

BOOK REVIEW

**Constitutional Labour Rights in Canada: Farm Workers and the
*Fraser Case***

Edited by Fay Faraday, Judy Fudge & Eric Tucker
Toronto: Irwin Law, 2012, 322 pp.

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During Bob Rae's NDP government in Ontario, farm workers for the first time were given collective bargaining rights under the province's *Labour Relations Act*.¹ Less than a year-and-a-half later, Mike Harris's newly-elected Progressive Conservative government repealed the NDP amendments with the passage of the *Labour Relations and Employment Statute Law Amendment Act, 1995* (Bill 7) and enactment of the new *Labour Relations Act, 1995 (LRA)*,² thereby restoring the exclusion of agricultural workers from the provincial labour relations regime. The exclusion was successfully challenged in *Dunmore*,³ and the Supreme Court of Canada in that decision took its first steps towards recognizing that freedom of association under the *Charter* entailed substantive collective bargaining rights, beyond the right merely to belong and associate. *Dunmore* suggested that the purposes of association could receive protection under the *Charter*:

[A]t minimum the statutory freedom to organize in s. 5 of the *LRA* ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.⁴

With utmost cynicism, however, the successor PC government led by Ernie Eves — relying on the support of Ontario's agribusiness lobby — responded by passing the *Agricultural Employees*

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¹ *Agricultural Labour Relations Act, 1994*, SO 1994, c 6 (incorporating provisions of the *Labour Relations Act*, RSO 1990, c L.2).

² SO 1995, c 1, s 77(1) and Schedule A.

³ *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016.

⁴ *Ibid*, per Bastarache J at para 67.

Protection Act, 2002 (AEPA),⁵ legislating the bare letter of what the Court in *Dunmore* said was constitutionally required, but maintaining the exclusion of farm workers from the *LRA*. Agricultural workers could form associations without interference, and they could make representations to their employers, but that, essentially, would be the extent of their associational rights.

The *AEPA* was challenged in the courts by the United Food and Commercial Workers Union (UFCW), which represented many farm workers, in the *Fraser* case.⁶ To its discredit, the Liberal government that inherited the legislation did not seek to repeal or amend it to afford agricultural workers greater collective bargaining rights. It also did not abide by the convincing unanimous decision of the Ontario Court of Appeal⁷ holding that the *AEPA* violated the *Charter* by failing to provide farm workers with such rights. Instead, it chose to continue the defence of the *AEPA* by appealing the Court of Appeal's decision to the Supreme Court of Canada.

In a split decision, the Supreme Court in *Fraser* weakly affirmed its landmark ruling in *B.C. Health*⁸ that the right to collective bargaining was an essential part of the *Charter* freedom of association. Astonishingly, however, the majority judges (McLachlin C.J. and Binnie, LeBel, Fish and Cromwell JJ.) concluded that the *AEPA* met the requisite standard. Three judges (Rothstein, Charron and Deschamps JJ.) concurred only in the result, two of them (Rothstein and Charron JJ.) going so far as to opine that *B.C. Health* was wrongly decided and that the Court should never have constitutionalized the right to collective bargaining. Standing alone was the dissenting voice of Justice Abella, who affirmed the similarly strong decision of the Ontario Court of Appeal that the *AEPA* fell far short of what was required under the *Charter*.

The Supreme Court's *Fraser* decision has been much discussed, not least among those who had come to expect that *B.C. Health* had ushered in an era in which collective bargaining rights would have strong constitutional protection and for whom the decision in *Fraser* came as a

⁵ SO 2002, c 16.

⁶ *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3.

⁷ *Fraser v Ontario (AG)*, 2008 ONCA 760, 92 OR (3d) 481.

⁸ *Health Services and Support-Facilities Subsector Bargaining Ass'n v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*B.C. Health*].

deep disappointment. Adding valuably to that discussion is the recently published book, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case*.⁹ The volume's editors — Fay Faraday, Judy Fudge and Eric Tucker — have assembled a collection of essays from different perspectives and fields of expertise that, together, provide a thorough analysis of what went wrong in *Fraser* and a roadmap which the Court might follow in future cases.

