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Abstract

The purpose of the Canadian military justice system is to allow the Armed Forces to deal with matters that pertain directly to the discipline of the military. Significant shortcomings in the Canadian military justice system identified following the Somalia Affair, called into question its ability to achieve its purpose. Other influences such as the Charter of Rights and Freedoms, changes in Canadian societal values and continued media scrutiny have caused some to question whether the military justice system remains effective.

This paper begins with an examination of the importance of military discipline and the role that the military justice system plays in its maintenance. Following a brief review of the development of the military justice system and the perceived challenges to its effectiveness, information is presented to support the conclusion that the military justice system remains an effective means of maintaining discipline in the Canadian Forces.

The early twentieth century French statesman Georges Clémenceau once proposed that “military justice is to justice what military music is to music.”¹ This well known quote has been interpreted in several ways. Some have called it an admission of Clémenceau’s dislike of brass instruments while others see it as a reflection of the controversy that military courts have always prompted.² In the opening pages of his excellent history of Canadian military law, author Chris Madsen expands on Clémenceau’s comment suggesting that “The form [of justice] is similar, but the character is very different.”³

The difference in character to which Dr. Madsen refers is unavoidable due to the society that the military justice system is designed to serve. What makes the military uniquely different from the rest of society is what General Sir John Hackett described as the clause of unlimited liability, or the acceptance of the possibility of death while serving one’s country.⁴ In order to

Canada has long recognized and supported the existence of a military justice system separate from the civilian criminal justice system.⁶ It has acknowledged the special requirements of the military to deal with breaches of discipline, particularly the need to do so quickly and often with punishments more severe than would normally be awarded in civilian courts. In fact, the military justice system remains the core mechanism for controlling misconduct in the Canadian Forces.⁷ As such, unit Commanding Officers have it at their disposal to apply when other methods of maintaining discipline such as sound leadership and esprit-de-corps have failed.

At the heart of the entire system of military discipline is the unit Commanding Officer.⁸ The military justice system grants the Commanding Officer the authority to investigate offences, to issue warrants, to arrest and detain suspects, to lay or have charges laid and to conduct summary proceedings of an accused.⁹ In civilian society, the vesting of such authority in someone not formally trained in the practice of law would be unheard of, yet in the military it is the norm. It was not until the incidents in Somalia in 1993 that the Canadian public took any real interest in the existence of a separate military justice system, and in the aftermath of Somalia, the shortcomings it held.

⁶ The Constitution Act of 1867 grants Parliament the authority to make laws relating to the “militia, military and naval service and defence.” Additionally, the Supreme Court of Canada has upheld the existence of a separate military justice system on two separate occasions, in 1980 and again in 1982. *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces 2002-2003*, (Ottawa: National Defence, 2003), 50.

⁷ Martin L. Friedland, *Controlling Misconduct in the Military: A Study Prepared For the Commission Of Inquiry into the Deployment of Canadian Forces to Somalia*, (Ottawa: Minister of Public Works and Government Service, 1996) 67.

⁸ *Report of the Special Advisory Group on Military Justice and Military Police Investigative Services*, The Right Honourable Brian Dickson, Chairman (Ottawa: National Defence, 1997), 9.

⁹ *Ibid.*

The Somalia Affair would mark a defining moment in the manner with which military justice is administered in Canada, particularly at the unit level. The numerous studies, reports and recommendations produced following the Somalia Affair highlighted the need for significant reforms in the Canadian military justice system. Additionally, the implementation of the Canadian Charter of Rights and Freedoms, shifts in societal values, policy changes within the Department of National Defence, and the ubiquitous presence of the media have all had an influence on how Canadian military commanders apply justice. Some argue that these influences are not all positive, believing that in a rights-driven society such as Canada, the military has lost its ability to maintain the discipline required of military service¹⁰ and that these changes are leading to the erosion of the enforcement of military regulations.¹¹

The purpose of a military justice system, as decreed by Canada's Supreme Court is "to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military."¹² Despite the developments of recent years, both internal and external to the military, the Canadian military justice system, particularly at the unit level, effectively achieves its purpose. This paper contends that the Canadian military justice system is effective as a means of maintaining unit discipline in the Canadian Forces.

To support this thesis, the meaning and importance of military discipline will first be explored. Next, a brief description of the Canadian military justice system and a short history of

¹⁰ Major Arthur E. Gans, "Vocation or Job: A Warrior's Place in a Rights Driven Society," *Canadian Defence Quarterly* 24, no.2 (December, 1994), 13.

