THE INTERNATIONAL PROTECTION OF TRADE UNION RIGHTS: A CANADIAN CASE STUDY

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The recent decision of the Alberta Court of Queen's Bench in *Alberta Union of Provincial Employees v. The Crown in Right of Alberta*[1] has focused attention in Canada as never before on the international protection of trade union rights and its relationship with municipal law. In that case, Chief Justice Sinclair was asked to declare that the Alberta Public Service Employee Relations Act,[2] having been enacted in violation of an international treaty ratified by Canada, was invalid legislation. The treaty in question was the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), a Convention adopted by the International Labour Organisation (ILO). According to the applicant, the Convention required that all public servants, except those in essential services, should enjoy the right to strike, and this right had been taken away from all employees in the Alberta public service by the impugned legislation.

The main thrust of the applicant's case seems to have been that an international quasi-judicial tribunal had criticized the legislation as being in violation of Convention No. 87. The tribunal in question was the ILO Governing Body Committee on Freedom of Association, which had considered a complaint submitted to it by the Canadian Labour Congress (CLC) in 1977,[3] and had recommended in 1978 and again in 1979 and 1980 that the legislation be amended.

The Court of Queen's Bench rejected the view that the legislation was a breach of international law. It refused to answer the other question raised by the application — namely the power of the legislature of Alberta to legislate in violation of Canada's international obligations — since it had become purely academic as a result of the finding that there had been no breach of international law.

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[1] Unreported, Alta. Q.B., 25 Jul. 1980 (No. 8003-18095).

[2] S.A. 1977, c. 40.

[3] The Canadian Association of University Teachers also presented a complaint concerning the legislation. Its allegations related to the ambiguous position in which academic staff at Alberta universities found themselves as a result of the legislation. The application in the Court of Queen's Bench did not relate to this aspect of the legislation.

The purpose of this paper is to shed some light on the international protection of trade union rights, a corner of international law which is relatively unknown in Canada, to examine the manner in which the dispute relating to The Public Service Employee Relations Act was dealt with by the ILO and by the Alberta Court of Queen's Bench, and to draw some general conclusions.

I. THE ILO

The International Labour Organisation itself is reasonably well known in Canada. Created in 1919 by Part XIII of the Treaty of Versailles, it was to be part of the new world order which would ensure peace and stability for future generations in the aftermath of the Great War. Three interwoven themes, which are still at the basis of the ILO's legislative programme, are referred to in the Preamble to Part XIII as necessitating the foundation of the ILO. First, there is a statement of political faith that there can be no lasting peace without social justice; secondly, there is a humanitarian expression of concern for alleviating injustice, misery and deprivation among a large number of the workers of the world; and thirdly, there is an economic argument that governments, however well motivated, would find it impossible in a competitive world to improve the lot of their workers in the absence of a co-ordinated universal effort to improve working conditions.[4]

Most of the early work of the ILO was of a standard-setting nature. In pursuance of the principles and objectives set out in the Preamble to Part XIII of the Treaty of Versailles, the International Labour Conference adopted numerous Conventions, Recommendations and Resolutions designed to encourage member states to improve working conditions and social benefits. Following World War II, the ILO undertook a new form of activity, namely the provision of technical assistance. To a certain extent, this can be explained by the admission to membership of a large number of less developed countries following their attainment of independence. Merely to have set standards and to have encouraged compliance with them would have been an empty exercise from the viewpoint of those member states which were too poor or underdeveloped to provide their citizens with the basic necessities of life. The ILO took on the role of a specialized agency of the United Nations with

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[4] For the history of the creation of the ILO, *see* N. VALTICOS, VIII TRAITE DE DROIT DU TRAVAIL 3-77 (Camberlynck 1970).

While the themes mentioned in the text have always found expression in official and semi-official works on the ILO, the motivating force behind the creation of the ILO may have been tainted by some less idealistic considerations. According to Cox, *Labor and Hegemony*, 31 INTERNATIONAL ORGANIZATION 385, at 387 (1977), "[T]he ILO was the response of the victorious powers [in 1919] to the menace of Bolshevism. By creating the ILO, they offered organized labor participation in social and industrial reform within an accepted framework of capitalism."

particular responsibility for questions relating to labour and employment, a role it still fills today.

The assumption of these new responsibilities did not lead to any diminution in its standard-setting activities; the adoption of Conventions, Recommendations and Resolutions continued at a regular pace. However, following World War II, a new element was added to the philosophical underpinnings of the adoption of standards: the principle of respect for fundamental human rights.

Awareness of Nazi atrocities had inspired new and urgent attempts to protect human rights at the international level. There emerged among states a new willingness to regard individuals as appropriate "subjects" of international law, whereas traditionally they had only been regarded as possible "objects" of international law.[5] The result was an outpouring of international instruments for the protection of human rights. In 1948, the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man and the Inter-American Charter of Social Guarantees were all adopted. In 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms was signed at Rome, and in the same year the General Assembly of the United Nations commenced its consideration of the draft Covenant on Economic, Social and Cultural Rights and Covenant on Civil and Political Rights.[6]

It was in this atmosphere of heightened sensitivity to fundamental human rights and their international protection that the ILO made three major and enduring contributions to the field of trade union rights: in 1948, the International Labour Conference adopted the Freedom of Association and Protection of the Right to Organise Convention (No. 87); in 1949, it adopted the Right to Organise and Collective Bargaining Convention (No. 98); and in 1951, the Governing Body of the International Labour Office established a Committee on Freedom of Association.

II. Conventions Nos. 87 & 98

Other contemporary international instruments were recognizing freedom of association as a fundamental human right.[7] Earlier ILO instruments had also advocated freedom of association and the right to

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[5] *See* H. Lauterpacht, International Law and Human Rights 3-72 (1950) (reprinted in 1973).

[6] The two Covenants were not, however, finally adopted until 1966.

[7] *See* Universal Declaration of Human Rights, 10 Dec. 1948, art. 20, 23(4), American Declaration of the Rights and Duties of Man, 1948, art. XXI; The European Convention on Human Rights and its Five Protocols, 4 Nov. 1950, art. 11; International Covenant on Economic, Social, and Cultural Rights, 1966, art. 8; International Covenant on Civil and Political Rights, 1966, art. 22. The texts of these international instruments are reproduced in Basic Documents on Human Rights (I. Brownlie ed. 1971).

organize. The Preamble to Part XIII of the Treaty of Versailles, 1919, had recognized "the principle of freedom of association" and Article 427 of the Treaty had proclaimed "the right of association for all lawful purposes by the employed as well as by the employers"; a Convention dealing with the right of association for agricultural workers had been adopted in 1921; and the 1944 Declaration of Philadelphia, which was incorporated into the ILO Constitution in 1946, had declared that "freedom of expression and of association are essential to sustained progress" and had committed the ILO to programmes designed to achieve "the effective recognition of the right of collective bargaining". What distinguished the 1948 and 1949 Conventions from all of these previous instruments was that they were the first to give substantive content to the concepts of freedom of association and the right to organize.

The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) is detailed.[8] In summary, it is designed to

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[8] The following is the text of the substantive portions of the Convention No. 87, 23 Mar. 1972, [1973] Can. T.S. No. 14, which is reproduced in BASIC DOCUMENTS IN HUMAN RIGHTS, *supra* note 7, at 280-82:

Article 1

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

Article 2

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

Article 3

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

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

Article 4

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

Article 5

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

Article 6

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

Article 7

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

Article 8

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

ensure that trade unions and employers' organizations can be established and can function without any government interference. The Right to Organise and Collective Bargaining Convention (No. 98), which is also detailed,[9] complements the earlier Convention. While Convention No.

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

Article 9

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

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

Article 10

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

Article 11

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

[9] The following is the text of the substantive provisions of Convention No. 98, which is reproduced in BASIC DOCUMENTS IN HUMAN RIGHTS, *supra* note 7, at 286-87:

Article 1

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

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

(a) Make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership,

(b) Cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2

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

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

Article 3

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

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and

87 is concerned primarily with relations between governments, on the one hand, and workers' and employers' organizations, on the other, Convention No. 98 focuses on employer-employee relations. It defines a number of unfair labour practices in respect of which protection at the national level is required. It also advocates the encouragement of free collective bargaining.

It is worth noting at this stage that the adoption of a Convention by the ILO does not in itself impose any legal obligation on ILO member states (other than the obligation to submit the Convention to competent national authorities).[10] It is only the ratification of a Convention by a state that creates the duty to comply with the Convention's provisions.

