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FOREWORD
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I am grateful to the editors of the Windsor Review of Legal and Social Issues (WRLSI) for the invitation to write this foreword. As I write, the effect of US President Trump's executive order banning citizens of 7 Muslim-majority states is being felt around the world, including in Windsor, a border city with deep, historic ties across the Detroit River. A comity and rules-based approach to continental and international affairs is unquestionably under fire.

One of the articles in this fine Digital Companion to the WRLSI, "After Paris: A New Era of Securitization of US & Canadian Refugee and Immigration Policy" directly interrogates this threat to the rule of law in global affairs from a "securitization" agenda rooted in fear and ignorance. Other articles examine transnational legal issues in the context of trade and illegal wildlife trade. Closer to home, two articles take education as a site to examine how the regulatory state addresses collective bargaining and mental health.

Each of these pieces, written by students and edited by students, give me hope that critical thinking and careful, deliberate research and communication will continue to challenge fear, ignorance, and decision-making unmoored from evidence in international and domestic affairs.

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AFTER PARIS: A NEW ERA OF SECURITIZATION OF U.S. & CANADIAN REFUGEE AND IMMIGRATION POLICY?

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> *It appears the greatest threat to our freedoms is posed not by the terrorists themselves but by our own government's response. Supporters argue that the magnitude of the new threat requires a new paradigm. But so far we have seen only a repetition of the old paradigm – broad incursions on liberties, largely targeted at unpopular noncitizens and minorities, in the name of fighting a war. What is new is that this war has no end in sight, and only a vaguely defined enemy, so its incursions are likely to be permanent.*
>
> Professor David D. Cole, Georgetown Law

I. INTRODUCTION

With the greatest loss of life on North American soil since Pearl Harbor, September 11, 2001 ushered in a dramatic alteration to the Canadian and American domestic and foreign policy agendas. Since the attacks, it has become generally accepted that broad incursions of our civil liberties are a prerequisite to enhanced national security. Jeremy Waldron conceptualizes national security as a balancing formula: on the one side is our perceived risk or assessment of the threat to our security; while on the other side is our liberty or freedom to act without government interference.[1] When the risk or perceived risk of our security is threatened, Waldron suggests that our willingness to maintain our liberties decreases. By accepting this liberty/national security dichotomy it is important to be cognizant of the potential for the establishment of security for the majority at the disproportionate expense of a minority group.[2]

This recent emphasis on national security following the September 11th attacks has had a profound and disproportionate impact on the development of United States and Canadian refugee and immigration policies. Scott Watson has characterized the approaches of governments to refugee and immigration policy into two different national security frameworks: a humanitarian approach and a securitization approach. The humanitarian approach focuses on the country's international commitments to refugees and on the net benefits of immigration, while also seeking to protect the national interest by ensuring terrorists and criminals do not gain access to the state.[3] This approach adheres to the normative rules established by international law and

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[1] Jeremy Waldron, "Security and Liberty: The Image of Balance" (2003) 11:2 J Political Philosophy 191 at 192.
[2] *Ibid* at 194.
[3] Scott D Watson, "Manufacturing Threats: Asylum Seekers as Threats or Refugees?" (2007) 3:1 J Intl L & Intl Relations 95 at 99.

domestic legislation.[4] In contrast, the securitization approach identifies existential threats to the state and implements extraordinary measures to combat this threat.[5] Securitization views migration as a credible security issue that threatens not only the safety of the country's citizens but also the country's ethnic, religious and economic fabric.[6] This approach challenges the normative rules of international law and domestic legislation.[7]

The September 11th attacks have shifted the balance towards a securitization framework of refugee and immigration policy in both the United States and Canada. The recent terrorist attacks in Paris, committed in part by a fraudulent refugee claimant, have further augmented the potential for securitization.[8] In the United States, members of Congress have called for the cessation of the influx of Syrian refugees. President Trump has even gone so far as to call for a ban on Muslims from entering the country. In Canada, the government's plan to take in 50,000 Syrian refugees by the end of 2016 has been met with significant public opposition and criticism.

In the wake of the Paris attacks and the ongoing Syrian Refugee Crisis, Waldron's liberty-national security formula weighs in the balance once again. Although much of the scholarly work focuses on the national security paradigm in refugee and immigration policy following September 11th, this paper will argue that refugee and immigration policy in the United States and Canada has long been framed around the exclusion of minority groups in the name of security. In light of this argument, this paper also seeks to compare and analyze the current Syrian refugee policy to previous policies and argue that the calls for greater securitization are unfounded. Part I of this paper surveys the history of American and Canadian refugee and immigration policy from the late 19th century to the Paris attacks; Part II examines the current security paradigm in relation to the Syrian refugee crisis and whether it requires revision; and Part III provides for overall recommendations and conclusions in light of these arguments.

II. FROM THE LATE 19TH CENTURY TO THE PARIS ATTACKS: THE SECURITIZATION OF REFUGEE AND IMMIGRATION POLICY

The United States and Canada have long used exclusionary practices to prevent the potential entry of persons considered national security risks. In the late 19th and 20th centuries, Chinese immigrants were excluded from both nations, and race-based quotes were used frequently. In the following years, Japanese-Americans and Canadians were unjustly interned, as the Cold War movement of communist-fleeing "freedom fighters" was on the rise. Most recently, Canada and the United States have implemented xenophobic policies following the September 11th attacks.[9] The make-up of refugees and immigrants permitted to enter both countries has consistently reflected "desirable" ethnicities, and geopolitical strategies of the relevant time period believed necessary to ensure the integrity of fundamental American and Canadian values. In each instance, the state enhanced its powers to prevent or diminish the

[4] *Ibid* at 96.
[5] *Ibid* at 97.
[6] *Ibid*.
[7] *Ibid* at 95-96.
[8] "Syrian Passport by Stadium Stolen or Fake, A.F.P. Reports", *The New York Times* (17 November 2015), online: <www.nytimes.com>.
[9] See generally Debra Black, "Canada's immigration history one of discrimination and exclusion", *Toronto Star* (15 February 2013), online: <www.thestar.com>; Alex Dudek, "All Americans Not Equal: Mistrust and Discrimination Against Naturalized Citizens in the US", *Huffington Post* (27 August 2016), online: <www.huffingtonpost.com>.

prospect of a national security threat by reducing the liberties of immigrants and refugees. This section will explore the history of the securitization of refugee and immigration policy dating back to the late 19th century through the Second World War, the Cold War, September 11th and the most recent policy responses following the Paris terrorist attacks.

a. Late 19th Century to Early 20th: Race-Based Quotas and the Fear of Anarchists, Revolutionaries and Aliens

From the late 19th century up to the Second World War, immigration control focused on race-based quotas and bans on certain Asian and European immigration under the justification that allowing these groups to enter would undermine fundamental American and Canadian values.[10] During this period, it was widely held that a country's right of exclusion and selection of immigrants was a consequence of national sovereignty.[11] In the United States, the 1889 Supreme Court decision *Chae Chan Ping v United States* (otherwise known as "*The Chinese Exclusion Case*") recognized the authority of the federal government to set immigration policy. The Court upheld legislation that forbid immigration of Chinese labourers into the United States, contrary to American treaties with China that encouraged immigration and granted privileges to Chinese immigrants.[12]

During this period, immigration law and policy in Canada shared a similar trajectory to the United States. While understanding immigration as an essential tool for industrial growth, the newly formed Confederation was also fixated on "safeguarding the developing nation from undesirable individuals based in race, nationality, economic, medical, criminal and security reasons."[13] An 1872 Amendment to Canada's *Immigration Act* provided the Governor in Council "where he deems it necessary, [to] prohibit the landing in Canada of any criminal, or other vicious class of immigrants."[14] Like in the United States, this power was used to restrict Chinese immigration, as a significant portion of Canadian society felt that "the Chinese way of living compromised the safety of other communities."[15]

Beginning in the early 20th century, the United States Congress established the Dillingham Commission to study the effects of migration to the United States.[16] Upon its completion in 1910, the Commission concluded that mass migration of Europeans was "damaging American culture and society, and thus, must be reduced."[17] Similar sentiments were felt in Canada. In 1910, the Canadian Parliament amended the *Immigration Act*, adding to the prohibited classes, "any person other than a Canadian citizen who advocated in Canada the

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[10] Sharryn J Aiken, "Manufacturing 'Terrorists': Refugees, National Security and Canadian Law" (2001) 19:3 Refuge, Canada's Periodical on Refugees 54 at 55 [Aiken, "Manufacturing Terrorists"].
[11] Molly Martin, "Refugee Relief and Resettlement During Armed Conflict: An Excuse for Programmatic Overhaul to Maximize National Security" (2012) 26:2 Geo Immigr LJ 405 at 410 [Martin].
[12] *Chae Chan Ping v United States* 130 US 581 (1889) (although the Chinese Exclusion Act was repealed in the 1950s, *Chae Chan Ping* has never been overruled); see also *Fiallo v Bell* 430 US 787 (1977) (the US Supreme Court noted that "our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control.").
[13] Aiken, "Manufacturing Terrorists", *supra* note 10 at 58.
[14] *Ibid* at 60.
[15] Watson, *supra* note 3 at 98.
[16] Jeremiah Jaggers, W Jay Gabbard & Shanna J Jaggers, "The Devolution of US Immigration Policy: An Examination of the History and Future of Immigration Policy" (2014) 13:1 J Pol'y Practice 3 at 6.
[17] *Ibid*.

overthrow by force or violence of the government."[18] In the United States, the Dillingham Commission resulted in the passing of the *Immigration Act of 1917* which banned a long list of "undesirables" from entering the country, including, but not limited to: "homosexuals," "criminals," "all persons mentally or physically defective," and "anarchists."[19] Additionally, the law established the Asiatic-Barred Zone, which excluded immigrants from Asia and the Pacific Islands.[20]

Following the Russian Revolution in 1917 and increasing labour unrest, both the United States and Canada introduced policies to manage the Red Scare – the potential threat of Soviet immigrants and revolutionaries. Congress passed the *Emergency Immigration Act of 1921* that introduced a formulaic approach to significantly decrease the number of European immigrants. The number of immigrants that could be admitted from any country was restricted to 3 per cent of the population living in the United States as established in the Census of 1910. In Canada, the *Immigration Act* was also amended once again. The amendment widened the scope of undesirable persons to include, "anyone who advocates or teaches the unlawful destruction of property" and "anyone who is a member of or affiliated with any organization entertaining or teaching the disbelief in organized government." The government used this broad definition to bar entry and deport hundreds of suspected communists and union organizers.[21]

b. The Second World War: Ethnic and Racial Priorities Alongside National Security Discourse

Immigration and refugee policy leading up to and during the Second World War represented a culmination of ethnic and racial priorities, alongside considerations of national security. During this period, European Jews, Japanese-Americans and Japanese-Canadians, in particular, were deprived of significant civil liberties in the name of national security. Historians have argued that both American and Canadian immigration policies contributed to the catastrophic fate of European Jews during the Holocaust.[22] Between 1933 and 1945, the United States took only 200,000 Jews into its borders, while Canada accepted fewer than 5,000.[23] Canada's record during this time period has been described as "the worst of all possible refugee-receiving states."[24] Despite the anti-Semitic undertones in the decision to keep Jewish people out before the war erupted, there was also a real concern that accepting Jewish refugees would damage diplomatic relations with Germany.[25]

Following the Japanese attack on Pearl Harbour in December 1941, both American and Canadian governments became concerned that Japanese-Americans and Japanese-Canadians could become saboteurs, despite a lack of substantiated evidence to support this view. In the United States, Presidential Executive Order 9066 provided the military with the authority to "remove from designated areas of persons whose removal is necessary in the interests of national

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[18] *The Immigration Act,* SC 1910, c 27, s 41.
[19] *Immigration Act of 1917*, Pub L No 301, § 3, 39 Stat 874 at 875-76.
[20] Jaggers, *supra* note 16 at 7.
[21] Aiken, "Manufacturing Terrorists", *supra* note 10 at 61.
[22] Irving Abella & Harold Trope, *None is Too Many: Canada and the Jews of Europe, 1933-1948* (Toronto: University of Toronto Press, 2012) at xx.
[23] *Ibid*.
[24] *Ibid*.
[25] Martin, *supra* note 11 at 410.

security."[26] In Canada, the Order-in-Council Administrative Order 40-46 under the *War Measures Act* "gave the government the power to arrest, detain, exclude or deport persons when it was 'necessary or advisable for the security, defence, peace, order, or welfare of Canada."[27] In total, the United States detained approximately 125,000 Japanese-Americans while 22,000 Japanese-Canadians were affected.[28] Neither the orders in the United States nor Canada distinguished between those who were born in their respective countries and those who were not. Nearly 80,000 of those detained in the United States were born in America while over 13,000 had been born in Canada. This resulted in the internment of many Americans and Canadians who had few ties to the countries with whom the Allied powers were at war. No Japanese-Canadian was ever charged with treason or sabotage. Although both the American and Canadian orders were challenged in court, the Supreme Courts in both nations upheld the constitutional validity of the measures.[29] Since then, both the United States and Canadian governments have formally apologized and paid reparations to surviving detainees.[30]

c. The Aftermath of the Second World War, the Cold War to September 11: Immigration and Refugee Policy as a Geo-Political Strategy

Following the conclusion of the Second World War and the mass displacement of millions of people as a result, the United Nations formed the *High Commission of Refugees* (*UNHCR*) in 1951. The Commission developed the *Refugee Convention Relating to the Status of Refugees*, which defined "refugee" and promulgated international regulations on the treatment of refugees. In 1967, the *Protocol Relating to the Status of Refugees* was introduced to remove the geographic and temporal limits that had been developed in response to the unique European displacements following the World War. Both the United States and Canada moved slowly to adopt the 1951 Convention and 1967 Protocol – Canada adopted these instruments in 1969 and the United States in 1968.[31] In the years that followed the Second World War, ideological considerations and the geopolitics of the Cold War heavily informed American and Canadian response to the international refugee crisis.

In 1950, the United States Congress passed the *Internal Security Act*, which specifically banned communists from entering the country.[32] In Canada, the *Immigration Act of 1952* granted the Minister of Citizenship and Immigration broad powers over decisions of admission and

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[26] "Japanese Internment: Encyclopedia of United States National Security" in *Encyclopedia of United States National Security,* by Richard J Samuels (Thousand Oaks: SAGE Publications Inc, 2005) at 2.
[27] Charles Ungerleider, "Immigration, Multiculturalism, and Citizenship: The Development of the Canadian Social Justice Infrastructure" (1992) 24:3 Can Ethnic Studies 7 at 9.
[28] *Ibid*.
[29] See e.g. *Korematsu v United States*, 323 US 214 (1944); *Co-operative Committee on Japanese Canadians v Canada (Attorney General)* [1946] SCR 48, [1946] 3 DLR 321.
[30] See generally "20th Anniversary of the Canadian Government's Formal Apology for Japanese Internment during World War II", *Immigration, Refugees, and Citizenship Canada* (29 October 2008), online: <www.cic.gc.ca>; Bilal Qureshi, "From Wrong to Right: A US Apology for Japanese Internment", *National Public Radio* (9 August 2013), online: <www.npr.org>.
[31] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954, accession by Canada 4 June 1969, accession by USA 1 Nov 1968).
[32] Michael C Lemay, *Guarding the Gates: Immigration and National Security* (London: Praeger Security International, 2006) at 25.

deportation.[33] In both countries, there was a perception that communist subversives were immigrating as refugees to infiltrate the US and Canadian governments.[34] Cold War-driven foreign policy led Congress to enact a special refugee statute, entitled the *Refugee Relief Act of 1953*.[35] The Act specifically defined "refugees" as victims or opponents of communism. Those fleeing the persecution of communism were deemed "freedom fighters" with a special claim and low security risk upon resettlement.[36] These refugees were required to condemn communism to be admitted to the United States. If there was any suggestion that the refugee was unable to do so, they were returned to their country of origin.[37] Nearly 1.6 million communism-fleeing refugees from Cuba, to Hungary, to Czechoslovakia, to Hong Kong and Vietnam, entered the United States from the end of the Second World War to 1980.[38]

The inherent ideological biases of the immigration screening system were also apparent in Canada. Whitaker, Kealey and Parnaby note:

> The sharp contrast between the extraordinary welcome and assistance accorded the displaced persons fleeing the Red Army in the late 1940s, and the refugees from Hungary in 1956 and Czechoslovakia in 1968, on the one hand, and, on the other, the ill-tempered delays and prevarications surrounding the acceptance of refugees from the murderous Pinochet coup against a democratically elected leftist government in Chile in 1973. Right-wing refugees from Communist oppression were exemplary; left-wing refugees from right-wing oppression were suspects.[39]

In 1979 and 1980, Canada would also welcome 60,000 Vietnamese "boat people" as refugees. This represented one of the largest resettlement that the country had ever accepted.[40] While Canada received international praise for its efforts, these efforts were informed by ideological and security considerations just as they had informed the government's decision to provide refuge to people fleeing other communist regimes. Although this period suggests a shift to a humanitarian approach to refugee and immigration policy, considering the geopolitical context of the Cold War, both countries' policies were "inextricably linked to national security and [did] not necessarily [represent] a heightened interest in human rights."[41]

d. September 11th: An Intensification of Securitization

Since the September 11th attacks, immigration and terrorism have become inextricably linked to national security. The perpetrators of the attacks were foreigners of a visible ethnic and

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[33] Freda Hawkins, *Canada and Immigration: Public Policy and Public Concern*, 2nd ed (Montreal: McGill-Queen's University Press, 1988) at 102.
[34] Martin, *supra* note 11 at 410.
[35] Lemay, *supra* note 32 at 29.
[36] *Ibid* 25.
[37] Martin, *supra* note 11 at 411.
[38] Lemay, *supra* note 32 at 29.
[39] Reg Whitaker, Gregory S Kealey & Andrew Parnaby, *Secret Service: Political Policing in Canada from the Fenians to Fortress America* (Toronto: University of Toronto Press, 2012) at 199.
[40] Michael Enright, "The Vietnam War: Canada's Role, Part Two: The Boat People" *CBC Radio* (30 April 2015), online: <www.cbc.ca>.
[41] Martin, *supra* note 11 at 411.

religious group who entered the country through legal means to murder over 3,000 civilians. The attacks on the World Trade Center marked the greatest loss of life on American soil since the attacks on Pearl Harbor nearly 60 years prior.[42] Following the attacks, both the United States and Canada introduced a series of legislative, regulatory and administrative measures that intensified the securitization of refugee and immigration policy.

Within six weeks of the attacks, the United States Congress overwhelmingly approved the *USA Patriot Act*. The Act provided the Bush Administration with a broad range of powers to combat terrorism. Despite vigorous calls from civil liberties organizations at both ends of the political spectrum, a complex, far-reaching piece of legislation that spanned 342 pages was passed with no public hearings, debate, conference, or a single issued committee report.[43] The new powers provided the government with:

> Expanded surveillance, the use of informants, revisions to the use of search and seizure, use of wiretaps, arrests, interrogations and detentions of suspected terrorists, uninhibited by the prior web of laws, judicial precedents and administrative rules proponents argued had hamstrung law enforcement officials in dealing with the new terrorist threat.[44]

The Bush Administration argued that only with these sweeping new powers could the Department of Justice target and penetrate al-Qaeda cells.[45]

Included in these powers were measures that targeted immigrants and refugee groups. Tools such as "preventive arrests, pre-charge detentions, detention of suspected terrorists for immigration violations, and closed deportation hearings to the public" all disproportionately impacted immigrants.[46] Nearly 800 people were arrested and detained following the immediate aftermath of the attacks.[47] Further, the United States implemented a call-in registration program for men from select Middle-Eastern and South Asian countries who had entered the United States on temporary visas to appear for registration, photographs and interviews.[48]

In the days following the attacks, the refugee resettlement program was completely shut down as it was perceived as being particularly vulnerable to security problems. Two weeks after the attacks, the United States refused to accept a plane full of pre-screened and approved Afghan refugees that had arrived at the JFK airport in New York.[49] In the three years prior to September 11th, the United States had an average resettlement rate of 75,000 refugees per year.[50] In the following two years, the average plummeted to 27,000 refugees per year.[51] At an administrative level, the Immigration and Naturalization Service (INS) – which had been an agency within the Department of Justice for 70 years – was folded into the newly created Department of Homeland

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[42] Sean Alfano, "War Casualties Pass 9/11 Death Toll", *CBS News* (22 September 2006), online: <www.cbsnews.com> (2,390 people died at Pearl Harbor compared to 2.973 who died on September 11, 2001).
[43] Lemay, *supra* note 32 at 209.
[44] *Ibid*.
[45] Michiko Kakutani, "Unchecked and Unbalanced", *New York Times* (6 July 2007), online: <www.nytimes.com>.
[46] Donald Kerwin, "The Use and Misuse of 'National Security' Rationale in Crafting US Refugee and Immigration Policies" (2005) 17:4 Intl J Refugee L at 751.
[47] *Ibid* at 760.
[48] *Ibid*.
[49] Martin, *supra* note 11 at 405.
[50] "Refugee Admission Statistics", *US Department of State* (2016), online: <www.state.gov/j/prm/releases/statistics>.
[51] Martin, *supra* note 11 at 406.

Security (DHS). This reorganization was a marked transition to thinking about refugee and immigration policy as an integral component of national security. It is clear from the DHS's mission statement and budgetary allocations that there was a reduced emphasis on immigration and citizenship and a greater emphasis on the protection of the homeland.[52]

In Canada, the government responded to the September 11th attacks with a series of anti-terrorist measures that mimicked many of the United States' actions. The Canadian government introduced Bill C-36, or the *Anti-Terrorism Act*, which was extremely similar to the *USA Patriot Act*.[53] The Act provided police and intelligence forces with extraordinary powers that were previously only used in a time of war.[54] Like the creation of the Department of Homeland Security in the United States, the Canadian government created a new Department of Public Safety and Emergency Preparedness and established the Canada Border Services Agency (CBSA) with a similar goal to achieve better coordination amongst security agencies and improve information sharing.[55]

Canada also introduced the new *Immigration and Refugee Protection Act* (*IRPA*), "expanding the powers of immigration officers to provide for the examination of non-Canadians, not only on entering Canada, but at any time while they were living in Canada."[56] Further, the government's budget allocation for immigration detention was significantly enhanced, resulting in an increase in the number of detentions.[57] Between 2001 and 2002, there was an average of 455 people detained at any given moment across the country. In contrast to the 1990s, by 2005, an average of 43% of all immigration detainees were refugee claimants.[58] Critics in both Canada and the United States argued that both countries were violating their international obligations and infringing upon human rights. Despite numerous constitutional challenges, Coutui and Giroux argue that following the September 11th attacks, the judiciary has shown significant deference to the power of the federal government.[59] In *Suresh,* for example. in affirming Canada's decision to deport a refugee claimant, the Supreme Court noted that: "international conventions must be interpreted in light of current conditions. It may have once have made sense to suggest that terrorism did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid."[60]

Despite these changes, Canada did not completely adopt US-style immigration enforcement practices. Several high-profile first-hand accounts of Canadian citizens facing torture at the hands of American authorities (Maher Arar, Benamar Benatta, Omar Khadr) lessened the appetite of the Canadian public to adopt such measures.[61] In fact, the Canadian government openly criticized the United States' call-in registration of Middle Eastern and South

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[52] Lemay, *supra* note 32 at 206.
[53] Alexander Moens & Martin Collacott, *Immigration Policy and the Terrorist Threat in Canada and the United States* (Toronto: Fraser Institute, 2008) at 78.
[54] *Ibid*.
[55] Sharryn J Aiken, "National Security and Canadian Immigration: Deconstructing the Discourse of Trade-Offs" in Francois Crépeau ed, *Les migrations internationals contemporaines: Une dynamique complexe au coeur de la globalization*, Montreal: Presses de l'Universitie de Montréal, 2009) 172 at 191 [Aiken, "National Security"].
[56] *Ibid* at 181.
[57] *Ibid* at 184.
[58] *Ibid* at 185.
[59] Michael Coutu & Marie-Helene Giroux, "The Aftermath of 11 September 2001: Liberty vs Security before the Supreme Court of Canada" (2006) 18:2 Intl J Refugee L 313 at 328.
[60] *Suresh v Canada (Minister of Citizenship & Immigration)* 2002 SCC 1 at para 87, [2002] 1 SCR 3.
[61] Aiken, "National Security", *supra* note 55 at 190.

Asian men as discriminatory.[62] In response to these actions, the Canadian government issued a travel advisory warning Canadian citizens who were born in Iran, Iraq, Libya, Sudan, Syria, Pakistan, Saudi Arabia and Yemen to "consider carefully whether they should attempt to enter the United States for any reason, including transit to or from third countries."[63]

Nevertheless, in 2004, the Canadian government released a report entitled "Securing Open Society: Canada's National Security Policy" that assessed Canadian refugee and immigration policy following September 11th. The report suggested that more should be done to securitize and reform the refugee system. The government noted that new measures were required to "better provide protection to those genuinely in need and to more efficiently identify and remove those individuals who may be attempting to abuse our refugee and immigration system."[64]

e. After the Paris Attacks: A New Era in Securitization?

On November 13, 2015, a series of coordinated suicide bombings and mass shootings took place across Paris, killing 130 people. The attackers were members of the Islamic State of Iraq and the Levant (ISIL), who targeted French civilians as retaliation for France's participation in airstrikes on Syria and Iraq. One of the suicide bombers carried a Syrian passport, which indicated that they had entered Europe fraudulently as a refugee. In the days following the Paris Attacks, nearly 30 State Governors and 1 Provincial Premier called for the cessation of the inflow of Syrian refugees into the United States and Canada. In response to concerns about the refugee screening process, and in the name of national security, the United States Congress passed the *American Security Against Foreign Enemies* (*SAFE*) *Act*. The Act requires the FBI, along with Secretary of Homeland Security and the Director of National Intelligence, to certify to Congress that each refugee from Iraq and Syria is not a security threat.[65] Further, it requires the Department of Homeland Security Inspector General's Office to assess refugee approvals independently.[66] The result of this legislation is to impose new certification requirements that effectively prevent refugees from entering the country. Therefore, the Act prevents the United States from meeting its previous commitment to the *UNHCR* to allow 10,000 refugees to enter the country by the end of 2016.[67] The recent calls by President Trump to ban all Muslims from entering the United States have further intensified the securitized anti-refugee rhetoric.

Unlike their converging approaches following September 11th, both the United States and Canada have strongly diverged in the handling of the Syrian Refugee Crisis. In stark contrast, the Canadian government has reaffirmed to the *UNHCR* its commitment to take in 50,000 refugees by the end of 2016.[68] This policy position has not come without significant criticism from the Official Opposition and members of the public and media. However, for the time being, while the United States moves towards a hardening of its securitization approach to refugee and immigration policy, Canada appears to be headed towards a humanitarian approach.

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[62] *Ibid* at 189.
[63] *Ibid*.
[64] *Ibid* at 192.
[65] US, Bill HR 4038, *American SAFE Act of 2015*, 114th Cong, 2015, s 2(a).
[66] *Ibid*, s 2(c).
[67] Laura Koran, "Obama pledge to welcome 10,000 Syrian refugees far behind schedule", *CNN* (1 April 2016), online: <www.cnn.com>.
[68] Terry Pedwell, "Canada could welcome up to 50,000 Syrian refugees by the end of 2016, governor general says", *National Post* (2 December 2015), online: <news.nationalpost.com>.

