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## **DISCIPLINE BREAKDOWN: CONFRONTING AND ADDRESSING THE EROSION OF DISCIPLINE IN THE CANADIAN ARMY**

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THE EROSION OF DISCIPLINE IN THE CANADIAN ARMY**

Maj Anthony Robb

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## ABSTRACT

Army commanders have historically relied on discipline as a way of exerting control over their forces. It normalizes the process of following lawful and ethical orders, enables synchronization of forces and enforces standards of behavior. Discipline within the Canadian Army (CA) is not where it needs to be. Present-day CA commanding officers (COs) lack the requisite tools to create and maintain disciplined units. The current military justice system, both at the summary trial and court martial level, is not an effective tool in enabling CA COs to enforce discipline. The system is plagued by a general lack of trust, unresponsiveness and lack of command-level influence. The institutionalization of a unit-owned tier of justice could relieve some of the pressure on the existing system while simultaneously empowering unit COs with complete ownership of a formal disciplinary tool.

Social and political forces have also undermined the level of discipline and disciplinary control within the CA. The CA must contend with a changing society—a society that is more individualistic, litigious and egalitarian than ever before. The CA cannot create disciplined warfighting forces—forces whose strength depends upon service before self—if soldiers are unwilling to sacrifice some individual rights and freedoms. Furthermore, the CA is a fighting force and it needs to be able to choose effectively who is recruited, retained, rewarded and released. The more influence CA COs lose in these areas, the more difficult it is to maintain a disciplined force. Recreating disciplined units within the CA is predicated upon empowering COs with ownership of the disciplinary process.

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## INTRODUCTION FROM IRON DISCIPLINE TO INDIVIDUAL RIGHTS

An army without discipline sets itself up for failure. As former Canadian Chief of Defence Staff (CDS) Rick Hillier observed, “an effective military is a disciplined military.”<sup>1</sup> Discipline underpins obedience to authority and behavioural standards within an army. Its criticality has been understood by military commanders for millennia. The classical Chinese military strategist Sun Tzu wrote: “Soldiers must be treated in the first instance with humanity but kept under control by means of iron discipline. This is a certain road to victory.”<sup>2</sup> But the manner and methods by which an army can enforce discipline within its ranks is directly reflective of the social and political context within which it operates. Several tangible and intangible forces guide the way in which discipline is enforced in Canada’s army. These forces include explicit and largely permanent rules such as those contained in the *Criminal Code of Canada*, the *Code of Service Discipline* and the *Canadian Charter of Rights and Freedoms*. But tacit and often temporal guidelines such as those gleaned from political pressures, times of crises and evolving societal norms also pertain.

With a relatively peaceful period at present and regional conflicts that Canada spectates, the Canadian Armed Forces (CAF) confronts an evolving world. Emerging new global powers present Canada with both new threats and new opportunities. Definitive strategic guidance and resourcing for CAF has been articulated in the new defence policy *Strong, Secure and Engaged* (SSE), which targets the Canadian Army (CA) for growth

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<sup>1</sup>General Rick J. Hillier, *Chief of the Defence Guidance to Commanding Officers* (Kingston: n.d., 2007), 32.

<sup>2</sup>Sun Tzu, *The Art of War*, ed. James Clavell (New York: Bantam Doubleday Dell Publishing Group Inc., 1983), 49.

and evolving roles.<sup>3</sup> SSE also contains social and cultural guidance (gleaned from broad public and governmental consultation), which influence how the CA will look, feel and operate going forward. Issues such as diversity; recruitment and retention standards; treatment of veterans; and physical, mental and spiritual health shall have a measurable impact on the future of the CA and the manner in which discipline is enforced in line with government policy.

## LITERATURE REVIEW AND ROADMAP

Much has been written regarding military justice and discipline. Nearly two millennia ago, Sun Tzu's *The Art of War* spoke of the importance of discipline as a means of building and controlling an effective army.<sup>4</sup> Centuries later, Plubius Flavius Renatus Vegetius wrote the *Epitome of Military Service*—a seminal piece of writing outlining the principles and tenets of a highly trained and professional army. The main thrust of Vegetius' ideas centered around fragmentation of the army, barbarization of its personnel, loss of professional skills and substitution of mercenaries for regular forces.<sup>5</sup> Millennia later, these issues—all of which have a disciplinary nexus—still hold relevance for modern armies. Antoine Henri de Jomini's *The Art of War* and Carl von Clausewitz's *On War* both cover a broad a range of military topics that still guide military practitioners today, including the role of discipline within an army.<sup>6</sup> Jomini, in particular, comments that a mere multitude of brave men armed to the teeth make neither a good army nor do

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<sup>3</sup>Strong, *Secure, Engaged: Canada's Defence Policy* (Ottawa: Department of National Defence, 2017).

<sup>4</sup>Sun Tzu, *The Art of War*, ed. James Clavell (New York: Bantam Doubleday Dell Publishing Group Inc., 1983).

<sup>5</sup>Plubius Flavius Renatus Vegetius, *Epitome of Military Service*, trans by N.P. Milner (Liverpool: Liverpool University Press, 1993), book jacket.

<sup>6</sup>Antoine Henri de Jomini, *The Art of War*, trans. G.H. Mendell and W.P. Craighill (Rockville, MD: Arc Manor, 2007); Carl von Clausewitz, *On War*, trans. James John Graham (North Charleston: Createspace, 2017).

they constitute a national defence.<sup>7</sup> Discipline, which he discusses extensively in his chapter on military policy, serves as one of the chief factors in the creation and maintenance of an effective army.

Sun Tzu, Vegetius, Jomini and Clausewitz provide a historical precedent regarding the importance of discipline in successful armies. More recently, Robert Sherrill's *Military Justice is to Justice as Military Music is to Music* provides a thorough discussion regarding the unique disciplinary and judicial needs of a modern military.<sup>8</sup> Chris Madsen's *Military Law and Operations* and *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* provide the most in-depth and comprehensive assessment of the history and application of military justice within the CAF.<sup>9</sup> Finally, Michel Drapeau's *Behind the Times: Modernization of Canadian Military Criminal Justice* takes a highly critical look at the CAF's approach to justice and calls for greater civilian control of the military justice system.<sup>10</sup>

Over the last few decades, the Canadian military justice system has been the subject of consistent review. *The First Independent Review of the Provisions and Operation of Bill C-25, An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts, as Required Under Section 96 of Statutes of Canada 1998* written in 2003 by Antonio Lamer and the *External Review of the Canadian Military Prosecution Service* conducted by the Bronson Consultancy Firm are particularly

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<sup>7</sup>Antoine Henri de Jomini, *The Art of War*, trans. G.H. Mendell and W.P. Craighill (Rockville, MD: Arc Manor, 2007): 40.

<sup>8</sup>Robert Sherrill, *Military Justice is to Justice as Military Music is to Music* (New York: Harper & Row, 1970).

<sup>9</sup>Chris Madsen, *Military Law and Operations* (Toronto: Thomson Reuters Carswell, 2011); Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* (Vancouver: UBC Press, 1999), 109.

<sup>10</sup>Michel Drapeau and Giles Létourneau, *Behind the Times: Modernization of Canadian Military Criminal Justice* (Ottawa: Giles Létourneau and Michel Drapeau, 2017).

relevant.<sup>11</sup> These two reports, known as *The Lamar Report* and *The Bronson Report* respectively, provide brutally honest assessments and recommendations regarding the efficacy of the military justice system. More recently, a *Court Martial Comprehensive Review Interim Report* compiled by the Court Martial Comprehensive Review Team (CMCRT) provides valuable and topical insights regarding both the current state of discipline and the efficacy of military judicial tools within the CAF.<sup>12</sup> Additionally, Donna Winslow's two articles *Canadian Society and its Army* and *Misplaced Loyalties: The Role of Military Culture in the Breakdown of Discipline*, along with Albert Legault's *Civil-Military Relations: Democracy and Norm Transfer* and Sebastien Junger's *Tribe* all comment on societal influences and how they impact military discipline.<sup>13</sup>

This paper comprises three chapters. Chapter 1 discusses the importance of discipline and its inextricable link to the profession of arms. It also briefly summarizes the history of military discipline—from Roman legions through to present day. Chapter 1 also examines the CA's relationship with discipline over the last one hundred years. Chapter 2 focuses on the present state of the military justice system and its shortcomings in enabling discipline within CA units. The credibility of the system, its inherent procedural slowness and the lack of unit command-level influence over the system are all explored. Chapter 2 concludes with an examination of a third tier of military justice that

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<sup>11</sup> Antonio Lamer, *The First Independent Review of the Provisions and Operation of Bill C-25, An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts, as Required Under Section 96 of Statutes of Canada 1998*, c.35 (n.d., 2003); Andrejs Berzins and Malcolm Lindsay, *External Review of the Canadian Military Prosecution Service* (Ottawa: The Bronson Consulting Group, 2008).

<sup>12</sup> *Court Martial Comprehensive Review Interim Report* (Ottawa: Office of the Judge Advocate General, 2018).

<sup>13</sup> Donna Winslow, "Canadian Society and its Army," *Canadian Military Journal* (2004); Donna Winslow, "Misplaced Loyalties: The Role of Military Culture in the Breakdown of Discipline," *Journal of Military and Strategic Studies* 6, no. 3 (2004); Albert Legault, "Civil-Military Relations: Democracy and Norm Transfer," in *The Soldier and the State in the Post-Cold War Era*, ed. Albert Legault and Joel Sokolsky (Kingston, 2002); Sebastien Junger, *Tribe: On Homecoming and Belonging* (Toronto: HarperCollins Publishers Ltd., 2016).

could complement the existing CAF military justice system. Chapter 3 looks at societal and political forces and how they are directly and indirectly impacting the level of discipline within the CA. Chapter 3 takes an in-depth look at individual rights, the increasingly litigious nature of Canadian society writ large and the linkages between health (both physical and mental) and discipline. This paper concludes with several recommendations aimed at confronting and addressing the erosion of discipline within the CA.

### **DISCIPLINE AND CANADIAN SOCIETY**

The level of discipline within the CA has both evolved and devolved throughout its short history due, in part, to the ever-changing nature of influential internal and external forces. Stressing the relationship between the armed forces and society, Judge Advocate General (JAG) historian R.A. McDonald suggests that the procedures for disciplining the military forces of a nation are a direct reflection of the society that the forces were created to defend.<sup>14</sup> And as Canadian society and polity evolves, so too must the methods of enforcing discipline. As the CA enters this new post-SSE milieu, it is crucial to examine whether or not CA commanding officers (COs) can still effectively enforce discipline within their units. Presently, the ability of a CO in the CA to enforce discipline in units and formations is impeded by deficiencies in the military justice system as well as restrictive social pressures. The old days of military discipline are over, if they ever really existed in the Canadian context.

For various reasons, the current state of discipline within the CAF, and by extension the CA, is not where it needs to be. Some 25% of CAF members are considered

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<sup>14</sup>R.A. McDonald, *Trail of Discipline: The Historical Roots of Canadian Military Law* (DND: n.d., n.d.), 1.

obese.<sup>15</sup> CAF culture writ large is accused of being hypersexualized and not welcoming to women and minorities.<sup>16</sup> Between 2012-2017, the number of courts martial held per year has risen by more than 200%.<sup>17</sup> Absence without leave (AWOL), fraud, thievery, insubordination, issues of domestic violence, use of drugs and other controlled substances, drunkenness and conduct prejudice to good order continue to occur within CA units. Taken cumulatively, these points suggest that the CA is falling short of its full potential or at least are distractions to the military's main purpose, defending Canada and protecting Canadians.

Some might suggest such behaviors are commonplace within most western armies. However, that justification is insufficient for an organization that is not supposed to settle for mediocrity. The CA is a national institution and must consistently strive to represent the very best of the society it serves. And the situation will not improve unless aspects of discipline and, by extension, disciplinary control are confronted and addressed.

CA leadership and stakeholders must acknowledge both the current state of discipline and the disciplinary tools available to COs. The current CAF judicial system is failing CA COs as a means of maintaining unit discipline. Furthermore, certain well-intentioned social and political forces are degrading discipline within CA units. Re-institutionalizing and fostering a culture of discipline within CA units is imperative should Canada wish to employ a credible army as a means of global influence. The

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<sup>15</sup>Sarah Turner, Tamara Taillieu, Kristene Cheung, Mark Zamorski, David Boulos, Jitender Sareen, and Tracie O. Afifi, "Child Abuse Experiences and Perceived Need for Care and Mental Health Service Use among Members of the Canadian Armed Forces," *The Canadian Journal of Psychiatry* 62, no. 6 (2017): 414.

<sup>16</sup>Marie Deschamps. *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces* (Ottawa: Department of National Defence, 2016).

<sup>17</sup>Major-General B.B. Cathcart, *2016-2017 Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2016 to 31 March 2017* (Ottawa: Office of the Judge Advocate General, 2017).

inextricable links between maintenance of discipline, and an army's effectiveness as a professional fighting force cannot be overemphasized. "Lack of discipline", writes military legal expert Chris Madsen, "portends potential defeat and disaster, conditions that threaten the very fate and livelihood of a nation."<sup>18</sup> The CA's Gordian knot is learning to balance the unique disciplinary tools and techniques needed to maintain an army culture and ethos steeped in discipline while simultaneously respecting individual rights. Achieving this balance is the only way the CA can stay relevant while maintaining the trust of the society it serves.

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<sup>18</sup>Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* (Vancouver: UBC Press, 1999), 1.

## CHAPTER 1 DISCIPLINE AND THE PROFESSION OF ARMS

Discipline as a concept carries different meanings depending on the context.

Within the military context, it would be easy to see strictly discipline as a solely negative or punitive concept. But, as written by Major Young, a CA CO serving almost a century ago:

Discipline is by no means a matter that is associated wholly with punishment for offences. It is an attitude of the soldier that carries with it a willing, prompt and implicit obedience of all ranks to responsible senior authority. It connotes attention, order, regularity, system, absence of crime and accountability to those who are senior in service.<sup>19</sup>

Discipline is what enables an army to function. It underpins many key army attributes: obedience, respect for authority, respect for the institution, pride and so on. Without discipline, there could be neither unlimited liability nor institutionally enforceable standards of behavior. For millennia, army commanders have understood the importance of discipline. In fifth century BC, Sun Tzu wrote: “The consummate leader cultivates the Moral Law and strictly adheres to method and discipline; thus it is in his power to control success.”<sup>20</sup> Centuries later, Roman soldiers would overtly pledge disciplined obedience via the *Sacramentum militae*, stating: “But the soldiers swear that they shall faithfully execute all that the Emperor commands, that they shall never desert the service, and that they shall not seek to avoid death for the Roman republic!”<sup>21</sup> A CO’s ability to enforce discipline as a means of uniting his force was particularly germane within the multicultural Byzantine army in the middle ages. Haldon notes: “The ability of

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<sup>19</sup>C.R. Young. *Notes on Military Law for Canadian Officers* (Toronto: The University of Toronto Press, 1939), 30.

<sup>20</sup>Sun Tzu, *The Art of War*, ed. James Clavell (New York: Bantam Doubleday Dell Publishing Group Inc., 1983), 20.

