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IN LABOUR ISSUES

Changing the Face of Labour Law in Nova Scotia

By Judy Haiven and Larry Haiven

Canadian Centre for Policy Alternatives

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UNIFOR Local 567

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Introduction

Since the Nova Scotia Liberal government was elected in October 2013, it has brought down a breathtaking barrage on labour, restricting the right to strike, curtailing collective bargaining rights, demonizing public sector workers, gerrymandering bargaining units and picking favourites among unions.

This is set in the context of a province not previously renowned for its progressive labour legislation. Indeed, Nova Scotia is notorious for anti-labour initiatives going back to 1979 when the infamous "Michelin Bill" deliberately and retroactively blocked a union organizing drive at that employer and made it harder to organize multi-plant employers in the future. In 1984, Nova Scotia was the first province in Canada to eliminate "card count" evidence to determine union support, again hobbling unions. Its Labour Standards legislation has been among the most regressive in the country.[1]

Trade unionists, therefore, were hoping for some relief when the NDP was elected in 2009. They especially desired a move back to "card count" certification and "anti-scab" provisions. Some activists hoped that the government might reverse the "Michelin Bill" (though NDP leader Darrell Dexter swore he would never go there.) But even the mildest trade unionists were disappointed. The NDP government, determined to show that it was not "anti-business," was exceedingly modest in its labour and employment agenda. The sole significant initiative was first collective agreement arbitration, a move that the employer lobby fought viciously, as much to warn government not to go any further as to oppose the project. The NDP government, long an opposition critic of anti-strike moves by previous governments, itself removed the right to strike from restive ambulance workers a mere three months before the Liberal victory. Once in power, the Liberals would not tire of reminding the NDP and its supporters that interfering in the right to strike was an all-party activity.

With a majority government, the Liberals stormed out of the gate with a series of purposeful legislative attacks:

- They amended the NDP's first collective agreement law to make it almost impossible for unions to access the provision.
- They constrained the right to strike for a wide swath of public workers in health care and social services. Rather than ban strikes entirely (which would send disputes

to binding arbitration,) they imposed "essential services" limitations so strict that the Act's wording contemplates negotiations becoming "meaningless."

- They proposed to force acute health care workers into a single union for each of four bargaining units. The aim of the legislation was to kneecap the activist Nova Scotia Government and General Employees Union (NSGEU) and its leader (deemed public enemy number 1 by the Liberals) Joan Jessome. The initiative could have deprived that union of a quarter of its membership and 40 percent of its revenue, effectively removing it from its position of dominance in the Nova Scotia labour scene.
- They passed a law severely restricting the rights of unions in higher education, allowing universities to declare financial exigency and hence to remove their unions' access to bargain collectively and to strike. Nowhere else in Canada has this been done.

What makes these initiatives especially outrageous is that they flout the spirit, if not the letter, of the Supreme Court of Canada's rulings, of recent years, on freedom of association for workers and their unions.

The Economic Context of Nova Scotia's War on Workers

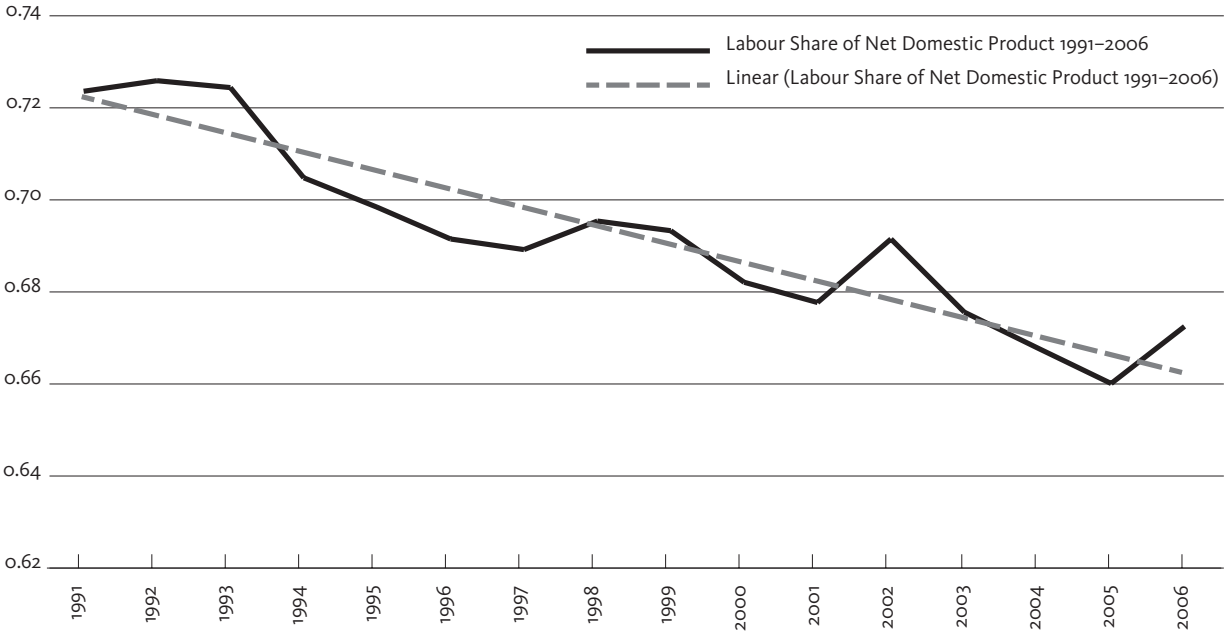
Contrary to the "conventional wisdom," Nova Scotia, while not one of the richer Canadian provinces by any means, did become considerably wealthier (an increase in real GDP per capita of 54%) in the thirty plus years since 1981. Of course, that bounty was not shared equally. Workers and the poor were not 54% better off.