III. A GREATER NEED FOR SECURITIZATION?: EXAMINING THE CURRENT SCREENING PROCESSES

At the core of the securitization approach is the belief that the modifying civil liberties for refugees and immigrants will decrease the potential for terrorism.[69] As the previous examples in the history of immigration policy have shown, an increase in the power of the state does not necessarily prevent or diminish the prospect of terrorism. As the United States Congress moves to implement new security measures to refugee screening, and the Canadian government defends its screening processes to vocal opposition, this section will explore the refugee screening processes in both countries and will examine criticisms that suggest the screening process leaves both Canada and the United States vulnerable to attack.

a. The Canadian Refugee Screening Process

Canada has pledged to accept up to 50,000 refugees by the end of 2016 – the largest influx of refugees to Canada in the past 30 years.[70] The Government of Canada has argued that "protecting the safety, security and health of Canadians and refugees is a key factor in guiding [government] actions throughout [the Syrian Refugee Crisis]."[71] Facing backlash from members of the opposition and the media regarding the refugee screening process, Canada has defended the process as rigorous and has opted to initially identify vulnerable, low-risk refugees for immigration, such as women, complete families and members of the LGBTI community.[72] Each individual Syrian refugee that Canada welcomes will undergo a multi-layered screening process that consists of six stages: refugee identification; immigration and security interviews; identity and document verification; health screening; identity confirmation; and identity verification upon arrival.[73]

At the first stage, the *UNHCR* in Jordan and Lebanon will identify and prioritize vulnerable refugees who are a lower security risk to Canada.[74] At the second stage, applicants will be interviewed to confirm and validate information provided in the application process.[75] Nearly 500 Canadian officials have been deployed to Jordan, Syria and Lebanon to be a part of this screening process.[76] At the third stage, identity and document verification takes place.[77] Visa officers will collect biographical and biometric information, including fingerprints and digital photos. This information will then be verified against immigration, law enforcement and security databases. At the fourth stage, as per the *Quarantine Act*, a full medical exam will be conducted prior to the refugee's arrival in Canada.[78] Refugees will be further screened for signs of illness

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[69] See generally Watson, *supra* note 3 at 97-98.
[70] Steven Chase & Daniel LeBlanc, "Up to 50,000 Syrian Refugees May Enter Canada by the End of the Year", *The Globe and Mail* (3 December 2015), online: <http://www.theglobeandmail.com>.
[71] Ministry of Citizenship, Immigration and Refugees, "#WelcomeRefugees: Security and health screening" (21 December, 2015), online: <http://www.cic.gc.ca>.
[72] *Ibid* at "we focused".
[73] *Ibid* at "refugee identification".
[74] *Ibid*.
[75] *Ibid* at "immigration and security interview".
[76] *Ibid* at "approximately 500 officials".
[77] *Ibid* at "identity and document verification".
[78] *Ibid* at "health screening".

upon arrival. If a refugee does not pass a security and medical check they will not be issued permanent resident visas. Finally, at the fifth and sixth stage, the identity of the refugees will be confirmed by the CBSA, and then reconfirmed upon arrival in Canada.[79]

b. The American Refugee Screening Process

The United States has pledged to take in at least 10,000 refugees by the end of 2016.[80] Since the Syrian crisis began in 2011, the United States has admitted approximately 2,200 Syrian refugees, representing approximately 0.5% of the 332,000 refugees that have come to the United States during the same period.[81] Although former President Obama threatened to use his powers to veto any legislation that restricts the passage of refugees into the United States, with the recent introduction of the *SAFE Act* – which effectively bars refugees from entering the country – it remains to be seen if the both the House and the Senate can muster a two-thirds majority in each legislative body to overcome the President's veto. During his presidency, Barack Obama responded to critics by proclaiming that the refugee screening process was rigorous, and chided Congress for being afraid of "widows and orphans."[82] Like Canada, the United States is seeking only to admit the most vulnerable refugees. Each Syrian refugee that the United States welcomes will undergo an enhanced review, within the guise of a six-step screening process: refugee identification; processing by the Resettlement Support Center (RSC); biographic security checks; interviews with the Department of Homeland Security and United States Citizenship and Immigration Services; biometric security checks; and medical checks.[83]

At the first stage, similar to Canada, the *UNHCR* identifies and refers refugees to the United States. At the second stage, applicants are received by the federally-funded RSC, which collects identifying documents, creates an application file and compiles information to conduct biographic security checks.[84] At the third stage, security checks begin with enhanced interagency security checks.[85] The National Counterterrorism Center/Intelligence Community, the FBI, the Department of Homeland Security and the State Department screen every refugee candidate, looking for information that the individual is a security risk. A refugee that may have connections to "bad actors" or has outstanding warrants or criminal violations will be denied. Further, the Department of Homeland Security conducts an enhanced review of Syrian cases that are referred to the USCIS Fraud Detection and the National Security Directorate for review. At the fourth stage, the DHS and USCIS interviews are conducted by specially trained USCIS officers.[86] These interviews conclude by taking fingerprints, which are used for a biometric check. If fingerprinting results raise new questions, applicants will be re-interviewed and put through additional security checks. The USCIS will place a case on hold if necessary. At the fifth

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[79] *Ibid* at "identity confirmation".
[80] Koran, *supra* note 67.
[81] US, *The Syrian Refugee Crisis and its Impact on the Security of the US Refugee Admissions Program,* 114th Cong (Washington, DC: United States Government Publishing Office, 2016) at 62 [Rpdriguez] (statement of Director of USCIS, Leon Rodriguez).
[82] Gregory Korte, "Critics of Syrian refugees are 'scared of widows and orphans,' Obama says", *USA Today* (18 November 2015), online: <http://www.usatoday.com>.
[83] Amy Pope, "Infographic: The Screening Process for Refugee Entry into the United States", *The White House* (20 November 2015), online: <www.whitehouse.gov>.
[84] *Ibid*.
[85] *Ibid*.
[86] *Ibid*.

stage, the biometrics that have been collected will be run against the FBI, DHS and US Department of Defense's databases. Finally, refugees are medically screened and receive two final screens from the US Customs and Border Protection's National Targeting Center-Passenger and the Transportation Security Administration's Secure Flight program before boarding a plane to the United States.

c. Criticisms of the Screening Process

Both American and Canadian government officials have expressed confidence in the Syrian refugee screening process. The Director of the USCIS has declared the screenings as "the most rigorous process in the history of refugee screening."[87] The Minister of Public Safety and Emergency Preparedness has emphasized that all refugees will undergo "robust layers of security screening … up to the standards that we would expect in Canada."[88] Yet, in the days following the Paris Attacks, nearly 53% of Americans and 54% of Canadians opposed their government's plan to resettle refugees within the proposed timelines.[89] In the United States, high-ranking immigration and refugee government officials received a significant number of tough questions by members of the House Judiciary Subcommittee on Immigration and Refugee Policy. Similarly, in Canada's first session of the newly elected Parliament, members of the opposition parties questioned the federal government's commitment to national security in all but two of the Question Periods.[90] The criticisms of the screening process have focused on three primary areas of concern: the lack of autonomy in refugee referrals; conflicting state/federal or provincial/federal interests; and significant information gaps in intelligence.

i. Lack of Autonomy from UNHCR Referrals

The screening process for both countries begins with the referral of candidates by the *UNHCR*. The applicant is required to fill out the Refugee Referral Form which contains the grounds for their refugee claim and biographical information. Some critics of this referral process argue that US and Canadian officers may be referred persons that do not meet the strict definition of the Convention refugee but rather fall under the *UNHCR*'s humanitarian mandate, posing potential security risks to officers and allowing "bad actors" to infiltrate the system. In fact, of the 7,000 refugees referred to the United States in the last year less than one third of those proceeded to the subsequent stages of the screening process because of security concerns.[91]

This lack of autonomy, however, serves a practical purpose as the *UNHCR* has greater resources to interview more people, creating a buffer zone before refugees meet Canadian and American screening officers. Should the US and Canadian governments wish to take greater control of the referral process, more resources will have to be invested into the first screening phase. With current estimates that the refugee program will cost nearly $1.2 billion dollars over

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[87] Rodriguez, *supra* note 70 at 80.
[88] *House of Commons Debates*, 42nd Parl, 1st Sess, No 148 (8 December, 2015) at 1425 (Hon Ralph Goodale), online: <www.parl.gc.ca>.
[89] Eric Bradner, "Poll: Americans oppose Syrian refugees in U.S", *CNN* (18 November, 2015), online: <http://www.cnn.com>; Aileen Donnelly, "Majority of Canadians oppose Trudeau's plan to bring 25,000 Syrian refugees over in just six weeks: poll", *National Post* (18 November 2015), online: <www.nationalpost.com>.
[90] Stephanie Levitz, "Opposition parties decry Liberals' approach to parliamentary security committee" *National Post* (1 March 2016), online: <news.nationalpost.com>.
[91] Rodriguez, *supra* note 70 at 80.

six years in Canada, it is unclear whether there will be either political or financial capital to bear additional costs.[92]

ii. Balancing Federal and State/Provincial Interests

Despite thirty State Governors and one Provincial Premier declaring their states and provinces as unwelcoming to refugees, in reality, these statements have little legal force. In both Canada and the United States, immigration is a matter of federal concern. The federal government in both countries has the legal right to resettle refugees across the country. However, as Anne Richard, the Assistant Secretary of State for Population, Refugees & Migration, conceded, there is a practical and legal solution to this problem.[93] While the federal government has the constitutional authority to resettle refugees, the program can only function with the support of local communities at the city and town level to ensure the effective resettlement and integration of refugees.[94]

Some of the major concerns at the State and Provincial level are that if even a few individuals wish to do harm, the results could be devastating. For example, in 2010, the FBI stopped a bomb plot by two Iraqi refugees who were admitted into the United States and settled in Bowling Green, Kentucky. Despite their fingerprints having been found on an Improvised Explosive Device (IED) in Iraq, the databases between the different agencies did not overlap and their safe passage was permitted into the country. Officials have argued that because of these mistakes, agencies have made significant strides to share information and vastly improve the screening process.[95] Even still, some local representatives have concerns that once refugees are resettled, the federal government fails to keep track of and share the whereabouts of these individuals to state and local officials. Assistant Secretary Richard noted that while refugees are tracked over the first three months, they are "treated like ordinary Americans once they have become permanent residents."[96] Similar concerns about the whereabouts of immigrants and refugees in Canada have also been raised. In a 2008 Parliamentary Information and Research Service Report, it was estimated that the whereabouts of nearly 41,000 immigrants and denied refugee claimants was unknown.[97]

While 99% of refugees in both countries are law-abiding citizens, informational gaps between federal and state counterparts have exacerbated fears about potential terrorist threats. Recent shootings in the United States by descendants pf the Middle East have only compounded this problem.[98] With the constant media coverage highlighting the potential for terror at any moment, it appears that American and Canadian fear of terrorism seems to be at its peak since September 11th. Although former President Obama and current Prime Minister Trudeau have

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[92] Stephanie Levitz, "Price tag of Liberal's refugee plan to hit $1.2B over six years: government document", *National Post* (20 November 2015), online: <news.nationalpost.com>.
[93] Rodriguez, *supra* note 70 at 73.
[94] *Ibid*.
[95] *Ibid* at 89-90.
[96] *Ibid* at 72.
[97] Parliamentary Information and Research Service of the Library of Parliament, *Canada's Immigration Program* (Revised 10 September, 2008) at 24 (Chair: Penny Becklumb) in *Parliamentary Information and Research Service*, online: <www.parl.gc.ca>.
[98] AJ Willingham, "A visual guide: Mass shootings in America", *CNN* (21 June 2016), online: <www.cnn.com> (For example, a 2016 shooting at Pulse Nightclub in Orlando, FL resulted in 49 deaths and was committed by Omar Mateen, who was an American citizen of Afghan heritage).

urged the public not to fall victim to fear, and while the likelihood of an actual attack is marginal, it is impossible to ignore the fact that many individuals have a genuine fear of a terrorist threat. The government must do more to reassure the public.

Some legislators have suggested that while a three-month tracking period may have been sufficient for previous waves of refugees, increased monitoring of refugee populations is required. However, these types of policies will likely face constitutional challenge in both countries. The Equal Protection Clause of the 14th Amendment of the US Constitution prohibits distinctions made on the basis of alienage and national origin. These types of distinctions face a strict scrutiny analysis by the courts and it is unlikely that policies that make these distinctions will pass constitutional muster. In Canada, sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* provide that all people have the right to life, liberty and security of the person, along with the right to be free from unreasonable search or seizure.[99] Along with the *Privacy Act* that regulates how the government collects, uses and discloses personal information, there are clearly significant barriers to policies that might monitor Canadian citizens based on their former refugee status. Ultimately, this debate harkens to Waldron's balancing of security and liberty interests. On the one hand, Canadian citizens require substantiated reassurances of their safety. On the other hand, many of these refugees will eventually become citizens and deserve the inalienable rights held by citizenship, including the freedom of privacy.

iii. Gaps in Intelligence

Failed states like Syria pose a unique challenge to intelligence gathering and subsequent refugee screening. Neither the United States nor Canada is operating within Syria. This is in contrast to the US presence in Iraq and Canadian presence in Afghanistan over the last twelve to thirteen years, which has allowed for significant intelligence gathering and identification of bad actors. In his testimony before the House Judiciary Committee, the FBI Director James Comey noted that, "the only thing we can query is information we have – if we have no information on someone, there will be no record there and it will be challenging."[100] The FBI Director also emphasized that previous missteps in vetting, including the incident with the two Iraqi refugees in Kentucky, have helped improve screening and intra-agency cooperation. Ultimately, the lack of intelligence on the ground in Syria renders traditional intelligence data less robust than in Iraq and Afghanistan. The intelligence community has assured the government that they are attempting to mitigate their risk, however, "absolute assurances" cannot be provided.[101]

These gaps in intelligence pose a significant challenge to countries seeking to reassure their citizens that refugees from Syria do not pose a security risk. However, considering the demographics of the refugee population in Syria and the focus of both countries on taking the most vulnerable refugees, this risk can likely be mitigated. Nearly 76.6% of the 12 million Syrian refugees are women and children;[102] over half are children.[103] As the former Immigration and Refugee Board Chair Peter Showler has noted, "security concerns have been blown out of proportion, as Canada is likely to accept children and the single mothers rather than the migrants

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[99] Ss 7-8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[100] "Goodlatte: Why Does the President Ignore Concerns About Syrian Refugees?" *House of Representatives Judiciary Committee* (27 October 2015), online: <www.judiciary.house.gov>.
[101] *Ibid*.
[102] World Vision Staff, "What You Need to Know: Crisis in Syria and the Impact on Children" (10 August 2016), *World Vision* (blog), online <http://www.worldvision.org>.
[103] *Ibid*.

flowing into Europe."[104] Despite the United States' concerns about security measures, 10,000 refugees represents a commitment of only one tenth of a percent of the total Syrian refugee population. Similarly, Canada's commitment to take 50,000 refugees represents less than half of a percent. Since so many of the refugees are children and members of vulnerable populations that do not pose a security threat to the country, the call for greater screening measures has clearly blown the security risk out of proportion.

IV. RECOMMENDATIONS & CONCLUSION

The history of refugee and immigration policy in the United States and Canada has been marred by unsubstantiated beliefs that undesirable immigrants and refugees adversely impact the security of the nation. Since the September 11th attacks, the balance of the liberty-national security formula has been tipped heavily in favour of a securitization framework. Most have accepted that a loss of liberty will result in the increase of national security. Fear and ignorance have driven policy changes in refugee and immigration policy and continue to do so in today's new paradigm and recent terrorist events.

The policy reactions to the Paris Attacks alongside the recent anti-Muslim rhetoric in the United States is reminiscent of the United States' reaction to European Jews attempting to enter the country prior to the beginning of the Second World War. Knee-jerk reactions and fear of the "other" have driven US refugee and immigration policy to make broad categorizations of all Middle Eastern refugees. Despite a rigorous screening system, the United States refuses to accept a mere 10,000 refugees who have suffered traumatic losses at the hands of ISIL and the Assad regime. While Canada's direction towards a more humanitarian approach is commendable, it is important not to forget that much of Canada's refugee and immigration policy has mimicked that of the United States. The 50,000 refugees that Canada has accepted still only represent half a percent of the total Syrian refugee population. In comparison, to the one million refugees welcomed in Germany, 50,000 is miniscule.

Canadians and Americans are understandably afraid in the current global climate of terrorism. Sovereign nations have a right to protect their citizens and provide assurances so that their people can feel safe. However, this can be done not by rejecting refugees and closing the borders to immigrants, but by better educating the population about the nature of the ongoing refugee crisis and what the country is doing to safeguard its population against terrorism. Despite being a federal issue, the federal government must recognize that while it has the right to settle refugees, without the local states, provinces, cities and towns as willing partners, refugees cannot resettle and become full-fledged members of society. Additionally, it may become necessary to track the integration of Syrian refugees in Canada and the United States for longer than it has been done before. While this raises unique constitutional questions, in the interests of ensuring that refugees are able to make their way to safety in North America, this may be an adequate trade-off for now. Ultimately, nothing in life is risk free. Canada and the United States, in particular, must be careful not to repeat their previous mistakes and to remember that both countries are nations built on immigrants.

[104] Carol Off & Jeff Douglas, "Thorough' refugee screening puts Canada at low security risk, says former refugee official", *CBC* (16 November 2015), online: <http://www.cbc.ca>.

A SILENT CRISIS: ADDRESSING THE GLOBAL ILLEGAL WILDLIFE TRADE WITH EXISTING INTERNATIONAL LEGAL MECHANISMS

Julio Paoletti*

I. INTRODUCTION

The story of international law is one of "slow, incremental progress towards a less desperately barbaric human condition."[1] This story is filled with frustrating chapters, but also with promise. Within only a century, humankind has lurched beyond parochial concerns to foster a promising global consciousness largely facilitated by the United Nations (UN). It is easy to overlook international law's recent successes. However, states must resist such a temptation, for the greatest threats to humanity's future are now global and therefore require global responses. International law's existing framework allows states to cooperatively address common concerns, which is why humanity must not lose faith, but endeavor to use international law as effectively as possible. This paper deals with only one global crisis facing humanity, as well as the international legal tools that accompany it: the global illegal wildlife trade.

Part 1 surveys the nature and impacts of the global illegal wildlife trade, and demonstrates why states must take action. Part 2 analyzes existing international legal tools that can be used to address the problem. Part 3 considers whether international law informs how states should respond to the problem, and whether Canada's approach can serve as a model.

The global illegal wildlife trade is a complex phenomenon with diverse drivers, and none of its available international legal instruments can address all of the factors that collectively cause the problem. The problem can only be tackled through a holistic approach that incorporates transnational criminal and international environmental legal instruments, along with international capacity-building mechanisms. International law is not perfect, but it offers a workable framework for global cooperation and problem-solving, which states must use to work together. However, much depends on states nationally implementing and deploying the legal tools currently at their disposal. Unlike many other states, Canada has implemented the relevant legal mechanisms in robust domestic legislation, and is therefore a model for other states in this respect.

II. WHY SHOULD WE CARE ABOUT THE GLOBAL ILLEGAL WILDLIFE TRADE?

The global illegal wildlife trade is the product of several influences, such as: organized crime, corruption, greed, poverty, poor governance, and geopolitical destabilization. Everyday,

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[1] John H Currie et al, *International Law: Doctrine, Practice and Theory*, 2nd ed (Toronto: Irwin Law, 2014) at 2-3ff [Currie].

the world's most endangered species are slaughtered and shipped across the globe to satisfy trifling desires, while enriching organized criminals and corrupt officials; the impact is vast. Illegal wildlife trade contributes to the destruction of biodiversity, the stunting of economic growth and development, the promotion of corruption, and the undermining of the global rule of law.[2] Although the UN has recently the true scope and salience of this pernicious evil, much work remains to be done, to effectively address the problem, one must appreciate the scale, actors and drivers, and primary impacts of the global illegal wildlife trade.[3]

a) Scale: Money Involved, States Implicated, and Animals Slaughtered

The global illegal wildlife trade is currently carried out on a "massive scale".[4] Wildlife comprises all specimens and derivatives of both flora and fauna, thereby also encompassing the illicit fishing and timber industries.[5] The United Nations Environment Programme (UNEP) estimates that the international black market for wildlife is worth between $70-213 billion USD annually.[6] The US government alone estimates that the illegal trade in fauna is worth at least $7-10 billion USD, whereas illegal trade in logging and fishing accounts for $30-100 billion USD and $10-23 billion USD annually.[7] But a legal trade in wildlife exists as well, valued at around $300 billion USD per year.[8] The sheer volume of the legal trade, coupled with the lack of comprehensive research on the clandestine, illicit trade render the true scale of the illegal wildlife trade almost impossible to calculate.[9] Although more targeted and comprehensive research on the scale of the illicit wildlife trade is required, the illegal trade is still lucrative for criminally-minded actors.[10] For example, live Lear Macaws fetch $90,000 USD apiece and rhino horns can command upwards of $50,000 USD per kilogram; they are more valuable than gold and cocaine in some markets.[11] While some illicit products, like bushmeat,[12] may be consumed locally, most

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[2] UNGAOR, 69th Sess, 100th Plen Mtg, UN Doc A/69/PV.100 (2015) at 7 [UNGA "Implementation Meeting"].
[3] *Tackling illicit trafficking in wildlife,* GA Res 69/314, UNGAOR, 69th Sess, Supp No 49, UN Doc A/69/L80 (2015) [UNGA, "Tackling Illicit Trafficking"].
[4] United Nations, Press Release, "Wildlife Trafficking is Organized Crime on a 'Massive Scale', Warns UNODC Head" (27 September 2013), online: <www.unodc.org>.
[5] See *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 UNTS 233, arts 1(a)—(b) [*CITES*] (entered into force 1 July 1975) ("species" and "specimen" are defined broadly); *The New Oxford Dictionary of English*, 2001, *sub verbo* "animal".
[6] UNEP, *The Environmental Crime Crisis—Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources,* (Nairobi: UN, 2014) at 4, online: <www.unep.org> [UNEP].
[7] US, Congressional Research Service, *International Illegal Trade in Wildlife: Threats and US Policy* (2013) at Summary, online: <www.archive.org> [Congressional Research Service]; but see "Illegal Trade in Wildlife" in *UNEP Year Book: Emerging Issues in Our Global Environment* (2014) at 25, online: <wedocs.unep.org> (slightly different figures are provided in the break-down of the trade's value).
[8] Katherine Lawson & Alex Vines, *Global Impacts of the Illegal Wildlife Trade: The Costs of Crime, Insecurity and Institutional Erosion*, (London: Chatham House, 2014) at ix, online: <www.chathamhouse.org> [Lawson & Vines]; but see Tanya Wyatt, *Wildlife Trafficking: A Deconstruction of the Crime, the Victims, and the Offenders* (New York: Palgrave Macmillan, 2013) at 8 [Wyatt] (in 2003, the legal trade value was estimated at $160 billion USD annually).
[9] UNODC, *Wildlife and Forest Crime Analytic Toolkit*, revised edition (Vienna: UN, 2012) at 169, online: <www.unodc.org> [UNODC, "Wildlife and Forest Crime"]
[10] *Ibid* at 169-170, 177.
[11] ""Saving the Rhino: A Dilemma of Horns", *The Economist* (8 August 2015), online: The Economist <www.economist.com> [Saving the Rhino]; Lawson, *supra* note 8 at viii; Jennifer Harper, "$60K a pound: Illegal rhino horn now declared more valuable than gold, diamonds and cocaine", *The Washington Times* (17 May 2015), online: <www.washingtontimes.com>.

are shipped to distant jurisdictions where consumers with deep pockets and appetites are willing to pay exorbitant prices.[13] The illegal wildlife trade is thus a burgeoning black market industry with a transnational scope.

The transnational scope of the illegal wildlife trade is exemplified by the number of states that unwittingly function as nodes in a network of violent groups, anonymous financial mechanisms, corrupt middlemen, and consumers. Each state can play one or many parts in this obscure network.[14] Some are "source" states. These are suppliers of illicit wildlife specimens. Examples include Russia (for various species of bears) and central African countries, like Chad (for ivory).[15]

Others are "transit" states. These are intermediary nodes where illicit wildlife specimens are organized to either facilitate smuggling elsewhere, or to process raw materials, like ivory, into more lucrative products, such as carved decorations.[16] Examples include Tanzania and Kenya due to their strategic coastal positions, proximity to central African ivory source-countries, and weak legal frameworks.[17]

But almost every state is a demand country.[18] Some, such as Myanmar and Cambodia are source, transit and demand states.[19] Even Canada can be a source, transit and demand state, as the internet greatly facilitates the global flow of illicit wildlife products to middlemen and consumers.[20] Massive seizures of illicit wildlife shipments are now increasingly commonplace, with at least 55 ivory seizures averaging about 2.3 tonnes each between 1989 and 2009.[21] However, the foregoing figures offer only a glimpse into the volume of the illicit trade, not the resulting scale of costs borne by states and humanity as a whole.

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[12] Robert Nasi, *Conservation and use of Wildlife-based Resources: The Bushmeat Crisis*, CBD Technical Series No. 33 (Montreal: Secretariat of the Convention on Biological Diversity, 2008) at 6, online: <www.cbd.int>; but see Toolkit, *supra* note 9 at 148 (bushmeat is also a coveted luxury item abroad because it is viewed as a luxurious status symbol).

[13] UNODC, "Wildlife and Forest Crime", *supra* note 8 at 149; UNODC, "Environmental Crime —The Trafficking of Wildlife and Timber", online: <www.unodc.org> [UNODC, "Environmental Crime"].

[14] Congressional Research Service, *supra* note 7 at Summary; UNODC, "Wildlife and Forest Crime", *supra* note 9 at 144.

[15] Sergey N Lyapustin, Alexey L Vaisman & Pavel V Fomenko, *Wildlife Trade in the Russian Far East: An Overview* 83 (TRAFFIC Europe: 2007) at 92, 98, online: <www.wwf.ru> [Lyapustin]; UNODC, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment* (UN, 2010) at 9, online: <www.unodc.org> [UNODC, "Globalization of Crime"].

[16] Wyatt, *supra* note 8 at 5-6.

[17] Tom Maguire & Cathy Haenlein, *An Illusion of Complicity: Terrorism and the Illegal Ivory Trade in East Africa* (London: Royal United Services Institute for Defence and Security Studies, 2015) at 33, 35, online: <www.rusi.org> [Maguire & Haenlein] (in 2013, around 80% of large ivory shipments seized around the world were connected to Kenyan, Tanzanian, or Ugandan ports, while the highest volume of global seizures, 18.8 tonnes, transited Mombasa).

[18] UNODC, "Globalization of Crime", *supra* note 15 at 155ff (there are helpful maps and diagrams in this area of the document); see also Wyatt, *supra* note 7 at 3-7 (contains a thorough summary of how animals are illicitly brought to market).

[19] UNODC, "Environmental Crime", *supra* note 12.

[20] *Logan v United States of America*, 2015 NBCA 59 at para 4, [2015] NBJ No 225 [*Logan*] (accused trafficked in narwhal tusks to buyers in the US); *R v Luah,* 2006 ABCA 217 at paras 2, 4, 391 AR 190 [Luah] ("Thanks to the internet, the appellant saw a chance to make a lot of money" and sold 72 rare fish from Asia to buyers in the US and profited by around $46,000 to 59,000 USD)*;* see also Joyce Wu, "Wildlife Trade on the Internet", *CITES World* (February 2010) at 6, online: <www.cites.org>.

[21] Maguire & Haenlein, *supra* note 17 at 34-35.

The scale of slaughter to feed the black market is more telling and visceral. Elephants, rhinos and tigers are three of the primary species killed for their valuable tusks, horns, skins and bones; the population of each species has been decimated.[22] The world's elephant population plummeted from 1.2 million in 1980 to fewer than 500,000 today.[23] Rhinos have disappeared entirely from several Asian and African countries; in South Africa, one rhino is killed every eight hours.[24] Tiger populations have plunged by over 95% since 1900, with fewer than 3,200 left in the wild.[25] These species—and countless others—are exploited to meet global consumer demand for three general categories of goods: traditional East Asian medicine, exotic pets, and luxury products.[26]

b) Actors and Drivers: Untangling the Diverse Elements of the Problem

Consumers are integral actors in the illegal wildlife trade.[27] Much of the available literature indicates that demand is concentrated in Asia and driven by socio-economic and cultural factors, such as an emerging middle-class with a desire for luxury goods, and widespread cultural beliefs that certain wildlife products confer unique health benefits.[28] For instance, ivory chopsticks are coveted luxuries in China, selling for more than $1000 USD, and many people in Vietnam believe that rhino horn cures various illnesses, including cancer.[29] But demand is not confined to Asia; it is global. Therefore, part of the solution to the problem must lie in changing norms and educating consumers everywhere about the illegal wildlife trade's effects on our world and societies. Until this occurs, some of the world's most precious resources will continue to perish in order to gratify trifling desires and destructive cultural beliefs.

Beyond consumers, various other actors and motivations fuel the illicit wildlife trade. The actors generally fall under one of two categories: subsistence actors or commercial actors. Subsistence actors include the local people living in poorly governed supply countries, such as villagers and Indigenous hunters, who may be driven to the illicit trade by a variety of factors, such as poverty.[30] For example, impoverished locals reportedly commit much of the poaching in the Russian taiga due to a lack of other economic opportunities.[31] For many people in developing states, participating in the illegal wildlife trade makes the difference between a comfortable lifestyle and a desperate existence.[32] These actors and their drivers render the illegal wildlife

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[22] See generally UNODC, "Environmental Crime", *supra* note 12.
[23] "Animal Conservation: The Elephants Fight Back", *The Economist* (21 November 2015), online: <www.economist.com>; see generally UNGA, "Implementation Meeting", *supra* note 2 at 2.
[24] World Wildlife Fund, "Species: Rhino", online: <www.worldwildlife.org>; United Nations, Press Release, "Organized Crime Threat to Wild Species on the Increase, Says UN on Wildlife Day", *UNODC* (3 March 2015), online: <www.unodc.org>.
[25] Lawson & Vines, *supra* note 8 at 13.
[26] *Ibid* at 11.
[27] UNODC, "Wildlife and Forest Crime", *supra* note 9 at 43.
[28] *Ibid* at 43, 149, 152; Lawson & Vines, *supra* note 8 at 11; Congressional Research Service, *supra* note 7 at 9.
[29] Bryan Christy, "How Killing Elephants Finances Terror in Africa", *National Geographic* (12 August 2015) at 3-4, online: <www.nationalgeographic.com> [Christy]; Saving the Rhino, *supra* note 11.
[30] UNODC*, "*Wildlife and Forest Crime", *supra* note 9 at 143-144, 148-149; Lawson & Vines, *supra* note 8 at 7; see also *Republic v Akimu* [2003] MWHC 96 [*Akimu*] (an interesting case from Malawi. The accused was a female divorcee supporting her children by trafficking in ivory; when officials went to arrest her, the entire community rose against them in her support).
[31] Lyapustin, *supra* note 14 at 94.
[32] Michael Bowman, Peter Davies & Catherine Redgwell, *Lyster's International Wildlife Law*, 2nd ed (Cambridge: Cambridge University Press, 2010) at 483 [Bowman].

trade an international development and governance issue, rather than a strictly criminal issue.

