

Labour Standards Reform in Nova Scotia

Reversing the War Against Workers

Kyle Buott, Larry Haiven and Judy Haiven

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**LABOUR STANDARDS REFORM IN NOVA SCOTIA:
REVERSING THE WAR AGAINST WORKERS**
By Kyle Buott, Larry Haiven and Judy Haiven

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About the authors:

Kyle Buott is President of the Halifax-Dartmouth & District Labour and a member of CAW 606.

Larry Haiven is a Professor in the Department of Management at Saint Mary's University and a Research Associate of the Canadian Centre for Policy Alternatives–Nova Scotia.

Judy Haiven is an Associate Professor in the Management Department, the Sobey School of Business at Saint Mary's University and serves as President of the Saint Mary's University Faculty Union (SMUFU). She is also a Research Associate with CCPA-NS.



CCPA
CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES

NOVA SCOTIA OFFICE

P.O. Box 8355, Halifax, NS B3K 5M1
TEL 902-477-1252 FAX 902-484-6344
EMAIL ccpans@policyalternatives.ca



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Introduction

The Nova Scotia NDP government is now midway through its first term in office. And we have heard virtually nothing from it about reform of one of the most basic laws pertaining to “working families” – the Labour Standards Code. That is the law that lays out the minimum standards applicable mostly to workers not covered by a collective agreement – about 68.3% of the Nova Scotia workforce (Statistics Canada 2011a). The only changes to date are exceedingly modest. One obliges employers to give an unpaid break to workers attending their citizenship ceremony. The other protects temporary foreign workers from paying employers their own recruitment costs (DLAE, 2011). Commendable as those are, they are applicable to a tiny minority of workers. Changes to employment law are essential to improve the Nova Scotian economy.

But a coalition of employer groups called the “Nova Scotia Employers Roundtable” came out swinging against any change in employment law, such as the government’s very modest proposal for first collective agreement arbitration (no author 2011). Despite the Premier’s protestations to the contrary, heavyweight employers like Sobeys, Michelin and Clearwater, leaked suggestions that they might curtail investment if the employment law changes were implemented (Flinn 2011). Employers, opposition parties and the media had mounted just such a campaign a year before (Jackson 2010, A6) when the government introduced Bill 101 to change the Trade Union Act, an initiative which contained almost nothing of substance. Why the fuss? It was not really about these very modest pieces of legislation. It was about the legislation the government *could have* introduced, but didn’t. And likely won’t.

And it’s about continuing the war on workers that began in Nova Scotia as far back as 1979, starting with the corrupt Michelin Bill (which interfered retroactively in a union organizing campaign and proactively against industrial organizing) and continued in 1984 when Nova Scotia was first province in Canada to eliminate “card count” evidence to determine union support, again hobbling the unions.

Supporters of the government patted themselves on the back for steering Bills 101 and 102 into law. But, amid all of the controversy, the employer lobby appears to have already won. For it has effectively intimidated the government into retreating to the most meagre, unambitious and pusillanimous set of employment law reforms imaginable.

Yet, as is shown in the first section of this report, average working Nova Scotians are desperately in need of all the help they can get in their relations with their employers. This report is meant to explore ways in which the current Nova Scotia provincial government could improve the law that lays out the minimum standards that apply to all workers, unionized or not.

Our purpose here is not to draft new legislation for the government, nor to precisely lay out the details of every proposal. Nor have we dealt with every single aspect of the Labour Standards Code. Rather, we hope to begin to show just how many ways are available to the government to improve the lives of working families by making recommendations based on a comparative survey of labour legislation across Canada. The government need not adopt all of what we propose. But they will be seriously failing those working families if, as it seems, they avoid or neglect adopting some of them.

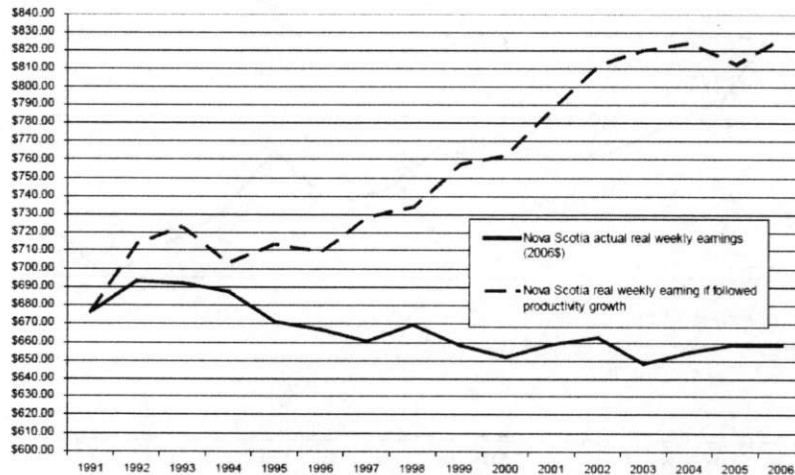
The second section of the report examines a wide range of provisions included in labour standards legislation across Canada and makes suggestions on what Nova Scotia's government could consider. As is shown in that section, Nova Scotia has some of the lowest labour standards in the country, tied perhaps with Prince Edward Island. A third section, available elsewhere online (http://husky1.smu.ca/~lhaiven/ls_comparison_chart.pdf) presents a comparison of Labour Standards provisions across the country.

Why We Need to Reform Labour Standards in Nova Scotia

Workers in Nova Scotia are worse off economically than they were a quarter century ago. For the most part this deterioration in wages happened at the same time that the economy of the province vigorously increased the wealth it generated. That was during the “good times.” More recently, during the recession beginning in 2008, workers’ earnings have suffered even more.

First, let’s look at the so-called “boom time.” In the twenty-five years between 1981 and 2006 (including one of the most prosperous periods since the 1950s), workers’ wages across Canada fell sharply behind. While the national economy (measured in real GDP per capita) grew by 51%, average real weekly earnings did not increase. But, in Nova Scotia, the situation was even worse for workers (Dufour and Haiven 2008). In that same 25 years, while the provincial economy grew by 62%, average real weekly earnings actually fell by 4%. This means that after adjusting for inflation, workers in Nova Scotia were 4% poorer than they were 25 years ago. During those 25 years, productivity in Nova Scotia (measured in real GDP per worker hour) increased by 16%. The big productivity-earnings gap was in the 15 years between 1991 and 2006, when both indicators took off in opposite directions (see Figure 1).

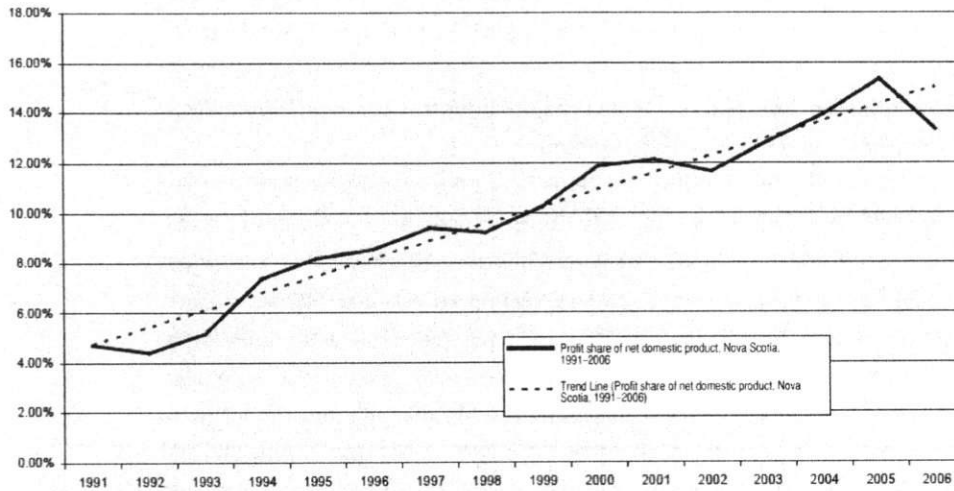
Figure 1 the Earnings-Productivity Gap in Nova Scotia 1991-2006



