

THE BEST OF BOTH WORLDS: A PRAGMATIC APPROACH TO THE CONSTRUCTION OF LABOUR RIGHTS AS HUMAN RIGHTS

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ABSTRACT

Labour rights are increasingly being constructed as human rights. While this construction is gaining popularity, there is still considerable opposition to it. Recently, the debate has made its way to the pages of *Just Labour*. Building upon a pragmatic approach utilized by feminist legal scholars, the present article seeks to continue this important dialogue and offers an alternative that combines elements of both rights-based pluralism and critical legal scholarship. It contends that the labour movement ought to employ a multi-faceted strategy to protect and promote the rights of working people. Such a strategy recognizes the limitations of rights-discourse, but also recognizes its potential benefits. The paper argues that the labour movement cannot rely solely on rights-discourse to protect its interests but that it should also not be dismissed out of hand. Thus, the construction of labour rights as human rights can be only part of the labour movement's broader fight back strategy.

INTRODUCTION

In recent years, there has been an increase in the frequency of constructing labour rights as human rights. This is due, in part, to the growing salience of human rights as an international norm, as well as the growth of 'rights speak' as a by product of the *Canadian Charter of Rights and Freedoms*. Additionally, the labour movement has garnered a number of victories using rights discourse through appeals to the Supreme Court of Canada in recent years and consequently has seen its rights expand under the *Charter*. In turn, this has led many in the labour movement to equate their rights with human rights protected by the both *Charter* and international labour accords. Furthermore, the

rise of neo-liberalism, an increase in coercive measures used by the state against labour, and the unwillingness or inability of labour's traditional social democratic allies to protect and promote the rights of working people may also play a role in the labour movement's embrace of rights-discourse, the *Charter*, and the legal system.

The construction of labour rights as human rights, however, is not uniformly embraced by those within the labour movement or allied with it. Thus, an important and needed dialogue is beginning to develop between the proponents and opponents of constructing labour rights as human rights. This debate has recently made its way to the pages of *Just Labour*. The debate began with an article published by Roy Adams on the elevation of labour rights in recent years from statutory rights to human rights (Adams, 2008a). The publication and content of this article led to a response by Larry Savage, which criticized the construction of labour rights as human rights and highlighted the limitations associated with this strategy (Savage, 2008). Adams in turn responded to Savage's criticisms in a further article, clarifying his original approach, addressing Savage's criticisms, and highlighting two competing understandings of trade unions and labour rights: the Wagner Act Model (WAM) and the International Labour Organization's Mode of Regulation (I-Mode) (Adams, 2008b).

Despite the important contributions on the construction of labour rights as human rights by Adams, Savage, and others, the debate is far from over. Indeed, Adams noted that there is a pressing need to "...reach a common understanding about the differences between the way we think of labour issues here in Canada and the way they are conceived of by the international community" (Adams, 2008b: 85). The present article seeks to continue this debate and promotes a strategy for the labour movement that synthesizes elements of both critical legal theory and rights-based pluralist legal theory. In so doing, it relies on a pragmatic approach to rights discourse that is borrowed from feminist approaches to the *Charter*. This draws on the strengths from both Adams' and Savage's conceptions of constructing labour rights as human rights and avoids confining the labour movement to simply being an enthusiast or a skeptic of the validity of labour rights as human rights. A pragmatic approach to labour rights as human rights sees the *Charter*, the legal system, and international labour accords as being only one potential tool to be utilized in the struggle to better the lives of working people and expand the strength, size and capacity of Canadian trade unions. This in turn allows the labour movement to rely on the *Charter*, the legal system, and international labour accords on one hand, and political action, workplace mobilization, and a class-based challenge to neo-liberalism on the other.

Since the publication of Adams and Savage's articles, a ruling in a legal challenge filed by the United Food and Commercial Workers (UFCW) has

contributed to the dialogue on the construction of labour rights as human rights.¹ This case is important to the discussion of labour rights as human rights for a number of reasons. On one hand, this case may validate a human rights-based approach to protecting and promoting the rights of working people; illustrate the potential of the *Charter*, international labour accords, and a legalistic strategy; and give credence to Adams' argument of viewing labour rights as human rights. On the other hand, despite being a victory for the labour movement at the provincial level, there are a number of shortcomings to this case. It fails to provide a meaningful challenge to the dominant ideology of neo-liberalism, has considerable other limitations and is steeped in the language of the Wagner Act Model (WAM) notion of labour rights. As such, this case should play a prominent role in any discussion of labour rights as human rights.

