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# Why the Bank of Canada Won't Do

*Readers are encouraged to review Joyce Nelson's article, "The Government's Proposed Infrastructure Bank: A 21st Century Trojan Horse," COMER, March-April 2016.*

## $40 billion in Infrastructure Funding Urged

*By Bill Curry, Sean Silcoff, Ottawa, The Globe and Mail, October 21, 2016*

• Expert panel on economic growth predicts ambitious bank proposal could deliver more than $200 billion in projects over coming decade

• Previous government efforts to attract private investment have had limited success, with pension fund managers saying Canadian projects too small

An expert panel on economic growth is calling on the government to launch an ambitious national infrastructure bank capitalized with $40 billion in federal funds aimed at attracting major institutional investors.

The proposal to entice global pension funds into major Canadian investments goes far beyond anything promised to date by the federal Liberals, but Finance Minister Bill Morneau – who worked directly with the panel over the past several months – signalled a strong openness to the recommendations announced Thursday.

The Advisory Council on Economic Growth released three reports calling for the national infrastructure bank, a greater effort to attract foreign investment and a major boost to immigration.

Mr. Morneau said he's prepared to act on some of the ideas as soon as November 1, when he will release the fall fiscal update; November 1 is also the deadline for Ottawa to announce its 2017 immigration targets.

The goal of the recommendations is to increase economic growth at a time when the Bank of Canada has once again lowered its expectations to 1.1 percent this year and 2 percent in 2017.

The council predicts an infrastructure bank could raise private capital at a four-to-one ratio to deliver more than $200 billion in infrastructure over the coming decade with a focus on projects worth at least $100 million.

Ottawa's previous efforts to attract private infrastructure investment – including through an agency focused on public-private partnerships – have had limited success. Pension fund managers say Canadian projects to date have simply not been big enough.

However, the panel's 14 members include leaders of some of those institutional investors, including Mark Wiseman, senior managing director of BlackRock Inc., and Michael Sabia, CEO of the Caisse de dépôt et placement du Québec pension fund.

Examples of potential projects listed on Thursday include toll highways and bridges, high-speed rail, port and airport expansions, city infrastructure, national broadband infrastructure, power transmission and natural resource infrastructure.

The report also says the bank could issue infrastructure bonds as a way of raising its own capital to invest. Another key recommendation is a suggestion that Ottawa should privatize – in full or in part – some of its existing assets as a way of raising money that could be spent on other infrastructure

*Continued on page 2*

**The next hearing before the Federal Court will take place on Wednesday, December 7, 2016.**

**For details, visit www.comer.org.**

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Bank of Canada *from page 1*

priorities.

That advice comes as the government recently hired Credit Suisse AG to analyze several privatization options for Canadian airports.

Mr. Morneau said the airports study is preliminary work and indicated Ottawa is not yet committing to any asset sales.

"As we think about how best to amplify our impact on infrastructure investment in this country, we need to create ways for institutional investors to invest in our country," he said. "So we'll move forward in a way that will allow us to attract institutional money and it's not conditional on any other government activity around government assets."

The council is chaired by Dominic Barton, global managing director of the consultancy McKinsey & Co. As *The Globe and Mail* reported earlier this week, the council's recommendations also include a call to boost immigration by 50 percent to 450,000 a year and to launch a department aimed at enticing foreign direct investment into Canada.

"Now's the time when we have to take very bold actions," said Mr. Barton, explaining that demographic changes will produce a period of prolonged slower growth that requires a policy response. "They may not be new. These [ideas] have been talked about before, but they haven't been done. And so what we're keen to do is to jolt it."

Federal Immigration Minister John McCallum made it clear this week that he will not follow through on the council's call to boost immigration by 50 percent to 450,000 a year.

"That's an enormous number," Mr. McCallum told reporters Wednesday. He said many stakeholder groups have urged him to increase Canada's current immigration target of 300,000, but many Canadians have also said they do not support a major increase. He also said there is a significant federal expense in accepting more immigrants.

In its white paper titled "Bringing Foreign Direct Investment to Canada," the council recommends creating an FDI agency to attract "anchor companies" to invest here, and to develop an accompanying strategy to attract the investment. "These actions would bring much-needed coherence to what is currently a disjointed approach to foreign investment," the council report says, adding that such a strategy could increase GDP by $43 billion.

In addition to recommending increased immigration levels, the council also called on government to make it easier for skilled foreigners to immigrate to Canada. Foreign executives, programmers and other science-based professionals typically now wait between six and 12 months to have their work permits approved. The council called for wide-ranging exemptions for those recruits from a cumbersome, time-consuming immigration process that requires employers to prove they can't find a Canadian to fill the job before offering it to a non-Canadian. The council also said foreign students studying in Canada should have an easier time applying for permanent residency after their studies are complete.

Edmonton Mayor Don Iveson, who chairs the big city mayors' caucus of the Federation of Canadian Municipalities, said cities should be involved in the design of any new infrastructure bank. He also noted that many types of municipal infrastructure are not likely to attract investors.

"Public good infrastructure is going to be difficult to finance using an infrastructure bank," he said.

Canadian Union of Public Employees president Mark Hancock said in a statement that he strongly opposes the call for an infrastructure bank and asset privatization, calling it "a recipe for the cannibalization of Canada's public infrastructure."

"Nowhere in the report does it mention that investors in these schemes demand a much higher rate of return than the government can borrow at," he said, warning it will lead to new user fees on Canadians.

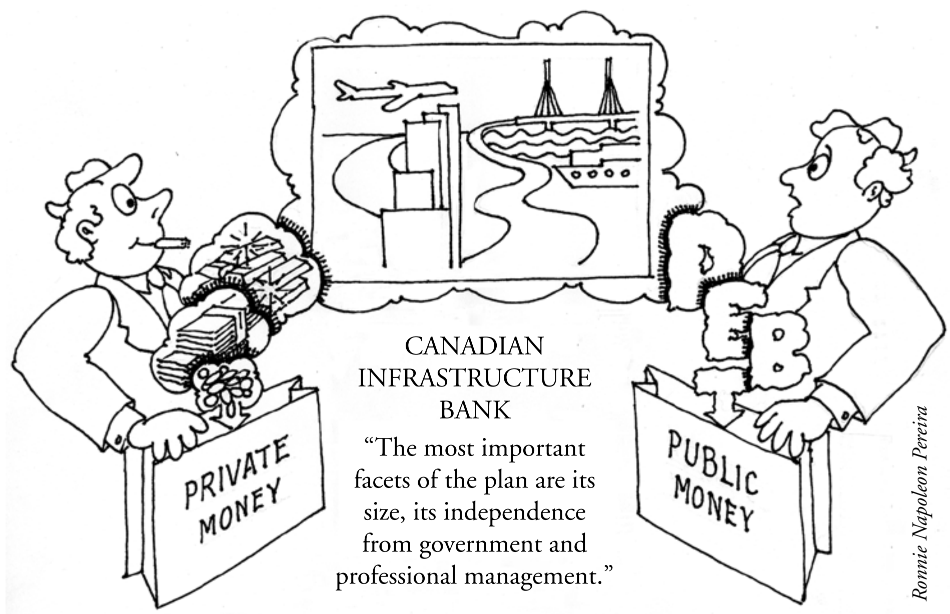
Doug Porter, chief economist at Bank of Montreal, said the proposals, if implemented, would not have much impact on the economy in the short term, but they could improve Canada's outlook over a longer period.

"We are dealing with a relatively sluggish global economy that is impeding exports, and there is very little we can do about that," he said. "Here in Canada we are dealing with fundamentally sluggish productivity growth and changing demographics, which are leading to slower labour force growth. Those two things are very difficult to turn around."

### Our Comment

The Canadian Infrastructure Bank is indeed an *ambitious* bank proposal – a bold move to consolidate the neoliberal victories of the past four decades and to ensure their benefits long-term.

The CIB will exemplify the neoliberal




principles of privatization and the limited role of government.

It will amplify the financialization of the economy and reduce most Canadians to debt serfs (Guess who will pay the interest on those infrastructure bonds!)

The trend to the "toll-road economy," "represents a return to a feudal-landlord economy of unearned profits from rent-seeking" (Ellen Brown, *Web of Debt,* quoted by Joyce Nelson, *COMER*, March-April 2016).

Small wonder that Dominic Barton and his confederates are "keen" to "jolt" it!

Why not provide opportunities for Canadian unemployed students to *acquire* the skills suited to emerging needs? Why should young Canadians – many of whom have to graduate debt slaves to afford post-secondary education – have to compete for work with foreign students who, presumably, can afford to study abroad?

The observation that investors will not likely want to invest in "public good infrastructure" raises the important issue of priorities.

Could the fact that "investors in these schemes demand a much higher rate of return than the government can borrow at" have a bearing on why the Bank of Canada won't do?

"As I see it, the governments of Canada have broken three fundamental financial rules. These rules are:

1. No sovereign government should ever, under any circumstances, borrow money from any private bank.

2. No Canadian, provincial, or local government should borrow foreign money when there is excessive unemployment here…. Deficits should be financed internally and largely through the central bank.

3. Governments, like businesses, should distinguish between "capital" and "current expenditures," and when it is prudent to do so, finance capital improvements with money the government has created for itself (Professor John H. Hotson, 1930-1996, Professor Emeritus of Economics, University of Waterloo, Ontario, and Past Executive Director of COMER).

*Élan*

## How Not To Fund Infrastructure

*By Michal Rozworski, The Bullet, Socialist Project, E-Bulletin 1296, August 26, 2016*

Recycling is supposed to be a good thing, so when the federal Liberals quietly announced that "asset recycling" would be part of their strategy for meeting their much-ballyhooed infrastructure promises, not many eyebrows were raised. They should have been. Asset recycling is an obscure code word for selling our public goods for private profit. It's privatization by another name.

Don't have the taxes to pay for new buses? It's okay, you can sell your electricity utility to pay for them instead. In fact, this is precisely what the Ontario Liberal government is doing. Already 30 percent of the profitable Hydro One have been sold and another 30 percent will be sold before 2018. A public Hydro One could more directly fight climate change, lower energy costs for the poor or work with First Nations on whose lands generation often happens. A private Hydro becomes an instrument for profit first with other goals secondary.

What the Liberals have started in Ontario will soon be rolled out across Canada. Here are the problems with these schemes.

### Cut Taxes to Create a Funding Crisis

*First*, there is no crisis that says you have to sell a bridge to fund a hospital or the other way around. Or, better put, we have manufactured crises. Decades of slow but crippling austerity, tax cuts and restructuring have led us here. We cannot afford transit and hospitals by choice and it is in our power to reverse things. Deficit spending can be part of a reversal in the short term; asset recycling cannot.

*Second*, remember that we need more infrastructure spending because what we have is often crumbling and the economy faces gaps in demand. Investment in infrastructure not only creates useful things we depend on, it also creates demand for materials and jobs, which themselves create – you get the picture. Business isn't investing, so there is a big role for public investment. Keepers of global order like the OECD and the IMF have recognized this. The IMF was applauded recently for walking back its support for austerity. Rightly so, but the same document reaffirmed support for privatization. Canada's Liberal Party is really at the forefront of this policy shift by elites.

However, getting funds for investment by selling other assets into a system that has created massive asset price inflation – seen in stock markets at record highs, a lack of sub-million dollar homes in Vancouver or smashed art auction records – seems questionable at best. The response to the global financial crash of 2007-08 saved the world from depression but left fundamental inequalities in place.

*Third*, shares in newly-privatized public enterprises can become bargaining chips. Asset recycling has already created space for new and refined forms of triangulation, with worse to come. The latest batch of Hydro One shares in Ontario will be sold at a slight discount to First Nations for loaned funds. What seems like new funding is, however, a cynical one-off.

This is the Ontario government effectively saying, "we've underfunded your schools and clinics, poisoned your rivers and abandoned your communities, let's make it right by helping us privatize Hydro." Beyond slightly accelerating the sale of Hydro and coming at low political cost (the government gets a slightly smaller share of privatization income, rather than making explicit expenditure on First Nations), this scheme does nothing to address real grievances First Nations might have with Hydro. Seats on the Board of Directors or other regulatory bodies, deeper co-governance arrangements, priority hiring – none of this is on the table and neither is new, stable funding.

### Pension Funds on the Prowl for 'Investment Opportunities'

*Finally*, here's a quote from an investment manager in a *Maclean's* piece on asset recycling:

"'If you took a road that used to be free and you tolled it, I think consumers are right to say, 'Hey, that used to be free and now it's being tolled, that's unfair," he said.

"'But let's remember that governments need to balance their books somehow…. I don't think they can raise taxes too much more. I don't think any of us want that.'"