Source: Statistics Canada CANSIM Table 282-0028 and 384-0002

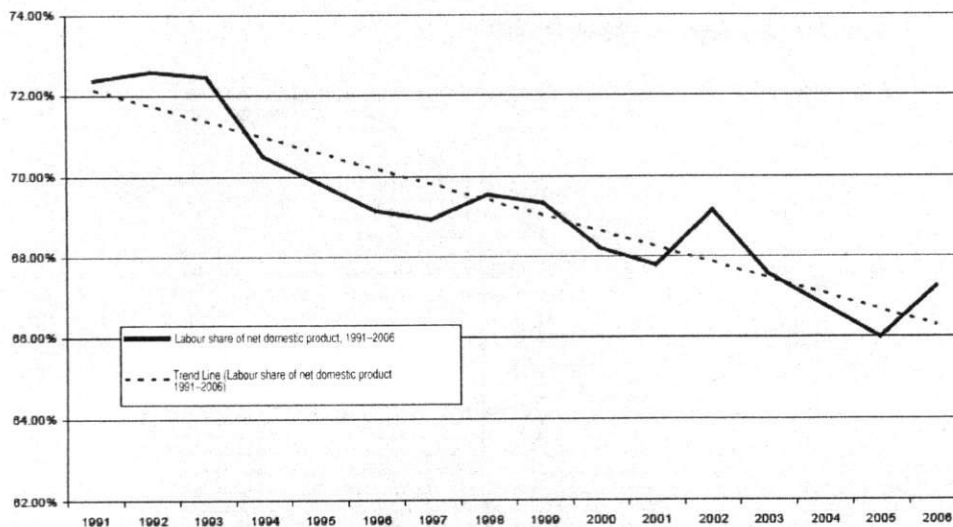
So what happened to the wealth generated by those productivity gains? Did it go to workers? No, as we can see from Figure 2, the share of net domestic product going to labour (i.e. employed workers) in Nova Scotia between 1991 and 2006 fell! Did it go to government? No, the proportion of government revenues as a proportion of GDP has not increased. However, as we can see from Figure 3 the share of net domestic product going to owners of capital rose.

Figure 2 Profit share of net domestic product Nova Scotia 1991-2006



Source: Statistic Canada Table 384-0001

Figure 3 Labour share of net domestic product Nova Scotia 1991-2006

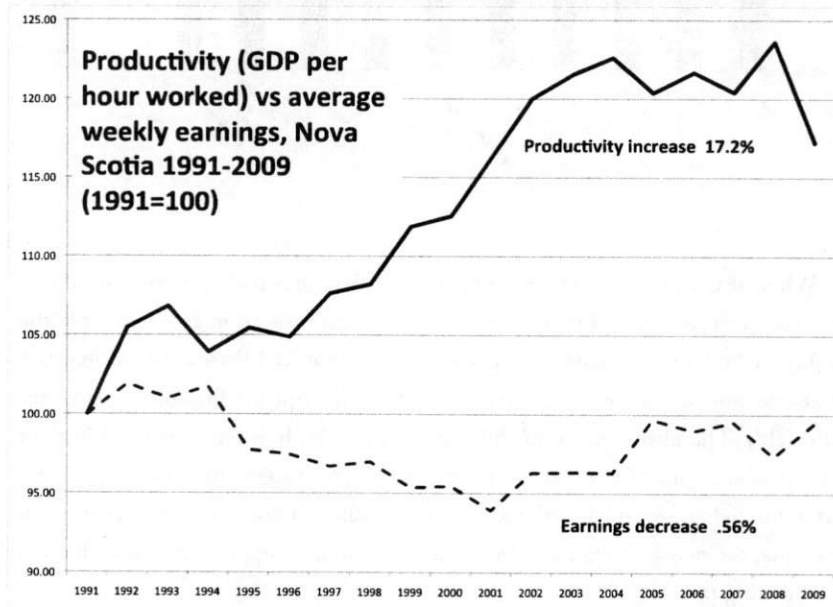


Source: Statistic Canada Table 384-0001

Surely, Nova Scotia has been turning into a low-wage ghetto or at least getting worse in that regard. In the end, this is bad not only for workers, but for employers and the Nova Scotia economy as well. Able to keep their labour costs low, employers are less ready to invest in capital improvements, research and development and worker education and training, the deficits of which contribute to the perpetuation of an immature economy (Dufour and Haiven 2008).

And, what has happened in the years since the end of the economic boom? Of course, the province's economic performance has taken a hit and wealth accumulation has dropped. But, because of the recession, average weekly earnings have also taken a hit, making the inability to take advantage of the previous boom worse (see Figure 4). Indeed, in the last year, average Nova Scotian earnings have not only fallen in comparison with inflation, they have actually falling in absolute terms (Statistics Canada 2011c)!

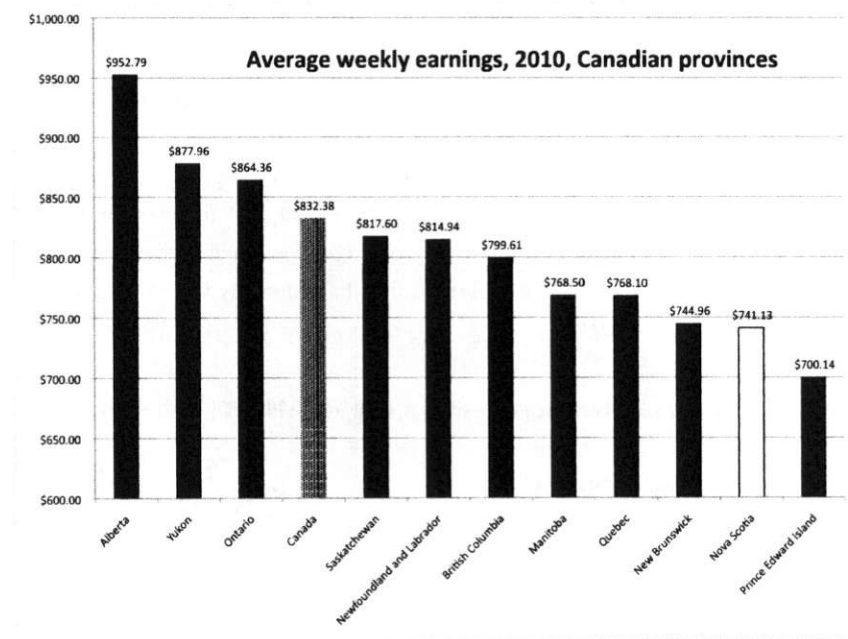
Figure 4 Real productivity vs. real average weekly earnings, Nova Scotia 1991-2009 (1991=100)



Attempts to “catch up” (not only by unionized, but by all workers) are being dashed, as unemployment and employer resistance to increasing wages rises. We expect that the earnings situation will get worse as public sector restraint continues. Thus the old wave pattern of labour compensation improving with booms, deteriorating with busts, has turned into a constant bust for workers. It's a downward spiral that must be broken.

