

THE MAGAZINE OF THE MACDONALD-LAURIER INSTITUTE

INSIDE POLICY

OCTOBER 2016

The Foreign Policy Issue

A world of challenges for NATO

Canadian leadership and a renewed role for collective defence

Also INSIDE:

How Obama
lost his way in
the Middle East

The winter of
discontent for
Arab women

Trouble on the
US border for
Canada

Free trade
gets it from
both sides





INSIDE POLICY

THE MAGAZINE OF THE MACDONALD-LAURIER INSTITUTE

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Subscriptions: \$39.95 per year; single issue, \$6.95. | ISSN 1929-9095 (Print) | ISSN 1929-9109 (Online)

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From the editors

The Cold War is long over, but there's still plenty for the North Atlantic Treaty Organization to do. That's the message in our cover story from MLI Munk Senior Fellow **Shuvaloy Majumdar** and his co-author, documentary filmmaker **Marcus Kolga**. It is a different world from the Soviet era, but Russian President Vladimir Putin seems intent on re-establishing his nation's former glory, and destabilizing his rivals in the process. Majumdar and Kolga write that Canada has a leadership role to play as NATO faces challenges in the Ukraine, the Baltics and Arctic, along the alliance's southern flank in Syria, and even in cyber space.

This issue of *Inside Policy* features a variety of articles on the changing global scene. In his contribution, **Stanley H. Hartt** offers a critical assessment of Barack Obama's foreign policy legacy. He contends that the outgoing President's greatest failure can be traced back to his 2009 Cairo speech to the Muslim world, beginning a path that saw a lapse in American leadership create chaos in the Middle East, and a refugee crisis in the streets of Europe. And **Raheel Raza** writes that the hope of the Arab Spring has turned to a winter of discontent for women in the Middle East and North Africa, but they have not given up hope for a brighter future.

Still with foreign affairs, journalist **Naomi Lakritz** warns that anti-trade rhetoric in the US election debate could have a receptive audience, which is bad for both our countries, and **Scott Newark** counts the growing number of border irritants Canada faces with the US. Finally, **Richard Owens** and **Sean Speer** respond to a well-meaning but self-defeating UN panel report on access to medicines.

Also in this issue, **Geoffrey Cowper** says that the Supreme Court has made an important challenge to the "culture of complacency towards delay" in Canada's justice system, and **Paul Cassidy**, **Monika Sawicka** and **Leah Whitworth** explain why the concept of "social licence" for resource development is incompatible with the rule of law. And for those who would like to see Canada receive a low-cost economic jolt, **Paul Beaudry** and **Sean Speer** make the case that the federal government's innovation agenda would get a real boost from the creation of a climate for investment in broadband infrastructure.

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Naomi Lakritz



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Barack Obama and the blinkers of idealism in foreign policy

As the US President nears the end of his term, his handling of global affairs, particularly in the Mideast, will be a tragic legacy.

Stanley H. Hartt

Most observers who conclude that history will treat Barack Obama's tenure in the White House as a failed presidency place the blame for this squarely on the shoulders of the Republican members of Congress. In the United States the division of authority among the legislative, executive, and judicial branches of government was expressly intended by the framers of the US Constitution to limit the risk of a restored autocracy to replace the one from which they had so recently been liberated. And so, no initiative can ever get anywhere unless it has broad support, across party lines and among the electorate.

Dominated for much of Obama's tenure by the opposition, the two chambers of the US Congress did indeed represent a

formidable obstacle to what the young, idealistic, ideologically left-of-centre Chief Executive came to office to achieve. The Tea Party's rise, coupled with the demand in conservative ranks for uncompromising purity in all things, undoubtedly set up the Obama agenda and legacy for failure (even while ensuring that the reputation of right-wing policies became scarred in the process). But despite the germ of truth available to lay blame for Obama's botched promise on his opponents, it is sadly correct to insist that his most colossal blunders were self-inflicted.

Even without getting into domestic disasters such as Obamacare, skyrocketing debt, legislative gridlock, and questionable Executive Orders, one particular bungled file has led to

continuing violent unrest and instability in the Middle East, and world-wide, out-of-control terrorism. It has also led to mass migrations threatening the fabric of Western societies and the integrity of the European Union itself, including, arguably, the recent Brexit referendum result and its attendant economic uncertainty and volatility.

Did one man, because of noble intentions distorted by his naïve, almost romantic, world view cause all this? The plain, sad, realistic answer is “yes”.

During his 2008 primaries and election campaigns, the future President had appealed to the deep emotions felt by Americans frustrated and repulsed by the failure of US force to overcome insurgencies and terrorism in Afghanistan and Iraq. Heroism by body bag induced not only a sense that these were wars that could not be won, but that local resistance by amateur militias familiar with the terrain created contests of attrition that were humiliating to the super power’s might.

Obama’s vow to end the US military presence in both theatres of combat – virtually immediately in Iraq and eventually in Afghanistan – struck a chord and, as President-elect, he would have been entitled to conclude that his electorate had given him a clear and powerful mandate to withdraw from the commitments the Bush administration made.


That would have been serious enough, but coupled with a view that it was the very offence taken in fundamentalist Muslim quarters to American “boots on the ground” that was generating the problem of continuous insurrection and instability in the region, he came to believe that withdrawal was more than a gesture in favour of the US anti-war mood. He believed it represented, at the very least, the beginnings of a solution to the perennial problem of peace in the Middle East.

This was clearly the thought process that informed Obama’s fateful, and massively ill-advised, address at Cairo University on June 4, 2009. His talk was both an apology for past US military intervention in the region and a call for Arab populations to infuse what he pre-supposed were the universal human yearnings for liberty and democracy into the governance of their various nation states, all of which presaged (some would say encouraged and induced) what has become known as the Arab Spring.

The President began his review of the relationship between the Muslim world and the United States by stating: “I’ve come here to Cairo to seek a new beginning between the United States and Muslims around the world, one based on mutual interest and mutual respect, and one based upon the truth that America and Islam ... need not be in competition. Instead, they ... share

common principles ... of justice and progress; tolerance and the dignity of all human beings.”

“Islam is a part of America,” he continued. “And I believe that America holds within her the truth that regardless of race, religion, or station in life, all of us share common aspirations – to live in peace and security; to get an education and to work with dignity; to love our families, our communities, and our God. These things we share. This is the hope of all humanity.”



Did one man, because of noble intentions distorted by his naïve, almost romantic, world view cause all this? The plain, sad, realistic answer is “yes”.

As he reviewed Islam’s contribution in harbouring accumulated human knowledge during the Dark Ages in medieval Europe, and the Muslim presence in the fabric of life in the United States, he built towards the core message of his speech: “I know there has been controversy about the promotion of democracy in recent years, and much of this controversy is connected to the war in Iraq. So let me be clear: No system of government can or should be imposed by one nation by any other.

“That does not lessen my commitment, however, to governments that reflect the will of the people. Each nation gives life to this principle in its own way, grounded in the traditions of its own people. America does not presume to know what is best for everyone, just as we would not presume to pick the outcome of a peaceful election. But I do have an unyielding belief that all people yearn for certain things: the ability to speak your mind and have a say in how you are governed; confidence in the rule of law and the equal administration of justice; government that is transparent and doesn’t steal from the people; the freedom to live as you choose. These are not just American ideas; they are human rights. And that is why we will support them everywhere.”

Those words clearly left the impression that, in his naiveté, the President believed that there was some parallel or similarity between the Minutemen and the Muslim Brotherhood, or between

Paul Revere and Mohamed Morsi, and that the noble American struggle for independence could somehow be replicated in the vastly different culture and traditions of Islam. At the very least, the leader of the free world was telling his audience: “Choose your own path to liberty and democracy. The United States will no longer project its military power in this region to tell you what to do”.

Just as former US Ambassador to Iraq April Glaspie is reputed to have induced Saddam Hussein to believe that America would not intervene to prevent his takeover of Kuwait in 1990, a reasonable reader of the entirety of Obama’s solicitous attempt to resolve long-standing Middle East tensions with the weapon of goodwill could have concluded that the time was ripe for insurrection and insurgency.

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It should not be surprising, then, that some see a direct line between the President’s abandonment of the option of intervention and the outbreak of the Arab Spring. Beginning with the overthrow of Tunisia’s government in December 2010, and rapidly spreading to Egypt, Yemen, Libya, and Syria (with incidents falling short of successful coups in Algeria, Jordan, Oman, Djibouti, Somalia, Sudan, Bahrain, Kuwait, Morocco, Mauritania, Lebanon, and even Saudi Arabia), the entire region was engulfed by competition among various factions to oust existing regimes. Some of the revolutionaries were not imbued with the honourable Jeffersonian principle, cited by Obama, that “the less we use our power the greater it will be”.

In a biblical series of “begats”, the Commander-in-Chief reaped what he sowed. Canadians, not Americans, led the NATO bombing of Libya beginning in March 2011. Perhaps the most shameful exhibition of the super power’s new non-interventionist stance was the hesitation to send military aid to the US Consulate

in Benghazi when it was attacked on September 11, 2012, and which resulted in the deaths of Ambassador Christopher Stevens and three other Americans.

The precipitous withdrawal from Iraq, so much the symbol of the new policy of leading from behind, and the announced intention to do the same in Afghanistan, renewed the seething militant uprisings in those countries and breathed fresh life into Al Qaeda and the Taliban. One group allied to Al Qaeda morphed into what has become known as ISIL (the Islamic State of Iraq and the Levant) or ISIS (the Islamic State of Iraq and Syria – Daesh in its Arabic acronym) which proclaimed the creation of a worldwide caliphate.

The President’s weakness became more palpable as the months progressed. When the Syrian regime appeared poised to use poison gas on its own people, Obama drew a “red line”, without making clear exactly what he would do about it. In the event, the answer was nothing. He has continuously insisted on using the “ISIL” version of the terrorist organization’s name instead of “ISIS” as his way of avoiding involvement in Syria. Vladimir Putin’s Russia quickly adopted Syria as a client state and tweaked America’s nose, as it had previously done in the power vacuum created by the American absence in Crimea and Ukraine.

In Syria, with virtually the entire country reduced to rubble, the do-gooders have turned their attention to the mammoth task of assisting refugees. By the hundreds of thousands they have poured over the borders into Europe, thousands drowning by fleeing in unsuitable craft across open waters, and capsizing when wind and waves battered their fragile vessels. Various European countries improvised tactics to contain the mass migration for which they were totally unprepared in terms of basic services, but which they felt obliged to facilitate under the EU’s Schengen Agreement.

Even wealthy Germany eventually capitulated to reality and agreed that quotas needed to be placed on the number of refugees swelling its population centres at the rate of more than 10,000 a day.

Then, the refugees began to reach the United Kingdom. Pitched battles occurred at the Eurotunnel as migrants sought to force their way into Britain. The pressure to accommodate them, together with large numbers of other foreigners legally (in accordance with European freedom-of-movement rules) living and working in England, created a backlash among working-class Britons in an economic atmosphere of stagnation, provoking fears of unsustainable labour market conditions.

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The winter of discontent for women in the Middle East and North Africa

The female leaders of the Arab Spring aspired to bring about peaceful transition through collaboration between men and women, Muslims and non-Muslims, government and civilians. But for women in much of the region, oppression and violence are still constant facts of life.

Raheel Raza

Si Tawakkol Karman, a Yemeni journalist, activist, and the first Arab woman to win the Nobel Peace Prize, said: “My dear women! You have revolted from all over the countries of Yemen, Tunisia, Egypt, Libya, and Syria in order to construct a dignified life and a better future. Therefore, there is no way that we should bend down or go back.”

Heroic words in an ideal world! There is no doubt that the movers and shakers behind the so-called Arab Spring were sharp, courageous, talented, passionate, and inspirational women who thought they would create change in the Middle East that would make their dreams come true and give the next generation of women a better future. They aspired to bring about a peaceful transition through collaboration between men and women, Muslims and non-Muslims, government and civilians. But as

Karman also points out: “One of the necessities of partnership is for women to obtain their full rights. No dignity and no liberty for a nation which oppresses women and takes away their rights.”

That women have been dehumanized and their rights usurped is the sad reality today. The rise of ISIS in Iraq, Syria, and elsewhere in the Middle East has regressively impacted whatever rights women once enjoyed. ISIS’s ideology regarding Yazidi women is that they are to be used for “sex and service” for the men. Muslim women have to be segregated and isolated, with their rights and social mobility greatly restricted.

During the revolutions and uprisings across the Arab world, there were numerous reports of violence targeting women, committed by militia, soldiers, and police. Fellow demonstrators also perpetrated incidents of violence against women.

Mona Eltahawy is an Egyptian-American award-winning columnist and an international public speaker on Arab and Muslim issues based in New York. Eltahawy reported extensively on the Egyptian uprising, urging women to stand up and speak out. Her passion led her to join protests in Cairo's Tahrir Square in 2011 where she was sexually and physically assaulted. Her book, *Headscarves and Hymens: Why the Middle East Needs a Sexual Revolution*, speaks about the autonomy, security, and dignity of Muslim women.

Canadian Muslims come from almost 60 different parts of the world and belong to diverse cultures and ethnicities.

