To What Extent is Canada's Provincial Regulatory Regime Efficient at Regulating Foreign-Operating Canadian Private Military-Security Companies?

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Introduction and Background

The twentieth century witnessed the privatization of several industries across the globe.[1] Many governments, including Canada, have passed along their public obligations in realms such as transportation and education to private companies who boast greater efficiency and social surplus maximization.[2] Interestingly, national security and foreign military commitments have, to an extent, also been swept up in the trend of privatization in Canada.[3] Although private military organizations and mercenaries have existed throughout early history, the now-incorporated and industrial forms of private military-security companies (PMSCs) did not gain prominence until the end of the Cold War and the Iraq War.[4]

Focusing on the Canadian context, modern-form PMSCs brought the promise of greater military expertise and lower public expenditures as compared to the Canadian Armed Forces (CAF).[5] Because of the significantly greater wages offered by Canadian PMSCs in comparison to the CAF and Canadian special forces such as JTF-2, many of the top military officers in the country have begun to leave the Canadian military for PMSCs.[6] This bulk movement of highly-skilled military personnel to the private sector has created shortages of expertise and manpower within the CAF, which limits its effectiveness and mission capability.[7] Moreover, given that a significant portion of premium military services only exist in the private sector rather than in-house, the Canadian government has been attracted to using PMSCs to achieve their more nuanced and tactical military needs.[8]

Apart from the expertise gap, the Canadian federal government often decides to outsource military-security contracts to PMSCs rather than the CAF because of budgetary constraints. Compared to some of its allies such as the United States or the United Kingdom, the Canadian government has a comparatively tighter military budget and smaller personnel size.[9] Accordingly, a range of scholars have argued that outsourcing contracts rather than training and employing elite forces is a more budget-friendly choice for the Canadian government.[10]

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[1] Saul Estrin and Adeline Pelletier, “Privatization in Developing Countries: What are the Lessons of Recent Experience?” (2018) 33:1 The World Bank Research Observer 65 at 67.
[2] Mylène Levac and Philip Wooldridge, “The Fiscal Impact of Privatization in Canada” (1997) Bank of Canada Review 25 at 35.
[3] David Borys and Joshua Matthewman, “Corporate Allies: Canadian Armed Forces and the Use of Private Military, Security and Logistic Companies” (2016) 16:2 The Canadian Army Journal 91 at 91. [Borys and Matthewman, “Corporate Allies”]
[4] Ibid.
[5] Christopher Spearin, “The Changing Forms and Utility of Force: The Impact of International Security Privatization on Canada” (2009) 64:2 International Journal 481 at 495. [Spearin, “The Changing Forms and Utility of Force”]
[6] Ibid. at 497.
[7] Ibid. at 496.
[8] Ibid.at 492.
[9] John Alexander, “Canada’s Commitment to NATO: Are We Pulling Our Weight?” (2015) 15:4 Canadian Military Journal 4 at 5.
[10] Ben Makuch, “The Company Formerly Known at Blackwater is Getting Paid Millions by the Canadian Government, Reports Say” (2018) Vice News. [Makuch, “The Company”]

Given the financial and tactical benefits that contracting with PMSCs provides to the Canadian government, one may understand why it has chosen to employ both American-based PMSCs and Canadian-based PMSCs. In fact, Canadian government spending on PMSCs has only continued to grow over the last several years.[11] According to scholar David Borys, Canadian PMSCs are currently being used for a variety of strategic reasons including combat roles and non-combat roles such as security, training, and logistical support.[12] For example, the Canadian government has contracted Ottawa-based Calian Group Limited to "provide CAF personnel with training through combat simulation exercises and give them technical and operational support in the training, planning and execution of complex combat exercises using advanced computer simulations systems."[13] In combat roles, Canada and other governments have contracted PMSCs such as Montreal-based GardaWorld to "provide security for the British consulate in Basra and the British embassy in Baghdad and helping the UN during the Afghanistan elections in 2005."[14] Canada has employed a number of other Canadian-based PMSCs, including some of the following: Tundra Strategic Security Solutions; Globe Risk Holdings; SNC Lavalin-PAE, Skylink Aviation, and ATCO Frontec.[15] In an assessment of the defense and security industry in Canada during 2011, KPMG stated that over 2000 PMSCs existed in Canada.[16] The size of the Canadian PMSC industry is arguably substantial, and scholars believe it will only continue to grow.[17]

Regulatory Issues Surrounding PMSCs

Although Canadian and foreign PMSCs offer a myriad of benefits to the Canadian government, PMSCs have found themselves in political turmoil in recent years for controversial combat incidents that have taken place in host countries. Most famously, several contractors of American-based PMSC Academi were involved in a massacre of 14 Iraqi civilians in Nisour Square, Baghdad, resulting in four of the contractors obtaining convictions for homicide-related crimes in the United States.[18] Moreover, in 2004, British ex-soldier Simon Mann, co-founder of Sandline International, was convicted of aiding a coup d'état attempt in Equatorial Guinea.[19] Interestingly, the other co-founder of Sandline International, Tim Spicer, went on to found Aegis Defense Services which employed child soldiers. [20] Aegis Defense Services was since acquired by Montreal-based GardaWorld in 2015.

Canadian PMSCs have also had their own controversies. In 2012, GardaWorld contractors were detained in Afghanistan for possession of unlicensed automatic

[11] Spearin, "The Changing Forms and Utility of Force" at 483.
[12] Borys and Matthewman, "Corporate Allies" at 92.
[13] Ibid.
[14] Ibid. at 95.
[15] David Antonyshyn, Jan Grofe and Don Hubert, "Beyond the Law? The Regulation of Canadian Private Military and Security Companies Operating Abroad" (2009) 3:9 National Reports Series 1 at 5-6. [Antonyshyn, "Beyond the Law"]
[16] "Economic Impact of the Defense and Security Industry in Canada" (2012) KPMG Advisory Services 1 at 5.
[17] Borys and Matthewman, "Corporate Allies" at 92.
[18] Nicky Woolf, "Former Blackwater Guards Sentenced for Massacre of Unarmed Iraqi Civilians" (2015) The Guardian.
[19] Peter Apps, "As Iraq, Afghan Wars End, Private Security Firms Adapt" (2012) Reuters World News.
[20] Alice Ross, "UK Firm 'Employed Former Child Soldiers' as Mercenaries in Iraq" (2016) The Guardian. ["Ross"].

rifles.[21] GardaWorld was moreover was associated with hiring a disgraced former CAF general, Daniel Ménard, who was arrested by the Afghan government over possession of 129 unlicensed firearms.[22] Ménard was also convicted under the Canadian *National Defense* Act ("*NDA*")[23] for negligent use of a firearm and having sexual relations with a subordinate while in the military.[24] Moreover, GardaWorld faced a significance licensing and business-relations crisis with the Afghan government in 2014 after failing to follow Afghan business protocol and allegedly issuing staff-directives to ignore ethical guidelines if needed.[25]

Apart from explicitly illegal behaviour, Canadian PMSCs have also been allegedly involved in behaviour that may not be illegal but is offensive to international standards and human rights principles ("offensive conduct"). For example, GardaWorld has reportedly employed former child-soldiers in their operations in Iraq.[26] Although employing Sierra Leonean former child-soldiers is not illegal, some scholars have concerns that employing soldiers who face haunting memories each time they equip a gun[27] is immoral and contrary to "international standards and human rights principles."[28] Although no current piece of international law legally restricts the usage of former child soldiers, multiple organs of the United Nations have condemned the re-recruitment of child soldiers on human rights grounds. For example, a 2018 United Nations report noted about principles of former child soldier reintegration that "offering former child soldiers a viable alternative to bearing a weapon may be the most important aspect of reintegration."[29] Moreover, a 2017 UNSC Working Group on Children and Armed Conflict condemned the "re-recruitment and re-association of children who have formerly been released or disengaged."[30] Finally, GardaWorld also allegedly engages in wage discrimination by paying its Sierra Leonean soldiers significantly less than its British counterparts, [31] which is contrary to Article 23 of the Universal Declaration of Human Rights ("UDHR"). In this way, certain Canadian PMSCs are allegedly engaged in offensive conduct contrary to intergovernmental organization policies and universally-accepted human rights norms.