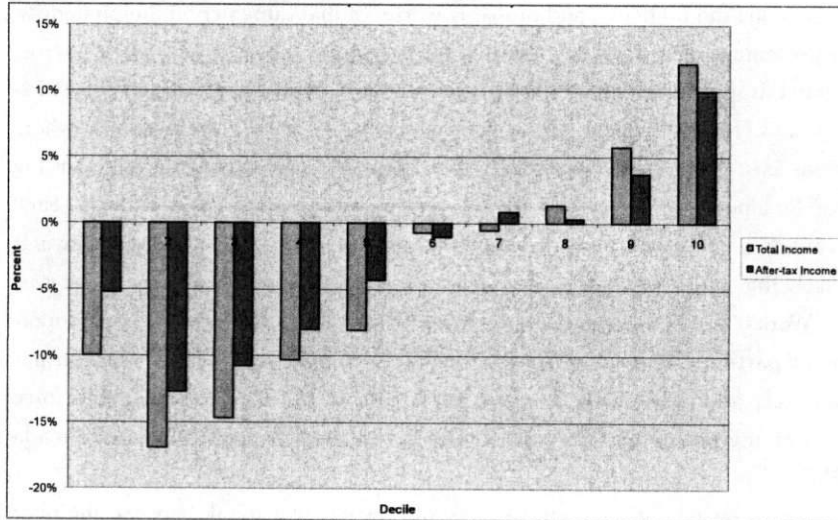
As we can see from Figure 5, by 2010, Nova Scotia had the second lowest average weekly earnings in the country.

Figure 5 Average Weekly Earnings, Canadian Provinces, 2010



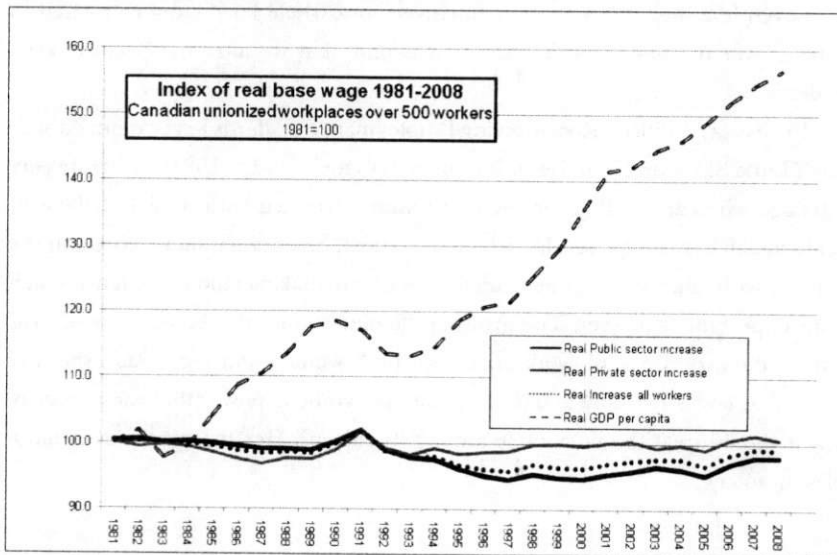
While real workers' average compensation has dropped, we also know that some groups have suffered more than others. As can be seen in Figure 6, only the top fifth of families with children in Nova Scotia improved their national share of market income (i.e. income from employment, self-employment and investments) appreciably. The lowest two fifths of families with children have dropped in their share of market income. Even after taxes are paid and government transfers received, the richer are still ahead and the poorer still behind. The numbers confirm the saying, the rich get richer and the poor get poorer, except now everyone but the rich is getting poorer.

Figure 6: Percentage change in income shares of families with children (1976-1979 to 2003-2006)
 (Source: Statistics Canada Survey of Labour and Income Dynamics)



If workers fell behind, how did unionized workers fare during this period? It is difficult to tease out the figures for Nova Scotia, but there is evidence that the unionized did no better than workers as a whole. If we look at wage settlements for the largest (and hence most powerful) bargaining units across the country before the current recession, those with more than 500 workers (Figure 7,) we discover that those unionized workers did not keep pace with inflation (derived from Labour

Figure 7: Wages in large unionized establishments, Canada, 1981-2008



Canada and Statistics Canada 2007). If the unions representing the largest bargaining units across the country performed at this level, it is certain that unions in Nova Scotia did no better, and probably worse. In that same period, union density, the percentage of workers in a given industry that are members of a union, across Canada dropped from about 35% to just over 30% (Statistics Canada Tables 279-0026 and HRSDC 2008a). Given the presence of a union wage premium where unions exist (Fang and Verma 2002), there appears to be connection between the dwindling power of unions and the general drop in real earnings over the 25 years. A caution here: this does not necessarily mean that unions have been ineffective. It is likely that without unions *the drop in overall earnings would have been greater than it was*.

Work is also becoming more precarious (Vosko 2003). For example, the proportion of part-time workers in Nova Scotia has been growing in recent years, as has temporary and casual work. In April 2011, 18% of the Nova Scotia labour force was working part-time, 12% higher than the national average (Statistics Canada 2011b).

The growing gap between workers and owners of capital, between the poor and the wealthy has not happened by mistake, nor inadvertently, nor was it provoked by circumstances beyond our control. The backbone of the post-World War II social contract that provided working people with decent earnings, and more equitable and safer workplaces was a set of laws and regulations, like the Labour Standards, Occupational Health and Safety Workers' Compensation and Human Rights. Those laws have not kept pace with changes in labour markets, like the growth of precarious work, multiple jobs of shorter and shorter duration in one's lifetime, and diminishing union power.

Given how well Nova Scotian employers as a whole have fared compared to workers over the past quarter century, it is time that we alter the balance, even modestly.

In an essay entitled "Reconceiving Employment Standards Legislation: Labour Law's Little Sister and The Feminization of Labour," (Fudge 1991) written twenty years ago when an NDP government in Ontario wrestled with similar challenges, legal scholar Judy Fudge set the debate in context. She argued that changes in the world of work, then only in their earlier stages, were making labour standards much more important than ever. The growing "feminization" of labour, she said, was making the experience of work poorer for both women and men. And, she suggested that law is not only about rules, but has symbolic power that shows society how it should treat the vulnerable among its citizens. Her message is even more relevant today.

Labour and Employment Law across Canada

Canada is one of the most decentralized countries in the world when it comes to employment law. Each province and territory (and the federal jurisdiction for the roughly 10% of employers who are regulated by that government) has its own set of legislation on topics such as labour standards, collective bargaining, occupational health and safety, and pay and employment equity. Human rights law is another area that affects employment relations, and each jurisdiction regulates this area separately.

Thus, when we talk about “minimum wage” or “sexual harassment” or “union certification,” in Canada, there is no single standard, but as many as fourteen. As we will see, there are some commonalities but there is also a large degree of variation. For example, the number of statutory holidays ranges from six to ten. Some provinces prohibit psychological harassment at work. Some provinces ban discrimination on the basis of political belief; others don’t.

In general, employment regulation improved for workers throughout the four decades following the Second World War. But, the forward march stalled and then split into different paths in the 1980s. In some areas, it advanced (human rights and equity); in some areas (collective bargaining) it fell back. And, in others (labour standards) it stagnated. Ideology had something to do with the progress or lack thereof. Majority governments of a strong right wing character (e.g. Harris Conservatives in Ontario, Klein Conservatives in Alberta and Campbell Liberals in British Columbia) undid several important initiatives; left-liberal governments headed by the Liberals or NDP introduced modest changes or maintained the status quo. Governments across Canada do consult with one another on employment regulation and are aware of provisions in one another’s regimes. In the progressive era between the 1950s and 1980s, they did copy one another’s good ideas. For instance, the major 1970s Saskatchewan reforms in occupational health and safety soon spread across the country. So did collective bargaining reforms initiated in Saskatchewan and Ontario. But, copy-cat initiatives on legislation to improve workers’ lot have slowed in recent years and some provinces are vying with others to make that lot worse. In short, Canadian employment legislation is a confusing and contradictory mess.