Typical right-wing talking points. The problem is that these typical right-wing talking points are coming from someone ostensibly representing union workers: this investment manager works for the Ontario Teachers' Pension Plan. Canada is a world leader when it comes to workers' own pensions being turned against them and younger generations. What were once simple, safe pension investments in government bonds are today predatory arrangements with pension boards acting more like hedge funds. Asset recycling only accelerates this process and binds regular people more tightly to a system that ultimately works against them. [Editor: see "Pension Funds and Privatization," *LeftStreamed* No. 194.]

So, too few buses in your city? Sell an airport. First Nations have inadequate health facilities? Here's a few Hydro shares. Need a pension? Buy a highway…and don't forget to contract out the maintenance and toll staff to make sure you're earning maximum returns. As a friend put it, "Trudeauism is able to sublimate both neoliberalism and social democracy into itself." Just so, asset recycling is the wrong answer to each of the above good questions.

*Michal Rozworski is an independent economist, writer and organizer. He currently works as a union researcher in Toronto, blogs at Political Eh-conomy, where this article first appeared.*

### Our Comment

Bad policies lead to crises – crises lead to worse policies. How bad does it have to get, before we rise to the challenge?

*Élan*

## Liberals Eye "Asset Recycling" and Privately Owned Infrastructure

*By Brent Patterson, rabble.ca, June 17, 2016*

The Canadian Press reports:

"The federal government has identified a potential source of cash to help pay for Canada's mounting infrastructure costs – and it could involve leasing or selling stakes in major public assets such as highways, rail lines, and ports. A line tucked into [their] federal budget reveals the Liberals are considering making public assets available to non-government investors, like public pension funds. The sentence mentions 'asset recycling,' a system designed to raise money to help governments bankroll improvements to existing public infrastructure and, possibly, to build new projects."

CUPE has previously explained:

"Asset Recycling is a new phrase describing corporatization, marketization and privatization of government assets. An asset is 'recycled' when a government, corporation or bank either sells or borrows against its physical assets to get money for investment in new capital…. Asset recycling is just another scheme driven by bankers and governments desperate to hide past failures of neo-liberal privatization policy."

The term "recycling" comes from the notion that, as described by the Mowat Centre, governments "dispose of legacy assets to generate capital to invest in new assets or to refurbish existing infrastructure."

The clearest example of this may be the Ontario Liberal government selling 60 percent of Hydro One, the provincially owned electricity transmission utility, to generate funds to spend on transportation infrastructure. The grim truth is that a publicly owned utility that generates about $750 million a year in "profit" and puts another $100 million a year in the provincial treasury in lieu of taxes is being privatized. Federally, just a few examples of Crown corporations (state owned corporations) that could be subject to asset recycling include Atomic Energy of Canada Limited, Canada Post Corporation, the Canadian Broadcasting Corporation, the Halifax Port Authority, and Via Rail.

Another Canadian Press article examines more closely the issue of public pension fund investments in public infrastructure.

That article notes:

"The Trudeau government's newfound enthusiasm about a big Montreal transit proposal has given Canadians a glimpse at one way Ottawa could fund billions in public infrastructure…[Quebec's public pension fund manager], the Caisse de depot et placement du Quebec, is prepared to pump $3 billion into [a $5.5 billion light-rail plan for Montreal] – and it wants the provincial and federal governments to kick in the rest…. A subsidiary of the Caisse would operate the rail network and gradually recoup the pension plan's investment through user fees. Eventual profits would be funnelled into Quebecers' public nest egg – the Quebec Pension Plan – which is managed by the Caisse."

Finance Minister Bill Morneau says, "I salute the innovative efforts of the Caisse de depot et placement du Quebec, which, through its metropolitan electric network, is proposing a new business model to implement major infrastructure projects." And Infrastructure Minister Amarjeet Sohi says, "I see this as a great opportunity for us to support innovation in delivery of infrastructure, because we do need to engage public sector pension funds, as well as private sector funds, to make sure the amount of infrastructure that we build across the country engages other stakeholders and partners."

We do not share the enthusiasm of these ministers for this model.

The Montreal transit project is not a public-private partnership nor the privatization of an existing publicly owned asset. But it is just as problematic that the ownership and operation of this new rail line will be in private, for-profit hands from the start. We believe that public services and public infrastructure, including transportation infrastructure like this rail line, is most efficiently operated on a publicly owned and democratically accountable basis. The involvement of a public pension fund does not change the reality that the service is to be operated and controlled by a for-profit corporation.

It should also be noted that pension fund companies do not pay income taxes on their profits. That's why in some instances pension funds take the lead in a consortium with tax-liable corporations in order to shield the entire consortium of investors from their obligation to pay taxes. That is not fair and hurts the public purse.

CUPE has stated:

"The Liberals are clearly hoping that Canadian pension funds could become privatizers of infrastructure…. CUPE strongly opposes this concept. Privately-owned and operated infrastructure will result in more expensive, lower quality, less accessible services for Canadians. We are strongly opposed to privatization, whether the private owner of the infrastructure is a profit-seeking corporation or a worker's pension plan. In either case it is wrong; if future infrastructure improvement and development is to truly benefit all Canadians, it must be publicly owned and run."

**Our Comment**

To what extent this project and others like it will lead to a further looting of the commons will depend on how soon Canadians address the need to sort out an acceptable balance between private profit and the common good.

"Public infrastructure should be publicly funded through new money borrowed at the government-owned Bank of Canada, paying near zero interest rates – just sufficient to cover the bank's running expenses."

*John Hotson*

## Monopoly's New Era

*By Joseph E. Stiglitz, Project Syndicate, May 13, 2016*

New York – For 200 years, there have been two schools of thought about what determines the distribution of income – and how the economy functions. One, emanating from Adam Smith and nineteenth-century liberal economists, focuses on competitive markets. The other, cognizant of how Smith's brand of liberalism leads to rapid concentration of wealth and income, takes as its starting point unfettered markets' tendency toward monopoly. It is important to understand both, because our views about government policies and existing inequalities are shaped by which of the two schools of thought one believes provides a better description of reality.

For the nineteenth-century liberals and their latter-day acolytes, because markets are competitive, individuals' returns are related to their social contributions – their "marginal product," in the language of economists. Capitalists are rewarded for saving rather than consuming – for their *abstinence*, in the words of Nassau Senior, one of my predecessors in the Drummond Professorship of Political Economy at Oxford. Differences in income were then related to their ownership of "assets" – human and financial capital. Scholars of inequality thus focused on the determinants of the distribution of assets, including how they are passed on across generations.

The second school of thought takes as its starting point "power," including the ability to exercise monopoly control or, in labor markets, to assert authority over workers. Scholars in this area have focused on what gives rise to power, how it is maintained and strengthened, and other features that may prevent markets from being competitive. Work on exploitation arising from asymmetries of information is an important example.

In the West in the post-World War II era, the liberal school of thought has dominated. Yet, as inequality has widened and concerns about it have grown, the competitive school, viewing individual returns in terms of marginal product, has become increasingly unable to explain how the economy works. So, today, the second school of thought is ascendant.

After all, the large bonuses paid to banks' CEOs as they led their firms to ruin and the economy to the brink of collapse are hard to reconcile with the belief that individuals' pay has *anything* to do with their social contributions. Of course, historically, the oppression of large groups – slaves, women, and minorities of various types – are obvious instances where inequalities are the result of power relationships, not marginal returns.

In today's economy, many sectors – telecoms, cable TV, digital branches from social media to Internet search, health insurance, pharmaceuticals, agro-business, and many more – cannot be understood through the lens of competition. In these sectors, what competition exists is oligopolistic, not the "pure" competition depicted in textbooks. A few sectors can be defined as "price taking"; firms are so small that they have no effect on market price. Agriculture is the clearest example, but government intervention in the sector is massive, and prices are not set primarily by market forces.

US President Barack Obama's Council of Economic Advisers, led by Jason Furman, has attempted to tally the extent of the increase in market concentration and some of its implications. In most industries, according to the CEA, standard metrics show large – and in some cases, dramatic – increases in market concentration. The top ten banks' share of the deposit market, for example, increased from about 20% to 50% in just 30 years, from 1980 to 2010.

Some of the increase in market power is the result of changes in technology and economic structure: consider network economies and the growth of locally provided service-sector industries. Some is because firms – Microsoft and drug companies are good examples – have learned better how to erect and maintain entry barriers, often assisted by conservative political forces that justify lax anti-trust enforcement and the failure to limit market power on the grounds that markets are "naturally" competitive. And some of it reflects the naked abuse and leveraging of market power through the political process: Large banks, for example, lobbied the US Congress to amend or repeal legislation separating commercial banking from other areas of finance.

The consequences are evident in the data, with inequality rising at every level, not only across individuals, but also across firms. The CEA report noted that the "90th percentile firm sees returns on investments in capital that are more than five times the median. This ratio was closer to two just a quarter of a century ago."

Joseph Schumpeter, one of the great economists of the twentieth century, argued that one shouldn't be worried by monopoly power: monopolies would only be temporary. There would be fierce competition *for* the market and this would replace competition in the market and ensure that prices remained competitive.

My own theoretical work long ago showed the flaws in Schumpeter's analysis, and now empirical results provide strong confirmation. Today's markets are characterized by the persistence of high monopoly profits.

The implications of this are profound. Many of the assumptions about market economies are based on acceptance of the competitive model, with marginal returns commensurate with social contributions. This view has led to hesitancy about official intervention: If markets are fundamentally efficient and fair, there is little that even the best of governments could do to improve matters. But if markets are based on exploitation, the rationale for laissez-faire disappears. Indeed, in that case, the battle against entrenched power is not only a battle for democracy; it is also a battle for efficiency and shared prosperity.

*Joseph E. Stiglitz, recipient of the Nobel Memorial Prize in Economic Sciences in 2001 and the John Bates Clark Medal in 1979, is University Professor at Columbia University, Co-Chair of the High-Level Expert Group on the Measurement of Economic Performance and Social Progress at the OECD, and Chief Economist of the Roosevelt Institute. A former senior vice president and chief economist of the World Bank and chair of the US president's Council of Economic Advisers under Bill*

*Clinton, in 2000 he founded the Initiative for Policy Dialogue, a think tank on international development based at Columbia University. His most recent book is* The Euro: How a Common Currency Threatens the Future of Europe.

**Our Comment**

To hear today's finance gurus reporting on the *markets*, one would think that the *markets*, like corporations, should be considered *persons* – persons, indeed, of superior intellect and authority!

How refreshing, to read Stiglitz's clarification of the reality that markets lead – not to "marginal returns commensurate with social contributions" – but to *monopoly*.

The neoliberal rational for laissez-faire has been the excuse for many destructive policies, not the least of which are those responsible for the disastrous exploitation of the environment.

We can hardly hope to wage a serious "battle against entrenched power" without reversing their key monopoly – the monopoly over money creation!

*Élan*

## Canadian Cities Push Back on Plans for Infrastructure Bank

*By Bill Curry, Ottawa – The Globe and Mail, October 25, 2016*

Canada's municipalities are pushing back against plans for a $40 billion federal infrastructure bank, warning Ottawa that it should not be capitalized with the billions of dollars the Liberals have already promised cities for transit, bridges and other projects.

Finance Minister Bill Morneau's advisory council on economic growth – which has worked directly with top federal officials for months – released a report last week calling for the creation of a new infrastructure development bank that would bring public and private money together to build major projects across the country.

The council said Ottawa should capitalize the bank with at least $40 billion over 10 years and predicted that would leverage a further $160 billion – if not more – in private capital.

The report was silent though as to how the federal government should come up with the $40 billion. In interviews, two members of the council – Mark Wiseman, senior managing director of BlackRock Inc. who was recently the head of the Canada Pension Plan Investment Board, and Michael Sabia, president and CEO of the Caisse de dépôt et placement du Québec pension fund – said that decision is up to the federal government. But both suggested the money could come from the existing federal pledge to spend $60 billion in new funds on infrastructure over 10 years.

The challenge for the federal cabinet is that some of that $60 billion has already been spent on what it called Phase 1 of its infrastructure plan. Negotiations toward a second phase that would allocate the remaining $48 billion are already well-advanced with provinces and municipalities, who are expecting to hear details this fall. Federation of Canadian Municipalities president Clark Somerville said Monday the proposed bank should be funded independently of the Phase 2 infrastructure plan.

"FCM has been working closely with the federal government to ensure Phase 2 provides predictable funding for urgent local priorities like transit, housing and green infrastructure," he said in a statement to *The Globe*. "Based on these conversations, we expect the infrastructure bank would serve as an additional financing mechanism, above and beyond the $48 billion core investment committed for Phase 2."

