

## Select Comments Regarding the RMCC SSAV Report

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On March 29, 2017, the Chief of the Defence Staff (CDS) visited Royal Military College of Canada (RMCC) to release the “Special Staff Assistance Visit - Report on the Climate, Training Environment, Culture and ROTP Programme at the Royal Military College of Canada – Kingston”<sup>1</sup>. This Report stretches to 227 pages and covers a broad scope of subjects. What follows is not intended as a comprehensive review of the entire report. That would take much more than a few pages. However, following in the theme of ‘Organization and Establishment of the Canadian Forces’ described in a companion article, and the effect that such organization has on command and control within the Canadian Forces (CF), I do wish to address two discrete issues:

- The misuse of organizational nomenclature in the Report – specifically the oddly worded ‘formation’ – “Military Personnel Generation”; and
- The problematic distinctions drawn between administration and governance of select CF personnel at RMCC (specifically, officer cadets (OCdt) under the Regular Officer Training Plan (ROTP)) and other CF personnel, whether at RMCC or otherwise.

While the first issue represents a specific, and problematic, derogation from the legislative parameters for the organization of elements of the Canadian Forces, it also represents a broader laissez-faire approach that denotes a tendency to pay lip service to aspects of the rule of law in military society.

A thorough examination of the second issue would require broad and extensive analysis and discussion. Much of the RMCC SSAV report addressed a variety of concerns arising from the governance of ROTP students at RMCC. It would not be possible to address all relevant issues within a brief Blog article. Therefore, I have chosen to raise two specific examples briefly: (i) the sustainability of a seemingly distinct disciplinary code, (i.e. not the Code of Service Discipline), applied to the ‘Gentleman Cadets’ of RMCC; and (ii) the enforcement of the ‘Four Pillars’ for select OCdts and students at RMCC.

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<sup>1</sup> <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/special-staff-assistance-visit.html> [RMCC SSAV Report].

Even a summary discussion of these two issues could entail significant analysis. Consequently, what is offered below is a brief exposition that hopefully demonstrates the failure of the RMCC SSAV Report to at least identify, if not fully address, some of the potential shortcomings of the existing regime. The RMCC SSAV Report did not purport to offer a comprehensive analysis or definitive conclusion concerning these issues. However, the commentary below suggests that the Report did not even acknowledge the possibility that the existing regimes may merit significant revision or even elimination.

A third issue of importance – namely, the selection of a Staff Assistance Visit (SAV) over the legislatively based Board of Inquiry (BoI) – is addressed, albeit briefly, in a separate Blog entry.

### **The misuse of organizational nomenclature in the Report**

The term MILPERSGEN, a purported abbreviation of Military Personnel Generation, is used throughout the report. The RMCC SSAV observed, under the sub-heading ‘Command and Control of RMC’:

... The Commandant of RMC is directly responsible to the Commander Canadian Defence Academy (CDA). CDA is a formation allocated by the Minister to Military Personnel Command (MILPERSCOM). SSAV Team noted that Military Personnel Generation (MILPERSGEN) is apparently a grouping of CDA and the Canadian Forces Recruiting Group (another formation allocated by the MND to MILPERSCOM), but **has not yet been organized in accordance with the National Defence Act, and therefore has no formal existence within the Canadian Armed Forces.**<sup>2</sup> [footnotes omitted, emphasis added]

This passage cites, in footnotes, the relevant Ministerial Organization Orders (MOO) and Canadian Forces Organization Orders (CFOO) pertaining to the organization and establishment of RMCC and CDA. MOO are the instruments used to signal ministerial decisions pursuant to section 17 of the *National Defence Act (NDA)*<sup>3</sup>, and CFOO represent the instructions issued by the CDS, or those acting under his authority, to further refine the organizational relationships for the elements of the Canadian Forces organized by the Minister. The Report does not make direct reference to s. 17 of the *NDA*, so perhaps it would be useful to cite it here:

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<sup>2</sup> *Ibid*, para 63.

<sup>3</sup> *National Defence Act*, RSC 1985, c N-5 [NDA].

## Organization

17 (1) The Canadian Forces shall consist of those of the following elements that are from time to time organized by or under the authority of the Minister:

- (a) commands, including the Royal Canadian Navy, the Canadian Army and the Royal Canadian Air Force;
- (b) formations;
- (c) units; and
- (d) other elements.

## Components

(2) A unit or other element organized under subsection (1), other than a command or a formation, shall from time to time be embodied in a component of the Canadian Forces as directed by or under the authority of the Minister.