<sup>21</sup>Plubius Flavius Renatus Vegetius, *Epitome of Military Service*, trans by N.P. Milner (Liverpool: Liverpool University Press, 1993).

commanding officers to impose their will on their forces and maintain a strict discipline was, of course, particularly important...when the multi-ethnic character of the Byzantine armies was especially marked.”<sup>22</sup> Successful post-renaissance armies such as the Royal Prussian Army and Napoleonic Army were notorious for their highly disciplined forces. In *The Art of War*, Jomini asserts that among the factors of a perfect army is a strict but not humiliating discipline, combined with a spirit of subordination and punctuality, based on conviction rather than on the formalities of the service.<sup>23</sup> Discipline, then, can be seen as an attitude.

Throughout history, army commanders have relied on discipline as a means of exerting control over their forces. In particular, discipline serves an army in three key ways. First, the profession of arms demands that individuals obey all orders issued by superior commanders, so long as such orders are both lawful and ethical. And while all commanders are expected to mitigate risk wherever possible, mission accomplishment predominates. As a result, all members of an army may be compelled to make the ultimate sacrifice. The justification for this sacrifice is rooted in utilitarian ethics; completion of a mission—even those missions that could result in the death of one’s own soldiers—will result in greater good and more preservation of life writ large. But knowingly obeying an order, which may lead to being killed or injured is unnatural. “The brutality of Western Warfare, its single-mindedness, [and] its imperative to kill or be killed...,” writes historian Max Boot, “[runs] counter to most...societies.”<sup>24</sup> Discipline

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<sup>22</sup>John F Haldon, *Warfare, State and Society in the Byzantine World, 565-1204* (London: UCL Press, 1999), 232.

<sup>23</sup>Antoine Henri de Jomini, *The Art of War*, trans. G.H. Mendell and W.P. Craighill (Rockville, MD: Arc Manor, 2007): 32.

<sup>24</sup>Max Boot, *War Made New: Weapons, Warriors and the Making of the Modern World* (New York: Penguin Group (USA) Inc., 2006), 88.

normalizes the process of following lawful and ethical orders—even those that are uncomfortable, unnatural and life threatening. As such, conditioning starts early in soldiers' careers, learning obedience through benign tasks such as rote responses to drill movements. The essence of drill is about submission to authority. Over the course of training, commands and tasks become increasingly complex. "Love of life and fear of death", writes one nineteenth century Prussian officer, "are overcome in a soldier by discipline."<sup>25</sup> By the time soldiers reach the battlefield, they are accustomed to following orders—even those that are inherently dangerous.

Second, discipline enables army commanders the ability to control the movements and actions of individuals and large groups of soldiers. Such a feat has primarily been achieved through the use of disciplined military drill. At the individual level, seemingly complex or technical tasks are broken down into discrete easy-to-execute movements. In seventeenth century Europe, for example, Dutch army commander John of Nassau counted forty-two distinct steps necessary to fire a musket, assigning simple words of command for each one and drilling his men incessantly in their execution.<sup>26</sup> Disciplined drilled movements also aid in the control of large groups. As Sun Tzu wrote, "Maneuvering with an army is advantageous; with an undisciplined multitude, most dangerous."<sup>27</sup> Aptly summarizing this point, former Minister of National Defence Brooke Claxton writes:

A military unit consists of some hundreds of different individuals with different habits, feelings and aims, each hitherto accustomed to do much

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<sup>25</sup>Stephen D. Jackman, "Shoulder to Shoulder: Close Control and "Old Prussian Drill" in German Offensive Infantry Tactics, 1871-1914," *The Journal of Military History* 68 (2004): 2.

<sup>26</sup>Max Boot, *War Made New: Weapons, Warriors and the Making of the Modern World* (New York: Penguin Group (USA) Inc., 2006), 59.

<sup>27</sup>Sun Tzu, *The Art of War*, ed. James Clavell (New York: Bantam Doubleday Dell Publishing Group Inc., 1983), 30.

what he wanted, when he pleased. Upon giving up the ways of private life, the soldier must be conditioned to a hard life in crowded association with others.<sup>28</sup>

Discipline ensures orderly conduct and synchronization of maneuver—both of which have been historically important for successful armies. Disciplined drill, for example, enabled Roman commanders to synchronize the movements of their legions, thereby giving them a significant tactical advantage. Centuries later, European army commanders revisited the classic military textbooks of the Romans and updated those same drill movements for the modern gunpowder battlefield.<sup>29</sup> In fact, it was discipline and drill that enabled Maurice, Prince of Orange to create the first modern professional army. In addition to having his soldiers load and fire their weapons in unison, Maurice taught them to march in step, which vastly improved their efficiency and responsiveness on the battlefield.<sup>30</sup> And while the idea of an army conducting disciplined drill movements might not seem like a ground-breaking concept today, it was a revolutionary idea in seventeenth century Europe.

The idea of disciplined drill as a means of controlling an army's movements was perhaps best exemplified by the Prussians. For a time, the Prussians enjoyed battlefield superiority due in large part to the disciplined drill movements of their formations. Rigid tactical execution and the synchronization of multiple units on the battlefield was a product of disciplined Prussian drill.<sup>31</sup> Strict Prussian discipline was not achieved through fear but through habituation and obedience, where commands were sacred, the smallest

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<sup>28</sup>Brooke Claxton, *Notes on Military Law and Discipline for Canadian Soldiers*. 2nd (revised) Edition (Montreal: n.d., 1940), 45.

<sup>29</sup>Max Boot, *War Made New: Weapons, Warriors and the Making of the Modern World* (New York: Penguin Group (USA) Inc., 2006), 59.

<sup>30</sup>*Ibid.*

<sup>31</sup>Stephen D. Jackman, "Shoulder to Shoulder: Close Control and "Old Prussian Drill" in German Offensive Infantry Tactics, 1871-1914," *The Journal of Military History* 68 (2004): 91.

details were treated with the greatest importance and the absolute correctness of every movement was forced into habit.<sup>32</sup> Disciplined drill as a means of controlling movements still exists in modern militaries. And while the idea of soldiers performing rote movements based on blind obedience does not characterize modern twenty-first century armies, the value of disciplined drill as a means of control still exists. Modern western army concepts such as maneuver warfare and mission command still depend on formed units executing precise movements in a disciplined manner. Discipline underpins synchronization of forces. Furthermore, as the CA conducts more missions in Active Dispersed Operations (ADO) environments—environments characterized by small teams operating within the bounds of a commander’s intent and with minimal direct supervision—the need for discipline as a means of control and synchronization remains paramount.

Third, discipline is the means by which standards of behavior are enforced. Soldiers—members of the profession of arms—are uniquely entrusted with power and responsibility unlike any other profession. Those persons in positions of authority can command soldiers to commit severe acts of violence against an enemy, which can result in acts of killing and irreparable collateral damage. Adding further complexity, modern conflicts, such as Afghanistan, Iraq and the Balkans routinely saw soldiers thrust into technically challenging and ethically ambiguous scenarios. Operational effectiveness in such a milieu has depended and will continue to depend upon disciplined standards of behavior. “Rigid discipline,” writes Jomini, “is at all times the best preservative of good

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<sup>32</sup>*Ibid.*

order.”<sup>33</sup> With regard to soldier skills, discipline ensures that weapons are maintained, fitness standards are met and corps threshold knowledge is thoroughly understood. Furthermore, and particularly germane to the CA given the conclusions in the *Deschamps Report* in regard to sexual assaults and misbehavior in the military, discipline is a key force in ensuring all soldiers treat one another with respect. Indeed, the military ethos of the CA is founded on respect for dignity of all persons, a principle that is embodied in CA and CAF policies, which are themselves enforceable through disciplinary action.<sup>34</sup> Discipline is the force that legitimizes the CAF code of conduct.

### **A HISTORY OF DISCIPLINE AND DISCIPLINARY OVERSIGHT IN THE CA**

The CA’s relationship with discipline and justice has both evolved and devolved throughout the twentieth and twenty-first centuries. Much of what exists is based on procedures and punishments borrowed from the British model. Between 1879 and 1945, a steady growth of summary powers and jurisdiction of CA COs generally led to fewer courts martial and more summary proceedings.<sup>35</sup> With respect to discipline during World War I (WWI), the Canadian Expeditionary Force (CEF) encountered some challenges. First, given that the CEF was composed primarily of citizen-soldiers who had been hastily trained and thrust into combat, the discipline and submission to authority was not properly inculcated.<sup>36</sup> Second, “the duration of stress under which soldiers were placed far exceeded the relatively short campaigns which were traditional prior to the twentieth

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<sup>33</sup> Antoine Henri de Jomini, *The Art of War*, trans. G.H. Mendell and W.P. Craighill (Rockville, MD: Arc Manor, 2007): 180.

<sup>34</sup> Marie Deschamps. *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces* (Ottawa: Department of National Defence, 2016), ii.

<sup>35</sup>“Chapter 2: History of Summary Proceedings,” accessed 12 December 2017, <http://www.forces.gc.ca/en/about-reports-pubs-military-law-summary-trial-level/ch-2-history-summary-proceedings.page#n29>.

<sup>36</sup>Marc-Andre Hemond, “Military Law, Court martial and the Canadian Expeditionary Force, 1914-1918” (Master Thesis, University of Manitoba, 2008), 44.

century.”<sup>37</sup> The inability to acclimatize appropriately these new citizen-soldiers into military culture combined with the longevity of the intense stress led to breakdowns in discipline within the CEF. Extreme punishments, including executions, were employed as means to quash this ill-discipline, endeavoring to achieve general deterrence. Such draconian measures have caused many historians to describe military law during WWI as barbaric and arbitrary.”<sup>38</sup> Hemond, however, also argues that, “military law was not an...arbitrarily constructed legal code focused on brutality and executions; rather, it was a legal system established in order to ensure obedience and discipline within a group of highly armed...men.”<sup>39</sup> By the end of WWI, the CA had proven itself as a credible fighting force capable of commanding and governing itself. And as the CA matured during WWI and later during the inter-world war period, so too did its relationship with discipline.

By World War II (WWII), the CA still contended with many of the same disciplinary challenges faced during WWI. That said, long campaigns spanning multiple continents were no longer new phenomena. Yet the CA field force was still composed primarily of citizen-soldiers. By the summer of 1940 various authorities, including the Inspectors-General, were seriously concerned about the widespread slackening in discipline throughout the CA field force.<sup>40</sup> According to a memorandum authored by the wartime Attorney General, the situation with respect to absent without leave was particularly unsatisfactory.<sup>41</sup> This state of affairs was acutely troubling as it was believed

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<sup>37</sup>*Ibid.*

<sup>38</sup>*Ibid.*, 37.

<sup>39</sup>*Ibid.*

<sup>40</sup>T.M. Hunter, "Some Aspects of Disciplinary Policy in the Canadian Services, 1914-1946," accessed 9 January 2018, [http://publications.gc.ca/collections/collection\\_2016/mdn-dnd/D63-5-91-1960-eng.pdf](http://publications.gc.ca/collections/collection_2016/mdn-dnd/D63-5-91-1960-eng.pdf), 36.

<sup>41</sup>*Ibid.*

that absence without leave was representative of a general lack of discipline.<sup>42</sup>

Understanding that the solution to such disciplinary issues resided in empowerment at the tactical level, additional explicit guidance was issued directly to unit commanders:

District Officers Commanding, if this has not already been done, should call together the officers of each unit and impress on them the urgent necessity for obtaining the desired standard of efficiency required. This responsibility should be handed down from the Commanding Officers to junior officers. If the junior officers take the requisite amount of interest in their men and gain their confidence, it is felt that results will be obtained quickly.<sup>43</sup>

WWII commanders came to realize that engaged and empowered unit leadership, combined with intelligent administration and a carefully framed code of conduct, were key in obtaining the requisite disciplinary standard of a fighting force.<sup>44</sup> Experiences during WWI and WWII suggest that rapid mobilization and insufficient time for military acclimatization set the conditions for ill-discipline.

The CA disciplinary difficulties emanating from rapid mobilization were repeated during the Korean War. Madsen notes:

Canadian military authorities encountered a significant number of disciplinary problems with the Canadian Army Special Force...The adjutant general...attributed a high level of military crime and absences without leave to the overall lowering in the class of men being enlisted into the Active Force...Eager to fill quotas...officials accepted many men with questionable backgrounds.<sup>45</sup>

Post-Korea, the latter half of the twentieth century saw a significant CA drawdown, a unification of the three services and a general lack of political investment. By the 1990s—the decade colloquially dubbed the ‘decade of darkness’ by General Rick Hillier—the CA was thrust into a high operational tempo while receiving very little

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<sup>42</sup>*Ibid.*, 35-36.

<sup>43</sup>*Ibid.*, 36.

<sup>44</sup>*Ibid.*

<sup>45</sup>Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* (Vancouver: UBC Press, 1999), 109.

political or public support. Madsen posits that an incremental erosion of capabilities and professional standards characterized the Canadian Armed Forces during this post-Cold War period—a period where the CAF was floundering for both a sense of self and mission.<sup>46</sup> Similar to the American experience post-Vietnam War, such conditions resulted in extremely low morale, which had a corrosive effect on discipline.

Commenting on the relationship between morale and discipline, Pratt notes that the “will to obey” is one way that an army defines morale and that military forces have historically associated healthy morale with good discipline.<sup>47</sup> The ill-fated CA deployment to Somalia in 1993 aptly illustrates this morale-discipline linkage and how low morale directly led to a complete breakdown in discipline in at least one CA unit.

The tragic events in Somalia starkly demonstrate how a lack of discipline at the unit level can result in strategic and even political failure. History (and specifically CA history) has shown that poor discipline can lead to disobedience, disgraceful conduct and an overall reduced level of operational effectiveness, thereby compromising mission success and endangering lives. To that end, it is incumbent upon CA leadership to evaluate consistently the level of discipline as it is a direct indication of operational readiness and a critical enabler of mission success. Further, CA leadership must continually assess whether existing systems, policies and norms promote or hinder the requisite level of discipline within units. Qualitative assessment of the level of discipline is perhaps best gauged through consultation with CA unit command teams. Quantitative assessment, however, is less clear. The logical starting point for such assessment is the CAF military justice system—the formal tool for disciplinary enforcement. However, the

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<sup>46</sup>*Ibid.*, 122.

<sup>47</sup>William John Pratt, "Medicine and Obedience: Canadian Army Morale, Discipline, and Surveillance in the Second World War, 1939-1945" (PhD thesis, University of Calgary, 2015), 35.

current state of the military justice system calls into question its effectiveness as a tool in promoting good order and discipline within the CA.

## CHAPTER 2 THE SOLDIER AND THE STATE OF MILITARY JUSTICE

The profession of arms is a profession unlike any other. And one of the main attributes of a profession is the ability to objectively and fairly govern itself.<sup>48</sup> Discipline is one of the primary means by which such internal governance within the CA occurs. To achieve this internal governance, CA commanders have some leeway in how they discipline forces under their command to meet these standards. Formal discipline, however, is primarily achieved through the application of military law by the CAF military justice system. Credible institutional self-governance demands that there be a fair and objective system capable of promoting good order and discipline. Justice is the fair and transparent process through which disciplinary infractions are formally evaluated. Military justice, then, is a key tool in ensuring disciplined behavior within army units.