¹¹ Major General J. Arp, *Joint Inspection Team Report: Incidents Task Force Bosnia-Herzegovina – 24-26 November 2000*, (15 December 2000) [report on-line]; available from http://www.forces.gc.ca/site/reports/JIT_report_02_01/jit_rep_e.htm; Internet; accessed 20 April 2004, 10.

¹² *Report of the Special Advisory Group on Military Justice and Military Police Investigative Services*, The Right Honourable Brian Dickson, Chairman (Ottawa: National Defence, 1997), 7.

its development will be presented to establish a framework upon which to judge whether or not it remains an effective mechanism for the maintenance of discipline. Perceived challenges to the effectiveness of the Canadian military justice system will then be examined to determine if they have undermined its ability to achieve its purpose. Finally, evidence will be presented to show that the Canadian military justice system has responded and adapted to the challenges and is an effective means of maintaining discipline.

At its most basic, to discipline someone is to “control by training in obedience.”¹³ This involves developing what is referred to as the “habit of obedience”; habit being a second nature response to react accordingly to pre-established drills and orders.¹⁴ The military relies on discipline to ensure that the soldier does not give way in times of great danger to his natural instinct for self preservation but carries out his orders, even though they may lead to his death.”¹⁵ Discipline such as this is achieved in the military through the development of collective discipline and individual discipline. Collectively, recruits are brought into the military through the regimented system of basic training which relies heavily on drills and training to indoctrinate the civilian into the standards and behaviour required by military life. Individual discipline or self discipline has become more important in recent times due to the impact of technology and changes in ways of conducting warfare. The direct, physical control exercised in the close quarter battles of the past has given way to situations where small army units are geographically dispersed and individual weapons systems with operational and potentially strategic impact (i.e.,

¹³ The Pocket Oxford Dictionary of Current English, , ed. Della Thompson, Eighth Edition, (Oxford: Clarendon Press, 1992), 245.

¹⁴ Department of National Defence, *Report on the Discipline Survey: The Development of a Training and Education Strategy*, (Ottawa: Office of the Judge Advocate General, 1998), 4.

¹⁵ Anthony Kellett, *Combat Motivation. The Behaviour of Soldiers in Battle*, (Boston: Kluwer Academic Publishers Group, 1982) 89.

ships and aircraft) are commanded by individuals far removed from senior commanders. Individual discipline is necessary in these cases so that the service member follows orders, not through fear of punishment or by the “habit of obedience”, but because he or she has made a conscious acceptance of what is expected of members of a military force.¹⁶ In other words, self-discipline is the individual acceptance of the requirement to obey.

The expectations of the Canadian Forces have been clearly presented in the recent publication “Duty With Honour: The Profession of Arms in Canada.”¹⁷ It presents the core responsibility of the Canadian Forces as the defence of Canada and Canadian interests, going on to emphasize that the country’s military professionals are collectively accountable to the Government and the people of Canada for the successful execution of this primary duty.¹⁸ Central to this responsibility is the requirement for each member to act in compliance with the law and maintain the highest standards of military conduct. Further, because the government has a responsibility to its citizens to ensure their security, it is compelled to provide the military with weapons and technologies with which to do so. While the Government retains ultimate control over the use of sanctioned violence in defence of national interests, the responsibility for the training and deployment of the armed forces rests in the hands of the military. Accordingly, there exists the professional responsibility to ensure that the highest standards of discipline, particularly self-discipline are maintained.¹⁹ Canadians, therefore

that will obey laws and act accordingly with the powerful instruments of warfare that have been entrusted to them.

Military discipline, according to the Canadian Forces Judge Advocate General, serves a threefold purpose: it ensures members carry out assigned orders in the face of danger; it controls the armed forces so that it does not abuse its power; and it assists in assimilating a recruit to the institutional values of the military.²⁰ Consistent with the definitions previously presented is the assertion that the “chief purpose of military discipline is harnessing the capacity of the individual to the needs of the group.”²¹ It follows that by individuals subordinating their own interests to that of the collective body, the body becomes more cohesive and ultimately more effective and its members more motivated.²² In his discussion of the Canadian Army’s regimental system, military historian David Bercusson suggests that soldiers willingly accept tough disciplinary measures to keep individuals or groups of individuals in line.²³ The sense of belonging and support provided by membership in a unit (regardless of environment), makes such a difference to an individual such that they want to carry on its proud traditions and in the words of one officer, “there’s nothing we’ll do to screw that up.”²⁴ These by-products of discipline (high morale, cohesion, esprit-de-corps) are essential elements for an effective military and indeed, are what every commanding officer strives to achieve in his or her unit.

