Bringing Canada's Wagner Act Regime into Compliance with International Human Rights Law and the *Charter*

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In recognizing a constitutional right to strike in its Saskatchewan Federation of Labour *decision, the Supreme Court of Canada reaffirmed that workers in Canada are entitled to freedom of association rights that are at least equivalent to those provided by international human rights instruments. This paper considers the implications of this principle for employees in the private sector, where unionization rates have been in continual decline for several decades, by focusing on the potential of "minority" unionism for realizing Canada's international law obligations. The author notes that the ILO's supervisory committees have approved three options as being consistent with ILO principles on freedom of association: minority worker associations, each of which has full rights to represent its own members; unions which, though not representing a majority of the workers in the bargaining unit, are recognized as being the "most representative," and as such have the right to conclude a collective agreement applicable to all the workers; and unions certified under the North American Wagner Act model, through a majoritarian procedure. Thus, while ILO member-states are permitted to adopt legislation based on majoritarian exclusivity, such legislation cannot have the effect of depriving non-majority unions of the right to bargain collectively on behalf of their members, in those workplaces where no exclusive agent has been certified. With a view to ensuring that labour law and practice in Canada conform to international standards, the author proposes that every Canadian jurisdiction revise its legislation to provide for certification of the "most representative" minority union in a workplace, while retaining the existing procedures for certification of an exclusive bargaining agent. Under this proposal, the most representative union (or coalition of unions) in a bargaining unit would have all the rights and duties of an exclusive agent, but not an exclusive right of representation. In this way, the author contends, Canada could live up to its international law commitment to "promote" collective bargaining.*

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1. INTRODUCTION

Under international human rights law, freedom of association at work is composed of three elements: the right to organize, the right to bargain and the right to strike.[1] In a series of recent cases, the Supreme Court of Canada has stated that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."[2] In *Dunmore* and *B.C. Health*, the Court made it clear that section 2(d) of the *Charter of Rights and Freedoms*, consistent with international law, protects the rights freely to organize into associations and, through those associations, to bargain collectively.[3] In *Saskatchewan Federation of Labour v. Saskatchewan*, issued in January 2015, the Court further aligned Canadian law with international law by

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1 Bernard Gernigon, Alberto Odero & Horacio Guido, "ILO Principles Concerning Collective Bargaining" (2000) 139:1 Intl Labour Rev 33 at 51-52. In 2012 the Employers Group at the ILO "surprised many" by questioning established principles regarding the right to strike; see Sonia Regenbogen, "The International Labour Organization and Freedom of Association: Does Freedom of Association Include the Right to Strike?" (2012) 16:2 CLELJ 385; Janice R Bellace, "The ILO and the Right to Strike" (2014) 153:1 Intl Labour Rev 29; Janice R Bellace, "Back to the Future: Freedom of Association, The Right to Strike and National Law," Draft dated 17 December 2015. The issues raised were settled when an agreement acceptable to all three major constituents of the ILO (labour, business and government) was reached in February 2015. See *Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level*, ILO (2015); Hector Bartolomei de la Cruz, Geraldo von Potobsky & Lee Swepston, *The International Labor Organization, The International Standards System and Basic Human Rights* (Boulder: Westview Press, 1996) at 166 (the right to organize is generally understood to subsume "the right of trade unions to be free from any restriction or intervention from the State which impedes the establishment or functioning of professional organizations").

2 The most recent iteration of this standard is to be found in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 64, 1 SCR 245 [*Saskatchewan Federation of Labour*].

3 *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*B.C. Health*]; *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*].

declaring that the right to strike is constitutionally protected by section 2(d).[4]

Historically, international human rights law had little practical effect on Canadian labour law, and therefore the relation between the two did not attract a great deal of scholarly attention. With the SCC's recent decisions, that has begun to change. The SCC has stated that Canadian law ought to match or surpass international law. An understanding of international freedom of association law, which is also human rights law, is essential for the Canadian labour law and industrial relations communities.

There is little question that the *Saskatchewan Federation of Labour* decision will have a significant effect on the public sector, where governments have repeatedly restricted the right to strike in a manner contrary to international standards.[5] As a result, much of the discussion about *Saskatchewan Federation of Labour* is likely to explore the implications of international law for Canadian public-sector labour law. The impact of *Saskatchewan Federation of Labour* and international law on the private sector, most of which is regulated by what is commonly referred to as the Wagner Act Model is, however, less obvious and therefore unlikely to attract as much attention.

In his dissenting judgment in *Saskatchewan Federation of Labour*, Justice Rothstein posed this question: "has the majority now created a fundamental freedom that [despite the *Charter*'s promise to protect all Canadians] can only be exercised by government

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4 *Saskatchewan Federation of Labour*, *supra* note 2 at para 3.

5 See e.g. Roy J Adams "Public Employment Relations: Canadian Developments in Perspective" in Gene Swimmer, ed, *Public-Sector Labour Relations in an Era of Restraint and Restructuring* (Don Mills, Ont: Oxford University Press, 2001) 212 [Adams 2001]; Roy J Adams, "From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining" (2008) 12 Just Labour 48 [Adams 2008]; Kevin Banks, "The Role and Promise of International Labour Law in Canada's New Labour Law Constitutionalism" (2012) 16 CLELJ 233 [Banks]; B Etherington, "The Right to Strike Under the *Charter* after *Saskatchewan Federation of Labour v Saskatchewan* – Applying the New Standard to Existing Regulation of Strike Activity" (2015), Queen's University Working Paper; Leo Panitch & Donald Swartz, *The Assault on Trade Union Freedoms*, 3d ed (Toronto: University of Toronto Press, 2003); Joseph B Rose, "Constraints on Public Sector Bargaining in Canada" (2016) 58 J of Industrial Relations 93 [Rose].

employees and the 17 percent of the private sector workforce that is unionized?"[6] The answer to that question, I believe, depends strongly on the status of minority unions in Canada.[7] That, in turn, depends critically on international law and its connection with Canadian constitutional law.

This paper investigates the implications for those Canadians who work in the private sector of an entitlement to freedom of association rights that are at least equivalent to those provided by international human rights instruments. How might Canadian governments fashion law and policy that is compliant in both letter and spirit with international human rights standards? I will examine the status of minority unions and "most representative union" rights in Canada, analyze Canada's failure to fulfil its duty to promote collective bargaining, and propose changes to Canadian law that will have the effect of expanding collective bargaining while making minimal changes to the existing procedures.

Under current Canadian Wagner Act Model (CWAM) statutes, minority unions are not forbidden to exist but they have few statutory protections.[8] To acquire a protected right to strike, workers covered by CWAM statutes must certify a "bargaining agent" by demonstrating to a government agency (usually a labour relations board) that

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6 *Saskatchewan Federation of Labour*, *supra* note 2 at para 123, Rothstein J, dissenting.

7 For brevity's sake, this paper generally uses the term "minority union" to refer to a union that has not been certified through a majoritarian process as the exclusive bargaining agent for a group of employees defined as a bargaining unit. Logically, however, a legitimate non-certified union might choose to operate outside of the Wagner-Act system even though it commands the support of a majority of the relevant employees. Examples are to be found in those Canadian universities where the faculty association has decided to operate independently, even though it would qualify for Wagner Act certification and would have the support of a majority of the employees. See the brief discussion in Adams, *Labour Left Out*, *infra* note 11 at 32-34.

8 In his judgment in the Ontario Court of Appeal in *Fraser*, *infra* note 26, Winkler J would have prohibited minority unions. See Roy J Adams, "*Fraser v. Ontario* and International Human Rights" (2008) 14:3 CLELJ 377. See also David Doorey, "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" (2013) 38:2 Queen's LJ 515 [Doorey 2013] for an excellent discussion of the status of minority unions in Canada.

the association of their choice has the support of a majority of the employees in a government-determined "bargaining unit."[9] Certified bargaining agents acquire exclusive representation rights and the employer is forbidden to deal with minority unions. Because of the dominance of this regulatory scheme, minority unionism has had little impact on Canadian labour relations. It exists on the margins and has attracted some theoretical discussion. But it has not been embraced as a serious option by the labour movement or its political allies and thus is essentially absent from the political agenda.[10]

Consider two possible interpretations of the right of private-sector workers to strike recognized in *Saskatchewan Federation of Labour*. The first is that requiring workers to certify an exclusive agent in order to acquire a protected right to strike is an unreasonable hindrance to the exercise of a fundamental human right, and does not comply with Canada's international obligations or with the *Charter*'s protections. The second is that it is permissible for the state to make the right to strike contingent upon certification of an exclusive agent by a majority of workers in a government-specified bargaining unit.

