THE MAGAZINE OF THE MACDONALD-LAURIER INSTITUTE

INSIDE POLICY

APRIL 2015

The Supreme Court v Parliament

Matters of life and death

Stanley Hartt fears for the most vulnerable following the recent Supreme Court decision on assisted suicide. Dwight Newman and Brian Lee Crowley weigh in on recent SCC rulings that have cast the role of the court in doubt.

Also INSIDE:

A look at C-51 without hype or hysteria

Progress for Aboriginal peoples still haunted by the past

How science is sidelined in the public debate

Saving history from institutional amnesia

INSIDE POLICY
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Brian Lee Crowley, Managing Director, mgdir@mli.ca
David Watson, Managing Editor and Communications Director

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Production designer: Renée Depocas

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Inside Policy: 8 York Street, Suite 200, Ottawa ON, Canada K1N 5S6, PH; 613-482-8327

From the editors

The cover story in this month's edition of *Inside Policy* deals with an issue that tragically affects many Canadians, that of physician-assisted suicide. It's a controversial subject many policy-makers would likely prefer to avoid, but it has been thrust upon them with the recent *Carter* decision by the Supreme Court of Canada.

In this issue, **Stanley Hartt** urges parliamentarians to use caution in drafting new legislation on physician-assisted suicide. He is concerned that many vulnerable people will feel pressured to ask a physician to speed their deaths, and he notes that the question of a patient's competence to make such a decision must be handled with utmost caution. Hartt rejects calls to leave a legal vacuum as Canada has done with regard to abortion, emphasizing Parliament's role in protecting rights while upholding societal standards.

This latest case is just one example of a string of high-profile decisions the Court has made that have had an enormous impact on public policy, as documented in the December issue of *Inside Policy*, which declared the Supreme Court the Policy Maker of the Year. In this issue, MLI Senior Fellow **Dwight Newman** takes issue with the Court's recent decision on public servants' right to strike in the *Saskatchewan Federation of Labour* case and warns that any future back-to-work legislation may be subject to constitutional litigation, which could invite use of the *Charter*'s notwithstanding clause. And MLI Managing Director **Brian Lee Crowley** writes that an "insidious corruption of purpose of the law, the legal profession and the courts" could have economic consequences because society depends on the certainty provided by a robust legal regime. This isn't just happening with the Supreme Court either. This cultural rot has also eroded other areas of the legal and judicial world. Given that it will require "a generation of patient and determined effort across a broad front to fix", Crowley advises that we need to get to work on it sooner rather than later.

This issue of *Inside Policy* includes an essay by *Globe and Mail* national affairs columnist **Jeffrey Simpson**, who reflects on decades of covering Aboriginal issues and finds that attempts to move forward are still stymied by a tortuous past. Commissions of inquiry have produced tens of thousands of pages but we still struggle to find the middle ground where First Nations can participate in a modern economy while preserving autonomy and traditional lifestyles.

Also in this issue, psychologist **Paul Gendreau** discovers what happens when you try to introduce scientific facts into an impassioned media debate, **Karen Horn** says the "nudge" phenomenon isn't as benign as it seems, journalist **Eric Marks** raises alarm over institutional disregard for history, **Scott Newark** analyses the federal government's controversial anti-terror legislation, rail industry expert **Malcolm Cairns** warns against intrusive regulation, and **Brian Lee Crowley** says political parties who ignore "expert opinion" shouldn't be throwing stones.

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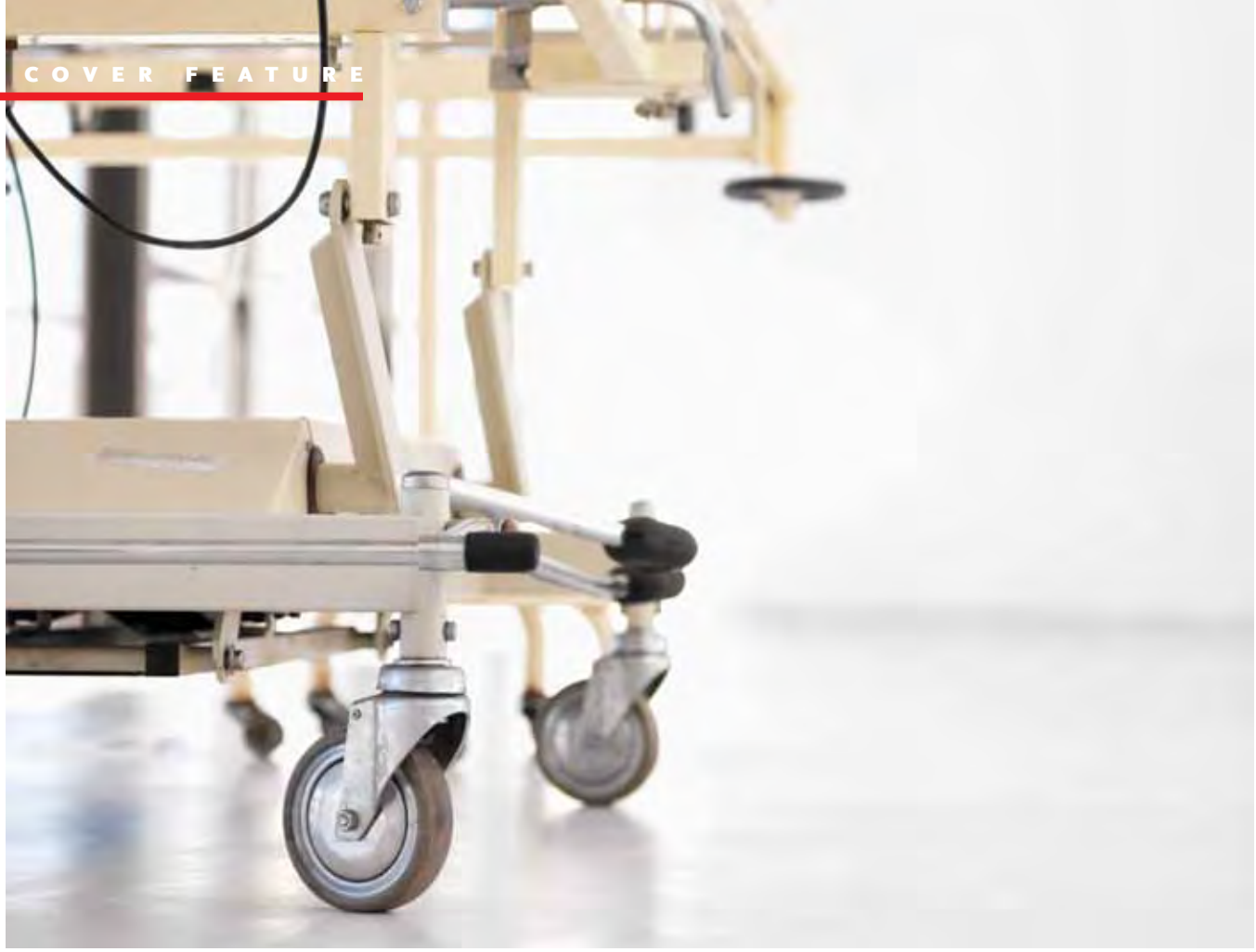

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A matter of life and death

Legal expert Stanley Hartt writes that new legislation on assisted suicide must be drafted with great care to protect the vulnerable. We can't just "muddle through".

Stanley Hartt

She should have died hereafter.
– Macbeth, *Act 5, Scene 5*

Macbeth's seeming indifference to the announcement that his beloved Lady Macbeth had died, reflecting on the eventual inevitability of death and the resulting futility of life, needs to be borne in mind by our legislators as they ponder what to do about the Supreme Court of Canada's recent unanimous decision in *Carter v. Canada (Attorney General)*, 2015 SCC 5, striking down the Criminal Code provisions prohibiting physician-assisted suicide.

It matters a great deal whether someone dies sooner rather than later, not the least of all to the person whose death is hastened. The Court sets out clear requirements for any forthcoming legislation, intended to ensure that the consent of the patient is indeed free, informed and rational.

The essential holding in this highly-publicized ruling is that "the prohibition [in the Criminal Code] on physician-assisted dying is void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability)

that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition".

Relying on the evidence of truly horrible medical conditions advanced by the Appellants, where the focus was on a hopeless prognosis for progressive deterioration accompanied by severe and unbearable suffering, it is not surprising that much of the judgment emphasizes the need to protect the Section 7 *Charter* rights of patients to life, liberty and the security of the person. The decision essentially makes the obvious point that relief from unremitting and incurable pain is a matter of individual dignity and autonomy, and that preventing physician assistance in end-of-life decisions could actually push vulnerable persons to take, or be persuaded to take, their own lives before they would otherwise choose to, in order to avoid being in a position where they no longer could do so for themselves. The decision refers repeatedly to the need to "protect the vulnerable from being induced to commit suicide at a time of weakness".

> *When an incurably ill person is nearing inevitable death, they are extremely vulnerable to external pressures as to the timing of death.*

Throughout the reasoning, the Court takes the view, upholding the trial judge's decision on the evidence, that "properly qualified and experienced physicians [can] reliably assess patient competence and voluntariness, and that coercion, undue influence, and ambivalence [can] all be reliably assessed as part of that process … Physicians should ensure that patients are properly informed of their diagnosis and prognosis and the range of available options for medical care, including palliative care interventions aimed at reducing pain and avoiding the loss of personal dignity".

They reject Canada's argument that a permissive regime in Canada would result in a slippery slope into euthanasia and condoned murder. "At trial Canada went into some detail about the risks associated with the legalization of physician-assisted dying. In its view, there are many possible sources of error and many factors that can render a patient 'decisionally vulnerable' and thereby give rise to the risk that persons without a rational and considered desire for death will in fact end up dead. It points to cognitive impairment, depression or other mental illness, coercion, undue influence, psychological or emotional manipulation, systemic prejudice (against the elderly or people with disabilities), and the possibility of ambivalence or misdiagnosis as factors that may escape detection or give rise to errors in capacity assessment".

Ultimately, the Court concludes that, "We agree with the trial judge that the risks associated with physician-assisted death can be limited through a carefully designed and monitored system of safeguards."

So that leaves us with a road map for what Parliament must consider in order to amend the Criminal Code in a manner that will be compliant with the *Charter* to protect the rights of those with grievous and irremediable medical conditions (including illness, disease or disability) that causes enduring suffering that is intolerable, while maintaining safeguards against the slippery slope abuses feared by Canada's attorneys.

The difficult part, with all respect to the Court, is assigning to physicians the responsibility to ensure that decisions expressed by vulnerable patients asking for assistance to terminate their lives are really the informed, conscious and thought-out decisions of the patient and not planted in their minds by others.

When an incurably ill person is nearing inevitable death, they are extremely vulnerable to external pressures as to the timing of death. Children and their spouses tired of making endless hospital visits, heirs eager to inherit, and others with agendas not in the interest of the about-to-be deceased may find it easy to conclude, based on the doctor's advice, that the situation is hopeless, and so effectively "persuade" the unfortunate patient to hasten the extinguishing of life. The guilt of the dying about hanging on is a sad but real phenomenon.

Many of our largest financial institutions play on guilt and the fear of becoming a "burden" when selling guaranteed acceptance life insurance to cover "final expenses". Extreme caution should be exercised in the drafting of any legislative response. Care should be directed not merely to the need to provide a mechanism to end excruciating pain and suffering but also to the need to discern situations where undue, insidious, unseen influence is brought to bear on the very vulnerable the Court wrote this judgment to protect "from being induced to commit suicide at a time of weakness". There are many ways to commit suicide; one is to accede

to the spoken or unspoken wishes of those closest to someone to "get on with it".

