

# DALHOUSIE LAW JOURNAL

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Volume 37

Number 2

Fall 2014

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*What does it mean to say that labour rights are human rights? What is the role of the courts in transforming a political manifesto into a legal claim? The answers to these questions are developed in three parts. The first places the rights to organize, to bargain collectively, and to strike in the social and political context in which they are claimed, contested, and recognized. The second part examines what it means to say that labour rights are human rights with an eye to teasing out the significance of this characterization. Third, the role of the courts when it comes to making the maxim that labour rights are human rights a legally enforceable right is assessed by focusing on what it means to say that courts should be neutral in interpreting the freedom of association contained in the Canadian Charter of Rights and Freedom in the labour context.*

*Qu'entend-on quand on dit que les droits du travail sont des droits de la personne? Quel est le rôle des tribunaux dans la transformation d'un manifeste politique en revendication légale? Les réponses à ces questions sont élaborées en trois parties. Dans la première, l'auteure place le droit d'association, le droit à la négociation collective et le droit de grève dans le contexte social et politique où ils sont revendiqués, contestés et reconnus. Dans la deuxième partie, elle se demande ce que signifie affirmation que les droits du travail sont des droits de la personne, afin d'en extraire tout le sens. Enfin, dans la troisième partie, elle examine le rôle des tribunaux lorsqu'il faut transformer cette affirmation en droit juridiquement exécutoire. À cette fin, elle se demande ce que veut dire, dans le contexte du droit du travail, la déclaration que les tribunaux doivent être neutres dans leur interprétation de la liberté d'association prévue dans la Charte canadienne des droits et libertés.*

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\* Kent Law School, University of Kent. This paper was initially presented as the Fourth Annual Innis Christie Lecture, Schulich School of Law, Dalhousie University on 3 October 2013. I would like to thank both the Faculty of Law and the Christie family for their invitation and for their hospitality.

*Introduction*

I. *Then and now*

II. *Labour rights as human rights*

III. *The role of courts: labour rights as legal claims*

*Conclusion*

*Introduction*

Innis Christie began his prolific career as a researcher and scholar by publishing a comparative study of the liabilities of strikers in the law of torts in England and Canada.<sup>1</sup> In what was his master's thesis, he examined whether or not, and, if so, the extent to which, the courts' elaboration of the common law took the legitimate interests of trade unionists into account when deciding upon liabilities and remedies for harms caused in the context of strikes. He was interested in seeing how judges deployed common law rules and reasoning where picketing was typically involved. By comparing Canada with England, he could assess the role of courts in two different labour law contexts. In Canada, promotional legislation supported collective bargaining, whereas in the U.K. the dominant approach, called collective *laissez-faire*, was not to enact statutory rights to support collective bargaining but, instead, to provide trade unions with immunity from common law actions brought by employers in the context of industrial disputes.

Innis adopted an historical and comparative approach to his account of the development of tort doctrine in the U.K. and Canada as it pertains to workers' and trade unions' collective industrial action. He began his study by noting how, from their origins in the late eighteenth century in England during the crucible of *laissez-faire* capitalism, trade unions, which are organizations that depend upon combined action, did not fit into a framework that emphasized individualism and competition. Under that system, he described how "workers were regarded as individual units of labour power which, in the capitalist system, were to be priced in accordance with the laws of supply and demand. When workers combined

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1. IM Christie, *The Liability of Strikers in the Law of Tort: A Comparative Study of the Law in England and Canada* (Kingston, ON: Queen's University, Industrial Relations Centre, 1967).

against an employer they interfered with those laws.”<sup>2</sup> He explained how these economic ideas were translated into legal rules by judges who were drawn from the ruling elite.

Innis concentrated on how, despite the widespread social acceptance of trade unions and legislative support for collective bargaining in the mid-1960s in Canada, courts continued to develop new common law heads of liability—new torts—for trade unions and their members who engaged in collective action. Referring specifically to the 1963 decision of the Ontario Court of Appeal in *Hersees of Woodstock v. Goldstein*,<sup>3</sup> which involved union members picketing a retailer in order to put pressure on a supplier to enter into a collective agreement, he complained that the “political maxim of a ‘right to trade’ had been elevated to the ‘status of a legal rule.’”<sup>4</sup> He dissected the legal niceties by which judges were able to ignore the interests of trade unions and in doing so revealed how economic and legal ideologies combined to restrict collective action by workers.

Innis’s solution to this bias or tilt in the common law was to call upon judges to be neutral in their treatment of employers and trade unions. These conflicts between employers and unions were best resolved by the parties in a framework to be established by legislatures and not in the courts.<sup>5</sup> In this prescription, he shared the view of his thesis supervisor, Bill Wedderburn, that in the battle between the legislature and the courts over who gets to define the scope of permissible collective trade union action, labour’s best bet was with politicians and not with judges.<sup>6</sup>

Like Innis, I am very interested in the process by which the courts transform a political maxim into a legal right. Where I differ from him is that I am intrigued by the “rights” which conflict with the right of employers to trade. These are the collective rights of labour to associate in trade unions, to bargain collectively, and to go on strike. In this paper, I will examine the slogan “labour rights are human rights” and consider the extent to which it has been turned into a legal claim. I am particularly keen on considering what it means to say that judges and courts should be neutral in this process.

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2. *Ibid* at 2.

3. (1963), 38 DLR (2nd) 449 (Ont CA). For a discussion of *Hersees* in its social and historical context, see Eric Tucker “*Hersees of Woodstock Ltd v Goldstein: A Small Town Case Makes it Big*” in Judy Fudge & Eric Tucker, eds, *Work on Trial: Canadian Labour Law Struggles* (Toronto: Irwin Law and the Osgoode Society for Canadian Legal History, 2010) 217.