If the second interpretation is sanctioned by the courts, the *Charter*'s promise to promote workplace equality, democracy and justice through collective bargaining is unlikely to be met. Requiring employees to certify an exclusive agent via a majoritarian scheme

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9 George W Adams, *Canadian Labour Law*, 2d ed (Aurora, Ont: Canada Law Book, 1993 (looseleaf release 50) [George Adams].

10 For examples of the theoretical discussion on the positive possibilities of non-majority unionism in Canada, see Beth Bilson, "Future Tense: Some Thoughts about Labour Law Reform" (2005) 12 CLELJ 233 [Bilson]; Roy J Adams, "Fear of Minority Unionism: real and imagined" (19 December 2010), *Freedom of Association* (blog), online: <foa2010blogspot.ca>; Mark Harcourt & Peter Haynes, "Accommodating minority unionism: Does the New Zealand experience provide options for Canadian law reform?" (2011) 16:1 CLELJ 51; Alison Braley-Rattai, "Harnessing the Possibilities of Minority Unionism in Canada" (2013) 38:4 Labor Studies J 321 [Braley-Rattai]; Doorey 2013, *supra* note 8. On potential negative effects, see James Clancy, "In unity there's strength!" (2010) 17:4 Intl Union Rights 14 [Clancy]; Paul JJ Cavalluzzo, "The Fraser Case: A Wrong Turn in a Fog of Judicial Deference" in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) [Cavalluzzo]. See also *Ontario (AG) v Fraser*, 2011 SCC 20, 2 SCR 3, at paras 346-351, Abella J, dissenting.

in order to acquire effective bargaining rights, including the right to strike, is a format that has thwarted the advancement of collective bargaining for more than three decades.[11] As employers have become increasingly sophisticated in convincing, cajoling, intimidating and manipulating employees to "remain loyal" to the medieval customs of the "non-union" enterprise, collective bargaining in Canada has been in recession. But the second interpretation ought not to be sanctioned by the courts because, as I will elaborate below, it is clearly contrary to Canada's international obligations, on which the Supreme Court has repeatedly assured Canadians they have a right to rely.[12]

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11 Where unions are able to achieve certification, the Wagner Act Model does provide them with many advantages. For example, it requires "employers to bargain with unions in good faith and to refrain from committing unfair labour practices." It also grants "legal status to collective agreements," and ensures "the mandatory adjudication of workplace grievances." See Michael Lynk, "The Wagner Act in Canada" in Matthew Behrens, ed, *Unions Matter: Advancing Democracy, Economic Equality and Social Justice* (Toronto: Between the Lines, 2014) 79 at 79. For these reasons, the Wagner Act Model is highly regarded by trade unionists. But it challenges employers to institute policies designed to ensure that less than 50% of relevant employees support unionization. As employers have become increasingly skilled at that task, new union organizing becomes next to impossible. When unionized enterprises are shut down (as many have been in, for example, manufacturing) and replaced by non-union operations (in, for example, retail and high-tech industries), the collective bargaining coverage rate will decline, as it has almost continuously for several decades. See e.g. Roy J Adams, *Industrial Relations under Liberal Democracy: North America in Comparative Perspective* (Columbia, SC: University of South Carolina Press, 1995) [Adams 1995]; Roy J Adams, *Labour Left Out: Canada's Failure to Protect and Promote Collective Bargaining as a Human Right* (Ottawa: Centre for Policy Alternatives, 2006); Adams 2008, *supra* note 5. See also Bilson, *supra* note 10.

12 In its *MPAO* decision, the SCC apparently gave approval to the Wagner Model when it noted that it "offers one example of how the requirements of choice and independence ensure meaningful collective bargaining." See *Mounted Police Association of Ontario v Canada (AG)*, 2015 SCC 1 at para 94, [2015] 1 SCR 3 [*MPAO*]. That observation does not contradict the argument made here, which is that while it is consistent with international law to offer the Wagner Model as an option, it is not consistent with that law to deny protection to bargaining and strike rights except where an exclusive agent has been certified through a majoritarian process.

2. MINORITY UNION RIGHTS UNDER INTERNATIONAL LAW

The primary agency responsible for setting international labour rights standards is the International Labour Organization (ILO). Since its founding in 1919, and especially since the end of World War II, the ILO has produced a large body of principles regarding freedom of association. The Supreme Court of Canada (like the courts of many other nations in interpreting their constitutional and statutory frameworks) has found that body of work to be a persuasive aid in interpreting section 2(d) of the *Charter*.[13]

The first principle of international labour law is that collective bargaining is a human right, one which all nations have a duty to "promote." In its 1998 *Declaration on Fundamental Principles and Rights at Work*, the International Labour Organization declared that "all Members" have "an obligation . . . to promote and to realize in good faith" ILO principles regarding "freedom of association and the right to collective bargaining."[14] It is generally accepted that the principles which this statement refers to are those embedded in the jurisprudence of the ILO's primary supervisory bodies: the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR).

The function of the CFA is to hear cases alleging a breach of freedom of association. The essential question that it asks in every case is: Does this impugned action or law promote or hinder

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13 *Saskatchewan Federation of Labour*, *supra* note 2 at paras 71-74.

14 *Declaration on Fundamental Principles and Rights at Work*, ILO 86th Sess, Agenda Item 7, 2000-01-0003-27A.DOC/v3 (1998) 27 at 27; *Oxford Dictionaries*, online: <www.oxforddictionaries.com> (defines promotion as "[a]ctivity that supports or provides active encouragement for the furtherance of a cause, venture or aim"); see also *The Cambridge Dictionary*, online: <http://dictionary.cambridge.org/dictionary/british/> (defines promotion as the "act of encouraging something to happen"). In short, ILO member-states have a constitutional duty to "actively encourage" collective bargaining.

collective bargaining?[15] As a body that is charged with arriving at consensus decisions acceptable to representatives of employers and governments as well as unions, it must choose its words carefully. As a result, when it comes to a conclusion that there has been a breach of freedom of association, it often prefaces its specific comments with a statement to the effect of, "this [action or law] does not necessarily promote collective bargaining." Periodically, the CFA issues a digest of the principles that it has developed in the course of issuing its decisions, which, at this point, number over 3,000.[16] The CEACR's task is to comment on the laws in countries that have ratified specific conventions. As with the CFA, the key question it asks when analyzing any freedom of association statute is: "Does it promote collective bargaining?" It, too, periodically issues a digest of its observations.[17] The work of the two committees is closely coordinated and their position on freedom of association is, as a result, essentially identical.

One of the basic ILO principles is that "all workers" (with a few exceptions) "have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization."[18] The result of exercising

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15 *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, ILO, 5th ed (2006) [CFA *Digest*]. For an extensive discussion of the promotional responsibilities of ILO member-states, see Industrial and Employment Relations (DIALOGUE) & International Labour Standards Department (NORMES), International Labour Office, *Promoting Collective Bargaining – Convention No 154* (1 June 2011) (Geneva: ILO, 2011), online: <www.ilo.org/ifpdial/information-resources/publications/WCMS_172186/lang--en/index.htm>.

16 *371st Report of the Committee on Freedom of Association*, ILO Governing Body, 32d Sess, Agenda Item 12, GB.320/INS/12 (2014) i at 2.

17 *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, ILO Committee of Experts on the Application of Conventions and Recommendations, 101st Sess, Agenda Item 3, ILC101/III/1B (2012) [CEACR 2012].

18 *Ibid* at para 53 (states are permitted "to determine the extent to which the guarantees provided for in the Convention shall apply to the armed forces and the police") at para 54. In Canada, as a result of the SCC's *MPAO* decision, *supra* note 12, the freedom of association of police is protected by the *Charter*. The status of the armed forces is an issue that has not yet been addressed in Canada.

that right may be either a majority or a minority union.[19] Under international law, both types of unions are considered legitimate vehicles through which workers may exercise their freedom of association rights.[20] With a view towards "promoting" unionization and collective bargaining, the ILO committees have approved three options as consistent with ILO principles: the default option of minority worker associations, unions that are recognized as "most representative," and certification of unions under the Wagner Model.