This statutory basis for the establishment of the constituent elements of the Canadian Forces has further been amplified at article 2.08 of the Queen's Regulations and Orders for the Canadian Forces (QR&O) (entitled 'Organization and Composition of Commands and Formations):

(1) The Minister may authorize:

- a. the establishment of commands and formations; and
- b. the allocation to commands and formations of such bases, units and elements that the Minister considers expedient.

(2) Except that he shall not authorize the permanent re-allocation of any base, unit or element, the Chief of the Defence Staff may, when he considers it necessary to do so by reason of training requirements or operational necessity, exercise the powers conferred upon the Minister under subparagraph (1)(b).<sup>4</sup>

The minister has not authorized any other person to organize these elements and has traditionally exercised these powers personally. There is a compelling argument that, absent the Minister's authorization, the constitutional convention of devolution of ministerial power would not apply to this statutory power<sup>5</sup>.

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<sup>4</sup> QR&O 2.08.

<sup>5</sup> *Carltona Ltd v. Commissioners of Works*, [1943] 2 All ER 560 (CA). Incorporated into Canadian jurisprudence: *The Queen v. Harrison*, [1977] 1 SCR 238 and *Ramawad v. Minister of Manpower and Immigration*, [1978] 2 SCR 375; amplified at *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 and *R. v. NDT Ventures Ltd.*, 2001 NLCA 16 (CanLII). Arguably, under paragraph 24(2)(c) of the *Interpretation*

The Report acknowledges that the Minister of National Defence has not organized any formation (or any element) of the CF called Military Personnel Generation or MILPERSGEN<sup>6</sup>. The truly remarkable aspect of the Report is that, having clearly noted and understood that there was an utter absence of any Ministerial approval of such a name or re-organization, the authors continued to use the term MILPERSGEN throughout the Report.

One of the principal stated purposes of the SSAV was to make inquiry into the command, control and organization of RMCC and its controlling formation and make recommendations on that subject<sup>7</sup>. Surely, one of the recommendations could (or even should) have been: “Don’t use organizational terminology that has not been authorized by the appropriate statutory authority or purport to administer a unit or formation in an organizational manner that has not been approved by the appropriate statutory authority.”

In an organization that prides itself on the maintenance of the ‘habit of obedience’ and the importance of respecting and following superior officers and authority, surely there should have been a comment along the lines of: “A formation commander does not have the authority to unilaterally and permanently re-organize and re-name the elements under his or her command.” The fact that a formation commander causes signs to be erected around his headquarters, appearing to re-name and re-organize the formation, does not override Parliament’s clear intent or the Minister’s exercise of statutory powers.

While QR&O 2.08 does permit the CDS to temporarily reassign units for operational or training purposes, that is manifestly not what appears to be behind the ‘creation’ of MILPERSGEN. Neither can the CDS unilaterally reallocate RMCC or even CDA, where a unit or formation has been allocated by the Minister, such that they will report directly to him. While the CDS can temporarily exercise the Minister’s powers in this regard, there are two important legislative caveats.

First, it must be temporary. This exception cannot be relied upon to effect a permanent reallocation (which, presumably, would include a ‘temporary’ reallocation that is intended to endure for an extended period of time). Second, even the temporary re-allocation must be limited to those justified by “...training requirements or operational necessity...”. While RMCC can be described as a training establishment, the manner in which QR&O 2.08 is constructed is clearly intended to apply to specific training and operations: e.g. pre-deployment exercised, deployed operations. Neither is the operational doctrine relating to command and control (e.g. ‘Operational Command’, ‘Operational Control’, ‘Tactical Command’, etc.) the appropriate solution. Those are tools relating to command and control

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*Act*, RSC 1985, c I-21, the Deputy Minister could act in this capacity. In light of the nature of this power, and how it has been exercised, it is unclear if paragraph 24(2)(d) of the *Interpretation Act* would likely enable any departmental official to exercise this power, since it would be difficult to conclude that any more junior departmental official would be serving “...in a capacity appropriate to the doing of the act or thing...”.

<sup>6</sup> RMCC SSAV Report, n 1, para 63.

<sup>7</sup> *Ibid*, paras 3 and 4.

under operational doctrine; they cannot be used to alter the legislatively authorized powers for the organization of the CF.

The sole comment that the Report offers concerning the use of the term MILPERSGEN – before proceeding to continue to use that term to describe what is essentially CDA – is a footnote expressing: “Commander MILPERSGEN likewise does not benefit from the authority provided by QR&O to the commander of a command or formation.”<sup>8</sup> This is a singularly odd statement, considering that there is no ‘Commander MILPERSGEN’ because there is no MILPERSGEN for anyone to command. It’s not a question of whether MILPERSGEN has ‘formal’ existence within the CF; it plainly does not exist. Yet the SSAV appears to validate the use of this illusory term by consistently referring to MILPERSGEN as if MILPERSGEN actually exists and is some form of alter ego to CDA.