Labour Standards

Labour standards legislation concerns itself with minimum provisions applicable to practically all employees and employers (except for exemptions noted below). These standards exist to avoid the worst exploitation employers can inflict upon their workers. Nova Scotia has some of the lowest labour standards in the country, tied perhaps with Prince Edward Island. We should be at least the leader in Atlantic Canada, a credit which now goes to Newfoundland and Labrador. Notwithstanding, current Nova Scotia legislation does include a few provisions that are exemplary. One provides non-union employees who have more than ten years seniority the right to take what they consider unfair dismissal to adjudication with the possibility of being reinstated by the adjudicator. Another highlight is the minimum wage provision, which, in the past five years has gone a long way toward reaching the poverty line for full-year, full-time workers. Nova Scotia also has provisions for notice of termination for multiple employees that are more generous than most. But, aside from those three, Nova Scotia's labour standards provisions leave workers with a lower level of protection than that of other provinces.

We have compared the provisions of labour standards laws across the fourteen Canadian jurisdictions under certain major categories, as follows:

- Exemptions, i.e., who is not covered by labour standards
- Hours of work, overtime and rest periods
- Minimum wage
- Tips and gratuities
- Vacations and holidays
- Pay equity
- Leaves of absence
- Wrongful dismissal adjudication
- Individual and group termination and severance pay
- Benefits for part-time employees
- Whistle-blower protection
- Harassment and bullying
- Use of lie detectors

Exemptions from the legislation

Labour standards legislation in all jurisdictions exempts a number of types of employees from coverage of all or various provisions. In Nova Scotia, these groups include: real estate and car salespeople, commissioned salespeople who work outside the employer's place of business, those who work on fishing boats and people employed in a private home by a householder to provide domestic service for a member of the employee's immediate family or for 24 hours or less per week. The adjudication provision mentioned above is not available to practitioners or students in training for architecture, dentistry, law, medicine, chiropractic, professional engineering, public or chartered accounting, psychology, surveying, or veterinary.

Recent Supreme Court of Canada decisions could herald the way to an end for this kind of exemption¹ and extend labour standards law to all workers. But, the impact of these decisions is uncertain and will no doubt take some time to discern. In the meantime, justice delayed is justice denied and the province should not wait.

We understand why employers of certain groups of employees have in the past claimed special circumstances. Farmers employing casual labour and private families employing domestics are sometimes hard-pressed to offer all of the benefits and protections that larger employers do. However, many small employers are subject to Labour Standards. At the same time, there are farmers and families whose financial resources are greater than those small employers who must abide by the rules. Blanket exemption from the Code simply allows too much room for exploitation.

There is another group of workers who are not officially exempted, but who are also not covered by this and other pieces of employment legislation. Employment legislation generally applies only to employees i.e. those in a legal employment relationship with an employer. However, more and more people earning an income are self-employed yet work in conditions of dependence on and subordination to persons and companies more powerful than themselves (Muehlberger 2007). For example, taxi drivers who own their own car and editors who work from their own home may be formally self-employed, but surely they are not in the same category as the owner of a business that employs people? The federal government recently recognized this by allowing eligible self-employed workers to access special benefits under Employment Insurance for maternity, parental, sickness, and compassionate care (Service Canada 2011). The government of Newfoundland and Labrador has long arranged for labour standards (and collective bargaining rights) to apply to self-employed fishers.

We recommend that the NS government remove exemptions from labour standards legislation. We also recommend that government extend the provisions of the Labour Standards Code to those in dependent self-employment, defined as non-employees whose income depends crucially on the economic fortunes of other companies.

Hours of work

The amount of time workers must spend at work is a key issue in labour standards. Left to their own devices, some employers will extend the hours of their employees rather than hire additional workers. Labour Standards has two methods to discourage overwork: Mandating overtime pay after a certain number of hours in a day or week discourages employers by making it more expensive for them to exceed these hours. But, at a certain point, absolute prohibition must kick in, making it impossible for an employer to exceed a certain length of work time. In both of these areas Nova Scotia lags significantly behind most other jurisdictions in Canada.

Hours per day and week. The fight for the 8-hour day and 40-hour week was supposed to have been won more than sixty years ago. But, you wouldn't know it living in Nova Scotia. Most provinces in Canada mandate overtime payments after 40 hours. A few mandate 44 hours. And, then there is Nova Scotia, alone among the provinces, where overtime is not compulsory until after 48 hours. The situation cries out desperately for change.

We recommend that after 40 hours in a week, employees be paid one and one-half times their regular wage. For those workers on special (e.g. 12-hour) shifts, appropriate overtime will be paid each year after the average weekly hours are calculated.

Even if employers have to pay overtime after 40 hours in a week, unlike most other provinces, Nova Scotia has no absolute maximum number of hours that can be required to be worked in a day or week. Overtime or not, there must be a limit to the number of hours any worker can be forced to work.

We recommend that the maximum number of hours that can be worked in a single week be set at 48.

Time off per week for rest. At present, workers must receive 24 hours (non consecutive) time off in a 7-day period. When Sunday shopping was introduced in 2006, the legislation was amended to suggest that one of these days be a Sunday *if possible*, but there is no compulsion.

The present time off provision can be abused by employers. For example, if a worker gets off at 4 pm on Tuesday, she could have to be at work as early as 4 pm the next day. This is not a full day's rest.

We recommend 2 full calendar days (non consecutive) in a 7 day period; an employee should have the right to refuse to work on a Sunday.

Right to refuse unreasonable overtime. Right now there is nothing in the Nova Scotia legislation that protects an employee from being forced to work overtime if the boss insists, or of refusing to work more than a certain number of hours of overtime. Even with overtime after 40 hours, as we recommend above, employees should have the right to refuse unreasonable requests for overtime. Such a provision will also ratchet down the number of hours of overtime, something that should create more employment.

We recommend that no employee be compelled to work more overtime per week against her will than the average in his/her workplace over the previous year. Complaints would be adjudicated by the unified labour board.

Rest breaks in the work day. Currently employees working more than 5 consecutive hours must be granted an unbroken half hour break. Employees working more than 10 consecutive hours get an unbroken period of one half hour plus other rest or eating breaks totalling at least 30 minutes for each other 5 hours of work. Working ten consecutive hours without a break is simply too long. Newfoundland and Labrador has an hour-long meal break of one hour after five consecutive hours of work. In Ontario, employees may agree to split a break in two periods totalling 30 minutes.

We recommend a 30-minute unpaid meal break after 4.5 hours. In addition, we recommend 2 breaks of 15 minutes in any shift from 8-hours or longer.

Minimum wage.

The current Minimum Wage Review Committee (MWRC,) which began in 2003 under a Progressive Conservative provincial government and continued under the current NDP government, is to be congratulated not only for stopping the 25-year erosion of the minimum wage but also for reversing it somewhat. Both governments can take credit for this. In 1976, the minimum wage was \$2.50 (or \$9.97 in 2011 equivalent dollars). After decades of falling from that level, the trend was recently reversed. As of October, 2011, the minimum wage, at \$10.00, was a few pennies better than it was in 1976. But with that rise, it barely kept pace with inflation, or was only slightly better than it was at its previous high point. The MWRC proposes that the minimum wage rise with inflation hereafter. But this will guarantee that it will never get any better in real terms. As commendable as the progress on the minimum wage is, this wage is not adequate.

A person at minimum-wage, working a full year (approximately 2000 hours) would still make only slightly more than \$20,000 per year. (And many minimum-wage workers do not work full-time, full-year.) Over the period since the last high

point in minimum wage, the province has become a richer place, not poorer. Yet minimum wage has not increased accordingly. If minimum wage workers had kept pace with that increase in wealth (expressed as average GDP per capita) of the province, they would now be making more than \$15 per hour. The MWRC calculated that the 2009 increase would raise the minimum wage to within the “Low Income Cutoff” (LICO²) of a single person (Minimum Wage Review Committee 2009). The present minimum wage is about 59% of the median wage in Nova Scotia³. This is commendable. However, the LICO for an adult and a child (living outside of Halifax) is now almost \$24,000 and even that is arguably a recipe for poverty.

