

**Law and Justice: Scott v. Canada and the History of the Social Covenant with Canadian Veterans**

by

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## **ABSTRACT**

### Abstract

This paper explores the issues underlying the *Scott v. Canada* veteran class action lawsuit. In particular it seeks to provide context to these issues by examining the cultural and legal structure of the Canadian military, the historic developments of veteran benefits in Canada, and the difficulties veterans face navigating the institutions that disseminate these benefits. The *Scott v. Canada* veteran class action lawsuit was launched against the Federal Government in 2012, in response to the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (the “New Veterans Charter”), which replaced the disability pension regime for many Canadian Forces Members and veterans under the *Pension Act*.

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I dedicate this thesis to my friend Tyler Williams, who was supportive of this work, and passed away during the writing of this thesis,

*Don't cry because it's over. Smile because it happened.*

**-Dr. Seuss**

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## **INTRODUCTION**

*What should the country do in an endeavor, so far as this can reasonably be done, to replace the years “that the locust hath eaten”? What does the country owe those who, forsaking everything, offered their lives in its defence – to try and compensate for the time that was lost and the opportunities that were missed?<sup>1</sup>*

Canadians have a moral obligation to take care of those who sacrifice life and limb in the service of Canada. While the need to take care of veterans is clear, the process of achieving this goal is not. This is due to a disconnect between external perceptions of the internal reality of life in the military and the way in which different classes of veterans are treated. During the two World Wars, hundreds of thousands of Canadian served in the Canadian Military. In the post-war period, powerful stakeholder groups represented these veterans and they formed significant voting blocks in their own right. Veterans who served in the World Wars and Korea are often described as traditional veterans, and the Canadian Government uses the term War Service Veterans to distinguish this group from subsequent veterans for the purpose of providing War Service Veterans with a special set of veteran’s benefits.<sup>2</sup> Far fewer Canadians have served in what is now known as the Canadian Forces (“CF”). The missions of the CF are more limited in scope, and their participation in campaigns such as the “War in Afghanistan” have received less public support than the romanticized wars that proceeded them. As a result of this shift, the Canadian public is less engaged with the issues facing members of the CF and CF veterans (“Modern Veterans”) and the public

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<sup>1</sup> This was one of the questions posed by Special Committee on Demobilization and Re-establishment during the winter of 1939-1940. Walter S. Woods, *Rehabilitation (A Combined Operation)* (Ottawa: Queen’s Printer, 1953) at 9 [Woods]; Canada, Senate of Canada, Subcommittee on Veterans Affairs of the Standing Senate Committee on Social Affairs, Science and Technology, *Keeping Faith: Into the Future*: (Ottawa: Queens’ Printer, 1994) at 86 [Keeping Faith: Into the Future].

<sup>2</sup> Veterans Affairs Canada, *Definition of a Veteran*, online: <http://www.veterans.gc.ca/eng/about-us/definition-veteran> [Definition of a Veteran]; Veterans Affairs Canada, *Disability Benefits in Respect of Wartime and Special Duty Service – The Insurance Principle*, online: <http://www.veterans.gc.ca/eng/about-us/policy/document/1447> [The Insurance Principle]; Veterans Affairs Canada, *Disability Pension*, online: <http://www.veterans.gc.ca/eng/services/after-injury/disability-benefits/disability-pension> [Disability Pension].

has a more limited understanding of what these members of the military experience and what benefits they require. This shift has foregrounded an approach to providing benefits to the Modern Veterans, which differs from the approach for War Service Veterans.

As a result, Modern Veterans face a cumulative set of disadvantages, and a class distinction has emerged between Modern and War Service Veterans. Modern Veterans are treated as second-class veterans, receiving diminished levels of recognition for similar form of service. While the distinction between Modern and War Service Veterans appears to be the result of the differing role of the modern Canadian Military, the unique experience of those who serve in the military has not meaningfully changed, including the enhanced risk of death and injury faced by all those who serve in the military.

The differing treatment of Modern Veterans is also not a recent phenomenon. As will be discussed later in this paper, it began shortly after the Second World War and in part, it affected the veterans who served in Korea, although these veterans eventually brought under the definition “War Service Veteran.” The cumulative effect of this differential treatment recently came to a head and was the subject of litigation before the Canadian courts. In October of 2012, CF veterans of the Afghanistan campaign, supported by advocacy group *Equitas*, filed a class action lawsuit against the Federal Government, known as *Scott v. Canada (Attorney General)* (“Scott”)<sup>3</sup>, named after lead Plaintiff Daniel Scott. These veterans alleged that the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, commonly known as the New Veterans Charter (the “NVC”), which came into force April 1, 2006 and only applied to Modern Veterans,<sup>4</sup> provided less support to

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<sup>3</sup> *Scott v. Canada (Attorney General)* 2013 BCSC 1651 [*Scott v. Canada*].

<sup>4</sup> *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (S.C. 2005, c. 21) at s. 42 (hereafter, the “*New Veterans Charter*”) [*NVC*]; *Pension Act* (R.S.C. 1985, c. P-6) at s. 3.1 [*Pension Act*].

disabled veterans than under the previous *Pension Act*.<sup>5</sup> Further to this, studies showed that the *Pension Act* benefits, retained for War Service Veterans, provided a significant financial advantage over the new benefits for veterans with severe disabilities. The NVC financially disadvantaged veterans the greatest when they lived longer, were married, had more children, had a higher disability assessment, and were released at a lower rank.<sup>6</sup>

The NVC also takes a more restrictive approach to spousal benefits. War Service Veterans and their dependents (wife, child or parent) qualify rehabilitation and training services under the *Veterans Rehabilitation Act*, irrespective of injury. Rehabilitation services and vocational assistance, however, are only available to spouses under Part 2 of the NVC where the respective Modern Veteran has been approved for these services because of disability.<sup>7</sup> Further to this, there are benefits like the Re-establishment Credit under the *War Service Grants Act*, which was only ever offered to all War Service Veterans.<sup>8</sup>

Due to the differences in benefits, the *Scott* veterans alleged that the NVC was a contravention of the ‘social covenant’ between Canadian citizens, the Canadian government, and past and present Canadian Military members and their families. They also argue that then-Prime Minister Sir Robert Borden in his speech to Canadian soldiers articulated the covenant on the eve of the Battle of Vimy Ridge in 1917 as follows,

227. *As Canadian troops prepared for the Battle of Vimy Ridge in 1917, they were visited by the Prime Minister, Sir Robert Borden, who made this commitment on behalf of their country:*

*“You can go into this action feeling assured of this, and as the head of the government I give you this assurance, that you need have no fear that the government and the country will fail to show just appreciation of your service to the country in what you are about to do and what you have already done. The government and the country will consider it their first duty to prove to*

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<sup>5</sup> *Pension Act*, *supra* note 4.

<sup>6</sup> Alice Aiken and Amy Buitenhuis, *Supporting Canadian Veterans with Disabilities: a comparison of financial benefits*, (Defence Management Studies Program, School of Policy Studies, Queen’s University, 2011) at 47 [Aiken & Buitenhuis].

<sup>7</sup> *Veterans Rehabilitation Act* (S.C. 1945, c. 35) at ss. 2, 5, 12 and 13; *NVC*, *supra* note 4 at ss. 9-11.

<sup>8</sup> *War Service Grants Act* (S.C. 1944, c. 51) at s. 2 and 8.

*the returned men its just and due appreciation of the inestimable value of the services rendered to the country and Empire; and that no man, whether he goes back or whether he remains in Flanders, will have just cause to reproach the government for having broken faith with the men who won and the men who died".<sup>9</sup>*

The Plaintiffs also cited the following excerpt from the 1917 Unionist platform in support of the existence of a 'social contract,'

228. *Later in 1917 the Borden's Unionist national unity Canadian government made a further solemn commitment to those in uniform that:*

*"The men by whose sacrifice and endurance the free institutions of Canada will be preserved must be re-educated where necessary and re-established on the land or in such pursuits or vocations as they may desire to follow. The maimed and the broken will be protected, the widow and the orphan will be helped and cherished. Duty and decency demand that those who are saving democracy shall not find democracy a house of privilege, or a school of poverty and hardship."<sup>10</sup>*

The *Scott* veterans suggest that the Government of Canada, through representations to its armed forces, made a commitment to compensate fairly and adequately members who were injured, as well as their dependents. They said that this was an "essential condition of the relationship" and by virtue of the legal doctrine known as the 'Honour of the Crown', the Government of Canada was honour-bound to carry out the "Social Covenant".<sup>11</sup>

The Government rejected this claim and sought to have the veteran's case dismissed with a motion to strike.<sup>12</sup> A motion to strike argues that even if all the alleged facts are presumed to be true, Canadian law cannot be interpreted in a way that would allow the lawsuit to succeed. In short, the Government said the claim has no substance and the alleged Social Covenant was not legally binding. Crown lawyers stated that:

*At no time in Canada's history has any alleged 'social contract' or 'social covenant' having the attributes pleaded by the plaintiffs been given effect in any statute, regulation, or as a constitutional principle, written or unwritten...*

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<sup>9</sup> *Scott v. Canada*, *supra* note 3 at para 22.

<sup>10</sup> *Ibid* at para 22.

<sup>11</sup> *Ibid* at paras 23-24.

<sup>12</sup> Everson, Kristen Veterans Don't Have Social Contract, Ottawa Says in Lawsuit Response," *CBC News* (March 18, 2014) online: <https://www.cbc.ca/news/politics/veterans-don-t-have-social-contract-ottawa-says-in-lawsuit-response-1.2577053>.

*The defendant pleads that the statements made by Sir Robert Borden and the coalition government in 1917 were political speeches that reflected the policy positions of the government at the time and were never intended to create a contract or covenant.*<sup>13</sup>

The Crown also argued that, following the democratically upheld principle of parliamentary sovereignty, it was not the place of the courts to overturn validly enacted legislation. Crown lawyer, Paul Vickery, further suggested that, instead of using the courts, this was a matter within the purview of Federal legislators: “[t]he remedy for those who believe that legislation is unjust or unfair lies in the ballot box.”<sup>14</sup>

In September 2013, the Supreme Court of British Columbia rejected the government’s motion to strike. Government lawyers appealed this decision to the higher British Columbia Court of Appeal.<sup>15</sup> On December 4, 2017 the Court of Appeal released their decision, overturning the decision of the Supreme Court of British Columbia, dismissing the veterans’ action but stating that, “All right-thinking Canadians would agree that they [veterans] should be provided with adequate disability benefits. If that is not occurring, it is a national embarrassment.”<sup>16</sup> On January 31, 2018, the veterans filed an application seeking leave from the Supreme Court of Canada to appeal the decision of the British Columbia Court of Appeal.<sup>17</sup> The Court dismissed their motion on August 30, 2018, thereby exhausting all of their rights of appeal for this matter.<sup>18</sup>

While the Plaintiffs in *Scott* raised legal arguments that focused on the NVC as the reason the social covenant has been broken, the veterans were essentially arguing that they

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<sup>13</sup> Attorney General of Canada, *Crown’s Response to Civil Claim*, January 31, 2014 (*Scott v. Canada*) paras 100 and 103.

<sup>14</sup> *Scott v. Canada*, *supra* note 3 para 31.

<sup>15</sup> *Ibid*, paras, 16 and 181.

<sup>16</sup> *Scott v. Canada (Attorney General)*, 2017 BCCA 422, at para 98 [*Scott v. Canada BCCA*].

<sup>17</sup> *Scott v. Canada (Attorney General) [Application / Notice of Appeal]* 2018 CarswellBC 440.

<sup>18</sup> *Daniel Christopher Scott, et al. v. Attorney General of Canada* 2018 CarswellBC 2287 [*Daniel Christopher Scott, et al.*].

had not been treated fairly by the Government of Canada with respect to the sacrifices they made serving in the Canadian Military. While this unfair treatment may have culminated with the NVC, this paper will review a number of examples in which Modern Veterans have been treated differently than War Service Veterans. The *Scott* case marked a temporal point of intersection for a number of other issues affecting Modern Veterans and the NVC was the trigger that caused these veterans to act.

The prior examples of unfairness towards Modern Veterans and the build up to the lawsuit will be the focus of this paper. It will also track the many reiterations of Prime Minister Robert Borden's speech leading up to the creation of the NVC, while illuminating the historic influences of politics and economics, that shaped policies directed at those serving in the Canadian military. While this paper will highlight a number of broad developments in veterans' social policy, its primary focus will be on programs that provide disability benefits for veterans and their families. These benefits were the focus of the *Scott* case. They were supposed to address many of the unique issues associated with military service, but they were not applied to Modern Veterans the same way they applied to War Service Veterans. The development of disability benefits and an examination of the systems which have historically determined who gets these benefits and in what amounts, will provide a nuanced understanding of the changes in treatment towards Modern Veterans that shaped the drafting of the NVC and corresponding *Scott* lawsuit.

To provide context for these intersecting issues, this paper focuses on four questions:

1. How is the experience of those who serve in the military unique?
2. How does military culture and military structure impact a member's ability to address the injuries they have suffered because of their service?

3. How has the Canadian government historically responded to the unique status of those who serve in the military since the First World War, and how has the government described the scope of the duty to do so?
4. In comparison with War Service Veterans, how are Modern Veterans treated with respect to the benefits they receive, their interactions with government institutions and the acknowledgement of their service?

This paper rests upon a number of theoretical foundations summarized below, and aims at addressing the impact of the differing approach to War Service Veterans and Modern Veterans by examining the NVC and the *Scott* lawsuit.

### **I. Part 1: Theoretical Foundations**

This work has been influenced by at least four schools of thought and these theoretical pieces may assist readers in deconstructing the issues facing veterans, which led to the temporal tipping point that resulted in the legal action against the State. For example, Institutional Ethnography reminds of the importance of attending to the structures, like the Veterans Affairs Canada and the Veterans Review and Appeal Board.<sup>19</sup> These bodies perform a gate keeping function, which at times has resulted in “the reproduction of inequalities” between War Service and Modern Veterans and the breaking of the Social Covenant.<sup>20</sup> Complexity Theory has been considered in effort to avoid reductionism and to

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<sup>19</sup> Marjorie L. Devault. “Introduction: What Is Institutional Ethnography?” (August 1, 2006) *Social Problems* Vol. 53, no. 3 at 294 [Devault].

<sup>20</sup> T. MacLeod and Harold Leduc, *A Dirty Little Skirmish* (Vernon: J. Charlton Publishing, 2015) at 21 [MacLeod & Leduc]; see also Veterans Affairs Canada, *Volume II of the Disability Pension Program Evaluation* (July 2005) [Disability Pension Program Evaluation]; Devault, *supra* note 19 at 294-295.

suggest that legal systems must not be structured in an effort to predict outcomes.<sup>21</sup> Both of these theories and the others consulted, including Embodiment Theory<sup>22</sup> and Critical Disability Theory<sup>23</sup> are united by their ability to complicate a narrow understanding of the veteran-state relationship as they provide a nuanced approach to these impacts without essentialising the actors involved. Judith Butler's use of Embodiment Theory provides a critique to the naturalistic explanations, providing an analytical lens, which can be used to understand some of the unique experience of those serving in the military. This includes the element of coercion to conform to the military structure and the many heterosexual male norms, imposed upon women and members of the LGBT community serving in the military.<sup>24</sup> Critical Disability Theory challenges the liberal assumption that conceptualizes disabled individual, like many veterans "as unfortunate, while privileging the normal over the abnormal."<sup>25</sup>

The issues facing veterans, including disability, high levels of suicide, and difficulties reintegrating into civilian society are all multi-causal and as such, a number of critical lenses will be required to appreciate fully the variance and complication involved. The purpose of this section is to demonstrate that the issues affecting veterans are complex and it is therefore more useful to examine the nexus of triggers that led to the Scott case, rather than the

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<sup>21</sup> J. B. Ruhl. "Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State." (March 1, 1996) *Duke Law Journal* Vol. 45, no. 5 at 851-853 [Ruhl].

<sup>22</sup> Judith Butler. "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory." (December 1, 1988) *Theatre Journal* Vol. 40, no. 4 at 520 [Butler].

<sup>23</sup> Richard F. Devlin and Dianne Pothier. *Critical Disability Theory Essays in Philosophy, Politics, Policy, and Law* (Vancouver, B.C.: UBC Press, 2006) at 16 [Devlin & Pothier].

<sup>24</sup> Butler, *supra* note 22 at 522; see also Paul Jackson. *One of the boys: Homosexuality in the military during World War II*. (Montreal: McGill-Queen's Press-MQUP, 2010) at 222 [Jackson].

<sup>25</sup> Devlin & Pothier, *supra* note 23 at 2 and 16.

discrete issues associated with the NVC. These complexities feed into the subsequent three substantive sections in Parts 2-4.

## **II. Part 2: Military Culture - Unlimited Liability and the Military Veil**

Part 2 will expound upon military culture and the unique legal status of all members of the Canadian Military. It will discuss the institutional and socialized disincentives veterans' face obtaining long-term medical support for military injuries and getting help to reintegrate into Canadian society. Canadian Forces' members face a significant degree of social conditioning when they join the military. They are trained to kill and to complete military objectives. Their behavior is shaped by coercion from their fellow members, the military structure and justice system. This section examines veterans' reliance on the Canadian Military to provide disability benefits in exchange for the unlimited liability they face while serving. Military culture provides disincentives to reporting injuries and obtaining the medical documentation required to prove eligibility for disability benefits. Military indoctrination also shapes the way in which members interact with the governmental institutions that disseminate these benefits. If members do not meet the military's high mental and physical standards, they may also be dismissed from the military and lose their livelihood, identity and ability to support their injuries. While the operational role of the CF has changed, the ways in which the military negatively affects its members' ability to address their injuries has not.

## **III. Part 3: Historic Developments in Canadian Veteran Social Policy**

Part 3 will explore the rationale and evolution of veteran policies implemented by the government of Canada during the Great War (1914-1919), Interwar (1920-1938), Second World War (1939-1945) and Post War (1946-1968) periods to address the unique experience

of service in the armed forces. The evolution in veteran policy was shaped by economics, politics and key historic events. These are reflected in the evolving description of the *Social Covenant* with veterans, including the words of Robert Borden. At times, changes in policy resulted in insufficient support to veterans.<sup>26</sup> However, veterans were given special consideration because of the sacrifices they made. These included, the 1919 *Pension Act*, the first universal income benefit in Canadian social policy,<sup>27</sup> and a Bureau of Pension Advocates, which provided publicly funded legal representation to assist veterans in advancing their benefit claims.<sup>28</sup> The Government made continued efforts to address deficiencies with veteran benefits, especially when there were political repercussions associated with inaction. This section will chronicle the rise of War Service Veterans as an interest group within veteran institutions like the *Department of Veterans Affairs*, various pension adjudication tribunals, and as a voting block at large. It will also discuss the increase in veteran stakeholder groups such as, the Royal Canadian Legion, the Korean War Veterans, the Canadian Association of Veterans in United Nations Peacekeeping, the Canadian Peacekeeping Veterans Association, and the Gulf War Veterans Association. We will see the influence of these groups on Government with respect to veteran policies. This section will conclude with a discussion of the original Veterans Charter and the 1969 White

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<sup>26</sup> During the Interwar Period an amendment to the *Pension Act* provided veterans with a lump sum payment in lieu of a pension and this change resulted in many veterans facing difficulties reintegrating and deterioration of their health before the regular pensions were reinstated, Kellen Kurschinski. "State, Service, and Survival: Canada's Great War Disabled, 1914–44," Unpublished PhD Thesis, (Hamilton: McMaster University, 2014) at 172–173 and 280 [*Kurschinski*].

<sup>27</sup> James J. Rice and Michael J. Prince, *Changing Politics of Canadian Social Policy*, [Second Edition], (Toronto: University of Toronto Press, 2013) at 51-52 [*Rice & Prince*].

<sup>28</sup> Veterans Affairs Canada, *The Origins and Evolution of Veterans Benefits in Canada 1914–2004*, online: <https://www.veterans.gc.ca/public/pages/forces/nvc/reference.pdf> at 7 [*The Origins and Evolution of Veterans Benefits*].

Paper on Veterans, which set the high standards for War Service Veterans, deviated from in the treatment of Modern Veterans.

#### **IV. Part 4: Delay, Deny and Die – Veteran Institutions**

Part 4 will discuss the growing veteran class distinctions between Modern and Traditional Veterans and shows how these differences have affected changes to veteran policies and institutional practices affecting Modern Veterans. These distinctions affect the way in which the service of Modern Veterans are acknowledged and the way in which their sacrifices have been commemorated. This section will also look at how Modern Veteran applicants for disability benefits are treated differently under the *Compensation Principle* and *Insurance Principle* and pursuant to the *Pension Act* and the NVC. When Veterans Affairs Canada denies Modern Veterans' applications for a disability benefit these veterans face further challenges before the Veterans Review and Appeal Board ("VRAB"). Modern Veterans have been treated differently than War Service Veterans. This has included, (1) the breadth of their benefit programs, (2) government support for their benefit claims, and (3) resources devoted to their remembrance. Some argue that these differences are the result of changes in veteran demographics resulting in Modern Veteran stakeholder groups without an equivalent ability to influence the government.<sup>29</sup> This treatment of has contextualized the alleged breaking of the Social Covenant in the lead up to the *Scott* case.

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<sup>29</sup> Canada, Senate of Canada, *Proceedings of the Standing Senate Committee on National Finance*, 38<sup>th</sup> Parliament, 1<sup>st</sup> Session, Issue No. 22 (Minutes of Proceeding), May 11, 2005, online: <https://sencanada.ca/en/Content/SEN/Committee/381/fina/22mn-e> [Standing Senate Committee on National Finance].

## **V. Part 5: Justice Fairness Equity – One Veteran One Standard**

Part 5 will examine the process of legislative reform that resulted in the approach to disability benefits legislated by the NVC. It will review key policy documents, which proposed providing a lump sum disability payment to Modern Veterans to meet their allegedly differing needs, while suggesting that the superior *Pension Act* disability pension continued to be appropriate to meet the needs of War Service Veterans. These reports recommended providing a different standard of support to Modern Veterans based on an assumption that these veterans have little motivation to get better and could more easily reintegrate into Canadian civil society than their War Service Veteran predecessors. They also suggested that, from a taxpayer point of view, there was concern over the long-term fiscal liability of paying for lifetime pensions for Modern Veterans that were equal to those which continue to be paid to War Service Veterans. This section will then discuss the endorsement of the NVC by traditional veteran institutions like the Legion and the lack of consultation with Modern Veteran stakeholders, as the statute progressed through the House of Commons and Senate to receive Royal Assent in less than a month. The section will conclude by reviewing the actions of the Harper Conservative government in the lead up to the *Scott* suit. The failure of this government to address the deficiencies with the NVC, while flagrantly using the military's image for political reasons played an important role in angering veterans.

While Veterans come to their legal fight with important divisions among their ranks, and they continue to face significant shared obstacles to obtaining benefits, all veterans should be treated fairly. While this paper does not take a position on the legal standing of Borden's speech, it will argue there is a time-honoured promise by Canadians to take care of those who make the ultimate sacrifice for their country and their families. In addition, it will argue that upholding the social covenant requires keeping faith with all generations of injured

veterans, regardless of their vintage, of where they served, and of what injuries they have suffered as a result. There continues to be a disconnect between the will of the Canadian people and the actions of recent federal governments, which this paper seeks to illuminate, with the hope that one day Veterans will no longer have to fight their second battle for the support they have earned.

## **PART 1. THEORETICAL FOUNDATIONS**

According to Department of National Defence statistics, between 2004 and March 31, 2014, 160 Canadian service members took their own lives, surpassing the 138 killed in combat during the Afghanistan campaign.<sup>30</sup> The Canadian Armed Forces and Veterans Affairs Canada, *Joint Suicide Prevention Strategy* notes that “suicide rates for the Canadian Armed Forces are broadly in keeping with those of the general population.”<sup>31</sup> While suicide impacts many different groups of Canadians the study also acknowledges that suicide can be linked to the military lifestyle or post-service challenges faced by veterans. The Study identifies the following risk factors that are specific to,

- A prior suicide attempt
- Suicidal thinking or self-harming behaviour
- Suicide by a family member or friend
- Mental illness
- Substance abuse
- Impulsivity, impaired problem-solving
- Relationship conflict, discord or loss
- Few supportive relationships (sense of isolation)
- Feelings of hopelessness
- Feelings of being a burden to others
- Other significant loss (employment, financial)
- Physical illness or chronic pain
- Adverse events in personal history (trauma, abuse, including in childhood)
- Access to lethal means (such as firearms or medication)
- Harassment, discrimination and/or bullying
- Stigma associated with help-seeking behaviour
- Imitation, meaning the “contagion effect” where suicide by one person can influence vulnerable people who identify with the person who died<sup>32</sup>

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<sup>30</sup> Bruce Champion-Smith. “Canada’s Military Lost More Soldiers to Suicide than It Did to Combat in Afghanistan, according to New Statistics from the Defence Department.” The Toronto Star, (September 16, 2014) online: [https://www.thestar.com/news/canada/2014/09/16/suicide\\_claims\\_more\\_soldiers\\_than\\_those\\_killed\\_by\\_afghan\\_combat.html](https://www.thestar.com/news/canada/2014/09/16/suicide_claims_more_soldiers_than_those_killed_by_afghan_combat.html) [Champion-Smith]; See also, Government of Canada, Department of National Defence. “National Defence | Canadian Armed Forces | Backgrounder | Suicide and Suicide Prevention in the Canadian Armed Forces,” (September 12, 2014) online: <http://www.forces.gc.ca/en/news/article.page?doc=suicide-and-suicide-prevention-in-the-canadian-armed-forces/hgg87xvu>; Government of Canada, National Defence. “National Defence | Canadian Armed Forces | Fact Sheet | Canadian Forces; Casualty Statistics (Afghanistan),” (February 19, 2014) online: <http://www.forces.gc.ca/en/news/article.page?doc=canadian-forces-casualty-statistics-afghanistan/hgg87xxk>.

<sup>31</sup> Canadian Armed Forces and Veterans Affairs Canada, *Joint Suicide Prevention Strategy*, online: <https://www.canada.ca/content/dam/dnd-mdn/documents/reports/2017/caf-vac-joint-suicide-prevention-strategy.pdf> at 9 [Joint Suicide Prevention Strategy].

<sup>32</sup> *Joint Suicide Prevention Strategy*, *supra* note 31 at 18.

Suicide, like many other difficulties faced by members of the Canadian Military is multifaceted. It can be triggered and exacerbated by a number of visible and less visible factors and there is no simple solution. By examining the intersecting issues that contextualize suicide and attempted suicide a number of complex issues come to light which provided important context for this paper and the other difficulties face by Modern Veterans described in the subsequent chapters.

In the fall of 2013 instances of suicide in the Canadian Forces were covered extensively in the Canadian press. Master Cpl. William Elliott and Master Bombardier Travis Halmrast had both been stationed at Canadian Forces Base Shilo in Manitoba, before tragically taking their own lives in the fall of 2013. Elliott suffered from back injuries that occurred in 2006 while serving in Afghanistan. Before taking his life, he had told friends that he was worried the military would force him out and that he would not be adequately supported with his injuries.<sup>33</sup> The reason for his concern likely stemmed from the military's *Principle of Universality of Service* or the "soldier first" principle, which holds that all members of the Canadian Military can be administratively dismissed if they are unable to perform common defence and security duties, including, being physically fit, employable and deployable for general operational duties.<sup>34</sup> The then Veteran's affairs Ombudsman Pierre Daigle called this standard "arbitrary and unfair", and many Members of the military suggest that it makes it harder for them to come forward with mental health issues.<sup>35</sup>

Master Cpl. William Elliott suffered with a back injury, which may have been exacerbated over the subsequent seven years of service prior to taking his own life. It appears that he also suffered from a mental health condition, evidenced by the fact that he was court-martialled for shooting his weapon

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<sup>33</sup> CTVNews.ca Staff "Military to Investigate Suicides of 2 Soldiers with Ties to CFB Shilo." *CTVNews*, online: <http://www.ctvnews.ca/canada/military-to-investigate-suicides-of-2-soldiers-with-ties-to-cfb-shilo-1.1564107>[*Military to Investigate Suicides of 2 Soldiers with Ties to CFB Shilo*].

<sup>34</sup> Department of National Defence, *DAOD 5023-0, Universality of Service*, online: <http://www.forces.gc.ca/en/about-policies-standards-defence-admin-orders-directives-5000/5023-0.page>.