Many countries have registration systems that provide unions with various rights such as "special immunities, tax exemptions, the right to have recourse to dispute settlement machinery, the right to be recognized as a bargaining agent, *etc.*"[21] Under international law, conditions for registration cannot be made excessive. The supervisory committees have stated that a requirement specifying that "a first level organization" must represent "at least 50 workers to be able to acquire legal personality" is not in conformity with ILO standards. They have also stated that "to establish an enterprise union in small and medium-sized enterprises," the membership requirement "should be lower than 30 workers."

These examples demonstrate that when the ILO uses the term "union," it does not contemplate, as is the Canadian norm, a worker organization that has acquired majority support in any particular unit. To "be unionized" is to form or join a legitimate, independent

19 The ILO has established that the right to strike is one "which workers and their organizations (trade unions, federations and confederations) are entitled to enjoy" and that a trade union is "any organization for furthering and defending the interests of workers." Moreover, "[t]his definition is clearly of fundamental importance" for "demarcating the boundaries within which the rights and guarantees recognized by [the international standards] are applicable." See Bernard Gernigon, Alberto Odero & Horacio Guido, "ILO Principles concerning the right to strike" (1998) 137:4 Intl Labour Rev 441.

20 For more detail, see CEACR 2012, *supra* note 17 at 92-100. See especially CFA *Digest*, *supra* note 15 at paras 974-980.

21 CEACR 2012, *supra* note 17 at para 83.

workers' association.[22] In other words, unionization does not depend upon authorization or sanction by the state. In order to qualify for legal protections, including the right to bargain collectively, the worker organization need demonstrate no more than a modest membership. Moreover, while the ILO considers it legitimate that legislatures establish minimum membership rules for the acquisition of particular legal rights, it insists that "the exercise of legitimate trade union activities should not be dependent upon registration."[23]

Unionization, in other words, does not depend upon authorization or sanction by the state. The bottom line is that, under international law, minority unions are entitled to exist and to exercise appropriate trade union functions. Members of the ILO are obliged to ensure that those associations are able to exercise the international human rights to which they and their members are entitled.

The primary implication for Canada, after the *Saskatchewan Federation of Labour* decision, is that since the SCC has promised standards at least as robust as international human rights norms, all legitimate minority worker associations must now be assumed to have a constitutional right to organize, to bargain (with a compliant partner), and to strike (without incurring penalties).[24] This is the ILO's default option and the one which Justice Winkler, of Ontario's Court of Appeal, feared because it implied that the employer might have to negotiate simultaneously with multiple minority unions. In his judgment, the result of granting legal status to a large number

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22 *MPAO*, *supra* note 12 at paras 88-89. Employer-dominated employee associations do not qualify as genuine unions. In its *MPAO* decision, the SCC made clear that, consistent with international norms, "[t]he function of collective bargaining is not served by a process which is dominated by or under the influence of management." Furthermore, the "degree of independence required by the Charter for collective bargaining purposes is one that permits the activities of the association to be aligned with the interests of its members." *Ibid* at para 88. Indicators of independence include "freedom to amend the association's constitution and rules, the freedom to elect the association's representatives, control over financial administration and control over the activities the association chooses to pursue." *Ibid* at para 89.

23 CEACR 2012, *supra* note 17 at para 83.

24 *Saskatchewan Federation of Labour*, *supra* note 2 at para 67 (strikes are "essential means available to workers and their organizations for the promotion and protection of their economic and social interests"). *Ibid* at paras 73-74 (strikes are "a basic right").

of minority unions would be chaos.[25] That option, he therefore concluded, must be eliminated. In his 2008 decision in *Fraser v. Ontario (Attorney General)*, he put it this way:

> It is impractical to expect employers to engage in good faith bargaining discussions when confronted with a process that does not eradicate the possibility of irreconcilable demands from multiple employee representatives, purporting to simultaneously represent employees in the same workplace with similar job functions. It is not overstating the point to say that to avoid chaos in the workplace to the detriment of the employer and employees alike, it is essential that a representative organization be selected on a majoritarian basis and imbued with exclusive bargaining rights.[26]

If ILO principles were inflexible and rigid, then bearing or enduring the threat of the sort of chaos foreseen by Justice Winkler might be the only way in which Canada could conform to ILO and constitutional standards. But, being pragmatic and flexible, the ILO provides for alternatives. Recognizing that an "excessive multiplication of trade unions" might result in the practical difficulties noted by Justice Winkler and others, the ILO has given its approval to systems that grant "a variety of rights and advantages," including the granting of a restricted right to engage in "collective bargaining" to "representative trade unions."[27]

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25 Speculating about the effects of minority unionism in the U.S., Fisk and Tashlitsky have a much different view. See Catherine Fisk & Xenia Tashlitsky, "Imagine a World Where Employers are Required to Bargain with Minority Unions" (2011) 27:1 ABA J Labor & Employment L 1 [Fisk & Tashkitsky]. Doorey 2013, *supra* note 8 (Doorey also imagines a more benign outcome in Canada when considering minority unions with protected, but less than full, bargaining rights).

26 *Fraser v Ontario (AG)*, 2008 ONCA 760 at para 92, 301 DLR (4th) 335. See also *Fraser*, *supra* note 10 at paras 321-368, Abella J, dissenting.

27 CEACR 2012, *supra* note 17 at para 96 (the discussion about minority unionism in North America is hampered by the absence of universally agreed definitions); Braley-Rattai, *supra* note 10 (defines a minority union as "an entity legally entitled to represent less than a majority of a given bargaining unit") at 328. This definition would exclude the "most representative union" model approved by the ILO and discussed here, since such a union would have the legal right to represent everyone in the bargaining unit despite having less than 50% membership; Teri L Caraway, "Freedom of Association: Battering Ram or Trojan Horse?" (2006) 13:2 Rev of Intl Political Economy 210. In her article, Caraway suggests that a "liberal" ILO promotes union competition, either deliberately or passively, in order to serve the interests of competition-promoting institutions such as the International Monetary Fund and the World Bank. The acceptance by the ILO's supervisory bodies of the monopoly effect of the Wagner Act Model, as well as their acceptance and indeed promotion of the "most representative union" concept, is clear evidence that her analysis is off the mark.

The threshold established by the ILO supervisory committees for recognition of a "most representative" union, with authority to negotiate terms and conditions "destined to be applied to all workers in a sector or establishment," is somewhat inexact.[28] The CEACR has, however, established that "too high a percentage for representivity to be authorized to engage in collective bargaining may hamper the promotion and development of free and voluntary collective bargaining" and that "50% is excessive."[29]

Instead of a general percentage threshold, the Committee has suggested that an appropriate percentage might vary with the size of the bargaining unit. Applying that standard, the Committee has proposed that a requirement of 33% "at the level of the branch or in a large enterprise . . . may be difficult to achieve and does not allow the promotion of collective bargaining . . . ." It notes, with apparent approval, that some countries have thresholds as low as 10-20 percent.[30] Combining the guidelines for registration with those for "representivity," it appears that in a small to medium-sized firm a union with at least 30 members, in a bargaining unit of between 90 (of which it would have 33%) and 300 (of which it would have 10%), would have a legitimate claim for statutory support to be recognized as bargaining agent for all workers in the bargaining unit, so long as it had no competition or only competition from unions with fewer than 30 members.

In those cases where a most representative union (or coalition of unions having reached that status) has been recognized as bargaining agent for all workers in an establishment, ILO standards require that minority unions should retain "the essential means of defending the occupational interests of their members (for instance, making representations on their behalf, including representing them in case of individual grievances)."[31]

Since the ILO regards collective bargaining as a process primarily intended to conclude a collective agreement, the most representative union (or coalition of minority unions) acquires the right

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28 CEACR 2012, *supra* note 17 at para 233.

29 *Ibid* at para 235.