Commercial actors include transnational criminal organizations, insurgent groups, high-level corrupt officials in the military, police, and ruling classes of various source and transit countries, as well as consumers.[33] Aside from consumers, commercial actors participate in the illicit trade for two reasons: high financial rewards and low risks of being caught due to the weak legal frameworks in various states.[34]

The illegal activities of both subsistence and consumer actors are linked. Criminal organizations may exploit poor farmers in source countries to harvest and supply illegal wildlife products, and recruit local hunters as guides.[35] Nevertheless, one must distinguish between those participants due to their different motivations: poverty and insecurity on one side, and greed and funding for harmful activities on the other. Each class of actors and their incentives differ and must be addressed with a tailored legal tool to comprehensively suppress the illegal wildlife trade.[36]

The global illegal wildlife trade is thus a multifaceted black-market industry that generates billions of dollars in revenue for criminal organizations. Moreover, the illicit wildlife trade depends on a shrouded, transnational supply chain, enticing diverse actors to exploit wildlife on an industrial scale in furtherance of massive profits and selfish desires. In many respects, the illegal wildlife trade is akin to drug and human trafficking. Like those phenomena, its impacts are devastating to the global community, resulting in irreversible damage to the environment and the global rule of law. [37]

i. Impact on the Environment: Biodiversity is Insidiously Devastated

The "environment" lacks an international legal definition, but is generally agreed to include natural habitats, ecosystems, and human environments.[38] The illegal wildlife trade destroys the environment by reducing the Earth's biodiversity. Biodiversity is "the variability among living organisms from all sources"; without it, ecosystems and humanity could not exist. Ecosystems are, by definition, biologically diverse communities of myriad organisms interacting with one another and the environment.[39] Human communities and future generations also rely on biodiversity for agriculture, medicine, construction, and other pursuits that sustain and enrich life.[40] Consequently, biodiversity is the "web of life"; every species depends on it, and supports it by performing a key ecological role.[41] For example, elephants clear woodlands and disperse

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[33] UNODC, "Environmental Crime", *supra* note 13; UNODC, "Wildlife and Forest Crime", *supra* note 9 at 147-148.
[34] UNODC, "Wildlife and Forest Crime", *supra* note 9 at 3, 17, 164.
[35] *Ibid* at 143; Lawson & Vines, *supra* note 8 at 7.
[36] UNODC, "Wildlife and Forest Crime", *supra* note 9 at 143.
[37] Lawson & Vines, *supra* note 8 at 3; UNGA, "Implementation Meeting" , *supra* note 2 at 2.
[38] Currie, *supra* note 1 at 715; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 9, 1992 CanLII 110 (SCC) ("it encompasses the physical, economic and social environment").
[39] *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 art 2 (came into force 29 December 1993), *sub verbo* "biological diversity", "ecosystem" [*CBD*]; see generally Secretariat of the Convention on Biological Diversity, *Sustaining Life on Earth: How the Convention on Biological Diversity Promotes Nature and Human Well-being* (Secretariat of the Convention on Biological Diversity: 2000), online: <www.cbd.int> [SCBD]; Eric Chivian & Aaron Bernstein, "How Our Health Depends on Biodiversity" (2008) Harvard Medical School Centre for Health and Global Environment at 1, online: <www.chgeharvard.org> [Chivian & Bernstein].
[40] *Sustaining Life*, *supra* note 39 at 2-3; Chivian & Bernstein, *supra* note 39 at 10, 16, 20.
[41] Chivian & Bernstein, *supra* note 39 at 2; *Sustaining Life*, *supra* note 39 at ii, 2.

larger seeds for new plants to grow, while pangolins regulate insect and pest populations.[42] Every organism in an ecosystem plays a distinct role in the mechanism of life, and the removal of even one species can have destabilizing effects on the environment.[43] All states "share a global ecosystem", and the illegal wildlife trade threatens the biodiversity of each state's environment in three primary ways: (1) species extinction; (2) the spread of invasive species; and (3) the emergence and diffusion of infectious zoonotic diseases.[44]

First, the illegal wildlife trade causes species extinction due to the unsustainable levels of poaching undertaken to maximize profits. As species become endangered, they increase in value and are likely to experience greater exploitation, rather than conservation efforts.[45] Although extinctions can occur naturally, the current rate of extinction is estimated to exceed the normal rate by at least 100 times, meaning at least 200 to 2000 extinctions occur every year.[46] Habitat destruction and global warming are major contributing factors. However, unsustainable hunting used to supply the illicit wildlife trade has directly extinguished some subspecies, like the Western Black Rhino, while critically endangering numerous others, such as other Black Rhino subspecies, Pangolins, and Hawksbill Turtles.[47]

Second, the global illegal trade in wildlife pets introduces invasive species to foreign environments, where they can displace native species, reduce biodiversity, and consequently threaten the equilibrium of ecosystems.[48] For instance, Burmese Pythons are popular pets in the USA, but have also been released into the wild by their owners. These snakes are eight feet long, virile, and generally outcompete all native species in various ways. As a result, the populations of local species, such as the endangered Key Largo Woodrat, suffer.[49] The effects of invasive species are difficult to quantify, but they certainly have insidious long-term impacts on the environment and human societies. Zebra mussels, for example—while not pets—have caused millions of dollars in damage towards infrastructure in Canada.[50] To prevent further damage caused by other invasive species, the supply of illicit wildlife products into foreign environments must be curtailed.

Third, the transnational aspects of the illegal wildlife trade contribute to the spread of zoonotic diseases because smuggled wildlife cannot be inspected for pathogens and

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[42] World Wildlife Fund, "African Elephant" at 4, online: <www.wwf.org.uk>; US Fish & Wildlife Service, "Pangolins" at "Pangolin Facts", online: <www.fws.gov>.
[43] Chivian & Bernstein, *supra* note 39 at 5; Wyatt *supra* note 8 at 39-40.
[44] UNODC, "Globalization of Crime", *supra* note 15 at 149; *Sustaining Life*, *supra* note 39 at 2; *CBD*, *supra* note 39 at Preamble; Wyatt, *supra* note 8 at 39-40.
[45] UNODC, "Wildlife and Forest Crime", *supra* note 9 at 2; Wyatt, *supra* note 8 at 40; Jeremy Haken, "Transnational Crime in the Developing World" (2011) *Global Financial Integrity* at 12, online: <www.gfintegrity.org> [Haken].
[46] Nadia Drake, "Will Humans Survive the Sixth Great Extinction?" *National Geographic* (23 June 2015), online: <www.nationalgeographic.com>; World Wildlife Fund, "How Many Species Are We Losing?" (2015), online: <www.wwf.panda.org>.
[47] World Wildlife Fund, "Species Directory" (2015), online: <www.worldwildlife.org>.
[48] *Invasive Alien Species*, EP Dec X/38, UNEPOR, 2010, UN Doc UNEP/CBD/COP/DEC/X/38 at 2, online: <www.cbd.int>; *CBD*, *supra* note 39, art 8(h).
[49] Wyatt, *supra* note 8 at 42; United States Department of Agriculture, "Species Profiles: Burmese Python", online: <www.invasivespeciesinfo.gov>.
[50] Canada, Canadian Council of Fisheries and Aquaculture Minsters Aquatic Invasive Species Task Group, *A Canadian Action Plan to Address the Threat of Aquatic Invasive Species*, (Ottawa: Fisheries and Oceans Canada, 2004), online: <www.dfo-mpo.gc.ca>; Wyatt, *supra* note 8 at 47; Ontario's Invading Species Awareness Program, "Zebra and Quagga Mussels, online: <www.invasivespeciesinfo.gov>.

quarantined.[51] Zoonotic diseases pass from animal hosts to human hosts. At least 60% of human infectious diseases are zoonotic in origin, including West Nile Virus, Ebola, H1N1, and SARS; the latter is believed to have originated from an infected civet in China.[52] Such diseases infect local wildlife—which further reduces biological diversity—as well as domestic animals and humans, thereby imperiling the environment, agricultural industries, and human health alike. The illegal wildlife trade seriously impacts the environment of every state.

ii. Impact on the Rule of Law: Organized Crime and Corruption Thrive

The illegal wildlife trade corrodes the integrity of law and state authority across the world. In source and transit countries, insurgents, organized criminals, and corrupt officials flout existing laws, fuel civil conflict, and misappropriate natural resources with impunity.[53] Elsewhere in the world, the illicit trade in wildlife imperils border security and siphons taxable revenue to organized criminal groups (OCGs).[54] Virtually all states now appreciate the threats posed by the illicit wildlife trade to good governance and the rule of law across the world.[55]

Source countries are primarily developing countries with weak legal frameworks and unstable societies. For example, South Sudan, the Central African Republic, the Democratic Republic of Congo, Sudan, and Chad—five of the world's least stable nations—constitute the primary hunting grounds for ivory.[56] Roving insurgents, like the Janjaweed and Joseph Kony's Lord's Resistance Army (LRA), depend on the ivory trade to fund their operations.[57] When the LRA first camped in Garamba National Park, a UNESCO Heritage site, there were some 4,000 elephants; there are now around 1,500 at most.[58] The LRA and Janjaweed slaughter elephants with automated weapons and use chainsaws to hack off the lucrative tusks while looting communities and enslaving their residents.[59] "Well structured", and "often better armed than armies", they cannot be suppressed by the impoverished and poorly governed states that they infiltrate and exploit.[60] Often, all that stands between them and some of the world's most precious resources are the poorly paid, armed, and trained park rangers who regularly perish in the constant wars over wildlife.[61] There is also growing speculation that the ivory trade funds terrorist networks like Al-Shabaab.[62] While terrorist networks likely derive some benefit, the available evidence indicates that corruption and organized criminal groups are the primary culprits and beneficiaries of the illegal wildlife trade as a whole.[63] Organized criminals are also

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[51] Wyatt, *supra* note 8 at 43, 49.
[52] Chivian & Bernstein, *supra* note 39 at 12; Congressional Research Service*, supra* note 7 at 13-14; Haken*, supra* note 45 at 13-14.
[53] US, Senate Select Committee on Intelligence, *Worldwide Threat Assessment of the US Intelligence Community* (2013) at 6.
[54] US, The President, *Combating Wildlife Trafficking* (Federal Register, Washington DC, 1 July 2013).
[55] UNGA, "Tackling Illicit Trafficking" , *supra* note 3; UNGA, "Implementation Meeting", *supra* note 2.
[56] Christy, *supra* note 29; Fund for Peace, "Fragile States Index 2015", online: <www.fsi.fundforpeace.org>.
[57] UNODC, "Globalization of Crime", *supra* note 15 at 157; Lawson & Vines, *supra* note 8 at 8.
[58] Christy, *supra* note 29 at 8, 19.
[59]Lawson & Vines, *supra* note 8 at 6; Christy, *supra* note 29 at 19.
[60] UNGA, "Implementation Meeting", *supra* note 2 at 2; UNODC, "Globalization of Crime", *supra* note 15 at 10.
[61] UNODC, "Globalization of Crime", *supra* note 15 at 152; Christy, *supra* note 29 at 20.
[62] Penny Wallace & Sabri Zain, "Ivory and Terror: Fact or Myth?" (2015) 27:2 41 at 43 TRAFFIC Bulletin, online: <www.traffic.org>.
[63] Maguire & Haenlein, *supra* note 17 at 33, 35, 43.

heavily involved in all aspects of the illicit wildlife trade, thereby threatening the rule of law and the integrity of state institutions across the world.[64]

Organized criminals primarily act as brokers with contacts in source, transit, and destination countries by orchestrating poaching gangs, consolidating wildlife products in bulk, and arranging industrial-scale shipments to local black markets for retail distribution.[65] With the help of corrupt government officials, criminal groups derive most of the profits. Furthermore, organized criminals are often involved in other transnational criminal industries, such as the drug trade, that harm state interests across the world. Customs officials have reportedly seized elephant tusks stuffed with hashish, and South African street gangs purportedly trade abalone and other wildlife products to Asian crime syndicates for methamphetamine.[66] By funding organized crime, the illegal wildlife trade further undermines the rule of law and the sovereignty of states.

The corruption that facilitates illegal trade in wildlife also corrodes the rule of law, distorts markets, and threatens the security of societies in many ways; its nexus to the illegal wildlife trade is clear. Forest patrol officers, border guards, customs officials, prosecutors, judges, and officials at the highest levels of some governments are involved.[67] The Janjaweed and LRA regularly exchange ivory for weaponry with Sudan, a nation whose head of state has been indicted for war crimes and crimes against humanity.[68] Kenya and Tanzania are also plagued with corruption, which also contributes to their role in the illegal wildlife trade as transit states.[69] For example, Shareaf Shipping, which is owned by Tanzania's Secretary General, was caught carrying 6.2 tonnes of ivory in Vietnam.[70]

Corruption also filters down to lower levels of government, including to police. For example, in 2013, a Tanzanian officer crashed a military vehicle containing a stash of tusks and a gun with a silencer. Phone records indicated that the deputy head of the regional crime office was connected to this incident. No senior officials have been prosecuted.[71]

However, corruption is not restricted to the developing world; it flourishes in other states implicated in the illegal wildlife trade. In the Russian Far East, law enforcement officials routinely escort poachers to borders for transactions.[72] In transit and destination countries, fraudulently acquired import and export permits are purchased from corrupt officials, and customs officers are bribed to ignore or facilitate smuggling.[73] As a result, border security is undermined and taxable revenue to support social services is lost when natural resources are stolen. Corruption due to the illegal wildlife trade ripples across the world, perniciously threatening the rule of law on a global scale.

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[64] *Environmental Crimes* (2013) UNICRI, online: <www.unicri.it>; but see DLA Piper, "Empty Threat 2015: Does the Law Combat Illegal Wildlife Trade?" (2015) at 8, online: <www.dlapiper.com> [DLA Piper] (with few exceptions, little is currently known about the operations of criminal syndicates in the illegal wildlife trade).
[65] UNODC, "Globalization of Crime", *supra* note 15 at 152; Maguire & Haenlein, *supra* note 17 at 35.
[66] Congressional Research Service, *supra* note 7 at 4; Wyatt, *supra* note 8 at 5.
[67] DLA Piper, *supra* note 64 at 6.
[68] Christy, *supra* note 29 at 25-26; *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Second Warrant of Arrest (26 March 2015) (International Criminal Court), online: <www.icc-cpi.int>.
[69] Maguire & Haenlein, *supra* note 17 at 33-34.
[70] "Tanzania's Dwindling Elephants: Big Game Poachers", *The Economist* (8 November 2014), online: <www.economist.com> [*Dwindling Elephants*].
[71] *Ibid*; Maguire & Haenlein, *supra* note 17 at 41.
[72] Lyapustin, *supra* note 15 at 93.
[73] UNODC, "Wildlife and Forest Crime, *supra* note 9 at 54; DLA Piper, *supra* note 64 at 6.

Although poverty, organized crime, and corruption may thrive in jurisdictions with weak legal frameworks, the transnational impacts of these elements on the environment and the rule of law are not confined to the third world. In a global community, any particular enclave of evil poses a threat to the global body politic.[74] Just as provincial issues in Canada may require federal action, a problem like the illegal wildlife trade threatens and exceeds the means of any state to unilaterally address it.[75] States can only address the global illegal wildlife trade if they work together and use the existing framework of international law.

II. WHAT INTERNATIONAL LEGAL TOOLS ARE AVAILABLE?

States have created various international environmental legal frameworks to address aspects of the illegal wildlife trade. The two most important are: (1) the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (*CITES*); and (2) the *Convention on Biological Diversity* (*CBD*).[76] However, these environmental frameworks focus on sustainability, protection, and preservation, rather than organized crime and corruption, and thus fail to address some of the key actors, drivers, and impacts of the illegal wildlife trade. Existing transnational criminal law instruments, such as the *UN Convention Against Organized Crime* (*UNTOC*) and the *UN Convention Against Corruption* (*UNCAC*), address these gaps.[77]

The UN General Assembly recently decided that *UNTOC* and *UNCAC* should be used alongside *CITES* and the *CBD* to address the illegal wildlife trade. [78] This is wise because the illicit wildlife trade is both a complex, socio-environmental and criminal issue that cannot be addressed with one set of tools; a multifaceted response is essential. The following subsections will: (1) contextualize these legal instruments by sketching the nature of international law; (2) outline the strengths and weaknesses of *CITES* and the *CBD*; and (3) analyze how *UNTOC* and *UNCAC* can be used to address the illegal wildlife trade. *UNTOC* and *UNCAC* offer states effective tools to suppress organized criminal groups and corrupt actors involved in the illegal wildlife trade, but they are still inadequate on their own. A variety of different tools must be used to address each discrete element of the illicit wildlife trade, and international tools as a whole are only effective insofar as states choose to implement them.

a) Context: International Law and Cooperation

International law governs the relations between states and certain non-state actors, like international organizations.[79] The basic premise of international law is the "separateness", or sovereignty, of every state.[80] A state is sovereign within its jurisdiction—the areas where it can regulate natural and legal persons to the exclusion of all other states. As sovereigns, states do not recognize any authority superior to their own, and may only interfere with one another's affairs

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[74] ISIS is a recent and cogent example of this underappreciated truism.
[75] *Ontario (AG) v Canada (AG)*, [1896] AC 348 at 361, [1896] UKPC 20, Watson LJ.
[76] *CITES*, *supra* note 5; *CBD*, *supra* note 39.
[77] *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, 12 December 2000, 2225 UNTS 205 [*UNTOC*]; *United Nations Convention against Corruption*, UNGAOR, 58th Sess, Annex, Agenda Item 108, UN Doc A/RES/58/4 [*UNCAC*].
[78] UNGA, "Tackling Illicit Trafficking*"*, *supra* note 3.
[79] *Black's Law Dictionary*, 9th ed, *sub verbo* "international law"; Currie, *supra* note 1 at 12-14.
[80] Currie, *supra* note 1 at 4-5, 14.

by mutually consenting to constrain their sovereignty through international law.[81] Thus, states are both the source and subject of international law.[82] They are bound by it only if they consent to be bound and cooperate with one another. Without cooperation, international legal solutions to global problems are infeasible. Unfortunately, collective state action can be difficult to achieve because law-making in the interest of the international community is often displaced by the self-interest of individual states.[83] Nevertheless, states can and do cooperate in good faith to address common problems through international law.

Article 38(1) of the *Statute of the International Court of Justice* contains the most authoritative statement of international law's four official sources, but only two that states have generally used to address the illegal wildlife trade: (1) multilateral treaties and (2) general legal principles.[84] Treaty-making is a consensual sovereign act, whereby states indicate an intention to be bound and concretely undertake legal obligations. Although states must generally implement or "receive" their treaty obligations by altering their domestic laws and policies, states, as sovereigns, are largely free to choose how such implementation will occur.[85] As a result, treaty obligations are difficult to enforce, notwithstanding their binding status, because sovereigns are generally free to do as they wish within their jurisdictions, and they cannot be compelled to appear before a court for non-compliance with treaty obligations.[86] Furthermore, antagonism does not promote the goals of multilateral treaties such as *CITES*, *CBD*, *UNTOC*, and *UNCAC*, which aim to promote cooperation amongst states to address common problems. States must use softer procedures to promote treaty compliance, such as negotiation, normative pressure from treaty supervisory bodies, and diplomatic pressure from states themselves.[87] Conversely, general legal principles are non-binding, but influence the interpretation, application, and development of treaties and state practice generally.

However, the *Statute of the ICJ* is missing a third pertinent source of international law that is also non-binding, yet influential: the principles couched in the resolutions, declarations, and decisions of states and international organizations, such as the General Assembly of the UN, or the *CITES* Conference of the Parties ("CoP").[88] Since each pertinent source of international law is either non-binding or difficult to enforce, all international legal instruments seem to suffer from state non-compliance in some way. Nevertheless, states can use *CITES*, *CBD*, *UNTOC*, and *UNCAC* to tackle the illicit wildlife trade.

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[81] Currie, *supra* note 1 at 307, 145 (states may also bind themselves by unilateral declarations).
[82] *Case of the SS Lotus (France v Turkey)* (1927), PCIJ (Ser A/B) No 9 at paras 15-16, 18-19.
[83] Currie, *supra* note 1 at 3-4.
[84] *Statute of the International Court of Justice*, art 38(1), online: <www.icj-cjj.org>; the other two legal sources are (1) customary international law and (2) judicial decisions/teachings of the most qualified publicists, which have had a minor impact on environmental law; see Bowman, *supra* note 32 at 27-29.
[85] Currie, *supra* note 1 at 158-159 (generally, states are either (1) monists or (2) dualists. The former do not distinguish between international and domestic law, while the latter do. Canada is a dualist state).
[86] *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at paras 34-36, 38, [2014] 3 SCR 176 (however states are obligated under customary law to perform treaty obligations in good faith): See *Vienna Convention on the Law of Treaties,* 23 May 1969, 1155 UNTS 331, (entered into force 27 January 1980).
[87] Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment*, 3rd ed (New York: Oxford University Press, 2009) at 239 [Birnie].
[88] Currie, *supra* note 1 at 139, 151-152.

b) International Environmental Law: CITES and CBD

Various international environmental treaties have addressed wildlife concerns in a piece-meal fashion.[89] However, *CITES* and the *CBD* are the two most significant international conventions dealing with wildlife protection due to their comprehensive scope and potential synergy.[90] *CITES* regulates international trade in all endangered species, whereas the *CBD* supplements *CITES* by establishing an extensive regime for managing natural resources in general.[91] Common legal principles animate *CITES* and the *CBD*. One such principle is the sustainable development principle, which dictates that environmental protection constitutes an integral part of states' economic development.[92] Since poverty and weak governance are undoubtedly linked to the illegal wildlife trade, environmental instruments reflecting conservation and the sustainable development principle should be used to address this problem.

In broad strokes, *CITES* works by subjecting international trade in specimens of selected species to certain controls through a permit system.[93] The treaty's ambit is vast, as it protects roughly 35,600 species of plants and animals and "any" of their "readily recognizable part[s] or derivative[s]".[94] Species are listed on one of three Appendices according to how threatened they are by international trade.[95] Appendix I contains species threatened with extinction, such as rhinos, and no specimen of an Appendix I species may be traded except in exceptional circumstances.[96] Appendix II contains species that are not necessarily threatened with extinction, but may become so unless trade in their specimens is controlled.[97] Appendix III contains species which any state party has identified for the purpose of preventing and restricting exploitation, and as needing the co-operation of other parties in the control of trade.[98] State parties are largely responsible for implementing this tiered permit system, and *CITES* creates key administrative units to assist them.

Individual state parties must implement the permit system by designating Scientific and Management Authorities in their respective jurisdictions. Management Authorities are responsible for issuing permits and Scientific Authorities advise them on the effects of trade on the status of listed species.[99] State parties also implement *CITES* by prohibiting unauthorized trade in protected species and maintaining records of, for instance, which species are traded and to whom import and export permits are granted.[100] The result is a global network of domestic

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[89] See e.g. *Convention on wetlands of international importance especially as waterfowl habitat*, 2 February 1971, 996 UNTS 245 (entered into force 26 May 1976).
[90] Bowman, *supra* note 32 at 531; Birnie, *supra* note 87 at 652; UNODC, "Wildlife and Forest Crime", *supra* note 9 at 13–14.
[91] United Nations Environment Program, "How *CITES* Works", (2016), online: <www.cites.org/eng/disc/how.php> [UNEP, "How *CITES* Works"]; Bowman, *supra* note 32 at 18–19, 485, 594.
[92] Currie, *supra* note 1 at 715; *CITES*, *supra* note 5 at Preamble; *CBD*, *supra* note 39 at preamble; UNODC, "Wildlife and Forest Crime", *supra* note 9 at 14.
[93] UNEP, "How *CITES* Works", *supra* note 91; see e.g. *R v Nam Bak Enterprises Ltd*, 2012 BCPC 506 at para 6, [2013] BCWLD 7388 (in this case, a family business imported 1,150 pounds of American Ginseng without a *CITES* permit and received a fine of CAD $50,000).
[94] *CITES*, *supra* note 5, art 1; UNEP, "The *CITES* Species", (2016) online: <www.cites.org/eng/disc/species.php>.
[95] *CITES*, supra note 5, art 2.
[96] *Ibid*, art 3.
[97] *Ibid*, art 4.
[98] *Ibid*, art 5.
[99] *Ibid*, art 9.
[100] *Ibid*, art 8.

institutions cooperating with counterparts across the world. These entities are unfettered by the constraints of formal diplomatic channels, yet buttressed by key international institutions, such as the *CITES* Conference of the Parties (CoP), Secretariat, and expert committees.[101]

The CoP comprises all 181 state parties and generally convenes twice each year. The CoP is responsible for determining when species should be added or removed from an Appendix, and recommending measures to improve the efficacy of *CITES*.[102] The Secretariat monitors state parties' implementation of *CITES*, advises the CoP, and generally facilitates coordination amongst national Management and Scientific Authorities.[103] Expert committees, like the Plants and Animals committees, are crucial to *CITES* due to its technical subject matter. The committee members are elected to represent the six major geographic areas of the world, and include a specialist on nomenclature. The committees undertake periodic reviews of species to ensure appropriate categorization in the *CITES* Appendices.[104] Therefore, *CITES* operates through an elaborate, but workable permit system in which national units collaborate and receive high-level policy guidance and scientific expertise from international units.

i. CITES: Strengths and Weaknesses

The UNODC describes *CITES* as "the single most important international instrument dealing with illegal trade" and some academics believe *CITES* has curbed the illicit wildlife trade with relative success, largely due to its administrative structure.[105] *CITES* enjoys widespread membership, and its definition of "specimen" allows it to control trade in all kinds of wildlife products and derivatives.[106] Although various interpretive problems arise in applying the terms of *CITES*, the CoP appears to be a constructive forum for addressing problems, such as what "readily recognizable" means.[107] Similarly, the Animals and Plants committees help states reach consensus on technical issues, and the creation of such committees underlies the importance of scientific expertise in addressing the illegal wildlife trade.[108]

Furthermore, requiring states to collect information, penalize non-compliance, and create Management and Scientific Authorities "goes a long way" to ensuring that each party makes at least some effort to enforce the *CITES* permit system.[109] By collecting and disseminating reported data to and from national Authorities, and by training management authorities, the *CITES* Secretariat is also vital to detecting the movement of illegal specimens and promoting effective implementation.[110] If state parties are purposefully not complying with their implementation obligations, the CoP can issue sanctions, and if implementation does not occur

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[101] Bowman, *supra* note 32 at 489.
[102] *CITES*, *supra* note 5, art 11; UNEP, "Conference of the Parties" (2016), online: <www.cites.org>.
[103] *CITES*, *supra* note 5, art 12; UNEP, "The *CITES* Secretariat" (2016), online: <www.cites.org>.
[104] *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, EP Res Conf 11.1, UNEPOR, 2000, UN Doc Rev CoP17, online: <www.cites.org> ("Establishment of committees"); UNEP, "Animals and Plants Committees" (2016), online: <www.cites.org>.
[105] UNODC, "Wildlife and Forest Crime", *supra* note 9 at 15; Bowman, *supra* note 32 at 533.
[106] Bowman, *supra* note 32 at 490-491, 533; *CITES*, *supra* note 5, art 1(b).
[107] *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, EP Res Conf 9.6, UNEPOR, 1994, UN Doc Rev CoP16, online: <www.cites.org> ("Trade in readily recognizable parts and derivatives").
[108] Bowman, *supra* note 32 at 489.
[109] *Ibid* at 490; UNODC, "Wildlife and Forest Crime", *supra* note 9 at 15.
[110] Birnie, *supra* note 87 at 689-690.

due to insufficient resources, parties are encouraged to provide technical assistance.[111] Overall, *CITES* affords state parties some important legal tools to address the illegal wildlife trade and must form part of the solution to the problem.

However, non-compliance by state parties remains a fundamental problem.[112] The efficacy of any international agreement is the function of three major variables: "the range, rigour, and appropriateness of substantive provisions, the efficacy of the machinery for implementation and enforcement, and the level of participation by states."[113] The general problems with *CITES* can be grouped under the aforementioned categories.

First, *CITES* only requires states to prohibit non-compliant wildlife trafficking; it is silent on what penalties states should impose domestically, which has resulted in substantial differences in legislation across jurisdictions.[114] For example, many implementing laws are "extremely antiquated" and contain significant loopholes and other weaknesses, such as "frustratingly inadequate" fines.[115] The *CITES* permit system is also easily abused, even in more developed states like South Africa.[116] Among other substantive flaws, the length and complexity of the Appendices makes enforcement difficult, and parties may enter "reservations" in relation to listed species.

When a state enters a reservation regarding a listed species, the state effectively becomes a non-party to *CITES* in relation to that specific species.[117] Furthermore, Professor White asserts that instruments like *CITES*, which focus on protection, can theoretically worsen the situation of threatened species. By confirming their scarcity, the value of species jumps and becomes more attractive to criminal syndicates and private collectors.[118] This may be a further weakness of *CITES* and environmental instruments in general, but there is scarce empirical evidence to support this interesting claim.

