



# INSIDE POLICY

THE MAGAZINE OF THE MACDONALD-LAURIER INSTITUTE

DECEMBER 2014

## SUPREME COURT OF CANADA 2014 Policy Maker of the Year



*Benjamin Perrin analyses the Court's most significant rulings of the past 12 months  
Stanley Hartt examines the concept of 'judge-made law': is it fact or fiction?*

*Also in this issue: Christian Leuprecht calls for a national discussion on how we can detain terrorist threats while still protecting civil liberties; Dwight Newman and Brian Lee Crowley on social licence, what it means, its limitations and its implications for resource development; Dwight Newman on whether governments should use legal tools to support development when facing continuing protests; and Brian Lee Crowley calls on middle powers to do more to defend liberal democratic values as the US takes a diminished role on the world stage.*



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# Editor's message



In this year-end issue of *Inside Policy*, as a tribute to the Supreme Court of Canada – the Macdonald-Laurier Institute's Policy Maker of the Year for 2014 – the focus is on law and justice. (Note: previous MLI Policy Makers of the Year were John Baird (2013) and Mark Carney (2012).)

Our feature piece is by UBC law professor and MLI senior fellow Ben Perrin, who suggests one would be hard-pressed to find another actor in Canada who has had a greater impact on such a wide range of issues than the

Court has in the last year. In a recent study, Perrin examined ten of the Court's most significant rulings of the past year and found a series of landmark legal decisions that may prove to be of enduring significance. The areas of law and policy that were implicated include: the appointment of justices to the court from Quebec; aboriginal title and treaty rights; Internet privacy; prostitution; security certificates and the protection of intelligence services informants; undercover police operations; and sentencing.

Interestingly, Perrin found evidence that, even though six (now seven) of the nine justices have been appointed by Prime Minister Stephen Harper, this "stacking" of the Court has had no discernible effect on improving the government's prospects for favourable rulings. The federal government or its proxies had only one clear "win" in ten decisions. What's more, eight of the ten cases were decided by consensus, revealing "a remarkably united institution with consensus decisions on these significant cases being the norm."

In a related commentary, Stanley Hartt examines some of the thorny questions around the issue of "judge-made law". Does such a phenomenon exist or is it essentially the handy default construct of those who rail against rulings with which they disagree? Would less ambiguity in legislative texts limit the ability of judges to interpret laws according to their experiences and assessments of evolving societal values? Is it possible legislators have sometimes intentionally left some ambiguity, in order to avoid taking clear positions on contentious issues such as prostitution and abortion?

Also in this issue, national security expert Christian Leuprecht writes that recent terror attacks in Canada should provoke a national discussion on how we can detain terrorist threats while still protecting civil liberties.

In separate commentaries, authors Dwight Newman and Brian Lee Crowley trace the rise of the term social licence and argue that protesters are exploiting its original purpose to block development of any kind. Newman also examines whether governments will show enough political courage to use legal tools to support development or allow dissident groups to prevail.

In a text based on a recent speech, Brian Lee Crowley examines the common bonds and shared values of liberal democracies and calls for a staunch defence of these values by like-minded countries as the US takes a diminished role on the world stage.

*James Anderson, Managing Editor*

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# “Judge-made law”: judicial excess or sore losers’ sour grapes?

*Stanley Hartt examines some of the thorny questions around the issue of “judge-made law”. Does such a thing exist or is it essentially the handy default construct of those who rail against rulings with which they disagree? Would less ambiguity in legislative texts limit the ability of judges to interpret according to their experiences and assessments of evolving societal values? Is it possible legislators sometimes intentionally leave some ambiguity, in order to avoid taking clear positions on contentious issues?*

**Stanley Hartt**

Strict construction of legislative texts by members of the judiciary has been a watchword of the right-wing of American politics for a long time. If changes to the law as written are needed, the argument goes, then it is the job of the legislative branch of government, not the courts, to design and implement those changes.

Canada has had its fair share of commentary on the subject too, less strident perhaps in the terms in which it is expressed, but present and earnestly advanced nonetheless. But do we actually have a problem with judges who overstep the limits of their authority by deciding what the law ought to have been instead of what it is?

And if it is true that some learned titans of the bench do occasionally see constitutions and statutes as evolving documents, intended to be adapted to situations not contemplated at the time of their enactment, is this an attribute more common in left-leaning magistrates than in their conservative colleagues?

The famous American jurist, Oliver Wendell Holmes Jr., referred to the intellectual, philosophical and social baggage with which all human beings approach issues and decisions as the “inarticulate major premise”. It is undoubtedly the case that background, experience, outlook and education form part of the individual’s make-up which will invariably, if unconsciously, play a significant part when a jurist is engaged in what appears to be “reasoning”. Many lawyers believe that a judge is perfectly capable of first deciding what the proper outcome of a case should be and only then developing the rationale to support that result. That, after all, is how lawyers are trained to present briefs and arguments in our adversarial system – make the best case for your client given what you have to work with.

Let’s apply the foregoing to the Supreme Court’s decision in Reference re Supreme Court Act, ss. 5 and 6, 2014. That was the case in which the Court, by a significant majority, found that The

Honourable Marc Nadon was ineligible to be appointed to Canada’s highest tribunal because he was not, at the time of the appointment, either a Judge of the Court of Appeal or the Superior Court of the Province of Quebec or one of the “advocates of that Province”.

Justice Nadon’s ineligibility was attached to the fact that, as a supernumerary judge of the Federal Court of Appeal and not a current member of the Barreau du Québec, he did not meet the test that a careful scan of the words of Section 6 of the Supreme Court Act would appear to impose. The Court acknowledged that he *had* been a member of his Province’s Bar for more than ten years (the criterion stipulated in Section 5 for appointments generally), but concluded that for Quebec, unlike any other province, current membership in the Bar or the named courts was required by the wording of Section 6.

Section 6 is where the guarantee that no fewer than three of the nine Justices must be from Quebec is found. The majority held that it required *current* membership in the Bar, or a *current* seat on the Court of Appeal or Superior Court bench, presumably to ensure a more up-to-date connection with the civil law regime of that Province.

Justice Nadon was appointed to the Federal Court bench because of his expertise in maritime law, an important discipline though not in every-day demand on the Supreme Court. But who was he named to replace? The answer is a pre-eminent expert in criminal law, the Honourable Mr. Justice Morris Fish. While criminal law matters do indeed frequently come before the Supreme Court, and expertise in that field is vital to have in the mix on that bench, it would be fair to say that Fish J’s qualifications, much like Nadon J’s, were rooted in an area of law other than Quebec’s Civil Code. While Mr. Justice Fish did sit on Quebec’s Court of Appeal for 14 years before his elevation to the top court, the accumulated experience which qualified him

to be nominated in the first place was not in the area Section 6 is presumed to have been enacted to protect.

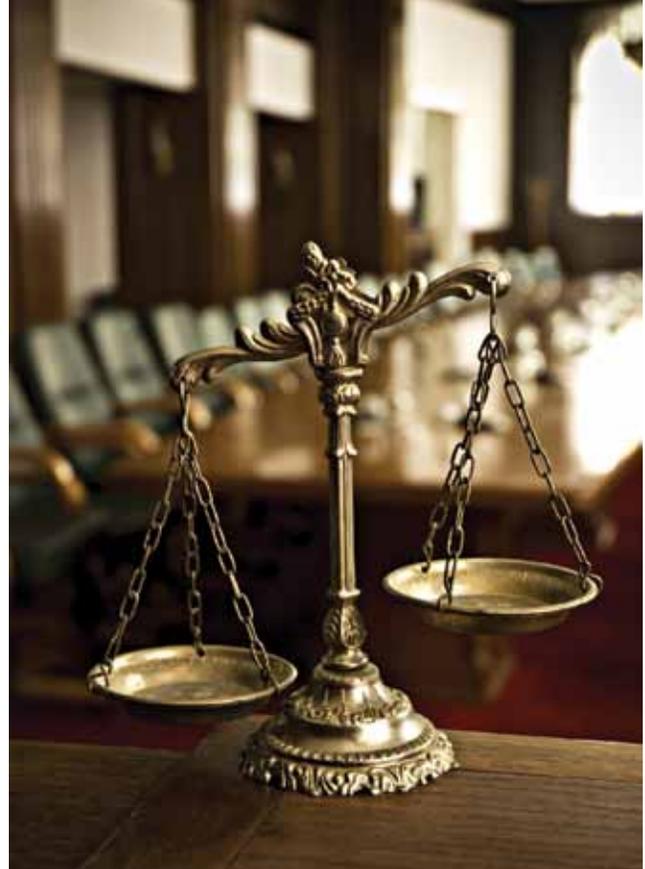
Mr. Justice Michael Moldaver was the sole dissenting judge. He argued that Sections 5 and 6 of the Supreme Court Act were intended to be read together, so that Section 6 was viewed as allotting three seats on the Court to jurists learned in Quebec Civil Law, but not as imposing more stringent qualifications on Quebec nominees than applied to those in other provinces by insisting that *former* members of the Bar with 10 years standing, eligible elsewhere, were not eligible in Quebec.

Yet here we have an ironic example of strict construction working against a conservative government's attempt to elevate a candidate of clearly conservative outlook to our most senior bench. Insisting on reading enactments literally as written and not "reading in" some intended (or even extended) purpose is usually the viewpoint defended by persons of a conservative bent who hold that judges have not been appointed to make laws, but rather to apply the laws duly passed by the legislative branch of government. Six eminent and erudite experts making up the majority here seem to have practised what the mantra of rigorous and precise interpretation required!

So what really went on in the Nadon case? Whenever a judicial nomination is made public, especially one at the level of the Supreme Court of Canada, pundits, commentators and elites who see themselves as the arbiters of conventional wisdom pounce on the name (and the process, as we shall see later) and deliver a self-justifying analysis on the merits of the appointment. When Judge Nadon's name surfaced, this intellectual flurry produced a *bon mot* from one wag who declared that, "He wasn't on anyone's short list. He wasn't even on anyone's long list".

Well, he clearly was on the Prime Minister's list, and, in our system, after consultation with the bench and provincial law societies, the prerogative to make this appointment rests with the Governor General on the advice of the Prime Minister. Is it possible that the decision in the Reference case was influenced, even subconsciously, by the view that Judge Nadon was not up to snuff in the eyes of observers and some of his putative future colleagues? Look at the opinions that were offered to the media after the appointments of the next two Justices named, Clément Gascon and Suzanne Côté. In the first case, the grousing was all about changes made to the process of nominating Supreme Court Justices and, in the second, the reviews blended into a consensus of universal acclaim!

The Supreme Court has made plenty of decisions that have disappointed the left of the political spectrum, those who



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Margaret Thatcher dismissively referred to as the "wets", precisely on the ground usually reserved for the purists, namely that the Court had created rather than interpreted law.

In *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, a majority of the Court decided that the prohibitions against private health insurance in Quebec's *Health Insurance Act and Hospital Insurance Act* were unconstitutional (as a violation of the guarantees of the rights to life and personal inviolability protected by s. 1 of the Quebec Charter of Human Rights and Freedoms) when necessary medical care is not delivered in a medically advisable time under the universal, state-paid health care system. While it appeared obvious that, if a patient fell between the cracks created by budgetary constraints and demands on the supply of physicians and facilities through no fault of his own, the arbitrariness of condemning him to tissue damage, pain and even death could not possibly be consistent with the principles of fundamental justice or with reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, the outcry from the defenders of the status quo palpably demonstrated their innate terror that requiring medical services to be delivered in a medically timely fashion would destroy their beloved system.

The rhetoric that followed was so over the top as to make clear that the defenders of the Canadian system of health care delivery believed it could not be repaired and that the guideline drawn by the Court for constitutional survival, namely timely

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delivery, was not possible to achieve. From the left came the accusation that the judgment was the work of Zombie Masters, who had created a monster that would inevitably lead to two-tier medical care delivery in this country. The concept that how much health care delivery can be afforded is a matter of public budgetary policy, not of protected Charter rights, presumably even when viewed from the perspective of the individual suffering or dying because of wait times, lives on among opinion elites, for example in Jeffrey Simpson's 2012 book *Chronic Condition*.

So the left can have its ox gored as much as the right by judges said to be making it up on the basis of their prejudices.

Do judges really think they are making law when they see legislative enactments through the lens of their personal perspectives? The evidence appears to be to the contrary. Rather, the problem may lie in ambiguous drafting which permits more than a single interpretation of a given text. In any case that reaches the courts, there are likely to be good lawyers who differ on the meaning to be given to the words that the skilled draftsmen in the Department of Justice have used to express what they consider to be the intent of the legislator. Could the legislator sometimes prefer to avoid the political fallout that an apparently clear and harsh text on a sensitive subject might engender?