LABOUR RIGHTS AS HUMAN RIGHTS: THE PROPONENTS AND THE OPPONENTS

Over the course of the last decade, there has been an increased call to construct labour rights as human rights. The concept of human rights is sufficiently broad, and there exists no uniform definition of what constitutes human rights, what their source is, how they are best enforced or what their boundaries are. The *Universal Declaration of Human Rights*, for example, asserts that "all human beings are born free and equal in dignity and rights...[that] they are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" and that the "...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (*UDHR*, 1948). While this normative approach to what ought to be is inspiring, it fails to fully explain what a human right is in practice. Building on the work of Ronald Dworkin, Jack Donnelly provides an empirical view of human rights stating, "to have a right to x is to be *entitled* to x. It is owed to you, belongs to you in particular. And if x is threatened or denied, rights-holders are authorized to make special claims that ordinarily 'trump' utility, social policy, and other moral or political grounds for action" (Donnelly, 2003: 8, see also Dworkin, 1977: xi, 90). Thus, labour rights should be seen as positive entitlements held by working people, emanating from state action (at both the international and domestic level), and enforced in the international arena by the ILO or the national arena by domestic supreme courts. A major boundary to the utility of these rights is that national governments routinely ignore ILO rulings and their own laws and statutes and proceed with action that contravenes labour rights (D. Fudge, 2005: 66-69).

As Adams makes clear, the construction of labour rights as human rights has a long history, at least at the international level (Adams, 2008a: 49-56). At the international level, the promotion of the concept of human rights began in 1948

with the passage of the *Universal Declaration of Human Rights*, although the document does not specifically mention collective bargaining. In that same year, the ILO passed both Convention 87 (*Freedom of Association and Protection of the Right to Organize*) and Convention 98 (*The Right to Organize and Collective Bargaining*).² Freedom of Association is also referred to in both the UN's *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Cultural and Social Rights*. More recently, the right to bargain collectively was reaffirmed at the ILO's 1995 Summit on Social Development and further codified in the ILO's 1998 *Declaration of Fundamental Principles and Rights at Work* (Adams, 2008a: 53-54).

Despite labour rights being proclaimed as fundamental rights at the international level, a similar construction in Canada was wanting in Canada. At the domestic level, collective bargaining was first recognized at the federal level in 1944 with the passage of *Privy Council Order 1003*. All provinces passed similar legislation shortly thereafter (D. Fudge, 2005: 19-22). While these rights applied primarily to private sector workers, collective bargaining was extended to public sector workers over the next few decades. While unions actively fought to obtain and protect these rights, they were not constructed as human rights. Indeed, they were viewed more as statutory rights emanating from government legislation than they were as being fundamental human rights possessed by all human beings (Adams, 2008a). With the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, rights in Canada were codified as fundamental human rights, though no mention of collective bargaining was made in the *Charter*. Recently, however, the concept of labour rights as human rights has become increasingly salient, especially in an era of heightened neo-liberalism and during a time in which the labour movement is declining in power and influence.

Adams has argued that, "it is high time for freedom of association and the right to organize and bargain collectively to be inserted in our human rights codes, thus proclaiming loudly that they are rights equivalent to employment equity" (Adams, 2006: 40). For Adams, however, these rights are not to be used as means to an end, but rather, as an end themselves. In so doing, he is not alone. Lance Compa, for example, asserts that, "so long as worker organizing, collective bargaining, and the right to strike are seen only as economic disputes involving the exercise of power in pursuit of higher wages for employees or higher profits for employers, change is unlikely. Reformulating these issues as human rights concerns can begin a process of change" (Compa 2000: 17). According to this construction, trade unions and individual workers are not viewed simply as economic interests, but instead are seen as bearers of fundamental human rights.