Clearly, the rationale behind the repeated use of the term MILPERSGEN is tantamount to ‘branding’ – various stakeholders wish to promote the perception of the amalgamation of CDA and Canadian Forces Recruiting Group into a larger formation styled as MILPERSGEN. Perhaps MILPERSGEN, despite the absence of a commonly accepted noun of aggregation such as ‘Group’ or ‘System’, is preferred over a name such as, say, Canadian Forces Recruiting, Education, and Training System. Perhaps this proposed change has already been staffed for eventual authorization by the Minister. Perhaps the Minister doesn’t mind that senior officers of the Canadian Forces, seemingly validated by other retired senior officers, have undertaken to re-organize and re-name formations of the Canadian Forces. Perhaps I am ‘making a mountain out of a molehill’.

However, in a constitutional democracy, governed not only by free and fair elections, but also by the rule of law in which statutory actors comply with the legislation that empowers them, perhaps we should be concerned when those same statutory actors choose to ignore the legislative basis for the exercise of powers simply because they consider it to be ‘the right thing to do’ or because they perceive the value in promoting a ‘brand’ or an ‘initiative’.

## **The Governance of ROTP OCdt at RMCC**

The SSAV Report briefly describes the history of RMCC. It began as a ‘Military College’ styled after its American ‘cousin’ at West Point. It was not, strictly speaking, a university. It did not initially grant degrees. Presently, an Act of the Ontario legislature<sup>9</sup> permits the Senate of RMCC, under provincial law, to grant degrees in arts, sciences and engineering. This power includes two implicit, though relevant powers: (i) RMCC can establish a Senate (specifically, an Academic Senate); and (ii) the Senate can establish or approve the curriculum requirements for the degrees it confers. Under this provincial Act, RMCC certainly ‘looks’ like a university. The RMCC SSAV Report identifies what distinguishes

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<sup>8</sup> *Ibid*, para 63.

<sup>9</sup> *Royal Military College of Canada Degrees Act, 1959*, SO 1959, c 131; specifically, s 2.

RMCC from a university: it is established, under an Act of Parliament, as a unit of the Canadian Forces, governed under the *NDA*.

RMCC can best be described as a national defence educational institution, established under section 47 of the *NDA*, and authorized by the Ontario legislature, to issue degrees. Admittedly, this is a mouthful; it's much easier linguistically to style RMCC as a military university. Presumably, it's also a more attractive proposition. However, with ease of language comes ambiguity.

Moreover, while RMCC may have been conceived as an educational institution similar to that of West Point, this is no longer the case. To be truly analogous to West Point, only ROTP OCdt would attend RMCC. As the SSAV Report acknowledges, while RMCC is "...known for the Regular Officer Training Plan (ROTP) programme..." that is not the sole basis for a person to attend RMCC<sup>10</sup>. Students at RMCC include: Reserve Entry Training Plan (RETP) OCdt; University Training Plan Non-Commissioned Member (UTPNCM) OCdts; and commissioned officers who are completing their initial baccalaureate degree or who are pursuing graduate studies, either full time or part-time. There are even civilians and Reserve Force non-commissioned members (who are not attending under the UTPNCM) attending RMCC.

The Report quotes the RMCC Mission from the RMCC website:

The mission of the Royal Military College of Canada (RMC) is to produce officers with the mental, physical and linguistic capabilities and the ethical foundation required to lead with distinction in the Canadian Armed Forces (CAF). To accomplish this mission, RMC delivers undergraduate academic programmes, together with a range of complementary programmes. These programmes are offered in both official languages. As Canada's military university, RMC also provides undergraduate and post-graduate programmes, and professional development education, both on campus and at a distance, to meet the needs of other members of the CAF and the Department of National Defence (DND). As a national institution, RMC endeavours to share its knowledge with civilians with interest in defence issues. RMC encourages research appropriate to a modern university and seeks out research opportunities that support the profession of arms.<sup>11</sup>

Thus, while acknowledging its purpose of 'producing officers', it also rationalizes why it also accepts as students non-commissioned members who are not pursuing a commission and even civilian students<sup>12</sup>. The main conclusion derived from the forgoing is that RMCC's

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<sup>10</sup> RMCC SSAV Report, n 1, para 20.