30 *Ibid.*

31 CFA *Digest*, *supra* note 15 at para 346 (the CFA says that in this situation minority unions should retain "the right to make representations on behalf of their members and to represent them in cases of individual grievances," at para 974). See also CEACR 2012, *supra* note 17 at 36.

to negotiate a collective agreement applicable to all members of the bargaining unit, including those who are members of other minority unions.[32] But those minority unions retain their rights to speak for their members and the right to represent their members in grievances. Since the right to strike is a right that may be exercised by any legitimate union, minority unions also retain their right to strike but only within the terms of the law and the collective agreement.[33] If the agreement or a statute specifies requirements such as notice, arbitration of grievances and strikes only at contract expiry, the minority union would be bound to respect those regulations.[34]

3. IS CANADA'S WAGNER ACT MODEL CONSISTENT WITH INTERNATIONAL LAW?

The CEACR specifically addresses a third option for legal recognition of collective bargaining rights, the Wagner Act Model:

> . . . the committee considers that systems are compatible with the Convention under which only one bargaining agent may be certified to represent the

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32 CEACR 2012, *supra* note 17 at para 198 (states that "the overall aim" of ILO standards on collective bargaining is the "promotion of good-faith bargaining with a view to reaching an agreement on terms and conditions of employment"). The CFA is even more specific in stating that "[m]easures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements." See CFA *Digest*, *supra* note 15 at para 880.

33 The CFA has developed this principle: "If strikes are prohibited while a collective agreement is in force, the restriction must be compensated for by the right to have recourse to impartial and rapid mechanisms, within which individual and collective complaints about the interpretation or application of collective agreements can be examined." See CFA *Digest*, *supra* note 15 at para 533. Furthermore, the "prohibition of strikes" over the "interpretation of legal texts" does not "constitute a breach of freedom of association." *Ibid* at para 532. For additional commentary, see Adams 2008, *supra* note 5 at 390-391.

34 See CEACR 2012, *supra* note 17 at para 157. According to the CEACR, "the principles developed by the supervisory bodies in relation to the right to strike are only valid for lawful strikes, conducted in accordance with the provisions of national law, on condition that the latter are themselves in conformity with the principles of freedom of association." A law forbidding minority unions to strike in any circumstances would almost certainly not conform to ILO principles.

> workers of any given bargaining unit, which gives it the exclusive right to negotiate the collective agreement and to monitor its implementation, provided that legislation or practice impose on the exclusive bargaining agent an obligation to represent fairly and equally all workers in the bargaining unit, whether or not they are members of the trade union.[35]

The U.S. version of the Wagner Act Model (USWAM) provides employees covered by the statute with a path, even if one fraught with obstacles, to certify an exclusive agent.[36] But employees covered by the Act also have the right to engage in "concerted action," which means that any group of workers may make demands on the employer and, if not satisfied with the response, may engage in a legal work stoppage.[37] They may undertake that action either as part of an informal group or through a minority union. If they form a minority union, that organization also has the right to represent its members in their grievances, so long as it does not offend the collective agreement or the law.[38]

The Canadian version of the Wagner Model is less generous. There is no right to concerted action, nor any right of minority unions to present grievances in any of the Canadian statutes.[39] In Canada, it is all or nothing. The state provides employees with the option of certifying an exclusive bargaining agent in a majoritarian process.

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35 CEACR 2012, *supra* note 17 at para 98.

36 Unlike Canada, where each jurisdiction maintains its own version of the CWAM, the USWAM is the result of federal legislation that applies nationally to most private-sector workers.

37 For discussion of concerted action, see Doorey 2013, *supra* note 8, and Fish & Tashlitsky, *supra* note 25.

38 Lance Compa, "The Wagner Model and International Freedom of Association Standards" in Dominic Roux, ed, *Autonomie collective et droit du travail, Mélange en l'honneur du professeur Pierre Verge* (Laval: Presse de l'Université Laval, 2014) 427 [Compa].

39 David Doorey, "Why Nonunion Workers Have a Right to Strike in US, But Not in Canada" (March 2014), *Doorey's LawofWork* (blog), online: <www.lawofwork.ca/?p=7403>. With regard to the right to strike, Doorey puts it this way: "The only legal strike in Canada is one that complies with the various requirements in labour relations legislation, which include: collective bargaining, exhaustion of mandatory government conciliation, a successful strike vote, completion of a 'waiting period,' and sometimes notice to the other party. Only unionized workers can ever satisfy those requirements, and even then, only workers who are in a certified union that represents a majority of workers at a workplace."

Employees in covered bargaining units who refrain from taking that option, either because no union is able to win majority support or because the employees prefer to avoid the constraints of the law, may not legally be disadvantaged by their employer if they choose to form a non-certified union. However, such an organization has no statutory right to be recognized with a view towards negotiating a collective agreement, no right to represent its members in pursuing grievances, and no protected right to strike.[40]

In a recent article written for a Canadian volume, Lance Compa, a distinguished American professor, human rights advocate and co-author of a textbook on international labour law, made little distinction between the American and Canadian versions of the Wagner Model, concluding that the Model, as practiced in the U.S. and Canada, provides a fair "trade off" by requiring employees to certify an exclusive agent in order to win state support for mandatory bargaining.[41] Compa states:

> Advocates of replacing majoritarian exclusivity with minoritarian pluralism often point to decisions of the ILO Committee on Freedom of Association that 1) "a provision [in the country's labour law] that stipulates that a collective agreement may be negotiated only by a trade union representing an absolute majority does not promote collective bargaining" (i.e., voluntary collective bargaining, *per* [Convention] 98) and 2) "when no trade union represents the absolute majority of the workers, the organizations may jointly negotiate a collective agreement applicable to the enterprise or the bargaining unit, or at least conclude a collective agreement on behalf of their members."[42]

He goes on to say that "the first instance is not the Wagner Model" because "the cases in question involved regimes in which *only* a majority union may reach a collective agreement even if the employer is willing to reach an agreement with a minority union."[43] He then argues that because it does not prevent the employer "from voluntarily reaching an agreement with a minority union as long as there is no majority union," the Wagner Model conforms to "ILO norms in support of voluntary collective bargaining."[44]

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40 *Ibid.* See also Bilson, *supra* note 10, and George Adams, *supra* note 9.

41 Compa, *supra* note 38.

42 *Ibid* at 453-454.

43 *Ibid* at 454

44 *Ibid.*

Compa further asserts that "the CFA says only that [multiple minority unions] 'may' bargain, implying that bargaining would take place voluntarily with an employer willing to bargain with them — not that the law should compel the employer to bargain involuntarily."[45] He also reports without comment that "[i]n the United States and Canada, employers do not do it [i.e. recognize minority unions for the purpose of bargaining collectively] because no one can make them, and they prefer not to deal with unions unless someone makes them." He considers this to be the "paradigmatic application of the ILO's flexibility and pragmatism."[46] In addition, he observes that it "takes into account U.S. and Canadian traditions, practices, and cultures of labour relations, recognizing a trade-off between requiring the union to establish majority status and forcing the employer to the bargaining table."[47] Contrary to the critics, according to Compa, this "trade-off" is a "social bargain" consistent with ILO norms.[48]

Since Compa is a well-established expert on international labour standards and an acknowledged advocate of collective bargaining, his argument must be accorded a great deal of respect. On this issue, however, there is another interpretation of ILO standards that better captures the broad purpose of the ILO effort to promote freedom of association. This interpretation is truer to the somewhat inexact texts of the supervisory bodies.

There are at least two problems with Compa's analysis. First, early in his essay he says that "a key question is whether labour law [in any country] *protects* the exercise of the right to freedom of association. Exercising the right without protection nullifies the right."[49] However, in his analysis of the Wagner Model trade-off, he apparently grants legitimacy to a situation in which the state fails to provide the support that workers need to effectively exercise their right to bargain through minority unions, despite his statement that the absence of protection "nullifies" that right. In Canada and the United States, as Compa recognizes, employers generally do not acknowledge and bargain with unions, unless pressured to do so by the government.

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45 *Ibid.*
46 *Ibid.*
47 *Ibid.*
48 *Ibid.*
49 *Ibid* at 437.

