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NOTES, DEBATES AND COMMUNICATIONS

International labour standards: Recent developments in complementarity between the international and national supervisory systems

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Abstract. *Far from competing against one another, the national and international systems of labour regulation are interlocked. ILO standards have been used in recent rulings by the highest jurisdictions of some countries. Examining two decisions by the Supreme Court of Canada and another by the Paris Court of Appeal, the authors clarify the circumstances in which national courts make use of these international sources of law and consequent legal implications. The cases involve proceedings before national courts and ILO bodies, and France and Canada also have different legal cultures, enabling a discussion of how national jurisdictions actually appropriate international labour standards.*

The idea of regulating labour internationally emerged concomitantly with the adoption of labour law provisions at the national level (Valticos, 1983). Far from being a mere reflection of national legal constructs, international labour law was indeed thought out as a regulatory system for dealing with competition between national economies. The framing of international rules on labour was thus a legal extension essential to the operation of national law.

The internationalization of labour law found institutional embodiment in the ILO. The adoption of national labour codes and the gradual institutionalization of labour law as a discipline were paralleled by the ILO's standard-setting work at the international level. The development of national legislation and international legal instruments on labour was thus coordinated. Indeed, the formulation of international labour standards based on tripartite consensus

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eventually produced what has often been described as an international labour code. Furthermore, as the scope of the ILO's work broadened in response to international political developments, it remained constantly underpinned by legal expertise which translated into the adoption of Conventions and Recommendations, principles enshrined in declarations or resolutions of the International Labour Conference, and comments and recommendations of its supervisory bodies. Far from competing against one another, the national and international systems of labour regulation are thus intricately interlocked. Yet, it remains important to clarify how this happened and how national jurisdictions actually appropriate international labour standards, beyond their general transposition into domestic law.

International labour regulation and national legal constructs: Complementarity?

With a few exceptions (Leary, 1982; Valticos, 1983; von Potobsky, 1997), studies on the incorporation of international labour standards into national law systems remained scarce until recently (Beaudonnet, 2005). International human rights law has been the focus of special attention in studies devoted to the case law of regional courts of human rights (especially that of the European Court of Human Rights). But international legal instruments concerned with labour have elicited much less analysis.

Over the past two decades, however, complementarity between national and international labour law, and the impact of international labour standards on national legal rules, have generated ever-widening debates – well beyond the confines of the legal profession. The issues raised by the incorporation of international labour standards into national law have provoked extensive legal discussion of the impact and effectiveness of ILO standards (Beaudonnet, 2005; Bronstein, 2004; Gravel, 2008; Thomas, Oelz and Beaudonnet, 2004). Other approaches have focused on political, cultural or institutional obstacles to the incorporation and effectiveness of international labour standards in various national legal systems (Filali Meknassi, 2007).

Building on recent research (Beaudonnet, 2005; Thomas, Oelz and Beaudonnet, 2004), this note aims to highlight the growing use of international labour standards by national jurisdictions and to distinguish the different legal applications that have resulted from this process at the national level. This, in turn, calls for consideration of national judicial practice in regard to international labour standards. Thus, alongside legal analysis of the effects of reception/incorporation of international labour standards into national systems, what matters more are ultimately the circumstances in which domestic jurisdictions draw on those standards.[1] Indeed, reference to international labour standards is but one of a number of resources available to national courts in the administration of justice.

[1] Echoing the views of many legal scholars, Xavier Beaudonnet mentions a number of factors which appear "in practice, either to favour or not to favour the use of universal sources of international labour law by domestic jurisdictions . . . [including] indifference as to whether states have a monistic or dualistic system, the extent of constitutionalization of labour law [or] the degree of autonomy enjoyed by labour jurisdictions in the development of labour law" (Beaudonnet, 2005, p. 76).

