
Centre for International
Governance Innovation

Canada in International Law at 150 and Beyond | Paper No. 22 – April 2018

“This is Hallowed Ground” Canada and International Labour Law

Adelle Blackett



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CIGI Masthead

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About the Series

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's past, present and future in international law and governance. *Canada in International Law at 150 and Beyond/ Canada en droit international : 150 ans d'histoire et perspectives d'avenir* is a series of essays, written in the official language chosen by the authors, that provides a critical perspective on Canada's past and present in international law, surveys the challenges that lie before us and offers renewed focus for Canada's pursuit of global justice and the rule of law.

Topics explored in this series include the history and practice of international law (including sources of international law, Indigenous treaties, international treaty diplomacy, subnational treaty making, domestic reception of international law and Parliament's role in international law), as well as Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Topics with an economic law focus include international trade, dispute settlement, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Finally, the series presents Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, and international legal issues related to child soldiers. This series allows a reflection on Canada's role in the community of nations and its potential to advance the progressive development of global rule of law.

Canada in International Law at 150 and Beyond/ Canada en droit international : 150 ans d'histoire et perspectives d'avenir demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future. The project leaders are Oonagh Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); Valerie Hughes, CIGI senior fellow, adjunct assistant professor of law at Queen's University and former director at the World Trade Organization; and Mark Jewett, CIGI senior fellow, counsel to the law firm Bennett Jones, and former general counsel and corporate secretary of the Bank of Canada. The series will be published as a book entitled *Reflections on Canada's Past, Present and Future in International Law/ Réflexions sur le passé, le présent et l'avenir du Canada en droit international* in spring 2018.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

About the Author

Adelle Blckett is a full professor and the Canada Research Chair in Transnational Labour Law and Development at the Faculty of Law, McGill University, where she directs the Labour Law and Development Research Laboratory. She holds a B.A. from Queen's, an LL.B. and B.C.L. from McGill and an LL.M. and J.S.D. from Columbia. She is widely published in leading international journals and university presses, has edited or co-edited two books and four special journal issues and has authored a forthcoming book on domestic workers and transnational law. She received the Social Sciences and Humanities Research Council's Bora Laskin National Fellowship in Human Rights Research in 2010 and the Pierre Elliott Trudeau Foundation Fellowship in 2016. A former official of the International Labour Office (ILO) in Geneva, she authored the law and practice report and questionnaire that led to the ILO Convention No. 189 on decent work for domestic workers, and she was the ILO expert on a labour law reform process in Haiti. She was unanimously appointed by the National Assembly of Quebec to the province's Human Rights and Youth Rights Commission (2009–2016). She was awarded the Christine Tourigny Award of Merit from the Barreau du Québec and the status of advocate emeritus in 2014.

Introduction

A visitor to the palatial World Trade Organization (WTO) building in Geneva, Switzerland, would be greeted by a plaque on the founding stone of the tranquil palace that the permanent secretariat of the International Labour Organization (ILO) initially occupied. Laid by the ILO's first director-general, Albert Thomas, the plaque proclaims that "if you seek peace, cultivate justice."¹ A specialized agency of the United Nations that predates both the United Nations and the establishment of the Bretton Woods institutions, the ILO was founded at the Paris Peace Conference on April 11, 1919, and was part of the Treaty of Versailles.²

Although Canada was not part of the initial Commission on International Labour Legislation of the Peace Conference that was "called upon...to draft plans for an organization which had no parallel in the history of politics,"³ Canada gained "international recognition of her national maturity by her admission to the League of Nations and the International Labour Organization as an original Member."⁴ Canada also became the first ILO member to send a woman — Violet Markham — to participate in

the governing body, in 1923.⁵ But Canada's most unique contribution remains that it provided a wartime home for the ILO, at McGill University; the ILO held its 1946 International Labour Conference at the Université de Montréal.⁶ In Canada, the ILO prepared its postwar policy, including its approach to decolonization,⁷ and readied itself for a more outward-looking approach as part of a soon-to-emerge UN system. During that same time, the ILO reaffirmed the "truth" of its 1919 constitutional affirmation that "lasting peace can be established only if it is based on social justice" in the historic 1944 constitutional annex adopted at the International Labour Conference in Philadelphia (the Declaration of Philadelphia).⁸ A renowned international labour official and subsequent director-general of the ILO, C. Wilfred Jenks, delivered these words as part of a thank-you speech to the Canadian government: "This is hallowed ground in the history of the ILO. Here we kept alive in a world at war the ideal and practice of international collaboration in pursuit of social justice in a world of freedom."⁹

This paper is a deliberate exercise in remembering the hallowed ground in the history of the ILO. It recalls the historical ideal of international labour law (ILL) in the ILO's founding to explain the renewed relevance of ILL in the midst of global restructuring. The paper then traces a similar trajectory, through the story of ILL in the Canadian courts. Throughout, the paper suggests that the evolution of ILL,

1 Albert Thomas, *International Social Policy* (Geneva: ILO, 1948). In reference to the ILO's "palace of wood and stone" (*ibid* at 37), Thomas stated, "In the parchment which I am going to place under the foundation stone, and which, according to custom, commemorates today's ceremony in the ancient Latin style, there is inscribed a motto. It sums up our Charter in a phrase. *Si vis pacem, cole justitiam*. If you wish peace, cultivate justice. It is with hearts resolute in the passion for justice that we shall enter into the fair and radiant dwelling which we are founding today" (*ibid* at 12).

2 *Versailles Peace Treaty*, 28 June 1919, 225 Parry 188, 2 Bevans 235, 13 AJIL Supp 151, 385 (entered into force 10 January 1920).

3 James T Shotwell, "Introduction" in James T Shotwell, ed, *The Origins of the International Labor Organization* (Morningside Heights, NY: Columbia University Press, 1934) xix [Shotwell, *Origins*]. See also Virginia A Leary, *International Labour Conventions and National Law* (The Hague: Martinus Nijhoff Publishers, 1982) at 6 (seeing ILO conventions as precursors of human rights treaties and addressing matters formerly considered to be domestic concerns).

4 C Wilfred Jenks, "The Constitutional Capacity of Canada to Give Effect to International Labour Conventions I" (1934) 16:4 J Comp Leg & Intl L 201 at 201. Canada also fought to secure a place in the ILO's governing body.

5 John Mainwaring, *The International Labour Organization: A Canadian View* (Canadian Government Publishing Centre, 1986) at 48–49. Markham was also known as Mrs. James Carrothers, and Albert Thomas sang her praises: "This was the first time a woman had participated in the work of the Governing Body and her able collaboration was very much appreciated" (*ibid* at 49). Biographers recall her social reformist streak, but also her profoundly conservative views on gender issues, and her belief in Britain's imperial mission, gleaned largely from her time in South Africa. See Eliza Riedi, "Options for an Imperialist Woman: The Case of Violet Markham, 1899–1914" (2000) 32 *Albion* 59.

6 ILO, *Edward Phelan and the ILO: The Life and Views of an International Social Actor* (Geneva: ILO, 2009) at 259ff; Mainwaring, *supra* note 5 at 107ff.

7 See generally Daniel Roger Maul, *Human Rights, Development and Decolonization: The International Labour Organization, 1940-1970* (Geneva: ILO, 2012).

