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**‘TIL DEATH DO US PART: WHY THE CANADIAN ARMED FORCES SHOULD ADOPT A
STAND-ALONE OFFENCE OF “ADULTERY DIRECTLY AFFECTING GOOD ORDER AND
DISCIPLINE” WITHIN THE NATIONAL DEFENCE ACT**

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AIM

1. The aim of this paper is to analyze the benefits of the Canadian Armed Forces (CAF) seeking legislative amendment to the Code of Service Discipline section of the *National Defence Act* (NDA) to introduce a stand-alone offence of “adultery directly affecting good order and discipline of the CAF”¹ (hereby referred to as ‘adultery’) in order to increase military effectiveness. While military effectiveness is highly subjective, this paper aims to provide rationale by way of reference to increasing positive reputation, discipline of forces and professionalism through respectful behavior and relationships among military members.

INTRODUCTION

2. Members of military forces are unique as they serve their profession with unlimited liability. Because they are trained to kill in armed combat, and may be killed themselves, it is imperative that they are held to high standards, live by common values and submit to good order and discipline at all times.² This paper examines adultery and its juxtaposition against CAF military ethos, values and discipline. It provides that adultery is hypocritical to military service and forms part of an inappropriate sexualized culture that needs to be eliminated for the military effectiveness of the CAF under OPERATION HONOUR.³ The paper recommends that one action to message and deter against adultery is to adopt an explicit offence in the NDA of “adultery directly affecting good order and discipline of the CAF”. This paper will demonstrate that in adopting such an offence, the CAF will be sending a clear message about the importance of living the military ethos, eradicating inappropriate sexualized culture and enhancing the trust and respect of the Canadian population and military families.

¹ The author contends that the offence should be directly tied to the good order and discipline of the CAF to ensure only such action that would objectively affect military effectiveness be captured as an offence. For example, those separated, or in open marriages (where dishonesty, betrayal and dishonor are not in question) would be exempt, yet relationships within a unit or relationships where unequal power has been abused (both within the military or situations with locals on operations) would be captured within the offence provision.

² Hopkins, C. “Rank matters but should marriage: Adultery, fraternization, and honor in the military”. (1999) *UCLA Women's Law Journal* 9(2), 177-262.

³ Operation Honour <https://www.canada.ca/en/department-national-defence/services/benefits-military/conflict-misconduct/operation-honour/about-operation-honour.html> (accessed 2 Sep 19)

THE IMPORTANCE OF CANADIAN ARMED FORCES ETHOS AND VALUES

3. The military effectiveness of the CAF, relies on its forces to act in accordance with a core set of values, beliefs and standards.⁴ This *military ethos* is just as important during peacetime as in conflict, as it provides a framework that fosters behaviour that is legitimate, professional and effective.⁵ It is not enough that military forces adhere to those values, beliefs and standards while in uniform, they need to embody them at all times, both on and off duty:⁶

The Canadian military ethos is not just a statement of values or a checklist of idealized beliefs to be written and hung on a wall. It is a living spirit — one that finds full expression through the conduct of members of the profession of arms.⁷

4. Such ethos is entrenched in CAF members through initial training and ongoing throughout their careers. Among the CAF's core values are integrity, “[a]dhering to the highest ethical standards, communicating and acting with honesty, and avoiding deception”⁸, and Honour.⁹ The act of adultery, is contrary to such values and ethos, as it is usually coupled with dishonesty, deception, dishonor, disloyalty and betrayal. It is hypocritical for one to serve in the CAF, professing to have such values, while simultaneously acting to the contrary.

5. Furthermore, if a member is acting with such disregard for values in their personal relationships, it is not farfetched that they would act in a similar vein, with a disregard to such values, with their colleagues and chain of command within the CAF. Once someone falters in his or her values, it is a slippery slope for such values to continue to deteriorate in other areas, including directly in their military tasks; for example, they could be dishonest in auditing or compliance for personal or financial gain. In otherwise a normalized deviance pattern could emerge. It stands that the CAF should not tolerate adultery by their forces, as it goes against the backbone of values from which they are founded and is a threat to military effectiveness.

⁴ A principal reference of the Canadian Armed Forces, ‘Duty with Honour’ (2003) at page 30, lists the core military values required of members: as Duty, Loyalty, Integrity and Courage as well as the overarching cornerstone value, being Honour.