Yet, when the mainstream media discuss Muslims, it's as though they are all the same.

In Syria, pro-regime forces have abducted women to spread fear within the population and there are many reports of rape, arbitrary detentions, torture, forced disappearances, and summary executions. The situation has deteriorated to such an extent that the United Nations ordered an international special commission of inquiry and continues to monitor the situation very closely. In 2014, the Independent International Commission of Inquiry on the Syrian Arab Republic reported that pro-government forces subjected women, men, and children to rape and sexual humiliation during arrest and detention.

In Libya, rape has been used as a weapon of war and the stigmatization of victims is such that they are condemned to silence. In Egypt, protesters sexually assaulted women who were participating in the demonstrations and the army forced several women protesters to undergo virginity tests.

Hanaa Edwar, head of the charity Al-Amal ("Hope" in Arabic), said: "Iraqi women suffer marginalization and all kinds of violence, including forced marriages, divorces, and harassment, as well as restrictions on their liberty, their education, their choice of clothing, and their social life."

The position of women varies throughout the MENA

(Middle East and North Africa) according to levels of education, freedoms, and politics, and has been evolving. However, the religious resurgence of the 1970s reversed many of the strides that had been made towards progress and modernity, taking many women back to the Dark Ages.

The lives of Middle Eastern women are impacted by cultural, religious, and legal norms. Changes in governments, economic strife, and the rise in extremism directly affect these women.

Some brilliant Middle Eastern academics have well documented these struggles for equality, education, and empowerment, and there are many grassroots movements working to bring about change from within.

Elham Manea is a Yemeni and Swiss political scientist specializing in the Arab Middle East, a writer, and a human rights activist. She has published academic and non-fiction books in English, German, and Arabic, in addition to two novels in Arabic. Her latest book, *Women and Shari'a Law*, deals with the controversy and public debate about legal pluralism and multiculturalism. Manea argues against what she identifies as the growing tendency for people to be treated as "homogenous groups" in Western academic discourse, rather than as individuals with authentic voices.

Manea explains that official multiculturalism places ethnic communities in boxes, as though all Muslims are part of a monolith, or all blacks the same. She adds that multiculturalism ignores the fact that diversity and individual thought exist among members of minorities. For example, Canadian Muslims come from almost 60 different parts of the world and belong to diverse cultures and ethnicities. Yet, when the mainstream media discuss Muslims, it's as though they are all the same. This type of generalization does a great disservice to Muslim communities.

Honour-based violence is another major factor that hugely impacts women's lives in the MENA region.

According to a Pew Research poll done in 2013, large majorities of Muslims in the Middle East favour Sharia. Among those who do, stoning women for adultery is accepted by 81 percent in Egypt, 67 percent in Jordan, 58 percent in Iraq, 44 percent in Tunisia, and 29 percent in Turkey.

Another Pew Research poll titled *The World's Muslims: Religion, Politics and Society* showed that an average of 39 percent of Muslims surveyed think it is "sometimes justified" to kill a woman if she engages in premarital sex or adultery. This translates to 345 million people who share this barbaric belief.

In a study of honour killings in Egypt, 47 percent of the women were killed by a relative after the woman had been raped. In Jordan and Lebanon, 70 to 75 percent of the perpetrators of

these so-called “honour killings” were the women’s brothers.

Here is the shocker: Part of article 340 of the Jordanian Penal Code states that “he who discovers his wife or one of his female relatives committing adultery and kills, wounds, or injures one of them, is exempted from any penalty.”

Female genital mutilation (FGM) is another huge challenge for women in the MENA region. UNICEF estimates that more than 200 million girls and women alive today have undergone genital mutilation, mainly in Africa and some Middle Eastern countries, while the World Health Organization (WHO) warns that three million girls a year are at risk of mutilation.

“The right to vote is essential and being denied it impedes women from participating in the making of laws that could protect them from all other forms of violence and discrimination.”

The UN Declaration on the Elimination of Violence against Women defines violence against women as: “any act of gender-based violence that results in ... physical, sexual, or psychological harm or suffering to women ...” Not being able to partake in the political, economic, and social decisions which will affect oneself and one’s family appears as a form of violence. When women are not consulted in decision-making, they can suffer psychological harm. Not allowing women to oppose or agree to the laws enacted which directly concern them, is an act of violence against women.

The right to vote is essential and being denied it impedes women from participating in the making of laws that could protect them from all other forms of violence and discrimination.

In 2012 when Egypt’s first post-revolutionary constitution was being written, women were mostly sidelined. As a result, Egyptian women gained only 2 percent of seats in the elections. For decades, Egyptian Muslim women suffered because divorce was not easy for them to access. But, also in 2012, Mohamed al-Omda, an independent MP, joined the heated debate over

women’s rights by suggesting a controversial draft law to limit the legal provisions for women to obtain divorce.

In Libya, ironically during Moammar Gadhafi’s rule, women had unlimited access to free education, thus giving both genders an equal opportunity. However, in 2013 Libya’s grand mufti issued a fatwa (religious edict) stipulating that women can attend a university only if it is gender-segregated. The same religious authority called for a woman to be accompanied by a guardian if she wishes to leave the country. As well, women faced setbacks when the National Transitional Council (NTC) adopted a law allocating only 10 percent of the seats to women in national elections, while leaving it to political parties how to allocate seats at the local level.

In Saudi Arabia, women can’t drive or leave the country without a male guardian. The World Economic Forum ranked Saudi Arabia near the bottom – at 134th out of 145 countries – in its 2015 Global Gender Gap Index. It was only in December 2015 that Saudi women finally got the right to vote and run for office – and even then only in municipal elections. Since they can’t drive, the point is moot!

Many of these women are lobbying for nothing more than the right to have a say in their country’s politics, to be emotionally and intellectually liberated, and to participate in public life free from the fetters of oppression.

Some of the issues they face aren’t new. The United Nations Development Programme has done intensive research into the status of Middle Eastern women. Its statistics show the level of education among Arab women is the lowest in the Muslim world – this in a tradition which believes that educating one woman is like educating the entire nation.

Why is there so much resistance to women lobbying for their rights? It’s because the self-appointed caretakers of Muslim traditionalism feel threatened by the phenomenon of a significant number of women now being seen in public, a space normally thought of as for men only. They see emancipated Muslim women as negative symbols of Westernization.

Yet, there are rays of light in the darkness and great hope that the struggles of the activists, scholars, and academics will bear fruit, since women themselves will bring about change. In addition to the powerful women quoted in this article, many voices have been heard in the past year.

Fouzia Assouli is president of the Federation of the

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How NATO must adapt in a changing world

Canada should be courageous in pressing the alliance to strengthen NATO's collective defence in the face of a revanchist Russia.

Shuvaloy Majumdar and Marcus Kolga

Inside the gilded halls of the Constantine Palace near St. Petersburg, on Tuesday, August 9, Turkish President Recep Tayyip Erdogan met with his “dear friend”, Russian President Vladimir Putin, to reconcile hostile Russian-Turkish relations. The relationship had soured after Turkish F-16s, defending Turkish airspace, shot down a Russian Sukhoi SU-24 bomber last November. The incident marked a low point between the two nations after Putin, who supports the Assad regime, accused Turkey of targeting the Syrian dictatorship instead of taking on the so-called Islamic State in Iraq and Syria (ISIS). But in Istanbul this month, the two shook hands in agreement over construction of the Turkish Stream pipeline, which will bring Russian natural gas to Europe.

Following the recent coup attempt against Erdogan and attack on parliament in the NATO partner's capital, Erdogan continues his consolidation of control over Turkish institutions. He has conducted the widespread detention of alleged potential conspirators, while moving towards normalizing Turkey's relationship with Israel, realigning its approach in Syria, and re-establishing its relationship with Russia. For this NATO partner, the complex relationships at play underline just how different the world is today from when NATO was founded nearly 70 years ago. Yet NATO, formed in the aftermath of the Second World War and in response to aggressive Soviet imperialism, is as relevant today as in 1949.

NATO since the Cold War

As the Berlin Wall crumbled, the determined resolve to defend capitalism and freedom that overcame communist tyranny began to lose focus. Bureaucracy, moral equivalence, and complacency became central features for a multilateralist ideology in Western governments, and the oxygen of freedom that gave life to post-war institutions became polluted by apathy.


Organizations formed during the Cold War in the name of collective security, the advancement of market democracies, and containment of the spread of communism suddenly lost their mandates and scrambled to find meaning for their existence. For NATO, this meant a period of wandering in the desert, until Article 5 compelled action in Afghanistan in 2001, and then again when action was needed in response to the direct threat that the Russian invasion of Ukraine represents to the post-war order.

NATO's principle of collective security was a rejection of the notion of spheres of influence, and an effort to shape an order based on the irreducible sovereignty of free countries. In 1956, a report prepared by NATO's Committee of Three (the foreign ministers of Norway, Canada, and Italy) clearly iterated that NATO was created by its member states for "purely defensive and constructive purposes". The committee, which included Canada's Lester B. Pearson, declared that "with this political commitment for collective defence as the cornerstone of the foreign and defence policies of its members, NATO has a solid basis for existence."

Forty years later, after the Soviet collapse, both NATO and Russia committed themselves to "creating in Europe a common space of security and stability, without dividing lines or spheres of influence" in a 1997 statement signed jointly by NATO and Russia. Known as the Founding Act on Mutual Relations, Cooperation and Security, the memorandum calls on signatories to respect the "sovereignty, independence, and territorial integrity

of all states and their inherent right to choose the means to ensure their own security".

Conventional warfare became less viable during the Cold War, and states turned to proxy wars and sponsoring terrorism as a means to advance their interests, inflaming the forces that sought to destabilize the international order. Today, globalization and technology are presenting a fundamental challenge to that order. Western nations are facing escalating threats posed by cyber-warfare, and an array of hybrid and asymmetric conflicts such as Russia's invasion of Ukraine and the advent of ISIS in the Middle East.



*These threats are redefining
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These threats are redefining the terrain upon which battles are waged, including their combatants. In order to successfully transition from NATO's initial Cold War posture to meet the challenges of a post-9/11 security environment, NATO must adapt aggressively, or risk suffering an existential crisis similar to that facing the European Union following the British vote to leave the EU. The leaders of NATO states, including Canada, must recognize that the disintegration of the European Union and NATO has been the primary foreign policy objective of Putin's neo-imperialist Russia. The collective defence that Pearson and his colleagues urged in 1956 is still vital today.

As these serious new challenges emerge, NATO members must not forget that their future security rests on the alliance's integrity and the principle of collective defence. A staunch response to active foreign attempts to erode confidence in NATO among its members is critical to the survival of the transatlantic alliance.

The backdrop of the 2016 Warsaw Summit

Atlanticists have been confronted by some brutal realities lately. Most recently, there was Brexit, in which the British public repudiated bureaucrats in Brussels for encroaching beyond the

economic deal that was to be the beating heart of the European Union. Most worrisome has been the emergence of a revanchist Russia under Putin, which already in 2007 began testing the resolve of Euro-Atlantic institutions in Georgia, Moldova, and Estonia, and found them wanting. Then came the invasion of Ukraine, the illegal annexation of Crimea and the deployment of thousands of troops, heavy weapons, and other materiel in the Ukrainian Donbass. And finally, the influx of hundreds of thousands of Syrian refugees brings the greatest humanitarian catastrophe of our times into Europe. Millions of refugees still reside in Turkey, and could yet migrate into Europe, significantly affecting the debate and outcomes of key European elections.

At the NATO Summit in Warsaw in July 2016, experts gathered in the aftermath of the Brexit vote to assess NATO's role in this new world. While European resolve appeared weak in the face of the UK's rejection, the Warsaw Summit established that the transatlantic security architecture would continue. At the onset of the Ukrainian crisis, NATO states sought to rebuild their security infrastructure along the vulnerable eastern flank. Since the 2014 Wales Summit, NATO states have developed an approach that goes further, moving from merely reassuring NATO's eastern partners towards establishing an actual deterrence against Russia's ongoing threat.

Russia continues to aspire to restoring Soviet "greatness" by presenting a sustained and comprehensive challenge to NATO and the international order NATO represents. Clearly, Russian actions are intrinsically linked to one another: what it does in Ukraine is not distinct from its support for the brutal Assad regime in Syria, its aggressive escalation in the Baltic and Black seas, its role in brokering the 2015 nuclear deal with Iran, Putin's invalidation of Kazakhstan's right to exist, its vast Arctic military buildup, or its arrogant and reckless air policy, seemingly desiring to provoke a global incident.

Responding to Western sanctions in Russia over Ukraine in 2014, Putin explicitly sought revenge by establishing closer relations with the West's rivals, including Iran, Venezuela, North Korea, China, and others. What commenced only two years ago with an oil-for-food program at the behest of Ayatollah Ali Khamenei, has now evolved into a sophisticated military alliance with Iran to ensure the continuity of Syria's Bashar al Assad, including the expropriation of Crimean gas to support Assad's brutal war against his own people.

