

THE LABOUR MOVEMENT

# AFTER FRASER

Report of a Seminar  
held May 30, 2011 on the  
Supreme Court of Canada Decision  
AG of Ontario v. Fraser



**Canadian Foundation  
for Labour Rights**

*Labour rights are human rights*

## Canadian Foundation for Labour Rights

The Canadian Foundation for Labour Rights (CFLR) was established in 2010 by the National Union of Public and General Employees (NUPGE).

CFLR is a national voice devoted to promoting labour rights as an important means to strengthening democracy, equality and economic justice here in Canada and internationally.

The key objectives the Foundation has established for itself are to create greater public awareness and understanding of labour rights as a key critical component of human rights; build effective political momentum and public support for progressive labour law reform.

For more information go to the CFLR website  
[www.labourrights.ca](http://www.labourrights.ca)

The Canadian Foundation for Labour Rights (CFLR) acknowledges and pays tribute to the tireless work of the United Food and Commercial Workers Canada (UFCW Canada) to support and defend agricultural workers in Canada.

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National Union of Public and General Employees

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## Foreword

**James Clancy**  
National President  
National Union of Public  
and General Employees (NUPGE)

EARLIER THIS YEAR, the Supreme Court of Canada released the *Fraser* decision in which agricultural workers in Ontario faced a major setback in achieving fairness and dignity in their workplace. Only two years after the promising decision of *BC Health Services*, the Court has signalled to the labour community that the constitutional protection of collective bargaining may be rolling back.

There may be many explanations for this development—legal and political—and so the decision needs to be examined from varying perspectives to effectively develop strategies to preserve and strengthen collective bargaining rights going forward.

On May 30, 2011 in Toronto, the Canadian Foundation for Labour Rights (CFLR) gathered prominent trade union lawyers, academics and activists from across Canada for a half-day seminar called *The Labour Movement after Fraser*. Presentations included analysis and interpretation of the decision, as well as insights on how *Fraser* may be applied in current and future labour litigation. Legal and political strategies for the labour movement were discussed amongst the seminar participants.

I believe this report provides valuable and timely material on how we respond to the growing attack on labour. The observations and insights provided also emphasize how and why we must make the connection between labour rights and human rights.

While the *Fraser* decision may be seen from many different perspectives, we must not lose sight of the workers who are most directly and detrimentally affected—agricultural workers, including migrant workers, who endure exploitive working conditions in order to put food on our tables.

The Supreme Court has turned its back on one of the most vulnerable groups of workers in our society. The Court has suggested it is the role of the legislatures to delineate the labour relations framework for these workers. At the same time, the Court also held that “*Charter* rights must be interpreted in light of...Canada’s international and human rights commitments”. Therefore, it is time for the federal government to step in and provide guidance to both the courts and the provincial legislatures by setting the foundation of labour rights for agricultural workers as well as all Canadian workers. This can be achieved by signing and ratifying ILO Convention 98, the Right to Organize and Collective Bargaining. This Convention, together with Convention No. 87—the Freedom of Association and Protection of the Right to Organize, is recognized as covering the basic principles of labour rights throughout the world.

Canada has signed and ratified ILO Convention 87 which the Supreme Court applied in interpreting the freedom of association guarantee under the *Charter*. However, Canada is only one of 23 countries which has not ratified Convention No. 98. Canada joins two other countries known for their poor record on human rights — Mexico and Myanmar — as being the only countries not to sign both Conventions.

Ratification of this Convention 98 would provide further guidance to the courts to help interpret the legislative intent to the right to collective bargaining. This would provide all Canadian workers access to a legislative framework allowing them to exercise their rights in an equal and meaningful manner.

We encourage readers of this report to become actively engaged with us in our campaign for progressive labour law reform in Canada. Please visit the CFLR website—[www.labourrights.ca](http://www.labourrights.ca)—for more information on our campaign.



## Foreword

**Judy Fudge**  
Professor, Faculty of Law  
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THE SCOPE OF collective action by workers and unions protected by the constitutional guarantee of freedom of association is highly contested in Canada. In its 2007 decision in *BC Health Services*, the Supreme Court of Canada broke from what had been its very narrow approach to labour rights to hold that the guarantee of freedom of association in the *Canadian Charter of Rights and Freedoms* “protects the capacity of members of labour unions to engage in collective bargaining on workplace issues”. According to the Court, legislation that tore up key provisions in collective agreements and prohibited future bargaining on key issues by health care workers and their unions in British Columbia was unconstitutional.

On April 29, 2011, the Supreme Court of Canada released its much-anticipated *Fraser* decision. *Fraser* was the first case after *BC Health Services* to address the scope of constitutionally protected collective bargaining rights. At issue was whether legislation designed by the Ontario government to provide agricultural workers with protection of their right to associate and the right to make collective representations to their employer, but specifically designed not to provide for collective bargaining, was constitutional. The question before the Supreme Court in *Fraser* was whether the *Agricultural Employee Protection Act* (AEPA) passed constitutional muster after *BC Health Services*, which appeared to require, in addition to protection of the right to organize, a duty on the employer to bargain in good faith. Eight of the nine members of the Supreme Court held that the legislation did. *Fraser* is a setback in the United Food and Commercial Workers Canada’s (UFCW Canada) decades long struggle to challenge the Ontario government’s exclusion of agricultural workers from the benefits of collective bargaining legislation that is available to the vast majority of workers in the province’s private sector.

The Supreme Court of Canada's decision in *Fraser* is remarkable for the degree of disagreement amongst members of the Court over the scope of collective bargaining and how this disagreement has influenced the tone and cogency of the Court's reasoning. Despite the lone dissent, the judges who agreed that the legislation was constitutional were deeply divided over the scope of the constitutionally protected freedom of association in the labour relations context, and they issued three separate sets of reasons.



Not only do the different sets of reasons in *Fraser* signal growing disagreement amongst members of the court over a short period of time, they mark a shift both in the tone of decision-making and the direction of the Court's freedom of association jurisprudence since *Dunmore* in 2001. It was in *Dunmore* that the Court, tentatively and incrementally, began to include collective activities by workers within the scope of freedom of association.

A large part of the majority judgment in *Fraser* is taken up by the defence of *BC Health Services'* expansion of freedom of association to include collective bargaining as a legally valid and binding precedent. Justice Rothstein, who is, to date, the sole judge appointed by the Harper government to the highest court, wanted to overturn the precedent established four years earlier in *BC Health Services*. Even more remarkably, he did so despite the fact that none of the parties asked the Court to overrule *BC Health Services*.

This disagreement on the Supreme Court suggests a brake on, but not a reversal of, the development of constitutional protection for collective bargaining.

How should we interpret this controversial and discordant decision? Too often interpreting Supreme Court cases is like reading tea leaves in a cup—only a psychic can make sense of them.

This report of the seminar, organized by the Canadian Foundation for Labour Rights on the *Fraser* decision, is an important contribution to discerning the decision's meaning for labour rights. It brings together the perspectives of a group of prominent trade union lawyers, academics and trade union leaders who share the view that labour rights and independent unions are essential for democratic and just societies.

The contributors also believe that freedom of association in the labour context includes the right to organize, bargain collectively and to strike. Yet, each offers a slightly different interpretation of *Fraser*, an interpretation that depends upon a specific point of view.