All the more reason to reject the very silly thesis reported in the *National Post* on February 26, under the headline "No need for Harper government to enact new assisted-suicide legislation: professor". In it, a law professor at the University of Ottawa argues that physicians are experienced at how to withdraw life-saving treatment.

> *Even patient options to refuse certain treatments are recognized in law, as the court is careful to point out, short of actually asking for assistance in dying.*

An expert in professional and applied ethics at the University of Manitoba agrees. According to the *Post*, "Doctors and family members have long made decisions about life support – 'tens of thousands of times every year in Canada' – in the absence of laws or regulations. In palliative care wards, a patient can contract pneumonia and not be given an antibiotic 'because the patient believes that it's time to go.'"

The Manitoba professor states: "It used to be called passive euthanasia, and I'm not aware of any cases of abuse, and no one from the evangelical Christian community or the disability rights community is raising alarms about this situation."

What this argument misses is that we are precisely worried about doctors' impressions of patient consent being influenced by not-disinterested family members. We are not here discussing treatment options for a patient in a coma or otherwise incapable of acting for themselves, which, it is quite true, have long been part of our medical system. Even patient options to refuse certain treatments are recognized in law, as the court is careful to point out, short of actually asking for assistance in dying. Here, rather, we are dealing with the need to protect patients against the exercise of insidious influence on a vulnerable person with a view to making it appear to a misled physician that the decision was actually a free, voluntary and informed one made by a competent individual him or herself.

The *Post* article goes on to be even more outrageous: "Canada 'muddled through' without an abortion law after the Supreme Court decriminalized it, 'and I think we'll do the same on assisted suicide.'

'Abortion proves that, where the medical profession has been left to its own devices it has arrived at a solution that, although not pleasing everybody, clearly pleases the majority of us. For everyone who is hyperventilating that the [assisted suicide] void must be filled by legislation — and, at that, federal legislation — I would say you're ignorant of history'," the law professor is quoted as saying.

To set the record straight, no one determined to "muddle through" when the Supreme Court decision in *Morgentaler* struck down the Criminal Code provisions on abortion as unconstitutional, leaving Canada without any rules whatsoever about when and under what circumstances an abortion could appropriately be performed. Far from muddling through, a significant effort was made by Justice officials to draft a Charter-compliant replacement statutory measure.

The proposed enactment won support from such diverse members of the House of Commons as the governing party's Quebec women's caucus and a group of committed Christians among the BC delegation, all of whom agreed that a replacement law was better than no law at all. The measure passed the House in 1990.

The reason Canada has no law on the subject is that Senator Pat Carney, who had promised to stay home if she couldn't in conscience support the enactment, showed up and voted against the proposal in the Senate, and caused the outcome to be tied. A bill on which the vote is tied is not carried and therefore lost. It would be dreadful if the consequential outcome of the Supreme Court's ground-breaking *Carter* decision were handled in the same manner.

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

Supreme Court's right to strike decision sets a troubling precedent

Macdonald-Laurier Institute Senior Fellow Dwight Newman picks apart a decision from early 2015 that he believes damages the Supreme Court's commitment to the rule of law.

Dwight Newman

In the abstract, nobody designing a democratic system of government would suggest that our largest societal decisions should be made by nine unaccountable people exercising their complete discretion – no matter how wise those people were. The decisions of the Supreme Court of Canada are meant to be guided by careful legal reasoning and by judicial precedent, and must include detailed reasons for its decisions. The Supreme Court is also subject to potential override by the legislative bodies in the event of disagreement on interpretation of certain *Charter* sections – indeed, some recent cases could invite this, undermining the Court's authoritativeness on constitutional interpretation.

Recent decisions of the Supreme Court have shown a remarkable disregard for precedent. The law is obviously not unchanging, but unjustified departure from precedent risks undermining the Court's role as legal arbiter. In each case, we can ask: is this disregard justified?

The *Saskatchewan Federation of Labour* case, in which a five-justice majority of the Court reversed earlier this year the Court's past decisions on the issue and created a constitutional right to strike, is an example of the Court gone astray. Whatever one thinks of delicate labour relations issues, the majority's reasoning is unfortunately well short of the standards we should demand from our best judges. It will have challenging consequences, without having been justified in adequate legal reasoning.

The decision is not short of potential legal sources. It purports to rely on dozens of past cases, dozens of academic articles, international instruments, and even the constitutions of half a dozen other states that have entrenched a constitutional right to strike. What is missing is a well-reasoned explanation of how this collection of stuff actually leads to the conclusion that section 2(d) of Canada's *Charter of Rights* protecting "freedom of association" contains a constitutional right to strike.

> *Canada specifically contemplated such a right when the drafting process for the Charter was underway in 1982 and specifically excluded it.*

Canada specifically contemplated such a right when the drafting process for the *Charter* was underway in 1982 and specifically excluded it – unlike the half dozen states the Court found that had included such a right in their constitutions. How the fact that other states included a right in their constitutions has anything to say about whether Canada's constitutional text includes it gets no explanation in the judgment. Notably, most of those constitutions predated the 1982 *Charter*, so the fact that they included a right to strike and Canada's excluded it does not give any logical reason why the Court should create such a right today.

Remarkably, in at least one instance, the majority does not

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> *The dissenting judgment … rightly points out that whether there is a right to strike in international human rights law is actually a contested matter amongst international bodies.*

even cite the most current version of one of the constitutions it cites but ends up citing a prior constitution. Putting it bluntly, the majority judgment of Justice Abella plays a bit loose with its sources in other ways as well. A significant part of the judgment traces through international human rights bodies' views on the right to strike and suggests a clear international consensus in favour of a right to strike as part of freedom of association. The dissenting judgment of Justices Rothstein and Wagner rightly points out that whether there is a right to strike in international human rights law is actually a contested matter amongst international bodies.

In one instance, they even show that the "decision" cited by Justice Abella was not a judicial decision and did not receive support at the decision-making body that is higher up the hierarchy than the committee she had cited. That goes unacknowledged in her decision, which simply continues to cite sources as if they definitively resolved things that they do not. The judgment offers no real explanation of why cherry-picked international law material would have anything significant to say about the contents of a section of Canada's *Charter*.

In some ways, the main potential argument of the majority is that there has been a trend in some recent decisions toward readings of Canada's freedom of association provision that protect greater labour rights. Explaining this, Justice Abella says that "the arc bends increasingly toward workplace justice" and says, of recognizing a right to strike as protected, that "[i]t seems to me to be the time to give this conclusion constitutional benediction".

Her colourful language – and her bold tendency to "give constitutional benediction" rather than to more cautiously apply the law – should not distract from the real questions. Recent cases have said that meaningful collective bargaining has constitutional protection. As the dissent points out, the fact that a constitutional case can be pursued over government failures to engage in meaningful collective bargaining arguably makes strikes less necessary than if there were no such opportunity. The "arc" leading to a constitutional right to strike may be more metaphorical than logical.

On one reading, the majority judgment constitutionalizes a right to strike only where necessary to meaningful collective bargaining rights. But many features of the judgment suggest it will be read as a broader constitutionalization of a right to strike, with restrictions on the right to strike always subject to constitutional challenge and constitutional analysis for their justification. That rigidly entrenches a particular labour relations model and takes away from opportunities to develop new models over time.

There could be further unexpected consequences as well. Governments do not resort lightly to back-to-work legislation, but when they do, they will now presumably be subject to constitutional litigation. It would not be surprising – and might be legally prudent – for governments to make proactive use of the notwithstanding clause in the special circumstances of various pieces of back-to-work legislation, simply to avoid unnecessary constitutional litigation. The case may yet open real precedent for the notwithstanding clause. Depending on how governments act in the years ahead, the majority's weakly-reasoned constitutional judgment in *Saskatchewan Federation of Labour* may actually trigger a process of reducing the role of the Supreme Court of Canada in constitutional interpretation.

Dwight Newman *is a senior fellow of the Macdonald-Laurier Institute and Professor of Law at the University of Saskatchewan. This article first appeared in the* National Post.

Cultural rot in the legal world is corrupting the rule of law

Canada's economy and society depend on a robust legal regime that reliably settles disputes according to established principles, writes Brian Lee Crowley. When the law becomes an instrument of social change, the cost could be great.

Brian Lee Crowley

Even the Supreme Court's friends are starting to get nervous at the gay abandon with which our highest court sweeps aside the annoying resistance of mere elected governments to its increasingly imperious will.

But the real long-term damage being done isn't in this or that decision over the right to strike, assisted suicide, national securities regulators, Senate reform or who is entitled to sit on the Court.

From an economic point of view the real damage that is being done is in the insidious corruption of the purpose of the law, the legal profession and the courts.

It is a commonplace that one of the greatest destroyers of growth and prosperity is uncertainty. Not all uncertainty can be eliminated, and indeed it is the risk of loss that entrepreneurs take in investing in the face of uncertainty that justifies their claim on any profit.

In a market economy you cannot get rid of the fickleness of consumer taste, the risk of currency movements and interest rate hikes, the unpredictability of the weather and technological breakthroughs, the perfidy and wiliness of competitors and employees and the instability of commodity prices.

But societies that can reduce uncertainty enjoy a leg up in the prosperity stakes compared to their riskier peers. If your schools graduate students who are reliably literate and numerate, your central bank maintains the value of your currency, the tax and regulatory regime is stable and predictable, and the police and the courts keep your property safe from fraud and theft, strong institutions are helping to squeeze uncertainty out of the world in which your business operates.

This brings us back to the law. One of the most basic purposes of the law is to help introduce certainty in human relations. One great blessing of the most stable and transparent legal regimes is not that you can get your dispute quickly before a judge. It is that the clarity of the law and the consistency with which it is applied means that the vast majority of disputes are never taken to court because the outcome can be confidently predicted in advance. Why spend time, money and energy on a case you cannot win?

A robust legal regime that reliably settles disputes according to established principles and is therefore deeply respectful of precedent, contract and private property confers a huge advantage on the society in which it operates.

Before the *Charter of Rights*, judges in our legal tradition were therefore a profoundly conservative force in the very best sense of that word. They were not on the bench to indulge their social theories or ride their favourite hobby horses. They were there to state what the law was in any particular case, not to make the law

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The Supreme Court v Parliament

(Top photo by P. Landreville, courtesy the Supreme Court of Canada; bottom photo: Thinkstock)

– a job reserved for lawmakers. And being bound by precedent and subject to accountability via the appeal process helped ensure judges spoke for the law, not their political and social beliefs.

The *Charter* did not set out to undo this enormously beneficial arrangement. It was intended merely to make our rights into a privileged form of law that overrode other kinds of law. The intention was a noble one. But the worm in the heart of the *Charter* apple has been the dawning realisation in the minds of lawyers, law professors and judges that they have unaccountable control over a document that trumps all other law.

The temptation to throw seemly judicial caution to the wind is both powerful and insidious. You can import your personal beliefs into the law merely by reinterpreting a word here, a concept there. The right of association becomes a right to strike. The right to life becomes the right to doctor-assisted death.

> *The cost to the rest of us isn't just the annoyance of unaccountable judges foisting their view on us. It is the corruption of the law.*

They don't even hide their imperialist ambitions behind the *Charter* justification anymore. Like Russia's slow-motion invasion of Ukraine, each breach in the wall of judicial self-restraint emboldens the court to expand its empire such as inventing new good faith obligations in well-established and well-functioning contract law. The law schools that produce our legal minds have gone from bastions of small-c conservatism focused on certainty-enhancing torts and contracts and wills to the vanguard of social engineering where the disaffected and the unscrupulously ambitious vie to produce new strategies for turning the law into an instrument of social change.

The cost to the rest of us isn't just the annoyance of unaccountable judges foisting their view on us. It is the corruption of the law, transforming it from a bulwark of certainty in an uncertain world into a new source of instability and risk. The cultural rot in the legal and judicial world will take a generation of patient and determined effort across a broad front to fix. Best get to work.

