

**CHANGING TACTICS: REHABILITATING CANADIAN JUSTICE
FOR TRAUMATIZED VETERANS**

by

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Submitted in partial fulfilment of the requirements
for the degree of Master of Laws

at

Dalhousie University
Halifax, Nova Scotia
July 2012

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DALHOUSIE UNIVERSITY

FACULTY OF LAW

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Dated: 22 July 2012

Supervisor: _____

Readers: _____

DALHOUSIE UNIVERSITY

DATE: 22 July 2012

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TITLE: CHANGING TACTICS: REHABILITATING CANADIAN JUSTICE
FOR TRAUMATIZED VETERANS

DEPARTMENT OR SCHOOL: Faculty of Law

DEGREE: LL.M. CONVOCATION: October YEAR: 2012

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DEDICATION PAGE

This thesis is dedicated to all of our Canadian veterans and their families. Thank you for your tremendous sacrifices and sufferings in protecting Canadian interests around the world. Your efforts have allowed Canadians to live in a society where free thought and learning can flourish. I hope that you all find peace and happiness.

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ABSTRACT

This thesis examines how military members and veterans with Operational Stress Injuries are treated by Canadian justice systems. It suggests a correlation between mental injuries sustained on operations by military personnel and propensities for military and societal misconduct. By comparing civilian and military processes with American justice counterparts, a plan to improve the existing Canadian legal landscape is proposed. Using an analysis of the underlying philosophy and purpose of military justice, a problem solving diversionary court is recommended, along with legislative and policy amendments. The use of a consent-based “Treatment Standing Court Martial” would place military justice officials parallel to civilian justice alternative measures programs, and in a better position to break the cycle of recidivism among veterans by addressing root causes. Education to reduce stigma along with military-civilian partnerships are also advocated to enhance the detection of mental illness and to foster early treatment for military personnel and veterans. The overall goals of the work include: reducing recidivism, improving operational efficiency and taking care of military members, veterans and their families.

LIST OF ABBREVIATIONS USED

CANFORGENS	Canadian Forces General Orders
CDS	Chief of Defence Staff
CM	Court martial
CF	Canadian Forces
CFSPDB	Canadian Forces Service Prison and Detention Barracks
DDCS	Director Defence Counsel Services
DJAG (Reg Svcs)	Deputy Judge Advocate (Regional Services)
DMP	Director Military Prosecutions
DMV	Department of Motor Vehicles
DTC	Drug Treatment Court
DVC	Domestic Violence Court
GCM	General Court Martial
JAG	Judge Advocate General
MND	Minister of National Defence
NDA	<i>National Defence Act</i>
OJAG	Office of the Judge Advocate General
OSI	Operational Stress Injury
OSI DAB	Operational Stress Injury Diversion Assessment Board
OTSSC	Operational and Trauma Stress Support Centres
PSC	Problem Solving Court
PTSD	Post-traumatic stress disorder
RDP	Record of Disciplinary Proceedings
SCM	Standing Court Martial
TBI	Traumatic Brain Injury
TSCM	Treatment Standing Court Martial
VTC	Veterans Treatment Court

ACKNOWLEDGEMENTS

I wish to thank and acknowledge Professors Robert Currie, Steve Coughlan and Archie Kaiser of Dalhousie University. All are top-notch academics and caring human beings. Your guidance and wisdom has helped me to realize an important goal that hopefully will advance the law for the greater good.

I further thank the brave men and women serving within the Office of the Judge Advocate General and the Office of the Chief Military Judge. Your individual and collective leadership, intellect, ambition and thoughtfulness allow me to better myself as an officer and lawyer everyday. It should be noted that the views expressed in this thesis are those of the author, and should not be attributed to or taken as representing the views or official policies of the Canadian Forces, the Government of Canada (including any department thereof), or any other institution or organization.

I also acknowledge the Honourable D. Troy Sweet, New Brunswick Provincial Court Judge, (Lieutenant-Colonel, retired) for his firm mentoring, encouragement, guidance and friendship throughout my military career. As opposing counsel on numerous courts martial, he forced me to quickly learn the art of advocacy in military justice by tirelessly and vigorously defending the interests of his clients. I wish him well on the bench.

I also acknowledge the Honourable Pamela S. Williams, Associate Chief Judge, Nova Scotia Provincial Court, and her mental health court team for their assistance and guidance in understanding the Nova Scotia Mental Health Court processes.

I further acknowledge my parents and sister for encouraging me to become a lawyer.