III. The Governing Body Committee on Freedom of Association

The Governing Body Committee on Freedom of Association, established in 1951, was created as a complaint-vetting mechanism. The role originally envisaged for it was in making preliminary examination of complaints submitted to the ILO by trade union organizations concerning violations of trade union rights with a view to recommending whether particular complaints merited consideration by the Fact-Finding and Conciliation Commission on Freedom of Association, a body established the previous year following agreement between the ILO and the United Nations Economic and Social Council. Since 1951, however, the role of the Governing Body Committee on Freedom of Association has undergone significant change, and it has displaced the Fact-Finding and Conciliation Commission as the primary mechanism for examining such complaints.[11] The main reason for this development was that a union's

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workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Article 5

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 6

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

[10] Constitution of the International Labour Organisation, art. 19. The formula of "competent authorities" was adopted in preference to "legislature" to facilitate compliance by states, particularly federal ones, where some organ other than a legislature had the power of implementation. *See* N. Valticos, *supra* note 4, at 522-32.

[11] *See* C. Jenks, The International Protection of Trade Union Freedom 180-200 (1957) for a detailed account of this development in the role of the Governing Body Committee.

complaint could only be referred to the Fact-Finding and Conciliation Commission with the consent of the government which was the object of the complaint, a consent which has frequently been withheld. In fact, only in five instances have complaints been referred to the Fact-Finding and Conciliation Commission,[12] while over one thousand cases have been examined by the Governing Body Committee on Freedom of Association.

The Committee on Freedom of Association and the Fact-Finding and Conciliation Commission are not the only ILO organs set up to examine the extent to which international labour Conventions are applied in practice and law by member states. The Committee of Experts on the Application of Conventions and Recommendations (hereafter referred to as the Committee of Experts), which predates them by some twenty-five years, conducts regular on-going supervision of compliance with Conventions and Recommendations.[13] The ILO Constitution also provides, in Article 24, for "representations" by any "industrial association" of employers or workers claiming that a member state has failed to secure the effective observance of a ratified Convention, and, in Article 26, for "complaints" by any member state that another member state has not complied with a Convention which both have ratified. Finally, provision is made for complaints by delegates to the International Labour Conference against states which are alleged to have violated a ratified Convention.[14]

There are three important features of the Governing Body Committee on Freedom of Association which set its work apart from that of the other supervisory procedures.

First, the jurisdiction of the Governing Body Committee does not depend upon the ratification of the freedom of association Conventions or any other instrument. The Freedom of Association Committee has

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[12] The complaints related to Japan (1966), Greece (1966), Chile (1975), Lesotho (1975) and United States of America (Puerto Rico) (1978). For an excellent account of the work of the Commission on the Japanese and Greek cases, *see* Nafziger, *The International Labour Organization and Social Change: The Fact-Finding and Conciliation Commission on Freedom of Association*, 2 NEW YORK U.J. OF INT'L LAW AND POL. 1 (1969). An *ad hoc* study group was also appointed in 1967 to examine the trade union situation in Spain following consideration by the Freedom of Association Committee of a series of complaints. Technically this was not a reference to the Fact-Finding and Conciliation Commission, although its objectives and work resembled those of the Commission. For a comment on the *ad hoc* study group, *see* Valticos, *Une nouvelle expérience de protection des droits de l'homme: le groupe d'etude de l'O.I.T. charge d'examiner la situation en matière de travail et en matière syndicale en Espagne*, 16 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 567 (1970).

[13] The reports of the Committee of Experts are examined in turn by a Committee of the International Labour Conference, which conducts a political rather than technical examination. For a critical appraisal of the work of the Committee of Experts, *see* E. LANDY, THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF I.L.O. EXPERIENCE (1966).

[14] *See* M. TARDU, 1 HUMAN RIGHTS: THE INTERNATIONAL PETITION SYSTEM, s. IIA (1979) for an account of the ILO's petition procedures.

expressed the view that there are certain fundamental principles embodied in the ILO Constitution, of which freedom of association is one, and that every member of the ILO must be deemed to have some commitment to these principles, even if it has not ratified the Convention that gives them substance. On this basis, it routinely asserts its jurisdiction to examine complaints against member states which have not ratified Convention No. 87 or Convention No. 98.[15]

Secondly, the Freedom of Association Committee is a standing committee meeting frequently, with a well established procedure, and equipped to handle complaints on an on-going basis. It is the only one of the ILO's "petition" procedures to have been invoked on a significant number of occasions.[16] As a result, it has developed, on a case-by-case basis, a detailed and sophisticated set of principles inspired by Convention No. 87 and Convention No. 98.

Thirdly, any union, however humble, whether or not national in scope, whether or not it has had any previous contact or relationship with the ILO, can invoke the Committee's procedure. Complaints are also receivable from international union bodies, such as the International Confederation of Free Trade Unions or the Public Services International, which often support allegations made by their affiliates.[17]

It should not come as a surprise that there is no procedure for enforcing decisions of the Freedom of Association Committee. Although the Committee conducts its business in a manner appropriate for a quasi-judicial body,[18] it is misleading to view its criticisms as binding decisions. The primary role of the Freedom of Association Committee is not to decide whether Convention No. 87 or Convention No. 98 has been violated. According to a subcommittee appointed at the 33rd Session of the International Labour Conference in June 1950 to consider the constitutional validity of the creation of the Fact-Finding and Conciliation Commission:

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[15] This view was first put forward by the Committee in 1955, when its jurisdiction was challenged by the Government of South Africa. *See* INTERNATIONAL LABOUR OFFICE, XXXVIII, OFFICIAL BULLETIN 15-41 (1954) [hereafter cited as I.L.O., vol. no., O.B.]. For a summary of decisions by the Freedom of Association Committee, *see* I.L.O., FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO (2d ed. 1976).

[16] The Committee of Experts is a more experienced Committee; however, it operates solely from government reports, solicited on a regular, ongoing basis, and does not examine complaints or other petitions against the member state concerned, except peripherally. *See* E. LANDY, *supra* note 13.

[17] On the procedure of the Committee, generally, *see* N. VALTICOS, *supra* note 4, at 588-90, and C. JENKS, *supra* note 11, at 187-200.

[18] Thus, members of the Committee always withdraw when a case relating to their country or their organization is considered by the Committee. *See, e.g.*, I.L.O., LXI, O.B. 124 (Series B, No. 3 1978). In addition, "[b]ecause of the quasi-judicial nature of the work of the Committee, its members participate in a personal capacity and not as representing their governments or organisations". *See* I.L.O., FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS, *supra* note 15, at 1.

> [the Commission] is not a judicial body which would pronounce sentences compelling recognition from the State against which allegations have been made, but is only a fact-finding and conciliation body charged with enlightening the Governing Body on matters of fact by attempting to verify the material accuracy or inaccuracy of the alleged facts, the requirement of previous consent of the government concerned showing clearly that the Commission works in accordance with a purely voluntary procedure by making its good offices available to governments.[19]

This view was subsequently endorsed by the International Labour Conference.[20] If the Fact-Finding and Conciliation Commission is in essence a fact-finding body, the Freedom of Association Committee can lay claim to no more formal a role for itself.

The value of an opinion expressed by the Freedom of Association Committee is essentially a moral one. The Committee has established for itself an enviable record of impartiality and technical expertise. As a result, its conclusions carry considerable moral weight. The extent to which criticism by the Freedom of Association Committee leads to changes in national law or practice depends very largely on the centrality of the law or practice criticized to the policies of the government concerned, and also on the government's sensitivity to international criticism. This sensitivity, in turn, is mainly a function of the type of regime in power and the current international political situation.[21] In addition to providing the impetus for changes in national law or practice, the system "has also exercised a preventive influence on the action of the public authorities".[22]

IV. *Canadian Labour Congress & Canadian Association of University Teachers v. Canada (Case No 893)*

The Alberta Public Service Employee Relations Act[23] received royal assent on 18 May 1977 and came into force by Proclamation on 22 September 1977. In November of that year the Canadian Labour Congress presented a complaint against the Government of Canada[24] to the Governing Body Committee on Freedom of Association relating to this legislation. The next month, the Canadian Association of University Teachers (CAUT) also invoked the procedure of the Freedom of Association Committee on this legislation. Canada, it should be noted,

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[19] C. Jenks, *supra* note 11, at 193.

[20] *Id.* at 193-94.

[21] E. Haas, Human Rights and International Action 93-113 (1970).

[22] N. Valticos, International Labour Law 250 (1979). *See also* von Potobsky, *Protection of Trade Union Rights: Twenty Years' Work by the Committee on Freedom of Association*, 105 Int'l Lab. Rev. 69, at 82 (1972).

[23] S.A. 1977, c. 40.