All Canadians are subject to the *Criminal Code of Canada* and other interrelated laws and acts. Violations of such laws are primarily processed through the civilian justice system. But the uniqueness of military operations requires that military professionals be subject to further regulations, thereby ensuring a higher standard of behavior. The civilian justice system, however, is unequipped (in terms of human resources and threshold knowledge) to administer proceedings related to breaches of the *Code of Service Discipline*. Furthermore, infractions that would not be considered offences under criminal law are far more serious under military law.<sup>49</sup> Insubordination or dereliction of duty, for example, are not punishable under the *Criminal Code of Canada*. Within a military context, however, such actions can egregiously compromise mission success and put lives

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<sup>48</sup>David J. Bercuson, "Up From the Ashes: The Re-professionalization of the Canadian Forces After the Somalia Affair," *Canadian Military Journal* 9, no. 3 (2009): 35.

<sup>49</sup>Brooke Claxton, *Notes on Military Law and Discipline for Canadian Soldiers*. 2nd (revised) Edition (Montreal: n.d., 1940), 15.

at risk. As such, the *Code of Service Discipline* contains additional rules that outline the unique behavioral standards required for a modern military force. One of the key attributes of the *Code of Service Discipline* is that it represents a uniform standard across the CAF and CA. While it is inevitable that each CA unit—beholden to its own organizational subculture—will generate its own unique disciplinary norms, the *Code of Service Discipline* remains a universally applicable rulebook by which all CA units must abide.

Given that military personnel are required to risk injury or death in the performance of their duties and given that the operational reality of military duty demands a higher standard of behavior than what would be expected of a civilian, a separate military-specific justice system is needed.<sup>50</sup> The need for a separate justice system to enforce disciplinary standards in the military has a history that dates back to the earliest organized military forces.<sup>51</sup> Furthermore, the Supreme Court of Canada has recognized the need for a separate and parallel system of justice to enforce disciplinary standards within the military.<sup>52</sup> The uniqueness of military service demands a custom military justice system.

The CAF military justice system is tailored to meet the unique requirements of the military profession. Specifically, the military justice system promotes the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency and morale.<sup>53</sup> Within the CA, discipline and justice are expected to work in tandem, thereby

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<sup>50</sup>“Canada's Military Justice System,” accessed 8 January 2018, <http://www.forces.gc.ca/en/news/article.page?doc=canada-s-military-justice-system/hnea75sh>.

<sup>51</sup>*The Code of Service Discipline and Me: A Guide to the Military Justice System for Military Members* (Ottawa: Office of the Judge Advocate General, n.d.), 1.

<sup>52</sup>“Canada's Military Justice System,” accessed 8 January 2018, <http://www.forces.gc.ca/en/news/article.page?doc=canada-s-military-justice-system/hnea75sh>.

<sup>53</sup>*Ibid.*

ensuring that deviations from universally accepted standards of military behavior are appropriately corrected. However, according to qualitative feedback from unit command teams across the CA, the military justice system is not achieving the desired disciplinary effect at the unit level.<sup>54</sup> This deficiency is primarily due to an overall lack of faith in the system's ability to deliver timely and appropriate justice.

### **A LACK OF FAITH IN THE SYSTEM**

The military justice system is the principal mechanism to enforce formally discipline within the CA and CAF writ large. Service offences—that is, breaches of the *Code of Service Discipline*—are tried by way of either summary trial or court martial. Former CAF JAG Major-General Cathcart explained the differences between the two:

Summary trials are prompt and fair trials presided by officers within an accused person's chain of command and are reserved for less serious offences involving less serious punishments... Court martials are trials before military judges who possess all the constitutional hallmarks of judicial independence.<sup>55</sup>

At present, the CAF military justice system, both at the summary trial and court martial level, is not an effective tool in enabling CA COs to enforce discipline within their units. In fact, statistics reveal that CA COs are relying on it less and less, thereby suggesting a lack of trust in its utility. As can be seen in Figure 2.1, there has been a 59% decrease in the number of summary trials held per year within the CA.

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<sup>54</sup>*Court Martial Comprehensive Review Interim Report* (Ottawa: Office of the Judge Advocate General, 2018).

<sup>55</sup>*Ibid.*

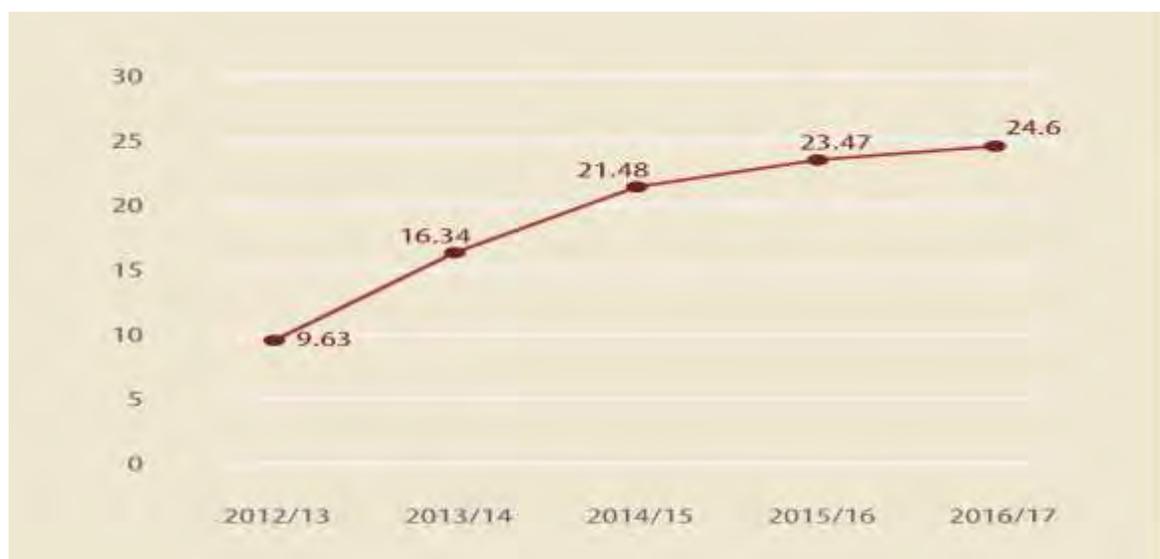


**Figure 2.1 -- Number of Summary Trials for the Canadian Army, the Royal Canadian Navy, the Chief of Military Personnel, the Canadian Joint Operations Command and the Royal Canadian Air Force**

Source: Cathcart, *2016-2017 Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2016 to 31 March 2017*, 2017, 26.

A few possible explanations account for such a dramatic drop in the number of summary trials. The relative strength of the CAF has remained relatively consistent over this five-year period, thereby eliminating population size as a possible factor. One possibility is that discipline within the CA vastly improved between 2012-2017. Regrettably, qualitative evidence suggests otherwise. General feedback from unit COs across the CA, as contained in the Court Martial Comprehensive Review Team (CMCRT) report, suggest

that there has not been a dramatic improvement in discipline over the last five years.<sup>56</sup> Another explanation for this drop is that many summary trials are resulting in a disproportionately high number of pre-trial charge disposals, thereby reducing the number of total trials. These disposals could be due to flawed investigations or other technicalities. At present, the Office of the JAG is investigating this trend and what corrective actions need to be taken.<sup>57</sup> The third possible explanation for the decline of summary trials in the CA is that more soldiers accused of a breach of conduct are electing trial by court martial in lieu of a summary trial. As can be seen from Figure 2.2, between 2012-2017 there has been a CAF-wide 2.5-fold increase in the number elections to court martial.



**Figure 2.2 – Percentage of Accused Electing Trial by Court martial**

Source: Cathcart, *2016-2017 Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2016 to 31 March 2017*, 2017, 17.

<sup>56</sup>*Court Martial Comprehensive Review Interim Report* (Ottawa: Office of the Judge Advocate General, 2018).

<sup>57</sup>Major-General B.B. Cathcart, *2016-2017 Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2016 to 31 March 2017* (Ottawa: Office of the Judge Advocate General, 2017).

This sharp decline in the number of summary trials combined with the high number of charge disposals and the dramatic increase in elections to court martial is deeply concerning. It suggests that small breaches of discipline are either untried or elevated to the court martial level.

Minor disciplinary breaches are best handled at the unit level, thereby ensuring the court martial system can administer timely justice for the major disciplinary breaches. The excessive length of the court martial process proves that the current court martial system is ill-suited and ill-equipped to handle minor disciplinary breaches. Furthermore, when elections are made (particularly for minor disciplinary breaches), CA COs lose their ability to administer any justice, thereby prohibiting timely punishment, absolution or general deterrence. Feedback from across the CA field force suggests that this occurs frequently. Living with the consequences of this reality, 2 Canadian Mechanized Brigade Group (2 CMBG) command teams, in particular, state that they simply see the system as broken from start to finish.<sup>58</sup> If the military justice system has fundamental deficiencies, then CA COs will justifiably tend to disregard it as a tool to enforce discipline within their units. Three fundamental issues, in particular, are eroding the effectiveness of the military justice system, thereby causing such a lack of faith in its utility: responsiveness of the system, general lack of chain-of-command influence and absence of a unit-controlled system of justice for minor offences.

### **MILITARY JUSTICE AT A CRAWLING PACE**

In order to be an effective tool, military justice must be swift and seen to be done fairly. At present, CA COs forcefully maintain that action must be taken very quickly in

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<sup>58</sup>*Court Martial Comprehensive Review Interim Report* (Ottawa: Office of the Judge Advocate General, 2018), 106.

the face of misconduct to maintain discipline.<sup>59</sup> They further suggest that within a matter of days, the potential impact of any disciplinary action taken will begin to decline dramatically.<sup>60</sup> The ideal scenario would see instances of misconduct dealt with in 14 days or less.<sup>61</sup> Furthermore, many CA COs assert that any action taken in respect of misconduct after 6 months is only capable of having a marginal effect on discipline.<sup>62</sup> In fact, in many cases, actions taken after 6 months will harm any potential disciplinary or deterring effect.<sup>63</sup> Corroborating this notion, Major-General Rouleau, former commander of Canadian Special Operations Command (CANSOFCOM) and now commander of the Canadian Joint Operations Command (CJOC), asserts that serious disciplinary breaches, which inherently require additional time for due process, must be processed within 6 months. For less serious matters, he suggested 7-14 days was optimal.<sup>64</sup> Delays beyond these timelines degrade any value to the chain-of-command for reinforcing discipline, efficiency and morale within their units.<sup>65</sup> Therefore, a direct relationship exists between time and disciplinary benefit. As time goes on, disciplinary value decreases.

In addition to having a damaging effect on discipline, untimely justice violates an existing legal imperative. In the case of *R. v. Jordan*, the Supreme Court of Canada ruled that a fundamental right of an accused person is to be tried within a reasonable time: “That decision created presumptive ceilings beyond which delay (measured from the time of charge to the actual or anticipated end of trial) is presumed to be unreasonable, unless

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<sup>59</sup>*Ibid.*

<sup>60</sup>*Ibid.*

<sup>61</sup>*Ibid.*

<sup>62</sup>*Ibid.*

<sup>63</sup>*Ibid.*

<sup>64</sup>*Ibid.*, 97.

<sup>65</sup>*Ibid.*

exceptional circumstances exist.”<sup>66</sup> For the CAF military justice system, the presumptive ceiling for trials by court martial is 18 months from the time of charge to the actual or anticipated end of trial.<sup>67</sup> But, as noted earlier, 18 months still represents too long of a time for military justice to serve its purpose. Satisfying the legal imperative in terms of judicial responsiveness would still fall short of achieving any disciplinary benefit.

Despite both the disciplinary and legal imperatives for swift justice, the military justice system is increasingly late in its responses. Among the primary factors contributing to this procedural slowness is that accused personnel are electing trial by court martial far more often than before. As noted earlier, election rates increased by a factor of 2.5 from 2012 to 2017. There are several logical reasons supporting this trend. First, while election is a fundamental right of the accused, there is an unsubstantiated belief that many are making the election with the hope that the charges will be dismissed long before a trial even begins. It is no secret that the court martial system has a backlog of cases and that the system may be unable to satisfy the 18-month deadline decreed in *R. v. Jordan*. Second, many soldiers are aware that a court martial consumes significantly more resources than a summary trial. By electing court martial, the tangible cost of justice (in terms of time, personnel, dollars and imposition on the unit) may not be worth the expense. And one can put a price tag on justice: the average all-inclusive cost of a court martial between 2012-2017 was \$48,966.<sup>68</sup> At a certain point (depending on the misconduct), the cost-to-benefit ratio ceases to serve the institution’s interests. In fact,

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<sup>66</sup>Major-General B.B. Cathcart, *2016-2017 Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2016 to 31 March 2017* (Ottawa: Office of the Judge Advocate General, 2017).

<sup>67</sup>*Ibid.*

<sup>68</sup>*Court Martial Comprehensive Review Interim Report* (Ottawa: Office of the Judge Advocate General, 2018), 209.

CMCRT consultations revealed that this factor may incentivize those responsible for discipline (namely CA COs) to deal with misconduct by “under-charging” in order to keep the charges at the summary trial level.<sup>69</sup> For example, a CO may choose to charge a soldier with quarrelling as opposed to assault—despite the fact that the particulars of the offence might warrant assault—so that the charge can be tried at the unit level. Third, a widely held perception exists amongst junior CAF members that an election to court martial will increase the odds of either the charges being dropped by a military prosecutor or a finding of not-guilty due to a technicality or clever legal defense.<sup>70</sup> After all, accused personnel are provided with defence counsel, free-of-charge, during a court martial. Fourth, despite the increased powers of punishment available to military judges, there is a belief that a court martial will yield a less severe sentence than what would have been received at a summary trial.<sup>71</sup> They would, after all, have military counsel advocating on their behalf and consulting with military prosecutors for joint sentencing recommendations to the military judge.

Election to court martial for the purpose of outwitting the system presumes a certain degree of cynicism on the part of the accused—a willful desire to undermine or outsmart the military justice system and an unwillingness to accept responsibility for their actions. And while these reasons are understandable and indeed cause judicial delays, the unresponsiveness of the system has more to do with its own systematic flaws than with soldiers trying to outfox it.

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<sup>69</sup>“Summary: Public Consultations,” accessed 2 December 2017, <http://www.forces.gc.ca/en/about-reports-pubs-military-law-court-martial-comprehensive-review/summary.page>.