Most importantly, I would like to acknowledge my wife, Michelle and my children, Joshua, Christian, Jeremiah and Gabrielle. Thank you for your countless sacrifices, doing extra or going without, while I was on temporary or foreign deployments over the past decade or in university. Your love, support and dedication has allowed me the opportunity to gather the requisite knowledge and experiences necessary to write this thesis. No words can express the appreciation, love and admiration that I have for each of you.

CHAPTER 1 INTRODUCTION

After ten years of combat in Afghanistan, with troops still remaining in that war zone to train the Afghan security forces,¹ Canadian military officials are now dealing with healing the combat wounds of thousands of veterans. These wounds are not always visible. In fact, many have been diagnosed with post-traumatic stress disorder (PTSD), operational stress injuries (OSI) and traumatic brain injuries (TBI). Unfortunately, these “hidden wounds of war” often manifest as disciplinary or criminal activity, attracting the scrutiny of the military justice system or the civilian justice system. Research has shown that punishing and incarcerating veterans with these hidden wounds, without proper comprehensive treatment, results in higher than necessary rates of recidivism.² Due to the nature of their specialized training to inflict violence and their related experiences, the

¹ See e.g. “Operation ATTENTION”, online: National Defence and the Canadian Forces <<http://www.cefcom.forces.gc.ca/pa-ap/ops/attention/index-eng.asp>>: “Operation ATTENTION is Canada’s participation in the NATO Training Mission–Afghanistan (NTM-A), which delivers training and professional development support to the national security forces of Afghanistan: the Afghan National Army (ANA), the Afghan Air Force (AAF), and the Afghan National Police (ANP) [...] In 2012, now a mature mission, NTM-A is working to sustain its momentum while initiating preparations for the transfer of the lead security responsibility to Afghan control in 2014. This is a conditions-based process that will take place when: the Afghan national security forces are ready to shoulder responsibility for security with steadily decreasing assistance from ISAF [(International Security Assistance Force)....]”

² Major Evan R. Seamone, “Reclaiming The Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism” (2001) 208 *Mil L Rev* 1 at 38: “Studies reveal that drug courts reduce recidivism and save more costs than traditional probation or prison. [...] As applied to the treatment of mental illness [...] there are strong indicators that the basic drug court principles work equally well.”

treatment of combat veterans with PTSD and TBIs has been recognized as a matter of public safety.³

The civilian justice system has adapted in recent years by pursuing more rehabilitative approaches when dealing with offenders with mental disorders. “Problem-solving”⁴ courts (PSC) have exploded in North America. Numerous Canadian jurisdictions now have mental health courts (MHC)⁵ and/or drug treatment courts (DTC).⁶ Twenty-six American jurisdictions have created 88 veteran treatment courts (VTC), which are a combination of MHCs, DTCs and other PSCs for their veteran offenders.⁷ At present, Canadian veterans who are released (or serving members who commit offences over which the military does not choose to exercise jurisdiction) may

³ *Ibid.*, at 3: “In contrast to problem-solving courts, which target the illness underlying criminal conduct, courts-martial function as problem-*generating* courts when they result in punitive discharges that preclude mentally ill offenders from obtaining Veterans Affairs (VA) treatment. Such practices create a class of individuals whose untreated conditions endanger public safety and the veteran as they grow worse over time.”

⁴ John H. Kramer, “Problem Solving Courts: New Approaches to Criminal Justice”, (2010) 39 *Contemporary Sociology: A Journal of Reviews* 466: “Problem solving courts (PSC) have exploded onto the criminal justice scene in the last twenty years.”

⁵ Donalee Moulton, “Mental health courts gain popularity across Canada” *The Lawyer’s Weekly* (1 June 2007), online: LexisNexis Canada Inc.

<<http://www.lawyersweekly.ca/index.php?section=article&articleid=484>>: “A few provinces, such as Ontario and New Brunswick, have mental health courts already up and running. Some provinces, like Newfoundland and Labrador, have ongoing pilot programs in place. Now they are being joined by other jurisdictions looking for ways to decrease the criminalization of the mentally ill while at the same time decreasing the growing number of individuals cramming provincial and federal jails”.

⁶ “Drug Treatment Court Funding Program”, online: Department of Justice Canada <<http://www.justice.gc.ca/eng/pi/pb-dgp/prog/dtc-ttt/index.html>>: “There are 6 federally-funded DTC pilot sites operating in Canada: Toronto, Vancouver, Edmonton, Winnipeg, Ottawa and Regina.”