²⁰ Department of National Defence, *Military Justice at the Summary Trial Level*, (Ottawa: Office of the Judge Advocate General, 2001), 1-9.

²¹ *Dishonoured Legacy: The Lessons of the Somalia Affair, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Volume 1*, Justice Gilles Letourneau, Chaiman (Ottawa: Minister of Public Works and Government Service, 1997), 24.

²² Anthony Kellet, *Motivation and Behaviour: The Influence of the Regimental System*,

²³ David Bercusson, *Significant Incident: Canada’s Army, the Airborne and the Murder in Somalia*, (Toronto: McLelland and Stewart Inc, 1996), 127.

²⁴ *Ibid*, 128.

When it becomes necessary for a commanding officer to address acts of misconduct, he or she may choose to do so through the application of the military justice system. This process includes the manner in which the alleged offence is investigated, how, when and by whom charges are laid; powers of arrest and ultimately, the disposal of the charge during a service tribunal. The National Defence Act (NDA) creates a two-tiered tribunal structure that includes the formal court martial system and, the most commonly used form of service tribunal, the summary trial system.²⁵ The benefits of trying offences summarily include the speed with which offenders can be brought to trial and the general deterrent effect punishment meted out at the unit level provides. Holding proceedings at the unit level also means that the offender (as well as witnesses, assisting officers, etc.) are not physically removed from their place of duty. This is something particularly important on operations where manpower is limited and workloads are increased.

It is not within the scope of this paper to provide a detailed history of the development of Canada's military justice system, but a brief review is helpful to place the remainder of this discussion in context. From Confederation until well into the Second World War, Canadian military law was based on British military law. The requirement for service offences to be dealt with quickly and that military justice be summary in nature was first recognized in the British Mutiny Act of 1689. This act, along with the Articles of War governed the conduct of military tribunals until the mid-nineteenth century. When Canadian Parliament passed the Militia Act in 1868 it essentially adopted British military law to govern Canada's Armed Forces. Following the implementation of several different acts (dependent on the service) the period between 1868

²⁵ Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces: A Review from 1 April 2002 to 31 March 2003*, (Ottawa: Department of National Defence, 2003), 59.

and 1944 saw a steady growth of the summary powers of military commanders.²⁶ While punishments available to the commanding officer ranged from minor punishments to imprisonment, the more severe forms of punishment became less frequent as society began to recognize the humanity of the service member and the requirement to recruit volunteers.

In 1950, the National Defence Act (NDA) came into being as a result of the dissatisfaction with the military justice system voiced by the large numbers of civilians who participated in the military during the Second World War. This discontent was centred on the harsh and inconsistent punishments that inexperienced military members imposed on accused persons and improper command influence.²⁷ Significant to the NDA was the provision for three types of courts martial, the end of the independent status of naval law and the introduction of a unified Code of Service Discipline. The NDA re-affirmed the requirement for military trials to be dealt with summarily and established three types of summary trials, two of which could be presided over by officers serving at the unit level. The summary trial system under the NDA remained virtually unchanged for thirty years until the passage of the Canadian Charter of Human Rights and Freedoms (herein referred to as The Charter) in 1982.

The need for a separate justice system to deal with breaches of discipline in the military has always been a part of the Canadian military heritage. The creation of the NDA in 1950 was long overdue as the military law in place had seen few changes in over eighty years. The minor number of amendments to the NDA since its inception have attempted to keep the military justice system in pace with change; however, there have been developments outside of the

²⁶ Department of National Defence, *Military Justice at the Summary Trial Level*, 2-4.