For agricultural workers, *Fraser* is a sad defeat. The majority of the Supreme Court of Canada ignored history and reality to provide an interpretation of the contested legislation that is simply not plausible in order to uphold its constitutionality. Despite this legal reversal, the struggle to make labour rights a reality for agricultural workers in Ontario continues in farms and fields, before courts and boards, and in the realm of public opinion.

For unions, *Fraser* is a caution. While the majority upheld *BC Health Services'* interpretation of freedom of association to include collective bargaining, within four years what was a unanimous position of the members of the Supreme Court has become contested, and the Harper government will soon make two new appointments to that bench. Whether the freedom of association will provide constitutional protection from legislation that attempts to prohibit or restrict workers from engaging in free collective bargaining is an open question and not a foregone conclusion.

For supporters of labour rights, *Fraser* demonstrates the need to explain why labour rights, including the right to strike, are necessary for a democratic and just society because they promote greater economic and social equality and expand deliberative processes. It also demonstrates that the audience for this message must be much broader than the courts. Rights are not won by legal arguments alone; rights involve political visions, institutions and collective strategies.

This report is part of the broader conversation about how to make labour rights a reality in Canada. The speed at which the majority Conservative government recently introduced back-to-work legislation to end the work stoppages at Air Canada and Canada Post demonstrates the urgency and importance of this conversation.



## Introduction

**Veena Verma**  
Labour Lawyer  
CFLR Board Member

ON APRIL 29, 2011, the Supreme Court of Canada released the long awaited decision in *Ontario (Attorney General) v. Fraser*.<sup>1</sup> The decision is significant in defining the scope of collective bargaining rights within the ambit of the freedom of association provision in Canada's constitution, the *Charter of Rights and Freedoms*.

This case deals with the exclusion of approximately 80,000 agricultural workers from the *Ontario Labour Relations Act* (LRA) and the constitutionality of the *Agricultural Employees Protection Act* (AEPA), which purports to create a separate regime for protecting agricultural workers to organize in "employees' associations" and make "representations" to their employer. Notably, there is no mention in the AEPA to "trade unions" or "collective bargaining". The Court upheld previous jurisprudence determining that collective bargaining rights are protected under the constitution. But, it provided an unworkable and restrictive interpretation of these rights, ultimately ruling that it was constitutional to deny agricultural workers the same collective bargaining rights as enjoyed by the majority of workers in Ontario.

In order to understand the full import of the *Fraser* decision, it is necessary to trace the Supreme Court's treatment of collective bargaining rights since the adoption of the Canadian *Charter* in 1982. The first cases dealing squarely with the issue of whether collective bargaining is protected under the *Charter* were a group of three concurrently released appeals now known as the *labour trilogy*.<sup>2</sup> In these early decisions, the majority view in the Supreme Court of Canada was that freedom of association did not extend to collective bargaining. Cen-

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<sup>1</sup> 2011 SCC 20 (released April 29, 2011).

<sup>2</sup> Reference re *Public Service Employee Relations Act* (Alta.), [1987] 1 S.C.R. 313, *PSAC v. Canada*, [1987] 1 S.C.R. 424, and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

tral to this analysis was the opinion that freedom of association covers only activities performable by an individual, and since an individual cannot perform collective bargaining, then collective bargaining is not covered.

The Court began to shift its treatment of collective bargaining rights in *Dunmore v. Ontario (Attorney General)*.<sup>3</sup> This case is the precursor to *Fraser* in which the United Food and Commercial Workers Canada (UFCW Canada) first challenged the exclusion of agricultural workers from the LRA. The Court retreated from the *labour trilogy* analysis and embraced the view that there may be activities that are collective in nature deserving protection under freedom of association.

The Court held at para. 17 in *Dunmore*: “[T]he law must recognize that certain union activities—making collective representations to an employer, adopting a majority political platform, federating with other unions—may be central to freedom of association even though they are inconceivable on the individual level.”

The Court found that the government interfered with farm workers’ freedom of association because the lack of legislative protection as enjoyed by all other workers in Ontario had a “chilling effect” on their ability to organize in an employees’ association. Farm workers are so vulnerable and disadvantaged that it was impossible for them to organize in a meaningful way to achieve workplace goals. Therefore, it was appropriate here to recognize a positive state obligation to extend protective legislation over their efforts to organize in an association and to make representations to their employer. However, the Court stopped short of recognizing that freedom of association included collective bargaining rights.

While the labour community initially heralded the *Dunmore* case as a victory, a closer read revealed an unworkable distinction between the right to join a union and the right to collective bargaining. The absurdity of this distinction was demonstrated by the Ontario government’s response to the decision, which was to enact the AEPA. The AEPA ostensibly protects agricultural workers’ right to organize in an employees’ association, and the right to merely make representations to their employer. The employer is only obligated to read or listen to the representations. Under the AEPA, UFCW attempted to bargain collectively on behalf of farm employees, but employers said that the company was not required to bargain with the union. UFCW

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<sup>3</sup> [2001] 3 S.C.R. 1016.



then launched a constitutional challenge of the AEPA that is the subject of the *Fraser* decision.

In *Fraser*, UFCW argued that it was unconstitutional to deny agricultural workers collective bargaining rights as enjoyed by the majority of all other workers in the province under the LRA. These rights include:

- A statutory duty on the employer to bargain in good faith;
- Precluding the formation of multiple employees' associations within a single workplace (i.e. recognition of the principles of majoritarian exclusivity); and
- A dispute resolution mechanism for resolving bargaining impasses.



The limitations of *Dunmore* became apparent when the court at the trial level dismissed the *Fraser* case by finding that *Dunmore* did not open the door for constitutionalizing collective bargaining rights.

The Supreme Court of Canada subsequently released the seminal case of *BC Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia*,<sup>4</sup> (*BC Health Services*) marking a sea change in the Court's treatment of collective bargaining rights. In this case, health sector unions squarely asserted that freedom of association protected a right to collective bargaining (as opposed to associational protections seen in *Dunmore*) which the British Columbia government had violated by legislating to both overturn existing contracts and preclude effective collective bargaining in the future.

Reviewing Canada's labour history, international law and Canada's Charter values, the Court finally held that freedom of association constitutionally protects collective bargaining on fundamental workplace issues. It also held that the right to collective bargaining includes the duty to bargain in good faith, consistent with the Canada Labour Code and legislation from all provinces. Laws or state actions that prevent or deny meaningful discussion and consultation between employees and their employer on fundamental working conditions are unconstitutional if they substantially interfere with the activity of collective bargaining.

Relying on *BC Health Services*, the UFCW successfully appealed the *Fraser* decision at the Ontario Court of Appeal. The Ontario government appealed this decision to the Supreme Court of Canada.

By the time the Supreme Court heard the *Fraser* appeal, *BC Health Services* had been in place for only two years. It quickly became apparent that governments and business intended to use the *Fraser* case as an opportunity to re-litigate *BC Health Services*. Several provincial governments and industry groups intervened in the case arguing that the Court had gone too far in *BC Health Services* and interfered with government policy-making by inappropriately constitutionalizing a labour relations model (i.e. the Wagner model).

UFCW and others pointed out that having already selected a labour relations regime for all workers in Ontario, the government could not then deny vulnerable agricultural workers the

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<sup>4</sup> [2007] 2 S.C.R. 391.

fundamental elements of collective bargaining found in existing legislation such as the LRA.