Much of that economic growth was fuelled by a 40% increase in productivity, measured in real output per worker-hour, with a steeper rise during the 1990s. But in that same time period, real *median* earnings for full-time, full-year workers actually dropped by 5%. Real *average* earnings did rise modestly, but mostly due to the ability of unionized workers at the upper end of the labour market and those with credentials and transferrable skills, like doctors, nurses, technologists, and trades people to resist the downward pressure.

Previously, earnings had roughly followed productivity, as was the case in most developed countries. It was 1991 when the productivity and earnings lines seemed to take permanent leave of one another, the former continuing upward, while the latter plummeted. By 2013, Nova Scotia had the second lowest average weekly earnings in the country (only Prince Edward Island was lower.) So if there were productivity and general prosperity gains over the 30 plus years, and declining median wages, where did the bounty go, especially given that government's take of the GDP did not increase? Mathieu Dufour and Larry Haiven, in a 2008 report,[2] analyzed the proportion of net domestic product going to labour and owners of capital between 1991 and 2006. The proportion going to employees declined by 8.3% while that going to capital increased by over 200%. This exactly reversed the trend of labour gains of the previous forty years. This was a sharper diversion than a similar trend across Canada in the same period.[3]

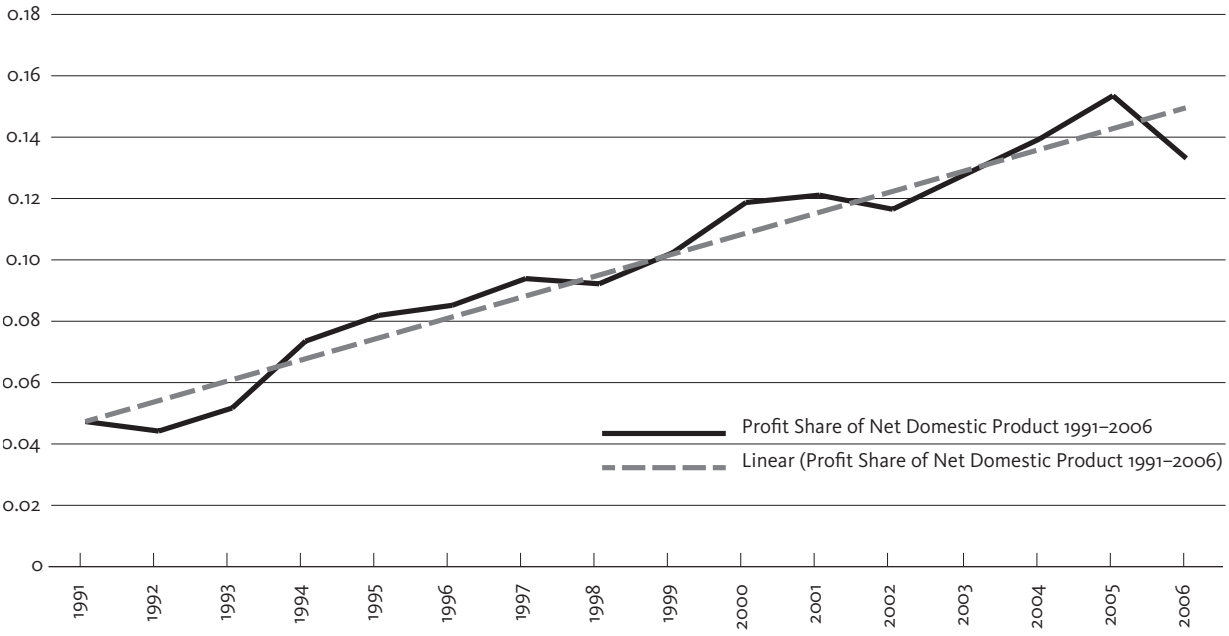
The evidence could hardly be starker for a "growing gap" between owners of capital and working people. By the time the Nova Scotia Liberals assumed power in 2013, unorganized workers and the uncredentialled union members had been truly beaten down. It remained only for the government to go after the skilled workers, especially those in the broader public sector.

FIGURE 1 **Labour Share of Net Domestic Product Nova Scotia 1991–2006**



SOURCE: Statistic Canada Table 384-0001

FIGURE 2 **Profit Share of Net Domestic Product Nova Scotia 1991–2006**



SOURCE: Statistic Canada Table 384-0001

First Collective Agreement Arbitration

Better late than never, the previous NDP government followed most jurisdictions in the country in enacting access to interest arbitration[4] for collective agreements immediately following union certification. The NDP provision allowed for unilateral granting of arbitration at the request of one of the bargaining parties, after a relatively short period of negotiations.