4. Christie, *supra* note 1 at 188.

5. *Ibid* at 188, 194-195.

6. KW Wedderburn, *The Worker and the Law* (London: Pelican, 1965) and the review of that book by Christie, (1966) 44 Can Bar Rev 163.

Essentially I am interested in two questions. What does it mean to say that labour rights are human rights? What is the role of the courts in transforming a political manifesto into a legal claim?<sup>7</sup>

In order to answer these questions I will do three things. I will begin by contrasting the labour relations landscape and climate as it was in the mid-1960s when Innis Christie wrote and published his monograph with the situation as it is today, almost 50 years later. Rights are not timeless, but can only be understood in their context.<sup>8</sup> Thus, it is essential to historicize the labour rights to organize, to bargain collectively, and to strike, to place them into the social and political context in which they were claimed, contested, and recognized. The legal validity of a rights claim is dependent upon the social processes through which rights claims are fought for and institutionalized in law.<sup>9</sup> Second, I will examine what it means to say that labour rights are human rights. Here my concern is to tease out the significance of characterizing labour rights as human rights. Third, I will assess the role of the courts when it comes to making the maxim that labour rights are human rights a legally enforceable right by focusing on what it

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7. It will become clear in this paper that I am neither a legal positivist nor an adherent of natural law (even of the weak Lon Fuller variety). I do not believe that there exist “right” answers to legal questions, just answers that are more or less plausible in light of what are generally considered to be valid legal sources and forms of argument. I do not believe that there is an over-arching normative “narrative” to labour law in particular or liberal law in general. Instead, I believe that there is a limited universe of contested positions that vie for dominance at particular moments in time in specific places. Nor do I believe that there is an innate and immanent “legal” grammar that can be discerned and that will provide a “correct” answer to every legal question. While Lon Fuller’s thin version of natural law, which emphasizes the constraints of “legality,” is experiencing something akin to a revival, see, for example, Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart, 2012), legal theories are contentious, and there are several plausible accounts (including realist, positivist, pluralist, and constructivist accounts) on offer. It is methodologically suspect to defend a particular approach to interpreting a constitutional provision by asserting, and not justifying and defending, a legal theoretical position. It is equally unsound, although perhaps more persuasive, to use analogies (that legal anatomy is like human anatomy, for example) instead of arguments to establish a position. Thus, my position is very different from that endorsed by Brian Langille & Benjamin Oliphant, “The Legal Structure of Freedom of Association,” at 6-8 provided to me by the Dalhousie Law Journal, 23 September 2014. The version I was provided with differs in detail, but not substance, from the version available online: SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2355976](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2355976)>.

8. The approach to rights that I am adopting is expressed in Judy Fudge, “Making Claims for Migrant Workers: Human Rights and Citizenship” (2014) 18:1 *Citizenship Studies* 29. For a typology of different approaches to rights, see Marie-Bénédict Dembour, “What Are Human Rights? Four Schools of Thought” (2010) 32 *Hum Rts Q* 1.

9. In his review of Wedderburn’s *The Worker and the Law*, Innis (*supra* note 6 at 164) quoted Wedderburn’s admonition, “But technical law by itself is useless, at best an arid game played by keen minds in court rooms and academic ivory towers. To understand its significance we must look at its historical and social setting, we must question what are the values and policy judgments enshrined within the propositions of law....” I have taken this advice to heart.

means to say that courts should be neutral in interpreting the freedom of association contained in the *Canadian Charter of Rights and Freedom* in the labour context.

I. *Then and now*

Innis Christie published his first monograph, *The Liability of Strikers in the Law of Tort*, in 1967, which marked the dawning years of the golden age of industrial citizenship.<sup>10</sup> Industrial citizenship, which comprised the freedom of association, the right to representation and collective bargaining, and the right to strike, was the crowning achievement of industrial pluralism. The legal foundation for industrial citizenship is specific to each nation, since how its key components are institutionalized is shaped by the interaction of economic, political, and social forces over time.<sup>11</sup> In Canada, industrial citizenship took an industrial pluralist form,<sup>12</sup> and it was embodied in a particular model of collective bargaining legislation, called Wagner-style.<sup>13</sup> This model, which was developed in the U.S. in the 1930s and adopted in Canada in the 1940s, has three key components: exclusive trade union representation of workers in a defined constituency on the basis of a majority vote, the duty on employers to bargain in good faith with the union that had won exclusive bargaining rights, and the right to strike to determine the contents of collective agreements. The legislation marked a rupture from the individualism of the common law, although it did not replace the common law. Industrial pluralism was layered on top of the common law, which continued both to operate in tandem with the statutory regime, especially when it came to workers' collective action, and to influence the interpretation of the legislation.<sup>14</sup>

What is distinctive about this legislative model of freedom of association is the degree to which the law regulates the relations between the parties and the extent to which restrictions on the freedom to strike

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10. HWA Arthurs, "Developing Industrial Citizenship A Challenge for Canada's Second Century" (1967) 45:4 Can Bar Rev 786.

11. Bob Hepple & Bruno Veneziani, *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries* (Oxford and Portland: Hart, 2009).

12. For a succinct discussion of the difference between pluralist and corporatist forms of collective bargaining see Guy Mundlak, *Fading Corporatism: Israel's Labor Law and Industrial Relations* (Ithaca: ILR Press, 2007) at 13-15, 227-240.

13. The Wagner-model refers to collective bargaining that is patterned after the American National Labor Relations Act of 1935, 29 USC § 159-161; Judy Fudge & Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900 to 1948* (Don Mills, ON: Oxford University Press, 2001, republished University of Toronto Press, 2004).

