements and freezing wages. In three separate judgments, Justices Galligan, O'Leary and Smith each supported the view that freedom of association protects the right to strike and to bargain collectively. Mr. Justice Galligan stated his reasons as follows:

"But I think that freedom of association if it is to be a meaningful freedom must include freedom to engage in conduct which is reasonably consonant with the lawful objects of an association. And I think that a lawful object is any object which is not prohibited by law."⁴⁴¹

He continues his reasoning by indicating that the purpose of an association of workers is to advance their common interests and if they are not free to advance those interests through bargaining and strikes "their association is a barren and useless thing".⁴⁴² Further in his judgment Galligan J. expounds on his interpretation of freedom of association, concluding that the "freedom to strike is an essential element of freedom of association" although he recognizes that justifiable restrictions may be imposed at times for "the common good of society".⁴⁴³ This

⁴⁴⁰ S.O. 1982, c. 55. You will recall that this legislation was the basis of a complaint before the ILO Committee on Freedom of Association, see p. 72.

⁴⁴¹ *Supra*, note 439, p. 248.

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*, p. 256.

reasoning is reminiscent of the approach taken by the ILO Committee on Freedom of Association in relation to restrictions imposed on the right to strike. The court did rule that the restrictions imposed by the Ontario government were, nevertheless, justifiable under s. 1 of the Charter. Mr. Justice O'Leary also arrived at the same conclusions relying mainly on the statements made during parliamentary hearings on the Charter, international conventions including ILO Convention No. 87 and its interpretation by the ILO Committee on Freedom of Association and the Supreme Court of Canada Zambri case.⁴⁴⁴ He concludes that the right to strike is inextricably linked to collective bargaining which itself is an integral part of freedom of association.⁴⁴⁵ Mr. Justice Smith relies on essentially the same sources in arriving at a broad interpretation of freedom of association. It is interesting to note the following comments he made concerning the origins of freedom of association in Canada:

"It is important to note that the freedom to associate freely, to bargain and to withdraw services were not conferred by statute. They were developed under a dynamic of their own. The various statutes dealing with labour relations merely served to recognize and regulate them in the interest of order and industrial peace."⁴⁴⁶

This supports the position we defended earlier.

In Re Retail, Wholesale & Department Store Union, Locals,⁴⁴⁷

⁴⁴⁴ Supra, note 384.

⁴⁴⁵ Supra, note 439, p. 284.

⁴⁴⁶ Ibid., p. 303.

⁴⁴⁷ (1985) 19 D.L.R. (4th) 609 (Sask. C. A.).

the Saskatchewan Court of Appeal ruled that provincial emergency legislation, designed to settle a dispute involving dairy workers, which prohibited strikes and lock-outs for a certain period violated freedom of association under the Charter and was not justifiable under s. 1. Chief Justice Bayda used a different reasoning to arrive at this conclusion:

"...a person asserting the freedom of association under para. 2 (d) is free (apart from s. 1 of the Charter) to perform in association without governmental interference any act that he is free to perform alone. Where an act by definition is incapable of individual performance, he is free to perform the act in association provided the mental component of the act is not to inflict harm."⁴⁴⁸

Applying this rationale to the contested legislation, he concludes that it impinges upon freedom of association.⁴⁴⁹ The reasoning of Mr. Justice Cameron is similar to the conclusions reached in the Broadway Manor case and refers particularly to international conventions. He concluded, as did the justices in Broadway Manor, that collective bargaining, of which the right to strike is an integral part, "lies at the very centre of the existence of an association of workers" and added that the presence of the "double-override" in ss. 1 and 33 of the Charter influenced his decision.⁴⁵⁰ Mr. Justice Brownridge dissented, opting for a narrower interpretation of freedom of association which excludes protection of the right to bargain collectively

⁴⁴⁸ Ibid., p. 620.

⁴⁴⁹ Ibid., p. 622.

⁴⁵⁰ Ibid., p. 647.

and the right to strike.⁴⁵¹

The other position supports a more restricted view of freedom of association relying on the "cardinal principle" of statutory construction which requires that words be given their plain ordinary meaning unless there is some ambiguity which renders it necessary to inquire into the purpose behind the enactment. The leading case which supports a narrow interpretation of freedom of association is the British Columbia Court of Appeal decision in Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union.⁴⁵² The case was concerned primarily with the issue of secondary picketing which fell within the ambit of freedom of expression. Nevertheless, freedom of association as it relates to trade unions was considered. Mr. Justice Esson expressed the view that freedom of association was an individual right which simply protected the freedom to join with others in a "common purpose" without this common purpose, or the means to achieve it, enjoying the same protection.⁴⁵³ He is critical of the judgments rendered in the Broadway Manor case, arguing that they did not take into account the ordinary meaning of "association" and seemed to restrict the application of freedom of association to trade unions.⁴⁵⁴ We do not think that this is a

⁴⁵¹ Ibid., pp. 629-635.

⁴⁵² (1984) 10 D.L.R. (4th) 198 (B.C.C.A.); reversed on other grounds by [1986] 2 S.C.R. 573 (S.C.C.).

⁴⁵³ Ibid., pp. 207-208.

⁴⁵⁴ Ibid., p. 209.

fair assessment of the Broadway Manor case. The case relied on several grounds, as discussed earlier, to support the broad interpretation of freedom of association. While considering the lawful objects of an association in the broader interpretation, it must be recalled that this view seeks not so much to protect the objects themselves as the freedom to pursue them.

The Dolphin Delivery case also relied heavily on Judicial Committee of the Privy Council ruling in Collynore et al. v. Attorney-General of Trinidad and Tobago.⁴⁵⁵ In this case, the Privy Council considered a section of the Constitution of Trinidad and Tobago which protected "freedom of association and assembly" in relation to a statute prohibiting strikes and lock-outs. The Privy Council upheld the decision of the Court of Appeal of Trinidad and Tobago holding that there was no breach of freedom of association. In his judgment, Lord Donovan noted that the decision was based upon a refusal "to equate freedom to associate with freedom to pursue without restriction the objects of the association."⁴⁵⁶ He quoted the following excerpt from the judgment of Sir Hugh Wooding C.J. in the Court of Appeal:

"In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor license for a course of conduct

⁴⁵⁵ [1969] 1 All E.R. 1207.

⁴⁵⁶ Ibid., at p. 1211.

or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the county."⁴⁵⁷

The reasoning in the Dolphin Delivery case was applied in Public Service Alliance of Canada v. The Queen.⁴⁵⁸ The Federal Court of Appeal rejected the ruling in the Broadway Manor case, opting instead for the conclusions reached in the Dolphin Delivery case in its interpretation of freedom of association under the Charter. It upheld the provisions of the Public Sector Compensation Restraint Act⁴⁵⁹ which extended collective agreements and "rolled back" wage increases provided in the said agreements. The Dolphin Delivery case has been applied in a number of subsequent decisions.⁴⁶⁰

ii) The decisions of the Supreme Court of Canada

In three separate appeals, the Supreme Court of Canada had the opportunity to consider the scope of freedom of association

⁴⁵⁷ Ibid.