Brian Lee Crowley *is Managing Director of the Macdonald-Laurier Institute.*

This article first appeared in the Globe and Mail.

Cole Burston

A police officer patrols the Parliamentary precinct on Oct. 22, 2014, the day Cpl. Nathan Cirillio was shot and killed in front of the National War Memorial.

C-51: An analysis without the hype or hysteria

In a new MLI paper, legal expert Scott Newark cuts through the rhetoric on both sides of the debate surrounding the federal government's new anti-terror legislation to demonstrate that it won't destroy the balance between security and liberty in Canada, but it could be improved.

Scott Newark

One of the most alarming aspects of the recent and growing terrorism attacks within Western societies is their Islamist ideological motivation and the assurances from the "bad guys" that there will be more to come. The people who lead these death cults have also figured out that they can advance their perceived cause by inspiring and instructing susceptible people in those same Western countries not simply to travel abroad to join them but rather to commit their horrific crimes in their own neighbourhoods so as to generate maximum fear value. Those same "bad guys" also realize that exploiting the freedoms of Western society is a tactic they can use and they actually hope that their atrocities will lead to alienation of Muslims in Western countries who they then hope to draw into the Islamist "us against the world" mindset. In short, it's an incredibly complex situation that must be addressed.

These events and the continuing malevolent determination behind them have rightly led to a review of how we as a society are prepared and enabled to effectively detect and interdict these "home-grown" threats while respecting and preserving the very Western values that make us who we are. This effort now includes C-51, the anti-terror legislation recently introduced by the Government of Canada. This paper will attempt to offer a

constructive analysis of the Bill with observations that may assist in its review.

At the outset, it is important to remember that Bill C-51 is a legislative response to the relatively new manifestation of an existing terrorism security threat; namely domestic radicalization and the growing reality of terrorist action taken within Western societies, including Canada. As uncomfortable as it may be for some people, the existence of this threat is now undeniable and re-examing existing legislative tools to address this reality is an entirely appropriate action to take. While that doesn't mean automatically assuming what's in C-51 is necessary or the best approach, it does mean that there is a rationale for the Bill being put forward in the first place.

> *C-51 does contain a number of internal checks and balances intended to prevent the kind of abuse by government that is being raised.*

A second factor that must be kept in mind is that unlike the traditional criminal justice sector, in counterterrorism operations, success is measured in prevention rather than prosecution. This is especially so when it comes to preventing radicalization and detecting and interdicting those intent on causing us harm.

This inherently involves a greater proactive focus, which means increased access, sharing, and analysis of personal information by public officials. Such actions legitimately raise concerns that we must ensure that the nature of the threat does not needlessly result in undermining cherished aspects of Western society, such as privacy and freedom from government intrusion.

There is clearly no single solution and this effort will necessarily involve a balancing of interests to maximize targeted operational effectiveness while minimizing the potential for both mission creep and unnecessary violation of individual privacy rights. One of the best ways to achieve this difficult task is through specially crafted, purpose-based independent authorizations of operational activity with checks and balances that include ongoing operational oversight and after-the-fact mandated review with appropriate accountability mechanisms. The sufficiency of these measures in C-51 is a legitimate area of inquiry.

It is also entirely appropriate for proposed operational changes to be targeted to achieve specific results and for Government to provide that rationale for the changes that are proposed. This expectation of analytical precision works both ways as those challenging C-51's provisions should do more than present speculative criticism that is founded on assumptions of wrongdoing by public officials.

Contrary to some of the criticisms levelled against it, C-51 does contain a number of internal checks and balances intended to prevent the kind of abuse by government that is being raised. These measures exist throughout the various Parts of C-51 and they include defined criteria for action, mandated judicial oversight with defined criteria, applicability of existing measures, and increased after-the-fact review for new powers provided by C-51.

The Parliamentary Committee process can also serve to address the concerns expressed by both proponents and opponents of specific measures within C-51 as to their necessity and the potential for abuse as a result of how the Bill is drafted. A mandated, after-the-fact review in five years by a specially empowered Joint House-Senate Committee is a good example of how that can be achieved.

C-51 is clearly not the complete answer to improved capabilities to deal with these new terrorist threats to Canadian security. Non-legislative action is also required including prioritized funding allocations, deployment of capability-enhancing technologies, and ensuring ongoing interagency security operations coordination with appropriate reporting mechanisms for non-performance. These measures also merit ongoing review such as what is currently being undertaken by the Senate Committee on National Security and Defence or by a specially constituted Joint House-Senate Committee, should be one be created.

This analysis will examine all five Parts of C-51 with special emphasis on Part 1 (*Security of Canada Information Sharing Act*), Part 3 (Criminal Code), and Part 4 (*CSIS Act*), which have understandably attracted the most attention. It will include both observations and recommendations aimed at supporting the co-existing but not incompatible priorities of counterterrorism and civil liberties protection.

Part 1 – *Security of Canada Information Sharing Act*

A new Act is created called the *Security of Canada Information Sharing Act*, which essentially confirms authorization for federal government entities to share and receive information related to protecting Canada against activities that undermine the security of Canada.

Section 2 defines "activity that undermines the security of Canada" as:

• any activity, including any of the following activities, if it undermines the sovereignty,

• security or territorial integrity of Canada or the lives or the security of the people of Canada:

(a) interference with the capability of the Government of Canada in relation to intelligence, defence, border operations, public safety, the administration of justice, diplomatic or consular relations, or the economic or financial stability of Canada;

(b) changing or unduly influencing a government in Canada by force or unlawful means;

(c) espionage, sabotage or covert foreign influenced activities;

(d) terrorism;

(e) proliferation of nuclear, chemical, radiological or biological weapons;

(f) interference with critical infrastructure;

(g) interference with the global information infrastructure, as defined in section 273.61 of the *National Defence Act*;

(h) an activity that causes serious harm to a person or their property because of that person's association with Canada; and

(i) an activity that takes place in Canada and undermines the security of another state.

For greater certainty, it does not include lawful advocacy, protest, dissent and artistic expression.

Section 5 of the *Act* makes the information sharing discretionary and further restricts the requesting authority to 17 defined Departments and Agencies (in Schedule 3 to the *Act*). It further adds the qualification that the information sharing should be restricted to circumstances where "the information is relevant to the recipient institution's jurisdiction or responsibilities under an Act of Parliament or another lawful authority in respect of activities that undermine the security of Canada, including in respect of their detection, identification, analysis, prevention, investigation or disruption."

Thus, there are tangible restrictions on the new clarification of discretionary information sharing among government agencies with an express prohibition that the qualifying criteria of "activities that undermine the security of Canada" do *not* include "lawful advocacy, protest, dissent and artistic expression." This deliberate inclusion is a clear reinforcement of the principle of the rule of law and critics of the section would do well to remember that no matter how important or noble they may think their particular cause is, they are not above the law.

Further, the existing authority of Government institutions to share personal information in security and law enforcement matters pursuant to sections 7 and 8 of the *Privacy Act* already permit much of what some critics claim is being "created" in C-51. The existing powers of complaint-based and self-initiated investigation by the Privacy Commissioner under the *Privacy Act*, including multi-agency examination, are also left intact, which serves as a further check on what is in C-51.

It appears from Privacy Commissioner David Therrien's March 5, 2015 brief on C-51 and other public critiques of Part 1 that data retention rules would be desirable, which could be accomplished through the Regulations contemplated under the *Act*. Requiring reporting of the number of information sharing actions taken pursuant to the new *Act* would also enhance transparency and accountability and this could be accomplished either by a small amendment to C-51 or subsequently to the *Privacy Act*.

Finally, the Privacy Commissioner appears to suggest in his critique of C-51 that the current reporting authority of his Office be transformed into a judicial-like direction authority. This larger issue is not one confined to Part 1 issues in C-51 and, as such, is best considered separately from it.

While this analysis questions the Privacy Commissioner's interpretation and recommendations regarding C-51, they are without doubt substantive and from a critical player involved in these issues. As such, it is recommended that Parliamentary Committees take advantage of this unique expertise and ensure that he is provided an opportunity to present his views on these important subjects.

Part 2 – *Secure Air Travel Act*

The *Secure Air Travel Act* is created to provide a more relevant legislative framework under the Minister of Public Safety for identifying and responding to persons who may engage in an act that poses a threat to transportation security or who may travel by air for the purpose of committing a terrorism offence.

The most significant change in this new *Act* appears to be an appropriate upgrade of the criteria for entry on the No Fly list through s.8 to go beyond immediate threats to aviation security and to include specified terrorism offences as well as indictable offences that also constitute the broader "terrorist activity".

Section 8 contains a glaring defect, however, in that it omits "photographs" from information that can be included to assist in identifying persons on the list. This is no trivial matter because, like other countries, Canada is in the process of field testing and hopefully deploying face recognition biometrics technology at Class 1 airports to detect and interdict people using false documents who are inadmissible to Canada.

This technology can also be used to detect arriving and departing persons of national security interest and people who are on the No Fly list. Recent cases such as the unexplained departure of known security threats Ali Mohammed Dirie and Mohammed Monir El Shaer illustrate the importance of this technology deployment.

> *While the terrorist threat must not be exaggerated, neither must the potential privacy or liberty intrusions be overstated or based on speculative assumptions of misconduct.*

Part 3 – Criminal Code Amendments

The most significant amendments in this Part include:

• Creation of a new offence of knowingly advocating or promoting a terrorism offence while knowing or being reckless that such an offence will be committed;

• authorizing seizure of terrorist propaganda (defined) where approved by the Attorney General and authorized by court order;

• authorizing, where approved by the Attorney General, a court order directing the takedown of terrorist propaganda on a publicly available computer system (ISP) with a subsequent dispute process; and

• reducing the qualifying criteria for a court-ordered preventive recognizance (peace bond) in s.83.3 and new s.810.011 from "will commit a terrorism offence" to "may commit" and that such an order "will" prevent it to is "likely" to prevent such an offence as well as increasing the potential sentence for breach of the conditions and expanding the definition of "Attorney General" (whose consent is required to seek an order) to include the federal AG, which will permit specialized prosecutorial participation.

It is important to note the presence of both AG approval and judicial authorizations that are required under these preventive measures. The terrorism propaganda takedown provision is also likely to be extremely important in preventing radicalization, recruitment, and assisting jihadi travel. One area that is unclear is how broadly this will apply as, hopefully, it will include all Internet-based communications, including social media, and not just websites hosted in Canada.

There has been criticism of the new advocating or promoting terrorism offence as being overly broad or unnecessary but the wording chosen contains an extremely high burden of proof and the counselling or advocating nature of certain offences, or generally, already exists. Parliament is simply expressing that same principle in the specific context of terrorism offences presumably for a deterrent and denunciatory purpose.

Part 4 – *CSIS Act* amendments

Part 4 amends the *CSIS Act* by significantly expanding the mandate of the agency from its traditional information gathering and analysis role into a clear operational role with a mandate to "reduce the threat to the security of Canada". The rationale for this dramatic change has not been fully explained but it likely includes a conclusion that expedited action may be necessary to deal with domestic terrorism threats. An inevitable consequence of this new CSIS operational role will be an increased need for interagency coordination, which remains an issue of concern.

Part 4 also includes changes related to the increased CSIS mandate, including:

• A defined process whereby CSIS must obtain approval of the Deputy Minister pursuant to s.7(2) to seek a judicial order under new s.12.1 authorizing actions which, without judicial approval, would be contrary to the law or a *Charter* breach (akin to the Supreme Court ruling in the *R. v. Spencer, 2014 SCC 43* case) with specific actions being expressly prohibited pursuant to s.12.2 and with defined criteria in new s.21.1 to obtain the order; and

• a mandatory after-the-fact reporting obligation pursuant to new s.6(5) on CSIS to both the Minister and the Security

Intelligence Review Committee (SIRC) with regards to the new operational authorities provided by C-51.

