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INSIDE POLICY

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IP on IP: The Intellectual Property Edition

Unleashing the power of Canada's creative class

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Inside Policy

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From the editors

The excitement over the federal election is now over, and the not-so-new Liberal government is faced with resolving a number of troublesome issues that have the potential to affect Canadians for years to come. Among their priorities are strengthening Canadian culture, boosting innovation, and growing the economy. Which makes it odd that there hasn't been a more serious national discussion on intellectual property protection.

This has been to our detriment. Why wouldn't Canada want to protect the ideas and creativity of its artists and knowledge industries? While it may surprise many Canadians, this country has been fairly lax at protecting its intellectual property, particularly its drug patents, as **Laura Dawson** points out in this issue. **Adrienne Blanchard** outlines specific court challenges that have been launched by drug makers concerned about the invalidation of existing patents. The courts' actions have left drug makers uneasy, which has led to a decline in investments in pharmaceutical R&D in this country.

Former Minister of Industry **James Moore** who led the modernization of Canada's *Copyright Act* emphasizes that at a time when our commodity-based and manufacturing industries are suffering, we must support our ideas-based economy through effective IP laws. In a more general sense, **Sean Speer** and **Michael Robichaud** remind us that stronger IP laws are a key ingredient to any effective Innovation Agenda. And **Richard C. Owens** reacts to the negative media commentary on the Trans-Pacific Partnership's IP provisions.

But, as **Brian Lee Crowley** notes, even with an "Innovation Agenda," government can't make businesses innovate; it would work better were it to get out of the way, and let businesses make their own decisions.

Another problematic matter for the new Liberal government is its much-promised electoral reform. For reasons **James Bowden** outlines, the government has little hope of being able to implement several of the alternative voting options before the next election.

Also in this issue, **Stanley Hartt** warns that restoring the long-form census is not a panacea: the census is backward-looking and Canada's policy-makers need data that will enable them to look forward to project what skills and services the country will need in the future. **Brian Lee Crowley** brings positive news about the many cases of Aboriginal entrepreneurialism that are employing Aboriginal people and giving them control over their own lives. In this issue's *Straight Talk*, **Gaétan Caron** explains how pipeline projects have become bogged down in politics — and why Canadians should trust the National Energy Board process for approving pipelines. **Philip Stevens** explains why well-intentioned people are incorrect when they claim that by abolishing drug patents, more people in developing countries would have better access to life-saving drugs. Lawyer **Ian Blue** predicts far-reaching implications from the *Comeau* case in New Brunswick, and **Elizabeth May** points out that despite the struggles they'll have in their new country, Canada is a miraculous option for Syrian refugees who've arrived on our shores.

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The long and the short of the census debate

By all means celebrate the return of the long form census, but remember the old saw that politicians tend to use statistics the way a drunk uses a lamppost – for support than for illumination, writes Stanley H. Hartt. Policy makers should base their decisions more on tomorrow's prospects than yesterday's evidence.

Stanley H. Hartt

When the federal Conservative government decided to eliminate the mandatory long-form census in 2010, it caused an outcry among academics and other adherents of so-called "evidence-based" policy development. Intended to appeal to the electoral base of the political party then in power, the decision was an ideologically-motivated manoeuvre designed to provoke outrage among the "chattering classes" while purporting to protect the privacy of citizens already fiercely opposed to intrusive, big government.

In its place, a new survey, the National Household Survey (NHS), would become voluntary for one out of every three households (estimated at about 4.5 million at the time) while the short form would remain mandatory.

The debate was predictable: individuals who had been selected in the past as among the 20 percent of households formerly compelled to complete a 40-page questionnaire had bristled when asked about their ethnicity, size and layout of their living accommodations, relationships with others living in the same abode, number of bedrooms etc. The reaction typically was, "Of what possible use could this information be to the government?" Even the knowledge that Statistics Canada was prohibited by law from divulging personal information to other

agencies of government did not comfort the objectors.

On the other side were the representatives of government-funded organizations, or those advocating policies backed by tax dollars, who relied on the census data to make their arguments that greater resources be allocated to the work of correcting the various ills that the data had exposed. Poverty groups, representatives of Aboriginal communities, advocates for same sex relationships, provincial and municipal governments, churches and charities, for example, opposed the interruption of the statistical series begun in 1971. They made the valid point that by altering the basis of data gathering, the accumulated output would become increasingly useless. They accused the government of using privacy concerns as an excuse, arguing that voluntary samples usually produce biased results because various groups, such as the very rich and the impoverished, often decline to respond.

As it turned out, while 97.1 percent of eligible respondents did complete their short form in 2011, only 68.6 percent submitted the voluntary NHS, a significantly lower proportion than for prior mandatory long-form census replies.

Fast forward to 2015. The Liberals promised to reinstate the mandatory long-form census in their election platform, and in early May of 2016, the distribution of mandatory long and short forms to the Canadian public began. It was accompanied by a feel-good advertising campaign designed to make respondents feel they were performing a civic duty by responsibly (indeed, the ad campaign seemed to suggest, joyously) completing their form and submitting it.

A cynic could have concluded that the determination to count census forms among the promises kept, was nothing more than a part of its slash and burn initiative to reverse signature measures in the Conservative policy legacy (including withdrawal of the CF-18s from combat against ISIS in the Middle East, eliminating financial reporting by First Nations, lowering the eligibility age for OAS, closing the Office of Religious Freedom, reversing the capital gains exemption for charitable donations of private company shares and real estate etc.).

Of course, the federal government gathers all sorts of data from us, some for very specific purposes, like our income tax returns, which are also used in aggregated form to support a great variety of social policy initiatives. Many other statistical series managed by Statistics Canada provide us with information about defined fields of interest, as for example, the Labour Force Survey measuring participation rates and unemployment in Canada.

This latter statistic is a slave to its own limitations: by including only individuals who are actively seeking work, it systematically under-estimates the economic pain felt by those who have abandoned hope of finding employment and have stopped looking. It also fails to count the large numbers who have chosen to call themselves "self-employed" as consultants or some other euphemistic designation in order to preserve their dignity, but who are suffering financial hardship not addressed by government policy. The uncounted deprived are part of the rebellion against establishment politicians seen in advanced Western democracies recently.

> *With the census, are we relying too much on … past historical information and not concentrating enough on predicting future trends and developments?*

This raises a point that seems to have been overlooked in the furor over maintaining the integrity of the census and the reliance placed on the end product as a major basis for introducing, modifying or expanding various governmental policy initiatives: are we relying too much on the "rear view mirror" of past historical information and not concentrating enough on predicting future trends and developments? Are we basing policy on yesterday's evidence and not on tomorrow's prospects?

Conscious of the wry humour in Yogi Berra's famous statement that, "It's tough to make predictions, especially about the future," yet fully aware of the old saw that politicians use statistics the way a drunk uses a lamppost – for support rather than for illumination, should we not require that the evidence on which policy is based be reflective of the reality it addresses, not of some past state of affairs?

Two personal experiences come to mind. Freshly graduated with my M.A. in Economics, I went to work for a summer at the Economics and Research Branch of the Department of Labour in Ottawa. There, we endeavoured to determine how Canada figured out what jobs it ought to be providing training for. What we learned was shocking. We had selected for a case study the job category of "electronics technician" at the dawn of the age in

which such skill sets were coming into significant demand. We identified the five largest employers of that category in Canada and went to see them. We learned that, at the time, despite an evident requirement for large numbers of trained personnel, effectively 100 percent of the employees in this job category were being recruited from the United Kingdom and, with great administrative trouble and expense, supported in their efforts to immigrate to Canada. The UK had advanced, sophisticated training programs that we didn't have for this kind of specialized labour and had foreseen the need to turn out graduates en masse; Canada was not even in the game.

> *Despite the howls of protest at the suppression of the long-form census and the great relief expressed upon its restoration, we have overestimated the usefulness of lagging data.*

One solution that has developed since, of course, is programs like the Canada Job Grant, under which the federal government farms out to industry the selection of those skilled trades for which training is demonstrably required. This permits employers to select the specific categories they believe they will most need in the future. Spectacular success stories have resulted from this program, such as General Electric Canada's introduction of robotics technology in its Canadian plants and leading-edge skills being acquired by existing and new employees.

But if there were a criticism to be levelled at this reliance on the enlightened self-interest of market participants it would be that the government has no long-term guarantees of the sustainability of the skills developed with our tax dollars (in the face of disruptive technologies or the exportability of whole factories to lower-cost jurisdictions). This training might be of fleeting benefit to our labour pool composition and ability to compete. What is missing is a view of the future and the impact of change, technological or otherwise, that would enable us to better match demand with supply of our skilled workforce.

This does not mean governments should become central planners. The remnants of the telecommunications policy that attempted to superimpose four cellular wireless competitors in each market, and the repeated scandals and waste from the Ontario government's attempts at top-down energy policy should assure us of that. But "fact-based" needn't mean we consider only old facts.

A second illustration of the limits of bureaucrats' abilities to have access to current facts from which they can base urgent policy-making is the daring, massive, and ultimately highly successful initiative of the Canadian federal government during the Global Financial Crisis.

Budget 2009 created the Extraordinary Financing Framework (EFF), consisting of up to $200 billion in programs. Among them was authority for the government to purchase up to $125 billion of insured mortgages from the financial institutions that held them, so that banks and other lenders could continue to make credit available to businesses to finance inventories and receivables, cover overheads, and manage payroll costs. Aside from direct spending on things like infrastructure, the main focus of Budget 2009 was on ensuring that credit remained available to credit-worthy participants in our economy.

A Canadian Secured Credit Facility (CSCF) of $12 billion was established to help large and small originators of loans or leases securitize the purchase or leasing of vehicles and equipment.

But here is the rub: the government formed an Advisory Committee on Financing, a group of ten chairpersons, CEOs and CFOs (chaired by the undersigned), to monitor the sufficiency and effectiveness of these programs. The committee found that the CSCF was not adequately ensuring that credit was available to smaller originators of leases and loans for vehicles and equipment.

The designers of the EFF had done a brilliant job of providing an effective mechanism for only the largest players, which available data had permitted them to identify.

The public servants had missed the small guys, whose existence and economic functions had not been captured by information in any database.

The Advisory Committee heard from the largest independent automobile dealer in Toronto, who could not qualify for the "small business tranche" of the CSCF, which required $100 million of paper to be securitized as an entry condition. This dealer pointed out that, while he generated about $120 million in sales and lease contracts in a year, he could not afford to accumulate them until

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"Geeky" policy: intellectual property reform and the innovation agenda

If the Trudeau government's Innovation Agenda is to "build a more innovative country," it will need to do more than simply direct taxpayer resources to certain companies or sectors. It must create the conditions for innovation, argue Sean Speer and Michael Robichaud.

Sean Speer and Michael Robichaud

IP on IP Intellectual Property EDITION

Innovation is the new byword in Ottawa these days. The prime minister's recent public tutorial on quantum computing has received millions of views online. The minister of industry (now titled the minister of innovation, science and economic development) is tasked with developing a new "Innovation Agenda." Variations of "innovation" appear 106 times in March's federal budget. And there are even calls for the government to "innovate the way we innovate." It is no wonder, therefore, that *The Economist* has written that our "geeky prime minister wants to make the country more inventive."

The big question, of course, is: what does this all mean for government policy? It is still too early to say. The minister's mandate letter provides little insight besides the usual smattering of "strategic investments" in different sectors and export-oriented companies. The budget talks about a "bold new plan" but most of the ideas are recycled "investments" in the same sectors and organizations that typically receive federal funding. Neither

document leaves much reason to believe that the new "Innovation Agenda" will differ significantly from the "Science, Technology and Innovation Strategy," or the "Science and Technology Strategy," or whatever came before it.

The point is that the Trudeau government is far from the first to experiment with different policies to help entrepreneurs and established firms to scale their businesses and invest in research and development. The record is subpar. And the risk, then, is that the "Innovation Agenda" takes the form of direct and indirect public subsidies to certain companies or sectors with minimal progress in meeting the goal of making the country more inventive.

> *The Innovation Agenda must create the conditions for innovation, no matter how big or small, or whether a firm is "high-growth" or politically connected.*

Consider tax credits for Labour-Sponsored Venture Capital Corporations (LSVCCs), for instance. Several Canadian governments have provided tax incentives for these corporations with Ottawa's tax credit costing $140 million in 2011 at the federal level alone. Yet the evidence shows this has been a poor public investment. LSVCCs tend to have higher rates of un-invested capital (that is, they invest less than the amount of venture capital they raise) and have produced poorer rates of return than other venture capital funds. Government tax incentives have had the result of distorting the relationship between investment and returns and led investors to put capital into LSVCCs in spite of their weaknesses. This has displaced more effective venture capital funds and reduced the capital available to Canadian entrepreneurs. And still the Trudeau government has reversed its predecessor's decision to eliminate the federal tax credit.