⁴⁵⁸ [1984] 2 F.C. 889 (Appeal Div.), affirming [1984] 2 F.C. 562 (Trial Div.); The facts of this case are discussed further on p. 151 where the Supreme Court of Canada decision in this case is considered.

⁴⁵⁹ S.C. 1980-81-82, c. 122.

⁴⁶⁰ See Reference Re Public Service Employee Relations Act, Labour Relations Act, and Police Officers Collective Bargaining Act, (1984) 16 D.L.R. (4th) 359 (Alta. C.A.); Newfoundland Association of Public Employees v. The Queen, (1985) 14 C.R.R. 193 (Nfld. S.Ct.); The Halifax Police Officers and NCO's Association v. The City of Halifax et al., (1984) 11 C.R.R. 358 (N.S.S.Ct.); Re Prime and Manitoba Labour Board (1983) 3 D.L.R. (4th) 74 (Man. Q.B.), rev'd on other grounds (1984) 8 D.L.R. (4th) 641 (Man. C.A.).

when applying it to trade unions. Their decisions in Re Public Service Employee Relations Act,⁴⁸¹ Public Service Alliance of Canada v. The Queen⁴⁸² and Retail, Wholesale and Department Store Union (RWDSU)⁴⁸³ were rendered on April 9, 1987. In all cases, a majority of four to two adopted the more restrictive definition of freedom of association.

In the Public Service Employee Relations Act case (hereafter referred to as the Alberta Labour Reference), the Lieutenant Governor-in-Council of the Province of Alberta had referred certain questions to the Court of Appeal of Alberta for an advisory opinion on a number of labour statutes which provided for compulsory arbitration as a mechanism for resolution of disputes and prohibited the use of strikes and lock-outs. The majority of the Court⁴⁸⁴ ruled that the legislation did not infringe freedom of association. The majority of the Supreme Court of Canada affirmed their decision and dismissed the appeal.

Mr. Justice McIntyre rendered a separate decision while Justices Beetz, Le Dain and La Forest concurred with a brief separate judgment. Mr. Justice Le Dain wrote the decision for himself and Justices Beetz and La Forest. In a brief two page judgment he concluded that freedom of association "does not include in the case of a trade union a guarantee of the right to

⁴⁸¹ [1987] 1 S.C.R. 313.

⁴⁸² [1987] 1 S.C.R. 424.

⁴⁸³ [1987] 1 S.C.R. 460.

⁴⁸⁴ (1984) 16 D.L.R. (4th) 359.

bargain collectively and the right to strike".⁴⁶⁵ He arrives at this conclusion by making a distinction between the freedom to join together to pursue common purposes and the pursuit of these purposes. According to Justice Le Dain the former is protected, but not the latter.⁴⁶⁶ He adds that collective bargaining and the right to strike "are not fundamental rights and freedoms" since they are "the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise".⁴⁶⁷ His preference that the courts defer to the legislatures would appear to support the opinion expressed by Prof. Weiler as discussed earlier.⁴⁶⁸ It is important to note that at no time in his remarkably brief judgment does Le Dain make reference to or comment on the relevance of international human rights law.

Mr. Justice McIntyre began his judgment by recalling that the Supreme Court of Canada had determined that the Charter should receive a broad and generous construction consistent with its general purpose, i.e. a purposive interpretation.⁴⁶⁹ Yet, he also emphasized that:

"It follows that while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the Charter should not

⁴⁶⁵ Supra, note 461, p. 390.

⁴⁶⁶ Ibid., p. 391.

⁴⁶⁷ Ibid.

⁴⁶⁸ See pp. 127-129.

⁴⁶⁹ Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at p. 155.

be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the Charter, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society."⁴⁷⁰
[Emphasis added]

Without ever referring to Canada's international obligations or the pre-Charter history, Justice McIntyre arrives at the very "legalistic" approach he stated should be avoided. His assessment of the scope of freedom of association is preceded with an affirmation that the Charter, with few exceptions, protects individual rights and not collective rights.⁴⁷¹ Nevertheless, this contention neglects to recognize that it is not the association itself that enjoys the protection but its members exercising their freedom together. It is their freedom that is protected. In the case of trade unions, after all, workers join unions in order to achieve the strength that allows them to bargain with their employer. That strength rests ultimately on their collective ability to withdraw their services from the employer. That ability is essentially associational, since it is ineffective unless exercised in concert with others. Surely if you interfere with the functioning of the group or association you necessarily interfere with the rights of the individuals that comprise it. Indeed, Justice McIntyre appears to recognize these points earlier in his judgment when, commenting about the purpose

⁴⁷⁰ Supra, note 461, at p. 394.

⁴⁷¹ Ibid., p. 397.

of freedom of association, he notes:

"While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others" [Emphasis Added]⁴⁷²

In his judgment, McIntyre J. reviews the various existing approaches to freedom of association⁴⁷³ which were explored at length in the article by Mr. Paul J.J. Cavalluzzo⁴⁷⁴ which he refers to frequently in his judgment. He arrives at the following conclusion:

"...I interpret freedom of association in s. 2 (d) of the Charter to mean that Charter protection will attach to the exercise in association of such rights as have Charter protection when exercised by the individual. Furthermore, freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone. But, since the fact of association will not by itself confer additional rights on individuals, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual.

When this definition of freedom of association is applied, it is clear that it does not guarantee the right to strike." ⁴⁷⁵

Before reaching this conclusion, McIntyre J. does note that these are not the only existing approaches but reflect the ones

⁴⁷² Ibid., p. 395.

⁴⁷³ Ibid., at pp. 399-408.

⁴⁷⁴ Supra, note 427.

⁴⁷⁵ Supra, note 461, p. 409.

advanced before the Court.⁴⁷⁶ As was the case in the British Columbia Court of Appeal decision in Dolphin Delivery, he invokes the Judicial Committee of the Privy Council decision in Collymore. As well, his reasons appear to be restricted to the existence of the right to strike. It is also interesting to note his remarks on the relevance of pre-Charter law. He recognizes that freedom of association existed before the Charter was enacted and makes specific reference to trade unions. He adds that the pre-Charter context is relevant to the interpretation of freedom of association because the Charter "must be construed with reference to the constitutional text and to the nature, history, traditions and social philosophies of our society".⁴⁷⁷

Yet, he fails to delve deeper into the pre-Charter evolution of trade union freedom of association as we have and its particular relevance to the interpretation of the Charter, nor does he consider Canada's international human rights obligations and their effect. He also rejects any contention that the right to strike may have acquired a fundamental status in the absence of specific reference in the Charter⁴⁷⁸ and notes that the guarantee of freedom of association is not meant to protect "particular activities or goals" but more with "how activities or goals may be pursued" in common.⁴⁷⁹ What Mr. Justice McIntyre fails to

⁴⁷⁶ Ibid., p. 403.

⁴⁷⁷ Ibid., pp. 403-404.

⁴⁷⁸ Ibid., at p. 413-414.