⁵ James M. Winner, "Beds with Sheets but No Covers: The Right to Privacy and the Military's Regulation of Adultery," *Loyola of Los Angeles Law Review* 31, no. 3 (April 1998): 1073-1114

⁶ Canadian Armed Forces, Department of Defence ‘*Duty with Honour*’ (2003) at page 34.

⁷ *Ibid.*

⁸ Canadian Armed Forces, Department of Defence, Statement of Ethics, found at <https://www.canada.ca/en/department-national-defence/services/benefits-military/defence-ethics/about/statement.html> (accessed 2 Sep 19)

⁹ Canadian Armed Forces, Department of Defence ‘*Duty with Honour*’ (2003) at pg 31.

Adopting the offence of adultery within the NDA emphasizes the importance of military ethos and living the values espoused. This would better promote behaviour, conduct and relationships that are positive and respectful at all times, both on and off duty, thereby enhancing military effectiveness.

GOOD ORDER AND DISCIPLINE

6. Together with values, good order and discipline are also integral to an effective military force.¹⁰ Military forces need to have strong unit discipline and also individual self-discipline for military readiness and mission accomplishment.¹¹ Adultery is a failure in discipline, a break of promise to a loved one, but can also carry second and third order effects of prejudicing good order and discipline, diminishing unit cohesion and morale, weakening the chain of command and deterioration of the mission.¹² For example, such could occur when the situation involves affairs between serving members within the workplace, while serving on deployment or affairs committed between a serving member and their colleague's spouse, to name a few.

7. There currently exists a convoluted avenue for prosecution of such extra-marital behavior under the NDA.¹³ It is a catch all offence, known as 'the prejudicing good order and discipline offence', which covers a broad range of actions including unauthorized discharge, sexual harassment, alcohol and drug related acts, and as a secondary dimension can include adultery.¹⁴ This offence was used in the case of Brigadier-General Daniel Menard¹⁵, who was convicted of prejudicing good order and discipline for having an affair with a married subordinate while he was Task Force Commander, Afghanistan.¹⁶ This was a severe lack of leadership on Menard's behalf, and caused disruption to the whole unit in leadership, cohesiveness and discipline, as well as the disruption for the two families involved. The charges laid were based on the contravention of the in-theatre directions on fraternization, rather than the act of adultery itself, despite the direct degradation to military effectiveness.¹⁷ Had the offence of adultery been one in its own right, it may have deterred both Brigadier-General Menard and his subordinate from conducting

¹⁰ Ibid, pg 27.

¹¹ Jack L. Rives, "It Works For Us: A Guide to the Military's Rules on Fraternization and Adultery," Reporter 24, no. 4 (December 1997) at pg 4.

¹² James M. Winner, "Beds with Sheets but No Covers: The Right to Privacy and the Military's Regulation of Adultery," Loyola of Los Angeles Law Review 31, no. 3 (April 1998): 1073-1114

¹³ Section 129 of the NDA provides "*Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment*"

¹⁴ Canadian Armed Forces JAG Annual Report (2017-2018)

¹⁵ R v Menard (2011) CM 3007, 97 W.C.B (2d) 117

¹⁶ Madsen, Chris Military Law and Operations May 2019 at page 4:60:20 (4-89)

¹⁷ Ibid.

their affair, and prevented the removal of the Commander from theatre, to the embarrassment of the CAF and Canadian public.

8. The implicit nature of the far-reaching prejudicing offence provision fails to designate a clear prohibition on adultery, diminishing the seriousness of such an act to the CAF. Bringing the act of adultery as an explicit offence, highlights the gravity of such behavior and provides a clear deterrence to members within well understood, accountable framework, reinforcing a highly disciplined, effective force. It would not have to rely on secondary policies and directives against fraternization, nor secondary offence provisions such as prejudicing the good order and discipline of the CAF.

GAINING THE TRUST OF THE CANADIAN PUBLIC AND PROTECTING THE FAMILY UNIT

9. Adopting adultery explicitly as an offence would enhance the trust and confidence of the Canadian public and military families, thereby increasing operational effectiveness.¹⁸ The public would have greater trust that their military forces are living up to their values that they swore to serve by, and would be confident in the CAF's ability to hold members accountable for breaches in that regard.