It is not just failed tax credits that Ottawa is planning to revive. The budget also announced more funding for regional economic development schemes and new "frameworks" for clusters, accelerators, and incubators. But these ideas are hardly new. Ottawa has dedicated considerable financial resources to regional economic development and business innovation for several years. The outcomes have been underwhelming.

In their 2003 study, *Brooking No Favorites*, economists Jack Mintz and Michael Smart reviewed the Atlantic Canada Opportunities Agency's spending between 1988 and 2000 and found a disproportionate share (on average 40 percent higher) was directed to recipients located in government-held ridings suggesting that politics can skew financing decisions. In 2013, in his paper *Corporate Welfare at Industry Canada since John Diefenbaker*, policy researcher Mark Milke evaluated federal business subsidies from the department of industry over a 50-year period and found documented cases of dubious government financing to hot dog firms, ice cream shops, pizza restaurants, and gas bars and convenience stores. These findings are unfortunately consistent with a broader body of research.[1]

Poor outcomes should not be unexpected. Government possesses no informational or technological advantage over private financiers. It is also prone to political impulses – not market ones – dictating financing decisions. The consequence is the government selects "winners" and "losers" with limited investment experience or expertise and partly through a non-economic lens. There is nothing "geeky" about throwing good public monies after bad.

The key takeaway, then, is, if the Trudeau government's Innovation Agenda is to "build a more innovative country" (as the budget puts it), it will need to do more than simply direct taxpayer resources to certain companies or sectors. It must create the conditions for innovation, no matter how big or small, or whether a firm is "high-growth" or politically connected. The central point about innovation is that it involves a new product, technology, or process that we do not yet know about and probably could not have conceived of. We need an Innovation Agenda that creates an environment where such an idea can be financed, developed, brought to market, and earn a return on the initial investment.

Herein the lies case for a world-leading intellectual property (IP) regime.

The role of IP rights in supporting innovation is not complicated. It does not require a large bureaucracy, expert panels, or billions of dollars in "strategic investment." It is a simple proposition: When

[1] See, for example, James A. Brander, Edward Egan, and Thomas F. Hellmann. 2008. *Government Sponsored versus Private Venture Capital: Canadian Evidence*. NBER working paper 14029. National Bureau of Economic Research.

firms are operating in an environment in which their right to exclude others from the returns on their research investments is robust and relatively simple to attain, then they have more of an incentive to invest in research and development (R&D). The result is a more inventive economy, where the payoffs associated with thinking creatively are greater, and innovative activity is a less risky endeavour.

> *There is a large body of research that draws a clear relationship between a jurisdiction's IP regime and its inventiveness.*

This is not an abstract point. It has tangible implications. Politicians, economists, and journalists – including from *The Economist* – use "innovation" as a surrogate for "invention." And there are means to measure how inventive a country is. The number of patent applications per capita or total spending on R&D, for instance, are pretty good proxies for inventiveness or innovation.

How does Canada fare? Relatively poorly. World Bank data show that R&D spending as a proportion of GDP is lower in Canada than the European Union or world averages, and much lower than that of the US.[2] And with respect to the number of patent applications filed per million people, Canada again lags well behind the US and other innovation powerhouses like Japan, South Korea, Germany, or Israel.

What is the explanation for our poor relative record on inventiveness? It is not a lack of public resources. As discussed, Canadian governments have experimented with a range of direct and indirect subsidies and incentives for decades. A new suite of tax credits or direct payments to businesses programs is unlikely to be the answer.

One area of policy reform that could make a difference is the intellectual property regime where, according to a recent study, Canada is lagging its competitors. The US chamber of commerce's Global Intellectual Property Center (GPIC) has consistently ranked Canada as having a weak IP regime. Indexing a number of variables related to the "robustness" of a country's protection and enforcement of IP rights on a scale from 0 to 30, the GPIC rated Canada second to last of G-8 countries – trailed only by Russia – and more than 10 points below the United States.

And even after an ambitious round of reforms undertaken by the last government – aimed at strengthening IP rights, freeing the application process of red-tape, and cracking down on counterfeiting – this year's version of the report still slotted Canada somewhere between Poland and Taiwan, and well below most other nations with comparable levels of GDP per capita.

Why does this matter? There is a large body of research that draws a clear relationship between a jurisdiction's IP regime and its inventiveness. The most recent GPIC study draws on this empirical research to highlight this relationship. Economies scoring above the median for the robustness of their IP regimes, for instance, produce on average 70 percent more technological, creative, and knowledge-based output than those scoring below it. Moreover, countries with stronger IP laws are 50 percent more likely to exhibit high levels of private sector R&D spending, and countries that offered the strongest patent protection enjoyed a rate of patenting that was a staggering 30 times higher than in those at the bottom of the index. The key takeaway, then, is that IP policy is a key ingredient to an effective Innovation Agenda.

Now, of course, improving Canada's IP regime is hardly a silver bullet. There are many factors that contribute to inventiveness, including competitive taxation, high-quality infrastructure, a skilled labour force, and so on. But the importance of strong IP protections to a pro-innovation agenda should not be understated, and the total absence of any discussion of intellectual property rights in the minister of industry's mandate letter is a glaring omission.

The Trudeau government has an opportunity to embrace IP reform as a key plank in its new Innovation Agenda. It will invariably make a bigger contribution to Canada's inventiveness than any number of "strategic investments."

Positioning Canada as a world leader with respect to IP policy can help the prime minister achieve his geeky yet important objective of turning Canada into a more inventive and innovative economy now and in the future. Just as in computing, sound institutional hardware is required before the software of ideas can be channelled into useful – and lucrative – outcomes. Here is where IP reform can contribute to the goal of making Canada more inventive.

Sean Speer *is a Senior Fellow at the Macdonald-Laurier Institute.* **Michael Robichaud** *is a University of Toronto law and public policy student.*

[2] See http://data.worldbank.org/indicator/GB.XPD.RSDV.GD.ZS.

Stop the TPP-IP media pile-on

It has become fashionable to declare the Trans-Pacific Partnership intellectual property provisions a disaster for innovation in Canada, writes Richard C. Owens. But fashionable doesn't make those opinions right.

Richard C. Owens

Even in the law and innovation communities it has become fashionable in Canada to be critical of intellectual property. The intellectual property (IP) provisions of the Trans-Pacific Partnership (TPP), which when implemented will strengthen IP rules generally among signatories, are prey to this fashion.

While the Right sometimes criticizes IP as monopolistic, the Left, perhaps because it tends to be critical of property in general, is the more common breeding ground of critics. The Broadbent Institute, Professor Michael Geist of the University of Ottawa, Joseph Stiglitz of Columbia University, Munk Centre denizens Dan Breznitz and David Wolfe, Brock University Professor Blayne Haggart, and of course, Jim Balsillie, all have recently published or reportedly had criticisms of the TPP IP chapter. I extensively critiqued such criticism in a paper published by the Macdonald-Laurier Institute, *Debunking Alarmism Over the TPP and IP*. Alas, that paper did not stem the critical flow. TPP negativism has been abetted by the media who uncritically report it, often without balancing perspectives. As we can see from the US election debate, the neo-liberal orthodoxy of the benefits of free trade is not so securely ensconced in public opinion that it, and the reason and research behind it, do not need restatement and reinforcement.

Various arguments are being raised against the TPP. One broad class of argument is that Canada lacks innovation capability and will therefore be at a disadvantage in the world in which the TPP is implemented. This is premised on the notions that additional IP protection will stymie innovation (not so), and that Canada has a negative balance of trade in IP-protected goods and therefore will suffer economically if IP rights are extended. Most simply, and like so many arguments against the IP provisions of the TPP, this latter notion falls down on the fact that the TPP makes virtually no significant changes to Canada's IP regime. Moreover, strengthening the IP regimes of our trading partners can only help Canadians and improve the balance of trade. And, studies show that the implementation of the TPP would have a minimally negative or a positive effect on Canada economically.

It has also been suggested that the way to address the problem of insufficient innovation in Canada is to weaken its IP legal regime. From this perspective, the TPP is seen to be problematic for locking us into excessive IP rights and preventing future loosening that would spur innovation. But in fact, Canada, while admittedly having a great deal to improve upon, has an innovative economy that ranks surprisingly high in some criteria – for instance, R&D investment and attractiveness to venture capital – in the recent (4th) edition of the US Chamber of Commerce's annual *International IP Index*. To suggest that Canada's innovation would be spurred by cutting back on IP protection is counterintuitive and not borne out by the literature. Moreover, to cut back our IP regime is unrealistic and would conflict with existing treaties.

Critics often seem not to fully grasp the admittedly complex provisions of the TPP and of Canada's background IP regime. Sometimes their criticisms are deliberately evasive; other times they seem to stem from insufficient attention to the TPP text. Critics seem to feel free to speak fairly broadly against the TPP. One critic, for instance, states simply in the *Globe* – without elaboration – that "the sections on intellectual property rights, foreign investment rules and trade secrets are particularly troubling." That view seems to be simply taken as read.

Whatever makes it fashionable to oppose property rights and free trade, it has become especially important for IP and trade scholars to continue to articulate disciplined insights and empirical study over ideological and political rhetoric. The great importance of IP rules to the innovation economy will be extensively analysed in an upcoming report on Canada's IP regime to be published by the MLI. There is not space here for a comprehensive rebuttal of TPP iconoclasm. But it is fair to ask why critics should make easy, populist slanders of the TPP, while it falls to those of us who actually have read it carefully to muster a point-by- point defence. It is time for more balance in the debate of trade and IP.

Richard C. Owens *is an adjunct professor at the University of Toronto Faculty of Law.*

A modern copyright regime requires regular attention

Effective intellectual property laws are essential for everyday Canadians, for investors, for the digital economy, for artists, for our academic communities, and more broadly, for Canada's place in the world, writes James Moore who led the modernization of Canada's Copyright Act.

James Moore

Few people pursue political office to wrestle with the issue of intellectual property law and all of its complications and incendiary debates. Certainly that was true of me when I first sought office, and it was still the case when I was later appointed to the federal cabinet in 2008. I am quite sure this is equally true of members of the current Parliament and Prime Minister Trudeau's cabinet, given that the words "copyright" and "intellectual property" don't appear even once in the 2015 Liberal or Conservative election platforms, nor in the government's Throne Speech, nor in any one of the mandate letters of the current cabinet.

While this isn't a big surprise given that the topic seems dry, at least superficially, the reality is that there are few issues that are as central to Canada's economic and cultural place in the world as ensuring that our intellectual property laws remain up to date and effective. Investment decisions, creative directions, academic collaborations, Canada's trade agenda, our much hashed and rehashed rhetoric on "innovation," and our global reputation all hinge on Canada's intellectual property laws.

So while few, if any, current members of Parliament ran for office on a platform of supporting and revising intellectual property law, in the coming months they will do themselves and the country a great service by educating themselves on the topic and its associated debates.

Back in 2012 the *Copyright Modernization Act* was passed into law, after over 20 years of endless debate, delay, and failure. Since its passage, the reforms have served Canada very well.

When the legislation was first proposed, it faced earnest criticisms and sparked a healthy debate about intellectual property law in the digital age and about how to accommodate and balance competing interests. In the end, the legislation passed, laws were reformed, and since then Canada has been broadly recognized as having an intellectual property framework that is contemporary with technological change, balances competing interests, and serves consumers, creators, and investors well.

Among the features of the *Copyright Modernization Act* is a mandatory 5-year review of the regime. This was put in place to force all future governments to assess and adjust our intellectual property laws as necessary to ensure that Canada does not fall behind in protecting Canadians in a globally competitive world of ideas-based economic development. Absent this mandatory 5-year review – as we witnessed in the 20 years prior to 2012's *Copyright Modernization Act* – stakeholder interests, tricky zero-sum policy decisions, and the political self-interest of governments subsume the greater public interest of copyright modernization. The first mandated review of the Copyright Act is set to take place next year and the federal government, and all Canadians, need to be ready for the discussion.