⁴⁷⁹ Ibid., p. 406.

realize is that when the pursuit of these "goals and activities" are interfered with they risk rendering the association ineffectual. He also emphasizes that the Charter, with a few exceptions, is meant to protect individual rights and not group rights and, therefore, could not be deemed to protect the right to strike since "there is no analogy whatever between the cessation of work by a single employee and a strike conducted in accordance with modern labour legislation."⁴⁸⁰ This conclusion does not necessarily follow from the premise. The fact that a strike can only be carried out in concert with others would tend more to support the protection of the right to strike under freedom of association.⁴⁸¹ This denies once more the associational character of freedom of association. In addition, Justice McIntyre goes further by noting that the Charter was not meant to, by implication, accord special constitutional rights to trade unions.⁴⁸² In support of this contention, he notes that during the hearings of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, a resolution calling for the inclusion of the right to bargain collectively, which was not adopted, failed to refer to the right to strike and that this could be inferred as rejecting its inclusion under s.

⁴⁸⁰ Ibid., p. 410.

⁴⁸¹ Andrew J. Petter, "Narrowing Charter Rights: The Freedom of Association Cases", Part II of "Developments in Constitutional Law: the 1986-87 Term", (1988) 10 Supreme Ct. L.R., 97-121, at p. 105.

⁴⁸² Supra, note 461, p. 412.

2(d) of the Charter.⁴⁸³ As we discussed earlier, the reasons invoked by the government at the time was that these components were already included in the guarantee of freedom of association. Instead of referring to international human rights law, he notes that specific reference to the right to strike is made in the constitutions of France, Italy and Japan and the omission of similar provisions in our Charter should lead us to conclude that this right was not meant to be protected.⁴⁸⁴ He concludes his reasons by expressing concerns that a broad interpretation of freedom of association would have the effect of entrenching the present collective bargaining system which could, among other things, be potentially detrimental to its evolution.⁴⁸⁵ One wonders whether these concerns are well founded since the right to strike and the right to bargain collectively, as recognized by the ILO as being protected under freedom of association, can be legitimately restricted under the ILO Conventions. Mr. Justice McIntyre's concerns extend further to include the realm of labour policy which he feels the courts would be intruding into if required to examine the validity of restrictions to these rights

⁴⁸³ Ibid., pp. 412-413.

⁴⁸⁴ Ibid., p. 413; When referring to the other constitutions he notes: "The framers of the Constitution must be presumed to have been aware of these constitutional provisions." Surely the provisions of international conventions to which Canada is a party to are of greater relevance and the drafters of our Charter were presumed to be aware of their existence.

⁴⁸⁵ Ibid., at pp. 414-420.

under s. 1 of the Charter.⁴⁸⁶ In doing so he echoes the sentiments of Prof. Weiler which we discussed earlier. We need only refer to our earlier comments with respect to these concerns.⁴⁸⁷ Yet Mr. Justice McIntyre supports judicial deference to the legislatures on the issue of the right to strike since according to him "the only support for its constitutional guarantee is an implication" and "the courts should refrain from intrusion into the field of legislation".⁴⁸⁸ As has been noted, by opting for a narrow interpretation over a broad interpretation the courts are also interfering in labour relations legislation in Canada.⁴⁸⁹ As well, the only support for the inclusion of these rights is not mere implication but is firmly grounded in international law, as has been demonstrated. As well, if we refer to the approach followed by the ILO Committee on Freedom of Association one discovers that the government's basis for adopting restrictive legislation never comes under scrutiny and only the limitations are examined in order to determine whether they are acceptable under international law.⁴⁹⁰ Surely the principles developed by the Committee, along with a historical

⁴⁸⁶ Ibid., p. 419; McIntyre J. also refers to the comments made by Joseph M. Weiler in his article "The Regulating of Strikes and Picketing Under the Charter", in Litigating the Values of a Nation, see supra note 427, pp. 211-244.

⁴⁸⁷ See p. 128-129.

⁴⁸⁸ Supra, note 461, pp. 419-420.

⁴⁸⁹ Petter, supra, note 481, p. 106.

⁴⁹⁰ See p. 55.

appreciation of how trade union freedom of association evolved in Canada, could serve to guide the courts under s. 1 of the Charter when determining the validity of the restrictions imposed by governments on the right to bargain collectively and the right to strike. It is important once again to note that Mr. Justice McIntyre never makes reference to Canada's international obligations under the ILO Conventions or other conventions.

Chief Justice Dickson and Madame Justice Wilson dissented, supporting a broader interpretation of freedom of association. The Chief Justice delivered the judgment. In arriving at his decision, he relied in large part on the definition accorded to freedom of association under international law, particularly by the ILO Conventions.⁴⁹¹ However, he considers the recourse to international law primarily as a guide for interpretation. After stating the case for applying international law to the Charter he concludes as follows:

"I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions."⁴⁹² [Emphasis added]

⁴⁹¹ Supra, note 461, pp. 348-355.

⁴⁹² Ibid., pp. 349-350.

He then proceeded to review the international human rights provisions relating to freedom of association with an emphasis on the ILO Conventions. He includes a review of three recent complaints against Canada before the ILO which were discussed in Part I.⁴⁹³ He concludes by noting how Canada is bound by international human rights law to secure the protection of freedom of association for the workers of Canada, which includes "the formation and activities of trade unions subject to reasonable limits", particularly in accordance with the interpretation of ILO Convention No. 87.⁴⁹⁴ Chief Justice Dickson thus attaches great importance to international law, unlike the other Justices who did not give it any consideration. He dismisses any reliance on the the Collymore decision⁴⁹⁵ to justify a restricted interpretation of freedom of association since it relied on a different constitutional document.⁴⁹⁶ In accordance with the "purposive" approach, he opts for the broader interpretation of freedom of association and rejects the restrictive approach adopted by the majority in the following terms:

"If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.

⁴⁹³ *Ibid.*, pp. 357-358. These were the complaints against Alberta, Ontario and Newfoundland, see pp. 71-73.

⁴⁹⁴ *Ibid.*, pp. 358-359.

⁴⁹⁵ *Supra*, note 455.

⁴⁹⁶ *Supra*, note 461, p. 338.

In my view, while it is unquestionable that s. 2 (d), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status to give effective protection to the interests to which the constitutional guarantee is directed."⁴⁸⁷

He also notes the collective dimensions of freedom of association.⁴⁸⁸ He affirms the fundamental nature of freedom of association and elaborates as follows on how the pursuit of activities are to be protected within its ambit:

"What freedom of association seeks to protect is not associational activities qua particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage. But this is not an unlimited constitutional license for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation."⁴⁸⁹

This approach is very similar to that of the ILO Committee on Freedom of Association, as we discussed in Part I, in its emphasis on protection of the individual's right to interact with others subject to certain limitations. He also accepts the proposition, as did Mr. Justice McIntyre, that "s. 2 (d) normally embraces the liberty to do collectively that which one is permitted to do as an individual"⁵⁰⁰ but arrives at a different

⁴⁸⁷ *Ibid.*, p. 363.

