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An Era of Wildcats and Sick-outs in Canada? The Continued Decline of Industrial Pluralism and the Case of Air Canada

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Abstract

In the winter of 2012, the Canadian federal Conservative government introduced back-to-work legislation prohibiting work stoppages at Canada's largest airline, Air Canada. In the following weeks, wildcat strikes by baggage handlers, ground crew, and even pilots rattled the company. These disputes were preceded in 2011 by another instance of back-to-work legislation and threats of legislation against Air Canada's customer service workers and flight attendants, respectively. In all cases, the union leadership was legally forced to police their membership and order their members to cease job actions when they erupted. This article situates the Conservative government's coercive measures to deal with labor unrest at Air Canada within a broader anti-union context, highlighting the continued decline of industrial pluralism in Canada and questioning whether the repeated use and threat of federal back-to-work legislation will open up space for civil disobedience as a new norm in Canadian industrial relations.

Keywords

industrial pluralism, Conservative Party of Canada, Air Canada, wildcat strikes, sick-outs, industrial relations, collective bargaining, Canada

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On the evening of Thursday, March 22, 2012, Air Canada's baggage handlers at Pearson International Airport in Toronto, represented by the International Association of Machinists and Aerospace Workers (IAMAW) District 140, engaged in a wildcat strike to protest the federal government's back-to-work legislation Bill C-33, the Protecting Air Services Act. A month later, Air Canada's pilots engaged in a "sick-out" in response to the company's attempts to undermine job security and, like their co-workers, Bill C-33. During the first wildcat, *Toronto Star* reporters Stephanie Findlay and Alyshah Hasham (2012) suggested the conflict at Air Canada was "nine years in the making," referring to the deep concessions made by Air Canada's unions in 2004 when the airline was struggling through bankruptcy protection. They were correct. In a telling remark about the state of labor relations at the airline, arbitrator Martin Teplitsky wrote in his decision on the termination of IAMAW members who helped instigate the March wildcat, "I recognize that within the Air Canada world, threats of illegal strikes occur relatively frequently. It has become part of the culture—a part which must be eliminated for the enterprise to prosper and equally for its employees to succeed" (*Air Canada v. IAMAW* 2013).

Our paper follows two lines of inquiry. First, is the current regime of industrial relations undergoing a period of decline? Second, has the frequent use of federal back-to-work legislation opened up space for, and perhaps made necessary, civil disobedience as a new norm in industrial relations? Events at Air Canada raise questions about the nature and implications of the federal Conservative government's repeated interventions in collective bargaining following its majority election victory in May 2011. Conservative Party industrial relations is characterized foremost by an unreserved support for business at the expense of workers. Where workers and unions have sufficient bargaining power to exact demands through work stoppages, as at Air Canada, the government is quick to respond in favor of the employer. This, we argue, represents a significant departure from the norms of industrial pluralism that characterized Canada's post-war industrial relations regime.

Although Canadian governments have made frequent use of back-to-work legislation since the 1970s, the Harper Conservative government's use of this tool, particularly in the private sector, signals a key shift. Back-to-work legislation is now being used pre-emptively under the aegis of the public interest and national economic well-being, even where evidence does not support the government's case. At Air Canada, legislation was deployed twice to prevent three unions from using the strike as a tool to resist concessions during bargaining. Then–minister of labour Lisa Raitt also attempted to have Air Canada employees designated as "essential," thereby prohibiting a strike or lockout, using provisions in the Canada Labour Code. The federal government has made it clear that it will be quick to intervene in the affairs of private corporations if only to protect their financial interests and send a message to organized labor. This selective departure from government "neutrality" in private sector bargaining stands in contrast to the Conservatives' adherence to that norm when market forces and company demands for concessions are pressed upon workers, as illustrated in the cases of Vale Inco and United Steelworkers Local 6500 in 2009-2010 (Peters 2010), Caterpillar and Canadian Auto Workers (CAW) Local 27 in 2012, and more recently

the denial of employment insurance benefits for locked-out workers represented by United Steelworkers Local 8782 at US Steel (Arnold 2012, 2013).

As governments narrow the scope for legal forms of industrial action, the current period is bringing forth a need for categorically different forms of protest and strategy. Given that industrial pluralism was in part premised on access to an albeit highly regulated right to strike, this current era demands a re-examination of civil disobedience as a necessary tactic for workers and part of a broader strategy for unions. As we argue, wildcat strikes, sick-outs, demonstrations, and other forms of direct collective action against employers and governments are situated in the context of repressive state intervention in labor relations. Whereas this return to a coercive regime and the institutionalization of "permanent exceptionalism" was characteristic of public sector industrial relations (Panitch and Swartz 2009), today, the logic and apparatus of repression is increasingly directed towards the private sector, with Air Canada being emblematic of this shift.[1]

Although the Conservatives did not invent the coercive regime, whereby the subordination of labor and unions is secured through force and fear, they are accelerating the process by making coercion a policy rather than an exception, just as they narrow the scope for accommodation and compromise. To demonstrate these points, our paper begins by identifying the core principles of industrial pluralism as a cornerstone of Canada's industrial relations system. We follow this examination by showing how the Conservative government is extending the state of permanent exceptionalism to the private sector. The paper uses economic restructuring at Air Canada and government intervention at the airline to illustrate the extent to which industrial pluralism has been compromised and why labor must embrace civil disobedience as a part of its political and economic strategies.

The Continued Decline of Industrial Pluralism in Canadian Industrial Relations

The wildcat and sick-out at Air Canada highlight the Conservative government's anti-union strategy deployed through an array of back-to-work legislation, private members' bills, and budget implementation legislation. Combined with the sector-specific suspensions of collective bargaining in British Columbia (Bill 22), Ontario (Bill 115), Quebec (Bill 54), Alberta (Bills 45 and 46), and Nova Scotia (Bill 86) as well as sweeping reforms to labor legislation found in Saskatchewan's Bill 85, the federal Conservative government's project is inching Canada towards a new era of industrial relations.

