The Harper government's war on labour

Solutions in search of a problem

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Introduction

IN 2011, STEPHEN Harper led his Conservative Party to a majority government in the House of Commons. Very soon afterward, the extent of the government's antipathy toward unions became apparent. Between June 2011 and June 2012, Lisa Raitt, then labour minister, sponsored (or threatened to) back-to-work bills impacting Canada Post workers, three separate bargaining units at Air Canada, and workers at CP Rail. Then, in December 2014, Bill C–525 received royal assent. This act amends the way federally regulated workers in both the public and private sectors can form unions, making it more difficult to do. Finally, on June 30, 2015, the irremediably flawed Bill C–377 passed third reading in the Senate. This act amends the *Income Tax Reporting Act* by singling out unions to create unparalleled reporting requirements.

The justification for these pieces of legislation shows little rational connection to their purported ends. Of course, policy-makers may articulate their policy goals poorly and choose means that ill serve their goals, just as *unintended* consequences may flow from *conscious* decisions. However, the consistent assault by the Harper government on the statutory framework governing labour relations can-

not be understood as the result of poor analysis. Rather, these decisions can only be understood with reference to the overriding force of ideology that sees virtually no legitimate role for organized labour in Canadian society. For the Harper government, the long game is what matters, which in this case is a transformation of the role of unions within the public sector and broader Canadian economy.

Everyone back to work

In June 2011, Lisa Raitt, then federal labour minister, introduced back-to-work legislation to end rotating strikes and a total lockout at Canada Post. At the same time, she sponsored back-to-work legislation for Air Canada customer service agents. Three months later, Raitt threatened back-to-work legislation to deal with Air Canada's dispute with its flight attendants. Two days prior to the beginning of a lawful strike, the minister referred that matter to the Canadian Industrial Relations Board under an "emergency" provision, for which she was accused of trying to buy time until it was possible to pass back-to-work legislation.[1] In March 2012, Raitt again introduced legislation to ensure that neither the unions representing pilots and baggage handlers at Air Canada nor the employer could access their statutory right to strike/lockout. One year and several legislative interventions later, Raitt legislated workers at CP Rail back to work after several days of picketing.

The frequent use of legislation to override the statutory instruments available to labour (and employers) in the summer of 2011 through to the spring of 2012 is remarkable. Economist Ian Lee calls it "the new normal" for labour relations.[2] Back-to-work legislation is not novel. Its increased use during the 1970s onward is well established by Panitch and Swartz.[3] However, the Harper government's response to collective worker action may be new in *degree* if not in *kind*. The manner of the government's interventions represents "an audacious willingness to intervene into labour-management relations" and to "push the goalposts a little further."[4]

Canada Post

A two-week rotating strike by the Canadian Union of Postal Workers (CUPW) in the spring of 2011 was the longest job action allowed by the government in any of the cases enumerated above. In part, CUPW was concerned about the possibility of legislative action and chose a rotating strike to avoid stopping mail delivery. It is only when Canada Post locked out its workers that mail delivery ground to a halt. Within days, Bill C–6 was being debated in a marathon filibuster session in

the House of Commons. Minister Raitt said the legislation was meant to protect the "fragile economic recovery."[5]

Two things are relevant here. The first is that with rotating strikes lasting just two weeks, there was hardly time to gauge their economic impact. Moreover, Raitt's rationale was at odds with the Canada Post's own stance during negotiations with the union. Canada Post said it was losing money precisely because the public was using other means of mail delivery. Whatever the economic loss for Canada Post, owing to either the rotating strikes or the lockout, it could hardly be considered significant across the economy. Economist Jim Stanford said he did not know of any economists "who were losing sleep over the impact of either work stoppage on the national GDP," citing other, far more serious threats to the general economic recovery about which the Conservatives were remarkably unconcerned.[6]

The second thing of note has to do with motivation. According to a former minister responsible for Canada Post, "there is no way Canada Post would ever order this lockout without the agreement of the government."[7] If the goal was ensuring mail delivery to prevent damage to the fragile economy then it did not make sense to permit a lockout. Having permitted one, it would make even less sense to turn around and legislate it away. This has led to speculation the actual goal was to provide the Conservatives with "cover" to order workers at Canada Post into binding arbitration. There, through legislative fiat, the government would have more control over the final terms and conditions of a new collective agreement.

