



# LABOUR

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## Review of Public Communication CAN 98-1 (Part I)

*Report issued pursuant to*

The North American Agreement  
on Labour Cooperation



Human Resources  
Development Canada

Développement des  
ressources humaines Canada

Canada <sup>131</sup>

## EXECUTIVE SUMMARY

### Background

Public Communication CAN 98-1 is the first submission received by the Canadian National Administrative Office (NAO) established under the North American Agreement on Labour Cooperation (NAALC).

This Communication was received from the Canadian Office of the United Steelworkers of America in concert with 47 other labour and non-governmental organizations from Canada, the United States and Mexico on April 6, 1998. It was accepted for review on June 4, 1998. It raises concerns related to two of the eleven labour principles set out in the Agreement: freedom of association and protection of the right to organize as well as prevention of occupational injuries and illnesses, at an automotive parts plant near Mexico City.

This report constitutes the first part of the review and deals specifically with the freedom of association issues raised in the Communication. The second part will be released in early 1999 and will focus on the occupational injuries and illnesses aspects.

The NAO has conducted the review with a view to furthering the objectives of the NAALC and gathered data from a wide range of sources to better understand and respond to the issues raised. The NAO received information from the submitters and the company and engaged in Cooperative Consultations with Mexican labour authorities.

The *Sindicato Nacional de Trabajadores de la Industria Automotriz, Similares y Conexos de la República Mexicana* (SNTIASCRM)<sup>1</sup>, an affiliate (section 15) of the *Confederación de Trabajadores Mexicanos* (CTM)<sup>2</sup>, represents workers at the plant and holds the collective agreement. Around June 1996, the *Sindicato de Trabajadores de la Industria Metálica, Acero, Hierro, Conexos y Similares* (STIMAHCS)<sup>3</sup>, a trade union affiliated with the *Frente Auténtico del Trabajo* (FAT)<sup>4</sup>, began a union organizing drive. The main issues of concern to the workers included better protection from contamination, unhealthy and unsafe working conditions, low wages, abusive supervisors, sexual harassment, and the lack of responsiveness on the part of the SNTIASCRM.

A representation election (*recuento*), originally scheduled for August 28, 1997, was postponed to September 9, 1997, by Special Board No.15 of the *Junta Federal de*

<sup>1</sup> National Union of Workers in the Automotive and Allied Industries of the Mexican Republic.

<sup>2</sup> Confederation of Mexican Workers.

<sup>3</sup> The Mexican Union of Workers in the Metal, Steel, Iron, & Allied Industries.

<sup>4</sup> The Authentic Workers Front.

<sup>5</sup> Federal Conciliation and Arbitration Board (FCAB).

*Conciliación y Arbitraje* (JFCA).<sup>5</sup> The JFCA failed to inform STIMAHCS and its supporters directly of the postponement. The submitters allege that, in the months preceding the *recuento*, the company and SNTIASCRM intimidated workers and that a number of them were dismissed for union activities. The company indicated that STIMAHCS supporters were not singled out and intimidated prior to the *recuento* and that the dismissals that did occur were performance-related except for those workers who were discharged following the application of the exclusion clause.

During the *recuento*, workers voted orally in front of JFCA agents, management and union representatives. The information received paints a picture of a disorderly proceeding under the auspices of the JFCA. For example, workers eligible to vote were denied access to the designated voting area, an atmosphere of tension prevailed and electioneering took place inside the company premises (where the vote was held) and outside of the plant walls.

The submitters allege that, after the *recuento*, the JFCA did not allow STIMAHCS representatives full opportunity to submit evidence in support of their claim that major irregularities had taken place. They believe that the presence of a CTM representative on the JFCA creates a bias in its actions.

STIMAHCS filed an *amparo* (appeal) with the Federal District Court arguing the JFCA had violated the workers' constitutional right to organize. It was judged premature since the JFCA had not yet released its final decision. The final decision, dated December 4, 1997, was released on February 4, 1998. It stated that SNTIASCRM still held the collective bargaining agreement. The submitters argue that the two-month delay in releasing the report was detrimental to STIMAHCS, particularly in the context of the *amparo*. The independent union filed a second *amparo* on February 26, 1998, which led to the Court ordering a new hearing into the allegations of irregularities during the *recuento*. While the hearing took place on August 13, 1998, the decision is pending.

Some of the dismissed workers filed for reinstatement with the JFCA which ordered the company to rehire them. However, they were fired again following the application of the exclusion clause (Clause 6 in the collective bargaining agreement). These workers were terminated because they no longer belonged to SNTIASCRM but it appears that proper expulsion procedures were not followed.

During consultations, when the *amparo* proceedings were not completed, the Mexican NAO did not comment on the specific events that took place at the plant except with respect to the status of reinstatement claims. However, Mexican officials provided additional information and clarification on Mexican labour law that were essential for the review.

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<sup>5</sup> Federal Conciliation and Arbitration Board (FCAB).

## **Summary of Analysis and Conclusions**

Freedom of association is a constitutional right in Mexico which is reinforced by federal law and provisions of international treaties incorporated into domestic law. Mexican workers have the right to join unions of their own choosing in an atmosphere free of outside interference.

The information received by the NAO suggests that Mexico did not conform to the following obligations of the NAALC:

- Article 2, which recognizes the right of each country to establish its own domestic labour standards but also commits each country to provide for high labour standards, by failing to ensure that Mexican labour laws and regulations protect workers involved in union organizing campaigns and the integrity of the workers' vote;
- Article 3, by failing to promote compliance with and effectively enforce Mexican labour laws concerning the expulsion of union members and the provision of a safe voting environment;
- Articles 4 and 5, by failing to ensure that the members of the Labour Board are not in a conflict of interest and that procedural protection is afforded to parties involved in Board proceedings.

## **Recommendations**

The NAO makes the following recommendations in the spirit of Cooperative Consultations and in a desire to build on our comparative knowledge and understanding of labour law and its enforcement in North America.

Pursuant to Article 22 of the NAALC, which provides that Ministers may request in writing consultations with another country regarding any matter within the scope of the Agreement, the NAO recommends that the Minister of Labour seek Consultations with the Mexican Secretary of Labour and Social Welfare on the following issues related to freedom of association:

- a) how the requirement of the Agreement that labour boards (*Juntas de Conciliación y Arbitraje* in Mexico) be impartial and independent and not have any substantial interest in the outcome of decisions is respected during the selection of representatives who serve on these boards;
- b) the extent of effective protection of procedural interests of parties to labour board (*Junta de Conciliación y Arbitraje* in Mexico) proceedings;

c) how freedom of association protections for workers are enforced a) before and b) during representation elections (*recuentos* in Mexico);

d) how the procedures for representation elections (*recuentos* in Mexico) protect the integrity and accuracy of the workers' vote;

e) the dissemination of information on the content of union by-laws and collective bargaining agreements to union members and other interested parties;

f) the enforcement of labour legislation in the case of a failure to adhere to union by-laws governing the expulsion of union members.

It is further recommended that the Minister of Labour defer the request for Ministerial Consultations until the second part of the review related to the occupational injuries and illnesses aspects of the Communication is submitted.

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## List of Acronyms

CAB	Conciliation and Arbitration Board
CTM	<i>Confederación de Trabajadores Mexicanos</i>
FAT	<i>Frente Auténtico del Trabajo</i>
FCAB	Federal Conciliation and Arbitration Board
FDC	Federal District Court
ICCPR	International Covenant on Civil and Political Rights
JC	<i>Junta de Conciliación</i>
JCA	<i>Junta de Conciliación y Arbitraje</i>
JFCA	<i>Junta Federal de Conciliación y Arbitraje</i>
ILO	International Labour Organization
LFT	<i>Ley Federal del Trabajo</i>
NAALC	North American Agreement on Labour Cooperation
NAFTA	North American Free Trade Agreement
NAO	National Administrative Office
SNTIASCRM	<i>Sindicato Nacional de Trabajadores de la Industria Automotriz, Similares y Conexos de la República Mexicana</i>
STIMAHCS	<i>Sindicato de Trabajadores de la Industria Metálica, Acero, Hierro, Conexos y Similares</i>
STPS	<i>Secretaría del Trabajo y Previsión Social</i>

## PREFACE

The North American Agreement on Labour Cooperation (NAALC) is the first agreement linking a free trade agreement to the effective enforcement of labour standards. In the preamble to the Agreement, the Governments of Canada, Mexico and the United States recall their resolve, as expressed in NAFTA, to improve working conditions and living standards in their respective territories and to protect, enhance and enforce basic workers' rights. These goals are pursued through mechanisms for cooperative activities, intergovernmental consultations, independent evaluations and dispute settlements procedures.

Several institutions have been set up to implement the Agreement. The Commission for Labour Cooperation, composed of a Ministerial Council and a Secretariat, is the only North American organization solely devoted to labour issues. Second, the Council, consisting of the Secretary (in Mexico and the United States) and Minister (in Canada) of Labour of the three countries, oversees the implementation of the Agreement and directs the activities of the Secretariat. Third, the Secretariat, located in Dallas, supports the Council. In addition, each government established a National Administrative Office within its labour department as a point of contact and source of information within each country and among the three NAALC partners. Under Article 16(3) of the Agreement, NAOs must provide for the review of public communications.

Figure 1 summarizes the institutional structure created under the Agreement.

**Figure 1. NAALC Institutional Structure**



## **1. Report on Public Communication CAN 98-1**

CAN 98-1 is the first Public Communication received by Canada since the North American Agreement on Labour Cooperation (NAALC) came into effect on January 1, 1994. This public communication raises issues related to the enforcement of labour legislation in Mexico, specifically freedom of association and the prevention of occupational injuries and illnesses, two key labour principles which the NAFTA countries agree to promote through cooperation and the effective enforcement of domestic legislation. Each country has established a National Administrative Office (NAO) which can receive public communications concerning labour matters arising in another country and undertake cooperative consultations with the NAO of the other country to better understand and respond to the issues raised.

In this report, the NAO examines the freedom of association issue. A second report on occupational injuries and illnesses will follow in early 1999.

This report consists of five sections. First, the North American Agreement on Labour Cooperation, including its objectives and the obligations it imposes on Canada, Mexico and the United States, is summarized. A description of the review process followed by the NAO is included in this chapter. Second, key elements of the information received as part of the review are highlighted. Third, a review of relevant Mexican labour legislation concerning the issues related to freedom of association raised by the Communication is presented in chapter 4. This review is followed by analysis and conclusions regarding the enforcement of Mexican labour legislation and the Mexican government's obligations under the Agreement. The final chapter contains specific recommendations to the Canadian Minister of Labour.

The NAO would like to express its appreciation to everyone in the three countries who contributed to this review. The NAO acknowledges the assistance of the Labour Departments of the provinces signatory to the Canadian Intergovernmental Agreement, the Canada and Manitoba Labour Relations Boards, the Justice Department and the Department of Foreign Affairs and International Trade in completing the review.