As Russia's corrosive policy became more ambitious globally, the Canadian government rightly commenced disciplined protocols for any engagement with Russia, closing gaps that the

Kremlin could exploit. The Trudeau government has since relaxed this extensive effort to preserve Canada's national security, while Ottawa seeks a dialogue with the Kremlin. But the architect of President Barack Obama's failed "reset" policy with Putin's Russia, Ambassador Michael McFaul, recently told the *Globe and Mail* that Russia only respects strength. Canada's reluctance to adopt further sanctions against the Putin regime in fear of disrupting the Trudeau government's re-engagement policy with the Kremlin is in McFaul's view "a sign of weakness, not a sign of strength." McFaul further characterized Foreign Affairs Minister Stéphane Dion's claim that Canada earned an invitation to join the International Syria Support Group in Vienna last May by not imposing sanctions over the death of activist lawyer Sergei Magnitsky, as "weird logic".

Canada's leadership must be courageous in pressing the alliance to strengthen NATO's commitment to collective defence in the face of this ongoing assault, tailored to contemporary threats, and entrenching the alliance's founding values of capitalism and freedom.

Russia's energy intimidation diplomacy

During the Cold War, the Soviet economy was a world unto itself where energy was among the only products or resources for which a foreign market existed. Since the end of the Second World War, Russian leaders have recognized Russian gas as a critical economic asset and an important political weapon. Preserving European reliance on Russian energy has always been a core national security interest for the Kremlin. For example, in 2008, Russia cut oil supplies to the Czech Republic after an agreement was signed to allow US ballistic missile radar-tracking technology to be installed on Czech territory. Ukraine has been repeatedly targeted by Russia's "gas diplomacy" whenever leaders in that country have considered co-operation with the EU and the West, as have most other Eastern European states.

At the onset of the Cold War, the 1955 Baghdad Pact was formed between the United Kingdom, Turkey, Iraq, Iran, and Pakistan to block off potential Soviet hegemony over Middle Eastern energy supplies to Europe and NATO member states. Today, Russian efforts aim to supersede Turkish-Arab pipelines, and expand Russia's energy supply to Europe from both the north and south. Russia seeks to expand its Nord Stream pipeline infrastructure through the Baltic region, to leverage its supply through Ukraine, and to assure that its Turkish Stream pipeline through the Black Sea presents another corridor for its natural gas. At their August 9 summit, Putin and Erdogan announced that this Turkish Stream pipeline would get built, reinforcing

Russia's economic and political strategies through energy intimidation diplomacy.

Even traditionally neutral Sweden, whose eastern coastline the proposed Nord Stream 2 pipeline skirts, has been unnerved by the Kremlin's dangerous military activity in the region, including repeated violations of Swedish airspace and undersea incursions by Russian submarines. In 2015 Russian military commanders organized a mock invasion of the Swedish island of Gotland, which Nord Stream is using to construct the new Russian pipeline.

Canada's active participation in developing NATO's strategy for energy security is self-evident. With its vast energy resources, Canada must play an important role in unlocking European reliance on Russian gas, by offering a reliable, alternative supply of liquefied natural gas and by promoting new energy technologies in Europe.

The re-emergence of NATO's Arctic flank

In May 2015, Russian Deputy Prime Minister Dmitry Rogozin, founder of the Congress of Russian Communities, whose constitution calls for the armed reconstitution of the Soviet Union, landed on the Norwegian island of Svalbard despite his being included on Oslo's sanctions list. Rogozin's trip, which followed the annexation of Crimea, coincided with a string of announcements about the completion of new, large-scale Russian infrastructure in the Arctic.

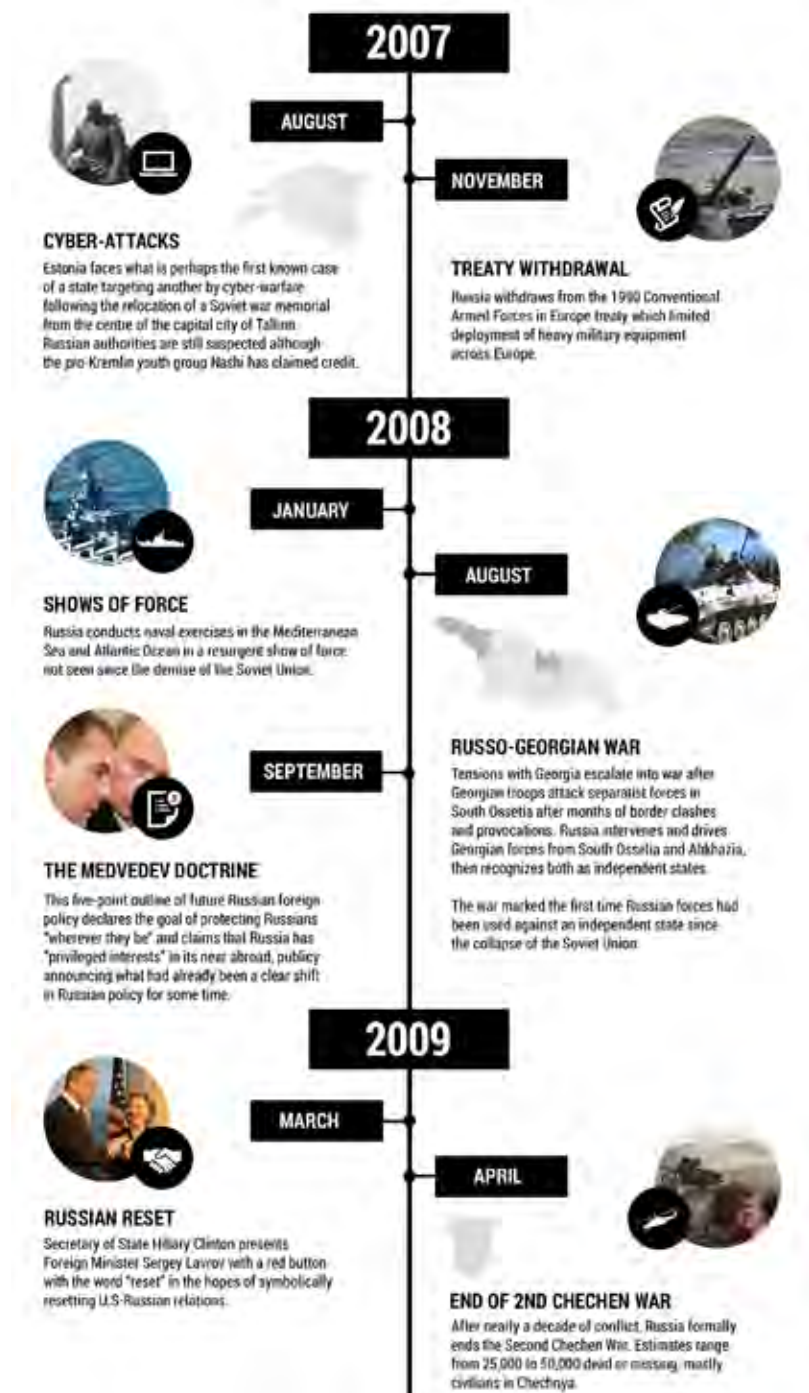
"Russia has begun to understand its place, its borders, and its interests," exhorted Putin's deputy prime minister in charge of Russia's military industry. Referencing the Russian annexation of Crimea, Rogozin astoundingly linked Russian conquest in Ukraine to the Arctic: "We saw something historic take place last year. Russia's territorial integrity was restored. This year, we are casting our glance elsewhere. We are taking a closer look at the development of the Arctic. The two things are the same."

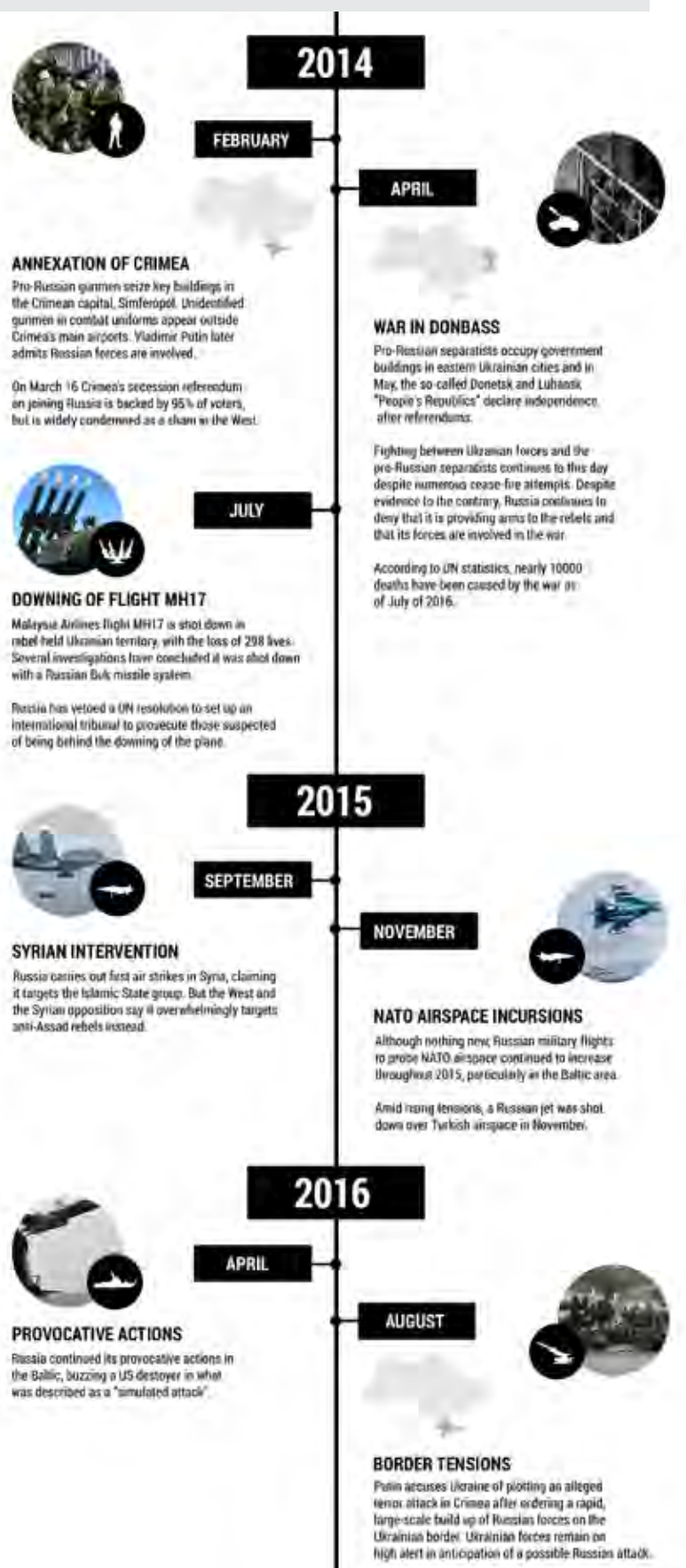
Rogozin reiterated Russia's position again in July 2016, just before Dion, who champions Arctic diplomacy with Putin, met with his Russian counterpart, Sergey Lavrov.

Russian aggression in northern Europe has provoked non-NATO states Sweden and Finland to seek closer co-operation with NATO to counter dangerously irresponsible Russian air and naval activity in the Baltic Sea and Arctic. The Kremlin's provocateurs are testing the world's resolve in the North, on one hand building up a robust naval capacity and massive Arctic bases, such as the Kotelny base

TIMELINE

How Russia has moved to advance its interests and undermine its rivals





in Siberia, against a fabricated threat that does not exist, while also participating nonchalantly in Arctic diplomacy.

When the Arctic Council was established in 1996 with the Ottawa Declaration, it was in part in the context of a larger effort laden with good intentions to integrate Russia into the world's rules-based system. In many ways, it has been a success. Arctic nations have created a system that speaks to how the North can be developed for its Indigenous peoples and how economic growth and sustainability can be fostered. It has also established the principle of leaving to the United Nations Convention on the Law of the Sea (UNCLOS) how Arctic delimitation issues and seabed claims should be adjudicated. However, the Kremlin's military investment and escalating rhetoric stand far apart from how Russian emissaries co-operate in the Arctic, or elsewhere. In the Arctic, the gap between the Kremlin's deeds and words is widening at an alarming rate, and the situation's gravity cannot be underestimated.

In addition to its announced contribution of troops to Latvia and jets to Baltic Air Policing, Canada should seize the opportunity to lead at NATO in developing an updated collective defence approach for the Arctic. Such a strategy should include support for UNCLOS as the process to resolve Arctic border disputes, and the Arctic Council as a forum for Arctic nations to ensure that the region's economic development is centred upon the people who live there. The potential for a Canadian-led Arctic security strategy would establish a clear military deterrence capability against Russia's vast buildup of maritime and air strength in the Arctic.

Canada must also invest more towards its own Arctic defence capability, including acquiring aircraft that are interoperable with NATO partners. Russia's Northern Fleet, which accounts for two-thirds of the entire Russian navy, has greatly increased its operations in the North Atlantic with submarine activity approaching Cold War levels over the past two years. To meet these security challenges in a re-emerging Arctic theatre, Canada must focus on developing its own submarine and ice-breaking capacity, and replacing its aging fleet of CF-18s.