The papers clearly set out how the majority in *Fraser* was cowed into thinking it would be an error to grant constitutional status to the Wagner Act model. The result was a fuzzy, defensive decision in which the Court was required to read into the *AEPA* a good faith obligation that the government apparently forgot or was unwilling to include. The majority decision seemed designed chiefly to counter the reactionary opinion of Justice Rothstein, who, with Justice Charron's endorsement, felt that the Court should never have constitutionalized the right to collective bargaining in the first place. The outcome was an unjust result that purported to uphold a constitutional entitlement to collective bargaining, but effectively denied that right to Ontario's agricultural workers.

How the *Fraser* case proceeded through the courts is well explained in Judy Fudge's introductory chapter. Professor Fudge elucidates what was decided in each of the opinions expressed. She suggests that the debate between the majority and minority judges ceased to be about whether the *AEPA* provided support for effective collective bargaining (the question answered by Abella J.), and became instead a debate about whether the section 2(d) right to free association under the *Charter* required the Ontario legislature to provide “a particular form of collective bargaining rights to agricultural workers, in order to secure the effective exercise of associational rights.”¹⁰ Fudge contends that, thus side-tracked in a debate over whether to constitutionalize the Wagner Act model, the Court strayed away from what was really being asked of it.

⁹ Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012).

¹⁰ *Fraser* (SCC), *supra* note 6 at para 18.

The next three chapters of the book give a history of farm workers' exclusion from labour rights in Ontario, their "exceptionalism," and their battle to secure those rights. In Chapter Two Eric Tucker — law professor and one of the book's editors — explains the historical context of the *Charter* challenge in *Fraser*. He speaks of the invisibility of the agricultural workers in *Fraser* — their circumstances, their particular vulnerability as contingent migrant labourers, and the reality of their working lives. Tucker traces the history of legislation affecting farm workers in Ontario, showing how late they received even basic protections, with employer-favouring exceptions, under workers' compensation, employment standards, and health and safety legislation. Tucker shows how rising capitalization and concentration in agricultural production was matched with increased employer demand for low-cost labour. This concentration of ownership and production in agribusiness resulted in greater reliance on immigrant labourers, whose compliance was guaranteed by the threat of being returned home or of not being selected for future employment. Tucker criticizes the failure of the majority in *Fraser* to engage in a fact-specific inquiry into the history and social reality of farm workers. The result was to continue farm workers' exceptionalism, by failing to give them a meaningful right to freedom of association.

In Chapter Three, Wayne Hanley, national president of the UFCW, recounts the long struggle of farm workers to try to protect their collective interests through unionism. He describes the harsh conditions in which farm labourers routinely work, and the efforts by the UFCW and the Canadian Labour Congress to organize them. The Global Justice Caravan Project was established, a portable outreach office to meet the mostly immigrant farm workers and address their needs. The project is now part of the Agricultural Workers Alliance (AWA), formed to coordinate the struggle to improve agricultural workers' situations across Canada. Hanley, commenting on the *AEPA*, says that it "delivered just the protection the corporate farm lobby wanted: legislation to protect the industry against the labour and organizing rights of agricultural employees."¹¹

Kerry Preibisch, a professor specializing in international migration, shows in Chapter Four that agricultural workers are primarily foreign migrant labourers whose temporary status in

¹¹ *Supra* note 9 at 69.

Canada and legal restrictions on their ability to change jobs make them particularly vulnerable to exploitation and abuse.¹² Each year some 40,000 men and woman come from more than 70 countries to work in Canada's agri-food industries.¹³ They earn no residence rights while working here. Preibisch explains the development of Canada's temporary migration programs, how they work to the advantage of agribusiness, and how exploitable are the temporary foreign migrant farm workers admitted under the programs. She notes that "the sources of migrant farm workers' vulnerability, precariousness, and cheapness are multiple and intersecting."¹⁴

The lesson of these first chapters is disturbing: agricultural workers are among the most vulnerable sector of workers, yet, as a result of the decision in *Fraser* upholding the *AEPA*, they have been relegated to a subservience that will likely ensure they cannot achieve any substantive improvement to their wages or living and working conditions.