14. Fudge & Tucker, *ibid.* The idea of separate zones of common law and collective bargaining fails to ignore how the former influenced and permeated the later.

were traded off for rights to bargaining and to strike.<sup>15</sup> While it worked well in the sectors for which it was designed—large employers in mass production and large resource industries—this model also created barriers that proved difficult for unions to overcome in order to organize sectors dominated by many small employers or the private service sector more generally.<sup>16</sup>

In the 1960s, about one in three workers was a member of a union.<sup>17</sup> But union membership was confined almost exclusively to the private sector, and the vast majority of members were men in primary blue-collar manufacturing, resource extraction, or transportation jobs. Civil servants were prohibited from joining unions in order to protect state sovereignty, and workers in the broader public sector—hospitals and schools for example—did not have the necessary legal support to make freedom of association real.

In 1966, the number of workers engaged in strikes peaked, and the upsurge in militancy had two effects.<sup>18</sup> First, it unleashed a third wave of unionization in Canada, which was fuelled by public sector workers. Second, governments across the country appointed several expert task forces to study the industrial conflict and advise on possible solutions. The federal Woods Task Force, for which Innis Christie co-wrote an important background study on unfair labour practices, diagnosed the cure to the problem of labour unrest as strengthening the institutions of industrial pluralism, especially the powers of labour boards.<sup>19</sup> The idea was to minimize the vestiges of the common law and the courts from the regulation of labour relations, and the judiciary was told to defer to the expertise of the boards. Employers' common law freedoms were restricted, although they were never completely displaced. There was widespread public as well as political support for trade unions and collective bargaining, and union membership spread in the 1970s, peaking in the early 1980s.<sup>20</sup>

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15. Judy Fudge & Eric Tucker, "The Freedom to Strike: A Brief Legal History" (2010) 15 CLELJ 333.

16. Judy Fudge, "The Gendered Dimension of Labour Law: Why Women Need Inclusive Unionism and Broader-Based Bargaining" in Linda Briskin & Patricia McDermott, eds, *Women Challenging Unions* (Toronto: University of Toronto Press, 1993) 321.

17. Judy Fudge & Eric Tucker, "Pluralism or Fragmentation?: The Twentieth-Century Employment Law Regime in Canada," (2000) 46 Labour/Le Travail 251 at 282.

18. *Ibid* at 283.

19. Canada, Task Force on Labour Relations, (HD Woods, Commissioner) (Ottawa: Privy Council Office, 1968); Innis Christie & Morely Gorsky, *Unfair Labour Practices: An Explanation of the Efficiency of the Law of Unfair Labour Practices in Canada*, report prepared for the Task Force on Labour Relations (Ottawa: Privy Council Office, 1968).

20. Fudge & Tucker, *supra* note 17.

Almost fifty years later, while about one-third of Canadian workers are union members, there has been a remarkable shift in membership from the private to public sector. While private-sector membership has fallen, public-sector membership has climbed. In 2012, only 17.7 per cent of private sector employees were union members, in contrast to 73 per cent union membership in the public sector. Moreover, Statistics Canada calculates that person-days lost to strikes and lockouts declined by almost 87 per cent between 1980 and 2010.<sup>21</sup>

Opinion polls indicate that most Canadians regard unions as “self-interested and that gains for organized labour are a detriment to the economy as a whole.”<sup>22</sup> Since the economic crisis began in 2008, public sector unions have become a target for criticism and legislative restriction.<sup>23</sup> Republican politicians in some heavily indebted states in the United States targeted unions as the cause of their problems. In Wisconsin, much-publicized and greatly contested legislation stripped most public union workers of the right to collectively bargain over everything except wages. Ohio went even further in interfering with workers’ rights by making it illegal for public sector workers to strike.<sup>24</sup> While such a full-scale attack on public sector unions has not yet occurred in Canada, the federal government imposed

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21. Richard Littlemore, “Do unions have a future?” *The Globe and Mail* (27 March 2013), online: *The Globe and Mail* <<http://www.theglobeandmail.com/report-on-business/rob-magazine/do-unions-have-a-future/article10310754/?page=all>>; Althia Raj, “Conservative War On Unions: As Public Service Job Cuts Mount, Tories Distract, Destabilize Critics” (26 September 2012) *Huffington Post*, online: *Huffington Post* <[http://www.huffingtonpost.ca/2012/09/25/conservative-union-bills-canada\\_n\\_1910888.html](http://www.huffingtonpost.ca/2012/09/25/conservative-union-bills-canada_n_1910888.html)>.

22. Mario Canseco, a vice president with Angus Reid Public Opinion, said most Canadians surveyed in May 2012 believed unions wield too much power, a sentiment that crossed all age groups and gender. Forty-nine per cent of those surveyed said unions had too much influence, while 26 per cent felt unions had just the right amount of influence and 16 per cent said unions had not enough influence, according to the poll of 1,003 Canadians, with a margin of error of plus or minus 3.1 percentage points, see Raj, *supra* note 21.

23. “The battle ahead: Confronting the public-sector unions” *The Economist* (6 January 2011), online: *The Economist* <[www.economist.com/blogs/multimedia/2011/01/confronting\\_public-sector\\_unions](http://www.economist.com/blogs/multimedia/2011/01/confronting_public-sector_unions)>. The Economist singled Canada out for attention; in the Canadian public sector union density has increased from 12 per cent in 1960 to more than 70 per cent today. “(Government) workers of the world unite!” *The Economist* (6 January 2011), online: *The Economist* <[www.economist.com/node/17849199](http://www.economist.com/node/17849199)>.