While nothing about the Conservative government's labor legislation thus far suggests that unions in Canada are returning to a state of criminalization, and while the institutions of modern industrial relations have not been dismantled, the federal government's interventions demonstrate that unionism, strike action, and free and fair collective bargaining are increasingly being treated as privileges, not rights. Moreover, the use of back-to-work legislation is not a Harper-era development but rather a central component of a long-term transition towards an increasingly coercive system of

industrial relations, as theorized by Panitch and Swartz (2003). "The era we have entered marks a return," they argue, "to the more open reliance of state and capital on coercion—on force and on fear—to secure [the] subordination [of labor]" (Panitch and Swartz 2003, 6). The current return to coercion must be understood in this broader historical context.

Shortly after World War II, Canada turned to a labor relations regime described as industrial pluralism and defined by "collective bargaining legislation administered by independent labour boards and a system of grievance arbitration to enforce collective agreements" (Fudge and Tucker 2001, 302). As a system, pluralism enforced a compromise in which the state regulated the power and influence of both labor and capital in industrial relations. The regime also brought about a "rupture" from the absolutism of property rights and individualism enshrined in common law (Fudge and Tucker 2001). In this regard, the regime restrained and enabled union power through legislative and institutional mechanisms.

The genesis of this model is traceable to Canada's Liberal wartime prime minister, William Lyon McKenzie King, who was pressured to advance labor relations legislation when confronted by a multitude of progressive political forces. Throughout the 1940s, new forms of union militancy—pickets, sit-down strikes, and mass demonstrations—were deployed for the purposes of achieving union recognition, higher wages, and the establishment of public services. Combined with the growing popularity of the left-wing Cooperative Commonwealth Federation, King recognized the dual threat posed by a strengthened labor movement and a populist party that was gaining favor for its opposition to the federal government's wage stabilization program. With the introduction of Wartime Labor Relations Regulations in 1944, or P.C. 1003, the Canadian government officially endorsed the pluralist model by compelling employers to recognize unions and to bargain collectively. Jurisdictions across the country ultimately adopted some variation of collective bargaining legislation and worked to endorse the hegemony of industrial pluralism within the decade (Fudge and Tucker 2001).

While the pluralist model provided legitimacy for unions in the employment relationship, it narrowed workers' capacity to challenge capital through what labor scholars and political economists have termed the "zone of legal toleration" (Smith 2012; Tucker 1991; Palmer 2003). Justice Ivan Rand's famous resolution to the 1945 Ford Windsor strike made this uneasy compromise abundantly clear. In exchange for financial security, the union became legally responsible for policing its own membership and enforcing the collective agreement, particularly the prohibition of job action while the contract was in force. Such was the price of industrial citizenship secured both by the Rand Formula and the Wagner Act model of industrial pluralism (Wells 1995). Still, Rand recognized the importance of strong, democratic unions as a means to counter capital's propensity to treat labor as a commodity. Unions functioned as a public good, in this regard, and the regime of industrial relations that Rand and others helped establish looked beyond assuring a modicum of industrial peace, to one where unions were citizens in a system of industrial democracy.

A period of relative tranquility in labor relations persisted for at least a decade, until a wave of work stoppages in the mid-1960s challenged the industrial pluralist regime.

In what Fudge and Tucker (2001) describe as a uniquely Canadian response, federal and provincial governments appointed commissions to investigate this defiance of legality. Several jurisdictions provided their labor relations boards with new remedial powers, ultimately strengthening the institutions of industrial pluralism. The resurgence of labor militancy had also expanded the regime to include public sector workers. Indeed, civil disobedience, manifested through illegal forms of collective action such as the postal workers' strike of 1965, was instrumental in achieving public sector unionization and bargaining rights (Warskett 2013). Workers and unions that pushed the boundaries of the law, in other words, were sometimes successful at expanding the scope of rights conferred under the industrial pluralist regime. Manufacturing, utilities, transportation, resource extraction, and eventually the public sector were established as strongholds of pluralism, in part because of their economic significance. Industrial pluralism had become tied to the viability and performance of these sectors and along with it the economic and political influence of unions.

The crisis of Keynesianism in the 1970s sparked a wave of repressive changes to labor legislation focused predominantly on taming the demands of public sector workers. Throughout the 1970s and early 1980s, the strengthening of monetarism and accompanying anti-inflation wage control policies were ultimately enforced by back-to-work laws during bargaining. The restructuring of the macroeconomic conditions that supported the regime of industrial pluralism combined with coercive measures meant that power relations between workers and employers had become increasingly asymmetrical. Globalization and successive free trade agreements further destabilized the capacity for compromise. The scope of industrial pluralism narrowed as global competition diminished the size and scale of the industries and workforces that were relatively privileged by the system.

As the ideological hegemony of industrial pluralism weakens, Fudge and Tucker (2001) insist, the use of coercion can be expected to increase. The turn to coercion has been bolstered by the "common sense" that there is no alternative to neoliberal capitalism, and that free trade, low taxes, "flexible" employment, and a return to a pro-business labor relations regime is both desirable and irresistible. Employers have used these advantages to radically contain unions' power during the bargaining process, with little to no opposition from government (Peters 2012). Faced with demands for major concessions, unions have been forced into taking strike votes against global corporations that are perfectly capable of carrying on with "business as usual" during what is otherwise a minor disruption. Unable to secure any meaningful political or economic leverage, unions and their members are essentially crippled by prolonged strikes and lockouts. Meanwhile, the formal institutions of industrial pluralism remain intact while deregulation, economic insecurity, and the retrenchment of public services renders the regime dysfunctional, at least for labor. Globalization and neoliberalism work in tandem to break union strength, while the government assault on pluralism effectively undermines whatever forms of institutionalized protections and mechanisms of empowerment remain in the prevailing regime of industrial relations. Such are the tendencies that the present federal government has sought to bolster.