Unlike several provinces who have a single minimum wage, Nova Scotia also allows employers to pay a lower minimum wage, currently \$9.50, to employees “without experience” (those with less than three month’s experience). This is a concession to employers, which has the perverse economic effect of encouraging the worst employers to lay employees off at the three-month mark. There is no robust reason for having such differential rates.

Several studies (Workman and Jacobs 2002; Murray and Mackenzie 2007) have shown that the minimum wage has a strong impact not only on those who work at the rate, but also on those immediately above the minimum. Given the drop in average real weekly earnings cited above, using a different standard against which to compare is in order. We find that the median wage is a better measure than LICO and we will use it in our recommendation.

Employers in the restaurant industry have been lobbying for years to set the minimum wage lower for those workers serving drinks in licensed establishments. Indeed, one bar owner in Halifax opined that servers could “get along fine on about four dollars an hour” (Lambie 2011, C1). Their argument is that these workers receive generous tips and that the employers could take the wages foregone and apply it to other workers (see Gratuities, below). We disagree strongly with this suggestion and these reasons. The proposal is merely a cash grab by employers that would lower the income of servers. There is also no evidence that employers, without legal compulsion, would “share” the wages foregone with other workers. Indeed, it is not an uncommon practice in the restaurant industry for owners to take for themselves all or part of the gratuities meant for employees.⁴ The MWRC itself shows that Nova Scotia bars and restaurants are more profitable than the Canadian average (MWRC 2009, 13).

We recommend that the minimum wage be raised in 3 steps to 70% of the June 2011 median wage. That would raise the minimum wage to \$11.90. After that, regulation of the minimum wage can return to the commission. We also recommend that the training minimum wage be abolished and that there be no special lower wage for those serving in licensed establishments.

Gratuities

At present, the Nova Scotia Code is silent on the rights of employees when it comes to tips and gratuities. Most, if not all patrons who pay a gratuity do so in the expectation that it will go to the employees. A study by two of the authors indicates that a significant proportion of Halifax employers keep all or part of the tips. At best, employees do not know if or to what extent this occurs⁵.

Two Canadian jurisdictions have legislative protections in this area and Nova Scotia should follow suit. Quebec specifies that tips belong to the employee as of right and must not be mingled with wages otherwise due to the employee. Tips collected by the employer must be remitted in full to the employee who rendered the service. While employees may make arrangements to share tips, the employer is forbidden from implementing or influencing such arrangements. Provisions in Newfoundland and Labrador are similar to those in Quebec.

We recommend that Nova Scotia implement legislation similar to that in Quebec and Newfoundland and Labrador, mandating employee ownership of gratuities.

Uniforms

At present, the Nova Scotia legislation is silent on whether an employer can require employees to purchase standardized items of equipment and clothing. It specifically allows employers to charge employees for the dry-cleaning of woolen or other heavy material uniforms.

We recommend that where the employer requires a group of employees to wear standardized clothing it must provide and maintain the clothing in appropriate multiples, or provide reimbursement thereof to the employee.

Vacations

Canadians take some of the fewest days of vacation in the industrialized world. And this is reflected in the minimum standards for vacation. As we will see below, Europeans regularly take much longer vacations without harm to their productivity. There is much talk of work-life balance, but very little has been done to enable this balance in meaningful ways including provisions in labour standards legislation.

Amount of vacation. At two weeks' vacation (and three weeks after eight years,) Nova Scotia is among the lowest in the statutory minimum amount of vacation leave mandated. In several other provinces, the three-week entitlement kicks in after a

shorter number of years, and some provinces provide for three weeks to start and four weeks after a number of years.

The common European standard is four weeks paid vacation, with many workers receiving more (HRSDC 2008). This has generally been achieved without loss of productivity. Indeed, when hours worked are factored in, France has arguably the highest productivity in the world (Business Insider 2009). Even *Globe and Mail's* Margaret Wentz, a usually pro-business columnist, had this to say about other European countries:

Germany is currently the most successful and productive nation in the world. It has the highest rate of exports. It also has high wage rates and six weeks (!) of federally mandated vacation. Germans work only 1,436 hours a year, while Americans work 1,804 hours – the equivalent of nine extra 40-hour work weeks a year. Canadians work 1,727 hours a year. The Dutch and the Norwegians, whose quality of life is not too shabby either, work even fewer hours than the Germans. (The world's worst workaholics are the South Koreans, who put in a wretched 2,390 hours a year.) (Wentz 2010)

We recommend a minimum of three weeks paid vacation for all workers rising to 4 weeks after 10 years of service.

Time of vacation. Currently the Nova Scotia law provides for joint employee-employer determination of the time of vacation. However, like other provisions calling for joint determination, this provision gives the non-unionized employee very little power at all. Putting the timing of vacations totally in the hands of employees might be a better idea, but we will defer to a third party.

We recommend that the new unified Labour Board be empowered to adjudicate disputes between employers and employees over the timing of vacation.

Qualification time. The law now insists that to qualify for paid vacation leave employees must have worked 90% of regular working hours in a previous 12-month period. That would exclude from vacation, for example, people who, through no fault of their own, were not able to work that number of hours. If an employer is dissatisfied with the number of hours an employee has been working, that employer has other means (e.g. disciplinary) to show its satisfaction, without punishing the employee by denying the right to take a vacation.

We recommend that access to full vacation entitlement be available after 12 months of employment.

Amount of vacation pay. Currently, the law provides that 4% of earnings be allocated as vacation pay.

Corresponding to our recommendation above on the amount of vacation, we recommend that 3/52 of the employee's pay in the previous 12-month period, and after 10 years of service, 4/52.

Statutory Holidays

As with vacations, Canada generally lags behind other jurisdictions in the amount of paid holidays we allow employees to take off. This is reflected in minimum legal standards. But Nova Scotia is particularly remiss among Canadian provinces in this regard.

Number of holidays. In this area, Nova Scotia is presently the stingiest jurisdiction in the country (tied with Prince Edward Island) with just 6 statutory holidays. A plurality of jurisdictions has 9 holidays, and Saskatchewan, Yukon and Nunavut have 10. Included in Nova Scotia's 6 is Remembrance Day with its own legislation, and slightly worse provisions than for other holidays (a day off rather than time and a half, if worked). Our comments above with regard to vacations apply to holidays as well.

We recommend that Nova Scotia move to 9 statutory holidays, all included in the Labour Standards Code, with the same provisions for all of them.

Qualifying period. Presently, to qualify for a statutory holiday, an employee must be entitled to receive pay for at least 15 of the 30 calendar days before the holiday, and have worked her last scheduled shift or day before the holiday and the first scheduled shift or day after the holiday. This is much too inflexible. Like vacations, holidays should be a right that comes with employment and employers should not be able to take that away. Saskatchewan has no qualifying period.

We recommend that any person employed by an employer on their scheduled shift before a statutory holiday, receive that holiday.

Right to refuse work. Several provinces give individual employees the right to refuse work on a statutory holiday. The payment of time and a half should be sufficient incentive for most employees to work on the holiday, but individuals should have an option not to do so. If the employer insists that it cannot manage otherwise, we suggest a solution similar to what we have suggested on the timing of vacations, above.

We recommend that individual employees have the right to refuse to work on a statutory holiday. Disputes over this right shall be adjudicated by the unified labour board.

