DÉJÀ VU... ALL OVER AGAIN:

THE ASSAULT ON WORKERS' RIGHTS IN NEW BRUNSWICK

1988-2008

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INTRODUCTION

New Brunswick's labour legislation has been seriously eroded over the last twenty years. Long-established legislation that has protected workers has been slowly depleted. This erosion has the potential to alter the future of the province. Although New Brunswick's labour legislation has long been the site of recurring struggles over the definition of eligible employees, specification of bargaining units and rights of collective action, a direct assault on trade union freedoms has been aimed at the protection of workers.

This article will examine the changes in New Brunswick's labour laws since 1988 using the criteria established by Harry W. Arthurs in "What Immortal Hand or Eye? Who Will Redraw the Boundaries of Labour Law", which questions the reasons for the re-drawing of the "boundaries of protection" for workers.[1]

Many of the protections once found in New Brunswick's labour legislation have been amended, modified or quashed. The result is that many well-established values and principles that previous generations considered fundamental labour and human rights have been taken away. To appreciate this erosion of protection, an examination of the development of labour law in New Brunswick and in Canada is helpful.

THE ORIGINS OF LABOUR LAW IN NEW BRUNSWICK

Unions and collective bargaining were entirely legal in Canada after 1872; however, most labour relations law prior to the 1940s was about evading the reasonable expectation that workers and unions would enjoy some protection for union membership and collective bargaining in dealing with employers.

Provincial labour legislation began in 1900 with the adoption of the Federal *Conciliation Act*. The *Act* established a federal Department of Labour which was

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1 Harry W. Arthurs, "What Immortal Hand or Eye? Who Will Redraw the Boundaries of Labour Law" in Guy Davidov, ed., *Boundaries and Frontiers of Labour Law, Goals and Means in the Regulation of Work* (Oxford: Hart Publishing, 2006) 373-389, at 373.

staffed by officers who provided conciliation of labour disputes at the request of the parties concerned.

At this time, Canadian workers gained workplace protection through legislated structures like the 1907 *Industrial Dispute Investigation Act (IDIA)* which applied to mining, transportation, communication companies, and utilities. It had, however, a limited impact as it offered no more than a *de facto* form of union recognition through the conciliation process. The fundamental problem of industrial relations remained the gross disparity of bargaining power between employers and workers.

Following the Winnipeg General Strike in 1919, the *IDIA* was amended to provide for the appointment of a conciliation board prior to a work stoppage taking place. However, jurisdictional disputes arose and the *IDIA* was challenged in the 1925 case of *Toronto Electric Power Commissioners v. Snider* on the basis that the federal government was acting beyond its proper constitutional jurisdiction.[2] The court held that the *IDIA* did not apply to municipal employees and therefore appointment of a conciliation board in a labour dispute in the provincial or municipal sectors was outside the Minister's jurisdiction. The federal *IDIA's* assumption of competence was successfully challenged when the case proceeded to the Judicial Committee of the Privy Council of England which issued a decision that limited application of the *Act* to federal works and undertakings.

When amending the *IDIA* in the light of the constitutional decision, the Government of Canada made the statute applicable to industries and provincial labour jurisdictions if the respective provincial legislature so determined. New Brunswick took up the offer in 1938. Thus, the predominance of provincial jurisdiction in labour matters and the limits of federal jurisdiction were established.

The first Annual Report from the Department of Labour indicates that new legislation was introduced between 31 October 1937 and 31 October 1938: *An Act respecting Labour and Industrial Relations*.

Issues of labour relations came to the national forefront in 1944, largely due to the Second World War. Since much of the workforce was involved in the war, supply and demand issues related to available labour became prominent and resulted in many work stoppages, exposing voids in labour legislation. This newfound national significance enabled the federal government to use its power over matters relating to "peace, order and good government" per ss. 91 and 92 of the *Constitution Act 1867* to enact labour legislation that would normally have been outside of its constitutional jurisdiction.

It was during the war, early in 1944, that the *Wartime Labour Relations*

2 *Toronto Electric Power Commissioners v. Snider*, [1925] AC 396.

