The Potential Pitfalls of Op HONOUR-related Administration

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On 14 August 2015, the Chief of the Defence Staff (CDS), General Jon Vance, launched Operation HONOUR (Op HONOUR). His intent is to "…eliminate harmful and inappropriate sexual behaviour…" within the Canadian Forces (CF)[1]. The targeted[2] misconduct ranges from sexual harassment to sexual offences under criminal law. While this initiative is clearly linked to the *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, completed by Madam Justice Marie Deschamps on 27 March 2015 (the Deschamps Report), it also arises following select high profile complaints and Code of Service Discipline proceedings. In some cases, those Code of Service Discipline proceedings ended in acquittal, precipitating calls for 'something to be done' – presumably based upon the conclusion that such acquittals were 'wrong'.

The central goal of eradicating sexual misconduct in the CF is laudable. Putting aside, for the moment, the feasibility of actually reducing sexual misconduct to 'zero' as well as the appropriateness of labelling the policy initiative as an 'operation' (i.e. at what point will the CDS declare 'mission accomplished'?), the initiative includes educational, support and reporting measures intended to improve the culture of the CF. However, the rhetoric of Op HONOUR raises the concern about whether the CDS believes that, having labelled certain processes with the 'Op HONOUR' badge, his intent is to abandon basic tenets of the rule of law by which a democratic society is governed.

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[1] J Vance, Op HONOUR Op Order, 14 August 2015 [Op HONOUR Op Order].

[2] The term 'targeted' is used here specifically and intentionally. General Vance has expressly and repeatedly used derivatives of this term in the context of policy development concerning sexual misconduct. He has repeatedly used the analogy of 'targeting' drawn from the 'operational' context – i.e. the process of selecting and prioritizing targets relating to military operations and matching the appropriate response (e.g. the use of lethal or non-lethal measures) to them, considering operational requirements and capabilities. Notwithstanding that the context of sexual misconduct does not call for the application of *jus in bello* principles, General Vance has employed this evocative, yet problematic, metaphor to describe his intent regarding Op HONOUR.

Before the merits of this article are drowned out by howls of derision that the author seeks to shield malfeasants and wrong-doers while indulging in 'victim-blaming'[3], and before statutory military decision-makers gird themselves in the armour of 'it's the right thing to do', I hasten to indicate that those who seek to enforce rules and standards of conduct imposed upon subordinates must, themselves, follow the rules and standards of conduct imposed upon them, particularly if they are statutory decision-makers. In some cases, adhering to the rule of law is not always the most expedient option. It does, however, tend to be just.

> By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution.[4]

In particular, this article addresses the erroneous belief that labelling a matter as relating to Op HONOUR somehow alters the legal paradigm affecting the relevant statutory decision-making within the CF. Such flawed decision-making has the potential both to unfairly persecute persons who have not committed an offence or other misconduct (or whose misconduct is not as serious as alleged) as well as to undermine legitimate action taken against, or in relation to, persons who have committed offences or other misconduct.

Although this article does not offer a comprehensive evaluation of the feasibility of Op HONOUR's purported end-state – the elimination of all sexual misconduct in the CF – it will address the indirect effect that such a bold assertion can have on the implementation of the policy. In the lead article of the Summer 2016 edition of the *Canadian Military Journal*, General Vance acknowledged the criticism levelled at an objectively unrealistic goal: "There has been some criticism of the target I established for operation HONOUR – that of *eliminating* harmful and inappropriate sexual behaviour. There are concerns that it is unrealistic…" [emphasis in original][5]. His rebuttal of that criticism was as perfunctory as it was declaratory: "…I cannot and will not accept a different target."[6] Notwithstanding the absence of any explanation about how he expects to achieve the absolute elimination of any sexual misconduct in the CF, my presumption is that this end-state describes an ideal objective: one toward which the CF will continue to strive, even if it is one that, realistically, can never be achieved in any society where people exercise free will. One presumes that there is an element of theatrical hyperbole in the CDS' proclamations. As explained below, that hyperbole can have detrimental impact.

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[3] Informed and productive discussion concerning the challenges of addressing sexual misconduct generally and sexual assault specifically can be undermined by ad hominem attacks and the hyperbole of appeals to emotion. Consider the well-reasoned Blog post by Lorne Sossin, Dean of Law at Osgoode Hall Law School concerning a call to ban Marie Henein from speaking at a law school: L. Sossin, "Marie Henein, Universities and the Sounds of Silence" (4 Dec 2016), (deansblog.osgoode.yorku.ca/2016/12/marie-henein-universities-and-the-sounds-of-silence)

[4] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 [*Dunsmuir*], para 28, per Bastarache and Lebel, JJ writing for the majority.