⁷ Tori DeAngelis, “Help for struggling veterans - Psychologists are involved in a new type of court that helps veterans on the wrong side of the law get the help they need to restart their lives”, online: (2012) 43:3 *Monitor on Psychology* 34

<<http://www.apa.org/monitor/2012/03/veterans.aspx>>. Note: More VTCs have been created since this count of 88 and continue to develop across the country.

have access to civilian rehabilitative alternative measures. Conversely, the military justice system currently has no similar mechanism in order to divert mentally ill veterans into these rehabilitative justice-led programs. Similarly, the civilian models do not yet fully incorporate the unique nature of military service into their PSC multi-disciplinary teams when dealing with veterans.

This thesis will argue that everyone suffering from a mental disability ought to have equal access to a justice system which is sensitive to their concerns. I will show that many Canadian civilians have access to problem solving courts, which are sensitive to their concerns; however, military personnel do not uniformly have access to mental health courts or other diversionary treatment courts. As a result, traumatized military personnel do not have equal access to a justice system sensitive to their concerns, and there is no military reason to deprive them of this access. Further, there is an urgent need to address this issue now. This thesis proposes that a problem solving court be created within military justice processes and that existing civilian processes be improved to meet the unique needs and concerns of released veterans.

In order to substantiate this position, Chapter One will review the history of mental health in combat and modern understandings of the injuries, including the concept of comorbidity. It will articulate the difficulty in detecting the illness, particularly for justice officials, and explain how insufficient treatment exacerbates the problem. Further, it will compare existing processes for dealing with mentally injured veterans in the civilian and military justice systems.

Chapter Two will develop why this issue is relevant now by describing the scope of the problem for the Canadian Forces and the current challenges in detection and

prevention of activities attracting military penal consequences. In addition, it will show that there are significant numbers of veterans anticipated to be suffering from OSIs and the correlative disciplinary or criminal behavior. It will also provide some relevant recommendations on improving the current justice processes for veterans, reducing OSI stigma and fostering related treatment.

Chapter Three will provide a comparative analysis of prosecuting veterans within the Canadian and the current American systems of justice. In so doing, it will compare four main areas, namely: the magnitude of the problem, the military justice process, the civilian justice process and veterans treatment courts. The comparison will assist in formulating the proposed Canadian approach. It will also provide some relevant recommendations on improving the current justice processes for veterans, reducing OSI stigma and fostering related treatment.

Building upon existing civilian and foreign models and ideas, Chapter 4 will propose a Canadian Military Justice Alternative Measures Process. This process will include a court martial structure that allows diversion for treatment where appropriate. It will justify its use by referring to the underlying philosophies of the military justice system, statements of key officials, and the stated purpose of military justice: namely, discipline, morale and efficiency. It will express the hope that innovative justice methods will better balance rehabilitation, public safety and the public interest by treating veterans with the respect and care that they deserve. In addition, Chapter Four will also advocate for building partnerships with civilian justice officials by using a “whole of governments” approach to deal with veterans who have or will reintegrate into civil society. It will provide a blueprint or “campaign plan” upon which the Canadian Forces and others can

build. It will suggest three main areas of action, namely: legislative reform, policy reform, and an educational initiative for justice issues impacting veterans and military members with OSIs.

Using primarily doctrinal, comparative, interdisciplinary and policy scholarship methodologies, this thesis will conclude that while all players truly have the best interests of Canadian Forces veterans at heart, they must consider new “tactics” to improve conditions and existing justice processes for our nation’s veterans.

As a legal officer in the Canadian forces with more than a decade of experience in military prosecutions and advising front-line units on summary trials, I will periodically provide observations within this work, which is based on my personal experience.

In addition, it should be made clear at the outset that while the arguments contained within this thesis place significant value on veterans and military personnel and their related treatment, the intent is not to devalue or prioritize veterans over any other profession, group or persons suffering from mental illness. Ideally, the recommendations in this thesis should be tailored to all Canadians suffering from mental disabilities; however this work focuses only on the welfare of military members, veterans and their families. The purpose is not to fetishize militarism. Rather, the hope is to draw attention to veteran issues and their correlation to operating an effective fighting force - a tool in governance and diplomacy.

1.1 MENTAL HEALTH IN COMBAT

1.1.1 A Historical Review

As it is often said, in order to understand where we are going, we have to

understand where we have been. Using a doctrinal approach to understand mental health injuries among military personnel, a brief review of how militaries have dealt with these injuries in the past is necessary to ground the argument being made here. Well-known World War II American military general George S. Patton, Jr. is attributed with having said “I am convinced that much more emphasis should be placed on history. The purpose of history is to learn how human beings react when exposed to the danger of wounds or death [...]”⁸ Further, military history and “lessons learned” are currently used by the Canadian Forces in determining future military doctrine and theory.⁹

The concept of suffering a mental health injury in combat is not new. As early as 1900 BC, there were reports by Egyptian physicians of what would now be described as PTSD symptoms related to combat.¹⁰ These symptoms and related reporting crossed all cultures throughout the history of military combat.¹¹

⁸ Martin Blumenson, *The Patton Papers: 1940-1945* (United States of America: Da Capo Press, 1974) at 750.

