From the Frying Pan into the Fire: *Fraser* and the Shift from International Law to International “Thought” in *Charter* Cases

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In its 2007 decision in B.C. Health Services, the Supreme Court of Canada invoked international law in support of its conclusion that the Charter’s guarantee of “freedom of association” included collective bargaining. In its 2011 decision in Fraser, the Court returned to the issue of the role of international norms in Charter cases and was presented with the opportunity to clarify its position and to respond to criticisms of its earlier ruling. In this article, we argue that the Court missed an opportunity to correct and clarify its approach to the use of international law, and, remarkably, sought to respond to its critics by shifting to the even more unstable ground of international legal “thought.” We also discuss the implications of the Court’s international turn on some other constitutional basics, including well-established rules on the impact of treaties in domestic law and the distribution of powers in the Canadian federation.

1. INTRODUCTION

An’ here I sit so patiently
Waiting to find out what price
You have to pay to get out of
Going through all these things twice.

Bob Dylan, “Stuck Inside of Mobile with the Memphis Blues Again”
*(Blonde on Blonde, 1966)*

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We began this project after reading what the Supreme Court of Canada said about international labour law in *B.C. Health*. There are a couple of sentences in that case — for example, the Court’s assertion that the 1998 *Declaration on Fundamental Principles and Rights of Work* crystallized a “global consensus on the meaning of freedom of association” on the basis of “interpretations of international instruments such as Convention 87” — which are just so far off the mark that the record had to be straightened. Many had cheered the outcome of *B.C. Health*, with admittedly varying

1 *Health Services and Support-Facilities Subsector Bargaining Ass’n v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*B.C. Health*]. As this article went to print, the Saskatchewan Court of Queen’s Bench released its decision in *R v Saskatchewan Federation of Labour*, 2012 SKQB 62, concerning legislation which permitted the provincial government to unilaterally declare services as ‘essential’ and thus prohibited the employees from striking. Justice Ball found a right to strike implicit in section 2(d), and held the legislation unconstitutional on that basis. We have no doubt that such a right does flow from section 2(d), although we may not agree with the reasoning process that led Justice Ball to this conclusion. While we cannot deal with the issue in any detail in this paper, it should be obvious that we harbour reservations as to the use made of international law in this case (at paras 100-114), and hope that the Court of Appeal will take the time to offer reasons, unlike Justice Ball, as to whether or not we have, as Justice Ball opines, “misapprehended” the Supreme Court’s guidance regarding the use of international law in *Charter* interpretation (para 107, n 35). Our view is that this decision’s heavy reliance on international law shows that a careful consideration of, and reasoned response to, the arguments expressed here is more important than ever.

2 *Ibid* at para 78.


degrees of vigour, and some without seriously questioning the Court’s dubious legal analysis and the consequences it could have for future jurisprudence. But on a deeper level, some of the positive reactions to B.C. Health, and the Court’s ruling itself, revealed a fondness for generally hushing up and bobbing one’s head in the direction of human rights documents as a form of legal argument. The legal world does not, and should not, work that way. Arguments and reasons are what count — not texts treated as Holy Scripture. Legal reasoning and analysis are just as vital here as elsewhere, yet they were conspicuously absent in much of B.C. Health. As a result, many things were (and as we will shortly see, still are) allowed to pass through the filter of the legal system which are plainly wrong — such as adopting the conclusions (without scrutinizing the reasons) of a political body, composed of non-lawyers, not engaged in interpreting or enforcing ILO conventions, concerning a convention that Canada has in any event not ratified.

And now we have Fraser. It is somewhat gratifying that a minority of the Court in Fraser picked up on some of these points and wrote about them, but this only makes the majority judgment even more dispiriting to read. In that judgment, the beat of B.C. Health goes stubbornly on, and the arguments against it — even those explicitly raised by the minority — are not engaged by the majority in any substantial way. In fact, the majority compounds and escalates the errors of B.C. Health by harnessing our constitutional fate not only to Canada’s international obligations (as problematic as that can be in itself), but also to what it labels “international thought.”

The other reasons provided by the Court in B.C. Health reveal structural errors at least as significant as those made in the international law section of the judgment. The principal manifestation of this inattention to legal reasoning lay in declaring that because certain interpretive aids (international law, legal history, Charter values)

5 And certainly not the interpretations of what turn out to be non-authoritative priests, or more probably their hired help. This religious language is not mere hyperbole: see infra, note 94 and accompanying text.
6 Ontario (AG) v Fraser, 2011 SCC 20, [2011] 2 SCR 3 [Fraser].
7 Ibid at para 92.
point to some notion of a freedom to collectively bargain, this leads inexorably to a particular (and idiosyncratic) conception of the right to collectively bargain — including a duty to bargain on the employer. This, and much else, led to the conclusion that *B.C. Health*, and indeed all of our section 2(d) cases in the labour relations arena, are really equality cases masquerading as freedom of association cases, and that we would be a lot better off if we just said so.  

While there are some glimmerings of hope in *Fraser* that this argument may be revisited, they are faint ones. The actual result in *Fraser* convinces us even more of the validity of the argument from equality. *Fraser* is another perfect demonstration of all of the unnecessary difficulties we get into by trying to divine the true meaning of section 2(d) — including trying to divine it from international sources. The better alternative is simply to say: “We may not know at the moment the constitutionally perfect meaning of ‘freedom of association,’ but we know the meaning we have given it for everyone else in the workforce, and the real question is whether there is good reason not to treat these folks the same way.” All of the problems we now face in our post-*B.C. Health* cases, including *Fraser*, would have been avoided if we had let the idea of equality bear the weight it is constitutionally designed to bear.

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9 *Ibid* at 207-208.
10 See especially the concurring judgment of Deschamps J. *Fraser*, supra note 6 at paras 315-319.
11 See e.g. *Ass’n of Justice Counsel v Canada (AG)*, 2011 ONSC 6435; *BCTF v British Columbia*, 2011 BCSC 469; *CUPE, Local 3967 v Regina Qu’Appelle Health Region*, 2010 CanLII 5199 (SK LRB); *Federal Government Dockyard Trades & Labour Council v Canada (AG)*, 2011 BCSC 1210 [Dockyard Trades]. The question in these cases should be relatively simple: are union members, or employees in a given sector of the economy, being treated differently than everyone else, and if so, is there a good enough reason for this disparate treatment? Instead, we are in a situation where a judge can find (as in *Dockyard Trades*, at paras 190, 196-200) that “[i]t does appear reasonably clear that as a matter of fact, the [impugned legislation] has had no discernable impact on the actual capacity of these employees to associate to collectively pursue workplace goals,” and yet, on a (probably correct) reading of *B.C. Health*, also find that the legislation amounted to a “substantial interference” with the union members’ freedom of association on the *B.C. Health* standard. The legislation was upheld on other grounds, but the case illustrates that legislation applying equally to all workers may be found unconstitutional as it applies to union members, and constitutional as it applies to everyone else. We do not think this situation is tenable.
It is critical not to lose sight of the bigger picture: Fraser repeats and entrenches the basic error of B.C. Health, and thus perpetuates the unhelpful idea that these are section 2(d) cases and not section 15 cases, with all of the resulting costs and incoherence. This paper attempts to identify one of the main reasons why the picture currently looks the way it does: the Court’s misuse of international labour law as a source of constitutional inspiration. One large lesson to take from the Court’s use of ILO law may be that, as with most legal enterprises, learning about ILO law and ILO legal processes takes time. A deeper truth might also surface if you spend enough time in Geneva: the ILO is in large part a political organization. And it is an international political organization, no less. The politics of all international organizations are notoriously fraught: merit, coherence and principle are not always the central criteria for decision-making. The ILO is even more complex than most; in a very heady concoction, it mixes the politics of internationalism with the politics of tri-partism between capital, labour and governments. This is a recipe for political complexity, inconsistency and strange bedfellows, on a massive scale. Thus, there are very good preliminary reasons — before undertaking any legal analysis whatsoever — to be wary of conclusions that may be proclaimed by an ILO political body (such as the Governing Body) or by its committees (such as the Committee on Freedom of Association — the CFA). There would seem to be even better reasons to think long and hard before adopting the conclusions of such bodies as authoritative sources for the interpretation of the Canadian Charter of Rights and Freedoms.¹²

In Part 2 of this paper, we will discuss in general terms why we should be careful not to cherry-pick statements by international bodies — regardless of their legal pedigree — as providing concrete guidance in interpreting the highest law of the land. Then, in Part 3, we will restate the main interpretive mistakes the Supreme Court made in B.C. Health in its attempt to derive the constitutional necessity of the Wagner model, or important parts of it, from discrete observations made by the ILO and its associated bodies. In Part 4 we will address Fraser’s specific contribution to this confusion, and the Court’s obfuscation in that case. In Part 5, we undertake a broader

discussion of the dangers in misusing international law in the way the Court has done. Finally, in Part 6, we respond to the quite striking and novel interpretation of Fraser’s use of international law offered by Patrick Macklem.

2. USING AND MISUSING INTERNATIONAL LAW

To address one anticipated objection at the outset, we have no interest in restricting our understanding of law to the geographical confines of Canada’s borders — far from it. We advocate using whatever legal resources are available when it comes to considering and determining the outcome of a legal dispute. It makes perfect sense to say that our courts (particularly in constitutional cases, but also in contract or labour cases) should look to any valid arguments or insights that are useful and relevant in addressing a legal problem. Good ideas and sound arguments — like facts — have no territorial home.

Nevertheless, the courts must exercise extreme caution in using external sources of law as “evidence” of the “meaning” of our constitution. There is a large volume of literature on the hazards of “importing” or “transplanting” legal ideas without sound consideration of whether they will be compatible with the adoptive jurisdiction. As the comparative labour law academic Clyde Summers once (rather flamboyantly) observed:

Work in comparative law is constantly in danger of becoming little more than the collecting of legal rules as souvenirs for scholarly display and intellectual one-upmanship. Elaborate and finely drawn comparisons may have little more meaning and less excuse than the traveling schoolgirl’s collection of foreign dolls in native dress.14


This peril is undoubtedly present to some degree in all areas of law, but particularly so in areas — such as labour law — that go to the core of what a society aspires to be and how it wants to arrange its affairs. As many have written, systems of labour law are particularly complex because they are deeply embedded in local cultures, societies, systems of industrial relations, economies, and “modes” of capitalism. They are intricate, multifaceted systems with countless parts, both core and peripheral. Their maintenance requires a delicate balance if they are to function even reasonably well; tinkering with one part will have consequences elsewhere, and transplanting one aspect without the support of the rest of the system is a recipe for failure.