<sup>35</sup> David Pugliese, "Is the Canadian military's universality of service policy fair?" *Ottawa Citizen* (October 31, 2014) online: <http://ottawacitizen.com/news/national/defence-watch/is-the-canadian-militarys-universality-of-service-policy-fair>.

at a colleague in 2010, only three years prior to receiving a special citation for bravery and valour. He may have avoided seeking help for these injuries, out of fear of being dismissed as a result of the *Principle of Universality of Service*. In the case of Halmrast, his injuries were not so visible although his friends and family stated that they thought he suffered from PTSD. He died after attempting suicide, while being held in a correctional facility on allegations of domestic assault. For both Halmrast and Elliott there appears to be an intersection of mental health issues, violent outbursts and the act of taking one's own life.<sup>36</sup> A short time after the deaths in Manitoba, warrant officer Michael McNeil also died in an apparent suicide at the Canadian Forces Base Petawawa in Ontario.<sup>37</sup>

Suicide in the CF has become rampant and it appears that the military is unable to provide viable solution. There is also evidence that the Military has attempted to downplay this significant institutionalised problem. After a struggle with alcohol and drug abuse, depression, and symptoms of PTSD, Corporal Stuart Langringe committed suicide at CFB Edmonton in March 2008. What began with his parents inquiring about an error on his death certificate, eventually led to a \$3.5 million public inquiry.<sup>38</sup> The initial report from Military Police Complaints Commission was released March 2015 detailing a bungled military police investigation. A previously secret police report also disclosed that the military not only blamed Langridge for the tragedy, but it also attempted to shift responsibility for his death to his biological parents, who divorced when he was five years old.<sup>39</sup> There were also allegations of a conflict of interest as Colonel Rob Delaney, the military's top police officer and did not

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<sup>36</sup> *Military to Investigate Suicides of 2 Soldiers with Ties to CFB Shilo*, supra note 33.

<sup>37</sup> CTVNews.ca Staff "Third Canadian Soldier Dies of Apparent Suicide." *CTVNews* (November 28, 2013) online: <http://www.ctvnews.ca/canada/third-canadian-soldier-dies-of-apparent-suicide-1.1565788> [*Third Canadian Soldier Dies of Apparent Suicide*].

<sup>38</sup> Chris Cobb. "Inquiry into veteran's suicide cost taxpayers at least \$3.5M" *Ottawa Citizen* (March 27, 2015) online: <http://ottawacitizen.com/news/national/inquiry-into-veterans-suicide-cost-taxpayers-at-least-3-5m>.

<sup>39</sup> Murray Brewster. "Stuart Langridge's Suicide Blamed On Him, Parents: Military Report" *The Canadian Press* (December 5, 2015) online: [http://www.huffingtonpost.ca/2015/03/12/secret-military-report-in\\_n\\_6858684.html](http://www.huffingtonpost.ca/2015/03/12/secret-military-report-in_n_6858684.html).

recuse himself during the investigation of his brother-in-law of Major Dan Dandurand, who was in charge of the police unit that initially investigated Langrange's death.<sup>40</sup>

Recent statistics on veteran suicide are found in the *2017 Report on Suicide Mortality in the Canadian Armed Forces (1995 to 2016)*. The Report indicates that in 2015-2016, the crude suicide rate of Regular Force males was 24.8 per 100,000.<sup>41</sup> This was the highest crude rate to date.<sup>42</sup> The Report also provides a number of concerning statistics with respect to those individuals that took their own lives in 2016. Depressive disorders were present in 35.7% of these individuals at the time of death and 64.3% of these individuals had at least two mental health factors.<sup>43</sup> Moreover, 85.7% of the Regular Forces males that died by suicide in 2016 had at least one work and/or life stressor including: failing relationships, friend/family suicide, family/friend death, family and/or personal illness, debt, professional problems, and legal problems). Half of them had at least three concomitant stressors prior to their death.<sup>44</sup>

These tragedies and others like them however, are not isolated incidences or exceptions to the rule for those serving in the military. They are clear signs that the current approach to taking care of members of the CF and Modern Veterans is not working. These instances illuminate a number of problem areas for these individuals including: disability, mental illness, access to pensions, accountability within the chain of command, and even the risk of contact with the criminal justice system. These key issues also all relate to the historically documented suffering of Canadian veterans

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<sup>40</sup> David Pugliese. "Family of dead soldier alleges conflict of interest for two military police" *Ottawa Citizen* (April 1, 2015) online: <http://ottawacitizen.com/news/politics/family-of-dead-soldier-alleges-conflict-of-interest-for-two-military-police>.

<sup>41</sup> A crude rate is the number of new cases (or deaths) occurring in a specified population per year, usually expressed as the number of cases per 100,000 population at risk.

<sup>42</sup> Government of Canada, *2017 Report on Suicide Mortality in the Canadian Armed Forces*, (November 2017) online <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/health/2017-report-on-suicide-mortality-in-the-caf-1995-to-2016-abridged-version.html> at page vi [*2017 Report on Suicide Mortality in the Canadian Armed Forces*].

<sup>43</sup> The Mental Health Factors included: (1) Depressive disorders; (2) Trauma and stress-related disorders (post-traumatic stress disorder); (3) Trauma and stress-related disorders (other); (4) Anxiety disorders; (5) Substance use disorders; (6) Traumatic brain injury; and (7) Personality disorders.

<sup>44</sup> *2017 Report on Suicide Mortality in the Canadian Armed Forces*, *supra* note 42 at page v.

documented in the history section of this paper and these concerns fit into broader theoretic debates, which underpin, military culture, the military institution and the shaping of government policy. The plight of Canadian soldiers goes beyond the heightened risk of death and injury. It involves a complex and often counterintuitive sets of influences which shape the relationship between military members, the military institution and state bodies, which are meant to take care of those who become injured in the course of their service.

A variety of theoretical approaches have been drawn upon to provide a foundational understanding of the complicated nature of veterans, and the relevant state institutions. Because the *Scott* case is contextualized by an intersection of veteran issues, the theories considered are united by their ability to complicate narrow understandings of the veteran-state relationship and provide a nuanced description of the impacts on veterans without essentialising the actors involved.

Understanding the issues which foreground the *Scott* case requires a complex analysis of the intricacies of military culture. It also requires an examination of the unique legal framework that regulates those who serve in the military and the governmental institutions which adjudicate the benefits required to address injuries suffered in the line of duty. This project involves an examination of veteran policy making, the structure of the military and government institution, as well as an exploration of how soldiers see themselves and their peers.

## **I. Complexity Theory**

Given the drastic nature of some of the problems facing veterans and the level of complexity involved, this project places value on nuanced understandings of Modern Veterans. One approach to studying suicide in that natural sciences context is the use of Complexity Theory.<sup>45</sup> This theory has also been used outside of the natural science context to guide the process of knowledge generation, while maintaining a critical, anti-determinist approach. While the contrary determinist approach

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<sup>45</sup> Martin Plöderl and Clemens Fartacek. "Known but unpredictable - an argument for complexity" (2018) *BJPsych bulletin* Vol. 42, no. 2 at 89.

proposes that all behavior is caused by preceding factors and is thus predictable, there are aspects of military service and military institutions which do not follow the cause and effect pattern. For instance, veterans have historically exhibited varying responses to lifestyle of soldiering. This impact can be difficult to predict and as noted above, the issues facing veterans and the symptoms resulting from their service are often multicausal. Therefore a determinist approach is less helpful.<sup>46</sup>

Theorists like J. B. Ruhl have successfully used Complexity Theory in the social sciences in an effort to avoid reductionism and to suggest that legal systems must not be structured in an effort to predict outcomes. While a reductionist approach suggests that complex phenomena can be explained in terms of something simpler, Complexity Theory allows for a greater appreciation of the forces at play in the interaction of law and society.<sup>47</sup> In the current context a reductionist approach might assume that those injured in connection with their military service will receive a disability benefit from the government which is commensurate with their injury(s) suffered in connection with their service or that the cause of their injuries can be predicted. The institutions which disseminate and adjudicate veteran benefits are premised on the idea that entitlement to a disability benefit can be calculated and proven through a causal connection to service in the military. While this approach works for some applicants, there are injuries such as repetitive strain and mental health injuries which do not follow the same cause and effect pattern as a physical injuries. Injured veterans may also forgo the application/adjudication process altogether, as a result of being unable to navigate these institutions or as a result of barriers created by the very injuries they need assistance with.

Taking a reductionist approach can also result in unforeseen, even contradictory outcomes. As seen above, the *Principle of Universality of Service* disincentives members from reporting their injuries, when it is meant to maintain the physical and mental fitness of members of the military. This

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<sup>46</sup> Robert Engen. *Canadians Under Fire: Infantry Effectiveness in the Second World War* (Montreal: McGill-Queen's University Press, 2009) at 23.

<sup>47</sup> Ruhl, *supra* note 21 at 851-853.

non-reporting also allows injuries to become more severe, can result in a heightened risk of suicide, and eliminates a paper trail which can later be used by veterans to establish their entitlement to a disability benefit. Due to fears of early dismissal and unsatisfactory pension prospects, there is instead an incentive to closet personal health issues rather than seek medical attention. This outcome also pushes the problem on to civilian authorities, who may not have the proper expertise to deal with military specific problems. Veterans may also have to deal with these issues following a period of incubation in fear and uncertainty. The issues facing veterans are complex and multi-faceted, and complexity theory provides helpful example of how complex problems can be approached in a non-determinalist manner.

## II. Institutional Ethnography

To understand the experience of Canadian veterans, we must look at how a soldier is made, beyond the commonly accepted notions of basic arms training. The Canadian Military Institution has shaped the bodies and minds of men and women and in doing so it has taken on a moral obligation for the impact associated with this process. Institutional Ethnography reminds of the importance of attending to the structures and that structures affect members of the Canadian military and the process of making a soldier and a veteran. Dorothy E. Smith first developed this theory to examine the work processes taken as fundamental in the grounding of social life.<sup>48</sup> This theory provides examples of institutional ideologies like those in the Canadian Military which have a tendency to only recognize the needs of certain members of society.

For example, when members train both in Canada and abroad they train for real combat situations and in the process, they are exposed to many of same dangers present on a battlefield, including potentially lethal weapons fire.<sup>49</sup> The location in which a member of the Canadian Military

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<sup>48</sup> *Devault, supra* note 19 at 294.

<sup>49</sup> Pete McMartin. "Disabled veterans' rights a matter of law, or justice?" Vancouver Sun (Décembre 8, 2014) online:

serves and the reason for which they are deployed plays a significant role in the way the Canadian civilian population views veterans. This has also shaped the way in which veteran's advocacy has evolved, recognition of military service is assigned and statutory benefits like the NVC have been justified by the Government. These factors have shaped the differential treatment of Modern Veterans and underpin the arguments for fairness posited in the Scott lawsuit.

Like the many examples provided by Institutional Ethnography this project will take a critical look at the Canadian Military as an institution, to better understand how it structures the lives and development of its members. It will also examine other institutions like veteran advocacy groups and the government bureaucracy. As Marjorie Devault suggests, "institutions may be a primary mechanism for the reproduction of inequalities."<sup>50</sup> To look at the ways in which people interact with one another in the context of the military and understand how those interactions are institutionalized. The military promotes a culture in which those who question or complain are punished by fellow members as well as the through the institution itself with a denial of advancement of rank. Like many other policy decisions, veteran policy has been most influenced by the War Service Veterans, due to their significant numbers and dominant advocacy groups. These veterans dominated the Federal civil service following the Second World War and they played a role in institutionalizing the priority of the needs of War Service Veterans over Modern Veterans.

A review of military institutions must also involve an examination of adjudicative bodies like the Courts Martial, which deals with infractions under military law and the Veterans Review and Appeal Board (the "VRAB"), which makes decisions on disability benefit applications. These bodies play an important role in the development of the relationship between soldier and state, which shapes the future actions of those in the military. Although the government is responsible for legislation and policy development, the operation of the Courts Martial, the VRAB and other government institutions is

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<http://www.vancouversun.com/news/Pete+McMartin+Disabled+veterans+rights+matter+justice/10451650/story.html> [McMartin].

<sup>50</sup> Devault, *supra* note 19 at 294-295.

intimately tied to the military leadership structure and government bureaucracy. The individuals who staff these bodies have a greater understanding of veteran's social programs and their non-elected status allows them to impart a long-term influence on policy planning and development. While government's have the power to change laws, the implementation of these laws through governmental bodies is equally important.

### III. Embodiment Theory

To further understand what it is to be a veteran, this paper draws on Embodiment Theory. This theory focuses on the construction of the human body rather than institutions and their effects. To borrow language from Simone de Beauvoir, one is not born but, rather becomes a soldier or veteran.<sup>51</sup> Similarly, Judith Butler states that "identity is a performative accomplishment compelled by social sanction and taboo."<sup>52</sup> Butler is critical of the naturalistic explanation, that social meanings of existence can be derived simply from physiology.<sup>53</sup> This form of essentialism of the body engages with the idea of disability but can also be used to understand the embodiment of the men and women in the Canadian Military, or that of the stereotypical "soldier".<sup>54</sup> Similarly, First or Second World War Veterans are often portrayed as the idealized image of a veteran in Canada.

Butler's analysis suggests there is an element of coercion to conform.<sup>55</sup> One cannot help but be bombarded with stereotypical, often patriarchal, notions of being a soldier and the pressure to conform to this mode. One obvious example is the age old debate over the admittance of women and members of the LGBT community to the military and the military's fear that this will compromise force cohesion.<sup>56</sup> While a challenge on this ground may seem absurd alongside notions of Canada's liberal

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<sup>51</sup> *Butler, supra* note 22 at 519; Simone de Beauvoir, *The Second Sex* (1949) [*de Beauvoir*].

<sup>52</sup> *Butler, supra* note 22 at 520.

<sup>53</sup> *Ibid*, 520.

<sup>54</sup> *Ibid*, 521.

<sup>55</sup> *Ibid*, 522.

<sup>56</sup> *Jackson, supra* note 24 at 222.

democracy and forward thinking features like the Charter of Rights and Freedoms, the military is a conservative institution that has not progressed at the same pace as Canadian civil society.<sup>57</sup> Training for combat and socializing members to work as a unit results in members self-policing and weeding out the perceived “weakest link,” or others perceived as outliers and dissenters in the group. This can also be seen in acts of regulation between soldiers, chronicled further in Part 2. There is a great deal of pressure to conform. As Butler states, “the tacit collective agreement to perform, produce, and sustain...as cultural fiction is obscured by the credibility of its own production.”<sup>58</sup>

This agreement and the history that underpins it must be investigated further to better understand the embodiment of these socially constructed norms within the Canadian Military. A better understanding of what it ‘is’ to be a soldier and then a veteran as embodied style, or even that of a family member in a military family is important. Considering the approach posited in Embodiment Theory will assist in unpacking the complicated nature of the transition into civilian life and many of the less visible challenges these individuals face will help contextualize their relationship with the state.

#### **IV. Critical Disability Theory**

An inevitable contradiction in the embodiment of a soldier is one who has become disabled. Critical Disability Theory provides helpful examples of an approach to issues which are analogous to the lived experience of many disabled veterans above and beyond the pressures already discussed and how their plight is seen by the state. Richard Devlin and Dianne Pothier suggest that “critical disability theory is not just about the failure of liberalism as a political response to the needs of persons with disabilities but it is a philosophical challenge to conventional liberal assumptions.”<sup>59</sup> They suggest that liberalism has a particularly hard time dealing with disability, because it conceptualizes

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<sup>57</sup> Aaron Belkin and Jason McNichol. “Homosexual Personnel Policy in the Canadian Forces: Did Lifting the Gay Ban Undermine Military Performance?” (December 1, 2000) *International Journal* Vol. 56, no. 1 at 74-75.

<sup>58</sup> *Butler, supra* note 22 at 522.

<sup>59</sup> *Devlin & Pothier, supra* note 23 at 16.

individuals as unfortunate, while privileging the normal over the abnormal.<sup>60</sup> The authors illustrate this point by stating that, “if the sign says that all are welcome, then gender or race is not an absolute barrier to getting in the door, but a set of stairs is an absolute barrier for a wheelchair user.”<sup>61</sup>

Similarly, the Canadian Military has progressed to a state where it is far more common to see women in active service roles. To be a member of the military however, one must still satisfy certain mental and physical requirements to meet the *Principle of Universality of Service* standard, something that is unattainable for those who are disabled. While there are obvious reasons not to employ someone in a wheelchair in a combat role, for operational concerns, when members of the military become disabled they do not just lose their career. The impact of disability and the act of being forcibly returned to civilian life can also cause a crises of identity. This is further exacerbated when the government deems veterans unworthy of certain forms of recognition, disability pension benefits or imposes and undue burden of evidentiary proof to access this support.<sup>62</sup>

Critical Disability Theory engages with “questions of power: of who and what gets valued, and who and what gets marginalized.”<sup>63</sup> Conceptualization of disability as a misfortune, can lead to a hierarchy of difference allowing governmental bodies to take a charitable approach to the disabled, which allows for the legitimization of cutting support and imposing other budgetary constraints on those with disabilities.<sup>64</sup> If veterans are deemed to not have a special status, their benefits simply become a policy decision rather than the fulfillment of a binding commitment.

Beyond simply honouring a past promise, legal recognition of the Social Covenant explicitly or simply by treating all veterans equally could also be an important way of protecting some of Canada’s most vulnerable veterans, including those who are seriously disabled. Unlike issues of race and gender, the group of people who are medically/professionally assessed or self-identify as disabled is

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<sup>60</sup> *Ibid* at 2.

<sup>61</sup> *Ibid* at 12.

<sup>62</sup> *Ibid* at 7.

<sup>63</sup> *Ibid* at 9.

<sup>64</sup> *Ibid* at 10-11.

fractured along many different lines. These include the more obvious mental versus physical, or perhaps those who were born with their disability compared to those who acquired it during their lifetime. These divisions undermine efforts to obtain funding, as groups compete over benefits, thereby allowing governments to create a race to the bottom. In the case of veterans, War Service Veterans were able to leverage their employment within governmental bodies, the strength of their advocacy groups and their sheer numbers when advocating for benefits from the Government. Modern Veterans however did not have these advantages, and the Government chose to prioritize the needs of War Service Veterans allowing them to retain the *Pension Act* benefits.

## V. Intersectional Theory

Problems created and perpetuated by the Canadian Military can have serious, complex and far-reaching implications. Intersectional Theory is an example of an approach which has been deployed to make sense of similarly multifaceted issues. Patricia Hill Collins suggests we need new ways of conceptualizing oppression and the activism surrounding it, which takes “class differences of a global matrix of domination into account.”<sup>65</sup> Essentially, domination incorporates a number of intersecting oppressions, and there exists a great deal of variance between matrices of domination.<sup>66</sup>

One cannot group all veterans together when examining the oppression they face, because this oppression can vary across class lines, sexuality lines, and across a number of other factors. Also, Disability Theory shows us that goals may differ across various sub groups and cause conflict along these lines as well. Another aspect that Collins suggests is important is the idea of nation, in the sense that it is “a collection of people who have come to believe that they have been shaped by a common past and are destined to share a common future.”<sup>67</sup> This influence can be seen in schools,

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<sup>65</sup> Patricia Hill Collins. *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (New York and London: Routledge, 2000) at 228 [Collins].

<sup>66</sup> *Ibid* at 229.

<sup>67</sup> *Ibid* at 229.

news media, and other social institutions, which legitimize the national narrative. Those in power use their authority to hide their promotion of special interests by presenting them as national interests and this can explain the ways in which the government uses the military.

In the context of nationalism and assumed Canadian values there is no better example than that of the importance of the Canadian forces and the idea of “supporting our troops.” However, this support is not equally felt by all classes of veterans, and it is often tied to the public support for a particular military campaign than those individuals who participate in it. The support can also fade after soldiers return home or are discharged or exist in an empty idealism. Other nationalistic ideas involve concepts of what roles military families play and how they fit into this narrative. And further complicating the discussion is the role of female service women, who may face oppression for not conforming to the traditional notion of a male-dominated army or break with that of a traditional notion of a military family.

The treatment of Canadian veterans cannot easily be separated from saber rattling and the romantic view of wars past. And as such, public perception plays an important role in the politics of veteran policy, especially when governments argue that pension policy must be decided by the ballot box rather than in the courts. It is also true that many of these theories touch on overlapping issues, which are interconnected in the ways they function. While understanding what it means to be a soldier can be helpful, there are many different veteran class distinctions that complicate this analysis. Many War Service Veterans returned home to jobs in the veteran bureaucratic administration. They played a significant role in the development of veteran policy for Modern Veterans, as their interest groups such as the Legion have a dominant sway over government legislators.

Articulating the relationship between Canadian veterans and state is no simple task and it will rest on a number of critical approaches which provide examples of the variance and complication involved in the issues facing veterans. It is understood that for the most part veterans are not born but made, and each comes with their own individualized needs and pressures to conform to many

contradictory notions of being a soldier and veteran.<sup>68</sup> Although this is no small challenge it is one that is both justified and necessary to accomplish a more complex understanding of the factors which underpin the *Scott* case.

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<sup>68</sup> *de Beauvoir supra* note 51; There is also literature which that has shown that the military can attract certain type of people. See the work of Mark Zamorski. "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* (2017) Vol. 62, no. 6 at 414.

## **PART 2. MILITARY CULTURE - UNLIMITED LIABILITY AND THE MILITARY VEIL**

### **Introduction**

This chapter examines the unique legal status of those who serve in the Canadian military, including the impact of Unlimited Liability, the Principle of Universality of Service and military member's inability to sue the government for their injuries. It also explores how military culture and military institutions, including the military justice system, have exacerbated the tension between the extraordinary physical and mental demands of serving in the military and the difficult process of seeking aid from the government to address the unique medical impacts of service.

### **I. Military Culture**

#### **A. Regulation within the Ranks**

In the military, members are socialized to interact with their peers in a way that is different from civilian life. As psychologist Timothy Black explains, "New recruits are quickly trained to lose their sense of autonomous individuality."<sup>69</sup> While this process affects every member differently, the military institution seeks to shape its members for their use as military assets rather than as self-interested individuals. Superior officers regulate those under their command by issuing orders, which may put them in harm's way and in the face of violations, bring forth disciplinary charges. They also control advancement, and can grant or withhold leave necessary to address both visible injuries and mental health conditions, which may be

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<sup>69</sup> Timothy Black and Chiara Papile. "Making It on Civvy Street: An Online Survey of Canadian Veterans in Transition." (August 7, 2010) *Canadian Journal of Counselling and Psychotherapy / Revue Canadienne de Counseling et de Psychothérapie* Vol. 44, no. 4 at 384.

more difficult to diagnose. In doing so, the military promotes a culture that is better suited for accomplishing military objectives than self-preservation and this creates a tension between the procedural requirements of service and the ability of members to address their injuries.

In addition to indoctrination through training exercises and the chain of command, members are also influenced by their relationships with their fellow soldiers. From the start of basic training, members exist in a co-dependent relationship with their peers. This makes sense because in combat the most important person is the person to your left and the person to your right. Each member has the power to ensure the safety of the other. The chain or line of battle is only as strong as its weakest link. This reciprocal relationship affects the security of each member and members must therefore gauge the potential reliability and trustworthiness of those they serve alongside, as a form of survival mechanism.

As a result of this co-dependent relationship members can face coercion from their fellow soldiers to act in a manner which is seen to be beneficial to the group. In addition, they may also feel a sense of camaraderie or duty which compels them to put the needs of the group ahead of their own. The impact of both coercion and camaraderie can be seen in a number of the suicide risk factors associated with the military lifestyle, listed in the Canadian Armed Forces and Veterans Affairs Canada *Joint Suicide Prevention Strategy*. These include, (1) impulsivity, impaired problem-solving; (2) a sense of isolation (3) feelings of being burden to others; (4) adverse events (trauma and abuse); (5) harassment, discrimination and/or bullying; and (6) stigma. These are some of the suicide risk factors associated with the military lifestyle.<sup>70</sup> Members may be coerced to act in the group interest out of a fear of abuse,

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<sup>70</sup> *Joint Suicide Prevention Strategy*, *supra* note 31 at 18.

harassment, discrimination and/or bullying from their peers. They may also act out of a feeling of camaraderie, in an attempt to avoid feeling isolated from or burdensome to the group.

While the first influence comes from an external source and the second is internally based, they can both have a negative impact on an individual's physical and mental health. The impact of coercion in the military is often sensationalized American media including through depictions of violent forms of hazing like the 'Code Red' featured in the movie *A Few Good Men* or the 'blanket party' inflicted on Private Pyle in the film *Full Metal Jacket*. While the Canadian Military faces issues including hazing, sexual assault and discrimination against women and members of the LGBT community, the sensationalized violence depicted in Hollywood films is not a common practice.<sup>71</sup> It is nonetheless a piece of the puzzle.

One of the important but less visible dimensions of the problem is the phenomenon of soldiers failing to seek assistance with their injuries out of a concern that they will burden their fellow comrades. Silence in this context is more frequent than silence from coercion alone. Anthropologist Donna Winslow notes that "Conventional army training intensifies the power of group pressure with its ranks by teaching recruits the need for teamwork."<sup>72</sup> In her article *Rites of Passage and Group Bonding in the Canadian Airbourne* she quotes an explanation of this phenomenon by a Canadian soldier,

*You have a bond. You have a bond that's so thick that it is unbelievable! . . . It's the pull, it's the team, the work as a team, the team spirit! I don't think that ever leaves a guy. That is exactly what basic training is supposed to do. It's supposed to weed out those who aren't willing to work that way. . . . And that's the whole motivation, that when somebody says we want you to do something then you'll do it. You'll do it because of the team, for the team, with the team and because the team has the same focus.*<sup>73</sup>

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<sup>71</sup> Donna Winslow. "Rites of Passage and Group Bonding in the Canadian Airbourne", *Armed Forces & Society* (Spring 1999) Vol. 25, no. 3 at 429 [Winslow]; Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, (March 27, 2015) online: [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](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) at 15-16.

<sup>72</sup> Winslow, *supra* note 71 at 429.

<sup>73</sup> *Ibid* at 430.

Social and disciplinary forces that might be seen in the workplace are enhanced by the respective risk of death and injury present as a result of life in the military. While a lazy co-worker in the civilian context may pose an economic risk to their colleagues, military members face the real prospect of death and bodily harm if one of their peers lets them down. As such, the threat posed by a “subpar” colleague might be met with a heightened response, including in accordance with the military justice system,

*Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential esprit de corps, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion.<sup>74</sup>*

As well as the loss of trust, these actions in the context of a war zone can understandably result in serious and even deadly repercussions for members. Missing part of or all of one’s kit is also a military law offence and can result in corporal punishment and other serious consequences.<sup>75</sup>

While the process of self-regulation is likely more prevalent early on, during basic training when outliers can be reformed or pushed out of the military, this self-regulation continues to play an important role throughout a soldier’s career. Within the military, all members are required to pull their own weight and the loss of a member to injury means more

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<sup>74</sup> *R. v. Généreux* [1992] 1 S.C.R. 259, 1992 CarswellNat 668 [*R. v. Généreux*].

<sup>75</sup> Department of National Defence, *Queen’s Regulations and Orders for the Canadian Forces (QR&O)* online: <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/queens-regulations-orders.html> at 103.46, 103.48 and 103.60 [QR&Os]; *National Defence Act* (R.S.C. 1985, c. N-5.) at ss. 114 and 116 [*National Defence Act*].

work for the rest of the group, especially during periods in which the Canadian military has been overstretched and under-manned. This general principle underlies the need for strong and trustworthy members but it also means that when someone suffers an injury there may be an inclination to 'soldier on' rather than report it, as members are conditioned to prioritize the needs of the group rather than their personal bodily integrity.

## II. Unique Legal Status

### A. Unlimited Liability

There is no equivalent profession to that of service in the military and this extends to military families who encounter this reality first hand when their loved ones return home injured or changed in other ways by the experience. As Christina Balis states: "What makes a professional soldier distinct...is a highly developed sense of public service combined with an exceptionally high level of professional risk."<sup>76</sup> Members of the military are exposed to Unlimited Liability, which means "completing a mission above all else including the giving of one's life."<sup>77</sup> Members may be ordered by their superiors to undertake a task knowing it will put their life and bodily integrity at risk. During a military operation or even training, the military leadership accepts that a certain number of its members may be injured or killed.