⁴⁸⁸ *Ibid.*, p. 364.

⁴⁸⁹ *Ibid.*, p. 366.

⁵⁰⁰ *Ibid.*

conclusion:

"[The proposition] is therefore a useful test of legislative purpose in some circumstances. There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. This is precisely the situation in this case. There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than quantitatively different. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature."⁵⁰¹ [Emphasis added]

This approach is sound in that it conforms to international law's definition of freedom of association under the ILO while taking into account freedom to associate for purposes other than collective bargaining. It is with this approach that he concludes that the right to bargain collectively and the right to strike are protected within freedom of association.⁵⁰² In applying this reasoning to the Alberta legislation, Chief Justice Dickson concludes that there is infringement of freedom of association.⁵⁰³ In determining whether the legislation is justifiable under s. 1 of the Charter, Chief Justice Dickson addresses the concerns raised by Justice McIntyre regarding the risk of permanently entrenching the present structure for collective

⁵⁰¹ Ibid., p. 367.

⁵⁰² Ibid., at p. 371.

⁵⁰³ Ibid., at p. 372.

bargaining by noting that the Court had not been asked to consider such a question and by emphasizing that the "Constitution does not freeze into place an existing formula of industrial relations".⁵⁰⁴ This amply addresses Justice McIntyre's concerns by emphasizing the basic purpose of the analysis under s. 1 of the Charter and rejecting the suggestion that judges would be "intruding into the field of legislation." Chief Justice Dickson considers that the protection of essential services is a valid legislative objective for the purpose of s. 1 of the Charter.⁵⁰⁵ He defines "essential services" as those whose "interruption would threaten serious harm to the general public or to a part of the population."⁵⁰⁶ He relies on the definition of essential services developed by the ILO Committee on Freedom of Association⁵⁰⁷ when he affirms that "mere inconvenience to the members of the public does not fall within the ambit of the essential services justification for abrogating the freedom to strike".⁵⁰⁸ By virtue of this definition, he concludes that police officers and firefighters are essential⁵⁰⁹ but that

⁵⁰⁴ *Ibid.*, p. 374.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.*, p. 375.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*, p. 376.

⁵⁰⁹ *Ibid.*, p. 376.

hospital employees, as defined by the legislation, were not.⁵¹⁰ In determining whether the arbitration system established for the police officers and firefighters was a fair substitute for collective bargaining and the right to strike, Chief Justice Dickson refers once again to the principles of the ILO Committee on Freedom of Association in concluding that "any system of conciliation or arbitration must be fair and effective",⁵¹¹ and that the system created by the legislation did not fulfill these criteria since there were limitations on the items that could be submitted to arbitration and the accessibility to arbitration was subject to the discretion of the Minister of Labour or an administrative board.⁵¹²

The conclusions reached in the Public Service Alliance of Canada case⁵¹³ were essentially the same, with the exception that Chief Justice Dickson disagreed with Madame Justice Wilson in deciding that the imposition of controls on the federal public sector was justifiable under s. 1 of the Charter. In a brief paragraph, Justices Beetz, Le Dain, and La Forest reiterated their view in the Alberta Labour Reference that the Charter did not include a guarantee of the right to bargain collectively and

⁵¹⁰ Ibid., p. 378; Dickson C.J. also referred to the decision of the ILO Committee on Freedom of Association on the Alberta complaint on this point.

⁵¹¹ Ibid., p. 381.

⁵¹² Ibid., pp. 384-385.

⁵¹³ Supra, note 462.

the right to strike.⁵¹⁴ In a separate two-page judgment, Mr. Justice McIntyre did likewise with respect to the right to strike. It is curious to note that Mr. Justice McIntyre added a proviso to his judgment in the Alberta Labour Reference when he indicated that his "finding in that case does not, however, preclude the possibility that other aspects of collective bargaining may receive Charter protection under the guarantee of freedom of association".⁵¹⁵ It is difficult to understand how this would be possible since the right to strike is so much an integral part of collective bargaining. Mr. Justice Le Dain, who ruled for the other justices deciding against such a protection, considers that these two components are closely tied.⁵¹⁶

As for the dissenting opinions, Chief Justice Dickson reaffirmed his ruling in the Alberta Labour Reference by concluding that the Public Sector Compensation Restraint Act⁵¹⁷ violated freedom of association since it infringed on the freedom of public sector employees to engage in collective bargaining by automatically extending the terms and conditions of collective agreements and arbitral awards and by fixing wage increases for a two-year period.⁵¹⁸ However, Chief Justice Dickson deemed that

⁵¹⁴ Ibid., pp. 452-454.

⁵¹⁵ Ibid., p. 453.

⁵¹⁶ See also the comments by Madame Justice Reed, the trial judge in this case, [1984] 2 F.C. 562, at 577.

⁵¹⁷ S.C. 1980-81-82-83, c. 122.

⁵¹⁸ Supra, note 462, pp. 437-438.

the Act's objective of reducing inflation was justifiable under s.1 of the Charter, but not all the means chosen to achieve that objective were "reasonable and demonstrably justified." He considered that the imposition of controls on the public sector only was consistent with the government's "leadership role".⁵¹⁸ However, he deemed the removal of the right to strike over non-compensatory issues, as well as the right to submit such disputes to binding arbitration, not a justifiable infringement of freedom of association.⁵²⁰ He invoked the conclusions reached in the Broadway Manor case to support his findings.⁵²¹ On the matter of non-compensatory issues, Chief Justice Dickson appears to support the position of the ILO Committee on Freedom of Association, although he does not make reference to their decisions in his judgment.

Madame Justice Wilson concurred with Chief Justice Dickson in determining that the legislation infringed freedom of association but disagreed with him that it was partly justified under s. 1 of the Charter. She accepted the control of inflation as being a valid objective but deemed the imposition of restrictions only on public sector employees was not justifiable.⁵²² She notes that "the government as employer has no

⁵¹⁸ Ibid., p. 445.

⁵²⁰ Ibid., pp. 448-449.

⁵²¹ Ibid., pp. 446-451.

⁵²² Ibid., p. 455.

greater power vis-a-vis its employees than a private employer"⁵²³ and by seeking to be a leader in its effort to control inflation it nevertheless "violated the fundamental rights of its employees under the Charter".⁵²⁴ She notes certain discrepancies in the government's rationale which resulted in an inequality between private sector and public sector workers, since the latter did not have the choice to voluntarily comply with the guidelines.⁵²⁵ She considered that the measures adopted did not meet the test enunciated in R. v. Oakes⁵²⁶ in that they were not "carefully designed to achieve the objective in question" since "they were imposed upon a captive constituency".⁵²⁷ Madame Justice Wilson's reasoning fails to take into account that these restrictions on wage increases would be deemed justifiable to a certain extent according to the principles of the ILO Committee on Freedom of Association so long as they are accompanied by adequate safeguards.⁵²⁸ In this respect, Chief Justice Dickson was probably closer to the Committee's reasoning when he ruled the restrictions on non-compensatory issues were unfair and unjustifiable.