²⁷ Department of National Defence, *Military Justice at the Summary Trial Level*, 2-7.

military justice system that have brought into question its ability to achieve its purpose. First and foremost, the visibility of the Canadian military in recent years, due in no small part to the increase in mass media coverage, has heightened the Canadian public's awareness of the military justice system. Whereas the calls for reform that resulted in the establishment of the NDA following the Second World War were made from those who were witnesses to the operation of the military justice system, recent cries of impropriety have come from the public. Fuelled by the highly publicized events in Somalia, the entire military justice system came under critical review in the mid 1990's.²⁸ Former soldier turned military critic Scott Taylor observed at the time that "the Canadian military [is] singularly incapable of investigating itself and administering justice in a fair and equitable manner."²⁹

Taylor's assertion is unfortunately rooted in fact. Despite the excellent performance of the majority of the Canadian Forces members deployed in support of operations in Somalia, the murder of a young Somali man at the hands of a few soldiers from the Canadian Airborne Regiment overshadowed their accomplishments. The inquiry that followed the Somalia Affair revealed an acute breakdown in discipline within the Canadian Airborne Regiment and considerable failings in the application of military justice. In the words of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia: "It is abundantly clear that the military justice system is replete with systemic deficiencies that contributed to the problems we

²⁸ Details of the actual events in Somalia will not be presented in this paper. There exists many excellent reviews of the Somalia Affair ranging from the detailed, official inquiry reports produced in the six volumes of *Dishonoured Legacy: The Lessons of the Somalia Affair, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Volume 5*, Justice Gilles Letourneau, Chairman (Ottawa: Minister of Public Works and Government Service, 1997) to a more general overview, such as David Bercusson, *Significant Incident: Canada's Army, the Airborne and the Murder in Somalia*, (Toronto: McLelland and Stewart Inc, 1996).

²⁹ Scott Taylor and Brian Nolan, *Tarnished Brass: Crime and Corruption in the Canadian Military*, (Toronto: Lester Publishing Limited, 1996), 150.

investigated. Without substantial change to the system, it will continue to demonstrate shortcomings in promoting discipline, efficiency, high morale and justice.”³⁰ Substantial changes were in fact made to the military justice system following the Somalia incident, many of which were included in *Bill C-25, An Act to Amend the National Defence Act*.³¹ This bill came into effect in 1999, based primarily on recommendations made in the Dickson Report.³² In a paper of this length, it is impossible to discuss every change made to the military justice system under Bill C-25, so only selected elements will be introduced with a view to showing how the changes have contributed to the effectiveness of the military justice system in use today.

The first change significant to this discussion was prompted by the discovery of the systemic problem of wide, unfettered discretion of commanding officers. The Somalia Inquiry found that leaving discretion to commanding officers on whether or not to conduct investigations into possible breaches of discipline; how to proceed if misconduct has occurred; and the flexibility to apply appropriate measures to promote military discipline “diminished the effectiveness and fairness of the military justice system.”³³ Bill C-25 addressed this by instituting changes to the NDA that precluded a commanding officer from presiding at any

³⁰ *Dishonoured Legacy: The Lessons of the Somalia Affair, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Volume 5*, Justice Gilles Letourneau, Chairman (Ottawa: Minister of Public Works and Government Service, 1997), 1261.

³¹ David Goetz, *Bill C-25: An Act To Amend The National Defence Act*, Library of Parliament – Parliamentary Research Branch, available from http://www.parl.gc.ca/common/Bills_ls.asp?Parl=36&Ses=1&ls=C25#BACKGROUND-text; Internet; accessed 17 March 2004.

³² The Dickson Report (*Report of the Special Advisory Group on Military Justice and Military Police Investigative Services*, The Right Honourable Brian Dickson, Chairman (Ottawa: National Defence, 1997)) is recognized as being one of the most influential documents in the development of Bill C-25. Virtually all the recommendations made in the Dickson Report were accepted and are reflected in Bill C-25 and subsequently in the amendments to the National Defence Act.

³³ *Ibid*, 1263.

summary trial if he had laid, or caused the charge to be laid.³⁴ It also included amendments that ensured that once charges were laid, they would be brought to trial.

The appearance of fairness and impartiality was a common theme in the changes initiated by Bill C-25. To provide a mechanism for the resolution of complaints outside of the chain of command, Bill C-25 established the Canadian Forces Grievance Board. Its stated role is to “conduct an expeditious, objective and transparent review of grievances with due respect for each individual member of the Canadian Forces, regardless of rank or position.”³⁵ Effective and transparent as the grievance system may be, it is not the means by which an offender can appeal any disciplinary action taken in a military tribunal. This does not leave the offender without recourse. Bill C-25 also introduced changes to the regulations that allow for a Request for Review to set aside the finding of guilty on the ground that it is unjust or alter the sentence on the ground that it is unjust or too severe.³⁶ The distinguishing feature of this review process is that it is initiated by the offender and must be conducted in accordance with defined procedural requirements.³⁷

In addition to the changes made to the NDA through Bill C-25, the incidents in Somalia brought to light one of the most commonly recognized shortfalls in the military justice system: the lack of training for presiding officers. In 2000, a regulation came into effect directing that “before superior commanders and commanding officers assume their duties, they shall be trained in the administration of the Code of Service Discipline in accordance with a curriculum

³⁴ Goetz, *Bill C-25...[on-line]*.

