DEVELOPMENT OF EMPLOYMENT STANDARDS LEGISLATION IN NEW BRUNSWICK

The Honourable Mike MCKEE**[1]

[1] Minister of Labour (as he was then known) for the Province of New Brunswick, Fredericton, New Brunswick.

This paper was prepared by the Honorable Mike McKee but was presented at our Conference by The Honourable Vaugn BLANEY, B.A. M.Ed. Minister of Advanced Education and Labour for the Province of New Brunswick and Frances McGinn, B.A. LL.B., Director, Labour Policy, Department of Advanced Educaton and Labour for the Province of New Brunswick, Fredericton, New Brunswick.

INTRODUCTION:

Labour codes and standards legislated in each Canadian jurisdiction give wage earners a degree of protection against exploitation, unsafe working conditions and loss of income due to workplace injuries. One hundred years ago New Brunswick workers had no such rights. The evidence presented at the 1889 Royal Commission on Labour[1] provides us with detailed descriptions of low pay, long hours, unsafe working conditions and lack of employer responsibility respecting workers injured on the job.

The Royal Commission Report describes children as young as 10 years old working sixty to seventy hours a week, often for as little as $1.50 a week with deductions from that amount for lateness or careless work. Within the factories and sawmills, machines were unguarded, ventilation poor and fire protection largely non-existent. In *Connors Rope Manufacturers* in Saint John, women working fourteen hours a day at the spinning jennies were not allowed to sit down at any part of the day although the factory manager agreed that they could have worked just as well sitting as standing. In the St. Croix cotton mill no compensation or assistance was given a young boy severely injured in a fall down an unguarded elevator shaft.

The object of this paper is to trace the evolution of legislated standards respecting conditions of employment in order to better appreciate the developmental process, the competing interests involved and the factors affecting the balance of those interests. This paper is focused on the New Brunswick experience which may be regarded, with certain variations in detail and timing, as generally representative of the Canadian experience since all Canadian jurisdictions have followed much the same path to present legislated standards.

I. THE STATUS OF THE WAGE EARNER: 1784 TO 1890

The development of employment standards legislation is the story of the struggle of wage earners to gain a more just and secure place in society, a struggle that was evident from the very beginning of provincial history. In 1784, when the Loyalist exiles from the American states were

successful in obtaining a separate colony north of the Bay of Fundy, the leaders of the new province were determined to establish a society similar to that of England with its recognizable class structures. Deliberate steps were taken to avoid challenges to authority on the basis of individual equality such as the Loyalists had witnessed in the American Revolutionary War. One such step was the handling of the legal issue of the reception of English statutes within the new province.[2]

Every Canadian province has a reception date, the latest date at which the statutes of the British Parliament are deemed to apply automatically within that colony. Nova Scotia, for example, has a reception date of 1758, the date when its legislature first met. It has been argued that the same date would apply to New Brunswick since New Brunswick territory had been part of Nova Scotia in 1758. Before a General Assembly could be elected, however, the Governor-in-Council chose 1660 as New Brunswick's reception date. This early reception date, unique in the North American colonies, prevented the application in the territory that had become New Brunswick of the 1688 English *Bill of Rights* and certain laws concerning election reform. Thus in 1785, when the first election was held in the province, these English laws did not apply. The results of this first election were controversial in that in Saint John a six-man slate, which had initially defeated a six-man slate of influential Loyalists, was declared defeated on a recount. The 1660 reception date may not have affected the result, but conflict over New Brunswick's reception date led to turbulent legislative sessions in 1795 and 1796 when the opposition party attempted to have the date advanced to 1758. The date 1660 has survived, however, having been applied by the New Brunswick Court of Appeal in a decision as recently as 1970.[3]

Even before the end of the 18th century, however, it was becoming evident that the aristocratic structure planned for New Brunswick could not succeed. Sufficient land was available to permit most of the population to become self-sufficient through farming, thus achieving a degree of independence. Working as a hired person was acceptable to raise enough money to start a homestead, but the person who continued in that dependent state was regarded as inferior in status.[4] The result was that the pol of persons willing to work for wages was too small to maintain a class of non-working gentlemen.