Regulations known as PC1003 were promulgated. Among other things, PC1003 provided a legal framework for access to collective bargaining supervised by the Wartime Labour Relations Board. The regulations included a requirement for parties subject to the regulations to meet and bargain in good faith similar to that established by the *Wagner Act* in the United States in 1935. PC1003 became the framework for the legalization of the collective bargaining process as it is known today.

The central features of PC1003 included: the establishment of a right for managerial employees to form and join unions, the prohibition of employer acts designed to prevent employees from organizing, the authorization of labour boards to certify unions and the exclusivity of representation, the requirement that employers bargain in good faith, prior to resorting to economic sanction, and the requirement that the parties participate in government-sponsored conciliation during the term of the collective agreement parties and that no party engage in strikes or lock-outs during that conciliation.

Following the repeal of the federal wartime regulations in 1948, virtually all provinces (and the federal government) adopted the United States' *Wagner*-style labour relations statutes, covering all employees in the private sector. The *Industrial Relations Act* of today is a direct descendant of those laws which have been the site of recurring struggles over the definition of eligible employees, the specification of bargaining units, and the rights of collective action.

In 1948, workers in Canada received another boost to the legitimacy of their established rights to organize and bargain collectively. The International Labour Organization (ILO), an agency of the United Nations, spelled out the details of the right to freedom of association in its conventions. The Government of Canada supported the adoption of both key labour rights conventions, No. 87 (Freedom of Association and the Right to Organize) and No. 98 (The Right to Organize and Collective Bargaining), confirming the right to bargain collectively and the right to strike. It was not until the 1960s, however, that public sector employees across the country gained the right to organize and collectively bargain with their employers in the federal and provincial jurisdictions.

Public sector bargaining legislation was introduced in New Brunswick in 1968 under Premier Louis Robichaud with the *Public Service Labour Relations Act,* which mirrored the *Federal Public Service Labour Relations Act* by allowing for public sector employees to commence organizing into unions and bargaining collectively. The legislation provided "boundaries of protection" for most provincial government employees in New Brunswick similar to those governing workers and their unions in the private sector.

The *Industrial Relations Act* and the *Public Service Labour Relations*

Act both afforded workers the right to withdraw their services and strike to support bargaining demands following the exhaustion of a conciliation process.

THE DECLINE OF WORKER PROTECTIONS

In his text "Collective Bargaining In Canada—Human Right or Canadian Illusion", Derek Fudge explains that almost every jurisdiction in Canada has experienced a major violation of the bargaining rights of its citizens over the last twenty-five years.[3] Collective agreements have been virtually shredded. Freely negotiated wages and benefits have been taken away. Employers' proposals have been legislatively imposed on workers and the right to strike has been removed in complete disregard for the rights that have been entrenched since the 1940s. In New Brunswick, both the private and the public sector have been hit by this phenomenon.

Harry W. Arthurs has outlined three possible intersecting causes of diminished worker protections in labour legislation:

> The "original sin" of inept conceptualization or poor drafting of labour laws and/or;
>
> A subsequent "fall from grace" occasioned by the emergence of new paradigms at work and/or;
>
> The deliberate re-entrenchment of boundaries under the influence of neo liberal policies.[4]

As Arthurs states, "the result is that the traditional communities of workers who once aspired to or enjoyed protection no longer receive it and that new communities with equally as compelling claims are likely to be denied it".[5]

1. The "Original Sin": Inept Conceptualization or Poor Drafting of Labour Laws

First, it is important to examine the falling of the "boundaries of protection" in light of the ever-varying mandate and influence of the provincial Department of Labour. In New Brunswick, we have seen several changes in the autonomy, size and functions of the Ministry of Labour over the last 25 years. It has been argued that in Canada, as in most democratic countries, provincial labour departments came to be perceived as a "natural" or "functional" division of administrative and legislative responsibility comparable to departments of education, agriculture, and health.[6] Additionally, as Arthurs explains:

3 *Ibid.*
4 Arthurs, *supra* note 1 at 373.
5 *Ibid.*
6 *Ibid.* at 375.