<sup>70</sup>*Ibid.*

<sup>71</sup>*Ibid.*

The severe delays and systemic failings of the layers within the court martial system threaten the very purpose of having a separate military justice system. In 2007, the Bronson Consulting Firm was asked to do an independent review of the CAF military justice system. Instead of focusing on the accused, the *Bronson Report* criticizes the various actors in the system and blames them for carrying out their individual responsibilities as though the delay was not a problem.<sup>72</sup> Specifically, the report offers that Military Police spend far too long investigating straightforward cases. Furthermore, chains-of-command delay too long before referring charges to the Director of Military Prosecutions (DMP).<sup>73</sup> Once received, prosecutors spend inordinate amounts of time preparing lengthy written legal opinions to superiors justifying their decisions whether or not to proceed with a case.<sup>74</sup> Meanwhile, defence counsellors vigorously advance the interests of the accused. Diligent military judges will spend days deliberating a sentence, even in cases of a joint submission.<sup>75</sup> Finally, the *Bronson Report* argues that many investigators, prosecutors, defence counsellors and judges are overly meticulous in their approach, generally risk adverse and relatively inexperienced, all leading to an inability to make quick decisions.<sup>76</sup> Each participant in the system has the potential to delay the judicial process, thereby making the cumulative delay exceedingly long.

The *Bronson Report's* findings and conclusions are still extant in 2017. As can be seen in Figure 2.3 below, the average length of time for the entire court martial process is

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<sup>72</sup>Andrejs Berzins and Malcolm Lindsay, *External Review of the Canadian Military Prosecution Service* (Ottawa: The Bronson Consulting Group, 2008), 11.

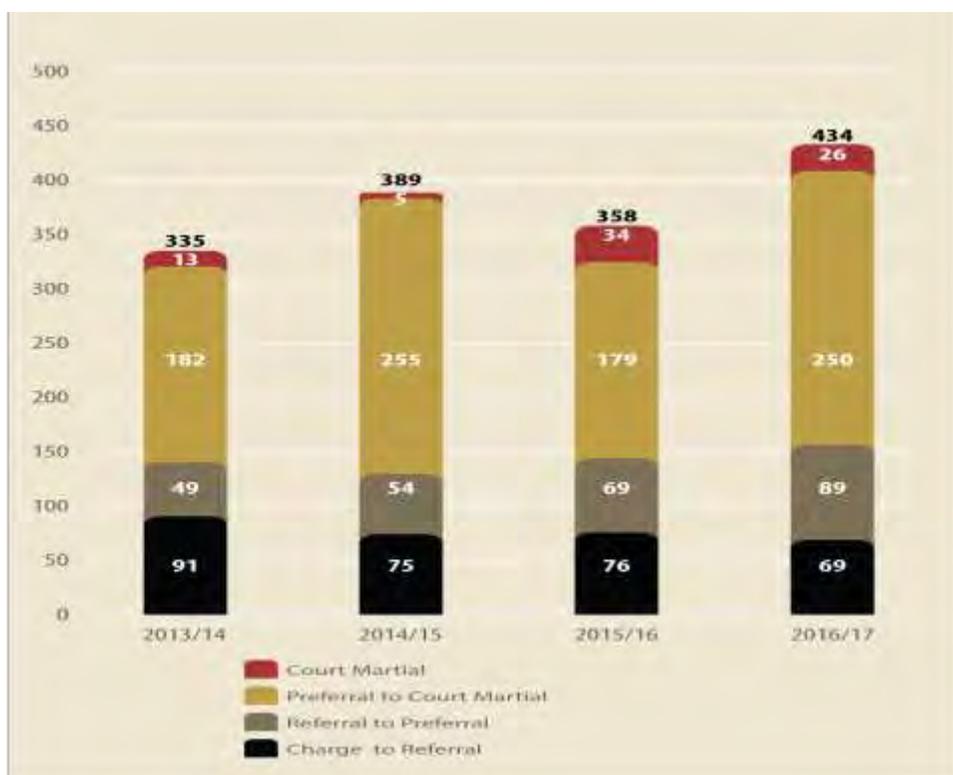
<sup>73</sup>*Ibid.*

<sup>74</sup>*Ibid.*

<sup>75</sup>*Ibid.*

<sup>76</sup>*Ibid.*

at least one year—twice as long as acceptable, except in extreme circumstances, for the system to provide meaningful disciplinary value.



**Figure 2.3 – Average Number of Days from Charge to Completion of Court martial**

Source: Cathcart, *2016-2017 Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2016 to 31 March 2017*, 2017, 26.

Further analysis of the data confirms that the delays are systemic across all stages of the court martial process. Delays at one step often exacerbate delays at subsequent steps.<sup>77</sup>

Delays seemingly spawn more delays.

The excessive length of time for the military justice system to function, particularly court martials, has severely reduced its value as a means of enforcing discipline within CA units. Much like in civilian courts, some accused personnel are actively playing the system, gambling that the charges will be dropped either due to

<sup>77</sup>*Ibid.*

delays or cost-to-benefit reasons. Many CA COs, as a result, have lost trust in the system. Lengthy and cumbersome, the military justice system leaves very little room for meaningful chain-of-command influence.

### **OWNERSHIP OF THE DISCIPLINARY PROCESS**

COs are carefully appointed men and women who have been selected and trained to exercise command. Furthermore, they are buttressed by a sergeant-major—the senior soldier within a regiment or battalion—who provides sage counsel based on years of experience. A CO, among other things, is responsible for the maintenance of discipline and efficiency within his or her unit, thereby ensuring readiness for war.<sup>78</sup> This is the role for which they were so carefully appointed. The Queen’s Rules and Regulations (QR&Os) direct that “an officer shall promote the welfare, efficiency and good discipline of all subordinates.”<sup>79</sup> Further, as stipulated in the Chief of Defence Staff (CDS) guidance to COs, “the responsibility to maintain discipline falls directly on a unit CO.”<sup>80</sup> “The CO”, the guidance continues, “is at the heart of the entire system of discipline.”<sup>81</sup> But when a breach of the *Code of Service Discipline* occurs and a CO chooses to exercise his or her powers of punishment, the soldier must be offered an election (for electable offences). So while COs are at the heart of the system and are responsible for enforcing discipline and ensuring operational readiness, disciplinary decisions can be bypassed by the most junior soldiers under their command. Given the prominence the CDS places on the CO’s role in maintenance of discipline, it is only fitting that CA COs should maintain

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<sup>78</sup>Brooke Claxton, *Notes on Military Law and Discipline for Canadian Soldiers*. 2nd (revised) Edition (Montreal: n.d., 1940), 8.

<sup>79</sup>Queens’ Regulations and Orders for the Canadian Forces, 2008, 4.02.

<sup>80</sup>General Rick J. Hillier, *Chief of the Defence Guidance to Commanding Officers* (Kingston: n.d., 2007), 32.

<sup>81</sup>*Ibid.*, 34.

a direct link to the disciplinary process so as to ensure the desired impact on unit effectiveness as a whole. After all, discipline is supposed to belong to the chain-of-command, not courts and lawyers.<sup>82</sup> While true in theory, it is not the reality in which present COs find themselves. Evidence suggests that the figurative and literal distance between CA COs and the military justice system, at both the summary trial (less so) and court martial levels (more so), is wide and getting wider.

With respect to summary trials, CA COs theoretically maintain a fair amount of control over the process. By their very nature, summary trials serve as a formal means for a unit CO (or delegated officer) to consider all facets of a particular case and make a sound judgment. Through consideration of evidence and making a ruling, justice is served. Through sentencing, the key goals of discipline are achieved—those found guilty of misconduct are duly punished and the publicity of the trial promotes general deterrence within the unit. COs, however, are increasingly losing the ability to keep the disciplinary process and decision-making authority at the unit level. First, as noted earlier, an alarming trend toward election to court martial automatically blocks the CO from controlling the disciplinary process. In some instances, this situation is completely justifiable. In others, particularly when the misconduct is regarding minor offences, this loss of unit-level ownership of the judicial process is highly detrimental to unit discipline and morale.

Second, legal advice is given more precedence than COs' intuition. It is mandatory for COs (or delegated officers) to receive both pre-charge and pre-trial advice prior to a summary trial taking place. This legal advice is intended to reassure presiding officers that the particulars of a charge are indeed present and that judicial procedures are

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<sup>82</sup>*Court Martial Comprehensive Review Interim Report* (Ottawa: Office of the Judge Advocate General, 2018), 99.

being followed in accordance with military law. Recently, during the CMCRT's consultation process, CA COs expressed extreme frustration with the process.<sup>83</sup> After receiving legal advice, they decide that charges (due to the nature of the offence) ought to proceed directly to court martial, only to have a Director of Military Prosecutions (DMP) prosecutor overrule and decide to reduce the charges or not proceed at all.<sup>84</sup> In essence, this decision is made by an officer of inferior rank and far, figuratively speaking, from the unit where the misconduct took place (and where the people affected by it remain).<sup>85</sup> Despite the fact that the alleged misconducts were grave enough to merit trial by court martial, the prosecutors have the ability to quash the cases if they are deemed unwinnable, thereby potentially undermining the CO's initial decision. In these cases, neither justice nor discipline are served. Further, the CO's judgment is publicly undermined, which degrades his or her positional power.

Adding insult to injury, many CA COs have indicated that they are not informed of the DMP course of action until after the decision is made and a letter has been sent to the accused.<sup>86</sup> Fortunately, Bill C-71 proposes a change to section 165.13 of the *Code of Service Discipline*, which would mandate DMP to inform COs, in writing, of the rationale behind their decision not to proceed.<sup>87</sup> Unfortunately, even if Bill C-71 successfully passes, COs will still remain somewhat powerless in the process. And while both *CDS Guidance to COs* and the *QR&Os* explicitly claim that COs own the disciplinary process,

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<sup>83</sup>*Ibid.*

<sup>84</sup>*Ibid.*, 104.

<sup>85</sup>*Ibid.*

<sup>86</sup>*Ibid.*

<sup>87</sup>Parliament of Canada, "Bill C-71 First Reading," accessed 19 February 2018, <http://www.parl.ca/DocumentViewer/en/41-2/bill/C-71/first-reading/page-24#1>.

it is hard to find any evidence within the present state of the military justice system that suggest this is actually the case.

In particular, CA COs are highly critical of their inability to influence the court martial process. In the 2007 *Bronson Report*, the consultants were left with the impression that in order to remove any perception of bias, COs have become completely detached from the court martial system.<sup>88</sup> Five years later, the situation had only worsened. During the 2012 Military Justice Stakeholder Reviews, the COs indicated that they felt completely “out-of-the-loop”. They believed that they had sacrificed all control of disciplinary matters as soon as they were passed to the DMP.<sup>89</sup> COs have neither ownership nor ranking decision-making authority when it comes to formal disciplinary procedures. A collective statement from the COs of 2 CMBG aptly summarizes the shared frustration with the court martial system:

If the chain-of-command cannot, as it cannot now: 1) meaningfully influence the process, including proceeding to the trial; 2) ensure key military matters or facts are submitted as evidence and given weight; or 3) meaningfully impact submissions and outcomes (especially in cases of joint submissions) on sentencing, then they failed to see the utility in having a military tribunal at all.<sup>90</sup>

Despite having intimate knowledge of the accused’s service history as well as the effect the alleged misconduct is having on the unit, COs, unless called as witnesses, are reduced to voiceless spectators.

To avoid any hint of bias or prejudice, strong advocacy for increased CO influence in the application of military justice cannot come at the expense of fairness and

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<sup>88</sup> Andrejs Berzins and Malcolm Lindsay, *External Review of the Canadian Military Prosecution Service* (Ottawa: The Bronson Consulting Group, 2008), 10.

<sup>89</sup> *Court Martial Comprehensive Review Interim Report* (Ottawa: Office of the Judge Advocate General, 2018), 70.

<sup>90</sup> *Ibid.*, 103-104.

impartiality. In *Sword and Scales*, William Generous Jr discusses the harsh and inconsistent punishments resulting from improper command influences.<sup>91</sup> This type of influence would undermine the credibility and consistency of the system writ large, which would give more legitimacy to post-trial appeals. A balance of justice for the accused needs to be achieved while simultaneously ensuring that the requisite punitive and deterring products of the military justice system are realized. But if CO vendettas and egregious abuses of punitive authority are really of concern, then one must seriously question the caliber of officers being appointed as unit COs. If COs can be entrusted with the lives of hundreds of soldiers along with millions of dollars of sensitive equipment, then they can surely be entrusted with increased ownership of the disciplinary process. The first step to increased ownership could be the institutionalization of a completely unit-owned tier of justice.

#### **A MISSING TIER OF MILITARY JUSTICE IN THE CANADIAN ARMY**

A lack of trust, responsiveness and influence are not the sole reasons why CA COs might be hesitant to employ the military justice system. Often times, a disciplinary infraction is relatively minor and the weight of the formal military justice system is not required. Furthermore, except in cases of minor punishments, when an accused CAF member is found guilty, the charge is permanently noted on the soldier's personal file. This "black mark" recorded entry will follow a member for the duration of his or her service in the CAF and can adversely affect future career progression. On one hand, CA COs must ensure that justice is served, thereby achieving sufficient punishment for the guilty party and overall general deterrence. On the other hand, a CA CO may not wish to permanently scar a soldier's career. And while a note in a soldier's personal file is not a

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<sup>91</sup>William Generous Jr, *Sword and Scales* (Washington: National University Publications, 1973), 15.

direct punishment, per se, it has indirect punitive consequences that carry forward long after the trial concludes. It should be noted that among the basic principles in sentencing is that a punishment imposed must be proportional to the seriousness of the offence.<sup>92</sup> As such, there may be cases whereby the mere act of proceeding by summary trial—with its forever-lasting scar on a soldier's file—is too punitive and therefore disproportional to the seriousness of the offence.

The judicial gap pertains between inaction and summary trial. Other like-minded militaries have noticed this gap and have formalized a third tier of military justice. The United Kingdom (UK) Armed Services employs a process known as Minor Administrative Action (MAA), a disciplinary system for minor infractions apart from the military criminal systems.<sup>93</sup> Tim Dunne explains the MAA system further:

A service member who is a few minutes late for duty or provides poor performance in a routine task, the usual errors associated with young service members, are handled formally by a presiding officer...[Examples of punishment include] reduced shore leave or extra guard duty. MAAs are not recorded on an individual's service record but are recorded within the unit. Junior commanders deal with the lowest level of misconduct. This has resulted in halving the number of summary dealings in the army, empowering junior leaders and improving discipline without resorting to a more formal tribunal.<sup>94</sup>

Similarly, the United States Navy (USN) employs a system known as Extra Military Instruction (EMI). EMI acknowledges that some infractions are relatively minor and do not merit formal military justice.<sup>95</sup> Instead, the JAG Manual (JAGMAN) formally codifies some punitive powers that COs can use at their discretion and without formal due

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<sup>92</sup>*Military Justice at the Summary Trial Level* (Ottawa: Office of the Chief of Defence Staff, 2018), 14.2.

<sup>93</sup>Tim Dunne, "Charter Rights are Ignored in Military Justice System," accessed 12 November 2017, <http://thechronicleherald.ca/opinion/1503452-charter-rights-are-ignored-in-military-justice-system>.

<sup>94</sup>*Ibid.*

<sup>95</sup>*Manual of the Judge Advocate General (JAGMAN)* (Washington: Office of the Judge Advocate General, 2008).

process. The JAGMAN cautions, however, that EMI is intended to supplement the military justice system, not a replace it.<sup>96</sup> US military lawyer Lonergan warns: “Truly grasping EMI requires an honest recognition that some users may abuse this tool as a way to punish without due process.”<sup>97</sup> EMI provides USN and US Marine Corps COs the ability to discipline formally sailors and soldiers in a tailored and responsive manner.

