

FROM STATUTORY RIGHT TO HUMAN RIGHT: THE EVOLUTION AND CURRENT STATUS OF COLLECTIVE BARGAINING¹

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In its 2007 BC Health Services Decision the Supreme Court of Canada, much to the surprise of the Canadian labour relations community, affirmed the human rights status of collective bargaining. Taken by a distinguished group of jurists who have no professional human rights or employment relations grounds to defend or proselytize, that decision may be seen by history to be a turning point in the way that collective bargaining is conceived and evaluated in Canada. Although long counted as a human right by experts and advocates, in Canada (as well as the United States and some other countries) prior to the Supreme Court decision, it was neither treated by governments as a human right nor regarded by the public as a human right (Burkett 2005). It was treated instead as, if not exactly an ordinary partisan issue, no more than a statutory right; one which political parties of the left might strengthen and expand and parties of the right might contract and fetter.

Despite the failure of governments to protect and promote it as a human right, Canada was among the more enthusiastic supporters of collective bargaining's human rights status in the international arena (Adams 2002). Canada was in the forefront of the forces that produced the International Labour Organization's 1998 Declaration of Fundamental Principles and Rights at Work that vigorously affirmed the human rights status of a core set of rights including collective bargaining (Olney 1999). In short, what Canada affirmed in the international arena it did not practice at home. That was one of the issues that led the Supreme Court to put aside twenty years of jurisprudence during which it allowed legislatures to mold, with little judicial interference, labour policy as they saw fit. In its BC Health Services decision the Court stated that "Canada's adherence to international documents recognizing a right to collective bargaining ... supports recognition of that right in s.2(d)²." The Court went on to say "The Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."

To put the issue into perspective I will first review the emergence and general characteristics of the modern international human rights regime. I will

then trace the evolution and major aspects of collective bargaining as a human right. I will also briefly consider the extent to which Canada falls short of full compliance with international norms regarding collective bargaining as a human right. Finally, I will suggest a way forward.

THE MODERN HUMAN RIGHTS REGIME

The seminal document of the modern human rights regime is the [Universal Declaration of Human Rights](#). Adopted in December, 1948, it was intended to put in motion legal and cultural forces making it clear that the world community would no longer tolerate the atrocities that occurred in preceding decades and especially in the context of the holocaust. But the declaration was also positively aspirational. It envisioned and aspired to a world in which the dignity and worth of every human being was honoured and secured.

Many of the issues declared to be human rights in the declaration were relevant to the world of work including freedom from slavery, child labour and discrimination at work and freedom of association. Although collective bargaining is not mentioned specifically in the UDHR, it seems clear that the framers intended that it be included as a prime aspect of freedom of association. Later interpretations of the meaning of freedom of association by UN human rights oversight committees affirmed the status of collective bargaining as a fundamental aspect of freedom of association (Maklem 2005).

The practical task of promoting human rights on the ground was delegated to various UN agencies. The International Labour Organization (ILO) was given prime responsibility for labour issues (Bartholomei de la Cruz, von Potobsky and Swepston 1996, Swepston 1998). The ILO had been formed after World War I as part of the League of Nations (Rubin 2005). It was and continues to be a tripartite organization with representation from labour, business and governments³. In recognition of the principle that “lasting universal peace can be established only if it is based upon social justice,” it set out to establish basic standards for all of the world’s workers.

The ILO survived the League’s demise as well as the disruption caused by World War II (when its secretariat physically moved to Canada) and in 1944 its mission, including prominently the promotion of freedom of association, was reaffirmed in the Declaration of Philadelphia which became part of the organization’s constitution in 1946. By the time the UDHR was enacted, the ILO’s working procedures were well established and it did not see the need to change them. Its major instruments were and continue to be conventions and recommendations. Conventions are international treaties that, when ratified by states, generally become part of domestic law⁴. Recommendations mark a general consensus within the ILO about the issues under consideration but one that has not reached the strength to move to treaty status (Rubin 2005).

During the same era when the UDHR was proclaimed, the ILO passed numerous conventions and recommendations relevant to the issues contained in the declaration. With respect to freedom of association and collective bargaining the most important were Convention 87 concerning Freedom of Association and Protection of the Right to Organize and Convention 98 concerning The Right to Organize and Collective Bargaining⁵. Because of its already established procedures, the ILO saw no need to reframe its work in the developing language of the expanding international human rights community. It continued using its own concepts and terminology and thus became separated from the human rights community (Leary 1996, Adams 2001a, Swepston 2007)⁶. For example, whereas human rights experts spoke of the rights of individual people everywhere, the ILO spoke of the duties of states. Whereas the human rights community spoke of abuses of individual human rights, the ILO spoke of failure to adhere to international standards.