Fact-Finding and Guilt Determination Difficulties

Prior to examining the legal regulation of PMSCs, this paper will comment on the difficult and precarious nature of evidence-gathering and guilt-determination for PMSCs.

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[21] Leon Watson, "British Private Security Workers Accused of Transporting Arms Illegally after Afghan Police Find Stash of 30 AK-47s" (2012) Dailymail.
[22] Matthew McClearn, "Why is Montreal's GardaWorld on the Outs in Both Afghanistan and Iraq?" (2014) Canadian Business. ["McClearn"]
[23] *National Defense Act,* RSC 1985, c N-5, s 156. [*NDA*]
[24] James Cudmore, "Daniel Ménard, Ex-Canadian General Jailed in Afghanistan, to be Released" (2014) CBC.
[25] McClearn.
[26] Rita Abrahamsen, "GardaWorld and Former Child Soldiers: The Price of Global Success?" (2016) Centre for International Policy Studies. ["Abrahamsen"]
[27] Ross.
[28] Abrahamsen.
[29] "Reintegration of Former Child Soldiers" (2018) Office of the Special Representative of the Secretary-General for Children and Armed Conflict 1 at 8.
[30]Conclusions on Children and Armed Conflict in the Philippines" (2017) United Nations Security Council Working Group on Children and Armed Conflict 1 at 2.
[31] "UK Private Military Firm Hired Ex-Child Soldiers from Sierra Leone for Iraq Ops" (2016) RT.

The global PMSC industry is one in which illegal and offensive activity is relatively-more difficult to detect and regulate. Given the high level of secret clearance required in security industries, public information on security incidents can be scarce.[32] The state and public-interest sectors surrounding PMSCs also often have difficulties monitoring behaviour due to "insufficient recordkeeping and/or their destruction in the midst of violence[,]…translation problems [that] are likely to slow the whole process…[and because] independent media reports or reliable evidence provided by non-governmental organizations may not be available."[33] Moreover, any self-reporting done by PMSCs in the form of use-of-force reports runs the risk of bias and inaccuracy.[34] Because of these evidentiary gaps, making substantiated conclusions on the behaviour of PMSCs to a level that satisfies a relevant burden-of-proof in Canada may prove difficult. Based on the available evidence, this paper can only cautiously conclude that some Canadian PMSCs may be involved in illegal and offensive behaviour while operating abroad.

Apart from evidentiary issues, scholars such as David Antonyshyn have expounded that because PMSCs often operate in countries with weak governance and rules of law, these controversial incidents bear the risk of less rigorous investigations and prosecutions.[35] Scholar Susana Mijares-Pena further states that countries that have weak governance allow a great risk of corporate injustices to be ultimately condoned.[36] Whether evidence exists in these situations or not, these foreign governments may choose to pursue convictions differently compared to Canada. As such, evidentiary issues and weak rules of law may result in an inaccurate reflection of the true nature and scope of illegal and offensive behaviour in which Canadian PMSCs are involved. Because PMSCs largely operate in destination countries with weak governance, this paper asserts that international laws and the domestic laws of the incorporating state should also play a role in constraining PMSC behaviour when justice is not served in host countries.

Acknowledging that some Canadian PMSCs abroad may be engaging in illegal and offensive behaviour abroad without facing legal recourse in their host countries, this paper advances that there is a domestic and international regulation shortcoming related to Canadian PMSCs abroad. In many of these host countries, PMSCs are not held accountable for crimes they commit. Scholar Marcus Hedahl finds that PMSCs in Iraq and Afghanistan are typically not arrested and prosecuted for their offenses.[37] Moreover, legal judgments against PMSCs have not always been maintained. For example, Academi was promptly allowed back into Iraq following the Nisour Square Massacre when the company ban was rescinded only four days after the incident.[38]

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[32] Ben Makuch, "Canada is Using Private Intelligence Contractors for its Special Forces" (2018) Vice News.
[33] Christopher Spearin, "What Montraux Means: Canada and the New Regulation of the Industrial Private Military and Security Industry" (2011) 16:1 Canadian Foreign Policy Journal 1 at 4. [Spearin, "What Montreux Means"]
[34] Note: this issue will be discussed later in the paper at page 22. Briefly, research has shown that security forces often misperceive threats during combat incidents, which may result in the inaccurate reporting.
[35] Antonyshyn, "Beyond the Law" at 3.
[36] Susana C. Mijares-Pena, "Human Rights Violations by Canadian Companies Abroad: Choc v Hudbay Minerals Inc" (2014) 5:1 Western Journal of Legal Studies 1 at 5. ["Mijares-Pena"]
[37] Marcus Hedahl, "Unaccountable: The Current State of Private Military and Security Companies" (2012) 31:3 Criminal Justice Ethics 175 at 182.
[38] Ibid.

Given the ostensible regulatory shortcoming surrounding Canadian PMSCs, this paper will examine the efficiency of the international and domestic regulatory regime in constraining illegal and offensive PMSC behaviour. For the purposes of this paper, efficiency will be defined as the ability of a regulatory measure to deter and stifle virtually all illegal and offensive behaviour without substantive disadvantages to the Canadian government and Canadian PMSCs such as costs, time, or hindering legitimate business activity. Part 1 of this paper will briefly consider the existing international law and conclude that the international regulatory regime is, on balance, inadequate for efficiently constraining PMSCs. Part 2 of the paper will then assess the available federal statutes and common-law and address concerns of extraterritoriality. It will conclude that although the federal legislation is generally untried and unrelated, it can be used with some effectiveness. Part 3 of the paper will then analyze the remaining provincial regulatory regime concerning PMSCs. This section will be the most comprehensive section given that the aspiration of this paper is to provide the first rigorous assessment of the Canadian provincial regulatory regime relating to foreign-operating PMSCs. This section will also address questions and concerns surrounding constitutional divisions of power. Finally, Part 4 of this paper will conclude with an assessment of Canada's provincial regulatory regime. In this section, the paper will advance the novel argument that although the provincial regime faces issues of purpose, disjointedness, and constitutional restrictions, it brings newfound efficiencies with respect to regulating foreign-operating Canadian PMSCs in areas such as improved relevance, authority, and scope.

Part 1: International Legal Regulatory Regime Related to PSMCs

This paper is concerned with illegal and offensive behaviour that Canadian PMSCs commit on the international stage. As such, the starting point for the regulation of these companies naturally begins with international law. Canada has several international legal obligations through its role as a signatory of several international documents that are directly- and indirectly-related to PMSCs. The first directly-related international document that Canada has signed onto is the Montreux Document, a non-legal document promulgating that PMSCs must abide by international human rights law.[39] The Montreux Document lays out obligations for states that contract with PMSCs and those that house their corporate offices.[40] According to the document, contracting states must consider any "reliably attestable" evidence of illegal past actions or any current discriminating practices in which the company has been engaged.[41] This provision places a burden on contracting states to investigate any alleged behaviour and to consider employing a different PMSC if investigations of the impugned PMSC unfold past or current illegal actions. Moreover, it requests that "home" states "take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as administrative or other regulatory

[39] Borys and Matthewman, "Corporate Allies" at 98.
[40] Ibid.
[41] *Montreux Document*, International Committee of the Red Cross at 17.

measures."[42] This provision requests that home states, such as Canada in this case, adopt their own domestic regimes to constrain illegal or offensive PMSC behaviour.[43]

Despite its direct relevance in regulating PMSCs, the Montreux Document carries several shortcomings. For one, the document only requests that contracting states consider illegal actions and does not strictly prohibit the usage of PMSCs that have engaged in illegal behaviour. The continued contracting of PMSCs such as Academi is an indication that this provision is not seriously considered by the Canadian government.[44] Moreover, the document in its entirety does not create binding obligations.[45] To this effect, Canada is not required to adhere to any of these commitments, and evidently has not done so through its continued contracting of impugned PMSCs and its underdevelopment of PMSC-related regulatory measures.[46] Finally, the document has been criticized for not demanding any commitments of PMSCs themselves, which arguably are the most important international actors with whom to engage.[47]

The International Code of Conduct for Private Security Service Providers ("ICoC") is another international document onto which Canada has signed. The ICoC advances a number of principles that implores PMSCs "to operate in a manner that recognizes and supports the rule of law; respects human rights, and protects the interests of clients."[48] The ICoC is an international agreement that is specifically created to engage with PMSCs themselves and demands the commitment to international human rights laws by corporations.[49] As of 2013, the ICoC had 602 signatories.[50] Evidently, the ICoC has allowed a large number of PMSCs to directly commit themselves to conduct that is in line with international law rather than relying on home states to constrain them.