It took 16 months from the date of oral submissions before the Court released its decision. The delay seems to reflect an internal battle over the legitimacy of *BC Health Services*, resulting in a four-way split decision. In a minority judgment, Justices Rothstein and Charron suggested that *BC Health Services* was wrongly decided and should be reversed. Accordingly, in their opinion, if the *Charter* does not protect collective bargaining rights, then the AEPA is constitutional. Remarkably, none of the parties took this position in their submissions and no notice was given to the parties to address the fact that *BC Health Services* may no longer be precedent.

The majority of the justices disagreed with Justices Rothstein and Charron. However, in defending *BC Health Services*, a political compromise appears to have been made on the backs of agricultural workers. Indeed, the bulk of the decision focuses on the correctness of *BC Health Services* as opposed to addressing the vulnerable and marginalized position of agricultural workers.

The majority maintained that collective bargaining is constitutionally protected and includes a duty to bargain in good faith on important workplace issues. Relying on *BC Health Services*, the Court found that freedom of association requires both employer and employees to meet and to engage in “meaningful dialogue” in pursuit of a common goal of peaceful and productive accommodation. They must avoid unnecessary delays and make reasonable efforts to arrive at an acceptable contract. It does not, however, include a particular process; it does not require the parties to conclude an agreement or accept any particular terms and it does not guarantee a legislated dispute resolution mechanism in the case of an impasse. It protects only the right to a general process of collective bargaining, not to a particular model of labour relations, or to a specific bargaining method.

On May 30, 2011, the Canadian Foundation for Labour Rights held a seminar in Toronto to discuss the implications of the *Fraser* decision. Summaries of the presentations made at the seminar are found in the following pages of this report.



## Delayed harvest

*The UFCW continues the struggle for bargaining rights for agricultural workers despite the Supreme Court decision*

**Wayne Hanley**  
National President  
United Food and Commercial Workers  
Canada (UFCW Canada)

[UFCW IS CANADA'S LARGEST PRIVATE SECTOR TRADE UNION. THE UNION CHALLENGED ONTARIO'S LABOUR LAWS EXCLUDING AGRICULTURAL WORKERS FROM COLLECTIVE BARGAINING THAT ULTIMATELY LED TO THE SUPREME COURT OF CANADA DECISION IN *FRASER*.]

WAYNE HANLEY PROVIDED an overview of the UFCW's long-standing campaign to bring collective bargaining rights to agricultural workers in Ontario. While the focus of the seminar was on the *Fraser* decision, Hanley said the bigger picture is in viewing labour rights as human rights. While the impact of the *Fraser* decision may go beyond agricultural workers, Hanley initially focused on the direct impact of the decision on Ontario's farm workers and UFCW's campaign to bring justice and dignity to all agricultural workers.

Hanley outlined the agricultural workers' struggle for collective bargaining rights in Ontario. Ontario's ban on farm unions has existed since the 1940s except for a brief period in the mid-1990s under the Bob Rae NDP government when farm workers could join a union and collectively bargain. At that time, the UFCW had a certified unit and was on its way to certify more units. But, Mike Harris' Tories were elected and they brought back the ban on farm unions. UFCW constitutionally challenged the ban on farm unions in the *Dunmore* case, which went all the way to the Supreme Court of Canada. In 2001, the Supreme Court of Canada ruled that Ontario violated the *Charter* by denying farm

workers their freedom of association rights. The Harris government responded with the creation of the *Agricultural Employee Protection Act* (AEPA). The AEPA states that farm workers can associate and present their concerns to employers, but there was no statutory obligation for employers to act on those concerns.

UFCW went back to the courts to challenge the AEPA in the *Fraser* case. In 2008, the Ontario Court of Appeal ruled that the AEPA was a constitutional sham because it denied Ontario farm workers an effective mechanism to achieve their collective bargaining rights. The ruling was written by Chief Justice Winkler, a management-side labour lawyer for most of his career, and it was clear he understood the true nature of collective bargaining. According to Hanley, the UFCW was pleased with the decision, but disappointed by the McGuinty Liberal government's decision to appeal the decision. The Supreme Court of Canada ruled in favour of Ontario and upheld the AEPA.

Despite the Supreme Court of Canada's ruling, Hanley emphasized that the UFCW remains committed to achieving full collective bargaining rights for agricultural workers in Ontario. The UFCW works with the Agriculture Workers Alliance (AWA), an association created by the UFCW. There are currently 8,000 members in the AWA—including migrant workers—and ten agricultural workers support centres across Canada. In 2010, the AWA centres handled 40,000 complaints from agricultural workers in areas such as abusive employers, unsafe housing and working conditions, and inadequate access to medical care. According to Hanley, while these problems can only be adequately remedied as a member of the union, the UFCW does the best it can to assist these workers with the tools available to them.

Hanley noted that agricultural workers do have the right to unionize in some provinces and the UFCW has been actively unionizing workers in these jurisdictions. The UFCW successfully certified agricultural worker units in British Columbia, which includes migrant agricultural workers from Mexico. The UFCW currently has a case before the BC Labour Board alleging that employers, with the assistance of the Mexican consulate, are instigating decertification drives of agricultural workers' unions.

In Quebec, the UFCW has successfully certified and negotiated union contracts for agricultural workers. There are a number of other applications pending before the Quebec Labour Board. The UFCW successfully challenged before the Labour Board provisions

of the Quebec Labour Code that limits agricultural workers' collective bargaining rights to farms where there are three regular, full time employees. The case has been appealed; therefore, the UFCW is continuing with this challenge.

Hanley observed that Ontario is the most intensive agricultural province in Canada, but farm unions continue to be banned. Hanley reiterated that the UFCW has fought hard in the last two decades to change this and will continue to fight despite the recent decision of the Supreme Court of Canada.

In Hanley's opinion, the *Fraser* decision failed agricultural workers. Hanley said that the decision says to him as a layperson that "the AEPA is constitutional, so if you don't like it, then go change the government and the law". This is somewhat ironic considering many of these workers are migrant workers who do not have the right to vote or change the government.

Hanley informed the audience that the UFCW has reformatted its campaign and will be using the AEPA as part of the UFCW's program to obtain collective bargaining rights for Ontario's agricultural workers. With an upcoming election in Ontario, Hanley assured the audience the UFCW will use all available tools to achieve this goal and will make farm workers' rights an issue. It will also serve as a wakeup call for all unions and workers that collective bargaining rights are threatened by the *Fraser* decision. Hanley stressed that this is not an exaggeration.

*By divorcing the Wagner model from collective bargaining, and by setting the bar so low that the presumption of employer good faith is enough to meet the freedom of association requirements, the majority of the Supreme Court of Canada opened the door to every legislature in this country to rewrite their labour laws to suit the corporate agenda.*

Hanley suggested if there is an upside to this decision, it is that the threat presented will create a fight back to force changes to the ways of right-wing and supposedly moderate governments. Hanley's last message to the audience was that the struggle for agricultural workers' rights will continue, and the battle for the rights for all Ontario workers is beginning again.



## Nothing meaningful

*Agricultural workers denied access to meaningful collective bargaining*

**Steven Barrett**

Senior and managing partner  
Sack Goldblatt Mitchell LLP

[STEVEN BARRETT REPRESENTED THE CANADIAN LABOUR CONGRESS AS AN INTERVENOR IN THE *FRASER* CASE.]

STEVEN BARRETT PROVIDED an overview of the background to the *Fraser* case, including the evolution of the Supreme Court of Canada's treatment of collective bargaining rights in *Dunmore* and *BC Health Services*. Barrett noted that *BC Health Services* was different on the facts from *Fraser*. While *BC Health Services* may be described as a negative claim requiring government to refrain from interfering with existing collective bargaining rights, *Fraser* was a positive claim requiring government to take steps to protect collective bargaining rights where the absence of a statutory framework makes it substantially impossible for workers to attain collective goals.