Second, non-compliance through inadequate or entirely non-existent reports constitutes "a major problem", as reporting data is essential to combat the illegal wildlife trade.[119] Perhaps some parties deliberately withhold information, but many are developing states that simply lack the resources to effectively implement their Management and Scientific Authorities.[120] Although the CoP has created compliance procedures, its resolutions are non-binding and thus relatively ineffective.[121] Sanctions can and have been applied against parties that display "no intention to

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[111] See generally *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, EP Res Conf 14.3, UNEPOR, 2007, UN Doc Res Conf 14.3, online: <.www.cites.org> [*CITES,* "CITES compliance procedures"].
[112] *Ibid* at para 29.
[113] Bowman, *supra* note 32 at 29-30.
[114] *CITES*, *supra* note 5, art 8(1); DLA Piper, *supra* note 64 at 1-2.
[115] DLA Piper, *supra* note 64 at 2 (some parties, like Angola, still have not even implemented legislation).
[116] *Lemthongthai v The State,* ,[2013] ZAGPJHC 294, 2014 (1) SACR 495 (GJ) at paras 17-18 [*Lemthongthai*] (this case is particularly interesting because the Court noted that government officials were also at fault: they "probably knew that the terms of the permit were not being met and that the stated purpose of the hunt was false").
[117] *CITES*, *supra* note 5, art 23; Bowman, *supra* note 32 at 515-516, 533 (e.g. France and Italy entered reservations regarding certain species of reptiles that were important to their luxury leather trades).
[118] Rob White, "Environmental Theft and Trafficking" in Neil Boister & Robert J Currie, eds, *Routledge Handbook of Transnational Criminal Law* (New York: Routledge, 2015) 280 at 289 [White].
[119] *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, EP Res Conf 11.17, UNEPOR, 2000, UN Doc Rev CoP16 ("National reports").
[120] Bowman, *supra* note 32 at 525; see *R v Leong*, 2014 BCPC 99, at paras 12-13, [2014] BCWLD 4424 [*Leong*] (Canadian wildlife officers must work alongside a marine biologist require reference books to identify many species; illustrates how difficult it can be for developing states to enforce *CITES* without such resources).
[121] *CITES,* "CITES compliance procedures", *supra* note 111.

achieve compliance", but sanctions are a last resort because *CITES* depends on cooperation, reciprocity, and mutual trust between parties to operate effectively.[122]

Third, state participation and implementation of *CITES* is compromised because many of its states face competing national concerns, such as poverty, political instability, and poor governance.[123] Even if states have the political will to participate in the fight against illegal wildlife trafficking through *CITES*, they often lack the requisite technical and financial resources. Finite resources are allocated to more pressing concerns, or diverted to the bank accounts of corrupt officials. As a result, national authorities are understaffed, personnel are inadequately trained, and the integrity of *CITES*' permit system is undermined.[124]

CITES is undoubtedly crucial to addressing the illegal wildlife trade because it provides a comprehensive framework for controlling the international trade in endangered species. However, it is also deficient in many respects, largely due to incomplete implementation by impoverished or deliberately non-compliant state parties. Still, *CITES* can likely be an effective regulatory tool if supplemented by (1) international mechanisms that support capacity-building and promote normative legal principles, like sustainable development; and (2) criminal law mechanisms that impose uniform penalties for non-compliance and mechanisms to recover misappropriated wealth by corrupt officials. The *CBD* may supply the former set of tools

ii. CBD: Strengths and Weaknesses

Unlike *CITES*, the *CBD* does not protect particular species, but broadly focuses on promoting sustainable use and equitable sharing of the Earth's biological resources.[125] The *CBD* purports to fill gaps in biodiversity regulation by laying down various guiding principles that states must consider when developing national laws and policies.[126] Its scope is massive, since it covers all ecosystems, species, and genetic resources. However, a few salient aspects deserve attention.

Notably, the *CBD* qualifies state sovereignty by stipulating that states are responsible for ensuring that activities within their jurisdiction do not damage the environment of other states.[127] State parties are required to: (1) identify components of biological diversity requiring conservation and sustainable use, such as wildlife; (2) monitor and maintain records on those components; and (3) pursue measures to protect those components and ecosystems in general "as far as possible and as appropriate".[128] The *CBD* also offers "remarkable" incentives to developing states to fulfill their conservation obligations. For example, Article 20(2) imposes "a clear obligation" on parties to provide developing states with the full incremental costs of implementing measures required to fulfill the *CBD*'s obligations.[129]

Like *CITES*, parties to the *CBD* are responsible for ensuring their obligations are fulfilled, and they are supported by a few similar international institutions.[130] The *CBD*'s CoP is composed of 196 members who convene biennially to advance implementation and review

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[122] Birnie, *supra* note 87 at 662.
[123] Bowman, *supra* note 32 at 116.
[124] *Ibid* at 25.
[125] *Ibid* at 18-19; UNOCD, "Wildlife and Forest Crime" , *supra* note 9 at 19.
[126] Bowman, *supra* note 31 at 618.
[127] *CBD*, *supra* note 39 at Preamble, art 3.
[128] *Ibid*, arts 7-8.
[129] Birnie, *supra* note 87 at 630-634; *CBD*, *supra* note 39, art 20.
[130] Bowman, *supra* note 32 at 618; *CBD*, supra note 39, arts 18(3), 23-25.

scientific and technological advice on biological diversity.[131] The *CBD* Secretariat supports the CoP and subsidiary bodies by compiling reports on compliance provided by domestic authorities and disseminating information to promote public education and awareness of biodiversity.[132] The Convention's Clearing-House Mechanism also establishes a network between the parties to facilitate scientific cooperation and knowledge-sharing.[133]

Strengths of the *CBD* include the potential normative force that it exerts on individuals and states through its goal-setting, as well as the mechanisms and incentives it creates for states to cooperate.[134] Since changing norms, raising awareness, and capacity-building are integral to suppressing the illegal wildlife trade, the *CBD* appears to afford states some helpful tools that should not be neglected. The *CBD* Secretariat can play an important coordinating role with other organizations. Likewise, the Clearing-House Mechanism and Article 20 can be used to promote capacity-building in developing states, which could theoretically rectify many of *CITES's* shortcomings resulting from non-compliance. Although the forestry industry remains suspicious of the *CBD*, Article 28 could also be used to create a specific protocol addressing illegal logging and trafficking in timber, which is a major source of revenue to criminal organizations.[135]

However, the *CBD* has frequently been criticized for achieving limited practical outcomes.[136] Like *CITES*, the *CBD* is strongly reliant on national implementation, but its imprecise goal-setting language, coupled with the significant resources required to realize its ambitious objectives, render it even less effective than *CITES*.[137] The broad scope of the *CBD* has caused many provisions to be expressed in "vague" and uncertain forms, or "hedged" around with substantial qualifications.[138] Particularly, phrases like "in accordance with [a state's] particular conditions"; "as far as possible and appropriate"; and "in accordance with [a state's] national plans, priorities and programmes" are problematic. The "remarkable" aspects of Art 20 are suddenly undermined, as developed states are to only help developing states when they find it convenient to do so.[139] Without assistance, the majority of states have no hope of observing their obligations. The sheer range of matters in Article 8 and what they encompass underscores how each obligation requires substantial financial and scientific resources.[140] Consequently, the *CBD* appears to lack teeth, notwithstanding its promise as a normative, consciousness-raising instrument for the international community.

iii. Environmental Instruments Are Useful, but Insufficient to Address Criminal Elements

International environmental law is still evolving, but *CITES* and the *CBD* already offer states some promising, albeit imperfect tools to address aspects of the illegal wildlife trade. *CITES* regulates the international legal trade in wildlife and requires states to prohibit non-

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[131] Convention on Biological Diversity, "Conference of the Parties (COP)" (2016), online: <www.cbd.int>.
[132] Convention on Biological Diversity, "Role of *CBD* Secretariat" (2016), online: <www.cbd.int>; *CBD*, *supra* note 39, art 24(1).
[133] *Scientific and technical cooperation and the clearing-house mechanism*, EP Dec X/15, UNEPOR, 2010, UN Doc UNEP/CBD/COP/DEC/X/15.
[134] UNODC, "Wildlife and Forest Crime", *supra* note 9 at 19; Birnie, *supra* note 87 at 630.
[135] UNODC, "Wildlife and Forest Crime", *supra* note 9 at 20.
[136] *Ibid* at 19.
[137] Bowman, *supra* note 32 at 623.
[138] *Ibid* at 19.
[139] *CBD*, *supra* note 39, arts 6, 11, 20; Bowman, *supra* note 32 at 597, 618.
[140] *CBD*, *supra* note 39, art 8.

compliant wildlife trafficking in their jurisdictions. It establishes a criminal law framework to address the illegal wildlife trade and a mechanism for states to collect and share pertinent data. Conversely, the *CBD* can be used as a capacity-building and consciousness-raising mechanism to help developing states implement *CITES* more thoroughly.

Nevertheless, the focus of both *CITES* and the *CBD* on sustainability, protection, and preservation only allows them to address some aspects of the illegal wildlife trade, such as poverty, capacity-building, and environmental protection. *CITES* and the *CBD* are therefore inadequate instruments on their own.[141] Transnational instruments focusing on criminality are needed to snuff out other movers of the illegal wildlife trade, like organized crime and corruption.

c) Transnational Criminal Law: UNTOC and UNCAC

As a preliminary matter, transnational criminal law ("TCL") and international criminal law ("ICL") are distinct and must be disentangled for greater analytical clarity.[142] Generally, ICL regulates conduct that is primarily prohibited under customary international law. Individual liability is directly imposed on state actors and enforced by the international community itself, either by individual states exercising universal jurisdiction, or by an international criminal tribunal. On the other hand, ICL only addresses the most heinous acts, also known as "core crimes", which include: aggression, genocide, war crimes, and crimes against humanity. [143] ICL has limited application because the exercise of criminal jurisdiction is viewed as a direct function of sovereignty, which states "jealously guard."[144] Consequently, ICL cannot be used to address less odious, but nonetheless pernicious activities with trans-boundary effects, such as the illegal wildlife trade.

TCL applies to domestic or "common" crimes that affect or engage the interests of more than one state when they are committed, such as drug trafficking and the illegal wildlife trade.[145] There is no direct liability under ICL for such crimes, but they transcend state boundaries and can only be suppressed if states cooperate. Otherwise, criminals take refuge in the "jurisdictional cracks along national borders" chiseled from sovereignty.[146] In order to cooperate, states must use international legal instruments, such as treaties, to coordinate their efforts. TCL thus covers "the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects".[147]

TCL instruments typically have three basic characteristics. First, they ensure that a network of states criminalize particularly harmful crimes. Second, they ensure that as many states as possible will exercise jurisdiction over these crimes to preclude "safe havens" for offenders. Third, they provide for cooperation between states, such as the sharing of resources and expertise, and require state parties to either prosecute or extradite offenders to a fellow state

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[141] UNGA, "Implementation Meeting", *supra* note 2 at 4.
[142] Robert J Currie, *International & Transnational Criminal Law* (Toronto: Irwin Law, 2010) at 15 [Currie, "International & Transnational"].
[143] *Ibid* at 21-22, 17-18, 104.
[144] *Ibid* at 56.
[145] *Ibid* at 54.
[146] *R v Hape*, 2007 SCC 26 at paras 98–99, [2007] 2 SCR 292 [*Hape*].
[147] Currie, "International and Transnational", *supra* note 142 at 304.

that is capable and willing to prosecute.[148] *UNTOC* and *UNCAC* possess all of the foregoing characteristics.

i. UNTOC: Nature, Application, and Tools

UNTOC is a flexible instrument that focuses more on the nature of actors and the seriousness and transnational nature of criminal activity, rather than particular crimes.[149] State parties are required to criminalize certain specific offences, such as participation in an organized criminal group and the laundering of proceeds of crime.[150] Moreover, state parties may use *UNTOC*'s tools to address any conduct that constitutes (1) a "serious crime" of a (2) "transnational in nature", involving (3) an "organized criminal group".[151] First, "serious" is defined as "an offence punishable by a maximum deprivation of liberty of at least four years or more".[152] A crime is not "serious" based on its content, but on how states view its egregiousness, which is determined in relation to how they penalize the crime domestically. Second, an offence is generally "transnational" if it has a nexus with either more than one state or a criminal organization operating in more than one state.[153] Third, a "criminal organization" generally contains three or more persons who have acted together to commit a "serious" crime to obtain a financial or material benefit.[154] Consequently, states can use *UNTOC*'s tools to investigate and prosecute transnational criminals involved in the illegal wildlife trade if state parties make trafficking in wildlife a "serious" crime in their respective jurisdictions.[155]

The tools in *UNTOC* can suppress actors and drivers that environmental instruments have failed to adequately address. Two notable categories of legal tools are available to states. First, *UNTOC* contains "modern and progressive" provisions on various forms of mutual assistance and cooperation.[156] Article 16 sets out a flexible and consultative extradition scheme while Article 21 provides for the transfer of criminal proceedings between state parties. Furthermore, Article 18 contains a highly detailed and stand-alone mutual legal assistance regime, employing stronger language than the financial incentives article of the *CBD*.[157] For example, parties "shall" afford one another "the widest measure" of mutual legal assistance "to the fullest extent possible".[158] States may share information with one another in various ways.[159]

Second, *UNTOC* also contains a set of specialized measures for enhancing investigational cooperation, including joint investigations, special investigative techniques, law enforcement cooperation, and the sharing of information and analytical expertise.[160] Article 30 requires parties to make "concrete efforts to the extent possible" to provide developing countries with economic and technical assistance to ensure they comply with their obligations and fully participate in the

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[148] *Ibid* at 306-307 (i.e. *aut dedere aut judicare*).
[149] *Ibid* at 316; UNODC, "Wildlife and Forest Crime", *supra* note 9 at 18.
[150] *UNTOC*, *supra* note 77, arts 5-6; see UNODC, "Wildlife and Forest Crime", *supra* note 9 at 49 (information about money laundering).
[151] *UNTOC*, *supra* note 77, art 3(1); Currie, "International and Transnational", *supra* note 142 at 317.
[152] *UNTOC*, *supra* note 76, art 2(b).
[153] *Ibid*, art 3(2).
[154] *Ibid*, arts 2(a), 2(c).
[155] UNODC, "Wildlife and Forest Crime", *supra* note 9 at 17; UNGA, "Tackling Illicit Trafficking", *supra* note 3.
[156] Currie, "International and Transnational", *supra* note 142 at 320.
[157] *Ibid* at 321; *UNTOC*, *supra* note 77, arts 16, 18.
[158] *UNTOC*, *supra* note 77, arts 18(1)-(2).
[159] *Ibid*, art 18(4).
[160] *Ibid*, arts 19-20, 27, 29; Currie, "International and Transnational", *supra* note 142 at 321.

treaty regime.[161] Tools promoting mutual assistance are useful because many source countries struggle to control their borders, allowing poachers and traffickers to operate with impunity. Myanmar is a concrete example; several areas within its jurisdiction are effectively outside of government control.[162] Therefore, *UNTOC* offers states a wide array of tools to suppress organized criminals involved in the global illegal wildlife trade.

ii. UNCAC: Tools and Application

UNCAC is also broad in scope and supplements *UNTOC* by providing further tools for cooperation, and promoting "integrity, accountability and proper management of public affairs and public property" within states.[163] *UNCAC* is notable for addressing private sector corruption and the demand side of corruption, like bribe solicitations.[164] Furthermore, state parties must criminalize a wide range of public sector corruption offences and implement a regime for the freezing, seizure, and confiscation of property linked to corruption crimes.[165]

Perhaps the most unique and promising feature of *UNCAC* is its asset recovery scheme, which the UNODC describes as "a major breakthrough". This is a key tool for developing states, whose foreign aid and assets are often plundered by corrupt officials. The asset recovery scheme provides both for the return of state assets and for access to the courts of party states by victims of corruption to facilitate the return of assets taken from them. *UNCAC* also contains detailed provisions obliging states to confiscate and return assets upon request by partner states.[166] To date, there have been few attempts to "follow the money trail" by freezing and confiscating the proceeds of wildlife crime. Tools allowing states to suppress the illegal wildlife trade through "financial devastation" sound promising because they can negate a main incentive for participating in the illegal trade: high profits.[167] *UNCAC*'s asset recovery scheme can also incentivize capacity-building initiatives between developed and developing states. States are often self-interested and reluctant to divert finite resources to other sovereigns. If a mechanism for tracing and recovering misappropriated foreign aid is implemented, then perhaps developed states will be less hesitant to assist developing states. Therefore, insofar as different forms of wildlife crime are connected with corrupt practices, *UNCAC* can provide important legal tools to combat those elements of the illegal wildlife trade.[168]

There are four primary international mechanisms that states can use to combat the illegal wildlife trade: *CITES*, *CBD*, *UNTOC*, and *UNCAC*. *CITES* and the *CBD* are useful, but cannot tackle organized crime and corruption in the illegal wildlife trade. Fortunately, *UNTOC* and *UNCAC* are tailored to suppress transnational organized crime and corrupt practices in governments. Each set of instruments thus provides a complementary set of tools for states to

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[161] *UNTOC*, *supra* note 77, art 30(2); Currie, "International and Transnational", *supra* note 142 at 321.
[162] DLA Piper, *supra* note 64 at 4.
[163] *UNCAC*, *supra* note 77, arts 1(c), 5–14; John Hatchard, *Criminalizing Corruption: The Global Initiatives*, in Neil Boister & Robert J Currie, eds, *Routledge Handbook of Transnational Criminal Law* (New York: Routledge, 2015) 347 at 353 [Hatchard].
[164] See e.g. *UNCAC*, *supra* note 77, art 12; Hatchard, *supra* note 163 at 363.
[165] *UNCAC*, *supra* note 77, arts 15, 18, 23, 31.
[166] *UNCAC*, *supra* note 77, arts 51-59; Currie, "International and Transnational", *supra* note 142 at 340.
[167] UNODC, "Wildlife and forest Crime", *supra* note 9 at 48; William C Gilmore, *Dirty Money: The Evolution of International Measures to Counter Money Laundering & the Financing of Terrorism*, 3rd ed (Strasbourg: Council of Europe Publishing, 2014) at 20.
[168] UNODC, "Wildlife and Forest Crime", *supra* note 9 at 18.

address the global illegal wildlife trade. Neither set is inherently better than the other at addressing the illegal wildlife trade, particularly since environmental and TCL instruments are only effective insofar as states choose to implement and use them.

III. HOW SHOULD STATES RESPOND?

States can use *CITES*, the *CBD*, *UNTOC*, and *UNCAC* to holistically and comprehensively target all actors and drivers of the illegal wildlife trade in three general ways. First, state parties to *CITES* should make trafficking in wildlife punishable by a minimum of four years imprisonment so that wildlife trafficking constitutes a "serious crime" under *UNTOC*. Once the illegal wildlife trade is brought within the scope of *UNTOC*, states will be able to target the organized criminal elements of the illegal wildlife trade that environmental instruments have failed to address. Although almost all *CITES* parties have some form of domestic legislation prohibiting wildlife trafficking, the penalties imposed by various states differ substantially.[169] Uniform penalties classifying wildlife trafficking as a "serious crime" across jurisdictions can promote concerted action amongst states.[170] If parties to *CITES* willingly fail to make wildlife trafficking a "serious crime", then trade sanctions should be applied more liberally to incentivize compliance through economic and political pressure.[171]

Second, the *CBD* can be used to reduce consumer demand and address underlying problems that drive otherwise non-criminals to the illegal wildlife trade, such as poverty.[172] Those driven to the wildlife trade by poverty and desperation should not be suppressed through criminal instruments; their socio-cultural drivers must be targeted. It is also essential to curb demand for wildlife products, but this requires a shift in public attitudes, not necessarily prosecutions.

The normative force of the *CBD* can be used to influence individual conduct, and thus the development of national laws and policies within states as a whole. Similarly, the *CBD*'s subsidiary institutions, such as the Secretariat and the Clearing-House-Mechanism, can be used to educate and promote awareness amongst consumers of the illegal wildlife trade's impacts.[173] Article 20 of the *CBD* and *UNCAC* in general could be jointly used by developed states to address poverty and poor governance in developing source states, and thus suppress the drivers for involvement by subsistence users and corrupt officials. Developed states could provide necessary foreign aid using the *CBD* to reduce poverty, strengthen state institutions, and support treaty implementation; yet also use *UNCAC*'s asset recovery scheme to prevent and recover misappropriated foreign aid. *UNTOC*'s legal assistance tools can also be used in this regard, as one of the most significant issues affecting developing countries is a lack of prosecutorial and judicial resources.[174]

Third, *CITES* parties should implement *UNCAC* and *UNTOC* to target all officials who corruptly participate in the illegal wildlife trade. Organized criminals and corrupt officials are motivated to participate in the illegal wildlife trade due to large profit potential coupled with the slim chances they have of being caught. By targeting these incentives, *UNCAC* and *UNTOC* can

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[169] DLA Piper, *supra* note 64 at 1-2.
[170] White, *supra* note 118 at 290.
[171] DLA Piper, *supra* note 64 at 8.
[172] See e.g. *Akimu*, *supra* note 30.
[173] DLA Piper, *supra* note 64 at 3; SCBD, *supra* note 39 at 13, 18.
[174] DLA Piper, *supra* note 64 at 7; see also *UNCAC*, *supra* note 77, art 11.

function as effective preventative tools. Furthermore, fraudulently issued permits under *CITES* can be linked to corruption, and so *UNCAC* can also be used to strengthen the integrity of the *CITES* regime.[175] International environmental, TCL, and capacity-building mechanisms must be synergistically applied to the problem to suppress each of its components.

a) International Law Informs How States Should Respond

International law is undoubtedly imperfect, but it informs states on how they should respond to the illegal wildlife trade. Transnational crimes that corrode biodiversity and the rule of law across states cannot be confined within state boundaries. So long as the illegal wildlife trade has trans-boundary effects, states must cooperate with one another, which requires the mediating mechanism of international law. Through international law, states have created some international legal mechanisms that are potent in principle; states must fully use these tools.

Regional cooperation amongst states in criminal matters remains weak and must be a priority.[176] States sharing borders and facing similar concerns, such as South Africa and Zimbabwe, should collaborate more closely. International organizations, like the International Consortium on Combating Wildlife Crime are models for collaborating states.[177] However, national implementation of existing treaties should be the foremost priority for states. Without strong domestic laws and institutions, any international legal mechanism is not a tool, but a mere collection of words.[178] Canada has served as an appropriate model for the domestic implementation of international treaties.

i. Canadian Domestic Law and Practice Is Informative

Canada is a particularly good model for other federal states when it comes to implementing environmental treaties, as both the federal and provincial governments of Canada have jurisdiction over environmental matters. Canada's federal and provincial laws are relatively uniform and enforced through undercover operations, thus informing how other federal states, like South Africa, should respond.[179]

South Africa has robust national legislation, but disparate provincial laws that incentivize criminals to "cherry pick" weaker provinces for illicit wildlife products.[180] Canada has effectively implemented *CITES* by passing the *WAPPRIITA*, *Wild Animal and Plant Trade Regulations*, the *Species at Risk Act* [*SARA*], the *Canada Wildlife Act*, and equivalent provincial

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[175] UNODC, "Wildlife and Forest Crime", *supra* note 9 at 53–54; see also *Lemthongthai*, *supra* note 116 at paras 9, 17.

[176] DLA Piper, *supra* note 64 at 8.

[177] UNODC, "The International Consortium on Combating Wildlife Crime" (2016), online: <www.cites.org> (a partnership between INTERPOL, UNODC, CITES Secretariat, the World Bank, and the World Customs Organization); it is active around the world).

[178] White, *supra* note 118 at 296.

[179] See e.g. *R v Lamouche*, 1998 ABPC 71, 236 AR 69 (accused caught selling walleye, an endangered species of fish, through an undercover operation); *R v Scalplock*, 2007 BCPC 181, [2007] BCWLD 4453 (undercover provincial wildlife officer arrested accused seeking immature bald eagle wings); *R v Sawicki*, 2002 SKQB 414, 225 Sask R 182 (Crown sought maximum sentence under provincial legislation for trafficking in wildlife).

[180] DLA Piper, *supra* note 64 at 3; *Wild Animal and Plant Protection Regulation of International and Interprovincial Trade,* SC 1992, c 52, s 22(1) [*WAPPRIITA*]; *Fish and Wildlife Conservation Act*, 1997, SO 1997, c 41, s 102 [*FWCA*] (one shortcoming is that provincial penalties do not constitute "serious crimes", but are still robust by imposing a maximum penalty of CAD $25,000 and/or one year of imprisonment).

legislation.[181] Canada also endeavors to observe its obligations under the *CBD*.[182] Notably, non-compliance with *CITES* and exploiting an endangered species is a hybrid offence that carries a maximum penalty of five years imprisonment when prosecuted by indictment, thereby already constituting a "serious crime".[183] Canadian environmental laws are enforced by Environment Canada through diligent wildlife officers assisted by scientists.[184] Canada's judiciary is also aware of the damages fashioned by the illegal wildlife trade, thus deterrence is the primary sentencing principle.[185] Furthermore, Canada has a dynamic and effective capacity-building institution that can serve as a model for other developed states: the International Development Research Centre.[186]

Canada has also been an active participant and coordinator of international efforts to address organized crime, being no stranger to its practices and effects domestically.[187] Canada has effectively implemented its obligations under *UNTOC* and *UNCAC*, as well as non-binding international obligations in various instruments. For example, Canada has implemented *UNTOC*'s tools for legal assistance in various instruments.[188] Section 11 of the *Seized Property Management Act* is notable for empowering the Attorney General to enter into agreements with foreign states for the reciprocal sharing of proceeds or property forfeited, where the foreign state's authorities participated in the investigation that led to the forfeiture.[189] Canada has also created an arm's length financial intelligence system to collect, analyze, and report information that assists in the detection and prosecution of money laundering.[190] Likewise, Canada has implemented *UNCAC*'s anti-corruption measures, and other international instruments, in various

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[181] See generally *WAPRIITA*, *supra* note 180; *Wild Animal and Plant Trade Regulations,* SOR/96-263; *Species at Risk Act*, SC 2002, c 29 [*SARA*]; *Canada Wildlife Act*, RSC 1985, c W-9.

[182] Environment and Climate Change Canada, "Convention on Biological Diversity" (9 June 2016), online: <www.ec.gc.ca>.

[183] *WAAPRIITA*, *supra* note 180, s 22(1); *SARA*, *supra* note 181, s 97.

[184] *Leong*, *supra* note 120 at paras 12, 14, 18-20, 28-32, 37 (facts of the case illustrate the diligence exercised by some of Canada's Wildlife officers at the front lines of the war against illegal wildlife trafficking. This case involved a "coral blitz". Rare, endangered corals were being imported fairly regularly, and officers were searching for imports that were non-compliant with *WAPRIITA*; a marine biologist assisted in species identification).

[185] *R v General*, 2007 BCPC 130 at para 16, [2007[BCWLD 3703 ("a penalty of significance is required even when one might look at individual circumstances and conclude that [the offender's] actions are a small drop in a very large bucket…the impact…is like 'death by a thousand small cuts'…deterrence is the overwhelming concern"); *R v Tschetter*, 2012 ABPC 167 at paras 53-54, 68, [2012] AWLD 4734 ("Trafficking in wildlife presents a serious threat…deterrence, both general and specific as well as denunciation are the primary considerations…for this type of offence". The offenders were Hutterites, and thus owned no property, but were still required to pay CAD 24,680 and 65,895 respectively, for the second offender had previously committed a wildlife crime. This was a "crushing" sentence.); see also *Luah*, *supra* note 20; *Lamouche*, *supra* note 179 at para 23 (case law unequivocally demonstrates that Canadian judges are aware of the illegal wildlife trade's impacts and gravity).

[186] *International Development Research Centre Act*, RSC 1985, c I-19, s 4 (an innovative capacity-building arms-length entity that supports research into the problems of the developing regions of the world).

[187] Currie, "International and Transnational", *supra* note 142 at 321.

[188] See e.g. *Criminal Code*, RSC 1985, c C-46; *Extradition Act*, SC 1999, c 18; *Mutual Legal Assistance in Criminal Matters Act*, RSC 1985, c 30 (4th Supp) [*Mutual Assistance Act*]; *International Transfer of Offenders Act*, SC 2004, c 21.

[189] SC 1993, c 37, s 11.

[190] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, s 40 (see also s 3 for the *Act*'s objects); Government of Canada, "About FINTRAC" (2016), online: <www.fintrac.gc.ca>; Transparency International, "Corruption Perceptions Index 2014: Results" (2014), online: <www.transparency.org> (Canada was ranked 10th least corrupt out of 175 states in the 2014 Index).

legislative acts, and is perceived as one of the least corrupt states in the world.[191] Internationally, Canada cooperates with other states in criminal matters, and plans to provide leadership on environmental and development issues.[192] Canada's approach, like any state's approach, is not perfect, but it serves as a model that other states may emulate to effectively implement and apply international legal tools to suppress the illegal wildlife trade.