However, the ICoC also faces several disadvantages. For one, despite over 600 original signatories, the ICoC website displays that only 96 PMSCs remain in "good standing."[51] Moreover, no Canadian PMSCs are currently listed as members in "good standing" on the ICoC website.[52] Already, these observations suggest that ICoC is not generally taken seriously by Canadian PMSCs. The ICoC is also not-binding, thus does not have any authoritative power to ensure Canadian PMSCs are respecting international human rights laws. Scholars have thus criticized that the shrinking scope and unclear oversight mechanisms of ICoC undermine its efficiency in constraining PMSC behaviour.[53]

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[42] Ibid. at 11.
[43] Ibid. at 13.
[44] Spearin, "What Montreux Means" at 4.
[45] Borys and Matthewman, "Corporate Allies" at 98.
[46] Note: this underdevelopment will be explored in Part 2.
[47] Borys and Matthewman, "Corporate Allies" at 98.
[48] *International Code of Conduct for Private Security Provides,* ICoCA, s 6c. [*ICoC]*
[49] Borys and Matthewman, "Corporate Allies" at 99.
[50] Ibid.
[51] Note: "Good standing" is undefined in both the ICoC itself and the ICoC website. See *ICoC*.
[52] "Membership", online: *ICoCA* < https://www.icoca.ch/en/membership>.
[53] Sorcha MacLeod, "Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-'Plus'" (2015) 62 119 at 122.

Canada is also a party to several indirectly-related international human rights agreements that may constrain PMSC behaviour abroad. For one, Canada is party to the *Crimes Against Humanity and War Crimes Act* which prohibits acts of genocides and war crimes.[54] Although no Canadian PMSC has been accused of engaging in offenses under this statute, this document nonetheless provides a future deterrent for any such abhorrent behaviour. Moreover, other documents which Canada has signed such as the UDHR, the UN Guiding Principles, the OECD Guidelines, and the Voluntary Principles on Security and Human Rights all may constrain Canadian PMSC behaviour by setting human rights standards which PMSCs should follow.[55]

Unfortunately, as with much of the international law regarding PMSCs, none of these lattermost documents are binding or have the authority to ensure Canada's stays committed to these obligations.[56] As a result, Canada is not obligated to constrain PMSC behaviour as per most of its international signatures.[57] In fact, some of these documents such as the UDHR are not intended to apply to corporations.[58] Moreover, as with the Montreux Document, many of these agreements pressure the home states to constrain PMSCs behaviour rather than creating obligations on the PSMCs themselves. Because of the non-binding nature of many international agreements, these documents are unlikely effective without domestic regulatory regimes in place.

Although international law is a natural starting point for constraining PMSC behaviour abroad, the current international regulatory regime is wholly inadequate in regulating PMSC behaviour. Most of these international documents either do not directly engage PMSCs, are not binding, or are not earnestly considered by PMSCs. Generally, a range of scholars including Mijares-Pena agree that "it seems that the legislation and voluntary international guidelines implemented by Canada do not provide sufficient enforcement and remedial mechanisms to redress and prevent cases of human rights violations" by Canadian corporations.[59] As such, due to the non-binding nature of most of the relevant international law, domestic regulatory regimes may be best equipped to address PMSCs.

Part 2: Federal Regulation and Common Law Applicable to PMSCs

This paper will now turn to an assessment of Canada's federal role in regulating the behaviour of Canadian PMSCs. This section specifically will focus on existing federal legislation and common law[60] that can be used to constrain PMSCs. It will first review directly-related federal statutes, followed by indirectly-related federal statutes and the common law in turn. As illustrated earlier, Canada houses certain PMSCs which may be

[54] Antonyshyn, "Beyond the Law" at 14.
[55] Mijares-Pena at 4.
[56] William A. Schabas, "Canada and the Adoption of the Universal Declaration of Human Rights" (1998) 43 McGill L.J 403 at 412. Notably, the *Crimes Against Humanity and War Crimes Act,* RSC 2000, c C-24, has been implemented in Canada and is accordingly binding law. However, as mentioned, it does not apply to any behaviour in which PMSCs are actually engaged.
[57] Mijares-Pena at 4.
[58] Jolene Hansell, "Case of Araya v. Nevsun Resources Ltd in the Canadian Courts" (2018) 3:16 Genocide Studies and Prevention: An International Journal 177 at 180. ["Hansell"]
[59] Mijares-Pena at 18.
[60] Note: Common law will be covered in this section because it is a tool available across all provinces.

involved in illegal and offensive behaviour. Because these companies are headquartered in Canada and receive their corporate profits in Canada, Canada can and arguably should have a role in regulating their behaviour.[61] For one, Canada's laws allow it to claim jurisdiction over offenses committed by locally-registered corporations when a Canadian province is the jurisdiction of incorporation.[62] To this effect, David Borys opines that the headquartering of several of these companies in Canada warrants subjecting them to Canadian business legislation and regulations.[63] Further, Mijares-Pena notes that host states are often developing countries that lack strong legal systems and that "there are no legal mechanisms available to ensure that these Canadian corporations abide by international standards and voluntary codes" in those countries.[64] Mijares-Pena advances a similar argument, citing Canada's reliable legal system as a more appropriate instrument to hold Canadian multinational corporations accountable for their human rights violations committed abroad.[65] On a final note, the United Nations also believes that only member states are ultimately able to address complex issues surrounding crimes committed abroad.[66]

Directly-Related Federal Statutes

The federal government has arguably not legislated any directly-relevant statutes that can robustly regulate modern-form PMSCs. The *Foreign Enlistment Act*[67] ["*FEA*"] is the only federal law that has ever been created to directly address the involvement of private citizens in foreign conflicts.[68] The *FEA* was passed in 1937 to prevent Canadian citizens from participating in the Spanish Civil War.[69] Although the introduction of this bill was intended to address historical types of mercenaries and private security providers, there are some provisions within this statute that directly pertain to current PMSC activity. Namely, section 11(1) of the *FEA* states that "any person who, within Canada, recruits or otherwise induces any person or body of persons to enlist or to accept any commission or engagement in the armed forces of any foreign state or other armed forces operating in that state is guilty of an offence." According to a textual interpretation of this provision, any business engaged in soliciting employees for overseas private security agent positions would be liable under the *FEA*. However, a modern[70] interpretation of this provision would likely eschew any liability due to the *FEA*'s context of seeking to punish private citizens that engage in war specifically against allied countries.

[61] Borys and Matthewman, "Corporate Allies" at 95
[62] Mijares-Pena at 5.
[63] Borys and Matthewman, "Corporate Allies" at 95.
[64] Mijares-Pena.
[65] Ibid. at 1-2.
[66] "Note: PRMNY-2886" (2016) Permanent Mission of Canada to the United States, <http://www.un.org/en/ga/sixth/71/criminal_accountability/questionnaire_canada_e.pdf>.
[67] *Foreign Enlistment Act,* RSC 1985, c F-28. [*FEA*]
[68] Antonyshyn, "Beyond the Law" at 7.
[69] Ibid.
[70] The modern approach, promulgated in *Rizzo and Rizzo Shoes Ltd. (Re*), [1998] 1 S.C.R. 27, explains that judges should assess the textual, contextual, and purposive meaning of a provision.

Apart from the fact that the *FEA* is arguably unsuitable to regulate modern-form PMSCs, scholars have also criticized it for its lack of use and enforcement capability.[71] Antonyshyn observes that no Canadian court has ever reviewed or adjudicated on any issues involving the *FEA*.[72] In sum, the *FEA* will unlikely contribute to Canada's regulatory regime surrounding PMSCs.