[24] For the federal-provincial aspects of Canada's participation in the ILO, *see* pp. 191-92 *infra*.

ratified Convention No. 87 in 1972, but has not ratified Convention No. 98.[25]

While several other allegations were contained in the complaints,[26] the main concern of the CLC was the total prohibition on strikes by employees of the Crown in right of Alberta and by employees of several emanations of the provincial Crown. In examining this question in November 1978, the Freedom of Association Committee was able to find in its own extensive case-law a basis for a decision. In fact, there are probably few questions which have been considered by the Committee as frequently as the right to strike in the public sector. The fundamental principle on this question, which had been invoked in many similar cases, was that limitations or restrictions on the right to strike in essential services or in the civil service are acceptable from the standpoint of internationally recognized norms on trade union rights provided certain conditions are met. Thus, legislation should ensure

> adequate guarantees to safeguard to the full the interests of the workers thus deprived of an essential means of defending their occupational interests. . . . [T]he restriction [on strikes] should be accompanied by adequate, impartial and speedy conciliation and arbitration procedures, in which the parties can take part at every stage and in which the awards are binding in all cases on both parties; these awards, once they have been made, should be fully and promptly implemented.[27]

Although the Committee only cited two of its earlier decisions in support of this principle,[28] it has been invoked on numerous other occasions.[29] In applying this principle to The Public Service Employee Relations Act, the Committee noted that provision was indeed made for "mediation, adjudication and arbitration in the event of disputes [and that] no allegations have been made regarding the adequacy of this procedure".[30]

However, this was not the end of the matter. The following criticism has also frequently been formulated by the Committee:

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[25] According to the Government of Canada, Convention No. 98 has not been ratified because in certain provinces professional employees and farm workers are excluded from the scope of the labour relations legislation. However, the Government expresses the view that "[t]here is substantial compliance in Canada with the basic provisions of the Convention". LABOUR CANADA, CANADA AND THE INTERNATIONAL LABOUR CODE 7 (1978).

[26] Thus, the CLC complained of the discriminatory scope of the legislation which, for example, applied to provincial hospital employees but not to municipal hospital employees, the latter being free to strike legally. Another concern of the CLC was the exclusion from collective bargaining of a number of items which are usually negotiable, including staffing and pensions. The CAUT's complaint, also mentioned by the CLC, was that academic staff at Alberta universities were denied the right to choose whether or not they wished to bargain collectively.

[27] I.L.O., LXI, O.B. 128-29 (Series B, No. 3 1978).

[28] *Case No. 793 (India)*, I.L.O., LVIII, O.B. 28 (Series B, No. 3 1975); *Case Nos. 758 & 783 (Costa Rica)*, I.L.O., LVIII, O.B. 51 (Series B, No. 3 1975).

[29] According to I.L.O., FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS, *supra* note 15, at 118-19, the principle had been applied in 34 cases.

[30] I.L.O., LXI, O.B. 128-29 (Series B, No. 3 1978).

> [I]t would not appear to be appropriate for all publicly owned undertakings to be treated on the same basis in respect of limitations on the right to strike without distinguishing in the relevant legislation between those which are genuinely essential because their interruption may cause public hardship, and those which are not essential according to this criterion.[31]

Other decisions where this principle had been applied were cited by the Committee,[32] but it is worth noting again that it had been relied upon in more cases than those cited.[33] The decision of the Committee was that the Alberta legislation was not in conformity with this principle in that it applied to some public-sector agencies (such as the Alberta Liquor Board) which were not "genuinely essential". The Committee recommended to the Governing Body

> to suggest that the Government consider the possibility of introducing an amendment to the Public Service Employee Relations Act so that, in cases where strikes are prohibited in certain undertakings, the latter should be confined to those which are essential in the strict sense of the term.[34]

In due course, the Governing Body endorsed the recommendation of its Committee and the suggestion was communicated to the Government of Canada.

The Government of Alberta's response, transmitted by the Government of Canada in April 1979, was that

> although some services might be more essential than others, the public service generally provides to the people of Alberta services for which, in the main, there is no reasonable alternative. . . . [I]t would not seem advisable to set up a process whereby different dispute-resolution mechanisms would apply to different groups of employees of a single employer.[35]

These observations did not persuade the Committee that its earlier conclusion was erroneous. At its session in May/June 1979 it reiterated these conclusions[36] which were again endorsed by the Governing Body.

Subsequently, in July 1980, the Canadian Labour Congress informed the Committee that the Government of Alberta was still ignoring its recommendations. It also drew attention to the imposition of fines on several Alberta public servants for participating in a strike. The Government's reply to this reopening of the case was to supply the Committee with two decisions by Sinclair C.J. of the Alberta Court of Queen's Bench. The first decision was one in which the learned judge imposed fines on some employees for contempt of court as a result of their participation in a strike in violation of an injunction granted to restrain a breach of the legislation. The second was his decision

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[31] *Id.* at 129.

[32] *Cases Nos. 741 & 742 (Japan)*, I.L.O., LVII, O.B. 45 (Supp. 1974); *Case No. 753 (Japan)*, I.L.O., LVII, O.B. 170 (Supp. 1974).

[33] According to I.L.O., FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS, *supra* note 15, at 116-17, this principle had been referred to six times in Committee decisions.

[34] I.L.O., LXI, O.B. 131 (Series B, No. 3 1978).

[35] I.L.O., LXII, O.B. 27 (Series B, No. 1 1979).

[36] *Id.* at 29.

concerning the validity of The Public Service Employee Relations Act. In response, the Freedom of Association Committee

> while noting the results of the provincial union's challenge to the Act in the Court of Queen's Bench of Alberta, feels that it must recall that Canada, in ratifying Convention No. 87, undertook to give effect to its provisions and gave this undertaking with the unanimous consent of the provincial governments.[37]

The Committee reiterated its criticism of the legislation, which was again endorsed by the Governing Body.

No further examination of the case has since been carried out by the Committee or by the Governing Body. The Governing Body had endorsed the Committee's criticisms of the legislation. The ILO not having any follow-up powers in the event of the refusal of a government to give effect to its recommendations concerning legislative changes, its involvement with The Public Service Employee Relations Act had come to an end, for the time being at least.

V. *Alberta Union of Provincial Employees v. The Crown in Right of Alberta*

However, the criticism of the legislation did not abate. The next step taken by the body primarily opposed to the legislation, the Alberta Union of Provincial Employees, was to apply to the Alberta Court of Queen's Bench by way of originating notice of motion for answers to a series of questions relating to the conformity of the legislation with Canada's international legal obligations and to the validity of provincial legislation which violates Canada's international legal obligations. As mentioned earlier,[38] Sinclair C.J. concluded that the legislation was not in violation of Canada's legal obligations, and that it was not therefore necessary to consider the challenge to the competence of the Alberta legislature.

It is my view that the manner in which the court approached the application before it was questionable: it should have considered first of all whether the legislature of Alberta was competent to pass legislation which violated Canada's international obligations, and only in the event of giving a negative answer to that question should it have proceeded to deal with the possible inconsistency of the legislation with international law.[39] My reason for this suggestion is that most municipal judges (and counsel) are unlikely to have an in-depth knowledge of the rules of public

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[37] I.L.O., Governing Body, Two Hundred and Fourth Report of the Committee on Freedom of Association para. 132 (214th sess., Geneva) (unreported, 18-21 Nov. 1980).

[38] *See* p. 169 *supra*.

[39] Counsel for the Government of Alberta seems to have been particularly concerned that the decision should be based on the international law question rather than the constitutional law one. *Supra* note 1, at 36-37.

international law: if at all possible it would be prudent for them to base their decision on a point of Canadian law rather than a disputed question of public international law. Indeed, the common law seems to have traditionally been reluctant to allow municipal courts to embark upon the interpretation of treaties,[40] a reluctance due in part to the feeling that "municipal judges do not have the means for deciding what is right by the rules of public international law".[41] While this reluctance has now been overcome on the ground that "[m]unicipal courts are frequently called upon to administer justice by applying a legal system other than English law . . . ,"[42] it remains advisable for courts to attempt to resolve cases by the application of the more familiar rules of Canadian law. It is true that the municipal law question raised by the application was a complicated constitutional one, but at least the court could be relatively certain in dealing with such an issue that it had before it all of the relevant material and that it had a sufficiently comprehensive understanding of Canadian constitutional law in general to be able to render a defensible decision. What is all the more surprising in the decision of the court not to base its disposition of the case on the constitutional point is that the court, while refraining from answering the question put to it on this aspect of the case, discussed the constitutional law question at some length and expressed the tentative opinion that it was bound by Privy Council authority to decide against the applicant on this question.[43]

VI. Is Canada Under Any International Obligations Concerning the Right to Strike in the Alberta Public Service?[44]

As Sinclair C.J. noted in his judgment, Convention No. 87 does not expressly refer to the right to strike, and this omission seems to have

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[40] Lord McNair, The Law of Treaties 355-56 (1961).