The second problem with Compa's analysis lies in his view of the meaning of "voluntary collective bargaining." He interprets the concept of voluntarism to mean that employers are entitled "not to deal with unions unless someone makes them."[50] But that notion of voluntarism is alien to the work of the ILO. The ILO's Committee on Freedom of Association says: "Employers . . . should [*not "may"*] recognize for collective bargaining purposes the organizations representative of the workers employed by them."[51] Moreover, the ILO's Committee of Experts on the Application of Conventions and Recommendations notes that, "[u]nder the terms of the ILO *Declaration on Fundamental Principles and Rights at Work, 1998*, collective bargaining is a fundamental right accepted by member States from the very fact of their membership in the ILO, and which they have an obligation to respect, to promote and to realize in good faith."[52] The CEACR further reports that "the supervisory bodies consider that the parties must respect the principle in good faith and not resort to unfair or abusive practices in this context (such as, for example, the *non-recognition of representative organizations*, obstruction of the bargaining process, etc.)."[53] The CEACR considers refusal by employers "to deal with unions unless someone makes them" to be an "abusive practice" or, according to North American terminology, an "unfair labour practice." In short, voluntarism means that the "autonomy" of labour and management ought to be respected by the state, but only within the scope of the state's obligation to promote collective bargaining.

Until the advent of the Thatcher regime in 1979, the United Kingdom pursued a labour policy that was commonly characterized as "voluntarism." It meant that labour and management ought to be free to negotiate not only terms and conditions of employment but

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50 *Ibid* at 454. This argument would appear to be essentially the same as the one made by Brian Langille in several articles. See especially Brian Langille & Benjamin Oliphant, "From the Frying Pan into the Fire: *Fraser* and the Shift from International Law to International 'Thought' in *Charter* Cases" (2012) 16:2 CLELJ 181.

51 CFA *Digest*, *supra* note 15 at para 952.

52 CEACR 2012, *supra* note 17 at para 198.

53 *Ibid* [emphasis added].

also (in contrast to North American practice) the structures and procedures regulating their relations. As Ruth Dukes has put it:

> Autonomous, or 'voluntary,' procedures were valued above statutory procedures and, though trade unions and employers were not, as a general rule, placed under a legal obligation to bargain collectively with one another, legal and non-legal means were used to encourage them to do so.[54]

This version of "voluntary collective bargaining" is the one that is consistent with the ILO's central mandate of promoting collective bargaining. In the U.S. and Canada, government abstention from addressing determined employer resistance to collective bargaining runs contrary to the fulfillment of his mandate.[55]

According to Compa's interpretation of international norms, under a Wagner Act-style statute, members of non-majority unions would lose their human right to state support for bargaining not only in situations where workers have certified a majority union in a specific bargaining unit, but also throughout the sector of the economy that is covered by the statute. Such an interpretation would legitimize the conclusion of Justice Winkler that the threat of non-majority unionism must be eradicated. However, the interpretation is one which the Supreme Court, drawing on international norms, rightly rejected because it is based on an approach that is impermissible under international norms. In its 2006 *Digest*, the CFA explicitly said: "Where, under a system for nominating an exclusive bargaining agent, there is no union representing the required percentage to be so designated, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members."[56] Note again that

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54 Cited in Roy J Adams, "Collective Bargaining as a Minimum Employment Standard" (2011) 22:2 Economic & Labour Relations Rev 153 at 158 [Adams 2011].

55 I expand on this argument in Adams 2011, *ibid*, but here it is well to note that as far as the supervisory committees of the ILO are concerned, governments may use a wide variety of means to ensure that employers do not engage in "abusive practices" (such as the refusal to recognize and bargain with legitimate trade unions), including allowing them to work out "recognition" procedures "voluntarily" with trade unions. Indeed, the ILO considers procedures that are worked out voluntarily by labour and management to be superior to those imposed by the state. The state, however, has a duty to ensure that "abusive practices" that thwart collective bargaining do not occur.

56 CFA *Digest*, *supra* note 15 at para 976.

there is no reference to "may bargain." Instead, the operative term is "should be granted."

Oddly, Compa's paper makes no mention of the "most representative union" option, even though that concept is central to ILO policy. As discussed above, the default obligation of all member-states of the ILO is to actively encourage the negotiation of collective agreements applying to all employees in a bargaining unit by, where several minority unions are active, either a coalition of those unions or the most representative of them. The supervisory committees have explicitly said that recognition for the purpose of collective bargaining should not be withheld from a "most representative" union that has attracted into its membership less than a majority of the relevant workers. Since, as documented above, minority unions retain their rights to bargain in situations where no exclusive agent has been chosen under a statute providing for that option, the right of a most representative union to negotiate a collective agreement applicable to everyone in the bargaining unit must also be recognized.

In short, as I have argued elsewhere, the ILO permits member-states to operate majoritarian exclusivity statutes but only if those statutes do no more than provide the relevant workers with the option to certify an exclusive agent.[57] If workers prefer not to do that, or if it is easier for them to organize and bargain through minority unions, international law provides for such an option, and indeed contemplates that they will negotiate a collective agreement applicable to all relevant workers in the bargaining unit through a non-majority "most representative" union or coalition. The existence of a majoritarian exclusivity statute does not "eradicate" the rights of non-majority unions.

Compa's interpretation may have been shaped by the existence of an American Supreme Court judgment in which the Court held it to be an unfair labour practice for the employer to recognize a minority union as exclusive bargaining agent, on the basis that this would interfere with the organizational rights of the employees, contrary to section 8(a)(1) of the *National Labor Relations Act*.[58] But that judgment which, it seems to me, is entirely inconsistent with

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57 Adams 2008, *supra* note 5.

58 *International Ladies' Garment Workers' Union v NLRB (Bernhard-Altmann)*, 366 US 731, 81 S Ct 1603 (1961).

the main thrust of ILO policy — was rendered without reference to the commitments of the U.S. to the ILO. In Canada, on the other hand, the *Fraser* decision of the Ontario Court of Appeal, in which Justice Winkler held the law must "eradicate" demands by minority unions that run contrary to the principle of majoritarian exclusivity, was overturned by the Supreme Court.

"Voluntarism," a term used by the ILO, does not mean a license to refrain from bargaining. Similarly, "majoritarian exclusivity" does not imply the eradication of the bargaining rights of all but certified exclusive agents.

4. A SECOND LOOK AT *FRASER*

The Supreme Court's *Fraser* decision of 2011 was almost universally condemned by trade unions and union-friendly academics and lawyers. As Chris Albertyn put it, referring to the papers in a recently published collection titled *Constitutional Labour Rights in Canada: Farm Workers and the* Fraser *Case*, "the majority in *Fraser* was cowed into thinking it would be an error to grant constitutional status to the Wagner Act model" and thus handed down a "fuzzy, defensive decision."[59] Had the SCC upheld the decision of the Ontario Court of Appeal, majoritarian exclusivity would have become essentially the sole means for establishing bargaining relationships regulated by law. The government would have been ordered explicitly to "eradicate" minority unionism and thus to consciously and blatantly go against the principle enunciated by the SCC that the *Charter* should be read to provide protections at least as great as those provided by international law.

Although she did not join the majority in the *Fraser* decision and would have denied the appeal, Justice Abella, in her judgment in *Saskatchewan Federation of Labour*, referred to *Fraser* as having "further enlarged" the *Charter* right to "engage in a meaningful process of collective bargaining."[60] Her statement caused many raised eyebrows, because *Fraser* had generally been interpreted, as noted

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59 Christopher Albertyn, Book Review of *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case*, Fay Faraday, Judy Judge & Eric Tucker, eds (2013) 17:2 CLELJ 493 at 495.