Indirectly-Related Federal Statutes

There are several existing statutes that are not directly relevant, but nonetheless may be used to efficiently deter and reprimand illegal or offensive PMSC behaviour abroad. This section will briefly assess three key pieces of federal legislation, namely the: *Criminal Code ("CC"), the NDA,* and the *Export and Import Permits Act ("EIPA")*. On a side note, other statutes such as the *Income Tax Act* or the *Corruption of Foreign Public Officials Act* may be used in circumstances where Canadian PMSCs have respectively evaded taxes[73] or engaged in bribery. However, no Canadian PMSC has yet been accused of any tax-related or corruption-related offenses.[74]

First, section 7 of the *CC* enumerates when the Canadian Crown may claim jurisdiction over crimes committed abroad. Some of these offenses include: terrorism, hostage taking, and using explosives in a foreign jurisdiction.[75] Although section 7 can be of significant benefit for such offenses, no Canadian PMSC has been alleged to have committed any such offenses yet. Therefore, the *CC* may not be helpful for the regulation of current undesirable PMSC activity.

Moreover, the jurisprudence surrounding whether the *CC* applies to corporations may also impact its ability to regulate PMSCs. Currently, corporations can be found liable for acts of their employees through: 1) vicarious liability which is rarely used in the context of criminal culpability and 2) identification theory which typically holds senior employees liable for the actions of junior employees.[76] Cases such as *R. v. Canadian Dredge & Dock Co.*[77] and *R. v P.G. Marketplace Ltd.*[78] have found both senior executives and front-line employees guilty of criminal offenses such as fraud depending on who the "directing mind" of the corporate offense was. Despite the fact that Canadian criminal law has the capacity to hold employees and executives liable, scholar Gerry Ferguson complains that Canadian criminal law is still unclear and is ineffective in its application against multinational corporations.[79] Moreover, Ferguson also argues that it does not

[71] Christopher Spearin, "SOF For Sale: The Canadian Forces and the Challenge of Privatized Security" (2007) The Canadian Military Journal 27 at 31.
[72] Antonyshyn, "Beyond the Law" at 7.
[73] Note: The Income Tax Act does not treat income obtained from illegal actions abroad any differently than legal income as per *Nghiep Minh Adam Truong and Hon Nguyen v. The Queen*, 2013 TCC 41. As such, any proceeds of crime-related offenses would be addressed through the criminal code.
[74] Additionally, the *Canada Business Corporations Act,* RSC 1985, c C-44 ["*CBCA*"], does also not prescribe any offenses in which any Canadian PMSCs have been engaged.
[75] *Criminal Code*, RSC 1985, c C-46, s 7. [*CC*]
[76] Gerry Ferguson, "Corruption and Corporate Criminal Liability" (1998) Seminar on New Global and Canadian Standards on Corruption and Bribery in Foreign Business Transactions 1 at 7. ["Ferguson"]
[77] *Canadian Dredge and Dock Co. v. The Queen,* [1985] 1 SCR 662. ["*Canadian Dredge and Dock Co.*"]
[78] *R. v. P.G. Marketplace Ltd.* 1979 Carswell BC 950, 4 W.C.B. 98.
[79] Ferguson at 13-15.

have the ability to ascribe culpability on an aggregate basis, and thus companies can simply continue to operate once the culpable individuals are removed.[80] Because of its limited extraterritoriality and ineffectiveness for multinational corporations, the *CC* may not be an efficient tool for regulating PMSCs.

Secondly, the *NDA*, which typically regulates the conduct of military personnel, applies the *Code of Service Discipline ("CSD")* to civilians in certain cases where they participate alongside the CAF during warlike operations.[81] Civilians found in breach of the *CSD* when participating alongside the CAF can be tried by the Courts-martial in Canada and can be resultingly imprisoned or fined to the tune of CAD 7,000.[82] Not only does the *CSD* apply its own offenses such as unnecessarily detaining an individual, but it also applies all *CC* offenses and may even apply the laws of a foreign country.[83] In this way, the *NDA* theoretically provides a wide range of offenses that may apply to PMSC contractors that participate with the CAF.

However, Antonyshyn makes several important observations that arguably undermine the applicability of the *NDA* to Canadian PMSCs. For one, as of 1974, only 142 civilians have been brought in front of a Court-martial for *CSD* offenses.[84] Antonyshyn observes that all of these prosecutions have involved either offenses of former CAF members or have been against dependents of CAF members engaged in activities such as impaired driving.[85] No PMSC contractors have ever been tried for offenses committed abroad under the *CSD.*[86] Moreover, the *CSD* does not apply to any PMSCs that are operating independently of the CAF, such as in many cases where Canadian PMSCs have privately escorted foreign diplomats or protected private buildings.[87] As such, the *NDA*, in practice, does not apply to a significant portion of PMSC activity and does not seem to have been used in cases where it can be applicable.

Finally, the *EIPA* may also provide a regulatory measure by restricting arms and munition exports by Canadian PMSCs to their contractors in host countries.[88] The Canadian government can regulate arms and munition exports to those countries where the "recipient state poses a threat to Canada, is engaged in or threatened by hostile activity, is under UN sanctions, or has a government accused of human rights violations."[89] In this way, the *EIPA* can ensure that PMSCs cannot bring arms and other dangerous equipment to high-risk states.

However, the *EIPA* does not arguably tackle the issue of PMSC behaviour in an efficient way. For one, the *EIPA* generally applies to goods and not services, and thus cannot typically directly restrict the export of PMSC services to any country.[90] Moreover, *EIPA*

[80] Ibid.
[81] *NDA,* s 61(1).
[82] "Recent Court Martial Results" (2018) National Defence and the Canadian Armed Forces.
[83] Antonyshyn, "Beyond the Law" at 26.
[84] Ibid. at 26-27
[85] Ibid.
[86] Ibid.
[87] Ben Makuch, "Mercenaries and Defense Contractors Are as Canadian as Maple Syrup" (2018) Vice News.
[88] Spearin, "What Montreux Means" at 7.
[89] Ibid.
[90] Ibid.

generally restricts arms exports based on the recipient state rather than the recipient importer.[91] This state-based restriction has the unintended effect of withholding arms shipments to legitimate PMSC recipients operating in those countries and leaving even those impugned PMSCs without their much-needed equipment. Moreover, if a state does not have any of the aforementioned concerns, it is unclear when and how the Canadian government can restrict arms exports to those countries.[92] In this way, the *EIPA*'s scope is generally inefficient given that it does not target recipients and may unintentionally undermine legitimate PMSC business activity and safety.

Canadian Courts and Common Law

The Canadian common law has potentially developed to a stage where it may be available to regulate PMSC behaviour abroad. Canadian courts can claim jurisdiction over civil offenses committed extraterritorially if 1) there is a "real and substantial connection" or *jurisdiction simpliciter* between the subject matter and a Canadian jurisdiction, and 2) the matter is not declined by the court based on *"forum non conveniens*."[93] When jurisdiction is established, courts can be prompted to apply their own domestic laws, international laws, or the laws of the foreign jurisdiction.[94] Though as of *Tolofsen v. Jensen*, for many claims that are tried in Canada extraterritorially, the laws are typically those of the foreign jurisdiction.[95]

First, to establish *jurisdiction simpliciter*, the Supreme Court of Canada ("SCC") in *Club Resorts Ltd. v. Van Breda*[96] explains that a real and substantial connection is presumed if "a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province."[97] The SCC has clarified that *jurisdiction simpliciter* may be met in common law jurisdictions when a corporation's head office is located in a Canadian jurisdiction.[98] Similarly, in Quebec, the *Quebec Civil Code* allows jurisdiction when "1) the defendant is a legal person that has an establishment in Québec and the dispute relates to its activities in Québec and 2) even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required."[99] In *ACCI c. Anvil Mining*, a Quebec court established jurisdiction merely by virtue of a Montreal office that solicited Canadian investments.[100]

[91] Ibid.
[92] Ibid.
[93] Brandon Kain and Byron Shaw, "A Real and Substantial "Tune-Up": The Ontario Court of Appeal Reformulates the Test for Asserting Jurisdiction Against Out-of-Province Defendants" (2011) 4:2 McCarthy Tetrault.
[94] Judith Schrempf-Sterling and Florian Wettstein, "Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations' Human Rights Policies" (2015) Journal of Business Ethics 1 at 7.
[95] *Tolofsen v. Jensen; Lucas (Litigation Guardian of) v. Gagnon,* [1994] 3 SCR 1022.
[96] *Club Resorts Ltd. v. Van Breda,* [2012] 1 SCR 572.
[97] Mijares-Pena at 7.
[98] Ibid. at 9.
[99] Ibid. at 8.
[100] *Association Canadienne Contre L'impunité c. Anvil Mining Ltd.*, 2011 QCCS 1966 at para 29.