³⁵ *Ibid.*

³⁶ Department of National Defence, *Queen's Regulations and Orders*, 108.45.

³⁷ Department of National Defence, *Military Justice at the Summary Trial Level*, 15-2.

established by the Judge Advocate General and certified by the Judge Advocate General as qualified to perform their duties in the administration of the Code of Service Discipline.”³⁸ Prior to the establishment of this requirement, military officers who sat as presiding officers at summary trial received virtually no formal instruction on the application of military justice. Apart from a limited number of instructional periods during officer classification training, studies in military law were limited to the completion of one, two hour self study multiple choice exam as part of the Officer Professional Development Program.³⁹ The Dickson Report directly addressed this issue, making the observation that presiding officers, through a lack of confidence and knowledge of summary trial procedures were reluctant to hear summary trials, opting to take administrative action or even requesting the convening of a court martial “in order to be relieved the obligation of conducting a summary trial.”⁴⁰ Today, every presiding officer must complete presiding officer training and be so certified by the Judge Advocate General.

The sweeping changes announced by Bill C-25 were not only a result of the Somalia Affair, but were also in response to the adoption of the Charter.⁴¹ Much like the reforms of earlier military law mentioned in previous paragraphs, the recognition of the Canadian soldier as a Canadian citizen was a factor in making certain amendments. The soldiers who fill the ranks of the Canadian Forces today came of age knowing, if not the detail, but the spirit of the rights guaranteed them under the Charter. Specifically, the “fundamental freedoms” have caused some to suggest that the rights of the individual have undermined the military adage of “service before

³⁸ Department of National Defence, *Queen’s Regulations and Orders, 101.09 and 108.10.*

³⁹ Department of National Defence, *Report on the Discipline Survey, A9-40.*

⁴⁰ Department of National Defence, *Report of the Special Advisory Group on Military Justice, 40.*

⁴¹ Goetz, *Bill C-25...[on-line].*

self.” Indeed, several challenges to the Canadian military justice system have been, and continue to be made based on rights guaranteed in the Charter.⁴² Resultantly, amendments have been made to the NDA specifically in the areas of judicial independence within the military justice system, the right of legal representation during a summary trial, and search and arrest procedures.⁴³

One of the changes to the military justice system of particular importance to commanding officers was made in response to the legal rights guaranteed under the Charter. Section 7 of the Charter provides that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”⁴⁴ In a summary trial where detention is a possible punishment, the accused’s right to liberty could be violated should he or she be awarded such punishment. Summary trials do not meet the procedural requirements necessary to be considered as adhering to the principles of fundamental justice, while the more formal courts martial do. Resultantly, amendments were made such that for any offence where the presiding officer may consider detention if the accused were to be found guilty, the accused must be given the right to elect trial by court martial.⁴⁵ Along similar lines, changes were made that automatically grant the accused the right to elect

⁴² Jacques J. Gauvin, “The Canadian Charter of Rights and Freedoms and the Canadian Forces: Social Experimentation, or a Revival of the Canadian Military Ethos,” (Toronto: Canadian Forces College National Security Studies Course Paper, 2000), 12.

⁴³ *Ibid.*, 14.

⁴⁴ *Canadian Charter of Rights And Freedoms*, Section 7, in Department of National Defence, *Military Justice at the Summary Trial Level*, Annex A, 1.