24. Anne Marie Lofaso, “In Defense of Public-Sector Unions” (2011) 28 *Hofstra Lab & Emp LJ* 301. See also the special issue “Public Sector Collective Bargaining Under Challenge Symposium” (2011) 28 *Hofstra Lab & Emp LJ* 253; Paul M Secunda, “The Perceptible Disconnect between the Global Economic Crisis and the Wisconsin Public Sector Labor Dispute of 2011,” 27 November 2011, online: SSRN <[http://ssrn.com/abstract=>The Globe and Mail \(29 October 2011\) A8. In November 2011, Ohio voters resoundingly rejected this legislation. Sabrina Tavernise, “Ohio Turns Back a Law Limiting Unions’ Rights” \*New York Times\* \(8 November 2011\), online: \*New York Times\* <\[www.nytimes.com/2011/11/09/us/politics/ohio-turns-back-a-law-limiting-unions-rights.html\]\(http://www.nytimes.com/2011/11/09/us/politics/ohio-turns-back-a-law-limiting-unions-rights.html\)>.](http://ssrn.com/abstract=>)

wage restraints on its public sector workers and, on two occasions in 2011, it introduced legislation prohibiting workers employed by private-sector airlines and the crown-owned postal service from striking and imposed interest arbitration to settle the disputes.<sup>25</sup>

The new economy has produced distinctive patterns of winners and losers when it comes to the types of jobs, wages, benefits, and working hours that the labour market generates.<sup>26</sup> One of the consequences of deregulation has been to downgrade the norm for new jobs for all labour force participants.<sup>27</sup> Precarious work and inequality undermine the sustainability of households and create fissures and tensions in the social fabric, which, in turn, undermines social cohesion. The decline in union density is linked to increasing labour market inequality in Canada and other countries.<sup>28</sup> Our old labour laws do not fit the new reality of the private sector—small workplaces, different groups of workers, and a variety of different types of jobs.<sup>29</sup>

If unions and collective bargaining are simply confined to the public sector, the political support for unions, collective bargaining and strikes will continue to evaporate, and governments will continue to be free either to let legal support for freedom of association at work atrophy or to outright revoke it.

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25. In June 2011, the federal government announced that it would legislate an end to a sixteen-hour private sector strike between Air Canada and its employees. The government introduced Bill C-5, *Continuing Air Services for Passengers Act*, 1st sess, 41st Parl, 2011 for First Reading on 16 June 2011. However, the parties negotiated a settlement before the legislation was passed. Only four days later, it introduced legislation, Bill C-6, *Restoring Mail Delivery for Canadians Act*, SC 2011, c 17, forcing locked-out postal workers back to work. Bill C-6 was introduced for First Reading on 20 June 2011 and Royal Assent was received on 26 June 2011. See the discussion in Derek Fudge, "Labour Rights: A Democratic Counterweight to Growing Income Inequality in Canada," in Fay Faraday, Judy Fudge & Eric Tucker, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin, 2012) 234.

26. Judy Fudge, "The New Workplace: Surveying the Landscape," (2009) 33:1 Man LJ 131.

27. *Ibid.*

28. Michael Lynk, "Labour Law and the New Inequality" (2009) 59 UNBLJ 14; Lane Kenworthy & Jonas Pontusson, "Rising Inequality and the Politics of Redistribution in Affluent Countries" (2005) 3:3 Perspectives on Politics 449.

29. See Cynthia Cranford, Judy Fudge, Eric Tucker & Leah Vosko, *Self-Employed Workers Organize: Law, Policy, and Unions* (Montreal-Kingston: McGill-Queen's Press, 2005). I have discussed this problem in "Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation" (2006) 44 Osgoode Hall LJ 609; "After Industrial Citizenship: Market Citizenship or Citizenship at Work?" (2005) 60 Relations Industrielles 631; "Beyond Vulnerable Workers? Towards a New Standard Employment Relationship" (2005) 12 CLELJ 145; "Feminization and Fragmentation: The Challenge of Equity for Labour Market Policy" in Janine Brodie, ed, *Women and Public Policy in Canada* (Toronto: HBJ, 1995) 57.

## II. *Labour rights as human rights*

In this climate, it is understandable why trade unions argue that labour rights are human rights, and, therefore, not subject, without review, to the winds of political appeal and popular support. A core component of the project to recast labour standards as international human rights is to elevate their moral appeal. Accompanying this shift in discourse is the change in institutions for protecting labour rights from the traditional vehicles such as the welfare state, social democratic parties, and trade unions to legal instruments like constitutions and the courts.<sup>30</sup>

In Canada, the campaign to have labour rights recognized as human rights operates at two levels—the international and the national, which have become linked through constitutional litigation.<sup>31</sup>

At the international level, since 1919 the International Labour Organization has treated workers' freedom to associate in trade unions as a fundamental component of social justice.<sup>32</sup> After World War II, freedom of association was also protected in the *Universal Declaration of Human Rights*. The rights contained in the Declaration were divided into two covenants, the *International Covenant on Civil and Political Rights*, which contained individual rights against the state, and the *International Covenant for Social, Economic and Cultural Rights*, whose rights require positive state action.<sup>33</sup> Although the two covenants have been seen as protecting different generations or types of rights (civil and political, on the one hand, and economic and social on the other), freedom of association is protected in both instruments.<sup>34</sup> In 1998, the International Labour Conference issued the Declaration on Fundamental Principles and Rights at Work, which identifies freedom of association and the effective recognition of collective

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30. Judy Fudge, "Brave New Words: Labour, the Courts and The Canadian Charter of Rights and Freedoms," (2010) 28 Windsor YB Access Just 23.

31. *Ibid* at 35.

32. Gerry Rodgers, Eddy Lee, Lee Swepston & Jasmien Van Daele, *The International Labour Organization and the Quest for Social Justice, 1919–2009* (Geneva: International Labour Organization, 2009) at Chapter 1. See also Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Oxford: Hart, 2013).

33. Traditionally, civil and political rights are considered to be justiciable, whereas social and economic rights are regarded as programmatic and subject to progressive implementation.