In Retail, Wholesale and Department Store Union v. The

⁵²³ Ibid., p. 456.

⁵²⁴ Ibid., p. 457.

⁵²⁵ Ibid., p. 457.

⁵²⁶ [1986] 1 S.C.R. 103, at p. 139.

⁵²⁷ Supra, note 462, p. 458.

⁵²⁸ See pp. 45-47 and p. 56.

Government of Saskatchewan,⁵²⁹ (hereafter referred to as the Dairy Workers case) a different scenario emerged. The majority of the Supreme Court Justices reiterated their previous positions and ruled that the provincial legislation which temporarily prohibited dairy employees from striking and the dairies from locking out their employees while imposing compulsory arbitration did not violate freedom of association.⁵³⁰ Once again, Chief Justice Dickson and Justice Wilson, while agreeing that the legislation infringed freedom of association as in the previous two cases, were divided on the question of whether the measures were justifiable under s. 1 of the Charter. Chief Justice Dickson introduces a new element to the justification of governments maintaining "essential services", which he elaborated in the Alberta Labour Reference case, by applying the same rationale when there is "economic harm to a third party" which relates to a "pressing and substantial concern."⁵³¹ Relying primarily on newspaper articles introduced as evidence,⁵³² Chief Justice Dickson concluded that the threat of a total work stoppage in the dairy processing industry met this criteria.⁵³³ It is difficult to accept this conclusion in light of the definition of essential services adopted by the ILO Committee on Freedom of Association.

⁵²⁹ Supra, note 463.

⁵³⁰ Ibid., pp. 484-485.

⁵³¹ Ibid., pp. 476-477.

⁵³² Ibid., pp. 478-480.

⁵³³ Ibid., p. 480.

Justice Wilson disagreed with Chief Justice Dickson in extending the "essential services" justification while noting he had adopted the definition of the ILO Committee on Freedom of Association in the Alberta Labour Reference and appeared now "to be engrafting a substantial extension on to that definition".⁵³⁴ She considers that the prevention of economic harm to a "particular sector" is not valid objective under s. 1 unless it presents "a serious threat to the well-being of the body politic or a substantial segment of it".⁵³⁵ She did not consider that the provision of milk was an "essential service" in accordance with the definition of the ILO Committee on Freedom of Association.⁵³⁶ She recognizes that there may be instances where governments are justified in intervening in the collective bargaining process when the minimum damage caused by the work stoppage "would be considerably greater than that from a work stoppage of reasonable duration".⁵³⁷ This, according to her, would also meet the requirement of a pressing and substantial concern" which the Court established in the Oakes decision. She cautioned governments to refraining from intervening unduly in the collective bargaining process:

⁵³⁴ Ibid., p. 486.

⁵³⁵ Ibid., p. 487, Madame Justice Wilson is also critical of the reliance on newspaper articles as evidence of the economic harm alleged since they cannot constitute a valid exception to the hearsay rule, ibid., pp. 490-492.

⁵³⁶ Ibid., p. 489.

⁵³⁷ Ibid., pp. 492-493.

"The government must stay its hand in order to give the process an opportunity to work. It must, in other words, distinguish between the permissible degree of harm which is the price of the system and the impermissible degree when the price becomes inordinately high."⁵³⁸

Justice Wilson concluded that the government had failed to discharge its onus under s. 1 and considered, if it had succeeded, that the measures applied were "not closely tailored to the objective so as to ensure the least possible infringement of the right [to strike]".⁵³⁹

B. Critique of the Supreme Court of Canada Decisions on Freedom of Association

The dissenting opinion of Chief Justice Dickson and Madame Justice Wilson in the Alberta Labour Reference case, in my view, best expresses the valid interpretation of freedom of association as it applies to trade unions. It is in keeping with Canada's international obligations and its legal and historical traditions. It also conforms to the purposive interpretation of the Charter prescribed by the Supreme Court of Canada. Nevertheless, it is not without its flaws. There are a number of arguments to support this view, some of which were invoked in the various court cases, while others have not been given the consideration they deserve. These will be reviewed under the following two headings: the international law arguments and the historical and legal arguments.

⁵³⁸ Ibid., p. 494.

⁵³⁹ Ibid., pp. 494-495.

i) The international law arguments

As discussed extensively in Part I, Canada has been a participant in the ILO since its inception. It has also adhered to a number of ILO Conventions, including the Convention on Freedom of Association and the Right to Organise, No. 87. It has also been subjected to the enforcement mechanism of the ILO and has had a significant number of complaints made against various legislative enactments before the ILO Committee on Freedom of Association. The ILO has recognized that Canada has implemented its standards with respect to the protection of freedom of association in conformity with Convention No. 87 and that its legislation is generally in compliance. But this protection is illusory if the Charter, as applied by the majority of the Justices of the Supreme Court of Canada, is allowed, in a sense, to override international law by providing only partial protection. As was noted, no consideration was given by the majority of the Supreme Court of Canada to the definition of freedom of association provided by international law, specifically the ILO's definition as discussed in Part I.

It is interesting to note the large number of court cases that have made reference to international law in an effort to define other sections of the Charter.⁵⁴⁰ It has been pointed out that the Charter had its source in international law.⁵⁴¹ In

⁵⁴⁰ See Daniel Turp, "Le recours au droit international aux fins de l'interprétation de la Charte canadienne des droits et libertés: un bilan jurisprudentiel," (1984) 18 R.J.T. 353-411.

⁵⁴¹ Claydon, supra, note 419.

addition, the insertion of the limitation clause in s. 1 of the Charter denotes an alignment with the structure of other international instruments.⁵⁴² There has also been a three-fold increase in court decisions making reference to international law, although the results obtained have varied.⁵⁴³ As Prof. Turp pointed out, the decisions that have referred to international law have contributed to the development of the principles of interpretation for the Charter and have also served to help define the content of the guarantees provided therein, although they have done so with some measure of hesitation.⁵⁴⁴ Nevertheless the principal general motive invoked to justify this recourse has been the context in which the Charter was adopted and the presumption that Parliament and the provincial legislatures do not intend to act in violation of international law.⁵⁴⁵ As was noted earlier, the drafting of the Charter was influenced greatly by international law.⁵⁴⁶ It is reasonable to assume that the drafters were therefore aware of the interpretation given by the relevant authorities and that our courts may therefore have recourse to these when interpreting the Charter. In our case, these would be the decisions of the ILO Committee on Freedom of Association. Thus, there is sufficient precedent in the cases

⁵⁴² Turp, supra, note 540, p. 355.

⁵⁴³ Ibid., p. 357.

⁵⁴⁴ Ibid., p. 379.

⁵⁴⁵ Ibid., pp. 362-379.

⁵⁴⁶ See pp. 120-125.

that have invoked international law to support the view that the ILO's definition of freedom of association should be applied under s. 2 (d) of the Charter. However, the fact that these decisions as a whole do not present a coherent approach to the application of international human rights law creates difficulty for future cases.