*Unlimited Liability* is not just a promise to serve one's country. It is a legally enforced obligation in the Canadian Military. When a person becomes a member of the CF, pursuant to

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<sup>76</sup> Christina V. Balis. "Reluctant Warriors?: European Army Professionalism in Transition." Unpublished PhD Thesis. (Baltimore: Johns Hopkins University, 2005) at 62.

<sup>77</sup> Pamela Stewart. "On Broader Themes of Canadian Forces Transformation." (2007) *Canadian Military Journal*, Vol. 8, No. 3 at 12.

section 23 of the *National Defence Act* (“NDA”), they are bound to serve until they are lawfully released. If the government sends them on a mission they do not support or determines that their disability benefits will be reduced, they are not free to leave the military. The legal obligation faced by members of the military is unlike any member of civilian society. Civilians who decide to quit their job may face the prospect of loss of employment or threat of a legal action for breach of contract, whereas members of the military who abandon their duty or fail to report for duty, will face far more serious repercussions.<sup>78</sup> For example:

- (a) a member on active service who is convicted of desertion before a service tribunal is potentially liable to a punishment of life imprisonment;
- (b) a member not on active service who deserts is liable to imprisonment for five years;
- (c) a member who is absent without leave is liable to imprisonment for two years less a day; and
- (d) a reservist who, without lawful excuse, neglects or refuses to attend any parade or training, may be found guilty of an offence that is punishable, on summary conviction, by a civilian court.<sup>79</sup>

The *Queen's Regulations and Orders for the Canadian Forces* (the “QR&O’s”) date back to the First World War<sup>80</sup> and are the primary form of military law issued under the authority of Section 12 of the NDA.<sup>81</sup> Article 1.23 of the of the QR&O’s authorizes the Chief of Defence staff with the power to issue orders and instructions, “not inconsistent with the *National Defence Act* or with any regulations made by the Governor in Council, the Treasury Board or the Minister.”<sup>82</sup> Article 19.015 of the QR&O’s states that, “Every officer and non-commissioned member shall obey lawful commands and orders of a superior officer.”<sup>83</sup>

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<sup>78</sup> *R. v. Généreux*, *supra* note 74.

<sup>79</sup> *National Defence Act*, *supra* note 75 at s. 23, 88, 90 and 294; see also Written Argument of the Plaintiffs on the Defendant’s Application to Strike the Amended Notice of Civil Claim, (July 12, 2013) (*Scott v. Canada*) at para 71 [*Written Argument of the Plaintiffs*].

<sup>80</sup> Minister of Militia and Defence, *Kings Regulations and Orders for the Canadian Militia*, Ottawa, December 1, 1917) online: [https://www.electriccanadian.com/forces/KRO1917\\_text.pdf](https://www.electriccanadian.com/forces/KRO1917_text.pdf).

<sup>81</sup> *National Defence Act*, *supra* note 75 at s.12.

<sup>82</sup> *QR&Os*, *supra* note 75 at 1.23.

<sup>83</sup> *Ibid* at 19.015.

There is a broad discretion to issue orders that put military members in harm's way. They are required to obey all lawful orders or face criminal liability under section 83 of NDA.<sup>84</sup> While a 'lawful' order or command might suggest that there are restrictions on the level of danger or risks soldiers must face, this term has been given a broad scope. Article 19.015 of the QR&O's, instructs that, "...In a situation, however, where the subordinate does not know the law or is uncertain of it he shall, even though he doubts the lawfulness of the command, obey unless the command is manifestly unlawful."<sup>85</sup> In *R. v. Finta*<sup>86</sup> the Supreme Court of Canada describes the term manifestly unlawful as follows:

*...Military orders can and must be obeyed unless they are manifestly unlawful. When is an order from a superior manifestly unlawful? It must be one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong...<sup>87</sup>*

While the 'lawfulness' of an order must take into consideration the unique facts involved, it seems highly unlikely that a soldier in the heat of battle would come to the conclusion that many orders meet the high standard of being "manifestly unlawful", as described by the Supreme Court.

If an order is considered lawful, as it almost always will be, a member's freedom of action is regulated by the QR&O's and NDA and there are severe repercussions for anyone who decides to resist the order. For instance, any soldier found guilty of disobeying a lawful command faces the penalty for 'Insubordination' under s.83 of the NDA and may face life imprisonment as a result.<sup>88</sup> While this deprivation of freedom may seem harsh, a number of offences under the NDA once called for the death penalty. During the First World War, there

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<sup>84</sup>*National Defence Act, supra* note 75 at s. 83

<sup>85</sup> QR&Os, *supra* note 75 at 19.015.

<sup>86</sup>*R. v. Finta* 1994 CarswellOnt 61, [1994] 1 S.C.R. 701, 28 C.R. (4th) 265.

<sup>87</sup> *Ibid* at para 239.

<sup>88</sup>*National Defence Act, supra* note 75 at s. 83.

were 222 death sentences issued against Canadian soldiers (197 commuted), including 23 members of the Canadian Expeditionary Force who were executed for desertion or cowardice.<sup>89</sup>

The Canadian government did not abolish the death penalty for members of the Canadian military until 1998. This is very recent considering that the Canadian government passed legislation suspending the death penalty for civilians in 1967 and then formally abolished it in 1976.<sup>90</sup> While the Canadian Military has not used the death penalty since the Second World War, its existence played a distinct role in the structure of the Canadian military, as described by the Supreme Court of Canada in *R. v. Généreux* citing the comments from Cattanach J. in the Federal Court of Canada's decision in *MacKay v. Rippon* as follows,

*Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential esprit de corps, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion.<sup>91</sup>*

Many of today's disabled veterans have sustained their injuries as a result of following orders in this context.

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<sup>89</sup> Teresa Iacobelli. *Death or Deliverance: Canadian Courts Martial in the Great War*, (Vancouver: University of British Columbia Press, 2013) at 4, 137, 123 and 163 [Iacobelli].

<sup>90</sup> Parliament of Canada, "BILL C-25: An Act To Amend The National Defence Act, (18 February 1998)" online [http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills\\_ls.asp?ls=C25&Parl=36&Ses=1](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=C25&Parl=36&Ses=1); Correctional Service Canada, *Abolition of the Death Penalty 1976*, online: <https://www.csc-scc.gc.ca/text/pblct/rht-drt/08-eng.shtml>.

<sup>91</sup>*R. v. Généreux*, supra note 74.

## B. Risks at Home and Abroad

*Unlimited Liability* and regulation under military law are not limited to active service members or those stationed overseas. They also apply during training, including exercises involving the use of explosives and live ammunition. While War Service Veterans and Modern Veterans faced some differing experiences, the respective risk to their physical and mental integrity was the same. Whether you lose your leg fighting on the beaches of Normandy, as a result of an improvised explosive device in Afghanistan, or in a training exercise, you still lose your leg in the service of your Country.

For instance, Daniel Scott, the *Scott v. Canada* named class member was severely wounded by two Claymore mines during a training exercise in Kandahar. This resulted in him losing a kidney, his spleen and a portion of his pancreas, as well as suffering from a collapsed lung, a gastric ulcer, a fractured rib and an abdominal staph infection.<sup>92</sup> With the threat of these types of injuries combined with repetitive strain and mental health issues, there is a great deal of overlap in the injuries faced by those serving at home and abroad. While the setting may be different, it is illogical and unfair to treat those injured in the service of their country differently, when they are compelled to face the same risks.

## C. Corporal Punishment

Corporal punishment has always been a feature of life within the Canadian military and employed by superior officers to regulate member's everyday life. A high level of discipline is necessary for the maintenance and functioning of the Canadian military and the institution

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<sup>92</sup>*McMartin*, *supra* note 49.

maintains strict regulation through the use of various forms of punishment under QR&O's and the NDA, including a Code of Service Discipline. For instance, a member may be considered absent without official leave or "AWOL" for simply arriving late to training and can be punished under section 90 of the NDA. In addition to this offence there is also catch-all offence known as Conduct to the Prejudice of Good Order and Discipline ("CPGOD") under section 129 of the NDA, which can also be imposed as follows,

***Conduct to the Prejudice of Good Order and Discipline  
Prejudicing good order or discipline***

**129 (1)** *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.*

***Offence and contraventions prejudicial to good order and discipline***

**(2)** *An act or omission constituting an offence under section 72 or a contravention by any person of*

**(a)** *any of the provisions of this Act,*

**(b)** *any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or*

**(c)** *any general, garrison, unit, station, standing, local or other orders,*

*is an act, conduct, disorder or neglect to the prejudice of good order and discipline.*<sup>93</sup>

In the 2017 decision of the Canada Court Martial in *R. v. Williams*<sup>94</sup>, the court found that section 129 of the NDA did not require the Crown to prove that an accused had any intent whatsoever to adopt conduct to the prejudice of good order and discipline. It was the underlying violation that was relevant in determining the *mens rea* or intent required for a finding of guilt pursuant to section 129. This "prejudice" would have to be proven, beyond a reasonable doubt, so long as the totality of the circumstances supports the finding that the

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<sup>93</sup>*National Defence Act, supra* note 75 at s. 90 and 129.

<sup>94</sup>*R. v. Williams* 2017 CM 4017, 2017 CarswellNat 8313 [*R. v. Williams*]; The Court declared subsection 129(2) void insofar as it makes an accused liable to be convicted despite the existence of a reasonable doubt on the essential element of prejudice to good order and discipline and because the presumption created in subsection 129(2) requires the trier of fact to convict in spite of a reasonable doubt.

conduct in question would tend to or be likely to result in prejudice to good order and discipline. Further to this, the court found that in most instances the trier of fact should be able to determine whether the proven conduct is prejudicial to good order and discipline based on their experience and general service knowledge.<sup>95</sup>

Given the offence of CPGOD is triggered by an act or omission of any number of regulations, orders and directives, members of the military might understandably feel that they will inevitably be convicted of this catch all offence. This offence is so broad that in certain instances, including the 2016 the Canada Court Martial decision in *R. v. Korolyk*<sup>96</sup>, the Court found that the provision had been applied contrary to section 11(d) Charter of Rights and Freedoms.<sup>97</sup> With a broad range of institutional offences including CPGOD, members also learn that it is generally easier to take the punishment doled out by their superior officer than assert their right to a courts martial trial, rather than a summary trial.<sup>98</sup> According to the Judge Advocate General Annual Report 2016-17, while court's martial trials are more formal and provide the accused more procedural safeguards, including the right to be represented by legal counsel, summary trials continue to be the most widely used form of service tribunal used to deal with service offences under the Code of Service Discipline.<sup>99</sup>

In part, this is because there is no right to a court martial where the accused has been charged with one of five minor service offences: (1) insubordinate behavior; (2) quarrelling; (3) absence without leave; (4) drunkenness; and (5) conduct or neglect to the prejudice of

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<sup>95</sup> *R. v. Williams*, *supra* note 94 at paras 57, 62 and 63; see also *R. v. Golzari* 2017 CACM 3, 2017 CMAC 3, 2017 CarswellNat 3714 at paras 77-79.

<sup>96</sup> *R. v. Korolyk* 2016 CM 1002

<sup>97</sup> *Ibid* at paras 20-29.

<sup>98</sup> *National Defence Act*, *supra* note 75 at s. 166

<sup>99</sup> Government of Canada, National Defence, *Judge Advocate General Annual Report 2016-17*, online: <http://www.forces.gc.ca/en/about-reports-pubs-military-law-annual-2016-17/ch-2-military-justice-system.page#fn-09> [*Judge Advocate General Annual Report*].

good order and discipline, where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment; and, the circumstances surrounding the commission of the offence are sufficiently minor in nature.<sup>100</sup> During the Judge Advocate General's 2016-17 reporting period, there were 553 summary trials in comparison to 56 courts martial. There were 366 charges in which no election was available. In the 187 cases where an election was offered, the accused elected to be tried by summary trial 141 times, representing approximately 75 percent of all of the members who were offered an election. Further to this AWOL and CPGOD are the two most common types of offences and account for approximately 65 percent of all charges in the summary trial system.<sup>101</sup>

While serious charges like murder would certainly go to a court martial, many members were unwilling to advance charges for less serious offences to the more formal courts martial process, and preserve their rights with procedural safeguards. One potential explanation is that these members felt it was easier to take the path of least resistance. Combined with the seemingly duplicative charges through the use of a CPGOD, the structure of the military justice system promotes the idea that those who resist are in a losing battle. In a sense it is easier to take the punishment, even if it is not fully warranted and move forward as part of the unit, than resist and face the potential institutional pushback from the chain of command or one's peers. For minor offences, there may be merit to this approach in the short term, but being conditioned not to resist the military structure can have broader repercussions.

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<sup>100</sup>The officer exercising summary trial jurisdiction over the accused concludes that a punishment of detention, reduction in rank or a fine in excess of 25 percent of the accused's monthly basic pay would not be warranted if the accused were found guilty of the offence.

<sup>101</sup> *Judge Advocate General Annual Report*, *supra* note 99.

After facing corporal punishment under the military justice system, members of the military may also be conditioned to perceive any legal battle with big institutions like the military and the Canadian government as unwinnable from the outset. Veterans may continue to have this perception when they leave the forces for reasons of retirement or injury. This can affect their ability to advocate for disability benefits, especially if they are not provided with support systems that allow them to understand and navigate the complicated and bureaucratic application and appeal process.<sup>102</sup>

### **III. Reliance on Government Benefits**

Despite their legal obligations and enhanced risk, members and their families are precluded from suing the military or the Canadian Government for death or injury sustained during service.<sup>103</sup> While this may seem unjust, like the requirement for Unlimited Liability, it is necessary to prevent a substantial burden on the functionality of the military, which would be limited its ability to make difficult tactical decisions for fear of lawsuits, resulting from putting its members in harm's way. Injury and death are part of the vocation, but it is for this very reason that special veteran pensions and disability benefits were pioneered for Canadian soldiers during the World Wars. These programs predated similar benefits for civilians, as will be discussed in the following chapter on the history of veteran legislation in Canada.<sup>104</sup> Not unlike the great compromise involved in the creation of Workers Compensation Programs, soldiers agreed to forgo their right to sue in tort, in exchange for a set of rights and

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<sup>102</sup> John Woods. "'Systemic' problems mean appeals board impotent to help Canadian veterans: report" *National Post* (May 7, 2012) online: <http://news.nationalpost.com/news/canada/systemic-problems-mean-appeals-board-impotent-to-help-canadian-veterans>.

<sup>103</sup> *Crown Liability and Proceedings Act* (R.S.C., 1985, c. C-50) at s.8.

<sup>104</sup> *Rice & Prince*, *supra* note 27 at 51.

entitlements from the government.<sup>105</sup> Canadian economist Morley K. Gunderson has described Workers Compensation Programs as a “social contract, between workers and employers.”<sup>106</sup>

Due to the nature of their vocation, the benefits that members of the military receive more often come at higher price to their bodily integrity. And unlike workplace safety, which has generally improved with technology, advancement in military technology or tactical developments such as improvised explosive devices, only make the lives of those serving in the military more treacherous. As such, the social contract between soldier and the government has not really changed substantively. It still involves the government’s provision of benefits in exchange for an explicit willingness to make the ultimate sacrifice for one’s country. While members of the Canadian military and their families have historically enjoyed many special programs unavailable to the general civilian population, their inability to sue also means that they are completely reliant on government benefits, which at times have been superseded by other policy initiatives advanced by the governments of the day. As a result of *Unlimited Liability* and unilateral reliance on the state, Canadian soldiers have a legal status and a relationship with the Canadian state unlike any other vocation. It is also a relationship which can lack stability. The Federal government is subject to change and it has the power to change the veteran benefit regime in the middle of a conflict, as it did with the NVC during the Afghanistan campaign.

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<sup>105</sup> *Ibid* at 48.

<sup>106</sup> Morley Gunderson and Hyatt, Douglas, eds. *Workers' Compensation: Foundations for Reform* (Toronto: University of Toronto Press, 2000) at 59.

#### IV. Contradictory Approaches to the Health of Members

Even though death and injury are a common occurrence in the Canadian Military, the benefits system that members of the military are forced to navigate is often incompatible with the military institution and the culture promoted therein. The process of military socialization, structure of the military institution and legal framework provide disincentives to soldiers seeking assistance with their injuries. The Canadian military also requires that all members maintain a high standard of mental and physical fitness as a requirement of service and in reporting their injuries, members also risk losing their employment in the military.<sup>107</sup>

In addition to military culture and the self-regulation of members, the structure of the Canadian military institution itself, directly and indirectly, regulates the ability of its members to seek medical assistance and obtain benefits for injuries sustained during service. One of the most important influences of the military structure is that serving members are reliant on their superior officers to send them to the closest medical inspection room.<sup>108</sup> They cannot simply abandon their duties without exposing themselves to the military justice system. And as noted above there are also other soft disincentives to being labeled as weak. Superior officers are also the gatekeepers to the advancement of rank and they also determine which disciplinary measures members will face while serving.<sup>109</sup>

As a result of the chain of command there is a structural incentive to appease those above you all the way up the chain. Those at the bottom of the chain are incentivized to obey

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<sup>107</sup> *National Defence Act*, *supra* note 75 at s. 33(1); see also National Defence and Canadian Armed Forces, *Fit To Serve: Universality Of Service And Related Support Programs*, online: <http://www.forces.gc.ca/en/news/article.page?doc=fit-to-serve-universality-of-service-and-related-support-programs/hnps1vfl> [*Fit To Serve*].

<sup>108</sup> *QR&Os*, *supra* note 75 at 34.07.

<sup>109</sup> *Ibid* at 11.01 and 19.15.

orders which put them in harm's way, under threat of corporal punishment assigned by their commanding officer. Officers are incentivized to complete objectives while maintaining the strength of their unit, in the face of significant threats to those under their command. As officers advance in rank by pushing those under their command to meet these objectives, they begin to take on leadership roles that are broader in scope and more detached from the experience of those serving on the ground. Those at the top of the chain set the tone for all those below them, but they are the most detached from the experiences of those on the front line. While many systems are structured in a manner in which those in upper management deal with broader considerations, the effect of decisions pushed down the chain of command can have significant and even deadly impacts on those below. This problem has been well documented in many works on the First World War, which chronicle decisions made by Lieutenant-General Sir Arthur Currie who knowingly sent thousands of Canadians to their deaths, on the basis that "[y]ou cannot meet and defeat in battle one-quarter of the German Army without suffering casualties."<sup>110</sup> When leadership has a mandate to accept casualties in exchange for meeting objectives, it is not surprising that they may also willfully ignore repetitive strain and mental health injuries faced by those under their command.

### A. Hidden Injuries

While there is less likely to be a stigma associated with obvious physical injuries, members may feel that raising mental health injuries or chronic pain with their superior officer creates a greater risk of being seen as weak or 'faking' it. Members may also worry about letting their

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<sup>110</sup> Robert J. Sharpe. *The Last Day, the Last Hour: The Currie Libel Trial* (Toronto: University of Toronto Press, 1988) at 26.

fellow members down. Military culture plays a powerful role in the decisions soldiers make. Soldiers may choose to ignore less visible injuries. Failure to report any injury not only risks exacerbating the injury but it can also impact member's entitlement to a disability pension. Without reporting, no paper trail is generated to provide evidence that the injury is tied to military service. Under the current disability benefit regime, the military must be satisfied that the injury occurred in the course of military service, not while on leave as a result of another cause. If the causality of the injury is contested, then the onus is on the active member or veteran to prove to the Veterans Review and Appeal Board ("VRAB") pension tribunal that the injury occurred in the course of duty. VRAB hearings can occur long after service has ended and they require proof of the connection to military service.<sup>111</sup>

This documentary evidence is usually in the possession of the government but there may be little or no record of injuries that go unreported, such as repetitive strain and mental health injuries. This makes it more difficult to prove that repetitive strain injuries are not simply a result of old age or some other non-service related injury. Mental health conditions have always been difficult to prove, even in the civilian context. As will be discussed in later sections of this paper, the institutional process of proving that an injury is causally connected to military service is generally more clear-cut for War Service Veterans, who are presumed to be that entitled to these benefits. Modern Veterans are more often faced with a higher evidentiary burden.

When members of the military are not provided with proper medical attention their health conditions can also become more serious. These problems are often transferred to the civilian realm, where there is a more limited understanding and available expertise to meet

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<sup>111</sup> *Veterans Review and Appeal Board Act* (SC 1995, c 18) at s. 39 [VRAB Act].

their special needs. One need only recall the RCMP's fatal shooting of CF veteran, Greg Matters, in May 2013 as evidence that civilian authorities still grapple with issues like Post Traumatic Stress Disorder (PTSD) and mental illness in general. And this is not a new or easy problem to solve in the military context. There has been a lengthy evolution in understanding/misunderstand of mental health injuries and the respective remedies.

As set out in Teresa Iacobelli's book *Death or Deliverance: Canadian Courts Martial in the Great War*, during the First World War the term "shell shock" evolved from the purely physical shock to the body as a result of explosion of shells, to a new type of mental illness produced by prolonged warfare.<sup>112</sup> As outlined by Iacobelli, shell shock,

*...was as much a disciplinary issue as it was a health issue. Many officers believed that shell shock was simply an acceptable term for cowardice, and they feared that, if legitimized, the excuse might spread through entire battalions.*<sup>113</sup>

Yet, Iacobelli suggests that many Canadian soldiers faced court martial charges in connection with this ailment, and some were even executed, simply as a result of suffering from a mental health condition.<sup>114</sup>

In *Battle Exhaustion: Soldiers and Psychiatrists in the Canadian Army, 1939-1945*, authors Terry Copp and Bill McAndrew explain how the understanding of warfare's impact on mental health treatment during the Second World War was an evolving process. Similar to practices used during the First World War, Allied armies experimented with the use of forward treatment facilities for Canadian soldiers during the Italian Campaign, believing there was value to keeping those afflicted in non-combat roles and that being within the sound of the guns was beneficial to rehabilitating them into the ranks. This appeared to be the best way of

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<sup>112</sup> Iacobelli, *supra* note 89 at 46.

<sup>113</sup> *Ibid* at 47.

<sup>114</sup> *Ibid* at 123.

preserving manpower for the battle, but it was unclear that these men were still effective members of their units and there was the continued risk that they would simply break down again.<sup>115</sup>

Currently the CF and Veterans Affairs Canada (“VAC”) use the term Operational Stress Injury (“OSI”), rather than battle exhaustion, shell shock or a variety of other historic terms used to describe a similar phenomenon. It is now understood that OSIs, including Post Traumatic Stress Disorder (“PTSD”), essentially resulting from increased exposure to combat. But the military still grapples with diagnosing and treating war-related trauma. There are distinctions between different forms of OSIs such as, acute stress casualties on the battlefield and delayed responses including PTSD. And there continues to be a tension between preserving military manpower and addressing problems that both members and officers are incentivized to ignore.<sup>116</sup>

Just as the Military’s thinking has taken time to evolve, responding to those exhibiting signs of mental illness resulting from service in the military is still foreign to members of civilian society. It was not until in 2006, that the United Kingdom Ministry of Defence granted a posthumous pardons to all 306 soldiers of the First World War (including 23 members of the Canadian Expeditionary Force) who were shot at dawn for cowardice or desertion.<sup>117</sup> Similarly, civilian authorities continue to struggle when dealing with individuals with mental health issues and veterans like Greg Matters. Veterans with mental health conditions are also

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<sup>115</sup> Terry Copp and Bill McAndrew. *Battle Exhaustion: Soldiers and Psychiatrists in the Canadian Army, 1939-1945*, (Montreal and Kingston: McGill-Queen’s University Press, 1990) at 14 and 46; see also Terry Copp. “Broken in Battle: A Look at Battle Exhaustion and Combat Stress,” (December 17, 2012) *Canadian Military History*, online: <http://canadianmilitaryhistory.ca/broken-in-battle-a-look-at-battle-exhaustion/>.

<sup>116</sup> Terry Copp. “Combat Stress: The Commonwealth Experience”, (2009) *Canadian Military History*, Vol. 18, Issue 3, Art. 2 at 1-2.

<sup>117</sup> Ben Fenton. “Pardoned: the 306 soldiers shot at dawn for cowardice,” *The Telegraph* (August 16, 2006) online: <https://www.telegraph.co.uk/news/1526437/Pardoned-the-306-soldiers-shot-at-dawn-for-cowardice.html>.

more likely to be perceived as a threat by members of law enforcement because they own personal firearms and possess arms, and have combat training.<sup>118</sup>

## B. Principle of Universality of Service

In addition to institutional stigma and other disincentives to reporting of medical conditions, members of the Canadian military may also risk administrative dismissal by reporting injuries as it may be determined that they do not meet the required the *Principle of Universality of Service* standard. Under s. 33(1) of the NDA, members of the Regular Force, “are at all times liable to perform any lawful duty”<sup>119</sup> and under s. 33(2), the same is required of members in the Primary Reserve or any other member serving alongside the Regular Force or Primary Reserve. The extension of this requirement to non-Regular Force members is necessary because the operational effectiveness of Primary Reserve and others supporting forces is required to properly support the Regular Force in meeting their objectives.<sup>120</sup>

Members rely on each other for their safety and must also meet the rigorous standard of the *Principle of Universality of Service* which requires that all members pass an annual physical fitness evaluation as well as meeting the following requirements:

*All CF personnel must be able to do the following basic tasks:*

- fire and maintain a personal weapon;
- conduct nuclear, biological, and chemical drills;
- fight fires;
- administer first aid, including CPR;
- communicate using a radio; and,
- prepare written military correspondence

*To be considered deployable, CF personnel must be able to do the following:*

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<sup>118</sup> Marissa Harvey. " Jury makes 9 recommendations in Greg Matters inquest" *CBC News* (January 30, 2014) online: <http://www.cbc.ca/news/canada/british-columbia/jury-makes-9-recommendations-in-greg-matters-inquest-1.2517854>.

<sup>119</sup> *National Defence Act*, *supra* note 75 at s. 33(1).

<sup>120</sup> *Fit To Serve*, *supra* note 107.

- deploy on short notice to any geographical location, in any climate;
- work irregular or prolonged hours;
- function effectively on irregular or missed meals;
- travel as a passenger in any mode of transportation;
- perform under physical and mental stress; and
- perform with minimal medical support.<sup>121</sup>

Because s. 33(1) and (2) of the NDA require soldiers to perform lawful orders at all times, this also necessitates that they do not have any serious mental or physical injuries which could preclude them from doing so. Although injured personnel are given some time to recover before administrative dismissal occurs, those who have been assessed with permanent medical employment limitations are immediately removed from the military and 'transitioned' to civilian life.<sup>122</sup>

While transitioning those who can no longer serve may seem like the practical response, a number of unintended consequences are associated with this approach in military culture. Because of the institutionalization involved in becoming part of the military, there has been a long history of soldiers who find it difficult to reintegrate into a civilian lifestyle. Military members reintegrating into civilian society often face a loss of identity and this transition can have serious consequences for their health and wellbeing. Members often resist being transitioned, as the process can also represent an identity crisis.<sup>123</sup> This can be exacerbated by mental health conditions like OSIs including PTSD. Since the Afghanistan mission began, more Canadian soldiers have lost their lives to suicide than as a result of combat.<sup>124</sup> The recent wave of suicides by CF members is one of the most striking examples of the tension between aspects of the military institution like the *Principle of Universality of*

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<sup>121</sup> *Ibid.*

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

<sup>123</sup> *Standing Senate Committee on National Finance, supra note 29.*

<sup>124</sup> *Campion-Smith, supra note 30.*

Service standard and the needs of members to obtain medical assistance and military pensions.<sup>125</sup>

### C. Difficulties in transition to Civilian life

One illuminating example of this tension is that of Master Corporal Kristian Wolowidnyk who narrowly survived his own suicide attempt in late November 2013. Two days before the attempt, Wolowidnyk had been told by the military that he was being discharged from the military because he suffered from PTSD. He stated he felt that his life was over. He was desperate to stay in the military and re-qualify for another military trade. "It is the only real job I've ever had. It's part of my life."<sup>126</sup> Due to his reported psychological injuries, including anxiety and serious depression, the military considered Wolowidnyk not to have met the military's standard of the *Principle of Universality of Service*. Making this situation even direr, Wolowidnyk was to be released just short of a fully indexed military pension.<sup>127</sup> Like other Federal employees, members of the military are reliant on the Government for a regular pension, but to obtain a Immediate annuity (unreduced pension) in the CF means serving at least ten years.<sup>128</sup> While the scope of the service pension differs from the disability pension under the *Pension Act* or disability payment under the NVC which may be awarded prior to ten years of service, the ten-year requirement can result in unfair outcomes as members are administratively dismissed out of no fault of their own. This requirement, has been criticized

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<sup>125</sup> *Third Canadian Soldier Dies of Apparent Suicide*, *supra* note 37.