[5] J Vance, "The Chief of the Defence Staff, General Jonathan Vance, Addresses Sexual Misconduct in the Canadian Armed Forces", *Canadian Military Journal*, Vol 16, No 3, Summer 2016 [J Vance, CMJ 16:3], 14.

[6] *Ibid*.

The Merits of the CF's Approach on Sexual Misconduct

This article is manifestly not an indictment of the broader CF goals of addressing the culture of sexualisation and sexual misconduct that can undermine the operational effectiveness of the CF. While the Deschamps Report does not represent a comprehensive statistical analysis, only the naïve would suggest that an effective, and ongoing, plan to combat sexual misconduct in the CF is not warranted. The periodic news conferences convened by the CDS and other senior leaders in the CF have highlighted the many steps taken by the CF to ensure that persons who have suffered from sexual misconduct are encouraged to report such misconduct, are able to seek appropriate support and counselling, and that the leadership of the CF will take action to effect change.
Among the steps taken are:

- Changes to training and education at all levels of the forces to provide clear definitions of what constitutes misconduct.

- The creation of dedicated teams of sexual offence investigators and the establishment of new investigator positions.

- Policy changes that include a mandatory requirement for military police investigators to consult with prosecutors in all cases where a decision is made not to lay charges, with a written summary provided to victims.

- An effort to ensure the same prosecutor handles a case so a victim doesn't have to repeat their story to different individuals as a case proceeds.

- The allocation of funds to gather and analyze data concerning the prevalence of sexual misconduct.

These are all valuable improvements in the mechanisms by which the CF addresses sexual misconduct (although the pitfalls arising from focus on 'metrics' is discussed below). As an aside, the policy intent described by these goals tends to favour characterization as a policy, rather than a (finite) Operation.

One of the greatest pitfalls, however, arises from the rhetoric of Op HONOUR.

The Dangers of Rhetoric

The CDS' intent can be drawn from: the Op HONOUR Op Order[7]; the aforementioned article from the Canadian Military Journal[8]; the CDS' various messages on Op HONOUR; and from the CDS' press conferences held since his appointment in 2015. Presumably, since the CF endeavours to create an atmosphere that encourages a 'habit of obedience',

[7] *Supra*, n 1.
[8] *Supra*, n 5.

the CDS' intent will subsequently influence statutory decision-makers who are subject to his "…control and administration of the Canadian Forces…"[9]. Therefore, this article will highlight three recurring problematic themes arising from the CDS' Op HONOUR rhetoric:

1. Focus on the victim – in particular the presumption of victimization and the countervailing presumption of guilt;

2. The tension between rapid and decisive action, and the requirement for procedurally and substantively fair decision-making by statutory actors; and

3. The appearance of the sanctioning of 'special' measures for Op HONOUR-related matters, distinct from other legislated processes.

Focus on the Victim

There is an ongoing tension between procedural rights of those who are accused of wrong-doing and the desire to support those who suffer from wrong-doing. Recent high-profile prosecutions – both within and without the Canadian Forces – have brought this tension into sharp contrast. Some comments have been inconsistent with the tenet that our democratic society should be governed by the rule of law. For example, the observation that a person charged with a criminal offence has a right to challenge the veracity of the allegation can and has been met with accusations (from some quarters) that affording an accused such a right leads to re-victimizing the victim or 'victim-blaming'[10]. Anyone suggesting that a person who is subject to administrative action merits a procedurally fair process and sufficiency of reasons is accused of being an obstacle to 'justice'.

In criminal proceedings (and I would include proceedings under the Code of Service Discipline in this description) there is a presumption of innocence. This does not mean that everyone must view the accused as a truly innocent person, untouched by sin; it means that the Crown (or the state, or the prosecutor) must prove the case against the accused. So far so good. However, labels can be problematic.

Complications arise from rhetoric surrounding the status of the victim. As a lawyer – indeed, as a reasonable open-minded person – my first instinct is to write: 'alleged victim'. The reason for this is derived not from doubting the merits of the complaint, but from the aforementioned presumption of innocence: if, prior to any finding of guilt, stakeholders in the criminal justice system (or Code of Service Discipline process) unanimously refer to the victim of an offence – any offence, not just sexual offences – then it erodes the presumption of innocence. Where there is a victim, there must be an offender. Thus, traditionally, a complainant in a criminal prosecution was just that: a complainant. When and if an accused was found guilty of an offence, the complainant is then referred to as a victim and the accused is then viewed as an offender.