8 *Constitution of the International Labour Organization*, 1 April 1919, 15 UNTS 40 (entered into force 28 June 1919) [*ILO Constitution*] at Annex, *Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia)*, 10 May 1944. See also Alain Supiot, *L'Esprit de Philadelphie: La justice sociale face au marché total* (Paris, France: Seuil, 2010).

9 ILO Archives, Geneva: Unpublished text on file with the author.

internationally and in Canada, constitutes a crucial basis upon which to build ILL's transnational futures.

The Historical Centrality of ILL

The Peace Conference gave its labour committee a title that suggests the extent to which labour law was centralized: the Commission on International Labour Legislation. Its task was “to inquire into the conditions of employment from the international aspect, and to consider the international means necessary to secure common action on matters affecting conditions of employment, and to recommend the form of a permanent agency to continue such inquiry and consideration.”¹⁰

Delegates struggled, however, with the shared intention to establish a system of labour legislation, internationally, as they held markedly different visions of how to do so. But they understood why they were doing so. While the purpose was expressed as a concern for establishing humanitarian baselines that respect human dignity, there remained a concern that international labour legislation should grow out of — and reflect — “problems which nations have in common.”¹¹ Consequently, for James T. Shotwell, a member of the US delegation to the Peace Conference and director of the Carnegie Endowment for International Peace, international labour legislation was not a substitute for domestic labour law; rather, the former grew out of and affected the latter, in an organic way. He argued that even the name ILO was a misnomer, for “[w]hat was created was an international economic organization to deal with labor problems.”¹² The

reasoning that he employed resonates with much of the current commentary on “fair competition”:¹³

[ILL] does not interfere with the normal processes of lawmaking but only seeks to make them more effective by raising the common standard of the conditions of life, so that those nations which lead the world in social reform may not be placed at an undue disadvantage by those which compete with them by the exploitation of their labor. Therefore, although its scope is limited, international labor legislation reaches out widely into the economic relations between nations because it deals with the fundamental conditions of production. If international markets are necessary for prosperity, international labor legislation is a vital element in world recovery.¹⁴

The response to unbridled competition was not revolution but deliberative cooperation; for the then-president of the Trades and Labour Congress of Canada, Tom Moore, the ILO was “the greatest experiment in co-operation that has yet been attempted.”¹⁵ And while the ILO led to a robust process for standard setting via international cooperative deliberation, the ILO constitution did not succeed in establishing international

10 Mainwaring, *supra* note 5 at 11.

11 Shotwell, *Origins*, *supra* note 3 at xix. Of course, the enlightened industrialists typically attributed with the idea of establishing international arrangements on labour — including Robert Owen and Daniel Legrand — embraced a mix of such objectives. See Bob Hepple, *Labour Laws and Global Trade* (Oxford, UK: Hart Publishing, 2005) at 24–26 (adding that the validity of the competition premise was not challenged).

12 Shotwell, *Origins*, *supra* note 3 at xxii.

13 Some of the contemporary commentary draws upon unfortunate assumptions about workers in the global South, framed around the language of “social dumping.” It may also overlook the theoretical, historical and contemporary implications of a closed-border policy on labour migration, which is at odds with free trade. See Roberto Mangabeira Unger, *Free Trade Reimagined: The World Division of Labor and the Method of Economics* (Princeton, NJ: Princeton University Press, 2007); Adelle Blackett, “Development, the Movement of Persons and Labour Law: Reasonable Labour Market Access and its Decent Work Complement” in Tonia Novitz & David Mangan, eds, *The Role of Labour Standards in Development: Sustainable Theory in Practice* (Oxford, UK: Oxford University Press for the British Academy, 2012) 143; E Tendayi Achiume, “Reimagining International Law for Global Migration: Migration as Decolonization?” (2017) 111 AJIL 142.

14 Shotwell, *Origins*, *supra* note 3 at xix. Similarly, Ernest Mahaim emphasized that the concept of ILL was meant to capture an opposition to “absolutely unrestricted international competition.” See Ernest Mahaim, “The Historical and Social Importance of International Labor Legislation” in Shotwell, *Origins*, *supra* note 3 at 4–5 [Mahaim, “Historical and Social Importance”] (discussing the various precursors to the peace conference, and arguing that certain humanitarian matters should be taken out of the sphere of competition). *Ibid* at 13–14.

15 Trades and Labour Congress (1922) 1:1 Canadian Congress J, quoted in Mainwaring, *supra* note 5 at 58.

labour legislation.¹⁶ Rather, it was a declaration of nine urgent “methods and principles”¹⁷ to guide the League of Nations, which, if adopted and safeguarded by the “industrial communities” that were members of the League of Nations, would benefit wage earners in the world.

The ILO set about to test this process of establishing international labour legislation, vigorously. In its first International Labour Conference, held in Washington, DC, from October 29 to November 29, 1919, no fewer than six international labour conventions and an equivalent number of non-binding recommendations were adopted. International labour conventions would be built on the basis of national law and practice, with a view to enabling laggard states to draw on the international labour legislation to harmonize their own national law and practice.¹⁸ Ideally, this effect would be achieved through ratification. But ratification would not necessarily be required to stimulate the

harmonization effect.¹⁹ For example, the ILO’s first convention consolidated an international aspiration: an eight-hour work day and the 48-hour work week that had been the basis of international workers’ militancy.²⁰ The Hours of Work (Industry) Convention, 1919 (No. 1)²¹ became the basis for collective bargaining in addition to protective legislation.²² In other words, it became a normatively controlling labour standard, whether or not it was applied in a more flexible manner than the convention itself may have appeared to permit. Even though the United States did not join the ILO until 1934, under the administration of President Franklin D. Roosevelt, the ILO is attributed with inspiring Roosevelt’s New Deal,²³ which brings to mind the late Louis Henkin’s highly quotable affirmation about international law generally: “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”²⁴

The ILO was at the heart of the harmonization of ILL over time into national labour legislation — at least in industrialized, metropolitan territories that currently comprise the global North²⁵ — a process that was actively supervised by the ILO’s regular supervisory mechanisms in the Committee of Experts on the Application of Conventions and Recommendations and the International

16 Most of the early writing on the ILO speaks of international labour legislation, rather than the contemporary term of ILL. The difference is not semantic, but rather reflects an acknowledgement of what had and had not ultimately been achieved both through the ILO constitution, and through the approach adopted regarding standard setting. While the expression “international labour law” encompasses a broad range of potential sources of law, the expression “international labour legislation” betrays a vision about the way in which international normativity would function. No state is required to ratify an international convention, nor to adopt implementing legislation. Rather, the ILO constitutional obligation (article 19(5)) is for a federal state to bring a convention before the competent authority or authorities for consideration. Mainwaring frames what a system of international labour legislation might look like this way: “The convention system would have been reserved for questions of great importance; lesser matters would have been dealt with in recommendations. The result would have corresponded with Mahaim’s and Fontaine’s concept of international labour legislation, namely that countries should move forward together towards agreed standards.” Mainwaring, *supra* note 5 at 34.