The most mature example of a third tier of justice is the Australian Defence Force’s (ADF) Discipline Officer (DO) Scheme. The DO Scheme, as explained in the ADF Military Justice Manual, was established to provide an alternative for dealing with more minor disciplinary infringements. The DO Scheme operates to dispose quickly of minor disciplinary infringements committed by junior members of the ADF.<sup>98</sup> The DO Scheme has no trial. Instead, the soldier accused of a disciplinary infraction admits to the wrongdoing and elects to be dealt with by a discipline officer.<sup>99</sup> The graphic below shows how the DO Scheme is integrated within the ADF Justice System:

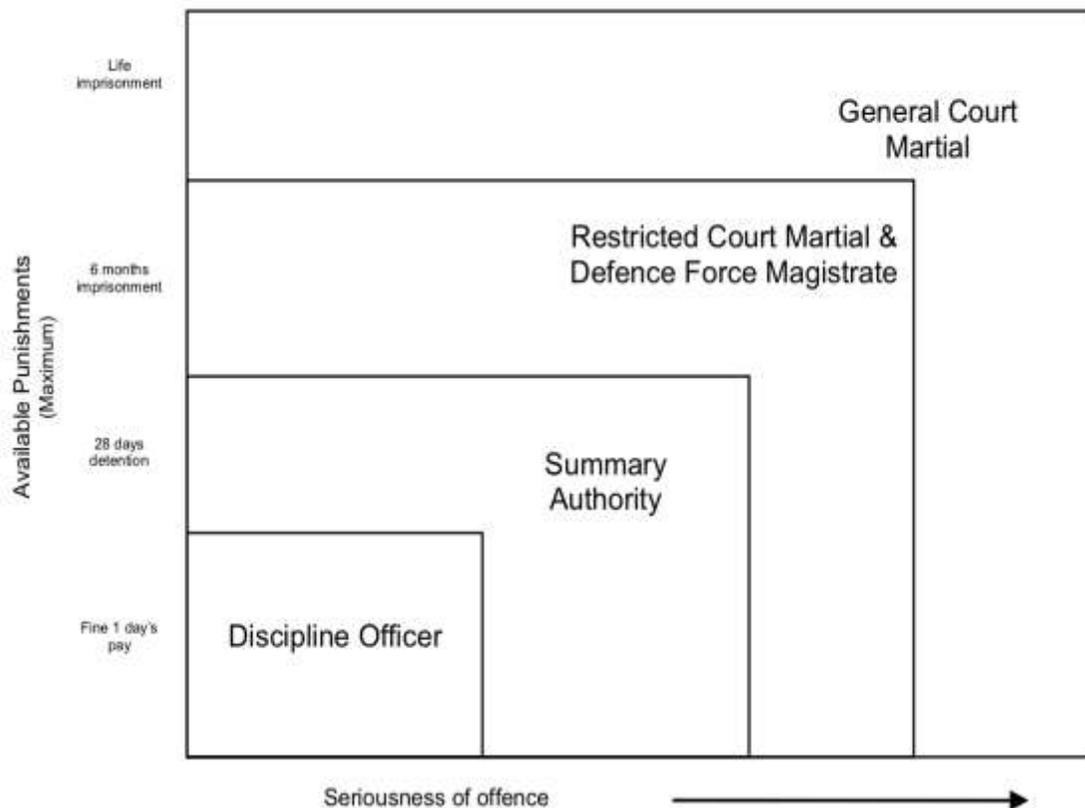
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<sup>96</sup>*Ibid.*, 1.9.

<sup>97</sup>Justin P. Lonergan, “A Fresh Look at Extra Military Instruction and the Need for a Steady Legal Role,” *The Reporter* 4, no. 2 (n.d.): 15.

<sup>98</sup>Director-General ADF Legal Services, “Response Systems to Adult Sexual Assault Crime Panel,” accessed 12 December 2017, [http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/australian-mj-sys/02\\_Overview\\_of\\_the\\_Australian\\_Military\\_Discipline\\_System.pdf](http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/australian-mj-sys/02_Overview_of_the_Australian_Military_Discipline_System.pdf), 4.

<sup>99</sup>Judge Advocate General, *Defence Force Discipline Act 1982: Report for the Period 1 January to 31 December 2014* (Canberra: Department of Defence, 2015), F1.



**Figure 2.4 -- The Relative Breadth of Jurisdiction of the Discipline Officer Scheme and Service Tribunals**

Source: *Defence Force Discipline Act 1982: Report for the Period 1 January to 31 December 2014*, 2015, 4.

The DO Scheme has proven to be a successful tool for the ADF. In 2014, the Australian Army used the DO Scheme to resolve 2,999 minor disciplinary issues.<sup>100</sup> Normally, such cases would have otherwise burdened the summary trial system and potentially the court martial system. And what the DO Scheme lacks in powers of punishment, it makes up for in responsiveness and CO influence—the very issues that currently plague the administration of discipline within the CA. The DO Scheme allows ADF COs to own fully a portion of the judicial process. Its key distinguishing feature is that offenders can voluntarily choose to be administered by the DO Scheme. Much like

<sup>100</sup>*Ibid.*, H1.

EMI, the DO Scheme could be abused or inappropriately employed, thereby making it an unfair process. Such concerns are mitigated by the fact that soldiers choose whether or not they want to be administered by the DO Scheme. Such concerns are further mitigated by ensuring that appropriately competent and capable officers were appointed into command billets.

Unlike the UK, US and Australia, the CA lacks a third tier of military justice. As a result, CA COs are faced with three options: 1) refer matters to the current military justice system—a system that has proven to be both unresponsive, unreliable and potentially counterproductive, 2) do nothing, 3) attempt to administer localized disciplinary measures (albeit without the codified protection that the EMI system offers). While this option may achieve the desired disciplinary effect, it will also likely be misinterpreted as workplace harassment, at least in today's context. Further, without codified guidance such as that which is offered by the EMI system, each CA CO may be imposing their own brand of local discipline, thereby creating a very inconsistent system across the CA.

Summary justice has its critics. Some, such as retired CAF logistics officer-turned lawyer and adjunct professor of law at the University of Ottawa Law School Michel Drapeau, believe that lack of due process renders the system unconstitutional and therefore has no place in a modern military. He candidly opined: “Although many western democracies and our allies have abandoned this medieval form of ‘justice,’ Canada [remains]...in the company of Pakistan, Sri Lanka, India, Bangladesh and Nepal.”<sup>101</sup> Notwithstanding his pejorative tone toward some allied countries listed above, Drapeau neglects to mention that Canada is also in the company of the United States, the

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<sup>101</sup>Tim Dunne, “Charter Rights are Ignored in Military Justice System,” accessed 12 November 2017, <http://thechronicleherald.ca/opinion/1503452-charter-rights-are-ignored-in-military-justice-system>.

UK and Australia. He concludes that summary justice should no longer be tolerated or allowed to continue.<sup>102</sup> By making such a bold conclusion, Drapeau is failing to appreciate soldier culture and the legitimate need for a responsive disciplinary process. The unique needs of the profession of arms requires a unique system of justice—an idea formally recognized by Canadian courts: “The highest courts in the country have acknowledged the existence of and the requirement for military justice that is differentiated from civilian jurisprudence, i.e., that is peculiar to the military profession.”<sup>103</sup> This is not to say that reform of the current system is unnecessary. The system is far from perfect. But what Drapeau fails to consider is that while an army serves modern society, it must operate within its own society—a society where people sacrifice certain rights and freedoms for the collective benefit of the institution and, by extension, the nation. Such a society—a society that still shares aspects of its medieval equivalent (discipline as means of enabling sacrifice, manoeuvre and standards of behaviour)—needs a formal military justice system to administer discipline.

### **ARMY INJUSTICE**

An effective military justice system is essential for the credible enforcement of discipline in the CA. The current system is both inefficient and ineffective, thereby discouraging CA units to embrace it as a disciplinary tool. The yearly decline in summary trials within the CA over the last five years is indicative of either misuse of the system (accused personnel electing court martial for minor offences) or disuse of the system (COs primarily relying on non-judiciary tools for discipline). The unresponsiveness of the system, the inability for the chain-of-command to exercise influence and a lack of a third

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<sup>102</sup>Michel Drapeau and Giles Létourneau, *Behind the Times: Modernization of Canadian Military Criminal Justice* (Ottawa: Giles Létourneau and Michel Drapeau, 2017).

<sup>103</sup>Chris Madsen, *Military Law and Operations* (Toronto: Thomson Reuters Carswell, 2011), 2-1.

tier prevent the overall military justice system from reaching its full potential. These factors undermine the positional power of a CA CO, which ultimately reduces a CA unit's efficacy. Sun Tzu noted millennia ago: "If you...are unable to make your authority felt,...unable to enforce your commands and incapable...of quelling disorder, then your soldiers must be likened to spoiled children; they are useless for any practical purpose."<sup>104</sup> The raison d'être of the military justice system needs to be centered upon empowerment of the CO and enabling his or her ability to maintain good order and discipline within the unit. The most recent JAG Annual Report, however, acknowledges that the system is not working as it should. While it is an aggravating factor, one cannot blame solely the military justice system for the current state of discipline and disciplinary ownership within the CA. Over the last several decades, social and political forces have idealized civil liberties, personal freedoms and objection to authority. While not necessarily bad for the average Canadian citizen, such ideations have eroded the unique soldier culture that distinguishes an army from civilian society.

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<sup>104</sup>Sun Tzu, *The Art of War*, ed. James Clavell (New York: Bantam Doubleday Dell Publishing Group Inc., 1983), 54.

### CHAPTER 3 SERVICE BEFORE SELF OR SELFISH SERVICE

An army must always act in accordance with the values of the country it serves. The CA—a national institution and one of the most tangible instruments of foreign policy—is expected to reflect the very best of Canadian society. “In a healthy democracy,” writes Donna Winslow, “it is vital that the armed forces do not remain too far apart from the society they are charged to defend.”<sup>105</sup> Discipline is intentionally embedded into army culture. The same cannot be said for Canadian culture writ large. This cultural disparity is not without reason. Military service—particularly in the army—is difficult, dangerous, demanding and often uncomfortable.

The soldiers who voluntarily choose to embrace such a profession are indeed an army’s greatest asset. Conversely, certain undisciplined soldiers who undermine the cohesion throughout the ranks are an army’s greatest liability. Several recent events tragically illustrate this point. From 2003-2004, members from the US Army routinely ridiculed, demeaned and tortured detainees at the Abu Ghraib prison in Iraq.<sup>106</sup> In 2003, members of the UK Army operating a military detainment facility tortured and killed Baha Mousa, an Iraqi citizen.<sup>107</sup> In 1993, members of the Canadian Airborne Regiment tortured and killed for sport 16-year-old Shidane Arone, a Somali boy, for the crime of breaching the military compound to steal bread.<sup>108</sup> Such instances are stark reminders as to what can happen when undisciplined soldiers’ and their rogue values deviate from those of the society they serve. Army discipline is the means by which soldiers are held to

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<sup>105</sup> Donna Winslow, "Canadian Society and its Army," *Canadian Military Journal* (2004): 21.

<sup>106</sup> CNN Library, “Iraq Prison Abuse Scandal Fast Facts,” accessed 12 December 2017, <https://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html>.

<sup>107</sup> Rachel Stevenson and Matthew Weaver, “Timeline: Baha Mousa Case,” accessed 19 February 2018, <https://www.theguardian.com/uk/2008/may/14/mousa.timeline>.

<sup>108</sup> David J. Bercuson, “Up From the Ashes: The Re-professionalization of the Canadian Forces After the Somalia Affair,” *Canadian Military Journal* 9, no. 3 (2009): 31.

certain standards of professional behavior. This feat, however, is not easy. Army culture espouses the idea of service toward one another and the institution above oneself. In *War Made New*, Max Boot goes one step further and distinguishes soldiers from warriors and the importance of the former: “The two categories are not mutually exclusive, because even modern society tries to cultivate warrior virtues such as courage, honor, loyalty and strength. The difference lies in discipline and cohesion: Soldiers have it, warriors do not.”<sup>109</sup> Unlike warriors, who have historically fought alone and typically in pursuit of personal glory, soldiers are supposed to stay in ranks, follow orders and complete their assigned tasks no matter how inglorious.<sup>110</sup> Allowing for the additions of morality, ingenuity and mission command, Boot’s characterization of army culture is still accurate for a modern army.

Soldiering, unlike any other profession, is a perpetual management of cognitive dissonance. In modern western armies, soldiers must simultaneously be both humane yet violent; friendly yet fierce; tenacious yet compassionate. They must be ready to take the life of a foe, only to work tirelessly to preserve that same life an instant later. Soldiers must grapple with their internal instincts of self-preservation while simultaneously acting in a manner that may demand the ultimate sacrifice. Reconciling this dissonance and managing the complex emotions that emanate from such a milieu requires the unique disciplinary environment that only army culture can provide. Army culture—and the group identity that it engenders—serves as a tool in regulating behavior within CA units.

CA COs need to be empowered to create and shape army culture within their units, thereby enabling them to build the group identity necessary for an effective,

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<sup>109</sup>Max Boot, *War Made New: Weapons, Warriors and the Making of the Modern World* (New York: Penguin Group (USA) Inc., 2006), 59.

<sup>110</sup>*Ibid.*

cohesive and disciplined fighting force. This requirement will not be without challenge as the CA responds to the social and cultural forces of a changing society—a society that is more individualistic, litigious and egalitarian.<sup>111</sup> These pressures complicate the CA's ability to both maintain a disciplinary culture while simultaneously growing in key demographics (young, capable, culturally diverse, educated and female people).

### **INDIVIDUAL RIGHTS AND THE COST OF JOINING THE TRIBE**

A disciplined army places the needs of the institution above the needs of the individual. The chasm between Canadian and CA cultures exists by design. Winslow highlights the difference in cultures that new soldiers face when they leave the familiarity and comfort of modern society: “Coming from civilian society that elevates the individual, recruits are now in a world where the institutional value of the group is supreme...The military does things quite deliberately to intensify the power of group pressure within its ranks.”<sup>112</sup> And while Canadian and CA cultures are not mutually exclusive, they certainly are not and cannot be one in the same. This point was stressed during the landmark *R. v. Généreux* trial where the presiding judge formally asserted that the military is something of its own society that exists within the greater one.<sup>113</sup> Highlighting the importance of the unique military norms, the judge continued: “while ultimately it must adhere to the expectations and carry out the policies of the civilian world, like any other society it entails a certain number of traditions, rules and taboos which are not within the normal ken of outsiders.”<sup>114</sup> To be clear, these traditions are not all restrictive or punitive. Unparalleled pride, a sense of belonging and a life of adventure

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<sup>111</sup>Donna Winslow, "Canadian Society and its Army," *Canadian Military Journal* (2004): 15.

<sup>112</sup>Donna Winslow, "Misplaced Loyalties: The Role of Military Culture in the Breakdown of Discipline," *Journal of Military and Strategic Studies* 6, no. 3 (2004): 4.