<sup>126</sup> Murray Brewster. "Soldier Attempts Suicide after Being Told PTSD Will End Military Career." *CTVNews*. (December 3, 2013) online: <http://www.ctvnews.ca/canada/soldier-attempts-suicide-after-being-told-ptsd-will-end-military-career-1.1573087>.

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

<sup>128</sup> Government of Canada, *Retired member with two or more years of pensionable service*, online: <https://www.tpsgc-pwgsc.gc.ca/fac-caf/rtr/rnsrgm/aprdap-petmy-eng.html>.

by the National Defence and Canadian Armed Forces ombudsman, Pierre Daigle. It also seems likely that members who do not meet this standard may be less able to find alternative employment due to their disabled state.<sup>129</sup>

The case of Master Corporal Wolowidnyk further illuminates the problem posed by the *Principle of Universality of Service* rule in the context of a service pension and the serious repercussions of not reporting injuries in general. Wolowidnyk's need for health services put him into a Catch 22. Reporting of the problem was both necessary to get this help and also provide evidence of his entitlement to a disability benefit. However, his medical status was also the trigger which led to his discharge thereby preventing him from accruing enough years of service to obtain a service pension. So while Wolowidnyk was desperate not to give up his status or identity as a soldier and because he could not meet the Principle of Universality of Service standard there was little other option for him but to be transitioned.

The knowledge of potential administrative dismissal associated with the *Principle of Universality of Service* and the lack of alternative roles for injured soldiers incentivized the Master Corporal to leave his symptoms unchecked out of fear of being transitioned. It also limited the paper trail available to him, to later advance a claim for a disability benefit, as he could not qualify for the ten year service pension. Further to this, losing experienced members, under these circumstances is not in the interest of the Canadian military as it struggles to find new recruits.<sup>130</sup>

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<sup>129</sup>Bruce Champion-Smith. "Soldiers suffering from stress risk being kicked out of forces, watchdog says" *The Star* (February 5, 2014) online: [http://www.thestar.com/news/canada/2014/02/05/soldiers\\_suffering\\_from\\_stress\\_risk\\_being\\_kicked\\_out\\_of\\_forces\\_watchdog\\_says.html](http://www.thestar.com/news/canada/2014/02/05/soldiers_suffering_from_stress_risk_being_kicked_out_of_forces_watchdog_says.html).

<sup>130</sup> National Post Staff. "Canada's military forced to accept fatter, less educated recruits as demographics change, audit reveals" *National Post* (August 17, 2013) online: <http://news.nationalpost.com/news/canada/canadas-military-forced-to-accept-fatter-less-educated-recruits-as-demographics-change-audit-reveals>.

## Conclusion

One of the most striking things about all the aforementioned institutional and socialized disincentives faced by members of the Canadian military is the fact that none of these features is new. They are the same problems faced by many traditional veterans. While the previous generations of veterans lived in societies that adhered to the idea of the 'stiff upper lip' rather than admitting weakness, veterans similarly struggled with losing their identity as a soldier, when they returned to civilian life. Historians such as Thomas Childers tell us that instead of seeking help, veterans often suffered in silence or turned to the bottle.<sup>131</sup>

While the military has held on to many dated social practices, including violent self-regulation and discriminatory treatment of women and members of the LGBT community, Canadian civilian society has moved forward and is out of touch with the life experienced by those in the military. Wars have changed as well. Canadians no longer participate in world wars, which result in mass casualties and national economic mobilization. Nor are the missions of the Canadian military, such as Afghanistan, broadly supported by the general civilian population. As a result, the contrast between civilian life and the lifestyles of War Service and Modern Veterans are more pronounced. The impact on body and mind as a result of serving has not lessened, but the change of civilian attitudes and a lack of support and understanding has created greater challenges and struggles for Modern Veterans reintegrating to civilian life.

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<sup>131</sup> Thomas Childers. *Soldier from the war returning: the greatest generation's troubled homecoming from World War II*. (Boston: Houghton Mifflin Harcourt, 2009) at 229 [Childers]. Pamela Moss and Michael J. Prince. *Weary Warriors: Power, Knowledge, and the Invisible Wounds of Soldiers*. (Oxford, New York: Berghahn Books, 2014) at 201 [Moss & Prince].

### **PART 3. HISTORIC DEVELOPMENTS IN CANADIAN VETERAN SOCIAL POLICY**

#### **Introduction**

Arguments in support of the ‘social-covenant’ asserted by the veterans in *Scott v. Canada* are historic in nature. Veterans say that Canadians and all of their previous governments since Robert Borden have honoured this unwritten covenant until the enactment of the NVC and the replacement of the lifetime disability pension with the lump sum disability benefit. Historians like Peter Neary and Desmond Morton have written extensive seminal works on the development of veteran pension legislation in Canada including the many changes to the veteran pension system. Many of these details associated with these works however are necessarily beyond the limited focus of this work.<sup>132</sup> Similarly, there are many veteran social policies, which are relevant to wellbeing of veterans and their families but are not directly tied to the changes brought forth by the NVC or the differing treatment of Modern Veterans and have therefore been omitted from this work.

The focus of this chapter will be those policies which relate to the intersection of issues, which contextualized the Scott case and those which highlight the differing treatment of Modern Veterans. It will explore the rationale for the evolution of Veteran policies implemented by the government of Canada in an effort to address the unique experience of

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<sup>132</sup> Notable works on the subject include: Peter Neary. *On to Civvy Street: Canada's Rehabilitation Program for Veterans of the Second World War*, (Montreal: McGill-Queen's University Press, 2011) [*Neary, Civvy Street*]; Peter Neary, and J. L. Granatstein. *The Veteran's Charter and Post-World War II Canada*, (Montreal: McGill-Queen's University Press, 1998) [*Neary & Granatstein*]; Desmond Morton. *Fight Or Pay: Soldiers' Families in the Great War*, (Vancouver: UBC Press, 2004) [*Morton*]; Desmond Morton, and Glenn T. Wright. *Winning the Second Battle: Canadian Veterans and the Return to Civilian Life, 1915-1930*, (Toronto: University of Toronto Press, 1987) [*Morton & Wright*]; Walter S. Woods, *Rehabilitation (A Combined Operation)*, (Ottawa: Queen's Printer 1953); James J. Rice and Michael J. Prince, *Changing Politics of Canadian Social Policy*, [Second Edition], (Toronto: University of Toronto Press, 2013); Leonard Marsh. *Report on Social Security for Canada* (Toronto: University of Toronto Press, 1975) [*Marsh*]; and Clifford Bowering. *Service: The Story of the Canadian Legion 1925-1960*, (Ottawa: Canadian Legion, 1960) [*Bowering*].

service in the Canadian military. It will also chronicle the rise of War Service Veterans stakeholder groups such as the Legion, which pushed the government to address some deficiencies in veteran benefits for War Service Veterans. This section will conclude with a discussion of the original Veterans Charter and the 1969 White Paper on Veterans. Both of these documents resulted in a high standard of benefits for War Service Veterans; however, this standard was not continued in the subsequent programs and approaches applied to Modern Veterans.

Throughout this section the many reiterations of Prime Minister Robert Borden's speech will be highlighted illuminating the intersection of political influences, economic, and social policy trends as the government determined how to address the unique obligation towards those who have served this country. The special treatment of veterans has always been impacted by the overarching socio-economic trends of the time which impacted the scope of the benefits provided. However, it will be argued that these influences did not cause the covenant to be broken for War Service Veterans. Instead, it is was the cumulative effect of the unequal treatment of Modern Veterans, culminating with the Harper Government's failure to address the deficiencies with the NVC while simultaneously cutting costs on the backs of veterans, which triggered the Scott lawsuit.

To follow the evolution in veterans' benefits, this section will be broken into temporal periods, the Great War Period from 1914-1918, Interwar Period from 1920-1938, Second World War Period from 1939-1945 and the Post war period from 1946-1969. The Great War Period features the earliest government social programs for veterans, culminating with the *Pension Act* 1919, put in place at the conclusion of the War. While some entitlements were provided prior to the First World War, this period represents a watershed moment in the

development of social programs for veterans and civilians alike. This reconceptualization of veteran entitlements however, cannot be detached from the unprecedented impact of the war and the important promises made by Borden and the Union government, in the context of a conscription crisis and general need to keep up morale during a war of attrition.

The subsequent Interwar Period from 1920-1938 features some of the growing pains associated with the dramatic change in social policy, as well as the establishment of the veteran advocacy groups which guided veterans and policy makers through this difficult progression. This section also highlights problems with the new organs of the veteran bureaucracy and an ideological resistance to the first vestiges of the social welfare state in Canada. The government's resistance to continuing to implement these policies once the political utility of the War had ended is eerily reminiscent of the Harper government and even the current Trudeau government's approach to veterans, as discussed in Parts 4 and 5.

The next period will cover the Second World War Period from 1939-1945. Valuable lessons were learned from the First World War and Borden's words were reiterated often during this period both by veteran advocates in the House of Commons and by the growing voice of the then recently established Legion. This was done to raise awareness of the many problems affecting WWI veterans, including the high levels of veteran unemployment, homelessness and the plight of the veteran settlers. There was also an important attempt to articulate Borden's promise in legal terms within the report of Veterans Assistance Commission. This report was published in 1937 just prior to Canada's entry into the Second World War and amidst calls to keep the faith with veterans from the First World War, prior to before involving Canada in another global war. Although the government did not explicitly adopt a legal obligation to veterans, the moral debt Canadians felt eventually led to the creation of the original Veterans

Charter. This celebrated collection of legislation set the standard for veteran policy in Canada and this is the reason why some hoped to brand the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* as the “New Veterans Charter”.

During the Post War Period from 1946-1969, in the context of the vibrant post war economy, there was a much more effective approach to veterans taken by the Canadian government than during the Interwar Period after WWI. This period also featured the largest influx of veterans into Canadian society, forming significant interest groups, voting blocs and even filling the ranks of the government bureaucracy. It began as a Golden Age of special entitlements for veterans, but it also saw a stark division in the treatment of subsequent vintages of veterans. The Canadian military moved from a large scale civilian army mobilized to fight in two World Wars to a much smaller standing army with the advent of the CF. The new classes of veterans starting with those who served in Korean were treated differently, as the more numerous traditional, World War Veterans who wielded a dominant influence over the development of veteran policy, as they were imbedded in the governmental institutions and could influence the political will through groups like the Legion.

While the class described as War Service Veterans was expanded following the Korean War, there was an unequal sharing of influence in the context of key policy developments affecting Modern Veterans. The year 1969 has been selected as the temporal end of this section because the policy changes put forward by Woods Report and implemented through the 1969 amendments to the *Pension Act* have been held in high regard by veterans. They set the standard by which all veterans should be treated. It is this standard we will use to gauge the unequal treatment of Modern Veterans showing the unfairness which underpinned the *Scott* case.

Each period features its own combination socio-economic and political context as well as an interpretation of the scope and rationale for benefits for veterans. While conceptually distinct, these periods all practically interrelate. Policy makers learned important lessons from previous mistakes and many of the demands made by earlier veterans were subsequently implemented when they meshed better with the broader economic, political, and societal context. That said, many veteran entitlements were not constrained by these influences and often represented novel approaches in Canadian social policy because they were in response to the unique needs and legal status of veterans. Many of these new forms of benefits also provided the foundation for subsequent civilian programs like universal healthcare, while others were never extended to the rest of the Canadian population. The evolution in veteran social policy is filled with historic lessons, some of which appear to have been forgotten by recent governments, at the risk of repeating history with tragic results.

### **I. The Great War 1914-1918**

To understand the context of Borden's promise and its use in supporting the arguments put forward in *Scott*, one must examine the government actions that followed Borden's speech and the impact it had on veterans and Canadians in general. The Battle of Vimy Ridge and Canadian participation in the First World War have often been attributed to Canada's evolution to full-fledged nationhood. Out of a population of 8 million, 600,000 served in the Canadian Expeditionary Force and 50,000 in the ranks of other allied armies. The war also claimed some 60,000 dead, sent 70,000 home with disabilities, and left 30,000 war widows.<sup>133</sup>

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<sup>133</sup> *Morton & Wright, supra* note 132 at ix.

Given the drastic impact of the war, the government made an unprecedented effort to assist veterans.<sup>134</sup> As historians Desmond Morton and Glenn Wright state, “no belligerent was as prompt in creating a single government agency to cope with the problem of re-establishing disabled soldiers,” as Canada.<sup>135</sup> There was also an attempt to bring Canadian soldiers up to an equal footing with other nations while trying to avoid the ‘pension evils’ of overspending in the United States on Civil War Veterans, which at that time had already cost the US federal government \$4.2 billion; eight times Canada’s national debt in 1914.<sup>136</sup> One could see an expansion of the social project from Victorian notions of pulling one’s self up by one’s bootstraps to more government-organised support. These benefits represented one of the country’s earliest social programs but this support was still linked to traditional ideas of entitlement based on moral duty.<sup>137</sup> A soldier was not given government assistance as a right of citizenship, but was rewarded with this support as an acknowledgement of their service defending the nation.

#### A. The Canadian Patriotic Fund

Prior to the First World War, military pensions were provided under the *Militia Pension Act* of 1901 and administered by the Pensions and Claims Board within the Department of Militia. But by 1907 pay allowances regulations from the department only allowed for an annual pension of \$150 for a private rendered totally incapable of earning a livelihood. In September 1914 these regulations were amended to account for the outbreak of the war and were provided to members of the Canadian Expeditionary Force (“CEF”).<sup>138</sup> During the early stages to the war the federal government had not taken up the bulk of the support for Canadian soldiers and

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<sup>134</sup> *Ibid* at 44.

<sup>135</sup> *Ibid* at 44.

<sup>136</sup> *Ibid* at 45.

<sup>137</sup> *Rice & Prince, supra* note 27 at 57.

<sup>138</sup> *Neary, Civvy Street, supra* note 132 at 10.

their families. It was presided over by the charitable, Canadian Patriotic Fund (“CPF”) established during the Boer War and brought back by Parliament in September 1914.<sup>139</sup>

Headed by prominent Montréal manufacturer and social activist Herbert Ames, the CPF came with all of hallmarks of the Victorian social project. Ames insisted that support would only be given to the families of CEF members who had gone overseas and the fund required that many lower-class female dependants adhere to strict moral and patriotic requirements under the supervision of the CPF’s predominantly middle-class investigators. This was done to ensure that that the money was not ‘squandered’ on vices like beer, tobacco, gambling and to further regulate other indiscretions, unbefitting a ‘good wife.’ In practice though, the CPF did try to be charitable in the context of quarrels with spouses and in cases of infidelity, as “[t]o visit the sins of the parent upon the children was no part of the Fund’s policy...No matter how much the woman may have erred, the Fund’s duty to the soldier required it look after his children.”<sup>140</sup>

### B. The *Pension Act* of 1919

While the approach of the CPF appealed to a spendthrift Canadian Government, its viability was soon called into question. The problems associated with the massive scale of modern warfare became apparent as significant numbers of disabled veterans began to arrive home in the fall of 1915. During the battle of Ypres from 22-24 April 1915, there were 6,035 Canadian casualties including 2,000 dead. It was Canada’s first major appearance on a European battlefield and a third of their committed forces became casualties. Following the battle, payments by the CPF were increased, but the meager sum of \$264 dollars a year for a

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<sup>139</sup> Desmond Morton. “Resisting the Pension Evil: Bureaucracy, Democracy, and Canada’s Board of Pension Commissioners, 1916–33,” (1987) *Canadian Historical Review*, Vol. 68, no. 2 at 201 [*Morton, Pension Evil*].

<sup>140</sup> *Morton, supra* note 132 at 100.

totally disabled private or widow was clearly insufficient. Further, those with lesser degrees of disability often earned half or a quarter of this sum and the overall result was both a feeling of indignation by injured soldiers and even ‘worse’, a serious threat to the Canadian recruiting effort.<sup>141</sup>

In December 1915, Frank Darling, a prominent Anglican layman and one of Canada’s foremost architects, met with members of the Toronto and York County Canadian Patriotic Fund Association and proposed a pension system which would acknowledge veterans’ special service and one that is much closer in description to modern social entitlements,

*[T]he duty of supporting the disabled men should and must, be undertaken solely by the Government, and that whatever is necessary for this purpose must be paid out of the revenues of the country.*

*... We owe our defenders no less than this. We must save them from both the humiliation and the uncertainty of public charity, and give them permanent and adequate security from want, paid them not as a favour, but as a right, for it would be an unpardonable insult to a body of brave men if payment of a pension carried with it the faintest trace of charity or the least suspicion of patronage.*<sup>142</sup>

For Darling and his team, charitable giving was not good enough for Canada’s heroes. This was a call for the government to provide consistent support to veterans, rather than relying on the uncertainty of and often qualified provisioning from charitable organisations like the CPF. Darling also explicitly stated that the government must support disabled veterans out of the revenues of the country and “whatever is necessary for this purpose must be paid out”.<sup>143</sup> This

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<sup>141</sup> Morton, *supra* note 132 at 142, 144 and 270; see also Morton, *Pension Evil*, *supra* note 139 at 201.

<sup>142</sup> The quotation comes from a pamphlet created by Darling’s team and read in the House of Commons on 19 January 1916 by Frank Oliver, Liberal Member of Parliament for Edmonton, Canada, House of Commons, *Debates*, 12th Parliament, 6th Session, Vol. 1, (January, 1916) at 105.

<sup>143</sup> Established during the Boer War it was brought back by Parliament in September 1914. The fund required many lower-class applicants to adhere to strict moral and patriotic requirements under the maternal supervision of the CPF’s predominantly middle-class investigators. This was done to ensure that that the money was not ‘squandered’ on the vices such as beer, tobacco and gambling or other more colourful indiscretions, un-befitting a ‘good wife.’; Morton, *Pension Evil*, *supra* note 139 at 201; see also Desmond Morton, *supra* note 132 at 18–20.

re-conception of welfare was in tension with Victorian ideals of the day. However, the veterans broke the mold since the government support was not a handout. It was earned as a result of the unique risks of death and disability facing those serving in the Canadian military.

The *Pension Act* of 1919 was the first universal income benefit in Canadian social policy.<sup>144</sup> A Board of Pensions Commissioners was instituted in 1916 to assist disabled members of the Canadian military in applying for benefits. A “benefit of the doubt” principle was instituted in 1918.<sup>145</sup> It was created in response to the difficulties veteran faced proving their pension entitlement, especially in the absence of a formal report associated with their respective injuries. The Government of Canada was the custodian of the applicant’s medical records, and these could go missing or be incomplete as a result of enemy action, accidents in transit, or simple human error.<sup>146</sup>

## II. The Interwar Period 1920-1938

The Canadian government continued to expand eligibility and increase the provision of benefits throughout the 1920s and 1930s, allowing for pension hearings and decisions on appeal.<sup>147</sup> While this provisioning was not without its shortcomings, it seemed to give credence to Borden’s words at Vimy Ridge. The Federal Government even provided an equivalent to an Old Age Security pension to veterans through the *War Veterans Allowance Act*. This support, which could be accessed at an earlier age, was used to aid the families of veterans who were

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<sup>144</sup> *Rice & Prince, supra* note 27 at 51-52.

<sup>145</sup> Justice Mervyn Woods. *Report of the Committee to Survey the Organization and Work of the Canadian Pension Commission to the Honourable, the Minister of Veteran Affairs*, Volume 1, (Ottawa: Queen’s Printers, 1968) at 274 [*Woods Commission*].

<sup>146</sup> *Ibid* at 239.

<sup>147</sup> *Ibid* at 52.

physically exhausted and no longer employable as a result of their strenuous military service.<sup>148</sup> But just as the veteran social project had begun, cracks began to appear as wartime necessities were displaced in the post-war period by the changing demands of politics, economics, and social policies.

Historian Jeff Keshen suggests that Ottawa still clung to a *laissez-faire* approach following the First World War. He suggests that the unprecedented generosity towards veterans was viewed as a wartime necessity and a deviation from small government values. The perception that improvements had been made allowed the government to veil insufficient support for veterans from the public who had come to accept the justifications of the liberal economic approach toward welfare.<sup>149</sup> The government also used the veteran institutions of the time like the Military Hospitals Commission and the Department of Soldiers' Civil Re-establishment, to counter veteran complaints while reassuring citizens that generous pensions and other benefits were being supplied. Similarly, Jeff Keshen states that "Canadian pension commissioners, acting on orders from their elected masters, commonly denied compensation to veterans unless their injuries were directly related to war service."<sup>150</sup> As a result of the unique circumstances under which members of the military served, it could be very difficult to determine the causation of repetitive strain and mental health injuries suffered by those serving in the military. So while the government could point to institutions that supported veterans, the procedures which dictated the allocation of these resources did so in a restrictive manner, more

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<sup>148</sup> *Ibid.*

<sup>149</sup> Jeff Keshen, "Getting It Right the Second Time Around: The Reintegration of Canadian Veterans of World War II," in Peter Neary, and J. L. Granatstein. *The Veteran's Charter and Post-World War II Canada*, (Montreal: McGill-Queen's University Press, 1998) at 62–63 [Keshen].

<sup>150</sup> *Ibid* at 63.

amenable to the small government and the anti-welfare state aims of the Federal Government than the needs of veterans.

Historian Kellen Kurschinski discusses another problem with the government's post-war laissez-faire approach, which is all too reminiscent to the approach under the New Veterans Chart in 2006. In the 1920s, veterans pushed for a *Pension Act* amendment to gain a lump sum payment equal to a ten-year pension. However, they had a lay understanding that their health was getting better over time and feared that the current pensions would be discontinued as the government shifted to a postwar mindset to veteran benefits. Pension authorities saw this as an opportunity to cut costs and the amendment proved to be a catastrophic failure as it related to the health and wellbeing of veterans. Many veterans faced further difficulties reintegrating and deterioration of their health as a result of this approach. Soon after, the regular pensions were reinstated.<sup>151</sup>

#### A. Veteran Advocacy and the Veteran's Assistance Commission

In response to the difficulties faced by Veterans following the First World War, the Great War Veterans' Association petitioned the government to investigate a number of complaints with the pension system. A notable concern was that the Pension Board was applying the *Pension Act* eligibility guidelines in a restrictive manner. In part, this was the result of the fact that the three-member Pension Board (which determined the right of all applicants for pensions) was located in Ottawa and its decisions could not be appealed or reviewed by any outside body.<sup>152</sup> In response to these complaints, a Royal Commission, known as the Ralston

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<sup>151</sup> *Kurschinski, supra* note 26 at 172–173, 280.

<sup>152</sup> *Morton, Pension Evil, supra* note 139 at 217.

Commission, was launched from 1923-1924. The Commission found that *bona fide* claims for compensation were being denied by the Pension Board and in response it provided a number of recommendations to improve the functioning of the pension system.<sup>153</sup>

The Ralston Commission proposed the creation of nine district pension boards to better serve pension applicants, and an Appeal Board to address the concerns with the final determination of the Pension Board. The Ralston Commission also proposed that a publicly funded 'official soldier advisor' be provided to help claimants with their cases. The Mackenzie King government agreed with this approach. The Senate, however, acting as what historian Desmond Morton has described as the "self-appointed bulwark against a Canadian 'Pension Evil'", determined that a single Federal Appeal Board with jurisdiction only to hear appeals on the issue of 'attributability', was all the country needed or could afford this time. Because of this restrictive right of appeal, by 1928 the Federal Appeal Board had only allowed 987 of the roughly 11,000 appeals, rejecting 3,012 and declaring the balance of the appeals beyond its jurisdiction.<sup>154</sup> During the same year, the government also transferred their responsibility for the administration of veterans' benefits to the Department of Pensions and National Health.<sup>155</sup>

In 1925, the Great War Veterans' Association joined forces with other veteran groups to form the Canadian Legion of the British Empire Service League, commonly known today as the Royal Canadian Legion.<sup>156</sup> As a result of the government's failure to amend the Pension Board Appeal system pursuant to the recommendations of the Ralston Commission, the then Legion

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<sup>153</sup> *Ibid* at 217 and 218.

<sup>154</sup> *Ibid* at 217 and 218.

<sup>155</sup> *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 7.

<sup>156</sup> *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 16.

President, Sir Arthur Currie, presented these issues and a number of other veteran grievances to Prime Minister William Lyon Mackenzie King, just prior to the 1930 election. It was no surprise that Mackenzie King pushed harder for reforms in the context of the upcoming election involving the votes of the hundreds of thousands of veterans of the First World War. This time even the Senate relented.

As a result of Currie's and Mackenzie King's actions, a nine-member Pension Tribunal was established, which would attend as travelling panels across the country and rule on every claim that the Pension Board did not accept. A brand-new Appeal Court was also established to make a final decision and had the ability to reopen a matter on the basis of fresh evidence. The *Pension Act* was amended to provide an independent Veterans' Bureau to assist veterans in making pension applications. As a result, veterans were provided with lawyers known as pension advocates, who worked with the veterans, preparing submissions and advocating for them before the Pension Board.<sup>157</sup> As a result of these changes the Mackenzie King government had essentially implemented the recommendations of the Ralston Commission. However, the Liberals were defeated in the 1930 election by the Bennett Conservatives, so their government did not survive to see them put into action.<sup>158</sup>

Under the Bennett Government, during the economic hardship of the Great Depression, there was a further move towards a *laissez-faire* approach to veterans. In 1933, amidst high levels of veteran unemployment, the income tax exemption for payments under the *Pension Act*<sup>159</sup> was removed and the government abolished the Pension Tribunal which had taken a

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<sup>157</sup> *Ibid* at 7.

<sup>158</sup> Morton, *Pension Evil*, *supra* note 139 at 217 and 220.

<sup>159</sup> *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 7.

more sympathetic to claims than the Pension Board.<sup>160</sup> While the Bennett Government eventually acknowledged the error of this approach, their realization was too late for the 1935 election, which took them out of office and brought the Mackenzie King Liberals into power.<sup>161</sup>

Shortly thereafter, at the behest of the Legion, the Mackenzie King Government created the Veteran's Assistance Commission to combat veteran unemployment which, in 1936, sat at roughly 35,000.<sup>162</sup> The outcome of the Commission was an increased discretion to accept applications for War Veterans Allowance.<sup>163</sup> A 1937 Commission Report included an important discussion of Borden's promise to veterans, as follows,

*The Promises of the War Period:*

*But obligation does not depend on such a slender support as 'Noblesse oblige.' In a certain sense there was a contractual obligation. Some of the statesmen who led Canada in the war, either from generosity of spirit or too great temerity, promised the volunteers that their country would be grateful for their efforts and mindful of the sacrifices made. The attitude of the country at that time was that all the members of the C.E.F. had to do when they returned was ask and they would receive. It has been suggested that there was no bond drawn up between the country and her army. There was no need of any. Sir Robert Borden addressed the Canadian Fighting Forces at Vimy Ridge in 1917 in words ascribed to him as follows:*

*"You are men actually facing the enemy day and night. You are suffering greatly from fatigue, over-strain and lack of rest. The marvel of it is that men could undergo such a strain without breaking; but you have never yet broken; and history will appreciate that in days to come.*

*"You men are about to enter one of the most serious engagements that ever faced the Canadian Corps. I cannot, at this moment, give any information as to where this attack will be staged, whether it be successful or not, but it is to be borne in mind that it will not be an easy success... We feel confident that you will*

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<sup>160</sup> Morton, *Pension Evil*, *supra* note 139 at 220-223.

<sup>161</sup> Neary, *Civvy Street*, *supra* note 132 at 39.

<sup>162</sup> Woods, *supra* note 1 at 4; see also Veteran's Assistance Commission, *Report of the Veteran's Assistance Commission* (Ottawa: King's Printer, 1937) at 5-7 [*Report of the Veteran's Assistance Commission*].

<sup>163</sup> Neary, *Civvy Street*, *supra* note 132 at 41-42.