The Conservative Party Attack on Industrial Pluralism

Assisted by their political allies in think tanks and lobby groups, the Conservatives have, since 2006, mounted an assault on the official discourses and practices of industrial pluralism. Conservative groups tightly aligned with the current federal government have a long history of opposition to one particular institution of industrial pluralism, the Rand Formula. In the late 1980s, the right-wing National Citizens Coalition (NCC) financed the case of an Ontario college instructor who challenged the right of his union to use dues for political activities. Ultimately the Supreme Court ruled in favor of the union in the landmark *Lavigne v. OPSEU* decision of 1991, upholding the constitutionality of the Rand Formula, dues check-off, and union political expenditures. However, this decision did not extinguish the NCC's opposition to mandatory dues check-off. During the 1990s, future Conservative prime minister Stephen Harper emerged as a leading member of the NCC, becoming its president in 1998. When the Harper-led Conservatives secured a long-coveted majority government in 2011, the party accelerated its anti-union initiatives.[2]

In addition to rekindling the "forced union dues" debate at the national level, the Conservatives have also championed heightened financial disclosure rules for unions, under the guise of transparency.[3] Anti-union lobby group LabourWatch was instrumental in constructing a perception that the Canadian public demanded this level of transparency from private and public sector unions through its August 2011 *State of the Unions* report (LabourWatch 2011), which relied on a push polling method to provoke participants into providing the desired response (O'Neill 2013). Conservative politicians across the country, and their allies in the business lobby community, have trumpeted the tainted poll as evidence that Canadians want public disclosure of union spending practices (Canadian Federation of Independent Business 2012; Government of Saskatchewan 2012).

Attempts to alter the rules of union certification and decertification have also emerged. In June 2013, Conservative Member of Parliament Blaine Calkins introduced private members' Bill C-525, which, if enacted, would alter the process of decertification by requiring the union to receive support from a majority of the entire bargaining unit, not simply the majority of voters. In short, workers who do not cast a ballot essentially would do so in favor of decertification. For a union campaign to be successful, meanwhile, a majority of a bargaining unit is required to support certification, not simply a majority of ballots cast. Calkins' Bill proceeded to second reading on October 29, 2013, and has since received support from the current labour minister, Kellie Leitch (Smith 2013).

Free and fair collective bargaining in the federal public sector has also been directly restricted by legislation. In 2009, public sector salary growth was restricted by the Expenditure Restraint Act, and unions representing federal public servants were prohibited from pursuing pay equity and human rights cases on behalf of their members under the Public Sector Equitable Compensation Act. In April 2013, Finance Minister Jim Flaherty introduced Bill C-60, the budget implementation bill, which included amendments to over fifty pieces of legislation (Government of Canada 2013). Changes

to the Financial Administration Act provided the Treasury Board the authority to direct a Crown Corporation's collective bargaining mandate, ending the arm's length relationship between the government and over forty publicly owned companies, including Canada Post, the Canadian Broadcasting Corporation, and Via Rail (Wherry 2013).[4] Direct government intervention into public sector negotiations has become policy rather than an exception with the passage of Bill C-60 into law.

Public sector unions immediately recognized this as a means through which the Conservatives could put their ideological opponents, and the remaining stronghold of union density, in the political crosshairs. Denis Lemelin, national president of the Canadian Union of Postal Workers, responded to the legislation by saying, "In 2011, the Harper government got rid of our right to strike. Now with this omnibus bill, they got rid of our right to negotiate" (MacKinnon 2013). Lemelin was referring to Bill C-6, Restoring Mail Delivery for Canadians Act, which forced striking and then locked-out postal workers back to work in June 2011. Bill C-6 also imposed wage rates that were lower than the employer's last offer and forced all other outstanding issues to final offer arbitration. The minister of labour also appointed a former federal Conservative Party candidate as arbitrator. He was eventually ordered to step down by the Federal Court of Justice after the Canadian Union of Postal Workers launched an appeal (Rankandfile.ca 2012a).

Perhaps one of the most powerful tools in the government's repertoire is back-to-work legislation. Since 2006, the federal Conservatives have executed this type of legislation no less than six times, including Bill C-33 at Air Canada (Government of Canada n.d.). Canada's fragile economic recovery and structural deficit are cited as the reasoning behind curbing wage growth throughout the federally regulated sectors, which also means putting an end to strikes and lockouts (Baluja 2012). But does Canada have a work stoppage problem, as the government suggests? Work stoppages in Canada have declined steadily for three decades, from an average of 754 per year in the 1980s to 319 per year in the early 2000s. Of these work stoppages, only 6 percent took place in workplaces under federal jurisdiction. In the early 2000s, only about 2 percent of disputes resulted in special legislation or a labor board ruling ending a strike or lockout (Akyeampong 2001, 2006). Between 2000 and 2010, the average number of work stoppages dipped further to 250 per year, and the estimated working time lost due to strikes and lockouts decreased to 0.01 percent in 2011, down from 0.03 percent in 2010 (Uppal 2011). Despite this trend, the federal government is increasingly intolerant of the collective bargaining process, as evidenced by its strong support for back-to-work legislation.

Since 1950, there have been no less than thirty-seven such bills at the federal level. Between 1965 and 1980, there were fifty-one instances of federal and provincial back-to-work legislation, compared to just six between 1950 and 1965; twenty-two such measures were enacted in the first half of the 1980s (Government of Canada n.d.; Panitch and Swartz 2003, 26-27). Between 1980 and 2011, government intervention per total person-days not worked escalated as the number of work stoppages decreased. In fact, 2011 marked a thirty-year record in terms of the rate of federal intervention per person-days lost to work stoppages. That year the government

intervened in over 60 percent of all strikes and lockouts occurring within the federal jurisdiction (Shepherdson 2011).