In the Nadon case, the government sought an opinion from a former Justice of the Supreme Court, concurred in by two other former Justices of the same body, which endorsed the government's reading of the Act. The nature of the judicial system is that a submission of some learned counsel is accepted and that of others is rejected.

What if anything can be done to take the personal preconceptions of candidates for a rarified place on the court of last resort out of the process of judicial judgment-crafting? The chattering

classes are at pains to insist that the system of vetting of nominees with bench and bar is not sufficient, particularly if the Governor General, on the advice of the Prime Minister, is free to arrive at a different conclusion and nominate a candidate not universally conceded to have sufficiently liberal, socially concerned and educated views to please the elites.

Prior to the nomination of Justice Gascon, a system had been developed whereby a panel made up of government MPs and opposition members was asked to narrow the list of candidates to a short list of three for consideration by the Prime Minister, followed by the holding of public hearings in Parliament at which the nominee could be questioned. The commentators who watch such developments have deplored the return to the time-honoured system of simply treating judicial appointments as an executive prerogative, with the public able to express approval or otherwise at election time.

Certainly we should not be attempting to create a Canadian version of the judicial confirmation process used in the United States. If it is true that we want judges without prejudices to render decisions based on the law and nothing but the law, we should resist fiercely the notion that the sample judgments that a candidate for elevation would be asked to produce to a Parliamentary panel vetting him or her for the short list would be predictive of that individual's views in cases yet to arise. Inducing judges to write popular judgments just in case the opportunity for a promotion might present itself is equally offensive. What can a candidate for the bench say to a vetting committee or a public Parliamentary review process that would help the citizenry decide if we wanted that person as a judge, other than a commitment to uphold and enforce the law without preconception or favour?

The politicization of the judiciary is but one step beyond the politicization of the nomination, approval and confirmation process. No human being can leave their personal makeup, antecedents, influences, beliefs and ideas in the robing room, but if we want an unbiased, competent judiciary, nor should we select its members based on those considerations. Opinions on current, burning social policy issues should not be a criterion for appointment, because we ought to want decisions based on the facts of each case applied to a precise and accurate reading of the law. ✪

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Back (l-r): Justice Richard Wagner, Justice Michael J. Moldaver, Justice Andromache Karakatsanis, Justice Clément Gascon.  
Front (l-r): Justice Marshall Rothstein, Justice Louis LeBel, Chief Justice Beverley McLachlin, Justice Rosalie Silberman Abella, Justice Thomas Albert Cromwell. Justice Suzanne Côté (not pictured) joined the Court on December 1, 2014, replacing Justice Louis LeBel (now retired)

# The Supreme Court of Canada: Policy Maker of the Year

*The Supreme Court of Canada made the headlines often in 2014. In an effort to determine whether it was an extraordinary year for the Court, MLI Senior Fellow Benjamin Perrin examined 10 of the SCC's most important decisions of the past 12 months. The period included rulings that: struck down Canada's prostitution laws, made a first-time ruling of Aboriginal title, rejected a government nomination for the Supreme Court and raised the bar for reforming the Senate. With Perrin's findings suggesting that these decisions are likely to have a lasting impact, the Macdonald-Laurier Institute is pleased to name the **Supreme Court of Canada as MLI's Policy Maker of the Year for 2014.** (Previous MLI Policy Makers were John Baird (2013) and Mark Carney (2012).)*

## *Benjamin Perrin*

Each year, the Macdonald-Laurier Institute recognizes a "Policy Maker of the Year". Past recipients have included former Bank of Canada Governor Mark Carney and Minister of Foreign Affairs, John Baird. One could argue that, while people in such positions are undoubtedly influential, there

is another entity that is rarely acknowledged for its impact on policy yet in the last year has changed Canadian public policy in wide-reaching and long-lasting ways – the Supreme Court of Canada.

During the last year, the Supreme Court of Canada has made

a series of landmark decisions in areas including Senate reform, Aboriginal title and treaty rights, prostitution laws, the appointment of justices to the Court from Quebec, security certificates, protection of CSIS human sources, undercover police operations, and sentencing. During this period, numerous commentators have characterized the decisions of the Court as reflecting a string of “losses” for Prime Minister Stephen Harper’s government. Some have gone so far as to say that Canada has entered a “legal cold war” and that these “[l]egal conflicts reveal a clash of beliefs about how Canada should work”<sup>1</sup>.

*It appears that the last year has likely had a disproportionate number of landmark cases of broad significance and interest to Canadians.*

Within this context and while appreciating that the work of the Court is cyclical and outcomes vary from year to year, my recent MLI paper examines the Court’s ten most significant judgments of the last 12 months (November 1, 2013 to October 31, 2014) in terms of their importance and policy implications. Table 1 provides a snapshot of these decisions and their outcomes, while discussion and analysis of each is included in the full report, “The Supreme Court of Canada: Policy Maker of the Year”, available on MLI’s website.

Looking at these cases as a whole, this study made three findings.

### **1. The policy and legal impact of the Supreme Court of Canada’s decisions of the last year are significant and likely enduring.**

In its decisions on significant constitutional matters in the last year, the Supreme Court of Canada has made bold decisions that

fundamentally affect the way that Canadian democracy functions, the relationship between the Crown and First Nations (including with respect to resource development), limits on police investigative tactics, and decisions on controversial criminal law issues. It appears that the last year has likely had a disproportionate number of landmark cases of broad significance and interest to Canadians.

The most significant and enduring impact of the Supreme Court of Canada in the last year will be its interpretation of the amending procedures in the *Constitution Act, 1982* in its reference decisions related to Senate reform and the appointment of judges to the high court from Quebec. Taken together, these decisions entrench the Senate and Supreme Court of Canada as institutions that are virtually untouchable. Changing the composition of either institution has been determined to require the approval of the House of Commons and the Senate as well as every provincial legislature.

The Aboriginal law decisions of the Court in *Tsilhqot’in Nation v. British Columbia* and *Grassy Narrows First Nation v. Ontario (Natural Resources)* are landmark decisions which, together, demonstrate that the constitutional authority that the provinces have over resource development generally applies even in dealings with First Nations. In particular, “provinces may now clearly regulate and make decisions relating to natural resources, even when Aboriginal rights and title questions are involved.”<sup>3</sup> However, provincial governments are obliged to respect Aboriginal title and treaty rights, as the case may be, in these interactions with First Nations. These recent authorities from the Court will undoubtedly be at the top-of-mind of provincial governments and private corporations that are seeking approval and implementation of large-scale natural resource projects now and in the decades to come.

Criminal law has always been a major part of the Court’s docket. The decision in *Bedford* is notable, not only on the issue of how prostitution may be addressed through the criminal law, but also because of the broader principles established in the decision with respect to the scope of section 7 of the *Charter* and its relationship with section 1 of the *Charter*. *Bedford* shifts the ground more broadly on when criminal laws will be found to infringe section 7, and creates a possibility of a successful section 1 justification argument by the government in appropriate cases. The next chapter of this saga will undoubtedly be a new Charter challenge

<sup>1</sup> Justin Ling, “Harper government’s legal setbacks suggest strategy of confrontation”, CBC News, August 7, 2014.

<sup>3</sup> Ken Coates and Dwight Newman, *The End is Not Nigh: Reason over Alarmism in Analysing the Tsilhqot’in decision* (Ottawa: Macdonald-Laurier Institute, 2014) at 20.

(Table 1)

**Top-Ten Supreme Court of Canada Decisions of the Last Year**

	<b>CASE</b>	<b>CITATION</b>	<b>SUBJECT</b>	<b>UNANIMOUS</b>	<b>MAJORITY AND RECURRING REASONS</b>	<b>DISSENTING REASONS</b>	<b>GOV'T WIN OR LOSS</b>
<b>1</b>	<i>Reference re Senate Reform</i>	2014 SCC 32	Senate reform	The Court			loss
<b>2</b>	<i>Tsilhqot'in Nation v. British Columbia</i>	2014 SCC 44	Aboriginal title and land claims	McLachlin C.J.			loss
<b>3</b>	<i>Grassy Narrows First Nation v. Ontario (Natural Resources)</i>	2014 SCC 48	Aboriginal treaty rights	McLachlin C.J.			win
<b>4</b>	<i>Canada (Attorney General) v. Bedford</i>	2013 SCC 72	Prostitution	McLachlin C.J.			loss
<b>5</b>	<i>Reference re Supreme Court Act, ss. 5 and 6</i>	2014 SCC 21	Appointment of Supreme Court of Canada Justices from Quebec		McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.	Moldaver J.	loss
<b>6</b>	<i>Canada (Citizenship and Immigration) v. Harkat</i>	2014 SCC 37	Terrorism –security certificates and CSIS human sources		McLachlin C.J.	Abella and Cromwell JJ.	mixed
<b>7</b>	<i>R. v. Hart</i>	2014 SCC 52	“Mr. Big” police operations		Moldaver J. (majority); Cromwell, Karakatsanis JJ. (concur)		mixed <sup>2</sup>
<b>8</b>	<i>R. v. Spencer</i>	2014 SCC 43	Cybercrime –request by police for basic subscriber information from ISPs	Cromwell J.			loss
<b>9</b>	<i>R. v. Summers</i>	2014 SCC 26	<i>Truth in Sentencing Act</i>	Karakatsanis J.			loss
<b>10</b>	<i>Canada (Attorney General) v. Whaling</i>	2014 SCC 20	Retrospective repeal of accelerated parole review	Wagner J.			loss

<sup>2</sup> The result is listed as mixed because the Court ruled that statements obtained by accused persons in Mr. Big operations may be admissible, depending on the facts. In *R. v. Hart*, 2014 SCC 52, the statements were inadmissible, whereas in *R. v. Mack*, 2014 SCC 58 they were admissible.

to Bill C-36 (the legislative response to *Bedford*) that proponents of legalized/decriminalized prostitution have threatened.

The Court has upheld the availability of some national security and policing tools, including the security certificate regime and the Mr. Big technique, while imposing safeguards to ensure their constitutionality and appropriate use, respectively, but has ruled against others such as protecting the identity of CSIS human sources and the ability of the police to obtain basic subscriber information voluntarily from Internet Service Providers to address cybercrime (e.g. distributing child pornography).

The Court also made modest decisions related to recent sentencing law reforms introduced by Prime Minister Stephen Harper's government. The much more significant challenges to his criminal justice reforms have yet to be decided by the Court, in particular the constitutionality of a raft of new mandatory minimum penalties of imprisonment.

## **2. The Supreme Court of Canada was a remarkably united institution with consensus decisions on these significant cases being the norm, and dissenting opinions rare.**

The Court's record on significant cases in the last year reveals a remarkably united institution, with unanimous decisions on most controversial cases that have come before it. Of the ten significant decisions reviewed, only two had dissenting reasons. In other words, in eight of the ten decisions, there was consensus on the outcome of the case (an 80% consensus rate). This rate of consensus stands out from recent years and is especially interesting given that it relates to the most significant decisions from the period under review.<sup>4</sup>

This study also found that Chief Justice Beverley McLachlin is showing leadership on major cases. Of these ten decisions, the Chief Justice was the sole-author of reasons in four of the ten cases and was a joint-author of two additional decisions. In all of these decisions, she was writing for either a unanimous Court or a majority of the judges. She did not dissent in a single significant case under review.

Due to the substantial unanimity of the Court's major decisions, there is no evidence whatsoever of any deep fissures within the Court along ideological lines. This is in stark contrast to previous decades at the Court and what has often been the case at the U.S. Supreme Court. Related to this observation, there

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<sup>4</sup> See Supreme Court of Canada, "Statistics 2003 to 2013" – Category 4: Appeal Judgments, online: <<http://www.scc-csc.gc.ca/case-dossier/stat/cat4-eng.aspx>>.

*The Court's record on significant cases in the last year reveals a remarkably united institution, with unanimous decisions on most controversial cases that have come before it.*

is no evidence whatsoever of any observable split in the Court's decisions on significant issues between the six judges appointed by Prime Minister Harper and the three judges appointed by previous Prime Ministers during this period.

## **3. The federal government has an abysmal record of losses on significant cases in the last year, with a clear win in just one in ten of them.**

Media commentary on the Court's decisions raising the specter of a string of losses for the federal government at the Supreme Court of Canada was validated by this study. Of the ten significant decisions, the federal government won just a single case, while achieving mixed results in two cases. By way of providing some context, on average, 41% of *Charter* claimants have historically been successful in the Court – meaning that various levels of government succeeded in 59% of such cases on average.<sup>5</sup>

However, it bears mention that the abysmal record of recent losses for the federal government does not mean that all of these losses are attributable to legislation or recent action of the current federal government led by Prime Minister Harper. For example, some cases relate to government action originating decades ago, by other levels of government (e.g. in *Tsilhqot'in Nation v. British Columbia*, the case was triggered by a commercial logging licence issued by B.C. in 1983 – nevertheless, the current federal government sided with B.C. and it lost).