[41] Mann, *The Enforcement of Treaties by English Courts*, 44 Grotius Transactions 29, at 56 (1958).

[42] *Id.* That Mann feels obliged to argue so strenuously in favour of the competence of English courts to enforce treaties is probably evidence of lingering doubts on this score. *See also* Lord McNair, *supra* note 40, at 356-58.

[43] *Supra* note 1, at 35: "In any event, as a Judge of the Court of Queen's Bench of Alberta, I have no option but to follow *The Labour Conventions Case*, assuming it to be relevant to the present proceedings."

[44] In addition to alleging a violation of Convention No. 87, the Alberta Union of Provincial Employees also complained of infringements of Article 427 of the Treaty of Versailles and Article 8 of the Covenant on Economic, Social and Cultural Rights 1966, *supra* note 7.

The argument based on the Treaty of Versailles was dismissed because of the rather vague allusion therein to trade union rights. *Supra* note 1, at 47-48. Article 8 of the Covenant provides for the right to strike, but Article 8(2) specifically imposes restrictions on this right for "members of the armed forces or of the police or of the administration of the State". Sinclair C.J. concluded that the persons covered by the Alberta Public Service Employee Relations Act were engaged in "the administration of the State" within the meaning of the Covenant and that, accordingly, there was no

persuaded him that there had been no violation of the Convention.[45] However, the international bodies responsible for supervising the extent to which ILO standards are applied have consistently treated the right to strike as being protected, albeit not absolutely, by Convention No. 87.

Thus, the ILO's Committee of Experts, whose role it is to conduct a technical and juridical examination of government reports on the application of standards, has recognized that the right to strike, although not dealt with explicitly in any ILO Convention, is guaranteed by Convention No. 87. It has explained that a complete bar on strikes would be inconsistent with Articles 3, 8 and 10 of the Convention. Those provisions are as follows:

> *Article 3*
> 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.
>
> . . . .
>
> *Article 8*
> 1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.
> 2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.
>
> . . . .
>
> *Article 10*
> In this Convention the term 'organisation' means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

The reasoning of the Committee of Experts seems to be as follows. Unions are to have the right to organize their activities and formulate their programmes free from government interference (Article 3) and free from laws which undermine their activities and programmes (Article 8). The activities and programmes which are protected in this way are those which are designed to further and defend the interests of workers (Article 10). Strikes are generally recognized as a means, often an essential means, by which workers can further and defend their interests.

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violation of the Covenant. *Supra* note 1, at 48. It is questionable whether all employees covered by the Act, including hospital employees and Alberta Liquor Board employees, could be considered as being engaged in "the administration of the State". It should be noted that Article 6 of ILO Convention No. 98 similarly excludes "public servants engaged in the administration of the State". This has not been interpreted as including all employees of the government. The ILO states that "[t]he distinction to be drawn . . . would appear to be between civil servants engaged in various capacities in government ministries or comparable bodies on the one hand and other persons employed by the government, by public undertakings or by independent public corporations." I.L.O., FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS, *supra* note 15, at 94.

[45] *Supra* note 1, at 48.

Therefore, bans or limitations on the right to strike could constitute a violation of Convention No. 87.[46]

Essentially the same view of the right to strike has been adopted by the Freedom of Association Committee, which has elaborated in considerable detail on the circumstances in which a ban on strikes is acceptable from the standpoint of its conformity with international standards. Reference has already been made to the extensive case-law of the Freedom of Assocation Committee on this subject.[47] In its Report on Freedom of Association in the Public Sector in Japan, the Fact-Finding and Conciliation Commission on Freedom of Association expressly endorsed the Freedom of Association Committee's principles concerning bans on strikes.[48] Similarly, a Commission of Inquiry, appointed under Article 26 of the ILO Constitution to examine a series of complaints concerning the application by Greece of the freedom of association Conventions, expressed the view that the right to strike was implicitly protected by Convention No. 87.[49]

Sinclair C.J., on the other hand, after noting that Convention No. 87 did not expressly refer to the right to strike, referred at some length to the Report of the Freedom of Association Committee on the Alberta case, and concluded as follows: "In my opinion, the effect of all this material from a legal point of view is that the Government of Alberta is in no way bound by the I.L.O. recommendations which do not and have never formed [*sic*] part of the law of Alberta."[50] I would suggest that Sinclair C.J. should not have rejected so wholeheartedly the opinions of the various ILO organs on whether the right to strike is protected by international standards.

In the first place, Sinclair C.J. seems to have been of the view that Convention No. 87 could not reasonably be interpreted as relating to the right to strike. Far from this being an untenable interpretation of the Convention, there is an interesting resemblance between the interpretation by the Committee of Experts and certain passages in the decision of the Supreme Court of Canada in *CPR v. Zambri*.[51] One of the questions the Supreme Court had to examine in that case was whether the exercise of the right to strike was protected by the Ontario Labour Relations Act.[52] On that matter, Cartwright J., speaking for himself and three other members of the Court, stated:

> It is said that the Act does not in terms declare the right to strike, but I find myself in agreement with Mr. Lewis' argument that the right is conferred by s. 3 which reads:

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[46] *See* I.L.O., REPORT OF THE COMMITTEE OF EXPERTS ON FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING 44 (1973).

[47] *See* p. 178 *supra*.

[48] I.L.O., IL, O.B. 491-92 (Special Supp., No. 1 1966).

[49] I.L.O., LIV, O.B. 59-60 (Special Supp., No. 2 1971).

[50] *Supra* note 1, at 49.

[51] [1962] S.C.R. 609, 34 D.L.R. (2d) 654.

[52] R.S.O. 1960, c. 202 (*replaced by* R.S.O. 1970, c. 232).

> 3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.
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> It is clear on the findings of fact made by the learned magistrate that the strike with which we are concerned was an activity of the union; I have already expressed my opinion that it was lawful; it follows that s. 3 confers upon the six employees, all of whom are members of the union, the right to participate in that lawful activity. I conclude therefore that the participation in the strike by the employees was the exercise of a right under the Act.[53]

Cartwright J., in common with the Committee of Experts, found an implicit recognition of the right to strike in a general declaration of freedom to participate in a union's activities. Strictly on the basis of Canadian parallels, then, Sinclair C.J. should not have jumped to the conclusion that the absence of an express declaration of the right to strike in Convention No. 87 meant that the Convention did not deal with strikes.

Secondly, when a Canadian court, or any other municipal court, is called upon to interpret a treaty, it seems axiomatic that it should consider itself bound by international canons of construction. It should not approach the task as if it were interpreting a statute passed within its own jurisdiction (except, perhaps, if the treaty had been "transformed" into domestic law by a statute).[54] I would suggest that, in particular, it should regard the interpretations of international tribunals of competent jurisdiction in much the same way as it would judicial interpretations from another municipal jurisdiction if, pursuant to the rules of private international law, it were called upon to apply a statute from that jurisdiction.[55]

Accordingly, the critical question which Sinclair C.J. should have explored (but did not even identify as a question worthy of consideration) is whether any of the interpretations of Convention No. 87 mentioned

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[53] *Supra* note 51, at 618, 34 D.L.R. (2d) at 664.

[54] Emmanuelli & Slosar, *L'application et l'interprétation des traités internationaux par le juge canadien*, 13 REVUE JURIDIQUE THEMIS 69 (1978).

[55] *See* Schreuer, *The Interpretation of Treaties by Domestic Courts*, 45 BRIT. Y.B. INT. L. 255, at 264 (1971):

> While the opinions of most authors point towards the application of international standards in the interpretation of treaties for the sake of uniformity — some even go to the extent of holding that there is an obligation under international law to secure this uniformity — others maintain that treaty law, as soon as it has become part of the domestic legal system, should be treated like any other law.

Cf. Mann, *supra* note 41, at 56:

> That . . . treaties are usually governed by public international law does not disqualify a municipal Court from pronouncing upon legal issues involved in them. Municipal courts are frequently called upon to administer justice by applying a legal system other than English law, and, more specifically, to apply public international law. There is no warrant for the suggestion that municipal judges do not have the means for deciding what is right by the rules of public international law.

See also Warren v. United States, 340 U.S. 523, at 527, 71 S. Ct. 432, at 434 (1951), for an example of the interpretation of an ILO Convention by the U.S. Supreme Court.

previously, according to which the right to strike is implicitly guaranteed, can properly be viewed as authoritative interpretations of the Convention, or, failing that, whether any of them warranted being treated with deference.

According to the ILO Constitution, Conventions are to be interpreted by the International Court of Justice or by a tribunal appointed pursuant to Article 37 of the Constitution.[56] In a strictly formal sense, pronouncements by none of the supervisory organs mentioned previously constitute "interpretations" of Convention No. 87. What is the juridical nature of these pronouncements?