Some labourers were able to take advantage of their scarce supply to organize in order to improve their status. The first unions in British North America were established in the port of Saint John during the War of 1812.[5] Organization continued to the extent that Saint John has been described as a leading centre of union activity from the late 1830's to the late 1850's, although almost all of that organization except for the dock workers was of skilled craftsmen and tradesmen and had little impact on the working conditions of the labourer.

Early legislation affecting labour was generally for the purpose of ensuring a sufficient supply and thus in the interest of employers. In the first Legislative Session in 1786 *An Act to Regulate Servants* was passed to prevent "damage and inconvenience" caused by an apprentice or servant who leaves the service of a master or mistress without proper discharge. A penalty for this offence of up to one month in gaol at hard labour was added in 1826. Apprenticeship laws permitted parents to bind their children as apprentices. Overseers of the Poor could bind children likely to become a charge on the parish and a Board of Commissioners was established in 1834 to import juveniles for binding as apprentices. Numerous laws were passed during the province's first fifty years to prevent the desertion of seaman.

The only source of strength available to wage earners during most of the 19th century lay in organization. There being no legislation protecting union activity, the strength of unions depended solely on their bargaining power which varied with economic conditions and the supply of labour. The changing fortunes of the Saint John longshoremen's union, the first and strongest of New Brunswick's early unions, illustrate how changes in union strength impacted on working conditions.

The Saint John longshoremen were able to organize as early as 1812, the scarcity of labour and a building boom during the war giving the labourers sufficient bargaining power to establish their wages. During the first half of the century the strength of the union varied, finding its height in New Brunswick's "golden age" of the 1850's. The union, at this time was "loading and unloading every vessel, proclaiming wage rates by newspaper advertisement and closing operations to attend the funeral whenever a member died on duty".[6]

Conditions had changed by 1875. New Brunswick was feeling the effect of a worldwide recession which would last in the province until the turn of the century Unemployed labourers flooded the market, desperate to work for $1.00 or $2.00 a day. The 1400 member longshoremen's union, attempting to maintain the established $3.00 rate that was recognized as barely enough to support a family, went on strike in 1875 to protest the hiring of non-union workers.[7]

Merchants and ship-owners retaliated by setting up a fund of over $100,000 to hire non-union dockworkers. Contributors to the fund included the mayor of Saint John and members of the Common Council, the Legislative Assembly and the federal Parliament. The Chief of Police recruited extra constables and the Mayor called out the troops of the 62nd Battalion of the Canadian Militia to prevent attacks on the non-union workers. With these forces against them, union members returned to work with the non-union workers at wages now less than $2.00 a day and for a work day of 11 hours instead of the 10 hours they had been able to establish in times of strength.[8]

The longshoremen's union managed to survive. Evidence was given at the 1889 Royal Labour Commission that the longshoremen's union, now of only 420 men, had decreased its daily rate from $5.00 to $3.00 in 1885. The daily rate was further reduced to $2.00 in winter when the work was harder but more men were available because of shut-downs in other industries. The Royal Commission Report credited the longshoremen's unions in the various Canadian ports with improving their working conditions, having gained "better compensation for their labour and more regular payments".[9] It is clear, however, how vulnerable even the strongest of unions were when conditions of employment depended upon the vagaries of supply and demand.

II. INTRODUCTION OF EMPLOYMENT STANDARDS LEGISLATION: 1890-1920

The evidence given at the 1889 Royal Labour Commission was that wage earners accepted their working conditions without complaint. They did not complain about the amount of their wages or about being paid only once a month or about some of their wages being in the form of an order

on the company store, nor did the women standing at the cotton jennies for a 14 hour shift ever ask to sit down. The exception recorded in the New Brunswick evidence was the Saint John longshoremen's union who successfully went on strike in 1889 to protest a change from a daily to an hourly wage, a change which would have had them waiting on the docks or vessels for considerable periods of time without pay. A ship broker gave evidence that the union members intimidated replacement workers by grouping in such numbers that they feared to return. Most labourers, however, having no power and thus no choice, had to accept whatever conditions the employer offered.