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Prior to the review of the *Copyright Act*, I have a few observations to share based on my experiences in dealing with this file:

Keep an eye on the world

All countries that aspire to attract investment, have a robust digital strategy, truly welcome innovation, and foster a creative culture are continually assessing and updating their intellectual property laws. In fact, the Australian government's Productivity Commission just released a massive white paper entitled *Intellectual Property Arrangements* that touches on virtually every topic related to IP law. The commission's goal is to stir debate and make recommendations to the government for reform so as to "ensure that the intellectual property system provides appropriate incentives for innovation, investment and the production of creative works while ensuring it does not unreasonably impede further innovation, competition, investment and access to goods and services."

In the United States, the House of Representatives Committee on the Judiciary is wrapping up broad-based hearings on copyright reform and will be making amendments in the coming weeks. In Taiwan, sweeping changes are coming to their Copyright Act after a great many consultations over the past couple of years by Taiwan's Intellectual Property Office. In total, 149 articles of their Act are expected to be amended, covering everything from fair dealing, digital convergence, enabling provisions, and more. Meanwhile, in Europe, the European Commission's push for a "Digital Single Market" (DSM) continues. This ambitious plan to transform the 28 European Union member countries into a single, borderless digital entity with standardized online regulations and business laws continues. They are tackling online piracy, safe harbour provisions, continental contractual parity recognition and remuneration regimes for artists, and more.

For Canada to compete in the world, we must pay close attention to these debates and their outcomes. Canada must be vigilant in recognizing the competitive advantages and disadvantages of our legal framework.

Build on success

Canada's current intellectual property laws are balanced, recognize our international commitments, are carefully thought out, and are rooted in sound principles that make sense for Canadians. Any changes we make must build on those solid foundations. Our laws are technologically neutral, which was difficult to achieve legislatively, but makes absolute sense in practice. With ever-changing technologies, governments should concede to, and in fact encourage, greater innovation, while avoiding technology-specific laws that stymie growth and innovation. Unlike many other jurisdictions, our laws have broad fair-dealing exemptions, which, for example, enable educators to more broadly use materials in their classrooms and provide a legal basis for such use. Those exemptions serve Canada well. Rules in Canada are clear for internet service providers and their liability when it comes to fighting online piracy. Consumers have clarity in law when it comes to the use of material and the consumption of content on the digital devices of their choice. And, we have empowered the creators of content – software, apps, games, music, films – to protect their ideas, and their investments, from those who would steal from them.

In short, Canada's copyright regime works well. Any reforms ought to be cautiously entertained and recognize the relative success of Canada's status quo.

Communicate and educate

As mentioned above, few members of Parliament sought office with copyright reform in mind; fewer still grasp the conflicting issues inherent in the debate. Before this year is over, the government would be well served to make clear its intent to engage on the issue, outline what aspects of the current law it believes need to be examined, and offer members of Parliament a group departmental briefing on the current law. Very quickly, debate on this topic can become irrational and be dominated by vested interests and by those with ideological biases. The surest way for Parliament to keep control of the tone of the debate is for it to respond with substance, to communicate clearly with Canadians on the intended policy direction, and educate Members of Parliament on an issue few are familiar with.

Effective intellectual property laws are essential for everyday Canadians, for investors, for the digital economy, for artists, for our academic communities, and more broadly, for Canada's place in the world. At a time when our manufacturing capacity is sliding, our productivity is slumping, our commodity-based industries are suffering, and our exports are struggling to get to global markets, we need to ensure our ideas-based economy is thriving. While we do have laws that work well now, we are competing against other jurisdictions that are using their intellectual property regimes as comparative advantages. The government needs to debate copyright laws responsibly here at home, keep a keen eye on global developments, and always ensure that our intellectual property laws serve Canada and all its potential.

James Moore, *P.C., M.A., served as Minister of Industry in Stephen Harper's government and is currently Senior Business Advisor at Dentons Canada LLP.*

Canada's patent "utility" regime on trial

The Supreme Court's decision to hear AstraZeneca's appeal and this month's NAFTA hearings on an Eli Lilly complaint shine a light on Canada's unusual legal approach to invalidating patents.

Adrienne Blanchard

Patent issues have rarely been as interesting to the Supreme Court of Canada as they have been in recent years.

The court recently granted leave to AstraZeneca to hear its appeal of a finding of invalidity of its patent related to the NEXIUM product. This case suggests that Canada's highest Court remains interested in settling patent law on what may seem like esoteric points. These concepts include what constitutes the "promise of the patent" and its relevance to the patentability criterion, the "utility" of a patent.

Critical patent issues have garnered attention over the past several years in Canada and internationally because they touch on both industrial policy and health policy (given the relevance of patent exclusivity to provincial drug budgets). In deciding to hear the appeal, the Supreme Court presumably recognizes that what many may view as arcane Canadian standards for patentability have significant practical implications for brand name and generic companies operating in Canada.

Intellectual property and patent protection matters to innovators; they define the business environment for companies willing to share their inventions with Canadians, disclosing their inventions as part of the patent "bargain." In return, they expect exclusivity for a time-limited period so they can recoup the investment they have made to bring the products derived from their patented ideas to market.

Generic drug companies have different interests; they stand to benefit substantially from invalidating patents on products before the end of the expected patent term. If a generic company is successful in invalidating a patent, and it can bring a less expensive copy of the once-patented product to market, it may be worth tens or hundreds of millions of dollars in annual sales.

The manner in which patent law has developed in the courts over the past several years has been disadvantageous, disproportionately, to the innovative pharmaceutical industry. Many

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Canadian patents that were granted on pharmaceutical inventions have been invalidated, years after they were granted but well before their expiry dates, by challenges from generic companies that the patents lacked "utility." This concept is a legal term which does not equate to the commonly understood notion of "usefulness"; it is an element of patentability that involves the application of court-made tests and standards. The development of those principles by case law is unique to Canada, which has led to the current debate as to whether Canada's law is in line with international standards, as it is impossible to predict how the patenting principles will be applied, and therefore, whether patents when granted will be found valid.

The trend of the courts to invalidate patents led Eli Lilly to lodge a complaint in 2014 under the NAFTA dispute resolution process after patents on two of its top-selling products were invalidated. In that dispute, under the investor-state provisions, Lilly claims damages of $500 million, claiming that its rights have been violated under the expropriation and compensation provisions, minimum standards of treatment, and national treatment provisions of NAFTA.

In a statement released after the case was filed, Eli Lilly's patent

counsel, Doug Norman, said that the Canadian courts' approach to assessing the promise of drug patents could deter companies from developing new drugs for sale in Canada. "It's impossible to know what specific 'promise' can be implied from an application, and how much data are needed to support it," Norman said. "If this pattern persists, the already challenging business of medical innovation will become all the more difficult in Canada."

> *Patent issues have rarely been as interesting to the Supreme Court of Canada as they have been in recent years.*

On the other side of the debate, Public Citizen, a Washington D.C.-based watchdog organization, commented that the company's so-called investor-state challenge "marks the first attempt by a patent-holding pharmaceutical corporation to use the extraordinary investor privileges provided by U.S. 'trade' agreements as a tool to push for greater monopoly patent protections, which increase the cost of medicines for consumers and governments." They have further commented that, "If Eli Lilly is successful in its claim for compensation, it 'could expose Canada to a slew of investor-state attacks from other drug companies that have had patents invalidated because their patent applications failed to show or predict that the medicines would provide the promised benefits.'"

The trade case has attracted international attention as it calls into question the potential for private companies to challenge the laws of a country through the use of dispute settlement provisions of trade agreements, which may have application beyond NAFTA to other agreements with similar provisions.

Eli Lilly's claim is that the courts in Canada are applying the patent "promise doctrine" unfairly, requiring patentees to provide proof of a drug's effectiveness as at the date of the patent application. It claims the bar for validity of a patent is set too high in Canada, and that it has, as a result, suffered financial losses "from the application in Canada of unique and burdensome patent utility standards which are inconsistent with international norms and Canada's treaty obligations." While all countries are required to provide protection for inventions that are new, useful and unobvious, these standards are interpreted and applied at the national level. For example, unlike Canada, in some other countries, evidence of "usefulness" that arises after the date a patent application is filed can suffice to meet the utility patentability criterion.

The Canadian government has defended the trade case, referring to Eli Lilly as a "disappointed litigant" that is now trying to turn the NAFTA panel into a "supranational court of appeal from reasoned, principled, and procedurally just domestic court decisions." Hearings took place earlier this month.

Concepts of patent validity similarly arise in the AstraZeneca appeal, which is set to be heard by the Supreme Court. At issue in the AstraZeneca case is whether the patent for Nexium, used for "gastric acid, reflux esophagitis and related maladies," delivered on the "promise," which in this case was an improved therapeutic profile, claimed at the time the patent application was filed. The claimed invention in the patent was found by the Federal Court to meet certain other criteria of patentability, and in respect of "utility," the court confirmed there is no particular level of utility that must be shown. However, if a patent promises a specific result, utility of the invention will be measured against that promise. In the analysis, the court ultimately held that the patent "promised more than it could provide … despite its many strengths, for this fatal flaw, the '653 patent for Nexium is invalid.'"

The Federal Court of Appeal agreed with the lower court's finding, holding that the Federal Court had directed itself to the correct legal tests applicable to claims construction: inventive concept and utility.

This is not the first utility case to capture the attention of the Supreme Court. In January 2014, generic drug maker Apotex was granted leave to appeal a finding of validity of Sanofi's patents on its Plavix product, a blood thinner; initially the Federal Court had found the patent invalid, but that had been reversed in Sanofi's favour at the Court of Appeal. The Sanofi case was set to be heard on November 4, 2014, but was settled literally on the eve of the hearing.

With the granting of leave in the AstraZeneca case, the Supreme Court may actually get the opportunity to pronounce on these important issues. The eventual decision, taken together with the outcome of the NAFTA hearing, could signal the need for change to Canada's law, at minimum, in terms of how courts should apply international norms of patentability, and whether a made-in-Canada approach to patent utility can, or should, survive.

Adrienne Blanchard *is founder of Blanchard Law Office, and a practitioner in IP and life sciences law.*

The critical role of biopharmaceuticals in Canadian health and economic growth

If Canada wants to continue to be a player in the pharmaceutical sector, it must provide stronger patent protection and more streamlined regulatory and approval processes to protect the financial investments that research-based companies make.

Laura Dawson

When Prime Minister Justin Trudeau took center stage at the World Economic Forum in Davos, Switzerland in January of this year, he declared that the world should not only know Canada for its resources but also know "Canadians for their resourcefulness." The prime minister's comments emphasize that Canada's future prosperity depends on its ability to maximize its strengths in the knowledge economy.

The biopharmaceutical sector is key example of the how the right government actions can accelerate future growth while the wrong actions (or inaction) can block competitiveness. Not only is the biopharmaceutical sector important for the expansion of Canada's knowledge economy, biopharmaceutical medicines can contribute to longer, more productive lives for Canadians.

The case for pharmaceutical innovation

Technological breakthroughs in medicines are now the most significant contributor to improvements in human health and longevity. Between 1986 and 2000, new therapies were responsible for 40 percent of the increase in life expectancy in both developing and high-income countries; between 2000 and 2009, that share increased to 73 percent.

Investment in innovative medicines generates significant cost savings elsewhere in the health care system. A 2013 Conference Board of Canada study examined the health and economic benefits associated with pharmaceutical spending in Ontario from 2007 to 2012. It concluded that spending $1.22 billion would generate offsetting health and societal benefits of nearly $2.44 billion. Some of the benefits cited by the Conference Board's study included reduced demand for hospital services and increased productivity in the workplace.

Life sciences have some of the highest rates of investment in the world and the largest portion of life sciences investment is directed

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to research and development (R&D). In 2014, global R&D investment was estimated at $200 billion, of which biopharmaceutical research was estimated at $51 billion.

In Canada, R&D investment in pharmaceuticals is not robust. According to Statistics Canada, between 2007 and 2015, R&D in pharmaceuticals and medicine manufacturing fell by 55 percent. This cannot be blamed on declines across the board. Even as pharmaceutical investment lagged, R&D increased by 63 percent in aerospace and 41 percent in scientific sectors in the same period. The Trudeau government's 2016-2017 Budget indicates that the new government is serious about public R&D investment in medical innovation. For the biopharmaceutical sector, planned spending in health research

Canadian Public Opinion and Pharma IP

54% According to Nanos Research, **54 percent** of Canadians polled believe that stronger IP will create more Canadian jobs in the pharmaceutical sector. (Only five percent believe that stronger IP discourages jobs. The rest are unsure or believe it has no effect).

56% A clear majority of respondents (**56 percent**) believe that stronger IP encourages the discovery of new medicines in Canada.