<sup>11</sup> *Ibid*, para 21, citing: National Defence and the Canadian Armed Forces, "Commandant-Office-RMCC-Mission," RMC Website, <https://www.rmcc-cmrc.ca/en/college-commandants-office/rmcc-mission>.

<sup>12</sup> There is merit in examining whether it is consistent with the division of powers under the *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK) for the federal government to permit any civilian students "...with an interest

operations are not limited solely to producing junior officers – or even officers – for the Canadian Forces. More particularly, not all the OCdt at RMCC fall within the ROTP or RETP regimes. ROTP OCdt – or the ‘Gentleman (and, presumably, Gentlewoman) Cadets’ – are not the sole students falling under the command of the Commandant of RMCC. Finally, the term ‘cadet’ is defined at article 1.02 of Volume IV - Appendix 6.1, The Queen's Regulations and Orders for the Canadian Military Colleges (QR Canmilcols) as: “an officer cadet who has been admitted to a college for a period of education and training”. Presumably this would apply to all OCdt admitted to RMCC for that purpose.

The SSAV Report also acknowledges that RMCC is a unit of the CF, established and organized by the Minister. It is embodied in the Regular Force, and allocated to Canadian Defence Academy. The CO of the unit – the Commandant – reports to, and is a subordinate of, Commander CDA (not Commander MILPERSGEN or Commander CDA/MILPERSGEN)<sup>13</sup>.

All CF personnel attending RMCC are subject to the same Code of Service Discipline. They are all subject to the same orders and instructions that apply universally to members of the CF. Yet, the ‘cadets’ (officer cadets who have been admitted to the college for a period of education and training) attending RMCC appear to be subject to a different standard than similar OCdt who attend civilian universities or other defence training establishments. Moreover, the ROTP (and RETP) OCdt who attend RMCC appear to be subject to different standards than other OCdt attending RMCC.

## **ROTP-RMC Program**

Much of the SSAV Report is dedicated to rationalizing and justifying the so-called ROTP-RMC program. I use the term ‘so-called’ as the ROTP is a single, specific plan of entry for officers into the CF.<sup>14</sup> The conditions for commissioning under the ROTP – regardless of where the OCdt obtains his or her education – is successful completion of a baccalaureate degree at an accredited university or educational institution, and confirmation of meeting the medical and fitness standards for the CF.

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in defence issues...” to attend a federally governed, and subsidized, defence educational institution in competition with civilian universities. However, such an analysis is beyond the scope of this article.

<sup>13</sup> The use of a back-slash “/” appears to be in vogue as a means to avoid precision in nomenclature.

<sup>14</sup> In the interests of ‘full disclosure’, the author of this article joined the CF as an ROTP OCdt. Unlike many of the members of the SSAV team, the author did not attend a military college under that plan. I attended Queen’s University. Upon graduation from Queen’s I was granted the same commission as the graduates of RMCC (and the sister colleges that were operating at that time), and conducted the same Military Occupation training for infantry officers as the graduates of those colleges. In fact, all of the commissioned officers with whom I served were granted the same commission that I received. And, all of the infantry officers with whom I served completed the same ‘Phase Training’ at the Infantry School. Acknowledging that not all Reserve Force infantry officers conduct the same Phase Training, the point is that Reserve Entry Scheme Officers (RESO), ROTP, and RETP infantry officers conduct the same training, typically side-by-side.

## The Governance of the 'Cadet Wing'

The SSAV Report provides a general description concerning the leadership and command of the 'Cadet Wing', which is distinguishable from the "Academic Wing". Not all students at RMCC are part of the 'Cadet Wing'. All military personnel, including the 'Cadet Wing', fall under the 'Military Wing'.

The SSAV Report acknowledges that much of the governance of RMCC is provided in the 'QR Canmilcols'<sup>15</sup>. These are predominantly Ministerial regulations<sup>16</sup>, many of which were last enacted or amended before the OCdt, to whom they presently apply, were born. The dated nature of the QR Canmilcols is exemplified in the fact that article 2.01 – which is a CDS order and not a regulation, and could thus be changed relatively easily – still lists Royal Roads Military College as a Canadian Military College, notwithstanding that it became a civilian university over 20 years ago.

The Code of College Conduct is predicated upon Article 3.10 of the QR Canmilcols. Many of these provisions are over 35 years old. They certainly pre-date the amendment of the *NDA* in 1998, which introduced significant amendment of the CF's Code of Service Discipline. This Code of Conduct is not unlike standing orders that might be issued to any unit. However, in other units, breach of standing orders carries the possibility (assuming that all elements of the offence are proven) of prosecution as a Code of Service Discipline offence under section 129 of the *NDA*.