Beyond differences of opinion on complementarity between the international and national systems of labour law and on the impact of international labour standards, there seems to be an emerging consensus that domestic jurisdictions have increasingly been making reference to those standards in recent years (Beaudonnet, 2005; Thomas, Oelz and Beaudonnet, 2004). This trend is particularly significant in that ILO standards have been used in recent rulings not only by national jurisdictions of first instance but also by the highest jurisdictions of some countries. Against this background, this note endeavours to clarify both the circumstances in which national courts make use of international sources of law and the legal implications of this particular application of international labour law. Of particular heuristic value in this respect is the examination of three high-court decisions – two by the Supreme Court of Canada and another by the Paris Court of Appeal. Not only are these rulings recent and concerned with litigation that involved proceedings before both national courts and ILO bodies, but France and Canada have different legal cultures, with monistic and dualistic systems, respectively. This provides a basis for discussing and comparing the ways in which national jurisdictions make use of international labour standards.

The legal saga of France's "new hire contract"

The legal battle that erupted in France over the "new hire contract" – hereinafter referred to by its French acronym, CNE – highlights the issues at stake in complementarity between the international and national systems of labour law, illustrating both the processes involved in judicial use of international labour standards by national courts and the procedures for supervising their application under article 24 of the ILO Constitution. Introduced by Ordinance No. 2005-893 of 2 August 2005, the CNE was to give rise to over 800 cases of litigation within two years, providing useful insights into recourse to international legal instruments by national jurisdictions. Accordingly, after reviewing the complaint lodged against France before the ILO and its procedural aspects, this section will focus on the rulings of that country's higher jurisdictions and how the French courts made legal use of international labour standards.

Pursuant to Law No. 2005-846 of 26 July 2005, which authorized the then Government of Dominique de Villepin to order emergency measures to promote employment, the Ordinance of 2005 established a special contract of employment for firms employing up to 20 workers. The new contract was of indefinite duration but with more flexible rules on termination within the first two years than those normally applicable to such contracts. From the very outset, some of the CNE's provisions proved extremely controversial, especially those establishing the two-year probationary period and grounds for termination.

The CNE at the international level

In a communication dated 25 August 2005, the *Confédération générale du Travail-Force ouvrière* (CGT-FO), one of France's largest trade unions, lodged a complaint with the ILO under article 24 of its Constitution, regarding the application of the Right to Organize and Collective Bargaining Convention, 1949 (No. 98),

the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Termination of Employment Convention, 1982 (No. 158) – all of which had been ratified by France. The complaint was concerned with two of the provisions contained in ordinances introducing "emergency measures to promote employment". The CGT-FO claimed that the first ordinance amended the Labour Code with the effect of "significantly undermining freedom of association, the right to organize and the right to bargain collectively" (ILO, 2005, p. 4).[2] In making its legal case, the trade union argued that several provisions of the ordinance at issue were, in effect, in breach of France's obligations under Conventions Nos. 98 and 111, and tended to narrow the scope of its obligations under Convention No. 87. The provision challenged by the CGT-FO in the second ordinance was more specifically concerned with termination of the CNE. According to the trade union: "Although accompanied by provisions on notice and severance pay, the provision allows an employer to terminate this type of employment contract for no reason, at any time, and at minimal expense, simply by notifying the worker by registered letter" (ILO, 2005, p. 6). This was held to be inconsistent with Convention No. 158 and its accompanying Recommendation, No. 166.

In accordance with the procedure prescribed in article 24 of the ILO Constitution, the complaint submitted by the CGT-FO was pronounced receivable on 6 December 2005 (ILO, 2005). The complaint was then referred to a tripartite committee,[3] while the allegations concerning trade union rights were laid before the Committee on Freedom of Association. In a communication dated 25 January 2006, the CGT-FO provided the ILO with additional information in support of its complaint. This was chiefly concerned with the French Government's plans to introduce yet another type of contract – the "first-time employment contract" (CPE) – which, the trade union claimed, was modelled on the CNE.

The Government responded to the CGT-FO's allegations in a communication dated 17 March 2006. After justifying the measures it had adopted with emphasis on the difficulties confronting young labour-market entrants, the French Government stressed that: "The CNE remained however subject to the provisions of the Labour Code, including those relating to public order with respect to the protection of the personnel representatives, employees suffering occupational accidents or illness and women expecting a child. The principle of judicial review was not put into question" (ILO, 2007, pp. 6 and 7, para. 31).