10. It is in the interest of the CAF to promote stable, healthy relationships both professional and personal for the mental health and wellbeing of the member (and thereby their military effectiveness). Families are often the support behind the members; they are the grounding support during times of postings and operational deployments. By outlawing adultery directly, families could be reassured that the CAF promotes respectful relationships in accordance with values and promotes the protection of marriage.¹⁹

11. Furthermore, members undergoing separation and/or divorce are often ineffective in the workplace and need time off to deal with the stress and change in their life. Not only is this unproductive for the member, but also greatly impacts the chain of command in draining unit resources in managing the member during this process. Adopting adultery as an offence in the NDA sends a strong message to the public and military families that the CAF has an interest in the health and wellbeing of member's relationships, including the preservation of marriage, and will use the disciplinary system to deter adulterous behavior to protect it as much as possible.²⁰

¹⁸ Hopkins, C. (1999). Rank matters but should marriage: Adultery, fraternization, and honor in the military. *UCLA Women's L.J.*, 9(2), 177-262

¹⁹ Christopher Scott Maravilla, "The Other Don't Ask, Don't Tell: Adultery under the Uniform Code of Military Justice after *Lawrence v. Texas*," *Capital University Law Review* 37, no. 3 (Spring 2009): 659-680

²⁰ *Ibid.*

OPERATION HONOUR

12. In 2015, the former Canadian Supreme Court Justice, Marie Deschamps concluded in a finding of the *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*²¹:

...that there is an underlying sexualized culture in the CAF that is hostile to women and LGBTQ members, and conducive to more serious incidents of sexual harassment and assault. Cultural change is therefore key. It is not enough to simply revise policies or to repeat the mantra of “zero tolerance”. Leaders must acknowledge that sexual misconduct is a real and serious problem for the organization, one that requires their own direct and sustained attention.²²

13. While not specifically mentioned in the Report, the act of adultery forms part of the sexualised culture must that can no longer be tolerated within the CAF. A common example of adultery in the Navy occurs where a wife (and often children) farewells her husband in their homeport, only for him to have an affair in the next port. Because of the close living quarters, this usually occurs to the knowledge of the ship’s company. While some turn a blind eye to this behavior, unfortunately even today, it can be encouraged as masculine heroism to the often younger and impressionable sailors. This promotes an unhealthy, disrespectful sexualized culture, usually to the detriment of women and families. The ship’s company then bare witness to the welcoming home of the sailor back to his wife and children and have the responsibility to keep the affair a secret, being a “private matter”. Such an example clearly falls into the behaviour that Chief of Defence Staff, General Vance, refers below in his Operational Order under OPERATION HONOUR. That is that behaviour which is contrary to the values of the CAF, damaging to the unit cohesion, morale and operational effectiveness, must be eradicated:

My intent is to eliminate harmful and inappropriate sexual behaviour within the CAF by leveraging the unequivocal support of my Commanders and all leaders in the CAF. Any form of harmful and inappropriate sexual behaviour is a threat to the morale and operational readiness of the CAF, undermines good order and discipline, is inconsistent with the values of the profession of arms and the ethical

²¹ Report of External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces Mar 27 2015) (Apr 2015)- https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/caf-community-support-services-harassment/era-final-report-april-20-2015-eng.pdf

²² Ibid, (i)

principles of DND and CAF, and is wrong. I will not allow harmful and inappropriate sexual behaviour within our organization, and I shall hold all leaders in the CAF accountable for failures that permit its continuation.²³

14. As recognized in the Report, cultural change is a highly difficult task and all command tools must be utilized and strengthened if the CAF is going to succeed in stamping out such toxic culture.²⁴ The author contends, that one such strengthening of the tools available to command is to expand the military justice framework against sexualized inappropriate conduct by adopting an offence of adultery within the NDA. This provides clear direction to all forces, that any inappropriate sexual conduct, is a punishable offence because the CAF will not tolerate such damaging behavior, breach in core values or poisonous culture. It would send a clear, strong message to assist in changing the sexualized culture as well as demonstrate practical action by the leadership in tackling the issue. It is clearly within the remit of OPERATION HONOUR and would promote more respectful relationships both on and off duty.