Article 3.10 of the QR Canmilcols is distinct because it carries specific sanctions, outside of the Code of Service Discipline, for breach of the Code of College Conduct. While many of the sanctions are distinguishable from the punishments imposed under the Code of Service Discipline, and can be viewed as administrative limitations that are directly particular to governance at RMCC, some of the sanctions do appear to encroach upon liberties enshrined in the *Canadian Charter of Rights and Freedoms*<sup>17</sup>. Notwithstanding the principle of statutory interpretation that presumes the constitutionality of statutory or regulatory provisions, the presumption carries with it caveats, including that it is not necessarily automatic and, particularly where the *Charter* is concerned, it endures only until a court of competent jurisdiction holds that a provision is unconstitutional<sup>18</sup>.

Noting that much of Article 3.10 of the QR Canmilcols dates from 1980 (before the enactment of the *Charter*) and the fact that they are Ministerial regulations that are not Gazetted, confidence in that presumption should not be over-stated. In particular, the final sanction that is listed under Article 3.10 is: "11. Other privileges as may be promulgated in

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<sup>15</sup> Volume IV - Appendix 6.1, The Queen's Regulations and Orders for the Canadian Military Colleges.

<sup>16</sup> Enacted under subs 12(2) of the *NDA*.

<sup>17</sup> Being Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.).

<sup>18</sup> *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, 1987 CanLII 79 (SCC).

orders issued from time to time by the Commandant.” This is alarmingly broad and potentially open to abuse.

Here’s what the RMCC SSAV Team had to say about the Code of College Conduct:

The QR(Canmilcols) require the Commandant to make rules (known as the Code of College Conduct) to govern the N/OCdts. The Code of College Conduct complements the CCoA<sup>19</sup>, and is unique in that while sanctions may be imposed by the Commandant or a member of the Training Wing, they may also be imposed by senior N/OCdts. [footnotes excluded]<sup>20</sup>

The footnote to this passage cites QR Canmilcols article 3.10 as the authority for the statement, and observes: “However, according to CADWINS, Chapter 6, while the CCoA may issue corrective training, the Squadron Commander must approve any sanctions.” CADWINS are the Cadet Wing Instructions issued by the Commandant, purportedly under the authority of QR Canmilcols 3.04 and 3.05<sup>21</sup>. They serve a similar function to the standing orders of any CF unit.

The biggest challenge to improving or updating the governance of RMCC is the inertia that arises from adherence to tradition for tradition’s sake. Calls for modernization or acceptance that the paradigm has shifted are met with cries of ‘But we have always done it that way’. It is note-worthy that most of the SSAV Team members are graduates of a Canadian Military College. Presumably, the belief was that only a graduate of a Canadian Military College could truly understand what is necessary. Conversely, such pre-conceived notions can lead to confirmation bias.

RMCC is a national defence education institution established under s. 47 of the *NDA*. It serves a significant, and relatively unique, role in the training of future leaders of the CF (and evidently some civilians). Presumably, then, it would be an ideal environment to instill in those future leaders the disciplinary and administrative processes that are applied, universally, across the CF. Every other training establishment in the CF – including many that train future officers and leaders – must rely upon these universal disciplinary and administrative processes to maintain discipline, encourage exceptional performance, and develop leadership.

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<sup>19</sup> Cadet Chain of Authority – evidently similar to a ‘chain of command’, save that, in prescribing this chain in CADWINS, the Commandant appears to expressly avoid using the term ‘chain of comamnd’.

<sup>20</sup> RMCC SSAV Report, n 1, para 78.

<sup>21</sup> These provisions, respectively, empower the Commandant to organize the cadets at RMCC and establish seniority and appointment of the cadets. Whether these are truly the legislative sources of authority to issue standing orders for RMCC – as distinct from the Commandant’s authority as a CO – is beyond the scope of this article.

It is therefore remarkable that the SSAV appears to adhere doggedly to antiquated and constitutionally-vulnerable practices without even recognizing the merit of possible alternatives such as eliminating or amending regulatory provisions that, compared to those in Volumes I through III, often appear to be an after-thought, if they are ever the object of critical thought. More than likely, significant change to these out-dated and poorly defined practices will only arise in the face of legal challenge before courts of competent jurisdiction.