⁹ See e.g. “Chapter 1 – Canadian Military Doctrine”, online: National Defence and the Canadian Forces <<http://www.cfd-cdf.forces.gc.ca/sites/page-eng.asp?page=10772>>: “Canadian Military Doctrine provides the military strategic guidance essential for the development and the employment of the full range of CF capabilities across the spectrum of operations in response to government direction. [...] By building on lessons learned with an understanding of the future, military doctrine provides the rationale behind the organization and the employment of military forces and assists in the determination of appropriate roles and missions.” [Emphasis mine]

¹⁰ Abdalla Bowirrat *et al.*, “Neuro-psychopharmacogenetics and Neurological Antecedents of Posttraumatic Stress Disorder: Unlocking the Mysteries of Resilience and Vulnerability” online: (2010) 8:4 *Curr Neuropharmacol* 335 <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3080591/>>.

¹¹ See e.g. Steve Bentley, “A Short History of PTSD: From Thermopylae to Hue Soldiers Have Always Had A Disturbing Reaction To War” *The VVA Veteran* (March/April 2005) online: Vietnam Veterans of America <http://www.archive.vva.org/TheVeteran/2005_03/feature_HistoryPTSD.htm>.

The first term used to describe PTSD was “nostalgia” in 1678, though its name has changed over time.¹² In 18th century, it was referred to as “homesickness,” while during the American Civil War it was called “soldier’s heart”.¹³ During World War I, it was known as “shell shock” and “war neurosis,” whereas World War II literature refers to it as “battle fatigue” and “combat exhaustion”.¹⁴ It should be noted that up until this point, most of the terminology used seemed to infer a non-medical condition that would pass. This is consistent with the historical stigma component of the problem we currently have today.

During the Gulf War in the early 1990s the symptomology was called “combat stress reaction”.¹⁵ More recently, since the commencement of the Iraq and Afghanistan conflicts, it has been referred to as PTSD and OSIs by most western nations. Some high-ranking military officials and academics have argued that using modern medical terminologies for combat related trauma impedes treatment. This recently resulted in calls to change the name of the military ailment.¹⁶ The Americans ultimately rejected this

¹² “History of PTSD: ‘Every man has his breaking point’”, online: WordPress.com <<http://historyofptsd.wordpress.com/early-history/>>.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Todd C. Helmus & Russell W. Glenn, “Steeling the Mind Combat Stress Reactions and Their Implications for Urban Warfare” *RAND Arroyo Center* (2005), online: RAND Corporation <http://www.rand.org/pubs/monographs/2005/RAND_MG191.pdf>.

¹⁶ See e.g. Daniel Sagalyn, “Key Psychiatric Doctor Rejects Name Change for PTSD” *PBS Newshour* (10 May 2012), online: MacNeil/Lehrer Productions <<http://www.pbs.org/newshour/rundown/2012/05/key-psychiatric-doctor-rejects-name-change-for-ptsd.html>>: “A key leader in the psychiatric community has rejected the idea of altering the name of a traumatic condition affecting an estimated tens of thousands of U.S. combat veterans -- a move that effectively blocks growing efforts by a small group of psychiatrists and military brass concerned about reducing patient stigma.”

approach in May 2012, suggesting that a multi-pronged approach, including combatting stigma using Canadian initiatives, is preferable.¹⁷

The historical evolution of combat mental injuries helps in understanding existing problems and the modern definitions for our veterans' "hidden wounds".

1.1.2 Defining the Combat Injury Today

PTSD became a formal diagnosis in 1980, despite its likely existence since combat began.¹⁸ Today, it is commonly understood as an "anxiety disorder that develops after exposure to a terrifying event or ordeal in which grave physical harm occurred or was threatened."¹⁹ It has been recognized that military combat is a traumatic event that may trigger PTSD. Common symptoms include "flashback episodes, memories, nightmares, or frightening thoughts, especially when they are exposed to events or objects reminiscent of the trauma."²⁰ Other symptoms include emotional numbness, sleep disturbances, depression, anxiety, irritability, outbursts of anger, and feelings of intense guilt. Physical symptoms that may develop include "headaches, gastrointestinal distress, immune system problems, dizziness, chest pain, or discomfort in other parts of the body."²¹ The fear of experiencing the symptoms generally leads to "avoidance" of things that remind sufferers of events that have caused the PTSD. Further, veterans often

¹⁷ See e.g. *ibid*: "By contrast, Friedman said, the Canadian approach is 'brilliant' and is 'proof that stigma can be addressed successfully without changing the name of the diagnostic label. So we can have it both ways. Keep the PTSD diagnostic term and have it regarded as an injury.'"