60 *Saskatchewan Federation of Labour*, *supra* note 2 at para 1.

above, as a drawing-back of the rights established by the SCC in *B.C. Health*.[61] Unfortunately, Justice Abella did not explain her reasons for having arrived at this conclusion. Immediately after the release of the *Fraser* decision, I was one of the few commentators who saw it as representing an expansion rather than a contraction of rights, so perhaps it might be useful for me to further clarify my reasons in this regard.[62]

The Ontario *Agricultural Employees Protection Act* (*AEPA*)[63] at issue in the *Fraser* case was enacted by a conservative provincial government, one hostile to bargaining in agriculture, solely because it had been ordered to do so by the Supreme Court in *Dunmore*.[64] The *AEPA* was designed to meet the Court's requirements, but only minimally. At the time, there was no constitutional right to bargain, and one Minister even stated that it was not the purpose of the *AEPA* to mandate collective bargaining.[65]

The majority of the Supreme Court discounted that history and instead read the *AEPA* as a template capable of effectively protecting farm workers' rights, if interpreted properly in the light of *Charter* jurisprudence as it had developed up to 2011 and administered according to that interpretation. By 2011 the Court's jurisprudence had evolved to include not only a right to organize and make representations but also a right to bargain collectively with a bargaining partner duty-bound to negotiate in good faith. In light of those evolved rights, the Supreme Court majority declared that since the *AEPA* did not reject "good faith" bargaining, it must be interpreted

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61 See also Judy Fudge, "Introduction: Farm Workers, Collective Bargaining Rights, and the Meaning of Constitutional Protection," in Fay Faraday, Judy Judge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 1 at 7-8 [Fudge].

62 "Roy Adams on the Vast Potential of *Ontario v. Fraser*" (4 May 2011), *LawofWork* (blog), online: <lawofwork.ca/?p=3271>.

63 *Agricultural Employees Protection Act*, SO 2002, c 16 [*AEPA*].

64 *Supra* note 3.

65 See Cavalluzzo, *supra* note 10 at 177. The SCC majority dealt with this criticism by interpreting the Minister's statement as "an affirmation that the *AEPA* did not institute the dominant Wagner model of collective bargaining, or bring agricultural workers within the ambit of the *LRA*, not that the Minister intended to deprive farm workers of the protections of collective bargaining that s. 2(d) grants." See *Fraser*, *supra* note 10 at para 106.

as including that *Charter* right.[66] Consistent with past decisions, the Court presumed that the Act would be administered in accordance with the principles which the Court had instantiated in *B.C. Health*.[67] Ontario was, in effect, ordered by the SCC to ensure that the *AEPA* was interpreted and administered consistent with Supreme Court's freedom of association jurisprudence.

In addition the Court has, many times, reiterated its position that Canadians are entitled to the international human rights principles contained in documents Canada has ratified.[68] Among those principles is the ILO position that it is the duty of all member-states to "promote" collective bargaining. Although the Court in *Fraser* did not make specific reference to that principle, the inherent logic of its jurisprudence ought to have informed the Ontario government that it had a constitutional duty to ensure that the *AEPA* was administered purposively, with a view towards promoting collective bargaining.

The vehicle through which these principles would be made good was the Agricultural Food and Rural Affairs Appeal Tribunal established by the legislation. In other words, the Court imposed a constitutional duty on the government, acting through the Tribunal, to "ensure meaningful exercise of freedom of association" by administering the law consistent with SCC jurisprudence which clearly embodied the principle of bargaining in good faith.[69]

If an employee association had organized and sought to negotiate with an employer bound by the statute, the employer's duty was to bargain in good faith with that association. If the association concluded that the employer was not bargaining in good faith, its remedy was to file a complaint with the Tribunal, which had the duty to ensure that the workers involved were able to effectively exercise their constitutional rights. As the Court noted, "the *AEPA* specifically empower[ed] the Tribunal to make a determination that there has been a contravention of the Act, and to grant an order or remedy with respect to that contravention."[70] As the SCC read the *AEPA*, the Tribunal had latitude

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66 *Fraser*, *supra* note 10 at para 101.

67 *Ibid* at para 104.

68 In *Fraser* the Court stated it this way: "*Charter* rights must be interpreted in light of Canadian values and Canada's international and human rights commitments." *Ibid* at para 92.

69 *Ibid* at para 106.

70 *Ibid* at para 112.

to fashion a remedy that presumably included the options of ordering that the issues in dispute be settled at arbitration or forbidding the employer to sanction workers because they had engaged in a strike.[71]

Prior to the Supreme Court's *Fraser* decision, the ILO's Committee on Freedom of Association had found the *AEPA* to be contrary to international standards.[72] After the *Fraser* decision, the Ontario government issued a statement that, since the SCC had upheld the Act as constitutional, it had no intention of altering it. The CFA, in a report issued after the *Fraser* decision was announced, found this response to be inadequate. It considered that "the absence of any express machinery for the promotion of collective bargaining of agricultural workers constitutes an impediment to one of the principal objectives of the guarantee of freedom of association."[73] The Committee recommended that

> [t]he Provincial Government of Ontario review the *AEPA* in full consultation with the social partners concerned with a view to providing the measures or machinery appropriate for full and meaningful collective negotiations in the agricultural sector, including by guaranteeing that agricultural workers may take industrial action without sanction . . . .[74]

The SCC's *Fraser* decision and the CFA's subsequent recommendation provided the Ontario government with clear direction

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71 *Ibid.* The SCC stated that section 2(d) does not "guarantee a legislated dispute resolution mechanism in the case of an impasse" (at para 41). On the other hand, in *Saskatchewan Federation of Labour*, the SCC said that "a meaningful process under s. 2(d) must include, at a minimum, employees' rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith." See *Saskatchewan Federation of Labour*, *supra* note 2 at para 29. This apparent contradiction can be reconciled if one contemplates the meaning of "voluntarism" discussed above. If labour and management can be enticed or cajoled to establish their own effective dispute resolution process, then state intervention may be uncalled for. Whatever the SCC's reasons for constructing language confusing to the Canadian legal and industrial relations community, the two statements are not inconsistent under international law.

72 Cited in Cavalluzzo, *supra* note 10. The relevant CFA ruling is in Case No 2704, which the CFA revisited after the *Fraser* decision. See *363rd Report of the Committee on Freedom of Association*, ILO, 313th Sess, Agenda Item 9, GB.313/INS/9 (2012) 388 [CFA *363rd Report*].

73 CFA *363rd Report*, *supra* note 72 at para 399.

74 *Ibid* at para 401.

regarding what it had to do to bring provincial agricultural labour policy into line with constitutional and international human rights. The provincial government's duty was to publicly make it clear that it conscientiously intended to implement the Supreme Court's charge to interpret and administer the *AEPA* as implicitly incorporating a duty to bargain, and that the Tribunal would be required to take whatever steps it considered necessary to ensure that workers had an effective remedy in the event employers failed to bargain in good faith. Had the government taken those steps, even without altering the text of the *AEPA*, it would have brought Ontario into compliance with constitutional and international law. The central reason for the lack of collective bargaining in Ontario agriculture is the absence of a firm public policy, consistent with constitutional and international law, to bring it about.

Although it must bear the greatest portion of the blame, the Ontario government is not entirely responsible for the absence of industrial democracy in Ontario agriculture. The United Food and Commercial Workers (UFCW), the main union operating in the industry, apparently considered that the likelihood of the Supreme Court eventually ordering the province to take the steps necessary to achieve collective bargaining was too small to justify additional expenditures.[75] Nor, as pointed out by Paul Cavalluzzo, has any other conventional union or independent employee association attempted to make use of the *AEPA* process.[76] Had the UFCW (or other union) made a concerted effort to test the *AEPA* procedures, it may have set in motion dynamics leading to a positive policy solution to the rights-deprivation of farm workers in Ontario. A process was there to be used, and the SCC was quite clear in making known that it would

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75 Wayne Hanley, "The Roots of Organizing Agricultural Workers in Canada" in Faye Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) (states that the union intended to make use of the *AEPA* but, according to a conversation that I had with officials of the Tribunal while researching this paper, no trade union has made use of its services subsequent to the release of *Fraser*).

76 Cavalluzzo, *supra* note 10 (interprets this as evidence that the legislation is obviously flawed but it may also be interpreted as a union failure to make use of available legal resources).

be prepared to revise its judgment on the *AEPA* if presented with evidence that it was not getting the job done.[77]

The bottom line is that Canadian democracy has failed farm workers, but not because the SCC refused to uphold an Ontario Court of Appeal decision that offended international law. In essence, Canada's legislatures, including Ontario, have been playing a game of chicken with the SCC. To the extent that they have complied with the SCC's recent jurisprudence, they have done so minimally or inadequately, apparently calculating that the Court would not stand firm in its new direction. If they interpreted *Fraser* as evidence that the Court had blinked first, the *Mounted Police Association* and *Saskatchewan Federation of Labour* decisions would seem to demonstrate that they were wrong.