In her chapter, Fay Faraday, a social justice lawyer and another of the volume's editors, recounts the constitutional challenges that preceded *Fraser*. She notes the courts' consistent failure to afford equality rights to farm workers, and how that has resulted in their continued vulnerability, marginalization, and ill treatment. While there have been expressions of sympathy by the courts, these have not been translated into a recognition of collective rights for agricultural workers which might allow them to protect themselves. Indeed, Faraday points out that, in *Fraser*, the Supreme Court failed to refer to some 40 volumes of evidence, much of which "examined the history and present day practice of systemic marginalization experienced by agricultural workers."¹⁵

With respect to the agricultural workers' *Charter* equality rights claim in *Fraser* — based on the section 15 guarantee of equal protection under the law, without discrimination — Faraday argues that this claim is distinct from the workers' freedom of association claim: "neither claim depends on the other for success."¹⁶ Only Ontario and Alberta preclude farm workers from

¹² *Ibid* at 118.

¹³ *Ibid*.

¹⁴ *Ibid* at 108.

¹⁵ *Ibid* at 112.

¹⁶ *Ibid* at 111.

exercising collective bargaining rights granted to other workers. For this reason, she contends that the exclusion of farm workers from the *LRA* amounts to discrimination on the test applied by the courts, because it perpetuates prejudice and stereotyping against those workers. The disempowerment of Ontario and Alberta farm workers, contrasted to other private-sector workers in those provinces, means that they are deprived of an essential feature of their personal dignity, thereby infringing the section 15 guarantee.

As an interesting complement to the written essays, the book includes a poignant photo essay on the lives of migrant farm workers by photographer Vincenzo Pietropaolo, reminiscent of John Berger's *A Seventh Man*.¹⁷

Chapter Seven is authored by Paul Cavalluzzo, who represented the UFCW and farm workers in *Fraser*. With methodical logic, he explains how the Supreme Court majority was distracted from the underlying facts of the case — facts which manifestly showed the need for greater collective rights for farm workers — by a debate on the role of the Wagner Act model in upholding workers' constitutional rights. As a result, he asserts, “the plight of farm workers in Ontario was given inadequate focus and attention and, accordingly, their discriminatory treatment by the legislature of Ontario continues.”¹⁸ Indeed, Cavalluzzo writes, “[t]o this day, the [Ontario] government has never explained why these vulnerable workers should be denied the kind of legislative protection to which other employees in Ontario are entitled.”¹⁹

The author goes on to describe in some detail the evidentiary record that was before the Supreme Court in *Fraser*. The record included the fact that “no association of farm workers has ever been successful in organizing and engaging in collective bargaining with any employer under the *AEPA*”²⁰ since it was enacted (a period of nearly a decade). In light of this fact, and more generally that farm workers have been struggling for over 40 years to secure meaningful collective bargaining rights, Cavalluzzo points out the cruel irony of the majority's conclusion in *Fraser* that the farm workers' application under the *Charter* was premature.

¹⁷ John Berger & Jean Mohr, *A Seventh Man* (London: Verso, 2010).

¹⁸ *Supra* note 9 at 157.

¹⁹ *Ibid* at 162.

²⁰ *Ibid*.

As Otto Kahn-Freund said in *Labour and the Law*, the primary purpose of labour law is to balance the social powers of capital and labour. Picking up on this point, Cavalluzzo suggests the correct approach would have been for the Court to determine the impact of the *AEPA* “on the equality of the bargaining power between labour and management, as well as the economic and political vulnerability of the workers making the constitutional claim.”²¹ He argues that in *Fraser*, unlike in *Dunmore* and *B.C. Health*, the majority was so deferential to the legislature that it became activist in defending the *AEPA*, reading in a duty to bargain in good faith which no party had argued was even implicit in the legislation.