Pay equity

Those who claim that discrimination against women in the workplace is a thing of the past should note that among full-time, full-year workers in Canada, for every dollar a male earns, a woman earns about 72 cents (Statistics Canada 2011d). Part of the gender wage gap can be attributed to women's responsibilities in child-bearing and child-rearing, lower unionization and differences in education and training. But, it is estimated that at least 15% of the gender wage gap can be attributed to discrimination (Pay Equity Commission 2011). Sometimes this discrimination is overt, occurring where an employer deliberately pays women less for doing the same work as a man. But more often, it is subtle and non-purposive systemic discrimination. In many cases women do not do precisely the same work as men; they are segregated into wage ghettos because of occupational segregation.

There are two main legislative methods to redress the discrimination-based gender pay gap. One way is to specify, as Nova Scotia now does for those in the private sector, that people doing "substantially the same work, requiring equal skill, responsibility, effort and similar working conditions" be paid the same. This is called "equal pay for equal work" and is good as far as it goes, but hardly rectifies most of the pay discrimination that occurs. Employers can effectively discriminate against certain classes of employee (like women, visible minorities, aboriginals and people with disabilities) by placing them into jobs that are different enough in the above characteristics, that those people cannot be compared to white, able-bodied males.

As a response to this situation, several jurisdictions have implemented "equal pay for work of equal value" legislation. Jobs are evaluated according to criteria such as skill, effort, and responsibility and working conditions and then ranked according to their "comparable worth." Employees of similar worth must be paid the same. The method for doing this, job evaluation, is long-established and practised by employers for the purposes of developing pay scales within their work force.

Nova Scotia has this formulation in the *Pay Equity Act* for workers in the public sector (meaning employees in the Civil Service, corrections employees, highway

workers, workers in Crown corporations, hospitals and school boards, universities, municipalities and municipal enterprises). But this does not apply to employers in the private sector.

The Human Rights Code provides that employers cannot discriminate in respect of employment. While this would apply to the private sector, a human rights complaint of unequal pay for work of equal value would be an extremely unwieldy way to achieve satisfaction there. Moreover, even a successful human rights complaint would result in equity only in a very specific workplace at best. If equal pay for work of equal value is suitable for public sector workers, is it somehow not suitable for those in the private sector? If our goal is fairness and an end to discrimination, then the time for its implementation is long past due.

We recommend that the provisions of the Pay Equity Act be extended to all workers in the province. Whether this is part of the Labour Standards Code or an amendment to the Pay Equity Act, it will achieve the same purpose. In some cases, it is impossible to find a group of male comparators within a workplace. In that case, it should be possible to branch farther afield beyond the workplace to implement pay equity.

Leave – Pregnancy, parental and adoption

Qualifying period. Presently Nova Scotia employees are not entitled to such leave until they have served one year. This is one of the highest thresholds in the country. Most other jurisdictions are more liberal, including the federal at 6 months, Newfoundland and Labrador at 20 weeks, and Ontario at 13 weeks prior to the estimated delivery date. Employment insurance (a federal program available to all employees across Canada) is available if the person has worked 600 hours in the previous 52 weeks (equivalent to 15 40-hour weeks).

Pregnancies last nine months. That means that a Nova Scotian woman could be ineligible for maternity leave in a job that began *before she became pregnant!* This makes a mockery of the provision. An employee who has worked less than a year and is denied pregnancy leave may make a complaint of discrimination at the Human Rights Commission, but as in the case of equal pay, a human rights complaint is an unwieldy way and time-consuming method to decide this issue. The rights of pregnant women should be crystal clear in the Labour Standards Code.

We recommend that the qualifying period for maternity and parental leave be similar to that in Newfoundland and Labrador: 20 weeks.

Length. Currently pregnant women employees are entitled to 17 weeks leave. Either parent is entitled to a separate 35 week leave (which must be taken by the birth

mother immediately after the 17 weeks). Currently, the employer is not obliged to pay, as federal employment insurance is available for up to 55% of wages up to a maximum. Several other jurisdictions (including Saskatchewan) offer 18 weeks paid pregnancy leave; Manitoba offers 37 weeks' paid parental leave. We are recommending merely that the length of leave allowed by the province be extended.

We recommend that Nova Scotia implement 18 weeks' pregnancy leave and 37 weeks parental leave.

Required notice. At present, an employee must give 4 weeks notice that s/he will be going off on maternity/parental leave. In emergencies, the employee must give as much notice as possible. But the arrival of children is notoriously unpredictable and this relatively long period of notice is prejudicial to the parent. Newfoundland and Labrador and Ontario require only 2 weeks.

We recommend that required notice of pregnancy/parental leave be 2 weeks.

Reinstatement and maintenance of seniority and benefits. The present provision mandates that the employee be returned to the "same or comparable position," and that there be no loss of seniority or benefits accrued as of the start of leave. The employee has the option to maintain benefits at her own expense. We have no problem with the reinstatement part and it is good that the employee can maintain benefits. However, in addition to income foregone, this is a further financial penalty to parents. Quebec mandates that all insurance plans be continued by the employer.

We recommend that the employer be required to continue to pay its portion of extant insurance premiums during the period of leave if the employee continues to pay his/her portion.

Leave – bereavement, sickness, family responsibility, emergency

At present, Nova Scotia employees are entitled to 3 days unpaid leave for death in the closest family and 1 calendar day for wider family. Three days unpaid leave are afforded for sickness in the family. Unpaid, 8-week leaves are available for employees who need to care for a seriously ill family member who has a high risk of dying. Other provinces have superior provisions. Ontario, for example allows 10 days of unpaid leave per year - up to 10 unpaid, job protected, personal emergency days, in situations in which the employee cannot come to work either because of serious illness or family emergency. Quebec also has good provisions for compassionate leave.

We recommend that Nova Scotia implement a provision of 10 days unpaid leave, similar to that in Ontario. As for the long-term care of ill family member, we recommend following the very humane Quebec model of up to 12 unpaid weeks for serious illness in the family, up to 104 weeks for potential mortal illness of a child and 52 weeks if a child disappears or in the case of suicide of a child or spouse.

Individual termination notice

Generally, the law provides two types of protection for employees in a non-union workplace who are dismissed due to no wrongdoing on their part. The fact that the employer is undergoing economic difficulties does not exempt it from either of these remedies.

First, outside of the Labour Standards Code, non-union employees can sue their employer in court for “wrongful dismissal.” While not empowered to reinstate the employee, the courts can award damages equal to the “notice” the employee should have been due. Older and more senior employees and especially those with high-paying jobs have received court settlements far in excess of the labour standards minimums.

However, most wrongfully dismissed employees either cannot afford to sue their former employer, or will not be eligible for much of a settlement if they do. That is where the second type of protection, the Labour Standards Code comes in. It provides a minimum of notice for employees dismissed for non-disciplinary reasons. Provisions across the country are based on how long the employee has worked for the employer but a maximum of eight weeks’ notice (or pay in lieu) is common. What does differ is the amount of seniority required to trigger a certain level of notice.

Under the Nova Scotia Labour Standards Code, employees with more than 3 months and less than 2 years are entitled to 1 week notice; from 2 to 5 years, there is 2 weeks’ notice; from 5 to 10 years there is 4 weeks’ notice; and there is 8 weeks’ notice after 10 years.

Termination of employment has been called “industrial capital punishment” because its effect on a worker’s whole life can be so disastrous. We would at the very least lower the trigger points to be more in keeping with the other jurisdictions.

We recommend that single employee termination notice (or pay in lieu) be on the following schedule:

up to 5 years – 2 weeks notice

after 5 years – 4 weeks

after 10 years – 8 weeks

Wrongful dismissal adjudication

Nova Scotia is almost unique among jurisdictions in offering non-unionized employees some recourse if they are dismissed. Those with 10 years' seniority can take their case to adjudication and get their job back if the adjudicator agrees. Only two other jurisdictions have analogous rights, the federal jurisdiction which kicks in after 12 months' continuous employment and Quebec which does so after 2 years. A job lasting ten years is less and less common nowadays, making Nova Scotia's provision somewhat of an anachronism. The threshold should be lowered.