Admittedly, this is speculation. We will likely never know exactly what transpired behind the scenes between the government and Canada Post. But speculation continued through the process. For example, the back-to-work legislation did more than just impose binding arbitration. The bill contained legislated wage increases that were less than those offered by Canada Post. Moreover, the government appeared to want to control the "neutral, third party" process through its choice of arbitrator. The first one quit after CUPW challenged his inability to speak French. More significantly, the second arbitrator chosen by Raitt was dismissed by a judge because his former roles as a Canada Post lawyer and Conservative Party candidate put the appearance of impartiality in doubt.

Air Canada

At the same time that Canada Post workers were being legislated back to work, Air Canada passenger agents were as well. The Conservative government prepared legislation even as the midnight hour struck in the first few seconds of a lawful strike that would last a total of three days before the two sides reached an agreement. Here, the argument about aiding the fragile economic recovery rings even

less true because Air Canada is a privately owned, non-monopoly corporation. Even if it were the job of the government to get Canada Post's mail going again (a position disputed by the International Labour Organization's committee on freedom of association),[8] it is not at all clear how it would be the government's right or responsibility to intervene at Air Canada — not once, not twice, but three times!

There is no doubt that a work stoppage at Air Canada would have proven highly inconvenient to many people. That is, it should be noted, the point of a strike in the private sector. The government, in banning an otherwise lawful strike, negated the very statutory framework through which private actors deal with labour relations.

Most labour relations experts agree that government intervention in labour disputes in this ad hoc way increases bad outcomes down the line. George Smith, a former director of employee relations at Air Canada, had this to say:

> The government has managed to pull a fast one by hiding behind the economic impact, and the assumption of the pro-Conservative folks was that this is harmful to unions, not management. That is a false assumption.[9]

Professor Laurel Sefton MacDowell agrees, saying this "intervention and threatening and warning from the beginning…it's being very disruptive, and it's actually creating problems, not solving problems."[10]

In conclusion, the government's ad hoc intervention into labour relations in 2011–12, supposedly to aid a fragile economic recovery, lacked the support of experts, stakeholders engaged in the negotiations of collective agreements, and economists. Ultimately, these actions disregarded the statutory framework because it recognizes a legitimate space for organized labour where the government does not.

Changing the framework: Bill C–525

At other times, the government chose to change the basic framework. Bill C–525, a private member's bill, received royal assent on December 16, 2014, and came into force six months later.[11] The act changes the way that unions are formed under federal jurisdiction from what was a "card-check" system to a "vote-based" system. With card-check systems the labour board will certify a bargaining unit (i.e., a group of people whose job duties are such that it is possible for them to be covered by a single collective agreement) once a certain number of membership application cards have been signed. The board takes the signed cards as proof of the employees' desire to join a union and certifies the relevant union as the representative of that bargaining unit. The threshold varies among jurisdictions from a low of 40% to a high of 65%. Aside from some contingency — like the employer chal-

lenging the make-up of the bargaining unit or raising doubts about the legitimacy of the cards — there is no further barrier to certification. Historically, all unions in Canada were certified using this process.

By contrast, vote-based systems incorporate card-check to the extent that a certain number of signed cards are still required, and the threshold also varies by jurisdiction. This triggers a secret ballot vote supervised by the relevant labour board. At present, five provincial jurisdictions and (now) the federal jurisdiction require a secret ballot vote.[12] The remaining four provinces and the territories employ card-check certification with some variations.

Not so free, not so secret votes

The evidence is clear that card-check systems result in higher levels of unionization than do vote-based systems.[13] It is why unions and their supporters favour card-check, while employers (and increasingly governments) favour vote-based certification. Proponents of each approach contend that their preferred system better reveals the true intentions of employees as to whether or not they really want to form a union.