Steven Barrett and Ethan Poskanzer, who also appeared as legal counsel in *Fraser*, representing the intervener Canadian Labour Congress, provide an extensive analysis of the legal principles and presumptions informing the Court’s decision. Describing the *AEPA* as “a deliberate and conscious legislative action and decision to exclude” farm workers from the benefits of collective bargaining, they too argue that agricultural workers in Ontario cannot effectively engage in meaningful bargaining outside of the “dominant and comprehensive legislative model” of the *LRA*.²²

According to Barrett and Poskanzer, “the Wagner Act model itself can readily be viewed as a trade-off, under which the constitutionally protected pre-statutory freedoms to bargain and strike (for recognition, for bargaining, and for enforcing collective agreements) were restricted in return for statutory protections.”²³ They criticize the Court’s failure to apply the Wagner Act model to farm workers. In their words:

... to treat the legislative exclusion from the normative collective bargaining regime as only or primarily an instance of legislative inaction is to ignore the extent to which the Canadian collective bargaining system has, over the past seventy years of deep and extensive state regulation, become synonymous with the normative legal labour relations regime embodied in and instantiated by the *Labour Relations Act, 1995* (particularly for vulnerable workers).

²¹ *Ibid* at 173.

²² *Ibid* at 216 n 55.

²³ *Ibid* at 221.

Granting access to that regime would not, in the authors' view, have the effect of "constitutionalizing" the Wagner Act model. Rather, as was recognized by the Ontario Court of Appeal and by Abella J. in the Supreme Court, "as long as the Wagner Act model was the normative, and indeed, exclusive legislative vehicle for instantiating and giving effect to collective bargaining, exclusion from the rights and protections offered by that collective bargaining regime, as a practical matter, nullified the capacity of agricultural workers to collectively bargain in any meaningful sense."²⁴

The authors examine what they call Justice Rothstein's "equal protection" approach, in which freedom of association cannot be understood to confer greater rights on the collectivity than on an individual. That approach denies any additional or collective dimension unique to associational activity. Rothstein J. held that the only activity protected by section 2(d) is the formation of an association. This is a narrower view of the scope of protection than that expressed in *Dunmore*. On Rothstein J.'s approach, the purposes of an association do not attract *Charter* protection. In his view, the means by which the purpose of trade union association is achieved — collective bargaining, with the coercive threat of a strike or lockout — is not protected. Barrett and Poskanzer suggest that this interpretation of the constitutional guarantee undermines the right to be free of government action or legislation that interferes with the process of collective bargaining, as does the *AEPA*. In contrast, *Dunmore* had protected individuals acting together to pursue "objectives that are uniquely collective in nature or which have an inherently collective component."²⁵

Barrett and Poskanzer also raise the issue, avoided by the Court in *Fraser*, of whether the right to strike, an essential element of the collective bargaining process, falls within the ambit of the guarantee of free association in section 2(d) of the *Charter*.²⁶

²⁴ *Ibid* at 228.

²⁵ *Ibid* at 213.

²⁶ If the Supreme Court grants leave, this issue will be squarely before the Court in an appeal by the Saskatchewan Federation of Labour in the case of *Saskatchewan v Saskatchewan Federation of Labour*, 2013 SKCA 43 (available on CanLII), application for leave to appeal to the Supreme Court of Canada filed 24 June 2013, [2013] SCCA No 257 (QL).

Derek Fudge, national director of policy development of the National Union of Public and General Employees (NUPGE), argues that *Fraser* was really a re-litigation of the *B.C. Health* case. Employers were hostile to *B.C. Health* and eager to roll back its impact. The Court was accused of being too activist, too interventionist in labour law. The Court in *Fraser* seems to have internalized this accusation. Perhaps it had gone too far in *B.C. Health*, raising the hopes of workers and trade unions of obtaining constitutional protection for collective bargaining. *Fraser* was a partial retraction of the Court's bold statements in *B.C. Health*, enfeebling its impact. Fudge describes the decision in *Fraser* as a political compromise, affirming the constitutional right to collective bargaining, yet limiting the practical meaning of that right.

Fudge describes three decades of increasing statutory restrictions on workers' rights, of which the *AEPA* is but one manifestation. He notes how cuts to corporate taxation have reduced government revenues and weakened the state's capacity to counter growing inequality in Canada. In this context, he points to the importance of constitutional labour rights as a counterweight to growing income and wealth disparity in Canada, and explains why growing inequality is an increasing threat to the institutions of a free democratic society. He suggests that the courts should recognize the restrictions that decisions such as *Fraser* impose on the capacity of workers to advance their interests and should resist the trend towards greater inequality in Canadian society.