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[2] Amendment of article L. 620-10 of the Labour Code regarding the counting of enterprise workforce numbers for the purposes of entitlement to certain worker representation rights and unionization, from which workers hired under CNEs were excluded.

[3] The tripartite committee was composed of Paolo Reboani (government member, Italy), Michel Barde (employer member, Switzerland), and Ulf Edström (worker member, Sweden). At its 296th session, the Governing Body of the ILO appointed Francesca Pelaia (government member, Italy) to replace Paolo Reboani as chair of the committee.

Following a decision of the State Council of 6 July 2007, which repealed the controversial provisions of Ordinance No. 2005-892 of 2 August 2005, the CGT-FO informed the Committee on Freedom of Association that it was withdrawing its complaint in regard to the alleged non-compliance with provisions of ILO Conventions on freedom of association. The Committee took note of the withdrawal of the complaint on this point in its November 2007 report. However, the tripartite committee, established under article 24 of the ILO Constitution to examine the complaint concerning alleged violations of Convention No. 158, carried on with its work. Its report was in fact submitted to the November 2007 session of the ILO's Governing Body.

The CNE at the national level

The aim of this section is not to comment on the contents of the tripartite committee's report but to examine how the French courts availed themselves of international labour standards to justify their own rulings on the disputed aspects of the CNE. Ultimately, the question is whether international standards make useful legal resources for the settlement of disputes and the development of case law at the national level.

France's Court of Cassation has historically been reluctant to draw on universal sources of labour law (Beaudonnet, 2005). Such explicit references to international labour standards as have appeared in its rulings have been marginal at best.[4] A partial explanation may be that the monistic system operating under French law implies direct incorporation of international law into national law. Yet, the judgment of 26 March 2006 of the Court of Cassation's labour division has interesting potential implications for future judicial decisions in regard to the use of international labour law instruments. Indeed, this judgment recognizes the direct application of the ILO's Convention No. 158 in the following terms: "Article 1, subparagraph 2(b) of Article 2 and Article 11 of International Labour Convention No. 158 concerning Termination of Employment at the Initiative of the Employer, adopted at Geneva on 22 June 1982 and having entered into force in France on 16 March 1990, are directly applicable before national jurisdictions". [5]

This decision on the right to prior notice of termination – which is covered by Article 11 of Convention No. 158 – established that a qualifying period of employment of less than six months was reasonable in terms of Article 2 of the Convention, which stipulates that:

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[4] Xavier Beaudonnet suggests that the extreme scarcity of cases in which constructive use is made of international labour law in French-speaking countries may, as far as the French Court of Cassation is concerned, be explained in part by the fact that "the brevity of the legal arguments underpinning the interpretations and principles put forward by the Court affords little opportunity for reference to international sources" (2005, p. 59, note 40).

[5] The full record of the judgment (No. 906) is accessible at www.courdecassation.fr/jurisprudence_publications_documentation_2/actualite_jurisprudence_21/chambre_sociale_576/arrets_577/br_arret_8868.html (visited 27 August 2008).

> 1. This Convention applies to all branches of economic activity and to all employed persons.
>
> 2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:
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> …
>
> (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration …

Furthermore, in a decision of 28 April 2006, the labour court of Longjumeau ruled against the applicability of Ordinance No. 2005-893 of 2 August 2005 concerning the CNE on the ground that its provisions were inconsistent with the ILO's Termination of Employment Convention, 1982 (No. 158). In this case, a law firm had hired a female secretary on a fixed-term contract with effect from 1 July 2005 to meet "a temporary increase in workload". The contract was concluded for a "tacitly renewable term of six months" subject to a probationary period of one month that could be renewed once. Prior to the expiry of this contract, on 6 December, the parties signed a CNE, for the same job description and for the same pay, with a starting date of 1 January 2006. On 27 January 2006, the employer served formal notice of termination of the CNE "with effect one month after the service of this notice". The plaintiff's case rested, inter alia, on "unilateral termination of the CNE, being at all events contrary to Convention No. 158 of the International Labour Organization of 22 June 1982, which prescribes that the grounds for termination of a contract of employment be stated".