The pushback from municipalities highlights how difficult it is for the federal government to reach agreements on infrastructure proposals and get projects off the ground.

While Mr. Morneau has said the idea of an infrastructure bank makes "eminent sense," he has not formally committed to the concept. That could potentially happen either on November 1, when he delivers a fall economic update, or November 14 when government officials meet with the leaders of several institutional investment funds to talk about Canada's infrastructure plans. A spokesperson for Mr. Morneau said it is too early to discuss how the minister might respond to the council's recommendations.

In an interview, Mr. Sabia – the head of Quebec's $255 billion pension fund – said Ottawa doesn't need to find the entire $40 billion right away. He said the priority should be to get the institution running as soon as possible so that it can gain investor confidence as a professional and independent source of expertise.

He described the concept as one that would avoid political intervention because the bank would be free to manage a project once it has been approved by government.

"This is a really important change in how infrastructure would be done in Canada," he said.

Mr. Sabia said criticism of some public-private infrastructure projects, such as the initial contract for Ontario's 407 toll highway, is valid, but an infrastructure bank staffed with experts could negotiate contracts that are positive for investors and the public interest.

"It's wrong to think about this bank purely as a financial institution. This bank is intended by us to also be a national centre of expertise on infrastructure," he said.

Canadian pension funds have been steadily adding infrastructure investments to their portfolios, buying airports, toll roads, bridges and shipping ports around the world.

But direct infrastructure investing is still relatively new for the country's largest institutional investors. CPPIB did its first infrastructure investments in 2004, but had $21.3 billion – or 7.6 percent of the $278.9 billion CPP fund's assets – allocated to infrastructure at the end of March this year. The Caisse had about $13 billion worth of infrastructure in its portfolio at the end of last year, while the Ontario Teachers' Pension Plan had $15.7 billion invested.

The pension funds are less often involved in public-private partnership deals to develop local infrastructure such as hospitals, prisons and transit because these are debt-heavy financings where the equity portion of the deal isn't large enough to move the needle for the big plans.

Mr. Wiseman, who left as head of the CPPIB in June to join BlackRock, said the council proposed $100 million as a minimum size for projects that would be supported by the bank because institutional investors need scale.

While the council said the infrastructure bank could raise $4 in private capital for every $1 invested by Ottawa, he outlined several scenarios where federal investments could be leveraged to even greater amounts.

Institutional investors are looking for large projects and predictability in terms of revenue and regulation, he said.

"This is about building the type of national infrastructure, the type of urban transportation, that will essentially serve the country for decades to come," he said.

Andrew Claerhout, head of infrastructure and natural resources at Teachers, is heavily in favour of the infrastructure bank proposal. However he expressed concern that the plan could "get whittled down in multiple places, such that it's no longer effective. That would be the thing that would keep me up at night."

The most important facets of the plan are its size, its independence from government and professional management, he said.

Mr. Claerhout added that the government should not only share in the risk of the projects, but should also share in the rewards to avoid leaving the bad taste in any mouths that private investors profited at the cost of government. If the government can turn a profit, support for future projects with an institution such as Teachers is more likely, he reasons.

**Our Comment**

Public-private partnerships have a history of cautionary tales.

In December 2014, Ontario's Auditor General, Bonnie Lysyk, blasted the Liberals' use of private money to finance new hospitals and transit, revealing that Infrastructure Ontario's use of P3s had cost $8 billion more taxpayer dollars than traditional public financing would have (*Toronto Star*, December 9, 2014, quoted by Joyce Nelson, *COMER*, March-April 2016).

"P3's are not really about government financing because of scarce money, but another con job by the corporations to expand their operations in order to enhance shareholder value. It is made to look like governments are asking for this form of help when in fact it serves the corporate interests for never-ending growth on a finite planet" (Herb Wiseman, quoted by Joyce Nelson, *COMER*, March-April 2016).

What opportunities has the average Canadian had to learn about P3s? It would be instructive to find out what one's MP knows and thinks about them!

It might be equally constructive both for one's MP and oneself to ask about "leveraging $160 billion plus in private capital. At what cost? Who would pay? Who would benefit? And, where *will* that initial $40 billion come from?

The makeup of the advisory board, and the plan so far revealed, portend a global feeding frenzy for big-thinking, long-term oriented corporations, that would lead, ultimately, to a global gobble-up of national assets for corporations, and a zooming debt-load for nation states on the "road to debt serfdom" (term coined by Friedrich von Hayek).

The expectation that the infrastructure bank "would serve as an additional financing mechanism above and beyond $48 billion core investment" exposes the potential cash-cow function of the bank.

Remember Blackrock, the world's biggest investor, and the single biggest shareholder in Bank of America?

"Governments in the US, Greece, and Britain, went there for advice on what to do with toxic assets" from crashing banks, even though Larry Fink, its co-founder, chair and CEO, "was an early and vigorous promotor of the same mortgage-backed securities responsible for the crisis." Now his firm is making millions cleaning up these toxic assets (Joyce Nelson, *COMER*, March-April 2016).

Given that, for Finance Minister Bill Morneau, the idea of an infrastructure bank makes "eminent sense," it might be interesting to ask him why?

"The priority should be to get the institution running as soon as possible so that it can gain investor confidence as a professional and *independent* source of expertise…." Independent of whom? Of what?

*"This is a really important change in how infrastructure would be done in Canada."*

No kidding!!!

Not to be considered "purely as a financial institution," the bank "is intended by *[them]* to be a national center of expertise on infrastructure." Is that to say that the people financing it also get to negotiate what "contracts…are positive for investors *and* the public interest"?

Some of us may have reservations about investing Canada Pension Funds in a toll-road economy that drags taxpayers on to "the road to serfdom" (Michael Hudson, *Finance Capitalism and Its Discontents*).

Luckily our pension funds won't take the P3 rout to "debt heavy financings" because *that* isn't profitable enough!

What are we to make of Mr. Wiseman's move to Blackrock?

One has to wonder what sort of guaranties institutional investors will require regarding "predictability in terms of revenue and regulation"!

"This is about building the type of national infrastructure, the type of urban transportation, that will essentially serve the country for decades to come."

*And corporations forever?*

What do you suppose "[getting] whittled down in multiple places" might involve, or why that might occur?

"The most important facets of this plan are its size, its independence from government and professional management."

*The ultimate neoliberal paradise!*

What, I wonder, would be the government's negotiated *share* of risk and profit?

Let your MP know how *you feel* and what *you think* about this proposed infrastructure bank!

*Élan*

## Additional Comment and Quotations

Of course, we already have an infrastructure bank – one that has served us well in the past. In 1939, Graham Towers, the first governor of the Bank of Canada, confirmed that "anything physically possible and socially desirable can be made financially possible."

From the 1940s into the mid 1970s for example, state funding through the Bank of Canada promoted a stunning era of growth in Canada's wealth, without causing undue debt or the dreaded inflation.

Bank-created money empowered Canada's outstanding contribution to the war effort, paid for physical infrastructure projects like the Trans-Canada Highway and the St. Lawrence Seaway, and social infrastructure projects like Old Age Pensions and universal Medicare.

Since 1974-5, in accordance with an agreement among central bankers (most of whose banks are private), at the Bank for International Settlements (BIS), Canadians have been denied that use of their central bank, and successive Canadian governments have borrowed, instead, from private banks. By 2012, that change in monetary policy had cost Canadian taxpayers more than $1 trillion in interest on the national debt

> *"The powers of financial capitalism had another far-reaching aim, nothing less than to create a world system of financial control in private hands able to dominate the political system of each country and the economy of the world as a whole. This system was to be controlled in a feudalistic fashion by the central banks of the world acting in concert, by secret agreements arrived at in frequent meetings and conferences. The apex of the systems was to be the Bank for International Settlements in Basel, Switzerland, a private bank owned and controlled by the world's central banks which were themselves private corporations. Each central bank…sought to dominate its government by its ability to control Treasury loans, to manipulate foreign exchanges, to influence the level of economic activity in the country, and to influence co-operative politicians by subsequent economic rewards in the business world."*
> — Carroll Quigley, *Tragedy and Hope, p. 324*

alone, and created a deficit that has been the excuse for a disastrous slash-and-strangle budget policy that continues to trash all of the social progress gained over those decades prior to the '70s.

From its inception, the Bank of Canada has been an arena of struggle over who's boss – the government or the bank!

There has always been a concern that politicians might abuse the power to create money to manipulate the electorate in a manner detrimental to the health of the economy, hence the provision that the bank should operate at arm's length.

"The Bank is not a government department as it performs its activities at arm's-length from the government; it is a Crown corporation owned by the Government (shares are directly held by the Ministry of Finance). The Governor and Senior Deputy Governor are appointed by the Bank's Board of Directors. The Deputy Minister of Finance sits on the Board of Directors but does not have a vote" (Bill Abram, *Money: A Servant For All Mankind: The Canadian Experience*).

Article 14(2) of the *Bank of Canada Act*, however, makes it crystal clear that "If… there should emerge a difference of opinion between the Minister and the Bank concerning monetary policy to be followed, the Minister may…give the governor a written…and the Bank shall comply with that directive" (Abram).

"In *practice*, the Governor sets *monetary policy* independently of the government. *This was not the intent of the Bank of Canada Act, as envisaged by Gerald Gratton McGeer & the writers of the Macmillan Minority Report"* (Abram).

Article 91 of the *Constitution Act* of 1867 declares that the *exclusive Legislative Authority of the Parliament of Canada* extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

Section 1A, The public debt and property

Sub 14. Currency and coinage

Sub 15. Banking, Incorporation of Banks, and the issue of paper money

Sub 16. Savings Banks

Sub 20. Legal Tender (Abram).

The purpose of the Bank of Canada is expressed in the preamble to the *Bank of Canada Act*. It is "to regulate credit and currency in the best interests of the economic life of the nation."

The Bank is empowered, by Article 18 to:

c) buy and sell securities issued or guaranteed by Canada or any Province…

(i) make loans or advances…

(j) make loans to the Government of Canada or the government of any Province… (Abram).

A separate Act, Bill 143 – "The *Municipal Improvements Assistance Act* an Act to assist Municipalities in making self-liquidating improvements" was passed in 1938 (the year the Bank was nationalized), and was rescinded – guess when – in 1975!

In 2011, William Krehm, on behalf of COMER, filed a suit to restore the Bank to its original purpose.

The crisis of the Great Depression sparked the appointment of the Macmillan commission struck to consider the need for a central bank.

The most influential person to address that commission was Gerald Gratton McGeer, a brilliant Canadian lawyer who argued the case for the need to establish a *public central bank*. He campaigned across Canada to encourage public support for such a bank, and was instrumental in persuading Prime Minister Mackenzie King to promote the project.

Highly pertinent to the *present* moment in the history of the Bank, is this comment from his report of 1933, entitled *The Toll Gate:*

"*The barrier that now blocks the way to progress is the misguided management of public credit by the private money system. We must wipe out that twentieth century anomaly in much the same way, and for the same reason that we wiped out toll gates and private management of public roads and highways in the nineteenth, and establish in its place national maintenance, control and regulation of the issue and circulation of public credit as the means of supplying the capital now required"* (Abram).

The Bank of Canada opened in 1935. At that time, Prime Minister Mackenzie King, in a radio broadcast to the nation, quoted from the Macmillan Commission's Minority Report:

"*Once a nation parts with control of its currency and credits, it matters not who makes that nation's laws. Usury once in control will wreck any nation. Until the control of the issue of currency and credit is restored to the government and recognized as its most conspicuous and sacred responsibility, all talk of the sovereignty of Parliament and of democracy is idle and futile…"* (Abram).

The proposed Canadian infrastructure bank is being designed to guarantee the unfettered growth on which finance capitalism depends, to ensure private control over democratic governments, and to perpetuate private profit and corporate power. It is the final coup in the transfer of power from our national governments to private corporations.

The Bank of Canada was designed to entrust to a democratically empowered government the power of money to serve the common good.

Andrew Clairehout's somewhat ingenuous acknowledgement that "the most important facets of the plan are its size, its independence of government and professional management", pretty well reflects its true purpose.

No, the Bank of Canada won't do! It won't do because it belongs to *Canadians* and is mandated to serve the common good. The Canadian Infrastructure Bank (CIB) will belong to the neoliberal oligarchy that is behind it. It's mandate will be to act in *its* best interests. It will appropriate our national sovereignty, and will trim our economic and political freedom.

The Bank of Canada is ours in trust. It is not ours to surrender. We owe it to all those Canadians, notably G.G. McGeer, who won for us that legacy, and we owe it to future generations to hand it on intact.