These oversight and review mechanisms are further supported by existing review procedures under the *CSIS Act* whereby SIRC can investigate and review the activities of CSIS in three separate scenarios. It should also be noted that SIRC does appear to have express statutory authority under the *CSIS Act* in defined circumstances to summon and question representatives from other agencies or Departments beyond CSIS and, with some restriction to seek relevant information from them (see sections 6(4); 40(2); 38(c); 41; 59).

C-51 may also be an opportunity for a small amendment to expand the multiagency investigative mandate of SIRC so as to include the new judicially authorized operational activities created by the new s.21.1 in the existing s.39(2)(b) of the *CSIS Act* where full information access is authorized.

Part 5 – *Immigration and Refugee Protection Act* amendments

This Part amends the security certificate sections of the *Immigration and Refugee Protection Act* to permit the Minister to seek judicial approval to withhold information from the special advocate and with the authority to appeal rulings of the Federal Court without their designation by the Court that they are of sufficient "importance" for an appeal.

Although these amendments increase the authority of the Minister with respect to withholding information and decrease the ability of the Federal Court to prevent appeals, they have received little attention. This may be because the security certificate regime has failed to actually expedite the removal of persons on security grounds from Canada.

Conclusions

C-51 provides a series of legislative amendments designed to improve the ability of officials to deal with the new reality of domestic terrorism. This is a challenging issue because it is focused on proactive interdiction rather than after-the-fact prosecution, which means an emphasis on information sharing and intelligence.

Concurrent with these new authorities, C-51 creates specialized criteria for their application as well as new oversight and review procedures. Because of the important privacy principles involved, all of these measures merit close scrutiny and substantive analysis from a full range of perspectives.

The following observations and recommendations are offered:

• The existing oversight and review provisions referenced in this analysis should also be fully considered in assessing the impact of any new authority granted under C-51;

• consideration should be given to how measures to create data storage rules can best be enacted and whether mandatory reporting of information sharing under the *Security of Canada Information Sharing Act* to the Privacy Commissioner is necessary;

• Section 8 of the proposed *Secure Air Travel Act* should be amended to include "photographs" to the information authorized to be kept;

• clarification should be sought to determine the scope of the new court-ordered Internet take down orders in relation to online terrorism propaganda;

• clarification should be sought as to whether the new court authorization created by s.12.1 of the *CSIS Act* simply pertains to situations where such activities would be unlawful or a *Charter* breach in the absence of judicial authorization as per the Supreme Court decision in *R. v. Spencer*;

• consideration should be given to amending the *CSIS Act* to expand the multi-agency investigative mandate of SIRC so as to include the new judicially authorized operational activities created by the new s.21.1 in the existing s.39(2)(b) of the *CSIS Act* where full information access is authorized; and

• consideration should be given to adding a clause to C-51 to create a mandatory review of the Bill's provisions and related issues in five years, ideally conducted by a Joint House-Senate Committee specially created and empowered for this purpose.

C-51 has attracted considerable criticism precisely because, by necessity, it deals with matters that potentially impact important Canadian values and principles that are rightly cherished and protected. These events and these issues clearly generate strong emotion that has manifested itself on both sides of the debate on several issues which, hopefully, will not derail the necessary analysis and action in confronting this threat in an effective but balanced way. While the terrorist threat must not be exaggerated, neither must the potential privacy or liberty intrusions be overstated or based on speculative assumptions of misconduct.

Security and liberty can, and must, co-exist and, in fact, each, when properly balanced, are the best guarantors of the other.

Scott Newark'*s 30-year criminal justice career began as an Alberta Crown Prosecutor, with subsequent roles as Executive Officer of the Canadian Police Association, Vice Chair and Special Counsel for the Ontario Office for Victims of Crime, as Director of Operations for the DC based Investigative Project on Terrorism, and as a security and policy adviser to both the Ontario and federal Ministers of Public Safety.*

Photo by Jason Ransom, courtesy of the Prime Minister's Office

Former Assembly of First Nations National Chief Phil Fontaine and Prime Minister Stephen Harper attend a 2008 House of Commons ceremony where the government formally apologized for the residential schools program, one of the few practical impacts of the 1990s Royal Commission on Aboriginal Peoples.

Progress for Aboriginal peoples still haunted by the past

The search for a middle ground and new prosperity for Aboriginal peoples has too often been derailed by fear of subjugation and assimilation, writes Jeffrey Simpson.

Jeffrey Simpson

In some religious traditions, it is customary for a leading figure to deliver a sermon. Often, it revolves around a segment taken from a holy book. I take the liberty of borrowing from that tradition in citing the American author, the great William Faulkner, who wrote that "the past is never dead; it is not even past."

Faulkner was a Southern American. Nowhere in the United States did/does the past weigh more heavily on – one might even say weigh down – society than the US South. The plantation economy. Slavery, the "peculiar institution." The mythology of female virtue and gentlemanly gallantry. The Confederacy. The Civil War. Defeat after a dreadful struggle, followed by the dream palace memory of the cause aborted but kept alive in memorials throughout the South to "our glorious dead." Always, there was the scar of race, so that negroes, as they were called for so long, became legally free but continued to be economically and politically bound. The Southern Way of Life meant that the "past" was "never dead" because it was "not even past." It took a long, long time for the South to get over itself, to stop looking over its

shoulder. Even today it sometimes seems as if some old habits are merely wrapped in new garb.

Of course there is also a big part of Canada's past that is not even past, and it influences the country's greatest future challenge: finding a better place for Aboriginal peoples in our society. We have failed in this challenge in the past, when we tried various approaches of assimilation that not only did not work but inflicted further damage on Aboriginals. There were other policies, too, that derived from racism: no voting rights, placing of Indians (as they were called then) on reserves, unequal treaties. All those failed policies haunt us still. They especially haunt Aboriginal people when they ponder their past that is "not even past."

> *We non-Aboriginals tried subjugation and assimilation and it failed. We are now trying or at least accepting parallelism, even what I might call a radical parallelism.*

We non-Aboriginals tried subjugation and assimilation and it failed. We are now trying or at least accepting parallelism, even what I might call a radical parallelism. After almost half a century of trying this re-creation of a long-ago past in modern idiom, the least we can say is that progress has been, and remains, heartbreakingly slow.

Necessarily, I must leave much out in discussing the long history of Aboriginal relations in Canada. So I highlight two seminal events, among many, because each illustrates the two paths I just described. A terminological note: Although I am using the term Aboriginals for the most part, I am not talking about Métis and Inuit, but rather Indians, status and non-status, or First Nations.

In 1969, the recently elected government of Pierre Trudeau published a white paper on Indian policy. (Inside the government, it was called a "red" paper.) Consistent with Mr. Trudeau's belief in individual but not collective rights, and reflective of the general frustration about the lack of progress on Aboriginal matters, the white paper recommended scrapping the *Indian Act* (which is what many Aboriginals said they wanted); delivering services through the same programs as for other Canadians; abolishing Indian Affairs special programs; and transferring Indian lands directly to Indian people and away from ownership by reserves.

Aboriginal leaders descended on Ottawa and furiously denounced the White Paper as a recipe for assimilation. They insisted that it undermined their special standing in Canada as the original occupiers of the land. They insisted that it diluted their relationship with the Crown that dated to the Royal Proclamation of 1763.

Trudeau retreated, not something he often did. The White Paper's ideas reflected what was a modern-day idiom for an old idea, to do away with special status for Indian people, to make them more like "us," in their own best interests of course. They did not see it that way.

Ever since, Aboriginal leaders and governments have tried to develop a functional, "nation-to-nation" relationship, without much success.

The next attempt to re-cast the relationship came when Prime Minister Brian Mulroney appointed the Royal Commission on Aboriginal Affairs in 1991. Again, it was an idea born in frustration about the lack of progress and the hope that new ideas might be injected into difficult, even intractable problems. The commission ran for five years, and went way over budget until it was given a produce-or-be-shut down edict by the Chrétien government.

Mulroney asked retired Supreme Court chief justice Brian Dickson to recommend commissioners. He did: four Aboriginals; three non-Aboriginals. Since judges like fellow judges, he suggested two of them, René Dussault from the Quebec Court of Appeal and Bertha Wilson, formerly of the Supreme Court of Canada, neither of whom had any experience with Aboriginal peoples, except as concepts. Judge Dussault became co-chair with Georges Eramsus, a prominent Dene leader from the NWT whom I had met and interviewed when he led the Dene Nation in its fight against the Mackenzie Valley pipeline in the 1970s. I later wrote a book chapter about him and his view of Canada. He was the commission's driving force.

The commission produced five volumes of some 2,000 pages. I can lay claim – if that is the right phrase – to being one of a very few Canadians who read them all. Well, not the indices.

Along the way, after about two years if memory serves, something quite important happened inside the commission. The only non-Aboriginal with hands-on experience in dealing with

Aboriginal issues – not as some abstract idea or as legal theory – quietly resigned. Allan Blakeney, a Rhodes Scholar and a former NDP premier in Saskatchewan, where more than 10 per cent of the population was and is Aboriginal, left because, as he told me later, he could not abide the slow and disorganized pace of the work, and because he thought the other commissioners were dreaming up unworkable non-solutions to what he, as a former premier, believed to be a series of practical problems. He did not think the intellectual direction of the commission would produce workable results. He was replaced by a former Alberta civil servant, Peter Meekison, a fine man whom I knew well, but without Mr. Blakeney's hands-on experience and political savvy.

> *The presented history was an extremely potted one. There were indeed peaceful and productive relations among some Aboriginal peoples; there was also frequent conflict and violence.*

"Separate worlds" was the title of the first chapter of the first volume, describing a largely peaceful, productive, prosperous, even bucolic state of affairs that prevailed among Aboriginals before the arrival of our non-Aboriginal ancestors – or "settlers" as they were then and are now called by some of those who write about Aboriginal affairs, a classic example of the appropriation of a narrative that is politically motivated and condescending, especially in this province where people trace their lineage back 400 years, obviously not as long as Aboriginals in these parts but very long by any reasonable standard.

The presented history was an extremely potted one. There were indeed peaceful and productive relations among some Aboriginal peoples; there was also frequent conflict and violence. Only in the last few decades have relations between Iroquois and Algonquins been somewhat repaired. At one point, the Iroquois, especially the Mohawks among them, were fighting the Delawares, Susquahannas, Abenakis, Pequots and tribes (or nations if you prefer) as far west as the Illinois country, to say nothing of their mortal enemies, the Algonquins north of the St. Lawrence River. In the classic study of intra-Aboriginal relations in what is now Michigan and Ohio – entitled *The Middle Ground* – Richard White depicts the ongoing struggles among Aboriginal groups in that area long before – and after – "settlers" arrived.

It is absolutely true that the British, French and American colonists tried to exploit these rivalries to their advantages, but they did not create them. You only have to read Samuel de Champlain's diary of the battle along the east coast of the lake named for him in which a handful of French soldiers killed a cluster of Mohawks to the immense delight of his Algonquin allies to understand that conflict was as much a part of inter-Aboriginal relations as peace and prosperity. I do not say this to sound superior. God only knows how often we non-Aboriginals from Europe have visited immense and violent miseries on each other: on this continent and in so many other parts of the world. I only mention it as a kind of mild corrective to one of the prevailing and misleading narratives that make dialogue and sound policy so difficult.

Who knows what, if any, influence Allan Blakeney might have had on the final report? He obviously concluded that he would have had none, and so he resigned. The result, which he foresaw, was a report based on what I might call parallelism: that would be two sets of peoples, as with the two-row wampum, with all sorts of diversity within each group, Aboriginal and non-Aboriginal, just as the report argued there had been at the time of the first arrivals of the settlers and for some period of time thereafter.