We recommend that employees should have access to adjudication for unfair suspension or dismissal after 3 years of continuous employment.

Group termination notice

As well as notice for the termination of individual employees, labour standards also provide for notice when an employer is terminating groups of employees. In Nova Scotia, when an employer intends to terminate or lay off 10 or more employees, it must give the employees notice according to the following schedule:

10 to 99 employees: 8 weeks' notice or pay in lieu

100 to 299 employees: 12 weeks

300 or more employees: 16 weeks

After notice is given, the employer may not change the employees' pay rates or benefits nor require them to use their remaining vacation during the notice period unless they agree. As far as group termination is concerned, these are among the best provisions in the country and deserve kudos. The only provision that could be copied from other jurisdictions is the requirement to give the union (if there is one) the same notice as the employees.

Separate from the Labour Standards Code, the Industry Closing Act prohibits an employer from shutting down a facility that would affect fifty or more employees without giving the government at least three months' notice.

We recommend that where there is a union present, it be given the same notice of mass layoff as employees.

Severance

Even if an employee receives the proper notice of termination (or pay in lieu of notice,) there is no separate severance pay in Nova Scotia. In Ontario, terminated employees also receive an amount of money over and above their notice under Employment Standards. The Ontario Ministry of Labour puts the rationale this way:

Severance pay' is compensation that is paid to a qualified employee who has his or her employment 'severed.' It compensates an employee for loss of seniority and job-related benefits. It also recognizes an employee's long service.

Severance pay is not the same as termination pay, which is given in place of the required notice of termination of employment." (Ontario Ministry of Labour 2009)

The formula by which Ontario calculates the amount of severance due multiplies the employee's regular wages for a regular work week by the sum of the number of completed years of employment and the number of completed months of employment divided by 12 for a year that is not completed. The maximum severance pay is 26 weeks. The example is given of an employee with seven years, nine months and two weeks' seniority upon termination. The severance pay amounts to \$4,650 exclusive of any pay received in lieu of notice.

Nova Scotia has no such provision, but should have it.

We recommend that, over and above the minimum requirement for notice of termination (or pay in lieu,) Nova Scotia have a severance provision similar to that existing in Ontario.

Pro-rated benefits to part-time employees

Many employers provide some types of benefits to their full-time employees e.g. dental plans, group life, accidental death or dismemberment plans and prescription drug plans. However, these plans are generally not made available to part-time employees. In 1996, the NDP government of Saskatchewan introduced a provision making benefits available to part-timers on a pro-rated basis and this provision persists despite a change of government.

The provision affects employers who have 10 or more employees. To qualify, an employee must have been employed for 26 consecutive weeks and have worked 390 hours in that time. To continue eligibility, he must work at least 780 hours in each calendar year. The level of benefits is determined by a formula involving hours worked.

We recommend that the Nova Scotia government adopt pro-rated benefits for part-time employees modeled on the Saskatchewan model.

Protection of Whistle-blowers

Protection for those who report wrongdoing by their employer is slowly making its way into Canadian law. In Nova Scotia, the Civil Service Act protects civil servants from reprisal. But a few jurisdictions, like New Brunswick and Saskatchewan extend this protection to private sector employees as well. Given the number of corporate scandals that have emerged in the past decade, such legislation is very much needed and should be included in the Labour Standards Code.

We recommend that Nova Scotia have whistle-blower protection similar to that in New Brunswick and Saskatchewan, where an employer is prohibited from discharging or threatening to discharge, taking reprisal against or discriminating against an employee who reports or proposes to report, alleged illegal activity, or who testifies or could testify in an investigation or proceeding conducted under provincial or federal law.

Harassment and bullying

At present, Human Rights law forbids harassment that is based on one of the prohibited grounds e.g. race, religion, sex, age. However, there is much harassment and bullying in workplaces that is not necessarily connected to these grounds. Yet just as surely, this behavior contributes to a poisoned workplace environment and much personal distress. More and more jurisdictions are introducing protections for employees from this kind of activity. The regulations in Nova Scotia's Occupational Health and Safety legislation do help contain violence in the workplace. But something more comprehensive, dealing with harassment and bullying behavior, both violent and non-violent, is needed.

In its occupational health and safety legislation, Quebec insists that employers "provide a workplace free from psychological harassment." Such harassment is defined as vexatious behavior (humiliating, offensive or abusive for the person on the receiving end, that injures self-esteem and causes anguish and exceeds what a reasonable person considers appropriate within the context of his work,) that is repetitive in nature, is hostile or unwanted and makes the work environment harmful for the victim. (Commission des normes de travail 2010) Ontario legislation is similar to this, with anti-bullying training mandated for workplaces.

We recommend that Nova Scotia adopt provisions against harassment and bullying similar to those in effect in Quebec and Ontario.

Lie detectors in the workplace

More than a few employers use polygraphs to ascertain the truthfulness of their current and prospective employees. This is not only an invasion of employees' privacy and outright intimidation, but polygraphs are not a valid indicator of truthfulness (U.S. Congress Office of Technology Assessment 1983, American Psychological Association 2004). The Supreme Court of Canada has ruled polygraph evidence inadmissible in court⁶.

New Brunswick's Employment Standards Act provides that "No person shall require, request, enable or influence, directly or indirectly, an employee to take or submit to a lie detector test."

We recommend that the Nova Scotia Labour Standards Code contain provisions protecting employees from lie detectors used by the employer, similar to those in the New Brunswick legislation.

Enforcement of the Code

Even the best legislation in the world means very little if it is not enforced. The authors, two professors of labour relations and the president of a district labour council have met scores of workers, especially young workers, who have been deprived of their rights under the Labour Standards Code by their employers, often without being aware of the fact. Several conditions conspire to make a mockery of labour standards provisions. The most important is the fact that enforcement is based on complaints by employees, more than on surveillance of employers by a government agency. Re-active enforcement is not sufficient. There must be a strong pro-active element to enforcement. Several reports back this up.

An independent study in 1997-98 of the Federal labour standards provisions found only 25% of employers covered were in full compliance and 25% in wide-spread non-compliance. The most common violations appeared in maximum hours, payment and provision of statutory holidays, severance pay, and pregnancy, and parental and sick leaves. (Human Resources and Skills Development Canada, 1997)

The Law Reform Commission of Canada had this to say about enforcement:

The effectiveness of complaint-driven enforcement mechanisms depends on the ability of individual workers or their bargaining agent to take action. Unrepresented workers have a very limited ability to take action against violations of labour standards. Moreover, many workers are unaware of the protections they do have. Most complaints are made once the employee leaves the workplace, a fact that demonstrates the real and perceived threat of reprisal against employees who complain about their employment while on the job... [I]t is not uncommon for workers to be told that any kind of resistance to or complaint about work conditions will be met with dismissal. Few workers are willing to take the risk. Many also find the complaint procedure confusing and intimidating. Added to this is the problem of reduced spending on enforcement and compliance. Budget cuts at all levels of government mean that even where there is a willingness and desire to assist vulnerable workers, the resources are insufficient for timely investigation and resolution of complaints. The result is inconsistent

and sporadic enforcement practices which effectively penalize those conscientious employers who voluntarily conform to legal requirements. (Law Commission of Canada 2004, 22)

