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Book Review

CONSTITUTIONAL LABOUR RIGHTS IN CANADA: FARM WORKERS AND THE *FRASER* CASE, by Fay Faraday, Judy Fudge & Eric Tucker (eds)[1]

JAMES A. GROSS[2]

THE SUPREME COURT OF CANADA (the Court) on 29 April 2011 issued its decision in *Ontario (Attorney General) v Fraser*,[3] the Court's most recent attempt to define the scope of constitutionally-protected freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms*.[4] *Fraser* involved a challenge to the constitutionality of an Ontario statute, the *Agricultural Employees Protection Act* (*AEPA*),[5] that, among other things, permitted farm workers in Ontario to make "representations" to their employers but required those employers only to listen to those representations, if made orally, or to read them, if written.[6] The Court in *Fraser* found that the *AEPA* met the constitutional standard for freedom of association.

The thirteen authors (including the three editors) of eleven separate essays in this book focus on Canadian agricultural workers and their attempts to achieve effective and constitutionally-protected collective bargaining. The editors openly express their commitment to social justice for agricultural workers and to securing for them the labour rights and standards available to the "vast majority" of other workers in Ontario.[7] In her introductory essay, Editor Judy Fudge, who was the Lansdowne Professor in Law at the University of Victoria when the book was published, describes the contributors to this collection of essays as "interested

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1. (Toronto: Irwin Law, 2012) 322 pages.
2. Professor, Cornell University.
3. 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*].
4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act, 1982 (UK), c 11 [*Charter*].
5. SO 2002, c 16.
6. *Ibid*, s 1(2).
7. Faraday, Fudge & Tucker, eds, *supra* note 1, at ix.

and partisan" and writes that the collection's goal is to intervene "in the debate over the *Charter*'s application in the world of work rather than to provide a dispassionate reflection on it."[8]

The essays state a pro-farm-worker and pro-collective-bargaining point of view, but who could or should be disinterested about violations that deny workers their fundamental rights and cost them their livelihoods and even their lives? Whether "disinterested" or "advocate," the standard of judgment should be whether every effort has been made to present relevant evidence thoroughly and accurately. The authors of these essays have met this high standard of scholarship.

As Professor Fudge explains, the book's objective is to bring together two stories: the social as well as the legal context of *Fraser*. Consequently, the first four essays discuss the struggle of farm workers to obtain collective bargaining rights in Ontario. In his essay, Editor Eric Tucker, Professor at Osgoode Hall Law School, York University, sets out to redress what he terms the "invisibility" of Ontario's agricultural workers—the reality of their lives and their exclusion from protection—in the Court's decision in *Fraser*.[9] As a result of the Court's failure to engage this "social reality," Professor Tucker says the Court "move[d] to an abstract and, frankly, tendentious exercise of statutory interpretation."[10] He presents two post-*Fraser* strategies to obtain collective bargaining rights for Ontario farm workers: one to abolish, through constitutional litigation, the exclusion of agricultural workers in Ontario from the protection of the law, which he believes holds "little promise";[11] the other to confront the "enormous challenge" of organizing farm workers and establishing collective bargaining "without 'the law.'"[12]

Wayne Hanley, National President of United Food & Commercial Workers Canada (UFCW Canada), describes the challenges of organizing people who do dangerous and hazardous work in heat and high humidity, with toxic chemicals, and who are often immigrants with limited fluency in English. Such workers are unlikely to raise workplace grievances because they fear deportation or blacklisting. Despite worker pleas that "[w]e're human beings. We're not farm animals. We have human rights,"[13] Hanley laments that politics and corporate interests

8. Judy Fudge, "Introduction: Farm Workers, Collective Bargaining Rights, and the Meaning of Constitutional Protection" in Faraday, Fudge & Tucker, eds, *supra* note 1 at 5.
9. Eric Tucker, "Farm Worker Exceptionalism: Past, Present, and the post-*Fraser* Future" in Faraday, Fudge & Tucker, eds, *supra* note 1 at 30.
10. *Ibid* at 47.
11. *Ibid* at 52.
12. *Ibid* at 56.
13. Wayne Hanley, "The Roots of Organizing Agriculture Workers in Canada" in Faraday, Fudge

have "trumped" farm workers' rights even in provinces where labour law includes agricultural workers.[14] Because he considers the law no friend to the people, he proposes action as the only legitimate response to *Fraser*, particularly the "election of governments and leaders who understand that workers' rights are human rights."[15]