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[9] *National Defence Act*, RSC 1985, c. N-5 [*NDA*], s 18.

[10] *Supra*, n 3: The 'outrage' directed at Marie Henein, following the acquittal of Jian Ghomeshi is an object example of emotional reaction trumping rational discourse.

However, this logical approach can understandably be criticised as failing to recognize the trauma experienced by victims of crime. A complainant presumably raises an allegation against an accused based upon a genuine belief that the accused has committed an offence. Why should the victim have to wait for a judicial determination to be recognized as a victim?

The problem arising in the context of Op HONOUR (and not only Op HONOUR or the CF), is that much of the Crown's power, and the statutory decision-making stemming from such circumstances, is focused on the accused (in criminal or Code of Service Discipline proceedings) or the respondent (in administrative matters). The requirement for proof beyond a reasonable doubt (in criminal proceedings) or clear and convincing evidence evaluated on a balance of probabilities (in deontological proceedings) arises from the fact that the accused or respondent is the person facing jeopardy at the hands of the state. Thus, when the CDS states "Victims must come first!"[11] [emphasis in original], he begs the countervailing question: But what of the rule of law in the exercise of statutory powers affecting the rights, interests and privileges of the accused or respondent?

The CDS' article in the Summer 2016 edition of the Canadian Military Journal runs to approximately 5 full pages of text. He used the term 'victim' (or its derivatives) ten times. Nowhere in the article does he refer to the rule of law or procedural fairness[12]. This is not surprising, as the focus of the article is on what the CF will do to stamp out sexual misconduct. What is disconcerting is that it appears that the CF will do so without reliance upon fundamental tenets of democratic society. If this were an op. ed. article by any member of the CF, the absence of reference to the rule of law would not be significant. But this article was, in effect, policy amplification by the CDS. Thus, the statutory decision-makers subordinate to the CDS have been told: support to victims comes first; adherence to procedural fairness in decision-making affecting the (pre-judged) offenders is a secondary concern, if it is a concern at all.

Thus, when the CDS states that "…there must be confidence that the mechanisms in place consistently deliver justice and protection throughout the reporting, investigation, and adjudication processes…"[13] there is no mistaking the focus of that confidence: justice and protection for the victim. There appears to be no similar regard for the confidence that the accused or respondent may have in the process, notwithstanding that the legislative and policy processes applied by the CDS and other CF leaders directly impact the respondents (or accused) of complaints of sexual misconduct.

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[11] J Vance, CMJ 16:3, *supra* n 5, 10.

[12] The CDS does mention 'fairness' in the context of "…national values we hold sacred: *freedom*, *respect*, *dignity*, *fairness* and *opportunity*…". One could, therefore, infer that the CDS is at least marginally aware of the need for procedural fairness. However, that principle certainly does not arise within the context of his rhetoric.

[13] J Vance, CMJ, *supra* n 1, 9.

Something Must Be Done, and Quickly!

Again, throughout his article, the CDS reiterates the need to act rapidly, decisively and permanently. Although the CDS does pause at one point to reflect that "It takes time to generate and inculcate; there are neither magic bullets nor quick fixes"[14], he thereafter resumes the 'rapid and decisive' approach. Such a focus is understandable. In the military community, bold and decisive action is admired. To paraphrase (and re-purpose) the oft-cited aphorism from *R v Sussex Justices, Ex parte McCarthy*,[15] as a 'military decision-making' principle: "Decisive action by a commander must not only be taken, it must also be seen manifestly and undoubtedly to be taken!" However, when a statutory decision-maker affects a person's rights, interests and privileges, 'bold and decisive' must be tempered with reasonable, justified, intelligible and transparent[16] – not to mention lawful. Otherwise, the haste to act decisively will obfuscate the actual lesson from the *Sussex Justices* case that it "…is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

Early in his article, the CDS asserts that "[i]mportant as it is for the CAF to consistently uphold the traditional values it exists to defend…"[17], the need to eliminate victimization within the CF is fundamental to the integrity and effectiveness of the force itself. I echo this sentiment. Indeed, it would be difficult to find any reasonable CF member, past or present, who would not. However, the CDS' rhetoric regarding Op HONOUR appears to marginalize some of those traditional values, particularly the respect for the rule of law. If a goal of Op HONOUR (perhaps a central goal) is to instill in all members of the CF respect for their fellow service members, and to reinvigorate confidence in the processes by which the CF is governed, then the marginalization of the procedural and substantive rights of the accused or the respondents in those processes is inherently counter-intuitive.