The construction of labour rights as human rights has also been championed by a number of trade unions, most notably the National Union of Public and General Employees (NUPGE), the United Food and Commercial

Workers (UFCW), the Canadian Teachers' Federation (CTF) and the Canadian Police Association (CPA).³ In calling on the federal and provincial governments to refrain from limiting the rights to organize and bargain collectively, and expanding them to cover workers for whom these rights are currently denied, these unions actively rely on notions of labour rights as human rights as envisioned by international accords. Rights discourse has come to play a central part in the lobbying strategy of these unions.

In late November 2008, these unions urged the federal to government to live up to their international commitments by ratifying International Labour Organization (ILO) conventions and declarations recognizing workers' rights (CPA, 2008).⁴ Derek Fudge, a researcher and analyst with NUPGE, has called for a *Workers' Bill of Rights* "which affirms that all workers have the right to join a union and engage in collective bargaining" (D. Fudge, 2006: 82, emphasis in original).⁵ However, as governments become increasingly hostile to organized labour, the labour movement is forced to rely on the *Charter*, international labour conventions, and the judiciary to protect and promote the rights of workers. Fudge also argues that the labour movement "...need[s] a coordinated national strategy...to use the judicial system to advance workers' rights in Canada..." (D. Fudge, 2006: 83). A legal strategy relies heavily on rights discourse and argues that workers' rights are human rights deserving of protection under the *Charter*. Indeed, rights discourse is becoming increasingly popular among labour activists. To be sure, the concept that labour rights are human rights is widely supported in the academic community (Compa 2000, 2003, 2008; Gross 1999, 2003; Macklem 2006; McIntyre and Bodah 2006; and Swepston 2003).

Despite the increasingly popularity of rights discourse within the labour movement, the belief that labour rights are properly constructed as human rights does not come without its critics. Savage, for example, argues that constructing labour rights as human rights undermines class-based responses to neo-liberalism, depoliticizes the labour movement, downplays the material aspect of workers' collective action, and wrongly assumes that power flows from rights (Savage, 2008). A number of other scholars, predominantly coming from Marxist inspired traditions of critical legal scholarship, are skeptical of the rights-based, pluralist legal approach.

In analyzing the increase in rights-based claims made by the labour movement, Savage draws upon Michael Mandel's concept of 'legalized politics' (Mandel, 1994: see esp. ch. 5). Although the labour movement can appeal to the legislature when constructing their rights as broader human rights, more often than not they are forced to rely on the *Charter* and legal system to advance their rights. This strategy is misguided, claims Savage, because it wrongly assumes that power flows from rights (Savage, 2008: 68). According to Mandel, "the whole idea of the *Charter* can be seen as a legitimation of the basic inequalities of Canadian society, of which the subordination of labour to business is one of the

most basic” (Mandel, 1994: 260). From this perspective, a reliance on the *Charter* and the use of rights-based appeals by the labour movement are unable to adequately challenge uneven power structures in society and ensures labour’s subordination to both capital and the state. A reliance on the notion of labour rights as human rights also undermines the militancy of labour movement, while simultaneously providing “provid[ing] the union [movement] with a quick and politically costless way of appearing not to back down” (Mandel, 1994: 278).

Not only do critics of human rights-based approaches to understanding labour rights take issue with the substance of labour rights as human rights, they are equally critical of the institutions which are all too often relied upon in making these claims. Harry Glasbeek maintains that the legal system is an institution necessarily adverse to the interests of working people, as “the role of courts in liberal-capitalist democracies has always been to maintain a distinction between the political and economic sphere... From this perspective, any advantage an owner of private wealth may have over wealth-less individuals is not objectionable...” (Glasbeek, 2001: 106-07). Furthermore, labour historians have argued that approaches which construct labour rights as human rights are problematic for their tendency to undermine labour militancy and a sense of collective action, and instead foster a sense of individualism in workers (Brody 2001; Lichtenstein 2003; and McCartin 2005).