<sup>113</sup>Chris Madsen, *Military Law and Operations* (Toronto: Thomson Reuters Carswell, 2011), 2-8.

<sup>114</sup>*Ibid.*

are some of the unique perks that draw people into the army tribe. But joining the tribe comes with a price. Members must acknowledge that their own individual liberties become secondary to institutional effectiveness. Robert Sherrill highlights the differences:

The civilian ideal has always been maximum freedom, restricted by law only so far as is necessary to permit others equal maximum freedom; the military ideal has been just the opposite—maximum restriction by law, with only so much freedom as is necessary to encourage re-enlistment and prevent a harmful slump in morale.<sup>115</sup>

But what happens when the distinction between military and civil society begins to erode? Or, as David Bercuson asks, how can discipline be maintained if soldiers actually have exactly the same rights as all other citizens?<sup>116</sup> How does the CA operate when, under the guise of equitability, society demands that the CA respect all individual rights and freedoms, to the peril of institutional effectiveness and cohesion? The CA finds itself in such a position, prompting one to question whether this evolution is detrimental to the CA. And while warfighting still governs the core beliefs and values that define CA culture, this ethos does not resonate well with post-modern Canadian society.<sup>117</sup> Canada proudly showcases its commitment to respecting the individual rights and freedoms of all its citizens. *The Constitution Act of 1982 (The Canadian Charter of Rights and Freedoms)* codifies these rights and guarantees them for all Canadians—soldiers and civilians alike. In fact, several court judgments reinforced the notion that soldiers enjoyed the same rights, protections and fundamental freedoms under *The Charter* as other citizens.<sup>118</sup> These fundamental freedoms include freedom of thought, expression, belief,

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<sup>115</sup>Robert Sherrill, *Military Justice is to Justice as Military Music is to Music* (New York: Harper & Row, 1970), 68.

<sup>116</sup>David J. Bercuson, "Up From the Ashes: The Re-professionalization of the Canadian Forces After the Somalia Affair," *Canadian Military Journal* 9, no. 3 (2009): 34.

<sup>117</sup>Donna Winslow, "Canadian Society and its Army," *Canadian Military Journal* (2004): 21.

<sup>118</sup>David J. Bercuson, "Up From the Ashes: The Re-professionalization of the Canadian Forces After the Somalia Affair," *Canadian Military Journal* 9, no. 3 (2009): 34.

opinion, peaceful assembly, association and liberty.<sup>119</sup> But such individual freedoms become less fundamental in an environment where the team matters more than the individual.

Where Canadian culture focuses on the rights and freedoms of the individual, CA culture must focus on personal sacrifice and an overall belief in service before self. This sacrifice includes the abdicating of many fundamental freedoms. Upon enlistment, soldiers surrender a certain degree of freedom of choice and control over their own persons.<sup>120</sup> For example, expressed thoughts, beliefs and opinions that are inconsistent with established military ethos are proscribed.<sup>121</sup> CA personnel are also prohibited from associating themselves with any group or cause that would bring discredit to the CA or any of its members.<sup>122</sup> They are also prevented from forming an association or union. At certain times, soldiers will also sacrifice their right to liberty, either for punitive or duty reasons. Additionally, in accordance with QR&O 20.01, soldiers are prohibited from using drugs and other controlled substances which may impair normal psychological or physical functioning.<sup>123</sup> None of these prohibitions are unnecessarily harsh or excessive, particularly given the gravity of the consequences. The abhorrent behavior of the CAR in 1993 or, more recently, the chauvinism demonstrated by the five so-called *Proud Boys* (albeit Royal Canadian Navy personnel) illustrate why these prohibitions need to exist within the professional military environment.

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<sup>119</sup>“Constitution Act, 1982: Part 1 - Canadian Charter of Rights and Freedoms,” accessed 1 February 2018, <http://laws-lois.justice.gc.ca/eng/Const/page-15.html>.

<sup>120</sup>Chris Madsen, *Military Law and Operations* (Toronto: Thomson Reuters Carswell, 2011), 4-3.

<sup>121</sup>*CDS Direction to Professional Military Conduct* (Ottawa: CANFORGEN 016/18, 18 Feb 18).

<sup>122</sup>*Ibid.*

<sup>123</sup>Queens’ Regulations and Orders for the Canadian Forces, 2008, 20.01.

The modern citizen soldier increasingly desires both the pride of joining the tribe along with all the rights and freedoms enjoyed by his or her civilian counterpart. This trend was slow, steady and entirely predictable. The period between 1960 to 1980 was characterized by extremely progressive politics and societal change with a palpable shift from *deference* of authority to *defiance* of authority.<sup>124</sup> While not necessarily bad for Canadian society writ large, questioning of authority does impair the CA's ability to fulfill its warfighting mandate. This trend sees each successive generation of CA recruits become more and more apathetic to the fundamental army values of discipline and obedience to authority. Lawful and ethical commands are no longer sufficient. Instead, commands must be accompanied by explicitly explained context and purpose, which is not always possible within the CA operating environment.

This trend severely complicates a CA CO's ability to maintain a healthy degree of discipline at the unit level. CO's can no longer assume that soldiers are willing to place the institution's needs above their own to the same degree as generations past. Today's soldiers, after all, are being recruited from a more vibrant, educated and sophisticated society.<sup>125</sup> Furthermore, social media allows for an unprecedented degree of information sharing. Unlike previous generations, soldiers are increasingly aware of their rights and freedoms guaranteed under *The Charter* and they are willing to use this knowledge to engage lawyers and challenge military authority, rules and regulations. The CA cannot create disciplined warfighting forces—forces whose strength depends upon service before self—if soldiers are unwilling to sacrifice some individual rights and freedoms. Success of army operations demands that the needs of the tribe supersede the needs of the

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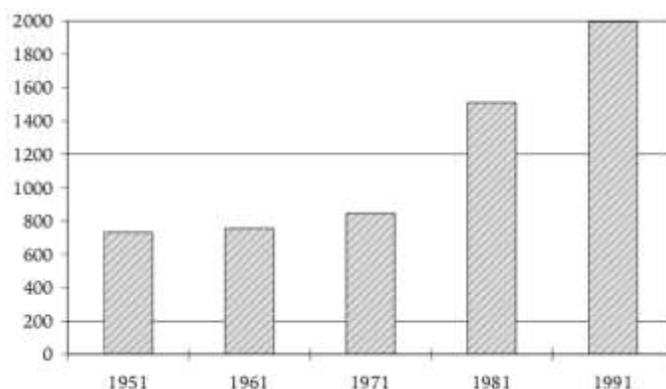
<sup>124</sup>David J. Bercuson, "Up From the Ashes: The Re-professionalization of the Canadian Forces After the Somalia Affair," *Canadian Military Journal* 9, no. 3 (2009): 34.

<sup>125</sup>*Ibid.*

individual and that lawful and ethical orders be followed obediently. Predictably, this trend toward individualism and its clash with army restrictiveness is well past the point of inconvenience and is increasingly the subject of litigation.

### **EQUAL JUSTICE FOR ALL**

Excessive litigation can cripple an organization. Canadian society is trending towards overuse of litigation as a means of resolution. In a sense, a liberalization of the rules in both Canada and the United States has created a litigious culture whereby lawyers and clients are incentivized.<sup>126</sup> This trend has led, writes legal expert Walter Olson, to much more litigation.<sup>127</sup> This assertion is somewhat corroborated by the dramatic increase in the number of lawyers per capita.



**Figure 3.1 -- Lawyers per million population, 1951 to 1991**

Source: Easton, S.T., *Law and Markets: Is Canada Inheriting America's Litigious Legacy?*, 1991, 77.

While litigation can provide a more fulsome and comprehensive review of a case, it can also be costly and lethargic. Among the fundamentals of a rights-based criminal justice system is the presumption of innocence until guilt is proven. The onus, then, lies with the

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<sup>126</sup>Walter Olson, "How America Got Its Litigation Explosion: Why Canada Should Not Consider Itself Immune," in *Law and Markets: Is Canada Inheriting America's Litigious Legacy?*, ed. John Robson and Owen Lippert (Vancouver: The Fraser Institute, 1997), 22.

<sup>127</sup>*Ibid.*

prosecution to prove convincingly the merits of a case. And while the military justice system is predicated upon this same fundamental, securing a conviction is far less onerous. Summary justice, for example, does not include the use of lawyers during the trial. Furthermore, judgment and sentencing are determined by a military commander or a delegated officer of his or her choosing.

The military justice system serves the unique needs of the military. Over the last few decades, however, the distinction between military needs and those of Canadian society have eroded mainly because of an increased emphasis on individual rights.<sup>128</sup> Furthermore, *The Charter* has certainly increased soldiers' awareness of the legal remedies available in seeking redress from military decisions.<sup>129</sup> These legal remedies include the use of civil litigation as means of resolution—even for trivial or petty breaches of the *Code of Service Discipline*, which could easily be resolved at the summary trial level. This eventuality is deeply concerning for the CA. While the civil justice system protects the rights of the individual, it has very little concern for the legitimacy of the CA as an institution. As noted by legal expert David Schlueter, “It will be a grave error if by negligence we permit the military law to become *emasculated* by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.”<sup>130</sup> This emasculation has the effect of quashing any disciplinary effect of military justice. As an extreme counterargument, some might argue that the military justice system should be solely

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<sup>128</sup>Michel Rossignol, *National Defence Act: Reform of the Military Justice System* (Ottawa: Library of Parliament, 1997), 6.

<sup>129</sup>Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* (Vancouver: UBC Press, 1999), 133.

<sup>130</sup>David A. Schlueter, “The Military Justice Conundrum: Justice or Discipline,” *Military Law Review* 215 (2013): 33.

concerned with maintenance of discipline and should not be subject to *The Charter*.<sup>131</sup> Such a system, however, would likely be unwelcome to civilian legal norms and current Canadian culture. The obvious flaw is that such a policy would alienate the military from the society it is charged to defend.<sup>132</sup> And a military that is alienated from its own society is fraught with risk.

While exemption from *The Charter* represents one extreme, there are others, such as Michel Drapeau, who argue for a complete civilian administration of the military justice system on a UK model of judge advocates. He advocates for civilianization of the military justice system, thereby completely removing chain-of-command influence from the process.<sup>133</sup> This modernization of the system would permit soldiers accused of a breach of the *Code of Service Discipline* access to legal counsel and a trial independent of the chain-of-command. Replacing a slow system (the military justice system) with an even slower one (the civilian justice system) would completely remove any semblance of general deterrence within CA units. CA COs would lose what little control they have in regulating disciplinary proceedings. What is gained in judicial equitability between soldier and civilian is disproportionately counterweighted by further erosion of the army's unique disciplinary culture.

Far from perfect, the military justice system could benefit from some aspects of civilianization. For example, the current Victims Bill of Rights does not yet apply to CAF

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<sup>131</sup>Michel Rossignol, *National Defence Act: Reform of the Military Justice System* (Ottawa: Library of Parliament, 1997), 7-8.

<sup>132</sup>*Ibid.*

<sup>133</sup>Joshua Juneau and Michel Drapeau, "Time for Parliament to Legislate Control Over Canada's Military Criminal Justice System," accessed 5 March 2018, <http://mdlo.ca/wp-content/uploads/2018/01/HillTimes.CustomMDLO-004.pdf>, 2.

members.<sup>134</sup> Victims, regardless whether civilian or military, have rights and should be entitled to a voice. Fortunately, in response to the *Deschamps' Report*, the *Victims Bill of Rights in the Military Justice System Act* is before parliament and, if passed, would afford such a voice to CAF victims.<sup>135</sup> Such a reform would indeed modernize the military justice system without having a degrading effect on soldier culture and discipline.

Drapeau eagerly highlights the demerits of army culture, while ignoring its merits. CA culture indeed has the potential to devolve into toxicity, which makes it an easy target upon which to focus. The toxicity that permeated one of the commandos in the Canadian Airborne Regiment's (CAR) culture in the early-1990s represents an example. But under the right leadership, army culture can be instrumental in creating a positive group identity—a disciplined identity. Winslow suggests that units with a soldier culture steeped in professionalism and discipline are less likely to commit infractions.<sup>136</sup> Unlike the culture that characterized the CAR, soldiers become invested in a culture which has components of self-discipline and ethics embedded in it.<sup>137</sup> French military sociologist Bernard Boëne optimistically suggests army and post-modern cultures can indeed coexist. He states that functional military values (such as discipline) may not be a problem in post-modern society, save for two key conditions: that they be sparing of human life and tolerant of diversity.<sup>138</sup> So long as those two conditions are met, the CA would simply be another “tribe amongst tribes”, where, in a post-modern Canada, “each and every group is

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<sup>134</sup>David Pugliese, “Victims Bill of Rights for Military to be Introduced in Parliament by the Conservatives but Proposed Law Not Expected to go Far,” accessed 5 March 2018, <http://ottawacitizen.com/news/national/defence-watch/victims-bill-of-rights-for-military-to-be-introduced-in-parliament-by-the-conservatives-but-proposed-law-not-expected-to-go-far>.

<sup>135</sup>*Ibid.*

<sup>136</sup>Donna Winslow, “Misplaced Loyalties: The Role of Military Culture in the Breakdown of Discipline,” *Journal of Military and Strategic Studies* 6, no. 3 (2004): 14.

<sup>137</sup>*Ibid.*

<sup>138</sup>Donna Winslow, “Canadian Society and its Army,” *Canadian Military Journal* (2004): 22.

left to pursue its inclinations and cultivate its lifestyle free of constraint from a cultural mainstream.”<sup>139</sup> While ideal, it may be wishful thinking.

Army culture is a powerful force. So long as the culture respects the two tenets of respect for human life and tolerance of diversity (as suggested by Boëne) and promotes overall professional standards of behavior (as suggested by Winslow), then it can be an instrumental tool in fostering discipline within the CA. Furthermore, upon revisiting the CA’s historical instances of ill-discipline (systemic AWOL during WWI, WWII and Korea, the CAR in Somalia), one can easily identify where Winslow’s and Boëne’s cultural criteria were violated.

### **A FIGHTING FORCE OR A SOCIAL EXPERIMENT**

A disciplined army upholds unique norms, values and standards of behavior, which are necessary for it to succeed in battle. Serving in the volunteer CA is a privilege, not a constitutional right. The CA, like most other professions, demands that its members meet or exceed certain professional standards. The implication is that not everyone is capable of serving in the CA—some simply lack the physical, mental or spiritual strength. This is not to suggest that the CA should be discriminatory. Discrimination along the lines of gender, sexual orientation, ethnicity or skin colour is abhorrent and fundamentally anti-Canadian. A legitimate need exists to ensure national institutions such as the CA are demographically reflective of Canadian society. But this should not imply that every Canadian is suitably equipped to serve in the CA. Inclusion and representation are critically important for the CA, but of penultimate importance when compared to the ability to meet professional army standards. The CA, like any profession, needs to enjoy a degree of exclusivity as they represent a society whose values are not suited to

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<sup>139</sup> *Ibid.*

everyone.<sup>140</sup> Not everyone is capable of commanding, controlling and participating in the extreme violence associated with CA employment. The CA is a fighting force and it needs to be able to choose effectively who is recruited, retained, rewarded and released. The more influence CA COs lose in these areas, the more difficult it is to maintain a disciplined force. The cornerstone of discipline is the act of holding a diverse multitude of people to commonly accepted standards of behavior and performance.