Op HONOUR as a Label – and an Excuse

The principal danger of Op HONOUR – or, perhaps more accurately, the rhetoric of Op HONOUR – is that it can, and likely will, be used as some sort of exceptional justification for derogation from norms that apply to statutory decision-making within the CF. Thus, where moderation, deliberation, and procedural fairness would typically be the norm, the fact that a matter is an 'Op HONOUR complaint' will be relied upon to justify over-reaction, expediency (i.e. rush to judgement), and unilateral decision-making (i.e. no opportunity for the subject CF member to be heard). All that would be required is the appropriate label.

The CDS' comments in a press conference announcing the 'second progress report' delivered on the first anniversary of Op HONOUR, and his comments from a press

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[14] *Ibid*, 12.
[15] *R v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256, [1923] All ER Rep 233 [*Sussex Justices*].
[16] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654, 2011 SCC 61 and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 amplifying *Dunsmuir*, *supra* n 4.
[17] J Vance, CMJ 16:3, *supra* n 5, 7.

conference three months later, are illuminating. Following the release of the 'second progress report' on 30 August 2016, media reports attributed to the CDS the comment that "… 30 people had received 'career-impacting' punishments."[18] The difficulty with such assertions is that they blur the line between disciplinary punishment and administrative action. This is a cause for concern.

Disciplinary action under the Code of Service Discipline can be distinguished from administrative action such as remedial measures or other exercises of statutory authority intended to correct deficiencies in conduct or performance. Administrative measures are not intended to be punishments. In training given to statutory decision-makers on the application of military justice at the summary trial level[19], emphasis is placed on this distinction. One of the prevailing reasons for this distinction is that, in the 1990s (when scrutiny of the conduct of CF personnel was not unlike what is currently in vogue) there was a tendency for commanders to have recourse to administrative measures as 'punishment' because they had allegedly lost faith in the Code of Service Discipline and its processes[20]. In 1998, the *National Defence Act* was amended[21] to reinvigorate the Code of Service Discipline, and mandatory training was instituted for officers presiding at summary trial.

It now appears that the CF is again facing a culminating point in matters of disciplinary and administrative law. CF leadership is not limited to the use of disciplinary measures in order to correct behaviour relating to sexual misconduct. Administrative measures, including, but not limited to remedial measures, offer means to address these issues. However, the proper application of these measures, and the distinctions between them, can become blurred by rhetoric. For example, media coverage following a November 2016 press conference stated:

> There have also been courts martial, summary trials and administrative actions that have led to punishment ranging from warnings, fines, counselling or probation to confinement to barracks, imprisonment and dismissal.[22]

While it may be reassuring that the CF is taking action, this comment also indicates a problematic failure to distinguish between disciplinary and administrative mechanisms. It mixes disciplinary punishments (fines, confinement to barracks, imprisonment) with administrative remedial measures (warnings, counselling and probation). These mechanisms have distinct procedures, different burdens of proof, and the rights of the accused and respondent are manifested differently. However, in both the comments from CF leaders,

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[18] T MacCharles, Toronto Starr online, "Canadian Armed Forces punish 30 for sexual misconduct in military ranks", 30 August 2016, https://www.thestar.com/news/canada/2016/08/30/canadian-forces-punish-30-for-sexual-misconduct-in-military-ranks.html

[19] B-GG-005-027/AF-011 Military Justice at the Summary Trial Level 2.2, as at 12 January 2011.

[20] Dickson, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, March 14, 1997.

[21] *Act to amend the National Defence Act and to make consequential amendments to other Acts*, SC 1998, c 35.

[22] K Harris, CBC News, "960 regular force military members reported sexual assault in the past year, StatsCan survey finds", 28 November 2016, http://www.cbc.ca/news/politics/sexual-misconduct-military-survey-1.3868377 While this statement is attributable to the reporting media outlet (CBC), it is consistent with the content of comments by CF leaders.

and the reporting in national media, these distinct mechanisms – which often serve markedly different purposes – are treated indistinguishably. Consequently, it is not surprising when statutory decision-makers err in the application of their statutory duties, functions and powers.

This misperception is compounded by the desire to generate 'metrics' and to subsequently use those metrics to demonstrate that 'something is being done'. Consequently, there is a focus on the iteration of statistics (or perhaps more accurately, data) in press conferences – how many people have been charged, how many people have been convicted, how many people have been removed from command. While measuring performance is a vital facet of ameliorative change, the danger posed by an obsession with 'metrics' is that their tabulation and exposition can become politicized, particularly in the absence of well-defined context.