Such an eventuality faces several challenges. First, anyone with standing would have to be prepared to risk, at an early stage in his or her career, attracting unwanted attention from a chain of command that seems committed to maintaining the poorly-defined status quo. Second, that same brave soul would have to first exhaust internal 'adequate' alternative remedies. Since application of article 3.10 of the QR Canmilcols does not technically constitute decision-making under the Code of Service Discipline, anyone challenging the basis of these sanctions would first have to bring a grievance under s. 29 of the *NDA*, which would eventually have to be determined by the final authority.

Assuming that this grievance is adjudicated before the grievor graduates from RMCC (and assuming that the submission of the grievance does not adversely affect the grievor, notwithstanding the prohibition against penalizing grievors<sup>22</sup>), the person challenging these processes could then potentially challenge the exercise of these powers through an application for judicial review. Much would turn on how the powers were exercised, how the exercise of these powers is re-rationalized by the initial authority (if there is an initial authority determination), and subsequent rationalization by the final authority. It would also turn on the level of deference given to the final authority by the Federal Court.

Needless to say, this represents a daunting challenge. Perhaps that is why the SSAV was not particularly concerned about the vulnerability of this entire system. Indeed, the sole recommendation from the SSAV concerning these aspects of governance was:

**Comprehensive review of CADWINS [Cadet Wing Instructions].** It is recommended that a review of CADWINS be initiated, involving participation by representatives of the Cadet Wing as well as the Training Wing, to identify any rules which could be replaced by desired outcomes, and that a similar outcome-based approach be adopted by the Training Wing in giving direction to the Cadet Wing.

This appears to presume that CADWINS and the Code of College Conduct will continue and that any possibility of change relates to replacement of rules, rather than a significant amendment of the entire structure of rule-making for RMCC. The SSAV Team seemed to either ignore, or be blind to, the possibility that the QR Canmilcols require comprehensive review. The team seems to have either ignored or discarded the possibility that one viable

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<sup>22</sup> *NDA*, n 3, subs 29(4).

option to improve morale, efficiency, and leadership development at RMCC is the elimination of the sanction protocols of the Code of College Conduct.

### **'Four Pillars'**

The so-called 'Four Pillars' are not standards of selection or completion of the ROTP. They can best be characterized as a 'standard' for select students (ROTP and RETP) at RMCC. These four pillars – Academic, Military, Fitness, and Bilingualism – represent standards that are generally distinct from any standard applied universally to the CF, or to any specific Military Occupation Specification (MOS), or to any level of advancement (e.g. promotion to a certain rank). They are unique to RMCC. Many of the standards are grounded in 'tradition' – e.g. "we have always done it this way". These standards are manifestly not standards for commissioning in the CF. They do not apply to ROTP OCdt attending civilian universities (although the numbers of such students is markedly lower than when the author joined the CF). They do not apply to UTPNCM OCdt, whether in attendance at RMCC or elsewhere. They do not apply to Direct Entry Officers (DEO) or any other officer entry program that does not include immediate subsidized education.

So the ultimate question is: can such an arbitrary standard be enforced? Clearly, it is being enforced insofar as ROTP and RETP OCdt attending RMCC are subject to remedial action or prohibition for failing to achieve one or more of these standards. The basis of the question is whether the continued application of the 'Four Pillar Standard' at RMCC would withstand judicial scrutiny if, and when, the enforcement of the standard is brought before a court with jurisdiction to review its application.

First, because of the nature of RMCC, the process of bringing this issue before a court will be laborious. However, once that arises, it is likely that the standard, as described in the RMCC SSAV Report, will be vulnerable.

The Report asserts: "The SSAV Team assesses that overall, the RMC Four Pillar programme generally has a basis in law having been prescribed by the MND in regulations."<sup>23</sup> However, the fact that a statutory actor is empowered to issue regulations or directives is not the sole test of whether such regulations or policies are valid exercises of statutory powers. This presumes that the exercise of these powers is reasonable and consistent with the legislative regime in which the statutory actor establishes the rules<sup>24</sup>. Part of that equation is whether the rules are discriminatory<sup>25</sup>.

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<sup>23</sup> RMCC SSAV Report, n 1, Para 111.

<sup>24</sup> *Green v Law Society of Manitoba*, 2017 SCC 20; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654.

<sup>25</sup> *Hutchinson v Canada (Minister of the Environment)*, [2003] 4 FCR 580, 2003 FCA 133.