Research on essential services legislation and back-to-work orders suggests that such measures fail to secure functional bargaining relationships, save costs, or even eliminate work stoppages. Acute health care workers in Alberta, for instance, lost their right to strike in 1983, but the number of person-days lost to health care strikes in that province far exceeds that of other jurisdictions where work stoppages are not prohibited (Haiven and Haiven 2007). Even a report published by the conservative C.D. Howe Institute found that back-to-work legislation reduces the likelihood of freely settled contracts in future rounds of negotiations, creating a reliance on government intervention (Dachis and Hebdon 2010). Other effects include an increase in labor disruptions by way of work-to-rule, slowdowns, and wildcat strikes. However, if the desired outcome is the dismantling of free and fair collective bargaining, a cornerstone of industrial pluralism, then it is likely that the government is establishing a new norm with such consequences in mind. What makes this policy shift particularly significant is its application to a private sector employer. At Air Canada, there is reason to believe that government intervention through these measures was executed with the intent of lending assistance to an airline determined to shed labor costs. In fact, for over a decade, Air Canada has been undergoing structural adjustment, and the current government has used legislation to further this process.

Economic Restructuring and Industrial Relations at Air Canada

Only a year after its 2001 merger with Canadian Airlines International, then Canada's second largest airline, Air Canada was in trouble. The catastrophic events of September 11, 2001, the Dot-com collapse, and the Toronto-area outbreak of Severe Acute Respiratory Syndrome created a perfect financial storm for the company. Faced with a towering $13 billion debt, sinking market share, and losses exceeding $500 million, the signature Canadian corporation filed for bankruptcy under the Companies Creditors Arrangement Act in 2003 (Jacques and Kepos 2011; Gillen and Morrison 2005). Together, Air Canada's president and CEO, Robert Milton, and then–chief restructuring officer, Calin Rovinescu, commenced an organizational overhaul of Air Canada. None of the changes that followed from this corporate structural adjustment would have been possible without serious concessions from the four main unions representing Air Canada's approximately 20,000 employees, namely, the IAMAW, the CAW, the Canadian Union of Public Employees (CUPE), and the Air Canada Pilots Association (ACPA).

Air Canada's management aimed to reduce labor costs, which accounted for approximately 30 percent of total operating expenses, by about $650 million (CAW 2003). In the end, over $1 billion was slashed from Air Canada's costs through the restructuring plan. Wage reductions, layoffs, increased employee contributions to benefit plans, cuts in overtime pay, the elimination of shift premiums, and the ending of

meal allowances were some of the concessions union bargaining teams took to their members for ratification. Most importantly, Air Canada's workers and their unions permitted the company to extend the amortization of unfunded pension liabilities from five years, as required by law, to ten. After securing financing through Deutsche Bank AG and Cerberus Capital, the airline finally emerged from bankruptcy in September 2004 (see Jacques and Kepos 2011). Milton and Rovinescu walked away as the clear winners with nearly $50 million in stock options when the company regained its financial foothold.

The establishment of ACE Aviation Holdings Inc., a parent company overseeing the entire Air Canada enterprise and headed by Robert Milton, escalated the structural adjustment of labor relations after the airline came back from bankruptcy. Creditors, who now controlled 87 percent of Air Canada, were seeking their due after agreeing to accept equity in the newly created holding company as part of the restructuring plan (*IAMAW v. Air Canada* 2011). Milton's agenda was clear: fragment Air Canada and its regional divisions into a handful of independent, profitable businesses (Jacques and Kepos 2011; Rosenthal, Bova, and Thomas 2007). Shares were issued for Air Canada's lucrative passenger rewards program, Aeroplan, creating previously untapped financial value for prospective shareholders. Even the airline's technical operations and maintenance division was carved out of the company and re-established as Air Canada Technical Services (ACTS), an independent entity held under the auspices of ACE. In 2006, ACE reduced its stake in Air Canada and turned the airline into a publicly traded company once again. This was part of a broader strategy to monetize what was left of Air Canada, transforming a once proud national icon into separate financial entities. ACTS was eventually re-organized and its assets transferred to a newly formed partnership, ACTS LP. The business was later sold to a consortium of private equity investors and, in September 2008, changed its name to Aveos Fleet Performance Inc. (*IAMAW v. Air Canada* 2011).

Air Canada's renewed prosperity came to a halt in 2008 with the global financial crisis. Once again, passenger loads fell, and the airline's debt increased. Workers, who had carried the weight of restructuring just four years earlier, were on the hook a second time. Canadian pension funds lost over a quarter of their value in 2008, and estimates showed that Air Canada's pension plans were only 90 percent funded (Koskie Minsky 2009). By the end of the year, Air Canada endured a $1 billion loss and was compelled to contribute nearly $500 million to its struggling pension funds (CAW 2009, n.d.; Jang 2012b).

Despite accusations that labor costs were to blame for Air Canada's financial woes, higher fuel costs and a strong Canadian dollar accounted for higher operational costs. The total bill for salaries, wages, and benefits had in fact declined by $24 million in 2008 compared to a year before (CAW 2009). This was due, in part, to the layoffs caused by the company's cutback in capacity. Rovinescu, now president and CEO of Air Canada, staved off bankruptcy protection by securing further concessions from labor as well as a $1 billion emergency loan, which included $250 million from the federal government (Jacques and Kepos 2011).

ACE, however, was still profitable. When the 2007-2008 financial crisis hit, ACE Holdings was sitting on $811 million in cash. Adding to the challenge confronting Air Canada's unions, workers now faced a nebulous holding company with which they had to bargain indirectly. Despite Air Canada's very public economic troubles, Robert Milton insisted that the airline gave ACE "the message that they were not in need of cash" and opted to distribute almost $400 million to shareholders instead. Since 2004, investors have received over $5 billion in the form of special distributions and share buybacks from ACE (Deveau 2012; Koskie Minsky 2009; CAW n.d.). ACE's payouts to shareholders were a clear sign that investors, not pension plan members, were the holding company's main priority. Air Canada, meanwhile, was forced into a wave of new borrowing because its parent company permitted the airline to suffer.