Barrett summarized the majority decision of the Court as upholding the principles of *BC Health Services*, to the extent that the freedom of association guarantee protects some fundamental aspects of collective bargaining. This includes the protection against legislation repealing important collective agreement terms and preventing future bargaining over those matters. It also, according to the majority, includes protection for good faith bargaining. In *BC Health Services*, the Court seems to say that the process of collective bargaining requires the parties to meet on fundamental workplace goals and the government to consult with the union if there is interference with existing rights. However, Barrett highlighted that

the majority was not necessarily saying this is all that freedom of association protects in terms of collective bargaining. For example, there are still very strong arguments to be made that the right to strike is an essential and fundamental aspect of freedom of association, as has been recognized in international law, including by the ILO and by the European Court of Human Rights.

As noted by Barrett, the Court goes on to list the things that freedom of association does not necessarily or automatically protect: it does not impose a particular process; it does not require an agreement must always be concluded; it does not require the employer to accept any terms; and it does not guarantee a statutory dispute resolution mechanism if there is an impasse in negotiations.

The Court accepted the employers' submissions that the Ontario Court of Appeal's decision had effectively constitutionalized the Wagner model of labour relations and reiterated that no one model of labour relations is required in order to protect freedom of association. While the Court of Appeal held that there were components necessary to make collective bargaining meaningful, the Supreme Court of Canada disagreed.

Barrett found that, unfortunately for agricultural workers, the Court's decision means they will not have access to meaningful collective bargaining. As a practical matter, the Wagner model is the way that legislatures in Canada have given effect to (or instantiated) the constitutional guarantee of collective bargaining. Barrett stressed the unions were not, as the majority suggested, arguing that this model is perfect or constitutionally required for all time. However, they were arguing that the effect of the legislative denial to agricultural workers—a particularly marginalized and vulnerable group—of the statutory framework for collective bargaining available to virtually all other workers means that agricultural workers have been denied any meaningful ability to engage in collective bargaining.

Just as the Supreme Court of Canada recognized in *Dunmore* that organizing a workers' association is virtually synonymous with unionizing under the unfair labour practices of the *Wagner Act* legislative scheme, so too should the Court have recognized in *Fraser* that collective bargaining in Canada is virtually synonymous with bargaining under the normative Canadian statutory collective bargaining regime. Exclusion from that scheme is therefore tantamount to denial of the ability to bargain. For the Court to suggest that a mere right to have a bargaining proposal considered in good faith amounts to an extension of real and meaningful

bargaining in the Canadian context is to ignore both labour history and collective bargaining reality. Justice Abella highlighted this point in her dissent.

The minority decision, written by Justices Rothstein and Charron, did not accept the majority's view that the freedom of association guarantee imposes any obligation on the employer to bargain in good faith, and by extension on governments, to positively enact legislation imposing such obligations on employers. However, as Barrett pointed out, even Justices Rothstein and Charron, who would have reversed *BC Health Services*, recognize that freedom of association protects the right of workers to come together, organize and attempt to collectively bargain with their employer over terms and condition of employment.

He noted it is important to understand that Justices Rothstein and Charron were not arguing in favour of reversing the principle that freedom of association extends constitutional protection to the right of workers to engage in collective bargaining. Rather, the justices reject the majority's definition of collective bargaining to include the imposition of a duty to bargain in good faith. While it is not clear as a practical matter what they mean by collective bargaining, in Barrett's opinion, it is clear that even Justices Rothstein and Charron believe that freedom of association imposes restrictions on the ability of governments to enact legislation prohibiting collective bargaining altogether.

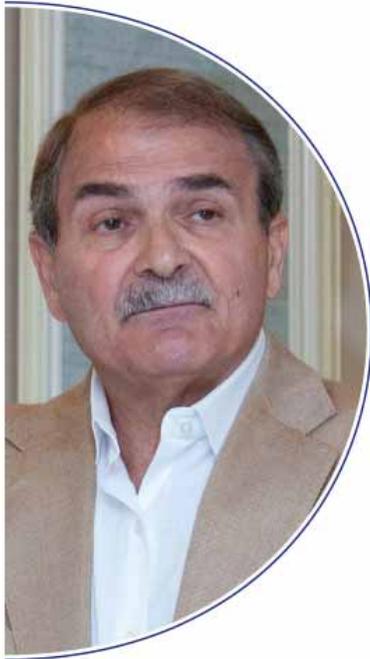
While rejecting any constitutional protection of collective bargaining as defined by the majority, Justices Rothstein and Charron criticized the majority's reasoning that if collective bargaining is protected, it does not include a dispute resolution mechanism. Barrett pointed out that the minority decision understood that if *BC Health Services* is still good law, as found by the majority, then there must be a dispute resolution mechanism, otherwise the right is illusory.

In addition to considering arguments under the freedom of association guarantee, the Court also considered whether AEPA violated agricultural workers' equality rights. The argument, in part, was that agricultural workers are analogous to the enumerated grounds under the *Charter* because of their vulnerable status in society. Barrett observed that the Court's treatment of the equality rights arguments is surprising because it did not close the door on the notion that agricultural workers may be an analogous group. Rather, the Court held it was premature to determine that the AEPA creates disadvantage for agricultural workers since the process under the Act has not been tested.

In conclusion, Barrett provided some personal observations on what may have been behind the Court's decision-making process—i.e. the belief that courts do not have a role in defining labour relations.

*What we may be seeing here is a reluctance on the Court's part to interpret and apply the freedom of association guarantee in a manner which requires legislatures to positively enact certain essential provisions of the Wagner Act or any labour relations model. The Court may well have been concerned that if legislatures are required to enact those features essential to meaningful bargaining, it would be faced with arguments that various provisions, for example, first contract arbitration, or card based certification, or anti-scab provisions, are essential to meaningful bargaining. While there is no doubt that the trade unionists in this room may well believe that these are all essential, from a constitutional perspective, the Court did not want to put itself in a situation where it had to decide what is and isn't essential for meaningful bargaining to take place. It is fair to say that Fraser is a setback for the ability to use the Charter to obtain positive legislative protections.*

Barrett added that the Court's reluctance to require positive legislative protection would not apply to situations where legislatures enact legislation restricting or overriding free collective bargaining, as was the case in *BC Health Services*. In that case, the unions were not making a claim for the enactment of positive legislative protection, but were arguing for protection from legislative interference with free collective bargaining. According to Barrett, given what is happening in the United States, including in Wisconsin, and the possibility of more conservative governments in Canada, freedom of association will hopefully still extend a constitutional shield against legislation that attempts to prohibit or restrict workers from engaging in free collective bargaining.



## Collateral damage

*Farm workers caught in political  
crossfire*

**Paul Cavalluzzo**

Senior partner

Cavalluzzo Hayes Shilton McIntyre &  
Cornish LLP

[PAUL CAVALLUZZO REPRESENTED THE UNITED FOOD AND COMMERCIAL WORKERS CANADA IN THE *FRASER* CASE.]

THE *FRASER* CASE is a surprising example of conservative judicial activism, according to Paul Cavalluzzo. Cavalluzzo reviewed the majority's conclusion that the AEPA is constitutional by reading-in a duty to bargain. He believes the ruling troubling from a number of perspectives.