*succeed where others failed; for you have never yet failed in anything you have set your hand to, as a Canadian corps.*

*“You can go into this action feeling assured of this, and as the head of the Government, I give you this assurance: that you need have no fear that the Government and the country will fail to show just appreciation of your service to the country and Empire in what you are about to do and what you have already done.*

*“The government and the country will consider it their first duty to see that a proper appreciation of your effort and of your courage is brought to the notice of the people at home, and it will always be our endeavor to so guide the attitude of public opinion, that the country will support the Government to prove to the returned man its just and due appreciation of the inestimable value of the services rendered to the country and Empire, and that no man, whether he goes back or remains in Flanders, will have just cause to reproach the Government for having broken faith with the men who won and the men who died.”*

*In these words Sir Robert, on behalf of the Government, entered into a contract every whit as binding as that between Canada and the holder of Victory Bonds. In a certain sense the contract was more solemn. The Victory Bonds were, after all, pretty much a business transaction. The contract between Canada and her men going Overseas reached beyond business into the realm of the ideal.<sup>164</sup>*

This excerpt suggests that for the Commission, Borden's Words were more than just a political speech and also form a legally binding contract between Canada and veterans. The report provided further descriptions of what it called 'The Sentimental Obligation' and 'The Practical Obligation' to veterans.<sup>165</sup>

The Sentimental Obligation held that while veterans did not make their sacrifice with an expectation of a reward and would be embarrassed by being labeled as doing so, Canadians civilians should not forget the gravity of the sacrifice veterans had made. It was further stated in the Commission Report that Canada was under a heavy sentimental burden as a modern state, to care for veterans who are in need and cannot care for themselves. The Practical

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<sup>164</sup> *Report of the Veteran's Assistance Commission, supra note 162 at 26–27.*

<sup>165</sup> *Ibid* at 33.

Obligation, was deemed to be even more important and it was explained that, “Canada is not yet sufficiently wealthy to maintain a segment of her population on the idleness of relief,”<sup>166</sup> but should Canada become wealthy enough, “there is no justification for those being in want and misery who are unfortunate through no fault of their own.”<sup>167</sup>

The distinguishing of sentimental and practical obligations clearly has the hallmarks of pre-war economics, especially given the Commission’s economic context within the 1930s depression. It is also reminiscent of tensions posed by Parliamentary Sovereignty, which prevents governments from being fettered in their discretionary distribution of public monies. While Parliamentary Sovereignty directs that past government may not bind future ones, the commission’s report suggests that if the Canadian government could afford to pay more, their obligation to veterans should expand accordingly.

While many Canadian First World War veterans spoke of a “loss of faith” with their government, an expansion of veteran benefits eventually did occur, with the enactment of the first Veterans Charter. But it took Canada’s involvement in another World War and a government that chose to invest in veterans rather than view them as objects of charity, to make this change.<sup>168</sup>

### **III. The Second World War 1939-1945**

In contrast to the approach of the First World War, Jeff Keshen states that programs for Canadian veterans of the Second World War were guided by “the oft-repeated dictum, ‘Those

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<sup>166</sup> *Ibid.*

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

<sup>168</sup> *Bowering, supra* note 132 at 4.

who cannot remember the past are condemned to repeat it'.<sup>169</sup> There were fears of yet another 'lost generation' of returned veterans and a concerted effort to better support veterans this time around.<sup>170</sup>

#### A. The Plight of WWI Veterans

For a number of years following the First World War, the Legion, other veteran groups and even returned veteran members of parliament directed the government's attention to the difficulties facing veterans. They spoke of high levels of unemployment, the plight of veteran farmers and stories of veterans too embarrassed to participate in ceremonial parades because of their shabby dress, all the while reiterating Borden's 1917 promise.<sup>171</sup> Shortly after Hitler invaded Czechoslovakia in March 1939, Arthur-Joseph Lapinte, the Liberal member for Matapédia-Matane, urged the government not to intervene in a European conflict that did not threaten Canadian soil, especially given the fact that after twenty years the nation had not yet discharged "the undertakings of the then leader of the government on behalf of our returned soldiers".<sup>172</sup> Lapinte, a veteran of the First World War, read out Borden's speech to the House of Commons and noted his concern with the government's inaction,

*Notwithstanding this solemn engagement, a great many veterans, affected by their war service but unable to establish claims to pension or compensation, wander today through the streets of our cities and towns dragging out their broken, handicapped lives and the government can find no way of helping them.*

*I have been shocked at hearing most unpleasant remarks made about these men that they are lazy, heartless, that they do not want to earn their own living...*<sup>173</sup>

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<sup>169</sup> *Keshen, supra* note 149 at 62.

<sup>170</sup> *Ibid* at 62-63.

<sup>171</sup> Canada, House of Commons, *Debates*, 18th Parliament, 4th Session, Vol. 4 (May, 1939) at 4445.

<sup>172</sup> Canada, House of Commons, *Debates*, 18th Parliament, 4th Session, Vol. 3 (March, 1939) at 2449.

<sup>173</sup> *Ibid*.

Lapinte's comments gave a personalized understanding of the hardship faced by many veterans attempting to reintegrate into civilian society, highlighting the public's inability to understand some of the less visible impacts of military service, including military conditioning and mental health issues.

In May of 1939, Charles Grant MacNeil, Co-operative Commonwealth Federation member for Vancouver North,<sup>174</sup> read an appeal published by the Canadian Legion that included the Borden speech and reiterated some of the findings of the 1937 Veterans' Assistance Commission. The Legion suggested that while Canadians had done much for veterans they had not yet "fulfilled the promises made in an address given by Sir Robert to the troops in France."<sup>175</sup> MacNeil recited the section of the report entitled 'The Claim to special Privileges':

*We feel that the veteran has a valid claim to special privileges. Not only is the dominion government under a heavy debt of obligation to the veteran because of his response to Canada's call in her hour of greatest need, but there has been repeated recognition of that obligation. We have already urged that the obligation is not merely sentimental, but contractual. We feel, as we are confident the country at large feels, that no matter what Canada has done to requite the services of her veterans, her obligation to them is not discharged while one of them walks the streets in distress. Canada has a general obligation to all her citizens to provide them with work and to keep them from actual want. Canada has a special obligation to her veterans.<sup>176</sup>*

## B. The Veterans Charter

The Canadian Military had not yet seen battle in the Second World War when the government was again cautioned not to take part in the war unless they were willing to keep faith with veterans and honour their contractual obligation noted above. This time the

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<sup>174</sup> Parliament of Canada, *PARLinfo*, online:

[https://lop.parl.ca/sites/ParlInfo/default/en\\_CA/People/Profile?personId=13941](https://lop.parl.ca/sites/ParlInfo/default/en_CA/People/Profile?personId=13941).

<sup>175</sup> House of Commons, *Debates*, 18th Parliament, 4th Session, Vol. 4 (May 1939) at 4444-4446.

<sup>176</sup> *Ibid* at 4446; see also *Report of the Veteran's Assistance Commission*, *supra* note 162 at 39-40.

government listened and by way of an order-in-council on September 2, 1939, the government extended the *Pension Act* to all those who served during the Second World War. In December 1939, Prime Minister Mackenzie King appointed a Cabinet Committee on Demobilization to “define the obligation of the state ‘to those whose lives were interrupted by service to their country’”<sup>177</sup>.

During debate in the House of Commons in May 1941, Borden’s words were raised again by then Social Credit Leader J. H. Blackmore. Blackmore reminded the house of the continued plight of veteran settlers and questioned whether Canadians were fulfilling the “pledge that Sir Robert Borden made.”<sup>178</sup> Discussions of Pension reform came to a head some five months later on October 1, 1941 when Privy Council order 7633, laid the foundation for a collection of legislation known as the *Veterans Charter*. The *Veterans Charter* included improved pensions, and new *Veteran’s Land Act* 1942 which built on the experience of the First World War. Alternatively, veterans could apply for education and training under the *Veterans Rehabilitation Act* of 1945. Along with other benefits they also received the payment of a non-discretionary War Service gratuity based on the duration and location of service under the *War Service Grants Act, 1994*.<sup>179</sup> The *Veterans Charter* was the first truly universal veterans benefit as it would be given to everyone who served during the war.<sup>180</sup>

The government also announced its Post Discharge Re-establishment Order, offering larger post-service payouts, a guarantee of resuming one’s employment or an equivalent job,

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<sup>177</sup> *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 8 and 10.

<sup>178</sup> Canada, House of Commons, *Debates*, 19th Parliament, 2nd Session, Vol. 3 (May, 1941) at 3185-3186.

<sup>179</sup> *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 11.

<sup>180</sup> *Keshen*, *supra* note 149 at 65.

and vocational training for all veterans. Jeff Keshen explains that these universal approaches to veterans during the Second World War were not just good for veterans but they were also a “Keynesian strategy to pump-prime the economy.”<sup>181</sup> Although this shift helped veterans, it also reflected larger social policy trends in the Canadian government and other industrial countries in the 1940s.<sup>182</sup> So while lessons learned from the First World War and the Interwar Period were important, there was also a broader departure from the small government approach to stimulus spending under a vibrant postwar economy.

### C. The Compensation Principle and the Insurance Principle

Although the Veterans Charter represented a watershed moment in the development of veteran pensions in Canada, these benefits were qualified by PC1971, an order in council dated 21 May 1940 which limited the government pension liability by drawing a distinction in coverage between classes of veterans through the ‘Insurance Principle’ and the ‘Compensation Principle.’<sup>183</sup> The Insurance Principle covered those serving outside Canada and provided round the clock coverage for death and disability. The Compensation Principle, however, was for those serving within Canada and came with the qualification that coverage for death and disability had to be directly linked to military service.<sup>184</sup> Ian MacKenzie, the then Minister of Pensions and National Health, described the distinction between the insurance principle and the compensation principle as follows,

*The chief principle involved in the order in council of May, 1940, was a clearer definition of the responsibility of the state, in relation to those whose service occurred in Canada. It was provided that, when the man served in Canada only, the liability for war pension should exist only when disability or death arose as a direct result of the performance of military duties. It will be realized that thousands of the*

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<sup>181</sup> Keshen, *supra* note 149 at 65-66.

<sup>182</sup> Rice & Prince, *supra* note 27 at 65.

<sup>183</sup> Neary, *Civvy Street*, *supra* note 132 at 67.

<sup>184</sup> Neary, *Civvy Street*, *supra* note 132 at 67.

*men on active service in Canada are engaged in their military duties for only a limited number of hours per day and that, in the evenings and on week-ends, they are at liberty in very much the same way as the ordinary civil employees of the government.... Actually, many of them are living normal civilian lives except for the hours during which they are on duty. Full protection is given where death or disability arise as the result of the performance of duty. But a number of cases arose in which men were the victims of accident while away from their military duties and under circumstances in no way associated with their service. It was not considered that any claim for war pension should arise from the consequences of accidents and incidents which come to all of us in the course of our ordinary lives. A special regulation was necessary to meet this set of conditions because the original pension act was based on conditions of the last war, when the assumption was that every man enlisted would proceed as rapidly as possible to a theatre of war.*<sup>185</sup>

This distinction has been carried forward into subsequent veteran legislation relating to disability benefits and applying the Insurance Principle more generously to War Service Veterans than Modern Veterans. These standards resulted in significant divisions between these classes and Modern Veterans often face a higher threshold, which requires that evidence be provided to link their injuries, including those related to repetitive strain and mental health, with their military service.

While the continued use of these principles would cause significant difficulty for future veterans, drawing such a distinction in the context of the Second World War may have appeared to be a reasonable compromise given that the Veterans Charter represented a pivotal step forward for Canadian social policy. As noted in Leonard Marsh's 1943 *Report on Social Security*,

*The War, whatever it was in death and destruction, was a vortex in terms of social ideas and political ferment. To understand the Social Security Report, it is necessary to recall the epoch-making events of the 1940s both internationally and specifically in Canada.*<sup>186</sup>

While the government acknowledged that the Veterans Charter was meant to be carried on with an evolving legacy, the government's approach was still premised on the idea that, "the

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<sup>185</sup> *Ibid* at 67.

<sup>186</sup> *Marsh*, *supra* note 132 at xiii.

majority of veterans would much rather work than receive relief in any form from the state...the purpose was therefore, to provide 'opportunity with security.'"<sup>187</sup> While the Government was reacting to the unique impact of the war, it still wanted to limit its liability for paying pensions into the future. And it was this rationale that would underpin the revisiting of the lump sum approach to disability pensions, under the NVC.

The Department of Veterans Affairs was established in 1944. Ian MacKenize was appointed as the first Minister and he took the idea of getting veterans back into the work force to heart. Tasked with administration of "the care, treatment, training, or re-establishment in civil life, of any person who served in the naval, military, or air forces", Mackenzie recruited thirty-four men in uniform to senior executive positions within the department. There was a mandate to hire others that had served in the military, to staff positions across the country.<sup>188</sup> Mackenzie, who served as Minister from 1944 to 1948, described the *Veterans Charter* as being created "in the same high spirit of service which inspired Canadians to fulfill their obligation in the crucible of war."<sup>189</sup> The *Veterans Charter* has a legacy that is fondly remembered by veterans. This is likely, why, six decades later, the Paul Martin Liberal Government sought to capture its spirit, when they passed the so-called "New Veterans Charter" in 2005, in an effort to update veteran benefits to fit the differing needs of Modern Veterans.

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<sup>187</sup> *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 10.

<sup>188</sup> Neary & Granatstein, *supra* note 132 at 9; *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 12.

<sup>189</sup> Don Ives, "The Veterans Charter: The Compensation Principle and the Principle of Recognition for Service" in Peter Neary and J. L. Granatstein. *The Veterans Charter and Post-World War II Canada*. McGill-Queen's Press - MQUP, (Montreal: McGill-Queen's University Press, 1998) at 86.

#### IV. Post War Period 1946-1969

At its peak in 1947, the Department of Veterans Affairs had a staff of 22,000 to meet the needs of the over one million veterans attempting to reintegrate into Canadian society. By March 1951, this figure had already been significantly reduced to 15,500, as many veterans appeared to have transitioned into civilian life. Even with this reduction, the cost of rehabilitating the veterans of the Second World War was significant. By 1951 it had amounted to \$1,455,985,682, roughly half the expenditure of the Government of Canada in the fiscal year 1950-51 (\$3,759,000,000). As costs continued to mount, Canada had involved itself in yet another overseas military engagement.<sup>190</sup>

##### A. Korean War Veterans

Between 1950–1953, 27,000 Canadians, including a number of veterans of the Second World War, served in the Canadian Army Special Force sent to Korea as part of a United Nations “police action”. The authority for establishing this Special Force and mobilizing the Canadian military in this respect differed from that which grounded Canada’s participation in the Two World Wars. It was not a declaration of war under the *War Measures Act*, but was contained in Order in Council PC 3860/50, dated 7 August 1950. However, the fighting in this police action was no less dangerous. There were 1,543 battle casualties, including 309 deaths.<sup>191</sup> Modern Veterans would be mobilised pursuant to similar Orders in Council but, as noted below, they would not be grouped into the same pension class as War Service Veterans and those who served in Korea.

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<sup>190</sup> *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 1, 16 and 21.

<sup>191</sup> Canada, Department of National Defence, Directorate of History and Heritage, *Strange Battleground: The Operations in Korea and their Effects on the Defence Policy of Canada*, (Ottawa: Queen’s Printer and Controller of Stationery, 1966) at 19, 31 and 287 [*Strange Battleground*].

The legislation that formed the *Veterans Charter* benefits did not cover the Korean War Veterans, so the government initially met their needs through further orders-in-council. In 1951 however, through the *Veterans Benefits Act*, and subsequent extensions, as well as the War Veterans Allowance, granted separately in 1952, Parliament essentially extended all of the benefits of the Veterans Charter to Canadian Korean War veterans.<sup>192</sup> These veterans would be the last to receive this grandfathered status. The same universal approach to the dissemination of veterans' benefits would not be used for the subsequent Modern Veterans.

#### B. Report of the Woods Committee 1968

In the fall of 1965, the federal government appointed a three-person committee, led by Justice Mervyn Woods of the Saskatchewan Court of Appeal, to survey the organization and work of the Canadian Pension Commission, which had been established in 1933 some 30 years prior. The Committee spent its first six months conducting research and invited submissions at forty-one public hearings between January 18<sup>th</sup> and June 20<sup>th</sup> of 1966. The Report of the Committee to Survey the Organization and Work of the Canadian Pension Commission was drafted in 1967 and tabled in the House of Commons on March 26, 1968. Woods found that the Pension Commission had generally not taken a proactive approach to addressing criticism by veterans and it took the troubling approach of “providing only limited public information in regard to its policies and interpretations” to the public. Similar to the Ralston Commission, Woods also found that the administration of the *Pension Act* was being carried out with an ‘air of secrecy’, which needed to be remedied.<sup>193</sup> The approach of limiting information to the public

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<sup>192</sup> Canada, *Acts of the Parliament of the Dominion of Canada*, 21<sup>st</sup> Parliament, 4<sup>th</sup> Session (June, 1951) at 393-97 [Acts]; *Acts* 21<sup>st</sup> Parliament, 6<sup>th</sup> Session (July, 1952) at 397; *Acts* 21<sup>st</sup> Parliament, 7<sup>th</sup> Session (May, 1953) at 417; *Acts* 22<sup>nd</sup> Parliament, 1<sup>st</sup> Session (June, 1954) at 749-60.

<sup>193</sup> *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 24

and operating with an air of secrecy appears to have been revisited during the drafting and rushed enactment of the NVC and within operation of current veteran institutions discussed in Part 4.

The Committee made 148 recommendations, including a key change to the appeal process under the *Pension Act*. More than 40 years after a similar issue was raised during the Ralston Commission, a three-member appeal board, drawn from the same membership of the Pension Commission, was still hearing appeals under the *Pension Act*. These same appeal board members were involved in turning down the applicant in the first instance. Unsurprisingly, this often resulted in those same members who denied the application attempting to affirm their previous decision on appeal. Although the Committee was divided, the majority recommendation of the Committee was that an independent pension appeal board should be established and that it should report to Parliament through the Minister of Veterans Affairs.<sup>194</sup> The Committee also called for the amendment of the “benefit of the doubt” section of the *Pension Act*, which required that evidence be weighed in favour of the veteran applicant. The amendment to the ‘benefit of the doubt’ provision was drafted to ensure that this section was clear and unequivocal in the face of its inconsistent application by the Pension Commission. A further recommendation in the spirit of fairness was that those Canadians that had been taken prisoner at Hong Kong in 1941 would be given special consideration in the payment of pensions under the *Pension Act*.<sup>195</sup>

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<sup>194</sup> *Ibid* at 23-24.

<sup>195</sup> *Ibid* at 25-26.

Veterans' organizations operating in the country at the time welcomed these changes in August 1969. The Government responded to the *Woods Report* with a *White Paper on Veterans*. Therein, the Government committed to implementing 118 of the 148 recommendations of the Woods Report. Amendments to the *Pension Act* including the establishment of a Pension Review Board and Bureau of Pensions Advocates, providing further clarity with respect to the 'benefit of the doubt provision; and a minimum 50 percent pension for all Hong Kong veterans all received royal assent on March 30, 1971.<sup>196</sup>

Veterans have held the Woods Report and the respective amendments to the Pension Act in high regard. Canada's first Veterans Ombudsman, Pat Stogran, described the Woods Report as "the 'magnum opus' on veterans in Canada," saying that it was "fundamental in shaping" his outline for the way veterans should be treated. While there is no doubt that the changes implemented through the governments *White Paper on Veterans* were comprehensive at the time, the same approach was not carried forward when the government sought to address the issues facing the CF veterans during periods of subsequent reform.<sup>197</sup>

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<sup>196</sup> *Ibid* at 25-27.

<sup>197</sup>Pat Stogran. *Rude Awakening: The Government's Secret War Against Canada's Veterans* (Victoria: Friesen Press, 2015) at 34.

## **PART 4. DELAY, DENY AND DIE – VETERAN INSTITUTIONS**

*...Central agencies are consumed with controlling the machinery of government, cutting budgets, and reducing financial expenditures. Their laser-like focus, however, appears to have caused some senior bureaucrats to lose touch with the sacrifices of our Veterans. Their enforcement of a culture of obedience, constraint, and denial within the public service is not only frustrating front-line staff at VAC, it is depriving many Veterans of services and benefits they rightfully deserve.*

*Senior bureaucrats wield tremendous power and influence in government, yet remain anonymous from Veterans, their families, and the people of Canada who depend on their moral governance. Not only do many of their current processes, policies, and regulatory imperatives actually violate legislation directing them to be “liberal” in interpretation, it seems that a distinct and deliberate effort has been made to step away from the people’s and the government’s acknowledged obligation towards Veterans, as clearly indicated in the NVC...*

**P.B. Stogran, Veterans Ombudsman, 2009-2010 Annual Report**

### **Introduction**

This section will discuss the policies and institutional practices, which shaped the differing treatment of Modern Veterans. Institutions like the Department of Veterans Affairs as well as Veterans Stakeholder groups contributed to this differing treatment, including through the drafting and implementation of the New Veterans Charter (“NVC”) triggering the Scott Lawsuit. It will examine the growing class distinction between War Service Veterans and Modern Veterans, visible in: differential recognition and commemoration; representation by veteran stakeholder groups; and treatment under the disability benefits. It will examine the difficulties veterans face when interacting with veteran benefit institutions including Veteran Affairs Canada (“VAC”) and the Veterans Review and Appeal Tribunal (the “VRAB”). It will demonstrate that veterans with disabilities such as mental health and repetitive strain injuries are more likely to struggle when attempting to prove that these injuries are tied to their military service than those with other kinds of physical injuries. The examination of veteran institutions in this chapter will also involve a review of the principles that help determine who receives benefits and in what amounts. Modern Veterans must navigate the VRAB review and appeal

process, whose decision makers have recently taken a more narrow approach to disseminating benefits. As described further below, the Federal Court has also found that VRAB has failed to abide by the 'benefit of the doubt' principle put in place to address veterans' unique circumstances. The Department of Veterans Affairs and veteran advocacy groups have also pushed for changes to veteran legislation and the review and appeal process which have resulted in the delay or denial of claims for many Modern Veterans.

### **I. The Inequality and Veteran Advocacy Groups**

One of the main themes of the Scott Lawsuit is the inequality created by the NVC. The NVC applies only to Modern Veterans who make disability benefit application after April 1, 2006, while leaving *Pension Act* disability pensions awarded to Modern Veterans prior to this date untouched. War Service Veterans continue to be able to access *Pension Act* benefits even if they apply after April 1, 2006. The use of the April 1, 2006 cutoff date for Modern Veterans is significant because it occurred in the middle of Canada's participation in the Afghanistan campaign, which took place between 2001 and 2014. The application of the NVC had the effect of only providing inferior benefits to Modern Veterans but it also provided different tiers of benefits to Modern Veterans who made applications before and after April 1, 2006. Further to this, the veterans who participated in the Afghanistan campaign may have joined the military and put their life on the line with the expectation of receiving equivalent disability benefits to their peers. The Scott veteran's argue that Canadian Forces recruiters who met with them prior to enlistment made representations to them including that members of the Canadian Forces injured in their service would be adequately compensated to all them to return to civilian life and provide for their families.<sup>198</sup> Benefits, including those for veteran families were unilaterally changed in the middle of the campaign

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<sup>198</sup> *Scott v. Canada*, *supra* note 3 at para 234.

through the NVC, yet these members were not allowed to leave the Canadian Forces (“CF”), because pursuant to section 23 of the *National Defence Act*, they were bound to serve until lawfully released.<sup>199</sup>

Researchers Alice Aiken and Amy Buitenhuis of Queen’s University have found the “*Pension Act* provides a significant financial advantage over the NVC for veterans with severe disabilities.”<sup>200</sup> They also found that differences in financial compensation between the *Pension Act* and the NVC, disadvantaged veterans the greatest when they lived longer, were married, had more children, had a higher disability assessment and were released at a lower rank.<sup>201</sup> The other key disadvantage associated with the NVC is the lump sum disability award in lieu of the long-term disability payments under the *Pension Act*. The Canadian government tried to implement lump sum pension during the Interwar Period but it did not work and that policy was reversed. The lump sum approach is also problematic for veterans because they face many challenges reintegrating into civilian society and as noted by scholars veterans face a historic risk of substance abuse and other mental health issues.<sup>202</sup> These circumstances are not amenable to the added requirement of budgeting a large single disability award over a long period of time. These concerns were echoed by Veteran Sean Bruyey, who was one of the few Modern Veterans to provide feedback to the Senate Committee on National Finance with respect to the NVC:

*...The legislation calls for a one-time lump-sum payment of \$250,000. Most disabled veterans will likely receive only a fraction of that amount. Nevertheless, one must question the wisdom of giving lump-sum payments to sufferers of operational stress injuries, while many are in the depths of depression and crisis. Presently, veterans enjoy a lifelong yet modest disability pension. The lump-sum payment is equivalent to no more than seven to 10 years of disability pension. Most disabled veterans live for 20, 30 or even 40 years after release. Such appropriate compensation, as the minister terms it, appears to dodge responsibility for caring for the disabled veteran rather than accepting responsibility for what are lifelong disabilities. If people are not convinced about the lump sum, then I suggest the Senate recommend that they make an amendment so that veterans can make a choice between lump sum and pension...<sup>203</sup>*

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<sup>199</sup> *National Defence Act*, *supra* note 75 at s. 23.

<sup>200</sup> *Aiken & Buitenhuis*, *supra* note 6 at 47.

<sup>201</sup> *Ibid* at 47.

<sup>202</sup> *Childers*, *supra* note 131 at 229; *Moss & Prince* *supra* note 131 at 201.

<sup>203</sup> *Standing Senate Committee on National Finance*, *supra* note 29.

The lump sum approach to disability benefits was historically unsuccessful for Veterans of the First World War and it was not applied to War Service Veterans.<sup>204</sup> Modern Veterans like Sean Bruyey raised specific concerns about it prior to the enactment of the NVC, and the government either misapprehended or ignored the potential negative impact of this approach when it enacted the NVC, which resulted in the unequal treatment of Modern Veterans.<sup>205</sup>

As evidenced by the evolution in veteran benefit legislation, governments have not always provided what veterans need to address the unique impact of military service and what is provided by the government. These deficiencies have historically been addressed after being raised by veteran interest groups like the Royal Canadian Legion (the “Legion”). In the past, more legislators and civil servants responsible for drafting veteran’s legislation had personal knowledge of these issues because they were veterans themselves and because veterans made up a more significant proportion of the Canadian population following the Two World Wars. However, since the end of the Second World War, the Canadian Military has undergone a number of changes. There has also been a shift in veteran demographics, in the ways in which veterans advocate for themselves, and in the way they are viewed by Canadian society. According to Statistics Canada, as of March 2014 there were 88,400 Second World War veterans, 9,800 Korea War Veterans, and 599,200 Canadian Forces Veterans (Regular Forces and Primary Reserves). Despite the fact that there are far more Modern Veterans alive today, War Service Veterans are often used as the face for all veterans.<sup>206</sup>

The Legion, which grew to be Canada’s most influential veteran interest group following an influx of veterans from the two World Wars, is now made up predominantly of civilians-often the children and grandchildren of War Service Veterans. While Korean veterans were reluctantly welcomed into this body

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<sup>204</sup> *Kurschinski, supra* note 26 at 172–173, 280.

<sup>205</sup> *Standing Senate Committee on National Finance, supra* note 29.

<sup>206</sup> Norman Leach. *Passchendaele: Canada’s Triumph and Tragedy on the Fields of Flanders: an Illustrated History* (Regina: Coteau Books, 2008) at 40.

to address the declining numbers of the World War veterans, Modern Veterans have generally not been represented in its ranks or leadership in the same numbers. Nor are there the same number of Modern Veterans as those who served in the Two World Wars. Instead, other groups have formed to advocate for Modern Veterans including: The Korean War Veterans in 1973, the Canadian Association of Veterans in United Nations Peacekeeping in 1986, the Canadian Peacekeeping Veterans Association in 1991, and the Gulf War Veterans Association in 1994. But these groups have always had a smaller membership and lacked the ability to influence legislators in the same way as the Legion.<sup>207</sup> This led to an imbalance in advocacy, as War Service Veteran advocacy groups advocated to protect the existing entitlements and forms of recognition for War Service Veterans, even at the expense of Modern Veterans. The dominant influence of War Service Veteran advocacy groups also played a role in the NVC and earlier instances of inequality. For example, Modern Veterans were excluded from benefits such as long-term care hospital beds and Last Post Fund benefits, as well as having more limited access to the Veterans Independence Program.<sup>208</sup> Modern Veterans were also negatively impacted by significant changes to the *Pension Act* in 1995 triggered by the Senate Subcommittee on Veterans Affairs.