The freedom of association cases that came before the Supreme Court of Canada would have provided the opportunity to establish a firmer position on this question. Instead, the majority of the Justices ignored the issue, while the dissenting Justices gave it much consideration. In the Alberta Labour Reference case, Chief Justice Dickson enunciated a presumption that the Charter is meant "to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified".⁵⁴⁷ Yet, he weakens this presumption by adding that the judiciary is not "bound by the norms of international law in interpreting the Charter" but affirms that they are a "relevant and persuasive source". In a recent article, Michel Le Bel was critical of this approach.⁵⁴⁸ He argues for a more generous approach to international human rights law when interpreting the Charter than what was proposed by the Chief Justice and Madame Justice Wilson.

⁵⁴⁷ Supra, note 492.

⁵⁴⁸ Michel Le Bel, "L'interprétation de la Charte canadienne des droits et libertés au regard du droit international des droits de la personne--Critique de la démarche suivie par la Cour Suprême du Canada", (1988) 48 R. du B. 743-783.

He deplors the fact that they have ranked this source below other sources such as American constitutional law.⁵⁴⁹ He suggests a modified and stronger approach when the Charter is interpreted which presumes that it must be meant to provide protection at least as great as that granted by similar provisions in international human rights documents.⁵⁵⁰ This approach would thus comprise instruments that Canada has not ratified. He notes that this presumption does not invalidate the traditional approach to interpreting the Charter, but adds to it.⁵⁵¹ It flows from the presumption that Parliament and the provincial legislatures do not intend to violate international law.⁵⁵² As well, due to the "special nature" of the Charter by virtue of its protection of human rights, it cannot be subject to ordinary rules of statutory interpretation.⁵⁵³ We agree with Le Bel's approach. It supports and reinforces our position. It remains to be seen whether the application of the ILO's definition of freedom of association by the dissenting Supreme Court Justices was consistent and conformed to the ILO's own approach.

Chief Justice Dickson and Madame Justice Wilson have effectively demonstrated in the Alberta Labour Reference case that Canada's obligations under the ILO and the ILO's definition

⁵⁴⁹ Ibid., pp. 755-757.

⁵⁵⁰ Ibid., p. 765.

⁵⁵¹ Ibid.

⁵⁵² Ibid., p. 762.

⁵⁵³ Ibid., p. 769.

of freedom of association can and should be applied within the context of the Charter. Both were in agreement in this same case as to the broad definition of freedom of association comprising the right to bargain collectively and the right to strike, and agreed with the restrictions allowed under ILO Convention No. 87 as interpreted by the ILO Committee on Freedom of Association. They consistently affirmed the authority of the ILO's definition of freedom of association. Their conclusions in this case are essentially the same as those reached by the ILO Committee on Freedom of Association in a complaint dealing with the same legislation.

However, in the Public Service Alliance of Canada case and in the Dairy Workers case they disagreed on the limitations that may be justifiable under s. 1 of the Charter. In the Public Service Alliance of Canada case, Chief Justice Dickson introduced the curious element of the government's "leadership role" in the fight against inflation to justify the imposition of a number of mandatory restraints in the federal public service when the ILO's definition of freedom of association clearly justified the conclusions he reached. His conclusion that the judiciary should defer to governments on the question of economic policies and strategies designed to combat inflation is consistent with the position adopted by the ILO Committee on Freedom of Association.⁵⁵⁴ Indeed, a complaint was made before the Committee concerning this legislation and the conclusions reached upheld

⁵⁵⁴ Supra, note 462, p. 442.

the measures.⁵⁵⁵ Madame Justice Wilson did not concur, affirming the government should be treated as any other employer. She appears to have overlooked the decisions of the ILO Committee on Freedom of Association on the issue of wage restraints imposed on the public service, otherwise she would have probably reached the same conclusions as the Chief Justice.

Chief Justice Dickson strayed from the ILO's definition in the Dairy Workers case by introducing the rationale of "economic harm to third parties" which relates to a "pressing and substantial concern" to the "essential services" justification in order to justify a temporary prohibition of strikes and lock-outs in the dairy industry. Justice Wilson rejected this approach and strongly affirmed a consistent application of the ILO's definition of freedom of association, noting that the Chief Justice's rationale would affect the underlying fundamental basis of this freedom. Indeed, our courts cannot have recourse to international instruments in such a selective manner. They do not constitute shops where judges may pick and choose those elements which they agree with and apply them in one case and reject them in another case. They must be applied consistently. Chief Justice Dickson and Madame Justice Wilson, in all three cases, were not consistent in their application of the ILO's definition of freedom of association. It is their opinion in the Alberta Labour Reference that should prevail in light of the position that has

⁵⁵⁵ See Madame Justice Reed's, the trial judge, comments on this, supra, note 458, pp. 585-586.

been defended in this thesis.

The extent to which international law applies within domestic law does not arise in the case of ILO Convention No. 87 since Canada has already implemented this Convention through federal and provincial labour legislation. However, whether it is meant to apply in the context of the Charter is another question. The Supreme Court of Canada appears to have answered it in the negative. For the reasons we invoked in Part I and during our discussion of the Charter cases, we believe the Supreme Court of Canada erred in their decisions.

ii) The historical and legal arguments

Earlier in this Part the case was made for trade union freedom of association within Canada's own historical and legal tradition. A strong case has been made to support a broad freedom of association within Canada even before the establishment of the ILO or the existence of its international convention dealing with freedom of association, which was later adhered to by Canada. The values reflected therein were the result of an evolution of historical events and legislative enactments. Yet, this aspect of trade union freedom of association has received little attention by authors who have written on the subject. Some of the court cases which supported a broad interpretation of freedom of association did recognize the importance of this evolution. Mr. Justice O'Leary in the Broadway Manor case noted that freedom of association, the right to bargain collectively and the right to

strike were not created by statute law, but were "developed under a dynamic of their own".⁵⁵⁶ Labour relations legislation intervened "to recognize and regulate them in the interest of order and industrial peace".⁵⁵⁷ Chief Justice Dickson in the Alberta Labour Reference case also referred to the historical and legal evolution of freedom of association in Canada.⁵⁵⁸ He notes how the Supreme Court of Canada in the Zambri case⁵⁵⁹ had already acknowledged this fact. The majority of the Supreme Court Justices gave no consideration to the historical and legal evolution of freedom of association in Canada. As was noted earlier in this Part, the principles that came to be recognized also contained a number of conditions and restrictions on the exercise of trade union freedom of association. They were recognized by and embodied in post-war legislation and have remained essentially unchanged to this day. It is proper that our Charter, which is meant to recognize our values, should encompass a broad interpretation of freedom of association based on our own legal and historical traditions as well as international human rights law. After all, there is no Canadian precedent to assist our courts in applying a s. 1 analysis to restrictive labour legislation affecting the public sector and essential services. This is where the principles established by the ILO Committee on

⁵⁵⁶ Supra, note 439, p. 303.

⁵⁵⁷ Ibid.

⁵⁵⁸ Supra, note 461, pp. 368-370.

⁵⁵⁹ Supra, note 384.