59% **Fifty-nine percent** of Canadians believe that strong IP encourages private sector investment in R&D (an increase over similar polls in 2013 and 2012).

Source: Nanos Research Group Research for Rx&D, Telephone survey of 1000 Canadians (December 2014).

and genomic technologies are particularly important. However, government investment is not enough; another critical aspect is a supportive policy and regulatory framework to create an enabling environment for innovation.

What are biopharmaceuticals?

Most drugs sold today are "small molecule" drugs that are made of pure chemical substances and are created through predictable chemical processes that produce consistent results, time after time. Aspirin is one example of such a drug. However, many of today's important medications that treat conditions such as rheumatoid arthritis, anemia, low white blood cell counts, inflammatory bowel disease, and various forms of cancer are "biopharmaceutical" drugs.

Compared to small molecule drugs, biopharmaceutical drugs (also called biologic drugs) are complex mixtures that can include whole cells or derivatives from human, animal, plant, or micro-organism sources.

Since biologic drugs are manufactured within cells, each of which imposes its own variabilities on the process, even minor changes during their production can cause significant changes in results and efficacy. Since biopharmaceutical drugs are far more structurally complex than traditional small molecule drugs, they are more challenging to produce and are, therefore, more costly to develop.

Precision medicine as the future of health care

Some of the most promising therapeutic products are biopharmaceutical drugs that are the result of advances in human genomic research. These drugs are key to providing targeted and effective treatments for chronic diseases. Biologic drugs for such conditions as Crohn's disease, rheumatoid arthritis, autoimmune disorders, and certain types of cancer are already providing better interventions to cure or manage illness and disease. For example, the five-year survival rate of chronic myelogenous leukemia has grown from 31 percent to 89 percent today, thanks to targeted biopharmaceutical therapies. Targeted biopharmaceutical therapies are increasingly referred to as "precision medicine."

The Canadian Cancer Society estimates that nearly 200,000 Canadians were diagnosed with cancer in 2015 and it was the cause of death for 75,000 Canadians that year. Previously, treatment options were limited to surgery and powerful chemotherapy drugs, derived from traditional small molecule drugs, with problematic side effects. But precision medicine provides new hope for cancer patients.

It is now possible to map all the cells in the body and then accurately identify genes that have cancer-causing mutations and create new drugs to stop specific gene mutations. The number of new drugs being developed is increasing dramatically. Between 2008 and 2012, the US FDA approved only two new anti-cancer drugs, but since 2013, more than 30 have been approved.

The economics of biopharmaceutical drug development

In the early 2000s, when genome mapping was in its infancy, the cost of sequencing the human genome ran into the hundreds of millions of dollars. Today, advances in technology and micro-processing speed have reduced the cost to just a few thousand dollars. Nevertheless, the complexity and variability of biopharmaceutical drugs still makes them much more costly to develop than small molecule drugs. The higher costs of biopharmaceutical development have pushed the average cost to develop a prescription medicine and bring the drug to market from $1 billion through the 1990s to around $2.6 billion today. It takes more than 10 years to develop a new drug from inception through to marketing approval. But the time and costs are producing results. IMS Health reports that up to 37 new products will be launched in 2016, up from an average of 25 to 30 products per year between 2005 and 2010.

There are long-term socioeconomic gains for human health from the efficient treatment of disease. Economic analysis suggests that every dollar invested in medical innovation generates an average of three dollars in future health benefits. As well, biologic technologies allow for conventional therapies to be more effectively targeted, lowering costs and improving patient outcomes. For example, an estimated 17,000 strokes can be prevented each year in the United States as a result of a genetic test to properly dose blood thinners.

The group representing American pharmaceutical manufacturers, PhRMA, estimates that targeted therapies save up to $7 for every $1 spent on medication for patients with diabetes, high cholesterol, or high blood pressure. Precision medicines are preventing complications from chronic diseases, reducing the number of visits to the emergency room and the length of hospital stays, as well as helping patients avoid major surgeries. In Canada, the Conference Board of Canada concludes that the costs of pharmaceutical innovation are more than offset by reductions in health care costs and productivity losses associated with illness.

Pharmaceutical contributions to the Canadian economy

Canada has a long history of biomedical innovation. Made-in-Canada innovations include the use of insulin to treat diabetes, the discovery of stem cells, and clinical trials for the polio vaccine at Connaught Medical Research Laboratories. In 2014, more than 26,000 Canadians were employed in pharmaceutical manufacturing facilities, mostly clustered around Toronto and Montreal. According to Industry Canada data, sales of research-based pharmaceutical products totaled nearly $14 billion in 2013, approximately 77 percent of all drug sales in Canada.

The pharmaceutical industry is one of Canada's leading sources of research and development. Twenty pharmaceutical companies were among Canada's Top 100 R&D spenders in 2013. Research-based pharmaceutical companies in Canada invest in basic research, but most investment is concentrated in applied research (which includes clinical trials and manufacturing processes).

The pharmaceutical industry accounts for around 10 percent of Canada's business-based R&D and a quarter of its venture capital, but Canada has relatively low absolute levels of both when compared with other developed countries, particularly the United States.

While investment still exceeds $1.3 billion annually, the share of investment by research-based pharmaceuticals in Canada has been declining as the global pool of $135 billion migrates to other jurisdictions. Meeting the demand for new innovative therapies requires considerable investment by research-based companies, strong patent protections, and streamlined regulatory and approval processes to ensure that inventers can benefit from the billions of dollars spent in new drug development.

Canada is falling behind

Biopharmaceutical research is an important component of Canada's knowledge economy. There is a strong foundation for biopharmaceutical growth as a result of early investment in the innovative pharmaceutical industry, a skilled workforce, and excellent education and research organizations. However, Canada is falling behind to such an extent that the Pugatch Consilium, which runs the global Biopharmaceutical Competitiveness and Investment Survey, calls Canada an "outlier" among countries of similar levels of development. According to the Pugatch survey, one of the main impediments to Canada's competitiveness is life sciences patenting and patentability standards that are out of sync with international best practices.

> *"Intellectual property is one of the key disincentives to investment in Canada.*

A mediocre IP environment

Canada has a middling reputation for its intellectual property (IP) protection. While new developments emerging from the Comprehensive Economic and Trade Agreement with the European Union (CETA) and the Trans-Pacific Partnership (TPP) have helped to update certain aspects of Canada's IP regime, its international reputation (and thus ability to attract investment) is adversely affected by legal decisions on patent utility (discussed below).

In the most recent edition of the Global Intellectual Property Center's International IP Index, *Infinite Possibilities*, which maps the IP environment of 38 economies from around the world, Canada is ranked 15th, lagging behind major trading partners such as United States, the EU, and Japan. Historically, periods of strong IP protection have helped to spur investment in R&D in new

and innovative drugs. For example, the 1987 and 1992 changes to Canada's *Patent Act* were followed by a 1500 percent increase in pharmaceutical R&D investment between 1998 and 2002.

However, new investment is migrating to other regions and the Pugatch Consilium identifies IP as one of the key disincentives to investment in Canada. One of the gaps that the CETA and TPP are helping to fill is patent term restoration (PTR). This is remedial time that can be added at the end of a company's patent life to help compensate for clinical development time and the time required to obtain approval from regulatory authorities. Under the CETA, Canada agreed to provide up to two years of PTR. The TPP extends this commitment to three to five years.

Data protection is another area of concern. This refers to the period of time when the innovator retains control over clinical testing data prior to making it available to generic manufacturers who do not conduct their own testing. Canada traditionally provided a maximum term of up to 8.5 years of data protection. The TPP requires different terms of protection for chemical entities (small molecules) and biologic drugs. But the effective period of protection for either drug type does not exceed Canada's current 8.5-year period. Since the US offers 12 years of data protection for biologics domestically, Canada should consider offering the same in order to remain competitive with the United States.

One of the most problematic gaps is patent utility, i.e., usefulness of a drug. In a number of recent decisions, Canadian courts have invalidated the utility of certain patents, meaning that they have determined that the drugs are not uniquely useful any longer, which is creating a chilling effect on pharmaceutical investment in Canada. Critics charge that Canada's imposition of a higher standard of utility than that used by other developed countries puts many patents at risk. Also, it is argued that questions of whether or not a drug is effective should be evaluated through clinical testing, not by judges. Since 2005, when the the new utility standard emerged, 18 pharmaceutical patents have been invalidated. In the previous 25 years only two pharmaceutical patents were invalidated for lack of utility.

Recent cases, such as Federal Court of Appeal Canada's *Sanofi-Aventis v Apotex Inc.* (2013) case, suggest that a return to a more moderate interpretation of utility may be on the horizon. In order to attract investment in the challenging, expensive, but also hugely rewarding biopharmaceutical sector, Canada must build and maintain a world-class standard of IP protection for innovation.

Other challenges

In addition to the main problems associated with Canada's mediocre protection of intellectual property, some of the generalized weaknesses affecting Canada's biopharmaceutical sector include poor commercialization of research, lack of governmental support for the biomedical sector, and a high-cost environment.

Taken together, lags in the system not only retard biopharmaceutical industry growth as a contributor to the Canadian economy, they are also affecting the quality of health care available to Canadians. Canadians face long delays for access to new drugs that are already being used safely and effectively in peer group countries. According to IMS Health, only 59 percent of cancer medicines were covered in public drug plans, ranking Canada 17th out of 20 peer countries, and only 23 percent of new biologic medicines were reimbursed in public drug plans, ranking Canada 19th out of 20.

What an innovation ecosystem looks like for biopharmaceuticals

An innovation ecosystem creates virtuous circles of sustainable growth by providing a network of mutually reinforcing factors. These include facilitative laws and policies, education and research centres, R&D, and a climate of public and private support for innovation. In the biopharmaceutical sector the ecosystem encompasses three operational areas:

1. Access to, and support for, human capital through education and research centres.

2. A regulatory and legal framework that provides robust legal protections and an enabling environment for the development of new knowledge.

3. A value-based approach to access to medicines that looks beyond short-term costs to long-term patient well-being.

The biopharmaceutical sector provides a double win for Canada. It is a key contributor to high-quality patient care and efficient health care spending while at the same time generating employment and contributing to the growth of Canada's knowledge economy. In order to create the sort of environment that will enable the knowledge economy to flourish, everyone from governments to the public to the pharmaceutical industry itself must be part of the discussion about the opportunities and challenges that new technologies pose for health care research.

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Image courtesy Mining Industry Human Resources Council

It's time for Conservatives to embrace Aboriginal power and entrepreneurialism

There is a great opportunity to re-brand the party as constructive and compassionate.

Brian Lee Crowley

If Canadian Conservatives wanted to steal a page from British Prime Minister David Cameron's playbook to reinvent themselves, they should start with the page entitled "Compassionate Conservatism."

Rightly or wrongly, Stephen Harper's government was seen as hard and mean, which clashes with the self-image Canadians have of themselves. No electorate will continue giving the nod to a party they sense is out of step with their values.

Britain's Conservatives faced a similar challenge. They were known popularly as "the nasty party," which helped give Tony Blair a record run as Labour prime minister.

To recover from such brand damage is not easy, but Britain's Tories achieved it, in part under the leadership of a former party leader, Iain Duncan Smith. Smith founded a think tank called the Centre for Social Justice to lay the groundwork for a constructive, but distinctively Tory response, to social challenges such as poverty, housing, and social mobility. The political payoff was tremendous. The Tories are now able to articulate intelligent ideas about how to use the power of markets and the state to improve the lot of the least well-off – and put those ideas into practice.

If Canadian Tories want to achieve such a rebranding, how can they do it, especially given that so much social policy falls under provincial jurisdiction? One way is to embrace Aboriginal Canada.

I am not saying that it will be easy. On the other hand, a party wishing to burnish its compassion credentials might well want to start with a burning social issue that most Canadians regard as a stain on the conscience of the country, namely, the shocking conditions in which far too many Aboriginal citizens

live. Especially in the wake of the Truth and Reconciliation Commission, reconciliation with Aboriginal people is now a major national preoccupation. Conservatives cannot permit themselves to have nothing to say on the topic, or worse, to be grumbling dissenters offering no real alternative.

Ironically, and perhaps surprisingly, this issue lends itself increasingly well to a small-c conservative narrative. The Canadian Left sees the issue as largely one of victimhood, something to be put right by inquisitions into the past that will underline yet again the poor treatment meted out to Aboriginal Canadians. Their solution includes compensation, apologies, and increased transfers, which end up digging ever-deeper the hole we have dug for Aboriginal people.