There is a desire to demonstrate the success of Op HONOUR. If someone is charged with some form of sexual misconduct, and is acquitted, how should that 'metric' be portrayed? Is it an example of the proper application of a military justice process, as it demonstrates the obligation on the Crown to prove its case beyond a reasonable doubt, or is it a failure since the victim did not get justice because the accused was acquitted? Is the metric altered if that same accused is subsequently 'punished' through administrative measures? For example, if a CF member is acquitted at court martial, but is compulsorily released from the CF, because Director Military Career Administration (DMCA) applies a less stringent burden of proof (balance of probabilities – and perhaps without due regard to the need for clear and convincing evidence upon which to base this burden of proof[23]), does that represent a successful outcome for Op HONOUR? Is it 'mission accomplished'? What if DMCA's decision is subsequently grieved by the affected CF member or that grievance determination is subject to judicial review before the Federal Court?

What if there is an increase in administrative measures, relating to sexual misconduct, taken against CF members? What if this increase in administrative measures is not matched by an increase in disciplinary measures? Would that indicate a shift toward 'administrative punishments'? Would that be a positive or deleterious development? Is such a correlation even being tracked?

Practical Effects of Derogation from the Principle of the Rule of Law

As stated at the outset of this article, flawed decision-making driven by problematic rhetoric gives rise to the dual problem of potentially unjust or unreasonable outcomes while also undermining just and reasonable determinations. Not all accused are guilty and not all respondents are culpable. This is not a question of 'victim blaming'. It is the nature of disputes generally. Prior to adjudication, facts are in doubt. Evidence is presented in order to permit the fact-finder to make one or more determinations. Whether a matter is criminal, disciplinary or administrative, the adjudicative regimes that have developed are designed to

[23] Significant administrative proceedings for members of the CF, such as Counselling and Probation and compulsory release are analogous to 'professional disciplinary' process that require proof on a balance of probabilities where the evidence is clear, convincing, and cogent: *F.H. v. McDougall*, [2008] 3 SCR 41.

permit those in jeopardy to test the evidence brought against them, to present their own evidence, and to make representations to the fact-finder or decision-maker. The more assiduously the proper processes are followed, the more reliable the eventual determination.

Where a decision-maker truncates a process, automatically favours one party over another, fetters his or her discretion, or approaches the decision with a closed mind, the potential for error increases. Where a respondent or accused is not culpable, this means that an erroneous determination of culpability may be made. Even where the respondent or accused is culpable, confidence in the eventual determination and in the administration of justice will diminish, and there is an increased risk that a reviewing or appeal court will overturn the determination.

Part of the difficulty with the rhetoric surrounding Op HONOUR is that the tangible effects of the derogation from the rule of law will not culminate during the current CDS' tenure. This is a consistent feature of flawed policy-making in the CF. Rarely do senior leaders (e.g. Commanders of Commands and L1) occupy the same position for more than 3 years[24]. The life-cycle for problematic policy-making generally exceeds this span of time. Consequently, when the 'chickens come home to roost' the officer responsible for the flawed policy will likely have moved on, either to another (perhaps more senior) position, or retirement. This practical effect diminishes personal (though not necessarily institutional) accountability.

Part of the reason for this lengthy life-cycle is the existence of the CF grievance process, and the resulting obligation on CF grievors to exhaust this remedy before seeking judicial review. Received wisdom in some quarters is that the CF grievance process exists because members of the CF are not allowed to form unions (see QR&O 19.10). It would be odd, however, that a prohibition in a Ministerial regulation would give rise to a comprehensive statutory grievance scheme. Parliament does not enact laws because of the content of subordinate regulations. It is much more likely that this comprehensive statutory regime, amplified by extensive regulations and policy, exists for a more fundamental purpose: it represents an alternative remedy that bars, narrows or delays litigation concerning unlawful or unfair decision-making in the administration of the affairs of the CF.

The CF grievance process offers the executive – here represented by the leadership of the CF – a second (and third) opportunity to review flawed statutory decisions. Any errors can (potentially) be remedied with *de novo* determinations prior to the matter being placed before the courts, whose constitutional role is to review such decision-making and ensure that it complies with the rule of law. Such remedies can take several months, if not years, and will likely include the boilerplate language that the grievor "…has been treated fairly and in accordance with the prevailing law and policies…". The passage of time both dilutes the personal accountability of senior decision-makers and dulls the shine of the adequacy of this alternative remedy.

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[24] There are notable exceptions – including two Judge Advocates General who each were appointed for second 4-year terms.