Kerry Preibisch, an Associate Professor at the University of Guelph, has spent more than a decade researching migration to Canada's farm and food industry. She writes about the approximately forty thousand men and women from over seventy countries who enter Canada each year on temporary authorizations to work in the agri-food industry. Using a rights-based approach, she finds that the opportunities provided by labour migration to Canadian agriculture "come at a significant cost to migrants' freedom, security, and human dignity."[16] For example, she notes that Canada's three "managed migration schemes"[17] still reflect the historic roles that race and gender have played in the country's immigration policies so that migrants are perceived in "highly racialized terms," adding to their social exclusion.[18]

Editor and social justice lawyer Fay Faraday, who was Counsel to UFCW Canada in the *Fraser* case, contributes an interesting transition essay, connecting *Fraser*'s social and legal contexts. She maintains that the Court's failure to engage the equality argument raised in *Fraser*, based on section 15 of the *Charter*,[19] has created a "disconnect or gap in which the court can express 'sympathy' for the vulnerable position of agricultural workers without confronting how law has been used to construct that very vulnerability."[20] Ms. Faraday also asserts that the exclusion of farm workers from collective bargaining "dispossesses them of their stake in workplace democracy, devalues their interest in participating in shaping the terms and conditions of their work, and deprives them of a remedy for their pre-existing disadvantages."[21]

& Tucker, eds, *supra* note 1 at 58.

14. *Ibid* at 59.
15. *Ibid* at 80.
16. Kerry Preibisch, "Development as Remittances or Development as Freedom? Exploring Canada's Temporary Migration Programs from a Rights-based Approach" in Faraday, Fudge & Tucker, eds, *supra* note 1 at 82.
17. *Ibid* at 86.
18. *Ibid* at 100.
19. *Charter*, *supra* note 4 at s 15. Section 15 of the *Charter* provides that "every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination… ."
20. Fay Faraday, "Envisioning Equality: Analogous Grounds and Farm Workers' Experience of Discrimination" in Faraday, Fudge, & Tucker, eds, *supra* note 1 at 111.
21. *Ibid* at 136.

The book includes a photo essay by award-winning photographer Vincenzo Pietropaolo, which offers what he terms a “glimpse” into the lives of Ontario’s migrant farm workers.[22] It is moving and powerful. As I have written elsewhere, there is a danger in academic analysis and other musings to shift the focus of human rights away from those who are suffering the real-life consequences of rights violations. Vincenzo Pietropaolo’s photo essay combats this tendency.

The essay by Paul Cavalluzzo, senior partner in a Toronto law firm and counsel to UFCW Canada before the Court in *Fraser*, is the first in the collection devoted solely to the judicial history and legal arguments in *Fraser* and related cases. He provides a chronological discussion that is very useful for readers not conversant with Canadian labour law. He points out, for example, that the enactment of the *Charter* raised the possibility that the Court would end the exclusion of farm workers from Ontario’s *Labour Relations Act* (LRA).[23] Before that could be determined, Ontario, in 1994, enacted the *Agricultural Labour Relations Act* (ALRA),[24] which provided, among other things, exclusive representation, a duty to bargain in good faith, and the right to grievance arbitration. Seventeen months later, a new government repealed the ALRA and amended the LRA to exclude farm workers from coverage. UFCW Canada challenged the repeal and exclusion as violations of section 2(d) of the *Charter*. In *Dunmore v Ontario (Attorney General)*,[25] the Court ruled for the first time that section 2(d) (and international human rights law) did protect certain activities that are part of the right to organize, such as “making majority representations to one’s employer.”[26] While the Court in *Dunmore* did not change prior rulings that section 2(d) did not protect collective bargaining, it did direct the Ontario legislature, because of the vulnerability of agricultural workers, “to enact a statutory framework including protections of the freedom to organize.”[27]

In response to the Court directive in *Dunmore*, Ontario enacted the *Agricultural Employees Protection Act* (AEPA) in 2002.[28] Cavalluzzo states that Ontario never intended to confer collective bargaining rights on farm workers nor even considered

22. Vincenzo Pietropaolo, “Harvest Pilgrims: Migrant Farm Workers in Ontario” in Faraday, Fudge & Tucker, eds, *supra* note 1 at 139.
23. RSO 1980, c 228.
24. SO 1994, c 6.
25. 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*].
26. Paul JJ Cavalluzzo, “The *Fraser* Case: A Wrong Turn in a Fog of Judicial Deference” [Cavalluzzo, “The *Fraser* Case”] in Faraday, Fudge, & Tucker, eds, *supra* note 1 at 160.
27. *Ibid* at 161.
28. SO 2002, c 16.

this an option.[29] The AEPA did recognize a right to make representations to employers but obliged employers only to listen to those representations if made orally or to read them if written. The AEPA led to *Fraser*.