A PRAGMATIC APPROACH TO THE CONSTRUCTION OF LABOUR RIGHTS AS HUMAN RIGHTS

While rights-based pluralist approaches and Marxist inspired critical legal approaches seem to be polar opposites, there are some similarities in the ends they seek. Indeed, both Adams and Savage would agree that a strengthened labour movement that represents an increased number of workers is desirable.⁶ Furthermore, they would also contend that it is problematic when the state and capital frustrate the rights to organize, bargain collectively and strike. It is largely on the means used by the labour movement to both prevent the abuse of their rights and increase their strength, predominantly the construction of labour rights as human rights, in which Adams and Savage differ. Although constructing labour rights as human rights may be seen as an end in and of itself, its ultimate utility rests in their ability to better the lives of working people. Thus, the debate over constructing workers’ rights as human rights is focused on normative claims of how the labour movement ought to proceed in ensuring that as many workers as possible have the rights to organize, bargain collectively, and strike.

Scholars from both sides of the debate would be wise to appreciate where their colleagues are coming from and the implications of their normative claims. While some scholars have criticized the *BC Health Services* decision for its

shortcomings (Smith, 2007; Tucker, 2008; and Savage, 2007 and 2008), it is difficult to deny that the Court's decision to provide constitutional protection to the procedure of collective bargaining was an important decision for the labour movement, regardless of any shortcomings. The precedent established in this case was most recently applied in the *Fraser* decision, which maintained that legislation failing to provide Ontario's agricultural workers with sufficient statutory protections to enable them to engage in meaningful collective bargaining was a violation of the *Charter*.

At the same time, however, scholars from the rights-based pluralist tradition should acknowledge that there are indeed severe limitations to a reliance on the construction of labour rights as human rights and using the *Charter* and the legal system to enforce and promote these rights. Judith Fudge's lament that "...the shift in the site of legitimation for labour rights from the legislature to the courts does not bode well for unions or for working people" should not be ignored (J. Fudge, 2004: 452). She maintains that "...courts have neither the power to foster new institutions nor to influence economic conditions...it is a sad commentary on democratic politics that the courts may be one of the few places where [labour rights have] some legitimacy (J. Fudge, 2004: 452). How, then, should the labour movement proceed in protecting the rights of Canada's working class? Is it possible to combine elements of both critical legal theory and rights-based pluralism? Can the labour movement both actively challenge neo-liberalism and use the *Charter*, the legal system, and rights-based arguments to its advantage?

The labour movement would be wise to look toward its allies in the women's movement and their pragmatic engagement of rights-discourse, the *Charter*, and the legal system as a potential model to emulate. Diana Majury asserts that, "feminists...have tended to see the *Charter* as part of a bigger picture and a longer-term strategy" (Majury, 2002: 302).⁷ Despite a willingness to use the *Charter* and include it as part of a larger strategy for advancing women's rights, Majury and other feminist legal scholars acknowledge the *Charter's* limitations and do not approach it without due skepticism. However, as rights-discourse and the *Charter* presents opportunities and can serve as powerful tools toward achieving meaningful ends, it is problematic to simply ignore them (Majury, 2002). Thus, rights-discourse and the *Charter* are utilized by the women's movement as part of a pragmatic and multi-faceted strategy employed in the name of women's advancement and equality.

The struggle over reproductive rights represents a clear example of the usefulness and benefit of the multi-faceted strategy employed by the women's movement. Alexandra Dobrowolsky recalls that "in the battles over abortion, Canadian feminists staged large-scale public events, coordinated coalitions of women, unionists, and other popular groups, plus forged alliances with the New Democratic Party, in addition to contesting abortion laws in courts"

(Dobrowolsky, 2000: 9). The women's movement did not place all of its emphasis in one strategy to achieve its desired result, but rather, relied on a whole host of strategies. As a result of this multi-faceted approach to ensuring a woman's right to control her own body, "...the women's movement [added] an educative, provocative, mobilizing, social movement layer to the conventional, interest group lobby" (Dobrowolsky, 2000: 9). In so doing, the women's movement has illustrated that a diverse, flexible strategy that incorporates rights-discourse but does not rely solely upon it is a feasible strategy capable of protecting and promoting their rights and interests.