Complaints against members of the ILO pursuant to Article 26 of the ILO Constitution are referred to a Commission of Inquiry, whose determination is binding on the state concerned pursuant to Article 29 of the Constitution unless the state informs the Director-General of the ILO within three months of the determination that it wishes to refer the complaint to the International Court of Justice. Its failure to inform the Director-General of such an intervention or its failure to follow through on such an intervention would "justify the presumption that it has agreed to carry out the recommendations — even though it does not approve of them — and will be bound to implement them".[57] There can be little doubt on the judicial nature of a Commission of Inquiry or on the constitutional authority of a Commission of Inquiry to interpret a Convention.[58] The Constitution must be interpreted as empowering a Commission of Inquiry to interpret a Convention to the extent necessary for its work. Accordingly, the endorsement by the Commission of Inquiry in the case against Greece of the view that Convention No. 87 implicitly protects the right to strike[59] can properly be regarded as an interpretation of the Convention authorized by the ILO Constitution, and thus deserving of the greatest possible deference by any other tribunal, including the Alberta Court of Queen's Bench. In fairness to Sinclair C.J., however, it does not appear that this decision of the Commission of Inquiry was brought to his attention.

As regards the authority of the Committee of Experts to interpret a Convention, the following explanation has been provided:

> The interpretative function of the Committee is not based on any explicit authority, but it derives logically from its mandate and the nature of its task. As the Committee itself put it, "the Committee's terms of reference do not require it to give interpretations of Conventions, competence to do so being vested in the International Court of Justice by Article 37 of the Constitution. Nevertheless, in order to carry out its function of evaluating the implementation of Conventions, the Committee has to consider and express its views on the meaning of certain provisions of Conventions". Such a function is all the

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[56] Osieke, *The Exercise of the Judicial Function with respect to the International Labour Organisation*, 47 BRIT. Y.B. INT. L. 315 (1975).

[57] *Id.* at 336-37.

[58] *Id.*

[59] *Supra* note 49.

> more important as, during the more recent period, a number of international labour Conventions have, in an effort to obtain greater flexibility, been drafted deliberately in general terms, so that the Committee of Experts has had to interpret and define more precisely their meaning and scope. This has happened in particular in the cases of the instruments dealing with forced labour, freedom of association and discrimination in employment.[60]

As another learned commentator observed on the subject of interpretations by the Committee of Experts,

> [i]n practice, the identification of apparent discrepancies inevitably involves an element of interpretation of the requirements of the conventions and the reports of the Committee of Experts . . . have come to be of high authority as a gloss upon the conventions elucidating the innumerable problems of interpretation presented by their practical application.[61]

In these circumstances, if the question of the interpretation of Convention No. 87 with which Sinclair C.J. was concerned had arisen before the International Court of Justice, it seems safe to assume that the Court would have treated the interpretation by the Committee of Experts as being of some persuasive value, but obviously not in any way binding upon it. The domestic parallel which suggests itself is the respect with which a superior court, on judicial review, will treat an interpretation of a statute by a statutory tribunal such as a labour relations board.

Decisions of the Freedom of Association Committee are of a significantly different legal nature. The task of the Committee of Experts is "to compare the legislation and practice described in the reports [made by member states] with the requirements of the Conventions and draw the attention of the Governing Body to any apparent discrepancies and any facts as regards which further information would seem to be required".[62] It cannot properly go beyond the requirements of the conventions. In both theory and practice, this is not the case with the Freedom of Association Committee:

> Faced with a wide variety of situations, the Committee, while relying at the outset on the general standards laid down in the ILO Conventions concerning freedom of association, was gradually led to frame principles defining more closely and in some respects supplementing and even extending those expressly embodied in the Conventions. The principles thus established by the Committee refer, in particular, to the right to strike, collective bargaining and the more general civil liberties on which the effective exercise of the right of association depends.[63]

Since pronouncements by the Freedom of Association Committee often go beyond the terms of the relevant Conventions, they cannot always have even the persuasive impact of decisions by the Committee of Experts on the proper interpretation to be given to a Convention. Where, however, the Freedom of Association Committee expressly bases a

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[60] N. VALTICOS, *supra* note 22, at 61-62.

[61] C. JENKS, LAW, FREEDOM AND WELFARE 124 (1963).

[62] *Id.*

[63] N. VALTICOS, *supra* note 22, at 61-62.

criticism on its interpretation of a Convention (as it did in the Alberta case),[64] there is no reason for treating such an interpretation as any less persuasive than one by the Committee of Experts.

There are undoubtedly some difficult questions that could be asked concerning certain aspects of the interpretation by these organs of Convention No. 87 as it relates to the right to strike. Although the general implication of protection for the right to strike drawn from Articles 3, 8 and 10 of Convention No. 87 appears sound, the various limits to this protection enunciated by these ILO bodies do not flow logically from the text of the Convention. The Convention in common with other national and international instruments dealing with fundamental human rights merely recognizes various general principles: the circumstances in which these principles will or will not apply are elaborated upon in a process which is in part deductive and in part experiential. Having ratified such a Convention, a state might object with some legitimacy to being bound as a matter of international law by whatever obligations the various ILO organs declare to have been created by the Convention, particularly if careful examination of the instrument prior to ratification could not have revealed these obligations. However, to view the problem from a different perspective, it is unrealistic to expect an instrument dealing with such a subtle concept as freedom of association to spell out in detail the precise limits of the concept.

These difficulties with the various international interpretations of Convention No. 87 were not addressed by Sinclair C.J. in his judgment. As mentioned above,[65] he dismissed these interpretations in a rather off-hand manner without inquiring into these interpretational problems or discussing the nature and jurisdiction of the tribunals in question. In short, he embarked upon his own interpretation of Convention No. 87 as if the matter were *res integra*. Despite the problems inherent in the international interpretations of Convention No. 87, they were rendered by international tribunals of competent jurisdiction and were therefore deserving of a high degree of deference by Sinclair C.J. One wonders whether the learned judge would have shown as little regard for judicial decisions from another jurisdiction in a private international law matter.

Quite apart from Convention No. 87 itself, there exists another basis upon which principles established by the Freedom of Association Committee could create international obligations. One of the recognized sources of international law is "international custom as evidence of a general practice of law".[66] The opinion has been expressed on several

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[64] *See* I.L.O., *supra* note 37, at paras. 132-33.

[65] *See* pp. 181-85 *supra*.

[66] *See generally* A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT. L. 1 (1974). On the more specific question of custom being generated by international organizations, *see* Higgins, *United Nations and Lawmaking: The Political Organs*, 64 AMERICAN SOC'Y INT'L PROC. 37 (1970); Jenks, *The Impact of International Organisations on Public and Private International Law*, 37 GROTIUS TRANSACTIONS 23 (1951).

occasions that the principles espoused by the ILO's Governing Body, upon the recommendation of its Freedom of Association Committee, constitute customary rules of international law. This was the view of Paul Ramadier, a former chairman of the Freedom of Association Committee (and a former Prime Minister of France) according to whom "the Committee [on Freedom of Association] had succeeded in laying down the principle that freedom of association was a kind of customary rule in international law, above or outside the scope of any Conventions or even of membership of one or other of the international organisations".[67] The late C. Wilfred Jenks, a distinguished international lawyer and a Director-General of the ILO, perceived the emergence of customary international law on questions of social policy. According to Jenks,

> [a] generation ago the suggestion that there is any customary international law of social policy would have been treated with a scepticism amounting to scorn. Social policy was at that time a typical example of a matter which, in the then existing stage of development of international relations, was "not, in principle, regulated by international law" and as regards which each state therefore remained "sole judge". . . . Matters have now reached a transitional phase in which we can discern reasonably clearly the makings of a customary international law of social policy.
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> The process has developed furthest in respect of the international protection of trade union freedom. . . . [T]he practical outcome has been that there now exists a quasi-judicial procedure for the examination of such allegations, by means of which, during the ten years from 1952 to 1962, 311 cases involving 67 governments and territories in all parts of the world have been considered and a comprehensive and imposing body of case law touching on virtually all the major aspects of freedom of association for trade union purposes evolved.[68]

Since Jenks wrote this in 1963, some 700 additional cases have been considered by the Freedom of Association Committee. It is a distinct possibility that matters have now gone beyond the transitional phase which he described in this passage.

Further support for the suggestion that Canada is bound by the Freedom of Association Committee's principles as a matter of international law can be found in the opinion of some commentators that the authoritative nature of a custom in international law is "reinforced" by the factors of consent and estoppel.[69] In this regard, it is relevant to note that the Government of Canada has been a member of the Governing Body ever since the establishment of the Freedom of Association Committee, and that there is no record of the Government of Canada having protested or dissented from the Governing Body's endorsement of recommendations by the Freedom of Association Committee. Moreover, before the Freedom of Association Committee disposed of the Alberta case in 1980, no fewer than eight other cases relating to Canada had been

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[67] Von Potobsky, *supra* note 22, at 83.