In this way, Canadian courts can quite easily find *jurisdiction simpliciter* for PMSCs headquartered in a Canadian jurisdiction.

Establishing *forum conveniens*, however, has proven more difficult for foreign-based plaintiffs. Canadian courts frequently decline jurisdiction over the offensive affairs of Canadian multinationals based on *forum non conveniens,* such as in cases of *Bil'in (Village Council) v. Green Park International Inc.* and *Spar Aerospace Ltd*. *v. American Mobile Satellite Corp.*[101] *Forum non conveniens* occurs when Canadian courts believe that the host courts are a more appropriate forum for hearing the legal matter compared to Canada. In *Spar*, courts found that the United States was a more appropriate jurisdiction because they also had a robust legal system and most of the assets and evidence were located in the United States.[102]

However, a recent trio of Canadian cases have uniquely found Canadian provinces as the appropriate forum for offenses committed by Canadian multinational corporations abroad.[103] In *Araya v Nevsun Resources Ltd.*, B.C. courts accepted jurisdiction when they determined there would be a "real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption."[104] These trio of Canadian decisions have accepted jurisdiction on the basis that foreign courts such as Eritrea lacked robust legal systems that would unlikely bring justice to the plaintiffs.[105] As established earlier, many countries in which PMSCs operate also lack robust and independent legal systems. In this way, the developing series of Canadian common law may also allow courts to regulate Canadian PMSCs through lawsuits based on the breach of customary international norms.[106]

Although these cases show a lot of promise for improving the regulation of Canadian multinational corporations abroad, relying on the Canadian courts and common law to regulate such companies has certain disadvantages. For one, the Canadian case-law has still not determined whether customary international law applies to corporations.[107] Compounding the fact that corporations are not considered to be subjects of international law, the SCC has historically decided that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created."[108] On this note, the defendants in the ongoing case of *Nevsun* will likely argue they are only bound by provincial business statutes rather than international law.[109] Moreover, apart from international law, the Canadian courts have also seemed to follow the American notion that there is no "specific, universal, and obligatory norm of corporate liability" regarding

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[101] *Bil'In (Village Council) v. Green Park International Inc.*, [2009] RJQ 2579; *Spar Aerospace Ltd. v. American Mobile Satellite Corp*., [2002] 4 SCR 205 at para 42. ["*Spar*"]
[102] *Spar.*
[103] *Choc v. Hudbay Minerals Inc.,* 2013 ONSC 1414; *Garcia v. Tahoe Resources Ltd.,* 2017 BCCA 39; *Araya v. Nevsun Resources Ltd.,* 2017 BCCA 401 [*Nevsun*].
[104] *Nevsun* at para 36. Note, this case has appeared before both the Supreme Court of British Columbia and the British Columbia Court of Appeal. It has leave to appear before the Supreme Court of Canada in January 2019.
[105] *Choc v. Hudbay Minerals Inc.,* 2013 ONSC 1414; *Garcia v. Tahoe Resources Ltd.,* 2017 BCCA 39; *Nevsun.*
[106] Ibid.
[107] Hansell at 180.
[108] *Canadian Pacific Railway Co. v. The Western Union Telegraph Co*., Supreme Court of Canada, (1889) 17 S.C.R. 151, 1889 CanLII 53 25 (SCC).
[109] Hansell at 180.

general human rights obligations.[110] On a final note, the substantial cost, time, and energy that must be expended by foreign plaintiffs and human rights organizations are extremely high and thus threaten the efficiency and accessibility of a common law-based regulation system.

As such, the effectiveness of Canadian courts in regulating PMSCs will greatly hinge on upcoming SCC cases. Nonetheless, if Canadian courts do not find that international law is applicable to Canadian multinational corporations, the burden of regulating of PMSCs will largely fall on domestic statutory regimes. As analyzed above, many of these federal statutes are also inadequate at addressing relevant PMSC behaviour due to limited scope or have never been applied to PMSCs *ab initio*. Nonetheless, these indirectly-related federal statutes provide at least one avenue of binding legal restraint on foreign-operating PMSCs by prosecuting serious criminal action and applying arms supply restrictions in necessary cases. This paper will now assess the provincial regulatory regime for the first time to determine whether it can address any legislative gaps left by the federal statutes and the Canadian common law.

Part 3: Provincial Regulation Directly Applicable to PMSCs

This section aims to provide the first comprehensive assessment of Canada's provincial regulatory regime related to PMSCs. It will rigorously analyze Ontario's provincial licensing regime and its ability to efficiently regulate PMSCs in ways that international laws, federal legislation, and the Canadian common law have not. First, however, this section will assess the constitutionality of a provincial regulatory regime.

Constitutionality of a Provincial Regulatory Regime

In Canada, the federal and provincial governments have divided responsibilities over different national issues. Under section 91 of the *Constitution Act,* the federal government retains responsibility over matters of (2) "regulation of trade and commerce," (7) "militia, military and naval service, and defense"[111] and matters of "peace, order, and good government" such as safety."**[112]** Conversely, under section 92 of *Constitution Act*, provincial governments are tasked with regulating corporations that are provincially incorporated.[113] Although no jurisprudence clearly places PMSCs into any one of these heads of power, PMSCs arguably fall into each of these federal and provincial heads and thus are under the scope of both the provincial and federal government. As per *Multiple Access Ltd. v. McCutcheon,* provinces and the federal government may have overlapping scope as long as they work towards the same policy and do not have conflicting rights and obligations.**[114]** For example, in the regulation of the mining industry, provinces are responsible for licensing mineral exploration.[115]

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[110] Ibid. at 181.
[111] *Constitution Act*, RSBC 1996, c 66.
[112] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at para 26.
[113] *Constitution Act*, RSBC 1996, c 66, s 92.
[114] *Multiple Access Ltd. v. McCutcheon,* [1982] 2 SCR 161.
[115] "Canada Country Mining Guide" (2016) KPMG Global Mining Institute at 10. Notably, provinces are responsible for licensing mineral explorations for any Canadian corporations, regardless of whether they were incorporated federally or provincially.

However, provinces transfer leadership to the federal government when mining exploration takes on an environmental concern.[116] Further on this note, Canadian mining companies operating abroad have often been subject to provincial corporation legislation rather than federal legislation.[117]

Admittedly, the two branches of government cannot impede on the other's head of power, such as in *Westendorp v. The Queen*, provinces could not legislate on matters that were exclusively under federal jurisdiction.[118] In the context of regulating PMSCs operating abroad, provinces are unable to legislate in areas that are under the exclusive jurisdiction of the federal government, such as creating criminal sanctions within their licensing regimes.[119] With this in mind, any provincial laws seeking to regulate PMSCs are largely confined to the regulation of businesses through the use of regulatory measures, which in this case are licensing restrictions.