Freedom of Association become necessary.

The majority of the Supreme Court of Canada seemed to ignore this evolution by adopting a more rigid and restrictive definition of freedom of association without considering the international definition of trade union freedom of association as enforced by the ILO. In addition, no consideration was given to the historical and legal evolution of trade union freedom of association in Canada. Instead, a legalistic approach was adopted in arriving at the restrictive definition by applying ordinary rules governing the interpretation of statutes to a Charter which is meant to enshrine fundamental rights and freedoms. Other authorities are cited in support of this view, yet one looks in vain at these sources to find any solid foundation which would justify their application. The majority ruling in the Supreme Court of Canada relied heavily on the Judicial Committee of the Privy Council decision in the Collymore case as did the cases in the lower courts who opted for a restrictive definition of freedom of association. Reliance on the Collymore decision to justify a literal interpretation of freedom of association is not well founded. The rulings that have invoked this case in support of their restricted view fail to take note of a number of important considerations. The Collymore decision is inapplicable because the Trinidad and Tobago Constitution associates freedom of assembly and association in the same manner as the Canadian Bill of Rights, unlike the Charter which grants freedom of association separate and independent protection. As well,

Trinidad and Tobago had no limitation clause in their constitution similar to s. 1 of the Charter and perhaps the Justices felt compelled to narrow their interpretation. Furthermore, if we apply the rule that Parliament and the provincial legislatures are presumed not to legislate in violation of international law, then it must be inferred that the drafters of the Charter intended to give constitutional force to Canada's international obligations and not to the meaning ascribed to different provisions in different constitutional settings. It is more than likely that in drafting the guarantee of freedom of association, greater attention should be paid to international human rights conventions which are legally binding on Canada than upon interpretations of the Constitution of Trinidad and Tobago.

Another aspect of the Supreme Court of Canada's position is the issue of individual and collective rights. Mr. Justice McIntyre contends that the Charter, with few exceptions, is meant to protect individual rights and not collective rights. The distinction is at best nebulous when applied to freedom of association. As was argued earlier, freedom of association can only be exercised in concert with others. Justice McIntyre readily admits this point when he notes that the pursuit of individual goals and rights "is generally impossible without the aid and cooperation of others."⁵⁸⁰ The approach adopted by Chief Justice Dickson in the Alberta Labour Reference case recognizes both the individual and collective dimensions of freedom of

⁵⁸⁰ Ibid., note 472.

association and demonstrates how it should be protected under the Charter.⁵⁶¹

Finally, the concern raised by Mr. Justice McIntyre that a broad interpretation of freedom of association would have the effect of entrenching the present collective bargaining system and interfering in the realm of labour policy which is the domain of Parliament and the legislatures. Chief Justice Dickson amply addressed these concerns in his decision in the Alberta Labour Reference and rejects Mr. Justice McIntyre's contention. He notes that the Court was never asked to rule on this point and that the issues raised did not suggest that it should be a consideration.⁵⁶² The concern expressed by Mr. Justice McIntyre could be interpreted as an abdication of the role entrusted on the courts by the Charter since the courts have already been called upon to weigh and balance the rights and freedoms guaranteed therein under s. 1 in numerous cases. Why should it be different when freedom of association as it applies to trade unions is considered? Why should labour relations legislation be shielded in this manner from the Charter's application? It has already been demonstrated that such a balancing of interests may be carried out by applying our own legal and historical tradition in relation to trade union freedom of association in light of the definition developed and applied by the ILO, a definition Canada

⁵⁶¹ Supra, note 501.

⁵⁶² Supra, note 504, See also his opinion in the Dairy Workers case, supra, note 483, pp. 481-482.

is bound to secure for workers under international law.

CONCLUSION.

The primary question raised by this thesis has been how we may reconcile the interpretation of freedom of association under the Canadian Charter of Rights and Freedoms with Canada's international obligations under various international instruments dealing with human rights, specifically with respect to freedom of association as it applies to trade unions and as protected by the International Labour Organisation.

In the realm of international law, the authority of the International Labour Organization over the protection of trade union freedom of association has been firmly established. A unique feature in the ILO system has been tripartism. Thus, representatives of workers and employers, alongside with those of governments, have worked together to bring about international conventions that respond to their concerns. Thus, unlike other international instances, governments alone do not determine the content of the international standards nor do they solely supervise their enforcement. For any government involved, this implies a greater commitment beyond the implementation of ratified conventions since worker and employer representatives enjoy "equal status" with them in the entire process.

This brings us to the question of what action taken by governments is sufficient to fulfill their obligation under the ILO Constitution as Member States with respect to ratified conventions. Article 19 (5) (d) of the ILO Constitution

stipulates that when a Member State ratifies a Convention, it agrees to "take such action as may be necessary to make effective the provisions of such Convention." Of course, implementation of the Convention in domestic law would be sufficient to amply fulfill this requirement. In the case of Convention No. 87 on Freedom of Association and the Right to Organise, Canada has already demonstrated general compliance. However, since the enactment of the Canadian Charter of Rights and Freedoms, the rejection by the Supreme Court of Canada of the ILO's definition of freedom of association was implied in its interpretation of s.2 (d) of the Charter. This raises the question as to whether Canada has done all that "may be necessary to make effective" its obligations under Convention No. 87. After all, to fulfill Canada's ILO obligations in domestic labour legislation and to renege on it in a constitutional document meant to enshrine fundamental human rights and freedoms would render it ineffective in actual practice.

Canada's labour legislation has been subjected to the complaints procedure before the ILO Committee on Freedom of Association on numerous occasions. As a result, the ILO's definition of freedom of association has been applied to the Canadian context and the principal features of Canadian labour legislation have been assessed accordingly. They illustrate how the definition has been applied and how the restrictions imposed on its exercise have been interpreted. These decisions serve to demonstrate how a similar interpretation could be carried out

under s. 2 (d) of the Canadian Charter of Rights and Freedoms. Furthermore we have already presented ample and strong arguments that would make them binding on Canada. In addition, the historical and legal evolution of trade union freedom of association in Canada also supports a broad interpretation of freedom of association.

What does this all mean for Canada? All of the elements previously discussed lead to one ultimate conclusion: Canada is obligated to accept the ILO's broad interpretation of freedom of association comprising the right to bargain collectively and the right to strike, as supported by Canada's own historical and legal traditions, and must apply it accordingly within the context of the Charter.