*(Bill Abram's handbook on money and the Bank of Canada is an excellent reference resource. If you are interested in a copy, please contact COMER at comerpub@rogers.com.)*

## Relevant Comments

***The late Professor John H. Hotson, co-founder of COMER:***

The Bank of Canada has sold out entirely to the country's chartered banks. It is now their "wholly controlled subsidiary." That is why it now lets the private banks create all but a factor of the nation's money supply, and lets their income from interest grow many times faster than all other forms of income…

*"The right of Canadians to benefit from the years of careful research that Parliament conducted in the 1930s, concluding that it is in the peoples' best interests to have a nationalized Bank of Canada, needs to be respected. What has been perpetrated since 1974 is nothing short of a deceptive undermining of the sovereignty of Parliament to act in the national interest. It is an example of the harmful cynicism that is created by putting private gain ahead of the right of communities such as Canada to create and benefit from the public issuance of credit."*
*– Alan Blanes, Canada Chapter – Public Banking Institute*

According to him, the fundamental rules of national finance are:

1. No sovereign government should ever under any circumstances, borrow money from commercial banks at interest, when it can instead, borrow from its own central bank interest free.

2. No federal provincial or local government should borrow foreign money when there is excessive unemployment here.

3. Governments, like businesses, should distinguish between capital and current expenditures and, when it is prudent, finance capital improvements with money the government created for itself.

***Compared to other issues, how important is monetary reform? – Michael Rowbotham,* The Grip of Death**

"The reform of the debt-based monetary supply system is the single most important area of reform confronting us.

"Reforming the financial system is more important than the war against poverty… more important than the movement to protect the environment…the fight against drugs and racism, and the battle for social justice and welfare.

"Financial reform is more important than all these problems for the simple reason that the current financial system is responsible, both directly and indirectly for causing, or at least exacerbating them."

*Élan*

# Part II: The Secret Court that Allows Corporations to Avoid Punishment for Enormous Crimes

*By Chris Hamby, BuzzFeed, September 1, 2016*

*Part I appeared in the July-August 2016 issue.*

Meanwhile, the government has changed its laws, stripping public-interest lawyers and average citizens of the right to file court challenges to dubious public contracts, such as the sale of public land to a developer like Sajwani.

One purpose of the law, according to corporate lawyers in Cairo who said they lobbied for it, was to prevent the domestic court cases that had led to ISDS claims. As a result, several cases challenging Mubarak-era deals are now frozen.

Corporate lawyers cheered these developments. But even some supporters of ISDS now worry that the system has been misused to help the powerful evade justice and to hold hostage the economy of a nation still in turmoil.

"If you get something out of corruption, you should not have your day in court; it should be dismissed," said Ahmed el-Kosheri, a native Egyptian and long-time arbitrator who recently received a lifetime achievement award from a leading international arbitration organization.

He worried that his country would be saddled with massive costs because of the ISDS cases. "That's the irony of it," he said, "that innocent people, the Egyptian public, would pay for the mistakes committed by the regime, which was corrupt."

Since settling with Egypt, Sajwani has enticed customers elsewhere with free Lamborghinis; partnered with Trump, whose campaign did not respond to requests for comment, on a collection of luxury mansions; and sold Damac shares on the London Stock Exchange, reaping a windfall.

This year, *Forbes* magazine estimated Sajwani's net worth at $3.2 billion, making him No. 8 on the publication's list of "World's Richest Arabs" and landing him on the overall list of billionaires, ahead of Oprah Winfrey and tied with the Dallas Mavericks owner Mark Cuban.

Sajwani is now advertising a massive tower in London with apartments designed by Versace Home, and he told an Emirati newspaper he's eyeing continued expansion; next might be projects in the United States.

Heba Khalil, a researcher at an Egyptian human rights organization, recently recalled the chaotic but hopeful days after the fall of Mubarak. "No one knew what Egypt would be like," she said. "International investors were kind of scared that the kind of deals that they did with the Mubarak regime wouldn't be possible anymore."

Then came the ISDS claims. "I think the impact of international arbitration," Khalil said, was that Egyptians "started knowing that, 'Oops, if we try to expose corruption, then those investors will take us to court internationally, and we will lose the case. Which means we had better just shut up and let the wrongs of Mubarak continue the way they are.'"

In the rural hamlet of Sitio del Niño, about 20 miles from El Salvador's capital city, Reyna Isabel Hernández de Avelar slumped in a plastic chair in an alcove outside her home, her eyes fixed on the small shrine before her – flowers, figurines of the Virgin Mary, a crucifix, and, at the center, a picture of her son César in a jacket and tie.

Six days earlier, César had suddenly collapsed and died. He was a healthy 16-year-old, she said, except for one thing: the lead in his body.

He'd complained of unceasing pain in his head, chest, stomach, and bones, she said, and he grew fatigued easily – all common symptoms of lead poisoning. The concentration of lead in César's blood, a test had shown, exceeded the level internationally recognized to cause serious health problems.

"Imagine," Hernández recalled César saying after a doctor explained what the results meant, "I'm the youngest son you have, and I'm going to die soon."

Not far away, across the street from the village school, Fany Carolina held an X-ray up to the light streaming through her kitchen window and pointed to dark spots on the images of her son José's leg bones. These, she said doctors told her, likely were deposits of lead. She unfolded reports showing levels of lead in her son's blood above the safe limit. The hazardous metal had first appeared in his body when he was 5 years old. Eight years later, he has pain in his joints, and Carolina worries his development has been stunted.

Across town, René Gómez Colocho sat beneath the coconut and mango trees in his dirt yard, pounded the table with his fist, and choked back tears as he described his daughter, Ángela. She was 11 years old when tests had shown levels of lead in her blood more than triple what is considered safe. Doctors had tried to leach the heavy metal from her body, but the treatments left her weak and ill. She became depressed and eventually drank poison, ending her own life.

Sitio del Niño is a manmade disaster, a result of environmental neglect by the lead-acid battery factory nearby, legal documents show.

Not long after the battery factory set up shop on the edge of Sitio del Niño in 1998, people began noticing clouds of ash floating over from their new neighbor, descending on fields where children played soccer and seeping into their homes at night. It burned people's throats and sent them into coughing fits.

Eventually, people started connecting the ash with the persistent headaches, dizziness, extreme fatigue, and constant bone and joint pain that children in particular were suffering. In 2004, a committee of local citizens began petitioning leaders for help, writing the town's mayor, national government ministries, and eventually even other nations' embassies and international aid organizations. For years, their efforts came to naught.

Then lead started showing up at potentially dangerous levels in the blood of the town's children. Testing in 2006 and 2007 found that dozens of children, some as young as 3, had been contaminated.

The reason for the contamination, a court would later conclude: The factory had promised environmental regulators it would upgrade its deficient pollution controls – installing systems to remove lead from the factory's water, for example, and improving how it stored contaminated slag. But the factory either delayed taking some of these steps for years, the court found, or never actually took them, even though the company's profit statements showed it had the money to make the fixes. As a result, the court determined, lead seeped into the town's water supply and blew over from smokestacks and waste piles.

Angry parents and a legal aid group demanded that the government take action. In 2007, the health ministry ordered the closing of the factory on the grounds that it lacked the proper permits. The following year, the attorney general brought charges of aggravated environmental pollution against the company, its three owners, and three lower-level managers.

The factory's owners, members of a prominent family in El Salvador who also hold US citizenship, fled to the US, which was asked to extradite two of them. The US refused, on the grounds that environmental crimes are not covered under the US–El Salvador extradition treaty.

In an email to BuzzFeed News, José Gurdian, the company's president, vehemently denied wrongdoing and insisted that his factory had been "confiscated by the government of El Salvador in violation of all local and international law." No test results ever showed that the factory was "emitting lead into the air," he said, and his company had "made all the necessary investments" to meet the safeguards that environmental regulators required. He disputed tests conducted before the factory closed that found lead contamination, and he said that the government's closure process itself "could have caused limited pollution." (The factory's other two owners are Gurdian's mother, Sandra Escapini, who directed questions to her son, and another relative, Ronald Lacayo, who did not respond to repeated requests for an interview.)

They were safe in Florida, and the case against them did not proceed. But the case against their company and three of its managers did. Before long, the company's legal team turned to ISDS.

In May 2009, a threatening letter on behalf of the owners arrived at a government office in San Salvador. It was signed by Jonathan Hamilton, the head of Latin American arbitration at White & Case, recently named by an international arbitration industry publication as the world's top firm in the ISDS field. By shutting down the factory and pursuing "unlawful criminal proceedings" against its owners, the Salvadoran government had violated the Central American Free Trade Agreement, Hamilton wrote. It had "expropriated" the factory "without a public purpose," treated the owners unfairly, and imposed an "unlawful and discriminatory sanction." They planned, he said, to file an ISDS case demanding that the Salvadoran government pay the owners $70 million. (Hamilton declined to comment. In a statement, White & Case said the firm "has not been involved in the matter for many years.")

Gurdian, the company president, told BuzzFeed News the ISDS threat was not intended to help the criminal case. The architects of his company's legal defense, however, said it was a key prong of their strategy. Arturo Girón, the lead criminal defense lawyer, said it was "necessary to strengthen" their case. In talks with the government, he said, he warned that the company might "play that card" if the case could not be resolved.

Another factory lawyer, who spoke on condition of anonymity, said that the threat to sue in ISDS was like a chess move intended to send the government an intimidating message: "I'm not so tiny; I have powerful people behind me." After the ISDS threat, the government officials' tone changed. "All of a sudden, they were very, very polite, and careful," he said.

And Luis Francisco López, a lawyer who represented the community as an interested party in the case, said the ISDS threat came up in meetings he attended involving the attorney general's office and the factory lawyers. "The message we got from the beginning was, 'Even if you beat us here, we're going to beat you there,'" he said.

In the midst of the trial, the prosecution agreed to settle. Prosecutors declined to comment on the role ISDS played, but the settlement document lays out the terms. The company agreed to pay for a limited cleanup of only the factory site, far short of the much more expansive cleanup the government has said is needed, and to establish a medical clinic in the village, albeit one that would provide only basic care and be funded for only three years. The company would also pay for some of the costs associated with the prosecution and make small donations to the community. And it agreed to drop its threat and not pursue an ISDS case.

Lawyers for the community denounced the deal, saying it failed to address the community's problems. The judges also refused to sign off on the prosecutor's bid to end the case, instead carrying it to its conclusion.

Ultimately, the court concluded that the factory had contaminated the village. But that same court acquitted the three lower-level managers, so, it reasoned, it had no choice but to exonerate the company, too.

A force that helped persuade the judges, said Girón, the company's lawyer, was the ISDS threat and its potential to slam the government with huge compensatory damages. Today, the legal wrangling – and the possibility of an ISDS claim – persists.

The factory is pursuing an administrative case against the government, and prosecutors have filed a new criminal case, accusing the owners of causing physical harm to the villagers. Gurdian dismissed the new charges as "completely baseless." But they might leave him and the other two owners vulnerable to extradition. If prosecutors do try to pursue the owners abroad, the factory lawyer said he knew exactly what move he would recommend: an ISDS claim.

The failure to hold the factory accountable is an open wound for the impoverished residents of Sitio del Niño – a village whose very name, "Place of the Child," is now a cruel joke. For six years, their community has been designated an "environmental emergency" by the government, which has warned them not to eat anything grown in the town's contaminated soil. But many of them have no other option.

The government has estimated that the total cost to remove the lead from the area and to restore the land would be about $4 billion. "We have a solution," the environmental minister, Lina Pohl, told BuzzFeed News. But, she said, "We are waiting for someone to give us the money."

Meanwhile, Rosa Aminta Rodríguez de Morales is waiting to find out how dire her son's health is. When she gave birth to Luis Jr., now 14, a doctor told her, "Don't have any other children until the factory closes," she recalled.

In 2007, when Luis Jr. was 5, tests showed unsafe levels of lead in his blood. He has suffered dizziness, extreme fatigue, and pain in his joints and bones.

Recently, his dizzy spells seemed to be getting worse, so his parents saved enough money from selling homemade cheese to take him to a private clinic. Doctors ran tests that indicated he had kidney disease – a classic symptom of lead poisoning.

The toxic metal is known to strike multiple organs, and Rodríguez and her husband said they hoped to save enough over the next month to find out whether their son's liver was also failing.

"Psychologically," Rodríguez said, "he already feels like he's going to die."

When NAFTA, the North American Free Trade Agreement, took effect in 1994, some lawyers at top firms took notice of ISDS for the first time. One heralded "a new territory" where some pioneering attorneys had ventured and "prepared maps showing a vast continent beyond." What they saw was the opportunity to expand and reshape ISDS to their benefit, and the previously dormant system changed forever.