17 *Versailles Peace Treaty*, *supra* note 2, Part XIII, art 427: these include “the guiding principle...that labour should not be regarded merely as a commodity or article of commerce” as well as freedom of association, “the payment to the employed of a wage adequate to maintain a reasonable standard of life,” the eight-hour work day, 48-hour work week and 24-hour weekly rest, the abolition of child labour, equal pay for work of equal value between men and women, “equitable economic treatment of all workers lawfully resident therein” and a system of inspection “in which women should take part” to ensure enforcement. It did not claim that the methods and principles are either final or complete.

18 Mahaim, “Historical and Social Importance”, *supra* note 14 at 10. Referring to the two Berne Conventions of 1909 that preceded the ILO — prohibiting night work for women and the use of white phosphorous — Mahaim relied on the language of “uniformity with a view to the equalization of costs of production, and also to standardize legislation” but later acknowledged that uniformity would be impossible and that the focus of international labour legislation is on minimum standards worldwide (*ibid* at 16–17).

19 See e.g. George P Politakis, “Deconstructing Flexibility in International Labour Conventions” in Jean-Claude Javillier & Bernard Gernigon, eds, *Les normes internationales du travail: un patrimoine pour l’avenir: Mélanges en l’honneur de Nicolas Valticos* (Geneva: ILO, 2004) 463.

20 It is worth remembering that the international campaign was framed in terms of eight hours of work, eight hours of leisure — understood as time for education and civic engagement, as well as for family life — and eight hours of rest. See Thomas, *supra* note 1 at 54, 63–65. The labour convention focused on the hours of work in industry dimension of that framing. See also Leah F Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (New York: Oxford University Press, 2009) (offering an important gender critique) and Guy Standing, *Beyond the New Paternalism: Basic Security as Equality* (London, UK: Verso, 2002)

21 28 November 1919, 1st ILC sess (entered into force 13 June 1921) [Convention No 1].

22 Mainwaring, *supra* note 5 at 35.

23 *Ibid* (adding that Canada’s interest in the ILO deepened once the United States joined and adopted New Deal legislation).

24 Louis Henkin, *How Nations Behave* (New York: Columbia University Press, 1979) at 42.

25 See Thomas, *supra* note 1 at 24 (addressing the early charges of Eurocentrism faced by the ILO in 1922). The limits of the vision of labour law reform as it applied to colonial territories and states of the global South are addressed in Adelle Blackett, “Beyond Standard Setting: A Study of ILO Technical Cooperation on Regional Labor Law Reform in West and Central Africa” (2011) 32 *Comp Lab L & Pol’y J* 443 and Adelle Blackett, “Social Regionalism in Better Work Haiti” (2015) 31:2 *Intl J Comp Lab L & Ind Rel* 163.

Labour Conference Committee on the Application of Conventions and Recommendations.²⁶ In the process, Thomas himself said he “taught the world to speak something like the same language on social questions.”²⁷ But the paradoxical, if predictable, result was that the institution, itself, became less visibly important as — through its at once stubborn and subtle exercise of persuasion²⁸ — its principles were largely normalized.

Keen observers of the ILO then and now are lucid about the ILO’s standard-setting limits. Shotwell noted as early as 1934 that although the ILO had already garnered 600 ratifications of its international labour conventions, “only a fraction of these deal with major issues.”²⁹ Moreover, the period of rapid standard production overtook the period of rapid ratification, which was characterized as cafeteria style.³⁰ As the ILO’s former legal adviser, Francis Maupain, argued recently about the period from the Cold War to the contemporary era:

In this context of ideological competition between two rival models of social justice, less attention was paid to whether States had ratified, or would ratify, standards than had been the case before the Second World War. The reason is that, in the context of the cold war, standard setting fulfilled a different “magisterial” function, which made ratification a less relevant test of the value and efficacy of the standards.

However, as soon as the Iron Curtain came down and — thanks to the digital revolution and the free movement of capital — financial “supercapitalism”

took over from industrial capitalism, the demand for the regulatory function returned with a vengeance, at least among workers in industrialized countries. The poor ratification record of ILO standards, however, called into question the Organization’s ability to meet this renewed regulatory challenge.³¹

Into the contemporary era of deepened global integration and serious related discontent with the Washington-consensus inspired decline of social mediation of economic policy,³² the ILO has been a more isolated, sometimes besieged, and at times ambivalent international standard setter,³³ it has also been consistently chastened even in any attempt to address issues of competitive advantage.³⁴ As well, the ILO has faced a rather more tattered conviction that a mix of international “legislative” action³⁵ and cooperative international deliberation involving a dated, but innovative, tripartite representational structure comprising governments, employers and workers³⁶ could help to foster the “rules of the game” of globalization.³⁷ For the ILO to be able to respond to a perceptible shift in expectations of it and for it to attempt to remain relevant, the institution has had to recognize that its norms really do continue to matter. It has sought to put order in its normative universe, carefully culling those instruments that

26 For classic overviews of the supervisory mechanisms, see Nicolas Valticos, “Un système de contrôle international: la mise en oeuvre des conventions internationales du travail” (1968) 1 *Académie de droit international*; Jean-Michel Servais, *International Labour Law* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2005) at 287ff; Nicolas Valticos & Geraldo von Potovsky, *International Labour Law*, 2d ed (Boston, MA: Kluwer Law and Taxation Publisher, 1995) at 290ff.

27 Thomas, *supra* note 1 at 22. See also Mainwaring, *supra* note 5 at 62. But see Hepple, *supra* note 11 at 27–29 (discussing parallel sources of influence for social legislation that had its own influence on the ILO’s establishment and legislative reform).

28 Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (New York: Hart Publishing, 2013) [Maupain, *Future*].

29 Shotwell, *Origins*, *supra* note 3 at xix. Shotwell nonetheless added that “as a whole they mark the progress of a uniform movement for social reform throughout the world.”

30 Francis Maupain, “Une Rolls Royce en mal de révision: L’efficacité du système de supervision de l’OIT à l’approche de son centenaire” (2010) 114:3 *RGDIP* 465.

31 Francis Maupain, “Revisiting the Future” (2015) 154 *Intl Lab Rev* 103 at 105.

32 See John Williamson, “What Washington Means by Policy Reform” in John Williamson, ed, *Latin American Adjustment: How Much Has Happened?* (Washington DC: Institute for International Economics, 1990).

33 See Hepple, *supra* note 11.

34 The challenges to the “social clause” debates are discussed in detail in Adelle Blackett, “Whither Social Clause: Human Rights, Trade Theory and Treaty Interpretation” (1999) 31 *Colum HRL Rev* 1 [Blackett, “Whither”].

35 A quote from Thomas captures an early spirit, which, arguably, the ILO has managed to retain: “I go all over the world...and if I can carry back in my big dispatch-case the ratification of some international Convention or the draft of some national Bill [it] means a small step forward towards the just and peaceful organisation of the world.” Thomas, *supra* note 1 at 14. Yet even Thomas acknowledged that the fate of progressive labour legislation, nationally or internationally, “depends primarily on the strength of the labour movement” (*ibid* at 29).

36 After some deliberation during the founding committee, it was agreed that this tripartite structure should mean that each ILO member had two delegates from governments: one from employers and one from workers. See Edward J Phelan, “The Commission on International Labor Legislation” in Shotwell, *Origins*, *supra* note 3 at 138 [Phelan, “Commission”] (noting that one of the most controversial issues discussed at the commission was the number of delegates to be received by governments).