The subsequent Liberal government, not wanting to be seen as trashing the NDP legislation entirely, effectively gutted it. It amended the law to lengthen the amount of time the parties had to engage in first negotiations and to offer arbitration *only* if one of the parties is found by the Labour Relations Board to be bargaining in bad faith. As is well-known in collective bargaining circles, a sophisticated employer with good legal counsel can easily avoid a charge of bad-faith bargaining. Indeed the only employers subject to first agreement arbitration would be those who outright refused to recognize the union, adopted outrageous bargaining positions and failed to make timely efforts to reach an agreement. By observing the niceties of the bargaining ritual and adopting a "hard bargaining" position, an employer could easily avoid the bad faith charge, and hence first agreement arbitration.

"Essential Services" Legislation

The Nova Scotia Liberals seemed to base their attack on health care strikes on the Saskatchewan model. When the newly-elected Saskatchewan Party introduced its ill-fated[5] legislation in 2007 to curtail health care strikes by designating an overwhelming proportion of potential strikers "essential," Nova Scotia remained the sole jurisdiction in the country with no legislative restrictions on strikes in health care.

Previous Nova Scotia governments had introduced temporary bans on particular strikes. In 1999, a Conservative government outlawed a strike by ambulance workers and substituted interest arbitration in its place. When that arbitrator awarded a 20 percent raise over three years, even though this massive catch-up was needed, the government decided arbitration was a very risky alternative. When, two years later, a larger group of health care unions threatened to strike, the same government not only banned those strikes but proposed to dictate the terms of new collective agreements itself rather than submit the issues to a third party. The minority government's situation was precarious as it was staggering to the end of its mandate and the premier, John Hamm — a family doctor — had old fashioned (or sexist) views about the worth of nurses and other female-dominated health occupations. Combined with an effective union public relations campaign and a threat by registered nurses to resign en masse, the government was forced to back off and agree to final-offer arbitration. The arbitrator, forced to choose between registered nurses and allied health professionals,[6] gave a substantial award to the former and disappointed the latter, setting in motion several years of catch-up bargaining and fractious industrial relations.

Despite the existence of four major health care unions, Joan Jessome, leader of the province's largest, the Nova Scotia Government and General Employees Union (NSGEU), became the go-to labour leader for the media and was largely perceived as the most militant. Anti-labour pundits demonized her as Public Enemy Number One or the Union Boss We Love to Hate.

In 2007, after a one-day strike by allied health professionals at the IWK Hospital, the Halifax hospital for women and children, a successor (though still minority) Conservative government came close to banning strikes entirely and permanently across the province. But local unions and management agreed voluntarily to arbitration before that could happen. The Canadian

Centre for Policy Alternatives — Nova Scotia published a trilogy of monographs[7] on the issue, and the opposition Liberals and NDP came out squarely against the government's threat. The crisis was averted.

Given this decade of turmoil, Nova Scotia political parties, as others across the country, came to appreciate a dilemma in trying to curtail health care strikes. Banning strikes entirely demanded a substitute that could achieve results comparable to "free" collective bargaining. That would be interest arbitration. But governments were unwilling to play that uncertain game.

A more Machiavellian alternative would be to *allow* strikes, but designate enough workers "essential" to render any strike impotent. The most outrageous example of this occurs in Quebec, where up to 90 percent of workers must be at work during a strike.

When the NDP came to power, the unions, careful not to make the new government look bad, managed to forestall this alternative by agreeing frequently to having health care disputes arbitrated. But one such settlement outraged not only the right-wing parties, but also several NDP politicians, including Finance Minister Graham Steele who resigned in protest.[8] Though this arbitrated settlement did not result in real increases for the workers, in a time of austerity, every agreement that avoided setbacks to labour was seen by capital as a surrender to the unions. The subsequent Liberal government would attempt to end that state of affairs.

Faced with a strike by home care workers three months after its election, the Liberals moved in late February 2015 to outlaw the stoppage temporarily with the Essential Home-support Services Act, declaring all those workers "essential" and thus forbidden to strike. This would be a first step in attempting to reverse a labour victory some years before that brought the remuneration of unionized continuing care assistants outside of hospitals (not well-paid by any standard) closer to their hospital counterparts.

Not two months later, the government moved, once and for all, to make the situation permanent, not only for those workers, but for all employees in the health and social services sectors. The move came as 2,400 Halifax nurses filed strike notice. That dispute centred around nurse-patient ratios.

The new legislation, deemed the Essential Health and Community Services Act, applied to over 40,000 workers (nearly 10% of the working population in the province) in acute health care, long term health care institutions, care facilities, group homes, 911 operators, ambulance services, home support, child protection and people working in homes for seniors, youth at risk and the disabled.

The legislation compelled the applicable unions to negotiate "Essential Services Agreements" with the employers in these sectors six months in advance of collective agreement expiry. Failing agreement, the unions would forfeit their right to strike. The negotiation process toward an essential services agreement puts great power in the hands of the employer. The employer gets to make the initial proposal as to staffing in the event of a strike. There is little incentive for the employer to propose anything short of the most stringent staffing proposal, as any impasse can be submitted by the employer to the Labour [Relations] Board.

Haiven and Haiven (2002) explain why third parties almost inevitably "over-designate" the proportion of workers deemed "essential."