Even after several rounds of concessionary bargaining that helped to resuscitate an ailing employer in 2004, Air Canada's senior management was anxious to further reduce labor costs and control escalating pension obligations. When negotiations commenced in 2010, unions were faced with a company that sought to make extensive organizational changes. Management was also seeking to introduce a two-tier pension system, with defined contribution benefits for new employees and reduced pension benefits for employees who opted for early retirement (CAW, IAMAW, CUPE 2011). Air Canada's intention to establish a new low-cost airline put hundreds of ACPA members' jobs at risk. This is the legacy that brings us to the events of 2011 and 2012.

The 2010-2011 Bargaining Round at Air Canada: Back-to-work Legislation and Labor's Response

On June 14, 2011, after ten weeks of negotiations, members of CAW Local 2002, representing Air Canada's 3,800 sales and service workers, went on strike. Negotiations broke down over management's demand for pension concessions. Fifteen hours after the work stoppage commenced, federal Minister of Labour Lisa Raitt hinted at back-to-work legislation. Publicly, the minister insisted that she hoped both parties could reach an agreement without government intervention. Her iterations about mandating an end to the dispute were simply a motivator for both parties to settle, according to the minister (Deveau 2011). However, collective bargaining remained at a standstill despite Raitt's attempt to bring closure to negotiations.

On June 16, 2011, Raitt ended the impasse by introducing Bill C-5, euphemistically titled Continuing Air Services for Passengers Act. The minister justified back-to-work legislation on the grounds that it prevented disruptions to the traveling public and mitigated the economic harm caused by industrial action. Reports at the time suggested, however, that the economic effects on Air Canada were minimal (Deveau 2011). Evidence later surfaced that the Department of Human Resources and Skills Development had advised against using back-to-work legislation, stating that the walkout by customer service agents was little more than a nuisance. The Conservatives rejected this warning (Canadian Press 2012c). Only a month into its majority mandate, the government appeared eager to use this legislation of last resort.

Ultimately, the CAW and Air Canada went back to the bargaining table before Bill C-5 became law, but the minister's message to Air Canada's other workers, also in bargaining, was clear. Two months later, in August 2011, Air Canada's flight attendants, represented by CUPE's Air Canada Component, voted 87 percent against the tentative agreement reached by the union and management bargaining teams. CUPE organized for a strike vote. By September 2011, the airline's flight attendants voted 98 percent in support of job action as negotiations broke down largely because Air Canada again demanded concessions on pensions. A war of words was waged on Facebook as thousands of workers criticized both the company and the union (Byres 2011). On October 9, this animosity came to a head as employees rejected the second tentative agreement by 65 percent. A day later, Raitt threatened CUPE with back-to-work legislation. Both parties quickly conceded to binding arbitration.

In late February 2012, IAMAW members voted down a tentative agreement reached earlier that month with unanimous support from the union's negotiating team (*Air Canada and IAMAW* 2012). Again seeking pension concessions, management's offer demanded workers retiring before 55 years of age see their pension entitlements cut by almost half (Jang 2012b). On March 6, IAMAW gave Air Canada seventy-two hours' strike notice. Within twenty-four hours, the airline told the Air Canada pilots, locked in bargaining since October 2010, that they were going to be locked out.

On March 8, Raitt threatened back-to-work legislation once again. A week later, the minister headed off work stoppages involving the IAMAW and ACPA by passing Bill C-33, the Protecting Air Services Act. Despite the rhetoric of defending the public interest and protecting the economy, both C-5 and C-33 were designed to uphold Air Canada's business interests. Both bills also prohibited a lockout, but the effects were weighted against the unions and workers. The legislation pre-emptively banned industrial action by workers and required the parties to submit to final offer selection. In this case, the arbitrator, selected by the minister herself, had to consider both sets of offers but was ultimately mandated to accept the one that best considered Air Canada's "long-term economic viability and competitiveness" and the "sustainability of the employer's pension plan" (Government of Canada 2012).

Even though Bill C-33 prohibited Air Canada from locking out its workers, as the company had threatened, it still provided the airline with an upper hand. Business was able to carry on uninterrupted while the machinists and the pilots were completely disarmed. Facing individual fines of up to $50,000 a day, and $100,000 a day for the union itself, union officials were tasked with policing their own membership by enforcing the bill's no-strike language. Outraged, IAMAW ground crew and baggage handlers responded with a demonstration of several hundred in Toronto's Pearson International Airport. Dave Ritchie, the General Vice President of IAMAW in Canada, denounced the bill as an attack on workers' rights for undermining free collective bargaining and labor relations (Ritchie 2012). Rank-and-file activists took their protest further.

On the evening of March 22, Raitt disembarked at Pearson International to Air Canada ground crew slow-clapping her entry into the terminal, with one worker sarcastically telling her she was doing a "great job" (Dobby 2012). It was reported by

ramp workers that a number of employees began hollering "Thanks for taking our right to strike" as the minister traveled through the airport (Findlay and Hasham 2012). After an angry exchange with workers, Raitt allegedly directed Royal Canadian Mounted Police officers to arrest the Air Canada employees, an accusation her office eventually rejected as false (Dobby 2012). Air Canada responded immediately by suspending the three employees who initiated the "slow-clap."