> the creation of a Labour Department was understood to have symbolic significance for working people, especially in an era when they had only recently acquired the franchise, when collective bargaining was in its infancy, when labour standards were threatened by a predatory form of capitalism and when "the social question"—the welfare state—still agitated most economically advanced democracies. Its continued existence in later years conveyed to workers that "their" department would serve "their" needs and protect "their" interests, and that "their" minister (often someone with links to the union movement) would present "their" point of view sympathetically when important political and economic decisions affecting workers were taken at the senior levels of government.[7]

As Arthurs explains, however, provincial labour departments can no longer be viewed in quite the same way. "Increasing influence from the business community on public policy, the widespread acceptance of market solutions to social problems, the shift from Keynesian to supply side economics and the desire to deregulate labour markets are some of the practical reasons that labour departments have been reconfigured from their own original functions redistributed, downgraded or abandoned."[8]

The New Brunswick Department of Labour began in 1904 as a Bureau of Labour under the Department of the Provincial Secretary-Treasurer. At present, its stature has been diminished and the Department has been bumped to a back seat position at the provincial cabinet table, but its history reveals that it was once prominent in the legislature. In 1910, a Commissioner of Labour was appointed. The Department of Health and Labour was established in 1926. In 1936, a Fair Wage Officer was appointed, in 1937 a Fair Wage Board was created, and in 1941 a Director of Labour was appointed.

The province's provisions evolved from the preliminary promises of the 1938 *Act* respecting *Labour and Industrial Relations* (more rhetoric than reality) to the more substantive provisions of the 1945 *Labour Relations Act*, which provided for recognition and certification of unions as bargaining agents, as implemented by the federal jurisdiction in wartime.

A separate Department of Labour was established in 1944 with an extraordinarily broad jurisdiction, which included the following statutes: *The Factories Act, The Stationary Engineers' Act, The Apprenticeship Act, The Labour Relations Act, The Minimum Wage Act, The Industrial Standards Act, The Trades Examination Act, The Fair Wages and Hours of Labour Act, The Vacation Pay Act, The Weekly Rest Period Act,* and *The Fair Employment Practices Act.* Departmental reports were issued annually and included summaries of general conditions in industry. The reports were presented by the Fair Wage Officer and then, in 1943, the reports were issued by the Director of Labour and by the Minister of Health and Labour. This evolution was in keeping with that of other jurisdictions.

7 *Ibid.*, 375-376.
8 *Ibid.*, 376.

From 1945 to 1952 the reports of the Department of Labour were issued by the Minister of Labour. The 1945 annual report mentions that the Ministry's responsibilities were expanded to include apprenticeship training, factory inspection, boiler inspection, examination and classification of stationary engineers, conciliation and arbitration in labour disputes. It is easy to appreciate why workers in New Brunswick would perceive the Department of Labour as having a "symbolic significance." From 1975 to 1983, the Department was known as the Department of Labour and Manpower. Through this period, Canada hit the high water mark in union density.[9]

In 1992, the entire legislative structure dealing with work-life issues in the Province was corralled into a single department, the Department of Advanced Education and Labour. Its mission statement in 1993 did not even mention the previous mandate of the Department of Labour:

> The continued development of New Brunswick as a viable economic entity depends on its ability to establish a strong knowledge base within and employment opportunities for its population.
>
> The Department of Advanced Education and Labour provides or assures the provision of a learning environment which advances New Brunswick adults along the knowledge/skill continuum, and a working environment which is fair, safe, productive and harmonious and permits New Brunswickers to move through learning/working cycles, so that:
>
> - *New Brunswick adults achieve satisfactory levels of educational attainment;*
> - *New Brunswick adults achieve skills and knowledge consistent with the needs of the labour market*
> - *New Brunswick adults achieve satisfactory labour force participation levels;*
> - *New Brunswickers have satisfactory opportunities to enhance their employability through work experience;*
> - *New Brunswickers have satisfactory levels of fairness, equity, safety, productivity and harmony in their working environments;*
> - *New Brunswickers have satisfactory levels of safety in other environments.*[10]

In 1994–95 the Department's mission statement was expanded to include:

> We create and promote opportunities for self sufficiency for New Brunswickers through quality life-long learning.