> Binding third party decision-making in emergency services designation suffers from all of the problems of third party decision making in interest arbitration, and more. A third party called in to adjudicate a dispute over emergency services will almost inevitably err excessively on the side of caution.
>
> Employers will always exaggerate the number of employees and services they consider "essential." They will do this first, because they feel an

> extreme position is a convenient bargaining gambit. Second, running an institution during a strike is a massive inconvenience, a massive headache. Which employer in her right mind would propose more inconvenience? Third, employers are understandably afraid that lack of staff might lead to patient harm, a consequence for which they are ultimately responsible.
>
> But employers are notoriously unable to distinguish between annoying inconvenience to themselves and harm to patients.
>
> The fact that Canadian employers have over the past twenty years regularly predicted disaster in strikes and then managed to cope is proof of this.
>
> Third parties adjudicating emergency services are usually specialists in labour relations, not in the running of health care institutions. In normal contract disputes, many of them are adept at cutting through the technical jargon and self-interested malarkey of both sides. The consequences are [damaging to] pay and working conditions. But when the issue is framed as "life and death," the task is much more daunting. Moreover, there is concern that the third party will bear some of the blame if an error is made. Even in the unlikely event that the third party were very knowledgeable in health care administration, that knowledge would invariably carry with it a managerial bias. So coming down on the far side of caution is natural and inevitable.

But, of course, the major problem with over-designation is that it usually achieves the exact opposite of curtailing labour conflict:

> …one of the serious problems of over-designation is that, far from spawning emergencies, the strike is so benign in the short term that it actually drags on causing greater problems in the long run for the union, the management or the public. It is arguable that a shorter, sharper drop in health services (other than true emergencies) is less harmful to the health care system than the deterioration that accompanies a longer, corrosive dispute.

It is then no wonder that the Nova Scotia Liberals' Essential Health and Community Services Act itself anticipates just such a situation:

> 15 (1) Where a party to an essential health or community services agreement with respect to a bargaining unit considers that the level of activity that is required to be continued under the agreement has the effect of *depriving the employees in the bargaining unit of a meaningful right to strike* or depriving the employer of a meaningful right to lock out the employees, the party may apply to the Board, by written notice to the other party and to the Board, to request that the Board direct the parties to a binding method of resolving the issues in dispute between the parties. (emphasis added)

In other words, if union (or management) feels that the proportion of workers designated essential renders a work stoppage meaningless, it can apply to have interest arbitration settle the bargaining dispute.

Reducing the Number of Bargaining Units in Health Care

Unlike most other provinces, where the structure of health care collective bargaining has been centralized and simplified over the years, the situation in Nova Scotia was a dog's breakfast of bargaining units and bargaining agents, complicated by history. The new Liberal government set out to reform that structure, but in such a way as to strengthen the hand of the health employers and weaken that of the unions.

The collective bargaining norm in acute health care[9] across the country has three features:

First, there is a clear division of health care occupations into three or four *functional standard bargaining units*. These are often as follows:

- Direct nursing care (including Registered Nurses, Registered Psychiatric Nurses and increasingly Licensed Practical Nurses)
- Allied health professionals (including more than a hundred paramedical professional and technical specialties like registered imaging and laboratory technologists, physiotherapists and social workers)
- Clerical workers
- General support services (including housekeeping, portering and dietary, and sometimes Licensed Practical Nurses)

Second, there is often a single, or dominant, trade union that acts as bargaining agent for each of these bargaining units.

Third, and most important, while the employer of record may be a particular health care institution or regional health authority, collective bargaining for each of these bargaining units is centralized provincially at a single provincial table. At this table, a provincial health employers' association represents the management side. A representative of the provincial government may sit at the table, but in any case, the government, as final paymaster, is extremely influential in these negotiations.

Over the years, Nova Scotia health care unions pushed strongly for centralized bargaining. But governments strongly resisted it, hoping to use a divide and conquer strategy against the unions. This strategy was not entirely successful, as the unions sometimes "whipsawed," trying to obtain good settlements in the Halifax region and then apply them to the hinterland regions.

Another Nova Scotia anomaly was several unions representing each of the bargaining groups. For example:

- Registered nurses were represented by two unions: the Nova Scotia Nurses Union

(NSNU) and the Nova Scotia Government and General Employees Union (NSGEU)

- All four unions represented some licensed practical nurses
- Allied health professionals were represented by NSGEU, the Canadian Union of Public Employees (CUPE) and UNIFOR (formerly the Canadian Auto Workers)
- The same three unions also held bargaining rights for the general support unit
- NSGEU and CUPE held rights to represent clerical workers

Despite the proliferation of unions, the NSGEU was clearly the dominant one, with over eleven thousand health care members. No other union represented more than half that number.

The NSGEU was also the dominant union in the province generally (with over 30,000 members in total.)

Soon after the first three pieces of labour legislation mentioned above, the new Liberal government introduced a fourth. This proposed to rationalize and centralize acute health care collective bargaining. But it was clear to everyone[10] that its main purpose was to cut NSGEU off at the knees and crush its hegemony. The government proposed to do this by:

- Banning health care strikes entirely until the process was complete.
- Reducing the number of acute health care employers in the province from nine to two.
- Centralizing collective bargaining to four bargaining units and thus four negotiation tables.
- Moving Licensed Practical Nurses from the Allied Health Professionals bargaining unit to the Direct Nursing Care bargaining unit.
- Specifying that each of the bargaining units could be represented by one union, and only one union. This would effectively deny the majority of health care workers the union of their choice.
- Insisting that a union could be considered as a contender for a bargaining unit only if it had previously represented such workers.
- Forbidding "run-off" votes among applicable workers to determine which union would "win" the bargaining rights for each of the four units (run-off votes are a time-honoured mechanism for such amalgamations.)