[68] C. JENKS, *supra* note 61, at 128-29.

[69] A. D'AMATO, *supra* note 66, at 187-215.

examined by the Committee[70] without, it appears, any protest by the Government of Canada as to the legitimacy of the work of the Committee in general, or as to the validity of particular principles formulated by it.

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[70] The following are summaries of the earlier Canadian cases:

(a) Case No. 211 arose in the context of an organizing struggle in Newfoundland between the International Woodworkers of America (IWA) and the newly created Brotherhood of Newfoundland Woodworkers, which enjoyed the support of the Newfoundland government. The complaint related to The Labour Relations (Amendment) Act, 1959, S.N. 1959, c. 1 and The Trade Union (Emergency Provisions) Act, 1959, S.N. 1959, c. 2, which, among other things, empowered the Lieutenant Governor-in-Council to revoke certifications and dissolve trade unions on his own motion, authorized the courts to dissolve trade unions if a "substantial number" of their officers had been convicted of various crimes, and prohibited all strikes. *See* I.L.O., XLIV, O.B. 170-83 (No. 3 1961). The Committee expressed a number of criticisms of this legislation. After the government stated that it intended to introduce amendments (I.L.O., XLIV, O.B. 334-37 (No. 3 1961); I.L.O., LXV, O.B. 18-19 (1st Supp. 1962)), the Committee was able to note with satisfaction that The Labour Relations (Amendment) Act, 1963, S.N. 1963, c. 82, had repealed the offending legislation. *See* I.L.O., XLVII, O.B. 6-8 (1st Supp. 1964).

(b) Case No. 523 related to two pieces of emergency back-to-work legislation. The first was the Saskatchewan Essential Services Emergency Act, S.S. 1966 (2d sess.) c. 2, designed to end a strike by employees of the Saskatchewan Power Corp., and the second was the Newfoundland Hospital Employees (Employment) Act, S.N. 1966-67, c. 11, aimed at striking hospital employees. The Committee absolved the Saskatchewan legislation and criticized the Newfoundland legislation, the difference being that the former had acceptable arbitration procedures to compensate for the denial of the right to strike, whereas the latter did not. *See* I.L.O., LI, O.B. 66 (4th Supp. 1968); I.L.O., LII, O.B. 35 (2d Supp. 1969). Although the Committee did not subsequently deal with the case, the Newfoundland legislature adopted a new Act in 1973, The Public Service (Collective Bargaining) Act, S.N. 1973, c. 123, which recognizes the right to strike of hospital employees (except if classified as "essential employees" under s. 10 thereof, in respect of whom recourse to "adjudication" might be had under ss. 29-34).

(c) Cases Nos. 699 & 746 arose from the "common-front" strike in the Quebec public sector in 1972. The complainants alleged that the banning of the strike, the arrest and imprisonment of trade union leaders and the back-to-work legislation all constituted violations of freedom of association. The only criticism levelled at the Government of Canada was in respect of the absence of adequate conciliation and arbitration procedures in the back-to-work legislation. *See* I.L.O., LV, O.B. 140 (Supp. 1972); I.L.O., LV, O.B. 181 (Supp. 1972); I.L.O., LVII, O.B. 85 (Supp. 1974).

(d) Case No. 818 arose from the response by the Government of Quebec to construction industry violence and corruption, particularly in 1974 at James Bay. In particular, certain locals of the Quebec Federation of Labour were placed under trusteeship by An Act respecting the placing of certain labour unions under trusteeship, S.Q. 1975, c. 57 (Bill 59) and persons with criminal records were prohibited from holding union office by An Act to amend the Construction Industry Labour Relations Act, S.Q. 1975, c. 50 (Bill 30). The Committee criticized both of these Bills. *See* I.L.O., LIX, O.B. 40-58 (Series B, No. 3 1976). Subsequently, the Committee noted with satisfaction that trusteeship had been lifted in respect of certain of the locals. *See* I.L.O., LXI, O.B. 3 (Series B, No. 2 1978). The aspects of Bill 30 mentioned above were still in force in March 1981.

(e) Case No. 841 was a complaint by the Canadian Workers' Union concerning problems it was encountering in seeking to displace an incumbent union as bargaining agent under The Labour Relations Act, R.S.O. 1970, c. 232. No criticism was formulated by the Committee. *See* I.L.O., LX, O.B. 75 (Series B, No. 1 1977); I.L.O., LX, O.B. 31 (Series B, No. 3 1977); I.L.O., LXI, O.B. 1 (Series B, No. 1 1978).

The question of the existence of a customary rule of international law, binding on Canada, prohibiting bans on strikes except in genuinely essential services cannot be exhaustively explored in this brief paper. For one thing, there is too little agreement among the publicists on the nature of "international custom as evidence of a general practice of law". International judicial pronouncements on custom, moreover, differ widely from each other.[71] It would probably also be necessary to conduct an empirical inquiry to determine whether states regard themselves as obliged to give effect to principles recommended by the Freedom of

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(f) Case No. 845 related to a temporary ban on strikes by teachers in the province of Quebec instituted by An Act respecting the maintaining of services in the sector of education and repealing a certain legislative provision, S.Q. 1976, c. 38 (Bill 23). The Committee did not find the temporary restriction objectionable. *See* I.L.O., LX, O.B. 8 (Series B, No. 2 1977).

(g) Case No. 903 was a complaint about proposed federal legislation (Bill C-28, 30th Parl., 3d sess., 1977-78) which would have re-defined and expanded the group of persons excluded from the definition of "employee" under the Public Service Staff Relations Act, R.S.C. 1970, c. P-35, by reason of their managerial or confidential status. The Committee dismissed the complaint since the Bill had been withdrawn in the meantime, but it pointed out that the proposed changes were not in accordance with Convention No. 87. The government subsequently introduced a new proposal (Bill C-22, 31st Parl., 4th sess., 1978-79) comparable to Bill C-28. The new Bill died as a result of Parliament's dissolution before the matter was re-examined by the Committee, which accordingly reiterated its previous views on the legislation and dismissed the complaint. No new attempt had been made by the government as of March 1981 to amend the legislation in this manner. *See* I.L.O., LXI, O.B. 11 (Series B, No. 3 1978); I.L.O., LXII, O.B. 10 (Series B, No. 2 1979).

Since the Committee formulated its conclusions in the Alberta case, the following Canadian cases have been before the Committee:

(a) Case No. 931 related to the 1978 strike of the Canadian Union of Postal Workers (CUPW), and in particular to the enactment of the Postal Services Continuation Act, S.C. 1978-79, c. 1, rendering the strike illegal, and to the conviction of CUPW's president for defying the legislation. The Committee expressed some concern over the impact of the legislation on industrial relations in the postal sector, and asked to be kept informed of the evolving situation. At the time of its examination of the case the conviction of CUPW's president was under appeal and the Committee asked to be kept informed of the outcome. *See* I.L.O., TWO HUNDRED AND SECOND REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION paras. 192-215 (Geneva) (unreported). The appeal has since been dismissed. R. v. Parrot, 27 O.R. (2d) 332 (C.A. 1979).

(b) Case No. 886 was a complaint by the Canadian Association of University Teachers concerning the Miscellaneous Statutes Amendment Act, 1977, S.B.C. 1977, c. 76, s. 38, which prevented faculty associations from being certified as bargaining agents under the Labour Code. The Committee noted that, in practice, voluntary recognition was extended to faculty associations by universities, and dismissed the complaint. *See* I.L.O., TWO HUNDRED AND SEVENTH REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION paras. 88-89 (215th sess., Geneva) (unreported, 3-6 Mar. 1981).

[71] *See*, *.e.g*, the varying views expressed in the South West Africa Cases, [1966] I.C.J. Rep., particularly by van Wyk J. and Tanaka J., discussed by Higgins, *supra* note 66, at 46-48. Judge Tanaka's view would tend to support the existence of a custom relating to the prohibition on strikes. According to Higgins, *supra* note 66, at 47:

In essence, Judge Tanaka suggests . . . and I quote . . .

"Human rights have always existed with the human being. They existed

Association Committee, since custom can probably not constitute a source of law unless compliance with a practice results from an *opinio juris*, a belief in its legally binding nature.[72] My contention is that a good arguable case could be made for the existence of such a customary rule of international law.