The labour court's decision in this case is based on Articles 4, 7, 9 and 2(2)(b) of ILO Convention No. 158. In particular, the court considered that the two-year "probationary" period provided for under the CNE exceeded the "reasonable duration" prescribed in Article 2 and, in the preambular statement preceding its decision, recalled:

> … ILO Convention No.158, in its Article 4, stipulates that: "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."
>
> And, in its Article 7, that: "The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."
>
> And, in its Article 9, that: "[The courts] shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified."
>
> And that the said Convention stipulates in its Article 2(2)(b): "A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention: … workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration".

On these grounds, the labour court of Longjumeau concluded that the Ordinance of 2 August 2005 establishing the CNE was inconsistent with ILO Convention No. 158. Its judgement was appealed by the prefect of the department of Essonne. But the Paris Court of Appeal, in a ruling of 20 October 2006,

dismissed the prefect's challenge to the labour court's jurisdiction. Explaining its decision, the Court of Appeal observed that the question of the direct applicability of Convention No. 158 in France was not at issue in the lower court's decision and that such applicability had been recognized both by the State Council and by the Court of Cassation.[6] Indeed, the legal issue centred on the "conventionality" of the CNE, i.e. the compatibility of the Ordinance of 2 August 2005 with ILO Convention No. 158.

In a judgement dated 6 July 2007, the Paris Court of Appeal ruled on the substance of the case, including the issue of CNE conventionality. Again, the Court grounded its decision in the provisions of Convention No. 158, with particular reference to its Articles 2(2)(b), 4, 7, 8 and 9:

> Wherefrom it follows that, in dispensing with the requirement of a genuine and serious reason for termination of the CNE, the Ordinance of 2 August 2005 is inconsistent with Article 4 of Convention No. 158 …
>
> That, in expressly breaching the unity of the law of dismissal, as established by Convention No. 158, the Ordinance of 2 August 2005 is inconsistent with its Article 7 in particular …
>
> Considering that, in order to validate the period of exclusion laid down by article 2 of the Ordinance of 2 August 2005, it needs to be established whether the two-year period is consistent with the prescriptions of Convention No. 158, which restricts the period of exclusion to a reasonable duration ...[7]

The Court therefore determined that:

> … for a period of two years the "new hire" contract deprives the employee of most of the rights pertaining to termination … and … in the circumstances, based on a test of proportionality, the two-year period … cannot be deemed reasonable; in consequence whereof this instrument cannot be seen to fall within the scope of the temporary exclusion that Convention No. 158 provides from its own application.[8]

The labour court's decision of 28 April 2006 was thus upheld by the Court of Appeal of Paris. And finally, in a judgement dated 1 July 2008, the labour division of the Court of Cassation confirmed the appellate decision to the effect that the CNE was inconsistent with Convention No. 158, particularly in that this contract set aside the general provisions of the Convention governing termination procedures and the requirement of a valid reason for termination subject to examination.[9]

The foregoing overview of the CNE's judicial record suggests that the traditional reluctance of French jurisdictions to refer explicitly to international sources of labour law may be waning. Whether or not this proves to be a lasting trend will have to be determined in the light of future judicial decisions.

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[6] See State Council Decision No. 283471, of 19 October 2005, and the 29 March 2006 Judgement of the Labour Division of the Court of Cassation.

[7] Court of Appeal of Paris, 18th Chamber E, Judgement of 6 July 2007.

[8] ibid.

[9] Court of Cassation, Labour Division, Judgement No. 1210 of 1 July 2008.