## **2. The North American Agreement on Labour Cooperation**

### **2.1 Overview**

Signed by Canada, Mexico, and the United States in 1993 as a complement to the North American Free Trade Agreement (NAFTA), the NAALC is the first international agreement linking a free trade agreement to the promotion of a specific set of labour principles and the effective enforcement of domestic labour

legislation. Under Article 16(3), each NAO is to provide for the submission and receipt of public communications on labour law matters arising in the territory of another NAALC country and is to review such matters in accordance with domestic procedures.<sup>1</sup> Each country has established procedures or guidelines for the review of these public communications. In addition to the review of the public communication, Cooperative Consultations under Article 21 were carried out with Mexico.

## **2.2 Objectives and Obligations**

Article 1 of the NAALC lists the objectives which the countries are to promote. Four of these objectives are particularly relevant to Public Communication CAN 98-1. First, Article 1(b) requires the Parties to promote, to the maximum extent possible, a set of eleven labour principles. These principles are:

1. Freedom of association and protection of the right to organize;
2. Right to bargain collectively;
3. Right to strike;
4. Prohibition of forced labour;
5. Labour protections for children and young persons;
6. Minimum employment standards;
7. Elimination of employment discrimination;
8. Equal pay for women and men;
9. Prevention of occupational injuries and illnesses;
10. Compensation in cases of occupational injuries and illnesses;
11. Protection of migrant workers.

Second, Article 1(d) calls on Parties, among other things, to encourage the exchange of information to enhance the mutually beneficial understanding of laws and institutions governing labour in each Party's territory. Third, Article 1(f) requires Parties to promote compliance with, and effective enforcement of, their respective labour laws. Finally, pursuant to Article 1(g), Parties are to foster transparency in the administration of labour law.

Each country is also to respect a series of obligations. For the review of Public Communication CAN 98-1, the relevant obligations are:

### **Article 2: Levels of Protection**

"Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labour standards, and to adopt or modify accordingly its labour laws and regulations, each Party

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<sup>1</sup> See Annex 1 for a description of Canadian NAO guidelines for the review of public communications.

shall ensure that its labour laws and regulations provide for high labour standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light."

### **Article 3: Government Enforcement Action**

"1. Each Party shall promote compliance with and effectively enforce its labour law through appropriate government action, subject to Article 42<sup>2</sup>, such as:

(b) monitoring compliance and investigating suspected violations, including through on-site inspections;

(g) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labour law.

2. Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labour law."

### **Article 4: Private Action**

"1. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labour tribunals for the enforcement of the Party's labour law.

2. Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:

(a) its labour law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, [...]

can be enforced."

### **Article 5: Procedural Guarantees**

"1. Each Party shall ensure that its administrative, quasi-judicial, judicial and labour tribunal proceedings for the enforcement of its labour law are fair, equitable and transparent and, to this end, each Party shall provide that:

<sup>2</sup> Article 42 (Enforcement Principle) reads as follows: "Nothing in this Agreement shall be construed to empower a Party's authorities to undertake labour law enforcement activities in the territory of another Party."

(a) such proceedings comply with due process of law;

(c) the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and

(d) such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.

2. Each Party shall provide that final decisions on the merits of the case in such proceedings are:

(b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and

(c) based on information or evidence in respect of which the parties were offered the opportunity to be heard.

4. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.

5. Each Party shall provide that the parties to administrative, quasi-judicial, judicial or labour tribunal proceedings may seek remedies to ensure the enforcement of their labour rights. Such remedies may include, as appropriate, orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures.

8. For greater certainty, decisions by each Party's administrative, quasi-judicial, judicial or labour tribunals, or pending decisions, as well as related proceedings shall not be subject to revision or reopened under the provisions of this Agreement."

### **2.3 Review Process**

Under the NAALC, an NAO may request Cooperative Consultations with another NAO in relation to its labour law, its administration or labour market conditions. The process is designed to examine domestic labour legislation and its enforcement and the extent to which a country meets its obligations under the Agreement. It does not contemplate the adjudication of private remedies or determining the appropriateness of actions by private sector organizations.

The role of the NAO is to make recommendations to the Minister of Labour who, in turn, decides on whether to engage in Ministerial Consultations (which are part of the Cooperative Consultation and Evaluation process under Part IV of the NAALC) on the issues that were not resolved during the review.

The NAO reviewed the Communication with a view to furthering the objectives of the NAALC and gathered data from a wide range of sources to better understand and respond to the issues it raised.<sup>3</sup>

The NAO received Public Communication CAN 98-1 on April 6, 1998, and accepted it for review on June 4, 1998.<sup>4</sup> It requested additional information and clarification from the submitters, the company and the Government of Mexico. Questions were sent to the submitters on May 8 and June 30 and to Echlin Inc. on June 26. The NAO forwarded a series of questions to the Mexican NAO on July 2 to clarify and better understand Mexican labour law. The NAO met with the submitters on July 9. Representatives for Echlin Canada and the Ottawa office of the *Secretaría de Comercio y Fomento Industrial* (SECOFI)<sup>5</sup> attended as observers. On September 9, the NAO Secretary met with the Mexican Secretary and officials from the *Junta Federal de Conciliación y Arbitraje*<sup>6</sup> (JFCA) as well as with officials from the *Secretaría del Trabajo y Previsión Social*<sup>7</sup> (STPS) in Mexico City. On September 10, the NAO met with representatives of Dana Canada in Hull, and sent questions to legal counsel for Dana Canada on September 11.

The NAO also organized a public meeting on September 14 in Ottawa. The submitters as well as representatives and legal counsel of Echlin Inc. and Dana Corporation responded to this invitation. Although only one public meeting had been planned, the number of interested participants led to focusing on freedom of association at this session and scheduling a second public meeting on occupational safety and health matters on November 5.<sup>8</sup> The NAO also received additional information on freedom of association and occupational safety and health from the company and the submitters after the second public meeting.

Throughout the review process, the NAO informed and sought the advice of provinces that have signed the Canadian Intergovernmental Agreement. The review of the Communication was also discussed at the inaugural meeting of the Canadian National Advisory Committee on September 18, 1998.

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<sup>3</sup> The NAO maintains a public file on Public Communication CAN 98-1 which includes briefs and supporting documents presented by the submitters and the company, answers to NAO questions, transcripts and other pertinent documents.

<sup>4</sup> The chronology of the review process is summarized in Table 1.

<sup>5</sup> Secretariat of Trade and Industrial Development.

<sup>6</sup> Federal Conciliation and Arbitration Board (FCAB).

<sup>7</sup> Department of Labour and Social Welfare.

<sup>8</sup> Transcripts of these three meetings are on file with the Canadian NAO. The information obtained is presented in chapter 3. The information received during the second public meeting will be considered in the second public report which, as previously mentioned, will deal with the occupational safety and health aspects of Public Communication CAN 98-1.

<b>Events</b>	<b>Date</b>
NAO receives Public Communication CAN 98-1	April 6, 1998
NAO sends questions to submitters	May 8, 1998
NAO accepts Communication for review	June 4, 1998
NAO sends questions to Echlin Inc.	June 26, 1998
NAO sends questions to submitters	June 30, 1998
NAO sends questions to Mexican NAO	July 2, 1998
NAO meets submitters. Legal counsel for Echlin Canada and SECOFI attend as observers	July 9, 1998
NAO Secretary meets with Mexican NAO Secretary, JFCA and STPS officials	September 9, 1998
NAO meets with representatives of Dana Canada	September 10, 1998
NAO sends questions to legal counsel for Dana Canada	September 11, 1998
First public meeting (on freedom of association)	September 14, 1998
Review of Public Communication CAN 98-1 is discussed at inaugural meeting of Canadian National Advisory Committee	September 18, 1998
Second public meeting (on occupational injuries and illnesses)	November 5, 1998

**Table 1. Chronology of Review Process**

### **3. Background ON FREEDOM OF ASSOCIATION ISSUES**

This chapter presents information provided by the submitters, the company and the Mexican NAO concerning the events that occurred before, during and following a union representation election (*recuento*) at ITAPSA S.A. de C.V., an auto parts plant located in Los Reyes La Paz near Mexico City.

The NAO did not attempt to reconcile the facts presented, nor does it believe that it is necessary to do so. Despite some factual inconsistencies, the key issues related to the obligations stemming from the Agreement are not in question.

### 3.1 Information from the Submitters

The submitters, which include 48 labour and non-governmental organizations from Mexico, Canada and the United States<sup>9</sup>, provided information related to alleged events surrounding a *recuento* at a plant near Mexico City. The Communication makes a series of allegations regarding the extent to which Mexico meets its obligations under the NAALC. The submitters make a series of requests, some of which exceed the mandate of the NAO which can only report to the Minister of Labour and recommend Ministerial Consultations, if appropriate.<sup>10</sup> This section presents the issues raised and summarizes the facts as described by the submitters.

#### 3.1.1 Issues

Public Communication CAN 98-1 raises allegations concerning the application of two NAALC labour principles: freedom of association and protection of the right to organize and prevention of occupational injuries and illnesses. The Communication also alleges that Mexico failed to ensure the fairness and impartiality of the JFCA handling of the *recuento* and to ensure access to this JFCA.

The submitters argue that Mexico has violated the following NAALC obligations:

- Article 2 of the NAALC, by failing to ensure that Mexican labour laws and regulations provide for high labour standards protecting freedom of association and the right to organize;
- Article 3 of the NAALC, by failing to promote compliance with and effectively enforce Mexican labour laws;
- Article 4 of the NAALC, by failing to ensure access to labour tribunals and procedures for the enforcement of rights under Mexican law;
- Article 5 of the NAALC, by failing to ensure that the administrative and labour tribunal proceedings of the JFCA are fair, equitable and transparent and the JFCA itself is impartial and independent.

<sup>9</sup> See Annex 2 for a complete list.

<sup>10</sup> See Annex 3 for a complete list of action requested.

### 3.1.2 Summary of Events as presented by submitters<sup>11</sup>

The *Sindicato Nacional de Trabajadores de la Industria Automotriz, Similares y Conexos de la República Mexicana* (SNTIASCRM)<sup>12</sup>, an affiliate (section 15) of the *Confederación de Trabajadores Mexicanos* (CTM)<sup>13</sup>, represents workers at the plant and holds the collective agreement. Around June 1996, the *Sindicato de Trabajadores de la Industria Metálica, Acero, Hierro, Conexos y Similares* (STIMAHCS)<sup>14</sup>, a trade union affiliated with the *Frente Auténtico del Trabajo* (FAT)<sup>15</sup>, began a union organizing drive. The main issues of concern to the workers included better protection from contamination, unhealthy and unsafe working conditions, low wages, abusive supervisors, sexual harassment, and the lack of responsiveness on the part of the SNTIASCRM.

On May 26, 1997, STIMAHCS filed a petition with the JFCA for the right to administer the contract on behalf of the workers. Shortly afterwards, representatives of both the company and the SNTIASCRM started a campaign of intimidation against the workers. It took three months for the JFCA to schedule a vote due to administrative and procedural delays (the latter caused by objections on the part of the company and SNTIASCRM legal counsels). These delays gave the company and the SNTIASCRM time to implement a campaign of intimidation. The JFCA was aware of these tactics but did nothing to prevent them.

The *recuento* was initially scheduled for August 28, 1997, but the JFCA postponed it to September 9, 1997, at the request of the SNTIASCRM. The postponement was communicated to the SNTIASCRM and the company but the JFCA failed to inform STIMAHCS and its supporters. Consequently, STIMAHCS supporters who showed up early for the vote were easily identified. On the same day, more than 20 of them were dismissed. A total of more than 50 STIMAHCS supporters were dismissed between May 26, 1997, and August 28, 1997.