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<sup>5</sup> Patrick Monahan & Chanakya Sethi, "Constitutional Cases 2011: An Overview" (2012), 58 *Supreme Court Law Review* (2d) at 2.

(Table 2)

## Current Members of the Supreme Court of Canada

NAME OF JUSTICE (THE HON. MADAM/MR. JUSTICE)	YEAR APPOINTED	APPOINTED BY THE RT. HON.	MANDATORY RETIREMENT
Rt. Hon. Beverley McLachlin, Chief Justice	1989 (J) 2000 (CJ)	Brian Mulroney Jean Chrétien	2018
Rosalie Silberman Abella	2004	Paul Martin	2021
Marshall Rothstein	2006	Stephen Harper	2015
Thomas Albert Cromwell	2008	Stephen Harper	2027
Michael J. Moldaver	2011	Stephen Harper	2022.
Andromache Karakatsanis	2011	Stephen Harper	2030
Richard Wagner	2012	Stephen Harper	2032
Clément Gascon	2001	Stephen Harper	2035
Suzanne Côté	2014	Stephen Harper	2033

According to the Supreme Court Act, members of the Court are entitled to serve until reaching the mandatory retirement age of 75 years. To date, Prime Minister Harper has appointed seven of the nine judges of the Court. The most recent appointee, Suzanne Côté, began her term on the bench on December 1, 2014, replacing the retiring Justice Louis LeBel. Based on their mandatory retirement dates, four of the judges appointed by Prime Minister Harper could serve until at least 2030.

The Supreme Court of Canada is comprised of the members listed at left, organized in order of seniority.

### Conclusion

The study found that during the last year, the Supreme Court of Canada has made landmark decisions having significant implications for law and policy across many areas. It has done so usually based on consensus, with just two cases among the top-ten most significant decisions having dissenting reasons. The Court has also ruled almost entirely against the federal government, with a single clear win among these most significant decisions.

One would be hard pressed to find another actor in Canada who has had a greater impact on such a wide range of issues than the Court has in the last year, such that the moniker “Policy Maker of the Year” is appropriate. The Court, no doubt, would resist such a label on the view that it simply applies the law. The Court has a constitutionally vital role both in interpreting and applying the law as well as providing constitutional scrutiny to laws and governmental action. However, as the study shows, it would be

naïve and simplistic to say that the Court’s decisions do not have a significant legal and policy impact. Indeed, the outcomes and implications of the Court’s decisions of the last year are notable across a number of areas and will likely be of enduring significance for years – even decades – to come. ✦

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# Be Careful What You Wish For

## Why Some Versions of “Social Licence” are Unlicensed and May Be Anti-Social

*The author traces the origins of the term social licence, noting that a Canadian mining executive first brought the term into mainstream language in the late 1990s and that it was designed to capture the notion that natural resource development companies can benefit from winning public approval for a project above and beyond the legally required licences and permits. Newman suggests, however, that the definition has now been expanded to a more nebulous (and problematic) notion and that activists are abusing it to undermine major projects, with the alleged consent of industry. In particular, Newman writes that failing to critically analyze the concept of social licence is creating problems in Aboriginal communities. He points to the example of the Chevron Pacific Trail Pipeline in British Columbia. While the builder has managed to win support from several First Nations groups, a small minority are still opposed and have threatened to block the development of the project. Newman argues that relying too much on social licence allows First Nations groups that oppose development to hijack the desires of those who do not. It also undermines important concepts, such as governments’ and businesses’ constitutional “duty to consult” with Aboriginals, which rely on the rule of law.*

### *Dwight Newman*

The concept of social licence to operate – sometimes abbreviated SLO – is increasingly on the minds of policy-makers, business actors, and social activists of various stripes.<sup>1</sup> The concept is also increasingly in the media, discussed as if it were some new requirement that had been legislated onto business in recent years. But, despite its name, a social licence is not a licence. And, on careful analysis, some versions of the concept of social licence have very different social consequences than may first appear that are partly “anti-social” and that may actually end up undermining various legal rights, including Indigenous rights.

The term “social licence to operate” is usually attributed to Canadian mining executive Jim Cooney, who was Director of International and Public Affairs for Placer Dome when he first spoke about it in 1997. He referred to the idea of needing something beyond the applicable legal licences in terms of attaining sufficient public support for a project so that it would remain viable. Others had used different terms for a very similar concept earlier, and some

seem even to have used the same term.<sup>2</sup> But Cooney’s use of the term got attention. Suddenly, a major mining executive had seemingly acknowledged a need for social licence. Things took off from there. The concept now features at every mining conference, at other natural resource conferences, and in broader public discourse – and often, mistakenly, as if it is some kind of new legal requirement on resource development or even on business more generally.<sup>3</sup>

The point of the term was actually to acknowledge a practical reality. A resource company that hopes to develop certain resources over the long term needs its legal licences and permits but, as part of

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<sup>1</sup> For a business-directed discussion of social licence that will be a prominent contribution, see John Morrison, 2014, *The Social License: How to Keep Your Organization Legitimate*.

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<sup>2</sup> Some longer history of the concept is present in Jacqueline Williams and Paul Martin eds., 2011, *Defending the Social Licence of Farming: Issues, Challenges, and New Directions for Agriculture*. Apart from earlier references to “social licence”, there were many writing on the concept of “social acceptability” in the years leading up to Cooney’s concept entrepreneurship.

<sup>3</sup> A particularly significant recent discussion in Canada on social licence to operate took place at a conference at the University of Calgary School of Public Policy in October 2014; Brian Lee Crowley’s presentation will be featured in an MLI commentary accompanying this one. On the latter point concerning the extension of the concept to business contexts generally, a Slate contributor in 2010 asked whether Goldman Sachs had lost the “social licence to operate”, considering it mainly in terms of reputation and whether various public entities would do business with it (Gross 30 April).



*Suddenly, a major mining executive had seemingly acknowledged a need for social licence. Things took off from there. The concept now features at every mining conference, at other natural resource conferences, and in broader public discourse.*

the business realities it faces, it also needs some degree of local public support for its projects so that the projects do not face new obstacles down the road. Cooney was thinking, particularly, of development in contexts without legal order, where the contents of the law are not set up for stability of business operations and where people can take political steps to alter the law based on shorter-term preferences or can take steps outside the law against a project. Thinking of those kinds of risks, social licence to operate matters a great deal to resource companies.

The presence or absence of support for a project is, in practical terms, a real factor that matters. As put by one mining executive, “Today, I can show you two mines identical on [other] variables that differ in their valuation by an order of magnitude . . . Why? Because one has support and the other doesn’t” (Lee 28 April 2014). Ernst & Young recently suggested that social licence to operate is the fourth-biggest risk factor affecting mining companies (Lee 28 April 2014).

In accord with these ideas, various analysts have offered specific definitions of social licence to operate, but they all come back to this idea of measuring public support because it impacts whether a particular business activity will be practically feasible on a longer-term

basis.<sup>4</sup> Their studies typically consider social licence to be granted at a broader societal level but to be particularly affected by support or opposition from locally proximate communities (Prno and Slocombe 2012, 347–349).

Obstacles arising from lack of local public support can vary but will often involve either a change in the law and/or application of extra-legal means against a company. So, for example, companies operating over the longer term in some jurisdictions have seen lack of local public support for their activities translate into major changes in royalty structures that later altered the business realities of their operations. In terms of more extra-legal means, Canadian resource companies operating abroad, for instance, have seen instances where their assets have simply been expropriated outright. For example, Vancouver-based South American Silver Corp. saw increasing conflict near its Bolivian silver mine with local artisanal miners from 2007, with lingering local issues suddenly escalating and influencing the national government to expropriate the mine in 2012. Other Canadian mining projects around the world have also faced extra-legal pressures when they have been delayed by non-violent protests or even affected by violent attacks.

Those employing the concept of social licence to operate developed a concept that could be used to assess the impacts of social support for or opposition to a particular project. Different consultants or accounting firms have now developed different tools for assessing the social licence to operate and changes in it over time, along with analysing means of investing so as to enhance the value of the social licence to operate.<sup>5</sup> For example, KPMG Australia published a report in 2013, “The Community Investment Dividend: Measuring the Value of Community Investment to Support Your Social Licence to Operate”, in which it detailed a number of methodologies for analysing social licence to operate and ways of effectively retaining the trust that is a key focus of the SLO. Similarly, a group including the International Finance Corporation (IFC), Rio Tinto, and Deloitte has more recently developed the Financial Value Tool for Sustainability Investments (FV Tool).<sup>6</sup> The FV Tool allows for the analysis of investment in communities in terms of its time-value-adjusted effects on value creation and value protection. The latter is particularly focused on SLO considerations in terms of the amount of mitigation

<sup>4</sup> For example, see Jason Prno and D. Scott Slocombe, 2012, “Exploring the Origins of ‘Social License to Operate’ in the Mining Sector: Perspectives from Governance and Sustainability Theories”, p. 347; John R. Owen and Deanna Kemp, 2013, “Social License and Mining: A Critical Perspective,” p. 30; Kieran Moffat and Airong Zhang, 2014, “The Paths to Social License to Operate: An Integrative Model Explaining Community Acceptance of Mining,” p. 61; Kathleen M. Wilburn and Robert Wilburn, 2011, “Achieving Social License to Operate Using Stakeholder Theory,” p. 3.

<sup>5</sup> Early efforts owe a lot to Robert Boutilier and Ian Thomson, 2011, “Measuring and Modelling the Social License to Operate: Fruits of a Dialogue Between Theory and Practice.” Boutilier and Thomson have been cited extensively, and they have also presented follow-up papers at various mining conferences in which they continue to articulate their approach to measuring social licence to operate.

<sup>6</sup> Many details on the FV Tool are available on the website [www.fvtool.com/index.php](http://www.fvtool.com/index.php).

of operational risks like production disruptions.

The FVTool has been subjected to testing by Newmont in some of its operations, and it has helped it identify new ways of investing that have helped reduce things like security costs on operations. The concept of social licence to operate, then, was put forward in a business context as a way of understanding various kinds of operational challenges that could emerge from changes in the law or extra-legal disruptions where a company did not have adequate

*To put it bluntly, any overly enthusiastic embrace of social licence to operate in its mistakenly transformed senses is actually a rejection of the rule of law.*

local social support. So far as it goes, it can help business to engage in stronger relationships with communities that have often offered win-win solutions.

However, several factors have led to the concept getting misinterpreted. First, those involved in business contexts, now reaching across various sectors, have made various prominent speeches in which they have referred to the need to have a social licence to operate in ways that, taken on their own, make it sound like something they acknowledge as a new requirement. To take just one example, Dev Sanyal, Executive Vice President for BP, gave a late 2012 speech in which he said that the “social licence to operate . . . indicates that companies cannot operate sustainably without the support of society.”

Second, there are various sectors interested in transforming the descriptive statement that companies “cannot” operate without an SLO into a prescriptive “cannot” and in using social licence as part of a broader political agenda. For example in her new book, *This Changes Everything: Capitalism vs. The Climate*, Naomi Klein (2014) writes “The main power of divestment is not that it financially harms Shell and Chevron in the short term but that it erodes the social license of fossil fuel companies and builds pressure on politicians”. Activists discussing social licence envision using the idea as a means of undermining the influence of resource development companies.

If they can peddle successfully the idea that companies need a social licence in order to operate legally and legitimately, then they succeed in transforming the concept into a new source of power for activists like environmental extremists.

Third, a sort of breakdown in real societal dialogue is currently weighing on resource development – something that MLI’s Brian Lee Crowley (2014) highlighted in an important recent Commentary in which he discussed the need to redevelop a more visible societal consensus in favour of responsible resource development. Experts and members of the general public who support responsible resource development will tend not to come out with radical statements because they see resource development proceeding within a carefully regulated framework and being subject to careful qualifications as needed. But those who would quash all development in general or, commonly, at least in their own back yards (the traditional NIMBYism) are quite ready to proclaim this loudly and to use the concept of social licence to operate as a means of saying that they hold a veto exercised through scowling faces on social media and, if necessary, peaceful and/or violent protest. All of the dynamics were present, then, for an internal concept concerned with business reputation and trust to morph into a term that would get reinterpreted into a new constraint to which business had allegedly agreed.