9 Diane Galarneau, "Unionized Workers", *Perspectives on Labour and Income,* Spring 1996 (Statistics Canada - Catalogue no. 75-001-XPE).

10 New Brunswick, Department of Advanced Education and Labour, *Annual Report*, (Fredericton: Department of Advanced Education and Labour, 1993).

> We contribute to a secure, equitable, productive and inclusive environment in which to learn, work and live better.[11]

Over the years, references to the principles of the Labour Department, as an icon for workers in the traditional legislative context, have not been included in the mission statement. Instead, the language used is either corporate-sounding or individualistic—the language of collectivism/labour/public utility is missing. "Quality life-long learning" sounds like a euphemism for "you're going to need to take a correspondence course at age fifty-seven so that you can learn how to work in a call centre, because we won't be protecting your good manufacturing job". Similarly, "ensuring New Brunswick's competitiveness" sounds like the start gun for the race to the bottom, not good public policy for workers in New Brunswick. This trend has continued to the present Department of Post-Secondary Education, Training and Labour mission statement:

> We ensure the New Brunswick workforce is competitive by making strategic investments in people through innovative programs, services and partnerships. We also contribute to a fair, equitable, productive and inclusive environment in which to learn, work and live.[12]

As Arthurs observes, labour departments have never had exclusive control over crucial decisions affecting the well-being of workers.[13] However, the erosion of the significance of the New Brunswick Department of Labour has established the ground work for a reduction in legislative protection for workers. There are many actors now establishing and exercising their influence on labour, such as autonomous central banks and Standard and Poores, the American financial and credit rating institution. These external organizations are expected to use their power to set interest rates and their influence over credit and investment deliberately to "cool out" the economy to prevent wages from rising too rapidly.

The New Brunswick Minister of Finance regularly initiates reductions in taxation, public expenditures and public employment with the ostensible objective of stimulating private sector investment and creating jobs. These reductions, however, frequently take the form of cuts to social programs and training schemes, endangering security for workers and shifting the balance of power in the labour market towards employers. These cuts, in turn, often result in lower levels of staffing in labour expectorants (Occupational Health and Safety and Workers' Compensation, for example) and also in the Labour and Employment Board, the Employment Standards Board, and their associated tribunals, lowering the levels of regulatory compliance with labour standards.

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11 New Brunswick, Department of Advanced Education and Labour, *Annual Report*, (Fredericton: Department of Advanced Education and Labour, 1994).

12 New Brunswick, Department of Post-Secondary Education, Training and Labour, *Annual Report*, (Fredericton: Department of Post-Secondary Education, Training and Labour, 2007).

13 Arthurs, *supra* note 1 at 377.

Arthurs further observes that Departments of Justice, whether federal or provincial, are not necessarily well suited to defend the rights of labour:

> The Department of Justice is the "government's law firm." But while of course it consults "client" departments, unlike most law firms, Justice generally makes decisions for them rather than simply following their instructions. Consequently legal values and the organizational logic of the Justice Department, rather than the pragmatics of labour and employment policy, are likely to shape the outcome of litigation, the drafting and interpretation of legislation and even the evolution of policy [in respect to labour]. Whether Justice lawyers can be spared from other tasks for the enforcement of labour legislation, what stance the government should take when labour laws are challenged on federalism or Charter grounds, what degree of juridification ought to be introduced into adjudicative proceedings at what cost to the ability of unrepresented workers to participate: such questions are very likely to be resolved by the Department of Justice, not by the Department of Labour.[14]

Arthurs would likely argue that the disappearance of the former Department of Labour in New Brunswick within the Department of Post-Secondary Education, Training and Labour leaves the "new" Department without a clear mandate to protect labour. If the big concepts are designed ineptly, then real results are forestalled.

The transformation of the Department of Labour is but one of the factors that have removed or reduced the boundaries of protection for workers.