34. *International Covenant on Civil and Political Rights*, GA Res 2200A (XX1), 21 UN GAOR, (Supp No 16) 52, UN Doc A/6316, 99 UNTS 171 (16 December 1966); *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A (XX1), 21 UN GAOR, (Supp No 16) 52, UN Doc A/6316, 993 UNTS 3 (16 December 1966). The only labour rights specifically protected within the *Covenant on Civil and Political Rights* are the protection against slavery and servitude and the freedom of association (Articles 8 and 22). By contrast, most labour rights—such as the right to work and decent remuneration—were included within the economic and social rights covenant (Articles 6, 7 and 8).

bargaining as core human rights. At the international level it is clear that labour rights are considered to be human rights.<sup>35</sup>

Beginning in the early 1980s, when industrial citizenship first came under concerted attack, Canadian unions have lodged complaints at the ILO against governments across Canada for violating their freedom of association.<sup>36</sup> Despite the success of the union complaints,<sup>37</sup> the observations by ILO supervisory bodies that Canada is in violation of its commitment to protect workers' freedom of association have had little direct effect of the behaviour of Canadian governments. Because ILO observations are soft law, governments can ignore them with impunity.

It is, however, possible to give international instruments and observations indirect legal effect by invoking them before constitutional courts in order to assist judges in interpreting fundamental rights in constitutional instruments that provide individuals with access to judicial review of state and private action. Freedom of association is a central component of many constitutions that protect civil and political rights.

How should Canadian courts treat international human and labour rights in interpreting similar provisions in the constitution? What is the normative justification for courts to refer to these legal norms? When a court relies on international instruments to interpret a constitutional right is it stepping on the toes of the executive, which has the exclusive power to ratify treaties? These are important questions, which I cannot delve into now.<sup>38</sup> However, the Supreme Court of Canada has provided an answer to the first; it stated that the "Charter should be presumed to provide at least

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35. Judy Fudge, "Labour Rights as Human Rights: Social Justice for Workers in Globalizing World," Faculty of Law Research Day, University of Law, Lund University, 4 June 2014, available from the author.

36. Judy Fudge, "The New Discourse of Labour Rights: From Social to Fundamental Rights?" (2007) 29:1 *Comp Lab L & Pol'y J* 29.

37. Derek Fudge, *Collective Bargaining in Canada: Human Right or Canadian Illusion?* 2nd revised ed (Halifax: Fernwood Publishing, 2007).

38. For a discussion of some of these issues, see Patrick Macklem, "The International Constitution" in Judy Fudge & Eric Tucker, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin, 2012) 261.

as great a level of protection as is found in human rights documents that Canada has ratified.”<sup>39</sup>

Taking this proposition as his baseline, Kevin Banks argues that relevant ILO instruments and their interpretation create a human rights framework for the right to collective bargaining that imposes no particular model of collective bargaining. In effect, this framework deploys “a set of largely negative obligations of non-interference and non-impairment, supplemented by limited obligations to prevent and provide remedies for interference by private actors.”<sup>40</sup>

In Canada, the Supreme Court has on several occasions been asked to interpret the freedom of association contained in the *Canadian Charter of Rights and Freedoms* as protecting labour rights to bargain collectively and to strike. Instead of reviewing the court’s answers,<sup>41</sup> what I want to focus on in my concluding section is what the role of the court should be in giving the claim that labour rights are human rights legal effect.

### III. *The role of courts: labour rights as legal claims*

In order to answer this question, we first need to be clear about what is at stake when constitutional courts like the Supreme Court of Canada are asked to interpret the freedom of association to include labour rights and why it is so contentious.

From the perspective of a constitutional court there are two problems with labour rights. First, they trouble the boundary between civil and political rights on the one hand and social and economic on the other.<sup>42</sup> In common law jurisdictions, simply prohibiting states from interfering with workers’ association is not enough. Meaningful freedom of association for working people has required the state to impose restrictions on freedom

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39. In their judgment, *Health Services and Support—Facilities Subsector Bargaining Association v British Columbia* [2007] 2 SCR 391 at para 70, McLachlin CJ and LeBel J state that Canada’s international obligations can assist courts charged with interpreting *Charter* guarantees, and they invoke Dickson CJ’s observation in the *Alberta Reference* that the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified: *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 [*Alberta Reference*]. The former Chief Justice made this observation in the course of a dissenting judgment in which he relied on Canada’s international obligations to support his interpretation of freedom of association as including the right to strike. In the twenty years since it was written, Dickson CJ’s dissent has taken on iconic status in Canadian labour law and has clearly displaced the majority’s reasoning in the Labour Trilogy as the dominant approach to s 2(d) of the *Charter*.

40. Kevin Banks, “The Role and Promise of International Law in Canada’s New Labour Law Constitutionalism” (2012) 16 CLELJ 233 at 271-272.

41. For a review of the decisions see Judy Fudge, “Freedom of Association” in Stéphane Beaulac & Errol Mendes, eds, *Canadian Charter of Rights and Freedoms*, 5th ed (Toronto: LexisNexis, 2013) 527.

42. Fudge, “The New Discourse of Labour Rights,” *supra* note 36.

of private parties, employers, either by granting trade unions and their members immunities from liability (as was the case in the U.K.) or granting them statutory rights (the approach in Canada).<sup>43</sup> Second, labour rights, unlike other rights, have an inherently collective dimension.<sup>44</sup>

These two features of labour rights cause difficulties for judges when it comes to interpreting freedom of association under the *Charter*. Why should judges tell elected officials that they are under an obligation to promote the freedoms of one group, workers, over those of another group, employers? Why should they restrict the freedoms of individuals in order to support collective action?