Canada's change of course

According to Canadian constitutional law, an international treaty to which Canada becomes a party is not directly applicable under domestic law. For such a treaty to be received and given effect, it first has to undergo a process of transformation or incorporation, typically in the form of legislation introducing or transposing its provisions into domestic law. Indeed, Canada is considered to be a dualistic State, i.e. one in which international agreements are treated as a regulatory system distinct from domestic law. Canadian law is in fact something of a hybrid in this respect – albeit predominantly dualistic when it comes to treaties. Since treaties are, in principle, concluded on the country's behalf by the Canadian Federal Government, their provisions become applicable under domestic law only if they are "reaffirmed" at the national level by a law. Customary international law, by contrast, feeds directly into domestic common law (Trudeau, 2005; Arbour and Parent, 2006).

Examination of the judgements of the Supreme Court of Canada over the past few decades provides insights into how international law – particularly international labour law – is received and used under Canadian law. Over much of this period, litigants who chose to invoke international labour law instruments ratified by Canada achieved mixed results. Since 2001, however, there has been a change, with the Supreme Court displaying greater openness to such instruments in its construction of Canadian law (Trudeau, 2005).

Indeed, the early 2000s witnessed a noticeable shift in judicial practice – particularly in regard to freedom of association – when the Supreme Court was called upon to rule on the constitutionality of the Ontario provincial Government's exclusion of agricultural workers from the statutory framework for collective bargaining in *Dunmore v. Ontario (Attorney General)*.[10] This case raised the question of the constitutionality of certain provisions of Ontario's Labour Relations and Employment Statute Law Amendment Act, 1995, and Labour Relations Act, 1995. The plaintiffs and appellants – individual agricultural workers and the United Food and Commercial Workers International Union – challenged the validity of these provisions on the basis of section 2(d) of the Canadian Charter of Rights and Freedoms, which protects the right to freedom of association.[11] Expressing the majority view of the Court, justice Bastarache found that the total exclusion of agricultural workers from the statutory labour relations regime constituted an infringement of that section which could not be justified in terms of section 1 of the Charter, namely: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[10] Supreme Court of Canada, *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, 21 December 2001, accessible at http://csc.lexum.umontreal.ca/en/2001/2001scc94/2001scc94.html.

[11] "Everyone has the following fundamental freedoms: … (d) freedom of association ." The full text of the Canadian Charter of Rights and Freedoms is accessible at http://lois.justice.gc.ca/en/Charter/index.html.

In arriving at that conclusion, justice Bastarache supported his argument by referring to international labour law. Indeed, in order to establish the collective dimension of section 2(d), the judge held that this provision protected not only individuals' interest in association (the individual dimension), but also a variety of genuinely collective rights pertaining to the activities and aims pursued by the association itself, as an entity distinct from its members. Justice Bastarache grounded this construction of freedom of association in commentary from the ILO's supervisory bodies, with particular reference to the observations of the Committee of Experts on the Application of Conventions and Recommendations and the recommendations of the Committee on Freedom of Association, both of which have clearly established the collective nature of trade union law. In a further reference to ILO principles, the judge also cited Articles 2 and 10 of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), in determining whether the outright exclusion of agricultural workers from the statutory labour relations regime constituted an infringement of freedom of association in terms of section 2(d) of the Charter. In order to strengthen his conclusions, the judge went on to refer to the Right of Association (Agriculture) Convention, 1921 (No. 11), and the Rural Workers' Organizations Convention, 1975 (No. 141). Although Canada had not ratified these instruments, he considered that "together these conventions provide a normative foundation for prohibiting *any* form of discrimination in the protection of trade union freedoms" (para. 27 of the judgement).

Besides, it had already been established that international sources of law on personal rights may have cogency in the interpretation of the provisions of the Canadian Charter of Rights and Freedoms.[12] In the *Dunmore* judgement, Justice Bastarache explicitly recognized that the ILO's Conventions and principles were among those sources. Similarly, Justice L'Heureux-Dubé , citing an earlier ruling of the Supreme Court,[13] made particular reference to the recommendations of the Committee on Freedom of Association which, she observed, established that full recognition of freedom of association implied effective protection of trade union activities embodying a collective dimension. This judge thus used the recommendations of the Committee on Freedom of Association to argue that while specific circumstances may justify the exclusion of particular agricultural workers, the exclusion of all agricultural workers from the entire statutory labour relations regime was unwarranted.