Two examples are presented below to demonstrate the potential ramifications of flawed administrative decisions arising from the misplaced expectations derived from the rhetoric of Op HONOUR. Although fictional, these examples are entirely possible in light of current attitudes viewed through the prism of past experiences. The first example concerns what might happen if a commanding officer is removed from command due to a complaint involving sexual misconduct. The second example contrasts the handling of an harassment complaint (simpliciter) compared to that of a sexual harassment complaint.

Example One – 'Loss of Confidence' in a CO. After being in his position for approximately a year, a commanding officer is removed from command due to 'loss of confidence'[25] by his superiors when accusations of sexual misconduct are made against him and a criminal/disciplinary investigation is commenced. The officer grieves the decision, but is hampered in making meaningful representations in the grievance for fear of jeopardizing his 'right to silence' in the criminal proceeding.[26] Perhaps the officer ordering his removal from command characterizes it as a 'temporary' removal (in the belief that the procedural safeguards for such action are somehow less stringent than a 'permanent' removal). Another officer is appointed to take command of the unit. 18 months later, the provincial Crown Attorney or the Director of Military Prosecutions either withdraws the charges or declines to proceed with the charges. 18 months after that, the final authority in the CF grievance process eventually renders a determination of the grievance relating to the removal from command.

Even where such action is characterized as 'temporary', is that truly an accurate depiction of the nature of the decision? Considering that most 'command tours' for a CO are two years in length, and that 'succession planning' identifying successive COs creates additional obstacles to resumption of command, what is the likelihood that the officer would be returned to command that, or a similar, unit three years after he was removed? He would not be entitled to any pecuniary damages: members of the CF are not in privity of contract with Her Majesty[27]; and, the officer continued to receive the pay associated with his rank. His loss was the loss of a year's command of a unit. While it is not a pecuniary loss, most CF members would likely agree that it was a significant lost opportunity. Even creative revision (re-visiting?) of annual Performance Evaluation Reports cannot fully undo such action. This inadequacy is exacerbated if the nature of the charges that precipitated the administrative

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[25] The oft-cited 'loss of confidence' in a CF member as a justification for administrative measures, such as removal from command, can be seen by some decision-makers as a 'silver bullet' – e.g. 'All I have to say is that I've lost confidence in X, and the decision will be good to go!' In addition to the requirement that such a decision must first be reviewed through the grievance process (see above), the courts will generally defer to a military decision-maker on matters of command and efficiency. It will only generally intervene if the decision-maker acted unreasonably, not simply in a manner different from that of the reviewing judge.

[26] The minefield presented by contemporaneous criminal/disciplinary and administrative proceedings merits its own detailed analysis; however, that is beyond the scope of this article. Steps can be taken to ensure procedural fairness in an administrative proceeding while safeguarding constitutional rights in the disciplinary/criminal proceeding. The author's past experience is that such complexities are beyond the experience and knowledge of most CF decision-makers without detailed advice from their legal advisor.

[27] *Gallant v the Queen* (1978), 1978 CanLII 2084 (FC), 91 DLR (3d) 695 (FC TD); *Cottle v Canada (Minister of Defence)*, 1998 CanLII 7902 (FC).

action had little or nothing to do with the officer's command of the unit. Yet such action is not unheard of.

Example Two – Distinction between harassment and sexual harassment. A sergeant and a corporal work in the same section – e.g. Base Clothing Stores. The sergeant is a member of the Regular Force and the corporal is a Reservist on a Class B period of service. Over time, a personal conflict develops between the two, and the corporal eventually submits a harassment complaint against the sergeant claiming that the sergeant abuses his authority. In essence, the complaint is that the sergeant is a bully. There are no claims of sexual misconduct.

Their chain of command has several duties, functions and powers in such circumstances. First, the responsible officer (RO) in receipt of the harassment complaint must conduct a situational assessment and, if the complaint describes conduct that falls within the definition of harassment, the RO must investigate it[28]. If the allegations are severe enough, appropriate persons in the chain of command may consider beginning a unit disciplinary investigation[29]. That could prove problematic, as the conduct of simultaneous administrative and disciplinary investigations is complex; however, where warranted, a disciplinary investigation is one viable course of action. In the interim, regardless of which investigation(s) is (or are) pursued, it is likely that the CO will separate the complainant and respondent. This is typically a challenging decision for a CO, who would not wish to appear to prejudge a matter by moving the supervisor to another workplace, nor appear to doubt the merit of the complaint by moving the subordinate. The decision can often be subject to other factors not directly related to the complaint, such as where each person's skill sets might be employed to the unit's advantage.