At first, Leo Glavine, the Minister of Health, spokesperson for the government initiative, seemed to indicate that the government itself would decide the disposition of the unions in the legislation. He announced to the NSNU 2014 annual general meeting "I like the idea of having one nurses union."[11] Only after an uproar from the unions, labour lawyers and opposition politicians, did the government decide to assign the task to a third-party.

The worst-case scenario for the NSGEU under the government's proposed arrangement would see that union lose 7,700 health care members, which would amount to ¼ of its total membership and a devastating revenue loss of 40 percent. The same scenario would see the NSNU gain 5000 for a new total of 10,000 members, making it the dominant health care union in the province.

Despite the government's bullying intrusiveness and clear favouritism, the four health care unions managed to maintain a united front, though it showed enormous cracks, almost to the point of breaking, as the process wore on. As CUPE Nova Scotia President Danny Cavanagh said, the government wanted to "put all four unions in the untenable position of having to horse-trade their own members. No union worth their salt would ever consider doing that."[12]

The government made the pretense of asking the unions to submit proposals on how to resolve the amalgamation exercise. The unions together proposed an innovation used in British

Columbia a decade earlier to sort out a problem similar to that in Nova Scotia. That innovation was "bargaining associations." No union would have to surrender members it already had, but at each central bargaining table only a single union would act as official bargaining leader.

As a last resort, some trade unionists called for a run-off vote. The government rejected both ideas out of hand. Premier Stephen McNeil insisted that bargaining associations did not work and would merely perpetuate the status quo.[13]

As for run-off votes, the unions preferred to avoid the divisiveness and rancour that this had caused when used in the past. But McNeil had his own reasons for rejecting the idea. Run-off votes tend to favour the union already holding a majority among those balloting. There was a strong probability that the NSGEU would thus maintain its dominance in the acute care bargaining scene and this is precisely what the government did not want.

As for the bargaining association process in British Columbia, it did not maintain the status quo and continues to work well to this day. The reason the government did not originally want bargaining associations was that the NSGEU, again, would maintain its dominant position.

The much-maligned bill became law on January 30, 2015. It called for a mediator to work with the unions to negotiate a solution in keeping with the law. Failing that, the third-party would take on the role of arbitrator and impose a settlement. But the constraints of the law were so severe, and the time limits so tight, that many despaired of a solution different than what the government intended. But the government did not reckon on the eventual choice — James Dorsey.

Dorsey, a lawyer from British Columbia, is one of the most senior and experienced labour specialists in the country. Moreover, he is a veteran in deciding health-care bargaining structure issues, having helped settle such matters in British Columbia and Saskatchewan. The four unions put his name forward and the Nova Scotia government could hardly disagree.

Only an expert as clever and practiced as Dorsey could have navigated through the legislation to fashion a remedy so contradictory to the government's legislative intent. From the start, it was clear that he was not necessarily going to be bound by the strictest interpretation of the government's legislative mandate. In an early report, he declared he would not be "simply an usher showing everyone preassigned seating."[14]

Dorsey delivered several sequential decisions. In the first, he awarded the clerical bargaining unit to the NSGEU. In the second, he in effect awarded that union the allied health professionals unit.[15] And he appeared to be opening the doors to the possibility of NSGEU winning the direct nursing care unit as well. But before he could do that, the government "fired" him, announcing that he had disobeyed the terms of his appointment and the rules imposed in the legislation.

While legal experts debated whether Mr. Dorsey could actually be "fired," the government realized it was in very hot water, and looked ridiculous and inept to boot. In March 2015, it quickly convened an emergency meeting with the four unions. In essence, it agreed to the British Columbia model of "bargaining associations," floated by the unions the previous summer, and rejected by the government then.

Certainly, the government showed an embarrassing ignorance of labour relations; it appeared overly ambitious and less than competent in redrawing the map of bargaining. And it did back down. The unions justifiably claimed a victory. But government may merely have been wounded, as witnessed by the next legislative initiative.

The Liberal Government's Attack on Collective Bargaining in Universities

A month after the Dorsey debacle, the Liberal government shocked trade unionists with a fourth piece of legislation. This one, called The Universities Accountability and Sustainability Act, gave universities formidable powers to bypass collective agreements in order to implement a broad array of financial and other alterations. It would apply not only to unions of professors, but other unions, representing part-time teachers, clerical staff and blue collar workers.

After getting approval from its Board of Governors and giving notice to the government of a "significant operating deficiency," a university could initiate a "revitalization planning process." This process would bar unionized workers from striking (and the university from locking them out) for a period of one year. Fines of up to $100,000 in total or $10,000 per day of continuing violation are the deterrent. Moreover, "any person or organization" found guilty of "doing anything" or "failing to do anything" that could "aid or abet a unionized employee" from defying the legislation would also be guilty of contravening the Act and subject to fines.