On September 8, armed individuals began patrolling the grounds around the plant and intimidated workers. At voting time on September 9, some STIMAHCS supporters were prevented from entering the premises while SNTIASCRM supporters and some non-employees were allowed to enter. These non-employees were wearing CTM Section 15 T-shirts and, in some cases, carrying

<sup>11</sup> A chronology of the main events as presented by the submitters can be found in table 2.

<sup>12</sup> National Union of Workers in the Automotive and Allied Industries of the Mexican Republic.

<sup>13</sup> Confederation of Mexican Workers.

<sup>14</sup> The Mexican Union of Workers in the Metal, Steel, Iron & Allied Industries.

<sup>15</sup> The Authentic Workers Front.

Events	Date
Beginning of union organizing drive.	June 1996
STIMAHCS files a petition for the right to administer the contract on behalf of workers with the JFCA.	May 26, 1997
Original scheduled date of <i>recuento</i> .	August 28, 1997
Dismissal of more than 20 workers.	August 28, 1997
Actual date of <i>recuento</i> .	September 9, 1997
The JFCA schedules a first hearing to review the election report and to consider the allegations of illegal conduct and inequitable election procedures.	September 10, 1997
First JFCA hearing. STIMAHCS was not informed of date.	September 23, 1997
The JFCA hears a motion brought by STIMAHCS to have the hearing declared void. STIMAHCS is not allowed to present evidence about the violations of Mexican law which it believes occurred during the <i>recuento</i> .	October 15, 1997
JFCA decision regarding the STIMAHCS motion. The motion is denied.	November 11, 1997
STIMAHCS initiates <i>amparo</i> proceedings	November, 1997
Armed individuals beat STIMAHCS supporters outside the American Brakeblock plant.	December 15, 1997
FDC proceeding with respect to the <i>amparo</i> filed by STIMAHCS is held. The FDC declined to consider the matter and judged the appeal premature because the JFCA had not yet issued a final decision.	January 5, 1998
The final JFCA decision is released regarding all matters related to the petition filed by STIMAHCS (the decision is dated December 4, 1997)	February 4, 1998
STIMAHCS files a second <i>amparo</i> with the FDC	February 26, 1998
The FDC issues a decision requiring the holding of a hearing into objections to the <i>recuento</i> . This decision voids the JFCA decision dated December 4, 1997.	June 5, 1998
New JFCA hearing ordered by the FDC. Decision pending.	August 13, 1998

**Table 2. Chronology of Events as Presented by Submitters**

sticks or metal pipes. The vote inside the plant took place in front of management, in an atmosphere of intimidation and threats of physical violence and suffered from irregularities as to who was permitted to vote and who

controlled the voting process. STIMAHCS representatives were unable to ascertain the accuracy of the voting list which is not available for review in advance.

On the day of the election, JFCA agents failed to provide a safe environment for the *recuento*. They did not act to rectify the problems (other than suggesting a postponement at one point) and did not postpone the vote. Workers voted orally and, in some cases, at the main gate outside company premises.

While writing the election report, JFCA officials refused to allow STIMAHCS representatives to submit any evidence in support of the claim that major irregularities had taken place during the vote.

On September 10, 1997, the JFCA scheduled a hearing for September 23, 1997, to review the election report and to consider the allegations of illegal conduct and inequitable election procedures. However, it failed to inform STIMAHCS and workers directly. Consequently, neither group of petitioners was present at the hearing.

Legal counsel for STIMAHCS subsequently brought a motion before the JFCA to have the hearing declared void. When the motion was heard on October 15, 1997, STIMAHCS was not allowed to present evidence about the violations of Mexican law which occurred during the election. In a decision dated November 11, 1997, the motion was denied on the ground that proper notice for the hearing, as set out in Mexican law, was not required because the JFCA did not know the names and addresses of the numerous workers whose interests were affected by the hearing.

STIMAHCS subsequently filed an appeal (*amparo*) with the Federal District Court (FDC) arguing that the JFCA had violated the workers' constitutional right to organize. In a proceeding held on January 5, 1998, the FDC rejected the request and judged the appeal premature because the JFCA had not yet issued a final decision.

The JFCA final decision, dated December 4, 1997, was not released until February 4, 1998, and concluded that SNTIASCRM continued to represent the workers. The JFCA determined that STIMAHCS had failed to prove that it had the support of a majority of workers or that there were any valid objections to the results of the September 9 vote due to the lack of evidence at the September 23 hearing.

The submitters believe the JFCA was not logically consistent in its decision because it repeatedly denied STIMAHCS the chance to present evidence and then dismissed the petition on the grounds that STIMAHCS had not proved its case. They argue that, in its final decision, the JFCA also ruled that the

STIMAHCS objections were not in accordance with Mexican law because they pertained to procedural matters and not to the workers present at the vote. The submitters argue that this ruling suggests that even if STIMAHCS had been able to present evidence, the JFCA would not have considered it.

The submitters also point out that had the JFCA released its final decision soon after December 4, 1997, (when it was dated), and not on February 4, 1998, the *amparo* to the FDC would not have been premature. The two-month delay forced STIMAHCS to file a second *amparo*.<sup>16</sup> On June 5, 1998, the FDC ruled that a hearing into objections to the *recuento* was required. Although this hearing took place on August 13, 1998, no decision had been rendered by the end of November.

In October and November 1997, the JFCA also initiated proceedings to hear claims of discriminatory dismissals for union activity. About half of the dismissed workers initially filed for reinstatement (the others took severance pay). Of the half who filed for reinstatement, a number eventually accepted severance pay. The remaining workers (11) have maintained their claim with the JFCA. The submitters argue that the JFCA failed to take any action to reinstate the dismissed workers promptly.

Of the 11 workers who filed for reinstatement, nine who were reinstated and fired again, following the application of the exclusion clause in the SNTIASCRM/ITAPSA collective bargaining agreement (Clause 6). According to the submitters, their claims are still pending. They argue these workers were expelled from SNTIASCRM (allegedly without the application of proper union expulsion procedures) because of their support for STIMAHCS and, in turn, dismissed by the company because they no longer belonged to the incumbent union.

Finally, the submitters stated that the JFCA did not take any action to prevent further violence or intimidation against STIMAHCS supporters. For example, on December 15, 1997, armed men beat a group of STIMAHCS supporters at the American Brakeblock plant (a sister plant of ITAPSA) where they were disseminating information about STIMAHCS and the *recuento*.

### **3.2 Information from Mexican NAO**

After accepting the Communication for review, the NAO engaged in consultations with the Mexican NAO pursuant to Article 21 of the NAALC to better understand and respond to the issues raised. On July 2, 1998, the NAO forwarded a series of questions related to freedom of association<sup>17</sup>. Additional

<sup>16</sup> At the time the submission was written, the second *amparo* was pending.

<sup>17</sup> Questions on occupational injuries and illnesses were also included.

questions were also sent in early September.

While the Mexican NAO did not comment on the specific events that took place at the plant except with respect to the status of reinstatement claims, it provided additional information and clarification on Mexican labour law that were essential for the review.

In the spirit of Cooperative Consultations, the Mexican NAO invited the NAO Secretary and a representative of the Canada Labour Relations Board to Mexico City to meet with STPS and JFCA officials on September 9, 1998. This meeting focused primarily on *recuento* procedures and the attributions of labour boards.

With respect to Public Communication CAN 98-1, the Mexican NAO indicated that 38 workers filed complaints with the JFCA (Special Board Number Fifteen) stating that they had been fired for supporting STIMAHCS. Three of these workers were offered reinstatement by the company. No requests for reinstatement are pending.<sup>18</sup>

To avoid repetition, the information provided by the Mexican NAO on Mexican labour law has been inserted in the appropriate sections of chapter 4.

### **3.3 Information from the company**

The plant is wholly owned by *Grupo Echlin México* which, in turn, is a wholly owned subsidiary of Echlin Inc. of Branford, Connecticut. In July of 1998, Dana Corporation of Toledo, Ohio, completed its purchase of Echlin Inc. Both Echlin Inc. and Dana Corporation have subsidiaries in Canada.

Dana Corporation provided information to the NAO from the time of the first public meeting (September 14, 1998). This section presents information which deals with events surrounding the *recuento*.<sup>19</sup>

#### **3.3.1 Events Surrounding the *Recuento***

In May or June 1997, plant management learned that STIMAHCS was seeking to replace SNTIASCRM as the bargaining agent for employees. Around May 26, 1997, STIMAHCS filed a petition with the JFCA requesting a *recuento*. A vigorous campaign by both unions ensued. The company informed its employees that it was satisfied with its relationship with SNTIASCRM but let

<sup>18</sup> Correspondence with the Mexican NAO dated October 28, 1998, available in Public Communication CAN 98-1 public file.

<sup>19</sup> The owner of the plant, Echlin Inc., had not participated in the review process. Dana Corporation, through its Canadian subsidiary, communicated with the NAO, offered information (such as the SNTIASCRM/ITAPSA collective bargaining agreement) and participated in the process.

them know that it was their decision as to which union would represent them.

The company did not single out STIMAHCS supporters to harass, intimidate or dismiss them because of their union activities. The dismissals that did occur prior to the *recuento* were performance-related. The only exceptions were the workers who were discharged following the application of the exclusion clause by SNTIASCRM, as provided for by Clause 6 of the collective bargaining agreement in place at the plant.<sup>20</sup>

Mexican authorities found no violations of Mexican law related to the *recuento* at the plant. STIMAHCS lost in JFCA proceedings in part because of the lack of merit of its allegations and in part because it failed to adhere to the prescribed procedures.

With respect to the *recuento* itself, a Mexican lawyer retained by the company, as an observer, affirmed that the atmosphere was tense but that he did not witness any violence, chaos or disturbance of the election process. He claimed that STIMAHCS supporters located outside the plant caused the greatest disruption with their political speeches and statements about the company. He reported that there was a group of workers wearing CTM Section 15 T-shirts and some of them were carrying sticks or metal pipes to protect themselves from STIMAHCS supporters.

The *recuento* took place in one of the offices of the main building. There were representatives from management and both unions in the polling area. The identification of voters was checked at the voting table by JFCA representatives where employees voted orally. STIMAHCS had apparently not requested a secret ballot and the JFCA representatives had not raised the issue.

There were a number of discharged employees standing outside the company premises by the main gate. The JFCA representatives and election observers went outside to record their vote. They also voted orally (for STIMAHCS).

According to the company observer, the *recuento* took place without coercion or violence and in compliance with Mexican law. He stated that there were no "thugs" on the company premises to intimidate the workers.

As for the incidents at the American Brakeblock plant, company management did not observe them and cannot confirm them with any degree of certainty. The injured employee initially stated that he did not know who had hit him but later accused the company. Mexican authorities refused to prosecute and the employee was later dismissed on the grounds of poor performance.

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<sup>20</sup> The SNTIASCRM/ITAPSA collective bargaining agreement is available in the Public Communication CAN 98-1 public file.