Sinclair C.J. was content to adopt Blackstone's definition of customary international law, according to which it was a "system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world".[73] After alluding to the various international instruments to which he had been referred, as well as to discussions at international conferences concerning the right to strike, he concluded that this material "falls far short of establishing that there is any universal consent on the subject of the right to strike in the public service".[74]

In summary:

(1) contrary to the view of Sinclair C.J., it is a reasonable interpretation of Convention No. 87 to find therein an implicit recognition of the right to strike;

(2) the interpretations of Convention No. 87 by the Commission of Inquiry, the Commitee of Experts, the Fact-Finding and Conciliation Committee and the Freedom of Association Committee were deserving of greater deference than Sinclair C.J. demonstrated towards them; and

(3) a good arguable case can be made for the existence of a rule of customary international law, binding on Canada, to the effect that the right to strike is to be enjoyed by all workers except those in genuinely essential services.

VII. Can a Province Legislate in Violation of Canada's International Obligations?

It is well known that Canada's ratification of an international treaty does not clothe the Parliament of Canada with the authority to implement the treaty. Whether the Parliament of Canada has that authority will depend upon the division of legislative powers prescribed by the British North America Act.[75] This means that the provincial legislatures have the

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independently of, and before, the State". Accordingly, he contends they are rooted in "natural law", and cannot be modified by the constitution or practice of states. Human rights form part of the *jus cogens*, and cannot be derogated from the shortcomings of state behaviour [*sic*]. And the resolutions of the United Nations, and statements there made, are evidence of this deep-rooted legal norm.

[72] *See* A. D'Amato, *supra* note 66, at 49-54, 66-87.

[73] *Supra* note 1, at 47, citing W. Blackstone, IV Commentaries on the Laws of England 66 (1769) (reprinted in 1966).

[74] *Supra* note 1, at 47.

[75] *See* Attorney-General of Canada v. Attorney-General of Ontario (Labour Conventions Case), [1937] A.C. 326, [1937] 1 D.L.R. 673 (P.C.). The decision and the

primary role to play in implementing the majority of international labour Conventions, since Parliament's jurisdiction over labour relations is essentially limited to certain federally regulated industries.[76] Canada therefore finds itself in the uncomfortable position where the federal government ratifies international labour Conventions as an executive act,[77] but cannot comply with its international obligations, for the most part, without the concurrence of all provincial legislatures.[78] In order to protect itself from exposure to international criticism in the event of a provincial legislature refusing to implement a Convention, the Government of Canada regularly consults provincial governments on international labour matters, including the proposed ratification of Conventions. The government has stated that it "has to be absolutely certain that all jurisdictions are in compliance, or will be in compliance at the required date, before it does ratify [a Convention]".[79]

What are the consequences in international law and in Canadian law of a province legislating in violation of an international labour Convention or other related international obligation?

The position in international law leaves no room for doubt: Canada could not excuse its failure to live up to its international commitments by reference to the legislative incompetence of the Parliament of Canada or to the disrespect by a provincial legislature for those commitments.[80]

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principle it embodies have been the subject of intense scrutiny and criticism. *See* Jenks, *The Present Status of the Bennett Ratification of International Labour Conventions*, 15 CAN. B. REV. 464 (1937); Jennings, *Dominion Legislation and Treaties*, 15 CAN. B. REV. 455 (1937); La Forest, *The Labour Conventions Case Revisited*, 12 CAN. YEARBOOK INT. L. 137 (1974); Rand, *Some Aspects of Canadian Constitutionalism*, 38 CAN. B. REV. 135, at 140-44 (1960); Scott, *The Consequences of the Privy Council Decisions*, 15 CAN. B. REV. 485 (1937). In MacDonald v. Vapor Canada Ltd., [1977] 2 S.C.R. 134, at 167-72, 66 D.L.R. (3d) 1, at 27-31 (1976), Laskin C.J.C. speaking for the majority expressed doubts regarding the correctness of the decision in the *Labour Conventions* case. Specifically, he suggested that the general power of Parliament to legislate for the peace, order and good government of Canada might support federal legislation to implement international treaties.

[76] Semple, *Parliament's Jurisdiction over Labour Relations*, 11 U.B.C.L. REV. 232 (1977).

[77] A. GOTLIEB, CANADIAN TREATY-MAKING 4-6, 13-19 (1968).

[78] The ratification of ILO Conventions cannot be accompanied by reservations. *See* N. VALTICOS, *supra* note 22, at 229. Moreover, ILO Conventions do not contain "federal clauses" enabling a federal state to accept international obligations only in respect of certain of its component units. The problem is discussed by Wanczycki, *Les aspects constitutionnels de la ratification des conventions de l'O.I.T.*, 24 REL. IND. 727 (1969). For a comparative overview of the issue, *see* Sabourin, *Le fédéralisme et les conventions internationales des droits de l'homme*, in HUMAN RIGHTS, FEDERALISM AND MINORITIES 67 (A. Gotlieb ed. 1970).

[79] LABOUR CANADA, *supra* note 25, at 3.

[80] Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig, Ser. A/B, No. 44, at 24 (P.C.I.J. 1932), where the Permanent Court of International Justice said, "[A] State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force". *See also* Vienna Convention on the Law of Treaties, 23 May 1969, U.N. Doc. A/CONF. 39/27, art 46.

The impact of international labour obligations on provincial legislative authority was the question which Sinclair C.J. preferred not to answer in the *Alberta Union of Provincial Employees* case.

The answer that should be given to this question is not at all clear. On the one hand, Canada is an heir to the common law's traditional "dualist" doctrine on the relationship between national and international law, which was described as follows in the *Labour Conventions* case:

> Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. . . . Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default.[81]

From this it could be inferred that the existence of international treaty obligations does not affect the powers of the various Canadian legislative bodies.

The argument, however, has been put forward that these bodies, both federal and provincial, do not have plenary powers over the matters assigned to them by the British North America Act, and that, in particular, they do not have the power to legislate in violation of international obligations whether arising from treaties or from custom.[82] According to another view, it is only provincial legislatures that are restricted in this way and even then only as regards customary international law.[83]

The core of the argument to the effect that Canadian legislatures cannot validly legislate in violation of international law is summed up in three propositions:

> (i) By a well-established rule of statutory construction applicable even to legislation of the Parliament of the United Kingdom, it is presumed that the legislature does not intend to enact a law contrary to international law. It is not lightly to be supposed that the legislature intends to contravene the provisions of international law. It follows also, that it is not lightly to be assumed that the legislature intends, or intended, to confer such a power on any other authority. This rule is itself intended to implement a basic principle of international law, which requires each state to ensure that its domestic law is in conformity with the rules, doctrines, and principles of international law.
> (ii) The British North America Act is a statute of the United Kingdom. It does not by express terms confer upon Canadian legislative authorities the power to legislate in contravention of international law.

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[81] *Supra* note 75, at 347-48, [1937] 1 D.L.R. at 678-79.

[82] Vanek, *Is International Law Part of the Law of Canada?*, 8 U. TORONTO L.J. 251 (1950).

[83] La Forest, *May the Provinces Legislate in Violation of International Law?*, 39 CAN. B. REV. 78 (1961). *See also* Rand, *supra* note 75, at 143-44. The views of La Forest on this question seem to have evolved since 1961. *See* p. 195 *infra*.

> (iii) Therefore, neither the Dominion legislature nor, *a fortiori*, the legislatures of the several provinces (which do not even enjoy ordinary extraterritorial powers) possess the power to enact such legislation.[84]

The other opinion mentioned above is to the effect that only provincial legislatures are under this disability. The reason is said to be that they are subject to the doctrine of "extra-territoriality", according to which

> the law-making powers of a colonial or other subordinate legislature must be construed in accordance with the inherent conditions of the colony or other area over which it exercises jurisdiction. . . . The language used in most of these cases also indicates that the so-called doctrine of "extra-territoriality" is not so much concerned with keeping colonial legislation within the bounds of a colony as to prevent it from interfering with international usage or imperial institutions because this type of legislation is inconsistent with colonial status.[85]

The distinction between federal and provincial power in this regard, it has been suggested, is to be found in Canada's change of status resulting from the Statute of Westminster, 1931, following which "any limitations flowing from its former status disappeared".[86] According to an alternative suggestion, the Imperial Parliament, by conferring on Parliament power to legislate for the peace, order and good government of Canada, intended to create a semi-sovereign nation with "extra-territorial powers" — that is, with powers to legislate in violation of international law.[87] Finally, according to this view, since the recognition of provincial incompetence to legislate in violation of international treaties could seriously jeopardize the division of legislative powers in Canada, particularly in the light of the Government of Canada's undoubted authority to ratify treaties and the wide range of social and other domestic matters dealt with in international treaties, the argument for provincial disability is stronger in the case of customary international law than in the case of conventional international law.[88]

These views find some support in two decisions of the Supreme Court of Canada relating to the taxation powers of provincial legislatures,[89] as well as in a *dictum* of the Judicial Committee of the Privy Council.[90] However, the judicial pronouncements in question are open to

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[84] Vanek, *supra* note 82, at 275-76.

