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### A Critical Review

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## A Critical Review

**By Roy J. Adams**

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For the past two decades, Ontario farmworkers have been on a legal roller coaster. In the early 1990s, Bob Rae's NDP introduced legislation protecting their right to bargain collectively for the first time. A few years later, Mike Harris' pro-business government withdrew that protection. In the early 2000s, the Supreme Court, in its *Dunmore* decision, found the Harris government action to be an offense against the Canadian Constitution and ordered the Ontario government to protect the right of agricultural employees to unionize.

Most pro-labour observers considered the resultant *Agricultural Employees Protection Act* (AEPA) to be a scam since it left out aspects of the *Ontario Labour Relations Act* that most Canadian trade unionists have come to rely upon as essential. It did not, for example, require employers to recognize and bargain in good faith exclusively with trade unions that had attracted majority support of the relevant employees. It did not specify how impasses were to be settled. It simply said that employers had to meet with the representatives of any group of relevant employees (whether or not those representatives had the support of a majority), with a view towards working out a mutually acceptable solution to the issues raised. The main union seeking to organize Ontario farmworkers, the United Food and Commercial Workers (UFCW), appealed the decision.

Whereas *Dunmore* did not "constitutionalize" collective bargaining, *Health Services*, decided by the Supreme Court of Canada (SCC) in 2007, did. In that decision, having to do with the constitutional rights of health care workers in British Columbia, the SCC waxed eloquent on the democracy-enhancing qualities of collective bargaining, declared that collective bargaining was constitutionally protected, and ordered the BC government to ensure bargaining in good faith between health care workers and their employers. In coming to its conclusion, the court relied heavily on international law.

In 2008, the UFCW's appeal was heard by the Ontario Court of Appeal. The unanimous decision, known as *Fraser*, was written by Winkler CJ, a one-time labour lawyer who relied heavily on his expertise in Canadian labour law and practice. In the event, he found the AEPA to be inadequate, given the *Health Services* decision, and ordered the Ontario government to introduce legislation for farmworkers that contained the main elements of the *Wagner Act Model* (WAM) of labour legislation. Borrowed initially from the United States, the major elements of WAM (State certification of majority unions, exclusive representation

by certified unions, mandatory bargaining, and State specification of dispute resolution) are found in the legislation of all Canadian jurisdictions. In essence, Winkler said that Ontario farmworkers are entitled to protections equivalent to those of other private sector workers. He largely ignored the body of international law on which the SCC had relied so heavily in both *Dunmore* and *Health Services*. Encouraged by most provincial governments, as well as management-side law firms who considered the decision to be inappropriately interventionist, the Ontario government appealed.

After a very long delay, the SCC issued its *Fraser* decision (let's call it *Fraser II*) in 2012. The majority overturned Winkler and upheld the AEPA, but with the proviso that it must be administered such that the constitutional rights of Ontario farmworkers (including their right to good-faith bargaining) are effectively protected. A minority of the court disagreed—some of them vehemently—with the decision. In a very long minority opinion, Rothstein rejected not only the *Fraser* majority but, also, *Health Services*. As a result, the published decision focused heavily on the pros (as seen by the majority) and cons (as seen by Rothstein and Charron) of the 2007 *Health Services* decision and (as Ewing and Hendy note in their contribution to this volume), less perhaps than it might have on the constitutional merits of the AEPA and how it might be administered so that the constitutional rights of farmworkers were effectively protected.

This volume was conceived and produced in response to *Fraser II* and the various twists and turns leading up to it. The editors are all pro-labour, pro-farmworker, pro-collective bargaining and they carefully selected contributors apparently comfortable with that perspective. The volume's major message is that *Fraser II* was a bad decision that does farmworkers an injustice.

The majority of contributors are labour lawyers—either practitioners like Fay Faraday, Steve Barrett, Ethan Poskanzer and Paul Cavalluzzo (all of whom have presented pro-union arguments before judges considering one or more of the three key cases) or law professors such as Judy Fudge, Eric Tucker, Kerry Prebisch, Patrick Maklem, Keith Ewing and John Hendy. Tucker and Fudge have written extensively about the relevant cases and about the conditions of farmworkers. Prebisch is expert on the conditions of migratory workers. Maklem, Ewing and Hendy (the latter two are Britons) are expert in international law. Wayne Hanley, National President of the UFCW Canada and Derek Fudge of the National Union of Public and General Employees (a union that has campaigned vigorously in favour of Labour Rights as Human Rights) also contribute chapters.

Although the authors qualify their arguments in various ways, I believe that it is fair to say that most, if not all, of the contributors to this volume would have

been more or less satisfied if the SCC upheld *Fraser I*. Hanley hired Cavalluzzo and Faraday to argue that case. NUPGE (and Derek Fudge personally) strongly supported that position. Barrett argued in favour of that outcome on behalf of the Canadian Labour Congress and Judy Fudge argued for it in her academic writings and, at one point, served as an expert witness.

The argument is, it seems to me, unconvincing. Had the SCC upheld *Fraser I*, it is almost certain that the provincial government would have brought agricultural workers under the *Ontario Labour Relations Act* with one wrinkle. Instead of the right to strike, farmworkers would have been given the right to take impasses to binding arbitration. That was the Rae government's solution, that is basically what Winkler recommended (but did not require) and the UFCW was on record as being content with that approach, despite being officially an advocate of the right to strike.

Had the Supreme Court made this group happy, the UFCW might have been able to certify a few additional bargaining units, but it is almost certain that the majority of Ontario farmworkers would have continued to labour without the benefit of collective representation.

Data relevant to that assertion is provided in the article in this volume by Eric Tucker: "In Canada, in 2009, the overall private sector union density was 17.77 percent," he writes, "but in agriculture it was 5.25 percent, or about 30 percent of the norm." Six of the eight provinces that have brought agricultural workers under the provincial *Wagner Act Model Statute* have better organization rates than the Canadian norm, he reports, but in no province are as many as 15% of farm workers covered by collective agreements.

Should the Ontario government bring farmworkers under the OLRA, what might reasonably be expected? From the current 2.65% level of unionization reported by Tucker (a rate attained with no State help), a rise perhaps to six percent? What a victory! The UFCW, the main union organizing Ontario farmworkers, will have expanded marginally. Its new dues income might repay its legal fees, but over 90% of farmworkers will have zilch.

The main theme of the Ontario farmworker saga, it seems to me, is the stagnation of creative thought in the ranks both of organized labour and of their erstwhile allies. The entire pro-labour community in Canada has been blinded, deadened by the totalitarian mental headlock of WAM. It can see nothing else, imagine nothing else. Intellectually smothered by WAM's ever-tightening embrace, the labour movement is floundering. With private sector union density fewer than 18%, labour has declining political clout and shallow social attractiveness. A passionate campaign for effective democratic representation for all Ontario farmworkers might have a chance of arousing the rank and file

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.**

Université Laval

*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.