5. A PRACTICAL AND PRINCIPLED STATUTORY OPTION

Under the *Charter*, Canadian workers are entitled to a level of protection "at least as great as" that which "is found in the international human rights documents that Canada has ratified." Additionally, as argued above, minority union rights persist in those bargaining units with no certified exclusive agent under Wagner Act Model regulatory regimes. One must ask what options, consistent with international law, are available to the state to secure the human and constitutional rights to organize, bargain collectively and to strike?

Survey evidence indicates that there is a significant pent-up demand for collective representation.[78] Over the past several decades, despite that demand, the practice of collective bargaining has been in persistent decline in the private sector. In 1981 Statistics Canada estimated that 29.8% of private-sector workers were unionized.[79] By

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77 The majority effectively took that position that a successful appellant would have to provide the Court with evidence that it had tried, unsuccessfully, to make use of the procedures embodied in the *AEPA*. See also Banks, *supra* note 5.

78 For example, see the data reported in Table 3 of Adams, *Labour Left Out*, *supra* note 11 at 24. See also Doorey 2013, *supra* note 8.

79 Rene Morissette, Grant Schellenberg & Anick Johnson, "Diverging trends in unionization" (2005) 6:4 Perspectives on Labour and Income.

2012 the figure was down to 16.4%.[80] That is clear evidence that the Canadian state is not fulfilling its duty, as an ILO member, to effectively promote collective bargaining. Now that the Supreme Court has granted protection to the three major elements of freedom of association in the labour context (the right to organize, the right to bargain collectively and the right to strike), and, in doing so, has eloquently elaborated on the civic virtues of collective bargaining, it is time for Canadian labour law to fulfill the promotional role that Canada has accepted as a member of the ILO and the international community of human rights-respecting nations.

Over the years, I have put forth several proposals for bringing labour law and practice more fully into line with Canada's international obligations to promote collective bargaining. In the mid-1990s I provided a detailed critique of Wagnerism and offered a comprehensive plan for revising Canadian labour law and practice intended to realize the vision of economic democracy inherent in international freedom of association standards.[81] The major elements of that plan included:

(1) Replacing certification with a policy "which states that management has a responsibility to recognize and negotiate with any agent chosen by any individual or group of employees."[82] This proposal would have put into practice the first ILO option discussed above (the default option of minority worker associations).
(2) A system of works councils to supplement collective bargaining.[83]

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80 Diane Galarneau & Thao Sohn, "Long Term Trends in Unionization" (Statistics Canada, November 2013); Doorey 2013, *supra* note 8 (concludes that the contemporary rate is closer to 15%).

81 Roy J Adams, "A Pernicious Euphoria: 50 years of Wagnerism in Canada" (1995) 3 CLELJ 321 [Adams, "A Pernicious Euphoria"]. See also Adams 1995, *supra* note 11.

82 Adams, "A Pernicious Euphoria," *supra* note 81 at 347.

83 I first made this proposal in a paper published in 1986. See Roy J Adams, "Two Policy Approaches to Labour-Management Decision Making at the Level of the Enterprise" in W Craig Riddell, ed, *Labour-Management Cooperation in Canada* (Toronto: University of Toronto Press, 1986) 87 at 100. This proposal was later elaborated on by Paul Weiler in the U.S. context. See Paul C Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Cambridge, Mass: Harvard University Press, 1990).

(3) Worker representatives on boards of directors.
(4) Union-management consultative mechanisms at the industry level.
(5) An "annual wage round" intended to ensure that wage movements and overall economic policy could be coordinated. This was intended as a measure to deal with inflation which, while a concern at the time, over the past 20 years has subsided into the shadows.
(6) Opening up all issues of mutual concern (including, for example, investment and technology) for discussion and perhaps hard bargaining, thereby giving labour a greater stake in economic development.
(7) Establishing a national labour-management-government forum for the discussion of policy issues of tripartite concern.

In 1998, the International Labour Organization issued its *Declaration on Fundamental Principles and Rights at Work*, which called on all member-states to review their law and practice regarding a core set of labour human rights, which included freedom of association and the right to organize and bargain collectively.[84] In the wake of that development, in 2002 I proposed the following changes to Canadian law and practice:

(1) Revisiting the works council option as one means of closing the "representation gap" that the ILO had identified as a priority goal.[85]
(2) Abandoning the practice by governments "of overriding collective bargaining by unilaterally imposing conditions of employment."[86] The Supreme Court addressed this issue in its *B.C. Health* decision.
(3) Noting that the "federal government has repeatedly, during the past decade, pledged to be bound by ILO jurisprudence with respect to freedom of association and the right to bargain

84 *Supra* note 14.
85 *Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, ILO, 129th Sess, GB.279/TC/3 (2000) I at 4.
86 Roy J Adams, "Implications of the International Human Rights Consensus for Canadian Labour and Management" (2002) 9:1 CLELJ 119 at 141.

collectively," the Supreme Court ought to "consider reversing the *Alberta Reference* excluding the right to bargain collectively and the right to strike from its definition of freedom of association under s. 2(d) of the *Charter*."[87] The SCC put this proposal into force in its *Saskatchewan Federation of Labour* decision.

In 2008, subsequent to the Supreme Court's *B.C. Health* decision constitutionalizing the right to collective bargaining, I made additional proposals. Noting several public-sector practices that were out of line with international standards ("contract stripping, contract imposition, back-to-work legislation when workers are on legal strike, restriction of bargainable issues and the denial of the right to strike to approximately half of public sector workers"[88]), I proposed the convening of a "labour policy review process," in which all relevant actors would be invited to participate. The object would be "to come to a consensus, consistent with international norms, acceptable to all."[89] I suggested that should such an agreement come about, the Supreme Court would almost certainly defer to it, thus restoring parliamentary primacy over labour law.

For the private sector, I suggested a similar forum and proposed that the following might be placed on the bargaining table:

(1) Canadian business, voluntarily or through coercive legislation, should no longer have the green light to "discourage workers from organizing and bargaining collectively."[90] This would be in accordance with the Equator Principles developed by international banks as corporate responsibility standards for businesses seeking development loans.
(2) Revisiting the works council option.
(3) A public commitment by government to "social dialogue" — the seeking of "tripartite consensus on all issues critical to the interests of labour and management as they arise."[91]

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87 *Ibid* at 140.
88 Adams 2008, *supra* note 5 at 58.
89 *Ibid* at 58, 62. For a more recent assessment, see Rose, *supra* note 5.
90 *Ibid* at 62-63.
91 *Ibid*.

Many of these sweeping proposals have gone unrealized. Although I continue to believe that most of them make good sense, they were apparently overly ambitious then, and probably still are today. I therefore offer a more modest suggestion here.

It is clear that both management and labour in Canada are uncomfortable with the prospect of the proliferation of unregulated labour organizations.[92] Instead of abandoning the Wagner Model, as I urged in 1995,[93] I suggest that we revise it in accordance with the second ILO-compliant option noted above. Specifically, every Canadian jurisdiction should revise its Wagner Model to provide for certification of "most representative" unions.

The option of certifying an exclusive agent through a majoritarian procedure would continue to exist but it would no longer be the only form of certification available to workers. In an appropriate bargaining unit, the most representative union (or coalition of unions) with, perhaps, 30% support and a minimum membership to make it credible, could be certified by the labour law authority in each Canadian jurisdiction as the primary bargaining agent. It would have all of the rights and duties of exclusive agents but it would not have exclusive representation rights. In enterprises with certified "most representative" unions, minority unions would have the legal rights to speak for their own members, to present and pursue the grievances of their members, and to organize legal strikes, all of which are consistent with ILO norms.[94] Collective agreements would have to allow minority unions to exercise those rights, but only within the terms of the agreement (and the law).[95] Thus, for example, minority unions

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92 See e.g. Clancy, *supra* note 10, and Cavalluzzo, *supra* note 10.

93 Adams 1995, *supra* note 11.

94 To effectively regulate these activities, Canadian legislatures might have to institute registration procedures to ensure that minority unions are independent, financially sound, legitimate and conform to, for example, employment equity laws.