Thus, having established that the exclusion of agricultural workers from the statutory regime was an obstacle to the effective exercise of freedom of association, the Supreme Court of Canada – its reasoning reinforced by reference to the Conventions of the ILO and commentary of its supervisory bodies – ruled that section 80 of Ontario's Labour Relations and Employment Statute Law

[12] Supreme Court of Canada, *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (Justice Dickson), 9 April 1987, accessible at http://csc.lexum.umontreal.ca/fr/1987/1987rcs1-313/1987rcs1-313.html.

[13] ibid., note 20.

Amendment Act, 1995, and section 3(b) of its Labour Relations Act, 1995, were unconstitutional.

Canadian jurisprudence on labour relations was to undergo further development in 2007, particularly in regard to collective bargaining, as a result of the Supreme Court's decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*.[14] Indeed, until very recently, collective bargaining was not considered to be protected under the Canadian Charter of Rights and Freedoms. Furthermore, Canada has yet to ratify the ILO's Right to Organize and Collective Bargaining Convention, 1949 (No. 98). Nonetheless, in its judgement of 8 June 2007, the Supreme Court ruled that freedom of association, as protected by the Charter, extended to the procedural right to collective bargaining. This ruling was made in a case brought by trade unions and unionized workers regarding the Health and Social Services Delivery Improvement Act that the British Columbia legislature had rushed through in 2002 to cope with the difficulties facing the province's health services at the time. The Act gave employers greater flexibility in managing their employee relations and annulled important provisions of collective agreements that were still in force. Moreover, its section 10 invalidated any provisions of current and future collective agreements that were not in conformity with the new Act. The Supreme Court ruled that certain sections of the Act were unconstitutional because they infringed the protection of freedom of association enshrined in section 2(d) of the Canadian Charter of Rights and Freedoms. The Court held that the Charter protected the right of unionized workers to engage in collective bargaining on workplace issues without unjustified interference by the State.[15] Expressing the majority view of the Court, Chief Justice McLachlin and Justice LeBel again made reference to ILO instruments in support of their arguments, as reflected in paragraphs 69 et seq. of the judgement:

> (b) *International Law Protects Collective Bargaining as Part of Freedom of Association*
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> 69. Under Canada's federal system of government, the incorporation of international agreements into domestic law is properly the role of the federal Parliament or the provincial legislatures. However, Canada's international obligations can assist courts charged with interpreting the Charter's guarantees (see *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 46). Applying this interpretive tool here supports recognizing a process of collective bargaining as part of the Charter's guarantee of freedom of association.
>
> 70. Canada's adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2(d) of the Charter. As Dickson C.J. observed in the Alberta Reference, at p. 349, 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.

[14] Supreme Court of Canada, *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 R.C.S. 291, 2007 SCC 27, 8 June 2007, accessible at http://csc.lexum.umontreal.ca/en/2007/2007scc27/2007scc27.html.

[15] For an analysis of this judgement, see also ILO (2008, p. 15).

> 71. The sources most important to the understanding of s. 2(d) of the Charter are the International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 ("ICESCR"), the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 ("ICCPR"), and the International Labour Organization's (ILO's) Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize […] Canada has endorsed all three of these documents, […] ratifying Convention No. 87 in 1972. This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.
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> 72. The ICESCR, the ICCPR and Convention No. 87 extend protection to the functioning of trade unions in a manner suggesting that a right to collective bargaining is part of freedom of association. The interpretation of these conventions, in Canada and internationally, not only supports the proposition that there is a right to collective bargaining in international law, but also suggests that such a right should be recognized in the Canadian context under s. 2(d).