Bolstering NATO's eastern flank

Russia's provocative recent escalation of fighting in the Ukrainian Donbass is a fundamental betrayal of the Minsk agreements that were to pacify the ongoing war

in Ukraine. As Ukraine's 25th anniversary of independence from Russia approached on August 24, Ukrainian forces went into high alert while Russian forces built up in Crimea and along the eastern front. Putin's threatening rhetoric is seen by astute observers as a basis to instigate conflict to remind Kyiv of the deep resentments Moscow holds towards Ukrainian sovereignty, and to intentionally sober Ukrainian enthusiasm for independence. For Putin, bludgeoning Ukraine also bolstered his domestic propaganda in advance of Russian parliamentary elections in mid-September.

Announcements by NATO's 38 members from the Warsaw Summit in July were encouraging, including Canada's participation as a framework partner to bolster Baltic defence. NATO's decision from the 2014 Wales Summit, to create a NATO rapid reaction force to respond to Article 5 situations (recognizing that an attack on one member is "an attack against them all") is fully apace. This initiative is intended to shrink the time with which NATO forces could respond to an invasion, and create multinational forces that would comprise that response. Yet, apace does not mean that the transformation has been fully realized. Some NATO leaders too readily concede Russia's illegal occupation of Crimea as the new normal, even while Ukrainian soldiers fight heroically to defend Europe's integrity.

Deeply troubling statements by the Kremlin's military planners threatening the possibility of regional nuclear conflicts have been accompanied by massive escalations of Russian military infrastructure on Russia's western borders, including the deployment of Iskander offensive tactical missile systems.

Since 2008, Kremlin officials and state-run media have continuously justified the expansion of Russia's offensive capabilities in the Baltic region by conjuring up myths around NATO's limited deployments in the region, including the small, but effective, NATO air policing mission based in Lithuania.

Russia's invasion of Crimea and its ongoing offensive in eastern Ukraine have prompted regional analysts to no longer ask "if" Putin will fulfil his commitment to reconstructing the Soviet imperium by attacking the Baltics, but "when" he will do so. If Putin could so readily betray the Budapest Memorandum, which provided for the dismantling of the third largest nuclear stockpile in the world in exchange for Ukrainian sovereignty, then what good are Russia's commitments to the sovereignty of Baltic states?

Bolstering NATO's collective deterrence against Russia's aggression in eastern Europe is critical to transatlantic security, which includes Canada. In order to maintain peace and stability in the region, Canada's ambassador to NATO should be asked to take



a leadership role in advocating for key priorities as part of the next iteration of NATO's eastern presence. This includes going much further towards repelling Russia's encroachment into Ukraine.

At the Warsaw Summit in July, it was reported that some 200 Russian tanks, 500 artillery systems, and 42,000 military personnel, of which some 6,500 are uniformed Russian troops, are deployed in Ukraine. According to NATO officials, an estimated 300,000 Russian troops are deployed in Russia's Western Military District which borders Ukraine, Poland, and the Baltic States. The Russian Defence Ministry has announced that three additional divisions will be deployed in the coming weeks. NATO officials also confirm that at least 40,000 Russian troops are currently deployed in Crimea. The Ukrainians require meaningful levels of support to ensure the Kremlin's provocateurs feel NATO's deterrence.

Perhaps the most important support that NATO could offer Ukraine, beyond current efforts to train Ukrainian forces and strengthen their command and control, is for NATO to fearlessly embrace its own Open Door Policy. Canada can lead the effort within NATO to welcome widespread Ukrainian aspirations towards a European future, documented in the International Republican Institute's July Ukraine Poll sponsored by the government of Canada, and not capitulate to Russian aggression. NATO should not be timid about initiating the process for Ukraine to join the alliance, and Canada's ambassador to NATO should be instructed to make every effort towards realizing this strategic longer-term goal.

As part of his strategy to disrupt, split, and eventually dismember NATO, Putin has made it Russia's foreign policy priority to stop any other nations that were once within the former

Soviet sphere from benefiting from NATO's collective defence. By invading and illegally occupying parts of Georgia in 2008 and Ukraine in 2014, Putin has created very intentional complications for the accession of either of those countries into NATO any time in the near future.

Despite these significant roadblocks, the presence of Russian troops in Crimea and Donbass in Ukraine, and Abkhazia and South Ossetia in Georgia, do not preclude NATO from accepting either state as a member. As noted above, when Russian and NATO leaders signed the NATO-Russia Founding Act of 1997, they agreed that both must respect all states' "inherent right to choose the means to ensure their own security, the inviolability of borders and peoples' right of self-determination." While Kremlin propagandists have long attempted to misrepresent the Founding Act as a document that prohibits NATO expansion, it clearly states the opposite.

Like any other nation, Ukraine and Georgia have the right to choose how they protect their borders in order to secure their own sovereignty. If these countries are indeed accepted into NATO, it is unlikely that they will do so with those parts of their countries that Putin's armies have violently hacked away. Doing so would present NATO with significant risks, including the possible retroactive application of Article 5. Yet the right to self-determination of all states in this region, as well as overall peace and stability, hinge on NATO's commitment to its own principles.

Canada has the opportunity to lead within NATO and navigate the alliance towards realistic and successful membership action plans for Ukraine and Georgia without recognizing Russia's illegal annexations of Crimea, Abkhazia, or South Ossetia. While many real hurdles remain, Canada can start a process by which Ukraine and Georgia could eventually be admitted to the alliance.

The longest war

NATO has concluded its only and longest ground campaign in Afghanistan, and the country is 18 months into its transformation decade. Despite the negligence of the international community – brought on by political fatigue – the country's population has maintained a majority consensus towards a reform-and-development program.

Multiparty coalition governments are challenging, at best, for experienced democracies. While the Afghan National Unity government has not collapsed in the two years it has existed, recent reports demonstrate its fragility, with stresses between the president and the chief executive officer spilling into the public domain.

Despite fierce advances by the Taliban, Afghan security forces



Canadian Forces in Iraq in 2015

DND/combatcanada.ca

have held their own and are beginning to take the fight to the enemy. While gradual progress is being made towards developing an anti-corruption regime, election law updates continue to work their way through the Afghan political process.

The biggest impediment to Afghan momentum remains its own neighbour, Pakistan. Pakistan organizes, funds, and deploys terrorists, and permits them safe haven. It has yet to cease its policy of using terror as an instrument of statecraft. From sheltering Osama bin Laden to most recently, Mullah Akhtar Mansour, there are those within the Pakistani military who actively support terror. They should be listed by Canada as sponsors of terrorism, and advanced by Canada for being listed under UN terrorism regulations.

Canada's renewal of training support for the Afghan military, announced at Warsaw, should be encouraged. It accompanies a notable shift from Washington in giving the renewed mandate for US forces a wider remit to confront terrorist elements and support the efforts of the broader Afghan military. During Canada's brave deployment in Kandahar, at the heart of the Afghan insurgency, Canadian soldiers were killed by Pakistani-supported terrorism in Afghanistan. It is high time for Canada to push for NATO to reconsider its partner status for Pakistan. Canada should also demonstrate leadership by asserting a position that focuses on bringing the real actors behind Afghan instability to an accord – the sponsors of terror in Afghanistan – rather than be distracted by the pantomime of the current peace and reconciliation process that negotiates with Pakistan in the abstract.

Cyber-warfare and intelligence

With the advent of new technologies on the battlefield, NATO forces should expect that the Russian military has developed the capability to subvert electricity grids, weapons systems software, and tactical communications equipment, and to pose other cyber-threats through Advanced Persistent Threat (APT) technologies.

Russian state-sponsored hacking through various methods and groups has become a weekly occurrence, and has even threatened to affect the current presidential election in the US with Russia's unprecedented alleged role in hacking, infiltrating, and exploiting American political parties and presidential campaigns. The Kremlin's hacking of activist accounts and its agents' sophisticated electronic trolling of social media and news websites have caused serious confusion among Western policy-makers and the media, and led to manufactured disagreements. Canada should support expanding intelligence and counter-propaganda resources to actively address the Kremlin's destabilizing efforts.


Canada has itself been the target of at least 25 state-sponsored APT malware attacks in recent years and CSIS warns that the impact of future attacks "could be severe and affect any and all areas of critical infrastructure, including those which affect water supply, energy and utilities, manufacturing, Internet communications technology, or even gravely affect institutions such as schools and hospitals."

The threat of cyber-warfare against Canada and NATO will increase exponentially as belligerent state-sponsored and independent cyber-terrorists further advance their technologies and deploy them against Western nations. Canada has the expertise and resources to help take measures that will both defend Canadian and NATO digital infrastructure, and establish counter-measures to neutralize hostile cyber-attackers.

NATO took the first steps at Warsaw towards developing its cyber-threat capacity. NATO must move beyond these nascent discussions towards addressing the full spectrum of cyber-threats to the alliance. One source of inspiration that Canada could leverage is the new Israeli office at NATO's headquarters. The Israel Defense Forces are among the very few who have recently formed a dedicated cyber-defence command, a first and best-in-case example of what NATO must accomplish. Another source of inspiration comes from one of the earliest targets of Russian cyber-warfare, Estonia, which has vast experience and well-developed counter-measures that Canadian cyber-security and intelligence experts can learn from. The Estonian Defense League recently created a volunteer civilian cyber-defence unit as part of its active defence to counter cyber-attacks against the small Baltic state.

Exposed to Iranian cyber-threats, Russia's world-class electronic and cyber-capacity, and those of ISIS, NATO must move beyond debating baseline definitions of cyber-threats and towards establishing a fully operational allied cyber-defence command.

Implications on the Canadian approach to cyber-warfare are significant. Former Canadian national security advisor and CSIS director Richard Fadden recently suggested that Canada may need to possess cyber-warfare capacity. Whether this capacity is used offensively or defensively is a tactical discussion; tanks play both offensive and defensive roles. Canadian leaders should move beyond the notion of whether we require the capacity, and ensure that our capacity meaningfully contributes to reduce threats that Canada and its allies face.



*At Warsaw, NATO also
took initial steps to
co-ordinate intelligence
sharing among its members.*

At Warsaw, NATO also took initial steps to co-ordinate intelligence sharing among its members. Across the alliance, member states have wide-ranging capacities to collect, analyze, and share their intelligence. Unlike the Five Eyes intelligence alliance of which Canada is a part, (with Australia, New Zealand, the UK, and US) NATO member states have varying degrees of confidence with each other, and are inhibited by the fact that intelligence is collected and reported on in different languages.

If transatlantic security is to be able to assess and respond to real threats, NATO needs to establish a baseline for timely and relevant intelligence sharing. Threats range from Russia's infiltration to exploit the European economy and its propaganda efforts to alter domestic public opinion of member states, to the threat manifest in near-daily terror attacks in European states, and by massive migration emanating from the Middle East's conflicts.


Further Canadian efforts should also include expanding on Canadian investments announced at Wales in three NATO Baltic Centres of Excellence on cyber-security, energy security, and strategic communications. These centres merge state-of-the-art facilities for the alliance's strategic and tactical planning, generat-

ing meaningful responses to Russia's omnipresent cyber-threats, energy intimidation, and propaganda. In Warsaw, there was a missed opportunity to expand dramatically on these initiatives.

The southern flank: ISIS, the Mideast, terrorism and migration

Europe's migration crisis and the humanitarian catastrophe flowing from the Middle East may have been avoided with a more robust response at the onset of the Syrian civil war. At the time, Canada was the only NATO partner that joined the US-led Coalition Against ISIS by committing to substantial efforts in surveillance, fighter jets, special forces training personnel, and humanitarian support. Today, this conflict is not contained to the region as the Middle East's issues become Europe's issues, and European states play a greater role in the coalition.

The containment of Syria's civil war has failed, and as the reach of ISIS-affiliated terrorism extends across Europe, it poses even greater risks to Canada. No long-term stability can be expected if Assad remains in power, nor can stability be realized if post-civil war power in the country is consolidated in the military.



For Canada, pursuing our national security interests through all tools at our disposal remains essential.

In this, Canadian leaders face significant pressures. Russia's interventions in Syria have largely strengthened Assad's war against his own people, and, under the guise of combating terror, have diminished moderate US-trained elements inside the country. In response to a downed Russian helicopter in early August, Assad's forces continued to demonstrate their contempt for disbanding their chemical weapons stockpiles, and unleashed this horror on the civilian population from where ISIS launched its attack. In obvious and defiant ways, Assad still continues to hold and use his chemical weapons stockpiles.

The Russian deployment of its S-400 missile defence system poses a real risk to the coalition's efforts in Syria's airspace. Their diplomatic effort to divide NATO by applying pressure on Turkey had some success, until recent ISIS attacks on Istanbul's Ataturk

International Airport. NATO is being tested even further by the Turkish rapprochement with Moscow, its crackdown following the failed coup attempt against Erdogan's government, and the AK Party's own Islamist identity politics in the Muslim world. When Turkish parliamentarians visited Ottawa recently, many decried how Brussels and NATO partners seemed quietly saddened by the coup's failure to oust Erdogan at the expense of Turkish democracy.

While NATO struggles to establish consensus in addressing Syria, it is pre-positioning resources to train any legitimate partner that emerges in Libya to confront ISIS forces that have been gaining a foothold in Libya's eastern region.