By this time, however, the social problems created by rapid industrialization and urbanization resulted in a movement for reform that stretched across the country. Important to the early stages of the movement were radical thinkers such as Martin Butler and H. H. Stuart, both self-taught men who had suffered considerable hardship as children. Butler established in Fredericton in 1890 a monthly newspaper called *Butler's Journal.* This paper, which was published until 1915, supported the rights of labour and advocated economic and social reform. H. H. Stuart, a lay preacher and school teacher who was dismissed from his teaching post in Fredericton Junction in 1899 for "talking socialism in public places" was, for many years, editor of the *Newcastle Union Advocate*. Stuart is credited with founding the New Brunswick Teachers' Association in 1902. Butler and Stuart joined in forming the Fredericton Socialist League in 1902 and succeeded in forming locals of the Socialist Party of Canada in McAdam Junction, rural Albert County, Saint John, Newcastle and Moncton.[10]

After the war the social reformists turned to the political process, Stuart advocating "a truly popular political party by union of workers, farmers and all others who perform useful labour with hand and brain".[11] The 1920 election returned a substantial number of third party candidates for the only time in New Brunswick history. The results of that election were United Farmers 9, Labour 2, Farmer-Labour 1, Independent 1, Conservative 11 and Liberals 24.[12] In the 1921 federal election the counties of Victoria-Carleton elected T. W. Caldwell, the president of the United Farmers of New Brunswick Party and the only federal third party candidate ever elected in New Brunswick.[13]

The protest movement was also reflected in the actions of organized labour. Workers in New Brunswick were striking in such numbers that the movement was viewed as a clear break from traditional patterns of behaviour.[14] Saint John, for example, had 144 strikes, primarily of longshoremen and construction labourers, and St. Stephen had 6 strikes in the cotton factories. Throughout New Brunswick the most active protesters were the labourers, largely unskilled, such as longshoremen, haypressers, freight handlers, construction labourers, and factory workers.[15]

Employers generally responded to the increased number of strikes with the use of strikebreakers who were often protected by the militia as well as by the police, leading to violent encounters. In the Saint John Street Railway Strike of July, 1914, for example, Mayor James Frink called on the military to control a demonstration supporting strikers. An ill-conceived charge by a few sword-wielding Royal Dragoons down King Street hill into a large crowd assembled at Market Slip led to a riot, the burning of several street cars and the destruction of the powerhouse that provided much of the city's electricity.[16]

The New Brunswick reform movement, however, is generally perceived as less radical than the movement in other parts of Canada. One writer of labour history describes the Atlantic Provinces during this period as seeming "an island of tranquillity . . . compared to the messy turbulence of the West Coast".[17] Nevertheless, it was during this period that New Brunswick workers obtained the basis of a legislated right to certain standards of working conditions.

At the very beginning of this period, in 1889, the status and influence of the wage earner was increased when the Legislative Assembly removed the property qualification from voter eligibility, thus extending the right to vote to most workingmen. Shortly after, in 1894, the government of A.J. Blair passed three Bills for the protection of wages, the *Mechanics Lien Act*, *the Woodsmens Lien Act* and *An Act for the Protection of Wage Earners* which gave wage priority over other creditors on any assignment for the benefit of creditors. One legislator described the 1894 session as the workingman's session.[18]

By the turn of the century activist groups such as the Trade and Labour Council the Fabian League and the Saint John Women's Enfranchisement Association were advocating a *Factory Act*, similar to the 1884 Ontario *Factory Act*, to control hazardous working conditions and child labour. In 1904 the government submitted a proposed *Factory Act* to a provincial Royal Commission for an assessment of the need of such legislation. The Commission made enquiries in various parts of the province in 1904 and 1905, revealing young children employed for 60 to 70 hours a week in buildings with inadequate ventilation, no fire protection and unguarded machinery. The Commission reported, however, that there was "no absolute necessity" for a *Factory Act* at that time. The Commission "found no complaints from employees as to their condition and all seemed well satisfied with their treatment and ... [The Commission] found a feeling existing among some larger manufactories that it might be unwise to pass legislation which might interfere with the investment of capital in manufactories for the reason that in this province these industries are in their infancy and should be encouraged rather than impeded".[19]