There is good reason to believe that the average person would be inclined to prefer a vote-based system. In a liberal democracy there is a strong connection between the secret ballot and legitimacy. A secret ballot assures the voter's ability to freely register their true intention to vote for X, Y or Z, so a vote-based system for unionization sounds like it should better reveal employees' "true intentions." This assumption is far from assured.

Card-check systems reduce the time lapse between when the union applies for certification and actual certification. Requiring a vote gives the employer time to catch wind of the process and to engage in acts that might interfere with it. For instance, the certification vote itself generally takes place on the employer's property. While the content of the actual ballot is secret, an employer can see who showed up to vote, and they can come to conclusions, whether rightly or not, about how they voted. In a smaller workplace, this might be particularly problematic.[14]

When the newly unionized Walmart in Jonquière, Quebec was closed, one of its workers identified that she had not voted in the certification process, apparently to appear "non-committal."[15] Such a stance suggests that workers view non-voting as a strategy to avoid being labelled "pro-union." Most candidates vying for votes in a municipal, provincial or federal election are unlikely to know the identity of the voters, or have any real leverage against them one way or the other. As a result, the analogy between a secret ballot vote for union certification and that in a provincial, federal or even municipal election is limited.

The disadvantage of the card-check system is that employees can feel *compelled* to sign cards. Blaine Caulkins, the MP who sponsored Bill C–525, said that "[a]nyone who operates under the belief that bullying, threats, or even blackmail is a mutually exclusive act operates under complete and willful blindness."[16] What this statement ignores is that the union simply does not have the same ability to compel workers as the employer. We need to understand what counts as a threat or undue influence in the employment context.

For example, when workers at the Jonquière Walmart held a successful certification drive with the United Food and Commercial Workers (UFCW), rather than allow an arbitrator to resolve an impasse in negotiating its first collective agreement, Walmart closed its doors citing business reasons. The UFCW challenged the closure as being motivated by anti-union animus, and a violation of Quebec labour law. After nearly a decade in the courts, including two stints at the Supreme Court of Canada, the union ostensibly won: Walmart was deemed to have broken the law. However, the store is still closed. Despite the compensation Walmart will be forced to pay, with their enormous financial resources this is still a victory for the company. And with anti-union "trailblazers" like Walmart leading the way, other employers do not need to do or say very much to signal that the road forward might be rocky if workers decide to certify a union.

A similar chill is created when union organizers are fired. These organizers may get reinstated if they pursue an unfair labour practice claim, but by then the damage is often already done. This illegal union avoidance tactic appears to make good business sense. A comprehensive look at Canadian employer responses to certification drives concluded that "overt opposition to union certification was the norm." Additionally, 12% of employers revealed that they had engaged in practices *they believed to be illegal* during the certification drive.[17]

Committee amends the bill

Under the original wording of Bill C–525, those who did not cast ballots counted *against* unionization instead of making the wishes of those who cast a ballot decisive. When it came to *de*certifying the union, however, those who did not cast a ballot did *not* count. In other words, the true intentions of those not wanting the union counted as truer than those who did.

Wisely (or strategically), the committee considering the bill after second reading thought better of these imbalances and corrected them. This was despite the fact Bill C–525 received a total of only four hours of consideration in committee, prompting committee member Jinny Jogindera Sims to call the process "a farce."[18] As it stands, Bill C–525 requires a threshold of 40% of cards signed to trigger a vote,

and a count of 50% plus one to trigger certification. *De*certification is triggered by a comparable process.

Still, we are left wondering what problem Bill C–525 was meant to solve. Caulkins says it has to do with a "mountain of complaints" received about the card-check process, but this is not supported by the evidence provided at the committee stage. The majority of witnesses focused their attention on other issues; for example, that the original drafting of the bill was unprecedented and could violate Canada's commitments under international labour law. These concerns were incorporated into the amendments to the legislation mentioned above.