But that kind of difficulty is nothing compared to the difficulty the ILO faces in constructing its laws. The ILO is not merely “doing” comparative law; it is not simply looking at facially similar regimes and pointing out subtle but important differences. It is trying to construct global law. This leads to some even more fundamental constraints on what we can expect from ILO law as a means of informing our understanding of our own labour law, much less our own constitutional law. Jean-Michel Servais, a former senior ILO official, explained it this way:

ILO conventions use very general terms that can serve as a basis for various systems of industrial relations. International labour standards do not seek to impose a specific system. Since every domestic legal order has to integrate countless political, economic, social and cultural factors including a historical component it would be unrealistic to put forward more than minimal rules, basic principles that can be transplanted into most if not all national systems. ILO law therefore aims to reconcile defence of the general principles of freedom with respect for the individual characteristics of each country when it

15 This point was famously made by Otto Kahn-Freund in “Uses,” supra note 13.

16 A good local example of the dangers involved is offered by attempts to compare U.S. and Canadian collective bargaining laws. We are fond of saying that we share the Wagner Act model. But in spite of significant overlap, there are real and significant differences — such as the role of compulsory arbitration — which resonate throughout the rest of the system and make it quite dangerous to invoke labour law decisions from one system as authoritative in the other. On the differences between Canadian and U.S. labour law, see generally Roy J Adams, “North American Industrial Relations: Divergent Trends in Canada and the United States” (1989) 128 Int’l Lab Rev 47.
comes to the technical means of incorporating those principles into domestic legislation.\textsuperscript{17}

The general lesson we might draw from this at the outset is not to expect too much from international labour law, or ILO law, when it comes to giving tangible and concrete meaning to domestic labour regimes, much less to fundamental constitutional provisions that affect spheres of life well beyond labour law. It is simply not the job of the ILO to create international laws that definitively answer concrete, detailed domestic labour law questions or inform constitutional interpretation.\textsuperscript{18} This is especially true when we turn to very basic, generally worded human rights documents such as Conventions 87\textsuperscript{19} and 98,\textsuperscript{20} both of which the Supreme Court relied on in \textit{B.C. Health and Fraser} in modifying the definition of freedom of association to include a right to collective bargaining that imposes a correlative duty on employers to bargain in good faith.

This returns us to the Court’s claim that such a unique regime of collective bargaining reflects a “global consensus” on the meaning of freedom of association in the labour relations context.\textsuperscript{21} This cannot be so, for the simple reason that there are countless ways in which the general principle of freedom of association is put into practice.

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\item[18] In fact it is widely acknowledged, by senior ILO lawyers among others, that this is precisely where ILO law has often gone off the rails. It has created too many overly detailed conventions which, because of the truths we have just noted, are unratifiable (and unratified) by member states. For a good example of an ILO insider making this point, see William Simpson, “Standard Setting and Supervision: A System in Difficulty” in Jean-Claude Javillier & Bernard Gernigon, eds, \textit{Les normes internationales du travail: un patrimoine pour l’avenir: Mélanges en l’honneur de Nicolas Valticos} (Geneva: ILO, 2004) at 47. The Canadian government makes the same point as its standard explanation for not ratifying conventions.
\item[19] \textit{Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organise}, 68 UNTS 17 [Convention 87].
\item[20] \textit{Convention (No 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively}, 96 UNTS 257 [Convention 98].
\item[21] See Part 4, below.
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around the world. 22 Using ILO law to unequivocally support one specific way of doing so stretches the bounds of credulity.

Furthermore, if the Court wants to use sources external to the Charter and the domestic context, it should bear the burden of explaining why it is doing so. It should have to make clear why a Charter freedom should be in any way defined by agreements that have been entered into by the executive branch of the federal government, let alone by international treaties (and their attached interpretations) which the federal executive has explicitly refused to ratify. 23 Of course, the Court had said prior to B.C. Health that the Charter should be presumed to provide at least as much protection as international instruments, 24 but to our knowledge it has never given anything approaching a justification for this blanket presumption. It certainly does not flow from the Canadian constitution itself, 25 and it conveniently appears to arise only where a particular international source ostensibly supports the Court’s conclusion.

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22 This is acknowledged by Rothstein J. in his partially dissenting reasons. He states, accurately, that “[m]any positions — including a freedom of association which includes voluntary collective bargaining — are equally, if not more, consistent with international norms.” Fraser, supra note 6 at para 250.

23 In coming to its conclusion, the Court relied heavily on a summary of international obligations — a summary based almost entirely on ILO Convention 98, which Canada has not ratified and which places no binding obligations on this country. See Langille, “ILO,” supra note 3, and Fraser, supra note 6 at para 248, Rothstein J., dissenting.

24 See Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 70 [Baker]; United States v Burns, 2001 SCC 7, [2001] 1 SCR 283 at para 80 [Burns]; Suresh v Canada (Minister of Citizenship and Immigration, 2002 SCC 1, [2002] 1 SCR 3 at para 46 [Suresh]; Slaight Communications Inc v Davidson, [1989] 1 SCR 1038 at 1056-1057 [Slaight]. In each of these cases, the relevance of “international human rights law” to Charter interpretation is asserted but not really defended, other than by referring back to other cases in which the same proposition was asserted and not defended. Its genesis appears to be Dickson C.J.’s dissent in Reference Re Public Service Employee Relations Act (Alberta), [1987] 1 SCR 313 [Alberta Reference]. We do not necessarily suggest, at this juncture, that such a presumption could never be justified, but only that no attempt has yet been made to justify it.

So, if the Court has not explained where the general presumption comes from and how we can know when it applies, perhaps the Court can suggest why the particular instruments it refers to (the ILO conventions and CFA interpretations) are relevant to the issue at hand in \textit{Fraser}.\textsuperscript{26} Indeed, it offered something approaching such an explanation in \textit{B.C. Health}: because the conventions in question had been ratified (or, in the case of Convention 98, actually not ratified) by Canada before the enactment of the \textit{Charter}, they must have been in the “contemplation” of the authors of the \textit{Charter}.\textsuperscript{27} This ill-considered venture into a form of originalism — which suggests that the \textit{Charter} should be construed in accordance with the presumed intent of the framers — was not defended in principle but was just stated as a matter of fact. The Court then said in the very next sentence that even if the framers did not intend to impose a constitutional obligation of compulsory collective bargaining, it did not matter; their intent was largely irrelevant because our constitution is “a living document [that] grows with society and speaks to the current situations and needs of Canadians.”\textsuperscript{28}

We will first consider the Court’s initial kick at the can. The Court said in \textit{B.C. Health} that “international instruments, such as Convention No. 87 . . . were adopted by the ILO prior to the advent of the \textit{Charter} and were within the contemplation of the framers of the \textit{Charter},”\textsuperscript{29} as if this were evidence of the meaning of “freedom of association.” Accepting this argument would require acceptance of the otherwise aberrant notion that interpretation of \textit{Charter} provisions necessarily depends on what was in the “contemplation” of the framers — something, of course, that is very difficult to ascertain. This method of constitutional interpretation, rejected by the Court

\textsuperscript{26} Unfortunately for the Court’s line of reasoning, the CFA had actually found the \textit{precise} piece of legislation at stake in \textit{Fraser} — Ontario’s \textit{Agricultural Employees Protection Act} — to offend ILO standards. See Case No 2704, Report No 358: \textit{Complaint against the Government of Canada presented by the United Food and Commercial Workers’ Union — Canada (UFCW Canada) (2010) \textit{ILO Fraser}}.

\textsuperscript{27} \textit{B.C. Health}, \textit{supra} note 1 at para 78.

\textsuperscript{28} \textit{Ibid}.

\textsuperscript{29} \textit{Ibid}.
early in the life of the Charter,\textsuperscript{30} also appeared elsewhere in \textit{B.C. Health}: the Court cited the 1981 statement by the then acting Justice Minister that the government’s “position on the suggestion that there be specific reference to freedom to organize and bargain collectively is that that is already covered in the freedom of association that is provided already . . . in the Charter” through section 2(d).\textsuperscript{31} Even if we were to accept legislative history as definitive on what the Charter entails — a proposition of which the Court is normally quite wary — what the Minister did not say was which particular conception of the freedom to bargain collectively was being entrenched. Here again, we go from the notion that section 2(d) protects some aspects of that freedom, which it surely does, to the notion that it protects one particular instantiation of the freedom.

Moreover, there is something of a chronological incongruity here that seems to have escaped notice. In \textit{B.C. Health}, the Court was careful to note that relying on ILO conventions to interpret the Charter made sense from a temporal point of view: because Canada had ratified Convention 87 before the Charter came into existence in 1982, that convention must have been in the framers’ “contemplation.” The problem is that the notion that the Charter should be interpreted to provide “at least the same level of protection” as those international instruments that were ratified was not even articulated until 1987,\textsuperscript{32} and not until \textit{B.C. Health} itself was it adopted by the majority of the Court with respect to the ILO law and its interpretations.\textsuperscript{33} So while Convention 87 may or may not have been in the contemplation of the framers, the idea that future interpretations of that document (or the content and interpretation of unratified

\textsuperscript{30} Re \textit{B.C. Motor Vehicle Act}, [1985] 2 SCR 486 at paras 47-53 (where the intent of the framers was found not to be particularly helpful in determining the content of section 7).

\textsuperscript{31} \textit{B.C. Health}, supra note 1 at para 67.

\textsuperscript{32} \textit{Alberta Reference}, supra note 24 at para 59, Dickson C.J. dissenting.

\textsuperscript{33} The Court in \textit{Dunmore} noted, a few times, that its conclusion was fortuitously consistent with international (and ILO) obligations, but it did not appear to suggest that those obligations were a factor in determining Charter obligations. See \textit{Dunmore v Ontario (AG)}, 2001 SCC 94 at paras 16 and 27, [2001] 3 SCR 1016 [\textit{Dunmore}].
conventions) might be presumed to provide tangible meaning to the Charter surely was not. In short, even if this method of constitutional interpretation was defensible, it could not possibly mean that conventions not adopted, or “international thought” on human rights, or subsequent interpretations of international law, were in the contemplation of the framers and are thereby presumptively incorporated into the Canadian constitutional order.

The “original intent” argument being unconvincing, the Court in B.C. Health turned to its antithesis — the “living tree” doctrine. That doctrine has as many forms as it has adherents, but few of them give much weight at all to the intent of the framers. Leaving aside the problems with the Court’s rhetorical technique of offering two quite inconsistent methods of constitutional interpretation in the course of a single paragraph, the “living tree” doctrine offers no more help than the original intent approach when it comes to relying on the ILO’s Committee of Freedom of Association (the CFA). There is no reason why the Canadian constitutional tree should grow in a given direction merely because a non-legal international body has decreed as much. Of course, arguments of both local and foreign descent may be used to provide a normative framework for the elaboration of a constitution that “grows with society and speaks to the current situation and needs of Canadians.” But it is an essential step to address the merits of any argument made in this regard by an international body. The decisions or compromises reached in Geneva on the basis of principles Canada may or may not have endorsed can in themselves have no immediate or self-evident consequences for the meaning of our constitution. The argument that our constitution should reflect such decisions must be made and defended. It would be an unruly tree indeed if presumptive offshoots appeared every time an

34 B.C. Health, supra note 1 at para 78.
35 Ibid.
international body or tribunal decided a case having nothing to do with Canada or with our constitution.36

As noted above, we have no doubt that international law and practice can be illuminating when we grapple with complex constitutional law and labour law issues, but only if we scrutinize that international law and practice carefully to determine how, if, and to what extent it might apply in the Canadian context. Even if the Supreme Court had adequately explained why international documents and interpretations are relevant, it would still have the burden of describing how they are pertinent, and how they are to be used in informing the meaning of the Charter. While the Court is at pains to point out that international law is not constitutionally binding but is merely “persuasive,” it does not actually engage the reasoning of the ILO (indeed, it does not cite a single ILO case in B.C. Health)37 or the CFA, or of any of the other international bodies cited. Nor does the Court suggest exactly what it finds persuasive beyond the fact that the precedents and principles it refers to appear (on a superficial and at times inaccurate reading38) to support its preferred outcome. At

36 It may not be unreasonable to suggest that comparative sources, if carefully considered, can be useful in determining which limitations on the freedom are “demonstrably justified in a free and democratic society” under section 1 of the Charter. There is a distinction between using ILO experience as evidence of what section 2(d) means and using it to determine whether a limit is justified under section 1, and the latter exercise may be much more conducive to using international comparators. For example, John Claydon has argued that “[s]ection 1 contains an explicit invitation to courts to look at comparative (and international) law by stipulating the ‘free and democratic society’ standard.” John Claydon, “The Use of International Human Rights Law to Interpret Canada’s Charter of Rights and Freedoms” (1986-1987) 2 Conn J Int’l L 349 at 351. Indeed, in many of the cases where the Supreme Court has considered international law and practice, that has been done in the section 1 context. See Slaight, supra note 24; Canada (Human Rights Commission) v Taylor, [1990] 3 SCR 892; Ross v New Brunswick School District No 15, [1990] 3 SCR 892; Edmonton Journal v Alberta (AG), [1996] 2 SCR 1326, La Forest J. dissenting; R v Lucas, [1998] 1 SCR 439 at para 50; R v Zundel, [1992] 2 SCR 731; R v Sharpe, [2001] 1 SCR 45 at paras 171, 175-179, L’Heureux-Dubé, Gonthier & Bastarache JJ.; Sauvé v Canada (Chief Electoral Officer), 2002 SCC 68, [2002] 3 SCR 519 at paras 127-134, Gonthier J. dissenting.