#### A. Keeping Faith: Into the Future

By 1992, there was growing criticism with respect to the way in which pension claims were being adjudicated and objection to the then Conservative Government's 1993 decision to place the VAC and Department of National Defence ("DND") within the same ministerial portfolio.<sup>209</sup> In response to these difficulties, Veterans again turned to the instruments of veteran advocacy. This time, Modern Veterans, as well as those from the Korea mission, brought grievances through their own associations. In response

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<sup>207</sup> *Neary, Civvy Street*, *supra* note 132 at 286.

<sup>208</sup> While the VIP benefits are available to all disabled WWII and Korea Veterans, the eligibility of disabled Canadian Forces Veterans is tied to an assessment of their disability, *Veterans Health Care Regulations* (SOR /90-594) at s. 15; see also *MacLeod & Leduc*, *supra* note 20 at 62.

<sup>209</sup> *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 36-37.

to criticisms, then Minister of National Defence Kim Campbell acknowledged that the pressure on the military pension system in Canada had not been this pronounced since the end of the Second World War and as a result, a pension evaluation study was needed to identify deficiencies in the system.<sup>210</sup> In April of 1994 the Senate Subcommittee on Veterans Affairs was given an Order of Reference to study the Future Direction of the Department of Veterans Affairs. The recommendations from this study would underpin many of the reforms leading up to the NVC, including the functioning of the institutions involved in the award and adjudication of disability benefits today.<sup>211</sup>

One of the most recent reiterations of Robert Borden's speech in a government policy document is found in the Senate Subcommittee on Veterans Affairs' 1994 report, *Keeping Faith: into the Future*. Not only does this report have part of the speech in its title, it also includes an excerpt from the speech at the conclusion of the report which states, "Prime Minister Sir Robert Borden articulated Canada's obligations to veterans when he addressed the soldiers about to take part in the Battle of Vimy Ridge in 1917."<sup>212</sup> This report reviewed the future directions of the VAC and led to the introduction of Bill C-67. It was clear, however, from the testimony given and the recommendations proposed, that many of the changes were aimed at advancing pension claims specifically made by War Service Veterans. For instance, with respect to recommendations under the heading Post Traumatic Stress Syndrome, particular emphasis was to be placed on veterans who served in the Second World War and Korea,

*Post-Traumatic Stress Syndrome*

*5. that the Department of Veterans Affairs immediately establish clinics and outreach programs for the diagnosis and treatment of Post-Traumatic Stress Syndrome among veterans, and **that particular emphasis be placed on the persistent psychological problems of World War 2 and Korea War veterans;***

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<sup>210</sup> *Ibid* at 36-37.

<sup>211</sup> *Keeping Faith: Into the Future*, *supra* note 1 at vi.

<sup>212</sup> Dave Rogers. "Veterans' graves to receive same care as fallen soldiers," *CanWest News Service* (September 13, 2007) online: [http://www.canada.com/story\\_print.html?id=1a56dab6-98c3-4a68-a62b-1cf8d0467eab&sponsor](http://www.canada.com/story_print.html?id=1a56dab6-98c3-4a68-a62b-1cf8d0467eab&sponsor) [Rogers].

7. that in deciding disability claims arising from Post-Traumatic Stress Syndrome adjudicators **be particularly attentive in awarding the benefit of the doubt to the veterans of World War 2 and the Korean War, given the latter's advanced age;**

A similar preference for War Service Veterans was shown in the consultation recommendations, providing a favourable status to the older Army, Navy and Air force Veterans, the Legion and the National Council of Veteran Associations,

*Consultation*

42. that the Department consult with The Army, Navy and Air Force Veterans in Canada, the Royal Canadian Legion and the National Council of Veteran Associations on a regular basis, **that all proposed changes affecting veterans and their programs be discussed at these consultation meetings and that the three organizations be provided, by the Department, with the same and all the information concerning the proposed changes; and**

43. that, **when issues of particular interest to veterans of small organizations are being discussed, the organization concerned be invited to participate in the consultation process.**

While there is no doubt that the first three groups had a much larger membership, the unnamed “small organizations” were more likely to understand and advocate for the needs of Modern Veterans. On the other hand, it is unclear what level of meaningful consultation the leaders of each of these groups had as there is no information on the internal consultation of any of these groups. By showing preference to consult with the established veteran groups like the Legion however, this approach had the effect of giving those representing War Service Veterans more influence over the proposed reforms. Further to this, the Senate Subcommittee chair Jack Marshall and the majority of the veteran witnesses interviewed by the Subcommittee were War Service Veterans<sup>213</sup>

Following the release of the report in 1995, Bill C-67 brought about a number of corresponding amendments to the *Pensions Act* as well as significant institutional changes to the adjudication of pension claims. Authority and responsibility to render decisions at the first level of the pension adjudication process was given to the Minister of Veterans Affairs and the Bureau of Pensions

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<sup>213</sup>*Keeping Faith: Into the Future*, supra note 1 at i, 87-94; see also CBC News Staff, “Former senator Jack Marshall dies” *CBC News* (August 17, 2004) online: <https://www.cbc.ca/news/canada/former-senator-jack-marshall-dies-1.486337>.

Advocates, who had previously been involved in completing veterans' first application for pensions, but had ceased this work as a result of changes in legislation. Their involvement was now limited to assisting with the preparation and presentation of pension reviews and appeals. The Canadian Pension Commission and Veterans Appeal Board were both replaced with the establishment of the Veterans Review and Appeal Board (defined above).<sup>214</sup> This commission also resulted in Korean War veterans being grandfathered into the same benefit scheme as the World War Veterans which would allow them to avoid being captured by the scope of the NVC.<sup>215</sup>

### B. Recognition and Remembrance

Even though Korean War Veterans were grandfathered into the same benefits as the World War veterans, these veterans and the subsequent Modern Veterans lacked the numbers and support of stakeholder groups to exert comparable influence on the Canadian Government. While they equally risked life and limb for their country, they have not been recognized as having the same status when it comes to official forms of recognition and remembrance. Unlike the other War Service Veterans, veterans of the Korean campaign did not initially receive service badges from the Canadian Government, or a nationally funded war memorial to commemorate their sacrifice. The first Korea Service Badges were presented to veterans in 1988, and the Canadian Volunteer Service Medal for Korea was only issued in 1992, nearly 40 years after the mission ended in 1953. Private and publically funded memorials were eventually established in 2001 and 2003, roughly 50 years later. When veterans from the Korean campaign had asked for these acknowledgement they had been met with resistance, including from groups representing veterans of the two World Wars.<sup>216</sup>

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<sup>214</sup> *Keeping Faith: Into the Future*, supra note 1 at 85–86; see also *The Origins and Evolution of Veterans Benefits*, supra note 28 at 37.

<sup>215</sup> *Keeping Faith: Into the Future*, supra note 1 at 32.

<sup>216</sup> *The Origins and Evolution of Veterans Benefits*, supra note 28 at 21 and 36; Veterans Affairs Canada, *Korea Service Badge*, online: <http://www.veterans.gc.ca/eng/remembrance/medals-decorations/medal-type/3>.

By 1992, the CF had already participated in active service for seven further missions following the Korean Campaign. As the decade advanced, CF members had to meet ever-expanding commitments with fewer recruits and a significant drop in their budget.<sup>217</sup>

1. P.C. 1990-192, (1 February 1990), United Nations, Observer Group in Central America (ONUCA);
2. P.C. 1990-1995 (15 Sep 1990) United Nations, Arabian Peninsula (Suez Canal);
3. P.C. 1991-2115 (15 Sep 1990) United Nations, Arabian Peninsula (Iraqi invasion of Kuwait);
4. P.C. 1992-354 (27 Feb 1992) United Nations, Protection Force (Yugoslavia);
5. P.C. 1992-355 (27 Feb 1992) United Nations, (Cambodia);
6. P.C. 1992-2006 (8 Sep 1992) United Nations, (Somalia);
7. P.C. 1992-2519 (7 Dec 1992) United Nations, (Somalia);<sup>218</sup>

The CF were called upon to deliver unprecedented levels of humanitarian aid. They were often deployed to areas engulfed in civil wars. They encountered occurrences of genocide in the former Yugoslavia and Rwanda. In the 1990s, some 40,000 Canadian Military personnel served in the Balkan region alone. These missions had a significant, albeit less visible toll on CF members as they were exposed to a different kind of warfare than had generally been experienced by the veterans of the two World Wars and Korea. With fewer individuals required to do more missions, it also became more difficult to reassign sick or injured members to non-operational duties. As a result, the CF increasingly forced these members out of their ranks through the application of the *Principle of Universality of Service*.<sup>219</sup>

While the size of the previous Canadian military and the Department of National Defence might have once accommodated a shift in career for injured CF members into non-combat roles, this was no longer an option amidst the budget cuts and service requirement of the 1990s. As a result, CF members were released earlier than expected and often without being able to qualify for a disability pension, or

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<sup>217</sup> *The Origins and Evolution of Veterans Benefits*, supra note 28 at 51.

<sup>218</sup> Veteran Harold Leduc drew my attention to significance of the various Orders in Council used to Place Members of the Canadian Forces on Active Service. He has provided a list of these Orders as well as other comparative indicia of different Canadian military veterans in his Active Service Comparison Matrix found on his website, Veteran Watch, *Books & Documents*, online: <http://www.veteranwatch.ca/books--documents.html> [Veteran Watch].

<sup>219</sup> Veterans Affairs Canada, *Historical Sheet - The Canadian Armed Forces in the Balkans*, online: <http://www.veterans.gc.ca/eng/remembrance/history/canadian-armed-forces/balkans/information-sheet-balkans>.

for career retraining, and thus without the necessary income needed to support their families.<sup>220</sup> To add insult to injury, these Modern Veterans were not recognized for their service, as compared to their War Service Veteran predecessors. There was no equivalent to the Korean War Service Badge given to “Korean War veterans”<sup>221</sup> for subsequent CF member participating in peacekeeping missions pursuant to the same form of Order in Council. While these Modern Veterans were eligible for the same Canadian Peacekeeping Service Medal awarded for participation in Korea, there was only a single Peacekeeping Monument for all of these subsequent missions, and it was commemorated years later on September 6, 2000. It was clear that when it came to recognition, the Federal Government drew a temporal line between Modern Veterans and War Service Veterans.<sup>222</sup> This is evidenced by the numerous and extensive “Official Histories” available on the World Wars and Korea found on the Canadian Forces Directorate of History and Heritage website. No such official histories were commissioned for subsequent peacekeeping missions even though veterans put their lives on the line serving Canada in the same capacity.<sup>223</sup>

## II. The Compensation Principle and the Insurance Principle

As a result of the May 21, 1940 Order in Council (PC1971) relating to the original Veterans Charter, the government limited their liability to payout disability pensions by creating a distinction between those members of the military who served in the theatre of actual war, under the “insurance principle”, and those on active service in Canada under the “compensation principle”. Those covered under the compensation principle would only receive a death or disability pension for an injury that was attributable to military service, whereas those covered under the insurance principle had the right to

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<sup>220</sup> *The Origins and Evolution of Veterans Benefits*, supra note 28 at 50-54.

<sup>221</sup> Veterans Affairs Canada, *War Service Badges*, online: <http://www.veterans.gc.ca/eng/remembrance/medals-decorations/medal-type/3>.

<sup>222</sup> Government of Canada, *Canadian Medals Chart*, online: <http://www.forces.gc.ca/en/honours-history-medals-chart/medal-cpsm.page>; see also CVSM Support Document Active Service Medal document, *Veteran Watch* supra note 218.

<sup>223</sup> Government of Canada, *Official Histories*, online: <http://www.cmp-cpm.forces.gc.ca/dhh-dhp/his/oh-ho/detail-eng.asp?BfBookLang=1&BfId=41>.

unlimited coverage. Historian Peter Neary states that this distinction was created to keep significant government costs under control after the Insurance Principle was applied broadly to all those serving the First World.<sup>224</sup>

This same distinction continues nearly 80 years later with current policies for “Disability Benefits in Respect of Wartime and Special Duty Service – The Insurance Principle” and “Disability Benefits in Respect of Peacetime Military Service - The Compensation Principle”, including the following definitions,

**Compensation Principle:** *As stipulated by paragraphs 21(2)(a) and 21(2)(b) of the Pension Act and subsections 2(1) and 45(1) of the Veterans Well-being Act, a member is eligible for a disability pension/award for a disability or death resulting from injury or disease or the aggravation thereof that **arose out of or was directly connected to military service** in the non-permanent active militia or in the reserve army during World War II or in peacetime. Under this principle, in order to establish that a disability is service-related, one must demonstrate that the disability was caused by military service and not simply that the condition had its onset during service...*

**Insurance Principle:** *As stipulated by paragraphs 21(1)(a) and 21(1)(b) of the Pension Act and subsections 2(1) and 45(1) of the Veterans Well-being Act, a member is eligible for a disability pension/award for a disability or death resulting from injury or illness which **was incurred during, attributable to, or aggravated during Wartime Service or Special Duty Service**. This eligibility is referred to as the Insurance Principle, as individuals are covered 24 hours a day, seven days a week, and only need to demonstrate that their disability had its onset during the qualifying period of service. Unlike the Compensation Principle, no causal link needs to be established between the disability and military service.<sup>225</sup>*

Under the Insurance Principle definition, the term “Wartime Service” applies to the War Service Veterans who were members of the Canadian Expeditionary Force (World War I), the Active Force (World War II) and Special Force (Korean War and Theatre of Operations). These members are all covered under the Insurance Principle from the date of enlistment to their date of discharge, whether they served in Canada or overseas. All subsequent Modern Veterans however, are only eligible under the Insurance Principle for Special Duty Service, which is associated with service in a Special Duty Area (“SDA”)<sup>226</sup> or Special Duty Operation (“SDO”).<sup>227</sup> The scope of Special Duty Service is also limited to: (a) service in

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<sup>224</sup> Neary, *Civvy Street*, *supra* note 132 at 67.

<sup>225</sup> *The Insurance Principle*, *supra* note 2; see also, Veterans Affairs Canada, *Disability Benefits in Respect of Peacetime Military Service - The Compensation Principle*, online: <http://www.veterans.gc.ca/eng/about-us/policy/document/1578> [*The Compensation Principle*].

<sup>226</sup> Specific geographic areas outside Canada where members are exposed to conditions of elevated risk.

<sup>227</sup> Missions/operations which involve elevated risk. These may take place in or outside Canada.

the SDA/SDO; (b) travel to and from the SDA/SDO; (c) leave taken during service in the SDA/SDO, no matter where that leave is taken; and (d) time spent in the Third Location Decompression Program.<sup>228</sup>

The rationale for the creation of the distinction between the Insurance principle and the Compensation Principle is tied to the establishment of these two principles during the Second World War. Ian MacKenzie, the then Minister of Pensions described the rationale for this distinction as follows,

*The chief principle involved in the order in council of May, 1940, was a clearer definition of the responsibility of the state, in relation to those whose service occurred in Canada. It was provided that, when the man served in Canada only, the liability for war pension should exist only when disability or death arose as a direct result of the performance of military duties. It will be realized that thousands of the men on active service in Canada are engaged in their military duties for only a limited number of hours per day and that, in the evenings and on week-ends, they are at liberty in very much the same way as the ordinary civil employees of the government...*<sup>229</sup>

It is clear that the onset of an injury while serving in a theatre of actual war is more likely to be the result of military service than while serving outside of the war zone and employed in military activities on part time basis. This policy however, was drafted in the context of the Second World War, when the distinction between home and overseas service was more clear. Current members of the CF may serve on multiple missions across the globe with significant breaks in between. Mackenzie's explanation also suggests that the distinction between these two principles is tied to whether the Canadian State is "responsible" for the injuries suffered by those serving. In other words, the Canadian government responsibility to take care of veterans is reflected in scope of coverage under the Insurance Principle they receive. This approach suggests that given the respectively broader coverage allocation, the Canadian Government is more responsible for War Service Veterans than Special Duty Service Modern Veterans.

From a practical point of view, it makes sense not to impose an evidentiary obligation on those serving in a theatre of actual war, whose injuries are more likely-than-not tied to military service. The

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<sup>228</sup> *The Insurance Principle, supra* note 2.

<sup>229</sup> *Neary, Civvy Street, supra* note 132 at 67.

term “Wartime Service” also suggests that this class of veterans are distinguished because they include individuals who served pursuant to a declaration of war and those who were conscripted into service, and are therefore reflective of the differing considerations. The application of the terms War Service, Special Duty Area as well as the Insurance and Compensation principles however, are not applied consistently to members of the Canadian military nor are they reflective of the causation of the respective injuries faced by their members. For instance, members of the Canadian Military who served in Korea” are included under the definition “War Service”, even though this United Nations “police action” was not launched pursuant to a declaration of war and did not involve conscription.<sup>230</sup> These individuals were put on active service pursuant to an Order-in-council, in the same way subsequent CF members were put on active duty to serve in SDAs.<sup>231</sup> While the selection of the Korean police action as the cut off for “War Service” may have been tied to the police action’s temporal proximity to the Second World War or the fact that there were members of the Canadian Military who served in both these missions, it is not a principled distinction as different factors apply. These factors have an important effect on the application of the Insurance Principle, as it is applied more narrowly to Modern Veterans who served on Special Duty Service. War Service Veterans are covered by the Insurance Principle from the date of enlistment until the date of their discharge, while those who take part in Special Duty Service are only eligible for the period between when they leave and return from the SDA or SDO, including related leave periods and attendances to Decompression Programs associated with this service.

Unlike the civilian soldiers who served in the Two World War and who never served in the military again, CF members and many of those who served in Korea were career members of the military, who served on multiple tours of duty on United Nations peacekeeping missions, or pursuant to Canada’s obligations under the North Atlantic Treaty Organization (“NATO”). This form of service includes gaps in active service duty and the respective coverage under the Insurance Principle when these individuals

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<sup>230</sup> *The Insurance Principle*, *supra* note 2.

<sup>231</sup> *Strange Battleground*, *supra* note 191 at 31.

are stationed in Canada. During these gaps they are only covered by the Compensation Principle and must prove their entitlement to disability benefits. These members, however, are still required to be engaged in demanding training exercises, which may result in serious injuries, or simply put further wear and tear on their bodies at a faster rate than that experienced by the average civilian. Veterans have nearly double the rate of back problems, arthritis, gastrointestinal conditions and obesity when compared to similar members of the general Canadian general population.<sup>232</sup> They may also suffer mental health conditions such as PTSD, with symptoms that arise outside of the prescribed scope of the Insurance Principle. The Veterans Affairs Canada Research Directorate notes that “when compared to the general Canadian population, there are some areas of concern for Veterans including much higher prevalence of chronic pain, musculoskeletal disorders, hearing problems and mental health conditions.”<sup>233</sup>

War Service Veterans, on the other hand, are covered from the date of enlistment, including periods of training in Canada and abroad. While these War Service Veterans “only need to demonstrate that their disability had its onset during the qualifying period of service,”<sup>234</sup> those serving after Korea may struggle to prove similar kinds of repetitive strain and mental health injuries “arose out of or was directly connected to military service”,<sup>235</sup> under the Compensation Principle, as they are often harder to detect, multi-causal and can have a late onset of symptoms.

### **III. The Benefit of the Doubt Principle**

When members of the Canadian military seek benefits for their injuries, they first apply to the Minister of Veteran Affairs through VAC for benefits offered under a number of statutory regimes. If they

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Elizabeth G. VanDenKerkhof, et al. “Pain in Canadian Veterans: analysis of data from the Survey on Transition to Civilian Life.” (2015) *Pain research & management* Vol. 20, no. 2 at 89-95.<sup>232</sup>

<sup>233</sup> Veterans Affairs Canada, Research Directorate, *Fast facts on... Veteran Physical & Mental Health* (February 2018) online: <https://www.veterans.gc.ca/eng/about-vac/research/research-directorate/info-briefs/veteran-physical-mental-health>.

<sup>234</sup> *The Insurance Principle*, supra note 2; see also, *The Compensation Principle*, supra note 225.

<sup>235</sup> *The Insurance Principle*, supra note 2; see also, *The Compensation Principle*, supra note 225.

are not covered under the Insurance Principle, they must demonstrate that their disability was caused by military service and is not simply a condition that had its onset during service. If their claim is denied by VAC they may also seek a review and subsequently an appeal of the decision before the VRAB. Since 1995, as a result of the recommendation from the Senate Subcommittee on Veterans Affairs' 1994 report, *Keeping Faith: into the Future*, Veterans no longer have access to free legal representation from the Bureau of Pensions Advocates for the initial application to VAC. This is only provided at the review and appeal stage.

Once a review is sought, the VRAB assembles a Statement of Case, which includes service documents and medical records, as well as previous decisions by VAC on the subject application. This information may be supplemented with further written evidence, in the form of a witness statement from one of the member's colleagues. However, as set out in Part 2 there are social disincentives to reporting injuries while serving in the military and to exhibiting any signs of weakness in front of one's colleagues or superiors. As a result of these disincentives, there may be gaps in documentation evidencing a member's injury and it may be difficult to obtain corroborating evidence from other members present when the injury occurred.<sup>236</sup>

#### A. Special Committee to Study Procedures under the *Pension Act*

As noted, under the Compensation Principle, applicants must prove that their disability arose out of or is directly connected to military service, and they must do so by providing evidence of this by including a credible medical opinion. As set out in the Federal Court decision in *MacDonald v. Canada (Attorney General)*<sup>237</sup>, evidence is credible if it is plausible, reliable and logically capable of proving the

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<sup>236</sup> Veterans Review and Appeal Board, *Who we are, Review hearing*, online: [http://www.vrab-tacra.gc.ca/Videos/1\\_Review-page-eng.cfm](http://www.vrab-tacra.gc.ca/Videos/1_Review-page-eng.cfm).

<sup>237</sup> *MacDonald v. Canada (Attorney General)* 1999 CarswellNat 388 [*MacDonald v. Canada*].

fact it is intended to prove.<sup>238</sup> The “benefit of the doubt” principle is also applied in the favour of veterans to address some of the unique evidentiary problems in advancing their claims.<sup>239</sup> While the Benefit of the Doubt Provision has existed since 1918, the governmental institutions responsible for disseminating and adjudicating disability benefit claims have not always applied it consistently. One such example from the 1980s involved the case of air force veteran Bjarnie Paulson, who served in the Korean mission. The Canadian Pension Commission and Pension Review Board initially denied Paulson’s application for a disability pension related to skin cancer, which he argued was contracted as a result of his exposure to nuclear radiation during his participation in a secret clean-up operation related to the Chalk River Nuclear Facility. His claim was hampered by the fact that the government had not kept records with respect to the military participants in this clean-up. In the 1985 the Federal Court of Appeal set aside the decision of the Pension Review Board and referred the matter back to the Board for reconsideration. The Court found that the Board had not properly accounted for this evidentially deficiency and had incorrectly applied the ‘benefit of the doubt’ provision under the Act.<sup>240</sup>

In June 1984, in response to numerous similar examples of the Pension Board misapplying the ‘benefit of the doubt’ principle, and on the cusp of another Federal Election, then Liberal Minister of Veterans Affairs W. Bennett Campbell, appointed Rene J. Marin to lead a Special Committee to Study Procedures under the *Pension Act*. Like many of the past studies of this type, the “Marin Committee” was a response to complaints from veterans about delays in allocating benefits. The Marin Committee began its work by reviewing evidence from the Canadian Pension Commission, Pension Review Board, Bureau of Pension Advocates, and various veteran groups. Following the 1984 election of the Conservative government it was terminated by the new Veterans Affairs Minister George Hees.

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<sup>238</sup> *MacDonald v. Canada* supra note 237 at para 29; see also *Beaudoin c. Canada (Procureur général)* 2014 FC 536, 2014 CF 536, 2014 CarswellNat 2663 at para 10.

<sup>239</sup> *Woods Commission*, supra note 145 at 239 and 274.

<sup>240</sup> *Paulson v. Canada (Pension Commission)* 1985 CarswellNat 119, 32 A.C.W.S. (2d) 6, 62 N.R. 75 at paras 3-6; see also, *The Origins and Evolution of Veterans Benefits*, supra note 28 at 33.

Nonetheless, in December 1984, Marin still submitted an abridged report containing recommendations to Parliament. While many of these recommendations were implemented under the new government, Minister Hees indicated that the Department's actions would be guided by three key principles: "speed, generosity and courtesy."<sup>241</sup> By August 9, 1985 Hees sought to accomplish this goal by taking steps to consolidate the then twenty-seven pieces of legislation establishing Veteran benefit programs. By mid-1986 this consolidation and Hees' mandate for speed, generosity and courtesy" resulted in a decrease in the time to process initial applications for pensions from 22 to 11 months and an increase in positive responses to such applications from 13 to 36 percent. Further reforms included the Department of Veterans Affairs taking over the responsibility for disability pensions from the Canadian Pension Commission and in 1987, the Pension Review Board and War Veterans' Allowance Board were replaced by a single body; the Veterans Appeal Board.<sup>242</sup>

#### B. The Application of the Benefit of the Doubt Principle

Today the benefit of the doubt principle is codified in a number of pieces of veteran legislation, including in section 39 (Rules of Evidence), of the *Veterans Review and Appeal Board Act* (the "VRAB Act"):

*39. Rules of evidence*

*In all proceedings under this Act, the Board shall*

*(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;*

*(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and*

*(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.<sup>243</sup>*

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<sup>241</sup> *Ibid* at 33-34.

<sup>242</sup> *Ibid* at 34-35.

<sup>243</sup> *VRAB Act, supra* note 111 at s. 39.

Section 3 of the VRAB Act also includes the following statement with respect to jurisdiction, which directs that the statutory provisions therein are to be construed in favour of Veterans,

*...Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependents may be fulfilled...*<sup>244</sup>

Similar wording is found in section 2 of the Construction of the *Pension Act*, as follows,

*The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependents, may be fulfilled.*<sup>245</sup>

While these statutory provisions seem to contain language in favour of veteran claimant, the spirit of these provisions is not always followed during the VAC application and the VRAB review and appeal processes.

Harold Leduc, a veteran and a former member of the VRAB, explains that part of this problem stems from the process associated with the initial application for a disability benefit to the VAC. As noted above, this is now a two stage process. Applicants first apply to the Minister through VAC. If they are not satisfied with their decision, they have a right to both seek a review, and appeal to the decision before the VRAB. During the initial application to VAC, however, applicants do not have access to the same level of support as they do during the subsequent review and appeal before the VRAB. The Bureau of Pension Advocates currently only assists with reviews and appeals, although prior to 1995 they were also involved with the original application to Veterans Affairs Canada. This change was significant for Modern Veterans as they could no longer rely on expert advice and assistance assembling evidence and developing a legal basis at the stage of the initial application to VAC. They are now no longer able to put their best foot forward prior to having a negative decision issued by the Ministry, which they will have to overcome by way of a review or a subsequent appeal. On the other hand, having expert

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<sup>244</sup> *Ibid* at s. 3.

<sup>245</sup> *Pension Act*, *supra* note 4 at s. 2.

advice early on may also avoid "faint hope" appeals that might otherwise not be launched, with the effect of inflicting the further stress associated with that process.<sup>246</sup>

Unsurprisingly, this added input from the Bureau was most beneficial to applicants with more challenging claims under the higher standard of the Compensation Principle. But while involving the Bureau at the earlier stage was more beneficial to some applicants, it was also more time consuming and could hold up more straight forward claims to VAC. As an example, those War Service Veterans who would have qualified for and already obtained their initial disability pension, pursuant to the Insurance Principle, may be held up in obtaining further benefits such as a hearing aids, arthritis drugs or some of the support services available under the VIP, which were unlikely to require an appeal.<sup>247</sup> As a result, involving the Bureau at the stage of applications to VAC was unpopular with War Service Veterans, who raised this as a concern in the 1994 Senate Report *Keeping Faith: into the Future*<sup>248</sup> and as a result, the process was subsequently changed in 1995 so the assistance of a pension advocate was not available until the review and appeal stage.<sup>249</sup>

As a result of this change, a further hurdle was added for those who have the most difficulty proving their entitlement to a disability benefit. In the late 1990s, shortly after the change was made, the department of Veterans Affairs turned down about one-half of first applications to VAC. They would have predominantly been made by Modern Veterans.<sup>250</sup> As noted earlier, members of the military are already accustomed to a system that is regulated by corporal punishment and they may have viewed benefit application process as yet another legal process that was stacked against them. Without the assistance of a pension advocate at the first stage, and upon receipt of the VAC's decision rejecting their claim, an applicant may feel they were in a losing battle as a result of prior interactions with the military justice

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<sup>246</sup> MacLeod & Leduc, *supra* note 20 at 21; see also *Disability Pension Program Evaluation*, *supra* note 20.