Further resistance was equally swift. Around 150 ground crew began a wildcat strike and took to marching through Terminal 1 chanting "Fire Lisa Raitt" and demanding the suspensions be lifted. They carried a banner reading "Lisa Raitt Minister of Forced Labour" and "Occupy YYZ." The machinists were joined by a flying squad from CUPE Local 966 and CAW members from other locals.[5] Police called to the scene later described the protests as peaceful and mostly impromptu. All three workers were eventually reinstated with a three-day suspension (Findlay and Hasham 2012). Workers who had helped organize the wildcat action through Facebook were not so fortunate. With information obtained through anonymous sources, Air Canada suspended eight employees for having, as the arbitrator described it, "counseled and encouraged illegal job activities with a view to somehow improving the Union's bargaining position in the negotiations and as a reaction to the government's imposition of binding arbitration and removal of the right to strike or lockout" (*Air Canada v. IAMAW* 2013). Of these eight employees, four resigned, and only two were permitted to return to work.

Within hours the wildcat spread to Pierre Trudeau airport in Montreal, Jean Lesage in Quebec City, and Vancouver International. Over a hundred flights were cancelled and more delayed (Dobby 2012). Approximately thirty-seven Air Canada workers were fired for their participation in the demonstrations, but most of these dismissals were later overturned. On the morning of March 23, some thirteen hours after it commenced, an arbitrator issued an injunction against the wildcat. By midday, officials from the machinists union called for the work stoppage to end, as required by legislation. Whether this was to save face publicly given the considerable financial threats of defying a back-to-work order, or a more pernicious effort to curb rank-and-file militancy, is unclear. Reports surfaced that some union members even screamed at their leaders for bending under the political pressure (Godfrey 2012). What is known is that the IAMAW was also reeling from the concurrent closure of Aveos, previously Air Canada's heavy maintenance division, and was fighting battles on two fronts.

Air Canada's relationship with its pilots was just as tense. Negotiations between ACPA, representing 3,000 pilots, and Air Canada had also been turbulent since collective bargaining had begun in October 2010. Pilots suspected the employer was not bargaining in good faith. Air Canada had withdrawn travel privileges normally "accorded to [ACPA] representatives" while a wage and benefit freeze was in effect. In its complaint to the Canadian Industrial Relations Board (CIRB) in February 2012, ACPA argued that Air Canada unlawfully altered benefits and pay contained within the collective agreement, thereby breaching section 50(b) of the Canada Labour Code. The board eventually ruled in favor of the union on June 15, 2012, but provided little resolution to the problem (*ACPA v. Air Canada* 2012b). Earlier, on January 25, 2012,

ACPA was dealt a blow in an unfavorable CIRB ruling, when its members officially lost the right to fly the new Bombardier Q400 aircraft operated by Air Canada's Jazz and Sky Regional subsidiaries (*ACPA v. Air Canada* 2012a).

Surprisingly, public opinion was against government intervention despite the evident breakdown in labor relations and potential inconveniences caused by a work stoppage. A poll conducted by ACPA two months prior to Bill C-33 found only 35 percent of respondents believed the government should intervene in collective bargaining (ACPA 2012). A resounding majority agreed that it would be better for the federal government to allow the company and its employees to negotiate an agreement on their own.

Because of the breakdown in collective bargaining after a year of negotiations, pilots responded by providing their union with an overwhelming 97 percent strike mandate in February 2012. The next day, Minister Raitt appointed two mediators to work with both parties. On March 7, Air Canada tabled a third offer, and on March 8 the company served the ACPA with a notice of lockout. That same day, Minister Raitt stalled a work stoppage by referring a question to the CIRB regarding the status of pilots as providing "essential services." Four days later the minister introduced Bill C-33. Along with Air Canada's other employee groups, pilots were prevented from exercising their right to strike, which further upset the balance of power in Air Canada negotiations. This left the pilots with few options at their disposal. ACPA's first effort against Bill C-33 was a constitutional challenge launched on March 19, 2012 (Canadian Press 2012b). The thrust of the challenge declared that the Protecting Air Services Act violated the Charter of Rights and Freedoms.

Since the Supreme Court of Canada's now famous *Health Services* decision of 2007, unions have looked to the Charter and the courts to protect collective bargaining rights (Savage 2009; Smith 2012). In the spirit of *Health Services*, ACPA's appeal reads, "A right to strike is a necessary incident for employees to meaningfully exercise their freedom to associate, and may only be restricted in the case of essential services where a work stoppage endangers the life, personal safety or health of a population" (*ACPA and Jean-Marc Belanger v. Attorney General of Canada* 2012). ACPA and Air Canada have never identified the services provided by the pilots as necessary to prevent serious and immediate danger to public health or safety. However, the minister did not even wait for the CIRB to resolve her question regarding the essential services status, pursuant to section 87.4(5) of the Canada Labour Code, before introducing back-to-work legislation. ACPA's appeal still awaits a decision.

Labor relations deteriorated further after the ground crew wildcat in March. Rumors spread of disgruntled pilots' planning a "sick-out" to protest Air Canada and the government's legislation (*Huffington Post* 2012). Then, on April 13, over 150 Air Canada pilots called in sick, resulting in the cancellation and disruption of dozens of flights. On any given day about 50 to 70 pilots are reported to call in ill and unfit to fly (Lu 2012). Through the use of emails, text messages, and social media, a group of pilots calling themselves "97 Squared," in reference to the ACPA strike mandate, encouraged their peers to call in sick as a form of resistance against both the company and

Bill C-33 (Deveau 2012). The CIRB ruled the action a violation of Raitt's back-to-work legislation and ordered the sick-out to end (Canadian Press 2012b).