37 Langille, “ILO,” supra note 3 at 379.

38 See Part 3, below.
best, it simply recites the conclusions of those bodies as indicative of the presumed meaning of the Charter. But as we all know, conclusions, without more, cannot be "persuasive." Only the reasons for those conclusions can be. This is all to say that it is not clear how the analysis would have been different if the Court had somehow (inexplicably) found the CFA’s interpretations of ILO law to be directly binding or authoritative in the interpretation of the Charter.

Finally, there is the question of how seriously to take the presumption that international legal obligations generally, and ILO obligations in particular, are to inform the interpretation of our constitution. To take one example, the Universal Declaration of Human Rights commits signatories (including Canada) to protect “property rights.”39 The Canadian Charter of Rights and Freedoms is one of the few such documents around the world that does not include some right to property,40 and the failure to include property rights amounts to a “shocking and deliberate departure from the constitutional texts that provided the models for section 7” of the Charter, including international human rights documents.41 However, our Supreme Court has chosen not to read our constitutional provisions as including a right to property,42 despite some academic support to the contrary43 and the opportunity to bring us into conformity with something approaching a “global consensus” on the

39 Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art 22.
42 Irwin Toy v Quebec, [1989] 1 SCR 927 at 1003.
right to property. Would the presumption of conformity not apply here? Why or why not? How do we know when it applies, and when it is to be overridden by other considerations? What considerations will suffice to override it? And so on. We do not mean to suggest that property rights should be included as an aspect of “liberty” or “security of the person” under section 7, but merely that they could be, as easily as one can conclude that section 2(d) includes protection for compulsory bargaining, which is also not explicitly mentioned in the Charter. The Court has chosen not to include property rights, many would say wisely, for the simple reason that they were deliberately not included in our constitution. But it has not explained why the presumption of conformity applies at some times but not at others, or why the courts will at times stick to the precise wording of an international covenant but at other times will depart from that wording and rely instead on interpretations of those covenants.

To use a more concrete example arising in the labour context, the ILO has found “that the principle of majoritarianism is acceptable only so long as minority unions are allowed to exist, to recruit members, and to represent their members in relation to individual

44 The “consensus” has not been on the precise articulation and scope of such a right, but merely on the fact that such a right is commonly protected. See generally Alexander, supra note 40; AJ Van der Walt, Constitutional Property Clauses: a Comparative Analysis (Cape Town: Juta, 1999).

45 Hogg, supra note 41 at 47-10 to 47-11.

46 See Canadian Foundation for Children, Youth and the Law v Canada (AG), 2004 SCC 4 at para 33, [2004] 1 SCR 76 [Canadian Foundation], where the Court declined to rely on non-binding interpretations, instead sticking closely to the relevant treaties’ actual wording, in finding that “[n]either the Convention on the Rights of the Child nor the International Covenant on Civil and Political Rights explicitly require state parties to ban all corporal punishment of children.” However, as Arbour J. pointed out in dissent (at paras 186-187), the international body tasked with monitoring compliance with the treaty found that corporal punishment should be prohibited — a point not addressed by the majority.

47 See e.g. Burns, supra note 24 at para 89, where the Court acknowledged that the “evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty,” but cited a number of non-binding international resolutions, reports and protocols (at paras 82-89) in support of its finding that extradition to the death penalty violated the Charter.
grievances.”48 Supporters of the B.C. Health ruling, such as Roy Adams, have pointed this out. Adams has noted that union shop clauses (similar to those upheld by the Supreme Court in Advance Cutting and Coring49) “clearly offend . . . the basic principles of freedom of association” as declared by the ILO.50 On this reading, Canada is in default of “international commitments,” as nowhere in the country does the law provide for the recognition of minority unions, and indeed in every Canadian jurisdiction such unions are expressly denied most of the benefits of labour relations statutes — most crucially, the right to compel the employer to bargain. Not only that — where there is a majority union, it is a violation of the statute for the employer to bargain with a minority union, even voluntarily. Unlike compulsory collective bargaining (which, as we shall see,51 the ILO neither requires nor condemns52), the ILO unequivocally endorses the right of workers to join minority unions.53

51 See Part 3, below.
53 Committee on Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed (Geneva: International Labour Organization, 2006) at para 975 [Digest]. As Brian Etherington has noted, “there are numerous other aspects of the regulation of collective bargaining activity in both public and private sector labor relations statutes that can be challenged as presenting a substantial interference with a right to engage in collective action to achieve workplace goals” on the B.C. Health definition. Etherington, supra note 4 at 741.
After *B.C. Health*, Judy Fudge suggested that the attitude of Canadian labour law toward minority unions would not be jeopardized by the Supreme Court’s willingness to look to international labour standards. The ILO’s position on minority union rights, she said, is based on Convention 98, which Canada has not ratified, and “[s]ince the Supreme Court has relied only on international conventions that Canada has ratified, it is unlikely that this jurisprudence will provide persuasive authority for interpreting section 2(d).”

There are several problems with this suggestion. First, the Court did rely on Convention 98, without knowing it. Second, the Court has not explained why international treaties ratified by Canada should be considered any more “persuasive” than international treaties generally. And finally, given the Court’s backtracking on this position in *Fraser*, and its endorsement of “international thought” on human rights (not just of Canada’s international commitments) as a persuasive influence on the *Charter*, we can no longer be so confident that the Court will not find principles set out in unratified conventions, or non-binding interpretations of those conventions, to be equally “persuasive” on the meaning of the *Charter*.

This is all to say that if the Supreme Court is serious in suggesting that the *Charter* should be presumed to provide at least as much protection as is provided by ILO law and ILO interpretations, it will eventually have to reckon with challenges to a concept which is at the very core of the Wagner model — the concept of majoritarian exclusivity. However, the Court’s haphazard treatment of international law in *B.C. Health* and *Fraser* suggests that it may not be all that serious. Either the Court is committed to taking the unauthoritative interpretation of principles loosely embedded in international law as a legitimate source of constitutional meaning, and thus redesigning the *Charter* with these international interpretations in

54 Fudge, “*B.C. Health,*” supra note 4 at 44.
55 Langille, “ILO,” supra note 3 at 378-381.
56 See Part 4, below.
57 The Court has relied to varying degrees on unratified treaties or non-binding interpretations in a number of cases, although it is not clear how much these sources affected the decisions in those cases. See e.g. *Dunmore, supra* note 33 at para 27; *Suresh, supra* note 24 at para 73; *Burns, supra* note 24. But see *Canadian Foundation, supra* note 46.
mind, or it is committed only to cherry-picking (as “persuasive”) those examples that appear to support a predetermined outcome, without discussing how they are persuasive. Neither of these options is particularly desirable.

Furthermore, especially with respect to ILO conventions, there is an air of unreality in the idea that they supply very much by way of inspiration in interpreting section 2(d). On the one hand, there are too many overly detailed ILO conventions. On the other hand, the ILO has some very generally worded human rights conventions, such as Conventions 87 and 98, both of which were created precisely because you could vote for them in Geneva and not ratify them at home. Or you could vote for them in Geneva, ratify them at home, and ignore them — because everyone knows there is no real enforcement. The softer the law, the more we will have of it, and the less care and attention ratifying members will give to ensuring that its consequences are compatible with their domestic agendas.

It must be added that the point of the 1998 Declaration was to end this sort of legal nonsense. It was a move to acknowledge the largely “promotional” nature of the ILO’s real influence in the world, and to adopt a new legal strategy in that light. This strategy was to identify core rights and tie their promotion to development assistance — i.e. to back them up with money, technical assistance and other resources that the developing world needs desperately, all driven by local demand (not by supply from Geneva). And precisely not backed up with legal “enforcement” by (among other bodies) the CFA, which had come to be seen by many (and by itself), mistakenly and unconstitutionally, as a sort of “small claims court” version of the ILO’s real legal machinery for enforcement.\(^5\) The classic and oft-cited example resulting from this change of strategy is the ILO’s International Program for the Elimination of Child Labour.\(^5\)

To summarize, even before we get to actually “doing” law, there are a number of reasons to be reluctant to simply grasp at the

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conclusions of international bodies as if they can resolve very difficult questions of constitutional interpretation. First, doing comparative law of any sort, and comparative labour law in particular, is a difficult task; it must be done carefully and deliberately if it is done at all. Second, anyone who desires to use international law, or international obligations, or interpretations of international law, or interpretations of international principles that are not international obligations, as a source of inspiration for the Charter has to consider and explain why the given document or interpretation is relevant and how it is to be used. Third, anyone who claims that an interpretation of a document is to be used as a “persuasive” source of reasoning on the meaning of the Charter must do more than just point to the conclusion itself, and must suggest why the reasoning which led to that interpretation is particularly persuasive in the context of the Charter case at hand. Finally, if one is seriously of the view that the Charter is to be presumed to be consistent with international obligations, one must pay attention to what that would mean for the interpretation of the Charter generally, and what applying the presumption with any degree of consistency would mean for the continued viability of the Canadian system of labour relations. In short, there is a correct way to consider international law in the context of Charter interpretation, and it requires that a number of steps be taken. The Court has taken none of them.

3. THE SPECIFIC ARGUMENTS ABOUT ILO LAW

We have outlined a few reasons why we should be wary of relying on international norms, and particularly norms set out by representative bodies in complex areas (such as labour relations) that touch on the core values to which societies are committed. We now turn to the more specific errors made by the Supreme Court of Canada in the context of finding a duty to bargain through ILO documents and institutions. We have not done a complete inventory, but we think the mistakes made in this regard in B.C. Health and in Fraser can be organized into several categories: misunderstanding the ILO’s Constitution; misunderstanding its “supervisory” system; misunderstanding its conventions; and misunderstanding its 1998 Declaration.
(a) Misunderstanding the ILO Constitution

The ILO Constitution is an interesting document. More people should read it. Some rather basic points emerge from it, including the fact that a member state can have no obligations under a convention it has not ratified. In Canada’s case, this includes Convention 98 (the Right to Organise and Collective Bargaining Convention). As has been detailed elsewhere, while the Court in B.C. Health purported to rely on Convention 87 (the Freedom of Association and the Right to Organise Convention), the conclusions drawn about Canadian obligations under ILO law were based on a report that was almost exclusively concerned with Convention 98, which Canada has not ratified. This is a problem insofar as any interpretation of Convention 98 is deemed to be indicative of Canada’s “obligations” under international law.