Conservative MLA Tim Houston echoed several other critics in observing that passage of the law would actually generate, rather than prevent, crises in universities. In response, Minister of Labour and Advanced Education Kelly Regan astoundingly suggested that the Act would never be used, but later admitted universities had already taken steps to use the legislation or the threat of it. Scott Stewart, of the Cape Breton University Faculty Association reported that his institution's Board of Governors had imposed a 21 percent tuition hike and a faculty and staff cut. "That budget and that revitalization plan would not have been put forward without the threat of this bill hanging over us." In the same week, the University of King's College froze wages.[16]

The legislation delivered what several business and political leaders had been calling for. Former New Brunswick Liberal Premier and business icon Frank McKenna[17] had a few months earlier blamed "greedy faculty unions" and "debilitating faculty strikes" for a crisis in higher education.[18] Such is McKenna's status in the Atlantic Liberal political elites that it must be assumed that these ideas have received wide currency in those circles.

Like their counterparts across the country, several Nova Scotia universities had earlier tried to implement a "program prioritization process"

(PPP.) PPP is inspired by the work of US consultant and former university administrator Robert C. Dickeson.[19] Part of Dickeson's modus operandi to transform especially mid-size universities is to demonize faculty and their trade unions and the institution of tenure and by bypassing established academic channels.[20] And certainly faculty union resistance made it very difficult for the PPP process to be implemented.[21]

Canadian Association of University Teachers (CAUT) Executive Director (at that time) Jim Turk condemned McKenna for being ill-informed. Salaries at many Maritime universities, he said, lagged woefully behind and made it difficult to recruit top talent. Referring to McKenna's position as a banker, Turk commented, "TD Bank doesn't pay one-third less than competitors in order to save money. Yet that's what he's recommending for universities in the Maritimes and it's bad advice."

CAUT condemned the legislation, arguing that in removing collective bargaining "meaningful dialogue about [the revitalization] plan cannot really happen." CAUT argued that the legislation was unconstitutional and promised "to commence censure proceedings against any university in the province that attempts to trigger the provisions of the legislation by submitting a 'revitalization plan' with the government."[22]

The new Liberal legislation would please business in other ways as well. One provision mandates that the university must satisfy the government that research can be converted to "business opportunities," that curriculum will be "relevant" to "students, society and the economy" and that knowledge and innovation will be shared with the private sector in university-industry collaboration.

The Universities Accountability and Sustainability Act became law in early May 2015. Whether its provisions are actually used by Nova Scotia universities remains to be seen. It is already clear, however, that its bark, as it were, may be more dangerous than its bite. Holding the threat of the legislation, university administrations are already acting to intimidate the unions with which they negotiate. Already reports of such veiled and not-so-veiled threats are emerging. While CAUT affiliates, representing professors, may offer some resistance because of their labour market strength, the more precarious and less powerful unionized groups may be more vulnerable. And once the weaker succumb, the stronger may well follow.

Why Defy Charter-protected Labour Rights?

Most of the aforementioned Liberal legislative initiatives run afoul of, if not the letter, then certainly the spirit of a string of decisions by the Supreme Court of Canada giving labour rights protection under the *Charter of Rights and Freedoms*. Most of the new Liberal legislation has been denounced by the labour movement and its legal experts and are or will be subject to Charter challenges.

Those Supreme Court decisions enshrine Charter protection for the following labour rights:

- The right of secondary picketing (by striking workers against a business other than the one against which they are on strike)[23]
- The right to bargain collectively[24]
- The right to the bargaining agent of the workers' choice[25]
- The right to strike[26]

This group of decisions are not only legal matters. As with many issues dealt with by the highest court in the land, they are aspirational; they are meant to send a message to governments and to society at large about what is right and proper and admirable in a liberal democracy. They also attempt to weigh the rights of individuals and groups to gather and express themselves, even if such actions are inconvenient or annoying to members of the public at large.

Unions are associations of individuals banding together for mutual protection. But in order to effectively do that, they also engage in types of economic struggle that are disruptive, that impose hardship on others, such as threatening to and actually withdrawing their labour, picketing and denying ease of access to businesses and services to employers, other workers and members of "the public." Union actions can also frustrate government policy initiatives. The set of Charter-protected labour rights announces that such disruptive union activity is acceptable, defensible, worthy and honourable. In the words of the author of the majority decision, Justice Rosalee Abella:

> The right to strike is essential to realizing these values through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives. The ability to strike thereby allows

> workers, through collective action, to refuse to work under imposed terms and conditions.[27]

Charter protection, however, does not mean that these rights are absolute. Even with Charter protection, governments can limit those rights. But they cannot do so by a simple legislative vote. Section 1 of the Charter says that governments can contravene rights only if they can prove to the courts' satisfaction that such action is "demonstrably justified in a free and democratic society." Further, the governmental action is only justified if the rights impairment is "minimally intrusive" and is unconstitutional if it "substantially interferes" with the ability of a union to negotiate over work issues.

A good example is precisely the case examined by the Supreme Court in the right to strike issue. The government of Saskatchewan, ostensibly in an attempt to limit the harm done to the public by strikes in acute health care, passed a law giving itself the power to declare any public service "essential" and thereby prohibit an employee or group of employees from striking.

The Supreme Court found that the Saskatchewan government was using a sledgehammer to kill a fly and that it provided no reasonable alternative for meaningful collective bargaining.

Another key Charter case, on the right to collective bargaining, revolved around the British Columbia government's nullifying large parts of collective agreements that health employers and unions had negotiated and agreed to in good faith. The Supreme Court ruled that the governmental action was wanton and unnecessarily destructive to the collective bargaining process.