37 Maupain, *Future*, *supra* note 28. See also Adelle Blackett, “Beyond the ‘Rules of the Game’” (2015) 154:1 *Intl Lab Rev* 73.

remain relevant or “up to date,”³⁸ prioritizing those conventions that it deems to embody fundamental principles and rights at work, and identifying those that establish the elements of core governance frameworks for labour.³⁹ On the eve of its centenary, the ILO has launched an extensive standards review.⁴⁰ It has had to respond to a plethora of challenges to the interpretation of its standards — challenges that may well cast light on the extent to which its normative universe has gained in relevance for a broad range of transnational institutions and actors,⁴¹ including national courts, precisely when the relationship of social justice to economic policy seems deeply contested.

The next section looks at ILL’s growing relevance for national courts, historically, and at precisely this moment of contestation of the direction of the social.

ILL in Canadian Law: An Evolving Narrative

Many Canadian law students learn about the labour conventions reference to the Judicial Committee of the Privy Council⁴² in their first-year constitutional law studies, but the ILO is decidedly peripheral to law students’ nuanced study of the federal-provincial division of powers. Difficulties in the interpretation of the division of powers are a significant part of the reason why the ILO’s first international labour

convention, Convention No. 1,⁴³ was only ratified by Canada on March 21, 1935, along with the Weekly Rest (Industry) Convention, 1921 (No. 14),⁴⁴ followed swiftly by the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26)⁴⁵ on April 25, 1935.

In hindsight, it is ironic that the US delegation expressed concerns over the constitutional division of powers between the federal and state governments, while the Canadian delegation in 1919 did not think the difficulty to be insuperable and supported a weaker version of what was ultimately the British delegation’s proposal.⁴⁶ When Sir Robert Borden was asked about the future article 19 of the ILO constitution, he referred the matter to the Canadian Minister of Justice, Charles Doherty, who issued the following opinion:

The provisions of Article 19, with reference to ratification by Federal States...would, I think, find no application in Canada. Though she is a Federal State, and though matters will in all probability be dealt with in conventions made in pursuance of the one now under consideration, upon which matters the power of legislation would ordinarily belong to the Legislatures of the Provinces, Article 132 of the British North America Act seems wide enough in so far as legislation may be necessary even as regards such matters, to confer upon the Parliament of Canada all the legislative power necessary or proper for performing the obligations of Canada or of any province under such conventions.⁴⁷

Both the federal government and each Canadian province participated in the first International Labour Conference in Washington, DC. British Columbia even passed a series of laws to comply with the Washington, DC, conventions, but the acts were to come into effect only once the other provinces had passed similar legislation

38 See ILO Working Party on Policy regarding the Revision of Standards (Cartier Working Group) (1995–2002), online: <www.ilo.org/global/standards/international-labour-standards-policy/WCMS_449912/lang-en/index.htm>.

39 This has been largely accomplished through two declarations, which are not constitutional texts of the ILO: *The ILO Declaration on Fundamental Principles and Rights at Work*, 18 June 1998, ILC 86th sess, and the *ILO Declaration on Social Justice for a Fair Globalization*, 10 June 2008, ILC 97th sess.

40 See ILO, “Standards Review Mechanism Tripartite Working Group”, online: ILO <www.ilo.org/global/standards/WCMS_449687/lang-en/index.htm>.

41 See generally Janice R Bellace, “Pushback on the right to strike: Resisting the Thickening of Soft Law” in Adelle Blackett & Anne Trebilcock, eds, *Research Handbook on Transnational Labour Law* (Northampton, MA: Edward Elgar Publishing, 2015) 181; Claire La Hovary, “The ILO’s Supervisory Bodies’ ‘Soft Law Jurisprudence’” in Blackett & Trebilcock (*ibid*) at 316.

42 *Canada (AG) v Ontario (AG)*, [1937] UKPC 6, [1937] AC 326, [1937] 1 DLR 673 [*Labour Conventions Reference*, cited to DLR].

43 *Convention No 1*, *supra* note 21.

44 17 November 1921, 3rd ILC sess (entered into force 19 June 1923).

45 16 June 1928, 11th ILC sess (entered into force 14 June 1930).

46 Mainwaring, *supra* note 5 at 15; Phelan, “Commission”, *supra* note 36 at 150–55 (on the US interpretation at the time that labour legislation was a matter for individual states and not for the federal legislature, and the initiatives that helped to overcome US reticence).

47 Quoted in Phelan, “Commission”, *supra* note 36 at 155, and adding that Canada ultimately has not proceeded under article 132 of the *Constitution Act, 1867*. It does not seem that this argument was terribly persuasive to the United States.

— as a result, they remained dead letter.⁴⁸ The union movement — through the Trades and Labour Congress of Canada — prioritized ILO standards implementation, but was met with deep opposition from Canadian businesses. The Canadian Manufacturers' Association warned that “disastrous consequences” would follow should an “undeveloped country,” such as Canada, that needed to attract capital enacted such legislation, unless the United States passed similar legislation first.⁴⁹

Canada did not ratify the conventions immediately. Instead, it held dominion-provincial meetings in 1922 and 1923 to discuss the question of jurisdiction. It became clear from an official opinion by the Department of Justice⁵⁰ that the treaty obligation undertaken through article 405 of the Treaty of Versailles⁵¹ Labour Part (Part XIII) — being article 19 of the ILO constitution⁵² — did not justify dominion action under section 132 of the Constitution Act, 1867⁵³ for conventions on subjects that otherwise fell within provincial jurisdiction.⁵⁴ All Canada had agreed to do, under the ILO constitution, was to bring the matter before the competent authority or authorities. Article 19 clearly provided that there was no further obligation (other than reporting obligations added with subsequent modifications to the ILO constitution). In the first labour conventions reference,⁵⁵ the Supreme Court of Canada (SCC) largely accepted that argument, as formulated by the federal government and the government of Quebec,⁵⁶ although Justice Lyman Duff clarified that the SCC was expressing no

opinion about the succeeding clauses of article 405 of the Treaty of Versailles. Justice Duff's decision acknowledged that the subject matter of hours of labour was “generally within the competence of the legislatures of the provinces,”⁵⁷ while recognizing exclusive federal legislative authority in “those parts of Canada not within the boundaries of any province, and also upon the subjects dealt with in the draft convention in relation to the servants of the Dominion Government.”⁵⁸ Following that decision, on March 31, 1926, Canada held off on ratifying Convention No. 1 and instead ratified conventions that were resolutely within federal jurisdiction: the Minimum Age (Sea) Convention, 1920 (No. 7);⁵⁹ the Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8);⁶⁰ the Minimum Age (Trimmers and Stokers) Convention, 1921 (No. 15);⁶¹ and the Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16).⁶²

Canada's slow rate of ratification did not go unnoticed. In 1934 and 1935, Jenks wrote scholarly companion articles addressing Canada's “relative backwardness” on ratification. Jenks was critical of Canada's less than fruitful process of proceeding by federal-provincial meetings, reviewed the jurisprudence to that point and argued that the constitutional question had to be resolved in favour of the federal authority to legislate, emphasizing the obligations under article 405 of Part XIII of the Treaty of Versailles, as well as section 132 of the Constitution Act, 1867. Jenks even suggested that the ILO might play an active role in assisting domestic courts to decide questions that relate to the interpretation of ILL:

48 Mainwaring, *supra* note 5 at 54.

49 Mainwaring, *supra* note 5.

50 Order in Council of 6 November 1920 (PC 2722) dealing with the jurisdiction of the Dominion Parliament and the Provincial Legislatures. The Order in Council and the committee meetings are discussed in *Reference in re Legislative Jurisdiction over Hours of Labour*, 1925 SCC 77, [1925] SCR 505, [1925] 3 DLR 1114 [Hours of Labour Reference, cited to SCR].