While *Fraser* was winding its way through the court system, the Court decided in *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*[30] that collective bargaining was protected as an exercise of freedom of association under section 2(d) of the *Charter*. The Court defined collective bargaining both as a union of employees negotiating with employers on workplace issues or terms of employment and as the "duty to consult and negotiate in good faith."[31] In *Fraser*, the Court majority reaffirmed its decision in *BC Health Services* but still found that the AEPA met the freedom of association constitutional standard. Cavalluzzo contends that upholding *BC Health Services* should have led inevitably to the conclusion that the AEPA was unconstitutional. He and other essay authors say that the Court was able to rule as it did in *Fraser* only by implying (one might say concocting) a duty to bargain in good faith even when all parties to *Fraser,* and the other lower courts in *Fraser*, had agreed that the AEPA did not impose a duty to bargain. Cavalluzzo points out that, after struggling to achieve collective bargaining rights for almost forty years, Ontario farm workers were told by the majority of the Court in *Fraser* that their application was "premature" because there was as yet "scant" historical record under the AEPA.[32]

In their essay, Steven Barrett and Ethan Poskanzer, partners in a labour law firm that represented the Canadian Labour Congress as an intervener in *Fraser*, explore the implications of *Fraser* for labour rights and rights litigation in Canada. They are more optimistic than their fellow authors that the majority opinion in *Fraser* provides "strong reaffirmation" of the *BC Health Services* principle "that, at least at some fundamental level, collective bargaining is protected by section 2(d)."[33] They also maintain that freedom of association under section 2(d) would be "vacuous," if it meant only that individuals were free to form associations.[34] Barrett and Poskanzer view the duty to bargain, which the majority in *Fraser* found implicit in the AEPA, to be only a "derivative" right—necessary to ensure that collective bargaining is not reduced to a meaningless exercise—and not "an associational activity that *per se* is

29. Cavalluzzo, "The *Fraser* Case," *supra* note 24 at 161-62.
30. 2007 SCC 27, [2007] 2 SCR 391 [*BC Health Services*].
31. Cavalluzzo, "The *Fraser* Case," *supra* note 24 at 163.
32. Cavalluzzo, "The *Fraser* Case," *supra* note 24 at 164-65.
33. Steven Barrett & Ethan Poskanzer, "What *Fraser* Means for Labour Rights in Canada" in Faraday, Fudge & Tucker, eds, *supra* note 1 at 201-02.
34. *Ibid* at 206.

protected by section 2(d)."[35] They also anticipate that the "question of whether the right to strike in itself falls within the section 2(d) guarantee" will soon appear before the courts.[36]

Derek Fudge, Director of Policy Development for the National Union of Public and General Employees (NUPGE), charges that the Court in *Fraser* "turned its back on one of the most vulnerable groups of workers in Canada."[37] In his opinion, when faced with efforts by big business and government to repeal or restrict *BC Health Services*, the Court "handed down a political compromise decision."[38] Fudge reports that since *BC Health Services*, "fourteen labour laws have been passed in Canada that have restricted the bargaining rights of workers."[39] He calls for the labour movement to promote and defend its rights beyond the courts by reinforcing publicly and otherwise that "labour rights are indeed human rights."[40]

Consistent with that call, Patrick Macklem, Professor of Law at the University of Toronto, writes about a "fundamental transformation" in which the judiciaries in democratic societies are increasingly willing "to look to comparative, regional, and international legal developments for guidance in constitutional interpretation."[41] He cites the Court's reliance in *BC Health Services* and other cases on the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; International Labour Organization (ILO) Conventions 87 and 98; the ILO's Fundamental Principles and Rights at Work; as well as the findings and recommendations of the ILO's Committee on Freedom of Association.