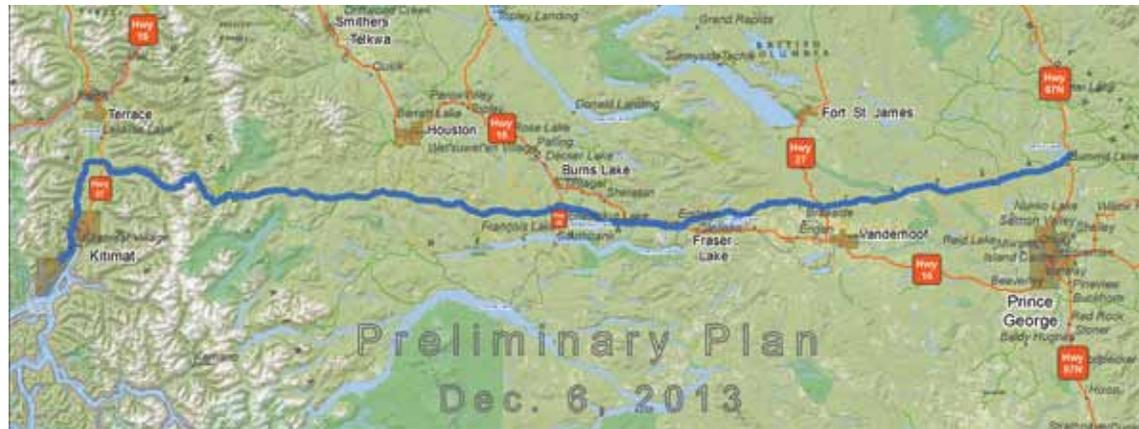
Thinking of social licence to operate as a new quasi-legal requirement on companies, though, carries with it some extremely dangerous underlying assumptions. These become apparent as soon as one thinks again of what it measures: the risks of legal changes adverse to a business’s operations and of extra-legal disruptions of business activities. To say that businesses operating in Canada should be subjected to a shifting social licence to operate is to say that businesses should face risks of legal changes that damage their business interests and of extra-legal disruption of their business activities by those opposed to them. To put it bluntly, any overly enthusiastic embrace of social licence to operate in its mistakenly transformed senses is actually a rejection of the rule of law and a suggestion that Canada should become a less well-ordered society.

Consultants who have studied means of assessing social licence to operate and who advise companies on ways of measuring their social licence to operate at a particular point in time would identify a particularly low level of social licence at a moment in time when a project faces violent disruption.<sup>7</sup> That is pertinent (if not surpris-

<sup>7</sup> This would be true of the models offered by Boutilier and Thomson (whose presentation at the World Mining Congress, 2013, in Montreal set out various means of measuring social licence to operate grounded in their earlier work) but also of any plausible measurement models concerning the social licence to operate.

The Pacific Trail Pipeline in British Columbia is a proposed 480 km natural gas pipeline that will deliver gas from Summit Lake to the Kitimat LNG facility site at Bish Cove on the northwest coast of BC.

Photo: [www.chevron.ca](http://www.chevron.ca)



ing) information for a company, and the company needs to reflect on what it can do to avoid such situations. However, if someone transforms the descriptive statement that the company cannot operate with this low-level social licence into a prescriptive claim that the company cannot legitimately operate, that morphing of the statement logically depends on a presumption as to the legitimacy of the underlying violence. Unfortunately, over-enthusiastic embraces of social licence that actually misinterpret it through a sort of mistake about categories thereby undermine legally determined rights and even legitimize physical violence. Those who have rushed to embrace some interpretations of social licence because they are socially minded and support better flourishing of people in society should really think about whether they want to embrace a form of the concept through which they may legitimize physical violence.

Further implications follow too. At the extremes, surrender the rule of law, and you surrender the rights that law protects. Legitimize physical violence, and you surrender to the rule of the mighty and powerful. Those embracing the misinterpreted version of social licence actually embrace the exact opposite form of society from that which they presumably hope to support.

This point perhaps becomes clearest in the context of Indigenous rights. Many of those who advocate for better opportunities for Indigenous communities – myself amongst them – may have initially felt tempted by the idea of social licence as something that could help protect Indigenous communities and support them in their negotiations with resource companies where they have real opportunities at economic empowerment. However, Indigenous communities also need to think about whether their interests are always going to be aligned with the interests of certain environmental extremists, Twitterverse activists, and individuals ready to resort to disruption of business.

Consider the very practical scenario of the Chevron Pacific Trail Pipeline. This pipeline, which received its full environ-

mental approvals a number of years ago, will transport gas on a 480-kilometre route from northeastern British Columbia to an LNG terminal at Kitimat. Chevron has signed agreements with 15 of the 16 First Nations along the route, who will economically participate in the project. Chevron also has support from significant parts of the leadership and membership within the last First Nation, the Wet’suwet’en Nation. However, some specific clans within that Nation, such as the Unist’o’en clan, have withheld their support and have even erected protest camps along the route. Chevron continues to try to negotiate. But, at some point, the question is raised of whether the practical challenge of protest camps – which some will trumpet as showing a lack of social licence to operate – gets to override the legally negotiated agreements of 15 other First Nations. Those Indigenous communities who want to participate in responsible resource development – of whom there are many – should think very carefully before deciding that their interests are aligned with those who try to use the idea of social licence in extreme ways.

*Those embracing the misinterpreted version of social licence actually embrace the exact opposite form of society from that which they presumably hope to support.*

This is, as much as anything, because effective protections for Indigenous rights themselves depend upon the rule of law. In the context of a rule of law that is working toward very nuanced balances between resource development and Indigenous rights, legitimization of a concept that breaks down the rule of law is not helpful to industry, and it is not helpful to Indigenous communities. The duty to consult provides a very important legal instrument and policy tool for Indigenous communities in Canada, many of whom have been able to leverage the duty to consult into win-win agreements with industry project proponents.<sup>8</sup> The adoption of vague ideas about social licence to operate, with much less clarity about how it is obtained and with whom, would arguably undermine rather than consolidate meaningful gains by Indigenous communities.

Nothing here, of course, weighs against business making use of tools that help them to analyse social licence to operate and its implications in terms of ongoing support for resource projects. At a real level, social licence to operate has practical effects. At the same time, there are important reasons to resist any drift in the concept. So long as it remains a descriptive concept for business to be able to analyse factors that include what are ultimately illegitimate impacts against business, it is a valuable tool for those bold enough to try to create prosperity in a sometimes unwelcoming world. But any steps that turn it into a prescriptive concept – a new requirement on business that you obtain social licence to operate, however we define it today, or else – have very negative effects in terms of what they legitimize.

The risk that social licence to operate is subject to a sort of conceptual drift – from practical, useful business concept to imposition of new requirements through extra-legal means – gives rise to several recommendations of ways that different sectors and different actors can help to avoid this problematic transformation and work toward well-ordered, responsible resource development that is appropriately responsive to environmental issues and Indigenous rights.

## Business

(1) Business actors who are speaking about the social licence to operate should be extremely careful about the different categories of the concept.

In speaking about the practical business concept, they should be careful that their words do not support misinterpretations of the concept as legitimizing new extra-legal requirements on business.

Indeed, they should actually contemplate the possibility of discussing the same concept with different terminology so as not to continue to support the development of a problematic discourse.

(2) Business actors may wish to think about different and more neutral terminology, such as terminology related to building public trust or building community relationships.

The presence of the term “licence” in the name gives it a more legal-sounding legitimacy than it has and may help perpetuate confusion.

That said, it may be worth realizing here that different business actors may initially seem to have rather different interests on the point – something that is one of the complications in this context. Some larger businesses with certain kinds of economies of scale may be well-placed to mount public relations campaigns around each new project. Indeed, they may see themselves as having a competitive advantage over smaller businesses – such as junior exploration companies – and may see the development of additional layers of regulatory complexity by government and society as something that supports a more oligopolistic industry structure that is to their advantage. However, this thinking is short-term. Major resource companies are dependent, over the longer term, on junior exploration companies being able to make finds. Larger companies are dependent on a culture of entrepreneurship continuing to be supported.

(3) Even business actors who think themselves well-positioned to meet the challenges of a misinterpreted SLO discourse should still be wary of it.

## Indigenous Communities

(4) Indigenous communities should be more cautious about the social licence to operate than they have sometimes been.

We can all sympathize with Indigenous communities who are looking for every advocacy tool they can find to advance the position of their economically disadvantaged members. But something like the social licence to operate contains real risks in it and may, quite frankly, come back to bite those who currently think they can use it. Indigenous communities should make careful choices that best reflect their interests and best support the protection of Indigenous rights. Surrendering power to a vague concept like social licence carries longer-term risks to Indigenous communities.

## Policy-makers

(5) Policy-makers should continue to develop well-designed, well-ordered, stable policy frameworks that facilitate investment and that offer appropriate, well-defined protections for the

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<sup>8</sup> For a fuller discussion, see Dwight Newman, 2014, *Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and Canada's Natural Resource Sector*.

environment, for Indigenous communities, and for others affected by resource development. They should work to ensure broad-based understanding of the design of these frameworks and the protections that they offer and work to continue to build public input.

Strong public understandings of the nature of these frameworks should build an ongoing base of support for well-ordered regulation and limit the appeal of extra-legal means of impacting decisions or projects.

(6) Policy-makers should also contemplate the possibility of providing additional protections against sudden shifts in policy frameworks, such as strong administrative law protections for those playing by the rules, or possibly even property rights protections.

Although such protections raise a variety of questions going beyond the scope of this article, the presence of a growing discourse that calls for businesses to be subjected to shifting legal requirements raises the stakes for ensuring that our policy frameworks provide adequate certainty so that entrepreneurs can continue developing Canadian prosperity. Stable policy frameworks and predictable legal requirements are important to entrepreneurship. Those playing by the rules need the assurance that decisions made under those rules will receive protection. And those playing by the rules may need assurances that their work is not subject to sudden seizure through actual or effective expropriation through shifts in the legal regime. Appropriate property rights protections might also offer some additional

protection against extra-legal efforts against business, though that latter issue largely depends on adequate enforcement of the rule of law.

(7) Policy-makers should, quite simply, continue to recognize that business actors may have reasons to analyse legal and extra-legal risks to their businesses without taking those analyses as in any manner a way to increase legal and extra-legal risk. Policy-makers do not generally have reason to be referring to the social licence to operate.

## Academics, Public Intellectuals and the General Public

(8) The current discourse on the social licence to operate is, at the end of the day, an interesting example of conceptual drift. For the sake of a good society, we need to resist the kind of sloppy thought present in that sort of conceptual drift. We all bear a mutual responsibility to work toward clearer understandings, to combat misunderstanding, and to remember that ideas matter. ✱

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# When Demands for “Social Licence” Become an Attack on Democracy

*MLI Managing Director Brian Lee Crowley argues that activists who propagate social licence claims are undermining the rule of law and our democratic institutions. Canada has all kinds of bodies in place to ensure that natural resource development projects meet the highest standards: outfits like the National Energy Board, or various environmental assessment agencies. Crowley contends that activists are free to exercise their democratic right to publicly disagree with their decisions, and even to threaten politicians with a loss of support if particular projects go ahead but suggests “it is wholly undemocratic, however, to say that you simply disregard the decisions of duly constituted constitutional and democratic authority as without merit or foundation, as if your views are the only ones that deserve to be heard or taken account of”. This paper is based on remarks made at the Social Licence Panel hosted by the University of Calgary School of Public Policy in Calgary on October 8, 2014.*

## **Brian Lee Crowley**

While I would never claim to have been the first to have expressed doubts about the idea of social licence, I think it is right to say that my *Globe and Mail* column about it last year was an “ah ha moment” for a lot of people. Before that, people invoking “social licence” were treated with kid gloves, and their every pronouncement treated virtually

as gospel. After my column I saw increasing skepticism, and an increasingly balanced debate.

As I tried to show in my original argument, the need for “social licence” before major development projects can proceed seems increasingly accepted as self-evident despite the fact that it is either a synonym for cool, calm, intelligent risk and reputation

management by government and industry or else a polite term for mob rule. Which kind of social licence we are dealing with matters enormously, and yet much of what I have heard at this conference assumes that we are dealing with the first kind and not the second. I believe, however, that they are now inextricably intertwined, with the illegitimate second kind getting a free ride on the soft innocuous appeal of the first.

Wherever there is organized opposition to new pipelines, mines, railroads, manufacturing plants, container terminals, or tree cutting, to mention just a few examples, the opponents repeat the mantra that such projects must obtain social licence or else they must not be allowed.

No one, however, seems to be able to answer a few basic questions about the need for such a licence.

What, for instance, is the address to which you need to write to obtain it? What form must be used? Who are the authorities entitled to decide if your application meets the rules and to whom are they accountable? In fact, what are the rules? What are the procedures followed in determining if you satisfy them? What appeal procedures exist if a project proponent feels their project has not been fairly assessed?