The UDHR was a very brief and non-binding document. To put meat on its bones and give it legal effect, the international community set about creating more detailed documents. The result, in the 1960s, was the adoption of two covenants, [one on civil and political rights and one on economic, cultural and social rights](#). Both made reference to freedom of association. The combination of the UDHR and the two basic covenants became generally known as the International Bill of Rights (Howard and Donnelly 1987, Leader 1992). Like ILO conventions, the covenants are international treaties. Canada has ratified both of them.

There were two covenants rather than one because of the cold war. The western capitalist democracies were prepared to commit not only in theory but also in practice to such issues as due process before the law, free elections and to trial by jury. They were not, however, as keen to recognize the right of all workers to a job or a livable income or decent housing as required by the covenant on economic, social and cultural rights. The eastern socialist countries took the opposite position strongly supporting economic and social rights while being unwilling to embrace all of the trappings of western democracy. Although involved in the development of the covenants, the ILO was uncomfortable with the division into categories and thus tried to disassociate itself from the ensuing controversy (Swepston 2007). As a result it became further distanced from the expanding human rights community.

COLLECTIVE BARGAINING AS AN ECONOMIC RIGHT IN CANADA

As noted above, like the UDHR neither of the two core UN covenants made explicit reference to collective bargaining. Both, however, included clauses making reference to and thus implicitly incorporating the ILO's Convention 87 (see Maklem 2005 and Swepston 1998). In recent years that implicit incorporation

has become more emphatic. The UN's covenant oversight committees have handed down decisions making it clear that both of the core covenants do, in fact, protect the right to bargain collectively as an inherent and inseparable aspect of freedom of association (Maklem 2005). From the perspective of the international human rights community collective bargaining is both an economic right and a civil right.

Although the dual character of collective bargaining was embraced by many continental European countries it was not so accepted in Canada and the United States (Adams 2001b, Adams 2002, Burkett 2005). Even though it ratified both covenants, Canada joined the U.S. in treating collective bargaining almost exclusively as an economic right in the same category as the right to a job or a minimum wage. As an economic right, unionization and collective bargaining came to be regarded as an option appropriately exercised only by those who felt economically disadvantaged. Unionization was characterized as almost wholly instrumental, an action taken not because it had inherent value but rather because it would result in better wages and more security. The notion became embedded that it was up to individuals to decide whether or not they were satisfied with their conditions and, if so, should not be expected or encouraged to change the status quo. The proper role of government with regard to that decision was neutrality. This conceptual system basically legitimized the absence of collective bargaining and implicitly gave its blessing to employer unilateral control of employment as the default. (Adams 2001b, 2002, 2006).

The problem with the conception is perhaps best seen by considering the way that we engage with other civil and political human rights. Consider how we think about gender equality. In the time when a woman's legal existence was incorporated in that of her husband through the operation of "coverture" principles, the economic conditions of many wives were no doubt better than were those of many single women who had independent legal standing (Stanley 1999). But, as the women's rights movement taught us to understand, although economic dependency was one aspect of the failure to recognize women as persons, more fundamental was the inhumanity of being denied control of one's fate. Equity is not solely about economics; it is more inclusively about dignity and the worth of the person. As a human right, collective bargaining is also about not only economics but also dignity.

With regard to those issues that we have elevated to human rights status, the goal is universality. For example, our policies in Canada are intended to achieve the complete absence of discrimination in all of its economic, social, cultural and political guises. But with regard to collective bargaining we have given little due to its dignity and democracy enhancing aspects. Our attitude has been that if the employees are economically satisfied they should expect no more.

In its BC Health Services decision the Supreme Court went far beyond that conception. It boldly declared that collective bargaining was a human right and deserved constitutional protection because it “enhances the human dignity, liberty and autonomy of workers” and because it is “intrinsically valuable as an experience in self-government.” From that perspective, the wielding by “unorganized” employers of near absolute power over employees is politically and socially problematic. From a human rights perspective the perpetuation of master-servant relationships in which employers assume and apply the authority to establish and interpret all of the rules of work including the wage, the work to be done and by whom, promotional opportunities, who and how many will be laid off or retained in difficult times is degrading. To oppose the establishment of a relationship “intrinsically valuable as an exercise in self-government” is to take a stand contrary to basic charter and human rights values. Even if they are well remunerated, where self-government is denied, working people are reduced to items of commerce. They become lumps of labour whose obedience, acquiescence, and subservience are for sale, or at least for rent (Ellerman 1992).