Although some aspects of the 'Four Pillars' are grounded in universally applied standards, many are not. The 'Pillar' relating to fitness is a useful example. The Report states: "The RMC Physical Performance Test (PPT) and Physical Education syllabus however are specific to RMC and conducted in accordance with RMC standards." Leaving aside the circular rationale that the RMCC PTT [an RMCC 'standard'] is conducted in accordance with RMCC standards, the Report acknowledges that "[t]he RMC PPT is denoted as exceeding the MPFS under the DAOD 5023-1."<sup>26</sup> Or, put more plainly, the RMC PTT exceeds the Military Physical Fitness Standard (MPFS). I note, tangentially, that it is DAOD 5023-2 that elaborates on the MPFS; DAOD 5023-1 concerns Minimum Operational Standards Related to Universality of Service.

DAOD 5023-2 acknowledges that the completion of other, authorized, physical fitness evaluations will exempt a CF member from having to complete the MPFS, which is now the FORCE test (even though DAOD 5023-2 still refers to the EXPRES test). This is because the other enumerated fitness evaluations are considered to be equal to, or more exigent than, the MPFS. This article does not purport to analyse whether this is actually the case.

However, DAOD 5023-2 is not a justification for the higher standards associated with those other fitness tests – it simply acknowledges that completion of a more exigent physical fitness evaluation will exempt a CF member from having to complete the annual (and universal) CF physical fitness evaluation. Moreover, a simple provision in a DAOD does not provide an independent justification for an elevated physical fitness standard, notwithstanding that some DAOD may explain part of the rationale for a particular standard. Ultimately, any fitness standard, in order to not be discriminatory, must be predicated upon a *bona fide* requirement. For example, the basis advanced for the standards established for the FORCE test is that the various physical activities comprising the FORCE test replicate common military tasks (CMTFE) described in DAOD 5023-2 that all CF personnel must perform in order to meet the requirements of universality of service.

Thus, the fact that the standard of the RMCC PPT exceeds the standard established under DAOD 5023-2 does not justify that higher standard.

Note the conclusion drawn by the SSAV team at paragraph 119 of the Report:

The SSAV Team assesses that the authority to set the fitness standards within the Four Pillars was exercised by Commander CDA/MILPERSGEN in issuing the CDA directive. The PPT is part of the published college standards. The CAF policy basis to support the standards requirement of the RMC PPT is unclear. As well, the RMC Athletic programme does not appear to be supported by DFit under the CAF Fitness and Sports Programme. DFit is responsible to fund the centralized staff and RMC does deliver components of the FORCE programme (i.e. conducting FORCE Fitness

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<sup>26</sup> RMCC SSAV Report, n 1, Para 118.

testing). The PPT should ideally be based on essential tasks or occupation/operational requirements and validated. These should be supported by the Commandant of RMC and approved by Commanders CDA/MILPERGEN and Military Personnel Command. [emphasis added]

Presumably, the 'CDA Directive' mentioned in this passage is: "4500-1 (SO OPD DP 1&2) CDA Directive 01/16, Canadian Military College Training Policy for Regular Officer/Reserve Entry Training Plans, 26 July 2016". This directive describes the 'Four Pillars' discussed in the RMCC SSAV Report.

Frankly, it's not a question of an 'unclear' policy basis for the RMC PPT; there is no defensible policy basis for the RMC PPT. The basis for the RMC PPT is that 'it has always been followed'. Indeed, the authors of the Report acknowledge that the PPT has not been scientifically validated<sup>27</sup>. Undoubtedly, one of the principal reasons that the enforcement of the PPT was the focus of inquiry is that it is not grounded in any defensible policy of universal application. It is not a universal standard for members of the CF, or even the officer corps of the CF. Failure of the PPT can result in remedial training and will prohibit what the SSAV Report states is graduation "...from RMC with the ROTP-RMC designation, often colloquially referred to as the 'AFAN qualification' (which is a human resource administration code for the qualification granted to an officer who has successfully completed the ROTP-RMC programme)." What does that even mean?

The Four Pillars 'standard' is not part of the mandated standard for ROTP. It is not part of the basic officer requirements for the CF. It is a source of confusion and frustration for select OCdt at RMCC (because it does not apply to all students, or even all OCdt, at RMCC) because of the ambiguous justification for this so-called standard. A military qualification has been established, presumably based upon a Qualification Standard approved by Commander CDA, which is superimposed on an existing officer entry plan, but which does not apply to all persons who may join under that entry plan.

Even in acknowledging the lack of any justified (or justifiable) basis for the Fitness portion of the 'Four Pillars' the SSAV Team pointedly avoided (or refused) to acknowledge that a purported training standard that is neither properly authorized nor defensible should be abandoned. Instead, the SSAV Team recommended that Commander MILPERSCOM should approve a PPT "... based on essential tasks or occupation/operational requirements and validated." Isn't that the FORCE test? The implication appears to be that RMCC can impose a different, higher standard of fitness on select OCdt provided that it is approved by Commander CDA or Commander MILPERSCOM and somehow validated.