IV. CONCLUSION

The illegal wildlife trade is a pressing concern to states around the world due to its global scope. It is a multifaceted problem with a myriad of actors, drivers, and impacts that transcend state boundaries. Developing states and their people are exploited, while criminals and corrupt officials are enriched. Biodiversity is ravaged and the integrity of law and state institutions across the world are undermined. Therefore, a global solution is required.

States currently have four primary international legal tools at their disposal: *CITES*, the *CBD*, *UNTOC*, and *UNCAC*. Each of these tools can, in principle, address at least one aspect of the illegal wildlife trade. TCL instruments like *UNTOC* and *UNCAC* may provide more potent tools to address organized crime and corruption. However, environmental instruments like *CITES* and the *CBD* should also play a role. A complex and coordinated response is necessary to tackle to a complex and coordinated problem.

International law informs states to continue cooperating with one another, but also to strengthen their own national legal regimes so as well. Canada has implemented the available international tools in robust legislation. It has a strong judiciary, diligent enforcement personal, and an interest in cooperating with other states. The world can suppress the illegal wildlife trade, but only if states cooperate and strengthen their national legal regimes to deploy international environmental and criminal law instruments synergistically.

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[191] *Corruption of Foreign Public Officials Act*, SC 1998, c 34; *Mutual Assistance Act*, *supra* note 188, ss 9.3-9.4 (courts empowered to order enforcement in Canada of foreign orders for seizure and forfeiture).

[192] *Logan*, *supra* note 20; *Hape*, *supra* note 146; Canada, Office of the Prime Minister, *Minister of Environment and Climate Change Mandate Letter*, online: <www.pm.gc.ca>; Prime Minister Justin Trudeau, "Minister of International Development and La Francophonie Mandate Letters" *Government of Canada*, online: <www.pm.gc.ca>.

RIGHT TO EQUAL ACCESS: AN ASSESSMENT OF HUMAN RIGHTS VIOLATIONS FACED BY STUDENTS WITH MENTAL HEALTH STRUGGLES

***Kathryn Gasse**

I. INTRODUCTION

Rather than being a system that empowers students to reach their full potential, the education system has become one that sits idly by while students with mental health issues face discrimination. This paper will explore the failings of the system and the human rights violations associated with them. First, the mental health landscape in Canada will be examined, with a focus on how youth are affected. The importance of early intervention will be emphasized. Second, the failings of Ontario's special education programs will be discussed, with the issues being separated into suspensions, expulsions and exclusions, the Identification, Placement and Review Committee ("IPRC") standards and the use of Individual Education Plans ("IEP"). Third, it will be shown that exceptional students, particularly mentally ill ones, face systemic discrimination, necessitating an intervention from the legal profession. Throughout this paper, suggestions will be made on how to better accommodate mental health issues in school settings.

II. MENTAL HEALTH IN CANADA AND THE IMPORTANCE OF EARLY INTERVENTION

There are long-recognized and indisputable connections between mental illness, unemployment, poverty, homelessness, and addiction. Employment not only provides financial stability, but also a sense of status, identity and achievement. While daily routine and structure is important to many, it is particularly vital for those with mental health problems.[1] However, the unemployment rates among people facing mental health issues are extremely high, even for those who have the desire to work.[2] Of Canadians living with a serious mental illness, seventy to ninety percent of them are unemployed and those in the lowest income group are three to four times more likely to experience "poor to fair" mental health.[3] The relationship between poverty and mental illness is difficult to address. The barriers associated with mental health issues can lead to poverty and impoverished conditions can lead to, or exacerbate, mental health issues. As such, a vicious cycle is created between mental illness, unemployment and poverty.

A common result of poverty is homelessness. Between twenty-three and sixty-seven percent of homeless people report that they suffer from a mental illness.[4] Once again, it is hard to separate the effect that homelessness has on mental health from the effect that mental health

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[1] "Unemployment, mental health and substance use" (2015), online: Here to Help <http://www.heretohelp.bc.ca>.
[2] *Ibid*.
[3] *Ibid*; "Mental Illness and Addictions: Facts and Statistics" (2012), online: Centre for Addiction and Mental Health <www.camh.ca> [CAMH].
[4] *Ibid*.

struggles have on the risk of homelessness. Additionally, mentally ill Canadians are predisposed to struggles with addiction. Those with substance abuse problems are three times more likely to have a mental illness.[5] With proper education and early intervention, it seems plausible that some of these numbers could go down.

With the bleak future ahead for those with mental health problems, school-aged Canadians ought to be the priority in the ongoing quest for more accessible and effective mental health services and in the much-needed fight against stigma. [6] Best evidence suggests that seventy percent of mental health problems (including addiction) present themselves in childhood or adolescence.[7] One of the leading causes of disability in Canada is mental illness[8] and individuals between the ages of fifteen and twenty-four are more likely than any other group to suffer from mental disorders.[9] Youth also form one of the highest risk groups for suicide,[10] a fact consistent with the prevalence of mental health struggles. It is crucial that youth predisposed to suffering with mental illness and those already living with it be educated, supported and integrated into society.[11]

While biological factors and traumatic life experiences contribute to mental health problems, social circumstances arising at school also play a role.[12] How mental illness is addressed inside the walls of a classroom can make all the difference for mentally ill students as well as their communities.[13] In Ontario, because children between the ages of six and eighteen are legally required to attend school, the majority of a young person's day is spent in a classroom.[14] In high school classrooms, one in five students are struggling with mental health issues.[15] The most common mental health disorders for children and youth are anxiety, ADHD, depression, mood disorders, schizophrenia and eating disorders.[16] Each disorder comes with associated functional limitations, and without proper consideration of these limitations, appropriate accommodation is not possible.[17] Despite the fact that a mental health disability can

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[5] Brian Rush et al, "Prevalence of Co-occuring Substance Use and Other Mental Disorders in the Canadian Population" (2008) 53:12 Can J Psychiatry 800 at 802 (at least 20% of people with a mental illness have a co-occurring substance use problem).

[6] *The Opportunity to Succeed: Achieving Barrier-Free Education for Students with Disabilities: Consultation Report* (Toronto: Ontario Human Rights Commission, 2003) at 5, online: <www.ohrc.on.ca> [Opportunity to Succeed].

[7] Canada, Ministry of Health, *The Human Face of Mental Health and Mental Illness in Canada,* (Minister of Public works and Government Services Canada, 2006) at 88, 121, online: www.mdsc.ca [Ministry of Health].

[8] See generally Canada, Mental Health Commission, "Why Investing in Mental Health will Contribute to Canada's Economic Prosperity and to the Sustainability of our Health Care System" (Canada: Mental Health Commission, 8 February 2013) at 2, online: <www.mentalhealthcommission.ca>; Kah Leong Lim, "A new population-based measure of the burden of mental illness in Canada" (2008) 28:3 Chronic Dis Can 92.

[9] "Canadian Community Health Survey - Mental Health" (Ottawa: Statistics Canada, 18 Sept 2013), online: Statistics Canada < http://www.statcan.gc.ca>.

[10] CAMH*, supra* note 3.

[11] Opportunity to Succeed, *supra* note 6 at 6.

[12] Ministry of Health, *supra* note 7 at 19.

[13] Opportunity to Succeed, *supra* note 6 at 29.

[14] "Attendance Rights" (2013), online: Justice for Children and Youth <www.jfcy.org> (unless they graduate earlier).

[15] P Smetanin et al, "Life and Economic Impact of Hypothetical Intervention Scenarios on Major Mental Illness in Canada: 2011 to 2041"(Toronto: RiskAnalytica, 2012) at 3, online: Mental Health Commission of Canada <www.mentalhealthcommission.ca>.

[16] "Children and Youth Mental Health: Signs and Symptoms", online: Ontario Ministry of Children and Youth Services <www.children.gov.on.ca>.

[17] Alfred Souma, Nancy Rickerson & Sheryl Burgstahler, "Academic Accommodations for Students with Psychiatric Disabilities", *University of Washington* (Apr 2012) at 2, online: Disabilities, Opportunities,

affect a child the way cancer or a physical disability would,[18] their pain and suffering is not readily accepted or understood. Among the many obstacles facing Canadian youth struggling with mental health—such as the symptoms of their illness and ever-present societal stigma—mentally ill students are not receiving equal access to educational opportunities.

III. EDUCATION IN ONTARIO

Education is an international human right and is recognized in Canadian legislation as a fundamental social good.[19] A core responsibility of all provincial governments across the country is to create a publicly funded education system accessible to all. Some scholars believe that education is more important for mentally and physically challenged children because proper education is the only way to open the door to full involvement and inclusion in the community.[20] Despite all of this, special education has been a "dead end for far too many students" for far too long.[21]

For those with mental health issues, there is a two-tiered problem. First, there is ongoing discrimination against students requiring special education. Second, there is a lack of appropriate or official recognition of mentally ill students as those who require accommodation, resulting in their lack of clear access into the system. They are at an increased risk of failing because they are either not identified as exceptional or have an ineffective IEP. Subsequently, they might drop out, having felt that school is not the place for them. Principals are disproportionately excluding exceptional students under the umbrella excuse of "protecting staff and other students," either because of a particular disorder's symptoms or because of poorly exhibited frustration by a student. Many students will skip class because they feel the atmosphere is not welcoming (or conducive to learning) or they may need to miss class because of their illness.[22] They may face bullying because of their particular condition and the lack of understanding surrounding the symptoms of their disease. With mental health issues not being understood by teachers and thus not being discussed in classrooms, misunderstandings may lead to stigma.

Feeling excluded because of a school's attitude or actions towards them, these students then begin to self-stigmatize. All of these realities factor into the discrimination faced by mentally ill students. This discrimination goes against the Ontario *Human Rights Code,* the *Canadian Human Rights Act* and the *Canadian Charter of Rights and Freedoms.* [23] This paper will focus only on Ontario and the *Code*. Before delving into the suggested response to the

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Internetworking, and Technology < www.washington.edu> (some of the functional limitations are general and some are particular to a specific disorder).

[18] Children's Mental Health Ontario, "Children's Mental Health Week", *Community Wire* (6 May 2007), online: <www.communitywire.ca>.

[19] Opportunity to Succeed, *supra* note 6 at 5.

[20] Wayne Mackay & Vincent Kazmierski, "And On the Eighth Day, God Gave Us…: Equality in Education – Eaton v Brant Board of Education and Inclusive Education" in WF Foster, ed, *Education in Transition: Legal Issues in a Changing School Setting: proceedings of the Conference of the Canadian Association for the Practical Study of Law in Education* (Châteauguay: LISBRO, 1995) 205 at 205.

[21] "Victory at the Supreme Court of Canada on the Right to Education" (2012), online: Canadian Association for Community Living <http://www.cacl.ca>.

[22] They might miss class because of symptoms of their illness, or because of side effects of medication, or because of doctors' appointments in the quest for a diagnosis and/or treatment.

[23] RSO 1990, c H-19, s 17 [*Human Rights Code*]; RSC, 1985, c H-6, s 3(1); Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

systemic discrimination against exceptional students, it is important to understand the sources of the systemic discrimination.

Students in Ontario with "very high" levels of special needs have a legal right to support and special programs, equipment and classes.[24] The Ontario Ministry of Education has decided on five categories of "exceptionalities": behaviour, communication, intellectual, physical, and multiple.[25] Currently, mental illness only fits into the categories as it manifests itself, sending the message that the mental illness itself is not worth focusing on but rather the behaviours associated with it. While physical disability is a category on its own, mental illness is not, following the same narrative that physical illness is more accepted than mental illness. This is where the first crucial systemic failure arises. Not readily recognizing a mental health disorder as a disability is, in and of itself, needlessly barring mentally ill students from accessing the services they require.

When a mental disorder manifests itself in a way that fits into the predetermined categories of exceptionality, the mentally ill student enters a special education program. These programs fail to take exceptionality into consideration when deciding on disciplinary action. The only IRPC available is not required, nor is it easily explored, and IEPs are poorly implemented.

a) Suspensions, Expulsion & Exclusion

If an exceptional student partakes in any activity that could lead to suspension or expulsion, the principal is obligated to consider mitigating circumstances, such as the details surrounding the student's exceptionality. This is not occurring.[26] If a decision to expel is made, a report is sent to the school board and the parents. At the expulsion hearing, parents are entitled to participate but there is no requirement that a parent, guardian or representative accompany the student. The board supposedly considers the student's "exceptionalities" at the hearing, but with no advocate present on the student's behalf, there is a natural distrust of this process.[27] Moreover, the *Education Act* specifically allows the school board considerable discretion in making rules that protect exceptional pupils.[28] However, few boards have fully utilized this broad policy-making power bestowed by the safe-schools provisions in the *Education Act*. This is particularly harmful for students whose mental illness can manifest itself in a way where they are more likely to be suspended.[29] The propensity to exclude such students can be traced from the way their symptoms manifest or merely from the general misunderstanding and fear associated with such manifestations.[30]

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[24] "What are the categories of exceptionalities for special education?" (2016), online: People for Education <http://www.peopleforeducation.ca>.

[25] *Ibid*.

[26] Mary Birdsell, Emily McKernan, "OBA Student Discipline: Practical Strategies for Helping High Risk Students Succeed" (Lecture delivered at Ontario Bar Association Professional Development Conference, Toronto, 31 March 2015) [unpublished] [OBA Student Discipline]; Emily Chan, "The Rights of Children and Youth: Focus on Education" (Lecture offered through the Kingston Legal Clinic, Kingston, 27 March 2015) [unpublished].

[27] Suspension and expulsion can be appealed, yet principals knowingly exclude the statement saying parents can appeal. Common practice also seems to be requesting an extension on a suspension, taking advantage of parent's trust in the school or inability to fully comprehend that there is a deadline to appeal; *Ibid*.

[28] RSO 1990, c E.2, s 8(3) [*Education Act*].

[29] For example, a schizophrenic student may mutter or react violently because of his or her condition.

[30] Despite this, the OHRC received reports that the school system is not well-equipped to deal with students whose disabilities may manifest in disruptive behaviour and students are being suspended or expelled without due consideration. Justice for Children and Youth observes an increase in the number of reports about suspensions and

Apart from suspension and expulsion, principals also have the power to exclude students. In *Bonnah (Litigation Guardian of) v Ottawa-Carleton District School Board*, the Ontario Court of Appeal ruled that a principal may exclude an exceptional pupil from school for legitimate safety reasons. [31] This case recognizes the fact that a student can be exceptional but also pose an immediate risk to the safety of others.[32] Frequently though, there is no assessment being made as to whether or not the student actually presents a risk to others.[33] The Ontario Human Rights Commission reported that parents are being pressured to "voluntarily" remove their child from school.[34] Teachers also abuse their powers by subjecting students with disabilities to a disproportionate amount of time in forced isolation. Such procedures are psychologically detrimental to students.[35] Ostracizing students for behaviour that is beyond their control further stigmatizes mental disorders. When students with disabilities are arbitrarily isolated, excluded, suspended or expelled, it is an affront on their right to equal access. The effects of these discriminatory practices can be long lasting, and they dictate how disabled students are viewed by their peers and themselves.

b) IPRC

The purpose of an IPRC is to formalize the identification of exceptional students and to place them where they can benefit from special education programs and services. The key element of an IPRC decision is the proper identification of a child's learning needs. If a parent thinks their child requires a special education program or special education services, but they are unable to reach an agreement with the school principal (and vice versa), then a request in writing can be made to have an IPRC decide. Ideally, the process should be open and cooperative, not intimidating. The rules surrounding the IPRC process are supposed to ensure that parents are respected and that school boards can efficiently address matters. The process is a legal one, guided by the regulations under the *Education Act*.[36] However, this process of formally identifying the needs of an exceptional child is not mandatory. More shockingly, the school can reject IPRC decisions.[37] Despite this, it is possible for an exceptional student to receive special education services through an IEP, which will be discussed in the next section.

The IPRC process can be complex to parents. Schools must give ten days written notice of the time and place of the IPRC meeting. The time should be convenient for the parents and the school. The chair of an IPRC is required to consider any and all information submitted by a parent. Doctors' diagnoses are commonly considered, as well as any assessments conducted by professionals. At first glance, these requirements seem to make for an effective procedure.

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expulsions of exceptional students. The behaviour that makes them exceptional is the same behaviour not being considered in the decision to suspend or expel; See Opportunity to Succeed, *supra* note 6 at 22.

[31] 64 OR (3d) 454, 2003 CanLII 19087 (Ont CA) at para 34.

[32] *Ibid* at para 35.

[33] Opportunity to Succeed*, supra* note 6 at 24 (the OHRC's Disability Policy states, "A mere statement, without supporting evidence, that the […] risk is 'too high' based on impressionistic views or stereotypes will not be sufficient.").

[34] *Ibid* at 16 (The Marsha Forest Centre reported to the OHRC that, "It is routine that students with disabilities are required to begin school each year after other students do so, that some are told to remain at home when schools find themselves unable to provide necessary supports for various periods of time, and that others do not attend school due to disputes with schools over placement." These are other forms of exclusion).

[35] *Ibid* at 23.

[36] See generally *Identification and Placement of Exceptional Pupils*, O Reg 181/98.

[37] *Education Act*, *supra* note 28.

Unfortunately, many parents feel intimidated by the process and excluded from participating in it.

Despite the regulations under the *Education Act*, parents report feeling alienated. Community Living Toronto wrote to the OHRC, expressing that the IPRC process is extremely intimidating and not fully explained to parents. Parents can attend meetings where up to twelve professionals, who likely never met their child, are present and informing the parent of what is best. Parents might be unclear about the purpose of the meeting, the scope of decisions being made or even their role in the process.[38] The Ontario division of the Canadian Council of the Blind stated that parents are not adequately informed of their rights. Most move forward, trusting that the educational professionals know what is best for their child.[39] Representatives can attend the meetings, which is something parents are not always aware of or capable of arranging.[40] The representatives can also support the parent or speak on their behalf, ensuring that all of their concerns are expressed—something that should be of utmost importance. [41] It seems only proper that an advocate should not be an optional part of the process.

When the IPRC comes to a decision, the chair provides a written statement to the parent(s) or guardian(s). In the statement of decision, the IPRC identifies whether the pupil is exceptional or not. If the child is identified as exceptional pursuant to one of the five categories, the decision must also include a description of the pupil's strengths and needs and the placement decision made by the IPRC. Recommendations regarding special education programs and services are not required, even when a student is identified as exceptional. When recommendations are made, there is no limit placed on the needs that can be included and accommodated. The common practice, however, is to narrow the range of possible accommodations, which needlessly deprives students of potentially beneficial services. Upon receipt of the decision, parents are required to sign a document agreeing to the IPRC's recommendations.

Unfortunately, parents who attend the meetings without any representatives may end up signing documents they do not fully understand or do not reflect their true desires.[42] Far too often, forms are signed without a strong understanding of the implications for the future. One procedure in place that does alleviate this risk is that parents can take the document home to review it before signing.[43] While that removes the pressure of being out-numbered at the meeting, it does not address the potential lack of understanding of the child's or the parent's rights.

Parents can appeal decisions regarding determinations of exceptionality and student placement, but the process is far too cumbersome and time-consuming. There are specific rules and time limits at each level of appeal.[44] The first level of appeal is viewed as a "waste of valuable time" since the decisions are not binding.[45] Appealing decisions at higher levels requires spending much more time in court. If a parent receives a favourable decision, the school board can then apply to have that decision judicially reviewed.

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[38] Opportunity to Succeed, *supra* note 6 at 35.
[39] *Ibid*.
[40] Ed Mahony, "12 Things Parents Need to Know about IPRCs" (March 15, 2013), *Mahony Advocacy* (blog), online: <www.mahonyadvocacy.com>.
[41] O Reg 181/98, ss 5(3), 5(4).
[42] Opportunity to Succeed, *supra* note 6 at 35.
[43] Exceptional Pupils*, supra* note 47 at 19 (1).
[44] "Highlights of Regulation 181/98" (2016), online: Ontario Ministry of Education <www.edu.gov.on.ca>.
[45] Opportunity to Succeed, *supra* note 6 at 34.

While appeals are possible based on the identification and placement of a student, no clear avenues for appeals are provided for parents dissatisfied by the IPRC's recommendations. This has resulted in an increase in complaints made to the OHRC.

c) IEPs

IEPs outline programs and services for an exceptional child. Two broad services can be offered through an IEP: accommodations or modifications.[46] The OHRC takes a policy position that, in exploring accommodations for persons with disabilities, an emphasis needs to be placed on assessing unique needs and circumstances rather than resorting to "preconceptions or a blanket generalization" about particular disorders.[47] Theoretically and ideally, an IEP should do just that. In practice, it does not. Barbara Bateman, an expert in special education and education law in the US,[48] viewed the response of educators to IEPs as predictable: educators "changed their practice as little as possible." It is not a stretch to say that the same happened in Canada.[49]

Participants in the 2004 OHRC investigation into special education described multiple problems with the IEP process. By recent accounts from parents, advocates and educators, it is clear that the process is still plagued with the same problems. Trained parent advocates state that IEP templates are "crammed with all kinds of goodies in even more detail than the last one" and are "bureaucratic delight[s] because [of] the impression [given] that everything is being taken care of."[50] However, the OHRC reported that there are long waitlists for professional assessment, unnecessary delays in the preparation of IEPs, and, when not entirely ignored by the school, many IEPs do not accurately reflect the student's needs.[51] As a result of these problems, students with disabilities do not receive the accommodations necessary for them to fully and meaningfully participate in the curriculum. The OHRC concluded that IEPs were not meeting the requirements set out in the *Education Act* nor the standard of practice set out in the Ministry of Education's resource guide to IEPs.[52]

One of the "bureaucratic delights" promised by the IEP process is active collaboration. Parents must be consulted during the development of an IEP and be kept updated on its implementation and effectiveness. While principals are legally required to consult parents during the development of an IEP, the reality is that this is not happening. Students commonly bring home a form and parents are asked to check boxes off and make optional comments or suggestions. The OHRC received reports of parents expressing the pressure they feel to sign IEPs, even though they are not always certain that it is in their child's best interest.[53] Some parents fear that disagreeing with the school or complicating the procedure will result in their

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[46] *Ibid* at 60.
[47] "Human rights issues in education for persons with disabilities", online: Ontario Human Rights Commission <www.ohrc.on.ca> [Human right issues].
[48] "The IEP-IP Dilemma Breakthrough: Why IEPs Have Failed So Many Children" (2016), online: Parent's Advocacy in the School <http://www.parentsadvocacy.com> (in the US, IEPs were derived from the *Individuals with Disabilities Education Act* Pub L 101-476. [IEP-IP Dilemma].
[49] *Ibid*.
[50] *Ibid*.
[51] Opportunity to Succeed, *supra* note 6 at 16, 34; Ontario, Office of the Auditor General, *2001 Annual Report of the Provincial Auditor*, (Ministry of Education – 3.06 Special Education Grants to School Boards), (Ontario: Office of the Auditor General of Ontario, 2001) at 128-129, online: < www.auditor.on.ca > [Annual Report of the Provincial Auditor].
[52] *Ibid* at 16.
[53] *Ibid* at 35.

child suffering retaliation.[54] This is just one of the many incidences where the theory is divorced from reality. Since there is no clear right of appeal, parents' hands are tied even if they know that the IEP is failing their child.[55]

IV. HUMAN RIGHTS LAW

The Ontario *Human Rights Code* protects the right to equal treatment, regardless of disability. Section 10(1)(d) includes mental disorder in the definition of "disability."[56] Section 9 of the *Code* states that no person shall directly or indirectly infringe on the right to equal treatment, with respect to services and facilities.[57] Despite the apparent infringement on the equality rights of exceptional students, there has been minimal use of the human rights system in education. In fact, the legal profession has paid little attention to education.

From difficulty in finding an education law course in Canadian law schools, to frustration over the courts' reluctance in adjudicating educational disputes, the legal recourse to discrimination in the education system seems mythical. While two recent decisions have taken encouraging steps in the right direction, it is hard to forget that the area of human rights has stayed separate from education law and absent from special education literature regarding in-depth treatment of human rights.[58]

In an effort to explain the knowledge gap, some have speculated that the perception is that educators are the experts on what defines a "good education" and that educators know how to respond to students' needs. Not enough teachers are trained to be experts in special education—let alone mental illness—for this reasoning to carry any weight.[59] The disconnect between human rights and education is noted in the OHRC's report on barrier-free access to education.[60] Over eleven years have passed since the publication, and the efforts (or lack thereof) made provincially and/or at the school board level have not been reviewed or reported. Despite many years passing, the barriers still remain. In the wake of this report and the two aforementioned "encouraging cases," it is crucial that parents, educators and legal professionals push human rights language, principles and law into more than just a "timid entry into the world of education."[61]

Many of the obstacles mentally ill youth face are apparent in the failings of the school system, a system that ought to provide students with knowledge and a proper education. As previously mentioned, in order to benefit from educational services, students with disabilities require certain accommodations. While special education services have historically been regarded as "extra 'ancillary' service[s]", the court in *Moore* held that they are necessary for obtaining meaningful access to education. If the right to special education is viewed separately

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[54] *Ibid* at 16.
[55] Opportunity to Succeed, *supra* note 6 at 34.
[56] *Human Rights Code, supra* note 23 at s 10(1)(d).
[57] *Ibid* at s 9.
[58] *Moore v British Columbia (Ministry of Education)*, [2012] 3 SCR 360, 2012 SCC 61 (CanLII) [*Moore*]; *RB by his next friend SF v Keewatin-Patricia District School Board*, 2013 HRTO 1436, 77 CHRR D/427 [*RB*] (applied ratio in *Moore*).
[59] *Annual Report of the Provincial Auditor*, *supra* note 53 at 127, 138, 141
[60] Ontario, Ontario Human Rights Commission, *Guidelines on Accessible Education,* 2009 update (Ontario: OHRC, 2004) at 4, online: <www.ohrc.on.ca>.
[61] Mona Paré, "Inclusion of Students with Disabilities in the Age of Technology: The Need for Human Rights Guidance" (2012) 22:1 Educ & LJ 39 at 54.

from the right to education, students with disabilities will continuously face unequal access. The reality, as acknowledged by the court, is that "the disabled simply cannot receive equal benefit from the underlying service of public education."[62]

In *Moore*, Jeffrey, an exceptional student, was discriminated against because of a disability and was denied necessary services in order to meaningfully access education. This was contrary to section 8 of British Columbia's *Human Rights Code*,[63] which is very similar to Ontario's code.[64] The Tribunal found individual discrimination as well as systemic discrimination.[65] At the Supreme Court, the finding of discrimination was upheld,[66] putting the Province at fault. Four problems in the administration of special education were identified at the provincial level: the cap on costs, the underfunding of the district where Jeffrey went to school, the failure to ensure that necessary services were available, and the failure to monitor the district.[67] This decision could open the door for systemic changes across Canada now that the Supreme Court has emphasized that limited resources and services, regardless of funding issues, can result in discrimination. It is important that legal professionals use this to advocate for youth.

In grounding any human rights claims, *prima facie* discrimination must be found. For this, there simply needs to be evidence that demonstrates the government's failure to deliver the objectives of public education such that a student did not have access to services.[68] As it stands, exceptional students, and their parents, guardians, and at times, even teachers are aware of the presence of discrimination. However, before *Moore*, case law never truly supported this notion. There is a disconnect when it is common knowledge that exceptional students are being discriminated against and when the Supreme Court of Canada has provided the tools for fighting back, yet the equality rights of exceptional students are continuously infringed. This indicates a lack of active intervention by the legal profession to inform parents, school boards, principals and teachers. Where mental illness is concerned, there are potentially many discrimination lawsuits lying dormant based merely on the fact that failing to recognize the struggles faced by mentally ill students denies them meaningful access to education. It is not enough to have the *Moore* decision and for select groups of advocates to know that the system is failing our mentally ill youth. Action is required and it is time for the legal profession to make this a priority.

V. SUGGESTIONS

In an attempt to address the human rights violations mentally ill students are faced with, a few suggestions will now be made. While none of the suggestions are purported to be the best option, nor are they meant to be viewed as "easy fixes," they form a basis to start a much-needed discussion.

Human rights claims in the interest of students with mental illness need to be brought to the courts and to the OHRC. While the Commission already receives complaints about the issues exceptional students face, generally absent from the literature is how mental illness, in particular,

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[62] *Moore, supra* note 58 at para 28.
[63] *Ibid* at para 2; RSBC 1996, C 210, s 8 (section 8 of British Columbia's Code states that discrimination occurs if someone, without reasonable justification, denies any person or class of persons accommodations or services which are available).
[64] *Human Rights Code*, *supra* note 23.
[65] *Moore, supra* note 58 at para 20.
[66] *Ibid* at para 70.
[67] *Ibid* at para 22.
[68] *Ibid* at para 36.

needs to be addressed in the schools. In the wake of *Moore*, it is important not to leave mentally ill students out of the scope of consideration. In *Eldridge v British Columbia (AG)*, interpreters were necessary for meaningful access to the medical system.[69] In *Moore*, Jeffrey needed to attend a local diagnostic centre for remediation and, without that service, he could not have meaningful access to education. It is important to start seeing official and binding acknowledgement of the fact that students with mental disorders who do not receive appropriate accommodations are also being denied meaningful access to education and having their rights infringed upon. *Moore* ought to be regarded as a symbol of change, namely that we cannot let mentally ill students fall by the wayside in moving forward.