Professor Macklem also points out that the ILO "has repeatedly assured Canada [that] a constitutional duty to bargain is not inconsistent with the protection that its instruments and principles extend to freedom of association."[42] While rejecting the "constitutional insularity prevalent south of the border,"[43] Macklem cautions against intuitive acceptance of international human rights law without sufficient justification for giving international law primacy over domestic legal orders.

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35. *Ibid* at 215.
36. *Ibid* at 197.
37. Derek Fudge, "Labour Rights: A Democratic Counterweight to Growing Income Inequality in Canada" in Faraday, Fudge & Tucker, eds, *supra* note 1 at 234.
38. *Ibid* at 238.
39. *Ibid* at 241.
40. *Ibid* at 254.
41. Patrick Macklem, "The International Constitution" in Faraday, Fudge & Tucker, eds, *supra* note 1 at 262.
42. *Ibid* at 282.
43. *Ibid* at 285.

In the final essay, Keith Ewing, Professor of Public Law at King's College, London, and lawyer John Hendy, Q.C., agree that "it was perfectly proper for the SCC to rely on the ILO, the principles of which relating to collective bargaining *do* impose obligations on Canada."[44] They address what they consider the unmerited influence that an article written by a Canadian academic had on Justice Rothstein's "excoriating attack on [*BC*] *Health Services*" in his opinion in *Fraser*.[45] Ewing and Hendy, after a detailed critique of that article, state that they are "perplexed" by the contention of the article's author that Canada has no obligations to the ILO—a conclusion they say is supported neither by ILO jurisprudence nor by the legal obligations of all ILO member states.[46] More specifically, they assert that Canada "is bound by obligations relating to freedom of association by virtue of membership in the ILO," enforced not only by the 1998 Declaration on Fundamental Principles and Rights at Work but also the Declaration of Philadelphia (1948) in which Canada (and other member states) acknowledged a "solemn obligation" to "further" programs that will "achieve the effective recognition of the right to collective bargaining."[47]

Finally, in regard to the "duty to bargain" issue in *Fraser*, Ewing and Hendy state that the question should not have been whether there was a duty to bargain in good faith but, rather, "whether the right to make representations in AEPA was consistent with the duty to promote collective bargaining."[48] They conclude, unlike the Court, that the AEPA is not consistent with either the ILO's freedom of association principles or Canada's duty to promote those principles.[49]

It is difficult in a book review to give due justice to eleven essays covering over three hundred pages. Consequently, I have attempted only to highlight certain key points in each essay. The theme of this book, addressed from various perspectives, is the suppression and destruction of human life. The editors dedicate the book to ten migrant farm workers who were killed and three who were injured when their van collided with another vehicle in Ontario. They also include the driver of the other vehicle in the dedication. The editors recognize the humanity of all fourteen by listing their names. Too often, human life is so cheap that human beings are nameless. Those who deny workers their right of freedom of association and the right to bargain collectively with their

44. KD Ewing & John Hendy, QC, "Giving Life to the ILO—Two Cheers for the SCC" in Faraday, Fudge & Tucker, eds, *supra* note 1 at 287 [emphasis in original].
45. *Ibid* at 299.
46. *Ibid* at 302.
47. *Ibid* at 303.
48. *Ibid* at 301.
49. *Ibid* at 305.

employers deny workers' humanity by making them servile, dependent, and powerless to protect themselves or to become involved in the decisions that directly affect their lives. Elsewhere, I have called this (and other inhumane workplace violations) a crime against humanity.[50]

The Court's decision in *Fraser* raises the likelihood that farm workers in Ontario will continue to be denied their constitutional and human right to collective bargaining. The purpose of rights, particularly human rights, is to eliminate or at least minimize the vulnerability that leaves people at the mercy of others who have the power to harm them. The *Fraser* narratives, although focused on the rights of agricultural workers in Ontario, provide painful but necessary reminders that workers' rights, in regard to their realization and enforcement, have at best a fragile and perilous existence. This is true whenever the realization and enforcement of those rights are dependent on the shifting power of legislative policies or the values and value choices made by judges securely ensconced in their chambers, far removed from (and possibly ignorant of) what goes on in fields, mills, factories, and offices.

Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case is a collection of essays that explores ways to advance the rights of farm workers in Canada. It is an important book on that score alone but also because it has serious implications for workers' rights and human rights everywhere.

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50. James Gross, *A Shameful Business: The Case for Human Rights in the American Workplace* (Ithaca: Cornell University Press, 2010).