> *"There are many examples of resource development partnerships between First Nations and developers.*

A conservative narrative, however, could take an entirely different tack. Victimhood focuses on the past, which cannot be changed. It disempowers the victims, who must go cap in hand to the authorities for restitution. Imagine in its place a narrative of opportunity and legitimate Aboriginal power that must now be accommodated in modern Canada.

To date, the subtext of Conservative policy has been a grudging admission that Aboriginal people have gained power thanks to the courts and the constitutionalization of treaties and Aboriginal rights in 1982, but that this power is somehow illegitimate and cannot be embraced for fear of alienating the Conservative base. It is time to let this narrative go; it has been overtaken by events.

The courts have spoken, summoning Canadians to honour the promises made to Aboriginal people, promises now given constitutional protection. Just as importantly, the rising generation of young Indigenous Canadians wants jobs and opportunity on the reserve as well as in the cities. The natural resource frontier now runs through many of those communities, juxtaposing legitimate Aboriginal power and real opportunity in a way not seen before in our history. It is my view that the leading edge of reconciliation with Aboriginal people in this country now runs along the natural resource frontier, and it is natural resource companies and Indigenous Canadians who are striking the deals that are making reconciliation a reality on the ground.

First Nations, Métis, and Inuit are now reaching agreements with hundreds of developers for resource development and realizing major opportunities as a result. This may come as a surprise to many Canadians, especially Conservatives, who believe that the "Aboriginal problem" is intractable and insoluble, and sucks up billions of dollars but never shows any sign of improving. This view seems to be confirmed by Aboriginal people themselves; they appear to be resolute opponents of natural resource development. The poster child for this attitude is the decision by one First Nation to turn down over $1 billion to put an LNG plant on their territory on the BC coast.

However, this story-line is a distortion – and it has become an obstacle to the reconciliation I am calling for between Conservatives and Aboriginal Canadians.

When the Lax Kw'alaams allegedly decided to turn down $1 billion to put an LNG terminal on Lulu Island, the media, who feed on conflict, gleefully reported the refusal. What got far less attention was the fact that the Lax Kw'alaams themselves explained that the proposed site was unacceptable for conservation and cultural reasons, but that there were several other sites on their territory that they thought would be suitable, and which they would support.

And of course there was no attention paid to the fact that the Nisga'a, northward in the Nass Valley, saw the opportunity that had been created. They spent their own money to survey and identify seven sites that they said would be suitable, and indicated that they would be interested in becoming partners in development and seeing the pipeline and plant built on their territory.

There are many other examples of resource development partnerships between First Nations and developers. Just two years ago, the Muskowekwan First Nation in Saskatchewan held a referendum and voted over 77 percent in favour of developing a potash mine on their territory in partnership with Encanto Potash Corp. Also in Saskatchewan, another First Nation used the money from a major land claim settlement to buy a piece of the city of Saskatoon, turn it into a reserve, and create an industrial park there. Though it was opposed at the time by the non-Aboriginal business community on the grounds that it would be unfair competition, this very successful venture now employs many Aboriginal and non-Aboriginal people.

In the Northwest Territories, Aboriginal people abandoned their earlier opposition and became among the most fervent

advocates for the Mackenzie Valley gas pipeline once they had negotiated a 30 percent equity stake. No one was more disappointed than these local Indigenous people when the pipeline failed and they ended up with 30 percent of nothing thanks, in part, to a drawn out approval process that couldn't reach a timely decision. Many people do not realize that the Harper government's much-criticized reforms to the pipeline approval process were carried out in part as a response to Aboriginal pleas to reduce regulatory obstacles to their success in the natural resource economy.

> *Getting the relationship with Aboriginal people right will unlock great value for all Canadians.*

So having skin in the game has made Aboriginal people acutely aware of the perishable nature of opportunity. The Mackenzie Valley pipeline will not be built for decades now, if ever. A similar evolution has occurred in the Yukon, where one First Nation had opposed natural resource development on its territory for years, but then came to see that they were forgoing economic opportunities available to other Aboriginal communities. They responded to the pleas of the business community for certainty on the rules by putting in place a mining law governing their territory, rather than negotiating on a case-by-case basis with individual developers – showing that Aboriginal communities are increasingly understanding the needs of the business community and showing a willingness to respond constructively.

Just as Canada's Indigenous people are becoming an increasingly vocal and articulate voice in favour of natural resource development, they also hold the power to obstruct that development. Significantly, however, polling shows that when local Aboriginal groups support development, extreme environmental opposition has difficulty gaining traction. Aboriginal people have more credibility on these issues than governments, regulators, companies, or NGOs. Companies more and more realize that establishing and nurturing a positive relationship with Aboriginal people helps get the job done, just as failing to establish such a relationship virtually guarantees a pipeline full of headaches and opposition.

Of course Aboriginal communities have their vocal minorities who are opposed to development, and the expressions of their dissatisfaction are fodder for the media. But these vocal minorities are no more representative of Aboriginal Canada than non-Aboriginal protesters are of the country as a whole. When Conservatives treat these aggressive and vocal minorities as the mainstream of the Aboriginal world, they abandon their natural allies and help to reinforce the narrative of conflict that is holding a major part of the economy to ransom. While the natural resource economy may only represent around 20 percent of the economy as a whole, it represents roughly half of the business investment intentions. Getting the relationship with Aboriginal people right will unlock great value for all Canadians. We should welcome the growing spirit of enterprise and entrepreneurialism that seeks opportunity for Aboriginal people, respect for their rights, and control over their own lives.

The Macdonald-Laurier Institute has identified hundreds of agreements between project proponents and Indigenous communities. Within a few years, several Aboriginal development corporations will be among the largest corporations in Canada with billions in assets. Evidence shows that when Aboriginals negotiate benefits with developers, those benefits stay in the local community, helping Aboriginal and non-Aboriginal people alike.

This course correction I am recommending for the Tories does not imply that the search for accountability and transparency in Aboriginal government should be abandoned. It does, however, imply a change in strategy and tactics – abandoning the stick in favour of the carrot. You can't play in the high-stakes business world, where billions of dollars are at play and companies face an unprecedented scrutiny through stock exchanges, audits, laws such as the Foreign Corrupt Practices Acts, etc., without adopting yourself appropriate standards of transparency and accountability. Being at the table as a partner, equity stakeholder, or board member brings responsibility as well as power. If we want to speed the process, one way to do so is to offer financing for Indigenous communities to acquire equity stakes in resource development, but to require suitable business levels of transparency in return.

A pro-opportunity Conservative Party that embraced Aboriginal Canada as a respected, necessary, and welcome partner in unlocking prosperity would find a growing audience in the Indigenous world. And they'd have the foundation of that distinctive Tory narrative on social issues that Canadians are looking for.

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

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Straight Talk on pipelines and politics
with Gaétan Caron

For the latest instalment in its Straight Talk *series of Q & As, MLI spoke with former National Energy Board chair and CEO Gaétan Caron, now an executive fellow at the School of Public Policy at the University of Calgary, about pipelines, politics, and how to ensure the environmental assessment process serves the best interests of Canadians. The conversation took place in April.*

Gaétan Caron joined the School of Public Policy at the University of Calgary as an executive fellow in July 2014. His current areas of work at the school are Indigenous consultation and engagement best practices, and public interest determination of energy infrastructure. He lectures on energy policy and regulation and contributes to international partnerships, notably with Mexico. He speaks publicly and responds to media queries on a range of policy matters on behalf of the school. In addition to his work at the school, he provides independent consulting services on energy and regulatory matters. This follows his seven-year tenure (2007 to 2014) as chair and CEO of Canada's National Energy Board (NEB). Prior to his role as chair and CEO, he served as vice-chair (2005 to 2007), board member (2003 to 2005), and member of the executive in various staff functions throughout the NEB.

MLI: What are the most important barriers to the approval of energy infrastructure projects in Canada today, and can they be overcome?

Caron: Perhaps it's better to ask: What is the most important barrier to fair consideration of projects? Because sometimes the public interest would require that the project be denied. But the main obstacle to these determinations being made, I think, is the fact that the regulatory processes have become politicized before their completion. When federal politicians take a stand on projects being assessed by a federal regulatory body like the National Energy Board (NEB), they're saying they've made up their mind before the regulatory review has been completed, or in some cases before it has even started. Understandably, this is seen by many as an expression of indifference or distrust towards the regulatory process, making people believe the regulatory re-

view does not matter, or its outcome has been pre-decided.

Federal politics has a role to play after the federal government has received the final report from the regulator, that is, the National Energy Board in the case of pipeline projects. Provincial politics is something else, as provinces want to prepare their intervention before the NEB in advance of the NEB process. This is why the OEB [Ontario Energy Board], and now the Quebec BAPE [*Bureau d'audiences publiques sur l'environnement*], have examined or are examining the Energy East Project from the standpoint of the provincial public interest. The report of the NEB, and the federal government's final decision, however, will be made on the basis of the national public interest. Following the independent and transparent regulatory process in place, and forming opinions based on the facts and the evidence presented to the regulator, and eventually the regulator's decision and its reasons for the decision, would go a long way towards restoring trust in the overall process.

Perhaps in previous times federal ministers would actually express opinions on the merits of pipeline projects, especially if they were deeply in favour of them, but this might have worked against their own purposes. As a result, people are saying, "Why is the federal government having opinions while their own regulatory agency is assessing the pros and cons of the project, undermining the process itself?" This is despite the fact that the process itself was administered fairly by a bunch of competent people working in the public interest. So, I'd say politicization is a key obstacle.

Another barrier is the very unfinished journey of reconciliation with Canada's Indigenous people. There is no shortcut there. Deeper and better engagement with Indigenous peoples affected by infrastructure projects is necessary. I will discuss this in further detail as we go along.

MLI: Given that pipelines are an issue of national interest, how do you regard the notion that Ontario and Quebec can somehow extract conditions from the western provinces for allowing pipelines through their territories?

Caron: Well, they could try and do that in exchange for their support, but in the end it's not a bargaining exercise between provinces. It's really between the pipeline proponent and the National Energy Board and then the federal cabinet to decide whether the project is a go or not. Now, the NEB and the federal government will take into account the views expressed by provinces, but the NEB is not running a plebiscite asking itself how many people are supporting it and how many people are against. If the overriding social, environmental, and economic factors in support of a project are positive for the nation, the NEB would still approve a project even if a province was against it.

This is part and parcel of democracy in action in Canada. That's the way the federation works. Provinces are entitled to voice their opinions, especially when they do so on the basis of evidence and analysis and arguments in an NEB hearing. And, they are obviously entitled to have a political say in the political process, which follows the NEB process. What I'm saying is that an obstacle to the proper development of natural resources and infrastructure is the mixture of political and regulatory considerations in one bundle, which makes people believe that the regulatory process is political, which it is absolutely not, especially in the case of the NEB process which is quasi-judicial, independent, and relying on the fundamentals of the case before the board members.

MLI: We've been hearing that Canadians have lost faith in the review process for pipeline projects and that reform of the National Energy Board is required. It has been criticized both for failing to get projects approved and for being too supportive of industry. How should we properly regard the NEB?

Caron: What we are hearing mostly is that they have lost faith in the environmental assessment process, as acknowledged by the Liberals during the election campaign, and then acknowledged by the new government. In my view, the loss of faith comes from the Canadian Environmental Assessment (CEA) Agency and the NEB faithfully implementing Parliament's wishes as expressed in the *Jobs, Growth and Long Term Prosperity Act*, known as Bill C-38, in 2012. Changes implemented in Bill C-38 included the imposition of a 15-month time limit for the NEB process, and a legal requirement that parties to be heard by the NEB must be "directly affected," or have expertise of value to the NEB. Earlier, as part of the *Budget Implementation Act*, Parliament decided that the CEA Agency would no longer be involved in the administration of environmental assessments conducted by the NEB and the Canadian Nuclear Safety Commission.

While these changes were democratically passed and implemented, several politicians and many NGOs became very vocal and very organized about condemning them, and spared no efforts to criticize the government of the day and the agencies involved. Some went so far as to indicate that the government had "gutted" the environmental assessment process. This is perhaps fair game in politics. What was not fair was the criticism aimed at the 400 or more people working at the NEB who choose every day to invest their professional career in the promotion of the public interest. They cannot respond to this criticism, which is not about

concrete and specific examples of failures or errors on their part, but an overall judgment on the wisdom of democratic changes to legislation. Their work has included environmental assessments ever since the creation of the NEB in 1959. None of the legislative changes passed by Parliament since has had any impact on the independent work conducted by the people at the NEB in safety and environmental protection. As a result of their professional work, not a single member of the general public has been hurt by a federally-regulated pipeline since 1959, and not even a square metre of land has been irreversibly affected by a leak or a rupture, given the NEB's practices in environmental remediation.