Recognition and validation are required. It must be reiterated that the categories of exceptionality do not explicitly recognize mental health disabilities. While human rights codes include mental disorders in defining disability, the language identifies mental disorders by nothing more than its behavioural expression, and as such, remains invisible for receiving identification and placement through an IPRC. The IEP process is discriminatory in the way that it denies students meaningful access to the material. To make matters worse for mentally ill students, IEPs do not account for the unique circumstances they are in because there is no discussion about which accommodations would be best. Despite these failings, parents do not have clear legal recourse. Recognition of the problem is the only way to start addressing it. To ensure that mentally ill students receive proper accommodation, a new category of exceptionality should be created. If such a category were to exist, students with mental health issues might not feel like they are keeping a secret anymore. A mentally ill student whose disorder does not manifest itself in the "right" way in order to obtain the services he or she needs, might find themselves able to receive such services. Also, the inclusion of a category that specifically acknowledges mental illness will almost certainly be accompanied by information for school boards, administrators and teachers. While there is no guarantee such information would be absorbed or that accommodations would be implemented correctly, that is to be dealt with in a fight for all exceptional students. That fight must start with mental illness first being adequately addressed.

Following recognition, there needs to be understanding. The OHRC's Disability Policy ("Policy") places an emphasis on human dignity, respect and equality.[70] Taken from the Policy, human dignity "encompasses individual self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment." One's self-worth is intertwined with society's reactions and attitudes. A biological and/or physiological impairment can be disabling given the social response to it—a response that generally excludes those affected.[71]

Historically, paternalism and negative assumptions have marked the lives of people with disabilities.[72] Many people living with a disability emphasize that the degree to which they are disadvantaged is a consequence of the mainstream design of the environment they live in.[73] As such, a broad range of disabilities needs to be taken into account to ensure that those disabled are not excluded. The school environment needs to change for mentally ill students to feel accepted

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[69] [1997] 3 SCR 624, 1997 CanLII 327 (SCC) at para 71.
[70] Human Rights Issues, *supra* note 47.
[71] Peter Carver, "Mental Health Law in Canada" in Jocelyn Downie, Timothy Caulfield & Colleen M Flood, eds, *Canadian Health Law and Policy,* 4th ed (Markham: LexisNexis, 2011) 368 at 375 ["Mental Health Law"].
[72] Law Commission of Ontario, "Legal Capacity: Setting the Standard" (2009), online: Law Commission of Ontario <http://www.lco-cdo.org>.
[73] Mental Health Law, *supra* note 71 at 375.

and not unduly limited. Even if mental illness were better accounted for in writing, there is still stigma attached to it.

When students are stigmatized, they are harmed. School should be a place where students learn about diversity in order to appreciate and accept those with a disability. While young minds are developing, it is crucial that they be exposed to peers who are different than they are, in every sense of the word "different". Children develop a perception of themselves and of the world through the relations they have with their peers.[74] The experience one has in school can have a strong effect on their self-esteem and development. In *Trinity Western University v British Columbia College of Teachers*, the Supreme Court of Canada stated, "teachers are a medium for the transmission of values." Teachers should guide students to understand and accept differences, not to ignore, fear or make false assumptions about them.

The goal should be harmonious co-existence, never isolation. The persistence of negative attitudes in the education system needs to be addressed for anything to change.[75] The principal sets the tone for the school and teachers need to model respect for the right of each child. If the wrong tone is set and if teachers do not have the right attitude of acceptance, students cannot be expected to understand differing abilities.[76] The best protection we can offer disabled students from stereotyping and harassment is knowledgeable educators.[77]

To that end, two specific suggestions will now be discussed: curriculum changes and training. School curriculums should include units on mental health where more than just general statistics and keywords are taught. Teachers need to have a strong grasp of the material and an understanding of the importance of effectively communicating the material. Medical professionals, psychologists, advocates in the community who work in the mental health field, and adults who struggled with mental health issues in school should all be encouraged to take part in forming the unit(s) and holding seminars. This will benefit mentally ill students, their peers, and even educators.

Every adult in a school needs to be properly trained on how to effectively deal with mental illness and how to recognize symptoms and triggers. With a greater emphasis being placed on mental health—and hopefully with legal recourse in place to keep schools accountable—principals can be better equipped to understand the difference between a dangerous student and a suffering student. If the principal is equipped with knowledge, they can better monitor how their teachers are performing in the classroom. Teachers, for their part, need to not only inform themselves of best practices where exceptional students are concerned but also need to treat any incidents as teachable moments for all those involved.

The Ministry of Education would have to mandate these training requirements and curriculum changes, and teacher colleges would need to change their curriculum.[78] However, it still comes down to a certain level of personal responsibility. This may seem a lot to demand of educators, but that is the consequence of starting anew.

If discrimination is more broadly addressed through recognition and understanding, better-targeted responses to the situation could be explored. These responses could include requiring mental health nurses in schools and considering the benefit of an in-house psychologist. While there is great potential in having mental health nurses easily accessible,

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[74] Opportunity to Succeed*, supra* note 6 at 5.
[75] *Ibid* at 71.
[76] *Ibid* at 95.
[77] *Ibid* at 28.
[78] Opportunity to Succeed*, supra* note 6 at 29.

students will undoubtedly feel that the service is failing if the nurse's role is not clearly defined. There would be little benefit in merely having nurses present. For this idea to be workable, the nurses would need to have a clear mandate and access to appropriate resources. As for in-house psychologists, their role could be far more beneficial than the cost associated with hiring them.

The benefit would be for all students, not necessarily those with a diagnosable mental illness. A psychologist could also fill the role of educator in the fight against stigma, to the benefit of staff and students. While everything said in meetings with the psychologist would be kept confidential, he or she would gain an understanding of a student's unique circumstances and how their disorder manifests itself. Then, the psychologist could become an advocate for students going through an IPRC or a consultant in the creation of an IEP. An in-house psychologist would also provide a safe haven within the school for students with mental health struggles. The psychologist could be their refuge when they are being stigmatized, or when their behaviour results in their dismissal from class. Their behaviour can then be adequately addressed and the negative feelings can be dispelled.

The final suggestion involves the role of legal professionals in schools. The involvement of the legal profession would help the education system move from the stages of identification to implementation. However, even if the system were to operate seamlessly from identification to implementation, there would still be students facing discrimination and parents needing to take up a fight with the school. Schools and school boards encourage non-litigious communication, but they are in a position to access legal resources.

Students need a strong advocate to conquer the power imbalance inherent in cases that are "student versus the school board". The power imbalance is created by the fact that schools can make final decisions, with little room for appeal, and the school board has their own lawyers at their disposal. While principals can have a lawyer available during IPRC meetings and during disputes involving discrimination, parents cannot easily obtain the same help. They are then encouraged by school board lawyers not to bring in another lawyer because that will only extend the dispute and make it more adversarial.[79] There is an inherent conflict of interest when a lawyer representing a school board insinuates that they are capable of keeping everyone's rights in balance. For this reason, this paper suggests that the government fund in-house counsel at schools.

This would not necessarily mean that a lawyer would be hired each school, nor would it mean lawyers must work full-time in their role. A possible scenario could be where lawyers who want to advocate for youth hold something akin to "office hours" inside different schools. One or two lawyers could be hired per district, depending on interest and demand. Students and parents would need to be made aware of the resource. Another change that could be implemented is making representatives at IPRC and IEP meetings compulsory. The in-house lawyer, just like an in-house psychologist, would be an option for parents who either can't obtain help otherwise or who can't take the time off of work to attend meetings.

VI. ACKNOWLEDGING SOME DIFFICULTIES

It is important to acknowledge that the suggestions made in this paper have significant challenges to overcome before they may be implemented. The first is the lack of funding. Regardless, forming part of the discrimination against exceptional students is the

[79] OBA Student Discipline, *supra* note 26.

disproportionate cuts to funding for special education. Part of the duty to accommodate set out in the Ontario *Human Rights Code*[80] is to provide resources that children and youth with disabilities require to have the opportunity to succeed. Direct services to exceptional students have always been sacrificed in Ontario, and special education has been pitted against "regular" education,[81] a distinction that the Supreme Court has discouraged.

The *Moore* decision used very direct language in clarifying that a lack of funding is never a reasonable justification when denying exceptional students their right to equal access.[82] There is no doubt that individualized education comes with substantial short-term costs. However, as the OHRC emphasized, there are lifelong costs to not providing supports to students who need them.[83] That cost is more severe than any cost incurred through providing accommodation. Ultimately, beliefs and values about education will guide the difficult funding decisions that must be made.[84] It is time to have the funding allocations reflect the belief that exceptional students have a right to education.

The suggestion that lawyers become involved in IPRC processes and take up human rights claims encourages a litigious system. Such a system is one that takes time and floods already over-burdened courts. However, exceptional students are vulnerable and in the middle of an inherent power imbalance. Even when school board lawyers are not present for meetings, they are available for principals and board members to consult. While a non-adversarial system is unquestionably preferred in deciding a child's best interests, such a system has not been working. For this reason, while encouraging litigation is not a perfect solution, it certainly is one made with disabled students in mind.

Furthermore, when it comes to suspensions, expulsions and exclusions, it must be noted that school administrators do face the difficult task of balancing the right of students receiving education and the rights of students and staff to a safe environment. Clouding the issue further are the difficulties administrators face in separating unquestionably dangerous and punishable behaviour from behaviour that is a manifestation of a mental disability. While it is easy to be sympathetic to those in the middle of this struggle, it really emphasizes the necessity of better staff training. Oftentimes, an outward display that scares someone is simply a misunderstanding of what that student is trying to communicate. The impact of mental health issues on a child's behaviour at school is not well understood. Until it is, the discriminatory practice of excluding mentally ill students, without just cause, will continue.

Finally, the general struggle to access mental health services is not at all a struggle created by administrators, school boards, teachers, parents or students. While an emphasis in this paper has been placed on intervention for school-aged youth, the mental health treatment system in Ontario presents problems that cannot be addressed in a school setting. This supports giving mental health nurses more power to assess, refer and to consider in-house psychologists.

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[80] *Human Rights Code*, *supra* note 23.
[81] Jim Bradt & Noreen Hardwick-Leclerc, "Special Education Funding in Ontario: Bogged Down in Claims" (Oct 2000) at 1, online: The Caledon Institute of Social Policy <www.caledoninst.org> [Bradt & Hardwick-Leclerc].
[82] *Moore*, *supra* note 58 at 67-70.
[83] Opportunity to Succeed, *supra* note 6 at 7.
[84] Bradt & Hardwick-Leclerc*, supra* note 81 at 5.

VII. CONCLUSION

Mental health issues are prevalent in Canada and symptoms present themselves in childhood and adolescence. There are long-term costs associated with denying mentally ill youth proper education, such as unemployment, poverty, homelessness, addiction and suicide. Efforts to address mental health in youth should be focused on changing the education system to one that understands and accommodates appropriately.

By many accounts, special education practices are not consistent with school, school board, or the Ministry of Education's policies. Currently, exceptional students face discrimination, which violates human rights provisions. The OHRC reported on the discrimination but the report was issued to encourage dialogue; it was not binding. Also, it is outdated, even though the discrimination continues. According to its 2004 report, everyone is responsible for becoming informed about disability and education issues.[85] This paper has attempted to argue that the legal profession needs to take up the fight in support of mentally ill students.

Absent from the literature and jurisprudence is specific acknowledgement of the infringement on the rights of mentally ill students. The Supreme Court does allow for claims based on differential treatment and failure to accommodate—something that needs to be further explored in light of *Moore*'s decision. Mental disability is comparable to physical disability for the purpose of such claims. Going forward, human rights law needs to address the systemic discrimination in schools. In doing so, every effort must be made to ensure that mentally ill students form a clear, distinct group that are being fought for and are not simply involved by association.

[85] Opportunity to Succeed, *supra* note 6 at 7.

SAVING OUR SCHOOL YEARS: THE *CHARTER* AND THE REGULATION OF TEACHERS' COLLECTIVE BARGAINING IN ONTARIO

***Myles Anevich**

I. INTRODUCTION

In *Saskatchewan Federation of Labour v Saskatchewan*, Abella J., the former Chair of the Ontario Labour Relations Board, paraphrasing Dr. Martin Luther King Jr. wrote "[c]learly the arc [of case law] bends increasingly towards workplace justice."[1] The vision of section 2(d) *Charter of Rights and Freedoms* protection that she had espoused in her dissent in *Ontario (Attorney General) v Fraser* was finally supported by four other Justices of the Supreme Court of Canada (the "SCC"), greatly expanding the right to freedom of association and overturning the most unyielding elements of the 1987 Labour Trilogy.[2] The 2015 Labour Trilogy – the combined name for *SFL*, *Mounted Police Association of Ontario v Canada (Attorney General)*, and *Meredith v Canada (Attorney General)* – has been hailed as a step forward for freedom of association.[3] But, just as the Saskatchewan Federation of Labour and Mounted Police Associations across Canada begin to rejoice, it begs the question of where the Ontario government stands in its efforts to regulate public school teachers' collective bargaining.

Through back-to-work legislation, the 2015 school year was "saved" by the government and further collective action has been averted due to a last minute bargain.[4] Though collective action has been avoided, a greater confrontation has merely been delayed. A constitutional challenge to the (now repealed) *Putting Students First Act, 2012* occurred in late December 2015, with a decision not expected for weeks and an appeal almost assured.[5] Beyond the pending results of the constitutional challenge, there exists the greater question, which this paper will attempt to answer: how will the 2015 Labour Trilogy affect the government's bargaining tactics? Does the current government's reliance on back-to-work legislation as a negotiating trump card

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[1] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (CanLII) at para 1, [2015] 1 SCR 245, Abella J [*SFL*].

[2] *Ontario (Attorney General) v Fraser*, 2011 SCC 20 (CanLII) at paras 326-27, [2011] 2 SCR 3 [*Fraser*]; *Canadian Charter of Rights and Freedoms*, s 2(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[3] *SFL*, *supra* note 1; 2015 SCC 1 (CanLII), [2015] 1 SCR 3 ["*MPAO*"]; 2015 SCC 2, [2015] 1 SCR 125; see Eric Adams, "SCC labour rulings not revolutionary: it's the Charter at work," *The Globe and Mail* (3 February 2015), online: <http://www.theglobeandmail.com>; Sean Fine, "Canadian workers have fundamental right to strike, top court rules", *The Globe and Mail* (30 January 2015), online: <www.theglobeandmail.com>.

[4] The Canadian Press, "Ontario elementary teachers ratify deal", *The Globe and Mail* (13 November 2015), online: <www.theglobeandmail.com>.

[5] Mike Crawley, "Teachers unions in court today challenging Ontario's Bill 115", *CBC News* (14 December 2015), online: <www.cbc.ca>.

offend the newly enumerated principles that underlie section 2(d) of the *Charter*, and can Bill 122 stand up to *Charter* scrutiny?

II. BACKGROUND AND HISTORY[6]

Public school teachers in Ontario are currently regulated by three overlapping pieces of legislation[7] These are the *School Board Collective Bargaining Act*; the *Education Act*; and so far as it does not conflict with either of the former, the *Labour Relations Act*.[8] As provincially regulated public employees, teachers are entitled to the protections outlined in the *Charter*, including the right to freedom of association as guaranteed by section 2(d).

According to the SCC in *MPAO*, section 2(d) is to be interpreted in a purposive and generous fashion.

> In a phrase, in order to determine whether a restriction on the right to associate violates *s. 2(d)* by offending its purpose, we must look at the associational activity in question in its full context and history. Neither the text of s. *2(d)* nor general principles of *Charter* interpretation support a narrow reading of freedom of association.[9]

Constitutionally speaking, primary and secondary education is a provincial responsibility, and as such there are a myriad of different regimes and approaches to the regulation of bargaining for teachers in Canada.[10] In Ontario, according to Joseph Rose, there have been four historical stages in the development of teacher bargaining, which range from Confederation to 1975, 1975-1997, 1997-2002, and 2002-present.[11] Each of these eras corresponds with a different structure of negotiating, starting with no collective bargaining and ending with a cooperative approach under Dalton McGuinty.[12] Perhaps it would be more accurate to add a fifth era beginning in 2012, which has seen the strategy of cooperation morph into coercion. This fifth era will be the subject of this paper, but in order to understand where Ontario's policies currently are and how they fit into section 2(d) of the *Charter*, we need to understand their historical development.

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[6] This historical analysis will be cursory, however, it is necessary in order to understand how this specific aspect of public sector labour law has evolved and to determine the "full context and history," as set out in *MPAO, supra* note 3 at para 47.

[7] For the purposes of this paper the term "teacher" or "teachers," unless otherwise specified, refers to public school teachers.

[8] *School Boards Collective Bargaining Act, 2014*, SO 2014, c 5 [*SBCBA*]; *Education Act*, RSO 1990, c E.2; *Labour Relations Act, 1995*, SO 1995, c 1, Schedule A, s 3(f).

[9] *MPAO, supra* note *3* at para 47 [emphasis in original].

[10] Mark Thompson & Sara Slinn, "Public Sector Industrial Relations in Canada: Does It Threaten or Sustain Democracy Public Sector Collective Bargaining and the Distortion of Democracy: Do Public Sector Unions Have Too Much Power: Canada" (2013) 34:2 Comp Lab L & Po 393 at 398.

[11] Joseph B Rose, "The Evolution of Teacher Bargaining in Ontario" in Sara Slinn & Arthur Sweetman, eds, *Dynamic Negotiations: Teacher Labour Relations in Canadian elementary and Secondary Education* (Montreal and Kingston: Queen's Policy Studies Series, McGill-Queen's University Press 2012) 199 at 199 [Rose].

[12] *Ibid* at 215-17.

a) Bargaining: pre-1975

The first era preceded the legal status of collective bargaining, and instead focused on an "association-consultation" model of collective bargaining. Under this model, teachers' associations and school boards consulted on topics of mutual interest, but the consultative process was narrow in scope and confined to salaries and protection against arbitrary dismissal. This gave school boards the unlimited right to determine class sizes and staffing. Additionally, school boards had the ability to walk away from negotiations and unilaterally impose workplace conditions.[13]

The ineffectiveness of this model is in the principle factors that led to its downfall.[14] The limits of the model led to a rise in disputes between teachers' associations and school boards, which, beginning in the 1960s, led to the transition in the 1970s towards a system of collective bargaining.[15] In November 1970, the Ontario government created the Reville Commission, which issued its report in 1972 categorically rejecting the right to strike in favour of compulsory arbitration. These recommendations failed to gain traction with either school board trustees or teachers associations.[16] The report was also ignored by the government because of their failure to understand "the accumulated bargaining experience of both trustees and teachers since the end of the Second World War," and ignoring the need for partnership between teachers and school boards.[17] Additionally, others have speculated that the report also fell on deaf ears because the government was concerned about "entering an election with an anti-union reputation."[18]

b) Bargaining: 1975-1997

The eventual result of these conflicts and consultations was the passage of the *School Boards and Teachers Collective Negotiations Act* ("Bill 100") in 1975, ushering in the "second era". This was unique among other major public sector collective bargaining laws in the province, because while those laws imposed compulsory arbitration, teachers were granted the right to strike. In addition to the right to strike, Bill 100 expanded the scope of negotiations to include class sizes and student-teacher ratios, two aspects that were previously under the sole discretion of school boards. [19] Interestingly, unlike most other labour relations statutes in Canada, Bill 100 did not provide for the certification of teacher unions. Instead, the government would designate particular bargaining agents.[20]

Bill 100 created a climate of relative stability for education sector collective bargaining. It was effective in giving teachers comparatively some of the highest salaries in the country while keeping labour dispute occurrence rates low in relative and absolute terms.[21] However,

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[13] *Ibid* at 200.
[14] *Ibid*.
[15] *Ibid* at 200-01; see generally Downie B.M. *Strikes, Disputes and Policymaking*. Kingston, ON: IRC Press 1992 at 32-35 [Downie], in which the author outlines the Ontario government's efforts to handle the growing conflict between teachers and boards of education.
[16] Rose, *supra* note 12 at 201.
[17] RD Gidney. *From Hope to Harris: The Reshaping of Ontario's Schools* (Toronto: University of Toronto Press, 1999) at 119.
[18] Wayne Roberts, *Don't Call Me Servant: Government Work and Unions in Ontario 1911-1984* (Toronto: Ontario Public Service Employees Union, 1994) at 161.
[19] Rose, *supra* note 11 at 201-02
[20] Downie, *supra* note 15 at 73-74.
[21] Rose, *supra* note 11 at 205.

notwithstanding the successes of Bill 100 from a stability perspective, there were concerns over the "high-cost, low performance" nature of the education system. This led successive governments starting in the 1980s to consider significantly revising the labour relations model culminating in 1996 when the Harris government commissioned studies to investigate the cost of education and evaluate Bill 100.[22]

c) Bargaining: 1997-2002

The outcome of these studies led to the era Joseph Rose calls "the assault on and defence of teacher bargaining".[23] Through legislative and policy changes the Harris government sought to return to the pre-Bill 100 era, imposing higher workloads on secondary school teachers, constraining interest arbitration, and attempting to limit the right to strike.[24] This was done though the systemic implementation of new legislation to redefine collective bargaining for primary and secondary education. These efforts included the *Fewer School Boards Act, 1997,* which sought to reduce costs through amalgamating school boards; the *Education Accountability Act, 2000*, which among other elements allowed school principals to override collective agreement provisions on instructional workload and staffing in addition to making extra-curricular activities mandatory for teachers; and the *Stability and Excellence in Education Act, 2001*, which fixed the terms of subsequent collective agreements for three years.[25]

The most significant of all the legislative changes was the *Education Quality Improvement Act, 1997*, which repealed Bill 100 and placed teachers under the *Labour Relations Act.* [26] This restricted the scope of negotiable subjects allowing class sizes and instructional times to be made conditions of employment.[27] This fundamentally changed primary and secondary education bargaining in Ontario, increasing the power of the Minister of Education to regulate the education system, reducing the role of the school boards, and restricting the teachers' unions' abilities to regulate the teaching process through collective bargaining.[28]

d) Bargaining: 2002-2012

In 2003 Dalton Mcguinty's Liberals, the precursor to the current government, defeated the Ernie Eves led Progressive Conservatives. The new regime brought with them a different approach to education and sought to ensure labour peace through a mix of increased consultation and cooperation. At the same time the government started transforming the system from "warring school boards" to the two-tiered bargaining that exists presently. From 2004-2009 the government engaged in a concerted effort to reduce conflict between teachers and school boards. This resulted in an increase in direct bargaining settlements and a strike rate of 0.5% (which was comparatively lower than other groups, which ranged from 2.8% to 7.8%).[29] However, tied into

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[22] *Ibid*.
[23] *Ibid* at 207.
[24] *Ibid*.
[25] *Ibid* at 208-11.
[26] *Ibid* at 208.
[27] *Ibid*; *Education Quality Improvement Act, 1997,* SO 1997, c 31, ss 170.1-170.2.
[28] Rose, *supra* note 11 at 209.
[29] *Ibid* at 214.

this decrease in labour conflict were higher wage increases for teachers than any other area of the public sector, which led directly to the government's cost cutting efforts starting with Bill 115.[30]

From examining the history of the regulation of bargaining for teachers in Ontario it is clear that notwithstanding some of the effects of the "Commonsense Revolution" in the 1990s, the emphasis has been on negotiation and mutually beneficial settlements. In adopting a system of collective bargaining for teachers, the Ontario government, teachers' unions, and school boards explicitly rejected unilaterally imposed agreements and instantly binding arbitration in favour of cooperation and negotiation. It is with this understanding of the context and history that the recent efforts of the Ontario government can be examined.

III. BILL 115 – THE *PUTTING STUDENTS FIRST ACT (PSFA)*

An Act to Implement Restraint Measures in the Education Sector, better known as *the Putting Students First Act, 2012*, imposed two-year contracts between education sector unions and school boards from September 1, 2012 to August 31, 2014.[31] It removed the right to strike for all teachers' unions, and imposed collective agreements on two unions.[32]

The *PSFA* gave the Lieutenant Governor in Council broad ranging powers, which in effect delegated many of the traditional labour board remedies to cabinet.[33] Sections 9 and 10 gave the cabinet the powers to re-write any collective agreement, either by forcing terms to be excluded or included; require negotiation of a new agreement; or the power to "do anything else that the Lieutenant Governor in Council determines is necessary in the circumstances."[34] The powers even went so far as to allow the cabinet to "impose by regulation a collective agreement on a board, employee bargaining agent and the employees of the board who are represented by the employee bargaining agent."[35] Lastly, under the regime put forward by the Ontario Government there was no duty on the cabinet to consult with any of the stakeholders before imposing terms and conditions.[36]

Since *Health Services*, the section 2(d) *Charter* right to freedom of association has protected a meaningful process of collective bargaining. [37] This is not just the right to make representations to an employer; it is the guarantee that unions have the ability to "exert meaningful influence over working conditions."[38] Though a particular model of collective bargaining, or result, is not imposed by the SCC's approach to section 2(d), a procedural right to bargain collectively and have some influence on the process is indeed protected.[39]

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[30] *Putting Students First Act, 2012*, SO 2012, c 11 at Preamble [*PSFA*].
[31] Maryse Tremblay & Kate Dearden, "Supreme Court of Canada Decision on the Right to Strike Could Have an Impact on the Education Sector," *Borden Ladner Gervais* (4 March 2015), online: <www.blg.com>.
[32] *PSFA, supra* note 30 at s 9(4).
[33] See the powers granted to cabinet under ss 9 and 10 of the *PSFA*, supra note 30, compared to the powers set out for the Labour Relations Board by the *Labour Relations Act, 1995*, 1995 SO 1995, c 1 Sched A, s 125.
[34] *PSFA, supra* note 30, s 9(2).
[35] *Ibid*, s 10.
[36] *Ibid*, s 9(7).
[37] *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 (CanLII) at para 114, [2007] 2 SCR 391 [*Health Services*].
[38] *Ibid* at para 90.
[39] *Health Services*, *supra* note 37 at para 66. The SCC's insistence on process and not model is significant here, since any hints of explicitly attempting to constitutionalize the Wagner Model of collective bargaining seem to make the SCC less inclined to overturn a particular statutory regime; See *Fraser*, *supra* note 2 (majority's reasoning); *MPAO, supra* note 3 (majority's reasoning).

Based on the minimum aspects of the protections afforded to unions under section 2(d), it is highly likely that the *PSFA* is a clear infringement of the right to freedom of association. This conclusion can be reached either through applying the approach set out in *Fraser*, or the one in the 2015 Labour Trilogy.

In 2011, the year before the government of Ontario passed the first piece of impugned legislation, the *PSFA*, the SCC released their decision in *Fraser*. This was a landmark case in Canadian labour law. It simultaneously reaffirmed the SCC's approach to section 2(d) as set out in *Health Services*, while restating the scope of the protection as "whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals."[40] Essentially the SCC held that collective bargaining receives constitutional protection, but only "in the minimal sense of good faith exchanges."[41]

The Supreme Court in *Fraser* found "…the right of an employees' association to make representations to the employer and have its views considered in good faith…" to be necessary to the meaningful exercise of freedom of association.[42] With this requirement in mind the essential question for a section 2(d) *Charter* challenge became whether the government action made meaningful association to achieve workplace goals "effectively impossible."[43] The key change from the earlier test, as set forward in *Health Services*, was the rewording of "substantial interference" to "effectively impossible."[44] This was a substantial weakening of the scope of the section 2(d) protection set forward in *Health Services*, even though the SCC explicitly said they were upholding *Health Services*.[45]

Some, including three scathing dissenting opinions penned by Rothstein J., would argue that the majority in each of the 2015 Labour Trilogy decisions misquoted the ruling from *Fraser*. *Fraser* can be seen as setting the bare minimum of protection based on the evidentiary record before the Supreme Court. The Supreme Court in *SFL* interpreted *Fraser* to state that, at a minimum, a meaningful process of collective bargaining must include:

> Employees' rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith.[46]

Charter rights are to be given a broad and liberal interpretation. According to McLachlin CJC., in *MPAO,* courts are "to consider the most concrete purpose or set of purposes that underlies the right or freedom in question, based on its history and full context."[47] In *MPAO*, the SCC held that the purpose of section 2(d) is at its core to protect individuals against more powerful entities, and that it confers *prima facie* protections on a broad range of associational activities, subject to a section 1 justification.[48]

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[40] *MPAO, supra* note 3 at para 170; *Fraser, supra* note 2 at paras 46, 96.
[41] *MPAO, supra* note 3 at para 170.
[42] *Fraser*, *supra* note 2 at para 99.
[43] *Ibid* at para 98.
[44] *Health Services*, *supra* note 37 at para 90.
[45] Alison Braley, "I Will Not Give You a Penny More than You Deserve: Ontario v Fraser and the (Uncertain) Right to Collectively Bargain in Canada" (2011) 57:2 McGill LJ 351 at 362.
[46] *SFL*, *supra* note 1 at para 29.
[47] *MPAO, supra* note 3 at para 50.
[48] *Ibid* at paras 58, 60.