The Supreme Court of Canada in opting for a more restrictive view, has effectively shut out any effective protection of freedom of association. Their ruling, expressed primarily in the Alberta Labour Reference case and reaffirmed in the Public Service Alliance of Canada case and the Dairy Workers case, essentially "gut" this fundamental freedom leaving behind an empty fragile shell as protection. The simple act of association is guaranteed with no thought of further protection to ensure it effective and continuing existence. Governments may now proceed unimpeded by constitutional restraints, as they did before the Charter was enacted, should they wish to interfere with associational conduct beyond mere association. In the case of trade unions this will no doubt mean further periodic restric-

tions on the right to strike and the right to bargain collectively depending on the existing labour relations climate and the current economic state of the country. As well, the restrictive interpretation applied by the Supreme Court of Canada will have serious repercussions on associations other than trade unions. If the restrictive definition of freedom of association subsists, it will allow Parliament and the provincial legislatures to, in effect, override under the Charter what they are bound to respect under international law. As a result, in the case of trade unions, workers will have no other option but to resort to the complaint mechanism of the ILO Committee on Freedom of Association to obtain recognition of freedom of association since they could not rely on s. 2 (d) of the Canadian Charter of Rights and Freedoms as interpreted by the Supreme Court of Canada. Thus the increase in the number of Canadian complaints before the Committee, which occurred during the recessionary period of the early 1980's, may be expected to happen again. Canada will be forced to explain over and over before an international quasi-judicial body, with the political embarrassment it may entail, why its domestic legislation does not conform to the ILO standards it is bound to protect.

APPENDIX A

CONVENTION No. 87

Convention concerning Freedom of Association
and Protection of the Right to Organise¹

The General Conference of the International Labour Organisation,
Having been convened at San Francisco by the Governing Body of
the International Labour Office, and having met in its
Thirty-first Session on 17 June 1948;

Having decided to adopt, in the form of a Convention, certain
proposals concerning freedom of association and protection
of the right to organise, which is the seventh item on the
agenda of the session;

Considering that the Preamble to the Constitution of the Inter-
national Labour Organisation declares "recognition of the
principle of freedom of association" to be a means of
improving conditions of labour and of establishing peace;

Considering that the Declaration of Philadelphia reaffirms that
"freedom of expression and of association are essential to
sustained progress";

Considering that the International Labour Conference, at its
Thirtieth Session, unanimously adopted the principles which
should form the basis for international regulation;

Considering that the General Assembly of the United Nations, at
its Second Session, endorsed these principles and requested
the International Labour Organisation to continue every
effort in order that it may be possible to adopt one or
several international Conventions;

adopts this ninth day of June of the year one thousand nine
hundred and forty-eight the following Convention, which may be
cited as the Freedom of Association and Protection of the Right
to Organise Convention, 1948:

¹ Date of coming into force: 4 July 1950.

PART I FREEDOM OF ASSOCIATION

Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3

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

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

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 10

In this Convention the term "organisation" means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

PART II PROTECTION OF THE RIGHT TO ORGANISE

Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

APPENDIX B

CONVENTION No. 98

Convention concerning the Application of the
Right to Organise and Bargain Collectively²

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the
International Labour Office, and having met in its Thirty-
Second Session on 8 June 1949, and

Having decided upon the adoption of certain proposals concerning
the application of the principles of the right to organise
and to bargain collectively, which is the fourth item on the
agenda of the session, and

Having determined that these proposals shall take the form of an
international Convention,

adopts this first day of July of the year one thousand nine
hundred and forty-nine the following Convention, which may be
cited as the Right to Organise and Collective Bargaining
Convention, 1949:

Article 1

1. Workers shall enjoy adequate protection against acts of
anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect
of acts calculated to--

- (a) make the employment of a worker subject to the condition that
shall not join a union or shall relinquish trade union
membership;
- (b) cause the dismissal of or otherwise prejudice a worker by
reason of union membership or because of participation in
union activities outside working hours or, with the consent
of the employer, within working hours.

² Date of coming into force: 18 July 1951.

Article 2

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

Article 3

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Article

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 6

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

APPENDIX C

LIST OF ILO CONVENTIONS RATIFIED BY CANADA

	<u>Convention</u>	<u>Date Ratification Registered with ILO</u>
No. 1	- Hours of Work (Industry), 1918 (First Session)	March 21, 1935
No. 7	- Minimum Age (Sea) 1920, (Second Session)	March 31, 1926
No. 8	- Unemployment Indemnity, 1920 (Second Session)	March 31, 1926
No. 14	- Weekly Rest (Industry), 1921 (Third Session)	March 21, 1935
No. 15	- Minimum Age (Trimmers and Stokers), 1921 (Third Session)	March 31, 1926
No. 16	- Medical Examination of Young Persons (Sea), 1921 (Third Session)	March 31, 1926
No. 22	- Seamen's Articles of Agreement, 1926 (Ninth Session)	June 30, 1938
No. 26	- Minimum Wage-Fixing Machinery, 1928 (Eleventh Session)	April 25, 1935
No. 27	- Marking of Weight (Packages Transported by Vessels), 1929 (Twelfth Session)	June 30, 1938
No. 32	- Protection Against Accidents (Dockers) (Revised), 1932 (Sixteenth Session)	April 6, 1946
No. 45	- Employment of Women on Underground Work in Mines of All Kinds, 1935 (Nineteenth Session)	Sept. 16, 1966*
No. 53	- Minimum Age for Employment at Sea, 1936 (Twenty-Second Session)	Sept. 10, 1951
No. 63	- Statistics of Wages and Hours of Work, 1938 (Twenty-Second Session)	April 6, 1946

* Ratification was denounced in May 1978.

No. 68 - Food and Catering (Ships' Crews), 1946 (Twenty-Eighth Session)	March 19, 1951
No. 69 - Certification of Ships' Cooks, 1946 (Twenty-Eighth Session)	March 19, 1951
No. 73 - Medical Examination (Seafarers), 1946 (Twenty-Eighth Session)	March 19, 1951
No. 74 - Certification of Able Seamen, 1946 (Twenty-Eighth Session)	March 19, 1951
No. 80 - Final Articles Revision, 1946 (Twenty- Ninth Session)	--
No. 87 - Freedom of Association and Protection of the Right to Organize, 1948 (Thirty-First Session)	March 23, 1972
No. 88 - Employment Service, 1948 (Thirty-First Session)	Aug. 24, 1950
No. 100 - Equal Remuneration (Thirty-Fourth Session)	Nov. 16, 1972
No. 105 - Abolition of Forced Labour, 1957 (Fortieth Session)	July 14, 1959
No. 108 - Seafarers' National Identity Documents (Forty-First Session)	May 31, 1967
No. 111 - Discrimination in respect of employment and occupation, 1958 (Forty-Second Session)	Nov. 26, 1964
No. 116 - Partial Articles Revision, 1961 (Forty-Fifth Session)	April 5, 1962
No. 122 - Employment Policy, 1964 (Forty-Eighth Session)	Sept. 16, 1966
No. 162 - Safety in the Use of Asbestos, 1986 (Seventy-Third Session)	June 16, 1988

APPENDIX D
INTERNATIONAL HUMAN RIGHTS PROVISIONS
WITH RESPECT TO
FREEDOM OF ASSOCIATION
BINDING ON CANADA

Article 8 of the INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. The State Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restriction may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or of the police, or of the administration of the State.

3. Nothing in this article shall authorize State Parties to the International Labour Convention of 1948 on Freedom of Association and Protection of the Right to Organize to take legislative measures which would

prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 22 of the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order ("ordre public"), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize State Parties to the International Labour Convention of 1948 on Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in the Convention.

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