Our purpose here is not to delve into the intricacies of the law, nor to speculate on the chances of a Charter challenge of the raft of legislation. But, given this highly influential set of Supreme Court decisions on union rights, why would the Nova Scotia Liberal government come out with not one, not two, but three pieces of legislation that appeared to fly in the face of these decisions?

It is impossible to know for sure, but we can set out a number of possibilities:

1. The government believed that its legislation curtailing strikes and other union activity really was distinguishable from the cases giving rise to the Supreme Court decisions mentioned above. Indeed, in response to accusations that The Universities Accountability and Sustainability Act was unconstitutional, Labour and Advanced Education Minister Kelly Regan said publicly that she "remains confident the provision would stand up to a challenge under the Charter of Rights and Freedoms."[28] When the challenged laws came before the courts, the government could argue:
   a. The economic situation of the province and its health care and educational institutions were so dire that extraordinary measures needed to be taken to protect the public's rights of access from the unions' rights to bargain collectively and to strike.
   b. In any case, the government's impairment of labour rights was "minimally intrusive" to meaningful collective bargaining.
2. Even if the anti-labour legislation were eventually to be struck down, it would take a minimum of four or five years for the cases to wend their way up through the court and appellate system. After all, the original offending legislation in *BC Health Services* was enacted in 2002 and the Supreme Court ruling came in 2007; the *Saskatchewan* case took six and a half years to be finally declared unconstitutional. Moreover, the Supreme Court, loath to substitute its own remedy, in both cases gave the offending governments time to rectify the law to comply with its decision. Thus, even in the worst-case scenario for the government (a complete repudiation by the courts of the offending legislation), it

could take the better part of a decade until it had to rectify the situation by repealing or changing the law. In the interim, the law would stand, imposing a robust chilling effect on union militancy and strike activity, not only in the sectors involved, but across the provincial industrial relations spectrum.

3. Governments have a very short attention span — from their election to the next election. The threat and actuality of strikes in public services is a crisis, but only for a short period. Governments have many other challenges on their agenda. We have noted that governments across Canada tend, for the most part, to want the challenges to go away so they can deal with other challenges. Thus, it could be that the Nova Scotia Liberal government knows that most of this labour legislation could be overturned by the courts, but is merely trying to use a stopgap to kick the challenge down the road to another day, and possibly another government. While it may be true that this spate of legislation is part of an insidious austerity agenda (see below,) the immediate impetus is to devise a fix (quick or less quick) for an immediate problem.

4. For the government, if the options come down to angry workers in the streets and eloquent lawyers in the courts, the choice is a no-brainer. For several decades now, unions have increasingly turned to litigation rather than agitation. If the Supreme Court decisions on labour rights under the Charter had really changed the national discourse and stemmed the attacks on trade unions, one might give a tip of the hat to the impact of the courts. But the recent anti-labour initiatives by the Federal Conservative government and the Nova Scotia Liberal government (as well as by several other jurisdictions) have shown that the opponents of collective bargaining are not deterred. They seem to know that legalism amounts to depoliticization of the struggle and a draining-off of militancy. Nova Scotia health and education unions did mount some impressive and loud demonstrations outside the legislature and the Law Amendments Committee[29] sometimes sat days and nights to hear the objections of affected workers. But the promise that the courts would "make it right" became an all-too-common rallying cry.

5. Even if the offending legislation is eventually overturned by the courts, governments have one last, and powerful way out. They can invoke the so-called "notwithstanding clause." Section 33 of the Charter allows Parliament or a provincial legislature to suspend, for five years, a court Charter decision by a simple majority vote. Such action may well bring the governing party into disrepute, and it has not been used often. But it was invoked by a Saskatchewan Conservative government in 1988 to deny a group of workers the right to strike (though it became unnecessary subsequently when an earlier Supreme Court declined to give strikes Charter protection.)

As Charles Smith has noted:

> Legal challenges are…apolitical as they separate the question of "rights" from political and economic struggle. It is also difficult to contemplate how "rights" can be used to significantly restrain the power that employers or government maintain within capitalist societies. Quite simply, under a "labour rights" formula, victories are reduced to legalistic, judicial made law that bears little resemblance to workers' everyday struggles against the forces of neoliberalism or globalization.[30]

Why the Onslaught of Anti-labour Legislation?

We have mentioned above that Nova Scotia, similar to other jurisdictions but more so, has experienced a "growing gap" between owners of capital, who have been seizing the bounty of an overall growth in productivity and those who are employed, who have had their real incomes drop. We have also shown how Nova Scotia has in recent history been among the most aggressive in using legislation (and the lack of legislation) to curtail the power of labour. From the Michelin Act (which gave the province the unenviable distinction as the banana republic within Confederation) to the early removal of "card-check" evidence for union certification, to arguably the worst labour standards legislation in the country, the incomes and working conditions of most workers have been driven down.

If so, then why was the *current* onslaught of anti-labour legislation by the Liberal government necessary?

The only workers successfully resisting the race to the bottom are those with a competitive skillset and valuable credentials: nurses, teachers, professors, and allied health professionals (like registered technologists and therapists.) Not only do they have mobility, but withdrawing their labour individually or collectively, is a palpable threat. And they are organized into professional societies, and into strong trade unions with whom employers must negotiate.

Beyond pay, a range of professional issues, like autonomy, scope of practice and quality of service, spurs their militancy.