> *As a result of the National Energy Board's professional work, not a single member of the general public has been hurt by a federally-regulated pipeline since 1959.*

Many people, from various backgrounds, who have observed or participated in the work of the NEB over the years, find it is an example of a very competent, evidence-based, independent, and public interest-oriented institution. Inevitably, the tough decisions on complex matters they must make all the time make some people happy and some people unhappy, just like our courts of law. This is normal. One does not work for a regulatory agency to receive universal praise, or in fact any praise at all. Doing the best they can every day, one day after the other, having in mind the public interest, is the best approach to provide Canadians with the regulatory services they deserve in a modern democracy.

Few if any people have come up with concrete suggestions as to how to reform the NEB. As a start, perhaps one could ask Parliament to undo the changes it made with Bill C-38: make sure the NEB is well resourced with good people as it has always been, and keep federal, provincial, and municipal politics out of their work, and see what happens.

MLI: What do you think of the interim measures placed on the Trans Mountain and Energy East pipeline projects?

Caron: I really like them. In both cases, the price to pay for those waiting for the decision is a few months and that's after years of preparing for the application and the application itself and the hearings, final arguments, deliberation by the NEB, and the NEB's final report. It takes years to get to the start of a hearing and it takes up to 15 months once the application is complete for the NEB to deliver its final report. So, to add a few months here and there for the Trudeau government to – in the case of Kinder Morgan – consult outside the regulatory process with Indigenous people is a very wise investment. To appoint a special representative and go deeper into what Indigenous people have to say, with an attitude of listening, is a good idea. Something of the same nature is being considered for Energy East. So that's a good thing. In both cases, the government is also giving itself more time than the three months the NEB legislation allows to respond to the final report. Again, if the Trudeau government wishes to do its political work after the NEB process in a more orderly and inclusive way, I can only applaud that.

And I am very pleased that the upstream greenhouse gas emission test will be conducted by the department of Environment and Climate Change, outside of the NEB regulatory process. I am confident that the department will conclude, like the NEB has done several times on the basis of the evidence before it, that a particular pipeline has limited, if any, impact on the way provinces make decisions on the development of their natural resources, or the way consumers consume energy products at the other end of the pipeline.

There is a connection between climate change and pipelines if you take all pipelines together, of course, and you say let's choke the flow through all the pipelines the federal government regulates so that provinces produce less oil, but that would be a blatant intrusion into provincial jurisdictional matters under the Constitution and really a backdoor policy action as opposed to asking the provinces to do more. So, we have now a federal government who we see as a leader on the international scene, coming back from Paris; we have provinces praised by the prime minister for the actions they are taking, notably Alberta, which is developing a carbon pricing formula and a maximum cap on total accumulative emissions per year – this is the proper policy vehicle to deal with climate change. We do it at the policy level, in policy circles, not through the back door in a regulatory environment where the regulator itself has found that any particular pipeline has no bearing on climate change upstream or downstream of a pipeline it regulates.

MLI: So, what principles should the government keep in mind as it reviews the environment assessment process in general?

Caron: I'll keep it simple: make sure it remains evidence-based. The prime minister has been very clear that he wants environmental assessments to be evidence-based. Keep politics out of it and be faithful to the fundamental concept of sustainability, which was framed initially by the Brundtland Commission in its 1987 report known as *Our Common Future*. That was the seed of the concept of sustainable development. The Brundtland Report made it clear that sustainability is the integration of social, environmental, and economic considerations. Yes, we can develop natural resources, but not at any environmental or social cost. We must respect the environment, but we must also take our resources to market. So, I think the direction that the nation is taking now on environmental assessment is very sound and very much grounded in the fundamentals of sustainability.

MLI: You mentioned earlier the importance of consulting Aboriginal people and how reconciliation is an unfinished journey. How can Aboriginal people be better engaged in the environmental assessment process?

Caron: It takes time – lots of time – to make progress in our journey towards reconciliation with Indigenous peoples. We need to be patient, we need to be respectful of one another, and most importantly – and I'm repeating for emphasis even though it sounds funny – most importantly, listen, listen, and listen with sincerity and authenticity, leaving those we listen to, on both sides, with the belief that we are prepared to change our minds based on what we are hearing. And, I'd say that the history of Canada and the Indigenous governments and communities of this land over the years are more examples of how not to listen than examples of how to listen and how to get us together, treating each other as equals, and taking the time to do it right. There is no short cut. We have deepened the hole ourselves by sometimes cutting corners on consultation, accommodation, and the journey of reconciliation. It's not a pipeline project that will accelerate that long journey. So, it's going to be difficult, complicated, but it's got to be done and there's no way around it, and it's a good thing for all Indigenous communities and the broader Canadian society.

MLI: There have been a few instances where a proposal has been designed in consultation with the affected Aboriginal community, which has led to much more successful passage through the environmental assessment process. Would you say that involving Aboriginal communities early and incorporating their concerns into the project design is more beneficial than consulting when the design is more or less complete?

Caron: I totally agree. I would add to that also the opportunity offered to Indigenous people to participate in the economic space created by a pipeline project, a dam, or a mine. For instance, have them own equity or be debt holders in the investments for the projects and share the benefits from the investment over the years. That could be facilitated, for instance, by the federal government offering loan guarantees to Indigenous people. That's one example of the things that perhaps can happen when people listen to the aspirations of Indigenous people when they are being asked to form an opinion on a project crossing their land.

MLI: What are the prospects for some of those high-profile projects being completed, such as Northern Gateway and Energy East?

Caron: On Northern Gateway, I believe the decision to pursue it or not is in the hands of the leadership and board of directors of Enbridge Pipeline Corporation. They have a federal permit and they have said publicly that they are prepared to satisfy all of the conditions attached to the permit. So, they have what it takes legally to proceed. But, they know that if they proceed now they would face a degree of opposition which is well organized, vocal, and resourced, and they probably expect there would be further legal action. There might be civil disobedience, there could be delays, contributing to reduced value of their investment. The fact that there is a moratorium proposed against the movement of tankers on the West Coast also creates a major impediment to the project. So, we'll have to wait and see how it unfolds.

As for Energy East, it will depend on how the NEB and federal government see the national interest and the future of our nation with and without the project. It is way too early and I would invite all Canadians to not form a final opinion on Energy East until they've read some of the application and considered the evidence. Don't pre-judge the outcome until you know what the facts are. That's what the Trudeau government has been saying. I like that. That's what the NEB will do. The NEB never begins to form an opinion on anything until the last word has been offered in the final argument by the last party.

MLI: How do you respond to concerns about Energy East from mayors and premiers in Ontario and Quebec?

Caron: Mayors have to look after their constituents' interests and pipeline projects run through many, many municipalities. Mayors have a legitimate role to play in having opinions on things that af-

fect them. Mayors also understand that it is not their decision. The mayors around Montreal have been clear that it's obviously for the NEB to decide, but they will say what they think. Provinces will do the same and have done the same.

The best thing they can do moving forward to contribute to the debate is to have their teams study the application, contribute to the hearing, find evidence, ask questions, and form a final argument based on the evidence at the end of the public hearing. Mayors and their teams of officials at City Hall have a very important role to play because cities, like provinces and the federal government, have a difficult task integrating social, environmental, and economic considerations in their jurisdiction. They are in the business of making decisions that are in keeping with the sustainable path for their future. And, that's the precise question the NEB asks itself on behalf of, not the city or province, but on behalf of the entire nation. So, their work is comparable and of the same scope, so while the NEB is not bound by a sustainability assessment made by a city or province, it is doing a sustainability assessment for the nation and anything that it can hear from provinces and territories and cities is a good thing because it contributes to their thinking process.

MLI: How has the use of the term "social licence" evolved and what impact do you think it has on the pipeline debate?
Caron: I find the concept of social licence very unhelpful in the discussion of merits and demerits of infrastructure projects. It is not defined in a measurable way, and people using the phrase seem to use it at cross-purposes, like ships passing in the night. It means very different things to different people. Other similar phrases such as "social acceptance" and "social acceptability" have the same difficulties.

MLI: Do you think the pipelines have become a kind of proxy for environmentalists or opposition to oil sands? What impact has that had on the debate?
Caron: I would say that the assessments of the merits of pipeline projects have become a place where Canadians have tried to have broader policy debates on the development of natural resources, the fight against climate change, and other broad discussions that are beyond the project-specific assessment that regulatory and environmental assessment bodies are required to conduct under their enabling legislation. While these are important issues in today's society, these bodies have validly determined that these broad policy questions are not relevant to the project-specific determinations they must make, and the courts to date have agreed with them. The absence of a public space to debate these broad questions has caused a great deal of frustration among some members of the public.

We would be well served by a public place where citizens can go and be heard on these broad issues. The new government has talked about renewal of Parliament. What Canadians want, in my view, is the recognition, through genuine listening by their governments, of the diversity of views Canadians hold on key policy topics from coast to coast to coast. They want to feel that they are being heard, with respect, and without judgment. And if they are part of the silent majority, they want to know that people who are vocal about issues they care about – social, environmental or economic issues – are being heard with respect. Perhaps we need to strengthen our Parliamentary committees.

> *[Canadians] want to feel that they are being heard, with respect, and without judgment.*

By that, I include both House of Commons committees and Senate committees, which, by their nature, tend to be less partisan in their work, even more so today than in the past with the appointment of non-partisan senators. We could invest more resources to help Parliamentary committees better listen to Canadians, through a more varied set of tools, such as Internet-based tools, so the views of more Canadians can be more comprehensively reflected in the committee reports. We may then see that Parliamentary committee reports make a difference.

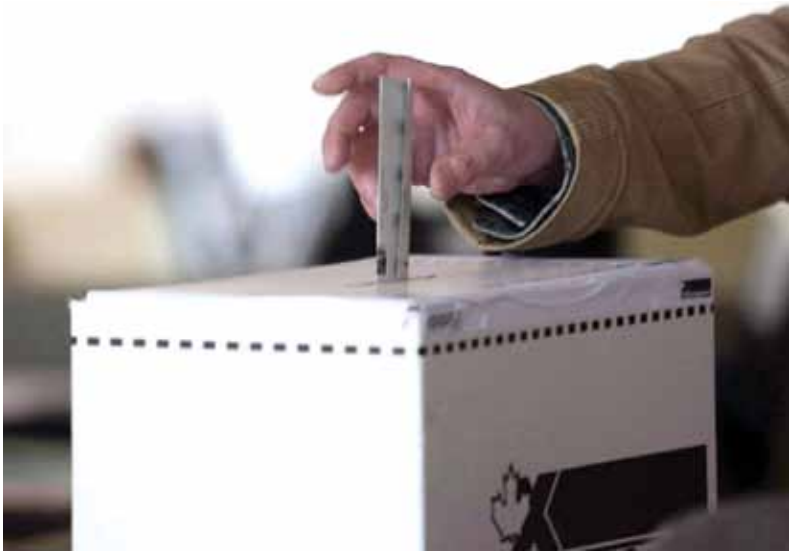
In some cases, it may be helpful for key topics of general interest to a large proportion of Canadians to go back to the practice of holding Royal commissions, or their equivalent, such as commissions of enquiry, to gather a wide range of views and suggestions, and make recommendations to Parliament.

We have so many tools already. Let us simply re-learn how to use them effectively, helping the nation find its path towards a sustainable future for our children and grandchildren, and beyond.

Time has already run out on electoral reform

The vow to 'make every vote count' in the next federal election may have sounded good on the campaign trail, but now that the Trudeau government is trying to implement voting changes it faces significant practical and constitutional constraints.

James Bowden



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In last year's federal general election, Justin Trudeau led the Liberal Party to a parliamentary majority after campaigning on a platform that included a promise that it would be the last time that Canadians would elect MPs under a single-member plurality electoral system, or "first past the post"; as Prime Minister, Trudeau has since reiterated this policy in the ministerial mandate letters and in the Speech from the Throne on December 4, 2015. The latter says, "To make sure that every vote counts, the Government will undertake consultations on electoral reform, and will take action to ensure that 2015 will be the last federal election conducted under the first-past-the-post voting system."

While the Speech from the Throne adopted the language typically associated with proponents of a proportional system ("make every vote count"), it is extremely unlikely that the next scheduled federal general election in 2019 will be conducted under either mixed-member proportional representation (MMP) or the single transferable vote (STV) – irrespective of whatever the upcoming special parliamentary committee on electoral reform reports by December 1, 2016. For reasons set out below, Parliament *cannot* adopt MMP, with its dual ballot of electing members to geographic constituencies and electing members from the political parties' lists for compensatory seats, nor STV, with its multi-member districts and preferential ballots, in time for 2019.