First, neither the Government of Ontario nor any other party argued this position. Indeed, the government argued against this position by submitting that the Charter could not impose a duty to bargain on agricultural employers because they are in the private sector. Up to and including the oral submissions before the Supreme Court of Canada, all of the parties and the courts below operated on the understanding that the law did not impose a duty to bargain.

Second, as Justice Abella in her dissent and Justice Rothstein in his concurring minority decision said, the language in the AEPA could not be stretched to imply a duty to bargain when the law only imposes on the employer a duty to listen to employee representations if given orally or give a written acknowledgement that the employer received representations in writing. When the legislature of Ontario wants to impose a duty to bargain it uses the typical language of requiring the parties to bargain in good faith and make every reasonable effort to reach a collective agreement.

The failure to use such language leads to the third concern. The former Harris government in Ontario never intended to confer collective bargaining rights on farm workers. In fact, when introducing the legislation, the then Minister of Agriculture and Food Helen Johns stated, “However I need to make one thing very clear here. While an agricultural employee may join an association that is a union, the proposed legislation does not extend collective bargaining to agricultural workers.”

All of the Ontario government written materials in support of the legislation said the same thing. The applicable law at the time was the Supreme Court of Canada’s *labour trilogy* which held that section 2(d) [freedom of association] of the *Charter* did not protect collective bargaining rights.

Cavalluzzo concluded that it would appear that Justices Abella and Rothstein are clearly correct that the AEPA cannot be read to imply a duty to bargain. As these two judges said, if *BC Health Services* is still good law, as confirmed by the majority, the inevitable result is that the AEPA is unconstitutional. It is for this reason Justice Rothstein described the majority’s conclusion as “entirely novel and unprecedented”.

Cavalluzzo pointed out the majority also did not address the comments of Chief Justice Winkler of the Ontario Court of Appeal about what is necessary for collective bargaining to be meaningful and effective in the workplace—a dispute resolution mechanism and majoritarian exclusivity.

On the question of majoritarian exclusivity, the record had the example of Rol-land Farms. This farm employer, unrestrained by the legal requirement to bargain only with one bargaining agent, sponsored its own “employee association” in direct competition with the union that had the workers’ majority support. The inevitable splintering of unified representation, resulting from the absence of statutory protection for exclusivity, is especially undermining for particularly vulnerable workers. While the majority made no reference to the record of this evidence, Justice Abella in her dissent agreed with Winkler that given the unique vulnerability of agricultural workers, statutory recognition of such exclusivity is essential for them to exercise their bargaining rights meaningfully.

Cavalluzzo reviewed the Court’s application of international law and pointed to the Court’s inconsistent treatment of decisions coming from the ILO Committee on Freedom of Association.

*We certainly agree with the majority's ruling that international law and ILO decisions are relevant to informing the interpretation of s. 2(d) of the Charter. Indeed, the majority pointed out that it had relied on an ILO decision in BC Health Services because it dealt with the very law before the Court in that case. Unfortunately, for some unknown reason, the majority failed to refer to two ILO rulings before it in the record, which decided that the AEPA violates Canada's obligations under international human rights law by failing to provide agricultural workers with collective bargaining rights.*

Cavalluzzo also raised aspects of the decision that created an unfair process. As noted earlier, the majority did not afford the parties an opportunity to respond to an interpretation of the AEPA that implied a duty to bargain in good faith. In addition, Justices Rothstein and Charron, on their own motion, suggested that *BC Health Services* be overruled without giving notice to the parties or hearing submissions on this point. Cavalluzzo noted that parties should have been asked to make submissions on such important aspects of the decision.

Cavalluzzo concluded with some general observations about the impact of the decision on agricultural workers.

*Unfortunately, the farm workers' case seems to have been lost in a larger political battle beyond their control. Big business and governments used the farm workers case to argue that the BC Health Services case had gone too far in its protection of collective bargaining rights under s. 2(d) of the Charter of Rights and Freedoms. A reading of the judgments reflects this in that most of the judgments deal with whether BC Health Services should be overturned rather than to the extensive record before them that demonstrated the plight of farm workers as one of the most vulnerable groups of workers in Canada.*



## Value of unions

*Fraser decision highlights importance of academic engagement in labour relations*

**Nathalie Des Rosiers**

General Counsel

Canadian Civil Liberties Association

[THE CANADIAN CIVIL LIBERTIES ASSOCIATION INTERVENED IN THE *FRASER* CASE.]

ACCORDING TO NATHALIE Des Rosiers, the *Fraser* case demonstrates a sharply divided Court on the issue of freedom of association and collective bargaining. The majority has taken great pains to narrow *BC Health Services* on the scope of collective bargaining; however, Des Rosiers noted the majority may have opened the door for agricultural workers to make an equality rights claim on the basis of occupational status in the future. This position is also supported by Justice Deschamps in her minority decision.

Des Rosiers noted that, helpfully, Deschamps dismissed the distinction between “positive” and “negative” rights and suggested a more expansive approach to analogous grounds under section 15 [equality rights provision] of the *Charter*.

Des Rosiers went on to describe the minority decision of Justices Rothstein and Charron as “more challenging and potentially dangerous” as they roll back freedom of association to only mean the right of individuals to gather together.

In Des Rosiers’ opinion, Justice Abella’s dissent presented the clearest judgment because it reflects the true application of precedent.

As the various justices in *Fraser* debated the weight of academic criticism and commentary on *BC Health Services*, it is apparent that academic comment can be influential in future labour relations cases. Des Rosiers encouraged greater academic engagement in labour relations issues. In order for this to happen, she noted that the lack of labour expertise in Canada's law faculties will need to be addressed. Des Rosiers suggested several strategies in order to minimize the adverse impact of *Fraser*:



- While *BC Health Services* is safe or now, more work needs to be done to shore up support for the issues. This includes, as noted earlier, encouraging more academic work, conferences, etc.
- While the Court has indicated the constitutional protection of collective bargaining includes the right to good faith bargaining, future research and commentary is needed to articulate exactly what are the elements of “good faith bargaining”.
- The labour community needs to challenge the legitimacy of reversing *BC Health Services* as Justices Rothstein and Charon are suggesting. It is important to ensure that good labour precedents are not presented as easily reversible when there is a change in the composition of the bench. The fundamental nature of collective bargaining as a human right and as part of freedom of association must be asserted.

- More work is needed to build on Justice Deschamp’s opposition to the distinction between “positive” versus “negative” rights, and “freedoms” versus “rights”.
- Des Rosiers would like to see more work done on building the notion of “derivative rights”. In the *Fraser* decision, the Court introduced for the first time the idea that collective bargaining rights are “derivative rights” of the freedom of association guarantee.
- The work done on collective rights in other areas such as linguistic rights, aboriginal rights, and possibly even religious rights needs to be legitimized and strengthened as a way to support the idea of collective rights in the *Charter* and as part of freedom of association.
- International precedents must be gathered and a diversity of academic voices should be encouraged. Greater emphasis needs to be made about the democratic possibilities in *BC Health Services*.
- More work needs to be done to show the public value of trade unions. Des Rosiers pointed out there is a problem of labour arbitration cases not being widely publicized; therefore, people do not appreciate the level of employer abuse in the workplace existing today. She suggested a public campaign showing the important work of unions in addressing this abuse and ensuring fairness on the job.