ACPA said it did not initiate or sanction the job action and urged members to report to work. "We didn't sanction it. We did not ask for it. I can't even verify it," ACPA President Paul Strachan said in an interview (Lu 2012). Strachan categorically denied that any of his members were ever engaged in illegal job action. The day of the sick-out, ACPA's then–Master Executive Council chair, Jean-Marc Bélanger, had received information from anonymous sources that some of his members were planning job action. In response, Bélanger issued a letter condemning these allegations and reiterated the requirement of union officials to ensure that employees comply with the back-to-work legislation (Bélanger 2012). But the Master Executive Council chair also made important overtures condemning Bill C-33:

> As I wrote in my last newsletter, it did not have to be this way. I will say it again: this airline can only succeed if management treats its pilots with respect and compensates them fairly for their contribution. Please continue to take care of each other and our passengers. Make sure you comply with all the provisions of the collective agreement, the Flight Operations Manual and the CARS [Canadian Aviation Regulations].[6]

The union was caught in a difficult situation. *Not* denouncing the "sick-out," let alone endorsing it, could result in tens of thousands of dollars in fines for the union and individual leaders. Still, the union leadership condemned the legislation and management's treatment of pilots. Paul Strachan publicly criticized the government for handing Air Canada "an insurance policy against industrial action" (Canadian Press 2012a). He also made it clear that the sick-out was not an unforeseen consequence of Bill C-33, going on to say, "If you stomp on people's rights like this, if you put them in a corner, they may act out on their own" (Lu 2012). Nearly a month earlier, the union had recognized in its constitutional challenge that the government was actually jeopardizing the safety of Air Canada passengers. Pilots were flying aircraft even if they felt "unfit to do so out of fear of being prosecuted criminally under the *Protecting Air Services Act*," the union argued (*ACPA and Jean-Marc Belanger v. Attorney General of Canada* 2012).

The "sick-out" was short-lived and failed to change the trajectory of collective bargaining at Air Canada. Both parties agreed to resume a ten-day negotiation period following the appointment of an arbitrator by the minister of labour in accordance with the provisions of Bill C-33 (CNW 2012). The arbitrator worked with ACPA and Air Canada by facilitating negotiations, but discussions once again fell flat. Ultimately the union and the employer submitted their final offers to the ministry-appointed arbitrator.

The Outcomes of Bill C-33

Air Canada's unions went into bargaining in 2010 with the legacy of 2004 in mind. But were they bargaining with the same company? The financialization of Air Canada and

the establishment of ACE during restructuring signaled a new era of industrial relations at the airline. Matched with the election of an anti-union federal Conservative majority government in 2011, shareholders and senior management at Air Canada were handed an ideal political climate in which to pursue their business interests, regardless of labor opposition. Reactive (Bill C-5) and preventative (Bill C-33) back-to-work legislation is an expression of this new confluence of specific corporate and ideological government interests.

With wildcat action at Air Canada quashed, both ACPA and IAMAW were at the mercy of a ministry-appointed arbitrator. And according to provisions in Bill C-33, arbitration was mandated to take the company's best interests into consideration. Indeed, the arbitrators in both cases did just that. Arbitrator Michael Picher recognized in his award the unique circumstances that Bill C-33 had imposed on the arbitration process, namely, his chief obligation to consider the company's "ability to pay" (*Air Canada and IAMAW* 2012). Ultimately he sided with the company in his June 17 award by imposing the airline's final contract offer. Picher's decision was guided by consideration for the viability of the company's pension plan and the job security of current employees. Remarkably, Air Canada's final offer had actually included some of the provisions demanded by the union and was viewed by the arbitrator as "over and above the value of the tentative collective agreement which was rejected at ratification" (*Air Canada and IAMAW* 2012). Picher said nothing of the events of March or April 2012. Whether or not the wildcat action and demonstrations had any effect on the airline's revised proposal is a matter for further investigation.

Douglas Stanley, selected by the minister to adjudicate the final offer selection between Air Canada and ACPA, also sided with the company. Stanley went so far as to suggest that the ACPA's offer on pension reform "puts at risk the company, their own pension plan and the plans of other unions" (*Air Canada and ACPA* 2012). After nineteen months of negotiations, a new five-year collective agreement was implemented. Rovinescu was pleased with the decision, remarking that the agreement "preserves our pilots' compensation and benefits in the top quartile of the North American industry and will help ensure the sustainability of the company's defined benefit pension plans" (Canadian Press 2012d). The company's president reiterated his commitment to transforming Air Canada into a "solidly profitable airline for the benefit of all stakeholders." Strachan and Bélanger, meanwhile, criticized the new contract, arguing it "imposed work rules that will cost many pilots their jobs, demoralize the rest and kick other important issues down the road" (Canadian Press 2012d).

Siding with management's final offer also meant the arbitrator had cleared the way for Air Canada's proposal to launch a low-cost discount airline to compete with WestJet and Air Transat. Interestingly, ACPA provided its own proposal for a low-cost carrier in its final offer, which the arbitrator rejected. Stanley accepted the company's need to establish the new carrier in order to remain competitive. The new Vancouver-based carrier could potentially violate existing work rules by allowing Air Canada to employ non-ACPA pilots without the union's consent (CBC News 2012). Bélanger minced no words about the lasting effects the decision might have on morale at the company. "Frankly," he said, "I am concerned that this airline may never be able to

recover the pilots' goodwill, let alone their best efforts. They may have won the decision, but in so doing, they lost us" (Jang 2012a).

What are the lasting effects of back-to-work legislation at Air Canada? As the ACPA leadership suggests, the real problems at the company continue to simmer. Likewise, George Smith, a former vice-president at Air Canada in charge of labor relations in the 1980s, is certain that government intervention has made matters worse. Smith has been an outspoken critic of back-to-work legislation and the Conservative government's intervention in labor-management relations (Rankandfile.ca 2012b; Hansard 2012). There is no reason to believe Raitt's quick-draw approach to resolving disputes will resolve the underlying problems within Air Canada. For Smith, labor unrest has been made worse, and the uncertainty that comes with it is hurting Air Canada's brand. "Pretty soon," he points out, "the damage will be irreparable. Management needs to hit the reset button" (Lu 2012). In a company whose chief products are safe travel and customer service, not allowing for the resolution of conflict could have disastrous consequences, especially in a competitive and cost-sensitive industry.