The international human rights consensus holds that human rights are a function of one’s humanity. They are rights that are not dependent on law or social custom. As stated in the Vienna Declaration issued by the UN’s Global Conference on Human Rights, they are “universal, indivisible and interdependent and interrelated.” Each of them must be treated “on the same footing, and with the same emphasis.” Although states have the prime responsibility to ensure human rights, they nonetheless evoke duties owed by all social actors (states, individuals, corporations) to all others (Howard and Donnelly 1987, Paust 2002).

When considered from this perspective the acceptance by employees of near absolute managerial authority over employment conditions is equivalent to the acceptance by slaves of their subservient and sub-human position, the acceptance by women of their chattel status, the acceptance by people of colour of “separate but equal” schools. These are attitudes that are cancerous to both Charter values and to the international human rights consensus to which our representatives have pledged us.

On the other hand when seen from a political and civil perspective, collective bargaining is both a right and a civic duty. In a democratic country, respectful of human rights, citizens have not only a right but also a responsibility to participate in democratic institutions. Participation strengthens democratic institutions; neglect allows them to wither.

The goal of employment equity champions is equity for all regardless of gender, colour, religion, ethnicity, etc. The goal of anti-slavery champions and of child rights champions is that slavery and exploitation of children should be totally eliminated. Since human rights are indivisible and deserve to be treated

equally with equal respect, the only acceptable goal for champions of collective bargaining as a human right is universality. All conditions collectively conceived and applied should be collectively negotiated. Although collective bargaining may be more of a nuisance than a boon to people who work in very small enterprises or for high level executives, for most working people it is both relevant and necessary to secure not only their economic well-being but their civil and political well-being as well.

RECENT EVOLUTION OF CORE LABOUR RIGHTS AS HUMAN RIGHTS

Because it decided to go its own way rather than get caught up in the east-west controversy over the division of human rights into two categories, the ILO did not become a significant player in the growing human rights community and debate. However, when the cold war ended in the early 1990s the United Nations sponsored a series of global summit meetings designed to shape the work of the organization in the post-cold war period. In 1993 there was a summit on human rights in Vienna that issued the [Vienna Declaration](#) mentioned above. In it the global community reiterated its commitment to the universality and indivisibility of human rights.

About the same time a wide range of civil organizations began to challenge the impact of globalization. Corporations were expanding around the globe, production was being sourced in countries far from those in which the results were marketed and financial markets were becoming increasingly international. The Uruguay Round of the General Agreement on Tariffs and Trade was developing the rules that would lead to the liberalized trade that would be managed by the World Trade Organization which came into existence in 1995. But, the critics argued, the fruits of this global liberalization and expansion of trade were not being equitably shared. The quality of life of those less well off was not improving significantly if at all. One response to this criticism was a push to make adherence to core labour rights a mainstream aspect of globalization. Towards that end several organizations got behind the idea of making membership in the WTO contingent on respect for human rights (Tsogas 2001).

At the UN's 1995 Summit on Social Development, core labour rights, including freedom of association and the right to organize and bargain collectively, were resoundingly reaffirmed to be fundamental human rights. The ILO participated strongly in the work of that meeting reestablishing its ties with the international human rights community. In 1996 the WTO briefly considered and rejected the proposal that it include a "social clause" in its requirements. It pleaded incompetence to judge nations on that criterion and passed the baton to the ILO (Tsogas 2001).

The outcome of this maneuvering was that in 1998 the ILO's annual conference, (sometimes referred to as the World's Parliament of Labour) passed the [Declaration of Fundamental Principles and Rights at Work](#). This Declaration passed unanimously with a handful of abstentions. Since delegates at the annual conference come not only from states but also from organized labour and employer organizations, the Declaration marked a global labour-management-state consensus about the human rights character of core labour rights which explicitly included collective bargaining. In the context of the Declaration collective bargaining was clearly declared to be equivalent in stature and concern with employment equity, and freedom from child and forced labour. Canada was a prominent supporter of the Declaration which obliged all ILO member states to "respect, to promote and to realize in good faith ... effective recognition of the right to collective bargaining" (Olney 1999, Bellace 2001).