Some judges and commentators argue that there is no constitutional justification for judges to do either of these two things.<sup>45</sup> They claim that as a matter of constitutional interpretation judges should be neutral when it comes to the treatment of all associations, regardless of whether they are trade unions, gun clubs, golf clubs, book clubs, or choirs. They have also argued that judges should not provide greater protection for collectives than for individuals.

But what does it mean to say that courts should be neutral when it comes to interpreting the freedom of association in the labour context?<sup>46</sup> It is possible to distinguish between two senses in which the word neutrality is used. The first sense is the way in which Innis Christie used it in his 1967 book; judges should not let their class biases influence their interpretation of the common law in order to impose new heads of liability on striking workers.<sup>47</sup> Neutrality is being used to refer to an attitude to judging that requires adjudicators to treat social activities and actors impartially and not to impose their own values. It is obvious that judges should be neutral in this sense.

However, the second sense of neutrality is more controversial. According to this version, judges should avoid assessing and weighing

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43. As Otto Kahn Freund noted, when we talk about freedom of association in the labour relations context, “we really mean two different things: the absence of prohibitions or restraints, and the presence of positive guarantees for its exercise.” Cited in Lord Wedderburn, “Freedom of Association or Right to Organise? The Common Law and International Sources” in Lord Wedderburn, ed, *Employment Rights in Britain and Europe* (London: Lawrence & Wishart, 1991) 142.

44. Regardless of whether or not one regards collective bargaining as vesting only in individuals or in individuals and groups, it clearly can only be exercised in concert with others. As such, it is inherently collective. See Fudge, “Brave New Words,” *supra* note 30.

45. See for example, Rothstein J, *Ontario (Attorney General) v Fraser*, [2011] 2 SCR 3 at paras 165, 184-215; Brian Langille, “The Freedom of Association Mess: How We Got into It and How We Can Get out of It” (2009) 54 McGill LJ 177.

46. See, for example, McIntyre J in *Alberta Reference*, *supra* note 39 at para 407; Rothstein J in *Fraser*, *supra* note 43 at para 165; Langille, *supra* note 45; Langille & Oliphant, *supra* note 7.

47. Christie, *The Liability of Strikers in the Law of Tort*, *supra* note 1 at 2-3 and 193.

the respective merits of associational activities and stay above the fray of identifying social goods. One popular method for avoiding these value judgments is to define the scope of freedom of association to include the protection of all activities pursued in association that a person could lawfully pursue as an individual.<sup>48</sup>

While this approach is called a “neutral” approach, it is better understood as equal protection, parallel equality, or a symmetrical treatment approach.<sup>49</sup> The idea is to treat all activities that an individual can perform lawfully as *prima facie* protected by the *Charter* when they are performed in association. This approach has been praised because it avoids “gassing around in the abstract about the true meaning of ‘freedom of association’ (invoking history, international law, *Charter* values, and so on).”<sup>50</sup> Another reason offered for taking this tack is that it does not give groups greater legal protection than individuals.<sup>51</sup> Two of the most vocal Canadian champions of symmetrical approach, Brian Langille and Benjamin Oliphant, explicitly argue that courts should not impose a positive obligation on the state to change the background rules of the common law that enable employers to dismiss or in other ways penalize workers who engage in these activities.<sup>52</sup> They claim that because the common law applies to everyone equally courts should not interfere with the background legal rules simply to promote particular interests or values.<sup>53</sup> Of course, this latter assertion assumes that the common law of employment is a manifestation of the “virtue” of formal equality and, in so doing, ignores how master and servant law, which was based on legal inequality, infused the common law of employment and continues to do

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48. *Alberta Reference*, *supra* note 39 at para 407; Rothstein J in *Fraser*, *supra* note 45, para 165; Langille, *supra* note 45.

49. Benjamin Oliphant, “Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard under 2(d) & Saving the Freedom to Strike” (2012) 70 U T Fac L Rev 36.

50. Brian Langille, “What is a Strike?” (2009–2010) 15 CLEJ 355 at 372.

51. Oliphant, *supra* note 49; McIntyre, J, *Alberta Reference*, *supra* note 39 at para 407.

52. Brian Langille, “Why the Right-Freedom Distinction Matters to Labour Lawyers,” (2011) 34 Dal LJ 143. In footnote 17 at page 149 of this article, Langille is agnostic on “the basic justification for this background set of rules,” but, instead, “merely appeal[s] to what all lawyers know—that our rules are ones which we all have equally (i.e. are formally equal in their application). This is their great strength and, as all labour lawyers know, their weakness as well.” In their most recent version of their “The Legal Structure of Freedom of Association,” *supra* note 7, Langille & Oliphant have moderated their view about whether, and when, courts should interpret constitutions in order to disrupt the background rules of the common law. See their discussion at pp 29–31.

53. Langille, *supra* note 52 at 158.

so through the duty to obey and the damage limitation rule of reasonable notice.<sup>54</sup>

What kinds of protections would this approach to freedom of association offer in the labour context? Essentially, it would prohibit governments from directly interfering with employees' freedom to form trade unions, bargain collectively, and withdraw services (strike).<sup>55</sup> However, it would leave in place all the common law rules that effectively vitiated freedom of association, as judges would be under no obligation to put positive obligations on governments to change these background rules. Legislatures could revert to the legal order—the common law—that prevailed before industrial citizenship without being subject to constitutional challenge.<sup>56</sup>

Is this approach to the interpretation of freedom of association conceptually or normatively required as a matter of constitutional interpretation?<sup>57</sup>

While an approach to freedom of association that insists on symmetry in the treatment of individuals and groups is sufficient for most cases, for example those involving gun clubs, golf clubs, and choirs, it is of no use when there is simply no individual analogue to the collective activity. Sheldon Leader explains, “there are domains of the law which can impede strikes and seem impervious to the symmetry principle because they do not recognize an individual right on which that principle

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54. Alan Fox, *History and Heritage: The Social Origins of the British Industrial Relations System* (Winchester, Mass: Allen and Unwin, 1985); Mark Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003).