Additionally, here, the corporal has been engaged on a Class B for a particular position. To alter that Class B would either take 30-days' notice to the Reservist or the Reservist's consent (which, may or may not be easy to acquire). Absent compelling evidence supporting or opposing the complaint, a CO would not normally be inclined to favour one of the parties over the other. Relief from performance of military duty would only be pursued by a CO (under QR&O 101.09) or a commander of a command (under QR&O 19.75) as a last resort if the subject of such an order could not be advantageously employed elsewhere in the unit.

Change one variable – now the harassment complaint involves sexual comments made by the sergeant to the corporal (and not necessarily about the corporal) when they encounter each other in a pub 'downtown' – and I suggest that method of handling the complaint would change drastically, in large part due to the rhetoric surrounding Op HONOUR. In these circumstances, and in light of the tenor of comments by the CDS regarding Op HONOUR, I would suggest that the following would arise:

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[28] DAOD 5012-0, Harassment Prevention and Resolution; A-PM-007-000/FP-001, Harassment Prevention and Resolution Guidelines, section X.

[29] QR&O 106.02. Although contravention of DAOD 5012-0 is not a criminal offence, it could constitute an act or conduct to the prejudice of good order and discipline, *NDA*, *supra* n 5, s 129.

- The likelihood of a unit disciplinary investigation would increase significantly, as would the likelihood of a charge being laid, notwithstanding that neither version describes an offence under the *Criminal Code* (as distinct from a Code of Service Discipline offence such as an act to the prejudice of good order and discipline);

- The likelihood that the sergeant would be removed from his or her position will increase significantly;

- The likelihood that the sergeant will be relieved from performance of military duty will increase significantly, even if there is a less intrusive option available to the chain of command;

- There is a far greater likelihood that the sergeant's CO will assert that he or she "… has reasonable grounds to believe that the member has committed an offence under an Act of Parliament or of a provincial legislature…" and the CO will order a unit disciplinary investigation, notwithstanding that the alleged misconduct is not a criminal offence and, objectively, lies at the lower order of the spectrum of sexual misconduct. One motive for a CO to make such a determination is that it would permit the CO to relieve the sergeant from performance of military duty under QR&O 101.09(3)(a), whereas the similar power under QR&O 19.75 – the prevailing regulatory provision in the absence of a disciplinary investigation – would require a decision by a commander of a command (a much higher authority); and

- The likelihood will increase that, when relieved from performance of military duty, the sergeant will initially receive little or no useful disclosure relating to the decision and the safeguards in QR&O 19.75 or 101.09 will be applied in a perfunctory manner.

The justification for the foregoing will be: "But it's Op HONOUR!" Moreover, the chain of command will be confident that they can pursue such 'administrative punishment', to use the CDS' turn of phrase, because they know that the affected CF member's recourse to such perfunctory administrative justice – a grievance – will not be adjudicated as quickly as the administrative punishment is applied.

Quid ergo faciemus – What do we do now?

The simple answer to this question is: CF decision-makers should follow the laws prescribed by Parliament (and the regulations created under Acts of Parliament) and interpreted by the courts. They should also apply the relevant existing policies consistently and fairly. If they follow the established processes, regardless of the label affixed to a particular matter, the resulting decisions should normally be procedurally fair and just. However, if that were the likely course of events, this article would probably have remained unwritten. Those CF members who face criminal and disciplinary prosecution generally have the benefit of being subject to judicially independent decision-makers. If they are charged under the Code of Service Discipline and are tried by court martial, they also receive legal representation from

Defence Counsel Services free of charge. The question posed above is principally for those respondents in administrative processes who are subject to procedurally or substantively flawed decisions.

The obvious, though not entirely satisfactory, answer is: an officer or non-commissioned member (NCM) of the CF has a statutory right to grieve any decision, act or omission in the administration of the affairs of the CF if he or she believes that he or she is aggrieved by the decision, act or omission[30]. In two to three years, the officer or NCM will receive a determination by the final authority, who will either acknowledge the initial error (and offer some form of remedy) or will attempt to rehabilitate the prior flawed decision through *de novo* review. It is likely, however, that the damage will be done and will be irreversible. Note too that the final authority in this process is the CDS, who is unlikely to fault himself for his own proclamations under Op HONOUR.

The alternative would be to seek interlocutory relief from the Federal Court through an application for judicial review.[31] Unless the litigant represents him- or herself, this is likely to be an expensive proposition. Neither is there a certainty of success, even where the impugned decision is procedurally and/or substantively flawed. It is likely that counsel for the Attorney General of Canada (AGC)[32] would bring a motion to strike such an application on the basis that the applicant failed first to exhaust the adequate alternative remedy presented by the CF grievance process.

