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Labour Rights and Union Strategies

Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case, By Fay Faraday, Judy Fudge and Eric Tucker (2012), Toronto: Irwin Law, 322 pages. ISBN: 9781552212912.

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BOOK REVIEWS: *Debates on a book* / Débats autour d'un ouvrage

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Labour Rights and Union Strategies

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In April of 2011, the Supreme Court of Canada issued its ruling in the *Attorney General of Ontario v Fraser* on the constitutionality of Ontario's *Agricultural Employees Protection Act* [AEPA]. This act had been passed by the province's Conservative government, in the wake of the Court's 2001 ruling in *Dunmore*, that the exclusion of farmworkers from the province's labour relations regime was unconstitutional on the grounds that the government had an obligation to help those too vulnerable to exercise their right to freedom of association on their own to do so. The United Food and Commercial Workers Union [UFCW], which had been organizing farmworkers since the late 1970s, had challenged the constitutionality of AEPA on the grounds that it didn't provide the same bargaining rights as the *Ontario Labour Relations Act*. In launching this challenge, the union and its supporters' expectations were buoyed by the Supreme Court's 2007 decision in *B.C. Health Services*, which dismissed the arguments in the infamous "trilogy" of rulings in 1987 concerning the meaning of freedom of association and seemingly asserted that freedom of association did include the right to engage in collective bargaining. They were further encouraged when the Ontario Court of Appeal ruling in 2008 agreed with them. The Ontario government then appealed this decision to the Supreme Court which ruled in their favour, dashing the hopes of the union and its supporters.

That ruling inspired *Constitutional Labour Rights in Canada*. The book brings together academic and practising lawyers as well as a few trade unionists, many of whom were involved in the Fraser case as appellants, lawyers or witnesses. As supporters of workers' rights to organize, to bargain and to strike generally, and as realized in the standard Canadian industrial relations regime, all were

dismayed, if not angered, by the courts ruling denying farm workers the same rights as other workers.

Broadly speaking, the book tells two stories. The first part of the book tells the story of farmworkers in Ontario, the conditions under which they work and the efforts of the United Food and Commercial Workers [UFCW] to help them realize the trade union rights available to other workers. The exclusion of farmworkers from the Post War labour legislation, as Eric Tucker's thoughtful historical analysis shows, was hardly unique, but rather another instance in a long pattern of "exceptionalism". Kerry Preibisch provides a critical analysis of the temporary migration programs that account for growing numbers of migrant workers, showing how these exacerbate the vulnerability of farm workers. Other chapters look at the efforts of the UFCW to organize farm workers and the court's treatment of the evidence regarding the inequality experienced by farm workers. Finally, this section includes a poignant series of photographs by Vincenzo Pietropaolo capturing the arduousness of farm work and the dignity of those doing it.

The other story, told in the second part of the book, critically examines how the Supreme Court has interpreted freedom of association in the workplace, as it pertains to the rights of working people to organize into unions, to bargain and to strike, with particular attention to the disputes among them as reflected in the *Fraser* ruling. Paul Cavalluzzo offers a critical look at the role of judicial deference in the ruling by the majority, and Steven Barrett and Ethan Poskaner look at the distinction between legislative action and inaction and then go on to offer a sharp critique of Justice Rothstein's argument that the courts decision in *B. C. Health Services* wrongly extended freedom of association to the objectives sought. Derek Fudge evokes the larger political context of the farm workers struggle, drawing attention to the general attack on trade union rights in Canada and its implications for inequality, and the final two chapters by Patrick Macklem, Keith Ewing and John Hendy look at the evolving role of international laws and legal norms in the court's decisions.

Overall, *Constitutional Labour Rights in Canada* convincingly exposes the manifest injustice done to farm workers by the court's decision in *Fraser*, while offering an informative dissection of the contending rationales of the various Justices on the court. These virtues notwithstanding, the book is not without its shortcomings.

The book is focused on the exclusion of Ontario farm workers from what the editors refer to as the Wagner model of industrial relation that exists in Ontario and Canada generally; exclusive representation for the union, the employer's duty to bargain and the right to strike to settle negotiating disputes. But the broader context for it is the unrelenting attack by governments at all levels of the State on the collective bargaining rights of organized workers, especially

those working in the public sector. This has been especially pronounced at the federal level where a combination of wage freezes and back to work legislation has rendered federal workers collective bargaining rights mute since the mid-1990s. Several of the measures involved in this attack have been the subject of the key Supreme Court rulings [the “trilogy” decisions in 1987 and *B.C. Health Services* in 2007] regarding the meaning of freedom of association in the workplace that preceded *Fraser*. In assessing the book then, we need to consider it in relation to both dimensions.