For Canada, pursuing our national security interests through all tools at our disposal remains essential. While that means working through NATO, it also requires Canada to work through the Coalition Against ISIS, and with ongoing humanitarian and development responses to which the previous government supplied nearly \$1 billion. Canada should also adopt a strong and clear commitment to confront radical Islam and extremism, through sustained political leadership that adapts to the ongoing crisis as it evolves.

Meaningful engagement versus the 2% rule

NATO requires that all member states spend a minimum of 2 percent of GDP on defence. Currently, only a few member states meet this criterion, among them the US, Estonia, UK, and Poland. Canada spends just half of the prescribed amount.

This has not gone unnoticed. US President Barack Obama's address in Canada's House of Commons proclaimed that "NATO needs more Canada," while the Republican nominee for president has cast aspersions over the American commitment to enforcing Article 5 should member states fail to "pay their fair share."

It is true that NATO members must invest more and invest strategically in building interoperable military forces capable of taking on the world's worst actors. But military spending isn't the only measure of a nation's commitment to collective security.

It should be understood that NATO possesses no materiel; it co-ordinates its members' assets on a voluntary basis. Some volunteer more readily than others. While German troops patrolled relatively stable Mazar-e-Sharif in the Afghan north, Canada took on the heart of the Afghan insurgency in Kandahar. Greek investments in its defence have little to do with assuring interoperability with NATO's security architecture.

While some NATO members that are closer to the vaunted 2 percent mark sat on the sidelines of Russia's invasion of Ukraine and complained about sanctions against Russia, Canada

contributed aircraft to NATO's Baltic Air Policing, deployed training troops in Ukraine, and became an important contributor to NATO efforts in cyber-security, energy security, strategic communications, and strengthening Ukraine's own command-and-control capacity.

Before piety is claimed over spending levels alone, there must be an additional category that ranks the actual value of what NATO members are contributing to the alliance – including contributions of blood and courage in the face of grave and global threats.

While there is little doubt that the larger defence establishment salivates at the prospect of spending commitments devoid of a clear focus, the world's problems will not be resolved just by throwing the bank at them; they require the application of force with surgical precision, and all parts of the alliance must share the perils of that action equally.

Conclusion

If NATO's next steps are to position the alliance to meet the challenges of the modern era, it must modernize and centre itself on the very values of market economies, democracy, and freedom that founded it. And it must be seen to be demonstrably worthwhile by the people of the countries who participate in this historic alliance.

As discussed above, Canada has an opportunity to take a leadership role in NATO by heeding the following recommendations:

- Canada should seize the opportunity to lead at NATO in developing an updated collective defence approach for the Arctic. Such a strategy should include support for the UN Convention on the Law of the Sea (UNCLOS) as the process to resolve Arctic border disputes, and the Arctic Council as a forum for Arctic nations to ensure that the region's economic development is centred upon the people who live there. A Canadian-led Arctic security strategy would establish a clear military deterrence capability against Russia's vast buildup of maritime and air strength in the Arctic. Canada must also focus on developing its own submarine and ice-breaking capacity, and replacing its aging fleet of CF-18s by acquiring aircraft that are interoperable with NATO partners.

- Canada can lead the effort within NATO to welcome widespread Ukrainian aspirations towards a European future, and work toward realistic membership action plans for Ukraine and Georgia without recognizing Russia's illegal annexations of Crimea, Abkhazia, or South Ossetia. While many serious hurdles remain, Canada can start a process by which Ukraine and Georgia could eventually be admitted to the alliance in the longer term.

- Canada should further expand on its investments, announced at Wales, in three NATO Baltic Centres of Excellence

on cyber-security, energy security, and strategic communications. These centres merge state-of-the-art facilities for the alliance's strategic and tactical planning, generating meaningful responses to Russia's omnipresent cyber-threats, energy intimidation, and propaganda.

- NATO must move beyond nascent discussions in Warsaw towards addressing the full spectrum of cyber-threats to the alliance. One source of inspiration is the new Israeli office at NATO's headquarters. The Israel Defense Forces are among the very few who have recently formed a dedicated cyber-defence command, a first and best-in-case example of what NATO must accomplish. Canada should also move towards developing its own cyber-warfare technology.

- At Warsaw, NATO took initial steps to co-ordinate intelligence sharing among its members which it must build on. Across the alliance, member states have wide-ranging capacities to collect, analyze, and share their intelligence. If transatlantic security is to be able to assess and respond to real threats, NATO needs to establish a baseline for timely and relevant intelligence sharing.

- During Canada's brave deployment in Kandahar, at the heart of the Afghan insurgency, Pakistani-supported terrorism killed Canadian soldiers in Afghanistan. It is high time for Canada to push for NATO to reconsider its partner status for Pakistan and list individuals who sponsor terrorism in the Pakistan intelligence and defence communities.

- In the Middle East, pursuing Canada's national security interests through all tools at our disposal remains essential. While that means working through NATO, it also requires Canada to work through the Coalition Against ISIS, and with ongoing humanitarian and development responses.

NATO has an important role in securing and preserving the world order, but as the threats arrayed against Western nations evolve and grow, the alliance must evolve with it. The Warsaw Summit and Canada's contribution to taking NATO's next steps were a positive start. More courageous leadership from this country will be needed in the near future. ✱

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Border security issues with the US are piling up for Canada

Ottawa is rapidly falling behind in an area of critical importance for Canadians' safety — border security with the United States. (Originally published in FrontLine Safety & Security magazine)

Scott Newark

When the new government assumed office a year ago, it was clear that they had new policy priorities and that they were specifically intent on a more inclusive and consultative process for decision-making than their predecessor. Some skeptics, myself included, cautioned that while this was understandable, governing was about making choices and taking action, not just holding media events to celebrate “inclusion” and “outreach”. Put differently, governing is more difficult than campaigning, but that’s what governments are elected to do.

This substantive lack of progress is evident in a number of areas, and Canada-US border security is clearly one that requires specific actions. This is true not only because of the inherent priority of the subject given our geographical situation, but also because of a changing security-focused world and the need to deliver on border security-focused commitments. Additionally,


although it is sometimes taken for granted, Canada-US relations is our highest foreign policy priority and border security issues are a central part of that discussion.

Canada remains a signatory to the Beyond the Border Action Plan (BTB) with the US which, wisely, has very specific commitments that include timelines which are now not being met. Perhaps the most important of these was for the joint assessment of border gaps and vulnerabilities (completed) and a commitment to address them through a joint technology procurement and deployment process.

In 2013 it appeared this might be happening when the federal government announced a \$92 million allocation to the RCMP to deploy sensor technology at the Canada-US border from Quebec/Maine to Oakville as part of its anti-tobacco smuggling strategy. A year later, with no action taken, the RCMP re-announced this

funding as the Border Integrity Technology Enhancement Project (BITEP), yet BITEP remains an acronym and not a deployed action.

The importance of this failure to deploy sensor surveillance technology along the Canada-US border cannot be overstated. Without it, Canada and the US face increased risk of cross-border smuggling of weapons, drugs, tobacco, and people. In today's world, that's an unacceptable risk and what's required is action, not repetitive consultation or more RCMP navel-gazing.



The importance of this failure to deploy sensor surveillance technology along the Canada-US border cannot be overstated.

As part of the BTB agreement, Canada also has committed to implement a border pre-clearance agreement with the US which was introduced in Bill C-23 during Parliament's final week of sitting before the summer break. It appears that the bill will provide the necessary legal authorizations which have been worked out for Canadian and US officers to conduct pre-screenings in each other's countries, including the taking of biometric identification.

Less clear is whether the RCMP has finally created a national security-based face recognition biometric database which can identify security threats who are using altered or counterfeited identification. This database need is not confined to border pre-clearance but, once again, it is unclear what actions, if any, the RCMP have taken to create and deploy this critical part of a modern border security system. In today's world of departing and returning jihadis, not having this detection capability deployed is simply unacceptable. The need for this specialized screening is also implicit in several announced border security initiatives, including the modernized (in C-51) no-fly database, the Advanced Passenger Information System initiative for screening at airports before departure to Canada and the Electronic Travel Authorization for screening of persons from select visa-exempt countries. The federal government needs to scrutinize all these programs to make sure the intended outcomes are actually occurring.

While a joint Canada-US database is the obvious starting point, in today's travel-facilitated world it will be necessary to expand the

database to trusted allies such as the other "Five-Eyes" partners (UK, New Zealand, and Australia) as well as the EU and indeed others.

Parliament also has another bill before it in C-21 which will implement the exit-entry information sharing agreement between Canada and the US that is part of the BTB agreement. The information sharing between Canada and the US on non-citizens entering and exiting each other's countries has been ongoing in a limited fashion and C-21 will expand the application to all persons, including to Canadian and US citizens.

It appears that the information obtained under the exit-entry process will only be used for records reconciliation rather than entry decision-making, which is unfortunate. This application use should be monitored as we will want to avoid the data being used to "detect" the departure of non-citizens who have non-appearance warrants outstanding (reported by the auditor general at the embarrassingly high number of 44,000+) so that the warrants are removed from the system without a concurrent creation of inadmissibility status should such persons try to re-enter Canada.

Both border pre-clearance and exit-entry will require the restoration of CBSA personnel resources, especially in the Intelligence and Operations units, which were cut as a result of the 2010 Deficit Reduction Action Plan (DRAP). Security programs without sufficient personnel don't deliver the results intended and promised.

In addition to this already lengthy list of border security issues, the government appears to be intent on implementing a new border crossing process for the Akwesasne Mohawks near Cornwall. For decades, the Canadian port of entry was on the Akwesasne reserve on Cornwall Island, but that changed when the Mohawk band council (and "Warriors") objected, with protests and threats of violence, to CBSA officers being armed on what they claim as their territory. The port of entry was moved to Cornwall, which created an obvious inconvenience to Island residents returning to Canada from the US, as they had to drive across the Island to report in.

Recently, the Senate committee on Aboriginal affairs produced a special report to the government on the issue citing the historical Jay Treaty from 1794 as justifying the need for a special identification program to permit and facilitate cross-border travel between Canada and the US for Akwesasne Mohawks. Given the undeniable reality of cross-border smuggling in the area, this issue has significant border security ramifications for both countries. Interestingly, the BTB agreement included completing negotiations by December 2012 for creating a pre-clearance facility in Massena, NY which would be a far better solution than what the Senate committee has proposed.

Irrespective of what process is selected, the reality of cross-border smuggling means that deployment of analytical radar surveillance systems to provide full domain awareness must be part of the plan. Also, detecting the target isn't the end game – interdicting it is, which means deployment of sufficient operational resources. That means cross-border operations, finally including CBSA in the Shiprider program, and full enforcement operations between ports of entry.

Canada has made a number of new border-related commitments as a result of its recent summit with the US and Mexico.

Finally, Canada has made a number of new border-related commitments as a result of its recent summit with the US and Mexico. These appropriately include trade and travel enhancements, such as including Mexico in the Trusted Traveller program, expanding the Single Window Initiative to facilitate Mexican imports to Canada, and working together to align commercial clearance practices.

The commitments also include having the three countries create a joint database with practices to detect and interdict “foreign fugitives with known or suspected ties to North America”. This kind of a targeted bad-guy lookout system has long been advocated. Presumably, it will have both criminality and security components, and hopefully be supported by face recognition biometrics because bad guys don't always use their real IDs.

Immediately prior to the summit, Prime Minister Justin Trudeau announced that the Canadian visa requirement on Mexican travellers to Canada, which was imposed in 2007, will be lifted by the end of 2016. While this was presented and reported as a reversal of a mean-spirited action by the previous Harper government, there has apparently been little consideration of why the visa restriction was imposed in the first place. In essence, following 9/11 and a US crackdown on persons illegally in that country, the Ontario government raised the issue of clearly bogus refugee claimants entering Canada at land ports of entry from the US where they made refugee claims which resulted in their

admission and a huge financial burden on the system. In truth, these people were not at risk while in the United States and simply, for a number of reasons, preferred being refugees in Canada. Ontario proposed a “safe third country agreement” where persons making such claims at land ports of entry were returned to either Canada or the US, from where they had arrived and sought entry.

Initially, the then-Liberal federal government resisted this initiative which was part of a larger perimeter security strategy which – full disclosure – I had been involved in drafting. This seemingly changed over time as Ottawa took over negotiations and the Canada-US Safe Third Country Agreement was enacted (with supporting Immigration and Refugee Protection Act regulations) in 2004.

The issue resurfaced in 2007 when, following another US crackdown on persons illegally in the US, southwestern Ontario became flooded with thousands of Mexican refugee claimants who had entered Canada from the US and been allowed to stay despite the Safe Third Country Agreement designed to prevent this. Examination of the agreement's fine print revealed that the federal Department of Justice had created an exception for people who were citizens of countries without a visa requirement, which in 2007 included Mexico. That was the reason the previous government imposed the visa requirement, and it worked, as the flood of bogus Mexican refugee claimants seeking entry to Canada from the US stopped almost immediately and has not recurred.

If the Trudeau government lifts the visa requirement without some modification to the Safe Third Country Agreement and the IRPA regulation, we will be re-opening the door to a problem that was fixed. Rest assured that the financial and systemic performance costs will be enormous, especially if Donald Trump becomes President.