"A whole industry grew up," said Muthucumaraswamy Sornarajah, an international lawyer and ISDS arbitrator who argued that the system is now being misused. Large law firms, he said, see ISDS "as a lucrative area of practice, so what happens is they think up new ways of bringing cases before the arbitration tribunals."

Lawyers' fees make up the bulk of the roughly $5 million in legal costs that each side pays in an average case, recent studies have found. Big firms can easily bring in significantly more. Top lawyers sometimes bill more than $1,000 an hour. Attorneys billed Turkey more than $25 million in one case, and after Russia lost a mega-case, the country said it paid its lawyers more than $27 million.

A key service offered by the ISDS legal industry goes by various euphemisms: "corporate structuring," "re-domiciling," "nationality planning." Critics have a different term: "treaty shopping." It amounts to helping businesses figure out which countries' treaties afford the most leeway for bringing ISDS claims, then setting up a holding company there – sometimes little more than some space in an office building – from which to launch attacks.

So it is that a private equity firm based in Texas can fly the flags of Belgium and Luxembourg, enabling it to sue South Korea, which convicted one of its executives of stock manipulation. The private equity firm declined to comment.

ISDS was designed to protect foreign investors, not people suing their own government. But members of the once-prominent Turkish Uzan family – accused of perpetrating a fraud worth billions and derided at one point by a US federal judge as "business imperialists of the worst kind" – found a way to sue their native land through a variety of companies primarily under their control in Cyprus, Poland, and the Netherlands. (Turkey won each case, but at a cost of tens of millions in legal fees.) The family's telecommunications company, however, remained Turkish so it could bring a claim against Kazakhstan, with which Turkey has a treaty – and win a $125 million award. Attempts to reach the Uzans through numerous intermediaries were not successful.

ISDS lawyers also grow the market for their services by advocating for new treaties, and some of the most outspoken are beneficiaries of the revolving door between the US government and top law firms.

Daniel M. Price negotiated the section of NAFTA containing ISDS when he was a lawyer at the Office of the US Trade Representative. He later served as a top international trade official in the George W. Bush White House.

In between these government stints, he worked as a private lawyer helping clients in ISDS cases. Twice he used the treaty he himself had helped negotiate to help US-based businesses pursue claims against Mexico.

He founded and chaired the unit handling ISDS claims at Sidley Austin, a leading global law firm. Today, he promotes his services as an arbitrator and, along with a powerhouse team that includes other former government lawyers, sells international expertise on ISDS and related matters.

Price, who at first agreed to an interview but later stopped responding to messages, is only one of a number of private lawyers who have exerted outsize influence on American policy on ISDS.

Ted Posner, a partner at US firm Weil, Gotshal & Manges and a former official at the Office of the US Trade Representative, has acted as a direct conduit to treaty negotiators. As officials from his former employer were hammering out the details of the Trans-Pacific Partnership, Posner told BuzzFeed News, he met with them on behalf of his clients and said, "We want you to be aware of this concern and hope that you'll take this point of view into account in the next round of negotiations."

"I don't see that as being a conflict," Posner said. "I don't think anybody gives my point of view more credibility just because they happen to have been a former colleague. I may be able to get a call returned more quickly or an email responded to more quickly, but I don't think prior service in an agency and knowledge of how that agency works is something that should be considered problematic from a public-interest point of view."

Private attorneys have emerged as some of the staunchest defenders of ISDS, accusing critics – from prominent scholars, to aid groups such as Doctors Without Borders, to the Australian government – of failing to understand the system and making exaggerated claims. While they concede that many arbitrators are chosen from their own ranks, they say that when lawyers adjudicate cases, they weigh the evidence without favor and reach just decisions in the overwhelming majority of cases. Their reputation for fairness is their currency, they say.

To prove that ISDS is not biased in favor of businesses, they point to the outcomes of known cases: Governments have won about 35% of the time, while business interests have won only about 25%.

But that statistic is anything but straightforward. It pertains only to the outcomes of known cases; ISDS is so secretive no one even knows how many additional cases there have been. Also secret are most of the settlements. Roughly a quarter of the known cases were settled, but the terms are almost never disclosed.

Moreover, subtract the cases that arbitrators tossed out because they didn't have jurisdiction to hear the claim, and that win–loss balance flips: Business interests have won 60% of the time. Even then, cases recorded as losses for the corporation can actually be wins. In one case, an executive failed to garner a monetary judgment but obtained a finding that helped him wipe away a criminal punishment.

And no statistic could ever include the many ISDS claims that are merely threatened, intimidating governments and shaping their policies while leaving hardly a trace. ISDS lawyers told BuzzFeed News that threats far outnumber actual cases.

Finally, companies can gain advantages by bringing an ISDS suit, even if they don't expect to win the case. Krzysztof Pelc, an associate professor at McGill University, found that there has been a proliferation of frivolous cases primarily intended not to win compensation but rather to bully the government – and other nations that want to avoid a similar suit – into dropping public-interest regulations. These new cases, Pelc found, represent a fundamental transformation of ISDS: The system was designed to deal primarily with theft by autocrats, but, in the majority of cases today, businesses are suing democracies for enacting regulations.

Such cases, he found, are far less likely to end in a settlement; the goal is to draw out the legal fight and run up the government's cost to deter future regulation. Even when a government ultimately wins, foreign investment in that country drops, another study found.

"The noble intent behind investor-state dispute settlement," Pelc told BuzzFeed News, is now "a tiny, tiny part of the action." The system has a legitimate purpose, he said. "It's just that, when it comes to this kind of use of aggressive litigation, then it really gets away from the objective."

Not all lawyers involved in ISDS are opposed to reform. Some, in fact, say it is necessary in order to protect the system. Industry publications and conferences now are filled with hand-wringing over the mounting public criticism of ISDS.

V.V. Veeder, a prolific arbitrator, warned fellow ISDS lawyers during a panel discussion at a London law office that, while they might be convinced of the merits of the system, many members of the public are not. "And," he said, "the more they find out what we do and what we say, and how we say it, the more appalled they are."

The British financial guru Rafat Ali Rizvi had a big problem: In Indonesia, where he'd plied his trade, he and a business partner had been convicted of embezzling more than $300 million from one of the country's banks. The government there had to bail out the bank – sparking enraged protests that police tried to quell with tear gas and water cannons – and Indonesian authorities were pursuing him and the money they said he'd stashed in accounts around the world.

Ensconced overseas, Rizvi was beyond the reach of the Indonesian authorities. But the conviction came with an Interpol "red notice," meaning he risked extradition if he traveled abroad. Some of his bank accounts were frozen. And with this stain on his record, he was largely cut off from the world of global finance he'd played in for years.

Rizvi's topflight criminal lawyer had threatened to sue Interpol if the agency didn't delete the alert, but so far it hadn't worked. What Rizvi needed was an entirely different type of lawyer. Someone like George Burn.

Burn had spent years representing businesses in corporate disputes, but, like many of his colleagues, he was drawn to ISDS as the system began to flourish in the 1990s. Now, he said, ISDS cases make up the majority of his work as a London-based partner at the US firm Vinson & Elkins.

The strategy he crafted for Rizvi epitomizes the ingenuity of elite ISDS lawyers and the willingness of arbitrators – many of whom are also attorneys who argue ISDS cases – to expand their own authority. It is a stark example of how canny and audacious lawyers can work the system, crafting a win even when they technically lose. The only real losers: a nation of taxpayers.

Born in Pakistan and educated in Great Britain, Rizvi had been managing private investment funds set up in various tax havens when he met Hesham al-Warraq, a Saudi financier educated in the US.

The two started buying up shares of Indonesian banks that eventually merged to form Bank Century. The two men assumed top posts, but al-Warraq "was always the junior guy in the partnership," explained Burn, who represented both men. Al-Warraq, Burn said, "really was just in the wrong place at the wrong time."

The bank was short on cash. It had a hefty stash of bonds and other securities, but it couldn't wait for them to pay out. The bank needed the money now.

Rizvi and al-Warraq got approval from the bank's other executives to sell many of these long-term investments or use them as collateral to obtain loans. Step one was transferring them to offshore companies that Rizvi and al-Warraq controlled.

If there was a step two, it basically never happened; the bank never saw the vast majority of those valuable assets again, legal documents show.

The two men were supposed to return to the bank whatever they couldn't sell or use to get a loan, but, for the most part, they simply didn't, according to the documents. In some instances, the documents state, they used the assets to get loans not for the bank but for themselves.

By the time the bank was bailed out in 2008, Rizvi and al-Warraq had siphoned off about $361 million, concluded an expert analysis prepared for the Indonesian government by The Brattle Group, an economic consulting firm that is based in Cambridge, Massachusetts, and has a principal who won a Nobel Prize.

Rizvi and al-Warraq contended that they actually had obtained at least a few loans for the bank and that the assets had been seized by creditors after the bank failed to repay these loans. But the bank and the experts hired by the Indonesian government said they couldn't find any evidence to support that claim.

The Brattle Group analysis summed it up: "Mr. Al Warraq and Mr. Rizvi controlled Bank Century, and treated it as their personal piggybank."

A criminal court in Jakarta tried them in absentia, convicted both men of corruption and money laundering, sentenced each to 15 years in prison, and ordered them to repay the massive sum it found they'd stolen.

They could have returned to Indonesia and challenged their convictions in court or tried to file a claim with a United Nations human rights body designed to handle the kind of claims they were making. But they had a more attractive option.

Enter Burn. His overarching strategy, as he explained it, was to use ISDS to attack the validity of their Indonesian trial, arguing "that they'd never been given a fair hearing and that there had been an abuse of process at multiple stages." But to get to that point, he had to deploy some of the most controversial tactics that ISDS lawyers have developed.

First, Burn needed to find a treaty that would apply to this case. His team discovered an obscure agreement among predominantly Islamic nations, including Indonesia, where the case was unfolding, and Saudi Arabia, where al-Warraq was a citizen. There was no record of anyone using that pact to file an ISDS claim before, but Burn audaciously forged ahead.

In fact, an official present at the creation of that treaty 30 years earlier told the tribunal that the agreement was not supposed to allow ISDS cases at all. The arbitrators waved off this objection as "irrelevant."

The key argument that Burn planned to make was that the criminal trial in Jakarta had violated al-Warraq's right to fair treatment as a foreign investor. This protection is now commonplace in investment treaties and trade deals, and it has become one of the most controversial aspects of ISDS.

Guaranteeing foreign businesses "fair and equitable treatment" sounds like common sense. But many treaties don't say what exactly that means, so arbitrators have found that governments have acted unfairly even when they regulated the price of water or merely complied with European Union law. Critics argue that such judgments have transformed a system that was supposed to uphold the rule of law into one that places foreign businesses above the law, able to get out of obeying almost any statute or regulation, no matter how worthwhile, that cuts into profits.

Many scholars and activists say the "fair and equitable treatment" provision, which is included in the Trans-Pacific Partnership now being considered by Congress, is the most widely abused element of treaties containing ISDS. Numbers from the UN's trade and development body show that arbitrators find violations of this controversial provision far more than any other.

As it happened, though, the treaty Burn had invoked didn't include that clause. But the agreement did have another common and often controversial clause, which requires a government to treat foreign businesses covered under one treaty at least as well as businesses covered under any of its other treaties.

So Burn plucked the fair-treatment provision from another agreement and applied it to the Islamic nations pact. In effect, he constructed his own super-treaty.

And the ISDS arbitrators allowed it, giving themselves the authority to rule on the actual merits of the case.

Burn enlisted a lawyer with perfect credentials for this case: Rutsel Martha, a former general counsel of Interpol who now specializes in, among other things, challenging the international police agency's actions.

He argued that the Indonesian authorities had committed numerous procedural errors, such as not confirming that al-Warraq had received the court summons and not enlisting the Saudi authorities to question al-Warraq. He also argued that Indonesia hadn't met the criteria under international law for conducting a trial in absentia and that it hadn't ensured al-Warraq was promptly notified of the guilty verdict. He even argued that the entire prosecution was a politically motivated ploy to scapegoat Rizvi and al-Warraq for the government's own contentious decision to bail out the bank.

For its part, the Indonesian government produced evidence that it had done many of the things it was accused of neglecting: It did seek help from the Saudi government, and it did seek out Rizvi and al-Warraq at various locations around the world. What's more, the government contended, Rizvi and al-Warraq had asked their lawyers to write to government officials, and the men had dispatched representatives to meet with Indonesian authorities as the trial approached. Those actions, the government said, made it clear that Rizvi and al-Warraq knew about the case against them and could have returned to face the court in person, avoiding the trial in absentia, but chose not to do so.