The judges went on to deepen their analysis by paying closer attention to previous interpretations of Convention No. 87, notably those given by the ILO's supervisory bodies and by the Supreme Court itself, with special reference to the *Dunmore* judgement discussed above:

> 75. Convention No. 87 has also been understood to protect collective bargaining as part of freedom of association. Part I of the Convention, entitled "Freedom of Association", sets out the rights of workers to freely form organizations which operate under constitutions and rules set by the workers and which have the ability to affiliate internationally. Dickson C.J., dissenting in the Alberta Reference, at p. 355, relied on Convention No. 87 for the principle that the ability "to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits".
>
> 76. Convention No. 87 has been the subject of numerous interpretations by the ILO's Committee on Freedom of Association, Committee of Experts and Commissions of Inquiry. These interpretations have been described as the "cornerstone of the international law on trade union freedom and collective bargaining" […] While not binding, they shed light on the scope of s. 2(d) of the Charter as it was intended to apply to collective bargaining: Dunmore, at paras. 16 and 27, per Bastarache J., applying the jurisprudence of the ILO's Committee of Experts and Committee on Freedom of Association.

The Court's argument continued with a reference to the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, which it deemed to be a useful instrument for the interpretation of the Canadian Charter of Rights and Freedoms.

In summing up its various references to international labour law – and to ILO standards and principles, in particular – the Court pointed out that "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 association. It is reasonable to infer that s. 2(*d*) of the *Charter* should be interpreted as recognizing at least the same level of protection."

The Supreme Court's decision recognizing that protection of freedom of association under section 2(d) of the Charter extends to the right to collective

bargaining is now widely seen as critically important for industrial relations in Canada. Although the Charter does not apply to private enterprises, it is binding upon the authorities of Canada's ten provinces and the Federal Government, which together employ millions of people across the country (Gernigon, 2007; ILO, 2008).

The foregoing overview of recent decisions of the Supreme Court of Canada highlights what appears to be the growing influence of international labour law over the country's jurisprudence, particularly in regard to determination of the scope of freedom of association under the Canadian Charter of Rights and Freedoms. Following the Supreme Court's judgement in the *Dunmore* case, one of the outcomes of the increasingly common and direct influence of international labour law on Canada's labour relations legislation – particularly via the scope of section 2(d) of the Charter – was the adoption of Ontario's Agricultural Employees Protection Act, 2002, which gives agricultural employees the right to set up and join an association and to act collectively in pursuing and representing with their employers their legitimate interests regarding their conditions of employment.

Conclusion

Alongside voluntary initiatives and non-legal regulation, the mobilization of legal resources in the judicial process is one of the most visible channels through which international standards are diffused. Jurisprudential recourse to international labour standards by the highest judicial authorities of some countries reflects the growing reception and use of such standards at the national level. Indeed, the national and international systems of labour regulation are mutually reinforcing. Interestingly, the issues at stake in the Canadian cases examined above had first been raised at the international level, in complaints to the ILO's Committee on Freedom of Association. While prior recourse to domestic judicial proceedings is a factor that must be taken into account, the Committee has consistently held that, given the nature of its mandate, its authority to examine a complaint was not subject to the exhaustion of domestic remedies (ILO, 2006, para. 30).[16] The Supreme Court of Canada, in turn, was thus able to make use of the Committee's recommendations to support its own decisions. In the litigation over the "new hire contract" in France, by contrast, the decisions of the French courts – while drawing on ILO standards – were made prior to the recommendations of the ILO's tripartite Committee. In this case, it was actually the latter which referred to the (French) national judicial decisions in support of its conclusions and recommendations. This mutually reinforcing interplay of procedures was indeed highly significant in the cases examined above.

[16] As a matter of fact, in those cases where the Committee did take account of domestic judicial process, this did not have the effect of slowing down its own proceedings. On average, the Committee completes the examination of a case in less than a year, i.e. from the date of the submission of the complaint to the adoption of its recommendations (Gravel, Duplessis and Gernigon, 2001).

What these examples show is that international labour standards appear to be a universal reference for a growing number of actors on the international scene. Through its multiple applications, international labour law is thus becoming an inescapable medium for denouncing inequalities in the world of work and for regulating labour relations, conditions and disputes, thereby earning greater respect for the values upheld by the ILO.

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