## 4. Mexican Labour Law

The NAALC is not designed to determine whether or not employers and unions abide by labour legislation. Rather, it creates a framework of values and principles which the signatory countries must respect, notably in adopting and enforcing labour legislation.

As noted in section 3.1.2, the allegations made by the submitters are based on Articles 2 to 5 of the Agreement and refer to the manner in which Mexico has discharged its NAALC obligations as they pertain to the adoption and subsequent implementation and enforcement, of labour laws. This chapter reviews the legislation that is relevant to the issues raised by Public Communication CAN 98-1.

### 4.1 Overview

Mexican labour law has several domestic and international legal sources. The Political Constitution of the United Mexican States constitutes the country's basic charter and contains general labour principles. It also indicates the priority which should be given to domestic legislation and international agreements. These principles are expanded on in the *Ley Federal del Trabajo*<sup>21</sup> (LFT) which is the key labour relations legislation in Mexico. Court decisions can also affect labour law, particularly in the context of the *amparo* process. Regulations, issued by the executive branch of the government, and procedures of labour agencies serve to implement particular statutes. Finally, international conventions and treaties are incorporated into domestic law after having been approved by the Senate and signed by the President of the Republic.

The Mexican labour law system is based on a series of fundamental principles, the most relevant of which are:

- "Labour standards provide a balance and social justice in the relations between employees and employers;
- Work is a right and a social duty;
- Work is not an article of commerce;
- Work must be performed under a system of freedom and dignity for the persons providing it;
- Work must guarantee life, health, and a decent economic level of living for employees and their families;
- There may not be differences among employees on the basis of race, sex, age, religious or political beliefs, or social standing;
- There is freedom to work in legal activities;

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<sup>21</sup> Federal Labour Law.

- Labour standards are mandatory in nature and workers' rights are irrevocable;
- The scope of a labour standard is construed in favour of the employee when there is doubt;
- It is presumed that a work relationship exists between the person providing a personal service and the person receiving it;
- There is no time limit on the length of the work relationship, unless it is explicitly defined as being for a set time or for a specific job."<sup>22</sup>

#### 4.1.1 Political Constitution of the United Mexican States

After the revolution of 1910-1917, the Political Constitution of the United Mexican States<sup>23</sup> was promulgated and gave rise to a new constitutional order. A legal framework for labour legislation was included in Article 123<sup>24</sup> which aims to achieve a balance between labour and management interests.

Article 123 outlines a series of worker rights and labour standards which enjoy constitutional status. For example, Article 123.XVI states that "[b]oth employers and workers shall have the right to organize for the defense of their respective interests, by forming unions, professional associations, etc." This article also sets out the organization and competence of the *Junta de Conciliación y Arbitraje* (JCA).<sup>25</sup>

In the context of Public Communication CAN 98-1, other articles are also of relevance to labour rights.<sup>26</sup> Article 9, though it does not pertain to workers as such, protects the right of assembly and association. In part, it states that "[t]he right to assemble or associate peaceably for any lawful purpose cannot be restricted".

Mexico is a signatory to numerous international conventions and treaties which have a particular constitutional status in Mexican law.<sup>27</sup> The incorporation of

<sup>22</sup> Dr. Nestor de Buen Lozano, and, Lic. Carlos E. de Buen Unna, "A Primer on Mexican Labor Law", U.S. Department of Labor, Bureau of International Labor Affairs, Washington D.C., 1991, p.5.

<sup>23</sup> Hereinafter referred to as the "Constitution."

<sup>24</sup> Article 123 is the world's first enactment of social and economic rights in a country's basic legal text.

<sup>25</sup> Conciliation and Arbitration Board (CAB).

<sup>26</sup> The following articles related to labour rights will not be discussed here: Article 5 (which guarantees the freedom to work), Article 28 (which provides that associations of workers formed to protect their own interests do not constitute monopolies), Article 73.X (which empowers the Mexican Congress to pass labour laws regarding Article 123) and Article 89.I (which empowers the President of the Republic to issue regulations to implement laws).

<sup>27</sup> For instance, Mexico has ratified 73 conventions of the International Labour Organization (ILO) including Convention 87 on Freedom of Association and Protection of the Right to Organize and Convention 98 on the Right to Organize and Collective Bargaining.

these agreements into domestic law is provided for by Article 133 which states that:

"Th[e] Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme laws of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States."

As provided for in Article 123.XXXI, jurisdiction over labour matters is shared between the federal and state governments. The federal government enacts labour legislation and its enforcement is shared between both levels of governments. That is, all enterprises fall within the purview of state authorities except for some key manufacturing industries.<sup>28</sup>

#### **4.1.2 Ley Federal del Trabajo (LFT)**

The LFT is the regulatory statute that implements the constitutional provisions of Article 123. It defines employment relationships and regulates collective bargaining and strikes. It also covers the functioning of the JCAs and employment conditions such as minimum wages, hours of work and overtime, vacations, child labour, protection for working women, workplace safety and health, profit-sharing and job training.

The Constitution incorporates obligations emanating from international treaties and conventions into domestic labour law. Article 6 of the LFT clearly highlights this integration: "[t]he respective laws and treaties concluded and approved in terms of Article 133 of the Constitution shall apply to labour relations insofar as they are to the worker's advantage, as from the date of commencement of their validity."

A particularity of Mexican labour law is that every employee is covered by an individual and permanent employment contract based on the minimum work conditions stipulated in the Constitution and the LFT<sup>29</sup>. Article 47 of the LFT identifies 15 causes for dismissing an employee without liability<sup>30</sup>. If an

<sup>28</sup> These key industries are: electricity, textiles, cinematography, rubber, sugar, mining, production of metals and steel, hydrocarbons, petrochemicals, cement, limestone, automobiles and automotive parts, chemicals, cellulose and paper, oils and vegetable fats, food packaging, bottled or canned beverages, railroads, wood products, glass, tobacco, bank and credit services. Article 527 of the LFT also lists the economic sectors under federal jurisdiction.

<sup>29</sup> This employment contract takes effect automatically at the beginning of the employment relationship whether or not it is signed and whether or not the employee is covered by a collective bargaining agreement.

<sup>30</sup> See Annex 4 for a complete list.

employee is discharged for another reason, Article 50 stipulates that he or she is entitled to severance pay equal to three months' pay plus 20 days' pay for each year of service.

#### 4.1.3 Judicial system

Mexico's legal system is rooted in the civil law tradition which places more emphasis on codified law and doctrinal opinions from jurists than on prior case law. Consequently, Mexican court decisions tend to cite the legal provisions and follow doctrinal interpretations of those provisions.

An *amparo*<sup>31</sup> is a special recourse authorized under Articles 103 and 107 of the Constitution.<sup>32</sup> An *amparo* is based on the claim that a government authority has violated constitutional rights through the application of a law or by judicial or administrative decision. An *amparo* ruling only applies to the petitioner. A decision flowing from an *amparo* suit "exempts" the petitioner from the application of a law, or from a judicial or administrative decision.

Mexican courts can nevertheless establish binding jurisprudence but only when the Supreme Court issues five decisions on the same point without contradiction.<sup>33</sup> Each decision is referred to as an *ejecutoria* or a *tesis de jurisprudencia* and jurisprudence can be interrupted if an *ejecutoria* contradicts previous ones.

#### 4.1.4 International Treaty Obligations

Mexico has ratified several international conventions and treaties relevant to labour rights: ILO Convention 87 on Freedom of Association and Protection of the Right to Organize; the International Covenant on Civil and Political Rights; the Universal Declaration of Human Rights; the American Convention on Human Rights; and the International Covenant on Economic, Social and Cultural Rights.

As previously explained, international conventions and treaties are incorporated into domestic law through Article 133 of the Constitution and Article 6 of the LFT.

### 4.2 Freedom of Association and the Right to Organize

The NAO has reviewed the relevant sections of Mexican labour legislation. This section presents the key points pertaining to the freedom of association issues raised in Public Communication CAN 98-1. Freedom of association and the right to organize are covered in the LFT in the following terms:

<sup>31</sup> Literally means "protection."

<sup>32</sup> The *amparo* process is also governed by the *Amparo Law (Ley de Amparo)*.

<sup>33</sup> See Article 192 of the *Amparo Law*.

"Employer's and workers' freedom of association is recognized by law" (Article 354)

"Workers and employers shall have the right to establish trade unions without prior authorization" (Article 357)

"Nobody shall be obliged to join or abstain from joining a trade union.

Any stipulation which prescribes an agreed fine for leaving a trade union is in any way contrary to the provisions contained in the preceding paragraph [and] shall be null and void" (Article 358).

The right of workers to organize trade unions is reinforced by the prohibitions contained in Article 133 against certain conduct on the part of employers:

"An employer shall not [...]:

IV. Compel an employee by coercion or any other means to join or withdraw from the industrial association or group of which he is a member, or to vote for a specified candidate;

V. Intervene in any manner in the internal activities of the industrial organization [...];

VII. Perform any act in restraint of the rights granted to employees by law [...]."

These provisions in the LFT correspond, in statutory form, to the right to organize, to assemble and to associate which are guaranteed under the Mexican Constitution.

In addition, a number of principles from international covenants and treaties have been adopted by the Mexican Government. Article 2 of Convention 87 of the International Labour Organization,<sup>34</sup> which has been ratified by Mexico, states that "[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization". Article 3 of the same Convention stipulates that:

"1. Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof".

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<sup>34</sup> Hereinafter ILO Convention 87.

Mexico is also a signatory to the Universal Declaration of Human Rights, which contains the provision, under Article 23, that "[e]veryone has the right to form and to join trade unions for the protection of his interests".

The International Covenant on Civil and Political Rights includes the following principles under Article 22:

- “1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security and public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize the States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.”

Finally, Mexico has ratified the American Convention on Human Rights which contains the following article<sup>35</sup>:

- “1. Everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interests of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.”

Freedom of association and the right to organize appear to be embodied in the Mexican Constitution, as well as in the provisions of international treaties and Mexican federal law, both of which enjoy status as sources of law secondary only to the Constitution itself. The statements of basic rights all seem to be consistent with each other and there are cross references which suggest that

<sup>35</sup> Article 16.

they are expected to reinforce each other.<sup>36</sup>

#### 4.2.1 Protection from Coercion

The *recuento* of September 9, 1997, was conducted after STIMAHCS, under Article 389 of the LFT, challenged the right of SNTIASCRM to continue to administer the collective agreement. Such a claim is dealt with by "special proceedings" before the JFCA, which are governed by Title XVII of the LFT. These proceedings contemplate that a *recuento* may be necessary to determine whether the existing union continues to enjoy the support of the majority of workers, and a vote was ordered at ITAPSA.

The rules relating to the *recuento* are contained in Article 931 of the LFT which states that:

"If a recount of the workers is submitted as evidence, the following rules shall be observed:

- I. The Board shall fix a place, date and hour in which it must be made;
- II. Only workers employed in the enterprise who are present when the recount is taken shall have the right to vote;
- III. Workers dismissed after the date of presentation of the notice of intention to strike shall be deemed to be employees of the enterprise;<sup>37</sup>
- IV. The votes of workers in positions of trust<sup>38</sup> and workers recruited after the date of presentation of the notice of intention to strike shall not be counted;
- V. Objections to the workers present at the recount must be recorded in the minutes of the proceedings, in which case the Board shall arrange a meeting for the submission and presentation of evidence."