Many of the practitioners of these occupations are popular with the public. Teachers instruct our children. Nurses care for the ill. Crown attorneys prosecute criminals. Technologists administer radiation treatments to cancer patients. If they are fed up enough to strike, public opinion is as likely to side with them as with the government.

Indeed, some of the key battles and victories in Canadian industrial relations in recent years have been waged and won by "professionalized" workers and their unions.[31]

Not only have they been resisting recruitment to the government's austerity agenda, their push-back encourages other workers to push back too.

That is why the Nova Scotia Liberal government decided to put its very heavy hand on the scales of collective bargaining.

But the next act in this play will now commence. Later this year and next, government will preside over negotiations with big groups of public sector workers — health care, primary and

secondary education and civil servants. Rather than taxing back some of the bounty reaped by capital, the government is eyeing savings from teachers, civil servants, and health care workers.

Three bi-elections in mid-July 2015 increased the Liberal majority and may well strengthen their resolve. A three-year wage freeze already announced for non-union civil servants (mainly managers) could lead to legislation imposing the same on unionized staff across the public sector. Physicians are reported to have already been offered a five-year deal with no increase in the first two years and 1 percent in the next three.[32] The Nova Scotia Teachers Union entered bargaining at the end of July and unionized direct employees of government have been without a collective agreement since the spring of 2015. And, as mentioned, health care workers' negotiations have been backed up from before the essential services legislation.

Will the groups of skilled workers with clout submit meekly, or will their anger and militancy re-double as the government attempts to balance the provincial budget on their backs?

Endnotes

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2 Dufour, Mathieu and Larry Haiven. 2008. *Hard Working Province: Is it Enough? Rising profits and falling labour shares in Nova Scotia*. (Ottawa, Canadian Centre for Policy Alternatives.) https://www.policyalternatives.ca/sites/default/files/uploads/publications/Nova_Scotia_Pubs/2008/Hard_Working_Province.pdf

3 Russell, Ellen and Mathieu Dufour. 2007. *Rising Profit Share, Falling Wage Shares*. (Ottawa, Canadian Centre for Policy Alternatives) https://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/2007/Rising_Profit_Shares_Falling_Wage_Shares.pdf

4 In interest arbitration, a third party decides on new collective agreement language for items in dispute in negotiatons.

5 The Saskatchewan legislation would eventually be struck down by the Supreme Court of Canada (see previous reference.) The Court found that the right to strike was protected by the Charter and that the Saskatchewan government's actions in curtailing that right was much too heavy-handed. Its actions failed the test of being "minimally intrusive" to the Charter right.

6 Allied health professionals consisted of licensed practical nurses and an array of technologists and therapists.

7 Judy Haiven and Larry Haiven. 2008. "Health Care Strikes: Pulling the Red Cord." in The Right to Strike in Nova Scotia Series. Ottawa. Canadian Centre for Policy Alternatives. January (http://www.policyalternatives.ca/documents/Nova_Scotia_Pubs/2007/Pulling_the_Red_Cord.pdf); Judy Haiven and Larry Haiven. 2008. "Is Compulsory Arbitration a Good Substitute for the Right to Strike in Health Care? The Persistence of Recruitment and Retention Problems." in The Right to Strike in Nova Scotia Series. Ottawa. Canadian Centre for Policy Alternatives. October (https://www.policyalternatives.ca/sites/default/files/uploads/publications/Nova_Scotia_Pubs/Binding_Arbitration_CCPA_NS.pdf); Judy Haiven and Larry Haiven. 2007. "A Tale of Two Provinces: Alberta and Nova Scotia" in The Right to Strike in Nova Scotia Series. Ottawa. Canadian Centre for Policy Alternatives. October (http://www.policyalternatives.ca/documents/Nova_Scotia_Pubs/2007/Pulling_the_Red_Cord.pdf.)

8 Steele resigned but, in order not to embarrass his colleagues, did not make public his reasons until after the party lost government.

9 Note that this discussion refers to acute care (mainly hospitals) only. There are different bargaining structures for continuing care, home care and public health.

10 That "kneecapping" the NSGEU was the government's intention was acknowledged not only by the unions, but by a wide array of commentators and politicians of the left, right and centre.

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20 Heron, Craig. 2013. *Robert Dickeson: Right for Ontario? An Analysis of Program Prioritization*. Ontario Confederation of University Faculty Associations.

21 A PPP process, dubbed "TransformUS" was initiated at the University of Saskatchewan in 2013 and blew apart spectacularly a year later, when a Dean was fired for publicly criticizing it. The resulting fiasco led to the dismissal of the University provost from that position and the "resignation" (firing) of the University's president. (The Canadian Press. 2014. "University of Saskatchewan fires president Ilene Busch-Vishniac amid controversy over professor's dismissal." *National Post*. May 22. http://news.nationalpost.com/news/canada/university-of-saskatchewan-fires-president-ilene-busch-vishniac-amid-controversy-over-professors-dismissal

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23 R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd. [2002]

24 *BC Health Services vs. BCGEU [2007]*

25 *Mounted Police Association of Ontario v. Canada (Attorney General) [2015]*

26 *Saskatchewan Federation of Labour v. Saskatchewan, [2015]*

27 *Saskatchewan Federation of Labour v. Saskatchewan, [2015]*

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