Simply put, the ILO Constitution places no legal obligation on member states to ratify any convention, much less to abide by the (often very general) terms of unratified conventions. Article 19(5) of the ILO Constitution obliges each member state to undertake that it will “bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.” And if the “Member does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member,” except for periodic reporting requirements. Constitutional language does not get any clearer than that. If a member state has ratified a convention, there is a detailed process for enforcing commitments under that convention. Ultimate legal authority is given to the International Court of Justice to adjudicate alleged violations, with remedies available under Article 33 of the ILO Constitution.

60 Langille, “ILO,” supra note 3.
62 Constitution of the International Labour Organisation, 1 April 1919, s 19(5)(a), online: <http://unhcr.org/refworld/docid/3ddb5391a.html#article> [ILO Constitution].
63 Ibid, art 19(5)(e).
64 Ibid.
CFA (along with the Committee of Experts) is nowhere referred to in that Constitution, and as explained below, the CFA simply has no legal or constitutional power to definitively interpret or enforce ILO law.

If we should be reluctant to accept the conclusions of the CFA when interpreting those conventions Canada has ratified, and from which legal obligations (however rarely enforced) do flow, one would think even greater caution is warranted in making use of those conventions Canada has expressly refused to adopt, which create no legal obligations whatsoever. In B.C. Health, it appeared that the Court (following the point made by Chief Justice Dickson in Alberta Reference) believed it was applying only those international documents ratified by Canada (which was not so, given the Court’s reliance on a summary document concerned almost exclusively with Convention 98). Even that belief is put into question in Fraser, further complicating an already seriously flawed analysis. We will return to this point in Part 4 of this paper. To the extent that the Court relied on Convention 98 in articulating Canada’s legal “obligations,” and to the extent that those obligations are considered relevant in interpreting the Charter, greater attention will surely have to be paid to what they actually are.

(b) Misunderstanding the ILO “Supervisory” System

Here there are two main problems with the Supreme Court’s analysis. The first lies in the Court’s failure to understand the nature,
stature or “authoritiveness” of the two key ILO committees — the Committee of Experts and the CFA. These committees are at best dubious sources of legal “obligation,” given that neither of them is mentioned in the ILO Constitution. Neither one is authoritative in any real sense, nor can it be authoritative under the terms of that Constitution.

The Court’s implicit grant of authority to the CFA is particularly troubling. When we get to the bottom of the CFA’s role in the ILO system, we see that it is not a good idea to give it an authoritative voice in interpreting ILO law, much less in interpreting our Charter. To do so would be to misunderstand not only the committee’s role but also its makeup and its approach to labour relations. It would also be to misunderstand the very reason for its existence. The CFA is a tripartite political body — unions, employers and governments each have three representatives on it, and it is engaged in seeking consensus among them. That search for consensus takes place in concrete domestic situations, involving what are often very basic issues and sometimes gruesome assaults on freedom of association. For years Canadian unions have been mailing cases off to the CFA in Geneva in the hope of obtaining favourable findings. This endeavour has of course had no legal effect whatever, and before B.C. Health it was always understood to be purely and transparently political. Everyone knew that the whole point of the exercise was to get a few column inches in The Globe and Mail, with a view to influencing public opinion. That objective is reasonable enough, as far as it goes. But opinions voiced by the CFA in these circumstances fall well short of providing definitive guidance on the meaning of ILO law, let alone on the meaning of a fundamental domestic constitutional provision.

In the pre-B.C. Health world, there was little harm in overlooking some inconvenient truths about the CFA. But when people — not

68 Ibid at 375.
just Roy Adams, but the Supreme Court of Canada — start saying that the CFA is an important source for interpreting our Charter, we need to recall that the CFA is not composed of lawyers and is not constitutionally authorized to interpret ILO conventions. As a result, it is unconstrained by ILO law and is equally at home taking into account issues arising in the domestic legal system that is in play in the particular case. Indeed, as one of us noted in an earlier article:

The CFA has to operate in the clear light of this legal reality, and must characterize itself as not being a “judicial” process at all. If anything, it is a fact-finding and conciliation service . . . It draws upon wider notions than those expressed in the conventions, including concepts used at the national level in the industrial relations system of the state in question. This makes sense for a tripartite political body whose role is to seek solutions to actual disputes involving a particular legal system, rather than to issue binding rulings on the violation of legal obligations under ILO conventions.

Second and equally troubling is the Supreme Court’s failure to grasp the true nature of the jurisprudence of these ILO committees. “Jurisprudence” is indeed too generous a term for the CFA’s output, which does not even aspire to be a particularly coherent or principled body of law. It is, rather, an effort to bring about voluntary and workable compromises, and consensus reports, in the light of local realities and concrete disputes between parties whose interests vary considerably from one country to another. A close reading of the CFA’s Digest drives the point home. It is precisely because the CFA does not act as a judicial body, but applies broad principles in situations where its objective is to get people to play by their own rules, that it has a free hand to strive for politically acceptable compromise and consensus, as opposed to offering definitive interpretations of international law. Furthermore, even if the CFA were tasked with

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71 According to Roy Adams, “the CFA might well be considered not only as the body whose function is to establish the constitutional responsibilities of ILO members with regard to freedom of association, but also the body whose function is to work out the meaning of the universal human rights responsibilities of all nations with respect to the human right to organize and bargain collectively.” Adams, “Statutory to Human Right,” supra note 50 at 57.
73 Digest, supra note 53.
74 Langille, “ILO,” supra note 3 at 376-378.
interpreting “law” through a judicial process, it is important to remember that it has never recommended a compulsory duty to bargain.\(^{75}\) The vast majority of ILO members would run afoul of such a standard, and the operative convention — Convention 98 — is explicitly committed to a process of “voluntary negotiation.”\(^ {76}\) As a matter of legal reasoning, it is a non-starter to use anything the CFA has said as evidence of an international obligation to provide for compulsory collective bargaining.

To better articulate the role of the CFA within the ILO, a few examples of its product may be in order. The CFA considered a complaint about 1999 Saskatchewan legislation which forced hydroelectricity employees back to work and imposed a three-year extension of a collective bargaining agreement. In its conclusions, the CFA suggested that the Saskatchewan government had failed to properly consult affected unions, and went on as follows:

Compliance with such a procedure guaranteeing transparency and prior consultation of the workers concerned and their organizations would have enabled the Government to avoid resorting to hasty legislation which can only prove to be an obstacle in the establishment of sound industrial relations. Thus, the Committee requests the Government to explore this possibility in future, in consultation with the parties concerned, and to keep it informed in this respect.\(^ {77}\)

On the issue of protecting workers from employer reprisals for trying to organize a union, the CFA laid down the following in its Digest: “it would be appropriate for the government to examine the possibility of adopting clear and precise provisions ensuring the adequate protection of workers’ organizations against these acts of interference.”\(^ {78}\) “Explore,” “possibility,” “appropriate,” “examine,” “adequate,” “requests” — these words do not sound remotely as though they purported to state binding legal conclusions. The reason

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\(^{75}\) Ibid at 382-3.

\(^{76}\) Convention 98, supra note 20, art 4.


\(^{78}\) Digest, supra note 53 at para 860.
is that it is not the CFA’s job to offer such conclusions (and under the ILO Constitution, it cannot be).

In short, the CFA is a representative, 79 non-judicial body 80 best seen as being engaged in what Servais calls “the functions of conciliation and mediation.” 81 Of necessity, it looks to domestic realities in order to offer suggestions on the resolution of domestic problems. Quite simply, again in Servais’s words, the CFA and the Committee of Experts “are not courts of law and their decisions are not binding.” 82 It is not at all clear why the “jurisprudence” of such bodies should be relied on in any way to help define freedom of association under the Charter.

Along with the constitutional fact that the CFA is not an authoritative source of ILO law, we have solid grounds to be skeptical of any attempt to treat it as even a persuasive source of legal reasoning. Because of the CFA’s nature and its role in the ILO system, it would seem imperative for a domestic court which relies on CFA jurisprudence to explain what makes that jurisprudence persuasive in the context of Charter interpretation. This would be very difficult to do, for all of the reasons canvassed above, and the Supreme Court of Canada has so far not even tried to do it.

(c) Misunderstanding the ILO Conventions

To recap, one problem in B.C. Health was the Supreme Court’s failure to mention which conventions Canada has ratified, and to make clear that no legal obligations can flow from an unratified convention. To the extent that the Court relied on Convention 98 as a guide to Canada’s international “obligations,” it was mistaken. A second problem was the Court’s failure to understand the role of the CFA in assessing and applying ILO principles. A third problem seems to lie in the fact that the Court did not look closely enough at

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79 As noted above, the CFA is a tripartite “political” body which includes representatives of labour unions, employers and governments. See Hepple, “Right to Strike,” supra note 48 at 137.

80 Langille, “ILO,” supra note 3 at 372.

81 Servais, International Labour Law, supra note 17 at para 1012.

the conventions themselves, whether ratified or not. Articles 1 and 2 of Convention 87 oblige signatories to “give effect” to the right of workers “to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.” For our purposes, that is all the convention says.\footnote{The wording of Convention 87 in itself could easily be read to condemn the Canadian system, which specifically requires government authorization of bargaining units (following a majority vote) before a union is established and before many of the protections essential to effective collective bargaining are engaged. Reading Convention 87 to denounce systems of collective bargaining that require registration or certification as a prerequisite to certain important protections would be overly formalistic. But that is precisely the point: the principles are very general, they do not give rise to clear and unequivocal obligations, and they neither require nor condemn the idiosyncratic system of labour relations law that Canada (and the United States) have adopted.} Convention 98, which Canada has expressly refused to ratify, is similarly ambiguous, and deliberately so. Article 4 of Convention 98, the real guts of the matter, only says:

\begin{quote}
Measures appropriate to national conditions shall be taken, where necessary, 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. [emphasis added]
\end{quote}

Two phrases immediately jump out from this text: “measures appropriate to national conditions,” and “voluntary negotiations.” The fact that Article 4 obliges member states who have ratified Convention 98 to adopt measures “appropriate to national conditions” speaks for itself, and the very breadth of this wording discredits any claim that the convention seeks to embody a definitive “consensus” on the meaning of freedom of association which could apply in every circumstance. As for voluntariness, the CFA has stated unequivocally that “[c]ollective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining.”\footnote{Digest, supra note 53 at para 926.} Leaving aside the fact that Canada has not ratified Convention 98, and the fact that the CFA has neither the legal authority nor the intention to interpret even binding conventions as law, how the Supreme
Court could read Article 4 as endorsing a “global consensus” imposing an involuntary obligation to bargain in good faith is, well, a mystery. We will return to this point below, in the context of our discussion of Fraser.