However, Parliament could feasibly adopt a majoritarian electoral system like the Australian-style instant run-off balloting, sometimes called a ranked ballot or alternative vote (AV), for 2019. This is because switching to AV would require only statutory amendments, such as to the *Canada Elections Act*, and would not require changing the boundaries of any electoral district.

In contrast, switching to either MMP or STV would certainly require both a constitutional amendment of some kind and changing the boundaries of all 338 electoral districts. The only question remains whether the constitutional amendment would fall under the ambit of the amending formula under section 44 of the *Constitution Act, 1982*, which the Parliament of Canada alone can pass like a regular statute, or, more ominously, whether it would be subject to the dreaded General Amending Formula, requiring the consent of both houses of Parliament and two-thirds of the provinces with a majority of the national population.

The latter brings with it all of the implications that flow from "opening the Constitution," as we tend to say in Canada, with the obvious, if unconscious, allusion to "opening Pandora's Box". It raises the spectre of the failed Meech Lake and Charlottetown Accords. Electoral reform most certainly is a constitutional matter, contrary to former chief electoral officer Jean-Pierre Kingsley's recent bizarre assertion to the contrary.

Mixed-Member Proportional Representation and Single Transferable Vote

Let's consider the most commonly proposed replacements for first past the post, MMP and STV.

Under mixed-member proportional representation (MMP), voters cast two ballots, one for their constituency member of

Parliament and another for the political party itself. Seats are then awarded to the political parties that won fewer constituency seats than their share of the popular vote would merit them. In this way, the overall percentage of seats that the political parties hold in the assembly comes much closer to the percentage of the party vote that they won in the election. Generally, this system benefits smaller parties, which would explain why the New Democratic Party and the Green Party have long advocated for it. Despite their claims to the contrary, they are motivated by self-interest just as much as the Liberals and Conservatives.

The single transferable vote (STV) relies on multi-member constituencies and allows voters to rank their preferred candidates in numerical order; a candidate must surpass a threshold number of votes in order to get elected. Unlike under MMP, STV ensures that all MPs represent geographic constituencies and not the political parties themselves. For candidates who surpass a given threshold, their surplus votes are redistributed according to the voters' ranked preferences. If some seats still remain to be filled after this first redistribution because none of the other candidates meets the quota, then the least successful candidate is eliminated from contention, and his or her votes are redistributed according to the voters' ranked preferences. This process continues until all the seats in the multi-member constituency have been filled.

In 2012, now Foreign Minister Stéphane Dion proposed that Canada adopt a system of STV with multi-member ridings represented by either three or five MPs. (Incidentally, Dion also argued that "precedent makes holding a referendum [on electoral reform] necessary.")

The Population Formula, the Decennial Census, and Electoral Boundary Commissions

Section 51(1) of the *Constitution Act, 1867* contains the formula by which seats in the House of Commons are allocated amongst the provinces after each decennial census. Parliament last amended this formula, and expanded the House of Commons from 308 to 338 seats, in 2011 by way of the constitutional amending procedure under section 44 of the Constitution Act, 1982. Section 51(1) also mandates that the seats in the House of Commons be redistributed after each decennial census; this process normally takes two years, and the next decennial census will not take place until 2021.

The current population formula is based on an "electoral quotient" that assigns approximately 111,000 people to each constituency. This electoral quotient forms the baseline number of seats that each province receives before the application of the other rules, which involve adding additional seats based on the Senate Floor Rule, the Grandfather Clause, and the Representation Rule.

After this amendment to the formula in section 51(1) became law on December 11, 2011, the Harper government also had to issue an Order-in-Council pursuant to the *Electoral Boundaries Readjustment Act* in order to establish the boundary commissions in each of the 10 provinces, which in turn re-defined the borders of the country's electoral districts, since the House of Commons has also expanded from 308 to 338 seats. The general election of 2015 was the first conducted under this new formula; if proponents of proportional representation had their way, it would also be the last.

> *"We could almost certainly not switch to MMP or STV in time for the next scheduled general election of 2019.*

This entire process of re-drawing the borders of Canada's electoral districts takes almost two years – and it could take even longer after adopting an entirely different electoral system. This practical constraint with the electoral boundary commissions shows why we could almost certainly not switch to MMP or STV in time for the next scheduled general election of 2019.

By definition, STV and MMP would require larger constituencies than the current electoral system. Under STV, each constituency would have multiple members representing it. Under MMP, Ontario could still return 121 MPs to Ottawa, but only, say, 80 MPs would represent geographic constituencies, while the other 41 would represent a party. More members per constituency or fewer members for the same number of constituencies would both mean larger constituencies. Larger constituencies contain a larger number of people.

Both MMP and STV would therefore run afoul of the current population formula contained in section 51(1) of the *Constitution Act, 1867*, and could therefore only be implemented by amending the rules under this section. This is because the formula under section 51(1) presumes that each electoral district contains a baseline of around 111,000 people, plus or minus the percentage variance allowed by the Electoral Boundaries Readjustment Act and taking

into account the current formula's exemptions and exceptions. While the current rules under section 51(1) are designed to accommodate increases in Canada's population determined after each decennial census, these existing rules simply could not accommodate the significantly larger population per electoral district that switching to MMP or STV would necessitate.

Since switching to STV or MMP would require adopting larger constituencies containing a larger number of people, the government would also therefore have to issue an Order-in-Council to call up the electoral boundary commissions in all 10 provinces so that they could then re-establish the borders of *all* 338 electoral districts. (The new MMP or STV system could still include a House of Commons consisting of 338 seats, but there would no longer be 338 geographic electoral districts.)

Then there is the Decennial Census Clause, which stipulates that the electoral boundary commissions must re-convene anyway after each decennial census; the next will occur in 2021. (The censuses held in 2006, 2016, etc., do not count as the constitutionally mandated decennial census). This means that even if the Trudeau government tried to strike up electoral boundary commissions in 2017 or 2018 after Parliament passed the constitutional amendment to alter the population formula in section 51(1), the government would have to strike up another round of electoral boundary commissions again anyway after the decennial census of 2021.

Establishing two sets of electoral boundary commissions within a period of four years would waste vast sums of money and amount to an unnecessary, impractical extravagance. Switching electoral systems on such short notice would also put an intolerable burden on Elections Canada, which has to train poll clerks and prepare the ballots months in advance of each general election.

The proportionate representation of the provinces: Do not disturb

If law-makers are not careful, a system of MMP or STV could contravene section 52 of the *Constitution Act, 1867*, which stipulates that the seats within the House of Commons must be distributed such that the "proportionate representation of the provinces" is "not thereby disturbed". Section 42(1)(a) of the *Constitution Act, 1982* subjects any change to this principle of "proportionate representation of the provinces" to the higher threshold of the General Amending Formula.

Based on the *Confederation Debates*, it is clear that in the 1860s, the phrase "proportionate representation" meant "representation by population," and that each province would enjoy representation in the House of Commons proportionate to its population. The Fathers of Confederation thus replaced the illiberal distribution of seats in the United Province of Canada, where Canada West (Ontario) and Canada East (Quebec) each received 20 seats irrespective of their populations, with representation by population. The phrase used in the *Constitution Acts* most certainly does *not* correspond to the modern usage of "proportional representation" and proportional electoral systems.

As long as the compensatory seats under MMP or the multi-member constituencies of STV remained within only one province, these proportional systems would indeed not "disturb" that all-important "principle of the proportionate representation of the provinces". In other words, Parliament alone could therefore probably implement models of MMP or STV that did not in any way attempt to amalgamate seats between two or more provinces or otherwise render ambiguous which seats belonged to which province. This means that under MMP, the compensatory party list seats would have to remain within only one province and that each of the 10 provinces would remain the baseline for calculating the popular vote for the political parties.

If, however, we tried to create a system in which the compensatory seats are allocated based on the party vote between two or more provinces, or Canada-wide across all 10 provinces, we would then need to pass a constitutional amendment under the General Amending Formula. This is because taking away seats from the provinces for the sake of establishing a pool of seats that represent all Canadians, would "disturb" the "principle of the proportionate representation of the provinces."

This might frustrate some proponents of proportional representation who would prefer that the compensatory seats be allocated to the political parties based on their Canada-wide popular vote, but these reformers must respect the legal-constitutional authority of this country just as much as the retrogressive anti-democratic reactionaries like me who support single-member plurality.

In short, the only electoral reform that could be implemented in time for the next scheduled general federal election in October 2019 is AV; quite simply, time has run out on implementing MMP or STV. In a non-coincidental coincidence, the only system that Parliament could adopt in time for 2019 is the very same system that Prime Minister Trudeau himself has identified as his own personal preference.

James Bowden *has a B.A. in Political Science from Carleton University. He has authored numerous columns and articles on topics such as responsible government, executive authority over prorogation and dissolution, royal succession, and officialising constitutional conventions. He also blogs regularly at parliamentum.org.*

Comeau decision just the first crack in the internal trade barriers dam

The recent Comeau *decision in New Brunswick was courageous, transformational and has far-reaching implications for knocking down internal trade barriers in Canada, writes Ian A. Blue.*

Ian A. Blue

Rarely does a court decision as important and as well reasoned as the *Regina v. Comeau* case released in New Brunswick April 29, 2016 come along. The retired Gerard Comeau was found not guilty of possessing liquor purchased in Quebec contrary to the New Brunswick *Liquor Control Act*. In this decision the court interpreted s. 121 of the *Constitution Act*, 1867 to prohibit all tariff and non-tariff trade barriers between the provinces. Because the provision under which Mr. Comeau was charged was a non-tariff trade barrier, the court acquitted him. This decision was courageous, transformational and has far reaching implications.

In making this decision, His Honour Judge LeBlanc of the New Brunswick Provincial Court corrected a very poor decision by a much different Supreme Court of Canada.

The Comeau decision has many more implications than just New Brunswick's *Liquor Control Act*. Provincial liquor monopolies across Canada, including the LCBO, are now vulnerable to judicial deconstruction. This is because the provision that creates them, s. 3 of the *Importation of Intoxicating Liquors Act (IILA)*, is as much a non-tariff trade barrier as the provision declared unconstitutional in the *Comeau* case. The Defence in the *Comeau* case had prepared an argument that s. 3 of the *IILA* was unconstitutional, but Judge LeBlanc did not need to decide that issue. It is likely that the next legal argument will be the constitutionality of provincial liquor boards. Imagine, the LCBO and other provincial liquor corporations may no longer have a monopoly on liquor sales.

In addition, all legislation, both provincial and federal, establishing milk, egg, and other farm products marketing boards is now also vulnerable to constitutional attack. So are laws providing favourable market access to local products. All are open to challenge as non-tariff trade barriers under the *Comeau* interpretation of S. 121. In addition, under Canada's GATT (General Agreement on Tariffs and Trade) obligations, foreign products entering Canada would have the same rights as Canadian products. Wouldn't it be refreshing for consumers to pay less for milk and cheese and have the ability to buy artisanal cheeses, beer and wines from other provinces at reasonable prices.

What of the many Canadians and their families who have a stake in the present system? Sound advice to them would be to remember that in change there is opportunity and that statutory privileges do not last forever.

New Brunswick's Public Safety Minister Stephen Horsman has implied that as a decision of the provincial court, the *Comeau* case is not of high authority. That view overlooks the compelling analysis in the *Comeau* decision. The lawyer, Gary Gillman who said otherwise in an ill-considered piece in the *National Post* on June 3, 2016, could not have read the evidence.

The New Brunswick government has now decided to appeal the *Comeau* decision, likely to be heard in October. There were repeated rumours that other provinces had requested New Brunswick not appeal so that they could say that the decision is not of high authority. In deciding to appeal, New Brunswick appears to have decided not to lose what it described at trial as an important revenue source without a fight. It does, however risk having the New Brunswick Court of Appeal adopt the reasoning in the *Comeau* decision and give it much higher authority. As the Supreme Court of Canada said in 1993, the notions of political scientists and other theorists must yield to the plain words of the Constitution.

It is likely that the matter will end up before the Supreme Court of Canada. Provinces will argue that the Supreme Court should not disrupt the existing system of interprovincial trade, after all this is not *Brown v. the Board of Education*. But in Canadian terms, perhaps it is. What is likely, however, is that the Supreme Court will uphold the wording of the Constitution.