If you're like most people, these questions will bring a smile to your lips, because you and I both know that there are no answers to these questions. Indeed to ask them is to invite ridicule from the social licence advocates, who will say that to ask such questions shows that you just don't get it.

And yet these are not silly questions. On the contrary they go right to the heart of how a democratic society that lives under the rule of law operates.

The very vagueness of the term "social licence" means we cannot know what the rules are, when you're in compliance, or when you've still got work to do. And hardline project opponents like that vagueness just fine because it gives them unilateral authority to claim that the need for social licence has not been met. Who can prove them wrong since no one knows the tests that must be satisfied?

Change always creates winners and losers. That is why we hedge economic development with many restrictions and requirements, including the need to consult and compensate people whose legitimate interests may be damaged, including, properly, Aboriginal peoples. We must minimize any unavoidable harms to the greatest extent possible. We also must meet the highest environmental standards while seeking to maintain the consent of the population. But we have to balance the harm created against the benefits that development may create in terms of jobs, business,

investment, and opportunity.

When the benefits are judged to outweigh the costs, every society must have ways to allow a decision to be made to proceed, even in the face of opposition. But we don't just allow those who benefit to ride roughshod over their opponents.

In a civilized society we create numerous institutions that are domiciled at known addresses and are given specific authority to examine impartially the issues that are raised according to known rules, outfits like the National Energy Board (NEB) or various environmental assessment agencies.

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And the standard we appeal to when such tribunals make their rulings is not whether we have won over the determined opponents of individual projects. Rather we appeal to the standard of winning over the average reasonable person or what Lord Denning, a famous British judge immortalized as the "man on the Clapham omnibus." What Lord Denning meant here is not something obscure, but the standard by which legal decisions are always measured, namely what an average reasonable person would conclude if he or she were in possession of all the relevant facts and arguments, which is what a legal proceeding is designed to elicit.

That is precisely the purpose of the regulatory and administrative proceedings we undertake through the NEB and other similar evaluation processes: to create a fair setting where all relevant information is gathered and independent and disinterested commissioners ask themselves what a reasonable person would conclude about the balance between the costs and benefits of the project before them.

Moreover, administrative tribunals such as the NEB, Canadian Nuclear Safety Commission, environmental assessment panels, and others apply laws they have not themselves made, but

that are determined by legislators. These boards and commissions are accountable to the governments that appoint them as well as to the courts, to whom aggrieved parties may appeal when they think the rules have been broken. The legislators who pass the laws creating these agencies must submit themselves periodically to the verdict of the voters.

*It is wholly undemocratic to say that you simply disregard the decisions of duly constituted constitutional and democratic authority...as if your views are the only ones that deserve to be heard or taken account of.*

The rules generally require public consultations of some kind and compensation for damaged interests. The NEB recently granted a permit to the Northern Gateway pipeline, subject to 209 conditions designed to respond to rising expectations around the stringency of approvals for such major developments.

Smart developers want local support for their plans. Politicians want development that wins public support rather than alienates voters. These institutions I am describing help to achieve this.

It is under this painstakingly built up institutional edifice that many of the great nation-building decisions of Canada have occurred in the teeth of opposition: the building of canals, the railways, the first pan-Canadian pipelines, highways, and more.

Sometimes mistakes are made and there are consequences, such as the way the great Pipeline Debate sowed the seeds of the defeat of the St. Laurent government in the 1950s. We are always revising the rules as we learn more about public expectations, innovative technologies, risks, and opportunities. In other words these are the procedures by which our society has decided such painful but necessary decisions shall be made, both because they make progress possible and because they treat all the parties fairly. If this, plus sensible risk-management by proponents and governments, is what is meant by “social licence”, who can object? Ordinary reasonable people want to be reassured that the properly constituted authorities – including companies – are applying

reasonable standards in making such momentous decisions.

The proponents of full-blooded “social licence”, however, sneeringly dismiss this as mere legalism. According to them, some abstract and ill-defined entity called “society,” independent of legislatures, regulators, and courts, must be satisfied or else it is illegitimate to build the mine or the pipeline or the plant.

But as I hope I have made clear, these claims don’t just constitute an attack on the rule of law thanks to their lack of due process and natural justice. They also constitute an attack on democracy, because they don’t just attempt to intimidate legitimate political and regulatory institutions, operating within the democratic rules of our society, who are called upon to make such difficult decisions. They refuse to recognize the fundamental legitimacy of those institutions. Unless those institutions come to the same conclusion that they do about individual projects, their work is to be discarded and indeed denigrated as obviously the work of the hand puppets of rapacious capitalism.

There is nothing undemocratic about saying that you think the processes used to make such decisions ought to be changed, and submitting your ideas to political parties and the voters. It is entirely legitimate to go to court to question whether the law is being correctly, fairly, and properly applied. It is equally democratic to voice your displeasure about proposed projects, to demonstrate against them, or to threaten politicians with a loss of support if they go ahead. That is all fair game and that is part of the process by which politicians get feedback about how the rules should be framed and what is publicly acceptable.

It is wholly undemocratic, however, to say that you simply disregard the decisions of duly constituted constitutional and democratic authority as without merit or foundation, as if your views are the only ones that deserve to be heard or taken account of.

The recent BC election was a good example of how the process should work, although as you will see shortly I have reservations too about the position of the government that was elected regarding the pipeline approval process.

The Liberal government campaigned on the notion that there were conditions under which pipeline projects should go ahead. The NDP started out with a nuanced position and then the leader of the party, Adrian Dix, decided to go full bore after the anti-development vote by opposing not only Northern Gateway but also the expansion of the Kinder Morgan pipeline to Burnaby. Most observers see that as the campaign’s turning point. The Liberals went on to win re-election with, I think it is fair to say, a reasoned pro-development policy.

But undaunted, the anti-project people in BC still rally

under the banner of social licence because, after all, what's the mere rule of law and democracy compared to your sense of your own righteousness? And so you get, to take just one example, the municipal government of Burnaby refusing to cooperate with the efforts to proceed with the legally-constituted Kinder Morgan approval process despite having no jurisdiction in the matter.

What the proponents of social licence outside the institutional framework I've described really mean to say is that change must be approved by its opponents, who decide whether "social licence" has been achieved, while its absence is allegedly demonstrated by angry media releases or hand-lettered signs waved on the evening news. This is why at the outset I equated some forms of social licence with mob rule.

Increasingly, therefore, "social licence" ought properly to be called "opponents' permission". And a moment's thought reveals why such open-ended, undefined, biased, undemocratic, and unaccountable tests can never be the basis on which civilized societies make such decisions.

Mentioning Burnaby and BC in the context of the "social licence" discussion brings me to a different aspect of the issue I can only touch on lightly, and that is the argument that people far away shouldn't have an important say on decisions that have a differential impact on locals, and therefore that social licence is something that must be conferred by those who have the most at stake. Moreover if the economic benefits are to be enjoyed more by the "far away" than by the locals, that licence's extortion of the far-away interests or "social licence" will not be forthcoming.

If the argument is that those who benefit must pay all the costs of their projects, including of the highest standards of environmental protection and of any clean-up required by a failure of those protections, and compensation for legitimate interests damaged, I think I scarcely need to say that such things are the hallmarks of a civilized society and can and must be done. But again these things must be determined by an independent and evidence-based process, not on the basis of orchestrated and exaggerated fear and emotion. And indeed in the case of Northern Gateway, that is precisely what many of the 209 conditions I mentioned are designed to ensure: that the project has confronted all these issues and has offered reasoned and reasonable answers to the foreseeable risks and dangers to which the project gives rise.

Once these legitimate claims are recognized and honoured, however, vital national projects cannot be held hostage to every grasping local interest. The Saint Lawrence Seaway benefits some communities hugely, others not at all, for yet others it is a nuisance, and some communities were even submerged to make way for it.



"The railway doesn't cross Manitoba or BC or Quebec. It crosses Canada. Ditto with pipelines, air travel, and a host of other things."  
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Railways pass through hundreds of communities in Canada where they never stop, and yet those communities run the risk of noise pollution, collisions, and catastrophic spills of chemicals and other toxic substances. People who live next to airports are surely inconvenienced by the noise and traffic.

But we don't allow provinces or communities or disaffected groups to throw up customs booths at their borders and collect taxes to allow them to get what they judge to be their "fair share" of other people's goods as they pass through or to prevent them from carrying on their lawful activities.



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“Holding up projects that benefit the whole country simply because you think you haven’t got your ‘fair share’, whatever that is, is the precise logic of protectionists and NIMBYists everywhere”

That’s what countries too often do to each other and the result is the collective impoverishment of the world and we are busily engaged in a massive effort to try and tear down those barriers so that other countries cannot object to the importation of our goods and services on the grounds that such transactions benefit Canadians more than the citizens of those other places. We rightly regard it as a great victory for Canada that we have just negotiated a free trade agreement with the EU, for example, that will prevent local European industries and politicians from obstructing access to their markets for Canadian products, claiming that Canadians have not been granted “social licence” to threaten local livelihoods.

Domestically this is exactly what Canada was supposed to prevent. In 1867 we created a national government and parliament to represent all Canadians and to make decisions in the national interest, over and above the interests of individual provinces or groups.

We empowered that government to create, for example, infrastructure of national significance, in defiance of petty local interests trying to extort booty from other regions. Manitoba, for instance, didn’t have the power to stop the CPR from crossing its territory until it got its “fair share” of the wealth that would be created. Ottawa could do it without provincial consent and had that power for a very good reason: the railway doesn’t cross Manitoba or BC or Quebec. It crosses Canada. Ditto with pipelines, air travel, and a host of other things.

There are certainly those who think that every transac-

tion, including building the infrastructure to open up the oil sands, should somehow be subject to a local cost-benefit calculation carried out by local communities or even the provincial government. In this view, a pipeline comes from Alberta and passes through BC or Ontario.

Legally, constitutionally, and economically, however, as soon as it crosses a provincial boundary, it ceases to be a provincial matter; it goes from one part of Canada to another. Ottawa makes the rules, in this case mostly through the National Energy Board, and generally very sound rules they are, too. The residents of every province are well represented in the parliament that is constitutionally, legally, and democratically entitled to make these decisions.

Some may want to make the case that specific communities or provinces get shortchanged in the benefits generated by individual projects. That is a legitimate political position. But holding up projects that benefit the whole country simply because you think you haven’t got your “fair share”, whatever that is, is the precise logic of protectionists and NIMBYists everywhere: that unless each transaction can demonstrably be shown to benefit us more than other parties to the transaction we will block it – not because blocking it will help us, but because we would rather all be poor together than to see anyone else get ahead.

BC already benefits from the national approach that disgorges the wealth of western Canada at the Port of Vancouver, creating prosperity and thousands of jobs. It will benefit from that same

national approach when the time comes to ship its Peace River natural gas to Alberta to fuel the oil sands extraction process. Saskatchewan and Manitoba benefit disproportionately from the physical and institutional infrastructure on which a great agricultural economy is based. Ontario benefits disproportionately from various national standards and projects around manufacturing, banking, a third crossing to Detroit, subsidies to electric transmission across Northern Ontario, and many more instances I could adduce.

In fact this whole discussion puts me in mind of a story. Some of you may recall that during the first Quebec referendum campaign in 1980, some genius in the nationalist campaign did a quick calculation and discovered that railway spending per capita in Saskatchewan was vastly higher than railway spending per capita in Quebec and this was advanced as evidence that Canada and federalism were not in Quebec's interests and an independent Quebec would eliminate this gross discrimination in favour of the rest of Canada at Quebec's expense.