95 In the wake of the *Saskatchewan Federation of Labour* decision, protection of freedom of association rights in situations in which no "most representative" union has been certified is a matter which Canadian legislatures may well have to regulate. In addressing that issue, they may find useful guidance in the ILO supervisory committees' jurisprudence regarding union registration. However, further discussion of that issue will have to be left to future research.

would have to respect the requirements of the grievance system laid out in the negotiated collective agreement and, should the minority association set out to organize a strike, the requirements in both the agreement and the law would have to be honoured. The law would also need to provide for replacement, at appropriate times, of the certified most representative union by another union that had acquired greater support, and for decertification.

This proposal would have the great advantage of requiring minimal change to existing procedures. The disruptions feared by Justice Winkler in *Fraser* would be kept at a minimum because of the requirement that minority unions operate within the bounds of the collective agreement and the law. Employers would not be continually accosted with demands that were inconsistent with one another. The competition from employer-sponsored "company unions," feared by organized labour as a consequence of legitimizing minority unionism, would also be minimized since such unions, unable to pass the independence test,[96] would not be certifiable and any bargaining arrangements established with them could be nullified by the certification of a legitimate most representative union. The result would be that the processes and regulations now in effect under existing Wagner statutes will require only minor adjustment.

Since union organizing would be much easier, collective bargaining should reverse its decline and begin expanding again, thereby fulfilling Canada's commitment to effectively promote (e.g. encourage, support, advance) bargaining. The promise of a growth in union membership by the institution of a procedure whose main effect would be to make certification easier ought to attract the support of the labour movement. There would also be an upside for business, since the chaos predicted by Justice Winkler as a result of implementing the ILO's default option — recognizing a diversity of small

96 *MPAO*, *supra* note 12.

unions, each of which would be entitled to exercise a full range of rights — would be avoided.[97]

Among the likely results that many practitioners and labour law theorists ought to welcome is the return of authority to labour relations boards and the quieting of freedom of association litigation. As Brian Burkett has documented, labour boards have been losing their central role in labour relations due to increased activism by both legislatures and the courts, thus destabilizing the system.[98] With the new duties of certifying and regulating (and perhaps promoting) minority unions, labour boards ought to recapture their dominant position and the need for courts to intervene would be much reduced.

Past experience indicates that some employer spokespersons will argue that a significant increase in collective bargaining activity will make Canadian business uncompetitive. Examples of collective agreement terms that are felt to fetter management will be brought forward. The appropriate response to such claims is not only that human rights trump economic aspirations, but also that there is little or no evidence that high levels of collective bargaining coverage harm economic performance. Indeed, the Scandinavian economies, in which collective bargaining is near-universal, are consistently rated as among the world's most competitive.[99] Moreover, the dynamics of

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97 As discussed above, international norms define a trade union as an independent worker association "for furthering and defending the interests of workers." See CFA *Digest*, *supra* note 15 at para 290. The norms do not specify a size limit for such associations and clearly state that independent worker organizations need not receive state sanction in order to exercise their rights. As a default in the absence of regulation, the norms require employers to recognize and bargain with all worker associations, at least in respect of their own members. However, as noted above, the norms also permit states to establish statutory thresholds for the acquisition of state protection, and they permit the state to impose reasonable limits on the exercise of bargaining and strike rights. Thus, the SCC's statement in *MPAO* that the *Charter* "does not require a process whereby every association will ultimately gain the recognition it seeks" is entirely compatible with international standards. See *MPAO*, *supra* note 12 at para 98.

98 Brian W Burkett, "The Future of the Wagner Act: A Canadian-American Comparison" (2013) 38:2 Queen's LJ 363.

99 All of the Scandinavian economies rank among the world's top 15 in the most recent evaluation by the World Economic Forum. See Klaus Schwab, *The Global Competitiveness Report 2014-2015* (Geneva World Economic Forum, 2014) at 30.

union-management relations demonstrate that at high levels of unionization, those relations transform from adversarial to cooperative, with positive effects on economic activity.[100]

6. IF GOVERNMENTS FAIL TO ACT

In *B.C. Health*, the Supreme Court of Canada determined that collective bargaining was worthy of *Charter* protection because it fortified the fundamental *Charter* values of liberty, democracy, equality and freedom, and breathed life into those values at the point of production. It also determined that all Canadian workers were entitled to rely on the international human rights standards that Canada had ratified, which include a promise to "promote" collective bargaining.

In light of that development, one might have expected Canadian governments to review their labour legislation to ensure its consistency with the new standards. However, without exception they persisted with the status quo. In subsequent cases, several governments (and employer representatives) argued before the Supreme Court that when dealing with a complicated and politically sensitive issue such as collective bargaining, the Court ought to back off from its new interventionist stance, and return instead to its previous long-standing policy of deference to legislatures.[101]

Many observers were convinced that the Court's resolve to hold fast to its new course had been weakened when, in its 2011 *Fraser* decision, it found Ontario's *AEPA*[102] to be constitutionally acceptable, even though the legislation lacked many of the aspects of the Canadian Wagner Act Model that labour has long supported, such as a statutorily protected right to strike.[103] As discussed above, Justice Abella's reasons in *Saskatchewan Federation of Labour* rejected that interpretation, noting that *Fraser* had "further enlarged" the right of

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100 Adams 1995, *supra* note 11.

101 See Steven Barrett & Ethan Poskanzer, "What Fraser Means for Labour Rights in Canada" in Fay Faraday, Judy Judge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 190.

102 *AEPA*, *supra* note 63.

103 Fudge, *supra* note 61; See also Braley-Rattai, *supra* note 10.

employees to a "meaningful process of collective bargaining,"[104] and, on behalf of the majority, specifically denied Justice Rothstein's plea for a return to deference to the legislature. Justice Abella noted that "[i]n the context of constitutional adjudication, deference is a conclusion, not an analysis," and that "the whole purpose of *Charter* review is to assess a law for constitutional compliance. If the touchstone of *Charter* compliance is deference, what is the point of judicial scrutiny?"[105]

After this resounding affirmation of the Court's recent freedom of association jurisprudence, there should no longer be any doubt about Canada's supreme law or about the duty of Canadian legislatures to bring their statutes in line with that law. To do otherwise is to deny Canadian workers their constitutional rights, or at least to hinder their ability to exercise those rights. Denying or hindering the ability to exercise constitutional rights places institutional interests over *Charter* values and weakens the core structure of Canadian democracy.

If the legislatures fail in the task before them, Canadian workers will have to rely on a champion who will come forward and argue their case before the courts. When that happens, the courts must find that contemporary Wagner Model statutes do not provide a level of protection for collective bargaining and the right to strike that is "at least as great" as the "level of protection" found in the international documents which Canada has ratified and which the Supreme Court has assured all Canadians they are entitled to rely upon. The courts must find that Canadian legislators are deliberately, with full knowledge of the legal implications of what they are doing, pursuing policies calculated to have a "chilling effect" on unionization and collective bargaining — a position that substantially interferes with the *Charter*'s freedom of association right and is, thus, unconstitutional.

7. FINAL THOUGHTS

Nearly a decade has passed since the SCC released its *B.C. Health* decision, in which it not only constitutionalized collective

104 *Saskatchewan Federation of Labour*, *supra* note 2 at para 1.
105 *Ibid* at para 76.

bargaining but also presented us with its opinion as to why collective bargaining deserved constitutional protection. Those of us who have worked hard over the years to promote collective bargaining found ourselves blushing at the effusiveness of the SCC's praise for it. Read in conjunction with the SCC's statement that the freedom of association right in the *Charter* must be read in a purposive, goal-directed way, that decision in effect gives Canada's legislative branch an order, which may be paraphrased as follows:

> *You have a* Charter *duty to promote, to encourage, to advance, to more fully realize the values of freedom, democracy, equality and dignity for all Canadians. To fulfill that duty you must institute and effectively administer legislation that ensures that all working Canadians who are able to benefit from collective bargaining are able to do so. If you don't do that you are behaving in a manner that is offensive to the* Charter*; you are delinquent in your duties; you are undermining an institution on which* Charter *values strongly depend, a value heralded universally as a fundamental human right. Unless you mend your ways, there will be continual struggle between your branch of government and ours.*

If Canada's legislatures continue to ignore that directive, we may be on the road to a constitutional crisis.