Provincial officials are anxiously watching. Much more to come!

Ian A. Blue. *Q.C. wrote the arguments for Mr. Comeau's defence. He is author of the 2011 MLI paper "Free trade within Canada: Say goodbye to Gold Seal."*

A dose of reality on drug patents

Concerns about drug patents raising drug prices in developing countries are likely overblown, writes Philip Stevens.

Philip Stevens

Debates on how to improve health care in developing countries often start from the same premise: patents can potentially raise drug prices, so they should be abolished for better public health.

In the early 2000s this argument drove the campaign against patents on HIV drugs in South Africa. This month, it anchors new NGO campaigns against a proposed EU-India Free Trade Agreement and the Regional Comprehensive Economic Partnership in Asia – both of which may include heightened intellectual property provisions.

NGO disquiet about drug patents has even led to the creation of a UN high level panel on access to medicines, due to report its recommendations in New York next month.

Such concerns may in fact be overblown. This is an implication of an interesting new study by researchers at the University of Ottawa and published in April by the World Intellectual Property Organization (WIPO) in Geneva.

To better understand how patents affect access to medicines, the researchers counted how many of the World Health Organization's (WHO) List of Essential Medicines are subject to patent protection in developing countries. This list contains 375 or so medicines considered most important by WHO experts.

It's a very influential list, and one based purely on the clinical usefulness of a medicine, not cost or patent status. Developing country governments and large international donors use it to guide which medicines they will procure.

The researchers checked national patent registries in developing countries and double-checked with manufacturers. They found that patents for 95 percent of the medicines on the list had expired.

Put simply, patents are not relevant to the vast majority of drugs typically used by physicians in developing countries.

Most of the remaining 5 percent of medicines – around 20 products – on the WHO list with patent protection are for HIV/AIDS. But patent owners either don't register or don't enforce their patents in the poorest countries. For middle-income countries, manufacturers often enter into voluntary licensing deals with generic manufacturers to broaden access, meaning there are cheap generic copies on the international market.

The one medicine with no generic equivalent is the cancer drug, bevacizumab (marketed as Avastin by Swiss patent-owner Roche). This modern so-called "biologic" drug is used against many cancers, and works by starving tumours of their blood supply through blocking a key protein.

Patented or not, these biologic drugs are difficult for generic competitors to copy cheaply.

Unlike most drugs, which are chemically synthesised and made from just a few molecules, biologic drugs are manufactured in living systems such as plant or animal cells, and have complex molecular structures. Their manufacture demands significant investment and technical know-how, meaning such drugs will never be as cheap as, say, generic aspirin.

One implication of the study is that if patents were abolished tomorrow it would make little difference to the cost or availability of most medicines used in developing countries.

Even so, these medicines are frequently unavailable in public health systems.

In 2014, researchers at the University of Utrecht in the Netherlands found that, on average, essential medicines are available in public sector facilities in developing countries only 40 percent of the time.

While generic medicines are cheap to make with no royalties to pay, they are still too costly for most people in developing countries.

One example from the WHO list is budesonide, commonly used by asthma sufferers. A single inhaler costs a staggering 50 days wages in Mozambique. In the US, one inhaler costs only $5 to $7 – around 30 minutes work on the median hourly wage.

The reasons behind the expense and scarcity of essential medicines in developing countries are complex, but failures of governance loom large.

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Want to boost innovation? Get government out of the way

Brian Lee Crowley has an innovative idea for governments hell-bent on cajoling businesses to innovate more: Get out of the way.

Brian Lee Crowley

The new government in Ottawa, like every one of its predecessors in the past 30 years or so, believes Canada is not innovative enough. Scarcely a day goes by without some minister patronisingly explaining why business needs to do more to innovate and how Ottawa will be there to help.

Well here is a radical suggestion. Instead of officials telling business how to run itself, perhaps they might ask themselves what obstacles governments create to innovation and then dedicate themselves to removing them.

Hurt protestations of innocence will be the order of the day in response. Why, we would never do anything to obstruct innovation. We love it and want to embrace and nurture it, officials will murmur, a hint of a tear glimmering in the corner of their eye.

But this charade of innocence can only be sustained by hiding behind the obfuscation of an abstract word – innovation – that sounds warm and cuddly but means nothing specific. "Innovation" is just a fancy way of describing doing new things or doing old things in a new way. And as soon as you put it that way, you realize that all too often a synonym for innovation is "disruption." And there is nothing politicians hate more than something that upends a world their constituents find quite comfortable.

Uber is a classic example. Exponents of innovation will hail Toronto's recent grudging embrace of this innovative sharing-economy technology, conveniently forgetting that Toronto, like virtually every other city in the country, has spent years fighting the threat it represents to the taxi industry and their own regulatory power. Toronto may be on board now, but almost every other major municipality in the country is still fighting a rearguard action against the inevitable, raising hugely the cost of an innovation that will benefit consumers, lower costs, give better service, open the market to new competitors, and make more rational use of the fleet of cars on the road.

On a strict cost-benefit calculation, politicians should have welcomed Uber, Lyft, and others with open arms. Instead they stood po-faced at the city gates, egged on by a tiny but well-organized band of taxi owners and drivers, loudly crying "stop" to the march of history. Most of them are still there. Innovation-friendly indeed.

Now let's talk about health care.

Health care is one of the largest sectors of the economy and with our rapidly ageing population it is going to expand enormously in coming years. Worldwide it is the focal point for almost every innovative field there is: nanotechnology, management science, diagnostic imaging, biotechnology, brain chemistry, and more.

Essentially the system is run, however, by the powerful established interests within it, such as doctors and nurses, and administered by bureaucrats for whom Rule Number One is never do anything that will embarrass the minister.

Yet every important innovation in health care threatens some powerful vested interest in the system. That's why international comparisons of health care systems consistently show that Canadians have poor access to the latest technologies. We keep costs low and vested interests quiescent by shortchanging patients, who are far less well-organized than the health professions.

Ironically, this is expensive. If we develop innovative drugs to manage conditions that previously could only be treated through surgery, you can be sure that ministers will complain bitterly about the cost of the drug, but surgeons will still get the same or a growing share of the pie at the negotiating table where the health care pie is divvied up.

In fact innovative technologies are so feared as a cost-driver within the health care system that one background study for the Romanow Commission looking at Canada's health care system a

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A future in Canada is a miraculous option for Syrian refugees

The embrace of Syrian refugees is the best thing that has happened to Canada in a generation, writes Green Party Leader Elizabeth May. On May 2, May took part in a debate with David Frum hosted by the Macdonald-Laurier Institute. May argued in favour of the resolution: "Mass resettlement to Canada is the best things for the country, and the best things for Syrian refugees."

Elizabeth May

Honestly, the resolution as stated is not one I can support, but I am arguing in the affirmative. So, let me declare the obvious. The best thing for refugees – whether from Syria today or Vietnam in another generation – is never to have been refugees at all. Wherever we are born, our home, our familiar language and culture are cherished. A childhood without violence and loss is always preferable. A life scarred by the deep turmoil that causes people to leave all they know and strike out for the unknown is never the "best" choice.

So let us assume that the proposition precludes any gainsaying on how the Syrian refugee crisis might have been avoided. Let us start from the reality in which we find ourselves. Over four million people have been made refugees from Syria clamouring the hostile shores of the Mediterranean, seeking admission to safer countries, and struggling every foot of the way. Let us start from the reality that a further six million are internally displaced within Syria, who, until the war ends, are likely to join their fellow citizens pressing outward to find safety in some other country.

In this bleak reality, a future in Canada is a miraculous option. Syrian refugee families arriving in Canada will find other settled Syrians. We have at least a generation of those who have already made Canada their home. The many compassionate refugee sponsoring organizations, self-organizing in communities across Canada, from church groups and synagogues and mosques, are making new homes ready for the beleaguered refugee families. Those with language skills are volunteering to help in the transition. Jobs are being found, school materials readied and volunteers to help with everything from how to shop

for what you need to how to pack a school lunch. The welcome is warm and thoughtful.

Canada will benefit in many ways from the acceptance of tens of thousands of new Canadians. First, let's consider the economic benefits. We know that Canadian fertility rates do not replace the population. We know that the demographic shifts in Canada currently place a larger burden on the fewer who are young to care for a growing population on seniors. We need more young people and we need more workers. As the CEOs of the German automakers said of the million Syrian refugees welcomed into Germany "This is an economic miracle." Of Syrian families I have helped, a large number have advanced degrees and professions. They have skills already from working before the war tore their country apart. They will not be dependent for long.

But it is likely the intangible benefits will exceed the economic ones. How can we measure the benefit to our global reputation of the images of Canadians, including our prime minister, opening arms to embrace the refugees? Can we ever measure the impact on those who seek to stir up hatred and violence against Canada when those images are fresh in the minds of those around the world who are susceptible to arguments that the world shuns them? How much does the current government's welcome of refugees help protect us, by any measure, no matter how small, of the threat of extremism?

Even more so, does the current citizen effort to support the government's resolve to welcome tens of thousands of refugees rekindle in us a compassionate energy? I have seen moneys raised overnight to help people we have never met. The marshalling of resources has been impressive – from finding homes to furnishing those homes, to planning for transportation and health check-ups. Every minute of volunteer commitment reminds us that we can accomplish anything when we set our minds to it. What a tonic to the neo-Liberal determinism that we are Hobbesian in our choices. That life is nasty, brutish and short and that the surest way for a politician to find favour in a voter is to promise them that selfishness will be rewarded.

In this aspect of a quickening of the heart of democracy we may find the greatest benefits. This is why it is the best thing that has happened in Canada in a generation. It reminds us of who we are and what we are capable of doing.

Elizabeth May *is the leader of the Green Party of Canada.*

Census Debate (Hartt)

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they reached the $100 million level, but needed to roll his paper about six times per year, so that he never was required to finance more than $20 million at a time.

The databases of the Finance Department and the BDC had missed this phenomenon. Faced with these new facts, Finance Minister Flaherty created a $500 million facility in Budget 2010, to be matched by the private sector, which provided much-needed relief for these smaller enterprises.

The moral of this story is that, despite the howls of protest at the suppression of the long-form census and the great relief expressed upon its restoration, we have overestimated the usefulness of lagging data. At the same time, we have underestimated the need for leading indications of the structure of our economy that demonstrate where it is going. We need that latter information if we are to make policy development responsive to more than past events and capable, instead, of anticipating future developments and trends.

So, *pace*, to the adherents of the long form. Enjoy your "victory" by all means, but let us keep this in context.

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.*

Drug patents (Stevens)

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Mark-ups along the distribution chain inflate the final price of medicines and include import tariffs, sales taxes, value-added taxes, and retailers' and wholesalers' margins. In Kenya, mark-ups add 300 percent to the manufacturer's price; in Brazil it's 200 percent, says IMS, the global health care data provider.

Dysfunctional medicine supply chain management is another culprit. A 2015 survey by humanitarian NGO Medecins Sans Frontières reported one in three health facilities in South Africa have shortages of key HIV and tuberculosis drugs. The drugs are imported in sufficient quantities but fail to reach patients

due to "local logistical and management problems, ranging from inaccurate forecasting to storage or transport issues," said MSF.

Governments under-invest in health, too. While most European Union countries commit 8 to 11 percent of GDP to health, few Asian and African countries spend more than 5 percent: not nearly enough given their enormous health challenges.

These are the major influences on access to medicines. Public health would be best served if the political focus were on these issues, rather than patents.

Philip Stevens *is director of Geneva Network (www.geneva-network.com), a research organization focusing on health, intellectual property, and trade. This article originally appeared on CapX.co.*

Innovation (Crowley)

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decade ago came up with the perfect solution based on our history to date. The author opined that the simplest way to control the cost of new technologies was not to use them.

In Canadian health care, which may soon represent nearly a fifth of the economy, innovation must go cap in hand and beg to be allowed to help patients. And in doing so it will be opposed by those in the system whose power and livelihood might be threatened, just like those taxi owners fighting Uber.

This is inevitable in a system where the amount of money available is determined in advance through government budgets. Every innovation accepted is a charge against a fixed pie, meaning established interests may be damaged to accommodate the innovation. And it is those established interests who are the system's gatekeepers.

It is as if Henry Ford, in his drive to bring the automobile within reach of the average person, had to get his assembly line ideas approved by a government committee composed of buggy makers, stable operators, horse breeders, and hay growers.

Hardly a recipe for fostering innovation, is it?

Brian Lee Crowley *is the Managing Director of the Macdonald-Laurier Institute. This column first appeared in the* Globe and Mail.

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