<sup>247</sup> *Disability Pension Program Evaluation*, *supra* note 20.

<sup>248</sup> *Keeping Faith: Into the Future*, *supra* note 1 at 60–63.

<sup>249</sup> MacLeod & Leduc, *supra* note 20 at 21.

<sup>250</sup> *Disability Pension Program Evaluation*, *supra* note 20.

system or as a result of barriers created by their disabled state. As a result he/she may forgo subsequent review and appeal rights. So while removing the involvement of the Bureau at the VAC application stage may have sped up some claims to the benefit to War Service Veterans, it also creates a significant barrier to those applicants with some of the most challenging evidentiary claims, such as mental health conditions.

#### IV. The VRAB

Another institutionalized problem faced veterans seeking reviews and appeals of Veterans Affairs decisions. This was raised in the Veterans Ombudsman Report, *Veterans' Right to Fair Adjudication* in March 2012.<sup>251</sup> The report shows that in sixty percent of cases judicially reviewed by the Federal Court, the court disagreed with the findings of the VRAB and sent the case back to be reheard.<sup>252</sup> Additionally, there were trends, indicating that the VRAB has failed to act according to its enabling legislation and failed to provide procedural fairness to veterans. The Report found that,

*The five most common errors identified by the Federal Courts were:*

- (1.) failure to liberally construe the applicable statutory regimes;*
- (2.) failure to accept uncontradicted evidence, including uncontradicted medical evidence;*
- (3.) failure to give veterans the benefit of the evidentiary presumptions;*
- (4.) failure to provide veterans with procedural fairness; and*
- (5.) failure to accept new evidence presented by veterans.<sup>253</sup>*

From 1995 to 2012, the VRAB made more than 118,600 decisions. While 33,990 were appealed and could have been judicially reviewed, only 140 of these were reviewed at the Federal Court and 11

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<sup>251</sup> Greg Kerr, M.P. (Chair). *Restoring Confidence in the Veterans Review and Appeal Board: Report of the Standing Committee on Veterans Affairs*. (Ottawa: Standing Committee on Veterans Affairs, 2012) online: [http://publications.gc.ca/collections/collection\\_2012/parl/XC78-1-1-411-07-eng.pdf](http://publications.gc.ca/collections/collection_2012/parl/XC78-1-1-411-07-eng.pdf) at 1 [Kerr].

<sup>252</sup> Office of the Veterans Ombudsman, *Veterans' Right to Fair Adjudication: Analysis of Federal Courts Decisions Pertaining to the Veterans Review and Appeal Board*, (Charlottetown, P.E.I: Veterans Affairs Canada, 2012) at 2 [Veterans' Right to Fair Adjudication].

<sup>253</sup> *Ibid* at 22.

at the Federal Court of Appeal. It is clear that significant attrition occurred at each level of appeal. The estimated legal cost of these cases range between \$15,000 and \$50,000 depending on complexity and this was compounded by the fact that the Federal Court lacked the power to substitute their own judgment for that of the board. They could only send it back to the VRAB for reconsideration, which might result in the same outcome, after a lengthy, stressful and expensive process<sup>254</sup> Until the 2011–2012 period, the VRAB used the percentage of cases upheld by the Federal Court and Federal Court of Appeal as the standard and an indication of the fairness of VRAB review and appeal decisions. This percentage however, saw a consistent drop from 2006 with only forty-four percent of decisions upheld in 2007–2008 and down to thirty-one percent in 2010–2011. This change in fairness also appears to coincide with the application of the NVC to all disability benefit claims brought by Modern Veterans after April 1, 2016.<sup>255</sup>

Despite these disturbing trends, the Conservative majority report of the *House of Commons Standing Committee on Veterans Affairs* in December 2012 failed to engage with the errors in law made by the VRAB, especially the ‘benefit of the doubt’ principle from section 39 of the VRAB Act, which was flagged as problematic in the Report.<sup>256</sup> The misapplication of this principle was highlighted in the Federal Court’s decision in *Bradley v. Canada (Attorney General)*,<sup>257</sup> wherein where Justice Phelan concluded that sections 3 and 39 of the VRAB Act were “more than a ‘tie goes to the runner’ provision...” This is legislation designed to protect and respect the members of the Armed Forces.”<sup>258</sup> Phelan further stated that the Board,

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<sup>254</sup> *Ibid* at 12–13.

<sup>255</sup> *Ibid* at 13.

<sup>256</sup> Only the Liberal minority report suggested amending this principle by lowering the burden of proof to better reflected the implementing legislation and ruling by the Federal Court, Kerr, *supra* note 251 at 33, 40–41, 44; see also, *Veterans’ Right to Fair Adjudication*, *supra* note 253 at 14.

<sup>257</sup> *Bradley v. Canada (Attorney General)* 2011 FC 309 [*Bradley v. Canada*].

<sup>258</sup> *Ibid* at paras 15–16; see also *Hall v. Canada (Attorney General)* 2011 FC 1431, 2011 CF 1431 at para 40; and *Cole v. Canada (Attorney General)* 2015 CAF 119, 2015 FCA 119 at para 25.

... approached the claim in a bureaucratic, narrow and parsimonious manner...It is not sufficient to pay lip service to the generous reading and application of the legislation which Parliament intended, this Court has affirmed and which members of the Armed Forces deserve.<sup>259</sup>

Justice Phelan's words were reflective of serious concerns about decisions made by the VRAB, in the context of the Harper Government that seemed hesitant to address them.

It appeared that then Veterans Ombudsman Guy Parent has since been de-fanged on this issue. In February 2015, he released the *Veterans' Right to Fair Adjudication: The Follow-Up Report*, which concluded that the "VRAB has made significant progress."<sup>260</sup> But compared to the extensive research in the *Veterans' Right to Fair Adjudication* report, this follow-up report relied on only four Federal Court judicial review decisions, which affirmed the VRAB's original decision. One of these was actually a Royal Canadian Mounted Police ("RCMP") decision, and all four were selected within the dubiously small 8-month test period from January 1, 2014 to August 31, 2014.<sup>261</sup> In September and October 2014, just prior to February 2015 publication of the follow up report, there were judicial review cases from the Federal Court and Federal Court of Appeal, which found in favour of the veterans and urged the VRAB to reconsider their decisions.<sup>262</sup>

The October 17, 2014 *McAllister* decision involved a successful application for judicial review by Basil McAllister. Basil was diagnosed with adenocarcinoma of the prostate and alleged that this was the result of being exposed to "Agent Orange" during while performing filed training. He made an application for a pension in May of 2005 but the VRAB denied his request after a number of appeal and reconsideration requests.<sup>263</sup> This decision was the second time that the Federal Court set aside the decision of the VRAB denying his claim for this ailment. A similar application was granted on June 19,

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<sup>259</sup> *Bradley v. Canada*, *supra* note 257 at para 20.

<sup>260</sup> Office of the Veterans Ombudsman, *Veterans' Right to Fair Adjudication: The Follow-Up Report*, (Charlottetown, P.E.I: Veterans Affairs Canada, 2014) at 14.

<sup>261</sup> *Ibid* at 4.

<sup>262</sup> *McAllister v. Canada (Attorney General)*, 2014 FC 991 at para 56 [*McAllister, 2014*]; see also *Newman v. Canada (Attorney General)*, 2014 FCA 218, para 33.

<sup>263</sup> *McAllister, 2014*, *supra* note 262 at paras 3-4.

2013, only months prior to the study period associated with *The Follow-Up Report*.<sup>264</sup> In granting the second application for judicial review the court outlined its frustration with the delay caused by the VRAB by forcing the applicant to bring a second application for judicial review after it made the same flawed decision,

**56 As much as I would have liked to issue directions in the nature of a directed verdict, I must refrain from doing so in the circumstances of this case. The determination of the Applicant's claim involves issues of facts (whether the Applicant was exposed to Agent Orange and the extent to which he was exposed) which are better left to the Board. That being said, the Court understands the frustration of Mr. McAllister, who has been trying to obtain compensation and to seek redress from Veterans Affairs Canada for almost ten years now. It is worth repeating that justice delayed is justice denied, especially for an 83 year old veteran. I therefore strongly urge the Board to resolve this matter as expeditiously as possible, in a fair and respectful manner.**<sup>265</sup>

*McAllister* decision showcases the limits of judicial review as the single right of appeal, in the context of the VRAB's unwillingness to deviate from its original flawed decision. This case also highlights the significant costs and delay which may be faced by veterans when they are forced to challenge the decisions of governmental institutions.

With developments like these in the VRAB, there seems a return to the same problematic approaches during the Interwar Period where pension tribunals, "acting on orders from their elected masters, commonly denied compensation to veterans unless their injuries were directly related to war service."<sup>266</sup> This institutional approach to denying benefits through the VAC and VRAC, even in the face of explicit statutory provisions and precedent case law belies what could be an even greater problem than the unfair effect of the NVC Modern Veterans. In this author's opinion, if Modern Veterans cannot gain access to support, it does not matter how good said benefits are.

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<sup>264</sup> *McAllister v. Canada (Attorney General)* 2013 FC 689, at para 65.

<sup>265</sup> *McAllister, 2014*, *supra* note 262 at para 56.

<sup>266</sup> *Ibid* at para 63.

## **PART 5. JUSTICE FAIRNESS EQUITY- ONE VETERAN ONE STANDARD (CONCLUSION)**

### **Introduction**

In the early 2000s, the Federal government began the process of exploring potential *Pension Act* reforms, including the lifetime disability pension provided under that act. While the alleged intent of these reforms was to provide a benefit program that better suited the needs of Modern Veterans, the net effect was an exercise in cost cutting, with the Pension Act's lifetime disability benefit converted into a lump sum payment under the New Veterans Charter ("NVC"). This change was premised on a theory that the needs of Modern Veterans would be better met with a lump sum benefit, whereas War Service Veterans should continue to be provided with a long term pension.

This section will explore the rationale associated with replacing the disability pension with a lump sum payment, proposed in Veterans Affairs Canada ("VAC")'s two-volume Disability Pension Program Evaluation, released under the Paul Martin Liberal government in October 2004 and July 2005. While the conclusions therein were likely reached well before these dates, they were clearly tied to the drafting of the NVC, which received Royal Assent in the interim on May 13, 2005 before the Report's release. The Report is one of the limited pieces of documentary evidence on the legislation from this period and due to its temporal proximity to the NVC the Report provides one of the few explanations for the lump sum that has not been influenced or politically massaged as a result of veterans negative reception to the NVC.

This section will also discuss the hurried nature of enacting the NVC, resulting in insufficient consultation with Modern Veterans. This prioritization of the interests of the War Service Veterans represented a continuation of prior practices in veteran legislative reform and resulted in problems faced by Modern Veterans under the NVC from the outset. The Stephen Harper Conservative Government took power in 2006 shortly after the NVC received Royal Assent and failed to address the deficiencies with the NVC that resulted in further instances of unfair treatment of Modern Veterans, which in turn triggered the *Scott* lawsuit. Under the Harper Government, the Veterans Review and

Appeal Board (the “VRAB”) took a narrower approach to the dissemination of disability benefits and this was exacerbated by the government’s cost cutting approach towards veterans’ services, while simultaneously using their image to promote nationalist sabre rattling, as will be discussed further below.<sup>267</sup>

The *Scott* lawsuit ended following the election of the Trudeau Liberals in 2015. Veteran policies have evolved since that time, including a proposed return to a form of disability pension, but there were no further attendances to court for the Scott veterans. The British Columbia Court of Appeal overturned the decision of the Supreme Court of British Columbia, dismissing the veterans’ action on December 4, 2017<sup>268</sup> and the motion seeking leave to appeal to the Supreme Court of Canada was denied on August 30, 2018, thereby exhausting all rights of appeal for this matter.<sup>269</sup> The Harper years highlight the exacerbation of the grievances of Modern Veterans but this paper will also conclude with a brief summary of the current state of affairs and some potential policy considerations for veteran disability benefits going forward.

## **I. The Disability Pension Program Evaluation**

Ten years after *Pension Act* amendments were triggered by the 1994 Senate Subcommittee on Veterans Affairs’ report, VAC published a comprehensive review of potential changes to the Disability Pension Program. In the fiscal year 2003-2004, the Disability Pension Program was the largest and most expensive VAC program in Canada, with approximately 168,894 recipients and pension payments totaling \$1.6 billion. The departmental review culminated in a two volume Disability Pension Program Evaluation. Volume I, dated October 2004, focused on program relevancy and client needs and Volume II, dated July 2005, similarly dealt with the future direction of the Disability Pension Program.<sup>270</sup> These

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<sup>267</sup> The percentage of VRAB cases upheld by the Federal Court and Federal Court of Appeal saw a consistent drop starting in 2006 through 2011 before the VRAB stopper posting these statistics, *Veterans’ Right to Fair Adjudication*, *supra* note 253 at 2.

<sup>268</sup> *Scott v. Canada BCCA*, *supra* note 16 at para 98.

<sup>269</sup> *Daniel Christopher Scott, et al.*, *supra* note 18.

<sup>270</sup> *Disability Pension Program Evaluation*, *supra* note 20.

reports were tied to the approach taken under the NVC when it received Royal Assent in the interim on May 13, 2005.

The reports note that for several years, the Disability Pension Program had been under increasing stress, and it was difficult to improve turn-around times for applicants due to higher numbers of first applications.<sup>271</sup> It is also indicated that this impact was an unforeseen result of Modern Veterans making application while still-serving and further applications by War Service Veterans as follows,

*...“The program was originally established to meet the needs of injured and disabled Veterans from the two World Wars and Korea. The program met those needs for the era in which it was conceived, and still does, as far as these “traditional” Veterans are concerned”.*

*What that era did not foresee was Peacekeeping missions, Special Duty Areas, Special Duty Operations, changes in legislation allowing “still-serving” CF members to apply for pensions, and the role the pension program now plays in the life of RCMP members, whether serving or medically discharged. Nor did that era foresee that so many of the traditional Veterans, most now in their eighties, would come forward and apply for the first time so late in life, and, along with others who had entered the program many years ago, tend to keep re-entering the system as new medical conditions, perhaps warranting an increased pension assessment, arise over time.<sup>272</sup>*

The wording of this passage suggests that pension benefits were appropriate to meet the needs of War Service Veterans. Those serving in the CF on peacekeeping missions and Special Duty Operations, on the other hand could apply for disability pensions while continuing to serve. The justification for the distinction drawn between Modern and War Service Veterans appears to be premised on the continued service of Modern Veterans after being injured and the assumption that they will not need to advance any further claim associated with that injury. This approach fails to consider the impact on those Modern Veterans with severe disabilities, which has proven to be an issue with the NVC lump sum regime.<sup>273</sup> The approach is also contradicted by the balance of the passage, which states that War Service Veterans continued to re-enter the system on multiple occasions. If service in the military has resulted

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<sup>271</sup> *Disability Pension Program Evaluation*, *supra* note 20.

<sup>272</sup> *Ibid.*

<sup>273</sup> Researchers Alice Aiken and Amy Buitenhuis of Queen’s University have found the “Pension Act provides a significant financial advantage over the NVC for veterans with severe disabilities”, *Aiken & Buitenhuis, supra* note 6 at 47.

in long term impacts and further application, warranting an increased pension assessment for War Service Veterans, why would Modern Veterans not be similarly affected?

#### A. The Service Income Security Insurance Plan

The increased costs associated with CF member's application for disability pensions while continuing to serve, in part relates to the application of the Service Income Security Insurance Plan (the "SISIP"). In 1969 the SISIP was created for CF members under section 39 of the *National Defence Act*<sup>274</sup>, as a provision that authorized the Chief of Defence Staff (the "CDS") to create programs for the benefit of CF Members.<sup>275</sup> Administered through a contract between the CDS and a private insurer, it was intended to fill the gap in coverage resulting from the Compensation Principle. It provides a voluntary death and disability insurance scheme, a Survivor Income Benefit and a Long Term Disability benefit in the case of death or total disability not attributable to military service.<sup>276</sup> SISIP is an income replacement scheme which guarantees a disabled CF member 75% of salary at the time of his or her release. Service Income Security Insurance Plan benefits are not a compensation for the gravity of one's injuries or for the loss of personal abilities, which are meant to be compensated under the *Pension Act*.<sup>277</sup>

Initially the SISIP benefits were not available to those receiving benefits under the *Pension Act*. However, in 1971 CF members injured in "Special Duty Areas" were allowed to collect *Pension Act* benefits notwithstanding their continued service in the CF. In 1976, in recognition of the inadequacy of the monthly *Pension Act* benefits, the SISIP coverage was expanded to include service-related disabilities. It was at this point that the SISIP and the *Pension Act* schemes came together and benefits payable under the *Pension Act* were added to the list of applicable reductions under the SISIP Policy to

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<sup>274</sup> *National Defence Act*, *supra* note 75 at s. 39; see also *Manuge v. R.* 2012 CarswellNat 1207 2012 FC 499 at paras 7-10 [*Manuge v. R.*]; *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 27-28.

<sup>275</sup> *Manuge v. R.* *supra* note 274 at paras 10.

<sup>276</sup> *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 28.

<sup>277</sup> *Manuge v. R.* *supra* note 274 at para 19.

prevent the “stacking” of payments from two federally funded sources for reasons of “cost and equity”.<sup>278</sup> Participation in the SISIP was made mandatory for all those who joined the CF on or after April 1, 1982.<sup>279</sup> While the expansion of SISIP and *Pension Act* coverage allowing CF members to collect benefits while continuing to serve was meant to address a gap in benefits, there was a significant cost associated with these changes, which concerned the government.

This increased capacity and carrying costs were raised as a concern in the Disability Pension Program Evaluation report, and it was suggested that the ability to collect benefits while continuing to serve played a role in the increase in first applications for disability benefits in the seven years prior to the report. In the fiscal year 1995-1996, VAC received 13,000 first applications and by fiscal year 2003-2004, the number had more than doubled to 29,000.<sup>280</sup> However, it is unclear that the upswing in applications was a result of Modern Veterans ability to apply for these benefits while still serving, as that policy had been in place since 1972. War Service Veterans were also making first time applications at this time, as they experienced symptoms associated with their service nearly 60 years prior. Further to this, Canada’s participation in the Afghanistan Campaign began in 2001. This was the Canadian military’s largest deployment since the Second World War. During the roughly 14 years between 2001 and 2014 more than 40,000 Canadian Armed Forces members served in Afghanistan.<sup>281</sup> This would likely have had significant effect on the number of CF veterans requiring disability benefits and provided an incentive to cut costs.

#### B. Lifetime Pensions Provide Little Motivation to Get Better...

One possible response to this influx of applications was a Pension Program Bypass for Traditional Veterans. This recommendation first appeared in Volume 1 of the *Disability Pension Program*

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<sup>278</sup> *Ibid* at paras 11-14.

<sup>279</sup> *The Origins and Evolution of Veterans Benefits*, *supra* note 28 at 28.

<sup>280</sup> *Disability Pension Program Evaluation*, *supra* note 20.

<sup>281</sup> Veterans Affairs Canada, *The Canadian Armed Forces in Afghanistan*, online: <https://www.veterans.gc.ca/eng/remembrance/history/canadian-armed-forces/afghanistan>.

*Evaluation* and illustrated in the conclusion of Volume 2 as the so call “Pension Gateway.” This Pension Gateway would provide a two-tiered system where older traditional Veterans’ benefits would be ‘grandfathered’ by a more forgiving set of rules.<sup>282</sup> In Volume II of the Report, it was also suggested that the Disability Pension system was outgrowing its young and middle-aged Canadian Forces clients. In the Summary and Future Directions section of the report, the following recommendation set the tone for what would become the NVC,

*...Veterans of the First World War, the Second World War, and the Korean War, are being for the most part well served by the VAC pension system, while CF and RCMP clients are not. From a taxpayer point of view, there was also concern over the long-term fiscal liability of paying lifetime pensions within a system that provides little motivation to get better, and few programs to address the needs not addressed by existing programs. In fact, the financial motivation is in the opposite direction - the more health conditions that are presented, the higher the likely total remuneration, as long as one is willing to keep applying again, and if unsuccessful, let the appeal process unfold. This process is, as one VAC official put it, "the only nail clients have to hammer," given the current lack of rehabilitative programming.*<sup>283</sup>

While the report does not provide any rationale as to why taxpayers should decline to pay to injured Modern Veterans the long-term disability pensions, that were deemed necessary for their War Service Veteran counterparts, the report clearly articulates a need to cut costs. There was also an unsupported allegation that disabled Modern Veterans were motivated to seek government benefits rather than transition to civilian occupations.

The report concludes with a section entitled “A Note of Urgency...” and with further references to taxpayer liability. Recommending the mitigation of costs associated with disability pensions by replacing them with a lump sum payment,

*A shift to greater use of lump sum payments combined with customized rehabilitation services would serve, over time, to regain control of an alarming future liability scenario. Senior management is well aware of the need to revamp the disability pension program, not just for the liability reason, but to provide younger clients with a support system that is based not on getting more pension by becoming more disabled, but on enabling and rewarding a return to the best life possible.*<sup>284</sup>

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<sup>282</sup> *Disability Pension Program Evaluation*, supra note 20.

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.*

The lump sum payment proposed by the VAC approach was clearly tied to the interest of minimizing taxpayer liability rather than to ensure that the VAC's "younger clients" received equal treatment for their injuries. It is also worth noting that, just prior to the publication of these reports, Statistics Canada information from 2003 indicated that 71% Modern Veterans were in their 40s, 50 and 60s.<sup>285</sup> While the War Service Veterans were clearly older at the time the Disability Pension Program Evaluation, the idea that the because Modern Veterans in their 40s-60s were so much 'younger' that they were better suited to a lump sum, and that having a disability pension acted as a disincentive to reintegration does not make sense. Using the age of a veteran as a proxy for their ability to reintegrate into civilian society generally makes little sense, when the emphasis should be on the level of disability. Many War Service Veterans returned home at much younger ages, were eligible for pensions, and continue to suffer from their injuries for many years after.<sup>286</sup>

Volume II of the Disability Pension Program Evaluation was released in July of 2005, roughly two months after the NVC received Royal Assent on May 13, 2005. It is clear from the conclusions of this report that the approach outlined in the NVC needed reform. It is also worth noting that this report is no longer readily available in its full form, and that none of the above noted quotations have been reproduced on the VAC website. Instead, a selective extract of the Executive Summary of the original report is the only information that remains in its place and it does not include any of the language referring to saving tax-payers money at the expense of Modern Veterans.<sup>287</sup> The entirety of this report was previously available on the VAC website as numerous similar reports continue to be. However, it

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<sup>285</sup> Veterans Affairs Canada, *Well-Being of Canadian Armed Forces Veterans: Canadian Community Health Survey 2003*, (May 10, 2013) online: [http://publications.gc.ca/collections/collection\\_2016/acc-vac/V32-262-2016-eng.pdf](http://publications.gc.ca/collections/collection_2016/acc-vac/V32-262-2016-eng.pdf) at 14.

<sup>286</sup> Tim Cook. *The Canadian Great War Soldier*, (August 7, 2014) online: <https://www.thecanadianencyclopedia.ca/en/article/the-canadian-great-war-soldier>.

<sup>287</sup> Extract of the Executive Summary of Veterans Affairs Canada, *Volume II of the Disability Pension Program Evaluation*, (July 2005) online: <http://www.veterans.gc.ca/eng/about-us/reports/departmental-audit-evaluation/2009-11-task-force-follow-up/6-1>.

appears that much of its content has been intentionally removed from the VAC website and it is now only accessible via archival searches and pursuant to a freedom of information request.<sup>288</sup>

## II. The Enactment of the NVC

Amidst the cost cutting measures espoused in the *Disability Pension Program Evaluation* report, Paul Martin's Federal Liberal Government brought forward Bill C-45, *An Act to provide services, assistance and compensation to or in respect of Canadian Forces members and veterans and to make amendments to certain Acts*, with the short title *Canadian Forces Members and Veterans Re-establishment and Compensation Act*. The government then proceeded to rush the bill through House of Commons with a First Reading on April 20, 2005, Second Reading and Referral to Committee (Reporting the Bill that day without Amendment) on May 10, 2005, and Third Reading again that same day. The First and Second Reading before the Senate also took place on May 10, 2005. The Standing Senate Committee on National Finance presented their report on May 12, 2005 and Bill C-45 received Royal Assent a day later on May 13, 2005. The Bill was passed with the unanimous support of all parties. The entire process was completed in less than a month.<sup>289</sup>

### A. The Wheelchair Ramp Clause

When the NVC received Royal Assent, then Liberal Minister of Veterans Affairs Albina Guarnieri acknowledged to be a living document in need of continued updates through consultation with the veteran community. The process however, did not get off to a good start as the original drafting of the NVC had involved insufficient consultation with Modern Veterans from the outset.<sup>290</sup> On May 11, 2005,

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<sup>288</sup>For the purpose of this research I have reviewed a digital copy of the *Volume II of the Disability Pension Program Evaluation* provided to me by Captain Sean Bruyey, who downloaded the document from the VAC website before it was deleted; Please also see Sean's fine thesis on the obligation to Canadian forces Veterans, Sean Bruyey. "Remembrance Forgotten: Seventy Years of Neglect and Our Obligation to Canadian Forces Veterans." Unpublished MA Thesis, (Ottawa: Saint Paul University, 2016).

<sup>289</sup> Parliament of Canada, *LEGISinfo*, online:

<https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=1768476&Language=E>; see also Veterans Affairs Canada,

<sup>290</sup>Government of Canada, *The New Veterans Charter Receives Royal Assent*, online:

<https://www.canada.ca/en/news/archive/2005/05/new-veterans-charter-receives-royal-assent.html>.

two Modern Veteran witnesses before the Standing Senate Committee on National Finance raised the rushed and even secretive process of drafting the NVC and the lack of consultation. The testimony of these veterans illuminated the deficiencies with the NVC, which they suggested created class distinctions between veterans. Captain (retired) Sean Bruyea stated the following,

*We all know that the government wants to be seen as honouring veterans, but that does not necessarily mean that their veterans charter is free of errors. In fact, given that the veterans' contribution to society is defined in many ways as timeless, one must ask, why is there such a rush to force something through in only two days after Veterans Affairs Canada has been dragging its heels for more than 15 years? We believe disabled veterans and the CF would rather have it right than have a flawed and unjust charter right now.*

*... There is indeed a strong consensus for the need to act. Nonetheless, as we understand, a select group of six veterans' organizations were provided with advance copies of the charter on a confidential basis and forbidden from sharing the information with anyone, including their membership. Thus the so-called consensus of veterans' organizations could be based on the view of as few as six people who actually saw the draft of the charter. In fact, veterans' organizations and opposition political parties based their support on a four-page press release. However, Bill C-45, as the chairman correctly point out, is a 50-page piece of legislation.*

*...Of concern is the nature of those consultations that were conducted. Many of these consultations were with groups that represent principally veterans of World War II. While it is fitting and proper to include them, as this is the sixtieth anniversary of their greatest victories and greatest sacrifices, the needs of the World War II veteran, as many have pointed out, and the needs of soldiers who have served in more recent conflicts can be very different.*

*Indeed, the veterans charter will not apply to World War II veterans. They are covered by a host of other regulations and act. Some are still effective and others have been suspended, such as the War Veterans Allowance Act, the Veterans' Land Act and the Pensioners Training Regulations. Since the new CF charter applies to future veterans, it would have made sense to focus on consultations with disabled veterans and serving members in the most recent conflicts, such as Yugoslavia, Rwanda and the Gulf War, to meet the emerging needs of veterans serving in today's, not yesterday's, military. Most witnesses in favour of Bill C-45 represent yesterday's military.*

*...Bill C-45 creates different and distinct classes of veterans: one for those who served in the Canadian military on or before April 1, 1947; a second for those who served in Korea; a third for those who served from World War II to present; and a fourth for those who are covered by new legislation.*

*Canadians are always told that veterans fought for democracy and there can be nothing more fundamental to democracy than equality. Creating multiple classes of people who were proud to serve in the Canadian Forces is not the type of equality that Canadians treasure and that Canadians have died for...<sup>291</sup>*

Further to this, Veteran Harold Leduc stated the following regarding consultation,

*The speed with which this bill must be passed has placed everyone in a difficult position. It is a dilemma for all involved. We heard people talk about consultation. I have been involved in this process since 1992, have been a member of the VAC-CFAC, and have sat with the modernization task force. I can tell you that we have been consulted on the details of the programs, but we have not been consulted on the details*

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<sup>291</sup> Standing Senate Committee on National Finance, *supra* note 29.

of Bill C-45 until two days prior to it being tabled in the House of Commons. That is unfortunate, because I have been interested and I have been asking about the details since at least January.