Two years after the Declaration, the Secretary General of the United Nations announced the coming forth of the [Global Compact](#) with international business. It challenged corporations to pledge respect for and work toward the full implementation of a set of environmental and labour standards. The labour standards were drawn explicitly from the ILO Declaration. Although the Compact did not bind firms legally, it did mark a formal, moral commitment to behave in accord with core labour standards including respect for the right of workers to organize and bargain collectively without interference. From a small base the number of corporations that have taken the pledge has risen to over three thousand. In short, formal acceptance of the right of workers to organize without interference and for their organizations to be recognized for the purpose of bargaining collectively has now become the global norm.

In 2004 another step was taken to strengthen the force of the international code of acceptable corporate conduct. An expert sub-commission of the UN's Human Rights Commission (now Human Rights Council) issued what became known as the UN Norms (Sub-Commission on the Promotion and Protection of Human Rights, 2003). That document laid out what were, in the sub-commission's expert opinion, the international human rights responsibilities of business. Controversially, it claimed that corporations had legal responsibilities to respect and conform to human rights standards. Business retorted that it was not the police and could not be expected to fulfill the functions of the state (Adams 2006b, Kinley and Chambers 2006).

Responding to the controversy, the Secretary General appointed a Special Rapporteur to consult widely with all concerned with the issue and to make recommendations for resolving the conflict. In an interim report John Ruggie declared that the commission had been "doctrinally excessive" in its statements regarding the legal responsibilities of business (Ruggie 2006). Nevertheless, he continued to consult and do research on the issues with a view towards narrowing the gap between the positions of the parties.

In his most recent report Ruggie presents a framework that comprises three key principles: The state duty to protect against human rights abuses by business; the corporate responsibility to respect human rights and effective access to remedies (Ruggie 2008). This framework does not go as far as the UN Norms in establishing the obligations of business for human rights but it does make clear that business cannot claim no responsibility other than compliance with law. Nevertheless Ruggie's framework would seem to leave ambiguous the legal obligations of business.

What is clear at this point is that – whatever the technical legal exposure of business – there is a rapidly strengthening global social norm that expects business to take responsibility for human rights (Kinley and Chambers 2006). With regard to collective bargaining that would appear to mean compliance with the behavioural norms developed by the ILO and its committees.

In 2006, the pressure on business increased when the World Bank's commercial lending arm, the International Finance Corporation, issued a set of guidelines that it will apply to corporate applicants for development loans (International Finance Corporation 2006). With regard to collective bargaining, the standard is that the loan applicant "will not discourage workers from organizing and bargaining collectively." Subsequently, the IFC standard became part of the [Equator Principles](#), a code broadly endorsed by international banks around the world. In short, in order to acquire a development loan, adherence to the new code is quickly becoming a practical necessity. Were this norm applied fairly in Canada and the United States to domestic corporations, the large majority of "non-union" firms would almost certainly fail the test because discouraging workers from organizing is the Canadian industrial norm (Adams 2006).

These international developments were mirrored by developments in Canada and the United States. In 1997 the [Society for the Promotion of Human Rights in Employment](#) came into existence with the mission of promoting knowledge, understanding and respect for core labour rights as human rights. It quickly attracted several hundred labour relations experts, many of them in leadership positions. In 2000 US-based Human Rights Watch commissioned a study of the state of US labour law and practice from an international human rights perspective and found the system sadly wanting (Compa 2000). That report has had a significant impact in increasing American labour's human rights awareness with regard to collective bargaining and with moving the human rights and labour movements closer together (Compa 2008). In 2001 the AFL-CIO, the US's major trade union federation launched its [Voice@Work Campaign](#) in which it began to vigorously employ the language of labour rights as human right. With significant trade union financial backing, in 2003 [American Rights at Work](#) was formed with the mission of "advancing democracy in the workplace." In Canada, the National Union of Public and General Employees joined with the

United Food and Commercial Workers to promote the message of workers' rights as human rights (Fudge 2005, Adams 2006). They were soon joined by the Canadian Teachers' Federation and the Canadian Police Association.

These are the global and recent local milieux in which the Supreme Court of Canada made its 2007 decision constitutionalizing the right to bargain collectively⁷.

As the Court noted its decision "may properly be seen as the culmination of a historical movement towards the recognition of a procedural right to collective bargaining." Although the Court made that statement primarily in reference to historical developments in Canada, it is equally, if not more accurate with respect to global developments.