Provincial Regulatory Regime

With that being said, this section will innovatively focus on how Canada's provincial statutes can constitutionally constrain foreign-operating PMSCs. Canada's regulatory regime is largely comprised of separate provincial statutes and regulations. These provincial pieces of legislation primarily seek to create licensing regimes that restrict initial licenses to impugned businesses and contractors. Moreover, they provide a code of conduct that regulate how these actors must act to maintain their licenses. This section will examine and assess the regulatory efficiency of Ontario's regulatory regime in specific given its industrial significance. PMSCs headquartered in Ontario account for 53% of all PMSC employees in Canada.[120] Moreover, a 2011 KPMG report observes that Ontario-based PMSCs comprised over half of all national revenue for the Canadian PMSC industry in Canada.[121] On a final note, many of the provincial pieces of legislation are significantly similar in terms of form, substance, and the legal rights and obligations they create.[122]

Purpose

First, this section will comment on the applicability of the Ontario *Private Security and Investigative Services Act*[123] ["*Act*"] to foreign-operating Canadian PMSCs. Generally, the provincial regimes are ostensibly intended for regulating PMSC behaviour domestically such as bouncer services rather than PMSCs that operate in foreign military environments.[124] For example, section 2(1) of the *Act* states that "this Act applies to security guards [who perform work, for remuneration, that consists primarily

[116] Ibid.
[117] Hansell at 180.
[118] *Western v. The Queen,* [1983] 1 SCR 43.
[119] Ibid.
[120] "Economic Impact of the Defense and Security Industry in Canada" (2012) KPMG Advisory Services 1 at 11.
[121] Ibid.
[122] Most provincial statutes are titled "Private Investigators and Security Guards Act." This paper acknowledges that some of the provincial statutes are different and defers to more pointed research if any of the following analysis is incompatible with another province's regime.
[123] *Private Security and Investigative Services Act,* SO 2005, c 34. [*PSISA]*
[124] Antonyshyn, "Beyond the Law" at 3.

of guarding or patrolling for the purpose of protecting persons or property]."[125] Importantly, in an example of the type of work that the *Act* covers, section 2(5)(c) specifies "services…in an industrial, commercial, residential, environmental, or retail environment."[126] Notably, the *Act* does not explicitly preclude the regulation of PMSCs in foreign military environments. Although the Ontario licensing process does not make any explicit mention of providing services abroad or in military environments, it does nonetheless allow the Registrar of Private Investigators and Security Guards ("Registrar") to consider PMSC behavior that was conducted abroad during its licensing decisions.

Although the *Act* seems to be designed for regulating domestic PMSC services, it nonetheless is available for the possibility of regulating those PMSCs that also operate in foreign jurisdictions. In fact, the *Act* explicitly purports to cover the main activities that comprise the majority of PMSC work abroad, being protection of people and property.[127] Even better than many of the indirectly-related federal pieces of legislation, these provincial regimes offer a directly-related and relatively-more efficient way of regulating foreign-operating PMSCs. On a final note, the *Act* applies to all corporations with offices in Ontario regardless of jurisdiction of incorporation.[128] As this section will show, the *Act* is both well-equipped to regulate foreign-operating PMSCs, and can do so within the confines of constitutional divisions of power by utilizing provincially-based licensing regimes. This section will now analyze the initial licensing process and the code of conduct that the *Act* creates to regulate domestically-operating and foreign-operating PMSCs.

Initial Licensing Requirements

The initial tool that Ontario possesses to ensure that PMSCs engage in legal behaviour abroad is its licensing process. The licensing process empowers provincial governments to legally allow to operate only those PMSC service providers that meet certain requirements.[129] In this way, licensing regimes can regulate those foreign-operating PMSCs headquartered in their jurisdictions by creating licensing requirements on what behaviours those PMSCs must follow in their operations.

The *Act* states the licenses will only be issued if: (1) private security agents possess a clean criminal record, (2) private security agents successfully complete all prescribed training and testing,[130] and (3) the Registrar reasonably believes that the "applicant will carry on business in accordance with the law and with integrity and honesty" due to their past conduct.[131] First, Section 10(5) of the *Act* explains that a "person possesses a clean criminal record if (a) the person has not been convicted of a prescribed offense under the *CC* (Canada), the *Controlled Drugs and Substances Act* (Canada) ("*CDSA*")

[125] Ibid, s 2(1).
[126] Ibid., s 2(5)(c).
[127] Borys and Matthewman, "Corporate Allies" at 91.
[128] I.e. Regardless of whether these corporations were federally incorporated under the *CBCA* or incorporated in another province. See *PSISA,* s.11(1)(a).
[129] *PSISA*, s 7.
[130] Ibid., s 10(1).
[131] Ibid., s 13(2).

or any other Act of Canada; or (b) has been convicted of such an offense and a pardon under the *Criminal Records Act* (Canada) has been issued or granted."[132] This initial licensing requirements prevents any high-risk applicants with previous criminal history in Canada from being allowed to legally operate as a PMSC business based in Ontario.

Importantly for PMSCs that operate abroad, section 13(2)(5)(iv) of the *Act* states that the Registrar may also decline to issue a license if the applicant has been convicted of a criminal offense under the law of another jurisdiction for which a pardon has not been issued or granted.[133] This provision provides flexibility to the Registrar to ensure that no potential employee with criminal records in any jurisdiction can become licensed employees of Canadian PMSCs. Moreover, section 15(1) of the *Act* allows the Registrar to revoke a license if any criminal issues arise once a license has already been issued.[134] As such, these provisions allow the Registrar to actively deny legal registration to any businesses or employees that have been convicted of offenses in host states.

Moreover, the Ontario regulatory regime importantly considers alleged offenses. As explained earlier, the difficulty in assessing the behaviour of PMSCs is that they often operate in countries that lack robust and independent prosecutorial systems. As such, although perpetrators may commit offenses, they may not necessarily be prosecuted or convicted of those offenses. First, sections 11(1)(c)(v)(vi) of the *Act* require applicants for private security licenses to disclose all charges allegedly committed in Canada and abroad. Moreover, according to section 13(2)(1) of the *Act*, the Registrar may decline licenses to individuals on the basis of alleged offenses if it believes that these agents are i) carrying on activities that are in contravention of this Act or the regulations, or ii) "will be" in contravention of the Act or the regulations if the applicant is issued a license.[135] The Registrar thus has the ability to deny a license to individuals it believes are allegedly engaging in illegal activities or are at a high-risk of engaging in illegal activities.

Secondly, applicants are required to meet a minimum required level of prescribed training and testing. Section 2(1) of Ontario *Regulation 26/10* outlines the various requirements for Ontario-based contractors such as: (a)(i) complying with the Training Syllabus for Security Guards, and (b) successfully [completing] the licensing test set by the Ministry.[136] This training requirement further ensures that foreign-operating PMSCs registering in Ontario must maintain a standard of professionalism and competence in their operations.

Thirdly, according to section 13(2)(2) of the *Act*, the Registrar can deny licenses if an applicant's past conduct leads it to reasonably believe applicants will not act in accordance with the law and with honesty and integrity. The Registrar may consider more than merely official convictions such as alleged offenses committed in foreign

[132] Ibid., s 10(5).
[133] Ibid., s 13(2)(5)(iv).
[134] Ibid., s 15(1).
[135] Ibid., s 13(2)(1).
[136] O Reg 26/10 S2(1).

jurisdictions. Section 13(2)(2) thus provides a flexible safeguard for the Registrar to deny licenses to high-risk private security applicants that may become involved in illegal or dishonest activities but were never officially prosecuted in Canada under the *CC* or *CDSA*. This provision in effect greatly lowers the threshold of impugned behaviour needed to deny a license. Given that much of the reported controversial PMSC actions are alleged criminal offenses in other jurisdictions and convictions under non-criminal federal acts, section 13(2)(2) allows the Registrar to broadly and flexibly deny licensing to dubious foreign-operating PMSCs that require a license to operate.

License Revocation: Remedial Tools

Once licenses have been issued, the Registrar is also permitted to revoke licenses or impose greater regulatory conditions on a licensee if the licensee breaches the code of conduct set out in Ontario *Regulation 363/07*.[137] First, this subsection will cover the flexible range of remedial tools given to the Registrar to regulate high-risk applicants. Apart from 1) simply revoking licenses (section 15(1)), the *Act* allows the Registrar to: 2) impose CDN 250,000 fines on businesses for committed offenses 3) directly ascribe personal liability on directors/officers and issue up to one year imprisonment (sections 45(1)(2)); 4) impose conditions on the types of equipment a licensee can use such as firearms (section 54(1)(o)); and 5) prescribe offenses or grounds for which a license can be refused (section 54(1)(r)(s)).