## Rights cannot be eliminated

*The implications of Fraser on existing collective bargaining rights: British Columbia Teachers' Federation vs. British Columbia*

**John Rogers, Q.C.**  
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TWO WEEKS BEFORE the release of *Fraser*, the British Columbia Superior Court had applied *BC Health Services* and found that the provincial government violated the teachers' freedom of association under the *Charter* by interfering with their collective bargaining rights.<sup>5</sup> John Rogers, who was lead counsel for the teachers, reviewed the key findings in the decision, and discussed what impact *Fraser* may have on the British Columbia Teachers' Federation (BCTF) and other unions.

In January 2002, the British Columbia government introduced legislation that represented a new agenda for dealing with public sector workers in the fields of education and health services, by way of Bills 27, 28 and 29. These were unionized workers and the legislation dealt with matters that were the subject of collective agreements. The health services workers constitutionally challenged Bill 29, which resulted in the 2007 Supreme Court of Canada decision in *BC Health Services*.

The teachers brought a court challenge to Bill 27 (the *Public Education Flexibility and Choice Act*) and Bill 28 (the *Education Services Collective Agreement Act*) similar to the challenge brought by the health services workers. This challenge waited on the sidelines while the *BC Health Services* case wound its way through the courts. In the BCTF case, the two pieces of legislation eliminated hundreds of clauses in the teachers' collective agreement and prohibited bar-

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<sup>5</sup> *British Columbia Teachers' Federation v. British Columbia* [2011] BCSC 469

gaining on various matters in the future. The prohibited matters included hours of work, class size and composition and the levels of non-enrolling teachers such as librarians. Rogers highlighted that the parties were in the midst of bargaining collective agreements when the government passed the legislation.

In this case, Justice Griffin applied *BC Health Services* and held that provisions of Bill 27 infringed section 2(d) [freedom of association] of the *Charter*, and this infringement was not a reasonable limit demonstrably justified in a free and democratic society under section 1 of the *Charter*. However, Justice Griffin suspended her decision on the invalidity of certain sections of the legislation and gave the government 12 months to deal with the repercussions of her decision.

She also held that section 9 of Bill 27 was no longer in force, and reserved the teachers' right to argue any additional remedies and to seek a further hearing in this regard. Section 9 provided for the appointment of an arbitrator to determine whether a provision in the teachers' collective agreement constituted under the *Education Services Collective Agreement Act* conflicted with Bill 27.

Rogers said that after the release of *Fraser*, the union assumed the government would appeal the BCTF decision. However, only days after *Fraser*, the British Columbia government announced it would not appeal the BCTF decision. The BCTF believed the Superior Court gave the government one year in order to restore collective bargaining diminished by the legislation. However, Rogers noted the government believes the decision does not require removing the impugned legislation, but merely requires a responsive consultative process with the union. The government has announced it wants to meet with the union before passing new legislation in November. Collective bargaining between the BCTF and employer groups is under way.

In the aftermath of *Fraser*, Rogers noted there were some positive aspects to focus on while, at the same time, stressing his comments were not intended to undermine the negative implications of the *Fraser* decision for Ontario farm workers. He noted there is a distinction between *Fraser*, a case about whether or not workers can obtain full collective bargaining rights, versus cases such as the BCTF where the government substitutes existing collective bargaining rights.

That is, if workers already have collective bargaining rights within an existing labour relations scheme, the question becomes what is the impact if these rights are taken away by eliminating existing

collective agreement rights of substantial importance and prohibiting the negotiation of such issues in the future.

It is in this latter context that Rogers offered five positive aspects arising from the *Fraser* decision:

- The Supreme Court of Canada affirms *BC Health Services* as being good law. In some respects, the Court uses stronger language than what was found in *BC Health Services*.
- The Court clearly establishes that it is a breach of the *Charter* to nullify significant existing contractual terms and to deny future collective bargaining of these terms. Both the majority decision and the minority decision of Justices Rothstein and Charron agree on this point. There is more than just a right to a process; the *Charter* also protects the “fruits of the process” as stated by Justice Rothstein. Rogers believes that this is likely to be the most common scenario faced by unions.
- The Court explains *BC Health Services* as providing support for unions to assert a “negative” right (i.e. the right to non-interference) in response to government action interfering with both collective bargaining and collective agreements.
- The Court affirms the importance of international law.
- The Court leaves open the question of whether or not the *Charter* protects the right to strike.

Rogers concluded by noting there is still an open question of remedies. This issue was not addressed in the *BC Health Services* or *Fraser* decisions. The government and BCTF are currently in discussions regarding the appropriate response to Justice Griffin’s decision. To date, there is a wide gap in their respective perspectives as to what are the consequences. It may be necessary to obtain a determination as to the meaning and consequences of the Court’s decision in order to resolve those differences.



## Not all bad

*Fraser could have positive impact on Saskatchewan labour movement's constitutional challenge against Bills 5 and 6*

### **Juliana Saxberg**

Director of Legal Services  
Saskatchewan Government and General  
Employees' Union (SGEU/NUPGE)

IN 2008, THE NEWLY elected right-wing Saskatchewan Party enacted two pieces of legislation that significantly impacted on collective bargaining rights in that province. The *Trade Union Amendment Act, 2007* (Bill 6) eliminated card-based certification and expanded the employers' ability to communicate its opinions to its employees regarding union activities and functions. The *Public Service Essential Services Act* (Bill 5) allows for the unilateral designation of essential employees based on the employer's position if the employer and the union are unable to reach a negotiated essential services agreement.

Essentially, Bill 5 severely limits the ability of SGEU members to engage in legal strike action. It also allows employers to increase essential service designations during a strike, thereby having the unfettered ability to determine how effective a strike will be at any stage of the job action. It states that essential services agreements may be unilaterally prescribed by government regulation, trumping any collective agreement or arbitrator's award.

The government summarily terminated the sitting chair and vice-chair of the Saskatchewan Labour Relations Board, in the middle of their terms, and installed new ones handpicked by the Saskatchewan Party. These appointees are tasked with administering the *Public Service Essential Services Act*.

The SGEU currently has three *Charter* challenges to Bills 5 and 6 that can be briefly summarized as follows:

- The SGEU, along with the Saskatchewan Federation of Labour and approximately 23 of its affiliate unions, has filed a challenge of Bill 5 and Bill 6 in the Saskatchewan Court of Queen's Bench.
- The SGEU and the Saskatchewan government entered into a Memorandum of Understanding on February 14, 2007, the



terms of which included that the parties would negotiate an agreement providing for the continuation of minimum staffing levels during any future job action. Failure to reach an agreement would result in essential services being defined by an arbitrator. When Bill 5 was enacted, the parties were engaged in mediation-arbitration with Colin Taylor who issued a decision on July 2, 2009 setting the terms of an essential services agreement between the parties. He declined to include an interest arbitration clause, or some reasonably comparable mechanism, to resolve collective bargaining disputes if the government designated a significant amount of SGEU's members as essential. The SGEU filed for judicial review of the Taylor decision claiming the arbitrator erred by refusing to decide whether Bill 5 was unconstitutional, and by failing to recognize that the absence of an interest arbitration clause violated SGEU's members' freedom of association. The action was stayed by the Court of Queen's Bench in light of the existing *Charter* challenge of Bills 5 and 6 before the Court.

- After the Taylor arbitration decision was issued, the government enacted regulations under Bill 5 incorporating Taylor's award, as well as designating additional workplaces and employees as essential. The SGEU filed an unfair labour practice complaint before the Saskatchewan Labour Relations Board claiming the government violated the *Charter* by giving itself the power to unilaterally impose its own essential services agreement, overriding any collective agreement language or arbitration process.