This type of multi-faceted strategy may be referred to as a pragmatic approach to rights protection. Majury elaborates on this approach, suggesting that:

Rather than falling into either the *Charter* optimist/enthusiast or the *Charter* pessimist/resister/skeptic categories that are often invoked, I would describe most feminists...who work in this area as *Charter* pragmatists who see the *Charter* as one among a limited number of potential tools to expose and to argue for the redress of women's and other marginalized groups' subordination (Majury, 2002: 303).

A pragmatic approach to rights protection recognizes the power and influence of the *Charter* and rights-discourse, but rightfully sees them as "fraught with dangers, both foreseen and unforeseen" (Majury, 2002: 303). As a result, adherents to *Charter* pragmatism approach rights-discourse with caution and hope for the best, but also have established networks with progressive allies in the community, alliances with like-minded political parties, an ability to lobby potentially hostile governments, are willing to engage in civil disobedience, public protest and mass-demonstrations, and have a mobilized grassroots membership to back up their demands. In short, this strategy is neither radical nor reformist, but falls somewhere in between. In discussing the differences between radical and reformist approaches, Dobrowolsky notes that "Canadian women's constitutional strategies have not reflected an either/or but a pragmatic 'both and' mentality. Their strategic emphases have shifted in different circumstances from a reliance on, for instance, caucusing and lobbying to inciting mass-based protests" (Dobrowolsky, 2000: 10). To combat the aggressive anti-labour attack launched by neo-liberal governments and capital in recent decades, the Canadian labour may adopt a similar pragmatic approach.

Rights-discourse does have its limitations, but so to do lobbying, workplace action, public protest, and alliances with political parties. However, the *Charter*, international labour accords, and rights-discourse are powerful institutions that should not be dismissed because of their deficiencies and limitations. In analyzing the *BC Health Services* decision, although Charles Smith notes that, "there are real limits to the decision," he nevertheless encourages "the

labour movement... [to] rightfully see this as a victory," adding that "the court has now affirmed that workers have certain constitutionally protected rights that governments cannot simply legislate away. [The labour movement] should be encouraged to use it as broadly as possible" (Smith, 2007: 31). Quite simply, there exists no foolproof strategy to ensuring the protection and promotion of the rights of working people, especially in an increasingly hostile neo-liberal era. Each potential strategy has not only its benefits, but also its limitations. Thus, much like the women's movement, the labour movement must employ a broad and multi-faceted approach to protecting the rights of Canada's working people.

THE FIGHTBACK AGAINST BILL 29: A PRAGMATIC APPROACH AT WORK

While Adams and others have made much has been made of the Supreme Court's affirmation of the constitutional right to the procedure of collective bargaining, the illegal strike that preceded the legal challenge is often overlooked.⁸ The *BC Health Services* case is often constructed as a clear example of the construction of labour rights as human rights. However, the precursor to the legal challenge- the fight back campaign against a Bill 29- is an example of a multi-faceted strategy on the part of the labour movement.⁹ While the use of rights-discourse though an appeal under the *Charter* and a reliance on international labour accords played an important role in the final outcome, it was part of a larger strategy and used only after other avenues had been exhausted.

The British Columbia labour movement's traditional allies in the NDP were of limited assistance in preventing the passage of the bill, as they only had 2 seats in the 79-member legislature. This weakness illustrates the importance of the labour movement working to elect labour friendly politicians to office. Nevertheless, in the absence of influential political allies, the Hospital Employees' Union (HEU), the union representing the majority of workers affected by Bill 29, employed a multi-faceted strategy in their fight-back campaign. This strategy is consistent with a pragmatic approach to rights-discourse. In the immediate aftermath of the passage of Bill 29, the HEU built links with the Greater Victoria Community Solidarity Coalition (CSC), a coalition of senior citizens, students, anti-poverty activists and fellow trade unionists, and engaged in a number of organized local actions, most notably a 'Day of Defiance' (Camfield, 2006: 22).