In spite of the Commission's report, the government passed a *Factories Act* in 1905. The *Factories Act* prohibited employment of children under 14, limited hours of work to ten a day and sixty a week, set safety requirements respecting machinery, and hazardous materials and set minimum ventilation and sanitary standards. Labour gives considerable credit to the work of W. F. Hatheway in urging the need for such legislation.[20] Hatheway ran as a Conservative-Labour candidate in Saint John, losing the election of 1903 but succeeding in 1908. In 1910 he successfully proposed an amendment to the *Factory Act* establishing a Bureau of Labour, the forerunner of the present Department of Labour.

Hatheway was also a leader in the movement to extend employer liability for worker injury. The common law had evolved in a way that made it very unlikely that an employee injured at work would receive compensation from the employer. The worker would have to prove in court the employer's negligence in that he knew of, and permitted, an unsafe condition of work that resulted in the injury. In addition the worker must not have had any knowledge of the unsafe condition or he would be held to have assumed that risk himself in contracting to work. The employer was not

liable if a worker was injured by the act of another employee because of a common law rule holding that several workers serving one employer know that they are exposing themselves to the risk of carelessness by other workers and must be supposed to have assumed those risks in contracting to work.[21]

The first workers' compensation legislation, the 1903 *Act Respecting the Liabilities of Employers for Injuries to Workmen*, extended employer liability for the negligent acts of certain of his employees, thus modifying the restrictive common law rule. The injured worker, however, still had to prove negligence in court unless the employer wished to settle. In 1913 a Royal Commission, generally referred to as the Meredith Commission, was appointed by the Ontario government to inquire into workers' compensation. Its report recommended legislation based on collective responsibility with payments made to workers from a fund created by a levy on employers, in effect a mutual insurance plan to be managed by a government board.[22] Ontario enacted legislation based on the Commission's report in 1914. In the following two years Nova Scotia, British Columbia and Manitoba passed legislation similar to that of Ontario. In 1917 the New Brunswick government established a Commission to inquire into the working of the new workman's compensation legislation in the other provinces. The final result was the enactment in 1918 of a *Workmen's Compensation Act* similar to that of Ontario.[23] This Act has been regularly amended but the basic principles still apply today.

The representatives of labourers and farmers elected in 1920 were not able, however, to continue the thrust for labour legislation. New legislation for the protection of workers ended as New Brunswick entered a recession in 1920 that would last for most of the next two decades. Also, some of the gains of the previous two decades were lost. The 1905 provision prohibiting the employment of children under 14, for example, was omitted from the 1920 revised *Factories Act* and there was no general provision respecting child labour until a new *Factories Act* was enacted in 1937.

III. EMPLOYMENT STANDARDS DEVELOPMENT: 1930 TO 1960:

The disastrous economic conditions of the 1920's and 1930's pushed the New Brunswick government to get involved in the pay of employees for the first time.

The first minimum wage legislation in effect in the province had a narrow application. In 1934 the *New Brunswick Forest Operations Commission Act* provided for a Commission to establish minimum wages and assist in resolving wage disputes in the lumbering industry. In 1936, however, J. B. McNair, Minister of Health and Labour in the Liberal government of A. A. Dysart, introduced the *Fair Wage Act* of New Brunswick. Speaking to the House of Assembly in 1938, he described the *Fair Wage Act* as the "first piece of labour legislation of general application in New Brunswick" and "the initial step in the development of sane and constructive legislation for the regulation of industrial relations".[24] The *Fair Wage Act* provided for a Fair Wage Officer to hear complaints and conduct investigations to ascertain the wages, hours and conditions of labour in any industry or business and gave him the discretion to establish fair rates of wages and the maximum hours for which that wage should be paid. The *Fair Wage Act* was incorporated into the 1938 *Labour and Industrial Relations Act* but reappeared in a separate statute in 1945 as the *Minimum Wage Act*.