TOWARDS A HUMAN RIGHTS COMPLIANT INDUSTRIAL RELATIONS SYSTEM

Canada's international responsibilities with regard to freedom of association and the right to organize and bargain collectively stem from several sources the most prominent of which are ratified conventions and covenants, constitutional responsibilities as an ILO member state and responsibilities stemming from the global human rights consensus.

Among the key documents that Canada has ratified are the two UN human rights covenants and the ILO's Convention 87 on the right to organize. All of these instruments make reference to freedom of association. More recently, Canada endorsed the Vienna Declaration thus committing itself to promote and respect the human rights aims of that document.

Freedom of association is a general concept, the detailed meaning of which in the context of work has been delegated by the world community to the ILO to work out. To do that it has created two key committees. The Committee of Experts on the Application of Conventions and Recommendations is composed of distinguished lawyers whose task is to review alleged infringement of ILO conventions in countries that have ratified the relevant conventions. With regard to the right to organize and bargain collectively there are two key conventions: 87 which Canada has ratified and 98 which Canada has not ratified. Convention 87 deals primarily with the right to organize and 98 with the right to bargain collectively. Since Canada has not ratified Convention 98 the Committee of Experts has no mandate to examine Canada's conduct with respect to that Convention.

However, all state members of the ILO also have constitutional responsibilities to respect and promote freedom of association. As Rubin (2005, p 5) notes: "concerning Freedom of Association, a special procedure was adopted from 1951 onwards to give effect to the principles relating to that subject. Both the procedure and the principles, as subsequently elaborated, have come to be

accepted as binding on Member States of the ILO, and their constituents, as part of the obligations assumed upon membership of the organization.”

To hear complaints on that specific issue, whether or not the member state has ratified the relevant conventions, the ILO created the Committee on Freedom of Association. This committee is tripartite. It operates on the basis of consensus and, by long established custom, it coordinates its opinions with those of the Committee of Experts. The committee was formed precisely because the Committee of Experts could not address issues in countries that had not ratified the relevant conventions. Although initially the CFA’s role was simply to make recommendations to the ILO Governing Body, over time it has acquired a quasi-judicial status (ILO 1989, p. 5). The procedure that has emerged is one where the CFA’s conclusions in each case are endorsed by the Governing Body thereby making them binding on Member States (Rubin 2005, p 31).

The result of this somewhat complicated scheme is that over time, with the broad consent of the ILO’s Governing Body, the combined jurisprudence of the committees is broadly regarded as the global “law” regarding freedom of association and its emanation in the employment context as the right to organize and bargain collectively (Rubin 2005, p 50). Although Canada has not ratified Convention 98 the jurisprudence regarding that convention is applicable because of the coordination of the efforts of the two committees. It is that body of jurisprudence that it is necessary to consult in order to establish Canada’s international obligations as a member of the ILO⁸.

There is also one additional wrinkle to these developments. Subsequent to the coming forth of the Universal Declaration of Human Rights, the UN’s Economic and Social Committee (ECOSOC) received representations from two trade union organizations regarding freedom of association which were referred to the ILO with a view that the ILO would establish a process for dealing with such issues not only on its own behalf but on behalf of the UN as a whole. The initial result was the establishment of a Fact-Finding and Conciliation Commission on Freedom of Association. That body could only act with the consent of individual governments. It was to get around that constraint and thus fulfill the mandate it had been delegated by ECOSOC, that the ILO Governing Body set up the Committee on Freedom of Association. As a result, the CFA might well be considered not only as the body whose function is to establish the constitutional responsibilities of ILO members with regard to freedom of association, but also the body whose function is to work out the meaning of the universal human rights responsibilities of all nations with respect to the human right to organize and bargain collectively (Swepston 1998).

WHAT NEEDS TO BE DONE

From the perspective of CFA jurisprudence there are, at present, two major problems with Canadian industrial relations. In the public sector, consistent with constitutional and international human rights values, the large majority of working people are represented by independent unions that seek to co-determine their members' conditions of work with their government employers through collective bargaining. The major public sector problem is that over the past quarter of a century governments have increasingly engaged in unilateral imposition of conditions of work instead of engaging in good faith negotiations (Fudge 2005). Among the practices that offend international standards and, very likely the new constitutional standard, are contract stripping, contract imposition, back-to-work legislation when workers are on legal strike, restriction of bargainable issues and the denial of the right to strike to approximately half of public sector workers. With regard to the first three, there may be occasions when such action is necessary, such as during wartime, but the general international standard is that bargaining should be done in good faith by governments and that bargains once struck should be honoured and that strikes, if legally undertaken, must be respected (Rubin 2005).