THE DISSENTION AGAINST REGULATING ‘PRIVATE AFFAIRS’

15. Much has been written on the challenges and opposition of disciplinary regulation of sexual infidelity.²⁵ Firstly, the very nature of sex is, more often than not based on an emotional or carnal decision, rather than a thought out, logical one. As such, the adoption of the act of adultery as an offence may do very little for practical deterrence as it fails to recognize acts of sex as human social indiscretion. Should the offence of adultery be made explicit in the NDA, it may not influence forces to be more ethically bound in their decisions, but rather cause greater dishonesty among the troops and concealment due to the fear of getting caught.²⁶ None the less, the author contends that even where the offence is unsuccessful in its deterrence value, the very nature of having an express offence provides clear direction that such behavior is not welcomed and is punishable accordingly, setting the standards high and reinforcing the ethos promoted. If the behavior goes underground, then it is still a positive outcome, that an inappropriate

²³ CDF OPORD for OPERATION HONOUR (ref Aug 15) at paragraph 6-accessed at <https://www.canada.ca/en/department-national-defence/services/benefits-military/conflict-misconduct/operation-honour/orders-policies-directives/cds-operation-order.html>

²⁴ Report of External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces Mar 27 2015) (Apr 2015)- https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/caf-community-support-services-harassment/era-final-report-april-20-2015-eng.pdf

²⁵ Hopkins, C. (1999). Rank matters but should marriage: Adultery, fraternization, and honor in the military. *UCLA Women's L.J.*, 9(2), 177-262

²⁶ Burke, Katherine R. "The Privacy Penumbra and Adultery: Does Military Necessity Justify an Adultery Regulation and What Will It Take for the Court to Declare It Unconstitutional," *Hamline Journal of Public Law & Policy* 19, no. 1 (Fall 1997): 301-338

sexualized culture is not being outwardly promoted by those that would choose to breach the CAF values with such behavior.

16. Secondly, should the offence of adultery be adopted into the NDA, it would not apply to those military members in de-facto relationships, or more broadly any couples who have promised to be faithful, and who commit a sexual indiscretion. It would only be applicable to those married by law, despite the action potentially having the same damaging consequences as outlined above. However, the express message sent by the CAF in adopting the offence and the positive change in culture through promotion of respectful relationships would no doubt positively impact the unmarried members, despite their being limited avenues for their prosecution in carrying out a sexual affair.²⁷

17. Thirdly, the adoption of the offence in the NDA presumes a reprehensible cultural and societal judgment of the Canadian public, that may not be real or matching of today's standards and therefore gain no greater confidence or trust of the Canadian people.²⁸ As advocated by US Army War College professor Martin Cook, "[o]nly a military that daily lives out its values and feels its connection to the citizens is a military that engenders the respect and loyalty of the nation and keeps it from being feared"²⁹. In fact, prosecution of such matters in the public arena has seen the victim gain the sympathy of the public population, and divide the community risking harmonious military-civil relations.³⁰ One such example of this was in the case of LT Kelly Flinn, the first US forces female B52 pilot, who was the poster child of female success, but was subsequently convicted and dismissed from the US military for having an extra-marital affair with her colleague's husband. Winning over the media, she had the attention of the country in magazines, newspapers and headlines, and split the country in public opinion of whether the military should regulate over such 'private' matters.³¹ However, this argument fails to appreciate that military members must be held accountable to set standards and values at all times because of the very unique, serious nature of what they may be called upon to do at any time as outlined above at para 2.³² While such standard or values may not necessarily represent the majority of

²⁷ They would still have the offence of section 129 NDA "prejudicing the good order and discipline offence" open to them in certain circumstances.

²⁸ Hopkins, C. (1999). Rank matters but should marriage: Adultery, fraternization, and honor in the military. *UCLA Women's L.J.*, 9(2), 177-262

²⁹ Maravilla, Christopher Scott. "The Other Don't Ask, Don't Tell: Adultery under the Uniform Code of Military Justice after *Lawrence v. Texas*," *Capital University Law Review* 37, no. 3 (Spring 2009): 659-680 at page 676.

³⁰ James M. Winner, "Beds with Sheets but No Covers: The Right to Privacy and the Military's Regulation of Adultery," *Loyola of Los Angeles Law Review* 31, no. 3 (April 1998): 1073-1114 at pg 1074.

