

**The *Fraser* Case:
Relevance, Judicial Disconnect and Implications for the
Right to Strike**

SUMMARY OF COMMENTS

**Workshop on the Implications
of the *Fraser* Case
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INTRODUCTION

There are varied views of *Fraser's* contribution to the question of whether the right to strike will be recognized under the *Charter*. I submit it is not a positive signal. Review of this issue leads us to explore the broader question of whether judicial decision-making is sufficiently rooted in the realities of the workplace and the extent to which judicial decisions set the parameters for the real power relationships between employers and labour in our society.

RIGHT TO STRIKE

The Supreme Court of Canada's "Labour Trilogy" of 1987 shut the door to the concept of a *Charter* protected right to strike. Their decision in *Health Services* seemed to have propped the door back open. Whether *Fraser* has closed that door again is an ongoing question. The content given to 2(d) in that decision does not fill one with encouragement.

JUDICIAL DISCONNECT

In its judgment, the majority concludes by saying:

We hope that all concerned proceed on the basis that s. 2(d) of the Charter confirms a right to collective bargaining, defined as “a process of collective action to achieve workplace goals”, requiring engagement by both parties. Like all *Charter* rights, this right must be interpreted generously and purposively. The bottom line may be simply stated: Farm workers in Ontario are entitled to meaningful processes by which they can pursue workplace goals. [para 117 emphasis added]

The process in the AEPA is clearly far from meaningful. Without the attendant requirements of the duty to bargain in good faith to arrive at a collective agreement and the right to strike, lockout or (at the very least) binding arbitration, the right to collectively bargain is hollow. It makes true collective bargaining rights a chimera for the most vulnerable.

RELEVANCE

The Supreme Court of Canada’s decisions must be placed within the context of the real world of labour relations. There is no denying the real, as well as signalling, effect of SCC decisions for workers. But for workers with the most workplace power, the SCC decisions, and possibly the whole legal regime, is only part of the picture.

CONCLUSION

Fraser is based on a very disconnected view of workplace relations and the power of workers. It doesn't fill one with a lot of encouragement that the right to strike will be recognized under the *Charter* in the future.