Following a series of rotating regional actions and numerous protests and demonstrations, the stage was set for a province-wide HEU strike in early 2004. On April 25th, the HEU established its picket lines, but the Liberal government quickly passed legislation to end the strike and impose a settlement containing an 11 percent wage decrease, an increase in the workweek, and no protection against contracting-out. The HEU decided to keep their picket lines up, and the

strike entered into a new phase in defiance of the law (Camfield, 2006: 26). In solidarity with members of the HEU (a component of CUPE), workers in at least 27 CUPE locals engaged in a wider solidarity strike. At school boards where CUPE locals were striking, many teachers refused to cross CUPE's illegal picket lines. Additionally, "smaller numbers of members of other unions, including the Communication, Energy and Paperworkers (CEP), BCNU, OPEU, International Brotherhood of Electrical Workers, Pulp and Paper Workers, and IWA, also struck" (Camfield, 2006: 28).

In the end, the strike ended with a concessionary settlement and the cancellation of a province-wide general strike that was set to commence, leaving many members to conclude that they were "Screwed By Our Own Leaders" (Camfield, 2006: 32). With the illegal strike ended and HEU workers back on the job, the fight back campaign was transferred to the legal system, with the Supreme Court eventually ruling that the *Charter* provided workers with a fundamental right to the procedure of collective bargaining.¹⁰ Furthermore, from the time of the passage of Bill 29 and other anti-labour legislation and throughout the strike, the British Columbia Federation of Labour was working actively to elect a New Democratic government in the upcoming 2005 election

While the fight back campaign against Bill 29 may have been cut short, it nevertheless is illustrative of the potential of a multi-faceted strategy and a pragmatic approach to rights-discourse. In addition to relying on the *Charter* and international labour accords as a part of a broader a right-based argument, the HEU and the broader BC labour movement also forged strategic alliances with progressive community partners, engaged in frequent public demonstrations and protests, undertook legal and illegal job action, and worked to defeat an anti-labour government and replace it with one more friendly to labour. This strategy mirrors the pragmatic approach employed by the women's movement and illustrates its usefulness. It also falls somewhere between the strategies envisioned by Adams and Savage and incorporates elements from both. Accepting a concessionary settlement and calling off a general strike in lieu of relying on a right-based approach speaks to Savage's fear of depoliticizing the labour movement and moving away from a class-based response to neo-liberalism (Savage, 2008: 68). Despite the court's important ruling that the *Charter* protects the procedure of collective bargaining and that Canada should uphold that labour rights that it has affirmed at the international level, there are many shortcomings to the decision (Smith, 2007; Tucker, 2008; and Savage, 2007 and 2008). Thus, Adams' seemingly uncritical embrace of the *BC Health Services* decision and the usefulness of rights-discourse are misplaced.¹¹ In short, there is not one single, foolproof strategy for the labour movement to employ that will increase both its size and strength. However, a pragmatic approach to rights-discourse that is capable of employing a multi-faceted fight back campaign

ultimately has a greater likelihood of being successful and providing meaningful protection to the working class.

RECENT DEVELOPMENTS IN RIGHTS DISCOURSE: THE FRASER CASE

Since the publication of Adams and Savage's dialogue, a ruling in another important case that posited that labour rights are human rights was delivered by the court. The Ontario Court of Appeal concluded that the legislation which failed to provide agricultural workers with sufficient statutory protections denied them the ability to meaningfully exercise both their freedom to organize and their right to bargain collectively (*Fraser*, para. 10). Although it is not possible to assess the final outcome of the case as the court suspended its decision for twelve months and the provincial government has been granted leave to appeal the ruling by the Supreme Court of Canada, it is possible to analyze the court's reasoning and determine how this case fits in with the larger constructions of workers' rights as human rights.

The court's reasoning is, in many respects, consistent with constructing labour rights as human rights. Indeed, the court argued that the rights to organize and bargain were grounded in fundamental freedoms, rather than statutory regimes (*Fraser*, para 57-59). Furthermore, the court's reasoning was significantly informed by previous opinions in both *Dunmore* and *BC Health Services*, suggesting that *BC Health Services* may in fact be the "...turning point in the way that collective bargaining is conceived and evaluated in Canada" that Adams suggested it would be (*Fraser*, para. 37-53; Adams, 2008a: 48).¹² Indeed, the court reasoned that, "...the combined effect of *Dunmore* and *B.C. Health Services* is to recognize that s. 2(d) protects the rights to organize and to engage in meaningful collective bargaining. [They] also recognize that...s 2(d) may impose obligations on the government to enact legislation to protect the rights and freedoms of vulnerable groups" (*Fraser*, para. 52). In short, the decision in *Fraser* represents a continuation of the construction of labour rights as human rights and illustrates that the *Charter* and international labour accords can be used to protect the rights of workers.