Everything in the report was premised on parallelism. Wilson dreamed up the rules and structure for a separate Aboriginal parliament that would, by inventive legal reasoning, be connected to but remain separate from the Parliament of Canada. In economic policy, the free-market was largely derided as a wealth-creator for Aboriginal peoples. Instead what was offered was deemed more appropriate for the different cultural traditions of Aboriginals, a collectivist kind of economic model much in vogue in the 1960s among African development theorists, Third World advocates and Marxist economists. It would operate on a different set of assumptions about how to organize an economy from what prevailed in the "other" society. Settler governments would be obliged to pay past debts, monetarily or culturally, while turning over responsibility for almost everything to Aboriginal governments. The *Indian Act*, the source of so much woe, was to be eliminated, but not for a while, not until the new parallel

At a 2014 meeting with Premier Christy Clark B.C.'s chiefs essentially said the government should recognize Aboriginal title over the entire province's Crown land and re-start relations from there.
(Photo courtesy of the Government of British Columbia)

governmental structures were put in place. Or the existing ones were fortified with considerable new powers and much new money.

The past was very much with the commission, and not just in the specific sections about history. To put the parallelism in place, it would be necessary for the "settlers" to acknowledge all the wrongs of the past, in the form of, say an inquiry into the taking of Aboriginal children from their homes to be educated in church or state secular schools, and a formal apology offered for that and other conduct. Without using the words, the rest of society had to – as we say in the Christian churches – expiate our sins, or at least those of our ancestors, which involves by definition an acceptance of guilt of the inter-generational kind which, as public opinion surveys constantly reveal, is often not always welcome by those who played no part in the evils of yesterday.

As the great political scientist Alan Cairns wrote after reading the 2,000 pages, it was striking how little attention the commission paid to what Aboriginals and non-Aboriginals have had, or might have, in common as "citizens" within the same state. His preferred conception for these relations was for Aboriginals to be "citizens plus," a recognition of their historic place and rights blended with an acceptance of shared citizenship with attendant rights and responsibilities; or to put matters another way, the country needed to think through an effort to blend Aboriginal distinctiveness and cultural traditions with mainstream society, rather than to concentrate on what the two groups did not have, and likely would not have, in common. Then, as now, I believe the royal commission would have served a great purpose if it had gone down that intellectual path rather than the one it chose – a path that we are still on and will be for some time. That path was not taken; it was never offered.

> *"Could a group of 500 or 700 PhDs make this territory economically viable and deliver services expected by a self-governing group?*

The commission had some practical impact. We have had apologies for the residential schools from the governments of Jean Chrétien and Stephen Harper. We now have a commission looking into that chapter of the past. Generally speaking, however, the Dussault-Erasmus commission for all its length had little effect – except in one important respect. Most of the practical recommendations died from neglect or implausibility, but its conception of the future relations between Aboriginals and non-Aboriginals based on institutionalized parallelism both reflected and deepened that conception that is now the prevailing one through Aboriginal Canada, among Aboriginals lawyers and law professors, in certain government policies, in constitutional provisions, and in rulings by the Supreme Court of Canada. And we are struggling to give meaning to this idea on the ground, for reasons that might in some quarters be grounded in racism, but also, because the majority of the general public already thinks enough time and effort is being spent on Aboriginals, and because courts have been moving the yardsticks down the field in the Aboriginals' favour. The parallelism idea on the ground is hard to put into practice for many reasons, not least of which are the demographic realities of many – not all but many – Aboriginal people.

When non-Aboriginals first arrived in Canada, they huddled

in small settlements, greatly out-numbered by Aboriginals. Many of them would not have survived had it not been for Aboriginal knowledge and help. But they did survive, and many centuries later it is the Aboriginals who are in a small minority of the population – at a maximum 4 per cent by the most elastic count as to who is a Native Canadian: Inuit, Métis and status and non-status Indian, although in Manitoba and Saskatchewan the Aboriginal share of the total provincial population is heading towards 15 per cent. Unlike many other parts of Canada, the Aboriginal presence is not only rural but decidedly urban, as any walk through disadvantaged parts of Winnipeg, Regina and Saskatoon will show.

Statistics Canada told us, following its 2006 survey, that there were 612 bands and more than 2,600 reserves. People have been voting with their feet, as they say, since Stats Can estimates that only 40 per cent of First Nations people live on reserve, a share that has been slowly dropping for some time. More than 60 per cent of these bands – or "nations" as they choose to call themselves – have fewer than 1,000 people. A handful have populations of tens of thousands such as the Cree in Northern Quebec, or the Dene (Georges Erasmus' nation in the NWT) but most have fewer than 2,500 people.

"As for the economic and social statistics, these are well-known. Unemployment is higher than the national average; on reserves much higher still. Aboriginal educational attainment is much lower, although graduation rates have improved.

As for the economic and social statistics, these are well-known. Unemployment is higher than the national average; on reserves much higher still. Aboriginal educational attainment is much lower, although graduation rates have improved. Half the child welfare cases in Canada are Aboriginal; the Aboriginal prison population vastly exceeds its share of the total population. Sexual abuse, fetal alcohol syndrome, diseases related to obesity such as diabetes, are much higher than the national norm. Suicide rates are higher; life expectancy lower. Some indices have improved, it must be said, but the gaps are a stain on the country. Under these trying circumstances, combined with small numbers, it is hard to find the capacity to run self-governing nations.

Let me illustrate the situation with reference to the recent annual report of the B.C. Treaty Commission. The report lists various First Nations with which final treaty agreements have been signed or implemented. Here are the "approximate" numbers in each "nation": 2,260, 350, 400, 1,050, 160, 780, 330, 3,460, 290, 225. For those "nations" in "advanced agreements-in-principle negotiations" the numbers are: 770, 940, 465, 550, 1,090, 1,790, 370, 2,505, 1,625, 1,041, 675, 3,685, 5,000 (Haida), 220, 945, 830, 6,565 and so on. But even these numbers misrepresent reality "on the ground." You will note that the Treaty Commission speaks of "approximately" because it is sometimes difficult for Statistics Canada to get accurate data on reserves, and because a certain number of members of a "nation" do not live in their traditional territories. They have moved away for whatever reason, and although they count as members of the "nation," they are in absentia. Factor in children and elderly people, a "nation" of 1,000 becomes perhaps 500 or 700 able-bodied adults.

I am not passing judgment here, just presenting a demographic reality that leads to inescapable questions of "capacity," the ability of small groups of people, often in remote areas, to deliver what is demanded when leaders speak of "self-government." Because what is "self-government," commonly understood? It is the capacity of a government, chosen by the people, to deliver services expected in modern societies such as education, health care, roads, social welfare, policing and justice, and other services – all financed, to the greatest extent possible by own-source revenues, for which those in positions of authority, by whatever means, are held accountable.

Given the demographic, it is reasonable to ask whether "nations" of fewer than 1,000 people is an oxymoron. It is certainly a rhetorically powerful idea, but in reality what does it mean? On some reserves I have visited, I have asked myself: Could a group of 500 or 700 PhDs make this territory economically viable and deliver services expected by a self-governing group? Anyone with a smattering of knowledge about university politics must doubt whether the PhDs could effectively govern themselves, but I'm not sure they could do the rest either.

This gap between narrative of self-government and reality, between memory of what once was a long time ago and what is

today, reflects what I call the "dream palace" of the Aboriginals – a phrase I adapt from Fouad Ajami's book, *The Dream Palace of the Arabs*, about the intellectual and political efforts, especially among Egyptians, to reconcile the greatness of their distant past with their reduced and difficult present circumstances. Inside the "dream palace," there are today – as there were before, long ago – self-reliant, self-sustaining communities (now called "nations") with the full panoply of sovereign capacities and the "rights"' that go with that sovereignty. These "nations" are the descendants of proud ancestors who, centuries ago, spread across certain territories before and for some period thereafter the so-called "settlers" arrived.

Today's reality, however, is so far removed in actual day-to-day terms from the memories inside the dream palace as to be almost unbearable. The obvious conflict between reality and dream pulls a few Aboriginals to "warrior societies," others to rejecting the "Crown" or asserting a "nation-to-Crown" legal relationship (that is false except through the government of Canada), others to fight for the restoration of treaty rights and Aboriginal title to create self-governing "nations" whatever their capacity and size, and everyone to demand that government turn over more power and money to Aboriginal "nations."

The past is omnipresent, although in varying degrees, in the desire to protect "traditional ways," which in most cases means hunting, fishing and trapping, noble ventures that given the shrivelled markets for these products can lead economically to something only slightly better than subsistence. Without a wage economy beyond these "traditional ways," the path lies to dependence on money from somewhere else, namely government, which, in turn, contributes, as dependence usually does, to a loss of self-respect, internalized anger, social problems and lassitude.

It is crucial to note here that there are Aboriginal communities that offer the antithesis of this picture. They have – like the Cree of Quebec – a large critical mass of people to organize the delivery of services and they have built a wage economy that brings self-reliance and pride. The Crees have also had exceptionally good leadership from Billy Diamond to Mathew Coon Come. In central Saskatchewan, as in some other resource areas, local Aboriginal people are gainfully employed in natural resource extraction and processing, and in the Saskatchewan case in uranium. In the southern Okanagan, chief Clarence Louie has led a community that is bustling with activity – including a hotel, a golf course and a winery, Aboriginal-owned and-financed – and successful. (Alas, Chief Louie is considered by many other BC Aboriginal leaders as an outcast because of his sharp tongue about their rhetoric and his entrepreneurial drive.) And there are other examples of success. The annual Aboriginal Business Awards pay tribute to some of these successes.

What these successes tend to have in common is that Aboriginal people have decided to integrate in varying degrees with the majority cultures, to form business arrangements in a vital attempt to create own-source revenues that will dilute or end spirals of dependency, especially those with potential natural resource exploitation projects. But even in these areas, there is ambivalence about the desirability of development, either from environmental fears, deep distrust of non-Aboriginal intentions and governments run by non-Aboriginals, uncertainty about the market economy and, most of all, the fears within the dream palace of memory about anything other than a separate, parallel existence leading to assimilation and eventual cultural disappearance.

"In the southern Okanagan, chief Clarence Louie has led a community that is bustling with activity – including a hotel, a golf course and a winery, Aboriginal-owned and-financed – and successful.

Parallelism, which is based on old treaties and recent legal developments, has been greatly advanced by court rulings at the provincial and Supreme Court levels, breathing new expression into constitutional protections in the *Charter of Rights and Freedoms of 1982*. Successive Supreme Court rulings have extended the meaning of Aboriginal claims, rights and title.

The most recent Supreme Court case, *William (Tsilhqot'in)*, involves six bands within a nation with about 3,000 people in a remote part of central BC. It greatly expanded Aboriginal title because it grants the nation Aboriginal title and a de jure veto on any development on their land, except if the government can prove a "pressing and substantial" public interest, which I think will be very hard to demonstrate. The previous Supreme Court ruling,

New Assembly of First Nations National Chief Perry Bellegarde will have one of Canada's most impossible jobs with 612 bosses.

(Photo by Fred Cattroll, courtesy the Assembly of First Nations)

Delgamuuku, had said native title could exist in areas where the band or tribe had settled but not necessarily where it travelled in search of game or fish. *William* says that if the band has wandered over territory in search of livelihood, and no other band did so, then it has title over all that territory and therefore has a final say over what happens there, subject to the "pressing and substantial" test. Moreover, the court said the statement of Aboriginal claim for title is enough to give the Aboriginal group what I would call a *de facto* veto, since it must be consulted and "accommodated" over all the land it claims, title having been proven or not.