In summary, there are a significant number of border security issues that require substantive choices and action from the government rather than consultation or review. The good news is that since his appointment in November 2015, Public Safety Minister Ralph Goodale has shown a repeated inclination for that kind of pragmatic approach, including wanting to know the facts and holding agency heads to account. That's called leadership and it's needed now on the critically important border security and Canada-US files. ✱

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The Supreme Court changes gears on the justice highway

The debate over how to achieve a speedy trial and who is responsible to do so is very old. But with the Supreme Court's recent decision in Jordan, we see a truly remarkable shift toward leadership by the Court that gives hope that all the actors in the justice system will leave behind our culture of delay.

Geoffrey Cowper

Seemingly impatient with the chronic problem of delays in the criminal justice system, a majority of the Supreme Court in the recent case of *Jordan v. Regina*¹ pronounced a dramatically new framework for the constitutional right to trial within a reasonable time. From a policy perspective the judgment, and the judgment in the *Williamson* case handed down at the same time, has generated a fascinating debate on the role of the courts in overseeing the justice system.

The debate in the judgments is principally about how constitutional rights and remedies should be framed regarding the goals of systemic reform, in this case aimed at achieving timely resolution of criminal charges. The heavy weight given by the majority in the *Jordan* case to standards which require active management of the system represents a significantly different institutional role assumed by the Court.

The decisions have now established two presumptive standards for timely disposition of criminal charges from the laying of the charge until commencement of the trial: 18 months in the provincial courts and 30 months in the superior courts. Under the new standard, cases which take longer than these limits to get to trial, for reasons other than delay caused by the defence, will be presumed to have breached the right to a timely trial under the *Charter of Rights and Freedoms*. Unless that presumption is overcome, the cases will be stayed.

There may be cases concerned with undue delay before and after the timelines the Court established. The Court provided some guidance as to those, but they will doubtless be the subject of further development. The Court also addressed the transition to



the new standard as it relates to the many dated cases already within the system and how those should be addressed. It is understood this will immediately affect thousands of cases across the country which are already past these time limits.

The new approach was agreed on only by a slender majority of five judges, but there was broad agreement on the need to address the problem of delay in the system. The disagreement between the majority and minority was over what was the appropriate solution, with the majority preferring a dramatic reset of the framework for these cases, and the minority preferring an incremental amendment of the principles governing this area since the Court's 1991 judgment in *Morin*.

¹ *Jordan v. Regina* 2016 SCC 27; *R. v. Williamson* 2016 SCC 28

² Translation from Latin by Francis Grigor, Sweet and Maxwell 1917, pp. 90-91.

Background

The constitutional right to trial within a reasonable time was included in the *Charter of Rights and Freedoms* without much comment or fanfare. Despite its quiet introduction, there has been little agreement even in developed criminal law systems on the scope of a right to a timely trial, or remedies for undue delay. The problem of delay in the courts is as old as the court system itself. For example, in 1537 Sir John Fortescue's *Commendation of the Laws of England*² included a debate in which delays in personal and realty proceedings were criticized. He writes that "It is objected that the Laws of England admit of great delays in the course of their proceedings ...". The defence then offered was that some delay was inevitable and useful, that wrongful convictions had been known to flow from overly rapid justice, and that the French courts were far worse – a criticism and defence which have parallels in many debates since. Fortescue records that within a year, a wife was executed for the murder of her husband and a servant later drawn and quartered for the same murder in which he confessed and exonerated the already executed wife. In Canada, the now reversed conviction of Steven Truscott for the murder of Lynne Harper in 1959 was obtained within four months of his arrest.

Prior to the *Charter*, extreme delay was featured only in rare cases in aid of an abuse of process argument³. Otherwise, decisions respecting delay have peppered the landscape of adjournments, stays of proceedings and other managerial decisions which indirectly affect the ability of the Crown to proceed.

Earlier attempts to address the issue included the Supreme Court's 1990 decision in *R. v. Askov*⁴ which it was said caused approximately 25,000 cases to be stayed in Ontario alone. The decisions have explored the intersection of the accused's private rights to a timely trial and broader social goals relating to timeliness.


There is now widespread agreement that both an accused and society may suffer prejudice from undue delay. An accused may suffer an unjustified deprivation of liberty and other restrictions on normal life during the pendency of charges, and the outcome may be affected by the natural erosion of memory, and the loss or degradation of evidence. Long delays can cause the public to view the system as remote and arbitrary, irrelevant to punishment or rehabilitation, and fundamentally unreliable.

³ Rare, it must be said, not because delay was rare, but rather due to the absence of any clear standards. See, *R v. Falls and Nobes* (1976) 26 C.C.C. (2d) 540; *R v. Thorpe* (1973) 11 C.C.C. (2d) 502.

⁴ *R. v. Askov* 1990 2 S.C.R. 1199

⁵ Eg. *R v. Auclair* Quebec judgment affirmed by the SCC: <http://canlii.ca/t/g0trw>; <http://canlii.ca/t/g2r8g>

The problem of delay has no doubt risen in prominence because of the shocks delivered to the system by the recognition of constitutional restraints on the institutional and other delays to which the system is prone. The public is understandably alarmed when it appears criminal charges are stayed arbitrarily because they were not processed in a timely way. This has included a high-profile motorcycle gang conspiracy case in Quebec and similar cases elsewhere.⁵ Apart from the court decisions, there have been numerous reports touching on the chronic nature of delay in the system.



A preoccupation with short-term imperatives could risk undermining the long-term efficacy of the government's plan.

Jordan

The majority of the Court has firmly taken a managerial approach. There is now a hard deadline for the commencement of trial that the participants will have to plan to meet and which will not be easily released or forgiven. The support for this approach includes:

- Rejection of the necessity of assessing timeliness after the fact, rather than establishing a time-related standard for delay;
- Recognition that undue delay is itself a problem and should be presumed to be prejudicial;
- Affirmation of the principle that efficiency and quality of justice concerns are interdependent;
- Criticism of the experience under the former standard as unpredictable, retrospective, subjective, and complex;
- The need to address the culture of delay in the court system by a standard that would provoke real action by other justice participants in relation to charging policy, resources, and logistics generally.

The minority judgment rejected the need or principle of a hard stop and expressed as a starting principle that a time-to-trial standard cannot and should not be defined by numerical ceilings. The dissenting judges fully agreed with the need for solutions, but

were concerned that the majority approach was disconnected from the process of judicially determining the breach of a constitutional right and by expressing a fixed standard, the Court was adopting an arbitrary measure which may prove too long and perhaps feed rather than change the culture of delay.

Old problem/new solutions

Is there anything different about this debate today and the social context of the long period since the 16th century? I believe so. In short, the public expectation of managerial performance by all public systems, the greater transparency and functionality afforded by modern information systems, and openness to innovation are all new features to the context of justice system delay. These modern features all seem to have contributed to this determination to change the gears of the system.

The majority's preference for a constitutional standard that would be prospective and focused on a numerical period reflects a preference for articulations of rights that require systematic and managerial performance. It also represents a different type of common law development, one which draws as much upon collective experience such as system performance as it does on individual cases. The cases have all featured different stories of delay with shifting types of causes and contexts, including prosecutorial indifference and negligence, institutional arrangements, and resourcing decisions, local factors, and a host of case-related delays arising from personal and professional factors. The approach taken in *Jordan* sweeps all that complexity and variability under one presumptive standard. Finally, it represents the Court engaging in the process of changing rights, where action from the system as a whole seemed called for.

This shift is truly remarkable. Judges have always been reluctant to assume institutional perspectives and responsibilities. To the extent that a system of justice exists, judges have always seen their influence as indirect and contingent on decisions by other justice participants, and fundamentally centred on adjudicating cases. The right to a timely trial raised broader system-wide issues with a particular focus and obvious judicial interest, but it will be interesting to see how the attention to shared experience and outcomes affects other constitutional debates.

Gradually, the value of judicial leadership has come to be recognized in a system with several interdependent but independent actors.⁶ The judiciary and the Supreme Court speak with a

moral and political force that is without equal in today's culture. It is perhaps natural that in the face of an ongoing chronic problem affecting their very role, the Supreme Court would use its constitutional role in a different way.

Calling out others

The Court also called on all justice system participants to work to achieve timeliness through structural and procedural changes within their respective remits. It hinted at changes within prosecutorial offices, the defence, and the courts. The Court urged the development of collaborative and efficient methods to achieving justice within a reasonable time.

From a policy perspective, it is obvious that different actors will have preferences for different solutions. One solution attracting widespread support is additional funds for the system participants. Judges frequently refer to the shortage of appointments. In May of this year, the Chief Justice of Alberta took the extraordinary step of saying that cases were being stayed because of the then 46-judge national shortfall in federally appointed judges. Prosecutors often refer to the need for greater funds to manage large, complex cases. Legal aid systems point out the role that underfunding legal aid has played in lengthening delays in the system.

The case for additional funding has often been met with silence on the part of governments, or episodic freshets of additional money to address urgent circumstances. Indeed, the governmental response to the earlier shock of *Askov* was to make additional judicial appointments and increase ministry funding.

There seems, however, very little widespread agreement as to how to assess the proper level of funding. In the result, participants are frequently encouraged to capitalize on opportunities presented by public alarm over particular cases or situations. It is clear that a broader consensus on the proper funding and management of the system may be encouraged by the Court, but is dependent on the decisions of senior levels of government.

A hard stop on lengthy trials as mandated in *Jordan* is not a solution in itself but an incentive to others in the system. The development of new information and management systems coupled with the recognition of both the possibility and necessity of really changing gears and leaving behind our culture of delay, offers real and new hope for enduring solutions to a very old problem. ✱

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⁶ See for example, *Achieving Timeliness Requires Judicial Leadership: A Perspective from the United States*, His Honour Judge Kevin Burke, 2014.

Good intentions won't help access to medicines

A new United Nations report on the accessibility of medicine in the developing world calls for loosening intellectual property regulations to make drugs cheaper. But, write Sean Speer and Richard Owens, this will only make it more difficult to provide drug access to the most impoverished.

Richard Owens and Sean Speer

Just as good intentions line the road to perdition, so too they line the route along which bad public policy develops. Examples are legion of fine intentions disguising policy flaws. When in the 19th century England made it illegal for dogs to work, mindful of conditions for the poor creatures, the result was not leisure for dogs. Rather, the owners, who could not afford to feed idle mouths, killed them.

And so on to the present. A new United Nations report on the accessibility of medicine in the developing world is just such a case study. The report, produced by a high-level panel including Canadian Stephen Lewis, calls for sweeping changes to intellectual property (IP) policy in order to expand the reach of proprietary medicines in the developing world. The panel's stated goal is to reconcile "the incoherencies between international human rights, trade, IP rights and public health objectives."

Increasing access for the world's poor to patented medicines is a laudable objective, but weakening IP laws will undermine this goal. Good intentions meet inadvertent consequences.

French philosopher Frederic Bastiat famously wrote of the "seen" and "unseen" to convey the economic principle of opportunity cost in action. His parable of the broken window showed that people tend to concentrate on the visible and tangible costs resulting from a decision or activity and fail to see potential costs "in the future." Short-termism, no matter how well-intended, can produce negative consequences in the long term if not properly considered and addressed.

The UN's report falls victim to this type of short-termism by focusing on the seen (improving access to cheap drugs) at the expense of the unseen (the negative effect on innovation and new drug development).

Drug accessibility and affordability involve a myriad considerations including, among other things, development assistance

programs, public infrastructure and education, and regulatory policy. Yet curiously, the panel came to focus on IP, as its final report concedes.

It's curious because the same report recognizes that "medical innovation has dramatically improved the lives of millions of people across the globe" and says that incentives are a key driver of innovation. Somehow, though, it seems to misunderstand the key relationship between incentives and innovation. Good intentions can't wish away the role of incentives in the development and distribution of life-saving medicines.


Weakening intellectual property rules, including tougher patentability requirements, controlled pricing, and compulsory licensing, challenges the root of the whole global patent system whereby patent-holders are given monopoly power for a certain period of time. The panel puts into question whether the patent-holder should be allowed that period of time at all, preferring, in its "seen" versus "unseen" fallacy, that everyone have immediate access to cheap drugs without properly considering the impact on incentives and innovation.

While decrying so-called patent thickets and patents on research tools, the panel ignores both the important incentive effects of research tool patents and cogent research that demonstrates that so-called "thickets" actually have little impact on research. Here the panel seems blind to the dynamics and impact of the innovation economy. It is blind to these dynamics and impacts in the less-developed world, too, by failing to account for the risks to foreign investment, technology transfer, and ultimately, drug accessibility and affordability that weakening patent protection there will engender.

Firms dedicate financial resources to early-stage research and development on the understanding that, if they prove fruitful, the firm will be able to earn a return on investment due to the

protections inherent in the patent system. Far from antithetical to IP rules, it is inherent that patent-holders may earn outsize returns with the promise of a bonanza (while these are rare) being part of the prize system that drives innovation. Weakening the IP rules would change these incentives and risk discouraging new private investment and in turn life-saving medical innovations.