The Constitution in general contemplates the creation of an orderly society, in which citizens may pursue their lawful endeavours without interference. Several articles provide examples of this right. For example, Article 14 stipulates that "[...] [n]o person shall be deprived of life, liberty, property, possessions or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act [...]". Article 16 states that "[n]o one shall be molested in his person, family, domicile,

<sup>36</sup> Examples of this are the reference in the International Covenant on Civil and Political Rights to ILO Convention 87, and the reference in Article 6 of the LFT to the international treaties and to the Constitution.

<sup>37</sup> Article 931 also applies to representation votes which are taken to challenge the legality of a strike, a situation which is not relevant here.

<sup>38</sup> In Canada, they would be referred to as "confidential employees."

papers or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken [...]. Finally, Article 17 says in part that “[...] [n]o one may take the law into his own hands, or resort to violence in the enforcement of his rights [...]”.

These constitutional provisions do not specifically address the labour relations environment, though they do suggest a general expectation that self-help and private violence are prohibited in Mexican society.

Article 133 of the LFT prohibits an employer from using coercion to affect the choices made by employees in the exercise of their freedom of association and right to organize,<sup>39</sup> and from performing any act “in restraint of the rights granted to employees by law.”<sup>40</sup> Prohibited employer conduct under Article 133 could be interpreted to include permitting coercion and interference or being complicit in the creation of a coercive environment.

The LFT itself does not specifically prohibit coercive conduct on the part of trade unions. In Article 135.I, a worker is prohibited from performing “any act which might endanger his own safety, that of his fellow workers or of third parties or that of the establishment’s workshops or the place in which the work is done.” This provision would not seem to cover what in Canada would be called “union unfair labour practices” of the kind alleged in the Communication. This would leave the criminal justice system as the only avenue to seek remedies for abusive behaviour, intimidation or coercion.<sup>41</sup>

The LFT itself provides the JFCA with authority to maintain order in its own proceedings. Article 728 states that “[t]he Chairmen of the Boards and the Assistants, may impose disciplinary corrections in order to maintain good order in the hearings or proceedings, and may demand that due respect and consideration be kept therein.”

Article 729 provides that the penalties which may be imposed include warning, fines or expulsion from the premises. It also provides that if there is resistance to such expulsion, the Board may call on the police service for assistance.

A *recuento* can be viewed as part of the proceedings of the JFCA, as it is conducted under Board auspices, and supervised by actuaries. It can be argued that the power of the JFCA to maintain order applies to the conduct of a *recuento* as well as to actual hearings in the chambers of the JFCA. The insistence on maintaining a reasonable level of decorum in the course of conducting a vote to

<sup>39</sup> Article 133.IV.

<sup>40</sup> Article 133.VII.

<sup>41</sup> Correspondence with Mexican NAO dated October 28, 1998, available in the public file on Public Communication CAN 98-1.

obtain evidence for assessment by the JFCA would seem to be a basic condition. Indeed, this argument was made by STPS officials during the consultative meeting of September 9, 1998, with the Canadian NAO Secretary (see section 4.2.3.2).

Article 17 of the LFT reads as follows:

“Where there is no express provision in the Constitution, or in this Law, the regulations thereunder, or in the treaties referred to in Art. 6, their provisions covering similar cases, the general principles of law, the general principles of social justice deriving from Article 123 of the Constitution, case law and precedent, custom and equity shall be taken into account.”

This section of the statute indicates that the LFT is to be read by the JFCA and other bodies charged with its implementation in a plenary and expansive way. The fact that Articles 728 and 729 do not refer specifically to the administration of the *recuento* does not, in this light, preclude the application of the principle of maintaining civility and order which is stated in those articles to all proceedings and measures which are carried out at the behest of the JFCA.

Moreover, members and agents of the JFCA, like all public officials, have an obligation under Article 128 of the Constitution to uphold and execute the law.

#### **4.2.2 JFCA Composition AND Procedures**

The Mexican Constitution establishes a system of state and federal tribunals to resolve labour disputes. They are termed the *Juntas de Conciliación y Arbitraje* (JCA) and the *Juntas de Conciliación* (JC).<sup>42</sup> The responsibilities of JCs are: provision of conciliation services, receiving claims, gathering evidence for JCA proceedings, and assisting the JCAs in the performance of their duties. Generally speaking, JCs are not adjudicative bodies.

The members of a JFCA include:<sup>43</sup>

- A president who is the government representative and is appointed by the President of Mexico for a maximum term of six years;
- Chief Law Clerks who are appointed by the JFCA president;
- An equal number of representatives of workers and employers who are elected to the JFCA by their respective organizations for a six-year mandate;

<sup>42</sup> Conciliation Boards (CB). JCAs at the federal level are called the *Juntas Federales de Conciliación y Arbitraje* (JFCA).

<sup>43</sup> Paul A. Curtis, Esq. and Alfredo Gutierrez Kirchner, Esq., “Questions on Labor Law Enforcement in Mexico and the Role of the Federal and State Conciliation and Arbitration Boards”, report prepared for the U.S. Department of Labor, undated, pp. 24-25.

- Auxiliary secretaries, clerks, registrars and typists who are appointed by the JFCA.

The President of the JFCA has the authority to determine appropriate enforcement measures. Decisions of a JFCA are final although they can be challenged in the Federal District Courts, the Federal Courts of Appeal or the Mexican Supreme Court on constitutional and due process grounds, as provided for by the process of *amparo*.

#### **4.2.2.1 Potential Bias and Conflict of Interest**

Article 707 of the LFT provides a basis for challenging the participation in a case of particular members and agents of the JFCA on the basis of apprehended bias or alleged conflict of interest. The grounds listed include personal, economic or blood relationships with other parties or participants, and also the general criterion of "a direct or indirect personal interest in the case". However, this list does not include criteria based on structural and systemic observations about the composition of the JFCA.

The JFCA is a tripartite body which includes a representative of employers and a representative of workers, along with a Government official, on every adjudicative panel. There could be a real or perceived bias or conflict of interest when one member of the panel has close affiliations with or is a member of one of the organizations involved in the case being reviewed by that same panel.

Worker representatives to the local and federal JCAs are elected at conventions provided for under Article 652 of the LFT. There is provision in this article for worker delegates who are not affiliated with trade unions in workplaces where there is no registered trade union, but where there are registered trade unions representing the employees, the delegates must be union members.

Article 671 provides that a workers' or employers' representative on the JFCA can be disciplined on grounds which include voting "in favor of any decision which is manifestly illegal or unjust." The disciplinary penalties range from reprimand to dismissal from office.<sup>44</sup> It is conceivable that this might be the basis for challenging the capacity for impartiality of a worker representative in flagrant cases; on the other hand, the determination of disciplinary issues lies in the hands of a Representatives' Disciplinary Board, which is composed and selected according to the same formula by which the JFCA is constituted.<sup>45</sup>

#### **4.2.2.2 Authority to postpone or suspend *recuentos***

<sup>44</sup> Article 672 and Article 673.

<sup>45</sup> Article 674.

The JFCA may postpone a *recuento* to comply with an *amparo* or because a party puts forth a question (demurrers of special pronouncement under Article 762 of the LFT) which must be settled in a special ruling before the *recuento* proceedings may resume.<sup>46</sup> Article 762 stipulates that:

"The following questions shall be treated as demurrers and questions of special pronouncement:

- I. Incompetence;
- II. Competence;
- III. Legal Status;
- IV. Joinder; and
- V. Disqualifications."

According to Article 748 of the LFT, all parties must be personally notified of the postponement of a *recuento* at least 24 hours in advance.

The decision to postpone a *recuento* is made by a majority vote of the members of the JFCA.<sup>47</sup>

During a consultative meeting with the Canadian NAO Secretary, STPS officials acknowledged that the JFCA can stop an election if it sees coercion. Furthermore, JFCA agents<sup>48</sup> can warn the parties that the vote may be suspended if there is violence and must report to the JFCA with the reasons for their decision. The JFCA can request the intervention of the police or request police presence during the *recuento* for security purposes. JFCA agents are also responsible for ensuring there is no electioneering on the voting site.

#### 4.2.2.3 Due Process

In Article 356 of the LFT, a "trade union" is defined as "an association of workers or employers set up for the study, aim and defense of their respective interests". STIMAHCS is a registered union in Mexico and, as provided for by the LFT, is entitled to act as representative of its members in dealings with competent government authorities. Indeed, Article 368 states that "[r]egistration of [a] trade union and its board of directors shall take effect for the purposes of transactions with all authorities once it has been confirmed by the Ministry of Labour and Social Welfare or by the local Conciliation and Arbitration Boards."

The legal status of trade unions is set out in Article 374 which reads:

<sup>46</sup> Correspondence with the Mexican NAO dated October 28, 1998, available in Public Communication CAN 98-1 public file.

<sup>47</sup> *Ibid.*

<sup>48</sup> The agents of the JFCA who conduct the *recuento* are called actuaries, and their role is to tally the vote and make a record of any events which occur.

"Every lawfully constituted trade union shall have legal personality and have capacity to:

- I. acquire ownership over movable goods or chattels;
- II. acquire ownership over the real and immovable property immediately and directly intended for the purposes of the union;
- III. defend its rights in dealings with authority and institute the corresponding legal proceedings."

The role of the union in representing the interests of members is outlined in Article 375 as follows: "[t]rade unions shall represent their members in defending the individual rights of the latter, without prejudice to the worker's right to act or intervene directly; in the latter case [a] trade union shall cease to act on behalf of the worker if the worker so requests."

Trade unions enjoy full legal personality and are recognized as representative of groups of workers, though workers may choose to defend their own rights in some cases.

For the purposes of proceedings before the JFCA, parties are defined, in Article 689, as "the individuals or legal entities furnishing evidence that they have a legal interest in the proceedings and bringing suits or entering a defense on that account."

Since trade unions are defined in the LFT as legal entities, they can appear as parties in proceedings before the JFCA and there are many sections of the statute which clearly contemplate the participation of a trade union in the proceedings.

The LFT contains a number of signals indicating that proceedings before the JFCA are to be conducted in a way which adequately provides the parties to those proceedings with the opportunity to bring forward evidence of various kinds, to make legal argument, to respond to their adversary, and to raise procedural questions.

Articles 739 through 754 outline the requirements for notification of parties of proceedings before the JFCA. Article 748 sets out the general requirement for at least a 24-hour notification before the proceeding will be held.

Extensive provision is made for personal notification to the parties. In the event this is not possible, notice may be given by publication in the Bulletin of the Board, or by posting notice on the premises of the Board.<sup>49</sup>

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<sup>49</sup> Article 739.

The nature of the proceedings before the JFCA is generally outlined in Article 685 as follows:

“Labour dispute proceedings shall be public, free of charge, expeditious and predominantly oral and shall be instituted at the request of any party concerned. Boards must take the necessary steps to ensure that proceedings are conducted with a maximum of economy, concentration and simplicity.”

Article 690 provides that other parties “who are likely to be affected by the decision taken on a dispute may take part in the proceedings on furnishing evidence that they have a legal interest in the dispute, or may be summoned to appear, if so decided by the Board.”