Witnesses also pointed out the lack of evidence to indicate the card-check process actually promoted intimidation or coercion by the union. Finally, it was pointed out that this ad hoc approach to labour relations was a rejection of the broad tripartite consultative system that had worked well for Canada's industrial relations landscape for nearly half a century. Those in favour of the bill simply reiterated the assumption that votes were more democratic, without grappling with the reasons provided for why that assumption is problematic in this context.[19]

Making union business everyone's business: Bill C–377

One observer has referred to Bill C–377 as "the bill that nobody wants."[20] The legislation, which passed into law this summer, is so deeply flawed that the Senate — not known for its rebellious streak — originally refused to approve it. Former Conservative Senator Hugh Segal condemned the policy as being deeply imbalanced and ill thought-out,[21] calling it "badly drafted," even "flawed, unconstitutional and technically incompetent."[22] Segal led the defeat of this bill in its original form, when 16 Conservative senators joined ranks with the rest and voted for significant albeit inadequate amendments. With Segal's resignation from the Senate in June 2014, some believed it was only a matter of time before the legislation would be reintroduced without amendments. Bill C–377 passed third reading in the Senate on June 30, 2015.

What does this bill do?

Bill C–377 is a private member's bill that amends the *Income Tax Act* to require labour organizations (and only labour organizations) to disclose detailed information of their accounts on a publicly accessible website under the auspices of the Canada Revenue Agency. This bill places tax reporting requirements on labour organizations unparalleled by those required by any business, charity or local or-

ganization. The legislation leaves open the disturbing possibility that the "form" and "particulars" of the reporting requirements could be changed by regulation (i.e., without further parliamentary oversight).

The government's justification for the bill was that those who pay union dues have a right to know where their money is going. Notably, legislation in most jurisdictions already requires that members be given audited financial statements upon request. And most of us with any union experience know that a key element of virtually every union meeting is a treasurer's report that is subject to questioning and ratification by the membership. The bigger question is this: why should the government police the internal organization of a private association? The two-part answer here reveals the depth of anti-union feeling in this government.

First, private associations are funded by dues that are deducted at the source by the employer and cannot, therefore, be voluntarily withheld. Since this is a unique aspect of labour organizations, there is no comparison between a labour organization and most other private associations.[23] Members cannot withhold their dues if they are dissatisfied with the level of accountability or transparency of their union leadership. Some workers have opted not to become union members, but because they are covered by the terms and conditions of the collective agreement, and owing to the benefits they receive, they must nevertheless pay union dues. This provides an opening for the government to intervene to rectify the alleged problem of some non-member dues-payers not knowing how their contributions are spent. Even if this were the case it would not explain why the *general public* rather than merely the dues-payers have a right to know the internal accounts of the union. The government's argument here is that since the dues are tax deductible, the public is also, in a sense, "funding" the union. Therefore, they too ought to know where virtually every union dollar is spent.

The bill's limits reveal how deeply insincere this rationale is. The universal position among labour unions is that the term "labour organization" in the legislation would be read broadly enough to include all the organizations with which unions, with duly signed collective agreements, are affiliated, such as the Canadian Labour Congress. Yet the term is restrictive enough to exclude professional associations for which dues are also mandatory (e.g., various medical associations and law societies). Russ Hiebert, the MP who sponsored the bill, testified that the term was intended to exclude them.[24] For this reason, arguments about the mandatory nature of dues appear frivolous. So, too, is the tax deduction argument, since the bill does not apply to any other organization that receives "public funding" in the form of tax deductions. Certainly, businesses that receive more benefits than unions could ever claim are not subject to the bill.

Supporters and detractors

They say you can tell a lot about someone by the company they keep. In this case, the same applies to Bill C–377. The legislation is supported by a handful of associations, none of which represents organized labour, and virtually all of which have a history of engaging in anti-union activities.[25] MP Hiebert says it is modelled on similar legislative initiatives in the U.S., where proponents explicitly stated the point of such measures is to cripple the labour movement. Such anti-union rhetoric is virtually absent in the Canadian debate, likely because it would not play as well here as it does south of the border.[26] But what *is* similar is the attempt to manufacture consent for Bill C–377 through methodologically flawed polls like those sponsored by the anti-union group LabourWatch between 2003 and 2013.