With regard to issues, the basic international standard is that all issues that influence worker well-being should be negotiable (Rubin 2005). In short, in order for Canada to come into compliance with international norms governments should negotiate over the range of issues of concern to workers.

Whether or not the Supreme Court will require governments to conform precisely to the letter of international labour law remains to be seen. However, since it proclaimed in *BC Health Services* that Canadians should be able to rely on international standards that Canada has committed to, then that body of relevant law must be seen, at this point, to be the default.

The second major problem exists in the private sector. Less than 20% of Canadian private sector workers work under collectively negotiated conditions. Moreover, despite the Equator Principle noted above, employers commonly oppose efforts by workers to unionize and bargain collectively seeing that action to be inherently critical of managerial practice. Governments, moreover, although pledged to "promote" collective bargaining, take a neutral stance (Adams 2006).

If collective bargaining is to be embraced as a human right, as it should be, this culture will have to change radically. All of the actors will have to change their ways. Governments must abandon their neutrality and, as they are committed to do under the Declaration of Fundamental Principles and Rights at Work, actively promote collective bargaining with a view toward it being practiced by all who stand to benefit not only economically but also socially and politically. Employers must abandon their opposition to collective bargaining

and must instead “voluntarily” embrace it as the only status consistent with respect for human rights and charter values. They need to come to grips with the idea that unilateral imposition of terms compromises the dignity of those on whom the terms are imposed.

But unions need to change too. The term collective bargaining in Canada has come to be applied solely to that process that takes place between government-certified bargaining agents and the employers of those they represent. But, as the Supreme Court explicitly recognized when it stated that workers have a “procedural right to collective bargaining” rather than a right to the common format protected by Canadian statutes, that is only one sort of collective bargaining. It is for the most part a legitimate form consistent with international standards. But over the years it has, in many circumstances, acquired an adversarial and rigid character with which, surveys tell us, many employees do not feel comfortable (Adams 2006). In a truly human rights-compliant system employees should be able to establish a broader range of organizations and those organizations should be able to negotiate the sort of arrangements they want with the employer. This notion of non-statutory unionism, a term invented by the Supreme Court, is new and unfamiliar to Canadian unionists (Adams 2003). They worry that non-standard worker organizations will be weak and prone to be manipulated by employers. The concerns are real but they need not materialize. Examples exist of independent, non-statutory organizations that have been quite effective.

Good examples of the possibilities exist in the Canadian university sector. Historically both faculty and staff in most Canadian universities formed independent associations that developed tailor-made arrangements with their administrations. Many of those associations have at some point decided to become certified as legally-backed exclusive bargaining agents. Others, however, have continued as independent entities.

At McMaster University the Faculty Association considered certifying but decided against it in order to preserve its flexibility and collegial relationship with the administration. Like more typical unions it regularly negotiates wages with disputes settled by reference to final offer selection, but unlike certified bargaining agents there is no single collective agreement. Grievances are settled according to an independent process mutually acceptable to the university and the association that has binding effect but there are no professional arbitrators involved (see Adams 2006).

The staff also formed an association at McMaster. It originally had a tailor-made relationship with the university like the Faculty Association. Over time, however, it became dissatisfied with that relationship and it certified as an exclusive but independent bargaining agent. Later the association decided that it might be more effective as an affiliate of an established union and it invited

several mainstream unions to make a pitch. The result was that it affiliated with the Canadian Auto Workers.

The experience in the university sector holds important lessons for mainstream unions in an era when collective bargaining is emerging as a constitutional and human right.

In the university sector, independent associations were only able to form and develop collective relationships with their administrations because university administrators accepted them as a legitimate part of institutional governance. A major challenge in Canada is to foster in the private sector a culture with regard to employee representation much like the one that existed historically in the university sector. That will not be easy. Customs that allow business legitimately to operate union-free have become deeply ingrained in the Canadian psyche. But business was made to accept, at least at the formal level, employment equity and the developments reviewed above have yielded resources that if employed creatively by a determined labour movement have at least reasonable prospects to produce similar results with respect to collective bargaining.

Survey evidence indicates that many employees prefer informal non-statutory collective representation over certified exclusive agency (Adams 2006). The case is there to be made that the socially responsible employer must voluntarily recognize and bargain in good faith with representatives freely chosen by the relevant employees even if those employees choose to negotiate outside the confines of statutory requirements.