(d) Misunderstanding the 1998 Declaration

To observers of international labour law, the Supreme Court’s misunderstanding in B.C. Health of the ILO’s 1998 Declaration is particularly startling. The common view seems to be that the Declaration does what is impossible under the ILO Constitution — bind member states to the terms of conventions they have not ratified. This is a serious error, one that the Court in B.C. Health compounds by saying that the Declaration was based on “jurisprudence” under the conventions. The truth is just the opposite:

The idea of the Declaration was precisely not to bring about the constitutional contradiction of treating non-ratifying members as if they had ratified and were bound by the conventions. The key idea was precisely not to focus on the details of the conventions; the supervisory committees set up to monitor them, or the jurisprudence of those committees. The idea was a completely different one, and one which was consistent with the ILO constitution. It was to declare that, simply by virtue of membership in the ILO, all member states were bound to recognize and “promote” the “principles” underlying the four core rights. This idea may be fuzzy (because of the need to get a consensus), but it has one clear edge: it cannot mean that non-ratifying member states are bound by the provisions of any of the eight conventions [focused on in the Declaration], or by reporting and supervisory mechanisms triggered by ratification, or by any of the detailed jurisprudence developed by those mechanisms.85

The purpose of the Declaration, as both its proponents and its detractors (such as Philip Alston86) agree, was to offer a radical alternative to that very jurisprudence and to the committee processes that created it.87

85 Langille, “ILO,” supra note 3 at 370 [emphasis in original].
87 Even if this were not the case, it is difficult to see what legal obligations could flow from a Declaration that is not itself a treaty.
(e) **Summing Up B.C. Health**

Let’s take a moment to think about what is going on here. In *B.C. Health* (and as we will see, in *Fraser*), the Court uses a summary of non-authoritative interpretations of non-binding law to identify “Canada’s legal obligations,” and to ground a presumption that the *Charter* must meet those standards. Of course, it notes that the international sources it refers to are only persuasive and not binding, but as we said above, it offers absolutely no analysis of what exactly it finds persuasive. Instead, in *B.C. Health*, the Court blithely takes from a journal article a summary of CFA interpretations (most of which relate to a convention Canada has not ratified), goes on to misunderstand them, and turns that misunderstanding into a fixed star of “global consensus” which is apparently required to orient the Court in its search for the meaning of *Charter* rights and freedoms.

One way of testing the validity of these propositions is to ask the following question: before 1982, if Canada had known it was going to have a *Charter*, had known that the Supreme Court of Canada would interpret that *Charter* as providing “at least the same level of protection” as ILO conventions and interpretations, and had known that the Court would take that “level of protection” to include all of the musings of the CFA (on the right to strike and the rest), would Canada have ratified Convention 87? And should it have? This would be a novel way of making domestic constitutional law — and as a result, domestic labour law. All that would be needed is for a sufficient number of union leaders, employers and ambassadors from around the world to put together a deal for an ILO convention and to vote for it in Geneva, and for our federal executive in Ottawa to ratify it (and perhaps even ratification would be unnecessary, following *Fraser*’s endorsement of “international thought”).

This surely would be a strange way to interpret or indeed create a domestic constitution — all the more so because the international body in question (the CFA) is a peculiarly political body of non-

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88 *B.C. Health, supra* note 1 at para 77.
90 *B.C. Health, supra* note 1 at para 78.
lawyers who do not apply legal texts. Some people may be perfectly comfortable with the notion of Canadian courts, on behalf of the Canadian people, delegating the interpretation of our fundamental freedoms to an international body, and effectively constitutionalizing that body’s preferred outcomes on highly controversial political questions. Others may justifiably be uncomfortable with it, without thereby outing themselves as parochial or small-minded. If, by suggesting that the meaning of the Canadian Charter ought not to be tied to the interpretations of international law by an international body loosely engaged in substantiating vague principles, we become advocates of “old metaphors of national sovereignty,” so be it. Otherwise, we may be headed for dangerous territory.

As it turns out, this territory may not be far away. In discussing the implications of a European Court of Human Rights (ECtHR) ruling that took ILO law into account in finding that collective bargaining is protected by Article 11 of the European Convention (which explicitly guarantees freedom of association and includes measures to protect trade unions), Keith Ewing and John Hendy have suggested that CFA rulings are for all intents and purposes embodied in that provision. According to Ewing and Hendy, the ECtHR’s endorsement of certain CFA findings has converted those findings into “texts that may now assume biblical status and with which [European] labour lawyers should now become as familiar as with their own national statutes and law reports.”

Similarly in the Canadian context, Roy Adams has argued that “since [the Supreme Court] proclaimed in B.C. Health Services that Canadians should be able to rely on international standards that Canada has committed to, then that body of relevant law must be

92 Demir and Baykara v Turkey, [2008] ECHR 1345 [Demir and Baykara].
seen, at this point, to be the default”; and that “[f]reedom of association is a general concept, the detailed meaning of which in the context of work has been delegated by the world community to the ILO to work out.” In the same vein, James Grey Pope suggests that “[t]urning to the problem of institutional capacity, B.C. Health provides what appears to be a workable solution. Instead of relying on their own policy judgments, courts can turn to the standards and opinions of experts associated with the International Labour Organization.”

Let us recognize what is happening here. These scholars are not suggesting merely that Canada has bound itself to certain substantive international legal commitments and to their enforcement through the relevant international processes (in this case, to the ILO process, in accordance with the ILO Constitution). Rather, they are suggesting that interpretations of those international commitments made by the CFA, in its efforts to promote political compromises in jurisdictions whose labour law regimes are often fundamentally different from our own, are to be presumptively incorporated into our domestic constitutional order. On this reading, if Canada signs a convention (such as Convention 87) dedicated to the concept of freedom of association, fully intending to protect that freedom as far as possible in accordance with its own “national conditions,” and subsequently adopts a constitutional Charter, it has assented to leaving to the ILO’s supervisory bodies the instantiation of that freedom in constitutional and other domestic law. This implies that Canadian courts are constitutionally committed to those interpretations, even though they are nowhere to be found in any documents assented to by Canada and have been made by bodies not empowered by the ILO Constitution to give authoritative interpretations of ILO conventions. How this delegation of foundational legal authority occurs is not

96 Ibid at 56.
98 Something along these lines was endorsed by Ken Norman even before B.C. Health. See Norman, supra note 91.
described, but if we are anywhere near to this state of legal reality, it is in our view time to stop and reassess the situation.\footnote{A final thought: in light of \textit{B.C. Health} and \textit{Fraser}, is there in Ottawa a committee or two now worrying about Canada’s future in the international community, or at least in the ILO? Are those committees asking whether Canada should ratify any more ILO conventions, if there is a credible risk that it may have the effect just described? We assume — well, at least we hope — someone has their eye on this ball.}{99}

4. \textit{FRASER’S SPECIFIC CONTRIBUTION}

The interesting subject now is how \textit{Fraser} picks up on these points and responds to them. In their minority judgment in \textit{Fraser}, Rothstein and Charron JJ. clearly take some of them seriously. They identify two of the errors outlined above. First, they note the confusion over which ILO conventions Canada has or has not ratified, and thus over which ones create “obligations” for Canada. More specifically, they point out that international legal obligations flow only from those conventions Canada has ratified, such as Convention 87, and not from those which it has not ratified, such as Convention 98\footnote{\textit{Fraser}, supra note 6 at para 248.}{100} — the convention which, as discussed above, formed the backbone of the journal article on which the majority in \textit{B.C. Health} relied (mistakenly, it turns out) in finding that international law requires a duty to bargain in good faith.

Second, Rothstein and Charron JJ. note the majority’s misreading of the content of the jurisprudence under ILO conventions, including those conventions Canada has not ratified. Justice Rothstein quotes the following correct proposition set out in an article by Gernigon, Odero and Guido — the very article the majority purportedly relied on in \textit{B.C. Health}:

\begin{quote}
The Committee on Freedom of Association \ldots has stated that nothing in Article 4 of Convention No. 98 places a duty on a government to enforce collective bargaining with a given organization by compulsory means, and that such an intervention by a government would clearly alter the nature of bargaining.\footnote{Gernigon \textit{et al}, supra note 89 at 40-41, cited and quoted from by Rothstein J. in \textit{Fraser}, supra note 6 at para 249.}{101}
\end{quote}
In essence, even if Canada had international legal obligations under Convention 98, which it does not, they would emphatically not include a right to collective bargaining, which contemplates a duty on the employer — a duty that the majority in *B.C. Health* and *Fraser* read section 2(d) to require. The ECtHR’s decision in *Demir and Baykara*,\(^{102}\) mentioned above, also found a right to some form of collective bargaining in Article 11(1) of the *European Convention*. However, in the words of Ewing and Hendy, who are strong proponents of that decision, the ECtHR decided that the Article 11 right to collective bargaining does not, *of course*, give the union a right to compel an employer to bargain with it. Consequently, the right recognised by the ECtHR is currently a negative right against the imposition of prohibitions on the freedom of the union side to engage in collective bargaining.\(^{103}\)

The ECtHR reached this decision in the course of interpreting a provision of constitutional force that explicitly guarantees not just “the right to freedom of association” but also “the right to form and to join trade unions for the protection of [the employee’s] interest.” We of course do not mean to suggest that the ruling in *Demir and Baykara* is authoritative in the Canadian context, but it surely merits consideration that the ECtHR came to precisely the opposite conclusion to that of the Supreme Court of Canada on whether international law confers a right to compulsory collective bargaining — even though Article 11 of the *European Convention*\(^ {104}\) would more readily lend itself to such a finding than section 2(d) of our *Charter*, which guarantees only “freedom of association” and makes no mention of trade unions.

And how does the majority in *Fraser* respond to the points made by, among others, Rothstein and Charron JJ.? Well, this requires a pause before hitting the “send” button, but we think it is fair to say that the majority’s reaction was more than a little

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102 *Demir and Baykara*, supra note 92.
103 Ewing & Hendy, supra note 94 at 30 [emphasis added].
104 *European Convention*, supra note 93, art 11(1) (“Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions *for the protection of his interests*” [emphasis added]).
unbecoming for a constitutional court. Rather than acknowledge that it had made a palpable legal error, confront that fact and move on, the Fraser majority digs itself in deeper, in at least two ways.

First, the Fraser majority falls back on, and quotes, the Court’s assertion in B.C. Health that “Canada’s current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the Charter.” The Fraser majority even adds its own underlining to the phrase, “the current state of international thought on human rights” — as if those words, by making the assertion broader and more ambiguous, somehow make the conclusion more compelling. We have detailed above why Canada’s “international law commitments” cannot support the claim that freedom of association includes a right to collective bargaining and a correlative duty on the employer to bargain in good faith; as we have noted, that claim is based on a misunderstanding of the ILO Constitution, its body of interpretations, its supervisory process, and the 1998 Declaration. We have also pointed out why the interpretations of these international documents by certain ILO bodies are not authoritative and cannot even be relied on as persuasive, at least unless we are told what is found to be persuasive about them. Such a flawed analysis cannot be rescued by the Fraser majority’s suggestion that the “current state of international thought on human rights” can do what those (only marginally) less ambiguous and non-authoritative sources cannot do, in the absence of any evidence on the body of “international thought” to which the suggestion refers. Indeed, that suggestion may be the most amazing one in Fraser, and in retrospect, in B.C. Health as well.

The second device used by the Fraser majority to dig itself in more deeply is its attempt to “unwrite” what was said in B.C. Health,

105 Fraser, supra note 6 at para 92.
106 It should also be noted that there is simply no explanation, let alone a justification, offered for what is on the face of it a rather remarkable change of legal focus. “Thought” is a long way from “law,” “decision,” “norm,” “principle,” or even “consensus.” Indeed, it is very difficult to conceive of a serious attempt at constitutional interpretation that would not, to some extent, reflect “international thought.”
which of course is not possible. What did the Court actually say in
\textit{B.C. Health}? In that case, it invoked international law, along with
Canadian legal history and \textit{Charter} values, to justify interpreting sec-
tion 2(d)’s guarantee of freedom of association as comprehending a
right to collective bargaining, including a duty to bargain. To use the
Court’s words, “collective bargaining is an integral component of
international law,”\textsuperscript{107} and “international conventions to which Canada
is a party recognize the right of the members of unions to engage in
collective bargaining, as part of the protection for freedom of associ-
ation.”\textsuperscript{108} This reading was then used to ground a constitutional duty to
bargain in good faith. Assuming that the Court was engaged in a
process of logical reasoning (where the premises support the conclu-
sions), and given its ultimate conclusion in \textit{B.C. Health}, the Court
must have meant by the above statements that collective bargaining
(including a duty to bargain in good faith) is an integral component of
international law. As we have seen, that is just wrong.