The combined effect of the provisions outlining the procedural aspects of proceedings before the Board is to indicate that there is an expectation that notice will be given to the parties to proceedings - in general, at least 24 hours prior to the commencement of a proceeding.

The LFT provides that the JFCA has jurisdiction over both collective and individual disputes. This is indicated in, for example, Article 870 of the LFT, which states that the “ordinary proceedings” outlined in that part of the statute will apply to both collective and individual conflicts.

Article 692 sets out a procedure for obtaining representation by a proxy in proceedings before the Board. Article 693, which allows the JFCA to accredit workers’ or union representatives without having recourse to this process states that “[b]oards may accredit workers’ or unions’ representatives as proxies without subjection to the rules of the preceding article.”

Although the particular question of proxy is not raised by this Public Communication, this article, among others, does suggest that the JFCA is accustomed to dealing with unions as entities which appear before them.

Although Article 879 of the LFT provides that hearings may be held even if one or other of the parties is not present, this would not seem to obviate the requirements for notice found elsewhere in the statute.

The nature of the proceedings under the LFT, like other proceedings in Mexican law, is an inquisitorial one, and does not follow the adversarial model which is seen in common law countries. The LFT does contemplate, however, that both parties will be given an opportunity to participate in the hearing at which a claim is considered.

Article 878 sets out the format for hearings before the JFCA, and this provides for both parties to speak to the issues which are raised, and for each to respond to the issues raised by the other, including procedural matters. Article 895 provides a similar, though abbreviated, process in the case of special proceedings.

There are specific rules laid out in the LFT for the presentation and admission of evidence in proceedings before the JFCA<sup>50</sup>. The presentation and consideration of evidence are described as a separate stage of the proceedings, and one which the Board can at some point declare at an end. In the context of ordinary proceedings, this stage is described in Article 880 which states:

"The stage of offering and admission of evidence shall be carried out in accordance with the following rules:

- I. The plaintiff shall offer his evidence in relation with the disputed facts. Immediately thereafter the defendant shall offer his evidence and may object to those of his adversary, who may in turn object to those of the defendant;
- II. The parties may offer new evidence, provided that they are related with that which is offered by the adversary; and that the stage of offering of evidence has not been closed. Likewise, if the plaintiff needs to offer evidence related to facts disavowed which were inferred from the reply to the petition, he may request that the hearing be suspended for continuance in the following 10 days for the purpose of preparing the evidence corresponding to those facts within that time period;
- III. The parties must offer the evidence, observing the provisions of Chapter XII of this Title; and
- IV. Once the offering is concluded, the Board shall decide immediately on the evidence which it shall admit, and that which it shall disallow."

The rules for JFCA special proceedings are set out in Article 895. As indicated earlier, these rules are somewhat less extensive than those covering ordinary proceedings:

"The hearing of conciliation,<sup>51</sup> petition and exceptions, evidence and decisions, shall be held in accordance with the following rules:

- I. The Board shall procure an agreement of the parties, in accordance with Article 876, items I and II of this Law;
- II. If the preceding is not possible, each of the parties shall expound that which he deems appropriate, drawing up his petitions and shall

<sup>50</sup> Chapter XII of the LFT lays out a number of specific criteria for the consideration of different kinds of evidence.

<sup>51</sup> Conciliation is a step which is contemplated in both ordinary and special proceedings. The effort at settlement occurs before the formal hearing is undertaken.

- offer and render the evidence which has been admitted;
- III. If inventory of the workers is offered, the provisions contained in Article 931 of this Law<sup>52</sup> shall be observed;
  - IV. Once the reception of evidence is concluded, the Board shall hear the allegations and pronounce a decision."

Thus, there is not the elaboration concerning the reception of evidence which occurs in the sections of the LFT dealing with ordinary proceedings. However, if a *recuento* is called for, it takes place as part of the evidentiary stage of the proceedings, and an opportunity to speak to this evidence seems to be contemplated by Article 895.IV.

Article 841 describes the awards made by the JFCA as "[a]wards [that] shall be decided on well-informed truth, with good faith kept and appraising the facts in good conscience, without the necessity of being subject to rules and formulas on the estimation of evidence, but shall express the legal reasons and foundations upon which they are based."<sup>53</sup>

#### 4.2.2.4 Procedural Time Limits

There are a number of points indicated in the LFT to provide for time restrictions on the taking of certain steps in order to prevent unwarranted delays. For instance, in Article 910.IV, there is a time limit of 48 hours for workers to raise any objection to the involvement of particular members of the JFCA, or the legal status of the parties, following the receipt of the first reply of an employer. This article also gives the JFCA 24 hours to decide these questions. Article 930 provides that the JFCA has 24 hours to decide on whether a strike is lawful, after the conclusion of the evidence on this issue.

Article 883 provides that, if all of the evidence cannot be presented in one hearing, further hearings may be held, but these should be held within 30 days. Following the end of the hearing, the officials of the JFCA have, according to Article 885, a period of ten days to prepare a proposed disposition of the case. This is forwarded to the members of the JFCA, who have a further five days to state their views on this decision, and to suggest that further input from the parties may be needed<sup>54</sup>. Within ten days after the five days permitted to members to state their views, or after any further hearing, the JFCA is convened

<sup>52</sup> This refers to the *recuento*.

<sup>53</sup> One Mexican commentator has alluded to the significance of Article 841 in the following terms: "The concept of 'known truth and good faith' expresses a faculty to solve, without subjecting to strict rules, but on the basis of good faith, which is supposed to be a guarantee against arbitrariness" (Nestor De Buen, "Mexico", Kluwer Law and Taxation Publishers, Boston, 1991, p.131).

<sup>54</sup> Article 886.

<sup>55</sup> Article 887.

to vote on the disposition<sup>55</sup>. The result of the case is to be declared at the end of this session, though it is possible for the JFCA to suggest amendments or corrections before it is signed.

Article 890 stipulates that “[o]nce [an] award is elaborated, the Secretary shall have the members of the Board who voted on the case sign it, and once they are obtained shall turn the file over to the adviser, for the immediate personal notification of the award to the parties.”

Article 899 specifies that the provisions of the LFT governing ordinary proceedings shall apply to special proceedings as appropriate, and this seems to include the procedures for making decisions.

#### **4.2.3 Enforcement of JFCA Decisions**

The JFCA is the federal body which has general jurisdiction over disputes and claims arising under the LFT. Title XV of the LFT outlines an extensive procedure for enforcement of the decisions of the JFCA; the general principle underlying this part of the statute is stated in Articles 939 and 940, which read respectively as follows:

“The provisions of this Title shall apply to the enforcement of awards made by Permanent Conciliation Boards and by Conciliation and Arbitration Boards. They are also applicable to the arbitration awards and decisions made in collective disputes of an economic nature and to agreements executed before the Boards.”

“The enforcement of the awards to which the preceding article refers, shall correspond to the Chairmen of the Permanent Boards of Conciliation, to the Chairmen of the Boards of Conciliation and Arbitration and to the Chairmen of the Special Boards, for which purpose the necessary measures shall be pronounced in order that the enforcement shall be prompt and expeditious.”

Article 946 makes it clear that both directions to carry out a particular act, and orders to pay compensation, are covered by the provisions of the LFT. It states that “[t]he enforcement must be discharged for the fulfillment of a duty or the payment of a net amount expressly stipulated in the award, the computation thereof being understood for this purpose.”

Title XV also provides that awards of the JFCA can be enforced by forwarding letters rogatory to other agencies<sup>56</sup>, that costs can be imposed for failure to

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<sup>55</sup> Article 887.

<sup>56</sup> Article 941, Article 949.

<sup>57</sup> Article 944.

comply with orders<sup>57</sup>, that compensation can be ordered in the event a respondent refuses to accept an award.<sup>58</sup> Title XV also outlines an extensive procedure for attachment and liquidation of assets in satisfaction of any monetary order from the JFCA or any other appropriate body.<sup>59</sup>

The terms of Article 940, quoted above, indicate that the President of the JFCA has a general power to consider measures by which awards of the JFCA can be enforced, and is under an obligation to ensure that such steps are taken within a reasonable time. Particular options for the enforcement of JFCA decisions are outlined in the rest of Title XV.

Title XVI of the LFT, while not speaking directly to the question of the enforcement of decisions by the JFCA itself, does provide for penal sanctions against persons who violate various aspects of the labour laws, and thus underlines the seriousness of the obligations which arise under the LFT.

Article 688 of the LFT permits the JFCA to call upon the judicial and administrative authorities for assistance in the carrying out of the objectives of the LFT:

“The administrative and judicial authorities must assist the Conciliation Boards and the Boards of Conciliation and Arbitration within the sphere of their respective competencies; if they refuse to do so, they shall be liable in the terms of the applicable laws. The Boards shall assist each other in the performance of their functions.”

The terms of the LFT seem to contemplate that the authorities charged with responsibilities for making decisions under the statute, including the JFCA, will have adequate power to ensure that the orders they make will be carried out. In this respect, they have powers of their own, and are also able to call on the judicial and administrative authorities of the country, where appropriate, to assist them in securing compliance with the terms of the LFT.

#### **4.2.4 Election Procedures**

Apart from Article 25 of the International Covenant on Civil and Political Rights (ICCPR), which was incorporated into domestic law following its ratification by Mexico as provided for by Article 133 of the Constitution, there seems to be nothing in Mexican labour law specifically requiring that a *recuento* be conducted by secret ballot or in a neutral location.

<sup>58</sup> Article 947: this article does not apply in cases of wrongful dismissal, which are dealt with under other sections of the LFT.

<sup>59</sup> Title XV, Sections II and III.

Article 25 of the ICCPR states that “[e]very citizen shall have the right and the opportunity [...] without unreasonable restrictions [...] to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors [...].”

Article 931 does not speak directly to the voting procedure in a *recuento*. However, its implication is that a *recuento* is a proceeding which is conducted under the authority of the JFCA, and, given the care which is taken throughout the LFT to ensure that the parties are given ample opportunity to express their views, and to ensure that the rights of workers are protected, it can be concluded that the JFCA has a responsibility to ensure the procedural propriety of any vote which is conducted under its authority.

In practice, voters can cast secret votes in a *recuento* if both unions agree or if imposed by a JFCA. During the September consultative meeting, STPS and JFCA officials explained that oral voting is a historical practice in Mexico and that an oral vote is considered a free vote in Mexico.<sup>60</sup>

While there is nothing in the LFT, and Article 931 in particular, which requires that *recuentos* be held on the premises of the employer, this is where they usually take place for reasons of convenience.<sup>61</sup>

#### 4.2.5 Prohibition of Discriminatory Dismissals

The basic position of a worker under the Constitution is stated in Article 123.XXII:

“An employer who dismisses a worker without justifiable cause or because he has entered an association or union, or for having taken part in a lawful strike, shall be required, at the election of the worker, either to fulfill the contract or to indemnify him to the amount of three months' wages. The law shall specify those cases in which the employer may be exempted from the obligation of fulfilling the contract by payment of an indemnity. He shall also have the obligation to indemnify a worker to the amount of three months' wages, if the worker leaves his employment due to a lack of honesty on the part of the employer or because of ill treatment from him, either to himself or to his wife, parents, children, or brothers and sisters. An employer may not relieve himself of this responsibility when the ill treatment is attributable to his subordinates or members of his family acting with his consent or tolerance.”