Every commentator accepts that the ruling strengthens Aboriginals' legal position and negotiating power, although there is disagreement by how much. BC's chiefs think they know. At a meeting with Premier Christy Clark, they essentially said the government should recognize Aboriginal title over the entire province's Crown land and re-start relations from there. Although the ruling was specifically about BC, where there are no modern-day treaties, chiefs across Canada immediately said in various forums that the ruling applies to them, to their title and their rights.

I agree with Jock Finlayson, chief economist of the BC Business Council, who wrote in a balanced summary that, "the full implications of the ruling will only be felt over many years." I think the ruling greatly complicates any major development in B.C., and will have a long-term depressing effect on the province's economy.

Others whom I respect are less pessimistic than I am about the ability now to get much done over vast swaths of British Columbia. And of course there are those in the Aboriginal law world who are heralding the decision as an overdue levelling of the playing field between Aboriginal "nations" and governments. For them, this reinforces the parallelism on which they hope the future will be based. I urge people to read my friend, someone I admire very much, emeritus professor Peter Russell of the University of Toronto who offers a quite different interpretation than mine in that he feels the *William* case represents "a major victory not only for Aboriginal peoples in Canada and elsewhere, but for all people who look forward to a just and mutually beneficial relationship with Indigenous peoples."

As I said, time will tell. I hope I am wrong. Another person whom I admire, who works with First Nations in BC, thinks I am. In his view, the younger chiefs there want to do business. They recognize their societies are too often stagnating economically. This decision will give them confidence and clarity to negotiate fair deals for their peoples. I think this is the wish being the father of the thought, but again, we shall see.

Parallelism plays itself out in all aspects now of relations between Aboriginal communities and governments and the rest of society. It certainly extends to education, which has been much in the news, with Aboriginals demanding full control of the education systems for their children. Ironically, studies by Professor John Richards of Simon Fraser University demonstrate that Aboriginal students achieve better outcomes in the public school system than in those run by native administrations.

But it has repeatedly been asserted that even if that result were true, the reason lies in inadequate funding for on-reserve schools. Last year, Prime Minister Stephen Harper swept aside

his Aboriginal Affairs minister – as often happens with ministers in this government – and negotiated mano-a-mano with the then-national chief of the Assembly of First Nations, Shawn Atleo. In these negotiations, the federal government dramatically improved previous offers of money and Aboriginal control and administration.

The agreement, as you will recall, collapsed because Atleo resigned following internal dissent within the AFN, which itself then collapsed. Quite absurdly, the dissident chiefs demanded that the government negotiate individually with each "nation" – all 612 of them. A more sure-fire recipe for inaction could scarcely be imaged. As it is, the old AFN is dead. A leadership contest for a new AFN put Perry Bellegarde in the top job. He will still have one of Canada's most impossible jobs with 612 bosses. The recriminations that accompanied the AFN's collapse, and the criticisms heaped on Atleo unfortunately demonstrated the tendency of some Aboriginal leaders, ones who get a lot of media attention, to ratchet up demands to the patently unreasonable, then blame whichever government is in power for failing to accept these demands.

It is not popular, I know, to say some of this. There is a great deal of touchiness around these matters, but I started writing about Aboriginal issues when no one in the Ottawa bureau wanted to do so back in the late 1970s.

To put matters more bluntly, with these sorts of demands, and this sort of negotiating structure, it is hard to get a Yes, because agreement would have offended the political culture of opposition that too many Aboriginal leaders have created and propagated. And if you think I exaggerate, take a look at the history of the BC Treaty process that started when Brian Mulroney was prime minister and Mike Harcourt was premier. In all those years, there have been six – count them six – implementing treaty agreements, and three completed final agreements out of 65 First Nations representing 104 Indian bands. At this crawling pace, the youngest person reading this article will be dead before treaties are implemented. But of course that isn't true really because 40 per cent of the First Nations in BC never entered the negotiating process or dropped out, some of them because they do not recognize the authority of the Crown. What began with high hopes for reconciliation through treaties that would enshrine the parallelism inherent in treaties and self-government by nations has been an almost complete failure – with blame on both sides to be sure, and Aboriginals saddled with hundreds of millions of dollars in debt through negotiations, monies they were to have paid off through the cash components of the settlements. A cynic would say – and there is plenty of room for cynicism here – that the biggest victors in this BC process have been the Aboriginal lawyers.

It is not popular, I know, to say some of this. There is a great deal of touchiness around these matters, but I started writing about Aboriginal issues when no one in the Ottawa bureau wanted to do so back in the late 1970s. I am hardly an expert, merely an observer, and wrong though I often am, and have been, I am not impressed by rhetoric from government or any other group, nor am I worried about the consequences of stating what I consider to be home truths. Anyone willing to write a book saying that the emperor of Canadian health care was wearing tattered clothes does not shy from offending shibboleths, although I never seek to do so in an insulting or derogatory fashion.

It took non-Aboriginals a tragically long time to realize that subjugation and assimilation was morally wrong and could never work. We had a lot of learning to do, and we have a lot more to do. We are now embarked on a new path that, with the greatest respect, I do not think is going to work very well, some of the reasons for which I tried to explain here. There is a middle ground about which little thought has been given of accommodating difference without entrenched parallelism, of "citizens first," of emphasizing what we have in common, and what we owe each other as common citizens of a great country that has surmounted many obstacles. And while we must never forget the past, and while in this complicated relationship it will never be past, it should not guide us into the future if we are to make the kind of progress we need and want.

Jeffrey Simpson *is the national affairs columnist for the* Globe and Mail. *This article is based on his prepared remarks for the F.R. Scott Lecture at McGill University in October 2014.*

It isn't only Tories who ignore expert opinion

Macdonald-Laurier Institute Managing Director Brian Lee Crowley says it's not just the current government – politicians of every stripe tend to ignore expert opinion as soon as it's politically expedient.

Brian Lee Crowley

Few things enrage the critics of the government of Stephen Harper more than its supposed tendency to make policy in the teeth of contrary evidence provided by experts. Not only is this treated as shameful in itself, but the sin is apparently compounded by the idea that the government might ignore "evidence" in order to cater to its "base."

Far be it from me to deny that government policy occasionally flies in the face of expert opinion. An appalling recent example saw the government force the railways to discriminate against all their other clients by forcing the rail companies to carry specific amounts of grain or pay a fine. This was despite a lack of evidence that the railways were doing anything wrong. But you could add to the list, say, some of their criminal justice policy, the elimination of the long form census and the GST cuts.

But the outrage that is attached in opposition circles to this alleged misbehaviour is out of all proportion to the crime. Politicians will never stop being politicians. Moreover the outrage implies that the Tories are uniquely guilty of this offence and that a change of government would somehow usher in an era of enlightened policy-making sagely guided by disinterested scientific experts.

That's an idea we can test. Based on past performance, for example, do the Liberals always follow expert advice even when it flies in the face of the party's political interests? Well, here are just a few examples where they demonstrably failed this test.

Missile defence: Canada was ready to partner with the US on the development of a system to defend against ballistic missile attack, a system that has the strong support of the scientific experts in the field. Then the Liberals' Quebec youth wing objected and the government caved to this pressure from its base.

Supply management: Despite a widespread consensus among policy experts (including former Liberal MP Martha Hall Findlay) that this policy unnecessarily enriches a tiny number of farmers at the expense of poor consumers of milk, cheese and chicken, the Liberals (along with the other parties, of course) found while in office that its political benefits outweighed inconveniently contrary expert advice.

Climate change: The Grits claimed to have signed on to the Kyoto Accord for evidence-based reasons, but then failed to enact any credible policy to make good on their commitment. In a sense this is worse than rejecting scientific evidence. They accepted the evidence and then knowingly failed to do anything serious about it. Surely this could not have been for so base a reason as that such action would have been politically unpopular?

Space prevents me from going into detail about the Wheat Board, the National Energy Policy, employment insurance, regional development spending, the gun registry, east coast fisheries policy and many more I could mention. In every case the Liberals preferred pandering to their base to accepting expert opinion.

Now the Liberals might make the case that that's all in the past and that they are going to behave better in the future. We can test that too. Take the Liberals' opposition to the Northern Gateway pipeline in BC.

Pipelines are subject in Canada to a rigorous evidence-based approval process. After exhaustive examination, the National Energy Board approved the project subject to 209 conditions, but the Liberals have rejected it without even seeing whether the conditions can be met. It couldn't be because the pipeline is politically unpopular in BC, where several parliamentary seats are at stake. By contrast the Energy East pipeline project, on which the experts at the NEB have not yet ruled, has already met with the Grits' approval.

This is not to say that the Liberals are worse or better than the Tories. In fact they're probably pretty much on a par. But that's the point: politicians of all stripes generally prefer the approval of voters to that of experts. Who knew?

Brian Lee Crowley *is Managing Director of the Macdonald-Laurier Institute.*
This article first appeared in the Ottawa Citizen.

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Solitary confinement debate shows how science has been sidelined

Noted psychologist Paul Gendreau writes that while he was discouraged that the scientific facts he brought to an online debate about the use of solitary confinement were largely ignored by readers, he wasn't surprised.

Paul Gendreau

The use of solitary confinement in Canadian prisons is highly controversial. Last December the *Globe and Mail* ran a series of articles and other features on the subject, which began with a debate between Kim Pate, Executive Director of the Elizabeth Fry Society, and me.

Globe readers were asked to vote on the "winner" and provide their reasons for doing so. Subsequently, Howard Sapers, the Correctional Investigator of Canada, a key player in the country on investigating alleged abuses of inmates in prisons, offered his views on the matter. And a number of other contributions and editorials appeared in the paper, the majority of which were highly critical of Correctional Service Canada polices in the matter.

My role in the debate was to present the science story on what is known about the research findings on inmates' psychological well-being in solitary confinement (SC). Ms. Pate, Mr. Sapers and I differ as to the extent which SC produces adverse mental health consequences.

Inmates in solitary confinement are placed in high security cells which typically limit the amount of auditory, visual and kinesthetic sensory stimulation available. My position is that if the inmate's behaviour in the situation is monitored in a

humane fashion and the physical structure of an SC cell meets acceptable health care standards, and the time spent in SC is two weeks at most, SC by itself is not the primary villain in the story. However, when the correctional "climate" is mean spirited and inmates are treated capriciously, harmful psychological consequences occur for both them and line staff under any type of prison living conditions. The data my fellow researchers and I have analysed suggest SC may not produce dramatic psychological effects. However that is not a justification for relying on it as a management tool except in those situations where the security of inmates and staff is clearly put in jeopardy. In my opinion, SC is an indolent, unproductive management strategy. Finally, I should note that there is agreement the scientific evidence on the effects of SC has to be taken into account in future discussions on the topic and policies need to be initiated as soon as possible to reduce its use. I provided examples of humane policies that should be pursued in this regard.

"The experience has strengthened my belief that the scientific evidence presented on this kind of media story tends to have far less impact than one might hope.

The experience has strengthened my belief that the scientific evidence presented on this kind of media story tends to have far less impact than one might hope.

To test my hypothesis I conducted a survey of the comments of the 85 online readers who commented on the op-ed pieces written by Kim Pate and me. I well realize that this sample is small and likely unrepresentative, so the results should be treated very cautiously. But for the record, they were what I anticipated: 34 per cent favored the use of SC, 26 per cent did not, and 20 per cent saw a limited role for its use while 20 per cent discussed tangential matters. What was noteworthy for what follows was that only six responders alluded to the scientific evidence and four dismissed it as incorrect. Clearly, the science story played a distinctly minor role in the minds of the 85 respondents.

