

## **Precarious, Peripheral and Unfree Workers**

*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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and peaking favourably the opinion of the public. On the other hand, “To the Barricades for Majoritarian Exclusivity” sounds like the title of a biting bit of Monty Python nonsense.

In my judgement, this volume will debase rather than nourish labour’s cause. Buy it; read it if you must. But then, deposit it with the legion of other well-meaning but unintentionally malevolent compendiums. Look for a better, more comprehensively democratic solution than that proposed here. Farmworkers are entitled to it. Other developed countries have done it. If our convictions and commitment are strong enough, we can too.

## Precarious, Peripheral and Unfree Workers

**By Travis Fast, Ph.D.**

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*The man 'cross the street he don't move a muscle  
though he's all covered in dust  
says constitutions of granite can't save the planet  
what's left to captivate us  
what's left to captivate us  
what's left to captivate us  
what's to become of us*

—Tragically Hip, *Save the Planet*

In the face of a now permanent crisis in social democratic politics in general and in that of its constituencies—the working class and its collective institutions such as trade unions—it is perhaps not surprising that much of what passes for the organizing of subordinate classes has drifted more and more towards a cadre model of interest articulation. While this professionalization of political organizing and interest articulation may be well suited towards achieving certain political ambitions—middle class brokerage politics for example—it would be hard to argue, on the evidence, that the movement away from mass organizing and interest articulation has served the ‘progressive’ left very well over the last generation. In many ways 1982, with the adoption of the *Charter of Rights and Freedoms*, was the high water mark of social democratic instincts in the Canada body politic. Does anyone imagine that, for example, Section 15 (2), the affirmative action clause, would make it in to the *Charter* were it drafted in the present ideological environment? Indeed, the whole idea of collective rights and substantive equality is more distant to the present *zeitgeist* than those values were in the early 1980s.

The responses by the progressive left to this crisis have been diverse; they involved much hand wringing, introspection, and above all attempts at deep 'modernization' and deep institutionalization. In many ways, the volume edited by Faraday *et al.* is simply about the attempt by trade unions and their legal allies to modernize and institutionalize the rights of some of the most peripheral members of the working class: migrant agricultural workers. But this volume is about much, much more than the legal, social and political plight of migrant workers in the Canadian agricultural sector. It is about the interpretation and the adjudication between strategies for making fundamental changes in Canadian law and politics of both the high and low variety. Put in the broadest terms, it is about the broader crisis in a humanist and "progressive" politics. All of these issues are broached explicitly and implicitly in this volume. In this critical review, I will proceed from the specific to the general issues raised.

Chapter two, three, five and six of this volume are concerned most specifically with the exceptionalism of agricultural workers and the work they do. Eric Tucker's chapter provides a good overview of the history of the legal exceptionalism that workers in the agricultural industry have had to deal with in Ontario (Canada) since the late nineteenth century. Before that time, agricultural workers were much like any other kind of workers: they were first subordinated under the masters and servant regime and then were served-up equal treatment under a *free* liberal regime.<sup>1</sup> As Tucker illustrates, however, by the end of the century, a persistent pattern of legal exceptionalism (less than the prevailing norm) for agricultural workers' rights was developed from health and safety and minimum standards legislation through to sanctioned collective activities such as organizing in unions and collective bargaining (p. 33-37).

In the Post-War Era, Tucker argues two factors had combined to further exacerbate the situation. First, the general pattern of exceptionalism continued; and second, successive Ontario and Federal governments moved increasingly towards an official *unfree* labour market supply policy.<sup>2</sup> Tucker observes that prior to the Second World War, the Canadian and provincial governments had met the demand for labour supply through immigration and the mobilization of internal reserves (p. 39). Tucker should have qualified this observation: Canada has, since its colonial inception, experimented with different forms of unfree labour from indentured servitude through to chattel slavery in an attempt to meet the labour supply needs of its bourgeoisie (colonial or otherwise; *grande ou petite*). In my view, the movement back towards an official unfree labour market supply policy after the Second World War and the recent expansion of the *Temporary Foreign Worker Programme* (TFWP) needs to be placed in this broader historical context. As does neoliberalism of which more will be said below. The point, here though, is that labour market exceptionalism is in the Canadian pedigree.

The two main sources of unfree labour market supply are administered through the *Seasonal Agricultural Workers Programme* (SAWP) and the TFWP. What the *Fraser* case represented above all, was the attempt by the UFCW and its lawyers to ameliorate rather than end the legal exceptionalism of agricultural workers. To understand how partial this attempt was, it is necessary to be cognizant that the *Fraser* case was not about ending the practice of an officially sanctioned unfree labour market supply policy. That is to say, it had nothing to do with asking the Supreme Court to rule that, as written, the SAWP and the TFWP, were unconstitutional. Rather it was about asking the Supreme Court to rule on the more narrow legal issue if Ontario's *Agricultural Employees Protection Act* (AEPA), introduced in response to the *Dunmore* case, passed constitutional muster in light of *Health Services*. The best that could have been hoped for in *Fraser*, is that agricultural workers would have been given quasi equivalent rights with respect to collective bargaining. However, it would have done nothing with respect to the official policy of unfree labour market supply. In an act of what Tucker describes as an "tendentious exercise of statutory interpretation," the *Fraser* ruling not only ruled that the AEPA was constitutional but, in doing so, cast a pall over the pro-collective bargaining ruling contained in the *Health Services* decision *vis-à-vis* the Supreme Courts interpretation of *Section 2(d)* of the *Charter*.