The counter to this, which made the absurdity of the whole argument become immediately apparent, was to reverse the calculation. The federalist side pointed out that landlocked Saskatchewan got essentially zero per capita spending on ports, whereas Quebec – a maritime province with the second largest port in Canada in Montreal, and smaller ports all up and down the Saint Lawrence,

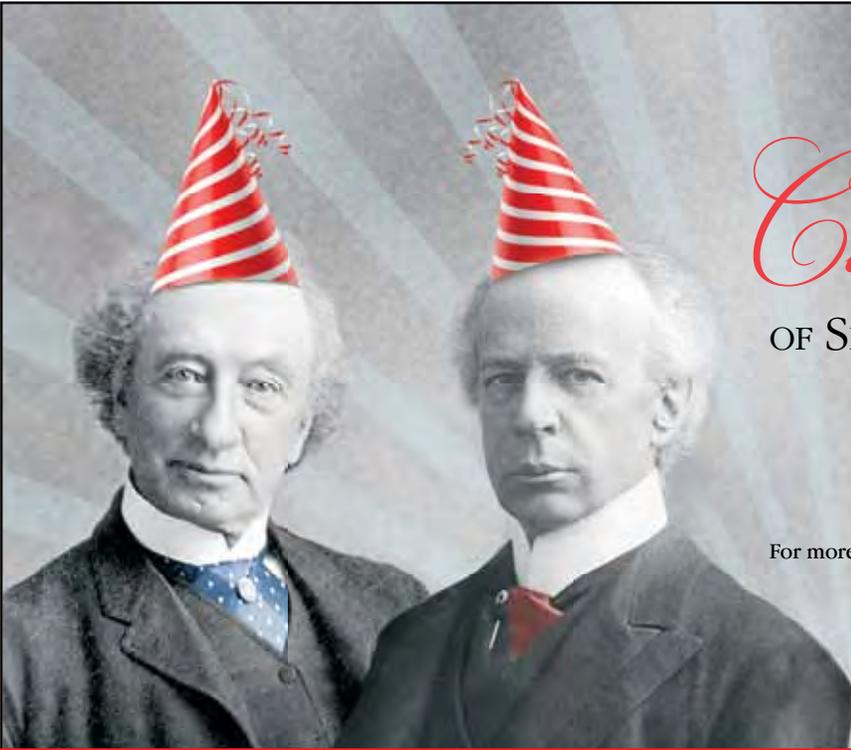
plus the benefit of the outflow of the Saint Lawrence Seaway that opened Great Lakes maritime traffic to the Atlantic – benefited hugely and disproportionately from such spending.

The “discrimination”, first against Quebec, then against Saskatchewan, was in fact nothing of the sort in either case. It is not discrimination to treat people or communities differently on the basis of their fundamental characteristics. At the time, Saskatchewan's grain economy depended on a vast array of small branch lines serving various grain elevators. Their need was for railways. Quebec, the commercial empire of the Saint Lawrence, needed port and navigation facilities. Both got what they needed. But of course if you asked Quebecers whether high rail spending in Saskatchewan was “in their interests”, they might well have said no; certainly the PQ hoped to turn it into a potent referendum argument.

In all these cases benefits that flow to identifiable regions vastly outweigh those to some or all the other regions in the country. To which the only possible response is: So what? That is what we created Canada to make possible. It is not a drawback of Confederation. It is its purpose.. ♦

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# Innocence Lost: Making good on Peace, Order and Good Governance

*National security expert Christian Leuprecht writes that recent terror attacks in Canada should provoke a national discussion on how we can detain terrorist threats while still protecting civil liberties.*

## *Christian Leuprecht*

Until October of this year, Canada had a first-rate batting average in thwarting attacks by homegrown terrorists on our soil: plots were few, people were charged, and, in many cases, convicted.

So, what went wrong this time? Michael Zehaf-Bibeau, who was responsible for the attacks in Ottawa that killed Cpl. Nathan Cirillo, and Martin Couture-Rouleau who killed Warrant Officer Patrice Vincent with his car during an attack in St-Jean-sur-Richelieu, Que., had both shown up on security intelligence radar. Both had prior convictions, struggled with mental health issues, and had known sympathies for politically-motivated violent extremism. Triangulated with other indicators, that put them at an increased risk of moving from thought to action.

Apparently, Canadian security services do not have difficulty identifying at-risk persons per se. Why are they not being detained? The current legal framework puts several measures at their disposal, including national security certificates, preventative arrest, and investigative hearings. Absent robust evidence that an individual is looking to move from thought to action, Canadian courts are reluctant to approve of detention, let alone convict.

The federal government appears to be looking at more expansive powers of detention, perhaps by clarifying conditions and criteria for detention. These are currently ill-defined in the criminal code and normally require evidence for detention to be presented to a judge within 24 hours. The government may extend the permissible period for detention to buy police and/or security intelligence additional time to gather the necessary evidence in the case of national-security investigations. Similar measures already exist in other allied countries; in the U.K., for instance, the period can be up to 28 days.

The government also appears to be looking at criminalizing association with or diffusion of discourse that incites politically-motivated violent extremism against Canada or Canadians. Similar measures already exist in other areas of law, such as those criminalizing the possession of child pornography or threatening someone else with violence.

Ultimately, though, these measures may not make much of a difference if the level of tolerance for the standard of evidence required to detain and possibly convict is not actually lowered. That is as much a matter of legal and societal culture than it is of law, per se. In Canada individual freedom, civil liberties and privacy persistently seem to trump individual and public safety. Ergo, the government is proposing to lower some thresholds for warrants, for instance, from reasonable grounds to reasonable suspicion.

Allies such as the UK, France, Germany, and Spain have had to learn to live with terrorism, some for decades. As a result, their courts and their societies have developed greater sensitivity towards the protection of public safety. “He who sacrifices freedom for security deserves neither,” Benjamin Franklin famously said. But what about he who sacrifices security for freedom? Freedom and security are not a zero-sum dichotomy; to the contrary, they are complementary: you cannot enjoy one without the other. However, you also cannot enjoy your freedoms if you are dead.

Unlike Americans, Canadians are not inherently skeptical and mistrusting of their government. Why, then, reduce the Charter to a mechanism to “protect” Canadians from government? In criminal law, we tend to convict after an act has occurred; anti-terrorism legislation, by contrast, is largely

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*Continued on page 35*

# Will governments use legal tools to support development, or let small dissident groups prevail?

*MLI Senior Fellow Dwight Newman writes that opposition to Chevron's proposed Pacific Trail pipeline raises vital issues for major resource and infrastructure projects. Where projects have support from Aboriginal communities but are blocked by a small minority, governments need to understand their legal options.*

## *Dwight Newman*

Vandalism by masked perpetrators against gas pumps at several Chevron stations in Vancouver earlier this fall as a protest against Chevron's Pacific Trail pipeline is just one example of a possible new kind of challenge for Pacific Trail and other major pipeline projects. An emerging critical national discussion of the so-called "social licence to operate" in recent weeks partly highlights the same kinds of challenges outside the law. The term, until quite recently accepted at face value by the media, is being exposed in many instances as a synonym for mob rule.

The question arises: Where a resource project receives extensive support, will a few holdout dissenters be able to block it? Or will governments use the legal tools available to them to back resource development where appropriate?

The Pacific Trail Pipeline (also known as the KSL line) will transport natural gas from northeastern British Columbia to an LNG export terminal at Kitimat. Chevron has already received support from 15 of the 16 First Nations along the pipeline's 460-kilometre route.

Chevron also has support from significant parts of the leadership and membership within the last First Nation, the Wet'suwet'en Nation. However, some specific clans within that Nation, such as the Unist'ot'en clan, have withheld their support and have even erected protest camps along the route. This puts Chevron in the position of trying to continue to negotiate with the Wet'suwet'en Nation. But those negotiations have to take place in the face of division between different streams of leadership within that community.

At a time when major Supreme Court of Canada decisions appear to have increased the title claims of Aboriginal communities, some might think that Chevron is unfortunately up the creek without a paddle.

However, as Ken Coates and I show in a recent analysis of this summer's landmark Supreme Court of Canada decision in the Tsilhqot'in Aboriginal title case, published by the Macdonald-Laurier Institute, the legal position on these issues is actually more nuanced and balanced than sometimes realized. As just one example, the Tsilhqot'in decision provides for the possibility of overriding Aboriginal title for the sake of a compelling public interest where a specific legal test for that override is met.

It is constructive and proper that Chevron is continuing to try to find a negotiated solution, and we have to hope that a positive solution can be found.

However, those negotiations should be shaped not only by claims of extensive Aboriginal title claims but also by the reality that governments could choose to override Aboriginal title where they do so for the sake of a compelling public interest.

A pipeline like Pacific Trail that first received environmental approval in 2008 and that has attracted support from the great majority of Aboriginal communities along its route is surely a candidate for full governmental support. Anything less cheapens the broader public interest and cheapens the value we attach to the 15 Aboriginal communities who are supporting the project.

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*Continued on page 35*



Air Task Force – OP Reassurance, DND/combataircom...forces.gc.ca

A CF-188 Hornet from the Canadian Air Task Force Lithuania flies side by side with a Portuguese F16 Fighting Falcon over Lithuania on November 20, 2014 for the NATO Baltic Air Policing Block 36 during Operation REASSURANCE.

# What's a middle power to do?

## Protecting what matters in a dangerous world

*In an article based on a November 4, 2014 talk hosted by the South Korean Embassy, Brian Lee Crowley examines the common bonds and shared values of liberal democracies such as Canada and Korea, and calls for a staunch defence of these values by like-minded countries as the US takes a diminished role on the world stage.*

**Brian Lee Crowley**

I'd like to begin with a story. It has the merit of being a true story, but it is also a parable about the values that alone can ensure that the middle powers of the democratic world can and will protect their precious heritage.

The story came to me from a good friend who was brought as a young child from Holland, the country of his birth, to live in Canada. The story is of how his family chose to come to my country.

The liberation of the Netherlands from Nazi occupation was a job that fell to the Canadian forces in the Second World War. This job was carried out with typical Canadian effectiveness and self-effacement. The losses were considerable.

My friend's father was walking down the road not long after the Nazis were driven from Holland, and the sacrifices of Canada and its troops on behalf of that country were still fresh in his mind. Walking down the road in the opposite direction came a Canadian soldier. The Dutchman stopped the soldier and said, "You don't know me and I don't know you, but I know who

you are and what you represent. You and your fellow Canadians came from across the Atlantic, from far away, knowing nothing of my country and having little at stake here. At great expense in blood and treasure you have freed us from cruel oppression, and I imagine you have lost friends and colleagues in the effort. The least I can do is to tell you how deeply grateful my fellow countrymen and I are for what you have done for us."

According to my friend's father, the Canadian just looked at him quite calmly, smiled, and said, "No need to thank me, sir. We had a job to do and we did it." Then the soldier saluted and carried on down the road.

Apparently my friend's father arrived home and announced to the family, "I think we have found the country where we must go to live." My friend is now a distinguished member of the Canadian Parliament.

Now, please remember that this story might just as easily have been told by a Korean during the conflict in Korea and that

*Do the common values  
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I believe that they do,  
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Canadian soldier could just as easily have been my father in either case, since he served in both wars. This anonymous Canadian might almost have been quoting one of the great wartime leaders of the Argylls, the regiment of martyred Corporal Nathan Cirillo, who said his work was “to save lives, get a job done.” Talk about typical Canadian understatement.

Let me next deal with the issue of what I believe are the foundational values which shape beyond all doubt the character of Canada, a middle democratic power,<sup>1</sup> values whose integrity and defence are, I believe, what unites the countries of the Western alliance, an alliance which includes Korea, as well as Canada, the NATO countries, Japan, and several others around the globe.

We have a tendency, among friends in the international community, to invoke commonality of values at the drop of a hat. But do the common values that allegedly unite us exist outside of the pretty rhetoric of diplomatic speeches? I believe that they do, but that these values are not self-evident, nor easily described or understood. They certainly are not eternal verities,

but are fragile human achievements that must be nurtured and protected; they are not unchangeable facts about the world.

We’ve often heard that the relationship of shared values is based on freedom and democracy, but surely while this is closer to the truth, it doesn’t get us the whole way there. Hugo Chavez was democratically elected. The Castros think they have “freed” Cubans from US domination. The Iranian revolution served to “free” Iranians to live according to God’s law as revealed to Mohammed and as interpreted by a theocracy. These people all have the mere form of democracy and freedom; they do not have its precious essence.

We believe in a special kind of democracy, where even the will of the majority is bound by laws and rules. We believe, in other words, that even majorities may be wrong and there are certain things majorities ought not to be allowed to do, such as oppress minorities. This means that constitutionalism and the rule of law are an integral part of the values that should unite us.

We believe in the supremacy of the individual, so that collective freedoms, such as freedom from Yankee domination or capitalist exploitation or want or sin cannot replace or substitute for freedom of conscience, association, thought, and action. We believe in freedom, not just for itself, but because freedom is the indispensable condition of the fully human life, in which we make choices for ourselves based on our own beliefs, experiences, and priorities, not on those of dictators, mullahs, caudillos, or even benevolent bureaucrats. Freedom is the essential means to the full flowering of the individual, to living a life of dignity and worth, and that is the highest good at which society can aim.