Ultimately, the tribunal did not find that the prosecution had been politically motivated. But siding with Martha and Burn, it did make a key finding: Indonesia had committed procedural errors that violated al-Warraq's right to fair treatment. The arbitrators didn't award any money, however, because they also determined that al-Warraq had "breached the local laws and put the public interest at risk."

But, Burn said, winning the case outright and getting monetary damages had never been the "primary target." Above all, he said, he wanted a finding that al-Warraq's rights had been violated. And the ISDS arbitrators handed him exactly that.

Martha took that crucial finding and presented it to his former employer. He argued that, unless Interpol dropped its red alerts against Rizvi and al-Warraq, the international cops themselves would be violating international law. Interpol obliged, deleting the red notices.

"Unprecedented Concessions by Interpol," trumpeted a press release put out on behalf of Martha's firm. The international cops also had agreed to delete information about the two convicts from its files and to send letters to certain risk profiling and due diligence agencies, as well as the roughly 190 Interpol member countries, according to the release.

"As a result, Mr. Rizvi and Mr. Al-Warraq will be able to travel and conduct business without restriction," the release boasted. "Such results have never been obtained before from INTERPOL." Reached by BuzzFeed News, Martha at first agreed to an interview but didn't respond to subsequent messages.

Now the legal team is trying to use the ISDS decision to block Indonesia from seizing the men's foreign bank accounts. Initially, Indonesian authorities had won a small victory when a Hong Kong court granted them access to a $4 million account. But that's been put in doubt.

"The Hong Kong government is now very cautious, and they are retaining international experts," said Cahyo Muzhar, an official in the Indonesian Ministry of Law and Human Rights who has been pursuing Rizvi's and al-Warraq's assets for years.

Legal side skirmishes continue, but Rizvi and al-Warraq have won the war. Rizvi is, for the most part, back to traveling and conducting business, Burn said. Rizvi himself did not respond to detailed questions sent to his email address, hand-delivered to a London home listed in his name, and provided to Burn and other intermediaries.

Al-Warraq has had a much tougher time than Rizvi, Burn said, even though, as "the junior guy," he "didn't take any of the commercial decisions." In addition to the Interpol red notice, Burn said, Indonesia petitioned Saudi Arabia to extradite al-Warraq, then asked Saudi Arabia itself to try him. "Al-Warraq probably for the last four years has had to report to the police every week," Burn said. But, he added, the ISDS finding was the key to persuading the Saudi court to finally drop the case.

"I am trying to bury this part of my life," al-Warraq wrote in an email to BuzzFeed News, but "to this date I am banned and unable to travel from Saudi Arabia." In reference to a detailed summary of the facts in this story, he said "so many points" are "not correct," but he did not respond to follow-up questions asking for specifics. Calling himself "wrongly accused," he said it was "a life mistake I got involved with bank century."

As for Burn, "I take a great deal of pride in holding states like Indonesia to account for their lack of rule of law," he said. "There is no meaningful evidence that Rizvi and al-Warraq were involved in any frauds, but, even if they were, the absolutely tainted nature of the process over a number of years means that nobody will ever know."

But to Cahyo, who said that years of effort by his team haven't led to the recovery of a single dollar of the bailout money, the ISDS gambit looks rather different.

"They are playing this game as if they are honest investors coming to Indonesia trying to do business," he said. "That is not the case. This is really somebody robbing the people's money."

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**Our Comment.** How could *any* trade benefit justify surrendering government control over such appalling corporate practices as that causing lead poisoning, or any other threat to public health for private profit? What an insight this report is into the expansive potential of ISDS! *Élan*

# Canadians Launch Constitutional Challenge Against CETA

*By Joyce Nelson, counterpunch, October 28, 2016*

Wallonia is not alone. Not only has the region been joined by several other Belgian regional parliaments in opposition to CETA (the Canada-EU Comprehensive and Economic Trade Agreement), but now a Canadian constitutional challenge against CETA has been launched in the Federal Court of Canada.

On October 21, renowned constitutional lawyer Rocco Galati filed the statement of claim against CETA on behalf of the Hon. Paul Hellyer (former Minister of National Defence) and two co-plaintiffs, Ann Emmett and George Crowell (members of the Committee on Monetary and Economic Reform). At the October 25 press conference, Galati referred to the corporate sector as "the new royalty," and he stated, "What this treaty does is literally revert us back to the divine right of kings, but they are multinational corporations now."

Galati's statement of claim argues that CETA is unconstitutional for several reasons, including the fact that it was never given Canadian Parliamentary approval, while "the treaty places the rights of private foreign investors over those of the Canadian Constitution and Canadian citizens."

Critics on both sides of the Atlantic maintain that massive trade deals like CETA give far too much power to corporations at the expense of citizens and governments, especially through the investor-state dispute settlement (ISDS) mechanism – or the "investor court system" (ICS) as it was rebranded in CETA – that allows foreign corporations to sue governments (in a private court system) over policy decisions or regulations that harm their future profits.[1] Across the planet, national governments have been sued for billions of dollars by companies claiming "lost future profits" because of regulatory decisions. Walloons (and Europeans in general) have been consistently critical of ISDS tribunals for private arbitration.

"It's ironic that everybody is dumping on the Walloons," Galati told the Canadian Press in advance of his October 25 press conference. "They have a very similar constitution to ours except they're respecting theirs. So I don't know why they're being criticized for respecting their constitution."[2]

Because of continued opposition by Belgian regional governments, the scheduled October 27 formal signing of CETA at a summit in Brussels was cancelled at the last moment on October 26. Wallonia's minister-president Paul Magnette has stated, "We are not against a treaty with Canada. But we won't have one that jeopardizes social and environmental standards and the protection of public services and we want absolutely no private arbitration [ISDS] mechanisms."[3]

Galati's statement of claim similarly warns that various articles of CETA "override Charter guarantees that ground Canada's ability to mount public programs on Health, Education, Social Services and public utilities including the elimination of subsidies, monopolies, and state enterprises for the public welfare." As Galati put it during the press conference, the only Canadian public services and entities protected in CETA are "tax collection, national security, and cultural industries," he said. "Everything else is up for grabs" for privatization. As well, CETA encroaches on "exclusive Provincial spheres of jurisdiction" and "guts and extinguishes the constitutionally protected Judiciary in Canada by creating foreign tribunals" for ISDS arbitration.

The Canadian Press asked International Trade Minister Chrystia Freeland whether CETA meets the requirements of Canada's Constitution and she replied, "Absolutely." At his press conference the following day, Galati said that "the Trade Minister's elaborate response – 'Absolutely' – doesn't cut it for me."

Galati also referred to "residual Crown prerogative" – the belief that the Prime Minister of Canada can sign a treaty without Parliamentary debate and voting – and said, "The federal court has already decided that this notion is a serious question to be resolved."

The constitutionality of CETA is also being challenged in German courts.[4]

The statement of claim gives the Canadian government 30 days to respond, and it also seeks interim injunctions to prevent the federal government from signing, ratifying and implementing CETA.

During the House of Commons question period on October 26, Canadian Green Party Leader Elizabeth May asked Prime Minister Justin Trudeau if he was willing to change or jettison the controversial investor-protection section of CETA in order to save the trade deal. Trudeau declined, calling CETA "gold-plated," and said, "We are confident that in the coming days we will see a positive outcome for this historic deal."[5] Hours later, the Brussels summit was cancelled indefinitely.

Trudeau, Freeland, and Canadian foreign affairs minister Stephane Dion had been part of a delegation scheduled to meet with EU leaders Donald Tusk and Jean Claude Juncker yesterday, but the trip was cancelled as "crisis talks" in Belgium continue.[6] While some CETA proponents maintain that a new signing summit could happen within days, Magnette has also said, "This treaty affects the lives of 500 million Europeans and 35 million Canadians for years and years. We can take a few weeks, a few months to analyze the problems and overcome them."[7]

### Freeland's Theatrics

Magnette's statement raises the question of why the rush to approve CETA? The answer for many is that the longer the delay, the more people (especially in North America) will find out about the ISDS clauses and the actual contents of the massive trade deals similar to CETA – the TransPacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), the Trade in Services Agreement (TISA) – and as a result, shift their opinion about these deals.

In other words, the rush to approve CETA isn't really about the so-called "credibility" of the EU to sign an agreement, as Trade Minister Freeland and others maintain. The rush is about the undesirability of the deals themselves – which are unravelling as more people learn what's in them.

On October 21, Freeland walked out of talks with Magnette and ("appearing to hold back tears") told the waiting press that the EU is not capable of making an international agreement, "even with a country with European values such as Canada, even with a country as nice and patient as Canada."[8]

But as Canadian law professor (and former Member of Parliament) Craig Scott recently wrote, "In the last week, Freeland's focus on her own disappointment and efforts has projected a sense of a noble mission fallen short due to Europe's spurning of a country sharing its progressive values… Freeland, holding back tears, went so far as to castigate Europeans for failure to do a deal with 'nice' Canada. This is all very rich. Based on a European negotiator's briefing to [New Democratic Party Members of Parliament] during CETA negotiations (the Harper government refused to brief MPs), it was Canada that insisted on some of the most regressive and dangerous provisions in CETA. The provisions in question were – and still are – the investor-state dispute settlement (ISDS) procedures."[9]

Freeland and others like to call CETA and Canada "progressive," but CETA was never voted on by Canada's Parliament or by any provincial/territorial legislature.[10]

So under the Harper Conservatives, we had a Canadian federal government that not only insisted on the ISDS provisions in CETA, but refused to brief Members of Parliament on the deal and neglected to have CETA debated and voted on in Parliament. This all happened while Justin Trudeau was leader of the federal Liberals, who Craig Scott says were "100 percent" behind the deal, "as evidenced by the support Trudeau gave Harper back in the fall of 2013" by "fawning" over CETA's prospects.[11]

Scott warns about "the continuation of a Liberal-Conservative tag team pushing old-style [neoliberal] economics" and writes: "Have no doubt that the present Canadian government is keen to resist truly progressive revisions to CETA. Have no doubt that Liberals want to retain a flawed ISDS system that undermines the democratic sovereignty of countries – and one that sets the wrong example for future trade policy."[12]

### Investor Lawsuits

The year 2015 saw a record high of 70 new ISDS corporate lawsuits filed against countries under NAFTA and various bilateral treaties, raising concerns worldwide about ISDS and the ways corporations use it to bleed governments financially while putting a "chill" on any new regulations. Even if a government wins an ISDS lawsuit, it will have spent an average of $8 million in legal fees to defend itself.

To date, the most thorough report on ISDS is called Profiting from Injustice, written by Pia Eberhardt of Corporate Europe Observatory (CEO) and Cecilia Olivet of the Transnational Institute.[13] They revealed that a "small club of international law firms, arbitrators and financial speculators are fueling an investment arbitration boom that is costing taxpayers billions of dollars and preventing legislation in the public interest" across the planet. They found a handful of legal firms "are actively encouraging corporate clients to sue governments" under investment treaties containing the ISDS clause, while "top arbitrators are using their influence to secure investor-friendly rules and sustain the flow of multi-million dollar lawsuits."

At the heart of this "secretive but burgeoning legal industry," they found an "inner mafia" of fifteen arbitrators who (as of 2012) had decided on 55% of all known ISDS disputes – earning millions in fees for themselves and billions in ISDS settlements for their corporate clients. That "inner mafia" includes three Canada lawyers: Marc Lalonde, L. Yves Fortier, and Henry Alvarez; four American lawyers: Charles Brower, Stephen M. Schwebel, William W. Park, and Daniel Price; and eight other lawyers from France, Chile, Switzerland, Netherlands, Germany and Belgium.[14]

After CETA opponents in Europe roundly attacked the ISDS private court system, the trade deal's investor-protection chapter was rewritten this past February. But a March 2016 report from CEO called the rewrite basically a PR re-branding exercise, giving ISDS a new name: the Investment Court System (ICS). Otherwise, "the proposed 'new' ICS is ISDS back from the dead," Pia Eberhardt wrote in the report appropriately called The Zombie ISDS.[15]

Under CETA's rebranded ISDS, the three for-profit arbitrators (now to be called

#### About Our Commenter

Élan is a pseudonym representing two of the original members of COMER, one of whom is now deceased. The surviving member could never do the work she is now engaged in were it not for their work together over many years. This signature is a way of acknowledging that indebtedness.

# Federal Court Hearing, December 7, 2016

*On Wednesday, December 7, 2016, COMER's appeal of the outcome of the last court hearing will be heard at the Federal Court of Appeal.*

This hearing will be held in Toronto at the same Federal Court building as the previous four hearings: 180 Queen Street West, north side of the street, just west of University Avenue.