In 1938 union strength in the province was greatly enhanced by the *Labour and Industrial Relations Act* incorporating principles of the 1935 American *Wagner Act* establishing compulsory recognition of unions and compulsory collective bargaining. New Brunswick had suffered two large and difficult strikes in 1937, one in the sawmills on the Miramichi and the other in the Minto coal mines where the fear of violence led to the RCMP contingent being increased from two officers to thirty-three.[25] The 1938 legislation was enacted in response to these strikes to stabilize and regulate industrial relations in the province.[26]

In New Brunswick from 1938 to 1953 there were amendments to existing legislation but no provincial initiatives in new policy areas. Following the 1952 election, however, there was another spate of employment standards legislation. That election had been called on a labour issue, the unionization of the public service. The Liberal government of the day took a stand against employees of NB Power joining the International Brotherhood of Electrical Workers. In the election

campaign labour support, for the first time in New Brunswick, went to the Progressive Conservatives.[27]

The new Progressive Conservative government under Premier Hugh John Flemming introduced in 1953 *The Fair Wages and Hours of Labour Act* which established fair wage rates for workers employed on work under a government contract, ensuring that contractors paid the same wages throughout the province. In 1954 the government passed the *Weekly Rest Period Act* requiring employees to be given at least one day's rest in seven and bringing New Brunswick's legislation in line with that of seven other provinces. In the same year the *Vacation Pay Act* was passed, applicable only to the construction and mining industries, providing for a system of vacation stamps so that an annual vacation could be accumulated when working for more than one employer in a year. In 1956 the *Fair Employment Practices Act*, incorporated in 1967 into the *Human Rights Act*, was enacted prohibiting discrimination against any employee or prospective employee because of race, colour, religion or national origin.

In 1961, the government of Louis Robichaud introduced a new subject area in provincial employment standards, the concept of equal pay for male and female employees for equal work. *The Female Employees Fair Remuneration Act* prohibited wage discrimination based on gender. It was also this government that introduced legislation authorizing collective bargaining in the public sector.

IV. CONSOLIDATION AND EXPANSION 1960 - 1990

Employment standards legislation, as represented today by the *Employment Standards Act*, began to take shape in the 1960's. Standards respecting workplace safety, compensation for workplace injuries, human rights and, more recently, pay equity, continued to evolve under separate statutes. Provisions related to basic conditions of work such as hours of work, wages, vacations, general holidays and special leaves, have been consolidated as employment standards.

The consolidation process started in 1964 with the *Minimum Employment Standards Act* which was concerned primarily with hours of work and incorporated the provisions of the *Weekly Rest Period Act*. The *Minimum Employment Standards Act* prohibited the employment of women and children under 18 years for more than 9 hours a day or 48 hours a week. It also prohibited any employment of women for a period of six weeks after childbirth. The restriction on women's hours of work was removed from the legislation in 1976.

During the 1970's the Department of Labour, partially in response to input from the N.B. Federation of Labour concerning the need to further consolidate employment standards legislation, researched the evolution of employment standards on the North American continent and reviewed New Brunswick legislation in light of that research. In 1978 the government introduced a comprehensive employment standards code for the consideration of employers, employees and the general public. Employers throughout the province responded vehemently, arguing the need to appreciate the costs of such social legislation and the effect on industry's competitiveness in the world market.[28] Supporters of the code dismissed the employers' concerns, suggesting that if the provincial economy was uncompetitive it was the fault of the business community itself and not minimum employment standards.[29] A revised Bill, incorporating the results of the consultative process, was enacted in 1982 and came into effect in 1985.

The 1982 *Employment Standards Act* consolidated employment standards in six separate statutes and extended coverage to the Crown and to persons employed in agriculture. It added new provisions concerning notices of termination of employment to assist in labour adjustment in cases of mass lay-off. The provisions dealing with the administration of the *Act* provided for more effective enforcement, shifting from what had been essentially criminal law machinery to a system of administrative orders through a Director. An administrative tribunal was established to hear appeals from the Director's orders and decisions.