Such a motion is not guaranteed to succeed. Increasingly the court has demonstrated reluctance to grant such motions unless they meet the high threshold of being 'bereft of any chance of success'[33]. However, even if such a motion by the AGC is unsuccessful, the AGC could still succeed upon the hearing of the application on its merits, asserting that the CF grievance process must first be exhausted.[34]

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[30] *NDA*, *supra* n 5, subs 29(1).

[31] *Federal Courts Act*, RSC 1985, c F-7, s 18.1. This assumes that the applicant would seek relief from legal errors by the executive. If the remedy sought is a declaration that legislation (not policy) is unconstitutional – e.g. inconsistent with the *Canadian Charter of Rights and Freedoms* – then the plaintiff would need to pursue and action.

[32] *Federal Court Rules*, SOR/98-106, Rule 303. The Attorney General of Canada would be the appropriate respondent, whether the application is brought against the final authority in the CF grievance process or any CF decision-maker.

[33] *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 (CanLII), para 16, per Sexton, JA. In the context of complaints by serving or former CF members, see, for example, *Pearson v Canada (Attorney General)*, 2015 FC 1286.

[34] *Vaughn v Canada*, 2005 SCC 11 (CanLII), [2005] 1 SCR 146; *Moodie v Canada (National Defence)*, 2008 FC 1233 offers a convenient summary of CF grievance-related examples at paras 27 to 30. Two dated, and conflicting, judgments on this issue are: *Gayler v Canada (Director Personnel Careers Administration Other Ranks, National Defence Headquarters)*, [1995] 1 FCR 801, 1994 CanLII 3544 (FC) [Gayler] and *Bast v. Canada (Attorney General)*, 1998 CanLII 8386 [*Bast*]. Arguably, the grounds upon which *Bast* is distinguished from *Gayler* are less-than-compelling.

Nevertheless, chinks in the armour of 'adequate alternative remedy' sometimes arise.[35] These exceptions are typically driven by very specific facts and, frankly, are more likely where the facts generate a degree of subjective sympathy for the (often self-represented) litigants. Successful applicants who have not exhausted the grievance process tend to be the rare exception, rather than the rule. Arguably, the chance of success increases if the applicant can demonstrate irreparable harm arising from the impugned decision necessitating a stay of that impugned decision until the grievance process can run its course.[36] Success further improves if the impugned decision is clearly unreasonable, procedurally flawed or unlawful. The minority of applications (or rebuttals of motions to strike) that are successful despite the applicant's failure to exhaust alternative remedies have one characteristic in common: the factual narrative presented by the applicant, even if it is disputed by the AGC, demonstrates unreasonable and heavy-handed decision-making by the CF 'chain of command'.[37] The more egregious the derogation from a procedurally fair and substantively reasonable process, the more likely the court will be inclined to intervene, even if the grievance process has either not been exhausted, or, where it has been exhausted, to permit a litigant to seek a remedy other than judicial review of the determination by the final authority (e.g. an action for damages).

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[35] *Gerard Jones v Canada (Attorney General)*, 2007 FC 386 [*Jones*]; *Bernath v Canada*, 2007 FC 104 (CanLII), 321 FTR 1, per Noel J, [*Bernath*] rev'g *Bernath v Canada*, 2005 FC 1232 (CanLII), 275 FTR 232; *Manuge v Canada*, 2008 FC 624 (CanLII), [2008] FCJ No 787 per Barnes J.

[36] *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311; *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110.

[37] See, for example: *Jones* and *Bernath*, both *supra* n 35; *Loiselle v Canada (Attorney General)*, 1998 CanLII 8810 (FC) [*Loiselle*]; *McLennan v Canada (Minister of National Defence)*, 1998 CanLII 8010 (FC); *Gayler*, *supra* n 34. The justification for the exceptions to the generally accepted view that the grievance process is an adequate alternative remedy can sometime appear tenuous. In *Gayler* and *Loiselle*, the court's intervention notwithstanding the applicant's failure to exhaust the grievance process turned on the conclusions that potential intermediate adjudicative authorities did not have the jurisdiction to overturn the impugned decision. However, the court in those cases appears to have ignored the fact that the final authority (prior to the 1998 statutory amendment, this would have been the Minister of National Defence) could have done so. Perhaps that argument was never raised or substantiated before the court; however, it would not be a conceptual stretch to conclude that the court chose not to focus on the powers of the final authority in order either to intervene in the process (*Gayler*) or to reject the AGC's motion to strike (*Loiselle*).