Despite supporting the construction of labour rights as human rights, the court did diverge considerably from Adams on one important point: the nature of an exclusive and majorities bargaining agent. In so doing, the court's decision was clearly anchored in the Wagner Act Model of Employment Regulation (WAM) (Adams, 2008b: 77-79). Adams contrasts WAM with the International Labour Organizations Mode of Regulation (I-Mode), and argues that, "...WAM contains bells and whistles that are not essential to I-Mode and some notions and practices that are entirely contrary to it" (Adams, 2008b: 77). As a result of the inconsistency between WAM and I-Mode, Adams argues that "...unions need to change too," and elaborates that "mandatory union membership- the union

shop- clearly offends the basic principles of freedom of association” (Adams, 2008a: 59-61). He therefore contends that workers should have more flexibility in establishing bargaining agents, and that they need not be majoritarian or exclusive in nature to be able to bargain with employers (Adams, 2006: 25-34; Adams, 2008a: 59). It is here that the court departs from Adams’s conception of labour rights and human rights and aligns more closely Savage’s conception of a *bona fide* trade union (Savage, 2008: 69-70).

The court argued that the “...twin principles of ‘majoritarianism’ and ‘exclusivity’ are common threads running through all Canadian collective bargaining legislation (Carter et. al, 286-87, cited in *Fraser*, para. 88). Notions of exclusivity suggest that there can be only one recognized bargaining agent for each employee group and notions of majoritarianism suggest that this single agent must be supported by a majority of the workers. To depart from these two guiding principles of Canadian unionism would foster multiple bargaining agents for the same employee classification that would likely not be supported by a majority of the workers. The court elaborated that “a common element found within labour relations statutes across Canada is a mechanism to allow workers to select, on a majority basis, a trade union...” and that “exclusivity provides workers with a unified, and thus, a more effective voice from which to promote their collective workplace interests” (*Fraser*, para. 87-89). While the court did embrace a conception of labour rights as human rights, it was clearly one anchored in the tradition on WAM and thus departed significantly from what is envisioned by Adams under the I-Mode approach.

Despite the important ruling in *Fraser* and its construction of labour rights as human rights, the ruling- like all legal decisions- does not come without its limitations. As a result of these limitations, Savage’s argument that the “...human rights approach is flawed...” gains considerable weight (Savage, 2008: 68). Indeed, the Court noted that the problem with the impugned legislation was not necessarily that it limited collective bargaining for agricultural workers in general, but that “it exclude[d] all employees in the agricultural sector...” and that “there [was] no attempt to minimize the impairment by carving out family farms that are allegedly incompatible with a more formal labour relations regime. Rather, all farms, including factory farms, are excluded from collective bargaining” (*Fraser*, para. 133, emphasis in original). Thus, it is possible for the government to pass legislation that continues to deny the rights to organize and bargain if it decides to draw its distinction between small family farms and large factory farms.

Furthermore, the ruling falls well short of providing justice to approximately 16 500 temporary foreign workers. While Justicia for Migrant Workers (J4MW), a Toronto-based grassroots organization dedicated to promoting the rights of the primarily Caribbean and Latino foreign guest workers employed in Canada’s agricultural industry, applauds the decision in

Fraser, they rightly point out that "...there is still much to be done to promote migrant farm workers' human rights" (J4MW, 2008). For example, they note migrant workers face many barriers upon coming to Canada, including: repatriation procedures that are unilateral and provide no appeal mechanism to workers, disparities in the health care system which deny equal access, mandatory fees and deductions for guest workers, a ban on attending educational institutions and problems with agricultural housing facilities, among others. While the ruling in *Fraser* may provide most agricultural workers, including migrant workers, with the right to organize and bargain, it does not directly address the other barriers faced by migrant workers, thus illustrating some of the limitations of the ruling and rights-discourse. Of course, with the Ontario government appealing the ruling, the lengthy process involved in seeing transformative change when relying on a legalistic process is also highlighted.