The wildcat actions themselves had little short-term measurable effect. They certainly did not advantage labor's position when the ultimate decision lay in the hands of a federally appointed arbitrator. But what does this mean for the efficacy of wildcats as a *strategy?* Union leaders were quick to follow the letter of C-33 to spare themselves and their organizations onerous financial costs and criminal repercussions. However, the militant machinists did draw attention to the vulnerability of the airline's bottom line and the benefits of national solidarity. In less than twelve hours, dozens of flights were cancelled, and Minister Raitt's credibility was left in tatters. Most importantly, the wildcat action showed that legislation cannot silence workers or rob them of their ability to strike—it can only make their actions illegal.

Pilots, certainly the most privileged workers at Air Canada, showed that by stretching the limits of established regulations that permit them, for safety reasons, to withdraw their labor, the services of a multibillion dollar enterprise can be grounded. The sick-out also suggests that there is an organized movement of dissent that refuses to be silenced by government intervention. Indeed, if back-to-work legislation creates a chilling effect on the bargaining relationship, as some studies indicate (Dachis and Hebdon 2010), then restrictions placed on legal forms of collective worker action could generate illegal, and potentially more disruptive, forms of such action. What the case of Air Canada demonstrates is that the narrowing scope of industrial pluralism and the extension of exceptionalism to the private sector makes wildcats, and other forms of resistance, a likely outcome.

Conclusion

The injunction against the March 22-23, 2012, wildcat at Air Canada compelled the machinists union to capitulate and exercise a disciplinary role with regard to its members in order to comply with the ruling and avoid punitive financial sanctions. The structural disadvantage imposed upon workers and unions by Bill C-33 was only made

possible through the cumulative effect of previous coercive measures, such as enormous fines and the historic compromise between labor and capital removing the right to strike during the life of a contract. But if industrial action by workers has entered the realm of illegality, then a wider labor-led struggle for reasserting workers' rights is warranted and indeed required.

While the use of back-to-work legislation at Air Canada represents a continuation of the coercive federal industrial relations policy initially identified by Panitch and Swartz in the 1980s, the level of coercion since the election of the Conservative majority government in May 2011 is unprecedented, as evidenced by the rapid, successive deployment of repressive and sometimes pre-emptive legislation extending into the private sector.[7] The federal government's assault on industrial pluralism has narrowed the opportunities for legal forms of collective action and signaled to employers that government-imposed arbitration will become more reliable at disciplining unions and curbing worker demands at the bargaining table. In the absence of such spaces for legitimate forms of protest and managed class conflict, workers at Air Canada were compelled to develop and employ forms of collective and individual action that amount to civil disobedience. Furthermore, the wildcat and sick-out at Air Canada demonstrate that civil disobedience as a tactical expression of protest is not the same as a consciously developed strategy *employing* civil disobedience. But whether or not unions will include these repertoires of collective action into their broader political strategies is another question.

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Notes

1. Panitch and Swartz (2009, 28) describe "permanent exceptionalism" as ad hoc government policies, like back-to-work legislation, that aim to "contain or repress manifestations of class conflict as practiced *within* the institutionalized freedom of association." Starting in the late 1960s, they argue, governments began to introduce back-to-work legislation with greater frequency and less parliamentary debate. The right to strike for public sector workers specifically was routinely withdrawn throughout the 1970s, and actions that were legal under general legislation were declared unlawful for particular groups of workers, for a period of time. Even free collective bargaining was suspended under the auspices of the Anti-Inflation Program of 1975-78. These suspensions were dispatched under "emergency" circumstances, such as chronic economic malaise, whilst leaving intact the framework of industrial pluralism and collective bargaining.
2. The country's leading right-wing think tank, the Fraser Institute, published a report on Labor Day in 2013 in an attempt to give some intellectual credibility to right-to-work

legislation in Canada (Zycher, Clemens, Veldhuis 2013). Since 2007, the institute has received over half a million dollars in tax-exempt charitable donations from the notorious Koch Brothers, who have been funding similar campaigns in the United States (Hong 2012).

3. Supported by the media and lobbying efforts of "worker choice" and "open shop" advocates like the Canadian LabourWatch Association and the Merit Contractors Association, Conservative Member of Parliament Russ Hiebert tabled Bill C-377, An Act to Amend the Income Tax Act, in December 2011. Modeled on American legislation, Bill C-377 would compel unions to publicly disclose an unprecedented amount of confidential and strategic financial information to the Canada Revenue Agency. According to Hiebert (2013), the tax-exempt status of union dues makes these organizations public institutions that require this level of public scrutiny. A few dissident Conservative members of Parliament have opposed the legislation, while several Conservative senators have suggested the bill was drafted not by Hiebert but rather the prime minister's office (Fraughton 2013; Hansard 2013).
4. The Treasury Board is responsible for providing administrative and financial resources for the management of government.
5. Canadian Union of Public Employees 966 represents workers in health care, libraries, transportation, and other public services in municipalities in and around Toronto's Pearson International Airport.
6. *Canadian Aviation Regulations* outlines the rights and obligations governing pilots who are not fit to fly (Transport Canada n.d.).
7. Two months after Bill C-33's introduction, Minister Raitt introduced Bill C-39, the Restoring Rail Service Act, ending a week-long strike by 4,800 engineers represented by the Teamsters Canadian Rail Conference at Canadian Pacific Railways. The company's demand for massive pension concessions provided cause for the 95 percent strike mandate (Stevens and Nesbitt 2012). Neither the union nor its members were under any illusion that the federal government would permit the work stoppage to continue. Raitt invoked "the economy" to justify the intervention. The saber of back-to-work legislation was rattled again when 800 airport security screeners represented by the United Steelworkers in Atlantic Canada voted almost unanimously to strike on October 5, 2012 (CTV News 2012).

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