Several of these tools can be highly efficient means of regulating PMSC behaviour. First, revoking a contractor's license is a simple way to ensure that they are no longer legally permitted to provide any PMSC services. Contractors, unless exempted specifically from the Registrar under section 2 of Ontario *Regulation 435/07*,[138] are unable to operate without a license.[139] Although this tool is merely reactive to any illegal conduct already performed, the possibility of license revocation may incentivize contractors to pre-emptively regulate their own behaviour so as to not lose their PMSC-related business opportunities. Significant research in the area of incentive regulation suggests that license revocation is an effective way to regulate businesses and deter undesirable behaviour, and may even be more effective than pre-licensing qualifications.[140] However, many scholars criticize that although regulatory regimes are able to stifle the most extreme types of abusive behaviour, they are not as effective in disincentivizing more minor abuses.[141]

Secondly, the threat of corporate fines to the tune of CAD 250,000 may also deter undesirable PMSC behaviour. Briefly, the effectiveness of monetary penalties as deterrents is contended.[142] Upon consulting a myriad of sources, this paper deferentially concludes that fines can be effective deterrents of abusive behaviour if offenders do not

[137] O Reg 363/07.
[138] O Reg 435/07 S 2.
[139] *PSISA*, s 6-7.
[140] Shirley Svony, "Licensing, Market Entry Regulation" (1999) 5120 Encyclopedia of Law and Economics 296 at 314.
[141] Sanford V. Berg, "Introduction to the Fundamentals of Incentive Regulation" (1998) 17 Public University Research Center 1 at 7.
[142] Raymond Paternoster, "How Much Do We Really Know about Criminal Deterrence" (2010) 100:3 Journal of Criminal Law and Criminology 765 at 766.

pass the penalties off to consumers in the form of higher prices,[143] and if the fines are neither of relatively-negligible amounts or too great that they cannot be paid.[144] In this way, these hefty provincially-issued fines may deter smaller foreign-operating Canadian PMSCs from engaging in illegal or offensive behaviour.

Thirdly, the regulatory regime has alternative effective deterrents for highly-profitable PMSCs. Notably, the average revenues of the over 2000 Canadian PMSCs in 2011 were between CDN 1.6 million and CDN 476.2 million.[145] For the larger businesses within this range, it is unlikely that CAD 250,000 fines will be significant deterrents.[146] To combat these relatively-insignificant penalties, the Ontario regulatory regime can ascribe two other types of liability. For one, section 44 of the *Act* can hold directors/officers personally liable for corporate offenses if they "authorize, permit, or acquiesce to" the commission of an offense by a front-line employee. Personal fines are arguably more effective than business fines because they pierce the corporate veil and create personal liability. This standard of participation for piercing the corporate veil is notably lower than that of the criminal law, which requires the Crown to prove directors/officers were the "directing mind" beyond a reasonable doubt.[147] This easily-ascribable personal-liability provision may thus incentivize directors/officers to act with apprehension in their operational strategies and training to ensure that their employees are not engaging in illegal or offensive behavior.

Moreover, the Registrar also may ascribe one-year imprisonment terms to individuals involved in committing an offense under the *Act*, whether committed domestically or abroad. Scholars admit that threat of imprisonment is likely an effective deterrent to the general population,[148] and thus a one-year imprisonment penalty as per section 45(1) of the *Act* may disincentivize illegal or offensive PMSC behaviour. As such, personal liability and imprisonment may act as an effective deterrent for those highly-profitable businesses that are largely-unaffected by business fines.

Fourthly, the Registrar may also impose conditions on the use of equipment such as firearms as per section 54(1)(o) of the *Act*.[149] As seen earlier, firearm offenses comprise a significant portion of illegal PMSC offenses abroad, including negligent handling of weapons[150]and unlawful possession of firearms.[151] Contractors are permitted to carry firearms only if they are authorized to do so under section 20 of the *Firearms Act,*[152] which is if the firearm is required "for use in connection with his or her lawful profession or occupation." However, the Registrar, as per section 54(1)(o), can impose conditions

[143] Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (Albany: State University of New York Press, 1983) at 287. ["Fisse and Braithwaite"]
[144] Ken Pease, "Community Service Orders" (1985) 6 Crime and Justice at 74.
[145] "Economic Impact of the Defense and Security Industry in Canada" (2012) KPMG Advisory Services 1 at 33.
[146] Fisse and Braithwaite at 287.
[147] *Canadian Dredge and Dock Co.*
[148] Raymond Paternoster, "How Much Do We Really Know about Criminal Deterrence" (2010) 100:3 Journal of Criminal Law and Criminology 765 at 802.
[149] *PSISA*, s 54(1)(o).
[150] Andrew Duffy, "Senior Officer Faces Court Martial for Accidental Firing of Gun in Kabul" (2012) National Post.
[151] Leon Watson, "British Private Security Workers Accused of Transporting Arms Illegally after Afghan Police Find Stash of 30 AK-47s" (2012) Dailymail.
[152] *Firearms Act*, RSC 1995 c C-39.

on the use of firearms or altogether restrict their usage even further for specific individuals. This restriction of firearms to high-risk individuals may effectively decrease chances of future firearm-related offenses happening abroad. This section allows for a more pointed and efficient restriction that the *EIPA* was arguably not able to achieve.

Finally, the Registrar can prescribe offenses or grounds for which a license can be refused under sections 54(1)(r)(s) of the *Act*.[153] This allows the Registrar to define and create offenses which would result in the automatic revocation of a license. In effect, this affords the Registrar great flexibility in establishing a range of behaviour that it deems unacceptable, such as employing former child-soldiers or any possible future human rights violations similar to those in which Academi was involved. Thus, sections 54(1)(r)(s) allow the Ontario Registrar to create new offenses to effectively ensure that no Canadian PMSCs engaging in illegal or offensive behaviour abroad are administered licenses in Ontario.

License Revocation: Code of Conduct

Upon covering the various remedial tools available to the Registrar, the Registrar must take remedial actions such as revoking a license if a licensee has breached the code of conduct outlined in Ontario *Regulation 363/07.*[154] In Ontario, section 2(1) of *Ontario Regulation 363/07* requires agents to a) act with honesty and integrity, c) comply with all federal, provincial and municipal laws, d) treat all persons equally without discrimination based on a person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability, f) refrain from exercising unnecessary force, and g) refrain from behaviour that is either prohibited or not authorized by law.

Subsection (a) requires PMSCs to act honestly and with integrity.[155] This provision suggests that PMSCs act with integrity in dealings with their clients, the public, and the Registrar. Such a provision may be useful for attaining transparency in the contracting and self-reporting processes. Moreover, this provision may be advantageous for ensuring that PMSCs remain highly professional and do not circumvent ethical guidelines in their operations.

Sections 2(1)(c)(g) of Ontario *Regulation 363/07* also require licensees to comply with all Canadian laws. These provisions greatly expand the range of behaviours for which the Registrar can reject licenses, by including offenses not solely limited to the *CC* and *CDSA*. These provisions arguably make the Ontario regulatory regime more efficient by appropriately broadening the scope of the Registrar's powers. As these provisions are likely to be read in the context of the relevant *Act* itself, license revocation may also be based on any newly-prescribed offenses under sections 54(1)(r)(s) of the *Act*.