CONCLUSION

Although labour rights are increasingly being constructed as human rights, there remain many critics to this construction. This article has proposed a middle ground, one that appreciates the inherent limitations of rights-discourse, but one that also recognizes its potential benefits. A pragmatic approach to rights-discourse that employs a multi-faceted fight back campaign to protect and promote the rights of working people is capable of providing the greatest gains. Indeed, as the women's movement has demonstrated, such a pragmatic approach has proven to be successful in the past. While there are no guarantees that it will be advantageous to the labour movement, it will be more successful than either a strategy that is uncritical of the limitations of rights discourse or one that is wholly dismissive of it. Thus, the labour movement can and should employ rights-based arguments and use the *Charter* and international labour accords to its advantage, while simultaneously recognizing the limitations inherent in this strategy. However, it should be noted that the construction of labour rights as human rights, specifically the right to bargain collectively, will best serve those workers who are already organized and will do little in the way of organizing the unorganized. While the right to organize is also seen as a human right, many workers facing practical, not *prima facie*, restrictions on bargaining will not be aided by this process. Thus the benefits of constructing labour rights as human rights may be allocated unevenly, with workers in industries with a history of unionization and rights restrictions (such as the public sector) will fare better than workers in industries which lack a history of organization. While workers in some of these unorganized industries, particularly, the ones in which *prima facie* legal prohibitions or organizing exist may benefit from a rights-based approach, workers in largely unorganized industries who are legally allowed to organized, such as retail and food services,

may not benefit significantly from a rights-based approach. For workers in these industries, class-based, political mobilization will need to occur for significant changes- notably legislative ones- to be achieved. The labour movement must also work to forge alliances with progressive community allies, ensure that labour friendly politicians are elected at all levels of government, and build the capacities of rank-and-file workers to engage in successful workplace action, mass protest, and public demonstrations. While no strategy is foolproof, one that is pragmatic and multi-faceted in its outlook is likely to be most successful in bettering the lives and conditions of Canada's working class.

NOTES

1. *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760.
2. The former was ratified by the Canadian government, while the latter has yet to be ratified.
3. NUPGE and UFCW have developed and co-sponsored the website www.labourrights.ca and published the first edition of Derek Fudge's *Collective Bargaining in Canada: Human Right or Canadian Illusion?*
4. The Canadian government has only ratified five of ILO's eight core conventions. Most notably, it has failed to ratify Convention 98 (The Right to Organize and Collective Bargaining), but has also failed to ratify Convention 29 (Forced Labour) and Convention 138 (Minimum Age Convention). In total, the Canadian government has only ratified 30 of 188 ILO Conventions. See: <http://www.labourrights.ca/fastfacts.htm>
5. A full copy of the proposed *Workers' Bill of Rights* can be found online at: http://www.nupge.ca/labour_rights/workers_bill_of_rights.asp
6. Admittedly they do differ on some level, such as the (un) desirability of non-exclusive, non-majoritarian representation.
7. She correctly asserts that her claim is a generalization that suffers from over inclusiveness as not all feminists are supportive of the *Charter*. That said, she believes that "feminists tend to be drawn to the more pragmatic, it's-worth-a-try end of the *Charter* spectrum."
8. A notable exception is David Camfield, "Neoliberalism and Working-Class Resistance in British Columbia: The Hospital Employees' Union Struggle, 2002-2004," in *Labour/Le Travail*, vol. 57 (Spring 2006), 9-41.
9. Bill 29, the *Health and Social Services Delivery Act*, allowed for extensive privatization in the health care sector; made it illegal for unions to discuss alternatives to privatization at the bargaining table; eliminated 'no contracting out' provisions, successor rights and bumping language; ended job retraining and job placement provisions; and allowed managers to move workers to temporary assignments at distant hospitals.
10. *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27
11. It should be noted, however, that Adams does not advocate the labour movement refraining from engaging in political or workplace action.
12. *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94.

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