*The impact of Bill C-45, once enacted, will change forever how Canada treats its veterans, potentially creating another class of veterans, as we heard. While the intent of Bill C-45 is to re-establish Canada's commitment, it in fact changes it — a change made without consultation with veterans or the people and Government of Canada, the major stakeholders in the existing social contract. In whose interests is it to shift the recognized obligation, and who agreed to the shift?*<sup>292</sup>

Both Captain Bruyea and Mr. Leduc also made reference to the intersection of military culture and the difficulties of reintegration into civilian society in their testimony, as well as the impact of the NVC on psychiatric or operational street injuries and the risk of suicide. Mr. Leduc stated the following, which references a difficulty that many veterans may face as a result of the *Principle of Universality of Service*,

*I would like to take a moment and talk a little bit about myself. I spent 22 years in airborne infantry. I served in Germany and Cyprus. At the end of the 22 years, in 1992, I was told, "Thanks for your service. You are broken. We do not need you any more."*

*From that day forward, I tried to find out why we are treated differently from other veterans. In doing so, I was lucky to be part of the Canadian Peacekeeping Veterans Association of Canada because we found a voice and, as part of that voice and representative of that organization, I was able to propose for Veteran Affairs Canada a 1-800 assistance line, and another proposal planted a seed with the Veterans Affairs Canada - Canadian Forces Advisory Council. I have been extremely lucky...*

*However, the part I am concerned about is that changing from the military culture to civilian culture is not an easy task. We are different people after we have joined the service. We do not take off the uniform and switch into being a civilian again.*

*Normal transition takes about two years. Sometimes people cannot get it, regardless of help. The bill needs to be liberally adaptable. From my understanding, you need some kind of medical need before you can even get job placement or other. However, some may not have a medical need, but a social or psychological need; some kind of need that is other than can be described. I do not think that part on suicide will cover that because people will go to any length, including self-medicating with drugs or alcohol, if they perceive themselves to be in a position where they cannot sort out their own issues.*

Following Mr. Leduc's comments on this subject, the following exchange took place between Senator Kinsella and Captain Bruyea regarding mental health injuries, the struggles veterans continue to face interacting with veteran institutions and the need to treat all veterans equally,

**Senator Kinsella:** *I would like to turn to Captain Bruyea on the text of your presentation tonight. You talked about the four different classes of veterans, in your mind. You raise the concern that this may lead to some form of discrimination between classes of Canadians. The principle that is enshrined in section 15 of our Charter of Rights and Freedoms is that everyone is equal before the law and has equal benefit of the law without discrimination. Where do you see inequality and unequal benefit between these four classes that you have defined for us?*

**Capt. Bruyea:** *That is fundamental to our concern about the legislation. Senator Atkins brought up the point about discrimination. The new group that will be discriminated against, in spite of the publicity to*

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<sup>292</sup> Standing Senate Committee on National Finance, *supra* note 29.

*support them and in spite of the valiant efforts of Senator Dallaire, are operational stress injuries, post-traumatic stress disorder and depression.*

*I will call this legislation the “wheelchair ramp clause.” Most Canadians do not need wheelchair access, but what I love about Canada is that we put wheelchair access in. We try to do that in most public buildings, do we not? This legislation does not have a wheelchair ramp clause for operational stress injuries. We heard one member from the veterans' organization speak about forcing veterans into jobs because it is good for them. That is the agenda we are most afraid of.*

*You are being asked to sign a blank cheque and trust that changes will be made regularly. The truth is that for 50 years the veterans organizations behind me as well as individual veterans have been banging their heads against the wall to make Veterans Affairs Canada not only change the Pension Act but administer the act according to the way it has been written. I am sure you are no strangers to complaints about the Veterans Review and Appeal Board, VRAB, departmental reviews and benefit of the doubt. When you are asked to sign a blank cheque here, what evidence do we have that Veterans Affairs Canada will do the right thing with it?*

*To see the most recent history of the actions of Veterans Affairs Canada, we need only look at the Auditor General's report of 1998 and 2000. I would ask you to consider that while deliberating. Such things as benefit of the doubt and the departmental review clause were pointed out by the Auditor General seven years ago. They are still problems today. It did not require new legislation to fix those problems. It required sound management. Veterans Affairs Canada still did not do it. Why would we trust that writing a blank cheque today ensures they will do what they promised?<sup>293</sup>*

As noted by Captain Bruyey, both War Service and Modern Veterans are equally required to sign a blank cheque and should therefore be treated equally. While this may not necessitate being covered under exactly the same legislation, veterans must be seen to be treated equally both under benefit policies and in the way they interact with veteran institutions. This means consulting with those veterans that will be impacted and making a meaningful effort to address their needs rather than look for opportunities to save money. Despite the serious concerns with NVC raised by Mr. Bruyey and Leduc, and the potential, ulterior, cost cutting motive alluded to in the Disability Pension Program Evaluation, Bill C-45 received Royal Assent on May 13, 2005 without any further amendments.

### **III. The New Veterans Charter, a Living Document under the Harper Years?**

The NVC did not come into force until April 1, 2006, following the election of Stephen Harper's minority Conservative government in January 2006. Stephen Harper made a statement in support of the NVC, on 6 April 2006,

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<sup>293</sup> *Standing Senate Committee on National Finance, supra note 29.*

*I want our troops to know that we support them. This veterans charter is one example of our government's commitment ... The Charter, the introduction of a Veterans Bill of Rights and the appointment of an ombudsman are clear examples how we begin to do the right thing for Canada's servicemen and women.*<sup>294</sup>

Greg Thompson, the then Minister of Veterans Affairs provided further support as follows,

*The New Veterans Charter is the most profound transformation of Veterans' services and benefits since the end of the Second World War... It provides all the fundamental programs and services that CF Veterans and their families have told us they need as they transition from military to civilian life.*<sup>295</sup>

Harper and Thompson were not incorrect. There was an opportunity to do right by veterans and the new legislation and Veterans Ombudsman position had great potential. However, this government did not address the deficiencies with the NVC and instead paid lip service to veterans while using them as political pawns.

#### A. Military Symbolism

In addition to the inequitable treatment resulting from the application of the NVC the Harper government also made hypocritical use of the Canadian military and veterans. While there is no doubt that prior Canadian governments have also let down veterans, the Harper government was responsible for a unique form of moral failing worthy of being considered a breach of the social covenant, which formed the basis for the key arguments raised in the *Scott* lawsuit. From 2006-2015, the Harper Government used every opportunity to cash in on the Canadian military's image while simultaneously "balancing the budget" on the backs of injured veterans.

This is not to say that prior Liberal governments had been overly generous with veteran entitlements, but the Harper government's political use of the military differed. Professor Donald Gutstein explains that recent federal Liberal governments have taken a more limited stance to the military and that "[p]eacekeeping was central to Liberal identity." This was not the approach of the Harper Conservatives.<sup>296</sup> Harper took a more hawkish approach in an attempt to rekindle nationalism by

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<sup>294</sup> Veterans Affairs Canada, *The Government of Canada Supports its Troops at Home and Abroad* online: <https://www.canada.ca/en/news/archive/2006/04/government-canada-supports-troops-home-abroad.html>.

<sup>295</sup> *ibid.*

<sup>296</sup> Donald Gutstein. *Harperism: How Stephen Harper and his think tank colleagues have transformed Canada* (Toronto: James Lorimer & Company, 2014) at 229.

drawing selective parallels to Canada's rich military history. This can be seen early on in Harper's reaction to Prime Minister Chretien's decision to opt for the NATO led Afghanistan mission in lieu of joining the United States led War in Iraq. Harper, then the leader of the opposition, co-authored an open letter to Americans condemning the Canadian decision. In the article entitled "Canadians Stand By You," Harper and Stockwell Day stated, "This is a mistake. For the first time in history, the Canadian Government has not stood beside its key British and American allies in their time of need."<sup>297</sup> Although Harper eventually admitted that his previous position on Iraq, "was absolutely an error"<sup>298</sup> his government continued to make unprecedented use of the military as a patriotic symbol in an attempt to market the Conservative Party as the natural governing party in Canada.<sup>299</sup> Journalist Paul Adams explains that,

*The Canadian nationalism of the late 1960s and the 1970s which was bound up with Medicare, tolerance at home, peacekeeping abroad and modesty almost everywhere, has yielded ground to a more muscular patriotism represented by the likes of General Hillier and Don Cherry ... The Conservatives have worked to sustain and broaden this new conservative nationalism, celebrating the War of 1812, reframing the development of the North as a military issue and even reviving the monarchist brand in Canada.<sup>300</sup>*

Even as Canadian public support for the Afghan mission diminished, the Harper government continued saber-rattling, spending a lavish twenty-eight million dollars on the 200th anniversary of the War of 1812, meanwhile ignoring the 30th anniversary of the Liberal-created Charter of Rights and Freedoms.<sup>301</sup> A further 4.3 million dollars were devoted to the 2014 Veterans Affairs television advertisement campaign, propagating the view that Canadian veterans are being helped with their reintegration to 'Civvy Street.' Both these campaigns capitalized on the image of Canadian veterans, using taxpayer money. Many Canadians viewed these advertisements as government self-promotion

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<sup>297</sup>Stephen Harper and Stockwell Day, "Canadians Stand With You," *The Wall Street Journal* (March 28, 2003) online: <http://www.wsj.com/articles/SB104881540524220000>.

<sup>298</sup> Sunny Freeman. "Canada's 'No' To Iraq War A Defining Moment For Prime Minister, Even 10 Years Later," *Huff Post* (March 19, 2013) online: [http://www.huffingtonpost.ca/2013/03/19/canada-iraq-war\\_n\\_2902305.html](http://www.huffingtonpost.ca/2013/03/19/canada-iraq-war_n_2902305.html).

<sup>299</sup> Max Nemni. "Stephen Harper is a patient man on a mission: remaking Trudeau's Canada," *Literary Review of Canada* (March 2014) online: <http://reviewcanada.ca/magazine/2014/03/the-incrementalist/>.

<sup>300</sup> Paul Adams. *Power Trap: How Fear and Loathing between New Democrats and Liberals Keep Stephen Harper in Power—and what can be done about it* (Toronto: Lorimer, 2012) at 16.

<sup>301</sup> Meagan Fitzpatrick. "Conservatives draw fire for War of 1812 spending," *CBC News* (June 15, 2012) online: <http://www.cbc.ca/news/politics/conservatives-draw-fire-for-war-of-1812-spending-1.1265851>.

and a misuse of taxpayer money, resources which could be used to serve veterans in a more meaningful way.<sup>302</sup>

The Harper government's treatment of veterans represented a great contradiction. During a military cemetery dedication ceremony in 2007, then Secretary of State for Multiculturalism and Canadian Identity Jason Kenney stated the following,

*In dedicating the newly-enlarged military cemetery we are keeping a promise made by Sir Robert Borden. In 1917, Sir Robert pledged that the Dominion would consider it our first duty to honour services rendered to the country and Empire. Like all Canadians, Borden was deeply moved by the sacrifices made not only by the men who served and died in Flanders and in France under the flags of our Empire and our Dominion but also those who returned home. No one, he said will have just cause to reproach the government for having broken faith with those who fought and died for Canada.*<sup>303</sup>

Despite verbal commitments in support of veterans and the promotion and implementation of the New Veteran's Charter, the idea that this legislation was a living document fell to the wayside. While the Harper government ensured that the Vimy Ridge memorial is now featured on the back of Canada's new twenty-dollar bill, he refused to dedicate more substantial financial resources to veteran pensions. Instead, Harper attempted to justify a spendthrift approach, and this sentiment was echoed by his Veterans Ombudsman Guy Parent. Parent alleged that the previous *Pension Act* inadvertently encouraged veterans to focus on the severity of their disability, to receive a larger benefit payout, rather than focusing on 'reintegration,' which is the mandate of the NVC.<sup>304</sup> This interpretation of the NVC was both in keeping with Harper's approach to veterans but also his greater economic goals. The use of lump sum payments in lieu of providing long-term care was part of a recent neo-liberal social policy approach, premised on the claim that government bureaucracies are ill-suited to provide services, and that the freedom of choice and ability to outsource to the private sector as a more productive use of resources. A good example of this small-government approach is the Harper government's decision to

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<sup>302</sup> Dean Beeby. "Veterans Affairs ads that cost \$4.3M fell flat with viewers: report," *CBC News* (March 17, 2015) online: <http://www.cbc.ca/news/politics/veterans-affairs-ads-that-cost-4-3m-fell-flat-with-viewers-report-1.2998647>.

<sup>303</sup> *Rogers*, *supra* note 212.

<sup>304</sup> Office of the Veterans Ombudsman, *Improving the New Veterans Charter: The Parliamentary Review*, online: <http://www.ombudsman-veterans.gc.ca/reports-rapports/reviewcharter01-examencharte01-01-2013-eng.cfm>.

provide a Refundable Child Tax Credit instead of a more comprehensive national childcare strategy. Similar to lump-sum veteran disability awards, the child tax credit is worth less than the actual cost of providing childcare in many instances.<sup>305</sup>

During the Harper years, the Canadian government was also less generous than many of its closest allies including the United Kingdom, Australia, and the United States. For disabled Canadian veterans, the lump sum payment maxed out at \$306,698.21 (tax free) and between 2006 and 2014 only 185 of the 45,615 veterans given the lump sum were granted the maximum amount. For severely disabled Canadian veterans with no chance of achieving full civilian employment, there was also an earnings-loss benefit, but this was set at seventy-five percent of the veteran's military salary and was taxable income. In comparison, during the same time period the United Kingdom paid disabled soldiers up to three times the amount of the Canadian lump sum with a cap set at \$1,092,348 (tax free), their earnings-loss benefit was one hundred percent of the previous military salary and was not taxable income.<sup>306</sup>

With the Harper Government's spendthrift approach to veterans starting in 2006, VAC returned more than \$1.13-billion to the federal treasury. All the while, the Minister of Veterans Affairs, Julian Fantino, bragged about Canada's world-class treatment of their veterans.<sup>307</sup> Budget projections for Veterans Affairs showed a drop of two percent between the 2013–2014 and 2014–2015 fiscal years, with a further projected drop in 2015–2016. Despite the drop in overall spending, VAC made a twenty-one percent increase to the Canada Remembers program from just over forty million dollars to fifty million. The Canada Remembers program was meant to honour veterans, military milestones and encourage national pride in Canadian military history relating predominantly to War Service Veterans,

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<sup>305</sup> *Rice & Prince, supra* note 27 at 208–209.

<sup>306</sup> Gloria Galloway, "Benefits for wounded Canadian veterans do not stack up" *The Globe and Mail* (March 9, 2015) online: <http://www.theglobeandmail.com/news/politics/benefits-for-wounded-canadian-veterans-do-not-stack-up/article23381161/>.

<sup>307</sup> Murray Brewster, "Veterans Affairs handed back \$1.1-billion in unspent funds," *The Globe and Mail* (November 20, 2014) online: <http://www.theglobeandmail.com/news/politics/1-1-billion-in-unspent-funds-at-veterans-affairs-documents-show/article21665655/>.

with part of the funding devoted to the new, permanent visitor centre at the Canadian National Vimy Memorial in France.<sup>308</sup> While remembrance is important, the Harper government used the iconic image of War Service Veterans in ad campaigns while simultaneously cutting support to all veterans.

#### **IV. The Scott Lawsuit**

The *Scott* Lawsuit was launched in October 2012 to address veterans' injuries as a response to the deficiencies of the NVC and an approach to veterans which prioritized their use more as a marketing tool rather than addressing their critical needs.<sup>309</sup> In addition to the Honour of the Crown argument tied to Borden's speech, veterans also argued that the NVC breached the Canadian Charter of Rights and Freedoms by providing "arbitrary, sub-standard and inadequate support and compensation schemes."<sup>310</sup> They stated that this led to a violation of section 7 "in depriving the Plaintiffs and the Class with the right to life, liberty and security of the person"<sup>311</sup> and a violation of the "equality rights of the Plaintiffs and the class protected under s. 15" of the Charter.<sup>312</sup> All of these arguments support the premise that Modern Veterans should be treated equally to War Service Veterans. In their written argument responding to the Crown's motion to strike, the Scott veterans argue that all veterans share a unique status within Canadian society, including as a result of the following:

- They are in the unique position of being required by law to risk their lives and bodies to death or serious bodily injury;
- No Canadians other than members of the Canadian Forces may be ordered to take actions where their life and limb are not only at risk but casualties are anticipated and planned for; and

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<sup>308</sup> Amy Minsky. "Less money to help veterans, more to remember them," *Global News* (April 15, 2014) online: <http://globalnews.ca/invisible-wounds/1255468/invisible-wounds-funding-for-veterans-programs-on-downward-trend>.

<sup>309</sup> *Scott v. Canada*, *supra* note 3.

<sup>310</sup> *Ibid* at para 81.

<sup>311</sup> *Ibid* at para 97.

<sup>312</sup> *Ibid* at para 81.

- Their unique sacrifices resulted in the creation and continuance of Canada as a free and independent nation.<sup>313</sup>

While the moral argument for treating all veterans equally is clear, there were limits to the process undertaken by the veterans. These veterans were attempting to establish a constitutionally protected Social Covenant in the context of a class action lawsuit and the limited scope of a motion to strike which prevented the veterans from advancing detailed evidence to be considered by the Court. These limitations may have been the reason why the veterans entered into settlement talks in the spring of 2015 and agreed to put the lawsuit in abeyance until after the October 2015 federal election.<sup>314</sup> This break in the action was controversial among veterans who both distrusted the Harper government and would have preferred to put political pressure on them during the lead up to the election. On the other hand, the veterans legal counsel Donald Sorochan, suggested that the abeyance gave the Harper government and now the Justin Trudeau Liberal government, the opportunity to update Veteran legislation, potentially avoiding drawn out litigation filled with government appeals at every stage. However, Sorochan had also stated that prior amendments to the NVC passed by the Harper government fell short of what is required by the covenant and the risk of renewed legal action following the election remains until the government makes good with veterans.<sup>315</sup>

#### A. ABC Veterans and the 2015 Election

On October 19, 2015, the Federal Liberal Party under the leadership of Justin Trudeau rode a wave of electoral support, defeating the nine-year-old Harper Government and obtaining a majority government. This dramatic change from the Conservative majority in part was attributed to a coordination between left leaning voters, including strategic voting to defeat Conservative candidates. Another campaign

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<sup>313</sup> *Written Argument of the Plaintiffs*, *supra* note 79 at para 1

<sup>314</sup> Bethany Lindsay. "Ottawa calls off legal fight with injured veterans," *Vancouver Sun*, online: <http://www.vancouversun.com/news/Ottawa+calls+legal+fight+with+injured+veterans/11100471/story.html>.

<sup>315</sup> Jon McComb. "A Win For Veterans," online: <https://soundcloud.com/cknw/a-win-for-veterans-the-jon-mccomb-show-june-2?in=cknw%2Fsets%2Fthe-jonmccomb-show-1>.

aimed at blocking the Conservative government's return to power was the "Anyone But Conservatives" or "ABC" veteran movement, which responded to Harper's veteran policies by urging voters to support Canadian veterans by voting for any other party.<sup>316</sup>

While it is difficult to determine the impact of specific groups like the ABC veterans, the fact the Federal Liberals were the only party that promised to bring back the lifetime disability pension under the *Pension Act* would have been a significant promise for supporters of Modern Veterans. For those Veterans who did play a role in Harper's defeat, the victory may have been short lived. The new Liberal Government did not follow through with bringing back the lifetime disability pensions offered under the *Pension Act* and as a result, the *Scott* Veterans were forced to continue their suit at the British Columbia Court of Appeal.

#### B. The Decision of the British Columbia Court of Appeal

When the British Columbia Court of Appeal dismissed the veteran's action in its December 4, 2017 decision it explicitly stated that it was "not in a position to compare the benefits provided under the New Veterans Charter with those previously available under the *Pension Act*" and was not being asked to weigh the evidence.<sup>317</sup> Instead, the Court was forced to weight the discrete legal arguments of the veterans in support of a Social Covenant against long held democratic principles like Parliamentary Sovereignty, as follows,

*57 The Constitution Act, 1867 then, assigns to Parliament all jurisdiction to legislate in respect of the military, including the exclusive ability to make laws dealing with the fixing of allowances. In order for a law to be enacted, it must be passed by both Houses of Parliament and be assented to by the Queen. Where legislation appropriates funds, there are additional requirements that the legislation originate in the House of Commons, and that it be preceded by a "message" from the Governor General (essentially, this amounts to a requirement that the legislation have the approval of Cabinet).*

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<sup>316</sup> Sean Kilpatrick. "Veterans group starts 'Anyone But Conservative' campaign, plans to picket in uniform" *National Post* (August 18, 2015) online: <http://nationalpost.com/news/politics/veterans-group-starts-anyone-but-conservative-campaign-plans-to-picket-pro-harper-events-in-uniform/wcm/550b38dd-eb35-46c3-91e2-43fd301cc3d9>; see also Tom Beaver and Ron Clarke. "If you care about veterans, defeat the Conservatives" *The Star* (August 31, 2015) online: <https://www.thestar.com/opinion/commentary/2015/08/31/if-you-care-about-veterans-defeat-the-conservatives.html>.

<sup>317</sup> *Scott v. Canada BCCA*, *supra* note 16 at para 14.

58 *In the face of these clear constitutional imperatives, it is not open to a court to recognize a power in the prime minister to unilaterally make laws that bind the federal government.*

59 *Even if a prime minister could unilaterally make laws, the plaintiffs' arguments could not succeed. Parliament always has the ability to amend federal laws, unless they have been constitutionally entrenched.*<sup>318</sup>

In the end the Court decided to dismiss the veterans' claim but in doing so it made an extraordinary act of judicial advocacy, by scolding the Federal Government, and stating that it had found to be acting within its powers,

16 *Second, this decision is not directed to the wisdom of legislation. I have considerable sympathy for the plaintiffs, who have served our nation and suffered serious injuries in doing so. We have tremendous respect and admiration for the plaintiffs. All right-thinking Canadians would agree that they should be provided with adequate disability benefits. If that is not occurring, it is a national embarrassment. Again, however, that is not the issue the Court is deciding. Rather, the question before the Court is whether an arguable case can be advanced that the Canadian Parliament lacks authority to enact legislation fixing and limiting compensation.*<sup>319</sup>

With respect to the Veterans, the Court also appeared to leave the door open for subsequent veteran cases, based on different facts, a differently drafted civil claim, and relying on section 7 of the Charter as follows,

91 *Before leaving the issue of s. 7 of the Charter, I should mention one additional matter that the Court raised in argument. While the benefits conferred under the New Veterans Charter cannot be characterized as deprivations of life, liberty, or security of the person, we wondered whether the plaintiffs might wish to argue that their injuries, which were caused in their service to Canada, should be so characterized. Such a proposition, in order to found an argument under s. 7 of the Charter, would have to be paired with a plausible assertion that the existence of an adequate compensation plan for service-related injuries is required by a principle of fundamental justice. While no such plausible assertion is made in the notice of civil claim, we wished to give the plaintiffs the opportunity to amend their pleadings if necessary. The plaintiffs indicated, unequivocally, that the deprivation of life, liberty, or security of the person that they are asserting is one that derives from the New Veterans Charter itself.*<sup>320</sup>

So while the remedy sought by the Scott veterans could not be achieved by way of the Courts in this instance, it appears that other veterans may not necessarily be precluded from doing so in the future.

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<sup>318</sup> *Ibid* at paras 57-59.

<sup>319</sup> *Ibid* at para 16.

<sup>320</sup> *Ibid* at para 91.

## Conclusion

On December 20, 2017, only weeks after they stood by idly as the British Columbia Court of Appeal dismissed the Scott suit, the Federal Liberal Government unveiled a new Pension for Life that is expected to cost \$3.6 billion over six years, and to take effect in April 2019. This new disability pension comes nearly four years after the Liberal's campaign promise and is still predicted to be inferior to the lifelong disability pension under the *Pension Act*, which the Liberals had specifically promised to reinstate during the 2015 election.<sup>321</sup> The Liberals' failure to honour their election promise may not have been politically prudent in light of the anti-Conservative sentiments advanced by veterans during the 2015 election and may affect the support from veterans in the upcoming federal election in October 2019. While the Liberals' decision was likely tied to the cost implications associated with providing the same standard of lifetime pension under the *Pension Act*, the fact that both the Conservatives and Liberals were unwilling to take this step, despite clear political repercussions, is further evidence of significant institutional resistance to providing Modern Veterans with the same standard of benefits. It is also telling that these governments clearly had other political priorities that mattered more.

The new Pension for Life proposed for April 2019 may yet be improved to provide Modern Veterans with the support they need and deserve. If legislators, however, are consciously choosing other political priorities and failing to provide veterans with sufficient disability benefits, despite the clear indications that our veterans are suffering and are not being adequately served by the current legislation, then as the British Columbia Court of Appeal noted, 'it is a national embarrassment.' It would be an injustice to those who risk their lives for this country and could result in a decline in Canadians enlisting in the Canadian Forces. The changes brought forward by the NVC and substandard form of lifetime

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<sup>321</sup> Lee Berthiaume. "Liberals' pension plan for disabled veterans won't take effect until 2019" *CTV News* (December 20, 2017) online: <https://www.ctvnews.ca/politics/liberals-pension-plan-for-disabled-veterans-won-t-take-effect-until-2019-1.3729370>; see also Gloria Galloway. "Veterans association calls Pension for Life program a 'betrayal' of community" *The Globe and Mail* (September 30, 2018) online: <https://www.theglobeandmail.com/politics/article-veterans-association-calls-pension-for-life-program-a-betrayal-of/>.

pension are not justified. Service in the Canadian military has not become any easier or less dangerous and cutting benefits for injured veterans should be the last place the federal government looks to save taxpayer's money.

As this paper comes to an end, I find myself reflecting on the experience of working with these documents and these texts over the past seven years. It is always a challenge to walk the line between providing an objective and historical account and working through one's personal feeling about a topic. In my opinion, our nation, its people and its government are all indebted to the men and women who serve in the Canadian Forces – past, present and future. I find myself wondering what it would mean if Canadians were to have a fuller understanding of the sacrifice that is made by these men and women, and of how our culture, our decisions and our legislative processes impact them. If legislators were to better understand the unique context in which military personnel operate, and consider how military culture and institutions impact their daily lives, would this impact Government efforts to care for veterans? Do we, as Canadians understand exactly what those serving in the Canadian Forces have given up in order to protect the rights of their fellow countrymen? If we understood the context in which veterans operate, would we be more willing to help them? It is my opinion that we can learn from past veteran programs, and determine in what ways these have either served to improve care for veterans or hindered care for veterans. While no program may be perfect, we need to continue to strive for further improvements, which is always possible where there is a will to do so. Will Canadians rise to the occasion as they have done in the past, or instead ignore the issues facing veterans and risk mistreating those who have sacrificed so much for them? It seems wrong to put a group as vulnerable and critical as veterans at risk of being ignored or mistreated.

The 1994 Report of Senate Subcommittee on Veterans Affairs, entitled *Keeping Faith: into the Future*, concludes with the following words,

*...Veterans need help to assess the merits of their case, help in determining the benefits to which they are or may be entitled, but most of all, they need help from someone they can trust to be operating in their best interests.*

We trust our veterans to protect our national safety and security, one of the things we hold most dear, it is only fair that we strive to earn their trust by looking out for their best interests and protecting them as well as they protect us. Canadians must ensure our treatment of veterans remains a matter of national pride and not one of national embarrassment.

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