Sections 2(1)(d) and 3(1)(b) of Ontario *Regulation 363/07* also prohibit PMSCs from discriminating based on a person's race, ancestry, place of origin, colour, ethnic origin,

[153] *Private Security and Investigative Services Act,* SO 2005, c 34, s 54(1)(r)-(s).
[154] O Reg 363/07.
[155] O Reg 363/07 S2(1)(a).

citizenship, creed, sex, etc. As discussed earlier, Aegis Defense Services, now acquired by GardaWorld, was paying its Sierra Leonean soldiers less than their British counterparts.[156] If this practice continued under GardaWorld's leadership, this practice could ostensibly result in the revocation of GardaWorld's business license.[157]

Finally, Ontario[158] demands that PMSCs avoid unnecessary uses of force. Given that PMSCs abroad often use firearms and other highly-dangerous equipment, this provision is useful for avoiding combat offenses. Although no Canadian PMSCs have evidently been engaged in controversies surrounding unnecessary uses of force, Canada does employ foreign-based PMSCs such as Academi that have been heavily involved in unnecessary force scandals. These provisions are useful in theory for preventing the types of combat-related concerns that many scholars have begun to share after incidents such as the Nisour Square Massacre.[159]

In practice however, monitoring combat incidents is difficult given the relative inadequacy of news and government reporting in the industry.[160] However, as per section 1(1)(4)(iii) of Ontario *Regulation 434/07,* governments can rely on use-of-force reports that agents are required to submit during combat incidents. The Registrar can thus assess the facts submitted by the PMSCs themselves to determine whether the defensive force used was necessary. However, the dependency on biased PMSC reports and a struggling media makes this process difficult. Scholar Jasenko Marin explains how some PMSCs have engaged in excessive self defense due to the subjective exaggeration or misinterpretation of the level of threat posed.[161] This misinterpretation thus theoretically colours PMSC reporting to aggrandize threats and justify the level of force used. As such, relying on uncorroborated PMSC use-of-force reports may be troublesome for governments attempting to determine the appropriate use-of-force. Although demanding necessary force is an important provision to include in the regulatory regime, the fact-obtaining difficulties threaten the credibility and robustness of the regulation process.

Part 4: Assessment of Regulatory Regime and Conclusion

This final section of the paper will assess the efficiency of Canada's provincial regulatory regime in comparison to the international and federal regulatory regimes. This section will first examine the arguments in support of the provincial regime's efficiency, followed by an assessment of its shortcomings. Ultimately, this section will find that the current provincial regime's relevance, scope, and authority allows it to be more efficient than any other form of regulation thus far. However, this section will also

[156] "UK Private Military Firm Hired Ex-Child Soldiers from Sierra Leone for Iraq Ops" (2016) RT.
[157] Notably, section 1(2) of the Quebec *Regulation Respecting Standards of Conduct* does not prohibit general discrimination in the same way that Ontario does.
[158] O Reg 26/10 S2(1)(f).
[159] James Risen, "Blackwater Founder Moves to Abu Dhabi, Records Say" (2010) The New York Times.
[160] Spearin, "What Montreux Means" at 4.
[161] Jasenko Marin, Miso Mudric and Robert Mikac, "Private Maritime Security Contractors and Use of Lethal Force in Maritime Domain" in Gemma Andreone, ed, The Future of the Law of the Sea (Switzerland: Springer Natural, 2017) at 200-201.

find that the provincial regime's efficiency is hindered to some extent by issues of purpose, disjointedness, and constitutional restrictions.

Positive Aspects of the Provincial Regime

Canada's provincial regulatory regimes arguably have several positive aspects, such as their relevance, scope, and authority. Regarding their relevance, the provincial regimes are arguably the only functioning pieces of legislation in Canada that directly and comprehensively address the conduct of PMSCs. Although other documents concern PMSCs, they are either international documents that are not law in Canada or are federal statutes only tangentially-related to PMSC behaviour. As shown in Part 2, most indirectly-applicable pieces of legislation have not been seriously considered by PMSCs themselves or by the government in the case of the *CSD*'s PMSC-related dormancy.

Further, although the provincial regimes were not ostensibly designed in consideration of foreign-operating PMSCs, they nonetheless have the capacity and permission to regulate them. The Ontario *Act* does not prohibit applicability to foreign-operating PMSCs, and many of the licensing and code of conduct provisions explicitly account for PMSC conduct abroad during licensing decisions. As shown in Part 3, the provincial statutes are arguably also well-suited to address foreign-operating PMSCs.

Secondly, the provincial regimes carry considerable authority compared to other relevant statutes and agreements. Alternative methods of regulation such as international law do not carry any binding authority. Even federal laws and the common-law typically only fine businesses, and, in unique and evidence-demanding circumstances, place criminal sanctions on senior executives as per the *CC*. However, the ability of these provincial regimes to relatively-simply ascribe significant personal liability and revoke PMSC-related operating licenses are arguably a greater deterrent to undesirable PMSC behaviour.

Moreover, provincial regimes are also given a wide range of remedial tools such as withdrawing licenses, placing restrictions on service capacity and equipment usage, and prescribing new offenses. The flexible authority provided by the range of tools allows provincial regimes to be highly efficient and adapt its remediation to ensure that legitimate business interests are not harmed. In this way, a flexible provincial regime provides an efficiency upgrade compared to some federal statutes such as the *EIPA* that potentially threaten legitimate commercial activity with overbroad restrictions.

Thirdly, the provincial regimes carry great scope in terms of what offenses they can consider. Unlike federal legislation such as the *CSD*, the provincial regimes can consider alleged offenses, human rights violations, breaches of rules of engagement and can prescribe new offenses. Importantly, in an industry where underreporting and weak governance in host states are common, the ability to constrain PMSC-related business operations based on alleged offenses is extremely important. In essence, the provincial regime has brought novel benefits in terms of its purpose, authority, and scope.

Negative Aspects of the Provincial Regime

There are three identifiable shortcomings with the provincial regime, namely its: purpose, disjointedness, and constitutional restrictions. First, although the provincial statutes are intended for domestically-operating PMSC behaviour, they are not explicitly designed for foreign-operating PMSCs. This non-mention of foreign-operating PMSCs in the Ontario *Act* could theoretically forgo its applicability in some future cases. Nonetheless, as shown in Part 3 of this paper, the regimes arguably have the capacity and permission to address foreign-operating PMSCs headquartered in Canadian provinces.

Beyond the statutes' purpose issues, a lack of a pointed single piece of legislation also creates issues of coherence and disjointedness within the regulatory regime. For example, both the Ontario *Act* and the Quebec *Private Security Act*[162] differ in terms of which legal offenses they consider. The Registrar may consider crimes conducted abroad, alleged crimes in Canada, and any other Canadian crimes. Comparatively, the *Quebec Private Security Act* does not include explicit mention of crimes committed abroad, alleged crimes, or any non-*CC* offenses. Apart from an evident lack of consistency, incoherence amongst provincial regimes can arguably also lead to jurisdiction shopping in which the least robust provincial statute becomes the most appealing for financially-competitive businesses. For this reason, a unified federal piece of legislation is needed.

Finally, the applicability of provincial regimes to foreign-operating PMSCs is somewhat restricted due to constitutional issues. As explained earlier, provincial regimes can only regulate foreign-operating behaviour insofar as they can restrict and rescind their licenses to operate as a PMSC. Although this licensing regime nonetheless provides a lot of scope and authority to provincial registrars, they cannot explicitly constrain businesses at a foreign-policy or criminal-law level. In this sense, a federal piece of legislation may be a more comprehensive solution to all aspects of PMSC behaviour abroad.

Conclusion

This paper began by introducing the prominence of Canadian PMSCs and discussed some of the issues surrounding their allegedly illegal and offensive behaviour. Searching for a robust regulatory solution, the paper then canvassed the available international law, Canadian federal statutes, and the Canadian common-law. However, virtually all of these legal avenues had significant shortcomings. None of the relevant international law was binding or seemed to be strictly adhered. The Canadian federal statutes were either never used or were applicable in very narrow sets of circumstances. Finally, although the Canadian common law has been developing tremendously with respect to corporate accountability, it still faces issues in regard to the applicability of international law and great inefficiencies in terms of time, cost, and energy for foreign plaintiffs. Turning to provincial regimes as a last resort, they provide

[162] *Private Security Act,* RSQ 2006, c S-35.

arguably efficient regulation for the current moment. The regimes bring relevance, authority, and a vast scope that other regulatory systems have not. In this way, the provincial regulatory regime regarding PMSCs is arguably the most efficient regulatory regime existent in Canada. However, its shortcomings with respect to purpose, disjointedness, and constitutional restrictions arguably call for a unified piece of federal legislation sometime in the future.