From a policy-making perspective this is deeply concerning, but not surprising. Surveys show that while the public claims they generally trust the sciences, scientific data that are well grounded in theory and evidence are often ignored or disputed when it comes to "hot button" topics such as evolution, climate change, certain health care treatments and in other social policy domains such as education, economics and criminal justice. It has been estimated that about 40 per cent of the public adhere to pseudoscience explanations when it comes to these types of topics and, moreover, about 70 per cent cannot understand a science story written in the print media, according to research published by Jon Miller at Michigan State University.

Why is this the case? First, scientific literacy does not come easily to anyone. It is much less demanding on the intellect to rely on "commonsense" opinions which often serve as a convenient smoke screen for employing pseudoscience rationalizations of beliefs. By this I mean where knowledge is qualitative and justified by anecdotes, confirmation bias, intuition, and testimonials, and the reasoning process relies on examples that are the most recent in memory (availability heuristics), "exceptions prove the rule", illusory correlates, and "what everybody knows" assertions.

Science stories, on the other hand, are complex and, sometimes, counterintuitive. To understand a science story requires a solid grounding in the theory and content of an area. Furthermore, familiarity with statistical reasoning and the type of research designs required to test hypotheses is critical to have confidence that the research findings in question are valid and replicable. As well, readers may not realize the amount of evidence that must be reviewed and analysed to arrive at a conclusion about an issue such as solitary confinement. If they were, it is plausible a science story might appear more convincing. For example, my brief *Globe* article was based on several hundred studies from three streams of literatures relevant to the topic (the effects of prison life in general, the sensory deprivation studies on non-inmate samples, and SC on inmates). The analytical process utilized was meta-analysis which has become the gold standard for "making sense" of research findings in the social sciences and medicine.

Indeed, even people trained in the sciences struggle to understand science narratives. A 20-year survey on a measure of scientific literacy at a major state university reported senior

undergraduates who had taken science courses only showed small gains in literacy of about 15 per cent from when they were freshmen. There are also examples of esteemed scientists, some of them Noble prize recipients (e.g., Linus Pauling; James Watson), who embarrassed themselves by misinterpreting data and theories outside their specialty areas.

> *Let us hope, for the sake of all concerned in promoting humane policies for the management of prisons, that the general thrust of scientific evidence promoted by those of us involved in prison research and corrections in general will be realized.*

Lastly, other reasons that hinder respect for science stories are the news media (see the crusade in some outlets against climate change, environmental issues, evolution, etc. for political agendas which are supported by vested commercial and political interests) and the Internet where there are no filters against the validity of information.

Regrettably, scientists have not helped their cause either. It has been revealed that in some areas of medicine and psychology there has been a failure to replicate findings which, in the opinion of some, are due in part to publication pressures, career self-actualization, and the misuse of statistics to inflate results.

Are there solutions to these three general problems? I will address these in order.

Do not expect scientific literacy to flourish anytime in the near future. The National Academy of Scholars' study of science curricula in the general arts for the top 50 universities in the United States found science requirements dropped from 90 per cent to 34 per cent. I do not have comparable Canadian data except to note from the Organization for Economic Co-operation and Development data set that student and adult math and science skills have slipped compared to other nations. And, from my observation, there seems to be a trend for more university courses in some disciplines that have found a comfortable home for qualitative research and exposing students to views that are hostile towards empiricism.

One can wish for high-profile scientists to weigh in on matters. Blogs are one avenue. They seem to have more influence than traditional publication routes in professional journals that have long delays in publishing, are written in jargon and read by only a few "insiders". Economics has taken the lead amongst the "softer" sciences in this regard. Paul Krugman, for one, comes to mind because of his academic stature (Nobel laureate) and his position at arguably the most influential newspaper in the Western world, the *New York Times*. His use of graphs makes the data accessible for readers, a method that is more effective than just relying on narratives or statistical tables to make a point.

On a positive note, some social sciences – psychology leads the way – are insisting on replication of studies to increase the accuracy of the disciplines findings. Thus, the quality of work will improve in the future.

Despite these considerable barriers, maybe a few successes are all one can hope for in having science stories translate into policy action. Forty years ago the distinguished psychologist, Donald Campbell achieved prominence in social policy circles in North America by advocating that social policy reforms should be based on replicable experimental findings. Believers of this initiative like me naively thought there would be a high success rate and a fairly immediate one at that, but that was another time, and maybe the positive feeling about this agenda even then was a mirage. Obviously, the bar has been set too high.

I have estimated a 30-per-cent success rate for policy being based on sound scientific evidence for the criminal justice field. Let us hope, for the sake of all concerned in promoting humane policies for the management of prisons, that the general thrust of scientific evidence promoted by those of us involved in prison research and corrections in general will be realized.

Paul Gendreau *is Professor Emeritus at UNB and has an appointment with the University of North Carolina, Charlotte. He is a former president of the Canadian Psychological Association. In 2007 he was appointed an Officer of the Order of Canada. Readers interested in more information can contact him at* paulgend@bell.net.

Courtesy Library Archives Canada

A painting depicts the death of British General James Wolfe on the Plains of Abraham.

Save Canadian history from institutional amnesia

Former journalist Eric Marks laments the degree to which public institutions are impeding understanding of our common history through political correctness, opportunism, and overweening faith in their own cultural leadership.

Eric Marks

On Canada Day, 2006, Canadians were shocked by images of several young men urinating on the National War Memorial in Ottawa. Public outcry inspired the creation of Bill C-217, which criminalized the vandalism of war memorials and cemeteries.

The enactment of C-217's protections was widely applauded in the wake of last October's attack by a terrorist gunman on the National War Memorial and Parliament. The applause may be premature, though, given that public institutions also have proven susceptible to historical amnesia.

In 2009, for example, the National Battlefields Commission cancelled a 250th anniversary re-enactment of the Battle of the Plains of Abraham due to public opposition in Quebec. In 2011, Mount Allison University in Sackville, New Brunswick, demolished a nationally registered war memorial library to make way for a performing arts centre. In 2012, federal bureaucrats preparing for the 110th anniversary of the Boer War recommended downplaying Canada's role as "sensitive" and potentially divisive.

An interesting contemporary example involves the New Brunswick Museum. The museum board recently proposed building a storage facility over a portion of Saint John's Riverview Memorial Park, one of Canada's oldest war memorials and the province's only monument to 700 soldiers of the Boer War. The park's defenders view this as the sort of desecration that Bill C-217 was designed to discourage, while museum supporters argue that the institution is merely asserting its stewardship over an aspect of provincial history.

In each of these cases, local arguments have tended to obscure

a larger national issue: the degree to which public institutions are impeding understanding of our common history through political correctness, opportunism, and overweening faith in their own cultural leadership.

The National Battlefields Commission's decision to cancel the 250th anniversary re-enactment of the Battle of the Plains of Abraham now seems a misguided concession to political correctness. As historian Desmond Morton noted in 2009, the proposed re-enactment was based on the latest scholarship and had been expected to improve public understanding of the roles played by previously undervalued participants, such as French colonial troops and Aboriginal allies. Its cancellation brought an important public conversation about the diversity of the Canadian experience to a premature end.

The expansion plans produced by Mount Allison University and the New Brunswick Museum exhibit a different dynamic: that of opportunism. Canadians can expect to see more of this, as building over historic sites sometimes represents the path of least expense for developers, even if those developers are institutions that have taken on the mantle of cultural leadership.

Mistaking memorial space for vacant space can have serious consequences for the reputations of public institutions. Consider the recent debate over Riverview Memorial Park. The park contains an early cenotaph and century-old trees planted in memory of fallen soldiers and community members. The New Brunswick Museum's proposal to build in the park would see the memorial statue moved and trees cleared to allow construction of an artifact storage facility. None of this will be legally possible, unless the courts or the provincial government remove deed covenants designed to protect the park in perpetuity.

After two months of heated public discussion, the Museum's board announced in March that it had begun to investigate alternatives, citing the length of time it was taking city staff to assess the legal ramifications of its proposal.

The plan to build on a memorial park triggered a passionate debate over whether a museum can honour its mandate to preserve and promote history while bulldozing an historic landscape. In effect, the Museum board asked community members to trust that it would be a wise steward of their history. That's more or less the same argument that Quebec politicians made as the anniversary of the Battle of the Plains of Abraham approached, or that Mount Allison University adopted in response to alumni who wanted the university's war memorial library preserved. Not everyone finds this line of argument reassuring.

Many people I have spoken to no longer trust governments, universities and museums to act as disinterested guardians of our national past. They aren't conspiracy theorists; they're just aware of the gap between institutional intentions and institutional actions. That says something about how poorly we have managed our historical assets, from artifacts, archival records and public spaces to the diversity of historical narratives that make up the Canadian experience.

Why do these institutional failures and the falling away of public faith matter from a policy perspective? Because historical amnesia robs us of something important: an awareness of where we come from, the complexity of our past and the richness of our collective experience.

Consider the Second Anglo-Boer War, which was added to Canada's National War Memorial in 2014. The Boer War is regarded by many today as a bit of foreign adventuring that enriched British crony capitalists at the expense of Africa itself. To downplay its importance to Canada, though, one would need to ignore some important lessons.

The Boer War prefigured the conditions, weapons and tactics that Canadians would face in the First World War and established our volunteer soldiers as an effective military force. Canadians' performance under fire made a profound impact on future allies, including Sir Winston Churchill, and many Boer War veterans volunteered in the First World War, too. Among them were former Mountie Sam Steele and physician-poet John McCrae, who wrote *In Flanders Fields*. The public's response to this conflict also set in motion many of our traditions of remembrance, from the creation of public memorials to holding remembrance ceremonies.

Unless historians can convince community and opinion leaders of the importance of remembering such details and the context they represent, we will continue to see significant aspects of Canada's history relegated to the darkest corners of museum and university archives, while monuments that were erected to stand in perpetuity by earlier generations are moved or destroyed.

It remains to be seen whether Bill C-217 will offer war memorials protection against the destruction wrought by institutional amnesia. I believe we need a national policy on monuments and memorial spaces that is rooted in awareness of the complexity of our history, and which opts to preserve historic monuments and discuss divergent historical experiences, rather than paving them over or pushing aside events of the past that have become politically unpopular today.

Eric Marks *is a former journalist, Rhodes scholar and contributor to the Canadian Inventory of Historic Building. He lives in Saint John, N.B.*

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Don't mess with success on Canadian freight rail

In an adapted excerpt from a recent Macdonald-Laurier Institute paper on the Canadian freight rail industry, consultant Malcolm Cairns makes the case that Canada's system is world class, and warns that further regulation could do economic harm.

Malcolm Cairns

If Canadians think of freight rail at all, it is often associated with images from history books, of the Last Spike and nation building. Or they might have to stop at a railway crossing and watch car after car filled with oil, grain or automobiles whiz by before they can go on their way.

But recently rail has been much in the news, and stimulated much debate, including: The terrible accident at Lac-Mégantic, Quebec when a train of crude oil derailed, exploded and killed 47 people; the meltdown of service during the winter of 2013/14 which left a huge crop of western grain unable to reach its markets; and labour unrest at CP and Canadian National (CN). There is also a review underway of the *Canada Transportation Act* led by the Hon. David Emerson.

One important point Canadians should be keeping in mind when considering these events is the significant contribution the railways make to the national economy and that their industry is world class.

Canadian freight railways are dominated by CP and CN

with over 80 per cent of the total rail freight traffic. Their rail line networks are vertically integrated with their freight train operations, are privately-owned, for-profit businesses, are financially successful, pay the regular panoply of taxes to the various levels of government, and importantly do not depend upon government subsidies as do railways in most other jurisdictions.

CP and CN operate as part of an integrated North American freight rail industry, and are members of the American Association of Railroads, rail operating standards and practices are effectively identical across all of North America. While there are some customs and security constraints at the Canada-US border, nevertheless CP and CN operate virtually seamlessly across their entire networks. They are multinationals operating successfully in a globalized economy with some 20 per cent of their business entirely in the US.