In his chapter, law professor Patrick Macklem traces how the Supreme Court of Canada has moved from a dualist conception of international law, "whereby an international treaty obligation does not become domestic law unless it has been implemented in domestic legislation,"²⁷ to one that treats all international law, even treaties unratified by Canada, as an instrument of national law. He describes this as a post-dualist conception of Canada's constitutional relationship with the international legal order.²⁸ The effect of this recognition is that all Conventions and Recommendations of the International Labour Organization (ILO), including those on collective bargaining, are treated as binding in Canadian law. Consequently, in *B.C. Health* the Court treated the conventions ratified by Canada no differently from those it

²⁷ *Supra* note 9 at 262.

²⁸ *Ibid* at 284.

had not ratified. Both were seen as relevant to defining Canadian domestic law. As a result, “even nonbinding international legal norms possess constitutional significance.”²⁹ What matters now “is simply consistency with ‘the current state of international thought on human rights.’”³⁰

In the book’s final chapter — in a similar vein to Macklem, though more directly focused on labour law — U.K. lawyers Keith Ewing and John Hendy compare decisions of the European Court of Human Rights³¹ with those of the Supreme Court of Canada. Ewing and Hendy note that, for ILO purposes, “collective bargaining is (1) a defined process (negotiation), for (2) a specific purpose (regulation of terms and conditions of employment), with (3) a view to a prescribed outcome (a collective agreement).”³² They show that the European Court has clearly embraced the ILO injunction that its members are bound to apply all ILO Conventions and Recommendations, including the obligation to promote effective collective bargaining. The European Court has held that the right to collective bargaining must be evaluated against the standards set by the ILO. This was not the approach followed by the Supreme Court of Canada in *Fraser*, even though, according to Ewing and Hendy, Canada is bound by ILO principles because of its membership in the organization. Among those principles is the obligation to ensure that “measures adapted to national conditions shall be taken to promote collective bargaining.”³³ The Supreme Court of Canada failed to do so in *Fraser*, treating the *AEPA* as sufficient compliance whereas

[b]y any standard, the rudimentary procedure in the *AEPA* falls short . . . First, because the right to make representations is not a right to enter into negotiations; and second, because the right to make representations respecting terms and conditions of employment is without indication as to the purposes for which these representations may be made; and third, because no provision is made for the outcome of this process by way of collective agreement, the terms of which should be binding.³⁴

²⁹ *Ibid* at 270.

³⁰ *Ibid* at 282, quoting from the judgment of McLachlin CJ and LeBel J in *B.C. Health*, *supra* note 8 at para 78.

³¹ See, in particular, the European Court’s decision in *Demir and Baykara v Turkey*, [2008] ECHR 1345.

³² *Supra* note 9 at 306.

³³ *Ibid* at 290, quoting from Article 5 of Convention C154 – Collective Bargaining Convention, 1981 (No 154).

³⁴ *Ibid* at 306-307.

Moreover, the European Court of Human Rights defers to the specialist tribunals of the ILO, particularly its Committee on Freedom of Association, which has found that the *AEPA* failed to provide “appropriate machinery and procedures for the promotion of collective bargaining in the agricultural sector.”³⁵ In contrast, the Supreme Court of Canada in *Fraser* did not treat the CFA’s conclusion as authoritative.

In summary, *Constitutional Labour Rights in Canada* has two goals: to tell the story of the farm workers’ struggle in Ontario to secure constitutional rights at work, and to refocus the legal debate over the scope of the constitutional protection of freedom of association. The book is a splendid read and substantially accomplishes both of these goals. It is rich in its analysis of all aspects of the *Fraser* case — the legal issues, the divergence from international law, the social and political implications, and particularly the unfair impact on the farm workers.

³⁵ ILO, *Reports of the Committee on Freedom of Association*, 258th Report (November 2010), Case No 2704 (Interim Report) at para 361.