⁴⁵ Department of National Defence, *Queen's Regulations and Orders for the Canadian Forces*, available from http://www.forces.gc.ca/admfincs/subjects/qr_o/vol2/intro_e.asp; Internet; accessed 17 April 2004, QR&O 108.17.

trial by court for all but five service offences.⁴⁶ In sum, the adoption of the Charter has not eroded the effectiveness of the military justice system, rather it has prompted changes to it that has modernized the Code of Service Discipline and has promoted accountability, fairness, integrity and transparency.⁴⁷

Even though the Charter was enacted over twenty years ago and the amendments to the military justice system resulting from it have been in effect for at least five years, there exists another aspect to individual freedoms that some may consider as a challenge to the effectiveness of the application of military discipline. Changes in demographics and shifts in Canadian societal values may be perceived as not being reflective of traditional military values. The Canadian Army's expression of the military ethos is based upon four precepts which are incumbent on all soldiers, regardless of rank. These are duty, integrity, honour and discipline. Anthropologist Donna Winslow contends that these values are reflective of those held by older generations, while the soldiers joining the ranks of the army today are less inclined to relate to such values.⁴⁸ She suggests that prospective recruits have difficulty accepting these traditional demands of Army life and that there is a significant waning in the deference to authority figures - a cornerstone of maintaining unit discipline.⁴⁹

⁴⁶ *Ibid.*

⁴⁷ Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces: A Review from 1 April 1999 to 31 March 2000*, (Ottawa: Department of National Defence, 2000), 2.

⁴⁸ Donna Winslow, "Canadian Society And Its Army," *Canadian Military Journal*, Volume 4, Number 4 (Winter 2003-2004): 21. Dr. Winslow's conclusions are based on the statistical data provided in Michael Adams, *Sex in the Snow: Canadian Social Values at the End of the Millennium*, (Toronto: Penguin Books Canada, Ltd., 1998).

⁴⁹ Winslow, "Canadian Society and Its Army," 21.

In part to address the more individualistic nature of present Canadian society, measures such as the implementation of the Grievance Board have been taken to allow service members the right to air their grievances outside the chain of command. Dr Winslow concludes by stating that this indicates a “loosening chain of command in order to incorporate a more rights-based system of command and consultation more akin to non-military organizations.”⁵⁰ Changing societal values need not be perceived as a threat to the efficacy of the military justice system. By recognizing and respecting individual rights and freedoms, the chain of command can only improve the morale and dedication of the soldiers joining the ranks of the Canadian Forces today. This has as much to do with leadership as it does with the maintenance of discipline.

Somalia showed that the military justice system was broken. The following paragraphs will suggest that it has been fixed and that the military justice system is working. A simple method of showing this would be to submit that there have been no Somalia-like incidents, i.e., breakdowns in unit discipline, since the Somalia mission itself. This statement might be taken for granted, but when one reviews the performance of the Canadian Forces on operations since the return of the Canadian Airborne Regiment from Somalia in 1993, it appears that any problems with the military justice system have been addressed. In just over eleven years, the Canadian Forces have participated in more than a dozen operations involving formed bodies of over 200 personnel or more, totalling over 50,000 deployed troops without any problems relating to the application of military justice.⁵¹ It must also be considered that the interest generated as

⁵⁰ *Ibid.*

⁵¹ The total number of operations, either ongoing, domestic or international in which the Canadian Forces has participated in since 1993 numbers more than fifty; however, only those involving formed sub-units or greater sized formations to include ships and aircraft detachments were included here. Additionally, the number of 50,000 includes service personnel who have deployed on multiple missions. These figures are estimates for illustrative purposes and were compiled based on the experience of this writer and statistics found at Department of National Defence, *Canadian Forces Operations*, [web page]; available from http://www.forces.gc.ca/site/operations/current_ops_e.asp; Internet; accessed 24 April 2004.

result of the Somalia deployment has meant that major Canadian Forces activities have been focus of unprecedented media attention, including the “embedding” of journalists with the units deployed to Afghanistan in both 2002 and 2003. Without doubt, any scandalous activity remotely resembling Somalia would surely have been reported. This is not to say that breaches of military discipline did not occur during this time, but the positive record of performance of the Canadian Forces in recent years would indicate that the systemic problems in the maintenance of military discipline identified following the Somalia affair had been solved.