### **Asian Values or Liberal Democracy?**

Let me open a parenthesis here and look at an objection that some will raise in the face of this argument that the Western alliance represents a coming together of like-minded nations from around the world in support and defence of values that lay claim to being

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<sup>1</sup> I don’t propose to get into a very complicated discussion of what constitutes a “middle power”. For the purposes of this article, I am implicitly assuming that there are three kinds of countries. There are superpowers characterized by major economies with international presence, significant population, major military, and diplomatic capability (that they have a track record of being willing to use and can project globally, not just regionally), and nuclear weapons. The US is undeniably in this category, China is increasingly so, and Russia still is but is in danger of falling out because of its economic weakness. France and Britain could be in or out of this club depending on your mood on any given day but I think are mostly out. India has nukes and military and diplomatic capacity, but these are more regional than global in nature and its weak economy also contributes to making it a rising regional power that can aspire to superpowerdom but has

not achieved it. The second group, the middle powers, would be mostly the members of the G20 who don’t belong in the superpower category, plus a few smaller countries (New Zealand, the Scandinavian countries, and the Netherlands would be examples) with developed industrial economies and that punch above their weight in world affairs for various reasons. The third group is everybody else. I don’t want to get detained by questions of who belongs in the middle power category since there will always be marginal cases about which reasonable people can disagree. The categories, however, seem to me to be generally sound. For the purposes of this, the only thing that matters is to establish that Canada is a middle power and that there are other middle powers with values and interests similar to Canada’s. Note I do not consider the EU to be a power at all in this sense. It could conceivably become one, but that is some little way in the future.

*We believe in a special kind of democracy, where even the will of the majority is bound by laws and rules. We believe that even majorities may be wrong and there are certain things majorities ought not to be allowed to do.*

universal, of being fitted not just to a few societies because of their ethnic and historical connection to the Western political and philosophical tradition, but applicable to all human beings because they are the values best suited to a universal human nature.

This claim of the universal applicability and appeal of the values I've described is contested, by among others, those who argue that there is a distinctive set of Asian values. "Asian values" is a notion promoted most notably by former Singaporean prime minister Lee Kuan Yew who made the case that Western concepts of democracy and human rights were ill-suited to Asian cultures that had a more authoritarian conception that was equally valid and perhaps even more successful. One of the starkest statements of this philosophy came from that great political philosopher and film star Jackie Chan, who in 2009 said,<sup>2</sup>

"I'm not sure if it is good to have freedom or not," [Chan] said. "I'm really confused now. If you are too free, you are like the way Hong Kong is now. It's very chaotic. Taiwan is also chaotic." He added: "I'm gradually beginning to feel that we Chinese need to be controlled. If we are not being controlled, we'll just do what we want."

There are many ways to refute the Asian values thesis, but I'll just mention three: 1) what Asians actually say; 2) the success of the East Asian counter-examples; and 3) the testimony of Asian leaders who reject the Asian values thesis.

Let's start with what Asians actually tell pollsters about their

values and whether they conform to the wishes of their authoritarian rulers or reflect their aspiration to join the ranks of societies that protect and nurture the individual and operate under the rule of law.<sup>3</sup> According to one exhaustive survey of values, with polling that includes East Asia as well as many democracies on the Pacific Rim and in Europe:

In summary, in contrast to the previous claims that East Asian political cultures lean toward authoritarian regime forms, the emerging consensus from cross-national survey research is that democratic aspirations are widely endorsed across contemporary East Asia – even in several non-democracies. Our research should, at the least, contribute empirical evidence to other criticisms of the 'Asian values' thesis, which claims that Confucian traditions and the resulting social authority relations are a significant impediment to democratization in Asia.

Let's talk now about the East Asian counter-examples that demonstrate the compatibility of Asian culture with the universalist aspirations of genuine democracy, human rights, and the rule of law. For me the obvious counter-examples are Japan, Taiwan, Korea, and Hong Kong, although there are others I could also cite, such as Mongolia, Indonesia, or the Philippines, clearly picking their way gingerly to these values despite having little historical experience of them.

Now please note that I am not saying that the transition has always been smooth or easy or without deplorable incidents and behaviours along the way. Many of these societies went through authoritarian periods, have had or continue to have unacceptable levels of corruption and so forth. Some of them, such as Korea, came into the Western orbit through historical accident, not at the outset because they aspired to appropriate for themselves the values we are discussing. But when we see the unprecedented success these societies enjoy and the speed with which they achieved that success in the postwar world, and when we see the determined embrace of liberal democracy by their people, and how increased material success has gone hand in hand with increasing liberalisation of institutions and regimes, there can be little doubt as to why authoritarian regimes want to put about the idea that these societies have somehow sold out and adopted foreign values and failed to be true to their authentic inner authoritarian.

With regard to the testimony of Asian leaders on the Asian values question, I don't have space for a full survey but think

<sup>2</sup> Noah Smith, October 3, 2014, "On 'Asian Values'." Available at [noahpinionblog.blogspot.ca/2014/10/on-asian-values.html](http://noahpinionblog.blogspot.ca/2014/10/on-asian-values.html), accessed on November 4th, 2014.

<sup>3</sup> Russel J. Dalton and Nhu-Ngoc T. Ong, 2005, "Authority Orientations and Democratic Attitudes: A Test of the 'Asian Values' Hypothesis," *Japanese Journal of Political Science* 6 (2): 1–21/

it most appropriate in this context to quote former Korean president Kim Dae-jung. President Kim was the recipient of the 2008 Nobel Peace Prize and was graced in his lifetime with the accolade of “Asia’s Nelson Mandela” for his longstanding opposition to authoritarian rule and his Sunshine Policy toward North Korea. In a rebuttal to Lee Kuan Yew’s defence of authoritarianism published in *Foreign Affairs* magazine in 1994,<sup>4</sup> President Kim, after celebrating the fact that there were more genuine democracies in Asia than the world average, writes:

“Asia should lose no time in firmly establishing democracy and strengthening human rights. The biggest obstacle is not its cultural heritage but the resistance of authoritarian rulers and their apologists. Asia has much to offer the rest of the world; its rich heritage of democracy-oriented philosophies and traditions can make a significant contribution to the evolution of global democracy. Culture is not necessarily our destiny. Democracy is.”

### Sacrificing for What Matters

Another value which I have so far set aside is the value of self-sacrifice, the belief that because individual liberty and responsibility for self is the highest good, and because limited government and constitutional democracy and the rule of law are the essential means to those ends, that we are all prepared to make sacrifices in order to preserve and protect that good and those institutions. As Prime Minister Stephen Harper so movingly remarked in his funeral oration for Corporal Cirillo, “Corporal Cirillo knew what all those men and women who died before him [in the service of Canada] also knew. The only values really worth living for are those worth dying for.” Moreover we are not content merely to protect them for ourselves here in Canada, but we are prepared to do what we can to ensure that those who yearn for freedom shall not see it wrenched away by freedom’s opponents.

Thus it was that when Europe was engulfed by Nazism and Fascism, the entire democratic world – Britain, the US, Canada, Australia, New Zealand, and others – rose up and, at great cost to themselves, rescued Europe, to the wonderment of my friend’s father. Thus it was when the Soviet Union threatened all the values I’ve described that link the liberal democracies, politicians like former trade union leader Ernest Bevin in the UK convinced his former members that they needed to sacrifice, through

<sup>4</sup> Kim Dae Jung, 1994, “Is Culture Destiny? The Myth of Asia’s Anti-Democratic Values,” *Foreign Affairs* November/December. Available at <http://www.foreignaffairs.com/articles/50557/kim-dae-jung/is-culture-destiny-the-myth-of-asias-anti-democratic-values>, accessed on November 4th, 2014.



The Commanding Officer and Regimental Sergeant-Major of the Canadian Special Operations Force Command salute the fallen at the naming ceremony for the new Canadian Special Operations Force Command Patrol Base, Cirillo during Operation IMPACT in Iraq on November 6, 2014. Photo: Canadian Forces Combat Camera, DND

higher defence spending, a nuclear deterrent, and membership in NATO. Thus it was that Canada and the US, among many others, rallied to the defence of South Korea when Russia and its proxy China tried to invade the south in defiance of the postwar status quo. Thus it was that Canada and the US put military bases in Germany for the sole purpose of guaranteeing that if Soviet tanks rolled into Western Europe, they could not advance without attacking our two countries as well. We put ourselves intentionally in harm’s way as a sacrifice to protect shared values. Thus it was that, decades later, a number of Western European leaders made big political sacrifices in order to support US policy in Europe designed to turn the heat up on the USSR, such as the stationing of cruise missiles, policies that ultimately resulted in the failure of that society and a vast expansion of human freedom.

Note that most of this was not the “military solution” that



Members of Oscar Company Group, 3rd Battalion, The Royal Canadian Regiment conduct training with the Polish Army during Exercise Falcon in Central and Eastern Europe on November 23, 2014. Photo: Land Task Force – OP Reassurance, DND

US President Barack Obama so reviles. But note too that it was a solution that depended unequivocally on a demonstrated willingness to use the military solution when all else fails. Red lines, and the willingness to enforce them, were key. I'll come back to red lines in a moment.

### ***Is the World a Dangerous Place?***

For now, remembering that splendid legacy of sacrifice in the name of our values, brings us, at long last, to the central issue of this piece: how does Canada, as a middle power, and other similar liberal-democratic middle powers, protect ourselves from those who wish us ill, who believe that our way of life is an affront to their ambitions and most cherished beliefs, while not ourselves damaging or endangering the very things that we wish to protect?

Perhaps the first question I need to address here is whether in fact the world is a dangerous place, as the title of this article claims, and particularly a dangerous place for our liberal-democratic values.

I don't think that it takes much imagination to see the dangers that lie in wait for us, whether it is the nuclear proliferation threatened by rogue states, or the slaughter of innocents in the Middle East, or China's ban of exports of rare earths, a dagger aimed at the industrial heart of several Western-allied nations in East Asia, or China's effort to achieve regional dominance in the waters of East Asia after centuries of freedom of the seas

guaranteed first by Britain and now by the US, or many other threats I could mention.

Let me focus for a moment on just one of these threats: the re-emergence of Russia, not as a Communist power, but as a self-conscious re-invention of itself as a geo-political polar opposite to the US. Russia has been deeply offended by its loss of prestige in the world, and especially in the eyes of its old adversary, the United States. When President Obama told Russians that he regarded them as a mere "regional power," they realized that they were now humiliatingly seen as a kind of Brazil with ageing nukes.

President Vladimir Putin has, with infinite cunning and forethought, used Russians' deep patriotism as the foundation of a military and diplomatic resurgence. Unrestrained by mere considerations of democracy or the rule of law, he has used the US's and the West's current weakness and vacillation against it by bold and imaginative strokes: seizing the initiative in Syria, frightening NATO from extending itself to Georgia and Ukraine, grabbing Crimea, igniting an explosive regional conflict in Eastern Ukraine, and using its natural gas as a bludgeon against countries unwise enough to become dependent on it.

Russia is thus once again posing to the West the issue of the sacrifices we can and should be prepared to make to protect fundamental values like freedom, democracy, and the rule of law. It doesn't matter that Moldova, Ukraine, and Georgia are

places many of us would be hard-pressed to find on the map, although it is undeniably true that our interests prevent us from putting everything on the line in defence of small isolated players as yet uncommitted or only marginally committed to our values when Russia appears prepared to put everything on the line. The point is that every success for Russia in its aggressive expansionist policies is an incitement for them to up the pressure yet further. Moreover the world's other bullies are watching closely and are encouraged in their own aggression by the success they see flowing from Russia's belligerency.

*Russia is thus once again posing to the West the issue of the sacrifices we can and should be prepared to make to protect fundamental values like freedom, democracy, and the rule of law.*

That does not mean, of course, that every problem must be met with a military solution. As I've already suggested, the military solution is almost never necessary when your level of resolve demonstrates that it will be used if less dangerous measures do not produce the desired result. We must be prepared to sacrifice some energy security and some business in order to take vigorous economic and diplomatic steps to punish Russian aggression, for example, including painful and effective sanctions. We must be prepared to face down Russian displeasure and welcome countries like Ukraine into the Western orbit. Remember it was Ukraine's clear desire to sign an association agreement with the EU, and to cement its progress toward the West, that unleashed Russia's reprehensible behaviour. We must be prepared to withstand Chinese displeasure over rules on investment in natural resources or our criticism of its human rights record. And when necessary we must be prepared to take military action against those, such as ISIS, who refuse to recognize the most basic constraints on their behaviour and decimate innocents.

## The Indispensable Nation

Now we come to the United States, the indispensable nation. It is indispensable in this context because among the postwar community of like-minded nations that I have been discussing, the US has been the reliable provider of the intellectual and political leadership and the military might necessary to rally those countries to action in the face of threats. US leadership of what we used to call the free world was simply a given and it was based on a bipartisan commitment in Washington. In fact it was the Republicans that had to be dragged, kicking and screaming, out of a Fortress America isolationism, by a Democratic Party that took the US into the Second World War and helped to create the postwar institutions such as NATO, the UN, the World Bank, and others that promised a world safe for liberal democracy.

One of the most articulate defenders of that role was Democratic President John F. Kennedy. Under Kennedy, whatever his flaws, we saw on the international stage the deployment of US power in pursuit of the best of US values.