Rail freight traffic comprises bulk (coal, potash, sulphur, and grain), industrial products (chemicals, mining products and crude oil) and container traffic handling goods to and from Asia and Europe as well as across North America. Overall, the industries that are directly served by the railways, and that are dependent to a degree upon rail, represented some 37 per cent of the goods-producing GDP and 11 per cent of the total Canadian GDP in 2013.

The freight rail industry in Canada operates in the private sector, but is circumscribed by a complex web of largely federal policy and regulation: economic, safety, environmental and workplace. The fundamental goal of such government intervention is to ensure that Canada can achieve the best value from its national rail assets. It should be said that, despite opinions to the contrary, Canadian freight railways are already heavily regulated by governments and their agencies, and any increase in the level of regulatory activity is largely unwarranted and could do significant harm to railway investment and performance.

How do the railways achieve their world-class position?

CP and CN have accomplished three-per-cent annual average productivity growth over the past several decades – this is a stellar performance when compared with the one per cent accomplished elsewhere in the Canadian economy. The sources of this productivity, which resulted from the relatively benign regulatory framework and innovation by the railways themselves, arose from a number of interrelated developments – more modern locomotives and freight cars, improved track infrastructure, more advanced signals and communications, improved operating practices and better management. These innovations were achieved through significant capital investment over many years

“CP and CN have accomplished 3-per-cent annual average productivity growth over the past several decades – this is a stellar performance when compared with the 1 per cent accomplished elsewhere in the Canadian economy.

– over $3 billion in 2013 alone – and the productivity gains have been shared with shippers in the form of lower real prices, which in turn has led to increased rail traffic.

Increases in rail capacity since the 1990s have ensured that total rail traffic which increased at an average annual rate of 2.2 per cent has kept pace with the demands of real Canadian GDP which grew at an annualized rate of 1.9 per cent over the same period. Moreover, container traffic has kept pace with the faster pace of international trade at 6.2 per cent up to 2007 before the financial crisis, and is now beginning to recover.

Direct competition between CP and CN is strong for some 40 per cent of rail traffic, and there are a range of indirect sources of competition – through transload centres and geographic competition – as well as modal competition from trucks and marine shipping. For the less than five per cent of rail traffic with a restricted range of competitive options, there are regulatory options available to shippers with concerns or complaints about prices, but these are used only infrequently. Regulatory options to handle concerns or complaints about rail service have also been enhanced recently by the federal government.

On the rail safety side, it should be first noted that accident rates have been improving for over a decade both relative to the increasing traffic volumes as well as in absolute terms. It also needs to be said that, despite off-the-cuff comments in the media to the contrary, both rail and pipeline are safe modes of transporting dangerous liquids including crude oil. In fact the historical record

Photo courtesy Canadian Pacific Railway.

> *Both rail and pipeline are safe modes of transporting dangerous liquids including crude oil. In fact the historical record suggests that rail has a lower spillage rate per barrel-mile moved than pipeline.*

suggests that rail has a lower spillage rate per barrel-mile moved than pipeline.

Nevertheless, the public has a legitimate concern whether dangerous goods handled by freight rail pose an undue threat to their communities, and this particularly in light of the accident in 2013 in Lac-Mégantic, which was the worst rail accident in North America in some 100 years. Governments in both Canada and the US have responded firmly by amending regulations and increasing regulatory oversight, as well as by making changes to the tank car fleet and its reliability. Community concerns are also being addressed by providing additional information to first responders, and a new regime is being created to ensure that sufficient funds are available to compensate potential victims and pay for clean-up costs in the event of a future catastrophic accident.

On the matter of the meltdown in rail service to western grain during the winter of 2013/14, several points need to be noted. The grain crop during the previous fall was some 25 million tonnes higher than average, late fall rail capacity was underutilized while farmers waited for better grain prices, and the winter weather extremes were some of the worst on record. Both CP and CN as well as the western US railroads were forced to reduce train frequency and size in light of the adverse operating conditions.

The steps subsequently taken by the federal government in 2014 – including the authority to mandate the amounts of grain to be moved – were unnecessary and unhelpful, including amending irrelevant interswitching regulations, and favouring US railroads over Canadian railways. It is to be hoped that the current statutory review of transportation by Mr. Emerson's eminent panel will recommend that these changes be allowed to lapse in 2016.

Lastly, the brief CP strike in February, which will be dealt with by binding arbitration, demonstrates that the current regulatory regime is working, the parties are anxious to get back to business, and that further regulatory constraint is unwarranted.

Excerpted from a paper by **Malcolm Cairns** *recently published by the Macdonald-Laurier Institute, titled "Staying on the Right Track: A review of Canadian freight rail policy". Cairns is retired from a career that included employment with the former Canadian Transport Commission as well as nearly 20 years with Canadian Pacific Railway. He is now a private consultant on railway matters.*

Governments: don't 'nudge' us, convince us

Karen Horn explains why the craze for "libertarian paternalism" isn't as benign as its proponents insist.

Karen Horn

The book *Nudge*, published by Cass Sunstein and Richard Thaler in 2008, came as a godsend for politicians. Here they were at last, the much hoped-for theoretical underpinnings of government action that might even overcome fierce libertarian resistance. It is no coincidence that the two scholars – a law and economics professor and a behavioural economist – have called their approach "libertarian paternalism". This book doesn't expand on the familiar jeremiads about market failure, lack of social justice or the multitude of moral deficiencies of capitalism, which are usually drawn upon to justify state intervention. Quite to the contrary, the authors expressly endorse the classical liberal paradigm of methodological individualism and the normative premise of free choice.

They claim that government has to intervene precisely on these grounds: people need help in order to choose not only freely, but well, in their own eyes. They must be assisted to overcome their short-sightedness, exaggerated loss-aversion, over-optimism, laziness, status quo preference, framing biases and all those other irrationalities. Fallible as man is, we're full of behavioural "anomalies" of the sort, so that there should be plenty of reasons for a paternalist government to assist us. Quite obviously, "libertarian paternalism" is only a more sophisticated name for "nannying". The concept made its way into practical politics immediately. Just to name a few, there are "Nudge units" working in the US White House, for the UK Cabinet Office, in the French tax administration – and as of last week, at the German Chancellery, counting three experts. The objective: Effective governing.

The authors were clever enough to emphasize that none of these interventions should ever be coercive. That's the allegedly libertarian part of their argument. Government should "nudge" people only in order for them to do what is in their own best interest, and this, by a visible hand, would also help solving social prisoner's dilemma situations. By altering the "standard setting", government should place people in a position that automatically involves an obligation. Young folks systematically forget to save for their old age, for example? Well, create a mandatory savings plan system for everybody, a system that they could of course opt out of if they really don't like it. Isn't that most reasonable? It would be better for them, because sufficient coverage is what they would want if they weren't short-sighted, wouldn't they? It would also be better for society, because it would prevent the taxpayer from having to step in once it will be too late for the individual to take action. Sure. But note: This system only works if people indeed turn out too lazy to draw the exit option.

In another highly topical case, the imposed obligation involves much more than just money. It concerns people's property rights in themselves and in their own bodies. This case is about organ donations. In order to qualify as a potential donor in case of a lethal accident, you usually need to have signed an organ donator's pass proving your willingness. Many people however avoid the mere thought of what will happen to their dead bodies one day, and thus don't even consider signing such a pass. A dramatic scarcity of transplantable organs is the result. In Switzerland, for example, no more than 14 people in one million decide to potentially donate after being brain-dead. Last week, the Swiss parliament voted on a proposal to inverse the system: If you don't actively opt out by signing a document to that effect, you have implicitly agreed to donate. Austria already has such an inversed system, and only 0.2 percent of the Austrian population have opted out. Conundrum solved?

Yes, but at an awfully high price. By making a similar decision, the Swiss parliament would have socialized each and

every citizen's property rights in their own bodies, including those of future generations – a right which, according to a widely accepted ethical tradition in the footstep of, among others, the English philosopher John Locke (1632-1704), should be inalienable. And again, a system of this kind is built on the assumption that people are indeed too scared, too lazy or too clueless to make up their minds on the issue. If the "standard setting" is "yes", chances are good that they won't switch it to "no" and opt out – for the simple reason that this topic is so troubling, so awkward, so emotionally challenging. The threshold is too high. Instead of enabling people to make better-informed personal choices, in their own and each other's interest, perhaps by providing them with good additional information and respectful assistance, the social dilemma is thus solved by means of a ruse. If that isn't wicked! The Swiss deputies didn't want to cross this bridge.

A system of this kind is built on the assumption that people are indeed too scared, too lazy or too clueless to make up their minds on the issue.

If nudging is nevertheless the political order of the day, as it seems, government should at least make them less nasty, less intrusive and less dispossessing. To solve the organ scarcity dilemma, which clearly is a fact, the Swiss economist Charles B. Blankart has brought up the idea of a system based on strict reciprocity: only those people who are ready to potentially donate should be entitled to receive organs in case of their own need. But what if it were "easy" for a sick and needy recipient to sign his donator's pass because he well knew that his organs wouldn't be wanted once the day came, so that he ran no "risk"? How could such free-riding be avoided? If some standards of equivalence are needed to make the mutuality work, who should determine them? No, this isn't a solution either.

Sunstein and Thaler's new bicycle in town really needs some serene soft-pedalling if we want to keep government action within the boundaries designated by the adjective "libertarian". Why not begin by providing information that would enable people to make what they would themselves consider more rational choices? Not in the manipulative style of the photographs that the EU will place on cigarette packs next year, but in terms of serious, accessible information? Why wait for people to come across the painful issue by some unpleasant hazard of life? Why not simply ask them – nicely? In a 2013 trial, the UK Nudge unit found that a slogan alluding to reciprocity would work best, adding another estimated 100,000 donors a year to the existing list: "If you needed an organ transplant, would you have one? If so, please help others." No expropriation, no cheating, no blackmailing. Perfect.

Such a simple, polite, non-coercive and rather non-intrusive approach may also be useful in less existential matters. People don't get enough insurance? Just seek to improve risk literacy by providing unbiased, well-presented information. Or consider creating a funny information video and posting it on the Internet, using its viral potential, as US president Barack Obama just did. People don't switch to more ecological energies, even though it would be to their financial benefit? Why not send them a friendly letter providing a correct price comparison; that might get them started. People tend to wash their laundry all at the same time? Install the meter in such a way that they will be able to really see the effect of peak-load. If they still don't adapt, tough luck.

The base-line is: There is absolutely no excuse for taking away essential civil and property rights. The fact that governments are democratically elected, which is fortunately the rule in Western countries, can't soften this verdict. Democratic majority decisions annihilating everybody's essential individual rights would be plain illegitimate. They certainly wouldn't deserve the label "libertarian". And if such policies were paternalist, you'd better be an orphan. All government can legitimately do, on behalf of the citizens, is to explain and ask. Manners help: "Effective governing" can be that simple.

Karen Horn *is an independent author and teaches the History of Economic Thought at various universities. She also serves as the President of the Friedrich A. von Hayek Gesellschaft (Berlin). She is the author of* Roads to Wisdom – Conversations with Ten Nobel Laureates. *This article first appeared on CapX, a new media service making the case for popular capitalism at www.capx.co.*

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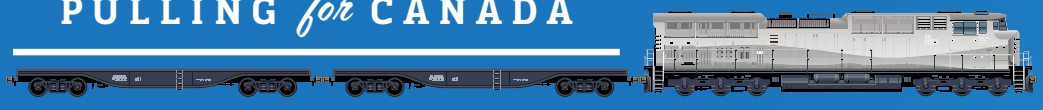

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