2. A subsequent "fall from grace" occasioned by the emergence of new paradigms at work.

Between 1988 and 2008, there has been a major shift in how work is performed in both the public and the private sectors. Work in the natural resource sectors (fishing, agriculture, mining) that once sustained the New Brunswick economy has given way to work in the service sector (call centres, retail).

Caught in the throes of a changing global economy, New Brunswick's workforce saw many well-paid, unionized jobs dissolve into jobs that, in many cases, lack job security, adequate employment benefits, pension and insured benefits.

For example, in 1980, less than 10 percent of the public service workforce in the province worked on a casual basis. In 2009, that percentage is estimated at upwards of 23 to 25 percent of the public service. Casual workers employed by the provincial government are denied basic protections. They have no job security and reduced employment benefits such as pensions, health care, and accumulated vacation.

14 *Ibid.*, 378-379.

This is the reality, despite the 2007 Supreme Court of Canada decision in *B.C. Health Services*.[15] In the majority decision, co-authors McLachlin CJC and LeBel J forcefully declared that "recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy." However, today there are over eight thousand casual workers in the New Brunswick public service awaiting a decision from the Court of Queen's Bench of New Brunswick. A three-union coalition, composed of the Canadian Union of Public Employees, the International Brotherhood of Electrical Workers and the New Brunswick Union of Public and Private Employees, challenged the constitutionality of provisions of the *Public Service Labour Relations Act* RSNB, c P-25 which deny casual employees all rights pursuant to that legislation, including the freedom to be a member of an employee organization "and to participate in the legal activities of an employee organization, essentially the right to negotiate the terms and conditions of employment."[16] The case was originally argued in July 2006 and reargued in September of 2007 after the Supreme Court rendered its decision in *B.C. Health Services*.

While casual workers in New Brunswick await a decision from the Court of Queen's Bench, the Quebec Superior Court in October 2008 and the Ontario Court of Appeal in November 2008 both followed the Supreme Court of Canada June 2007 decision in *B.C. Health Services*. The Ontario Court of Appeal relied heavily on *B.C. Health Services* when it rendered its decision in *Fraser v. Ontario (Attorney General)*, noting the following at paragraph 52:

> In summary, the combined effect of *Dunmore* and *B.C. Health Services* is to recognize the s.2(d) protects the right of workers to organize and to engage in meaningful collective bargaining. The decisions also recognize that, in certain circumstances, s.2(d) may impose obligations on the government to enact legislation to protect the rights and freedoms of vulnerable groups.[17]

In Ontario, the courts are saying that there may be a positive obligation to enact legislation to protect the right to organize, while in New Brunswick, unions were forced to turn to litigation to get an exclusion for casual employees dropped from the definition of "employee" in the *PSLRA*. In the *Ontario Crown Employees Collective Bargaining Act*, an employee is simply somebody who works for the government. This is the governing principle in New Brunswick's *Industrial Relations Act*, which governs labour relations in the private sector. The unions were starting from a disadvantage and the government still chose to defend the constitutionality of its *PSLRA* scheme.

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15 *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27.

16 Factum of the Appellant in the appeal of *New Brunswick Union of Public and Private Employees v. New Brunswick (Board of Management)*, 2007 NBQB 53, [2007] N.B.J. No. 38

17 *Fraser v. Ontario (Attorney General)*, [2008] O.J. No. 4543, 2008 ONCA 760 at para 52.

In her paper, "Why Unions Matter", Elaine Bernard argues that denying workers rights in the workplace adversely affects them in their roles as citizens. The "workplace is also a place where workers learn about the relations of power. They learn that they actually have few rights to participate in decisions about events of great consequence to their lives ... It is no surprise that citizens who spend eight or more hours a day obeying orders with no rights, legal or otherwise, to participate in crucial decisions that affect them, do not engage in robust, critical dialogue about the structure of our society."[18]

Casual workers with the province of New Brunswick still lack job security or job benefits, values that extend from the right to free collective bargaining by not being offered legitimate employee status under the *PSLRA*. This is the new paradigm that Arthurs says has fallen from grace.