³¹ *Ibid.*

³² James M. Winner, "Beds with Sheets but No Covers: The Right to Privacy and the Military's Regulation of Adultery," *Loyola of Los Angeles Law Review* 31, no. 3 (April 1998): 1073-1114

the public or the media at one given time, they are necessary for professional, ethical conduct required of members of the legitimacy of the profession of arms.³³

18. Lastly, one might argue that the catch-all prejudicial offence provision of section 129 of the NDA suitably captures the action of adultery where necessary and that no further specific offence is needed. However, as raised above this argument fails to take into account the need for clear messaging to both the forces and the public that the CAF prides itself on its values and that, under the premise of OPERATION HONOUR, the leadership is ready to take necessary action to tackle the issue of sexualized culture head on using all resources available.³⁴

CONCLUSION

19. In 2015, the CDS made a strong promise to the members of the armed forces, and the Canadian people, to take action and stamp out inappropriate sexual behavior and the toxic culture beneath it under OPERATION HONOUR³⁵. Adultery encompasses such behavior, is hypocritical to CAF values, and needs to be directly addressed. Adultery is contrary to military ethos (especially values of honesty, integrity and honour), damages unit cohesion, morale and discipline and hinders operational effectiveness. The CAF needs to put practical actions in place pursuant to OPERATION HONOUR in order to eradicate inappropriate sexual behavior. The adoption of adultery as a stand-alone offence within the NDA is one such action. It would send a clear message to the forces, and the public, that such behavior, and the underlying sexualized culture, will not be tolerated in the CAF.

RECOMMENDATION

20. The CAF should pursue legislative change of its NDA to include the adoption of the stand-alone offence of ‘adultery directly affecting the good order and discipline’, in order to increase military effectiveness. For the consideration of the CAF Director of Military Prosecution.

³³ Summary of Duty with Honour the profession of arms in Canada (2003), Canadian Forces Leadership Institution accessed at http://publications.gc.ca/collections/collection_2011/dn-nd/D2-150-2003-1-eng.pdf (page 13).

³⁴ Report of External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces Mar 27 2015) (Apr 2015)- https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/caf-community-support-services-harassment/era-final-report-april-20-2015-eng.pdf

³⁵ CDF OPORD for OPERATION HONOUR (ref Aug 15)-accessed at <https://www.canada.ca/en/department-national-defence/services/benefits-military/conflict-misconduct/operation-honour/orders-policies-directives/cds-operation-order.html>

BIBLIOGRAPHY

Burke, Katherine R. "The Privacy Penumbra and Adultery: Does Military Necessity Justify an Adultery Regulation and What Will It Take for the Court to Declare It Unconstitutional," *Hamline Journal of Public Law & Policy* 19, no. 1 (Fall 1997): 301-338.

Canadian Armed Forces, Department of Defence, *Duty with Honour The Profession of Arms in Canada* (2003), Canadian Forces Leadership Institution found at <https://www.legal-tools.org/doc/c7b14f/pdf/>.

Canadian Armed Forces, Department of Defence, Statement of Ethics, found at <https://www.canada.ca/en/department-national-defence/services/benefits-military/defence-ethics/about/statement.html>

Canadian Armed Forces JAG Annual Report (2017-2018) <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2017-18.html> [accessed Sep 17 2019]

Department of National Defence and Canadian Forces Code of Values and Ethics <https://www.canada.ca/en/department-national-defence/services/benefits-military/defence-ethics/policies-publications/code-value-ethics.html>

Esquivel, Raul V. "Implications of the Military's Proscription of Adultery upon Individual Privacy," *Loyola Law Review* 47, no. 2 (Summer 2001): 835-864.

Gasper, Joseph T. "The Road Not Taken: Decriminalizing Private Consensual Sodomy in the Military," *Howard Law Journal* 49, no. 1 (Fall 2005): 139-178.

Hopkins, C. Quince, "Rank Matters but Should Marriage: Adultery, Fraternization, and Honor in the Military," *UCLA Women's Law Journal* 9, no. 2 (Spring/Summer 1999): 177-262.

Madsen, *Chris Military Law and Operations*, (Release number 22; May 2019).

Mahoney, Jill "Former Afghan Commander Charged over Alleged Affair", *Globe and Mail* (July 12, 2010) <https://www.theglobeandmail.com/news/national/former-afghan-commander-charged-over-alleged-affair/article4323555/>.

Maravilla, Christopher Scott. "The Other Don't Ask, Don't Tell: Adultery under the Uniform Code of Military Justice after Lawrence v. Texas," *Capital University Law Review* 37, no. 3 (Spring 2009): 659-680.

Rives, Jack L. "It Works For Us: A Guide to the Military's Rules on Fraternization and Adultery," *Reporter 24*, no. 4 (December 1997): 3-6.

Winner, James M. "Beds with Sheets but No Covers: The Right to Privacy and the Military's Regulation of Adultery," *Loyola of Los Angeles Law Review* 31, no. 3 (April 1998): 1073-1114.