51 *Versailles Peace Treaty*, *supra* note 2.

52 ILO Constitution, *supra* note 8.

53 *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.

54 *Hours of Labour Reference*, *supra* note 50 at 507. See also Mainwaring, *supra* note 5 at 54–56.

55 Labour Conventions Reference, *supra* note 42.

56 *Hours of Labour Reference*, *supra* note 50 at 510 (“It seems very clear that the duty arising under this clause is not a duty to enact legislation or to promote legislation; it is an undertaking simply to bring the recommendation or draft convention before the competent authority.”) This argument was also ultimately accepted by the Privy Council in the second labour conventions reference, *Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act* [1937] AC 326, [1937] 1 DLR 673 at 680.

57 *Hours of Labour Reference*, *supra* note 50 at 512.

58 *Ibid.*

59 9 June 1920, 2nd ILC sess (entered into force 27 September 1921). This convention was automatically denounced on June 15, 2011, when the consolidated *Maritime Labour Convention, 2006*, ratified by Canada on June 15, 2010, came into force. *Maritime Labour Convention, 2006*, 23 February 2006, 94th ILC (Maritime) sess (entered into force 20 August 2013).

60 9 July 1920, 2nd ILC sess (entered into force 16 March 1923). This convention was automatically denounced on June 15, 2011, when the consolidated *Maritime Labour Convention, 2006*, *supra* note 59, ratified by Canada on June 15, 2010, came into force.

61 11 November 1921, 3rd ILC sess (entered into force 20 November 1922). This convention was denounced on June 8, 2016, when Canada ratified the *Minimum Age Convention, C138*, 26 June 1973, 58th ILC sess (entered into force 19 June 1976).

62 11 November 1921, 3rd ILC sess (entered into force 20 November 1922). This convention was automatically denounced on June 15, 2011, when the consolidated *Maritime Labour Convention, 2006*, *supra* note 59, ratified by Canada on June 15, 2010, came into force.

It would appear that in any case in which a national court is called upon to consider the relation to its own law of any of these instruments, it would be desirable for it to advise itself as to the international implications of the questions before it by hearing a representative of the Director of the International Labour Office. The fact that an international organization could not be bound by any decision of a national court is immaterial, for it would be to the advantage of all concerned that the Director of the International Labour Office should be in a position to advise the court upon subjects peculiarly within his competence without being bound by its decision.⁶³

Canada's 1935 ratifications of three international labour conventions on hours of work, minimum weekly rest and minimum wages followed the introduction of three pieces of related labour legislation said to reflect Canada's own New Deal⁶⁴ response to the Great Depression. These statutes elicited strong resistance from Canadian employers, who considered "the 48-hour standard was too advanced."⁶⁵ They were also acknowledged to affect property and civil rights within each province, yet were argued to be validly enacted by the federal government, under the Constitution Act, 1867 in light of section 132 and, alternatively, under the section-91 power to make laws for the peace, order and good government (POGG) of Canada. These acts yielded the second reference to the SCC, which

resulted in a 3-3 split decision.⁶⁶ On appeal, the Judicial Committee of the Privy Council issued its decision, penned by Lord Atkin, and found that the implementing legislation was ultra vires the Parliament of Canada. Framing the "complex" problem through the lens of the dualist system in the British Empire, whereby "the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action,"⁶⁷ the Privy Council considered that neither section 132 nor POGG could apply, and that the exercise of that legislative authority of the provinces under section 92 could not be encroached upon simply because the federal government had made promises to foreign countries by treaty. Although the Privy Council refuted the implication that Canada is "incompetent to legislate in performance of treaty obligations,"⁶⁸ since the federal government can act together with the provinces without encroaching on provincial powers,⁶⁹ Canada was essentially placed in default of its ILO obligations. The negative impact on future ratifications of any instruments not readily within federal jurisdiction can be gleaned from the relatively slim list of Canadian ratifications,⁷⁰ despite Canada's leadership role both as a wartime refuge and as an active, often pivotal, actor in ILO affairs.

While this might have mattered less during the period of sustained growth and relative prosperity that ensued in Canada, by the early 1980s, inflation and high unemployment were met with a series of liberalizing measures that challenged labour's gains and exposed the precarity of pre-existing categories of workers, who had always been excluded from labour law's mainstream.⁷¹

63 Jenks, *supra* note 4 at 214. Jenks reasoned by analogy to the ILO's advisory role on labour matters, before what was then the Permanent Court of International Justice. With the publication of his article in two parts, commenting on the 1925 constitutional reference and anticipating the SCC decision in its second labour conventions reference and the subsequent referral to the Privy Council, Jenks unabashedly sought to have section 132 squarely addressed by the courts. The second part is found at C Wilfred Jenks, "The Constitutional Capacity of Canada to Give Effect to International Labour Conventions II" 17:1 *J Comp Leg & Intl L* 12 (offering a close jurisprudential reading in favour of the applicability of section 132, seen to provide legislative authority to the federal government to implement treaties as essentially a distinct head of power).

64 *Weekly Rest in Industrial Undertakings Act*, SC 1935, c 14; *Minimum Wages Act*, SC 1935, c 44; *Limitation of Hours of Work Act*, SC 1935, c 63. See William Howard McConnell, "The Judicial Review of Prime Minister Bennett's New Deal" (1968) 6:1 *Osgoode Hall LJ* 39 (discussing the fate of the other legislative texts that comprised Prime Minister R.B. Bennett's Depression-era social legislation in both the judicial and the broader political context).

65 Mainwaring, *supra* note 5 at 83.

66 Reference re legislative jurisdiction of Parliament of Canada to enact the Minimum Wages Act [1935, c. 44], [1936] SCR 461, 1936 CanLII 24. Chief Justice Duff, with Justices Davis and Kerwin, found the legislation to be intra vires. Justices Rinfret, Cannon and Crocket found the legislation to be ultra vires.

67 *Labour Conventions Reference*, cited to DLR, *supra* note 42 at 678.

68 *Ibid* at 683.

69 The Privy Council employed the memorable "water-tight compartments" language that would give way to living tree metaphors. *Ibid* at 684.

70 A full list of Canadian ratifications of ILO conventions is available at <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102582>. See also JK Wanczycki, "Les aspects constitutionnels de la ratification des conventions de l'O.I.T./Constitutional Aspects of Ratification of I.L.O Conventions" (1969) 24:4 *Relations industrielles/Indus Rel* 727 (offering a senior Canadian government official's assessment of the impact of the cases on Canadian ratification).