3. The deliberate re-entrenchment of boundaries under the influence of neo-liberal policies.

A third factor in the erosion of labour protections in New Brunswick has been the lack of political will to provide legislative protection. In his text, the "New Structural Social Work", Bob Mullaly described the political culture that gripped Canada in the mid 1980s in the following manner:

> Faced with mounting deficits, governments could either raise taxes and extend the tax base (as some European countries did), or reduce government expenditure. Right-winged governments were elected in 1979 in Britain, in 1980 in the United States, and in 1984 in Canada. All three governments voiced similar priorities to deal with their respective economic crises. Thatcher's Conservatives stressed the values of 'self reliance', Reagan's Republican aimed 'to get big government' off the backs of people and Mulroney's Progressive Conservatives declared that 'Canada was open for business'. These governments chose to reduce expenditures rather than raise taxes.[19]

This public policy direction, supported by draconian legislative measures, led to the establishment of regulatory competition among provincial governments. From the early 1980s, provincial governments across the country began to take away the rights that public sector workers had struggled to achieve, in an apparent race to the bottom. For instance, in New Brunswick, the Liberal Government led by Premiers Frank McKenna, Raymond Frenette and Camille Theriault (1987-1999), followed by the Progressive Conservative Government of Premier Bernard Lord (1999-2006), fell into the regulatory competition trap and contributed to the dismantling of workers' protection legislation.

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18 Elaine Bernard, "Why Unions Matter" (1996) online: Harvard University <http://www.law.harvard.edu/programs/lwp/1996%20Why%20Unions%20Matter.pdf>.

19 Bob Mullaly, *The New Structural Social Work*, 3rd ed. (Toronto: Oxford University Press, 2007) 5.

From 1975 to 1979, the federal government initiated nation-wide "wage and price control" to address high levels of inflation. The measures did little to control prices, but severely restricted wage growth for workers.

Following the lifting of the federal wage and price controls, public sector unions negotiated "catch up" collective agreements. For example, in 1980 the New Brunswick Nurses Union negotiated a 41 percent pay increase over two years, as a catch up from 1975 to 1980 when there were not any increases. The provincial government led by Premier Richard Hatfield soon thereafter sought the public sector unions' agreement to a voluntary wage capping of expectations based on the 6 and 5 percent model, which is discussed below. This voluntary wage capping was sustained until 1987.

By 1982, Canada was in the midst of another bout of raging inflation. Governments responded with legislation that put caps on wage increases in the public sector. The model followed by most provincial governments was the "6 and 5" 1982 federal legislation that limited increases to 6 percent in the first year and 5 percent in the second. This legislation was a sham. The clear evidence was that wages followed inflation, not the other way around. If inflation was running at 8 percent per year, for example, workers pressed their unions to negotiate contracts that would protect their standards of living achieving pay increases of at least 8 percent.[20]

The effect of wage control legislation served to reduce the standard of living for public sector employees, especially lower paid employees. Most of the legislation expressed the limits in percentage of wages, not actual dollar amounts. This meant that lower income families were hit the hardest. The cost of food, rent or maintaining a car went up in actual dollars and cents, as opposed to percentages of minuscule incomes. For lower paid workers, the cost of living rose much more rapidly as a percentage of their income than it did for higher paid workers.

In 1987, the New Brunswick Liberal Party, led by Frank McKenna, swept into power with an absolute majority. With all fifty-eight seats in the legislative assembly, the Liberals chimed in with their own recipe for cost containment and cost reduction measures. Targeted were the least fortunate New Brunswickers: workers and those trapped in the welfare system. Soon thereafter, the legislative assault on workers continued with a newfound disregard for those on the lower end of the wage scale.[21]

In her paper "In McKenna No Trust: Labour's Response to the Expenditure Management Act of 1992 in New Brunswick," Caroline Mann determined that Premier Frank McKenna's "stronghold" in the Legislative Assembly was not lost on him and he embarked on an aggressive drive toward what would be ultimately labelled

20 *Fudge, supra* note 3 at 29.