55. *Ibid* at 163-164.

56. Langille seems to primarily be concerned with state interference with individual freedom. He is not as concerned with private interference with individual freedom, which requires positive state obligations, because he accepts the background distribution of common law rules because they treat every individual equally. The problem with this approach is that it has a very formal (and thin) conception of equality. See *ibid* at 163-164.

57. Nor is such a deferential approach required by accepted notions of institutional competency or legitimacy, although I will leave the institutional discussion to another occasion. However, for a discussion of these issues, see Paul Cavaluzzo, “The Fraser Case: A Wrong Turn in a Fog of Judicial Deference,” in Fay Faraday, Judy Fudge & Eric Tucker, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin, 2012) 156. Moreover, Langille & Oliphant, *supra* note 7 at 20-24, have a very unusual understanding of what constitutional remedies seem to require. According to their understanding of the requirements of legality, judges who venture to interpret the constitutional protection of freedom of association so as to require states to enact legislation must provide what is effectively a complete collective bargaining regime. They seem to ignore how the proportionality justification in section 1 of the *Charter* allows courts a great deal of flexibility. They also seem to be unaware of how courts interpret the *Charter* outside of the labour law context. Their brief discussion of s 15 at pp 25-27 suggests that because they are willing to look at constitutional interpretation exclusively in the labour law context they are not attentive to the problems of advocating a purely formal approach to equality, albeit one that would broaden the analogous grounds to include occupation.

could gain a purchase.”<sup>58</sup> For example, an individual employee who leaves employment without notice will be deemed to have terminated his contractual relationship. Should workers who collectively withdraw their labour in order to negotiate better terms also run this risk of having their employment terminated? Striking workers do not want to be treated the same as individual employees; what they need is a special liberty immunizing their concerted action from contractual actions by employers. In the labour context, it is important to depart from the symmetry principle if workers are to be entitled to exercise their freedom of association against the background of common law background rules that render collective worker action unlawful. Insisting on an individual analogue in order to protect collective action leads either to ignoring those situations in which there is no analogy or to constructing bad analogies.<sup>59</sup>

What about the normative argument in support of the individual symmetry approach? Why should judges be constrained from requiring governments to change some of the background common law rules? Here the question is whether employment is an area in which it is “legitimate

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58. Sheldon Leader, “Can You Derive a Right to Strike from the Right to Freedom of Association?” (2009–2010) 15 Can Lab & Emp LJ 271 at 281.

59. These bad analogies include the right to strike and the right to play golf (*Alberta Reference*, *supra* note 39, paras 404–405) and the right to collective bargaining with the right to sing in a choir or to be a member of a book club. In *Fraser*, *supra* note 45 at para 184, Rothstein J stated:

there may be qualitative differences between individuals acting alone and individuals acting in concert. Professor Langille refers to the example of choir singing. See B Langille, “The Freedom of Association Mess: How We Got into It and How We Can Get out of It” (2009) 54 McGill LJ 177 at 185. While he ultimately believes that the choir metaphor should not apply to determine the scope of s 2(d) rights, in my opinion the metaphor is apt in explaining the limited type of qualitatively different group activities that maybe protected by s 2(d).

Later in *Fraser*, *supra* note 45 at paras 211 and 212, Rothstein J went on to state that

[i]n an article critical of the Health Services decision, Professor Langille describes as “chilling” the suggestion that the Court should weigh the harm of banning book clubs as compared to banning collective bargaining and relegat[e] the former to a lower level of concern. Like Professor Langille, I question whether the approach advocated in *Health Services* accords with a purposive interpretation of *Charter* rights. In *Health Services*, the majority appeared to be inquiring into the purpose of an activity to see if it merits constitutional protection. This approach requires judges to select among a range of objects and activities on the basis of their general “importance” to society rather than their connection to the freedom to associate. It is inappropriate for the Court to engage in this sort of inquiry in defining the scope of a constitutional right.

These analogies are bad because by abstracting from the social context they obscure power relations that are historically dependent. It is a style of reasoning that tends to predominate in analytic philosophy and analytical jurisprudence, and one that is typically closely aligned with positions that simply uphold the status quo. This type of reasoning appeals to litigators and debaters as it does not require a deep knowledge of a subject, but rather, the use of rhetorical tropes as persuasive devices. Political economy and sociological approaches to understanding and justifying laws, such as the type that appeal to me, tend to avoid decontextualized analogies and argue on the basis of historical and sociological evidence.

for the freedom of one group to be used to limit the freedom of another in order to cope with an imbalance of power”<sup>60</sup>

The answer to this normative question depends upon an assessment of the evidence of what trade unions do: do they contribute to social justice or are they simply vehicles for narrow self-interest and rent-seeking behaviour? If research and evidence supports the claim that trade unions promote social justice—for example, advance substantive equality, promote democracy by representing important perspectives and interests, and promote compliance with employment and labour law—then this is a good reason for a liberal state to promote labour rights. While “such a policy would indeed be non-neutral in its impact on the associational sphere...it would not violate the core liberal commitment to neutrality of justification”<sup>61</sup> because it would be promoting the conception of justice that is at the foundation of a liberal system. Protecting workers’ freedom of association by restricting employers’ common law freedoms does not violate the liberal commitment to neutrality in justification. It is important for judges to interpret the *Charter* in accordance with the values—autonomy, equality, democracy, and dignity—that it is designed to promote. Although these values may be contentious and difficult to define, these challenges do not mean that invoking these values to support a specific interpretation of the freedom of association is simply “gassing around.”