One of the persistent questions that arises in this volume is where the *Fraser* decision leaves those who placed their hopes on protecting workers and their unions from the now four decade long attack on collective bargaining and labour rights in Canada. The hope by many on the left was that, after *Dunmore* and *Health Services*, the Supreme Court seemed ready to accept the argument that unions and collective bargaining were part and parcel of a healthy post-industrial liberal democratic institutional landscape. After *Fraser*, many such as Wayne Hanley who contributed *Chapter Three* to the volume, have bluntly concluded that "for now the law is not a friend to the people" (p.81). The way forward Hanley suggests, and somewhat at odds with Tucker, is a broad based political strategy as he argues: "even in provinces where the law provides mechanisms for agricultural workers to organize, it has been furiously undermined by the combined forces of the industry, their lobby, and the implicit support of their political friends" (p. 79).

Here, I think Hanley makes a small error. There has been nothing implicit about the support of the agricultural industry's political associates. As Tucker's chapter clearly demonstrates, politicians from the two major political parties have served up one piece of exceptional legislation after another to the industry since the end of the Second World War if not before. There is nothing implicit about the SAWP, the TFWP or indeed Ontario's AEPA. In this sense, the laws surrounding agricultural workers and their fundamental human rights are not only exceptional,

they are explicitly segregationist. As Kerry Preibisch's chapter so well describes, the laws have been designed to take advantage of the most disadvantaged segments of the working class in Canada and abroad. And here, class is the central pole of discrimination. It is not just that agricultural workers are not afforded the same legal rights as their industrial and post industrial brethren, but rather that many are legally segregated from access to citizenship. That is, they are legally segregated by their status as non-citizens. In combination, unfree labour market supply and exceptionalism create a vicious cycle of downward pressure on both wages and working conditions as precarious and peripheral Canadian agricultural workers are put, in direct competition with precarious, peripheral and unfree agricultural workers from abroad and *vice versa*.

One of the *lacunai* in this volume is any attempt to systematically map out the connection between present agricultural policy, particularly with the expansion in the low skill segment of the TFWP, and the broader neoliberal logic at play in the global political economy. In a sense, Canada's official policy of unfree labour market supply is a mirror image of its broader accumulation strategy. If the logic of neoliberal globalization has been to put Canadian manufacturing workers in direct competition with their low wage foreign counterparts via the free movement of capital and goods, then the logic of expanding the supply of unfree labour is in complete keeping with this logic. Agricultural production somewhat like resource extraction is "place fixed" as are certain service sector occupations. On the side of the State, the official policy of increasing the supply of unfree labour needs to be put in the context of the desire by policy makers to maximise the benefits of a relatively unlimited global labour supply curve while minimising the down side fiscal risks associated with citizenship. And, on the side of employers, these self same policies serve to deliver the benefits of globalization, while minimizing the possible profit constraints with respect to the place fixed nature of their economic activities.

As several authors in the volume noted, when the conservative minister introduced the AEPA, he was explicit that the government did not intend to confer collective bargaining rights, in any form, on agricultural workers. While most of the authors would take this as the primary motive for attempting to constitutionalize collective bargaining, the *Fraser Case* makes clear that the problem is broadly political and not, by any means, strictly legal—whatever these distinctions may mean when it comes to High Court decisions. Fudge wants to argue the court got side tracked on the question of constitutionalizing the *Wagner Act* model (WAM). Paul Cavalluzzo wants to argue they made a *Wrong Turn in a Fog of Judicial Deference*. I would argue the Supreme Court was not lost in a fog, or side tracked; rather it deployed a "tendentious exercise of statutory interpretation" to maintain the *status quo* in the agricultural sector

and remained unmoved by the class argument as to why it should not defer to the legislature.

What seems evident is that the *Fraser Case* makes clear that the road to constitutionalizing collective bargaining rights is much less certain than many hoped it would be. It also seems clear that most contributors to this volume seem aware that even should something like the WAM enjoy full constitutional protection, the positive implications for workers are narrow and limited. Several authors note the overall decline in union membership and influence. In the introductory chapter, for example, Judy Fudge makes the cogent observation that “[c]onstitutional protections for labour rights will not solve the problem of organized labour slow decline”. Moreover, “[n]or will such legal rights revitalize [unions] role as a vibrant social movement” (p. 22). Rather the best that can be hoped for in the constitutionalizing of workers’ rights, according to Fudge, is the fostering of “democratic deliberation.”

Although I would agree that courts have a role to play in democratic deliberation, I would argue that the courts cannot and should not be relied upon for sustaining democratic deliberation. The problem, as many authors noted, is political. Even if the courts could be a forum for the mere technocratic adjudication between established norms, values and rules, these norms, values and rules need to exist *a priori* to the deliberation. And they need to exist in the blood and bones of the body politic. Unions have always been a partial solution to the problem of articulating and representing the needs of workers. I would argue it is the very partialness of the solution that made unions so vulnerable to political attacks. Neoliberal globalization, with the free movement of capital and goods and the unfree movement of workers, means that the ability of unions to even partially articulate and ameliorate the condition of workers has become precarious. The *terrain* of the struggle will have to move out of the workplace, out of the union halls, and out of the courts. The struggle for workers’ rights will have to be universalized at a broadly political level, as will the benefits that flow there from.

I recommend this book to anyone interested in politics, law, and the sociology of both. I would also recommend this book to humanist progressives who seek to identify the dead ends of left politics and the limits to the modernization, professionalization and institutionalization of left politics.

## Notes

- 1 Unfree forms of labour supply can be characterized as those that do not render the worker free from control of the means of production, and free to choose for which employer and in which sector of the economy she will work.
- 2 See footnote 1.