CA recruitment is an exercise in balancing competing objectives. On one hand, the CA competes to attract the best and brightest, maintaining a skilled force across a broad range of tasks.<sup>141</sup> On the other hand, Canada's defence policy demands that the CA reflect the diversity of the country it defends: "Most importantly we need a military that looks like Canada."<sup>142</sup> To be clear, diversity and representation provide the CA with operational strength. They offer unique cultural perspectives and intelligence, language abilities and alternate ways of thinking—skills that can strengthen a force. But according to Legault, prioritizing diversity over all else comes with a price. Legault suggests that although the CAF should reflect the most cultural diversity possible, it is necessary that the interests of minorities not be placed before the operational efficiency of the Forces.<sup>143</sup> Alternatively, if diversity is indeed prioritized, it must also be admitted that there is an enormous price to be paid.<sup>144</sup> The price to which Legault refers is the potential of the CA employing people who reflect the diversity of Canada but lack the necessary core competencies of a soldier. Enforcing disciplinary standards in such an environment—an

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<sup>140</sup>Albert Legault, "Civil-Military Relations: Democracy and Norm Transfer," in *The Soldier and the State in the Post-Cold War Era*, ed. Albert Legault and Joel Sokolsky (Kingston, 2002), 25.

<sup>141</sup>*Strong, Secure, Engaged: Canada's Defence Policy* (Ottawa: Department of National Defence, 2017), 20.

<sup>142</sup>*Ibid.*

<sup>143</sup>Albert Legault, "Civil-Military Relations: Democracy and Norm Transfer," in *The Soldier and the State in the Post-Cold War Era*, ed. Albert Legault and Joel Sokolsky (Kingston, 2002), 24.

<sup>144</sup>*Ibid.*

environment where some recruits may not fully subscribe to the CA's ethos—is impossible and, according to Legault, fraught with risk. “The disciplinary system,” suggests Legault, “must rely on the lessons of history while staying in touch with the values of the civilian population.”<sup>145</sup> To that end, the CA must achieve its diversity targets. It has been politically mandated and explicitly ordered to do so. But it must find a way to do so without compromising performance standards, which is a difficult task that may or may not be possible in today's society. More difficult for the CA and its recruiting efforts, however, is contending with a generation that may be insufficiently prepared for the mental and physical demands of military service.

A disciplined army is a physically fit army. Soldiers serving in the CA must maintain certain standards of physical and mental fitness, which generally exceed those held by the average civilian. A soldier's degree of physical fitness is somewhat indicative of their level of self-discipline. And ideally, there is an expectation of a certain amount of self-discipline, never mind enforced discipline, for those in the army to maintain these standards.<sup>146</sup> But instead of disciplining those persons who fail to meet these standards, the CAF, in many instances, has chosen alternative methods to address such deficiencies. For example, 25% of CAF personnel are considered obese.<sup>147</sup> Furthermore, the CAF spends nearly \$200,000 a year on weight-loss surgeries for heavily overweight troops.<sup>148</sup> Additionally, the CAF has created a specialized 90-day regimen, known as the Warrior

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<sup>145</sup>*Ibid.*

<sup>146</sup>*Ibid.*

<sup>147</sup>François Thériault, Karyn Gabler, Kiyuri Naicker, *Health and Lifestyle Information Survey Information Survey of Canadian Armed Forces Personnel of Canadian Forces Personnel 2013/2014* (Ottawa: Directorate Force Health Protection Canadian Forces Health Services Group Headquarters, 2016), vii.

<sup>148</sup>Tom Blackwell, “Forget boot camp: DND spends about \$200,000 a year on weight-loss surgeries for morbidly obese troops,” accessed 14 February 2018, <http://nationalpost.com/news/canada/forget-boot-camp-dnd-spends-about-200000-a-year-on-weight-loss-surgeries-for-morbidly-obese-troops>.

Fitness Training (WFT) program, to address the problem of physically unfit soldiers. Facing similar challenges, the US Army has opted for a different approach. When US Army COs began noticing a trend of soldiers arriving to their units with poor standards of fitness, sloppy appearances and undisciplined attitudes, they saw it as a manifestation of an insufficient appreciation of army discipline.<sup>149</sup> As a result, the entire basic training program was redesigned, placing increased emphasis on drill, ceremony, marksmanship and physical fitness.<sup>150</sup> The US Army attacked the problem of lax standards with increased discipline, physical training and esprit-de-corps.<sup>151</sup> The CAF—and by extension the CA—has opted for a gentler approach: sponsored bariatric bypass surgeries and an individualized fitness retreat. Neither solution engenders the spirit of self-discipline, let alone military discipline. They suggest that one does not need to accept responsibility for falling short of a well-established standard and there are no consequences for a general lack of self-discipline. Instead, soldiers can rely on a sponsored individual solution for a self-imposed deficiency.

A disciplined army is a mentally fit army. In addition to physical health deficiencies, the CA must contend with an increased number of personnel lacking sufficient mental resilience, which further contributes to a culture of ill-discipline. Studies show that for various reasons the CAF attracts personnel who have suffered from childhood trauma. One recent study of representative Canadian population indicated that 47.7% of Regular Force personnel experienced physical abuse, sexual abuse, and/or

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<sup>149</sup>Matthew Cox, “Low Recruit Discipline Prompts Army to Redesign Basic Training,” accessed 14 February 2018, <https://www.military.com/daily-news/2018/02/09/low-discipline-new-soldiers-prompts-army-redesign-basic-training.html>.

<sup>150</sup>*Ibid.*

<sup>151</sup>*Ibid.*

exposure to intimate partner violence before the age of 16.<sup>152</sup> Those entering the military may have a higher prevalence of child abuse because they are trying to escape harmful home environments.<sup>153</sup> Such a high number of recruits entering the CAF with previous mental health issues impairs operational readiness, increases medical costs and boosts attrition.<sup>154</sup> And while focused resilience training can mitigate the effects of childhood trauma, a correlation exists between childhood mental trauma and trauma linked to operational stress. War correspondent Sebastian Junger notes:

Multiple studies, including a 2007 analysis from the Institute of Medicine and the National Research Council, found that a person's chance of getting chronic post-traumatic stress disorder (PTSD) is in great part a function of their experiences *before* going to war. Statistically, the 20% of people who fail to overcome trauma tend to be those who are already burdened by psychological issues, either because they inherited them or because they suffered abuse as children.<sup>155</sup>

It would be incorrect to suggest that persons with mental health issues are guaranteed to have disciplinary infractions. However, as noted by Junger, those with a history of mental illness have an increased chance of developing PTSD.<sup>156</sup> And while PTSD within the CA is certainly something to be taken seriously, it is somewhat misunderstood by the public and has become overly politicized.

Many veterans (both retired and still serving) along with citizens and politicians have advocated for increased benefits for soldiers suffering with a disability, which

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<sup>152</sup>Sarah Turner, Tamara Taillieu, Kristene Cheung, Mark Zamorski, David Boulos, Jitender Sareen, and Tracie O. Affifi, "Child Abuse Experiences and Perceived Need for Care and Mental Health Service Use among Members of the Canadian Armed Forces," *The Canadian Journal of Psychiatry* 62, no. 6 (2017): 414.

<sup>153</sup>*Ibid.*

<sup>154</sup>Jennifer E. C. Lee, Brigitte Phinney, Kimberley Watkins, and Mark A. Zamorski, "Psychosocial Pathways Linking Adverse Childhood Experiences to Mental Health in Recently Deployed Canadian Military Service Members," *Journal for Traumatic Stress* 29 (2016): 124.

<sup>155</sup>Sebastian Junger, *Tribe: On Homecoming and Belonging* (Toronto: HarperCollins Publishers Ltd., 2016), 82.

<sup>156</sup>*Ibid.*

includes PTSD. In December 2017, the B.C. court of appeal ruled against the so-called Equitas lawsuit—a lawsuit which aimed to reinstate lifetime pensions for injured CAF members.<sup>157</sup> This ruling, combined with rhetoric from the public and both major Canadian political parties, has elevated this issue to the national stage. And while the first-order effect—that is adequate care for those suffering from a service-related injury—has no direct bearing on discipline within CA units, the second-order effects certainly do. As Junger suggests, “Disability payments for a disorder like PTSD, which is both treatable and usually not chronic, risks turning veterans into a victim class.”<sup>158</sup> The creation of a “victim class” can incentivize the idea of operational stress injuries (OSIs) within CA units, which has a damaging effect on discipline and army culture writ large. And the CA is not immune. The Treasury Board of Canada Secretariat confirms that there are an increasing number of soldiers released from the CAF medically, vice voluntarily, due to the increased awareness of benefits.<sup>159</sup> Another aggravating factor, notes journalist Alan Zarembo, is that as PTSD awards have grown, so have concerns that many veterans might be exaggerating or lying to win benefits (up to 75% of salary, hiring priority, access to additional programs and services).<sup>160</sup> And because an OSI diagnosis relies mainly on what soldiers report, it is easy to exaggerate or lie to win benefits.<sup>161</sup> In online forums, for example, veterans trade tips on how to behave. Soldiers are advised, amongst

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<sup>157</sup>Lee Berthiaume, “B.C. court rules against injured veterans in fight for disability pensions,” December 2017, accessed 15 February 2018, <http://www.cbc.ca/news/politics/equitas-pension-bc-appeal-1.4431287>.

<sup>158</sup>Sebastian Junger, *Tribe: On Homecoming and Belonging* (Toronto: HarperCollins Publishers Ltd., 2016), 101.

<sup>159</sup>John Geddes, “The Number of Soldiers Citing Medical Reasons for Leaving the Military is Soaring,” Accessed 18 March 2018, <http://www.macleans.ca/politics/ottawa/the-number-of-soldiers-citing-medical-reasons-for-leaving-the-military-is-soaring/>.

<sup>160</sup>Alan Zarembo, “As Disability Awards Grow, So Do Concerns With Veracity of PTSD Claims,” accessed 5 March 2018, <http://www.latimes.com/local/la-me-ptsd-disability-20140804-story.html>.

<sup>161</sup>*Ibid.*

other things, to dress poorly and avoid showering.<sup>162</sup> Zarembo's research suggests the existence of a certain community of soldiers who are actively seeking to exploit PTSD. Furthermore, a key tactic of this toxic community, as the online forums suggest, seems to be the overt and purposeful promotion of ill-discipline. Such advice, combined with the deluge of media and political attention, is endeavoring to transform the soldier class into the victim class. The fact is, however, that the days of generous veterans' benefits now belong to a bygone era: the military's overriding concern, for which it is funded and organized must be the operational readiness in the national interest rather than the supplemental welfare of a privileged group in comparison to others in Canadian society.<sup>163</sup> CA soldiers need to be physically and mentally fit, distinguished from the rest of society for their strengths and not their weaknesses; ready to conduct full spectrum operations anywhere in the world. That is what a disciplined field force is supposed to look like.

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<sup>162</sup>*Ibid.*

<sup>163</sup>Chris Madsen, *Military Law and Operations* (Toronto: Thomson Reuters Carswell, 2011), 4-2.

## **CONCLUSION**

### **RECREATING DISCIPLINED UNITS THROUGH CO EMPOWERMENT**

For various reasons, discipline is not what it should be in the Canadian Army (CA). CMCRT interviews conducted with leadership across the CA qualitatively suggest a disciplinary deficiency within the CA and a corresponding feeling of helplessness amongst the leadership—a pressing problem for many western militaries. Major-General Rouleau, commander of CJOC, has stated that the CAF writ large has “lost sight of who owns discipline.”<sup>164</sup> Such issues are hardly unique to the CA. After compiling data regarding issues facing the US Army from surveys of about 27,000 commissioned officers, warrant officers and non-commissioned officers, respondents rated lack of discipline five times higher than any other issue.<sup>165</sup> Internal and external forces that have slowly eroded the level of discipline within the CA. Fortunately, confronting these forces is the first step in addressing their negative effects on the CA. The key to re-establishing a disciplined culture within the CA lies in CO empowerment. CA COs need to be empowered to effectively achieve their mandate, which is the creation, training and maintenance of a disciplined fighting force ready to be strong in Canada, secure in North America and engaged in the world.

COs need to be empowered to administer formal justice. Formal justice in the armed forces is currently conducted through summary trials and court martial. Both of these proceedings serve an important purpose in the administration of justice at the unit level. But neither of these options are ideal when 1) the breach of discipline is sufficiently

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<sup>164</sup>*Court Martial Comprehensive Review Interim Report* (Ottawa: Office of the Judge Advocate General, 2018), 99.

<sup>165</sup>Matthew Cox, “Low Recruit Discipline Prompts Army to Redesign Basic Training,” accessed 14 February 2018, <https://www.military.com/daily-news/2018/02/09/low-discipline-new-soldiers-prompts-army-redesign-basic-training.html>.

minor, 2) where an offender readily admits to a wrongdoing, 3) there is no desire to have record of a charge placed on a soldier's RDP, and 4) a swift minor punishment would sufficiently address the punitive and general deterrence disciplinary needs. The CA might benefit from a third tier of discipline, existing below the summary trial level. Similar to the Extra Military Instruction (EMI) scheme of the US Navy and Marine Corps, the Minor Administrative Action (MAA) of the UK Armed Services or the Discipline Officer (DO) scheme of the Australian Army, this third tier of justice would exist solely at the unit level. CA units could employ a DO Scheme similar to that of the Australian Army, centered upon the unit adjutant. Formal guidance regarding the powers of punishment could be akin to the seven practical EMI limitations written in the US Marine Corps'

*JAGMAN:*

- 1) EMI normally will not be conducted for more than 2 hours per day.
- 2) EMI conducted outside normal working hours should be conducted either immediately before or after the member's workday.
- 3) EMI will not be conducted over a period that is longer than necessary to correct the performance deficiency for which it was assigned.
- 4) EMI should not be conducted on the member's Sabbath.
- 5) EMI will not be used for the purpose of depriving the member of normal liberty to which the member is otherwise entitled. A member who is otherwise entitled thereto may commence normal liberty upon completion of EMI.
- 6) Authority to assign EMI that is to be performed during normal working hours may be withdrawn by any superior if warranted.
- 7) Authority to assign EMI to be performed after normal working hours is vested in the CO or officer-in-charge.<sup>166</sup>

Lonergan warns that while EMI is a useful tool for efficient discipline, it must be recognized that some users may abuse the tool as a way to punish without due process.<sup>167</sup> This risk could be mitigated by close CO and sergeants-major oversight and transparency. It should also be noted that soldiers would have the power to choose whether or not they

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<sup>166</sup>Justin P. Lonergan, "A Fresh Look at Extra Military Instruction and the Need for a Steady Legal Role," *The Reporter* 4, no. 2 (n.d.): 15-16.