Some argue that drug companies earn too much money from their discoveries, a mistaken opinion based on the fact that drug companies top some lists of profitable entities. But theirs is a risky and expensive business and one ought to expect that just as they are at the top, so too are they at the bottom of the lists, as a proper risk distribution would inevitably predict. Put differently: we have a profit-and-loss system with profit based on patents rewarding smart risk-taking and loss punishing wrong-headed risks — risks better undertaken by private entrepreneurs than cash-strapped government bureaucracies.



Weakening the IP rules would change these incentives and risk discouraging new private investment and in turn life-saving medical innovations.

Another point the panel raises is that private drug companies benefit from public research investment. This is probably true to some degree, but the panel doesn't quantify it. It is also true to say that public institutions benefit from drug company financing, and that drug companies pay royalties to public patent-holders. And it is impossible to say to what extent public research in general makes a significant difference to the huge costs of producing and distributing drugs. Yet the panel would have these accounted for, in several categories, on a per-drug basis, as though there were a one-to-one substitution for private costs.

It is ironic that the panel trades off private activity for public and proposes massive new public investment in medical innovation to make up for any "unmet need." It is counterproductive to disrupt the one aspect of drug accessibility and affordability that is producing results, in order to fund a costlier and less

effective response. That isn't to say that there's no role for public or charitable intervention to tackle tropical diseases and bacterial infections, which the panel reports receive too little attention. In fact, these interventions do take place, and on a large scale. But they operate as they should in parallel to, and not instead of, the commercial economy.

In addition to limiting patent protection, the panel contemplates levies on pharmaceutical companies, accountability to meet public accessibility objectives, and disclosure of R&D costs, with a view to reducing prices. These measures will not reduce drug prices — they will increase them. Consumers bear corporate costs in the form of prices of goods. When costs increase, prices invariably go up, not down. The alternative is called insolvency. Subsidizing drug access for the world's poor is an idea to consider, subject first to other considerations such as delivery capacity and the extant local price. But to choose, out of all actors, the industry that invents these life-saving treatments to provide such subsidies is worse than random, it is perverse.

The panel overstates the impact of patents on accessibility. The reality is that drugs often are not patented in less-developed countries at all; it is not worthwhile for the companies to pursue such patents because the market is so small. Drug companies do have programs that make their patented drugs available to the poor domestically and internationally. And prices are normally lower in poorer jurisdictions; discriminatory pricing of IP-protected goods for different markets just makes sense.

But prices cannot be reduced to zero if corporations are to fulfil their fiduciary responsibilities to shareholders, because of the need to recoup enormous costs of research and development, manufacturing, regulatory compliance, and distribution, as well as the extensive potential liabilities of the market for pharmaceuticals.

Re-thinking humanitarian assistance programs to focus on life-saving drugs is one option to achieve the UN's objectives. Bulk purchasing and pooling drug purchases to enhance economies-of-scale is another.

To weaken IP laws and attack drug companies may generate media headlines and emotive responses, but will ultimately hurt more than help. Governments would therefore be wise to eschew the panel's recommendations and instead focus on the slow yet steady progress to a real solution that the existing drug economy provides.

We can't let good intentions and bad thinking lead us to bad public policy. Policy must account for the seen and unseen. ✱

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“Social licence”: the rule of law transgressed

While it has become popular with politicians, the concept of requiring ‘social licence’ for resource projects is entirely at odds with the rule of law.

Paul Cassidy, Monika Sawicka and Leah Whitworth

Enshrined in the preamble of the *Charter*, the rule of law is a cornerstone of the Canadian legal system.¹ The rule of law is the constitutional principle that all citizens, including government officials, are governed by the same laws.² The principle mandates the existence of general legal rules that are created without an outlook to a specific case, and that these rules are applied without influence from personal interest or individual conceptions of justice.³ In the context of government decision-making, the rule of law mandates government action to be based in legal authority and prohibits the upholding of an irrational decision.⁴ Decisions are not irrational when they are reasonable, and reasonableness is demonstrated through defensibility in terms of fact and law.⁵

As a means of bringing credibility to environmental assessments, the current Federal Government has made representations signalling their intent to reform the *Canadian Environmental Assessment Act* (the “CEAA, 2012”) to include a mandatory “social licence” requirement.⁶ The term “social licence” refers to community acceptance and approval of major development projects, and was used throughout the 2015 federal Liberal Party’s campaign platform.⁷ As far back as a speech to the Calgary Petroleum Club in October of 2013, Prime Minister Trudeau notably stated, “[s]ocial license is more important than ever... Governments may be able to issue permits, but only communities can grant permission.”⁸

While public opinion has a place in environmental assessment, it should not serve as the stamp of approval, condition precedent, or a superseding consideration for a minister’s decision under the law. Procedurally, “social licences” are plagued by personal interest, inconsistency, and unpredictability. Thus, amending the *CEAA, 2012* to include a “social licence” requirement would be a violation of the rule of law.

Ministers must consider all factors relevant to a discretionary decision

A requirement that project proponents obtain a “social licence” before receiving government approval for a project is a violation of the rule of law, as it allows one factor to be determinative in the ministerial decision-making process. When one factor is determinative, other relevant factors that must be considered are effectively overridden and ignored. If a minister has failed to consider a relevant factor, upon judicial review the court will deem the decision to be “unreasonable”. As the rule of law does not permit the upholding of an irrational decision, the decision will be quashed and sent back to the minister for reconsideration.⁹

In *Chamberlain*, a school board passed a resolution on the sole basis of parental opinion to ban educational materials depicting same-sex couples. Based on the school board’s failure to consider factors relevant to the decision, the Supreme Court of

¹ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being schedule B to the Canada Act, 1982 (UK), 1982, c 11.

² *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 71, 161 DLR (4th) 385 [Secession Reference].

³ Bruce Pardy, “Towards an Environmental Rule of Law”, online: (2014) 17 Asia Pac. J. Envtl. L. 163 at 164.

⁴ *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 42, 1 SCR 190 [Dunsmuir].

⁵ *Ibid* at para 47.

⁶ *Canadian Environmental Assessment Act*, SC 2012, c 19.

⁷ John Colton et al, “Energy Projects, Social Licence, Public Acceptance and Regulatory Systems in Canada: A White Paper” (2016) 9:20 SPP Research Papers at 9-23.

⁸ Liberal Party of Canada, “Liberal Party Platform: Environmental Assessments” (2016) online: Liberal Party of Canada <<https://www.liberal.ca/realchange/environmental-assessments/>>; Speech of Prime Minister Justin

Canada held the decision to be unreasonable and sent the matter back for reconsideration. Writing for the majority, McLachlin CJC noted that while parent views are important, they cannot override considerations of diversity and tolerance as mandated by the statutory context.¹⁰

In the context of environmental assessment, there are factors in addition to public opinion that ministers must consider in deciding whether to approve a development project. Both the text and purpose of the *CEAA, 2012* mandate ministers to consider assessment reports and accompanying recommendations.¹¹ While the Minister retains discretion to allocate weight given to each factor in the balancing process, they cannot ignore environmental (scientific), economic, and additional social concerns in their entirety. If it were demonstrated that a project would bring economic benefit and pose low environmental risk, but was disallowed because the public withheld a “social licence”, the minister’s ultimate decision to deny approval would be unreasonable. Subsequently, it would be contrary to the rule of law for the courts to uphold such a decision.

Consideration of public interest is not a public veto

Due to the defining characteristics of public opinion, amending the *CEAA, 2012* to allow the presence of a “social licence” to be determinative or unduly considered in the decision-making process would be a strong affront to the rule of law. Public opinion is a realm historically dominated by the opposition¹² and where only the loudest voices count. In the context of development, public opinion is riddled with personal interest, framed by individualized conceptions of justice, and influenced by the “Not-In-My-Own-Backyard syndrome (“NIMBYism”).¹³ As the rule of law forbids these personal

*Public opinion is a realm
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interests and considerations to wade into the application of the law, it would be inconsistent with this constitutional principle for a “social licence” to be determinative of a project’s approval.

Consideration of public opinion at various stages of the environmental assessment process is warranted and prescribed by the *CEAA, 2012*.¹⁴ However, the Canadian courts have noted the purpose of public opinion is to serve as a mechanism for bringing government attention to factors that will ultimately be considered by democratically elected officials.¹⁵ This also applies to the consideration of public interest, as the Courts have noted public interest is not based exclusively on public desire, opinions, or enthusiasm.¹⁶ Instead, the term has been interpreted as including the broad economic and social considerations relevant to the statutory context.¹⁷ The only context where public opinion should be determinative is a referendum or plebiscite, as there are procedural safeguards that accompany both of these voting mechanisms to ensure they are carried out in line with Canadian democratic values.

Cost of procedural remedies outweigh notional benefit

If safeguards were implemented to bring the “social licence” procedure into alignment with the rule of law and democracy, the cost and inefficiency would significantly outweigh any claimed notional benefit. The method used by communities to withhold a “social licence” often comes in the form of public protest and disruptive behaviour.¹⁸ As inferred by one commentator, the result is an application of the law by a potentially unbridled opposition: nothing short of “mob rule”.¹⁹ Only the safeguards utilized in a referendum or plebiscite would suffice as a remedy to ensure every person in a defined population is entitled to equal input. However, both the cost and procedural inefficiencies associated with this process are vast.

Trudeau to the Calgary Petroleum Club, (30 October 2013) “Liberal Party Canada Leader Justin Trudeau’s Speech to the Calgary Petroleum Club” <<https://www.liberal.ca/liberal-party-canada-leader-justin-trudeaus-speech-calgary-petroleum-club/>>.

⁹ *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at para 73, 174 DLR (4th) 193 [Baker].

¹⁰ *Chamberlain v Surrey School District*, 2002 SCC 86 at para 33, 4 SCR 710 [Chamberlain].

¹¹ Act, *supra* note 6 at s 4, 10(a)(iv), 19, 27(1).

¹² White, R. “Why NIMBYs speak louder than YIMBYs” *Everyday Tourist*, May 2016

¹³ Colton, *supra* note 7 at 17, 28 (NIMBYism refers to citizens supporting development projects as long as they are not near their own residence, and is particularly problematic for renewable energy, such as wind farms and hydro-electric dams, as these initiatives involve elevated noise and altered scenery).

¹⁴ Comparison of Provincial environmental assessment acts (BC, Yukon, Ontario).

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Ottawa's innovation agenda requires a robust broadband strategy

Government policy will play a key role in determining whether we remain a world leader with respect to broadband infrastructure or slide down the rankings and in turn put the country's broader innovation goals at risk.

Paul Beaudry and Sean Speer

The Olympics are one of those rare instances when Canadian humbleness and civility are replaced with a competitive spirit and drive to be a world leader. We want to win and we are not self-conscious about it.

The lasting images of the Rio Olympics will invariably be Penny Oleksiak capturing the gold medal in the 100-metre freestyle, Erica Wiebe's golden performance in freestyle wrestling and Andre De Grasse pushing Usain Bolt in the 100-metre and 200-metre sprints. It was in these moments that Canadians exhibited their determination to be number one in the world.

This nascent national ambition is not limited to athletics. Canadians take tremendous pride in our global achievements in various fields – from music to philanthropy and science to filmmaking. Canadians are competitive and confident that we can compete and win against the world.

Prime Minister Justin Trudeau and his government have set out the goal of establishing Canada as a world leader in innovation. He famously told the World Economic Forum that he wanted the country to be known for its “resourcefulness”. He has since promoted Canadian leadership in quantum physics and recently tested out a gyroscope. Innovation has become the byword for the Trudeau government's economic agenda.

But becoming a global leader in innovation will require more than determination. It needs world-leading broadband infrastructure to enable and sustain it. Indeed, the increasing demand for bandwidth, combined with the growing number of devices connected to the Internet, implies an immense data throughput on broadband networks. Cisco estimates that global mobile data traffic grew by a staggering 74 percent in 2015 alone, and predicts an eightfold increase by 2020.

The good news is that Canada starts from a position of relative strength with some of the world's best digital networks. Government policy will play a key role in determin-

ing whether we remain a world leader with respect to broadband infrastructure or slide down the rankings and in turn put the country's broader innovation goals at risk.

Broadband infrastructure has become a driver of innovation, digital adoption, and economic growth. Everything from consumer products to high-tech business processes to medical research relies upon a digital foundation. It is a crucial enabling technology that is akin to the training facilities and equipment that athletes use to prepare for Olympic competition. No broadband, no innovation. No proper training facilities or equipment, no Olympic gold medals.

Presently, access to high-quality broadband technology is a competitive advantage for Canada.

Presently, access to high-quality broadband technology is a competitive advantage for Canada. A recent CRTC report finds that 99 percent of Canadians have access to high-speed Internet, and that 96 percent of Canadians can subscribe to download speeds of 5 Mbps.

This extensive coverage is largely a product of substantial private investment in Canada's digital infrastructure. Total Canadian investment in wireless networks has consistently exceeded \$2 billion per year for the past several years and has been among the highest in the OECD on a per-subscriber basis. Wireless

¹ See: <http://www.macdonaldlaurier.ca/steering-canada-clear-of-europes-disastrous-broadband-strategy-mli-study-by-andrea-renda/>.