Saxberg defined the overriding issue in the cases as whether or not the provincial government can use its executive, regulatory and legislative power to avoid collective agreement obligations.

Saxberg is optimistic that *Fraser* will have a positive impact on the current SGEU litigation against the Saskatchewan government. She proffered that prior to *Fraser*, the Supreme Court of Canada suggested in *BC Health Services* that the *Charter* might make it unconstitutional for the government to use its executive or legislative power to interfere with collective agreements, but the test was not clear. Saxberg highlighted that the first Supreme Court of Canada decision to consider *BC Health Services* was *Plourde v. Wal-Mart Canada Corp.*<sup>6</sup> In this case, the Court emphasized that *BC Health Services* should not signal a departure from the courts' long-standing deferential attitude towards labour legislation in crafting a balance between the rights of labour and management. Saxberg cited how the Saskatchewan Labour Relations Board relied on *Plourde* to reject another union's constitutional challenge to Bill 5 stating that the "Supreme Court cautions against judicial activism in labour relations".

In addition to reaffirming the *Charter* guarantee of freedom of association as including collective bargaining, Saxberg believes that *Fraser* will assist the SGEU going forward.

*Our litigation is unequivocally and unavoidably about the right to strike for public servants. After Fraser, there continues to be recognition that we have a constitutional right to bargain collectively with our government employer respecting significant terms and conditions of employment, and the Charter will be engaged if and when they engage in unfair labour practices. There continues to be recognition—as also seen in BC Health Services and other cases—that international human rights are a benchmark that supplies the minimal content of the rights and freedoms guaranteed under the Charter.*

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<sup>6</sup> 2009 SCC 54.



## No easy remedies

*A Quebec perspective  
after Fraser*

**Pierre Brun**

Labour Lawyer in Montreal

Melançon Marceau Grenier & Sciortino

PIERRE BRUN OFFERED a perspective from Quebec on the impact of the *Fraser* decision. He reviewed three Quebec cases that will likely apply the *Fraser* decision in the future.

Before turning to the specific implications on each of the Quebec cases, Brun made some general comments on the *Fraser* decision. He observed that the majority's reasons more or less confirm the *BC Health Services* decision: workers have the right to associate for collective purposes; the right to collective bargaining is still protected under the freedom of association guarantee in the *Charter*; and there is a duty of the state to offer workers a meaningful process of good faith bargaining.

However, in Brun's opinion, the problem lies in the implementation of these principles and the nature of remedies that can be sought. Brun suggested the Court in *Fraser* has created a very low constitutional threshold for legislation when it comes to collective bargaining rights. This was seen in the facts of *Fraser* where the AEPA had nothing in terms of meaningful collective bargaining but it was still upheld as constitutional. Unfortunately, the Court did not adequately address the pressing question of the efficiency of the process, thus ignoring the elephant in the room.

Brun noted that *Fraser* forces unions to now "test" the legislative scheme before Labour Boards and other tribunals to see if it works instead of challenging the legislation directly before the courts. Instead of looking at whether or not the framework of the legislation provides for a proper process, the Court now seems to be saying the facts have to be examined on a case-

by-case basis to see if the employer acted properly or not. In this regard, the Court gives minimal guidance as to what will constitute proper employer behaviour or “good faith” bargaining, thus making it difficult for unions to assess which cases to bring forward.

Brun believes that this represents a more restrictive approach with Courts limiting *Charter* application in “negative” rights cases. That is, the *Charter* can only be used to stop the state from interfering with collective bargaining as opposed to requiring the state to take positive steps to protect collective bargaining rights.

Finally, Brun suggested that the Court has slightly opened a door when it comes to arguing workers’ rights under section 15 of the *Charter* [equality rights]. Surprisingly, the Court in *Fraser* did not rule out altogether the section 15 arguments. Following a number of other recently rendered Supreme Court of Canada decisions<sup>7</sup> where the Court is suggesting that the previous “comparative group” analysis under section 15 may need revisiting, it appears the Court has left open the question of whether or not agricultural workers may be found as an analogous group. This avenue needs to be explored and tested more vigorously because new grounds of discrimination, such as employment or professional status, may now be seriously considered as an analogous ground under section 15.

Brun then turned to current litigation in Quebec that will likely be impacted by *Fraser*:

- The Quebec government passed Bill 30 restructuring bargaining units in the health care sector. It provides for four new categories of employees requiring unions to join employees with historically and philosophically conflicting interests. In addition, Bill 30 introduced two levels of collective bargaining split between the national and local levels. This has a direct impact on issues such as job definitions, job posting, work schedules, vacation and overtime. Without the right to strike, unions were given access to final-offer interest arbitration but only with government approved arbitrators with a limited mandate. Several unions constitutionally challenged Bill 30 and, in 2007, the Quebec Superior Court declared Bill 30 invalid. The government appealed the decision, which was held in abeyance until the Supreme Court of Canada released *Fraser*.

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<sup>7</sup> See for example: *R. v. Kapp*, 2008 SCC 41 and *Whitler v. Canada (Attorney General)*, 2011 SCC 12.

The thorny issue in this case is remedy. An argument has been put forward that the state has interfered with the workers' freedom of association but no specific model of collective bargaining is being sought. This is consistent with the rationale in *Fraser*. Rather, the employer should respect the existing process of collective bargaining and the government should refrain from



interfering using legislative powers to pass laws such as Bill 30. Thus, this can be described as a “negative rights” case. It also demonstrates the dilemma of examining the states' actions both as an employer and as a regulator.<sup>8</sup>

- In Quebec, the Labour Code stipulates that agricultural workers are excluded from collective bargaining on farms that have three employees or less working on a year-round basis. The UFCW

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<sup>8</sup> On July 6, 2011 (after the CFLR seminar), the Quebec Court of Appeal rendered its decision upholding the AG appeal and declaring Bill 30 constitutional on all accounts. Relying on *BC Health Services* and the restrictive approach in *Fraser*, the Court opined that it is completely valid for the government to redefine bargaining units as no particular bargaining scheme is entrenched in section 2(d). The Court does not discuss that, as a result, some unions simply disappeared or the confusion existing between the state acting as an employer and as a legislator. Finally, the Court upheld the local bargaining process despite the obvious flaws of the interest arbitration scheme put in place by Bill 30 following in the restrictive approach in *Fraser* regarding remedies.

launched a *Charter* challenge of the provision before the Quebec Labour Commission where it was seeking certification of a bargaining unit constituted exclusively of migrant workers from Mexico. Relying on *BC Health Services* (and before the release of *Fraser*), the Board found the provision unconstitutional as it denied agricultural workers the guarantee of freedom of association. The employer and Quebec government have given notice to judicially review the decision.

Brun believes the impact of *Fraser* should be limited in this case and is more analogous to *Dunmore*. Where *Fraser* will be problematic, however, is on the question of remedy. Will an AEPA-like scheme be sufficient for the Quebec workers? The more interesting question for Brun will be the section 15 argument as the union is not only arguing occupational status as an analogous ground, but also citizenship because all of the workers in this case are migrant workers. The recent evolution of the equality jurisprudence, as well as *Fraser*, provides an opportunity to argue the necessity of collective bargaining to balance the existing inequality of a particularly vulnerable group of migrant workers.

- In February 2011, the Quebec government legislated government lawyers and Crown attorneys back-to-work after only 12 days of legal strike action. The legislation imposes working conditions on these government employees for the next five years without any negotiations. The government similarly legislated these employees back-to-work in their last round of bargaining in 2005, and imposed working terms and conditions. Therefore, government lawyers and Crown attorneys will have been denied collective bargaining rights for years by the time the current legislation expires.