The nature and extent of validation is not described in detail in the report. However, the recommendation seems to presume that it would be a validation separate from that of the

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<sup>27</sup> RMCC SSAV Report, n 1, para 6.e. of Annex I.

FORCE test or any other universally applied test. Recalling the principal mission of RMCC – to produce officers for the Canadian Forces – the logical assumption must be that whatever physical fitness standard is imposed on any OCdt at RMCC must be the physical fitness standard for all officers entering the Canadian Forces.

The retention of an incentive-based fitness test for purposes of awarding insignia of accomplishment or evaluating overall performance for the purposes of ranking is one thing; imposing a separate fitness standard on a select portion of participants in an officer entry scheme is quite another. No amount of ‘scientific validation’ will overcome the inherent flaw of imposing and enforcing a training standard on a discrete segment of a class of persons whose sole distinguishing feature is that the segment subject to enforcement attends RMCC.

The PPT is but one aspect of the ‘Four Pillars’ program. A comprehensive review of all of the problematic aspects of this program is beyond the scope of this article. However, it was central to the RMCC SSAV inquiry. Yet it appears that the RMCC SSAV Team approached this issue with a confirmation bias: the report signals a marked reluctance to accept, or even consider, that there may be merit to abandoning or significantly amending the ‘Four Pillars’ program.

Note the following conclusions by the RMCC SSAV Team concerning the ‘Four Pillars’:

Upon commissioning, some N/OCdts perceive that there is little tangible benefit in having achieved the components of the Four Pillars. The SSAV Team assesses that the CAF needs to identify the reasons why those N/OCdts who are part of the ROTP-RMC (and CMR SJ) programme are subject to additional requirements and what the expectations or benefits to the CAF and those individuals may be. The SSAV Team noted that an analysis on behalf of CMP/Commander MILPERSCOM indicated that although ROTP-RMC graduates typically made up approximately one quarter of commissioned officer intake, they account for approximately half of General and Flag Officers ranks. This indicates a degree of correlation between completion of the ROTP-RMC programme and successful service as a senior leader in the CAF.<sup>28</sup>

The SSAV Team assesses that while the authorities to set the standards for each of the Four Pillars have some basis either in law, policy or approved directives, the nature of the standards setting process is made fairly complex by virtue of the unique combination of academic and military standards for the RMC programme.<sup>29</sup>

The conclusion from the first paragraph – that there is “...a degree of correlation between completion of the ROTP-RMC programme and successful service as a senior leader...” – represents both vague and flawed inductive reasoning. First, there is no quantitative, or even

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<sup>28</sup> Para 112.

<sup>29</sup> Para 115.

qualitative, assessment of the 'degree of correlation'. One degree of correlation is "a degree of correlation". Second, it presumes that the successful service as a senior leader is attributable to the 'Four Pillars' program, and not any other factor (such as the belief of some people that 'ring knockers' receive preferential treatment). The statistical relevance of analysis of a single point of data is limited. What the first paragraph does unquestionably relate is that one quarter of officer intake for the CF is subjected to an arbitrary standard that is not applied to the other three quarters.

The conclusion in the second paragraph is essentially a vague attempt to dismiss criticism of the 'Four Pillars'. While there may be 'some basis' in law to impose this standard, as indicated above, the legal test for the creation of a rule by a statutory rule-maker is whether it is made within the parameters of the rule-maker's legislated authority and, if so, if it is reasonable in light of the statutory regime in which the public rule-maker is acting. The context in which the 'Four Pillars' program is established is complex in large part because the public rule-makers have made it complex. In order to adhere to practices and standards that have been in place for an extended period of time – despite the evolution of both law and practices within the CF – those rule makers have adapted their justification for the rules and practices, rather than adapt the rules and practices to the current circumstances.

## **Conclusion**

The RMCC SSAV represented an opportunity for truly constructive review of a variety of practices and structures at RMCC. Despite its seeming comprehensive approach to the issues, it appears to have constrained itself in examining all potential avenues to improve the conduct of RMCC's mission. In its language, the Report perpetuates a laissez-faire approach regarding respect for the statutory basis for the organization and establishment of elements of the CF. The conclusions drawn by the SSAV, and the manner in which they are drawn, give rise to concerns of confirmation bias. While the foregoing was not a comprehensive examination of the RMCC SAV Report, it did highlight a couple of problematic approaches taken by the SSAV Team. This inquiry was an opportunity to address some of the more problematic shibboleths of RMCC. It failed to do so.