The 2004 report by the Auditor General of Ontario into enforcement of that province's Labour Standards Program enumerated a number of problems. Upon receiving complaints (usually from those who had left their employment) the ministry did not expand the scope of inspection to cover the employer's other workers. The Auditor General concluded that attempts to resolve current complaints left officers little time to do proactive inspections. Seldom were prosecutions initiated nor fines issued, even where violations involved large amounts of money (for example, of 51,000 substantiated violations in 5 years, only 18 cases were sent for prosecution, resulting in 63 convictions and \$210,000 in fines). Information needed for efficient prosecution was not readily available within the inspectorate. Performance suffered because goal-setting and reporting were not well done. (Auditor General of Ontario 2005)

To summarize the problems:

- First, the complaint-based nature of enforcement militates against effective enforcement by its very nature.
- Second, many employees are unaware of their rights.
- Third, even employees aware of rights may feel or be intimidated by their employer. Even the presence in the law of sanctions against employers' discipline of complainants helps little.
- Fourth, without a third-party "champion" like a union, employees are at a huge disadvantage.
- Fifth, like auto companies aware of exploding gas tanks, many employers flout the provisions, knowing that few complaints will be brought and, in any case, the cost of violation is less than the cost of compliance.
- Sixth, the inspectorate is not sufficient to induce employers to comply.
- Seventh, penalties are not consistently imposed. Nova Scotia's are \$25,000 for corporations and \$5,000 for non-corporations and a possible jail term on the repeated offences. But the province is reported not to have "sought to prosecute any employers for many years" (Lister 2007). Another observer comments that in Nova Scotia, "At the moment, however, the tendency is not to prosecute in instances of non-compliance" (HRSDC 2008). Thus at present, it is easy for employers to violate Code with impunity. Enforcement must be drastically improved.

We recommend a suite of measures be introduced to improve the enforcement of the Code:

- Hire more inspectors
- Empower inspectors to extend investigation of substantiated complaints to cover other employees of the same employer
- Target inspections of high risk business sectors
- Improve the audit system
- Provide better publicity and education of the Code's provisions especially among vulnerable workers. An example of this kind of aggressive activity is the province's workplace accident prevention campaign.
- Encourage community organizations and give them standing to bring complaints on behalf of workers. (Trade unions should also be able to represent non-members.)
- Raise the fines to those in Ontario (up to \$100,000 for first offences, \$250,000 for second offences and \$500,000 for third and subsequent offences. (The maximum prison term for individuals is twelve months.)
- More consistently and actively prosecute violations of the Code.

Concluding Remarks

Within the past two decades, there have been two major commissions appointed by Canadian governments to review labour standards legislation. The government of British Columbia appointed University of British Columbia Industrial Relations professor Mark Thompson who reported in 1994 and the federal government appointed Osgoode Hall Law School professor and former York University President Harry Arthurs who reported on federal standards (contained in Part III of the Canada Labour Code) in 2006.

Both commissioners reported that employer representatives urged extreme caution in changing minimum standards. Arthurs reported

Many employer submissions also argued for significant revisions to Part III that would enhance flexibility — but flexibility for employers, not employees. Such revisions are necessary, they claimed, if Canadian businesses are to succeed in an increasingly competitive environment. Specifically, employers sought flexibility in order to make compliance with Part III less burdensome and time-consuming, to accommodate new forms of work relations unencumbered by the obligations associated with traditional ‘employment,’ to ease restrictions on hours of work, and in general, to modify working conditions in ways they deemed necessary in order to respond to the new and difficult economic environment. (Arthurs 2006)

While both commissioners acknowledged the constraints on businesses and especially small businesses, they nonetheless made comprehensive and numerous recommendations to those standards.

To hear the Nova Scotia employer lobby, one would think that disaster will strike every time there is an improvement in any legislation affecting their workers. A cursory look at newspaper articles quoting business leaders over the past decade shows a number of doom predictions and crocodile tears about workers losing their jobs.

- “The [minimum wage] rate would be disastrous for the province” (Rondeau 2000 A4);

- “Much of Nova Scotia’s business community is up in arms about the code changes, which many claim will hurt workers rather than help them” (Taylor 2003, C5);
- “That’s a lot for a small-business owner to cope with in a short period of time” (Bradley 2005, C2);
- “I’m concerned for employees who will have their hours shortened, their jobs disappear and their benefits squeezed” (Erskine 2010, C1).

A more comprehensive study going back half a century would doubtless yield similar results. One wonders when the townspeople will tire of the boy crying wolf.

In that same decade, while the Nova Scotia minimum wage rose steadily, there was no sign of extraordinary business failure. For example, small business was consistent throughout the decade in its contribution to the Nova Scotia economy, at about 25% of our GDP (Industry Canada 2011). Nova Scotia Business Statistics reported that “There was a declining trend in the number of business bankruptcies in Nova Scotia between 2002 and 2008” (Nova Scotia Department of Finance 2010, 10). Even during the period of recession, a report by the Canadian Federation of Independent Business itself shows that businesses with 0 to 49 employees increased their employment while larger firms shed workers through 2008-9 (Mallett 2010). To paraphrase Mark Twain “Reports of the death of small business in Nova Scotia are greatly exaggerated.”

On the other hand, as we have seen earlier, conditions for Nova Scotia workers, and especially the most vulnerable among them, have deteriorated drastically over the past quarter century. Moreover, the share of domestic product going to owners of capital has increased. Even in the current economic climate, businesses cries of poverty are scarcely believable. For the past several years, Canadian companies have been hoarding hundreds of billions of dollars in cash reserves as they wait for the economy to improve. After fattening the pocketbooks of their executives and shareholders, by the 3rd quarter of 2011 non-financial companies had squirreled away half a trillion dollars according to Statistics Canada (Canadian Press 2012; Weir 2011). While provincial figures are not readily available, a fair estimate for Nova Scotia companies would be between 3 and 6 billion dollars. Yet we fully expect business spokespeople will say they can’t afford even the modest improvements to their workers’ conditions that we propose. The overheated reaction to Liberal MLA Diana Whalen’s recent championing of one extra statutory holiday is testimony to that (Markan 2012).

As evidenced by the Occupy movement that erupted around the globe in 2011, income inequality is now a topic of general conversation. In Canada, we have

reached a point where 61 billionaires own more wealth than the bottom 17 million Canadians (Stanford 2011). Addressing the huge disparities in wealth should be a top priority for any government. Changes to labour laws to improve the position of workers and their families is one of the best ways to address income inequality.

Major changes in Nova Scotia's Labour Standards Code are long past due.

Notes

- 1 One of the outcomes of the Supreme Court of Canada case *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27, may be that no group of workers can be exempted arbitrarily from coverage by statutes like Labour Standards. A more recent case *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 curtails the impact of *Health Services* on the extension of collective bargaining law, but *Fraser* will probably not prevent those currently exempted from the Labour Standards Code from eventual coverage by the law.
- 2 Murray and Mackenzie (2007, 42) explain: “Although Statistics Canada takes pains to stress that it is not a “poverty line”, poverty in Canada is most commonly measured by using Statistics Canada’s Low Income Cut-Off (LICO). The cut-off is based on the concept that people in poverty live in “straitened circumstances” — that is, they spend a disproportionate amount of their income on food, clothing and shelter. The Survey of Household Spending conducted by Statistics Canada shows that the average family spends 34.3% of its income from all sources before taxes on food, clothing and shelter. Families are considered to be in “straitened circumstances” if they spend 54.3% or more of their income on these three items.”
- 3 Statistics Canada Table 282-0069
- 4 Judy and Larry Haiven conducted a survey of restaurant and bar servers in Halifax 2007. 55% of respondents did not know whether proprietors took a portion of tips. Of the rest, 28% reported that the employer took some or all of the gratuities.
- 5 The study of restaurant and bar employees by Judy and Larry Haiven (unpublished) was carried out in early 2008.
- 6 *R. v. Béland* [1987] 2 S.C.R. 398
- 7 Some of these recommendations are taken from the above-cited 2004 report of the Ontario Auditor General.

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