<sup>167</sup>*Ibid.*, 15.

wanted their breach of discipline dealt with through this third tier of justice. To promote the system's legitimacy, it would not be in the unit leadership's interest to abuse the system. Any residual risk of a third tier of justice is outweighed by its benefits. The MAA system in the UK Army, for example, has resulted in fewer summary trials, empowered junior leaders and improved discipline—all without the need of a formal tribunal.<sup>168</sup> Fewer tribunals equates to decreased operating costs, expedited justice and an overall sense of unit-level ownership of unit-level disciplinary problems.

COs need to be reassured that the court martial system can credibly administer justice. Numerous reviews of the CAF military justice system continually raise the issue of procedural slowness. The 2003 *Lamer Report* commented on the “unacceptable delays” of the military justice system.<sup>169</sup> These delays were further criticized in the 2008 *Bronson Report*.<sup>170</sup> Furthermore, one of the most resounding observations within the 2017 CMCRT internal review was the widespread belief within the CAF that the justice system was too unresponsive and, therefore, distrusted by CA unit command teams.<sup>171</sup> Procedural slowness is rendering the CAF military justice system—particularly at the court martial level—ineffective. The current system is nowhere close to achieving the six-month timeline that COs have generally agreed to be the length of time within which disciplinary value can be achieved. For the system to achieve any sense of general deterrence, it is essential that efforts be made to satisfy the six-month court martial completion timeline.

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<sup>168</sup>Tim Dunne, “Charter Rights are Ignored in Military Justice System,” accessed 12 November 2017, <http://thechronicleherald.ca/opinion/1503452-charter-rights-are-ignored-in-military-justice-system>

<sup>169</sup>Antonio Lamer, *The First Independent Review of the Provisions and Operation of Bill C-25, An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts, as Required Under Section 96 of Statutes of Canada 1998*, c.35 (n.d., 2003), 3.

<sup>170</sup>Andrejs Berzins and Malcolm Lindsay, *External Review of the Canadian Military Prosecution Service* (Ottawa: The Bronson Consulting Group, 2008), 10.

<sup>171</sup>*Court Martial Comprehensive Review Interim Report* (Ottawa: Office of the Judge Advocate General, 2018).

One potential solution, which was discussed in the Lamer Report, is establishment of “a permanent military court of record pursuant to the authority given the Parliament of Canada under section 101 of the Constitution Act, 1867.”<sup>172</sup> The establishment of a permanent court would undoubtedly remove the ad-hoc nature of the current process, thereby increasing efficiency and standardization. Additionally, implementation of a third tier of justice would reduce the number of summary trials, thereby decreasing the number of elections to court martial. This addition would reduce the overall burden on the system, allowing for more resources focused on fewer cases.

COs need to be able to administer justice swiftly. Soldiers in the CA are subject to both the *Criminal Code of Canada* and the *Code of Service Discipline*. In some instances, a breach of the latter is simultaneously a breach of the former. When this occurs, CA COs are typically encouraged to wait until the outcome of the civil courts prior to proceeding with any disciplinary or administration measures. Despite *R. v. Jordan*, civil justice is still plagued with procedural delays, which inevitably lead to a delayed military procedure. As noted in the CMCRT consultations, CA command teams do not want prosecutorial decisions or outcomes at a trial to serve as a barrier to a command decision to conduct a disciplinary proceeding, either before or after the trial.<sup>173</sup> This act of waiting leads soldiers to assume that nothing is being done to address the offence, which undermines any chance of general deterrence. It is recommended that if soldiers commit a civil offence, CA COs still conduct a summary investigation. If the investigation and supporting evidence leads to a reasonable belief that a service offence has been

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<sup>172</sup>Antonio Lamer, *The First Independent Review of the Provisions and Operation of Bill C-25, An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts, as Required Under Section 96 of Statutes of Canada 1998*, c.35 (n.d., 2003), 28.

<sup>173</sup>*Court Martial Comprehensive Review Interim Report* (Ottawa: Office of the Judge Advocate General, 2018), 106.

committed, then COs should proceed with disciplinary or administrative measures as they normally would. If, at a later date, a soldier is absolved in civilian court, then CA COs *could assess* whether or not to also expunge the charge under the NDA. It is entirely reasonable that different justice systems could yield different outcomes, with culpability in one not necessarily implying culpability in the other.

COs need to be empowered with the ability to both punish and reward. Front-line CA units, in particular, incur an increased degree of physical, mental and emotional distress. Personnel posted to such units receive supplemental remuneration, known as Land Duty Allowance (LDA). According to CAF policy, LDA is compensation paid for the performance of assigned duties where there is continual and substantial exposure to adverse conditions (environmental, hardship, prolonged separation) associated with field operations.<sup>174</sup> Regrettably, soldiers in these units who, for various legitimate or illegitimate reasons, perpetually avoid exposure to these adverse environmental conditions. This benefit, however, is universally applied to all members posted into designated units. This universal application of the reward can result in some personnel receiving the benefit without having earned it, thereby creating a culture of inequity within the unit. To that end, it is recommended that CA COs be delegated the authority to revoke temporarily LDA on a case-by-case basis. If soldiers fail to meet the physical and mental standards for full employability within a field unit, then they should not be afforded the supplemental compensation. Indeed, a disciplined army is a physically and mentally fit army, as discussed earlier. Similarly, CA COs may wish to withhold LDA from soldiers who are facing disciplinary or administrative measures.

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<sup>174</sup>“Chapter 205 - Allowances for Officers and Non-Commissioned Members (Effective September 1, 2017),” accessed 12 December 2017, <http://www.forces.gc.ca/en/about-policies-standards-benefits/ch-205-officer-ncm-allowance-rates-effective-01-sept-2017.page>.

COs need to be empowered with the ability to influence the retention process. Some soldiers reveal, through their conduct, performance or both, that they are ill-suited for further employment in the CA. From a physical health perspective, suitability for military service is fairly straightforward (notwithstanding recent announcements by the CDS regarding a relaxation of these policies so as to optimize employment of wounded soldiers who still possess the warrior spirit).<sup>175</sup> Some soldiers, subjectively speaking, simply lack the integrity, intrinsic motivation or tenacity to serve as a soldier in the CA. These personnel are often administrative burdens and often, figuratively and literally, fail to carry sufficiently their own weight, let alone a portion of the unit's. Such personnel settle for mediocrity and generally put their own needs ahead of the organization's. While these personnel may not necessarily breach the *Code of Service Discipline*, they do reveal that they are unfit for the soldier's calling. Continued employment of such people lowers the professional standard of a unit, which affects both discipline and morale. In accordance with QR&Os 6.12, 6.22 and DND 2315, TOS renewal offers are generated at the NDHQ level. At present, a CO can only acknowledge that the offer is being made. No provision exists for a CO to recommend that such personnel be released from the CAF.<sup>176</sup> In fact, COs are expressly forbidden from withholding reengagement offers from personnel who have conduct or performance deficiencies.<sup>177</sup> COs are entrusted with the lives and livelihoods of the soldiers under their command. And given the need for collective excellence within army teams, it is essential that underachieving personnel—

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<sup>175</sup>Gloria Galloway, "Canadian Military to Relax Deployment-readiness Rule," accessed 19 February 2018, <https://www.theglobeandmail.com/news/politics/canadian-military-to-relax-deployment-readiness-rule/article35281256/>.

<sup>176</sup>Queens' Regulations and Orders for the Canadian Forces, 2008, 6.12, 6.22.

<sup>177</sup>"CF Military Personnel Instruction 05/05 – Terms of Service," Accessed 20 March 2018, <http://cmp-cpm,mil.ca/en/policies/cf-mil-pers-instr.page>.

people who have proved they are uninterested in development—be ushered out of the CA. Retention is a privilege, not a right. A single universality of service policy that covers both those with military-related health issues and those with self-imposed health issues (obesity and smoking-related respiratory problems to name a few) may be considered equitable but certainly is neither fair nor in the institution's best interests. As such, COs' opinions regarding who is and who is not suitable for future employment within their units and the CA writ large need to be given consideration prior to TOS offers. COs, and their subordinate leadership, hold the most qualitative knowledge regarding a soldier's suitability for future service in the CA. To that end, it is suggested that a CO's recommendation regarding a soldier's TOS renewal be given increased influence in the final decision.

The number of CA recruits with pre-existing mental health issues is increasing. From a generational perspective, the worldwide prevalence of mental disorders has increased significantly during the past two decades and it is anticipated that there will be a 15% prevalence by 2020, thereby having far reaching public health implications.<sup>178</sup> The number of potential CA recruits with mental health disorders is rising. This grim outlook, combined with the stress and trauma that can naturally result from soldiering, suggests that CA will need to address deliberately mental health head-on. If the CA fails in this endeavor, then units will be populated by non-deployable members whose inability to perform their primary duties will only have a negative effect on the operational tempo of remaining personnel. It would be challenging, and potentially counter-productive, to

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<sup>178</sup>James R. Riddle, Tyler C. Smith, Besa Smith, Thomas E. Corbeil, Charles C. Engel, Timothy S. Wells, Charles W. Hoge, Joyce Adkins, Mark Zamorski, and Dan Blazer, "Millennium Cohort: The 2001-2003 Baseline Prevalence of Mental Disorders in the U.S. Military," *Journal of Epidemiology* 60 (2007): 198.

attempt simply to screen out recruits with pre-existing mental health issues. Instead, resilience training should be incorporated at every officer and non-commissioned member developmental period.

COs need to be empowered with deep knowledge of CAF policy. The CA places primacy on operations and plans. The most gifted leaders are placed in positions corresponding to these competencies, often at the expense of other functional areas. The result is that CA unit leadership does not have a deep understanding of key CAF policies. No course or module within the officer professional development scheme describes, in detail, the policies surrounding administrative reviews, releases, drug testing and so on. Such knowledge is either gleaned through experience or not at all. CA leaders in the top-third tier should be employed, at some point in their career path, in key administrative organizations such as the Military Personnel Command (MILPERSCOM), the CA G1 branch, the Directorate of Military Careers (D Mil C), the Directorate of Compensation and Benefits Authority (DCBA) or the Directorate of Medical Policy (D Med Pol). This would be of mutual benefit to both the organizations and the individuals. The officer professional development program should deliberately incorporate more training regarding CAF policy. For example, the Joint Command and Staff Program (JCSP)—the pivotal ten month-long course for CA senior officers and future COs—provides neither mandatory CAF policy training nor lectures from D Mil C, DCBA or D Med Pol. Furthermore, the presiding officer training course—a two-day course culminating in a multiple-choice exam—is the only formal training officers receive in the application of military law. These same officers are then considered “qualified” to lay charges and incarcerate soldiers. The successful application of discipline depends on sound

understanding of existing policies and military law. And while CAF policies require consistent review to ensure relevance, one can neither criticize nor change policies which one does not fully understand.

COs and the CA writ large need to be empowered with increased emotional intelligence. Generally speaking, soldiers and officers alike need to embrace a culture of honesty. Evidence suggests that there is a systemic aversion to honesty, particularly when it comes to giving and receiving feedback. A recent survey of 150 CAF members revealed that 40% of the respondents felt discomfort when giving constructive negative feedback to subordinates.<sup>179</sup> What's more troubling, is that 51% of respondents claimed to have received positive feedback when they knew that their performance warranted otherwise.<sup>180</sup> This is only slightly better than industry, where a reported 70% of managers admit that they have trouble giving tough performance reviews to underachieving employees.<sup>181</sup> It will be impossible to create a disciplined culture within CA units if systemic emotional weakness prevents leadership from delivering hard truths and subordinates from receiving them. After all, "since the toughest feedback usually touches on deeply ingrained behaviors and personality traits, there's a fear of the intimacy required when offering observations that hit so close to home"<sup>182</sup> If a culture of discipline is going to be recreated in the CA, then dialogue needs to be less apologetic and more dispassionate. After all, a careful conversation is a failed conversation.<sup>183</sup> All CA personnel would benefit from focused training in emotional intelligence and verbal

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<sup>179</sup>Anthony Robb, "An Unfortunately Popular Aversion to Truthful Feedback within the CAF," *Canadian Military Journal* 15, no. 4 (2015): 49-50.

<sup>180</sup>*Ibid.*, 50.

<sup>181</sup>Kerry Sulkowicz, "Straight Talk at Review Time," *Business Week* (2007): 16.

<sup>182</sup>*Ibid.*

<sup>183</sup>Susan Scott, *Fierce Conversations* (New York: The Berkley Publishing Group, 2004).

communication. This will enable CA personnel to give and receive honest feedback and direction—critical components of a disciplined culture.

COs need to be empowered with supportive and present subordinate leadership. Tangible leadership is required to enforce the explicit rules and the implicit norms that constitute an effective disciplinary culture within CA units. In particular, junior leaders (section commanders and platoon/troop command teams) are of critical importance. These are the highly influential leaders who directly manage the CA's soldiers and who provide the first level of disciplinary intervention. External tasks, medical restrictions, systemic under-manning, professional development courses and operational tempo, however, have depleted many CA units of their junior leaders. Illustrating this point, the average infantry battalion is currently operating well below 70% of its mandated personnel establishment.<sup>184</sup> Many of these personnel deficiencies exist at the key junior leadership ranks (Master Corporal, Sergeant, Warrant Officer and Lieutenant).<sup>185</sup> This persistent lack of junior leadership creates voids in chain-of-command, thereby making disciplinary oversight even more difficult. If the CA is serious about recreating a disciplinary culture within units, then it must take a more judicious risk management approach when making any decision that could rob a unit of its junior leadership. Capable and available junior leadership is an essential component of CO empowerment.

Sun Tzu, Vegetius, Clausewitz, Jomini and many other seminal military writers address the importance of discipline within an army. Discipline underpins the most basic army tenets: service before self, adherence to authority and willingness to make the ultimate sacrifice. As the CA embarks on a new path—a path guided by *Strong, Secure*

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<sup>184</sup>Jesse van Eijk, "Too Busy to Fight: Degradation of the Infantry Core Combat Capabilities Through Excessive Tempo" (Service Paper, Canadian Forces College, 2018), 7.

<sup>185</sup>*Ibid.*

*and Engaged*, *The Deschamps Report*, and ever-increasing public scrutiny—it will be essential that senior leadership not lose sight of what makes an army an army. To achieve this, while simultaneously reflecting Canadian society, the CA will require careful balance of tradition, values and astute leadership. The military justice system—an instrumental tool in enforcing discipline—must exist to serve the institution, not the other way around.

Presently, the entire military justice system is under review, which may fix or exacerbate some of the existing judicial and disciplinary challenges. In particular, some offences that are presently electable to court martial will become non-electable. Additionally, COs' powers of punishment could be reduced, removing the power of incarceration as a punishment. A subsequent review of the state of discipline and disciplinary ownership within the CA should be conducted should such changes be implemented. The CA must also acknowledge that tradition alone is insufficient justification for certain uniquely-CA disciplinary norms. To maintain relevance, the CA will need to incorporate new cultural norms while fiercely protecting those existing ones that still add disciplinary value. Discipline, which is enabled by tools for low-level disciplinary enforcement, is the force that distinguishes professional teams of soldiers from an individual-centric society.

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