Any interpretation of the freedom of association that brackets out the common law rules ignores what Innis Christie and other labour law scholars have so clearly demonstrated—that they interfere with freedom of association at work.<sup>62</sup> A purely negative interpretation of freedom of association does not address the problem that workers’ freedom of association is undermined by employers’ exercise of common law powers. Civil and political rights do not always need to respect the boundary rule that they not interfere with competing liberties of others; in some situations they are allowed to cross that boundary.<sup>63</sup> Freedom of association for working people is precisely such an example. Employment is a prime example of an area in which it is “legitimate for the freedom of one group to be used to limit the freedom of another in order to cope

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60. Leader, *supra* note 58 at 285.

61. Stuart White, “Liberal Neutrality and Trade Unions” (2011–2012) 33 *Comp Lab L & Pol’y J* 417 at 423.

62. Christie, *supra* note 1. Moreover, there are other heads of common law liability that have a particularly limiting impact of workers collective behaviour, such as inducement of breach of contract and conspiracy to injure. See AWR Carrothers, *Collective Bargaining Law in Canada* (Toronto: Butterworths, 1965).

63. Leader, *supra* note 58 at 285.

with an imbalance of power.”<sup>64</sup> In Canada, the background distribution of private law rules, which were developed by an appointed judiciary before the advent of universal suffrage and, therefore, robust democratic deliberation, interferes with internationally recognized human rights. Human rights, including the freedom of association and freedom from discrimination, which are essential to liberal democratic societies, require the state to interfere with the common law liberties of private actors in order to protect the human rights of others. Collective bargaining and human rights legislation, which require positive state action, are necessary in order to protect human rights.

I have provided a conceptual and normative argument for why it is important to interpret the freedom of association to protect labour rights. However, it does not follow that every element of freedom of association is protected by the constitution. Not only is freedom of association a composite of three activities—organizing, bargaining, and striking—each activity has different elements that can be protected in different ways.<sup>65</sup> As Leader has noted with respect to strikes, “some elements are securely anchored in the heart of freedom of association; some parts have a less direct, means-end link to the entitlement; and some parts stand on their own, possibly protected by legislation or case law, but unconnected to the fundamental right of association.”<sup>66</sup> Collective bargaining and labour relations regimes are complex and changing, and different components have different degrees of linkage with freedom of association. The tighter the link that a specific element has to freedom of association, the more likely that there is a strong case for constitutional protection.

The fact that a court is called upon to make difficult value judgements when interpreting the constitution in a particular context is not a persuasive argument for adopting an interpretive approach, such as the “parallel liberty” approach advocated by Langille and Oliphant, the effect of which is to avoid making difficult value judgments explicit. The approach they advocate simply elevates the common law beyond constitutional scrutiny, and, as a consequence, protects some values (the liberty of employers) more than others (such as democracy at work or equality). The need for constitutional protection of labour rights is especially significant when trade unions are economically and politically weak. It is precisely because trade unions are weak that they are invoking constitutional protection.

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64. *Ibid.*

65. Fudge & Tucker, *supra* note 15.

66. Leader, *supra* note 58 at 275, footnote omitted.

While it is important to avoid an approach to constitutional interpretation that simply reifies a particular legislative compromise, which would be the result of an approach that sought to identify the fundamental elements of the Canadian model of collective bargaining, this approach is not the only option. The ILO jurisprudence provides an important normative resource for interpreting the freedom of association in the labour law context. Moreover, Banks has helpfully identified some of the Canadian constitutional structures and doctrines that “provide ways to manage conflicts between [Canadian] labour laws and ILO jurisprudence.”<sup>67</sup> In particular, he identifies the “substantial interference test” advanced in *Health Services*, interpreting the common law in accordance with *Charter* values, and the proportionality scrutiny under section one as devices that can be used to tailor the ILO jurisprudence to the Canadian labour law context.<sup>68</sup> Thus, it is possible to design legal tests and remedies that protect the essential elements of freedom of association and that respect the institutional legitimacy and competency of the courts.

### *Conclusion*

The challenges facing the labour movement and other civil society organizations that are concerned with justice and equality in the labour market are not easy. Constitutional protections for labour rights will not solve the problem of organized labour’s slow decline.<sup>69</sup> Nor will such legal rights revitalize unions’ role as key participants in vibrant social movements. Courts have neither the power nor the authority to create new institutions or influence economic conditions. However, constitutional protections could be interpreted by courts in ways that would give governments a reason to pause and to consider whether there are less restrictive means of attaining legitimate political objectives than by interfering with or refusing to protect workers’ constitutional rights. Constitutional review of legislation by judges could legitimately be used to foster democratic deliberation and to ensure that any restrictions on labour rights are proportionate to the goals and means that governments have chosen. It could also be used to ensure that governments live up to their international human rights commitments to provide freedom of association for all workers, including those who, like agricultural workers in Ontario, have historically been excluded from legislative rights at work. The constitutional protection of freedom of association could, and should, be used to embed labour markets in an institutional framework that

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67. Banks, *supra* note 40 at 279.

68. *Ibid* at 281-286.

69. Eric Tucker, “Shall Wagnerism have no Dominion?” (2014) 21 *Just Labour* 1.

requires any derogation from the values of democracy and human dignity to be justified.

While it is legitimate for courts to interpret freedom of association to protect labour's core rights, there is nothing that requires them to do so. In the past, as Innis showed, "the trend of judicial creativity in the modern tort law of industrial conflict"<sup>70</sup> favoured employers. Perhaps now is the time to right this imbalance, recognize that labour rights are human rights deserving of constitutional protection, and, in doing so, plant a substantive notion of equal respect and protection in the common law.

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70. Christie, *supra* note 1 at 3.