If Canada is to truly become a nation in which collective bargaining is honoured as a human right, not only rhetorically but also on the ground, creating conditions that allow them to act on that preference is critical.

The experience in the university sector also suggests that independent, non-statutory unionism need not be the final destination in the journey. The faculty at McMaster are satisfied, at this point, with the so-called "McMaster Model." But faculty at several other Canadian universities grew dissatisfied over time with their unique arrangements and decided to opt for full certification. As it did at McMaster, similar movement has occurred on the staff side.

These developments suggest that, although the encouragement of independent, non-statutory unionism may not benefit mainline unions immediately, in the long run it is much easier to convert an already organized association into a certified union than it is to organize disorganized workers from scratch.

In addition to governments, unions and employers, human rights organizations and organizations promoting corporate social responsibility need to support and proselytize the human rights status of collective bargaining. To date in Canada no general human rights organization has taken a strong principled stand like that of Human Rights Watch in the US. Such influential

organizations as Amnesty International and Canadian Civil Liberties Association have largely ignored the large human rights gap in Canadian employment relations. While organizations like the Maquila Solidarity Network and Rights and Democracy do concern themselves with labour rights in developing countries, they largely ignore the situation at home.

While global frameworks such as the Equator Principles and the UN's Global Compact clearly indicate that the socially responsible corporation must respect the right of employees to organize and bargain collectively and not dissuade employees from exercising those rights, Canadian Business for Social Responsibility – the leading Canadian CSR advocate – makes no mention of collective bargaining in its "[Good Company Guidelines](#)". Instead it implicitly assumes that the "Good Company" will be dealing individually with employees.

Incongruously, corporations that actively oppose unionization are not uncommonly listed among the best organizations in which to work. Wal-Mart, for example, a corporation notorious for its aggressive opposition to unionization and collective bargaining (Adams 2005), was recently designated by the *Globe and Mail* to be one of Canada's "[50 Best Employers](#)."

In the private sector the right to strike, which the ILO considers to be an essential element of the right to bargain collectively, needs to be extended (Hodges-Aeberhard and Odero De Rios, 1987). According to the international standards, a protected right to strike should be available generally but, at present, it is available only to certified exclusive bargaining agents.⁹ Employees not so represented exercise their human right to strike under the near certainty of employer retaliation. From a human rights perspective it is highly doubtful that effective denial of the right to strike to workers who prefer to organize in flexible, non-statutory formats meets international human rights standards.

One practice dear to unions may have to change. Mandatory union membership – the union shop – clearly offends the basic principles of freedom of association (Mitchnick 1993). On the other hand, the primary reason why unions negotiate such clauses is to ensure that they receive the income they need to carry out their duties effectively. Because employers and in some cases employees oppose mandatory unionism, the Rand Formula has become a familiar compromise. Under that formula, employees need not become union members but must pay union dues. Some employers may attempt to have the Supreme Court nullify even this arrangement. But they are unlikely to be successful since the formula is almost certainly compliant with international standards and the Supreme Court has said that it will, generally, defer to those standards. Moreover, in its *Advance Cutting and Coring* decision, although it found a Quebec law requiring workers in the construction industry to join one of several designated unions unconstitutional, it nevertheless permitted the law to stand as an exception justifiable in a democratic society (SCC 2001).

PRACTICAL STEPS

One may foresee a few different ways for this issue to be played out. Individual unions or employers might file court cases in an uncoordinated way in hope of decisions that will improve their particular situations. That appears to be what is happening so far.¹⁰ A year after the decision neither the Canadian Labour Congress nor any of the provincial labour federations has formulated a general strategy with regard to the constitutional right to bargain collectively. Should that situation continue the result will be piecemeal changes in industrial relations that will likely create a lot of uncertainty and possibly chaos. It is not the most sensible course of action.¹¹

A second scenario would be for Canadian governments to thoroughly review their labour legislation and policies with a view toward bringing them into compliance with the international human rights norms on which the Supreme Court says Canadian workers ought to be able to rely¹². The problem with that strategy is that there are a myriad of possible legislative and policy approaches that would comply with those standards and, without doubt, some of those approaches – many perhaps – would result in strong opposition from either business or labour. At this point nearly all Canadian governments appear to be maintaining the status quo while waiting for the courts to further clarify what they must change.