COMER's lawyer, constitutional expert Rocco Galati, strongly recommends that we be there by 9:00 am to avoid entering late and annoying the three Federal Appeal Court Justices. The Hearing will start promptly at 9:30 am and may continue throughout the day.

The proceedings to date for this action began on December 12, 2011: recorded entries for the Federal Court Number T-2010-11; recorded entries for the Federal Court of Appeal, Court Numbers A-228-14 and A-76-16.

As we approach the last stretch of this phase of our long and expensive, historic, legal struggle, we grow ever more dependent on donations. Nearing now the possibility of getting our case at last to court, COMER's executive is looking into the option of enlisting the help of a professional fundraiser. Meanwhile, we are still far short of what we need for the upcoming appeal.

Please help in any way you can to donate or to encourage others to donate.

Our lawsuit has done much to raise public awareness and to stimulate a keen interest in the monetary reform issue. We have been much encouraged by the growing interest among Canadians and from around the world, and the many warm messages of thanks that often include the words *hope* and *inspiration*.

There is just no way we can let people down.

### What we can do to support this action:

- Contact the media and inform them that this fifth hearing is taking place and tell them exactly where and when.
- Encourage as many people to attend as you can – even if they are able simply to drop by for some of the time. Demonstrating an interest in the proceedings will be a valuable contribution.
- Should the media request an interview, please refer them directly to Rocco Galati.

We are not competent to discuss the case or the hearing for it is not about the substance of our suit per se. This hearing is about our right to take our lawsuit to court. The argument will be about the law and legal precedent.

Let us make it clear that there is substantial public interest in this lawsuit, in Canada and around the world.

See you there! Please circulate this information.

*Ann Emmett, Chair, COMER*

"judges") who decide each case would be drawn from a pool of lawyers and would be paid US $3,000 per day, on top of a monthly retainer fee of 2,000 euros per month.

As well, they can moonlight as lawyers with the same corporations launching the lawsuits.

This conflict of interest is what the Walloons have been arguing against and resisting, noting that the so-called "Joint Interpretive Declaration" of October 13 does not clarify the situation. Investment law professor Gus Van Harten agrees, informing The Canadian Press that "Such matters should be resolved and subject to discussion and debate well before relevant decision-makers are requested to approve CETA."[16]

But there are other highly controversial aspects of ISDS that are getting little, if any, press – for example, what's called third-party funding of lawsuits.

### ISDS Gambling

Profiting from Injustice revealed that private investment funds have been speculating on ISDS court cases: lending money to companies so they can sue governments, and then taking a percentage of the final financial award. Such a gamble can be very lucrative: in a recent ISDS lawsuit, a national government was ordered to pay a whopping $50 billion to the claimant.

So-called "third-party funders" have become a fast growing industry as corporations outsource financial risk to "litigation finance shops" who receive cash to gamble with.

Profiting from Injustice states, "Imagine a multinational company eager to sue a government on the basis of an international investment treaty. It is about to hire a top arbitration law firm as counsel. But the lawyers charge astronomical fees – more than the company is willing to pay. Fortunately for the company, an investment firm offers to invest in the case. It pays parts of the lawyers' pay cheque in exchange for getting a share of the potential profits at the end. Welcome to the world of third-party funding.... A world flush with monumental settlements and glaring opacity, a place where public treasuries are treated like ATMs by arbitral bodies and awards can be enforced globally – this is a world that third-party funders are particularly interested in...Banks, hedge funds and insurance companies also invest in international [ISDS] disputes."[17]

Obviously, this little-known world of ISDS litigation – where "public treasuries are treated like ATMs" – needs far more exposure. It operates within most of the trade deals currently being pushed across the planet. So not only are signatory countries losing their sovereignty to the corporate sector, they're losing their shirts (as the saying goes).

While CETA would allow thousands of European companies to sue Canada under ISDS for "lost future profits," some 42,000 US multinationals that have branch-plants in Canada could similarly sue European governments through CETA – a kind of "backdoor" in case the equally controversial Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU collapses.

This is another aspect of what the Walloons have been resisting in CETA. At Galati's October 25 press conference, court challenge plaintiff Paul Hellyer rightly called the trade deal "monstrously immoral."

### High Stakes

But the stakes are even higher for Canada. As Rocco Galati explained, because of NAFTA "the US and Mexico automatically get all the benefits of CETA that are not present in NAFTA," while Canada would get no further benefits from those two countries.

The Canadian constitutional challenge against CETA is bolstered by an October 17 "Open Letter" by ten prominent Canadian academics to the Parliament of Wallonia and Belgium voters. They write: "...In Canada, our democracy has suffered because the federal government has insisted on pushing through agreements like the NAFTA and the CETA without legislative votes at the federal and provincial levels. As a result, and without the corresponding endorsements by our elected representatives, we have been left with a foreign investor protection system that binds all levels of government and that will bind all future elected governments in Canada for a very long time. Our experience hints at the dangers faced by European democracy in the case of the CETA.... From what we can see, you have shown great courage in opposing the CETA and, based on our observations of how the foreign investor protection system has been pushed on Canadians over the years, we wish to express our support for your democratic choices."[18]

During the press conference, Galati pointed to a stack of paper about three-feet tall on the conference table and identified it as the 1,600-page CETA text. "You're supposed to read and understand this in your spare time," he joked to those gathered. Fortunately for other Canadians, Galati has read the CETA text and – like the plaintiffs he represents: Paul Hellyer, Ann Emmett and George Cromwell – wants "democratic choices" beyond what Canadian tradition allows. The erosion of democracy is becoming that evident.

As reports of a new CETA compromise in Belgium began to emerge on October 27, the Council of Canadians issued a press release stating, "The democratic exercise that is taking place in Europe right now – where the Walloon government has looked at the text with its citizens, and asked for changes – needs to take place in Canada."[19] That is exactly why Galati and the co-plaintiffs have filed their constitutional challenge.

*Joyce Nelson's sixth book,* Beyond Banksters: Resisting the New Feudalism*, can be pre-*

# Call for Members

At the last AGM for the Council of Canadians, motions from the Hamilton Chapter of CoC were passed to utilize the Bank of Canada for infrastructure funding.

There are CoC chapters in many communities across the country. They have their own programmes and agendas but using the BoC for infrastructure financing has now been approved as one of their objectives.

As the federal government moves forward with its plans to establish an infrastructure bank – described by one of our newer members as the "Public Asset Pilfering Bank" – in conjunction with Blackrock investments, the executive believes that COMER members across the country could work with their local CoC chapters to mobilize opposition to the proposed infrastructure bank and, instead, to promote the use of the Bank of Canada for financing infrastructure.

The other opportunity for COMER members is through the LEAP Manifesto. Their stated approach to financing infrastructure is to use fiscal measures (taxing and spending) as suggested by the CCPA. Avi Lewis, one of the founders of LEAP, criticized COMER members for being "essentialists"; so, tends not to look at the role the BoC could play.

But LEAP does not recognize that the current financial system is an *essential* component of the environmental and social issues with which LEAP is concerned. Readers are encouraged to review what John Hotson wrote in the early '90s about the connection between environmental and financial systemic problems.

*Herb Wiseman*

*ordered at: http://watershedsentinel.ca/banksters now. She can be reached through www.joycenelson.ca.*

### End Notes


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16. Mike Blanchfield, "Amended CETA declaration not enough to win Walloon support: documents," The Canadian Press, October 25, 2016.

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18. David Boyd, et al., "An Open Letter to the Parliament of Wallonia and Belgian Voters on the Proposed CETA and Its Foreign Investor Protection System," October 17, 2016.

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### Our Comment

The scourge of "free trade," in conjunction with the strategy of debt and the co-operation of complicit governments, has enthroned "the new royalty."

How could Canadians who "have a very similar constitution" to that of the Walloons, and who have been trounced more than once in the kangaroo court of the ISDS, have – beginning with the FTA – submitted to international rules that so compromise their democratic *rights*?!

Who knew?!More disturbingly, how could *any* Canadian government have ever delivered this country into so undemocratic an arrangement? Paul Hellyer's injunction has provided us with an opportunity to begin freeing ourselves. Further details are available on his website. *Élan*

# What is Really the Matter with CETA?

*By Leo Panitch*

Canada's Trade Minister Chrystia Freeland's sense of *amour propre* was clearly dented last week when the latest talks to salvage the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada appeared to fall apart in face of the refusal of the Belgian regional parliament in Wallonia to accede to the Belgian government's support for it. The story is by no means over, but it would be quite wrong to think that what really threw this spanner in the works was that the EU was incapable of reaching an agreement, as she put it, "even with a country with European values such as Canada, even with a country as nice and patient as Canada."

First of all, Canadians might be expected to understand why Belgium's failure to secure the consent of the Walloons mattered so much. The Canadian federal experience has often required securing inter-governmental unanimity, and lent an effective veto not only to Quebec, but even to the tiny province of Prince Edward Island. If Manitoba, with a population of around one million, could write *finis* to Canada's last attempt at a Constitutional accord, why should Wallonia, with well over three million inhabitants, not be able to stop a trade agreement?

Moreover, Canadians know well enough that the opposition being registered by one provincial government usually resonates with a substantial body of opinion in other regions. And that is certainly the case with CETA, which has aroused very considerable concern right across Europe. It was only by a hair's breadth that CETA secured the approval last month of the German Social Democratic Party, the junior partners in Europe's most powerful government. The disquiet over CETA in fact followed on directly from what disturbed so many Europeans about the US-EU free trade agreement that bore the acronym TTIP.

### So-Called Free Trade Agreements

All free trade agreements since the US-Canada FTA (over which the 1988 Canadian election was fought, with the Liberal Party then strongly opposing the deal) have created the illusion that they have primarily been about reneging on the old political economy of tariff protectionism. But this was already accomplished by the progressive reduction in tariffs that took place in the post-war decades under the General Agreement on Tariffs and Trade, and in Europe itself by the Treaty of Rome and the Common Market it spawned. The so-called free trade agreements kicked off by the FTA have been much more about dismantling so-called 'non-tariff barriers' which establish rights for multinational corporations, deploying the talent and resources of the foremost international law firms, to escape and undermine domestic economic regulation.

What is especially worrying to a great many Europeans, now that they believe they have managed to render TTIP a dead letter, is that CETA will bring it in via the back door. A US company with a subsidiary that does business in Canada will qualify as a Canadian investor under CETA, so it is not just a matter of Canadian resource and finance companies posing a real threat of claims against Europe. Under CETA's investor-state dispute provisions, to be implemented through a new investment court system, individual companies could sue states for alleged discriminatory practices in their regulations, and if successful thereby allow domestic investors to escape regulation as well. Yet despite allowing special claims and access to public money by foreign investors, CETA sets out no actionable investor responsibilities, domestic or foreign, alongside these rights.

*"Moreover, no one else affected by such dispute, e.g., a local municipality or a province or a First Nation, is given a right of standing in the juridical process – making it fundamentally unfair as well as undemocratic."*

That Canada under the former Conservative government of Stephen Harper should have conceived and promoted CETA was perhaps not surprising, but it must surprise many Europeans that the Trudeau Liberals who came to office last year with such progressive fanfare should now, with only minor edits, be on the same page. And it is by no means clear that most Canadians are really so eager to be the conduit for foreign investors to escape economic, labour and environmental regulation, and thereby help domestic investors escape regulation as well. Indeed, under CETA, Canada's own exposure to foreign investor claims would roughly double because Western European companies invest about as much in the Canadian economy as do US investors.

Under NAFTA, the decisions of the Canadian judiciary on the constitutionality of many laws and regulations cannot be taken as final until all foreign investors eligible to bring claims have not done so or have run out of time to do so. Moreover, no one else affected by such a dispute, e.g., a local municipality or a province or a First Nation, is given a right of standing in the juridical process – making it fundamentally unfair as well as undemocratic.

Under enormous pressure to back down, the Walloons appear to have managed to at least secure the concession from the Belgian government not only to assess the economic and environmental impact of CETA, but also to insist on the right to go to the European Court of Justice to determine whether the decisions of the new investment court system were compatible with EU law. But even as the Belgian government joins the other 27 European governments in signing CETA, its ratification by all their parliaments is far from assured, since the broad coalition in Wallonia that stood up to CETA – encompassing Christian Democrats and Socialists as well as Marxists – is reflective of the breadth of the opposition across Europe.