<sup>60</sup> Mexican labour authorities referred to an “oral” vote as an “open” vote.

<sup>61</sup> Correspondence with the Mexican NAO dated October 28, 1998, available in Public Communication CAN 98-1 public file.

Therefore, a worker may expect to continue being employed unless dismissed on the basis of one of the grounds listed in Article 47 of the LFT.<sup>62</sup> Article 123.XXII of the Constitution indicates that dismissal on the basis of activity in a trade union is regarded as a separate (and unlawful) ground.<sup>63</sup>

The recourse open to a worker alleging an improper dismissal is to make a claim to the JFCA on the ground that the dismissal was improper. Under Article 784 of the LFT, the burden of proof is on the employer to show that there was legal cause for the termination of employment. If the complaint is upheld, the worker is permitted to choose either reinstatement or the payment of three months' wages as the remedy.<sup>64</sup>

Where an employee has chosen reinstatement, and is not reinstated, Article 50.III empowers the JFCA to order additional compensation to the worker. The JFCA is armed with a number of enforcement options to ensure that orders are carried out.

Article 123.XXVII of the Constitution includes the following provisions with respect to waiver of these rights:

"The following conditions shall be considered null and void and not binding on the contracting parties, even if expressed in the contract: [...]

- g. Those that constitute a waiver by the worker of indemnification to which he is entitled due to labour accidents or occupational diseases, damages occasioned by the nonfulfillment of the contract, or by being discharged;
- h. All other stipulations that imply waiver of any right designed to favor the worker in the laws of protection and assistance for workmen."

A comparable provision is contained in Article 5 of the LFT:

"The provisions of this Law shall be binding as a matter of public order; consequently, any written or verbal stipulation providing for the following shall be devoid of legal effect and shall not hinder the enjoyment and exercise of the rights concerned: [...]

XIII. The worker's waiver of any of his rights or prerogatives established by labour norms.

<sup>62</sup> See Annex 4 for a complete list.

<sup>63</sup> An employer is also entitled, under circumstances such as financial crisis or *force majeure*, to bring the employment relationship to an end, but these provisions are not relevant to this matter.

<sup>64</sup> Article 48. Articles 49 and 50 specify alternative remedies in particular circumstances, for example, where the length of employment has been less than one year.

In all the above cases the law or the supplementary norms shall be deemed to govern in lieu of clauses which are null and void.”

In addition, Article 33 of the LFT expressly makes null and void any waiver of the right to specific remuneration to employees.

Exclusion clauses are a common feature of collective bargaining agreements in Mexico and such a clause was incorporated in the collective bargaining agreement in place at the plant.<sup>65</sup> Article 395 of the LFT provides for the agreement to an exclusion clause in the following terms:

“A collective agreement may stipulate that the employer shall admit to his employment only persons who are members of the trade union which is a party to the contract. This clause and any other clause laying down privileges in their favor shall not be applied so as to prejudice workers (non-members of the union) already employed in the enterprise or establishment prior to the date on which the trade union asks for a collective contract to be made (or the revision of an existing collective contract) with the inclusion thereof of any “closed shop” clause.

It may also be established that the employer shall dismiss members who withdraw or are expunged from the contracting union.”

There are procedures to follow in expelling members from a union. In order to register and obtain legal status, a trade union must file with the STPS a copy of its by-laws.<sup>66</sup> Article 371 of the LFT specifies what must be contained in these by-laws, and a portion of this article is devoted to the rules for discipline of union members:

“VII. Grounds and procedure for expulsion and disciplinary penalties. In the case of expulsion the following rules shall be observed:

- a) a meeting of the workers shall be called for the sole purpose of informing them of the expulsion;
- b) in the case of trade unions subdivided into sections the expulsion procedure shall be carried out at a meeting of the section concerned; the motion of expulsion shall be submitted to the workers of each one of the sections of the trade union for their decision;
- c) the worker concerned shall be entitled to make a statement in

<sup>65</sup> See Clause 6 of the collective bargaining agreement between SNTIASCRM and ITAPSA. This agreement is available in the Public Communication CAN 98-1 public file.

<sup>66</sup> Article 365 of the LFT.

his defence in accordance with the rules;  
d) the meeting shall hear the evidence on which the motion of expulsion is based and the evidence submitted by the worker concerned;  
e) workers shall not be represented by proxy or vote by correspondence or in writing;  
f) expulsion shall be approved by the two-thirds majority of the total membership of the trade union;  
g) expulsion may be decided only in those cases expressly stipulated in the rules, duly evidenced and exactly applicable to the case."

Article 371 in essence sets procedural constraints on the application of exclusion clauses. In a decision establishing jurisprudence, the Supreme Court ruled that unions must effectively apply their by-laws to expel a member, in particular the requirement that two-thirds of their members vote for expulsion.<sup>67</sup> In another decision establishing jurisprudence, the Supreme Court ruled the minutes of the meeting dealing with the expulsion vote (which must contain an attendance list of members with their signatures) is sufficient to attest that the vote was lawful.<sup>68</sup>

## **5. Analysis and conclusions**

Freedom of association is a constitutional right in Mexico which is reinforced by federal law and provisions of international treaties incorporated into domestic law. Mexican workers have the right to join unions of their own choosing in an atmosphere free of outside interference.

When an incumbent union does not enjoy the complete support of its members, another union can challenge its right to administer the collective bargaining agreement. There are special JFCA procedures in place to determine whether the incumbent union still enjoys the support of a majority of workers. This is what the September 9, 1997, *recuento* at ITAPSA was to establish.

However, some of the events surrounding the *recuento* raise concerns about whether the labour authorities ensured the conditions necessary to protect the accuracy and integrity of the *recuento* were in place and whether they had the necessary means to do so.

### **5.1 EVENTS BEFORE THE *RECUESTO***

Under the Mexican constitution, workers, as citizens, are guaranteed the right to

<sup>67</sup> *Jurisprudencia definida por reiteración de criterios, 5a Epoca, Apéndice al Semanario Judicial de la Federación, 1917-1995, Tomo V, Materia del Trabajo, Tesis no.58, p.39.*

<sup>68</sup> *Jurisprudencia definida por reiteración de criterios, 7a Epoca, Apéndice al Semanario Judicial de la Federación, 1917-1995, Tomo V, Materia del Trabajo, Tesis no.57, p.38.*

pursue their legal endeavours without interference. Indeed, the Mexican constitution contains provisions that do suggest a general expectation that self-help and private violence are not acceptable conflict resolution methods.

In the specific area of labour, the LFT protects workers from coercion on the part of an employer during a union organizing campaign. However, protection from coercive conduct on the part of a union (which, in Canada, would fall under the rubric of unfair labour practices) is not as well delineated. That is, even if workers do complain to the JFCA about coercive conduct on the part of a union, it is not clear on what legal provisions they could base their grievances. Moreover, according to the Mexican NAO, the JFCA is not authorized to investigate and penalize acts of violence or intimidation related to union activities. In such circumstances, the appropriate avenue to follow in seeking redress is the criminal justice system.

It is not clear whether provisions of the LFT concerning the protection of workers from coercion and intimidation on the part of a union are sufficient to ensure Mexico's obligations under Article 2 are met.

## **5.2 EVENTS DURING THE *RECUENTO***

The information presented paints a picture of a disorderly *recuento* under the auspices of the JFCA. For example, workers eligible to vote were denied access to the designated voting area, an atmosphere of tension prevailed and flagrant electioneering took place inside the company premises (where the vote was held) and outside the plant walls.

The pertinent NAALC provisions related to the effective enforcement of labour legislation through appropriate government action contemplate that labour boards are under the obligation to take positive steps to investigate alleged violations of the law and to make sure legal recourses are available to those protected by the law. The JFCA could be expected to bear the responsibility for maintaining order and safeguarding the integrity of procedures carried out under its auspices (such as *recuentos*). The information submitted suggests that the JFCA failed to use its authority to fulfill this responsibility. To that extent, a question arises as to whether Mexico is in conformity with Articles 3(1)(b), 3(1)(g) and 3(2) of the NAALC.

## **5.3 EVENTS AFTER THE *RECUENTO***

The effective enforcement of labour legislation rests to a large extent on fair and equitable labour boards and processes.

JFCAs are organized as tripartite bodies. The LFT contains provisions for challenging the participation of members on the basis of apprehended bias or

conflict of interest but these are defined in purely personal terms. They do not include criteria based on structural and systemic observations about the composition of the board. For example, representatives of employers, workers and government sit on every adjudicative panel. A conflict of interest, real or perceived, could arise if one member has a close affiliation, beyond "direct or indirect personal interest", with one of the parties involved in the case under investigation. A concern is whether there is some way of addressing the possibility that members of JFCAs can be influenced by the fact that their organization has a stake in the outcome of *recuento* votes, without abandoning the principles which underlay the creation of a tripartite format.

In the case of Special Board no.15, a CTM official, as the labour representative, was working on a case involving a CTM-affiliated union (SNTIASCRM). While there is a provision in the LFT for disciplining members of a JFCA on grounds of voting for decisions that are manifestly illegal or unjust, the determination of sanctions rests with a disciplinary board set up with the same tripartite formula. In any case, it is uncertain that the current provisions of the LFT (such as Article 707) can ensure that the JFCA is impartial and independent and does not have any substantial interest (that is above and beyond purely personal interest) in the outcome of its proceedings as required by Article 5(4) of the NAALC.

The LFT seems to favour a holistic and plenary approach over a technical one. It contemplates that there will be ample opportunity to present evidence and address procedural issues and that the proceedings will be as expeditious as possible. The information obtained raises concern about the effective application of provisions of the LFT designed to ensure procedural protection and timely decisions. For instance, STIMAHCS was on occasion not directly informed of JFCA decisions and not allowed to present evidence even though it was a party to the proceedings. The JFCA also did not release its final report after it was signed and dated as provided for by the LFT.

Procedural protection is particularly salient because the JFCA is an autonomous body whose decisions cannot be appealed, except through the *amparo* process (which is not well suited as a means to assert procedural claims). If the JFCA does not allow irregularities to be brought to light or puts one party at a disadvantage because of avoidable delays, its efficacy can be compromised.

The kinds of procedural protection provided for by Articles 3(2), 4, 5(1)(a), 5(1)(c), 5(1)(d), 5(2)(b), 5(2)(c) of the NAALC can be implemented in many different ways depending on the circumstances. What matters is that the standard of due process be met. The information received regarding the handling of the STIMAHCS case by the JFCA does not appear to be consistent with the above provisions of the NAALC.

The exercise of the right to freedom of association is generally linked with secret

ballots, cast only by those with the right to vote. These election procedures are obvious ways to ensure a vote accurately depicts the free choice of individuals.

While great care is taken throughout Mexican labour law to protect workers' rights, including the opportunity to express their opinion, there is no provision in the LFT that specifically requires a *recuento* to be conducted by secret ballots in neutral locations. A *recuento* also does not provide for choosing not to be represented by a union. The information received indicates that the September 9, 1998, *recuento*, did not take place in a neutral location, that workers voted orally in front of management and that at least one party was not able to determine the accuracy of the voting list in advance of or during the vote.