First, consider the case of farm workers themselves. What it might have meant for these workers if the Supreme Court in *Fraser* had actually decided in support of the Ontario Court of Appeal’s ruling? This went beyond *B.C. Health Services* in asserting that meaningful collective bargaining required some elements of the “Wagner” model, notably exclusive representation and the duty to bargain, but not the right to strike. In addition to a great moral victory, farm workers would certainly have benefitted materially from such a decision, but as the chapter by Eric Tucker shows, in all likelihood, the benefits would be very limited. Agricultural workers are covered by the general labour legislation in 8 other provinces. Nonetheless, union density is less than 10 % in 7 of these, with an average of around 6 %—roughly one third of the 17 % in the private sector, Canada wide. Assuming that Ontario conformed to this pattern, union density in Ontario would double from its current rate, of less than 3 %, to something in the order of 6-7 %.

Certainly, these numbers reflect the particular difficulties in organizing seasonal workers, many of whom are “unfree” but they also reflect the general inability of the unions to organize workers in the private sector. This calls for a serious, critical examination of unions existing approach to organizing and indeed exploration of alternatives to the current focus on gaining majorities in specific workplaces. However, all the book offers on current organizing is a superficial, and surprisingly satisfied account of the UFCW’s efforts by its president. This is perhaps not surprising given that the UFCW didn’t challenge the NDP’s farm worker legislation, which failed to provide for the right to strike, arguably the most important workplace right, and more generally hardly has a reputation for being among the countries more democratic and militant unions. The closing pages of Eric Tucker’s chapter do raise the question of alternative strategies in the wake of *Fraser*. Evoking the boycotts used by California farm workers, he points out that, ironically, farm workers currently have more options for collective action than they would have had under the *Canadian “Wagner” Model* with its binding collective agreements, which prohibit strikes while in force [albeit with greater risks]. The points raised are certainly a provocative breath of creativity, but only begin the discussion.

Let's now turn to the broader context; the unrelenting attack by governments at all levels of the State on the collective bargaining rights of organized workers. In the face of these attacks, it was understandable that the unions would turn to the courts. While it was most unlikely that the courts would have interpreted freedom of association so broadly as to have stayed the attack on trade union rights, they might have provided one that at least contained or limited it in meaningful ways. The real question was how the unions went about this; would it be their predominant strategy or would it be used as a compliment to pursuing the most important response to attacks by employers and the State—the education and mobilization of their members and working people generally. To limit their strategy to the courts ignores the extent to which judicial decisions are shaped by broader economic and political forces. This is apparent from a brief look at the court proceedings and the judgements in the “Trilogy” cases—from the majority judgement's denial that freedom of association was a distinct conception of freedom, notwithstanding the Charter's assertion to the contrary, to the contextual considerations of Justice McIntyre's concurring judgement. Workers would not have realized collective rights in the first place without fighting in the streets and they aren't going to defend them without doing so again.

As it turned out, going to the courts was virtually their only strategy, and it is not surprising that it has been a failure. Yes, *Dunmore*, and *B.C. Health Services* did set some limits on the extent to which governments could act with impunity, but even the latter, as Fudge notes in her introduction, fell far short of protecting collective bargaining and the right to strike as understood within the field of industrial relations. This was far from a universal view within the labour movement, and even within the judicial system, and this perhaps helps us to understand why so much of the *Fraser* decision was a rehash of *B.C. Health Services*. Be that as it may, *Fraser* has served to destroy any illusions about where the court was headed.

Unfortunately, the book fails to address this failure. Worse, insofar as it even addresses the question of where to go next, it steers the labour movement back towards the courts. This is not only the direction [perhaps understandable] provided by the lawyers in the book, but even by Derek Fudge of NUPGE—the only other person to raise the question.

In sum, the book has much to say to those in law schools and the circles surrounding them who are interested in the various judicial arguments used to buttress different positions on freedom of association, but far too little to those concerned to find ways to advance the interests of farm workers and the labour movement more generally.