21 Stewart Hyson, "The Horrible Example." *Policy Options* vol. 9 (1988), 25-27.

"The Path to Self-Sufficiency in New Brunswick."[22] In December 1988, the McKenna government passed a bill to amend the *Industrial Relations Act* (Bill 73) by taking away the right to strike from all municipal and regional police officers and replacing it with binding arbitration. The *Industrial Relations Act* was amended again in May 1989 to enable the provincial cabinet to designate specific construction work as a "major project" and consolidate unionized workers into a single, new bargaining unit. In addition, picketing restricted at worksites designated as "major projects" was outlawed.

However, after a decade of voluntary wage capping, the Liberal government found itself in difficult circumstances as the salary levels of provincial government employees had fallen behind the national average. In fact, New Brunswick public sector workers were among the lowest paid in the ten provinces. In 1990, the New Brunswick Nurses Union' negotiated a 21 percent increase catch-up agreement to offset wage losses incurred over the previous eight years.

The ink was barely dry on these collective agreements when the Liberal government legislated four years of wage restraint. The provincial government proclaimed the *Expenditure Management Act* (Bill 73) in May 1991 (EMA 1991). The *Act* provided for a one-year wage freeze for all public sector employees in the fiscal year 1991-1992. The EMA 1991 was met with reluctant acceptance from public sector unions. Although the government had consulted with all public sector unions prior to one year-wage freeze taking effect, the message from the government was that it was a temporary wage freeze for one year only.

In April 1992, the government passed a wage "restraint" statute called the *Expenditure Management Act II* (Bill 42). Gerald Clavette, then the Minister responsible for the Board of Management, explained in the Legislative Assembly that since the EMA 1991 had worked so well for the government, it planned on passing the EMA 1992. This gave unions an option: they could accept a two-year wage package at 1 percent and 2 percent inserted into their collective agreements, effectively extending the collective agreements and delaying any previously unpaid negotiating improvements by two years, or they could negotiate for some other period of extension or delay in negotiated wage improvements "consistent" with the restraint measure contained in the legislation.

Mann stated that "the government's standpoint seemed to be that they were willing to tolerate and negotiate with the public sector but that, if necessary, collective agreements would be broken." Allan Maher, who from 1987 to 1995 was Finance Minister in Premier McKenna's cabinet, confirmed this. Maher said that despite the tension and anger, the wage restraint legislation should go ahead and once

22 Caroline Mann, *In McKenna No Trust: Labour's Response to the Expenditure? Act of 1992 in New Brunswick* [unpublished, archived at University of New Brunswick]; "Premier Steps Actions Matching Words: Self Sufficiency Aim of McKenna Government" *The Daily Gleaner* (21 May 1992).

again freeze wages. According to Maher, it would be 'the only logical solution".[23]

The assault on labour's protections continued. In April 1994, an *Act to Amend the Industrial Relations Act* (Bill 47) was passed by the Liberal government, giving employers the authority to request that a union conduct a vote on the employer's last offer.

At this time, the Liberal government of New Brunswick was treating its citizens to a picture of the province which depicted New Brunswick as "fighting above [its] weight" and being "open for business".[24] Did these measures against workers protection improve quality of life in New Brunswick?

The answer may be partially found in a publication from Industry Canada Research in 2000 entitled "A Regional Perspective of the Canada-U.S. Standard of Living Comparison," by Raynald Letourneau and Martine Lajoie.[25] The study examined the period of 1995 to 1997 (the last two years of McKenna's term as Premier) and focused on a comparison of standards of living with a special emphasis on labour productivity. The report concluded that standards of living varied less across provinces than among states in the United States of America. Although this reflects different economic profiles between provinces and states, it is also related to the presence of federal transfers to the province, such as the equalization program which tended to reduce regional disparities. Among the Canadian provinces, New Brunswick ranked seventh, ahead of Nova Scotia, Prince Edward Island, and Newfoundland, which ranked lowest, about 30 percent below the national average.[26]

In comparison with the fifty states of the U.S., New Brunswick came in at the bottom, fifty-seventh out of sixty. Its three Atlantic Canadian counterparts rounded out the bottom to sixty.[27] The study recognized that productivity rankings among the Canadian provinces were also very similar to those for standard of living, highlighting the importance of the level of productivity as a fundamental determinant of the standard of living.