Practically and pragmatically perhaps the best step would be for Canadian governments to put in motion a two part strategy. In the public sector they might organize a labour policy review process in which all of the relevant unions would be invited to participate. It would also be prudent to invite employees not now organized to form associations for the purpose of participating in the review. The objective would be to come to a consensus on an approach, consistent with international norms, acceptable to all. If the parties were to reach agreement via such a “Social Dialogue” almost certainly the Supreme Court would defer to it.

In the private sector governments could challenge labour and business to engage in a parallel exercise. The mandate should be to develop an approach promising universal or near universal collective representation consistent with international norms but not necessarily in the format dictated by currently existing statutes.

Among the proposals that might be placed on the bargaining table are the following:

1. An acceptance by management (either voluntarily or by statutory requirement) that it has a responsibility to conform to the Equator Principle that employers not “discourage workers from organizing and bargaining collectively” but instead accept the responsibility to recognize

and negotiate in good faith with independent worker representatives. There are a wide range of formats through which such negotiations might take place - from our current certified agent arrangements to less formal, tailor-made, negotiated arrangements such as those in the university sector mentioned above. Experience in other countries at the same level of economic and political development as Canada provides a storehouse of options from which to choose.

2. Establishment of works councils composed of elected representatives with a statutory mandate to ensure effective implementation of all relevant social and labour legislation such as employment standards, and health and safety standards, to codetermine specified critical aspects of work such as training, employment equity, technological change, job sharing and the terms of plant shutdowns and to cooperate with management in improving the efficiency and competitiveness of the enterprise. Much of this agenda already exists in Canada (e.g. statutory health and safety committees) or has been proposed (Adams 1986, Weiler 1990). Broadly mandated works councils are a common feature of many economically advanced, democratic countries and thus there is a wealth of experience on which to draw in constructing a model appropriate for Canada.
3. A public commitment by government to seek tripartite consensus on all issues critical to the interests of labour and management as they arise. This process is what the ILO calls social dialogue. It is very common in other advanced industrial countries and thus, like works councils, there is much experience on which to draw.

These initiatives are technically feasible. All of them have been tested in countries that have political and social institutions that are not that dissimilar from those in Canada.

Their adoption would merely bring us in line with the norm in much of the liberal democratic world. The reality, however, is that in other countries governments were generally forced to move in response to crises and pressure from labour (see, e.g., Adams 1995). Unless Canadian labour is able to reach a consensus about the need to push requisite reform, we are likely to muddle through until a crisis compels action.

NOTES

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1. I am grateful to Lee Swepston, Mark Thompson, Joe Rose and an anonymous referee for comments on earlier versions of this paper. The final produce is, of course, entirely my responsibility.
 2. Paragraph s.2(d) of the Charter of Rights and Freedoms.
 3. For voting purposes, each labour and business delegate has one vote and each state has two votes.
 4. In Canada treaties are not self-executing. They must be implemented via specific legislation.

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5. Convention 87 was adopted on 9 July 1948, the UDHR on 10 December 1948 and Covention 98 on 1 July 1949.
 6. The relationship between the ILO and the emerging global human rights community has yet to be carefully documented. Much of what we report here is based on comments made by Lee Swepston to the conference on Labour Rights/Human Rights, Making the Connection and on personal correspondence with Swepston.
 7. Judy Fudge (2007) has argued that these developments may be theoretically understood as a response to the increasing inequality caused by neo-liberal philosophy and policies. The Court also grounded its decision on a particular understanding of Canadian labour history that Eric Tucker (2008) has brought into question. Tucker's critique deserves thoughtful consideration but he raises issues that are tangential to those discussed here.
 8. For a contrary interpretation of Canada's responsibilities under international law see Langille (2008) and for a critique of Langille's argument see Adams (2008).
 9. The strike right may legitimately be withheld from police, the military, certain civil servants ("agents of the public authority") and from workers performing "essential services in the strict sense of the term"). See Hodges-Aeberhard and Otero De Dios, 1987, pp. 550-551.
 10. For example, the Professional Institute of the Public Service has recently filed a suit challenging the federal government's legislative restriction of bargainable issues. See Roberts and Peirce 2008. In addition, the Canadian Police Association has filed a suit challenging the failure of the RCMP management to recognize and bargain with independent associations of RCMP officers.
 11. For a careful consideration of the limitations and pitfalls of total reliance on the courts see Fudge 2008.
 12. Political parties in Canada have been remarkably slow to formulate a position on this issue. As of mid-summer, 2008 the Green Party of Canada is the only one to call for Canada to fully comply with its international obligations.

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