71 See Judy Fudge & Eric Tucker, *Labour Before the Law* (New York: Oxford University Press, 2001) at 313.

Table 1

	Canadian Industrial Relations Tribunal, Commission des relations du Travail, Labour Relations Commission of Ontario	Canadian Human Rights Tribunal, Quebec Human Rights Tribunal, Human Rights Tribunal of Ontario	Grievance Arbitration (Federally, Quebec and Ontario)
Before 2000	4	26	5
2000–2015	21	36	22
Total	25	62	27

Source: Author.

International labour conventions and their ratification began to look less like accessories to robust domestic labour legislation and more like a vanguard through which to safeguard labour and broader social rights — including human rights — in the face of concerted policy attack.

This moment coincided with the early days of the Canadian Charter of Rights and Freedoms⁷² (the Charter). Chief Justice Brian Dickson of the SCC offered fulsome readings of international and comparative law, including ILL, to guide the interpretation of the scope of the freedom of association under section 2(d) of the Charter. The spirit was decidedly cosmopolitan, reflecting a vision of Canada grappling with comparable, pressing concerns in a broader world. It attentively honed an independent interpretive approach that was at once rigorous, contextual and alive. Chief Justice Dickson’s reliance on ILL in his dissent in *Re Public Service Employee Relations Act*⁷³ remains highly influential on the contemporary decision making on section 2(d).

It bears adding that, since 2000, there has been a noticeable increase in the use of ILL in federal and provincial (Ontario and Quebec) human rights

tribunal adjudications,⁷⁴ labour relations boards and commissions and in grievance arbitration (see Table 1), soon after the SCC in *Baker v Canada (Minister of Citizenship and Immigration)*⁷⁵ set out a role for international law as a persuasive authority in domestic decision making, clarifying that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”⁷⁶

In labour law cases, the first high-water mark came in 2007. In *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia*⁷⁷ (*BC Health Services*), Chief Justice Beverley McLachlin and Justice Louis LeBel, writing for the majority (Justice Marie Deschamps wrote a partial dissent) drew assistance⁷⁸ from ILL — and, in particular, the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)⁷⁹ — to interpret the freedom of association protections in section

72 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

73 [1987] 1 SCR 313 [*Alberta Reference*]. This note does not focus on the deception triggered by the 1987 Labour Trilogy’s narrow interpretation of section 2(d) of the Charter. There is an abundant literature. See e.g. Maude Choko, “L’évolution du dialogue entre le Canada et l’OIT en matière de liberté d’association : Vers une protection constitutionnelle du droit de grève?” (2011) 56:4 McGill LJ 1113.

74 Some jurisdictions in Canada — notably the Quebec Human Rights Tribunal — have quite consistently relied on ILL as persuasive authority on the interpretation of constitutional or quasi-constitutional texts since their founding. The drafting of the Quebec Charter of Human Rights and Freedoms, RSQ c C-12, was heavily inspired by international law, and is understood to be Quebec’s implementation of its international human rights and labour law commitments. The Quebec Human Rights and Youth Rights Commission regularly cites ratified human rights treaties and international labour conventions, as well as the recommendations and observations of the range of international bodies charged with implementation or control in the opinions that it provides on conformity with the Quebec Charter.

75 1999 SCC 699, [1999] 2 SCR 817 [*Baker*]. See also Gilles Trudeau, “Droit international et droit du travail québécois, deux grandes solitudes” in Barreau du Québec, ed, *Développements récents en droit du travail* (Cowansville, Quebec: Éditions Yvon Blais, 2001) 145.

76 *Baker*, supra note 75 at para 70 (Justices Frank Iacobucci and Peter Cory dissenting on this point).

77 [2007] 2 SCR 391, [2007] SCJ No 27 [*BC Health Services*].

78 *Ibid* at para 69.

79 9 July 1948, 31st ILC sess (entered into force 4 July 1950) [*Convention No 87*]. This convention was ratified by Canada on March 23, 1972.

2(d) of the Charter as including the right to bargain collectively. Drawing on past jurisprudence for the appropriate interpretative approach to be given to ratified international instruments, the SCC majority held that the Charter provides “at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”⁸⁰

The SCC refined its reliance on ILL in the cases that followed.⁸¹ However, it might be cold comfort that the *Ontario (Attorney General) v Fraser*⁸² (*Fraser*) decision was more technically precise than *BC Health Services* in its reference to the sources of ILL. *Fraser* involved some of the most marginalized populations — farm workers, most of whom were migrant workers. The SCC might have considered the ILO Freedom of Association Committee’s approach to under-inclusion, including the committee’s attention to ensuring that workers should enjoy either the provisions of labour law enjoyed by other workers in the same jurisdiction, or “genuinely equivalent rights.”⁸³

In the 2015 section 2(d) labour cases, an ILL methodology that carefully articulates the core functions of freedom of association, which affirms (without being wed to) a particular industrial relations tradition,⁸⁴ is most readily exemplified. In *Mounted Police Association of Ontario v Canada (Attorney General)*,⁸⁵ the SCC hinted at

the space that it was leaving open in *BC Health Services* for the articulation and recognition of alternative, meaningfully enabling systems of collective autonomy over time⁸⁶ by confirming that “Parliament’s decision to use a collaborative scheme for labour relations within the RCMP is consistent with international instruments regarding freedom of association” and referencing Convention No. 87⁸⁷ alongside the UN International Covenant on Civil and Political Rights⁸⁸ (article 22) and the UN International Covenant on Economic, Social and Cultural Rights (article 8).⁸⁹

The evolution is most readily seen in *Saskatchewan Federation of Labour v Saskatchewan*.⁹⁰ In her section 2(d) analysis of the right to strike, Justice Rosalie Abella listed a significant number of international sources, alongside comparative law examples indicative of emerging directions worldwide. In so doing, the court sought guidance, as in other cases, on “the norm which best informs the content of the principles”⁹¹ in the Charter. Ultimately, though, the distinctive use of ILL is witnessed in Justice Abella’s interpretation of the section 1 limits. Justice Abella argued that “the need for demarcated limits on both the right of essential services employees to strike and, concomitantly, on the extent to which services may justifiably be limited as ‘essential,’ is reflected too in international law.”⁹² In other words, ILL is drawn upon not only to ascertain the scope of the substantive right, but to consider how it may assist, substantively, in articulating reasonable limits in a free and democratic society.

Case law developments under the freedom of association have broader implications for nuanced understandings of the dualist tradition in a Canada that has a constitutionalized Charter. Patrick Macklem argues that there has been a “fundamental

80 *BC Health Services*, supra note 77 at para 70.

81 See Adelle Blackett, “Mutual Promise: International Labour Law and BC Health Services” (2009) 48 Sup Ct L Rev 365 at 397 [Blackett, “Mutual Promise”] (discussing the range of ILO sources cited and clarifying their distinct normative character while underscoring the significance of the ILO constitution, ratified conventions, the Freedom of Association Committee’s reports and those of other supervisory mechanisms of the ILO; and offering a comparative law methodology of ILL in the new economy that “allows courts to build on international labour law while retaining a rootedness in Canadian labour history and treading delicately on the essential and constantly shifting contextual frameworks that characterize contemporary labour law”).

82 2011 SCC 20, [2011] 2 SCR 3.