Brun noted the ILO had previously ruled the 2005 back-to-work legislation violated the workers' freedom of association, and this will be highlighted in the present litigation. In this regard, the Court's findings in *Fraser* on the importance of international law may be useful; however, Brun also noted that the Supreme Court ignored ILO decisions in *Fraser*. This case also raises the confusion between the role of the state as employer and regulator. It will be argued that the state, as an employer, is acting in bad faith by using its regulatory powers to end a lawful strike where no essential services appear to be threatened. It will be seen how *Fraser* is interpreted in relation to the right to strike in this context. Finally, government lawyers have sought compensatory and punitive damages, which will test the scope of remedies available to unions if the state is found to have interfered with the employees' freedom of association guarantee.



## Labour rights are human rights

*Labour rights under the Charter after Fraser*

**Michael Lynk**

Associate Dean

Academic and Associate Professor

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Ontario

IS CONSTITUTIONAL LAW a useful strategy for unions to employ in order to protect eroding labour rights? Michael Lynk posed this question in the aftermath of the *Fraser* decision.

As background, Lynk noted the labour movement in Canada has been bleeding for the past 25 years: union membership has fallen from 38 per cent in the mid-1980s to just under 30 per cent today. He suggested that this may be explained in part by the stagnation in labour law reform over the past 20 years. The weakening of labour laws and decline in union membership is strongly connected to the sharp rise of economic inequality in Canada. Lynk referenced a recent ILO study (*World of Work Report 2008: Income Inequalities in the Age of Financial Globalization*) that shows the hydraulic relationship between unions' strength in society and the level of economic inequality.

Lynk then turned to the Supreme Court of Canada's approach to labour rights. He observed that for the decade after the *labour trilogy* decisions in 1987, it seemed clear that unions could not turn to constitutional law to address the erosion of labour rights. The Court poured virtually no substantive meaning into section 2(d) [freedom of association] of the *Charter*. During those years, according to Lynk, virtually every other significant section of the *Charter*—for example, section 2(b) [freedom of speech]; section 7 [life, liberty and the security of the person]; section 15 [equality rights]; and section 35 [aboriginal rights]—were given a broad and liberal

interpretation. But, as Lynk said, “there remained an empty seat at the constitutional banquet table”, and section 2(d) was burdened with an antiquated and inert reading by the Court in the *labour trilogy* and cases thereafter.<sup>9</sup>

In 2001 and 2002, the Supreme Court of Canada changed track and took a more open approach to the freedom of association guarantee. In the second *labour trilogy*,<sup>10</sup> the Court said, among other things, that freedom of association might compel a government to take some positive action to protect vulnerable employees, and that bans on secondary picketing might offend freedom of speech protections.

Among academics and those committed to the basic protection of labour rights, Lynk described three schools of thought—active since the late 1980s—on using the *Charter* to advance labour rights:

- The *Charter* Cynics argue that constitutional protections for labour law will never get a reliable progressive hearing by the courts because they are inherently too conservative and too unsympathetic to the rights of the vulnerable and to organized labour;
- The *Charter* Skeptics argue that constitutional protections for labour law will not be well-treated in the courts because they will never understand industrial relations and they are institutionally incapable of mastering labour law; and
- The *Charter* Romantics argue that, while the Supreme Court of Canada’s case law has been disappointing, *Charter* protection for labour rights is both possible and necessary.

Assuming the audience was largely composed of those who sought to expand the reach of the *Charter*, Lynk proposed four principles that are necessary to advance the concept of freedom of association and constitutional protection:

- The special nature of labour legislation as protective legislation. This principle emphasizes labour legislation as balancing the inherent inequalities of the workplace. The

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<sup>9</sup> *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 and *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989.

<sup>10</sup> *Dunmore v. Ontario (Attorney General)* [2001] 3 S.C.R. 1016, *R. v. Advanced Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, and *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156.

fundamental premise of modern labour legislation is associational—that is, enabling labour organizations to convert the illusory personal liberty of an individual employee to bargain on an equal footing with his or her employer into a meaningful collective liberty for all members of the group;



- Labour rights are human rights. Entrenching this principle elevates labour rights to the quasi-constitutional level that human rights occupy in Canadian law, and opens the door for genuine legal protection rather than occasional judicial endorsements. The 1948 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights all include the concept of labour rights as human rights;
- Build on international labour law. The principles developed by the International Labour Organization support four fundamental associational rights: (i) the right to organize; (ii) the right to collectively bargain; (iii) the right to strike; and (iv) the right to be free from government and employer interference. These rights are informed by the constitutional notions of balance and proportionality, which is the same approach taken by the courts when analyzing other constitutional rights under the *Charter*; and
- The social and economic role of unions. This principle advances the notion that unions play a vital egalitarian role in modern democratic societies. Unions are among the strongest supporters of human rights and social equity rather than simply another interest group.

Lynk commented on the importance of developing persuasive constitutional evidence, including social science and expert opinion. He observed the Supreme Court of Canada has been maddening-

ly inconsistent on the degree of constitutional evidence required to make a successful *Charter* case. In particular, the Court appears to be more demanding with respect to the evidentiary burden in freedom of association and equality cases.



Lynk observed the Supreme Court of Canada is conflicted about how active courts should be in adjudicating the constitutional rights of labour. The Court has three choices:

- Empty freedom of association of all meaning and demonstrate uber-deference to decisions of legislatures. This was the original position adopted by the Court in the 1987 *labour trilogy*, and Justices Rothstein and Charron in *Fraser*;
- State broad support for freedom of association and then apply these principles in a narrow and sterile manner. This was the approach of the majority in *Dunmore* and *Fraser*; and
- Match broad support for freedom of association with a purposeful and principled application when judging actions of legislatures. This allows for the protection of freedom of association with defined and careful exceptions, and allowing some discretion to the legislatures to act when appropriate in the broad public interest.

Lynk concluded that *Fraser* presents a challenge. Can it be limited as a decision that turns on the Court's view of the persuasiveness of the constitutional evidence or does it signal a retreat to the pre-2000 case law of the Court?





## Conclusion

### *How the labour community can move forward after Fraser*

After the speakers' presentations, the discussion focussed on how the labour community should move forward after the *Fraser* decision. Key points are summarized below:

■ **Improve collective mobilization.** There needs to be greater emphasis on politically mobilizing union members and workers around labour rights. Instead of just rushing to call lawyers when rights are under attack, the labour movement should also engage union membership, politicians and the broader public in order to garner political pressure and to build capacity for positive change.

■ **Better coordination.** The labour community should coordinate and communicate better on cases and strategy. This is also important for capacity-building.

■ **Engage academics** to be more offensive as opposed to defensive. Currently, the bulk of the academic literature appears to respond to cases as opposed to developing data and analysis that can be used on the offensive in labour rights cases. Academics should be encouraged to produce analysis and research in the following areas, for example: the right to strike, the proper threshold for *Charter*-protected collective bargaining rights and the scope of legislative deference.

■ **Labour's messaging on *Fraser*.** While there are varying perspectives on the impact of the *Fraser* decision, there is consensus that the decision detrimentally affects agricultural workers and this message must be emphasized whenever possible.

■ **Emphasize labour rights as human rights.** The connection between labour rights and human rights must be underscored in order to elevate the importance of labour rights.