The present government has amended the *Employment Standards Act* to improve employees' ability to recover wages due them, to expand the application of benefits to more part-time workers and to require the employer to grant unpaid leaves for child care and bereavement.

CONCLUSION

Today in New Brunswick there exists a considerable body of legislation that establishes standards respecting conditions of employment. Safety standards are prescribed under the *Occupational Health and Safety Act* and are constantly being re-assessed as new technologies with possible new hazards are introduced into the workplace. The *Workers' Compensation Act* provides for compensation for workplace injury on a no-fault basis and is also constantly under review. The *Employment Standards Act* sets standards for minimum wage, hours of work at minimum wage, statutory holidays, vacation pay, weekly rest periods, notices of individual and mass termination of employment and employment of children. The Act provides for job security for employees on prescribed leaves in cases of bereavement, childbirth or adoption and for purposes of child care. The Act prohibits wage discrimination on the basis of gender, mandatory lie detector tests and any action to prevent an employee taking advantage of his or her rights under the Act. The Act also provides efficient, easy-to-access enforcement procedures at no cost to the employee.

Every right accorded employees under this body of legislation obliges employers to take some action that almost invariably involves costs. Employers were concerned in 1904 that the added costs of the proposed *Factories Act* would impede the development of the province's infant industries. They were concerned in 1978 that the added costs of the proposed employment standards code would hinder industrial growth and have a detrimental effect on industry competitiveness. They have the same concerns today.

This historical account illustrates the dramatic change in working conditions from the bleak descriptions of one hundred years ago. Wage earners have earned at least a measure of the more just and secure place in society which they have been struggling for. There is, however, no consensus

as to just what measure of social justice has been achieved. It is the opinion of spokespersons for wage earners that there is still need of new legislation. Part-time workers and domestic workers need protection against exploitation. There must be improved wage protection. It is the opinion of employers that in general the industry cannot absorb more costs from such social programs and remain viable.

Responsible legislation in this field involves the consideration of continuing and increasing job opportunities as well as improved working conditions. Social justice to workers demands that legislators find the appropriate balance of these elements. The dilemma is that the appropriate balance is a moving target, affected by many factors and subject to many interpretations.

FOOTNOTES

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5. Forsey, Eugene. *Trade Unions in Canada 1812-1902*, University of Toronto Press, 1980, at 9-11.

6. Morton, footnote 4, at 11.

7. Schuyler, George W., *Saint John,* Halifax: Petheric Press, 1984, 52-57.

8. Schuyler, footnote 7, at 55.

9. Canada, Royal Commission on the Relations of Labour and Capital, *Report*, Ottawa: The Queen's Printer, 1889, at 111.

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12. Brym, R.J., "Political Conservation in Atlantic Canada", in Brym & Sacouman, footnote 11, at 67.

13. Footnote 12, at 71.

14. McKay, Ian, "Strikes in the Maritimes 1901-1914", *Acadiensis*, Autumn, 1983 at 12.

15. McKay, footnote 14, at 14.

16. Schuyler, footnote 7, at 65.

17. Morton, footnote 4, at 96.

18. Synoptic Reports of the Proceedings of the House of Assembly of New Brunswick at the Session of 1894.

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20. History of the New Brunswick Federation of Labour. Published by the New Brunswick Federation of Labour, 1933, at 45.

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22. Risk, footnote 21, at 458.

23. Report of the Commission Appointed to Enquire Into the Working of Ontario and Nova Scotia's Workman's Compensation Act, New Brunswick, 1917.

24. Synoptic Reports of Proceedings of the House of Assembly of New Brunswick at the Session of 1938.

25. Taylor-Morell, Marjorie, *Of Mines and Men*, Minto, N.B., 1981, at 113.

26. *Synoptic Reports*, footnote 24.

27. Woodward, Calvin A. *The History of New Brunswick Provincial Election Campaigns*, Fredericton: Micromedia Limited, 1976, at 69.

28. N. B. Branch, Canadian Manufacturers Association. Submission on the Employment Standards Code, September 25, 1978, as one example.

29. The N. B. Federation of Labour. Submission to the Department of Labour on the Employment Standards Code. January 9, 1979 at 5.