In protecting the rights of Mexican workers, the JFCA must take into account the possibility of coercion or intimidation when they are not allowed to vote with the protection of anonymity. If alternative procedures are selected, it would seem that the onus is on the JFCA to show that they are equally effective in protecting the accuracy and integrity of the *recuento* and that they meet the obligations stemming from Article 2 of the NAALC. The objective here is to ensure the true wishes of the workers are ascertained as required by the principle of freedom of association.

The exclusion clause as it was used by SNTIASCRM is also of concern. Union activity is not a just cause for termination of employment under Mexican labour law. The LFT clearly puts the burden of proof on the employer to show that a worker was not unjustly discharged. This provision is another important element protecting freedom of association. For this right to be safely exercised, it must be free of retaliation such as discriminatory dismissals.

According to the information received from the submitters and the company, a group of dismissed STIMAHCS supporters filed for reinstatement with the JFCA and was successful. However, they were dismissed a second time pursuant to the exclusion clause of the collective bargaining agreement. Although exclusion clauses are legal in Mexico under Article 395 of the LFT, there are also legal provisions regulating them and clear procedures for applying them.

Article 395 indicates that the exclusion clause can become operative only when a worker leaves or has been expelled from the union. Expulsion procedures are contained in the union by-laws which must be filed with the STPS. However, SNTIASCRM by-laws were seemingly not available to its members or other interested parties.

The information reviewed indicates that these expulsion procedures were not adhered to by the incumbent union and that workers were left with no effective recourse. For recourses to be effective, workers must a) be aware that the collective bargaining agreement contains an exclusion clause and b) be aware of

the content of union by-laws to know what the expulsion procedures are. According to answers provided by the Mexican NAO, this information is only accessible to a person who can provide proof of legal status or interest. The reason it is not automatically disseminated to the workers is not clear.

This raises concerns about the role of the JFCA in enforcing the safeguards against the misuse of Article 395 (in particular Article 371 and Supreme Court decisions) and the recourses available to Mexican workers when the expulsion procedures of their union are not properly applied. To that extent, a question arises as to whether Mexico meets its obligations under Articles 3(1)(b) and 3(1)(g) of the NAALC.

## **6. Recommendations**

The NAO makes the following recommendations in the spirit of Cooperative Consultations and in a desire to build on our comparative knowledge and understanding of labour law and its enforcement in North America.

Pursuant to Article 22 of the NAALC, which provides that Ministers may request in writing consultations with another country regarding any matter within the scope of the Agreement, the NAO recommends that the Minister of Labour seek Consultations with the Mexican Secretary of Labour and Social Welfare on the following issues related to freedom of association:

- a) how the requirement of the Agreement that labour boards (*Juntas de Conciliación y Arbitraje* in Mexico) be impartial and independent and not have any substantial interest in the outcome of decisions is respected during the selection of representatives who serve on these boards;
- b) the extent of effective protection of procedural interests of parties to labour board (*Junta de Conciliación y Arbitraje* in Mexico) proceedings;
- c) how freedom of association protections for workers are enforced a) before and b) during representation elections (*recuentos* in Mexico);
- d) how the procedures for representation elections (*recuentos* in Mexico) protect the integrity and accuracy of the workers' vote;
- e) the dissemination of information on the content of union by-laws and collective bargaining agreements to union members and other interested parties;
- f) the enforcement of labour legislation in the case of a failure to adhere to union by-laws governing the expulsion of union members.

It is further recommended that the Minister of Labour defer the request for

Ministerial Consultations until the second part of the review related to the occupational injuries and illnesses aspects of the Communication is submitted.

December 11, 1998

## **ANNEX 1**

### **CANADIAN NAO GUIDELINES FOR PUBLIC COMMUNICATIONS UNDER ARTICLES 16(3) and 21 OF THE NORTH AMERICAN AGREEMENT ON LABOUR COOPERATION (NAALC)**

#### **1. ELIGIBLE PUBLIC COMMUNICATIONS**

a) Any person or organization may submit a public communication to the Canadian NAO regarding labour law matters arising in the territory of another Party to the Agreement.

b) To be eligible for review, the public communication must:

(i) address and explain how the matters complained of may constitute a failure of another Party to comply with its obligations under Part Two of the NAALC,

including, where applicable, whether there appears to be non-enforcement of labour law by the other Party;

(ii) be substantially different from previous communications or include new or supplemental information not available in previous communications; and

(iii) meet the requirements in paragraph 2 below.

#### **2. REQUIREMENTS FOR PUBLIC COMMUNICATIONS**

a) Public communications must:

(i) be signed and dated and include the name, title, address and telephone and fax numbers of the submitter;

(ii) clearly state the matters the submitter requests the NAO to consider and include any relevant supporting information;

(iii) indicate if relief has been sought under domestic laws or before an international tribunal and whether these actions have concluded;

(iv) identify any confidential information included with the communication.

b) Public communications should be submitted in two copies by mail, hand, fax or e-mail to the Secretary of the Canadian NAO. For submissions received by fax, the NAO reserves the right to request a hard copy if required to facilitate the

review of the communication.

c) Public communications may be submitted in English or French. Supporting documents may be submitted in any of the three languages of the Agreement (English, French or Spanish).

### **3. WHEN A PUBLIC COMMUNICATION IS RECEIVED**

a) The NAO will promptly acknowledge receipt of the communication and inform the NAOs of the other Parties, the Secretariat of the Commission for Labour Cooperation and the Canadian Governmental Committee.

b) The NAO will, within 60 days of receipt of the public communication, decide whether to accept it for review. A communication will be accepted for review if it meets the conditions set out in paragraph 2(b) and is submitted in accordance with the procedures in paragraph 3. During this time, the NAO will consult with the Canadian Governmental Committee and may communicate with the submitter to request additional information or clarification, with the NAOs of the other Parties and with other Canadian government departments and agencies.

c) If the communication is accepted for review, the NAO will provide written notification to the submitter, the NAOs of the other Parties, the Secretariat of the Commission for Labour Cooperation and the Canadian Governmental Committee. The NAO will also publicly announce the decision to undertake the review.

d) If the public communication is declined, the NAO will provide written notification to the submitter, the NAOs of the other Parties, the Secretariat of the Commission for Labour Cooperation and the Canadian Governmental Committee, including the reason for the decision.

e) Authors of public communications may re-submit or revise a communication to ensure it meets these guidelines. If a communication is declined by the NAO, the submitter may appeal in writing to the National Administrative Office providing reasons why the decision should be reconsidered. If the communication is declined again, the NAO will provide its reasons.

### **4. WHEN A PUBLIC COMMUNICATION IS ACCEPTED FOR REVIEW**

a) The NAO will have 120 days to examine the communication to better understand and report on the issues raised. This timeframe may be extended to 180 days if circumstances warrant. The format for the examination may vary depending on the issue in question and could include meetings with the submitters and other interested parties, public meetings or consultations, appointment of an independent reviewer, requests for additional information or

any other information gathering process that will enable the NAO to carry out its responsibilities. Underlying the review will be an emphasis on ensuring an accessible, open and transparent examination of the issues.

b) Several public communications on related matters may be combined in one review.

c) The provisions of annex 46, paragraph 2 of the NAALC (Extent of Obligations) will apply when a communication is forwarded to the NAO of another Party for consultation.

d) Within the review period, the Canadian NAO may request additional information from the submitters as well as information from the NAOs of other Parties. Consultations between NAOs, as described in Article 21 of the NAALC, may be undertaken. The NAO may also request additional information and analysis from experts, academics, consultants and other interested individuals or organizations.

e) By the end of the review period, the NAO will produce a report in both of Canada's official languages, including its decision on whether to recommend Ministerial Consultations as provided for under Article 22 of the NAALC. The report will be made available to the submitter, the NAOs of the other Parties, the Secretariat and the Canadian Governmental Committee and other members of the public. Other relevant information received by the NAO will also be publicly available except for any confidential or proprietary information described in Article 44.

## ANNEX 2

### LIST OF SUBMITTERS

United Steelworkers of America-Canadian National Office	Canada
United Steelworkers of America (USWA)	U.S.
International Association of Machinists and Aerospace Workers (IAM)	U.S.
National Automobile, Aerospace, Transportation and General Workers Union (CAW-Canada)	Canada
International Brotherhood of Teamsters (IBT)	U.S.
Union of Needle Trades, Industrial and Textile Employees (UNITE)	U.S.
United Electrical, Radio and Machine Workers of America (UE)	U.S.
Industrial Union of Electrical Workers	U.S.
United Paperworkers International Union (UPIU)	U.S.
Canadian Labour Congress (CLC)	Canada
<i>Union Nacional de Trabajadores (UNT)</i>	Mexico
American Federation of Labour and Congress of Industrial Organizations (AFL-CIO)	U.S.
<i>Frente Auténtico del Trabajo (FAT)</i>	Mexico
35 other concerned organizations	Canada, Mexico and U.S.

## ANNEX 3

### ACTION REQUESTED BY SUBMITTERS

- initiate a review of the events surrounding the September 9, 1997, *recuento* at the plant;
- hold a full and public inquiry;
- issue a declaration that Mexico and the JFCA have violated Articles 2, 3, 4, and 5 of the NAALC;
- demand that Mexico develop specific and enforceable guidelines and policies to address the violations of Articles 2,3, 4, and 5 of the NAALC;
- demand that the JFCA and other Mexican labour authorities require Dana Corporation, Echlin Inc., ITAPSA, American Brakeblock and the *Confederación de Trabajadores Mexicanos* (CTM) to comply with Mexican labour laws providing for occupational safety and health standards, and protections for freedom of association and the right to organize;
- demand that the JFCA and other Mexican authorities declare that the application of union exclusion clauses to workers who have voted for a non-incumbent union violates freedom of association and the right to organize under Mexican and international law;
- demand that Mexico establish a complete public registry of current union contracts, constitutions, by-laws and financial reports;
- recommend that the Minister of Labour request Ministerial Consultations;
- following such consultations, recommend that the Minister of Labour request that an Evaluation Committee of Experts be established;
- grant such further relief as it may deem just and proper.

## **ANNEX 4**

### **JUST CAUSE FOR TERMINATION OF EMPLOYMENT IN MEXICAN LABOUR LAW**

Article 47 of the LFT stipulates that only the following 15 causes can be invoked to discharge an employee:

1. Falsification of documents or statements on which the worker bases his application for employment;
2. Misconduct at work directed at the employer, members of the employer's family, or managers;
3. Misconduct directed at co-workers that upsets workplace discipline
4. Misconduct outside of work directed at the employer, members of the employer's family, or managers;
5. Intentional material damage;
6. Material damage through negligence;
7. Inexcusable breach of workplace safety;
8. Immoral acts in the workplace;
9. Revelation of trade secrets;
10. Three absences within thirty days without permission or without just cause;
11. Disobeying management orders without just cause;
12. Refusal to obey health and safety rules;
13. Working under the influence of alcohol or drugs (except medical prescriptions);
14. Imprisonment under sentence of law;
15. Any equally grave act with similar workplace consequences.

For further information, contact:  
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