The Atlantic provinces' post-productivity levels were well below the national average, with New Brunswick ahead of only Nova Scotia and Prince Edward Island. Among the Canadian provinces and the U.S. states, New Brunswick ranked fifty-eight of sixty.

If decently paid jobs are derived from a worker's right to unionize and

23 Mann, *supra* note 20 at 14.
24 *Ibid.*
25 Industry Canada, *A Regional Perspective of the Canada-US Standard of Living Comparison* by Raynald Létourneau & Martine Lajoie (Ottawa: Industry Canada, 2000).
26 *Ibid.* at 24, 7.
27 *Ibid.* at 9.

negotiate fair collective agreements, employment status that allows for reasonable job security and work confidence, then it is reasonable to conclude that over the last twenty years in New Brunswick, regressive labour legislation has had a negative impact on both productivity and quality of life in the province.

The legislative measures to prop up a neo-liberal ideology established by Thatcher, Reagan and Mulroney failed working people in New Brunswick. The deliberate re-entrenchment of boundaries, as Arthurs put it, arrived in New Brunswick under the influence of neo-liberal policies developed in other jurisdictions.

The legislative assault on public sector workers' rights in New Brunswick has continued into the current decade with the implementation of more restrictive labour legislation. In 2001, the Progressive Conservative government of Premier Bernard Lord enacted back-to-work legislation against a striking CUPE hospital bargaining unit. This back-to-work legislation prompted a rallying cry from other public sector unions. The New Brunswick Union of Public and Private Employees enacted a charter of principles relating to public sector back-to-work legislation, including that the New Brunswick Union:

- go into bargaining with the full intent of negotiating a fair and equitable wage increase for each year of the contract.
- do everything within its resources to ensure public sector jobs remain in the public sector.
- reaffirm its total commitment to free collective bargaining; meaning that should legislation be imposed on a contract or back-to-work legislation be passed, it will respond in the strongest possible fashion.

In September 2004, the Lord government utilized the threat of back-to-work legislation against five thousand hospital nurses represented by the New Brunswick Nurses Union.[28] The parties reached a settlement before implementation.

WHERE DO WE GO FROM HERE?

Without legislated protection, other agendas will trump workers' rights. Making New Brunswick "open for business" could cause a further reduction in benefits, working conditions, and indeed the full panoply of workers' rights. The reduction in the size and scope of government, privatization of public services, and balancing pay roll benefits (workers' compensation, etc.) all favour the employers of the province but narrow the boundaries of protection for New Brunswick workers. The emerging global economic crisis could ultimately be used to justify further reductions on workers' protection.

28 "New Brunswick nurses accept contract deal", CBC News, 23 September 2004, <http://www.cbc.ca/canada/story/2004/09/23/nbnurses_040923.html>, accessed April 2, 2009.

The boundaries of worker protection in New Brunswick have fallen prey to a deliberate political agenda to facilitate the paradigm shift in the economy of work. Arthur's three premises for the demise of legislative protections may, in New Brunswick, be simply reduced to a regulatory competition among provincial governments across Canada to be more open for business, exposing talented workforces to the whims of transient service economy employers and mirroring substandard benefits and protections for their own employees normally paid in accordance with the principles of the service sector.

The New Brunswick Federation of Labour has called for the Provincial Government to enact anti-scab and first contract legislation, in addition to improving statutory protection for organizing groups of workers into unions.

If New Brunswick aspires to attract and retain a skilled workforce, it must improve its approach to the treatment of workers and respect basic human rights, most notably the right to collective bargaining. Without the redevelopment of sound progressive legislation, and the reestablishment of a political will to protect workers, the legal directives established by the coauthors of the SCC decision in *B.C. Health Services* will remain nothing more than an illusion for workers in New Brunswick.