83 See e.g. Case No 2314, *Confederation of National Trade Unions (CSN) supported by Public Service International (PSI) and Case No 2333, Centre of Democratic Trade Unions (CSD), the Quebec Trade Union Centre (CSQ) and the Quebec Workers’ Federation (FTQ)*, (2006), Report No 340, ILO Doc 0320063402314, Vol LXXXIX, Series B, No 1. See generally Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto, ON: Irwin Law, 2012) (for close analyses of what was at stake in the decision, and the other options that were available to the court).

84 Blackett, “Mutual Promise”, supra note 81 at 400 (arguing that the SCC’s “methodological approach will be strengthened over time by grappling with — rather than ignoring — the ILO’s own articulation of the meaning of its freedom of association principles”).

85 2015 SCC 1, [2015] 1 SCR 3.

86 Blackett, “Mutual Promise”, supra note 81 at 400.

87 Convention No 87, supra note 79.

88 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

89 16 December 1966, GA Res 2200A (XXI), 21 UNGAOR Supp No 16 at 49, UN Doc A/6316 (1966), 993 UNTS 3, Can TS 1976 No 46, 6 ILM 360 (entered into force 3 January 1976).

90 2015 SCC 4, [2015] 1 SCR 245.

91 See *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 75, [2002] 3 SCR 519 (in reference to section 7 of the Charter).

92 *Ibid* at para 86. Although the illustration is based on affidavit evidence by Patrick Macklem and reference to selected jurisprudential articles, Justice Abella’s decision also builds on Chief Justice Dickson’s analysis of ILL to ascertain the proper scope of “essential services” in his dissent in the *Alberta Reference*, supra note 73 at para 84.

transformation⁹³ of Canada’s dualist tradition, so central to the labour conventions references. For Macklem, the SCC has developed a more “relational understanding of the boundary between the international and national legal spheres.”⁹⁴ The Privy Council in the second *Labour Conventions* case expressly focused on implementation by the federal or provincial legislatures; however, the landscape has changed with the constitutionalization of Charter principles, including the freedom of association. Simply put, “[i]f legislatures fail to implement international labour law, they risk running afoul of the Charter.”⁹⁵ The emerging cases validate an approach embodied by the life’s work of the late pioneering Quebec labour law scholar Pierre Verge: international law has a central role to play in the reconstruction of labour law, domestically.⁹⁶ To paraphrase Guylaine Vallée in her beautiful overview of Verge’s lifetime contribution: Verge was inspired by international law’s capacity to affirm core principles that could bind a diversity of formal sources that might be seen as conflicting.⁹⁷

BC Health Services and the cases that followed it have consolidated a growing understanding by the SCC of its own role while faced with the challenge of economic restructuring to the labour law frameworks that guarantee fundamental rights and freedoms at work.⁹⁸ Rather than assuming that the SCC is a “neutral force”⁹⁹ in labour law, the court seems prepared to recognize that the Charter can also help to preserve spaces of collective autonomy that enable meaningful participation in debates on the direction of the world of work, and more generally of Canadian society.

With these jurisprudential developments, Canada’s most recent decision ultimately to ratify the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)¹⁰⁰ on June 14, 2017, no longer seems surprising. It may be understood as the culmination of what has become a jurisprudential readying of Canadian law to embrace this fundamental international labour convention that embodies Canada’s “reaffirm[ation of] the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization,”¹⁰¹ with a view to promoting the universal application of the ILO’s eight fundamental conventions. Canada has now ratified them all.¹⁰² As the Freedom of Association Committee recalled in its report regarding *BC Health Services*, “when a State decides to become a Member of the ILO, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association.”¹⁰³

93 Patrick Macklem, “The International Constitution” in Faraday, Fudge & Tucker, *supra* note 83 at 262.

94 *Ibid.* See also Leary, *supra* note 3 at 1. Leary limited her scope of inquiry to a subset of states that have adopted automatic incorporation.

95 Macklem, *supra* note 93 at 269. But see Brian A Langille & Benjamin J Oliphant, “From the Frying Pan into the Fire: Fraser and the Shift from International Law to International ‘Thought’ in Charter Cases” (2011–2012) 16:2 CLEJ 181 (challenging this “creeping monism”).

96 See e.g. Pierre Verge, “L’affirmation constitutionnelle de la liberté d’association : une nouvelle vie pour l’autonomie collective?” (2010) 51:2 Cahiers du droit 353.

97 Guylaine Vallée, “La contribution scientifique de Pierre Verge à l’affirmation et à la recomposition du droit du travail” in Dominic Roux, ed, *Autonomie collective et droit du travail: Mélanges en l’honneur du professeur Pierre Verge* (Quebec City, QC: Presses de l’Université Laval, 2014) 1.

98 Blackett, “Mutual Promise”, *supra* note 81 at 386.

99 *R v Advance Cutting & Coring Ltd*, [2001] 3 SCR 209 at para 162, [2001] SCJ No 68 (Justice LeBel).

100 1 July 1949, 32nd ILC sess (entered into force 18 July 1951).

101 *Declaration on Fundamental Principles and Rights at Work*, 18 June 1998, 37 ILM 1233. See also Blackett, “Mutual Promise”, *supra* note 81 at 374–77 (discussing the relationship between the ILO 1998 Declaration, the ILO constitution and the ILO Freedom of Association Committee’s approach prior to Canada’s ratification of Convention No. 87).

102 For a complete list of ratifications, see *supra* note 70. In the past 20 years, Canada has ratified seven international labour conventions, and the pace of ratifications is increasing.

103 ILO Freedom of Association Cases 2166, 2173, 2180 and 2196. See Report No 330 [Canada], Vol LXXXVI, 2003, Series B, No 1.

Conclusion: Canada in the Transnational Futures of ILL

In typically understated fashion, Virginia Leary affirmed in 1982 that “[i]t has become apparent that national resolutions of social and economic problems have significant repercussions in other countries.”¹⁰⁴ As the historical overview in this paper illustrates, the importance of Leary’s affirmation was recognized when the ILO was formed and expressed concern that competition could undermine social progress unless members took cooperative action to move social justice forward. The affirmation retains its potency in the current moment of deep discontent over globalization’s asymmetries, and their impact on labour law.¹⁰⁵ The Canadian example offers a palpable example of this trajectory.

Some may crave a stronger normative universe than what ILL at the ILO may offer; perhaps this would be something closer to the original ideas about international legislation or, at least, a thickened ILO adjudicative framework through which “authoritative” decisions might be rendered. But if it ever was the only or main actor, internationally, the ILO is no longer that, transnationally.¹⁰⁶ More importantly, ILL is increasingly marshalled to occupy a distinct set of functions by this plural group of actors. First, ILL may thicken normative content in emerging transnational contexts, such as social responsibility initiatives and trade agreements.¹⁰⁷ More broadly, Bob Hepple has called for the ILO to foster international and regional coherence on social and economic policy, drawing on its normative base.¹⁰⁸ Second, ILL might be drawn upon to provide purposeful, deliberative spaces — what Mainwaring, who represented Canada at the ILO throughout

his distinguished career in the federal civil service, referred to as an “international deliberative assembly.”¹⁰⁹ The ILO’s convener status should allow the institution to expand experimentalist measures and foster interdependency — and its corollary international solidarity, which is argued to be rooted in the founding of the ILO.¹¹⁰ Important work is under way to think through the ways in which deliberation may move beyond the original, invariably limited, tripartite framing.¹¹¹ And third, as seen in this paper, ILL may be called upon by a range of social actors — including national judges, before whom ILL may increasingly be pled — to affirm and give meaning to fundamental principles and rights at work.