We do not think any of this can plausibly be disputed. In
\textit{Fraser}, rather than stick to the story, or (preferably) admit that it was
wrong, the Court tries to claim that all it said in \textit{B.C. Health} was that
collective bargaining with a duty to bargain is tolerated by interna-
tional law — that the “ILO Committee of Experts has not found compul-
sory collective bargaining to be contrary to international
norms.”\textsuperscript{109} Let us stop there for a moment. To say that a certain inter-
pretation of a fundamental freedom is not plainly illegal under inter-
national law is hardly a robust argument in favour of that
interpretation. Nor is it the argument that was made in \textit{B.C. Health}.
There is a rather large and inconvenient gap between a legal rule
being an “integral component of international law”\textsuperscript{110} and being not
“contrary to international norms.”\textsuperscript{111}

On this point, Rothstein and Charron JJ. get it exactly right in
\textit{Fraser}. They state, compellingly:

> My colleagues say that international norms are not inconsistent with compul-
sory collective bargaining (para. 95). While this is true, it does not assist with

\textsuperscript{107} \textit{B.C. Health}, supra note 1 at para 20.
\textsuperscript{108} \textit{Ibid} at para 79.
\textsuperscript{109} \textit{Fraser}, supra note 6 at para 95.
\textsuperscript{110} \textit{B.C. Health}, supra note 1 at para 20.
\textsuperscript{111} \textit{Fraser}, supra note 6 at para 94.
the interpretation of section 2(d). Many positions including a freedom of association which includes voluntary collective bargaining are equally, if not more, consistent with international norms. However, the majority in *Health Services* said more than this. It said that Canada’s obligations and those international norms imply compulsory collective bargaining more than they imply voluntary associations: para. 72. With respect, international law does not support that conclusion.¹¹²

To this, the majority does not even respond. An unanswerable argument is simply left unanswered. In *B.C. Health*, the Court had advanced the not very convincing proposition that the fact that Canada’s obligations under international law supported some conception of collective bargaining was enough to justify the conclusion that they required one very specific instantiation of a right to collective bargaining. From there, the *Fraser* majority moved on to the even less compelling notion that because international law and “international thought” support some instantiation of freedom of association, which includes some form of collective bargaining, and because Canada’s system is not blatantly inconsistent (on this point anyway)¹¹³ with such a dedication to broad principles, it is appropriate to constitutionalize our specific system.

There is more, such as the rather large point concerning the *Fraser* majority’s selective use of the CFA’s product. The majority cites the CFA’s criticism of the legislation which was at issue in *B.C. Health*, stating that the “CFA concluded that the action of the government of British Columbia violated the employees’ right to freedom of association.”¹¹⁴ But then, inexplicably, in going on to uphold Ontario’s *Agricultural Employees Protection Act*, the majority fails to cite a CFA ruling which found that very statute to be in breach of international principles.¹¹⁵ This, too, is dispiriting.

### 5. A REALLY BIG POINT

When we consider how the Supreme Court in *B.C. Health* and in *Fraser* has treated international law in determining the scope and

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¹¹² *Ibid* at para 250.
¹¹³ See *supra* notes 48-53 and accompanying text.
¹¹⁴ *Fraser*, *supra* note 6 at para 94.
¹¹⁵ See *ILO Fraser*, *supra* note 26.
content of the three words “freedom of association” in the Charter, what we really need to ask is whether (and if so, why) it makes sense for the Court to have said any of the following:

(1) “I believe the Charter should generally be presumed to provide protection at least as great as that afforded by the similar provisions in the international human rights documents which Canada has ratified.” (Chief Justice Dickson in Alberta Reference 116)

(2) “In short, though I do not believe that the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter especially when they arise out of Canada’s international obligations under human rights conventions.” (Chief Justice Dickson in Alberta Reference 117)

(3) “Canada’s Charter of Rights 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.” (B.C. Health 118)

(4) “Charter rights must be interpreted in light of Canadian values and Canada’s international and human rights commitments.” (Fraser 119)

(5) Interpretations of the Charter must take into account “the current state of international thought on human rights.” (B.C. Health, endorsed in Fraser 120)

We hope it is clear by now that it is one thing to utter these remarks if we confine ourselves to “constitutional” (i.e. “human rights”) treaties (see the first two of the above comments by Chief Justice Dickson in Alberta Reference); if we restrict ourselves to human rights treaties

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116 Alberta Reference, supra note 24 at para 59.
117 Ibid at para 60.
118 B.C. Health, supra note 1 at para 70.
119 Fraser, supra note 6 at para 92 [emphasis in original].
120 Ibid.
that we have ratified; and if we limit ourselves to what our ratified conventions actually say, and not what the CFA says they say. If we do all of this, we will find, as we have seen, that we have committed ourselves only to some rather basic language — “freedom of association.” This, of course, is not of much help.

It is important, then, to keep our eye on the distinction between what our ratified conventions say and what others think they say — and on the further distinction between interpretations by bodies which are specifically tasked with applying and enforcing law, and interpretations by bodies (such as the CFA) which are not. At the ILO, this latter distinction is critical. The CFA effectively controls the application of Conventions 87 and 98, but as noted above, it is not a legal body at all. Nor is it charged with definitively interpreting those conventions — which it cannot do under the ILO Constitution. It would be remarkable enough for the Supreme Court of Canada to say that it is in any way bound by decisions of judicial bodies such as the International Court of Justice; for it to say the same thing about decisions of the CFA would be very remarkable. Yet we have come close to selectively taking the CFA’s interpretations as revealed truth of what those conventions actually say, in lieu of reading the conventions (and our commitments under them) for ourselves. Indeed, we may be going even farther — much farther — if Fraser means we are also to let the CFA articulate the state of “international thought on human rights.”

Thus, even if the judgment in B.C. Health were limited to ratified conventions, which is not what its core reasoning suggests, it would seem that the distinction between ratified and unratiﬁed conventions no longer applies after the Court’s backtracking in Fraser. No longer is Charter interpretation to be limited to “Canada’s international obligations,” as Chief Justice Dickson would have had it.

121 Admittedly, Dickson C.J. was a bit ambiguous here. Although his oft-quoted statement clearly refers to only those “documents that Canada has ratified,” he said earlier in his judgment that the “various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for interpretation of the Charter’s provisions.” Alberta Reference, supra note 24 at para 57.
and as *B.C. Health* appeared to suggest.\(^{122}\) Now it must take into account “current thought” on human rights, as expressed by bodies such as those in the ILO. If such “thought” indicates that any international norms which are not squarely opposed to the Canadian system support constitutionalizing that system, similar effect will surely have to be given to more concrete and direct manifestations of international thought, such as the protection of property rights in the U.N. *Universal Declaration on Human Rights* and most constitutional bills of rights,\(^{123}\) or the right to join minority unions clearly expressed by ILO bodies.\(^{124}\) So far, the Court has (in our view understandably) declined to do so. And yet it has constitutionalized a notion (that a duty to bargain is indispensable to freedom of association) which is nowhere to be found in international law, and it has ignored the very real and very serious reasons not to do that.

Many of the points we have made about the structure and content of ILO standards are in our view implicitly accepted by the majority in *Fraser*, although the judgment does not admit it. It appears to accept the fact that Canada has not ratified Convention 98, and that the Court in *B.C. Health* was not strictly looking to Canada’s international “obligations.” However, the *Fraser* majority’s remarkable claim that what was said in *B.C. Health* was simply a recognition of “international thought” on human rights, rather than a recognition of any particular international obligations Canada has consented to, merely sidesteps the problem and seems to make it worse. If the opinion of non-legal bodies interpreting non-law in the international sphere is now “presumed” to set a bare minimum standard for *Charter* obligations, there is really no end to the degree to which the giving of concrete meaning to the *Charter* may be delegated to international bodies.

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122 The Court in *B.C. Health* did not directly consider the effect of Convention 98. It said only that Convention 87, and two other non-ILO sources of international law, were the sources “most important to the understanding of section 2(d) of the *Charter*” because they “reflect not only international consensus, but also principles that Canada has committed itself to uphold.” *B.C. Health*, *supra* note 1 at para 71. This is also how Judy Fudge apparently understood the ruling in *B.C. Health* (see *supra* note 4), and what we understood the Court’s position to have been until *Fraser*.

123 *Supra* notes 41-45 and accompanying text.

124 *Supra* notes 48-53 and accompanying text.
On the other hand, Fraser may be interpreted to suggest that we have abandoned the whole project of saying we are in some way bound (or even presumptively influenced) by our international obligations, and to suggest instead that the only thing which can bind us is “thought” (i.e. reasons and arguments themselves). But this would really mean giving up on any sort of argument from authority. In other words, we would have to abandon the idea 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.” The fact that we have ratified such a document would not matter. The fact that some body has interpreted a ratified convention or treaty in a certain way would, in itself, not matter. What would matter is whether what is said in the document, or by the interpreting body, makes legal and constitutional sense in Canada. However, that would require looking and seeing — then thinking and reasoning. That is a generous interpretation of Fraser. We are not convinced it will prevail.

The bottom line, after Fraser, is that we are left exactly where we knew we would be after B.C. Health — in a world of “endless, incoherent and needless constitutional litigation.” The key word here is “needless.” All of this — including the further confounding of our understanding of the relationship between the Charter and Canada’s international obligations — would be avoided if we only let go of the irrational desire to cabin our constitutional commitment to equality. All that the farm workers in Fraser wanted was what they used to have (and what everyone else still has) — the Ontario Labour Relations Act, which is our statutory way of instantiating the fundamental freedom to associate. The farm workers’ argument was that their situation is unfair — that you cannot instantiate the fundamental freedom for Ontario workers as a whole and leave farm workers out. This is an equality argument. Dunmore “hinged upon an equality argument, an equality holding, and an equality remedy,” even though the Supreme Court in that case insisted on hanging its hat on section 2(d) of the Charter rather than on section 15. The same can be said of the recent British Columbia trial court ruling in Dockyard

125 B.C. Health, supra note 1 at para 70.
127 Ibid at 208.
Trades,\textsuperscript{128} which could have found\textsuperscript{129} austerity measures which had “no discernible impact on the actual capacity of [the employees in question] to associate to collectively pursue workplace goals”\textsuperscript{130} to be unconstitutional under section 2(d) insofar as those measures applied to union members and to be constitutional insofar as they applied to everyone else. Using an equality argument would make sense of cases like Dunmore and Fraser, where a category of workers was in fact being treated unequally in comparison to other workers. It would also avoid a potentially unjust result in a case like Dockyard Trades, where the affected union members were merely required to accept the same austerity measures as all other employees. After Fraser we see even more clearly the mess we are in as a result of this failure of the Supreme Court to stand behind our constitutional commitment to equality. It is not a pretty sight.

Eventually, we will reach a tipping-point somewhere — a point where the costs of the current unnecessary section 2(d) campaign will become so high that the Supreme Court will come to “seek the solace of section 15’s much simpler way of framing the issues and the solutions to them.”\textsuperscript{131} Unfortunately, we are not there yet; Fraser strikes another blow to equality in the instantiation and distribution of fundamental freedoms. But achieving equality has often required a long struggle. Someday we will get there.