While the *PSFA* does not infringe any of the three classes of protected activities outlined by the SCC in *MPAO*, it substantially interferes with a meaningful process of collective bargaining.[49] It authorized the imposition of terms by one side onto the other, with no requirement for consultation, let alone meaningful consultation.[50] According to *MPAO*, a meaningful process of collective bargaining "is a process that gives employees meaningful input into the selection of their collective goals," and a "labour relations scheme that complies with these requirements and thus allows collective bargaining to be pursued in a meaningful way satisfies section 2(d)."[51] This meaningful process is absent from the model imposed under the *PSFA*.

Based on these considerations and looking to the purpose and the effect of the *PSFA*, it is hard to see how it would not breach section 2(d).[52] By its very purpose, the *PSFA* seeks to give the government total control over collective bargaining.[53] It not only gave every possible advantage to the school boards, but it gave the cabinet the ability to re-write agreements in case school boards do not use every advantage.[54]

IV. BILL 122 – THE *SCHOOL BOARDS COLLECTIVE BARGAINING ACT, 2014 (SBCBA)*

Before the expiry of the contracts imposed under the *PSFA* and the 2015 wave of conflict between the teachers' unions and school boards, the *School Boards Collective Bargaining Act* was put into law. The *SBCBA* instituted a two-tiered designated bargaining model for education in Ontario. It bifurcated bargaining into local and central issues, setting forward the bargaining units, the bargaining agents, the framework for local and collective bargaining, and the scope of bargaining.[55]

Rothstein J., dissenting in *MPAO* while attempting to illustrate the logical failings of the majority opinion, points to the *SBCBA* as inconsistent with their reasoning. Earlier in the decision the majority of the SCC had pointed to the *SBCBA* as an example of a designated bargaining model that "may be acceptable" under the *MPAO* standard.[56] The dissent argued that this was logically inconsistent, since the *SBCBA* lacked "three of the so-called hallmarks of choice."[57] Under the statutory regime, Ontario teachers are unable to join or form new associations, change the bargaining agent that represents them, or dissolve their bargaining agent.[58] While Rothstein J. gives an entirely correct assessment of the nature and quality of the *SBCBA*, this model of designation does not appear upon closer examination to offend the teachers' right to freedom of association under the *Charter*.

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[49] *Ibid* at paras 66, 70, 71 (the classes of protected activities referred to are: "(1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.")
[50] *PSFA, supra* note 30, s 9(7).
[51] *MPAO, supra* note 3 at para 99.
[52] *R v Big M Drug Mart*, [1985] 1 SCR 295, 1985 CanLII 69 (SCC) at para 331 (among other things, *Big M* stands for the proposition that a violation can be found if either the purpose or the effect of the law infringes a fundamental freedom)
[53] *PSFA, supra* note 30 at Preamble.
[54] *Ibid*, s 9-10.
[55] *SBCBA, supra* note 8 ss 5-28.
[56] *Ibid* at para 95.
[57] *Ibid* at para 184.
[58] *SBCBA, supra* note 8, ss 5, 10, 17

As stated earlier, governments may not enact legislation or impose a labour relations regime that would substantially interfere with a meaningful process of collective bargaining.[59] In *MPAO,* the appeal was successful because the model of labour relations statutorily imposed upon the RCMP did not allow a degree of choice and independence sufficient to enable employees to determine and pursue their workplace interests.[60] In fact, employee choice in selecting the bargaining unit and independence from management were identified by McLachlin CJC. as two fundamental elements of the section 2(d) *Charter* right to freedom of association, and necessary to a meaningful process of collective bargaining.[61]

However, the mere existence of a restriction of choice, no matter how marginal, is not fatal to a particular labour relations regime. Section 2(d) does not constitutionalize the Wagner Model of collective bargaining, or require a particular regime; it instead requires a substantive process.[62] Choice is not a binary; it is a matter of degrees and is contextual, what is required by the *Charter* is a sufficient degree of choice to enable "employees to have effective input into the selection of the collective goals to be advanced by their association."[63] A designated bargaining agent model does not breach section 2(d) when the structures put in place are responsive to the wishes of employees and free from employer interference.[64]

There is no question that the *SBCBA* restricts the choice of teachers. It designates their bargaining agent, and it does not provide a means to change or dissolve the bargaining agent. However, employees under this model, as observed by McLachlin CJC., retain sufficient choice in pursuing workplace goals to still provide for a meaningful process of collective bargaining.[65] The labour relations scheme mandated by the *SBCBA*, while not the embodiment of an idealized version of the Wagner Model, is nonetheless sufficiently responsive to the specific context of the workplaces in question. As such, it does not appear that the *SBCBA* violates teachers' freedom of association.

V. BILL 105 - THE *PROTECTING OUR SCHOOL YEAR ACT, 2015 (PSYA)*

What is perhaps the most interesting aspect of the *SFL* decision is its theoretical impact upon the government's ability to use their legislative trump card, "back-to-work" legislation. Justices Rothstein and Wagner in their dissenting opinion imagine strikes as a political tool, which needs to be counter-balanced by the elected legislature for the good of the public purse.[66] With this label, the particular "back-to-work" legislation and designation of essential services are seen as the natural check on public sector unions, and if these tools are removed unions will possess an unfair advantage.[67]

Though the majority of the SCC did not explicitly mention the impact of the decision on "back-to-work" legislation, they found that the right to strike was constitutionally protected by

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[59] *MPAO, supra* note 3 at para 81.
[60] *Ibid* at para 5.
[61] *Ibid* at paras 5, 81.
[62] *Ibid* at para 95.
[63] Ibid at para 83.
[64] *Ibid* at para 97 (It is important to note here that from 1975 until 1997 teachers in the province had their bargaining units designated by Bill 100. This was a golden age of success in collective bargaining for teachers, which saw high compensation and a low strike rate); see *Rose*, *supra* note 11 at 203-07.
[65] *MPAO, supra* note 3 at para 95.
[66] *SFL, supra* note 1 at para 127.
[67] *Ibid* at para 127.

virtue of its role in the bargaining process.[68] The SCC set the test for section 2(d) violations when it comes to the right to strike as "whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining".[69] Any such interference must be justified under section 1.[70] Essentially, this approach turns any section 2(d) constitutional litigation into a process where once the threshold of substantial interference is met, all of the SCC's balancing efforts must be directed to an *R v Oakes* analysis.

Constitutional litigation is very fact specific. The evidentiary record is the key to success or failure in any challenge.[71] While "back-to-work" legislation might not be prima facie unconstitutional in principle, and is not necessarily unconstitutional in every case, it is highly likely that the *Protecting the School Year Act, 2015*, was unconstitutional, and unjustifiable. Furthermore, it is likely that a strict application of SFL to any "back-to-work" legislation affecting education will be at minimum a violation of section 2(d).

The *PSYA* was passed as a direct response to three local strikes in the Durham, Peel, and Rainbow local districts, which started between April 20, and May 4, 2015.[72] The collective agreements, imposed by the *PSFA*, had expired on August 31, 2014, and in the lead-up to their expiry, the Ontario Secondary School Teacher Federation (OSSTF) rushed to be in a lawful strike position, serving notice to bargain and holding a strike vote earlier that year.[73]

The *PSYA* was passed by the Ontario legislature on May 28, 2015.[74] It sought, as the full title suggests, to prohibit any further teachers' strikes in the Durham, Rainbow, and Peel school board districts, which were found to be illegal by the Labour Relations Board two days before, forcing the three local unions into an arbitration procedure. Additionally, the *PSYA* prohibited any strikes as a result of the central bargaining unit for the remainder of the 2014-2015 school year.[75]

There are two central issues with this act which would lend credence to the argument that it is at minimum, a violation of teacher's right to freedom of association: 1) The imposition of mandatory arbitration for the three local boards; and 2) the prohibition against any centrally organized strikes for the remainder of the 2015-2016 school year.

Since *Health Services,* the SCC has held that the *Charter* values of "human dignity, equality, liberty, respect for the autonomy of the person and enhancement of democracy" are the fundamental considerations that underlie section 2(d).[76] In *SFL,* Abella J., referring to *MPAO* and *Health Services* stated that the right to strike is essential in realizing these *Charter* values.[77] More so, the majority found that mandatory alternative dispute resolution mechanisms, such as the type of arbitration imposed by this act, while helpful in avoiding the negative consequences of strike action, are not a sufficient replacement. They do not help realize the same underlying

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[68] *Ibid* at para 77.
[69] *Ibid* at para 78.
[70] *Ibid*.
[71] *Guindon v Canada*, 2015 SCC 41 (CanLII) at paras 19, 111, [2015] 3 SCR 3; *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at para 48, 1997 CanLII 366 (SCC).
[72] *Protecting the School Year Act, 2015,* SO 2015, c 11, Preamble [*PSYA*].
[73] *Durham District School Board, Rainbow District School Board and Peel District School Board v Ontario Secondary School Teachers' Federation*, 2015 CanLII 30160 at paras 67, 78, [2015] OLRB Rep 465 [*Durham*].
[74] *PSYA, supra* note 72.
[75] *Ibid*, s 4; Rob Fergusson, "Teachers Condemn Ontario's Back-To-Work Legislation", *Toronto Star* (28 May 2015), online: <https://www.thestar.com>.
[76] *Health Services*, *supra* note 38 at para 81.
[77] *SFL, supra* note 1 at para 54.

values, and they do not, as Dickson CJC. observed in the *Alberta Reference*, serve the same associational interests.[78]

In short, if the "irreducible minimum" of freedom of association must include the "collective withdrawal of services" as Abella J. paraphrasing Paul Weiler suggests; and if the right to strike is vital to protecting a meaningful process of collective bargaining, then the *PSYA*, surely must be a violation of section 2(d) of the *Charter*.[79]

Even though the prohibition on strikes relating to central bargaining issues was only in effect until the end of the school year, it nonetheless undermines a meaningful process of collective bargaining.[80] This robbed the teachers of the most effective time to strike. The purpose of collective action is to put pressure on management. While the unions could have resumed their strike in September, it would not have been nearly as effective. Furthermore, if the right to strike can be legislated away when it would be most impactful, it reduces the efficacy of employee action to potentially mere tokenism. Just as Galligan J. found that the removal of the freedom to strike "renders the freedom to organize a hollow thing," restricting the timing also renders the right to strike hollow in its own right.[81]

a) Can either of these Violations Be Saved by Section 1 of the Charter?

Having concluded that the *PSFA* and *PSYA* in all likelihood infringe section 2(d), it is necessary now to turn to a section 1 analysis to see if either can be justified. Governments are permitted to limit *Charter* rights so long as these rights are prescribed by law and can be demonstrably justified in a free and democratic society.[82] This requires that the government satisfy the test set out in *R v Oakes*, demonstrating that the limit is both pressing, substantial, and proportionate.[83] The burden of proof for this test is the "preponderance of probabilities", and as such, in order to justify an infringement the government must show at each step that the test weighs in favour of the limitation.[84] At the outset it is important to recognize that "… the critical core of the *Oakes* analysis has always required deference to legislative choice."[85]

i. Pressing and Substantial

Since both of these limitations are set out by statute there should be no question that the limit is prescribed by law. Even if some of the impugned elements of the *PSFA* were to be interpreted as properly within the realm of regulation, this characterization would not be fatal to the section 1 justification.[86]

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[78] *Ibid* at para 60.
[79] *SFL, supra* note 1 at paras 24, 61.
[80] PSYA, *supra* note 72, s 4(3).
[81] *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home*, 1983 CanLII 1928 (ONSC) at para 63, 4 DLR (4th) 231.
[82] *Charter, supra* note 2, s 1.
[83] *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC) at paras 69-70 [*Oakes*].
[84] *MPAO, supra* note 3 at para 139.
[85] Colleen M Flood & Lorne Sossin, Administrative Law in Context, 2nd ed (Toronto: Emond Montgomery Publications, 2013) at 424.
[86] This would be because certain limitations were not set out in the statute, but the power to enact them was delegated to the minister, cabinet, or Lieutenant Governor in Council; see *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII) at para 40, [2009] 2 SCR 567 [*Hutterian Brethren*]; *Irwin Toy Ltd v Quebec*

The objective at the next stage of the analysis is to determine if the government objective is of sufficient importance, in principle, to override a *Charter* right.[87] It is unlikely that either piece of legislation would fail at the pressing and substantial objective stage of the *Oakes* test. The *PSFA* is clearly designed to help the Ontario government deliver public education during an era of budget restraint and fiscal austerity. Similarly, the *PSYA* was trying to ensure the continued delivery of education during a contentious period of labour unrest. Even though the SCC is weary to justify infringements of the *Charter* based on budget constraints, the dual purpose of each piece of legislation ought to be sufficient to overcome this difficulty.[88] Both of these reasons should constitute a pressing and substantial government objective.

ii. Proportionality

The proportionality stage of the *Oakes* analysis has been divided into three steps: first, the measure must be rationally connected to the objective; second, the means must minimally impair the section 2(d) right; and third, "there must be a proportionality between the deleterious effects of the measures limiting the rights in question and the objective, and there must be a proportionality between the deleterious and salutary effects of the measure."[89]

The rational connection step is not particularly onerous; it requires the government to show a causal relationship between the government's objective and the measure.[90] Essentially the government has to prove that adopting the measure will help bring about the government's objective.[91] It is also likely that the Ontario government will not encounter much difficulty justifying either of the impugned measures. The *PSFA* and *PSYA* did in fact achieve the government's objectives in the short term. Both pieces of legislation avoided strikes while they were in effect, and were successful on imposing agreements on at least some bargaining units.

Where the government will encounter difficulty is on the minimal impairment step of the analysis. The question at this stage is whether the limit on the right is reasonably tailored to the pressing and substantial goal, and whether or not there exists a range of reasonable alternative means of achieving that goal. [92]

The *PSFA* impairs the right significantly more than necessary. The prohibition against strikes and imposition of (or ability to impose) terms of a collective agreement goes beyond what is reasonably required to avoid labour strife. Similar to the impugned legislation in *SFL*, the unilateral authority of the government to impose terms and limit strikes without a meaningful dispute resolution mechanism is the fatal flaw in the *PSFA*.[93] The act was not "carefully tailored

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(Attorney General), [1989] 1 SCR 927 at 981, 1989 CanLII 87; *R v Therens*, [1985] 1 SCR 613 at 645, 1985 CanLII 29.

[87] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, 1995 CanLII 64 (SCC) at para 143 [*RJR-MacDonald*].

[88] *Health Services*, *supra* note 37 at para 147; *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 (CanLII) at para 72, [2004] 3 SCR 381.

[89] *MPAO, supra* note 3 at para 139 citing *Oakes*, *supra* note 84 at 140; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 1994 CanLII 39 (SCC) at 889.

[90] *MPAO, supra* note 3 at para 143, citing *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 (CanLII) at para 228, [2000] 2 SCR 1120.

[91] *Health Services*, *supra* note 37 at para 149.

[92] *Hutterian Bretheren*, *supra* note 86 at para 53; *Health Services*, *supra* note 37 at para 150.

[93] See *SFL, supra* note 1 at para 81 Abella J (agreed with the trial judge that the PSESA went "…beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike").

so that rights are impaired no more than necessary" and therefore, cannot be justified under section 1 of the *Charter*.[94]

Just as the *PSFA* impaired section 2(d) more than necessary, so too does the *PSYA*. While the act did provide for interesting arbitration at the local level for the three affected bargaining units, its failure is in its blanket prohibition on strikes at the central bargaining level. By not providing for impartial and effective dispute resolution, while at the same time prohibiting strikes for the remainder of the 2014-2015 school year, the *PSYA* is unjustifiable.[95]

Even if either of these measures were to pass the minimal impairment step of the test, it is highly unlikely that they would satisfy the third step of the proportionality analysis. At this stage of the analysis a court would have seen that the limitation on section 2(d) advances a pressing and substantial objective; that the restriction has a causal connection to achieving the goal; and that the means chosen to achieve this goal are within a range of reasonably minimally impairing alternatives.[96]

This leads us to the last question: "are the overall effects of the law on the claimants disproportionate to the government's objective?"[97] This final stage allows the SCC to engage in a broad assessment of whether the benefits of the impugned laws are worth the rights violation.[98] Both pieces of impugned legislation can be looked at together on this stage, as the cost-benefit-analysis weighs out the same. Both have the benefit of reducing government costs and ensuring labour peace in the short term. However, both have the same negative function as well. The denial of section 2(d) rights, specifically the right to strike, reduces the effectiveness of the collective bargaining process over time.[99] Abridging the section 2(d) rights of teachers weakens the ability to exercise the right in the future. Essentially the law makes the right hollow and reverses the evolution of the right that we have seen in our jurisprudence.

VI. SUGGESTION FOR FUTURE REGULATIONS

The overall conclusion that can be drawn from examining the history of regulating teachers' bargaining in Ontario and the impact of modern SCC jurisprudence on current regulation is simple: use less restricting measures. While this might seem like an over simplification of the issue, the failure of both the *PSFA* and the *PSYA* is that they were not minimally impairing. If either had provided for a neutral dispute resolution process the underlying goals could have been achieved while satisfying the *Oakes* analysis.

Any new regulation on teachers must not eliminate a meaningful process of collective bargaining. The government can restrict strikes, but if they do they must provide a neutral dispute resolution process. However, the government may not attempt to dictate terms, override collective agreements unilaterally, or give themselves an unfair advantage in future negotiations.

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[94] *RJR-MacDonald*, *supra* note 87 at para 160.
[95] *SFL, supra* note 1 at paras 92-97, where the absence of an effective means of dispute resolution in the PSESA in respect of "essential service workers" is one of the main reasons for it being unjustifiable.
[96] *Hutterian Bretheren*, *supra* note 86 at para 72.
[97] *Ibid* at para 73.
[98] *Ibid* at para 77.
[99] *SFL, supra* note 1 at paras 59-60.

THE *UNSETTLING* RELATIONSHIP BETWEEN THE TRANS-PACIFIC PARTNERSHIP AGREEMENT AND PUBLIC-INTEREST REGULATION IN CANADA

Jonathan Nadler*

I. INTRODUCTION

Salus populi suprema lex esto
-Cicero[1]

In 2011, Philip Morris, one of the world's largest tobacco companies, brought a claim in investor-state arbitration against the Australian government for its adoption of a pioneering new law, the *Tobacco Plain Packaging Act*.[2] The arbitral tribunal in turn deferred jurisdiction to Australia's High Court, who in 2015, upheld the constitutionality of the Act.[3] This decision was perceived worldwide as a triumphant victory for the welfare of the state over vested interests.[4] Since the law's enactment, the UK, France, New Zealand and other governments have started introducing and working on similar tobacco measures.[5] Coinciding with this development is the recently concluded Paris Agreement, the first-ever global climate deal of its kind.[6] World leaders are evidently embracing a change in tide towards a greener and socially conscious global economy. However, despite these progressions, states' abilities to continue to introduce and enforce public health and environmental policies may be hindered by their participation in the current framework of international investment agreements ("IIAs"). These IIAs, once ratified by the state, become enacted into domestic law and have been criticised for providing wide-reaching power to foreign investors to challenge states' democratically enacted regulations. A recent IIA of this nature, and one that some US officials have labeled a model for twenty-first century trade agreements, is the Trans-Pacific Partnership (TPP).[7]

Canada has been negotiating the TPP for the past three years with the US and ten other Pacific Rim countries: Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru,

[1] Translated to English: "Let the food of the people be the supreme law" or "The welfare of the people shall be the supreme law"; Marcus Tullius Cicero, *De Legibus, Libri Tertivs,* Carolus Buchner, ed, (Firenze, Italy: Firenze A. Mondadori, 1973) at para 8.
[2] Australia's laws were the first of their kind in the world; Rob Taylor, "Philip Morris Loses Latest Case Against Australia Cigarette-Pack Laws", *The Wall Street Journal* (18 December 2015), online: <www.wsj.com> [Taylor].
[3] The tribunal determined it had no jurisdiction to hear the claim, but the confidentiality regime governing the arbitration means that the substance of the decision cannot be published until confidential information disclosed in the decision has been removed; Australian Government, Attorney-General's Department, "Tobacco plain packaging – investor-state arbitration", online: <www.ag.gov.au> [Australia].
[4] *Ibid.*
[5] World Health Organization, Regional Office for Europe, Press Release, "Norway works towards the adoption of plain packaging" (13 March 2015), online: WHO Europe <www.euro.who.int>; Taylor, *supra* note 2
[6] Climate Action, "Paris Agreement", *European Commission* (2017), online: <ec.europa.eu>.
[7] Office of the United States Trade Representative, Executive Office of the President, Press Release, "Summary of the Trans Pacific Partnership Agreement" (October 2015), USTR, online: <www.ustr.gov> [TPP].

Singapore, and Vietnam.[8] The negotiations concluded in October 2015 and the deal is considered to be one of the largest plurilateral trade agreements in history, amounting to forty percent of global GDP and one third of world trade.[9] The general logic behind the proliferation of these trade and investment deals, dating as far back as the inception of the *GATT* in 1945, is articulated around one principle: free trade.[10] With twenty-nine chapters in the agreement, the TPP stretches its scope beyond just trade and sets binding policy in areas such as the environment, food safety, intellectual property, the internet, investment, labour, and access to medicines.[11]

While trade rules do provide for possible derogations when public interest issues are at stake, global trade of this nature historically has a difficult time interacting cohesively with legal and social norms. Ethical advocates have argued that such freedom of exchange and movement of goods and services disregards or even encourages social injustice.[12] This highlights the inherent power imbalance in these deals where states with higher and lower standards of social legislation and with large disparities in wealth are negotiating. Often times, these complicated economical and ethical interactions cannot easily be transformed into one unified legal rule or standard, inevitably leading to concessions being reached at the expense of socio-economic considerations.[13] The TPP, along with several other secretly negotiated trade agreements, are at the forefront of this debate over the incorporation of a social dimension in the 21st-century standard of international trade rules.[14]

As Canada's International Trade Minister Chrystia Freeland embarks on her cross-country consultations on the TPP this month in an effort to determine whether the government should ultimately ratify the agreement, she has publicly asserted, "[Canada is] a trading nation."[15] While many state officials have expressed their optimism from an economic position,

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[8] The signatories to the TPP are: New Zealand, Chile, Singapore, Brunei, the United States, Australia, Peru, Vietnam, Malaysia, Mexico, Japan and Canada. The negotiations on the TPP started seven years ago with fewer countries, before the U.S., Japan and Canada joined. *Ibid*.

[9] *Ibid*; The lack of progress in the WTO's Doha negotiations is one likely factor for the proliferation of multiple mega-regional trade negotiations, like the TPP, TTIP and TISA; See Miguel Rodriguez Mendoza, "Mega-regionals and the Doha negotiations: Implications for developing countries" (2014) 3:10 Bridges Africa 3 at 8, online: <www.ictsd.org>.

[10] The World Trade Organization's predecessor, the *General Agreement on Tariffs and Trade*; Marie-Pierre Lanfranchi, "Socio-economic rights in applicable international trade law" (2004) 8:1 L Democracy & Dev 47 at 48.

[11] TPP, *supra* note 7.

[12] Lafranchi, *supra* note 10 at 47.

[13] *Ibid* at 47-48; for the purposes of this paper, 'socio-economic rights' will be framed as the right to a healthy environment, the right to clean air, the right to safe food, or the right to safe drinking water. These environmental rights and responsibilities were not necessarily advanced during the era of the drafting of the *International Covenant on Economic, Social and Cultural Rights* in 1966, but in light of magnitude, pace and adverse consequences of environmental degradation, and human development and technology, they reflect the pioneering and fundamental global rights that are being more and more recognized and protected; Alana Mann, *Global Activism in Food Politics: Food Shift* (London: Palgrave Macmillian, 2014); See David R Boyd, "The Constitutional Right to a Healthy Environment" (2012) 37:4 Law Now 5, online: < www.lawnow.org/right-to-healthy-environment/>.

[14] Other notable international trade agreements that have recently been disclosed, or are still in secret negotiations, have met similar criticism. These include the TTIP (Transatlantic Trade and Investment Partnership, a free trade agreement between the EU and the US) and TISA (Trade in Services Agreement, a proposed international trade treaty between 23 states including the EU, the US, Canada and Hong Kong).

[15] Trevor Robb, "Canada's International Trade Minister Chrystia Freeland visits Edmonton, touts Trans Pacific Partnership (TPP) trade deal", *Edmonton Sun* (11 January 2016), online: <www.edmontonsun.com>; "Chrystia Freeland on TPP: 'We are a trading nation'", *The Globe and Mail* (18 November 2015), online: <www.theglobeandmail.com>.

a fundamental ethical question arises surrounding the TPP's expansive protection of investors' interests, through its investor-state dispute settlement (ISDS) system.[16]

This paper will be presented through three main points: What is ISDS, what are the concerns deriving from this arbitration mechanism, and how has it been used in prior IIAs? Have the drafters of the TPP's ISDS provisions addressed these concerns, and if so, does it do enough to protect governments' ability to regulate in the public interest? The results of this analysis will evidence to the reader that while efforts have been made to rework the TPP's investment protection provisions, the vulnerability of governments to the ISDS mechanism still poses a significant threat to the viability of states' public-interest policies.

II. THE INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

One of the most contentious and political topics in the last century in international trade law, and one that garners a wealth of attention when analyzing the TPP, is the level of protection ensured to the economic rights of foreign investors.[17] 1959 marked the first Bilateral Investment Protection Treaty between Germany and Pakistan.[18] This protection changed later in the 1960s when investment treaties stipulated that investors could file a complaint directly against the host country through independent arbitration.[19] This was the establishment of the ISDS, which has since been enshrined in bilateral investment treaties (BITs), and more recently in the rising mega-regional IIAs being signed by major blocs of countries.[20] To properly analyse whether socio-economic rights have been given adequate consideration in the framework of the TPP, this section will review some key criticisms of the ISDS system and how it has been employed in these prior deals.

a) Characteristics

ISDS essentially is a system of legal remedies for foreign investors to use when the host-state's government has violated a trade agreement.[21] The mechanism gives investors a specific right to circumvent the country's domestic legal courts and sue a government directly in an ad hoc international tribunal for compensation for losses arising from a violation to their investment.[22] Any damages awarded through arbitration are to be paid from the host-state's national treasury. The tribunal itself is established on a case-by-case basis and the three

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[16] Former Minister of International Trade Ed Fast claimed the TPP will deepen Canada's trading relationships with the dynamic and fast growing markets in the Asia-Pacific region; "Canada reaches trans-pacific trade deal", *Canadian Business Journal News*, online: <www.cbj.ca>; Kevin Lynch, "TPP is an evolution, not a revolution, in Canada's journey", *The Globe and Mail* (8 January 2016), online: <www.theglobeandmail.com>.

[17] Giorgio Sacerdoti & Matilde Recanati, "Alternative Investors – State Dispute Settlement Systems: Diplomatic Protection and State to State Arbitration" (2015) Bocconi Legal Studies Research Paper No 2562782 at 2.

[18] Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Frederick, MD: Kluwer Law International, 2009) at 42.

[19] The protection was first introduced in the 1960s, but was more widespread in more deals in the 1980s, *ibid* at 44; Markus Krajewski, "Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in TTIP from a Trade Union Perspective" (Brussels: Friedrich Ebert Stiftung, 2014) at 6, online: <www.library.fes.de>.

[20] Armand de Mestral, "Investor-State Arbitration Between Developed Democratic Countries" (Waterloo: Centre for International Governance Innovation, 2015) at 1, online: <www.cigionline.org>.

[21] *Ibid* at 7.

[22] *Ibid* at 2.

arbitrators assigned to each case are usually composed of specialized international trade or corporate lawyers.[23]

While it is difficult to dispute the notion that foreign investors should be protected abroad when governments are allegedly disrespecting their international obligations, the ISDS mechanism is heavily criticized for allowing investors to challenge developed states' policies on public health and the environment.[24] The TPP's inclusion of ISDS has garnered a similar response due to the text's resemblance to the US models of investment rules, a system that has had a poor track record of promoting sustainable investment, addressing socio-economic concerns, or holding investors to responsible behaviour.[25]

One of the main criticisms of the ISDS mechanism often cited by academics is the sheer increase in volume of investor claims that have been filed using US model IIAs. Academics have argued that once IIAs and BITs began to implement a dispute settlement system like ISDS, which was recognized as a legally binding instrument on states, popularity in this approach rose.[26] Several studies have calculated that the amount of ISDS cases heard in 1999 to 2012 increased from sixty-nine to 370-plus, and of those cases, seventy percent relate to state policies on natural resources, the environment, and energy.[27] Another alarming study conducted in 2015 found that of the seventy-seven known NAFTA ISDS claims filed since 2005, Canada has been the target of over seventy percent (the majority of which challenge the country's public-interest laws).[28]

Another worrying element of the ISDS is the quantum of damages often claimed and/or awarded to investors, which range between ten to hundreds of millions of dollars. This aspect alone (as will be outlined in section 1.2), has contributed to governments receding on or suspending their public interest initiatives. In the same 2015 study, the damages sought in those claims totalled over $6 billion USD.[29]

The possibility of arbitration may also be a significant deterrent to governments. In the 1990s, RJ Reynolds Tobacco Company threatened to bring a claim under NAFTA's investment chapter against Canada's proposed plain packaging legislation.[30] The government at the time was

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[23] Krajewski, *supra* note 19 at 6.