To further illustrate that the military justice system has been used effectively on recent operations, the case of one particular rotation to Bosnia-Herzegovina is worthy of review. In the fall of 2000 the Second Battalion, Princess Patricia’s Canadian Light Infantry (2 PPCLI) Battle Group consisting of over 1200 personnel deployed to Bosnia on peace support operations as Rotation Seven of Operation PALLADIUM. For the first two and a half months of the seven month deployment, the Battle Group had only three minor disciplinary infractions. In a forty-eight hour period in late November, however, twenty persons from the contingent were involved in six disciplinary infractions in five different locations in Bosnia.⁵² National Defence Headquarters in Ottawa responded almost immediately and dispatched a Joint Inspection Team lead by a major-general to Bosnia to review, examine and make recommendations surrounding the incidents described above. The Team conducted numerous interviews with the command teams of the elements deployed on the operation and after analysing disciplinary returns, training plans, guidance and instructions used in force generation, produced a detailed report to the Chief of Defence Staff on their findings. The Team found that contrary to concerns of possible systemic failures in leadership, training or enforcement of discipline, overall the leadership was

⁵² Arp, *Joint Inspection Team Report*, 1.

sound. “Personnel were well trained and transgressions of policy were addressed.”⁵³ It could not identify one single systemic causal factor for the incidents, attributing the incidents to individual acts of indiscretion. Further, it reported that the standards of leadership and discipline were high and that there were no significant shortcomings in policies and procedures regarding discipline.⁵⁴ Finally, as a clear reminder of the ghosts of Somalia, the Team found no evidence or indication (as some had speculated) that 2 PPCLI was a renegade unit.⁵⁵

Despite the high operational tempo of the Canadian Forces, the majority of its members make their daily workplace the bases and stations across Canada. The maintenance of unit discipline remains essential for unit effectiveness regardless of the roles they fill and there is evidence to suggest that the military justice system is being used to do so. Between 1 April 2002 and 30 March 2003, the number of summary trials conducted increased by nearly 30% from the previous year⁵⁶. The Judge Advocate General suggests this increase can be attributed to the fact that presiding officers are becoming more comfortable with the summary trial process and do not hesitate to use it when required.⁵⁷ Another key observation from the annual report of 2002-2003 is the 50% reduction in the number of accused who elected court martial over summary trial. While presiding officers are appearing to be more apt to employ the summary trial system, this statistic suggests that service personnel are placing more confidence in the summary trial

⁵³ *Ibid.*

⁵⁴ *Ibid.*, 16 and 26.

⁵⁵ *Ibid.*, 16.

⁵⁶ Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces: A Review from 1 April 2002 to 31 March 2003*, (Ottawa: Department of National Defence, 2003), 10.

⁵⁷ *Ibid.*

process.⁵⁸ Another indication that the summary trial is achieving its purpose is the decrease in the average time taken from the laying of the charge to final disposition. In 2002-2003 this decreased to nine days from eleven in 2001-2002, showing that the summary trial system is “able to provide unit commanders with an effective tool to deal with minor service offences in a prompt manner.”⁵⁹

It is impossible to quantitatively measure the level of discipline maintained in a particular unit. Even though statistics are kept on the number of service tribunals conducted across the Canadian Forces, a high number of summary trials held in one unit could mean several things. The unit could be extremely diligent in its application of the military justice system as a means of enforcing discipline, or there could truly exist a climate where misconduct is rampant. Conversely, a unit that conducts few summary trials could either be filled with the most disciplined soldiers who rarely step out of line or the unit could be reluctant to use the military justice system, choosing to deal with the offenders in other ways, or not at all. The only true measure of the effect of discipline in a unit is its performance, for without discipline, successful mission accomplishment is nearly impossible.

In reflecting on the development of the Canadian military justice system since its infamous rise to celebrity following Somalia, it would be fitting to apply the saying of “that which doesn’t kill it makes it stronger.” Without doubt, before the reforms to the military justice system in the late 1990’s, its efficiency was questionable. In the years that followed, the military justice system was modernized to reflect the changes in Canadian society and the

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, 12.

legislation governing Canadians in uniform and out of uniform. Mechanisms such as the grievance process and the Request for Review of Findings have not undermined the military justice system; rather, they have complemented it by providing transparency and independent oversight into the workings of the military justice system.

Commanding officers, whether on operations or not, rely primarily on sound leadership, unit cohesion, and esprit-de-corps to maintain discipline in their units. Though perhaps not his or her first choice, the military justice system remains a tool at his or her disposal to control misconduct and deal with breaches of discipline. The perceived challenges to the effectiveness of the military justice system discussed in the preceding paragraphs have been addressed through changes to policies and procedures. Provided that commanding officers remain cognizant of their responsibilities to in the application of military justice, there is no reason why the military justice system in general and the summary trial in particular cannot be used for the purpose for which it was designed. The Canadian military justice system is an effective means for enforcing unit discipline in the Canadian Forces.

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