6. AN EVEN BIGGER POINT

As detailed above, the Supreme Court’s misuse of international labour law in B.C. Health and Fraser has been a factor in rendering

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\item[128] Supra note 11.
\item[129] Because the collective agreement was imposed by an arbitrator (i.e. not the product of collective bargaining as such), and the government attempted to consult with the unions prior to its enactment, the Court held the legislation displacing the agreement to be constitutional, despite amounting to a “substantial interference” on the B.C. Health standard. Dockyard Trades, supra note 11 at paras 189-190, 205-264.
\item[130] Ibid at para 197.
\item[131] Langille “Freedom of Association Mess,” supra note 3 at 208. See also the discussion in Peter Hogg, “Equality as a Charter Value in Constitutional Interpretation” (2003) 20 Sup Ct L Rev 113 at 119-122 (“The agricultural workers in Dunmore were making an equality claim”).
\end{enumerate}
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incoherent the law of freedom of association in the labour relations context. In a recent and important paper,132 Patrick Macklem suggests that this movement in the section 2(d) jurisprudence may be part of a much larger venture embarked upon by the Supreme Court of Canada. In his view, *B.C. Health* and *Fraser* are best seen as playing a leading role in the clandestine reversal (that is, without the Court’s even mentioning it, let alone justifying it) of two very basic and well-established rules of Canadian constitutional law — rules about “dualism” and federalism.

In basic terms, dualism is the constitutional rule that, at least with regard to international treaties, “international law is only applicable domestically if there has been some kind of incorporation into the domestic legal order.”133 As Macklem says, “an international treaty obligation does not become domestic law unless it has been implemented in domestic legislation.”134 Likewise, and for the same reason, to the extent that customary international law is incorporated

132 Patrick Macklem, “The International Constitution” in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada* (Toronto: Irwin Publishing, 2012) 260 [Macklem, “International Constitution”]. In an earlier version of that paper (Patrick Macklem, “The International Constitution” (23 September 2011), online: SSRN <http://ssrn.com/abstract=1934981>), Macklem appeared to take a somewhat positive view of this larger venture on the part of the Court. In the current version (as we read him, and we hope we are correct), he does not necessarily celebrate this way of thinking, but rather points out its existence and calls for careful consideration of its consequences. We see this part of our paper as a response to his call for such consideration.

133 Stephane Beaulac, “Recent Developments on the Role of International Law in Canadian Statutory Interpretation” (2004) 25 Statute L Rev 19 at 19 n 5 [Beaulac]. This has been acknowledged, time and time again, by the Supreme Court of Canada. See e.g. *Canada (AG) v Ontario (AG)*, [1937] AC 326 (PC), Lord Atkin [*Labour Conventions*]; *Francis v The Queen*, [1956] SCR 618 at 621; *Capital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141 at 172-173; *Baker*, supra note 24 at para 69 (“International treaties and conventions are not part of Canadian law unless they have been implemented by statute”).

into the common law,\textsuperscript{135} it can be displaced by legislation.\textsuperscript{136} Macklem sees \textit{B.C. Health} and \textit{Fraser} as part of a move away from dualism, or as part of what has been called “creeping monism.”\textsuperscript{137} In short, he believes, as we read him at any rate, that dualism has died a slow death, having been chipped away on multiple fronts by the Supreme Court over the past decade or so.\textsuperscript{138} He is of the view that the traditional dualist Canadian constitutional rule on the relationship between international and domestic law has been reversed — or, in his words, “replaced”\textsuperscript{139} or “rendered obsolete”\textsuperscript{140} — and that we now live in “post-dualist times.”\textsuperscript{141}

What does this mean? Quite a lot. There is a clear and long-standing legal consensus that Canada is a dualist jurisdiction, not a monist one.\textsuperscript{142} Macklem’s point, simply put, is that we have undergone a constitutional revolution on this matter — Canada has \textit{de facto} joined, to one degree or another, the monist camp of nations,\textsuperscript{143} and (at least in the version of the revolution that Macklem sees in

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\item See Anne Warner La Forest, “Domestic Application of International Law in \textit{Charter} Cases: Are We There Yet?” (2004) 37 UBC L Rev 157 at 164-165; William A Schabas, “Twenty-Five Years of Public International Law at the Supreme Court of Canada” (2001) 79 Can B Rev 174 at 182 (“Customary international law is ‘the law of the land,’ subject of course to the right of the legislature to override it”). See also Beaulac, \textit{supra} note 133.
\item \textit{Supra} note 133 at 261.
\item \textit{Ibid.}
\item \textit{Ibid} at 263
\item \textit{Ibid} at 280.
\item \textit{Supra} note 133. This has consistently been recognized even by those judges who have interpreted the \textit{Charter} in light of international law. See e.g. \textit{Alberta Reference}, \textit{supra} note 24, Dickson C.J. dissenting, at para 60 (“I do not believe the judiciary is bound by the norms of international law in interpreting the \textit{Charter}”); \textit{Suresh}, \textit{supra} note 24 at para 60 (“International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment”).
\item On the different treatment of international human rights obligations in monist nations, see the brief discussion by Thomas Buergenthal, “Modern Constitutions and Human Rights Treaties” (1997) 36 Colum J Transnat’l L 211.
\end{enumerate}
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recent cases, especially *B.C. Health* and *Fraser*) international human rights law can now indirectly be made to apply domestically, without any need for a separate act of incorporation through the passing of domestic legislation.

Two points need to be made. First, it cannot be emphasized enough how deeply entrenched the dualist view is as a matter of clear (if often criticized) case law at the highest level, and how central it is to our democratic institutions. Second, we cannot ignore the fact that the dualist view has long governed Canada’s diplomatic conduct (both at the ILO in Geneva and at home) in terms of ratifying or not ratifying a particular convention. To take an example, one of Canada’s reasons for not ratifying Convention 98 (the *Right to Organise and Collective Bargaining Convention*) is that domestic law in some parts of the country denies collective bargaining rights to agricultural workers. The argument has always been that to ratify would put Canada in the position of breaching its international obligations. The argument has never been that if we ratify, two domestic laws would be in conflict — one saying that our labour law does not apply to agricultural workers, and the other (flowing from Convention 98) saying that it does. Nor has the argument ever been that if we ratify, a Canadian court would have to say that the agricultural exclusion does not exist because our law is really the international rule. In fact, no court has ever ventured to make explicitly even the lesser of these claims — that there are two contradictory rules in Canada. Yet Macklem suggests that all of this has been turned on its head.

The important point may be not just that this jurisprudential shift is wrong-headed (which in our view it is). Rather, if Macklem is right, and dualism is now dead in Canada because it has been overruled by the Supreme Court of Canada, we might reasonably expect that the Court would have mentioned that fact. But it has not.

The demise of dualism is only the first casualty. Macklem has identified a second constitutional victim, one which is perhaps even more significant for our purposes: the very clear, longstanding rules of Canadian federalism regarding labour law — rules which have likewise been often reiterated and always acted upon by our highest courts, as well as by the other branches of the state. If asked who governs labour law — the federal government or the provinces — all Canadian labour lawyers would say something to this effect: “Labour law is primarily a matter for the provinces, with some exceptions for
‘federal industries’ such as banking and airlines.” That is why we have provincial ministries of labour, provincial labour boards, provincial employment standards, and so on — concrete evidence, one might think, about where the safe money is on this question. But if Macklem is to be believed, all of this is gone (caught up with what he suggests, wrongly in our view, is a pro-capital race to the bottom in labour regulation engendered by the longstanding constitutional rules). The Court appears to be doing just what Ken Norman once advocated: using international law to “forge a route around” the pesky issue of federalism in the context of labour relations. Again, the Supreme Court is said to have achieved this transformation without telling us it was on the table as an issue, without citing any of the myriad cases to the contrary, and without offering any justification for such a radical change in our constitutional law. One is entitled to wonder, we suggest, what proponents of the rule of law should make of this way of proceeding (or for that matter, what the government of Quebec, which very carefully guards its jurisdiction over labour matters, as over much else, would make of it if it were true).

The procedural point is just the beginning. There is much more to be said about both of these constitutional issues on the merits. But a critical point is that the two issues are joined at the hip. Our rules on the monist-dualist question and our rules on the division of powers are related to and inform each other. This has always been obvious; it is critical, for example, to the key Labour Conventions case. Both issues must be seen in light of constitutional basics — namely that under Canada’s constitution, the power to ratify a treaty is a federal power. More than that, it is a federal executive power.

At the risk of over-elaborating a simple point, we should note that all constitutions, whether in federal or in unitary states, must


145 Norman, *supra* note 91 at 604.


147 Ibid at 142.
attend to the following basic question: if you live in an open society with a democratically elected legislature, and if you have a rule (like Canada’s) to the effect that the power to ratify treaties is an executive power, do you think it is a good idea to also adopt a “post-dualist” rule or a “creeping monist” orientation which says that the act of ratification may directly affect domestic law by virtue of the Charter? Would that not run some rather large and obvious holes through your parliamentary democracy? The answer to the latter question is yes, and thus, to the preceding one, no. So we can see that it is not an accident that if you have an executive power to ratify, you might well want a dualist theory on the effect of ratification. Likewise, if you have a rule, such as Canada’s, to the effect that the power to ratify treaties is a federal executive power, do you think it is a good idea to adopt a “post-dualist” rule or a “creeping monist” orientation which says that the act of ratification may directly affect laws within provincial jurisdiction? Would that not run some rather large and obvious holes through the rules on division of powers in your federalism? The answer, again, to the latter question is yes, and thus to the former, no. So we can see that if you live in a federation and you have a rule which says you have a federal executive power to ratify, you have a second reason for believing you need a dualist constitutional rule on the effect of international treaties. Happily, Canada has traditionally gotten it right on these points. This is not to say that we have the only possible right package — just that we have to see those rules as a package. Macklem does not comment on the wisdom of this movement away from these constitutional fundamentals. However, if he is correct that dualism has met its

148 We will come shortly to the even larger claim Macklem makes — which is that this revolution is not limited to ratified treaties.

149 If ratification is not an executive power but a legislative power, you can indeed be quite happy with a monist or post-dualist approach, as long as it respects the bounds of federalism.

150 Macklem acknowledges the logic of the Labour Conventions case in these words: “The justification commonly offered for this approach is that the Crown in its executive capacity, by entering into treaties with foreign states, should not be entitled to usurp federal or provincial legislative authority.” However, he does not return to the point directly. Macklem, “International Constitution,” supra note 132 at 263.
“demise,” surely the Supreme Court ought to acknowledge and account for its silent attack on our constitutional basics.

Before we turn to a major substantive problem with this trend, let us remark upon another rather obvious difficulty. It is this: if we accept Macklem’s observation that we are indeed now in, or entering into, a “post-dualist” world of the indirect application and (it seems to follow) the supremacy of international law, such as the now directly applicable international law actually says. In particular, we might want to look with some care at what the now directly applicable international law actually says. In particular, we might want to learn what it actually says about the two key problems we have identified with respect to the alleged shift to a post-dualist world. We would want, first, to learn the answer to this question: what does the relevant international law say about its impact domestically, in general? Second, what does it say about the other basic constitutional concern we have identified — that is, about the impact of international law not just in general, but in federal states? As it turns out, international law, and particularly ILO law, has a great deal to say about these two important questions.