This paper concurs with Mainwaring, who affirms that “[w]ith its controversial objectives, its unusual working methods, and its unique tripartite structure the ILO has been a fascinating endeavour.”¹¹² It has also at times been a lonely endeavour. For while the ILO was meant to embody its maxim, it has always known it could never achieve

104 Leary, *supra* note 3 at 2.

105 Irving Abella, Book Review of *The International Labour Organization: A Canadian View* by John Mainwaring, (1987) 68:2 Can Hist Rev 319 at 319, 320 (“To most Canadians I suspect the ILO is an irrelevancy. It was not always that way, nor should it be that way today... [i]ts work is today more important than ever”).

106 See Adelle Blackett, “Transnational Futures of International Labour Law” in Peer Zumbansen, ed, *Oxford Handbook of Transnational Law* (Oxford, UK: Oxford University Press, 2018).

107 Deeper contestation may yet be required to challenge the hardening of frameworks of investor protection, irrespective of local state capacity. See the thoughtful discussion in Armand de Mestral, ed, *Second Thoughts: Investor-State Arbitration between Developed Democracies* (Waterloo, ON: CIGI, 2017).

108 Hepple, *supra* note 11.

109 Mainwaring, *supra* note 5 at 3. That deliberative, convening capacity was considered by the “soul of the ILO” — its first director general, Albert Thomas — to be of “imponderable” value.

110 Thomas, *supra* note 1 at 71. For Thomas, “If States were to put forward the needs of their national economy as a pretext for refusing even to attempt to apply the fair and humane conditions of labour prescribed by the Treaty, they would in reality be going counter to the mutual understanding which is its basis.” Thomas also addressed interdependency by proposing that the freedom of movement (migration) should be addressed at the International Economic Conference of 1927 (it was not) (*ibid* at 107–11).

111 For example, the UN Committee on the Elimination of Discrimination Against Women’s General Recommendation No. 23: Political and Public Life (1997, UN Doc A/52/38) requires official delegates to international and regional conferences to include women among their delegation. See also Anne Trebilcock, “Labour Issues and the Convention on the Elimination of All Forms of Discrimination against Women” in Adriana di Stefano, ed, *Gender Issues and International Legal Standards: Contemporary Perspectives* (Catania, Italy: Edit Press, 2010) 139 at 168.

112 Mainwaring, *supra* note 5.

lasting peace through social justice alone.¹¹³ Its sister international economic organizations have known this as well, whether or not they have willingly embraced the maxim decorating the WTO's lawns, or the life-sized murals of workers recently uncovered from the WTO's walls.¹¹⁴ Many institutions and actors in Canada and abroad have a role to play transnationally. Canadian "hallowed ground" remains an important site on which the future of ILL will play out well into both the ILO's and Canada's second century.

Author's Note

I am grateful to the ILO's former legal adviser, Anne Trebilcock, for thoughtful comments on this paper and for sharing Wilfred Jenks' "Hallowed Ground" speech with me. I also thank Robin Morgan for excellent research assistance on the use of ILL by Canadian tribunals.

113 This might have been clouded in discussions over the ILO's institutional autonomy from the League of Nations, including the early care taken to assert that everything that relates to labour fell within the ILO's sphere, including when the Assembly of the League of Nations refused to deal with questions related to forced or contract labour and instead referred them to the ILO. See Thomas, *supra* note 1 at 19. However, the Declaration of Philadelphia affirms that "all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective" (*ILO Constitution*, *supra* note 8). It foresees that the ILO is responsible for examining and considering all international economic and financial policies and measures in light of this fundamental objective. See Supiot, *supra* note 8. And when the General Agreement on Tariffs and Trades (GATT) was being negotiated as part of a broader proposed Havana Charter for an International Trade Organization from 1946 to 1948, proposals included rules to govern the international aspects of domestic employment policies. See US Department of State, *Proposals for Expansion of World Trade and Employment*, Pub No 2411 (US Government Printing Office, 1945) at 8, cited in WTO, *Guide to GATT Law and Practice: Analytical Index*, 6th ed, vol 1 (Geneva: WTO, 1995) at 3; US Department of State, *Havana Charter for an International Trade Organization and Final Act and Documents*, Pub No 3117, Commercial Policy Series 113 (US Government Printing Office, 1948), art 7 at 7. See also Göte Hansson, *Social Clauses and International Trade: An Economic Analysis of Labour Standards in Trade Policy* (London, UK: Croom Helm, 1983) at 22 and Blackett, "Whither", *supra* note 34.

114 See Centre William Rappard: Home of the World Trade Organization, Geneva – Works of Art and Other Treasures, online: <www.wto.org/english/res_e/booksp_e/cwr11-3_e.pdf> (including a discussion of technical staff uncovering Albert Hahn Jr.'s ceramic panel of a male construction worker, commissioned by the International Federation of Trade Unions).


ON CANADA'S PAST, PRESENT AND FUTURE
IN INTERNATIONAL LAW

REFLECTIONS

RÉFLEXIONS

SUR LE PASSÉ, LE PRÉSENT ET L'AVENIR DU CANADA
EN MATIÈRE DE DROIT INTERNATIONAL

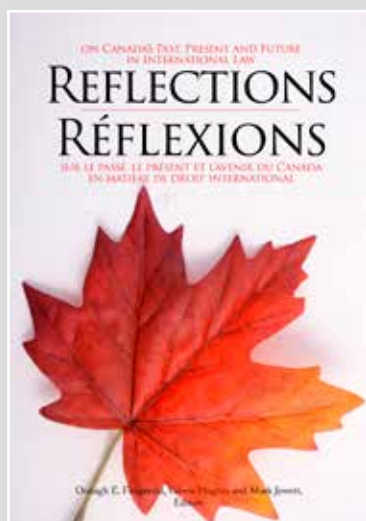
Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett,
Editors



Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's rich history in international law and governance, where we find ourselves today in the community of nations, and how we might help shape a future in which Canada's rules-based and progressive approach to international law gains ascendancy. These essays, each written in the official language chosen by the authors, provide a critical perspective on Canada's past and present in international law, survey the challenges that lie before us and offer renewed focus for Canada's pursuit of global justice and the rule of law.

Part I explores the history and practice of international law, including sources of international law, Indigenous treaties, international treaty diplomacy, domestic reception of international law and Parliament's role in international law. Part II explores Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Economic law topics include international trade and investment, dispute settlement, subnational treaty making, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Part III explores Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, child soldiers and gender.

Reflections on Canada's Past, Present and Future in International Law/ Réflexions sur le passé, le présent et l'avenir du Canada en droit international demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future.



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We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan doté d'un point de vue objectif et unique de portée mondiale. Nos recherches, nos avis et nos interventions publiques ont des effets réels sur le monde d'aujourd'hui car ils apportent de la clarté et une réflexion novatrice pour l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

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