Not be Moved: Presentation of the Canadian Freedom of Association Award to Chief Justice Beverley McLachlin and Justice Louis LeBel, Montreal, 2 May 2018

By

Roy J. Adams

With respect to labour relations there is in existence something very close to a global law. It may be consulted by referencing several key documents of which the most important is the “jurisprudence” generated by two key committees of the International Labour Organization. Most elements of our Wagner Model of labour legislation comply with that body of law but just barely. Many aspects of our principle labour law model are permissible but not required and, implicitly at least, not recommended.

That body of international labour law is not ordinary law but rather it is one branch of intl human rights law which has a special status in the realm of international law. It is held to be the entitlement of all human beings. Indeed, some human rights experts hold that to be denied these rights is to be denied the right to be fully human. It is to be reduced to something sub-human.

When Canada instituted our Charter of Rights and Freedoms it included a clause on Freedom of Association. Our government also participated in and supported the development of international labour law and international human rights law. When the Supreme Court of Canada heard early labour cases, it did not deny the relevance of this body of law. Instead it chose to defer to legislatures to make it effective.

In the early years of the 21st century, the Supreme Court led by Beverley McLachlin began to review the decisions taken by its predecessors in the 1980s as well as the record of legislatures in interpreting the meaning of the constitution and their duties in making it effective. By that time a culture of law and practice put in motion by the core elements of the Wagner Act Model had become deeply seated. But that culture contained components that were problematic to the global law.

To great cries of protest from all quarters – government, business, labour and the academic community – the McLachlin Court set about correcting what had become a wayward set of practices.

By the turn of the 21st century, international labour law had progressed to the point where three key principles were almost universally recognized: the right of workers to organize without interference by employers or by the state, the right of workers to negotiate collectively through representatives of their own choosing and the right of workers to withdraw their labour without putting their jobs at risk should negotiations fail.

In Dunmore, the SCC found that agricultural workers had a right to organize and make representations to their employers who in turn had a duty to enter into discussions in good faith with those representatives. Both employer and government voices demeaned this decision as interference by the court in technical decisions with which it was not equipped to deal. But LeBel and McLachlin would not back down.

In Health Services the Supreme Court found that a government could not simply override collective agreements freely negotiated by public sector workers. It had to bargain in good faith and could override the results of bargaining only in extreme circumstances which it failed to demonstrate were in evidence in the specifics of the case. This decision was again loudly bemoaned by government and employer interests as interference in political decisions. Some academics also criticized the decision arguing that the court had misinterpreted international law on which it relied as an interpretive aid. Again McLachlin and LeBel and the majority of the Court would not back down.

In Fraser, an appeal from an Ontario Court decision which would have made certain elements of the Wagner Model – majoritarian exclusivity in particular – constitutionally required, was denied. This decision produced howls from the labour side of the labour-management community as well as much academic criticism that farmworkers were entitled to no less than other workers. But the Court did not find that to be a convincing reason for constitutionalizing a legislative technique tolerated by but frowned upon by international law that has provided no benefit to the great majority of agricultural workers across Canada – more than 90% of whom have no collective bargaining despite being covered by Wagner-like statutes. Dissention also came from within. Two justices argued vigorously that Health Services was a mistake and should be overturned. McLachlin and LeBel were not moved.

The labour-management community was astounded by these decisions but it should not have been. The McLachlin Court had announced that it found international law to be a persuasive interpretative source for determining the meaning of Freedom of Association. It also had said clearly that Canadians should be able to rely, at a minimum, on international human rights standards its government had committed to respect. In these decisions the Court did no more than it plainly said it intended to do.

Most of the Court’s critics were simply unfamiliar with international law since, historically, it had played only a small role in the evolution of Canadian labour law, custom and practice. Although the Supreme Court must issue decisions on a wide range of legal issues, the McLachlin Court’s knowledge of international labour law, and Louis LeBel’s contribution stands out here, was keener, more precise, more learned than was that of those who found fault with its decisions.

And finally (to this point at least) in the Saskatchewan Federation of Labour decision McLachlin and LeBel upset the odds-makers and granted constitutional protection to the right to strike. And again, as they had signaled they would do, they relied on international law and they got international law exactly right.

But I should note that the Supreme Court has not slavishly followed international law. In Advanced Cutting and Coring (a decision written by Louis LeBel) the court found that a Quebec law which required workers in construction to belong to one of five unions was, indeed, contrary to international law but was allowed anyway as justifiable in the circumstances.

In Meredith some critics claimed that the SCC had made a decision contrary to the one that it made in Health Services and thus violated the standards it had previously established for itself. But international labour law says that, in specific circumstances, legislatures may override certain labour rights *temporarily* which is what happened in that case. In short, both Health Services and Meredith were consistent with international law. Neither should have come as a surprise and they were not inconsistent with each other.

In all of these decisions McLachlin and LeBel embedded comments that made it pretty clear that, in the first instant, they would decide such that Canadian workers would be able to enjoy the fruits of the near-global law of labour relations and, to the extent that our legislatures have infringed that law, they would be required to amend their ways.

The job is still not done. Agricultural workers in Ontario still have no collective bargaining. Indeed, over 80% of private sector workers in Canada are unable effectively to exercise their human right to negotiate collectively their conditions of employment. And, unfortunately, Beverley McLachlin and Louis LeBel will not be able to help them to get there since they are now both retired from the Court. But they have put in place strong principles which it will be hard for future courts to renege on. At least let us hope so.

And so, from all of us who cherish the right of working people to organize, bargain collectively and strike if necessary, let me thank you Justice LeBel and your colleague Chief Justice McLachlin. If your work continues to develop as it should a day will come when opposition to unionization will be no more tolerated than racism, where all branches of government actively promote collective bargaining as the legitimate counterpart of political democracy and where all conditions of work collectively conceived and applied are collectively negotiated. For setting us on the road to that ideal you and Beverley McLachlin will be remembered as two of the greatest champions of the rights of Canadian working people.