In his inaugural speech Kennedy committed the US to a stance whose power still reverberates down the years: "Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, in order to assure the survival and the success of liberty."

He meant what he said. Like it or not, he stood firm against Soviet intimidation in Europe and Vietnam. He took the world to the brink of nuclear war to stare down Nikita Khrushchev over the Cuban missile crisis. He laid down markers about the kind of behaviour that was compatible with peace and prosperity in the world and held to account regimes that failed those tests, including militarily where necessary.

I am sorry to report that under President Obama things could hardly be more different. Today the US seeks no burden and accepts little responsibility, and its status as a global superpower dwindles daily from disuse. Its president is largely unwilling to exercise that power to hold the world's villains in check and far too willing to dismiss the work and sacrifice of allies if he can ingratiate himself with those who are hostile to US interests.

The examples are legion, ranging from his shameful treatment of Poland and the Czech Republic over anti-missile defence to his unseemly haste to extricate himself prematurely even from the "good" war he himself declared Afghanistan to be. Tehran's duplicitous mullahs are today almost certainly playing him for a fool over their nuclear ambitions. Putin outmanoeuvred Obama on Crimea and then Ukraine.



The U.S. Capitol building, Washington, D.C. Thinkstock

But one of the most dangerous and egregious examples is what happened in Syria.

Obama claims that US diplomacy triumphed over the issue of the Assad regime's use of chemical weapons. He had made the regime's use of such weapons a "red line" whose crossing would bring US retribution down on Assad's head. The regime then repeatedly crossed that line and Obama prevaricated by seeking unnecessary Congressional approval for military action. When he couldn't get it (itself a scandalous failure of leadership) he fell in with a Russian plan to relieve Syria of its chemical weapons.

But the red line was not about the weapons. The red line was about the kind of behaviour that the US found acceptable in Damascus. Obama in effect warned Assad that any regime that used chemical weapons against its own civilian population put itself beyond the pale and that the US would punish lapses, by military action if need be. The mere removal of the chemical weapons is not a punishment for Assad's bad behaviour, but in effect the signalling that such bad behaviour now attracts no serious consequences. And what did Obama say about the issue in his State of the Union speech this year?

"We will continue to work with the international community to usher in the future the Syrian people deserve – a future free of dictatorship, terror, and fear." In other words, a chilling

rhetorical flight of fancy totally divorced from the reality of one of the worst humanitarian disasters of our times. Dictators the world over could be heard breathing a sigh of relief. Obama even allowed Putin to manoeuvre him into a face-saving deal over chemical weapons that may have resulted in their destruction (although I am skeptical) but left President Assad completely unpunished and unrepentant for their use, while reports continue to emerge of his use of other chemical weapons such as chlorine gas.

As JFK knew, world peace and stability often hangs by US willingness to enforce many red lines. There is such a line between the Koreas, another surrounding Israel, a third separating Japan and Taiwan from China. On one side of each such line the enemies of liberal democracy brood darkly, held in check chiefly by the fear of US retribution.

If you were on the right side of those lines under Kennedy, you knew US power was your friend. Under Obama, it is the people on the wrong side of those lines who have taken heart because the signs are increasingly clear that today's commander-in-chief believes that fine words and sentiments ought to be enough to police bad behaviour. As a direct result Japan is rearming, many Middle Eastern regimes are seeking nuclear weapons, the "good" opposition in Syria has essentially been displaced by Islamic extremists, and a resurgent Russia tweaks the US eagle's beak at every opportunity. In Iraq and Syria, in the face of ISIS's threat to civilized values and to thousands of innocents, Obama has

*The bipartisan coalition of political leaders committed to the defence of liberal democracy that included Democrats like Sam Nunn and Scoop Jackson as well as Republicans like Barry Goldwater and John McCain is a fading memory.*

once again responded more with fine words than with determined concerted action. According to a joke recently circulating among Kurds in the region, they couldn't tell whether the Americans were not fighting while pretending to fight – or fighting while pretending not to fight. And even though their presence has grown modestly in recent weeks, it is clear that the Obama administration's commitment remains far more rhetorical than real.

It is too early to tell whether the Obama administration's abdication of international leadership of the liberal democracies is now an enduring feature of US foreign policy or merely an aberration. The signs at the moment are equivocal. On the one hand we have the clearly expressed disquiet of US public opinion in the face of ISIS abuses and the widespread support for intervention. On the other hand the bipartisan coalition of political leaders committed to the defence of liberal democracy that included Democrats like Sam Nunn and Scoop Jackson as well as Republicans like Barry Goldwater and John McCain is a fading memory. Democrats have largely jumped ship, while one of the rising stars of Republicanism is the neo-isolationist Senator Rand Paul.

### The Free Rider Problem

Of course it is also true that the US has often, and rightly, felt that much was expected of it and not much given in return. Canada, along with many of the middle powers of the liberal democracies, has often called upon this community to take action, but been unwilling to put into it the investment in economic resolve, diplomatic commitment, domestic security arrangements, arms, and people proportionate to the benefit we derive. The US has shouldered the burden.

I have been critical of Obama's overblown rhetoric and anaemic actions, so I must be consistent and say that Canada in recent years has talked a good game but has failed to deliver. Just recently the Conference of Defence Associations rightly criticized the current government for starving the Canadian armed forces of the troops and materiel needed to be an effective fighting force. If Canada wants to see leadership from its fellow democracies and particularly the middle powers, it must itself lead by example and in so doing demonstrate to the US that those who benefit from that country's commitment to the world do so not as dependent but ungrateful vassals but rather as countries that carry their own weight in the alliance.

I suspect that as the middle powers like Canada see the US confirm its extreme reluctance to do more than talk about international security, they will do more out of self-interest in any case, as



CF-18 jets fly over Iceland on March 25, 2013 during Operation IGNITION. Photo: Cpl Pierre Habib, 3 Wing Bagotville, © 2013 DND-MDN Canada

countries like Japan are doing and I suspect a lot of former Soviet vassal states such as Poland and the Baltics are also doing.

But as middle powers we need to do more to get the US to re-engage. It is, after all, still the indispensable nation. In that regard I note the irony of the fact that while there is an international club for just about everything – one for former members of the British Empire, one for countries that speak French or aspire to do so, one for big economies, many for the developing world – there is no club that brings together the liberal democracies in a commitment to defend themselves and to co-ordinate their efforts to protect and nurture their values as they spread to other societies across the globe. Once upon a time in the rubble of the Second World War the victorious liberal-democracies could think that was the role of the UN, but the explosion of the number of autocratic countries in the world and the institutional failure of the Security Council have long since put paid to that dream.

In the face of the Soviet threat the phrase we used was "collective security". NATO was an effective response but today is too limited geographically and some of the members are increasingly doubtfully committed to the values of liberal democracy. Collective security is what we still need today, however much

*If Canada wants to see leadership from its fellow democracies and particularly the middle powers, it must itself lead by example.*

the context may have evolved. But whereas the US effortlessly provided the leadership that was needed, it may now fall to the middle powers, countries such as Canada, Australia, Japan, Britain, and others to coax the US back. We middle powers cannot achieve what needs to be done alone, but we can help to create the conditions in which the indispensable nation once more welcomes rather than resentfully resisting the responsibility that great power inevitably brings in its wake. And we need to do more to bring middle powers like India into our community of like-minded nations with which it shares so much.

We (by which I mean we bearers of liberal-democratic values) are constantly faced with regimes and peoples who are in absolutely no doubt about the values they embrace, and who demonstrate a willingness to make great sacrifices to preserve and promote those values at home and to project those values abroad. There are tests of strength going on all the time between our liberal-democratic world and the Russians over Ukraine or energy supplies; or with

the Iranians and the North Koreans over nuclear proliferation; or with international terrorist groups over our ability and that of innocent local populations to live free from attack; or with the Chinese over currency manipulation or dominance in the Asian seas or control over natural resources around the world.

The US will continue to be the world's greatest superpower but it is undeniable that its relative power is receding. The prosperous industrial liberal-democratic middle powers will be vital in the years to come for no one will be able to shoulder the burden alone.

### **What's at Stake for Liberal Democracy**

What will determine the worth and the longevity of the liberal-democratic world will be the extent to which it represents people willing to sacrifice for important moral values, such as freedom and personal responsibility and genuine democracy, even in the face of political opposition at home. Americans today worry that engagement with the world weakens the US at home, and so are tempted by isolationism and protectionism. Much of Europe's governing class fears the reaction of a population too dependent on the state's benevolence to answer any call to sacrifice on freedom's behalf. Many of the liberal democratic middle powers of Asia fear offending the rising power of the Chinese dragon.

When we act together we, the liberal democratic nations, are the world's hope for freedom and progress. When we go our separate ways those who do not share our values can more easily tempt us with offers of increased prosperity in exchange for compromise on foundational moral issues. It used to be that the governing class in its entirety saw this with great clarity throughout the democratic world, but that certainty has been frayed over recent years.

Can the liberal-democracies summon up this level of moral courage today in defence of their values and interests? On the answer to this question much depends. The answer is not yet no, but neither is it clearly yes. It is a resounding maybe. If we truly believe in a moral community of democracies devoted to the fullest flowering of the individual, and if we also believe that the world is full of people and regimes who do not wish that project success, then every one of us has a heavy burden of responsibility to ensure that this great project does not fail because we were not up to the task of explaining and defending it. For make no mistake: if we fail, then when the next great challenge arises to our shared moral values, there may well be no Canadian for my friend's father to meet on the road in the Netherlands. ✦

Flags laid on the Tomb of the Unknown Soldier, Ottawa.  
Thinkstock



*Brian Lee Crowley is managing director of the Macdonald-Laurier Institute.*

## Innocence Lost (Leuprecht)

*Continued from page 24*

meant to deter individuals from moving from thought to action, and to prevent those who do from actually realizing their intentions. Canadian courts and Canadian society give the latter short shrift: the evidence that someone is looking to act needs to be overwhelming.

Tell that to the parents of Cpl. Nathan Cirillo; or the parents of Michael Zehaf-Bibeau and Martin Couture-Rouleau. All would have preferred for the courts to err on the side of caution. So would most of the critics of the government's proposed legislative changes: If it was them or their child who was harmed, they would be chastising the government for not having done more.

CSIS appears to have great trouble convincing courts that some individuals should no longer be roaming freely; and the RCMP's national security investigations are lengthy, in part because much of the evidence CSIS produces under the legal threshold of reasonable suspicion does not withstand scrutiny against the threshold of reasonable doubt in a criminal proceeding. With CSIS unable to detain and the RCMP evidently struggling to lay charges with the prospect of obtaining a conviction, are the courts too exacting?

The current equilibrium needs some rebalancing: If

Canadian society and its courts can adapt – as jurisprudence in comparable rule-of-law jurisdictions has -- then perhaps Canada may be able to do without expansive laws of detention, arrest and criminalization. I value my freedoms; but I value my life and the lives of my compatriots even more.

More expansive powers for law enforcement and security intelligence need to be balanced with robust parliamentary accountability. My preferred model is Belgium's where two permanent agencies headed by judges – the Comité R (renseignement) and the Comité P (police) – are empowered to audit not only past but also ongoing investigations in real time and report their findings directly to a select group of security-cleared members of parliament.

But in the end, just as with child pornography or those who threaten to harm others, there comes an inflection point beyond which the protection of the collective interest enshrined in constitutional supremacy takes precedent over a denatured conception of individual rights. Michael Zehaf-Bibeau and Martin Couture-Rouleau were outliers; Parliament needs to assert its sovereignty to keep it that way. ✦

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## Will governments use legal tools (Newman)

*Continued from page 25*

There are, to be sure, complex political dynamics around any such suggestion, and the situations where it applies need to be carefully considered. However, legally speaking, the possibility of a government override comes from the very same legal sources as the recognition of Aboriginal title does.

British Columbia has some very challenging questions to sort through. September's historic meeting between the BC Cabinet and BC First Nations – and Premier Christy Clark's speech recognizing Aboriginal title – are the beginning of a larger process that is a phase of a larger reconciliation project.

Within these larger processes, there must be recognition that overwhelming support for certain projects must carry some weight.

It is proper that all have a chance to express their view and advocate for their rights. But the question is whether one

divided community – much of which has actually supported the project – should stop a project from which Canada generally and many other Aboriginal communities will gain clear benefits. And the broader question is how much weight governments allow to be held by small numbers of dissenters who assert themselves beyond the law.

The prospects for broader societal attitudes on reconciliation with Aboriginal communities, Canada's attractiveness as a destination for much-needed investment capital, and Canada's future as a resource superpower offering prosperity to both non-Aboriginal and Aboriginal communities may all hinge on how governments answer these questions. ✦

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