A 2011 poll conducted for LabourWatch by NANOS Research indicated that 83% of the Canadian population supports greater reporting requirements for unions. But the methodology was sufficiently flawed to have been the subject of a complaint to the Marketing Research and Intelligence Association (MRIA), which included accusations the firm used leading questions and suppressed results suggesting Canadians viewed unions favourably.[27] A complaint panel determined that the questionnaire was flawed, although NANOS was not found to have violated MRIA's code of ethics. According to one report, the MRIA's initial recommendations to NANOS included that they inform LabourWatch of the flaws and seek the group's permission to release those results that went previously undisclosed. LabourWatch did not comply.[28]

If the justifications for the bill are weak, the problems and concerns expressed by labour groups, as well as those with merely a professional interest, are legion. After several weeks of study, a Senate committee reported that the vast majority of witnesses and submissions raised concerns about the bill. Detractors included not only labour organizations, but professors, five provincial governments, the insurance and accounting industries, and the federal privacy commissioner. As a whole, the witness pool could hardly be considered a hotbed of labour activism.

The committee wrote that first among the concerns raised by these groups and individuals was "the constitutional validity of the legislation both with respect to the division of powers and the Charter." The report also listed "the protection of personal information, the cost and need for greater transparency, and the vagueness as to whom this legislation would apply."[29] Pending the outcome of the 2015 federal election, the legislation could very well be challenged in court.

The point that this bill singles out unions for unparalleled treatment has been made over and over again. Testifying before a House of Commons standing committee on finance, former federal privacy commissioner Jennifer Stoddart suggested

the (much more modest) reporting requirements that now exist for registered charities would likely be acceptable here. She argued that these requirements would "result in a more balanced, yet equally effective outcome."[30] It is clear, however, that the Conservative government does not believe these reporting requirements *would* yield equally effective outcomes.

That the point of the bill is to single out labour organizations for special treatment is made clear by its title: *An Act to amend the Income Tax Act (requirements for labour organizations)*. Despite this, the bill's proponents have consistently failed to recognize or address the discrepancy between the requirements for labour organizations and those for other, similar organizations. Unlike the reporting requirements for charities, no tax implications flow from the requirements in this bill. Thus, even the more modest reporting requirements would likely not render this bill constitutional on a division-of-powers analysis.[31]

Labour organizations believe this bill, with the enormity of its reporting requirements, is an attempt to bankrupt unions or divert their resources from the substantive work they do — to "tip their hand" during negotiations, since employers would have access to the union's information when the opposite is not the case. Former Canadian Labour Congress president Ken Georgetti summed it up this way:

> Bill C–377 is a solution in search of a problem. It wrongly violates Canada's Constitution and the Charter of Rights and Freedoms.... It relates not to the tax authority of the federal Parliament but the regulation of trade unions or labour relations. It causes Canada's privacy commissioner concern and it offends the intent of federal and provincial privacy laws. It creates an unfair advantage for non-union construction contractors and an uneven playing field in the labour market. It ignores the basic facts of the democratic structures of trade unions and the legal frameworks within which trade unions already operate.[32]

Conclusion

Canada's present statutory labour relations scheme was decades in the making and represents an attempt to balance diverse interests in a hotly contested, emotionally charged and wide-reaching policy area. Whatever one thinks about labour organizations, we should be wary of legislation that makes large-scale changes to this statutory framework without adequate input, without an electoral mandate — both C–525 and C–377 were private member's bills, not government legislation — and against the advice of a wide array of stakeholders and disinterested experts. The sheer variety of opposition to Bill C–377 is further proof that the Conservative government is not interested in thoughtful, evidence-based policy. This will become

more apparent as the law winds its way through a potential constitutional challenge. If the government was searching for a problem, it appears it has found one.

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12 These are BC, Alberta, Saskatchewan, Ontario and Nova Scotia. In some jurisdictions, secret ballots are ordered if the number of cards signed falls within particular parameters, for instance, more than 40% but less than 65%. In other jurisdictions, the labour board retains the discretion to decide if and when to order a secret ballot vote.

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