The social attitudes of those opposing CETA are quite different from those of the xenophobic far right parties which have made such gains in Europe. The rejection of CETA as well as the TTIP would not have anything to do with rejecting the values of diversity and democracy, as Ms. Freeland's comments implied. If anything, it has been the failure of the mainstream parties to articulate in a progressive manner the discontent with what has come with state promotion of 'free trade' over the last three decades that has opened so much political space for the Le Pens, on one side of the Atlantic, and for the Trumps, on the other.

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# Hon. Paul Hellyer: Why I am 100% Opposed to CETA

*There are two profound reasons for opposing the ratification of CETA.*

It would be illegal. It would result in a unilateral change in the Constitution of Canada – that is outside the power of both the government and Parliament.

The second reason is that to ratify CETA would be monstrously immoral. It would be the biggest betrayal of Canadian rights and privileges in the history of the country. Not only would it give foreign banks and corporations greater rights in Canada than those enjoyed by Canadian citizens, which is indescribably wrong. It would give foreign bankers an effective veto over the use of our most valuable financial asset, the Bank of Canada, at the very moment when we need it most.

The situation today is reminiscent of the 1930s. In 1938 there were no jobs in Canada. Then the war came along and pretty soon everyone was working – either in the armed forces, or building factories or making munitions. You might ask where the government got the money to accelerate growth to this extent. The answer is that the Bank of Canada printed it. *Printed it!* The money creation function was shared between the government of Canada and the private banks.

This system was maintained after the war and helped pay for our large infrastructure projects – the St. Lawrence Seaway, the Trans-Canada highway, the DEW (Distant Early Warning) line, as well as help us pay for a comprehensive social security system. All of this was accomplished without significant borrowing and with inflation in line with other OECD countries.

Then in 1974 the Governor of the Bank of Canada abandoned the needs of his shareholders and started taking his orders from the Bank for International Settlements that is controlled by the elite banking cartel.

The result for Canada is that because we had to borrow in the market from fiscal 1974/75 to 2013/14 we had to pay $1.17 trillion dollars in interest, almost all of it unnecessary, and still wind up $615 billion in debt. All of that plus decades of underfunding for all of our essential services. We switched from prosperity to austerity, and the international banking cartel ended up with a monopoly over money creation.

All of this has to be reversed. The Canadian Constitution gives the parliament in Ottawa the absolute right to create, or to have the Bank of Canada create, all of the money necessary to meet the legitimate needs of the Canadian people.

In fact there is a plan called "A Social Contract Between the Government and People of Canada" available to parliament now. This plan calls for the creation of $150 billion a year for seven years, to be split between Ottawa and the provinces and territories on a per capita basis.

But, if CETA were ratified and implemented, prosperity would never be restored, nor the backlog of needs met, because European banks would sue Canada for tens or hundreds of billions if we denied them the opportunity to lend us the money, buy up our real assets for 5 cents on the dollar, and keep us in poverty forever. The war between the rich and the poor, that the rich have been winning, would be over.

So CETA must not only wither but die on the vine, and become nothing more than a footnote to history.

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**Our Comment.** Money is power. Where was the government, a Liberal government, to quietly surrender monetary *policy* to the Governor of the bank. *Sharing* the function of money creation has transferred that power from our national governments to a global oligarchy. Either we take back our constitutional right to create money and exercise it *fully*, or we consign ourselves to serfdom in a vassal state of "The New World Order."

*Élan*

# Lobbying Watchdog Probes Liberal "Pay-for-access" Fundraisers

*By Robert Fife and Steven Chase, Ottawa – The Globe and Mail, October 27, 2016*

Federal lobbying commissioner Karen Shepherd says she is investigating what she called the governing Liberals' "pay-for-access" fundraisers to determine whether senior Trudeau cabinet ministers have breached the *Lobbying Act*.

The probe began in response to stories in *The Globe and Mail* that revealed wealthy donors are paying as much as $1,500 per ticket for private time with senior cabinet ministers in charge of major spending and policy decisions.

"We are seeing in the media that this is an issue potentially creating real or apparent conflict of interest, which is why I am looking into it," Ms. Shepherd told the Commons committee on access to information, privacy and ethics on Thursday. "Obviously, placing the public office holder in a conflict of interest is something that would be a potential breach of the *[Lobbying] Act*."

The act requires corporate executives or their lobbyists to register each time they make a representation to a federal cabinet minister. Ms. Shepherd said this includes organizing fundraisers or selling tickets to these events. Ministers would be in potential breach of the law if they attended these meetings without registering that they were lobbied.

Ethics commissioner Mary Dawson also added her voice to growing concerns that the Liberals' cash-for-access fundraisers appear to violate the "Open and Accountable Government" rules Prime Minister Justin Trudeau laid down shortly after taking office. Those rules state "there should be no preferential access or appearance of preferential access" in exchange for political donations.

Ms. Dawson on Thursday called the fundraisers "unsavoury," telling reporters: "One wonders whether people are getting unfair access."

Ms. Shepherd said she will probe the role of Apotex Inc. chairman Barry Sherman in helping organize and sell $500 tickets for an elite Liberal Party fundraiser on November 7 at the home of Toronto philanthropist Nancy Pencer and funeral home executive Michael Benjamin. Finance Minister Bill Morneau is scheduled to be the prize guest at the exclusive event.

The lobbying commissioner usually does not comment on specific cases, but Ms. Shepherd noted *The Globe* had already reported that the generic drug manufacturer's chief lobbyist, John Duffy, has lobbied the Finance Department three times in the past six months. The advocacy group Democracy Watch also filed a formal complaint about the fundraiser, she said.

"Under the act, I have the ability to look into a matter or as a result of a complaint. In the current situation with Apotex, it is quite public," she said.

Apotex is involved in high-level lobbying in Ottawa. The company has also made direct representations to Innovation Minister Navdeep Bains, International Trade Minister Chrystia Freeland and Health Minister Jane Philpott.

Apotex spokesman Elie Betito told *The Globe* on Tuesday that the November 7 "fundraising event is not part of Apotex's program of government relations" but simply a private undertaking by Mr. Sherman, who is one of the largest shareholders in the pharmaceutical giant.

Apotex is suing the federal government for $500 million for banning the company's drug imports from India. Mr. Morneau sits on the federal cabinet committee on litigation management, which deals with lawsuits against Ottawa.

*The Globe* has found at least 20 exclusive Liberal Party fundraisers that featured key ministers and were held at private homes, hotels or other venues. The main draws are Mr. Morneau, Infrastructure Minister Amarjeet Sohi, Canadian Heritage Minister Mélanie Joly and Mr. Bains.

The Liberal Party has refused to say who attended or what was discussed, but Ms. Shepherd said her office will seek that information.

"My investigators will do everything they need to do to provide me with a complete picture of the situation so that I can make an assessment as to whether a breach of the code has actually occurred," she said.

Ms. Shepherd said she would also "look into" whether Nova Scotia property developer Jim Spatz, whom the Liberals named to the Halifax Port Authority, was in a potential breach of the *Lobbying Act* when he paid $1,500 to attend a Morneau fundraiser on October 13 at the mansion of Halifax mining tycoon-turned land developer Fred George. The port authority is considering whether to seek $1 billion from Ottawa for a new port in Dartmouth that would free up vast tracts of land in Halifax for development.

In the Commons, opposition MPs called on the government to ban the special access fundraisers, especially in light of the lobbying commissioner's investigation.

"The Prime Minister knows this is wrong. Everybody knows this is wrong. It's damaging the integrity of his office," Interim Conservative Leader Rona Ambrose said.

Government House Leader Bardish Chagger read from a statement repeating what the government has said since *The Globe* began reporting on the fundraisers: "Federal politics is subject to some of the strictest political financing legislation in the country and we fully complied with the rules."

The ethics commissioner told reporters on Thursday that the current conflict-of-interest law prevents her from making a finding on whether the cash-for-access fundraisers are improper. She said the Prime Minister's tough new ethics rules should be included in the *Conflict of Interest Act*.

Mr. Trudeau has chosen not to assign the enforcement of his new rules to an independent watchdog. Instead the Open and Accountable Government document is the responsibility of the Privy Council Office, which reports to the prime minister.

### Our Comment

If accepting "donations" of "$1.500 per ticket for private time with senior cabinet ministers in charge of major spending and policy decisions" doesn't breach the *[Lobbying] Act*, the *Lobbying Act* is surely toothless.

Tracing developments that serve the vested interests of such "donors" ought to be easy enough.

What, one wonders, would make the financial minister and the infrastructure minister the "main draws" at "exclusive Liberal Party fundraisers"?

Hardly surprising that "Mr. Trudeau has chosen not to assign the enforcement of *his* new rules to an independent watchdog"!

Let's hope *The Globe and Mail* will keep us informed on the federal lobbying commissioner's probe.

*Élan*

# Medicare Threatens to Put Justin Trudeau to the Test

*By Thomas Walkom, National Affairs Columnist, The Toronto Star, April 3, 2016*

*Moves in Quebec and Saskatchewan toward two-tier health care will force the new Liberal government to act, one way or another. Saskatchewan Premier Brad Wall's government passed a law in November allowing private MRI clinics to operate, change fees and bill patients directly for service.*

In Canada, the struggle around medicare never goes away.

To the general populace, universal public health insurance is an unalloyed asset. Politicians who criticize it openly do so at their peril.

But beneath the surface, the pressure to eat away at medicare is relentless.

Sometimes, that pressure comes from health-care providers trying to make money. Sometimes it comes from governments trying to save money.

But in the end, medicare puts every government to the test. Prime Minister Justin Trudeau will find that his Liberal regime is no exception.

The most recent flashpoints are in Quebec and Saskatchewan. Both provinces have instituted reforms that push their health systems toward two-tier medicine.

Quebec's reforms in particular could end up violating the *Canada Health Act*, a federal statute that prohibits physicians from charging extra fees for medically necessary services.

That province has long allowed physicians to extra-bill patients for "medication and anesthesia agents." The idea, presumably, was that doctors couldn't charge patients out-of-pocket for, say, looking at a sore finger. But they could charge for the cost of a bandage.

This deft distinction was designed to get around the *Canada Health Act's* requirement that medically necessary physician and hospital services must be supplied free of charge.

As the *Montreal Gazette* has reported, some Quebec physicians interpreted this loophole in a remarkably broad fashion.

Some doctors performing colonoscopies in private clinics, for instance, charged $600 in medication fees – this on top of the amount they received from Quebec medicare.

Instead of banning such practices, however, Quebec's Liberal government decided to further embed them in the province's medicare system.

Bill 20, passed last November by the National Assembly, accepts the principle that physicians can charge ancillary fees but gives Quebec's government the power to regulate what those fees will be.

So far Premier Philippe Couillard's government has not yet produced a list of permissible extra-billing charges.

When it does, Trudeau's federal government will be on the spot. Will it enforce the *Canada Health Act's* ban on extra billing by withholding federal health monies from Quebec as the law demands?

Or, like so many federal governments before, will it ignore the problem and pretend that nothing happened?

Saskatchewan presents Ottawa with a murkier problem. In November, Premier Brad Wall's government passed a law allowing private MRI clinics to operate in the province, charge whatever fee they choose and bill patients directly for the service.

The interesting wrinkle is that for each private scan, these clinics would have to offer one MRI free of charge to patients waiting in the public system.

Wall says the net effect will be to reduce wait times overall. The Saskatchewan Medical Association, which opposes the move, is skeptical.

Writing on the University of Manitoba's EvidenceNetwork website, Dr. Ryan Meili of Canadian Doctors for Medicare notes that Alberta's embrace of private imaging clinics didn't solve wait time problems there.

Meili notes that although Alberta has the second highest number of diagnostic imaging scanners per person in Canada, it also suffers the longest wait times.

He points out that the real effect of private-pay imaging clinics is to give those with money an advantage in obtaining necessary surgery.

In the past, Ottawa has chosen not to get involved in the diagnostic imaging controversy, saying nothing when Alberta, British Columbia, Nova Scotia and Quebec went the private-pay route.

Stephen Harper's strategy for dealing with medicare was to ignore Ottawa's enforcement role and, when the opportunity presented itself, scale back federal funding.

That the provinces are responding by moving more into two-tier care is the logical result.

Trudeau's strategy is unclear. Except for a pledge – not yet kept – to devote an extra $3 billion to home care, he said little in the election campaign about health.

Any ideas he may have about his promised health-care accord with the provinces have yet to be revealed.

I don't recall him saying anything about the *Canada Health Act*.

Still, he can't avoid medicare for ever. No prime minister can. It may not dominate the front pages. But as far as most Canadians are concerned, it is still the country's number one political story.

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**Our Comment.** It's not only Justin Trudeau who is being put to the test! We're all going to have to face up to the challenge of creeping privatization of our health care system. *Élan*