On the first question, as noted above, the sole obligation of an ILO member state with respect to a new convention is to place it before the relevant domestic authority — in Canada, before the federal executive — for possible voluntary ratification. If ratification does not occur, then “no further obligations shall rest upon the Member” regarding implementation. This is not a hard rule to understand or to follow. It applies to all member states — those with monist and with dualist constitutional rules alike. Even assuming that we now operate in Canada on something approaching a monist view with respect to Charter interpretation, the result looks pretty clear. The supreme international law has spoken: without ratification according to local constitutional rules, there is no international law to

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151 Ibid at 282-284. At this point, Macklem seems to express some trepidation about the implications of finding that “international law confers on states the authority to arrange the constitutional distribution and exercise of sovereign power,” which the post-dualist model would seem to imply.

152 We know a bit about ILO law, but not enough about the other international legal regimes Macklem relies upon. However, the focus of his piece is largely on ILO law.

153 Supra notes 62-63 and accompanying text.
apply, because international law says there is none. That is the deal that Canada and all other ILO member states signed up for.

An inquiry into the second question is even more interesting — the question about the impact of an alleged post-dualist revolution on Canadian rules respecting the distribution of powers in our version of federalism. In fact, the matter of federal member states has always been controversial at the ILO. More than half a century ago, one writer put it as follows:

The supreme importance of the issue of federalism in relation to the formation of the ILO has not been generally realized. In fact the commission for the drafting of the Constitution of the ILO in 1919 very nearly foundered on the issue of federalism.\(^{154}\)

But it did not founder. The ILO Constitution has a detailed set of provisions regarding its federal member states. When we look at what those provisions say, it turns out that they too are rather devastating for proponents of “creeping monism.” Article 19(7) makes clear that “in the case of a federal State,” ILO law applies “as appropriate under [the member state’s] constitutional system for federal action.”\(^{155}\) Where the convention or recommendation in question would require “action by the constituent states, provinces, or cantons rather than” federal action, the federal government must refer the convention or recommendation “to the appropriate federal, state, provincial or cantonal authorities for the enactment of legislation or other action,”\(^{156}\) and must undertake consultations “with a view to promoting within the federal State coordinated action to give effect to the provisions of such Conventions and Recommendations.”\(^{157}\)

Again, this is rather devastating for the quasi-monists on the bench, as the allegedly applicable international law (here, ILO law) explicitly refers not only to local rules on the impact of international law domestically, but to the need to respect local division of powers rules in member states which are federations. Rather than run roughshod over such rules, international law respects and protects them. Thus,

\(^{154}\) RB Looper, “Federal State Clauses in International Instruments” (1955-56) 32 British Yearbook of Int’l L 162 at 164.
\(^{155}\) ILO Constitution, supra note 62, s 19(7)(b).
\(^{156}\) Ibid, s 19(7)(b)(i).
\(^{157}\) Ibid, s 19(7)(b)(ii).
on the creeping monist’s own view, what is seen as happening — the silent overriding of the traditional Canadian division of powers in labour law, ostensibly on the basis of international law — is not possible. The very international law relied upon has addressed this very issue, and has taken the opposite position. Nevertheless, because the Court has not addressed this issue directly, it has not had the opportunity to undertake such an analysis.

We come to the main point, which ties this part of the discussion to the criticisms we have made regarding Fraser. Macklem uses strong language: he speaks of dualism’s “demise,” of our living in “post-dualist” times, and so on. However, it is not clear what it actually means to replace dualism with what appears to be a discretionary or permissive form of monism. Early in his paper, Macklem says it means we will (and do) have “a more relational understanding of the boundary between the international and national legal spheres.”

But what does that mean? Monism may not be replacing dualism holus bolus. It may only mean something like the idea that our courts will “look to,” or “see as relevant,” or “invoke,” or “rely upon” international law, which will thus “have constitutional significance” in interpreting the Charter. This is such a broad set of notions that, in Macklem’s view of what the Court is up to, it extends naturally to relying on unratified treaties, on soft law, and on the views of non-authoritative and non-law-applying bodies such as the CFA, none of which would be relevant on a monist view which looks to binding international law in determining domestic legal obligations. Once we have modified (i.e. watered down) the verb used to describe what the courts do in this version of post-dualism, and then broadened the object to which the verb is applied, we think we are left in the same predicament that the Supreme Court found itself in once it was outed for its weak international law analysis in B.C. Health. As we have seen, the Court is now reduced to abandoning its legal argument and resorting to a mantra, not of international law, but of international “thought.”

159 Ibid at 261.
160 Ibid at 265.
161 Ibid at 267.
162 Ibid at 265.
Macklem describes Justice Rothstein’s fairly lethal observations in *Fraser* as making sense “only if Canada’s constitutional relationship with the international legal order remains dualist in nature.” As Macklem does not believe this premise still obtains, Justice Rothstein’s points appear to amount to mere nitpicking with respect to what the binding international law actually is — which conventions Canada has ratified, what those conventions actually say, and how the Court used international law to drive its conclusions in *B.C. Health*. But such nitpicking is relevant even if Canada is now operating as a monist nation with respect to international human rights obligations — we would only be bound domestically as we are bound internationally. On either the strict dualist or the monist conceptions, then, Justice Rothstein’s assessment of the relevant and binding international law is not nitpicking; properly understanding the relevant international law is crucial. However, neither conception would employ the “current state of international thought” as a constitutional lodestar in place of legal argument and in place of reliance on legal sources of obligation. At one point, Macklem puts his point this way: treaty obligations “now participate in the imposition of constitutional obligations on legislatures.” Still, how do they participate? Not as law — as “thought.” But thought is not law.

So perhaps the reality is not as stark as Macklem at times suggests: perhaps the Court has not rendered dualism obsolete, and Canada is not “dualist in name only” but rather has been willing to rely on “international thought” in developing the *Charter*. But how does, or could, one appropriately “rely” on such sources? In a very different way, we take it, than the way we rely on the words of the *Ontario Labour Relations Act*, or the *Charter*, or a Supreme Court precedent. In fact, it would appear we do not rely on them at all in a legal sense, as a monist nation would, because we have agreed they are not law. Other than through the merits of their reasoning, such sources have no authority, no claim to legitimacy (democratic or otherwise), and no claim to our attention. (That is, they have no independent legal authority which says we must attend to what they say

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163 *Ibid* at 280.
164 *B.C. Health*, supra note 1 at para 78; *Fraser*, supra note 6 at para 92.
165 Macklem, “International Constitution,” supra note 132 at 266.
whether we like it or not.) If those sources are to have an influence in the process of Charter interpretation, it must be because of the quality of their reasoning and their demonstrated relevance to the domestic legal order — this, and this only. We must also face the fact that just because many people think something is good or true, that does not make it so. The additional fact that some (or many) of those people do not live in Canada, and are thus seen to represent international thought, adds nothing to the legitimacy of the argument. Nor does it take anything away; its effect is nil. If law is not about separating opinion polls from what is right, then we are lost indeed.

If the Court is ushering in a new era of quasi-monism, whether deliberately or inadvertently, it must attend to what the law actually is, as Justice Rothstein has done, and it cannot fall back upon “international thought” as if that in itself was authoritative, even if it were a simple matter to definitively establish the content of such thought. Alternatively, if the Court is not going so far, it cannot credibly rely on international thought independently of the merits of what it has to say in light of our domestic law. Law is an exercise in reasoning. This is not a point about monism or dualism; it is a point about reasons. When we consider if something is a good idea, or a good interpretation, or a good argument, we need to attend to the reasoning. But — and this is a key point — if you are a judge, you need to consider if (good argument or not) it conflicts with some other position clearly staked out in our law. A court must make the new line of reasoning, the new interpretation, the new idea — whatever its source and whatever its charm — fit with our existing law, particularly our constitutional fundamentals, or else reject it. Any defence of a shift toward monism — if indeed anyone was inclined to defend such a shift in principle — fails on this basic point.

B.C. Health and Fraser also fail on this point. As we have seen, the Court has given no patient attention to (for example) the “reasoning” in decisions of the CFA or the wording of ILO conventions. If it had, it would in our view have concluded that CFA decisions are not (and should not be expected to be) reliable sources of principled reasoning, and that ILO conventions themselves simply repeat what we already know, often at an unhelpful level of generality. Macklem’s

166 See Part 5, above.
argument outlines the Court’s approach to the use of legal materials, then presses on to say that the result of this kind of “reliance” is to undermine some quite basic legal rules — by stealth. But courts do not and cannot work that way. Changing legal rules requires a decision. Courts cannot attend only to good thinking; they have to attend to all of the other rules of the legal system, and to whether what might appear to be a compelling line of reasoning can or cannot be made to fit with those rules.

In our view, it is impossible to make a creeping monist rule fit. Overt thinking about the points Macklem has raised will lead to the conclusion that a move to a post-dualist or quasi-monist view would be a large legal mistake in the Canadian context, precisely because it conflicts with what we know to be true about our law. The next question, then, is whether the trend identified by Macklem is really such a mild form of the post-dualism thesis that it avoids this problem. As we noted above, any thoughts or ideas (no matter whether they were conceived in Switzerland or Saskatoon) may be relevant or persuasive in the context of the Charter, and it is ultimately up to the courts to articulate what makes them relevant and persuasive. So, if the strong form of Macklem’s thesis has any grip, if the Court really has abandoned dualism and undermined federalism by incorporating international law into the domestic legal order, the jurisprudence must be wrong, because it would allow the federal executive to unilaterally alter domestic law, the domestic separation and division of powers, and the meaning of the constitution itself, with the swipe of a Prime Minister’s pen. Alternatively, if the Court is not embracing some form of monism, and instead the weaker version of Macklem’s thesis is accurate, it merely means that the Court should attend to legal arguments whatever their source, which is undoubtedly true. However, in the latter case, it would be incumbent upon the Court in using these international sources to suggest what exactly the Court finds persuasive and relevant about any given argument or position. Merely citing the relevant law would not suffice, as it would if we were in fact a monist nation, and a fortiori, any reliance on “international thought” needs to be scrutinized and defended.

Taking both the strong and weak versions of Macklem’s thesis together, we can summarize our point differently: in the real dualist world, the core question that has to be asked is how international law which binds Canada internationally becomes binding domestically.
For example, if Canada has ratified an ILO convention, that convention binds Canada internationally to follow ILO enforcement processes — but as we have noted, it can only be made binding domestically through domestic Canadian legislative action that respects the separation of powers and rules of federalism. In other words, the law is binding internationally but is not necessarily binding domestically, unless the relevant democratic body makes it binding. In a monist world, by contrast, we must identify the relevant international law, and apply it directly. In the ILO context, we would not rely on conventions which Canada has not ratified, or on “international thought,” but only on that law which binds Canada internationally. However, if Macklem is right and the Court will now rely on international legal “thought” (including unratified conventions, soft law, non-authoritative international sources, the opinions of “political” committees and so on) without suggesting why that thought should be seen to be persuasive and relevant in the context of the Charter, then we are in neither a dualist nor a monist world. Rather, we are in an upside-down, Alice in Wonderland post-dualist world — one where “law” that is not binding on Canada internationally, such as Convention 98 or CFA interpretations of ILO law, is effectively deemed authoritative domestically.

There is something very wrong with this new (and weird) form of creeping monism, and we have already put our finger on it: there is simply no international law in the picture. In the absence of an international obligation, the question of dualism versus monism (which asks what is the domestic effect of such an obligation) cannot and does not surface. And for all the reasons we have stated, any attempt to paper over this void in international and constitutional law with the idea of “international thought” will not work.