[24] Charles N Brower & Stephan W Schill, "Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law?" (2009) 9:2 Chicago J Intl L 471; There has been less academic and political criticism in the case of foreign investors using ISDS to sue developing states' violations with less reliable judicial systems. This point is further elaborated in other articles, but was too large for purposes of paper. Restricting scope of research to developed states; see Kathleen Cooper et al, "Seeking a Regulatory Chill in Canada: The Dow Agrosciences NAFTA Chapter 11 Challenge to the Québec Pesticides Management Code" (2014) 7:1 Golden Gate U Envtl LJ 5 at 22.

[25] Nathalie Bernasconi-Osterwalder, "How the Investment Chapter of the Trans-Pacific Partnership Falls Short" (6 November 2015), *International Institute for Sustainable Development* (blog), online: <www.iisd.org>.

[26] Krajewski, *supra* note 19 at 6.

[27] Open Letter from Elizabeth A Evatt et al to the Negotiators of the Trans-Pacific Partnership (8 May 2012) *TPP Legal* (blog) at para 11, online: <tpplegal.wordpress.com/open-letter/> [Evatt et al].

[28] ISDS is not always a transparent system, as its tribunals do not meet in public, the publication of awards is not mandatory, and other documents such as the complaint are not usually published; See Krajewski, *supra* note 19 at 16; Scott Sinclair, *NAFTA Chapter 11 Investor-State Disputes to January 1, 2015* (Ottawa: Canadian Centre for Policy Alternatives, 2015) at 31, online: <www.policyalternatives.ca>.

[29] *Ibid*.

[30] Matthew C Porterfield & Christopher R Byrnes, "Philip Morris v Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?" (12 July 2011), *International Institute for Sustainable Development* at para 1, online: <www.iisd.org>.

looking to offset the new low taxes on tobacco products by enforcing restrictive packaging.[31] However, the mere threat of ISDS was widely believed to have deterred the government from taking legislative action.[32]

Aside from the damages that states could incur at ISDS, the cost of defending an investor claim can lead states to either amend or halt legislative proposals. One study estimated that in the past two decades, Canada has spent $65 million USD defending claims.[33] One example that illustrates this is New Zealand's decision to delay their plans of adopting similar tobacco measures in anticipation of the result of the arbitration between Philip Morris and Australia.[34]

One possible solution proposed to this issue of excessive compensation is to limit the definition of "investments" provided in most IAs and BITs.[35] The standard definition, outlined in the TPP, reads:

> Every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment including such characteristics as the commitment of capital or other resources, *the expectation of gain or profit*, or the assumption of risk.[36]

In US takings law, the scope of potential compensation that the owner is entitled to is limited to the loss of value of the real property taken.[37] This is just one model that IIAs can use to limit the ability of foreign investors to seek such large quantum of damages. This would also serve to provide meaningful investor protections without compromising a host country's capacity to regulate in the public interest. If meaningful steps to reconstruct the language are not seriously considered, the system could cause a "regulatory chill", leading governments to continue to weaken, delay or altogether abandon vital policy making in an effort to avoid expensive litigation.[38]

b) Cases

It is important to highlight several examples of important cases targeting public interest regulations that have either granted damages relief against the government, that have been settled out of court, or those that are currently pending.

In March 2015, Bilcon, a US mining company, won an ISDS dispute under the North American Free Trade Agreement (NAFTA) against Canada for its permit denial of the company's plan for mining operations in Nova Scotia.[39] While the arbitration has yet to rule on

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[31] *Ibid* at para 4.
[32] *Ibid* at para 6.
[33] Sinclair, *supra* note 28 at 31.
[34] Martin Johnston, "Pressure to Bring in Tobacco Plain-Packaging", *NZ Herald* (2 March 2015), online: <www.nzherald.co.nz>.
[35] Meredith Wilensky, "Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership" (2015) 45:7 Enviro L Reporter 10683, online: <web.law.columbia.edu>.
[36] See TPP, *supra* note 7 at c 9.
[37] Wilensky, *supra* note 35 at 96.
[38] Cooper et al., *supra* note 24 at 16.
[39] *Clayton/Bilcon v Government of Canada,* (2015), T-1000-15, "Cases Filed Against the Government of Canada" leave to FCA requested, *Government of Canada* (4 January 2016), online: <www.international.gc.ca> [*Bilcon*].

the quantum of damages, the claim was for $101 million USD.[40] This suit arose from the province's rejection of the mining project for potential environmental risks and its inconsistency with "community core values."[41] The majority of the tribunal ruled that Canada's conduct was in breach of the international minimum standard of fair treatment, placing particular focus on the investors' reasonable expectations generated by the province's publicly stated policy of encouraging mining investments.[42] After the decision was handed down, Canada voiced its disagreement with the tribunal's broad interpretation of NAFTA's ISDS provisions, and has since attempted to appeal in domestic court. Donald M. McRae, Professor of trade law at the University of Ottawa, outlines his discontent well in the tribunal's dissent. McRae warned that Bilcon's only "expectation" should be that Canadian law was applied properly in the province's decision, and that it would be incorrect to equate violations of domestic law to a violation of NAFTA investment-protection standards.[43]

Another example of an ISDS case challenging Canada's public policy arose in 2012 after Quebec imposed a moratorium on shale gas exploration and production due to concerns over drinking water contamination in the St. Lawrence River.[44] Lone Pine, a US oil and gas company, brought the case against the government and is suing for over $250 million USD in damages. Similar to the *Bilcon* case, Lone Pine is also using NAFTA's Chapter 11 ISDS provisions to claim that the government's policy of restricting oil and gas activity and stripping their exploration license is "arbitrary, capricious and illegal," and in contravention of Canada's duty to provide due process and adequate compensation.[45]

Similarly, Windstream Energy, a US-owned wind and energy company has a pending suit filed under NAFTA against the Canadian government. The company is seeking $475 million USD as a result of the Ontario government's moratorium on offshore wind development, where they reasoned there was a lack of scientific research to determine the impact on health and the environment. While *Lone Pine* and *Windstream* are both still pending under arbitration, the size of the awards sought signify a substantial financial risk that ISDS poses to Canadian provinces who legislate in the public good.

Another case Canada lost through ISDS was a claim under NAFTA by US company Ethyl, who challenged Canada's federal environmental ban on the import and international trade of gasoline additive MMT due to its potential neurotoxic effects.[46] The failure of the Canadian government to adequately specify the health risks in its legislation was the point of litigation and led to the government settling out of court for $13 million USD.[47]

One similar case outside of Canada is the ISDS claim instituted by Vattenfall AB, a Swedish energy company against Germany. The company's arbitration dispute was filed under

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[40] *Ibid* (the claimants in the case sought damages upward of $100 million USD and won the first two phases of the arbitration regarding jurisdiction and Liability. The next step in arbitration is the determination on the quantum of damages).
[41] *Ibid*.
[42] Stefan Dudas, "Bilcon of Delaware et al v Canada: A Story about Legitimate Expectations and Broken Promises" (11 September 2015), *Kluwer Arbitration Blog* (blog), online: <www.kluwerarbitrationblog.com>
[43] *Ibid*.
[44] *Lone Pine Resources Inc. v The Government of Canada* (2012), UNCT/15/2 (Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement) at 11.
[45] *Ibid* at 15-16.
[46] MMT stands for Methylcyclopentadienyl manganese tricarbonyl; see *Ethyl Corp v. Government of Canada* (1998), (Award on Jurisdiction) (Charles N Brower and Marc Lalonde) at 2, online: <www.italaw.com/cases/409>.
[47] *Ibid*.

the Energy Charter Treaty ("ECT") in response to the city of Hamburg's decision to restrict construction of a coal-fired power plant in the wake of the Fukushima disaster.[48] Germany settled the €1.4 billion suit by weakening its restrictions in a way that the EU later said was harmful to protected fish species.[49]

The term "investment" under these BITs and IIAs has also been given broad interpretation, applying beyond enterprises into areas such as intellectual property rights. For instance, US pharmaceutical company Eli Lilly is currently claiming $500 million USD in damages against Canada for court decisions that revoked its Canadian patents on two drugs because the applications were deemed insufficient to assess the potential benefits of the drugs.[50]

This type of constraint put on governments' fundamental responsibility to protect public health and welfare is also evidenced in a parallel case involving the US's food labelling law. In December 2015, after a decade of legal battles between the US and its NAFTA trading partners, the US repealed a labelling law that required retailers to include the animal's country of origin on packages of red meat, poultry and other animal by-products.[51] The main reason for repealing the law was due to the World Trade Organization's recent decision to order over $1 billion USD in retaliatory tariffs against the US unless they repealed the law.[52] While the tariffs do not equate to direct compensation to corporations under ISDS, this example nevertheless evidences the economic pressure employed by international trade organisms where environmental and public health regulations produce these types of economic consequences.

While critics have acknowledged some improvements in the TPP regarding the aforementioned issues concerning the ISDS mechanism, in an open letter in 2012, 100 academics, judges, attorneys, and state legislatures have nevertheless advocated for the removal of the ISDS mechanism from the agreement entirely, stating that the dispute settlement system needs a drastic overhaul.[53] In the US, Vermont senator and former presidential candidate, Bernie Sanders, as well as congress senator, Elizabeth Warren, have demanded that the investment chapter be dropped altogether, saying, "if a final TPP agreement includes [ISDS], the only winners will be multinational corporations."[54]

III. THE TRANS-PACIFIC PARTNERSHIP (TPP)

This section of the paper will discuss specific elements in the TPP's investment chapter and how they might be invoked to challenge host-state's public-interest legislation. In so doing,

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[48] The ECT is a multilateral trade and investment agreement governing investments in the energy sector, and also contains ISDS as its dispute resolution mechanism; *Vattenfall AB v Federal Republic of Germany* (Request for Arbitration) (2011), ARB/09/6 (International Centre for Settlement of Investment Disputes) (Sir Franklin Berman, Gabrielle Kaufmann-Kohler), at 11-12, 17, 45, online: <www.italaw.com/cases/1148>.

[49] Claire Provost & Matt Kennard, "The Obscure Legal System that Lets Corporation Sue Countries", *The Guardian* (10 June 2015), online: <www.theguardian.com>.

[50] Cato Institute, "Patents, Public Health, and International Law: The Eli Lilly NAFTA Chapter II Case" (16 January 2014), online: < www.cato.org>.

[51] "Meat Labeling Law Repeal Leaves Buyers in Dark about Product Origins", *NBC News* (4 January 2016), online: <www.nbcnews.com>.

[52] *Ibid*.

[53] Evatt et al, *supra* note 27 at para 13.

[54] Bernie Sanders is also the Democratic Senator from the State of Vermont; Elizabeth Warren, "The Trans-Pacific Partnership clause everyone should oppose" *The Washington Post* (25 February 2015), online: <www.washingtonpost.com>.

this analysis will examine if, and how the TPP's text has addressed the criticism of ISDS outlined above.

Investment protection chapters have almost always contained three clauses that impose a standard of conduct on host countries in their dealings with foreign investors. There are two principles of non-discrimination and are expressed in the first two clauses respectively. The first principle is the most favoured nation clause, which prohibits host states from providing preferential treatment to one investor party to an agreement and not to an investor of another agreement signed with that host state. In other words, Canada may not treat US investors less favourably than it would treat Mexican investors.[55] The other non-discrimination principle is "national treatment", which prohibits giving more favourable treatment to your own investors than foreigners. Therefore, Canadian investors may not be treated more favourably than US investors.[56] The last notable clause that will be discussed is the minimum standard of treatment obligation.

a) Most Favoured Nation Treatment ("MFN")

One of the TPP's especially contentious clauses is the MFN provision. In the past, investment tribunals have allowed foreign investors to use this provision to take substantive guarantees from other treaties and base their claims on these more favourable clauses. For instance, a foreign investor making a claim against Canada can import more favourable provisions from the other treaties Canada has signed, regardless of whether the investor's home state is a signatory. The justification tribunals have provided is that it would be discriminatory for some foreign investors to be given less favourable ISDS rules than what would be afforded to others in a different treaty.[57] Since investment tribunals have generally embraced these manoeuvres, it has effectively broadened the scope of investment protections, beyond what is prescribed in their respective agreement.[58]

The MFN issue is well illustrated in *Vattenfall*, the case regarding a Swedish corporation's dispute and eventual settlement with the German government. In this case, the energy company challenged the host-state's environmental provisions under the Energy Charter Treaty (ECT), a multilateral trade and investment agreement governing investments in the energy sector. The investors were strategic in using the MFN clause to circumvent the stricter rules on fair and equitable treatment and indirect expropriation in EU trade provisions, and import the standards of the ECT's investment chapter, which had more broad substantial standards.[59]

In light of these problems, the TPP has addressed this issue by stipulating in the clause that it would limit the possibility of importing standards through the MFN clause. However, it has been criticized for only limiting the transfer of procedural ISDS provisions, and not imposing the same on substantial provisions in each agreement.[60] This would have inevitably blocked Vattenfall's ability to import favourably worded FET obligations[61] and pressure the government into repealing its public-interest provisions. Including the importation of substantial standards in

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[55] Krajewski, *supra* note 19 at 4.
[56] *Ibid* at 11.
[57] Wilensky, *supra* note 35 at 10-11.
[58] Krajewski, *supra* note 19 at 11.
[59] *Ibid* at 18.
[60] Wilensky, *supra* note 35 at 11.
[61] *Ibid*.

the TPP's MFN clause nevertheless provides an unnecessarily expansive power to investors to import any provision that better helps their claim.

Another example of this tactical use of the MFN clause was in the Philip Morris dispute with Uruguay. Here, the tobacco company invoked the MFN clause to circumvent a requirement in the Uruguay-Switzerland BIT that obliged investors to first pursue remedies in the domestic courts of the host nation, before proceeding with ISDS. Philip Morris ultimately benefited from a BIT between Uruguay and a third country that did not have the same requirement and proceeded through ISDS to sue the government over its new tobacco labeling laws.[62]

b) National Treatment

The other concerning element of the non-discrimination standards imposed through ISDS provisions is the principle of national treatment. The provision is intended to prevent host countries from favouring domestic investors over foreign ones, and under the TPP, provides:

> […] shall accord to investors of another Party treatment *no less favourable* than it accords, *in like circumstances,* to its own investors with respect to the *establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition* of investments in its territory.[63]

The risk of state liability for their public-interest measures is dependent specifically on the broad interpretation that has been given by tribunals to the wording, "like circumstances."[64] Under other IIAs like NAFTA, tribunals have determined the meaning of "like circumstances" by taking into account domestic environmental and health policy objections. This common approach, on its surface, seems to be a positive step in recognizing public policy concerns.

In the *SD Myers* case in 2002, a US waste treatment company challenged Canada's temporary federal ban of toxic PCB waste exports under NAFTA.[65] Canada argued in this case it was obliged to dispose of the waste within its own borders under another international treaty. The tribunal in *SD Myers* placed the burden on the regulating entity to show how the discrimination was "reasonable" based on their policy objectives.[66] However, the language in the national treatment provision does not articulate on "like circumstances", and the tribunal in *SD Myers* ruled that while the objective was reasonable, the measures were not a permissible way to achieve it, and thus violated NAFTA's standard for national treatment.[67]

Moreover, since the TPP has not addressed adding any further clarification to this provision, there is no way to stop future tribunals invoked under the agreement to move away from considering the regulatory objectives.[68] This has occurred under WTO jurisprudence, where courts determined "like consequences" by focusing on whether the goods were in a competitive relationship or not, inevitably ignoring public interest concerns.[69] Implementing clearer language

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[62] Evatt et al, *supra* note 27 at para 9.
[63] TPP*, supra* note 7 at Art 9.4(1) [emphasis added].
[64] Wilensky, *supra* note 35 at 10.
[65] *SD Meyers v Canada* (2015), "Case Summary No: 7" (30 July 2015), *Stockholm Chamber of Commerce: ISDS Blog* (blog), online: <www.sdsblog.com> [*SD Myers*].
[66] Cooper et al, *supra* note 24 at 30.
[67] *SD Myers, supra* note 76.
[68] Wilensky, *supra* note 35 at 10.
[69] *Ibid* at 10.

to this standard that would restrict tribunals in only considering if a public policy goal justifies treating them differently would be a strong step in the right direction of curtailing future claims against state public interest regulation.[70]

c) Minimum Standard of Treatment ("MST")

Another controversial ISDS provision in the TPP, and found in virtually all other IIAs and BITs, is the requirement of the "minimum standard of treatment" on behalf of host-states. Many critics have found this provision to be a "weapon" used to fight domestic laws, mainly based on the contentious wording: "legitimate expectations of the investor."[71] In the past, controversial decisions have arisen regarding the broad interpretation of this language that has brought this provision into disrepute.

For example, in the aforementioned *Bilcon* dispute against Canada, the case arose because the government rejected a quarry operations proposal due to its potentially adverse environmental impacts. The court found Canada liable under ISDS for violating NAFTA's minimum standard of treatment obligation. As stated earlier, the particularly concerning part of this judgment is the "legitimate expectations" element. Tribunals have allowed investors to argue that because the government has created an expectation of profit in the minds of investors, if a law is changed or enacted that frustrates those expectations, they are entitled to sue. In light of the case's significant award, it is clear the interests of investors' expectations that have been frustrated trumps the interests of a violation of a domestic national law that could, for instance, combat climate change.[72]

Another case where an unduly high standard was imposed by ISDS on a state's government was in *Tecnicas Medioambientales v Mexico*. Here, the tribunal found that Mexico had undermined the company's legitimate expectations when it refused to renew a one-year permit to operate a hazardous waste facility due to public health concerns.[73] While many in the international trade community criticized the decision for the high onus it placed on the regulating entity, other tribunals under CAFTA (Central America Free Trade Agreement) have given similarly broad interpretations to the "investors' expectations" language for claims targeting governments' public-health regulations.[74]

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[70] *Ibid*.
[71] Krajewski, *supra* note 19 at 12.
[72] *Bilcon*, *supra* note 39.
[73] Wilensky, *supra* note 35 at 8.
[74] US water company Azurix won a $165 million suit in arbitration against the Australian government, arguing that the government had expropriated its investment and denied fair and equitable treatment in a situation where Azurix had a contractual responsibility to ensure clean drinking water; *Azurix Corp v the Argentina Republic* (2009), ICSID Case No. ARB/01/12 at para 29(a), 37(5) (International Centre for Settlement of Investment Disputes, Annulment Proceeding) (Dr. Gavan Griffith, Judge Bola Ajibola, Michael Hwang), online: <http://www.italaw.com/cases/118>; see A US electricity distribution firm settled for $26.5 million with the Dominican Republic on a case in which they claimed expropriation and a violation of CAFTA's guarantee of fair and equitable treatment due to the government's unwillingness to raise electricity rates, which the government claimed was due to a state energy crisis; see *TCW Group, Inc and Dominican Energy Holdings, LP v The Dominican Republic* (2007), at paras 6-10 (United Nations Commission on International Trade Law, Notice of Arbitration and Statement of claim), online: <www.italaw.com/cases/1074>; see also Christian Tietje et al, "The Impact of Investor-State Dispute Settlement in the Transatlantic Trade and Investment Partnership" (2014), Ministry of Foreign Affairs, The Netherlands, at para 164.

The TPP added this clause in an attempt to reconcile what they address as a problem with the MST clause:

> For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is a loss or damage to the covered investment as a result.[75]

The latter text, however, has been criticized for leaving questions unanswered and offering little clarification on what standard of conduct the MST obligation imposes on states.[76] In light of the lingering uncertainty, many critics have called upon legislatures to identify these modifications as insufficient.[77] They argue that once the new global climate change pact comes into effect and governments begin imposing stronger emissions standards, uncertain ISDS clauses could leave states liable to compensate the investor for having to close down or change their environmentally hazardous operations.[78]

d) Other Elements

There is further evidence in the text of the TPP to suggest that rather than addressing what may be a "root problem" with the ISDS mechanism itself, the TPP has continued to do limited patchwork.[79] For instance, in light of the public outcry against the Philip Morris challenge to Australia's tobacco measures, and the subsequent appeals and new suits filed under ISDS by tobacco companies, the TPP added a Tobacco Control Measures clause.[80] This exceptional measure would deny investors the right to immediately institute arbitration claims against states relating to claims challenging tobacco control measures. This was added in an effort to "to preserve the right to regulate tobacco products domestically."[81] While this measure acknowledges a key problem in the ISDS system, it is certainly narrow in scope. Tobacco products are one of many dangerous products out on the global market.[82] The TPP does not provide similar limitations on other matters "necessary to protect human life or health,"[83] like it does for tobacco products. This inevitably misses a crucial opportunity for the agreement to

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[75] TPP, *supra* note 7 at Art 9.6(4).
[76] Osterwalder, *supra* note 25 at para 5.
[77] Krajewski, *supra* note 19 at 17.
[78] Wilensky, *supra* note 35 at 11.
[79] Osterwalder, *supra* note 25 at para 6.
[80] In December, Philip Morris publicly stated it was reviewing the decision for a possible appeal and in 2012, British America Tobacco also challenged Australia's laws; see Taylor, *supra* note 2; The Australian government is also currently being sued through a WTO Dispute Settlement Body by Ukraine, Honduras, Indonesia, Dominican Republic and Cuban for what they claim is a violation of Australia's WTO obligations; see Australia, *supra* note 3; see also "Tobacco Company Files Claim against Uruguay over Labelling Laws" (2010) 14:0 Bridges Africa at 7, online: <www.ictsd.org>; Aliya Ram, "Tobacco giants launch UK plain packaging challenge", *The Financial Times* (8 December 2015), online: <www.ft.com>.
[81] Office of the United States Trade Representative, "Fact Sheet: New Proposal on Tobacco Regulation in the Trans-Pacific Partnership" (August 2013), *Office of the United States Trade Representative*, online: <www.ustr.gov> [USTR].
[82] David Dayen, "TPP trade pact would give Wall Street a trump card to block regulations" (6 Nov 2015) *The Intercept*, online: <www.theintercept.com>.
[83] USTR, *supra* note 81.

protect governments from a wider array of potentially harmful suits against domestic health and environmental regulations.

Another notable aspect of the TPP is the language[84] outlined in Article 9.15:

> Nothing in this chapter shall be construed to prevent a party from adopting, maintaining or enforcing any measure *otherwise consistent with this chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[85]

While this provision seems, at first glance, to have promise for promoting democratic values and securing states' autonomy to regulate, it is seemingly negated and more or less redundant by the inclusion of the words, "otherwise consistent with this chapter." In other words, the state could legislate freely, but they must nevertheless conform to the aforementioned rules.

The TPP has also been criticized for its lack of adequate participation and representation in the negotiations. Many of the TPP members' legislatures and state representatives were notably excluded from the negotiations and were not given access to drafts due to issues of confidentiality. Instead, major corporations, via special advisory groups and executives, had a significant role in drafting parts of the agreement.[86] As outlined above, the need for adequate representation is essential, considering how these free trade deals have been characterized as "investor-friendly" and ultimately sets rules that are binding on how states' economies and governments will operate.

Moreover, the ISDS mechanism is not the only element of the agreement that could have a "chilling effect" on how governments will legislate in the public interest. The TPP has also introduced changes to domestic regulatory regimes, enabling greater industry involvement in policy making within areas of public health.[87] For instance, in the TPP's regulatory coherence chapter, it requires the establishment of a central body to coordinate the development of policy on food safety.[88] This could ultimately create a large opportunity to influence domestic decision-making.[89]

According to Food & Water Watch, under the TPP, "agribusiness and biotech seed companies can now more easily use trade rules to challenge countries that ban GMO imports, test for GMO contamination, do not promptly approve new GMO crops or even require GMO labeling."[90] The High Court of Australia's Chief Justice Robert French echoed these concerns in his 2014 article: "Arbitral tribunals set up under ISDS provisions are not courts, nor are they

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[84] Dayen, *supra* note 82.
[85] TPP, *supra,* note 7, art 9.16.
[86] "Trans-Pacific Partnership (TPP): Expanded Corporate Power, Lower Wages, Unsafe Food Imports", *Public Citizen*, online: < www.citizen.org/tpp>.
[87] Sharon Friel et al, "A New Generation of Trade Policy: Potential Risks to Diet-Related Health from the Trans Pacific Partnership Agreement" (2013) 9:46 Globalization & Health at 1.
[88] *Ibid* at 5.
[89] *Ibid*.
[90] Deidre Fulton, "Trans-Pacific Partnership (TPP): 'Worse Than We Thought'. A Total Corporate Power Grab Nightmare", *Global Research* (6 November 2015), online: <http://www.globalresearch.ca>.

required to act like courts, yet their decisions may include awards which significantly impact on national economies and on regulatory systems within nation states."[91]

In consideration of the foregoing, it is clear that while the TPP has responded in some ways to the criticism of the ISDS's system and its standard provisions, there is still a degree of risk for states and their abilities to legislate in the public interest. In some fashion, the TPP has taken steps forward to clarify controversial terminology and to stipulate additional exceptions to address problems in the past. Nevertheless, the avenues are still more or less open for investors to either use arbitration in the hopes of obtaining a favourable award, or bring a case to arbitration in the hopes of deterring a state from acting. Nothing is necessarily off the table.

IV. HOW TO *SETTLE* IT: THE WAY FORWARD

Despite the modest improvements made to the TPP's ISDS provisions, there is an ever-growing push by lawyers, industry experts, lawmakers and judges to substantially reform, or altogether end, the dispute mechanism's presence in international trade agreements.[92] What is most noteworthy about this opposition to the deal is the recognition of the inherent link that trade and socio-economic rights have with one another, and the importance to find an adequate balance. The debate regarding the proliferation of these deals is not challenging the necessity of international trade *per se*, but rather calling for an improved system that sets acceptable standards as a *means* for responding and adapting to the planet's constantly evolving environmental and societal needs.[93]

These ISDS rules were drafted in an era where BITs and IIAs were being signed predominantly between developed and developing countries, and the need to protect investments from less developed judicial systems were prevalent.[94] NAFTA, in fact, was the first deal to have more than *one* developed country.[95] With the proliferation of these BITs and IIAs between developed countries, like the TPP, there has been a clear need to reconsider how these rules should be constructed.

This conversation is already gaining traction. In September 2015, the European Commission's Trade Commissioner, Cecilia Malmström, called for the creation of a new type of investment court that would replace ISDS in all existing and future EU investment negotiations: "The old, traditional form of dispute resolution suffers from a fundamental lack of trust […] Europe must take the responsibly to reform and modernise it."[96]

States such as South Africa, India and Indonesia have drafted new trade agreement models that more effectively protect policy space, and seek to promote environmentally and

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[91] Chief Justice Robert French, "Investor-State Dispute Settlement – A Cut Above the Courts?" (Paper delivered at the Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014), at 1, online: <www.hcourt.gov.au>.
[92] Chief Justice Robert, "ISDS – Litigating the Judiciary" (Address delivered at the Chartered Institute of Arbitrators Centenary Conference, Hong Kong, 21 March 2015), at 1-3, online: <www.hcourt.gov.au>.
[93] Referring to the proliferation of multiple mega-regional trade negotiations, like the TPP, TTIP and TISA; Mendoza, *supra* note 9.
[94] Cooper et al, *supra* note 24 at 22.
[95] *Ibid*.
[96] European Commission Directorate-General for Trade, News Release, "Commission Proposes New Investment Court System for TTIP and other EU Trade and Investment Negotiations", *European Commission* (16 September 2015), online: <www.europa.eu>.

socially conscious investment.[97] In 2014, Indonesia announced that it intended to terminate more than 60 BITs.[98] These countries have attempted to strike a balanced approach to investor protection rules, imposing obligations not only for host-states but also for foreign investors.[99] Brazil has also introduced a new model that focuses on investment facilitation and cooperation, rather than the traditional adversarial model of ISDS.[100]

One of the key actors in this move to incorporate socio-economic concerns into the framework of international trade law has been Australia. First in April 2011, the Australian government publicly refused to enter into any further IIAs with developed countries that contained ISDS provisions, stating: "[…] Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do no discriminate between domestic and foreign businesses."[101]

Australia is still the *only* state party to the TPP that has refused to submit to ISDS as part of the agreement. Their stance on the ISDS underscores the heart of this unsettling relationship between these new trade deals and the viability of public-interest policy making, namely that countries are signing their way into a mechanism that can not only deter them from dictating policy in the future, but that can also undermine domestic public interest regulation. In the case of Canada, public interest regulation has been subjected to years of due process in Canadian lawmaking and potential scrutiny by its courts. *This* is at the crux of the issue that states, like Canada, must consider moving forward.

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[97] Naren Karanuakaran, "How developing countries like India are petrified of being dragged into international arbitration" *The Economic Times* (9 June 2015), online: <www.economictimes.indiatimes.com>; Transnational Institute, Press Release, "After South Africa, Indonesia take a brave decision to terminate its BIT with Netherlands" (26 March 2014), online: <www.tni.org>.

[98] Ben Bland, "Indonesia to terminate more than 60 bilateral investment treaties", *Financial Times* (26 March 2014), online: <www.ft.com>.

[99] Osterwalder, *supra* note 25 at para 3.

[100] *Ibid*.

[101] Cooper et al, *supra* note 24 at 48; see also Jürgen Kurtz, "The Australian Trade Policy Statement on Investor-State Dispute Settlement" (2011) 15:22 American Society Intl L Insights at 1.