[85] La Forest, *supra* note 83, at 81-82.

[86] *Id.* at 87-88.

[87] *Id.* at 89-90.

[88] *Id.* at 79-80.

[89] *See Reference re* Tax on Foreign Legations, [1943] S.C.R. 208, [1943] 2 D.L.R. 481; Municipality of Saint John v. Fraser-Brace Overseas Corp., [1958] S.C.R. 263, 13 D.L.R. (2d) 177.

[90] In Croft v. Dunphy, [1933] A.C. 156, at 164, [1933] 1 D.L.R. 225, at 229-30 (P.C. 1932), Lord Macmillan said:

> It may be that the legislation of the Dominion Parliament may be challenged as *ultra vires* on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the B.N.A. Act has not conferred power on the Dominion Parliament to legislate contrary to these principles.

other possible explanations, with the result that they do not constitute unequivocal support for a general principle of provincial incompetence to legislate in violation of international law. In particular, they have been seen as part of the development of a new principle, namely that provinces cannot interfere with Canada's status as a sovereign state:

> From the foregoing one can reason that the Supreme Court of Canada is prepared to hold that certain powers exist as adjuncts to sovereign power under international law, and that these fall within federal executive and legislative power and cannot be interfered with by provincial legislation. It is true that no one case supports the whole of this proposition, but it is evident that the Supreme Court of Canada is on its way towards developing a concept of international sovereignty whose attributes fall within the jurisdiction of the federal government and parliament.[91]

According to this theory, the ratification and implementation of international labour Conventions would not be necessary "adjuncts to sovereign power under international law".

The weight of authority is against any broad theory of provincial legislative incompetence. In particular, account must be taken of the decision in *Arrow River & Tributaries Slide & Boom Co. v. Pigeon Timber Co.*,[92] where the Supreme Court of Canada was called upon to consider the argument that an Ontario statute, being repugnant to a prior treaty, was invalid. According to Lamont J., the treaty "has only the force of a contract between Great Britain and the United States, which is ineffectual to impose any limitation upon the legislative power exclusively bestowed by the Imperial Parliament upon the legislature of a Province".[93] More generally, the Privy Council has said that provincial legislatures have plenary powers over the matters assigned to them by the British North America Act,[94] although it probably did not have in mind at the time the question now under discussion.

What should be obvious from the foregoing is that technical arguments in support of provincial incompetence are not lacking. The fate of the theory of provincial incompetence seems bound up with the future of the *Labour Conventions* case, notwithstanding that, on a legalistic basis, it would be possible to contend for the extrication of the one from the other. As regards the future development of the law in this area, Professor La Forest was undoubtedly correct when he noted that "[p]olicy grounds, not technicalities, will . . . dictate the future of the *Labour Conventions* case, and these policy grounds are far more evenly balanced than most supporters and critics of the decision are willing to admit."[95]

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[91] La Forest, *supra* note 75, at 145.

[92] [1932] S.C.R. 495, [1932] 2 D.L.R. 250.

[93] *Id.* at 510, [1932] 2 D.L.R. at 260. Vanek, *supra* note 82, at 270-74, notes that only one other member of the Supreme Court of Canada expressly endorsed the judgment of Lamont J. At least two other justices were able to construe the treaty restrictively and thus conclude that the Ontario statute was not repugnant to the treaty.

[94] *See* Hodge v. The Queen, 9 App. Cas. 117, at 132 (1883).

[95] La Forest, *supra* note 75, at 147. The various policy considerations alluded to are reviewed at pp. 147-52.

One final observation must be made on the constitutional aspects of the complaint to the ILO by the CLC. Before Canada ratified Convention No. 87 (and all other international labour Conventions), the federal government received the unanimous approval of the provinces. Sinclair C.J. noted that he could not attach much importance to such federal-provincial consultation. From a legal point of view, this position is not open to question: federal-provincial consultation is essentially a political and extra-legal phenomenon. Reference has already been made to the federal government's practice of satisfying itself that all provinces are in conformity with a Convention and agreeable to its ratification before Canadian ratification will occur.[96] In these circumstances, when provincial legislation has been found to be in violation of a Convention, as was the case with The Public Service Employee Relations Act, the provincial government in question can properly be held to account to the federal government for the violation. It would appear, moreover, that the federal government owes a responsibility to the international community to apply appropriate pressure on the provincial government to amend its legislation. How realistic federal pressure might be in the context of relations between Ottawa and Edmonton in 1980 and 1981 is a moot point. However, the federal government, lacking legislative power to remedy this violation of international law, is duty-bound to attempt to use whatever other powers it has over the Government of Alberta with a view to righting this international wrong, and the prior consent of the Government of Alberta to the ratification would give domestic legitimacy to any such attempts.

VII. CONCLUSIONS

Whatever the preferable disposition by the Alberta Court of Queen's Bench of the application by the Alberta Union of Provincial Employees, the Government of Alberta has acted irresponsibly in the negative stance it has adopted *vis-à-vis* the recommendations of the Freedom of Association Committee.

In the first place, the provincial government, having conveyed to the Government of Canada its approval of the ratification of Convention No. 87, is surely under a moral obligation to the federal government to take corrective action. Its failure to do so jeopardizes the integrity of the federal-provincial consultation process in international labour matters.

But it is the impact of Alberta's stubborn attitude at the international level that leaves the Government of Alberta open to the more serious criticism. Since World War II the international community has endeavoured to protect certain fundamental human rights through the medium of international law. Despite the glaring violations of human

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[96] *See* pp. 191-92 *supra*.

rights that are reported somewhere or other in the world on a daily basis, enormous progress has been made towards fostering the concept of the international responsibility of states for the effective observance as regards their own nationals of basic principles of humanity and decency. The ILO's procedures for the protection of trade union rights constitute one of the most successful examples of this development, a development, moreover, in which the western industrialized countries, including Canada, have played a leading role.

In spite of the progress which has been made, supervisory mechanisms, to the extent that they exist, are fragile. For the most part, concern for national sovereignty has precluded the possibility of effective sanctions being applied in the case of violations of internationally protected human rights. The complex relies largely upon moral pressure and the occasional unilateral application of economic sanctions in the case of the grossest violations. The effectiveness of moral persuasion, in turn, depends, in the final analysis, upon the demonstrated willingness of other states to accept unquestioningly the authority of decisions made by supervisory bodies. How are states to be convinced of their responsibility to the international community to change their law or practice when found to be in violation of international law, if not by the example of other states? Disrespect breeds disrespect; contempt begets contempt.

Alberta is setting a dangerous precedent in refusing to accept the authority of the criticisms by the ILO's Freedom of Association Committee. In earlier cases relating to Canada,[97] provincial governments, although not necessarily changing their law overnight in response to the Committee's criticisms, have at least acknowledged that the criticisms would be taken into account when next the legislation was reviewed. In *Case No. 523*, for example, the Government of Newfoundland was criticized for denying hospital workers the right to strike and not compensating for this denial by making available acceptable arbitration procedures. The Freedom of Association Committee reported as follows:

> In the communication of 3 February 1969 from the Government of Canada, the Government of Newfoundland states that there are, in fact, no arbitration provisions applying to labour disputes in hospitals. The Government expresses its desire, however, to find an acceptable alternative to the earlier hospital legislation which did contain arbitration provisions. In this connection the Government states that it is undertaking a review of its labour legislation, and it expresses the hope that in the consideration of the recommendations to be made within the framework of this review some answer can be found to the difficulty in question.[98]

Such a declaration by a government contributes to the moral authority of the Committee and, thereby, to the authority of other comparable international supervisory bodies. The most serious indict-

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[97] *See* note 70 *supra*.

[98] I.L.O., LII, O.B. 37 (2d Supp. 1969).

ment against the Government of Alberta is not so much that the impugned legislation reflects questionable policy,[99] but that its refusal to acknowledge its responsibility for changing the legislation tends to weaken respect for the whole system of the international protection of human rights.

[99] For a discussion of different legislative approaches adopted in Canada towards public sector collective bargaining, *see generally* H. ARTHURS, COLLECTIVE BARGAINING BY PUBLIC EMPLOYEES IN CANADA: FIVE MODELS (1971). In fairness to the Government of Alberta, it should be noted that it is not alone in denying public servants the right to strike. *See, e.g.*, The Crown Employees Collective Bargaining Act, 1972, S.O. 1972, c. 67; Civil Service Collective Bargaining Act, S.N.S. 1978, c. 3.