(Table 1)

Capital spending in the wireless sector, 2007-2013

COUNTRIES	CAPTIAL SPENDING (percentage change)
European Union	-3%
Canada	+21%
United States	+74%

infrastructure investment has totalled more than \$55 billion since 1987. Capital investment in networks between 2007 and 2013 was lower than in the United States but significantly more than in the European Union (see Table 1). The result is that Canada is now home to the second most high-speed LTE networks in the world.

But we cannot take this type of sustained investment for granted. It is not the natural order of things. It depends on a number of factors, including government policy. A new MLI study shows how Europe's experience with state-imposed mandates and top-down regulations has contributed to underinvestment, and poor broadband deployment and penetration.¹ It is a clarion call to the Trudeau government as it seeks to position Canada as a world leader with regards to innovation.

European broadband policy has been marked by what policy experts call "access-based competition." What this means is that regulators mandate that incumbent firms must grant access to their broadband networks to upstart competitors at regulated rates. The assumption was that high and non-transitory barriers to entry produced a "market failure" that necessitated this type of state intervention in the name of competition. Mandated access to incumbent networks would lower the barrier to entry and create the conditions for new competitors to grow and eventually invest in their own broadband infrastructure. The so-called "ladder of investment" theory would guide European policy and hopefully create the conditions for more sustainable competition.

The only problem is that the theory proved a failure in practice. As European scholar Andrea Renda writes in the new MLI study: "... regulators have often been unable to create a regulatory environment that encourages substantial investment

by new entrants. The large empirical literature that discusses the economic effects of telecommunications access regulation strongly supports the hypothesis that access regulation does not promote, and indeed can hamper, telecommunications investment and broadband penetration."

The European experience finds that new entrants never climbed the last rung of the ladder to invest in their own networks, preferring to rely on access to incumbent networks and below-market rates. In turn, incumbents responded by cutting back on their own broadband spending. Europeans got marginally lower consumer prices, but at the cost of significantly less investment in broadband. Considering the importance of broadband to the broader economy, this is not a good trade-off.

The facts are well substantiated. Europe performs poorly relative to its peers on several measures related to broadband investment and deployment. Here are some highlights:

- Europe's level of telecommunications investment has consistently underperformed that of the United States even though the latter has lower population density. As an example, Europe's per-household investment was less than half (US\$244) of the US level (US\$562) in 2013;
- EU incumbent firms invested between 10 percent and 40 percent less than equivalent US companies between 2006 and 2012;
- Fibre-to-the-premise coverage in Europe is approximately half the US coverage and overall Next Generation Access coverage is 54 percent in Europe compared to 82 percent in the United States.

It is no surprise then that European policy-makers are now trying to reverse these negative trends, including by liberalizing access-based regulations in certain cases and spending public resources to build broadband infrastructure. It is a powerful admission of the failure of the "ladder of investment" theory and the negative consequences it brought about in the form of less broadband investment and penetration.

What does it all mean for Canada and the Trudeau government's innovation agenda?

It is a reminder that an overemphasis on competition – particularly artificial competition produced by government diktats – as an end in itself can carry real costs that can eventually come to undermine broader economic goals with regards to innovation, digital adoption, and entrepreneurship.

The lesson comes at a critical juncture for broadband policy in Canada. Recent years have witnessed a policy shift in Europe's

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Why we should worry about Trump-Clinton trade bashing

Americans notoriously pay little attention to Canada. But if they listen to the rhetoric of their leaders about NAFTA and the TPP, both of our nations will suffer.

Naomi Lakritz

A growing number of Americans, blissfully unaware that Canada has immigration laws, insist that they will pack up and move here if Donald Trump is elected president. A friend who works as a tour guide in Calgary met one of these Americans recently on his bus. When she told him that she is a Republican but would flee a Trump presidency, he suggested that she wouldn't like it here because carrying guns is not permitted. Astonished at learning this, she demanded to know how Canadians protect themselves. "From what?" my friend asked.

Canadians have always fretted that the US pays us too little attention unless Rob Ford is in the news, but the protectionist climate created by the current election is really something to worry about, for us and our American friends. We had best hope that Americans stop making travel plans and start to consider the extraordinary benefits that free trade has brought our two nations.

During the first candidates' debate, Donald Trump, sniffing and snuffling as though frigid Canadian air was making his nose run, called the North American Free Trade Agreement the "worst" trade deal "ever." He wants to scrap it. Hillary Clinton, who supported NAFTA when her husband's administration brought it in, now says it needs to be "reassessed" and adjusted, whatever that means. Nor will she sign the Trans-Pacific Partnership, even though she supported it when she was a senator. I wonder if either of them has bothered to look at the statistics.

According to the Office of the United States Trade Representative, US exports of goods to Canada last year amounted to \$280 billion, up 179 percent over the pre-NAFTA era of 1993. That figure included \$24 billion worth of agricultural products, with Canada being "our largest agricultural export market," says the Trade Representative's Office. And at \$57.3 billion last year, US exports of services to Canada were up 237 percent from 1993.

In 2015, the US imported \$295 billion worth of goods from Canada. That included \$70 billion in mineral fuels, \$55 billion worth



of vehicles, and \$20 billion worth of machinery. Agricultural imports totalled \$22 billion last year, with Canada being the US's largest supplier of snack foods, red meat, and fruits and vegetables. These figures represent a 165 percent increase from pre-NAFTA 1993.

Could somebody please explain what is so terrible about statistics like these? Mr. Trump? Mrs. Clinton?

Trump, in his typical style of patriotic pit bull, went on to accuse other countries of stealing American jobs as a result of free trade. And despite her more measured responses, it was clear that Clinton, too, had swallowed her protectionist pills with her coffee that morning.

However, the truth is that other countries did not steal American jobs. American companies chose to outsource their jobs and move their operations elsewhere, often to Third World countries, primarily because of cheaper labour costs. Canadian companies did the same. NAFTA is not responsible for your bank's call centre relocating to Bangalore. With or without NAFTA,

Stock

those jobs would have migrated to China and other countries, says Mauro Guillen, a political economist at the Wharton School, in a 2014 article entitled *NAFTA 20 Years Later: Do the Benefits Outweigh the Costs?*

“We knew that low-wage manufacturing was going to move to Mexico from Canada and the US. And of course, part of this also moved to China and other locations ...” Guillen says. “Perhaps NAFTA accelerated the process, but it did not make a huge difference. At the same time, a lot of jobs were created in the US that wouldn’t be there without the Mexico trade ... Many of the products made in Mexico are designed in the United States. So there are a lot of jobs created here.”

He adds that in 2013, the US’s trade deficit with Mexico was \$54 billion, “but with China, it was \$318 billion, so the [US] deficit is five times bigger with China than with Mexico. In other

words, you would calculate, maybe for every job we have lost in the US to Mexico, five [jobs] were lost to China.”

Canadian MP Wayne Easter, chair of the House of Commons finance committee, estimates that the loss of NAFTA would “impact thousands and thousands of jobs” in Canada and the US because of the supply chains NAFTA has created.

Trump’s and Clinton’s free-trade skepticism could have a receptive audience. The results of a Gallup poll last April revealed that 43 per cent of Americans surveyed, some of whom may hold a few of those “thousands and thousands of jobs”, said they didn’t know enough to offer an opinion on NAFTA and the TPP.

The truth hurts. But ignorance has far more painful consequences. ✱

Naomi Lakritz is a Calgary journalist

Broadband investment (Beaudry and Speer)

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direction. The so-called “fourth wireless player” policy was rooted in a similar vision of access-based competition and mandatory network sharing. A change of government has done little to reverse this trend. The July 2015 CRTC decision, mandating telcos to share their highest-speed broadband networks with small ISPs, and the federal cabinet’s affirmation of this ruling, has Canada heading down the European path at the precise moment that Europe is coming to terms with its own challenges.

While we have not witnessed the same negative effects as Europe, there is similarly little evidence that most new entrants have climbed the “ladder of investment” and made substantial investments in their own networks. Instead, many of the firms that benefited from preferential spectrum access (one estimate is the 2007 auction rules amounted to a \$617 million subsidy to new entrants) have since sold out, extracting significant value for investors at taxpayers’ expense. It highlights the limits of government intervention, the potential for inadvertent consequences, and the unsustainability of artificial competition.

Canada has managed to achieve high-quality networks with limited public investment in part due to a regulatory policy framework that has generally sought to strike a balance between supporting competition and promoting investment. We have the makings of the digital foundation for today’s and tomorrow’s innovation mostly paid for by private capital.

Why, then, would we continue to move in Europe’s direction

when the European Commission has essentially admitted failure? It is time to chart a different course that creates the conditions for ongoing private investment in Canada’s broadband networks.

This could include:

- Lifting foreign investment restrictions to enhance dynamic competition and create opportunities for Canadian firms to become more integrated in a contiguous North American telecommunications market;
- Experimenting with more ambitious build-out requirements, particularly in rural communities, as a condition of spectrum licences;
- New rules around spectrum trading and leasing on the secondary market to create the potential for new market arrangements and partnerships including with Indigenous service providers;
- A “dig once” policy whereby public infrastructure construction could be leveraged to lay new wires, cable, or fibre particularly in rural and under-served communities;
- Expediting consultations and local approvals for telecommunications construction including broadband investment and new towers.

The Trudeau government’s ambitious innovation goals appeal to Canadians’ determination to be world leaders. We have the ingenuity and tenacity to achieve them. We just need world-class broadband infrastructure to support our efforts. ✱

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Obama and the Idealism of Foreign Policy (Hartt)

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Of course, fear of competition for jobs, and the costs of looking after the homeless and displaced of the Middle East, were not the only things voters in the UK had in mind when they elected to leave the European Union in the recent referendum. They certainly resented the arrogance of the unelected commissioners, the sovereignty ceded to the bureaucrats in Brussels, and the vulnerability that integration brings as the price of opportunity, in addition to other fears, grievances, and misgivings. But if the Syrian refugee crisis had even a small part to play in the decision of June 23, and the uncertainty brought about by institutional discontinuity, then Obama must accept his share of the blame.

All in all, it is clear that a super power that does not use its power loses its power. America has paid a great price in its role as the world's policeman. Since the end of the First World War,

it has been a force for good in a world replete with evil. Other powers have arisen to challenge the pre-eminence of the United States in world affairs and have, thankfully, been overcome in their ambitions. Nazi Germany, Imperial Japan, and the Soviet Union come to mind. But fatigue about foreign involvements, however justifiable, must not lead to an abandonment of the very principles Obama went to Cairo to extol. Unfortunately, those values are not, as yet, universal, and must be defended with more than words. ✱

Stanley Herbert Hartt, OC, QC is a lawyer, lecturer, businessman, and civil servant. He currently serves as counsel at Norton Rose Fulbright Canada. Previously Mr. Hartt was chairman of Macquarie Capital Markets Canada Ltd. Before this he practised law as a partner for 20 years at a leading Canadian business law firm and was chairman of Citigroup Global Markets Canada and its predecessor Salomon Smith Barney Canada. Mr. Hartt also served as chairman, president, and CEO of Campeau Corporation, deputy minister at the Department of Finance and, in the late 1980s, as chief of staff in the Office of the Prime Minister.

Women in the Middle East and North Africa (Raza)

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Democratic League for Women's Rights, a Moroccan NGO that has been fighting for women's rights for 40 years. She helped build a network of women activists, *Femmes Solidaires* (Women in Solidarity), involving hundreds of local associations across the country, to combat gender-based violence and to change policies.

And policies in the West as well affect the lives of women all over the world. The rise in honour-based violence led Canada to implement Bill S-7 and to declare that this country would not support "barbaric practices".

Bill S-7, the Zero Tolerance for Barbaric Cultural Practices Act, raised the national minimum marriage age to 16 and added forced marriage to the Criminal Code. It also toughened the laws around polygamy, with an eye to preventing immigration by those who engage in the practice and making it easier to deport polygamists. It strengthened the rules around honour killings, so that the defence of provocation can no longer be used in court.

Initially, there was resistance to the use of the word "barbaric" but some women's groups testified that cultural practices such as female genital mutilation and honour killings are barbaric indeed.

Similarly, many of the atrocities committed against women in the Middle East have been declared crimes in the Western world, which puts pressure on Middle Eastern governments also to implement changes.

For many years, organizations like Muslims Facing Tomorrow have been telling Western governments that they need to insist on more accountability from Middle Eastern theocrats and dictators – especially in terms of women's rights. If Western governments give financial aid to any of these countries, that aid should be subject to audit, with the money spent on women's education and to ensure their human rights are respected. At the same time, the Organization of Islamic Cooperation (OIC), which holds a large number of seats on the United Nations Human Rights Council, should be pressured to ensure that its UNHRC memberships are subject to equal rights being given to the women in those countries.

The Arab Spring was supposed to mean hope for a better life for women in the Middle East and North Africa. They will not "bend down or go back". But they need our help. ✱

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Conclusion

scrutinize government decision-making, and, when necessary, apply to an impartial court for judicial review. Credibility is not fostered through a “social licence”. Rather, a “social licence” endorses unpredictability, partiality, and a violation of the rule of law. ❖

Leah Whitworth is a law student. The views above are expressed solely on the author's own behalf. A condensed version of this article appeared earlier in the Lawyers Weekly.

²⁰ *Secession Reference*, *supra* note 2 at para 65.



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