¹⁸ Roxanne Dryden-Edwards, "Posttraumatic stress disorder (PTSD)" *MedecineNet.com*, online: MedicineNet, Inc. <http://www.medicinenet.com/posttraumatic_stress_disorder/article.htm>.

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ *Ibid*.

experience “hyperarousal” causing them to be extremely sensitive or anxious about normal life experiences, such as driving a car. “Complex posttraumatic stress disorder (C-PTSD) usually results from prolonged exposure to a traumatic event or series thereof and is characterized by long-lasting problems with many aspects of emotional and social functioning.”²² Prolonged exposure is consistent with deployments into combat in excess of twelve months during a three year period.²³ In fact, the United Kingdom has taken steps to reduce deployment periods in order to minimize the risk of its soldiers developing PTSD.²⁴

Along with the emotional and mental injuries that may occur in combat there are also physical injuries. Some physical injuries, such as TBIs, are difficult to detect because they cannot be seen and present more like a mental disorder. In addition to PTSD and OSIs, TBIs are now also commonly associated with combat veteran mental injuries. TBI’s more recent affiliation with injured veterans has been due to advancements in

²² *Ibid.*

²³ Brian P. Marx et al, “Association of Time Since Deployment, Combat Intensity, and Posttraumatic Stress Symptoms With Neuropsychological Outcomes Following Iraq War Deployment”, online: (2009) 66:9 *Arch Gen Psychiatry* 996 at 1002 <<http://archpsyc.ama-assn.org/cgi/reprint/66/9/996.pdf>>: “Such a Pattern would be consistent with a stress sensitization model of PTSD, 26-28 which purports that stress exposure leads to changes in neurotransmitter and neurohormonal response that, in some cases, generate or exacerbate PTSD symptoms. The PTSD symptoms, in turn, further promote increased overreactivity of the nervous system.” [Emphasis mine]

²⁴ Mark Phillips, “Britain Limits Deployment to Reduce P.T.S.D.” *The New York Times* (20 March 2012), online: [nytimes.com](http://www.nytimes.com/roomfordebate/2012/03/20/would-a-draft-reduce-the-number-of-post-traumatic-stress-cases/britain-limits-deployment-to-reduce-ptsd) <<http://www.nytimes.com/roomfordebate/2012/03/20/would-a-draft-reduce-the-number-of-post-traumatic-stress-cases/britain-limits-deployment-to-reduce-ptsd>>: “One study found that personnel who deployed for 13 months or more in three years were more likely to fulfill the criteria for P.T.S.D. Research has focused on the clear relationship between the duration of deployment and poor well-being [....]”

radiology to allow for detection and diagnosis.²⁵ A TBI is defined as “nondegenerative, noncongenital insult to the brain from an external mechanical force, possibly leading to permanent or temporary impairment of cognitive, physical, and psychosocial functions, with an associated diminished or altered state of consciousness.”²⁶ [Emphasis mine] The mechanisms of injury of TBIs are consistent with combat related experiences including: motor vehicle accidents, falls and gunshot wounds.²⁷ They are also linked to the use of alcohol, a common secondary illness to PTSD.²⁸

Similarly, OSIs are “[i]njuries caused by operational stress and trauma.”²⁹ The Canadian Forces refers to any persistent psychosocial problem that occurs as a result of a military operation as an OSI.³⁰ This term seems to capture PTSD, C-PTSD and TBI, along with any secondary injuries or illnesses associated with combat, such as depression or addictions. This phrase was coined by the Department of National Defence in the

²⁵ Segun T Dawodu, “Traumatic Brain Injury (TBI) - Definition, Epidemiology, Pathophysiology” *Medscape Reference: Drugs, Diseases & Procedures* (10 November 2011), online: WebMD LLC <<http://emedicine.medscape.com/article/326510-overview#showall>>: “Differences in diagnostic tools and admission criteria also may affect the above-defined severity classifications. In the past, the use of roentgenograms to help diagnose skull fractures after head injury did not show much of any concurrent intracranial lesions. These lesions were difficult to diagnose until the advent of CT scanning, which is now the diagnostic imaging of choice in TBI cases.”

²⁶ *Ibid.*

²⁷ *Ibid.*: “Work-related TBIs constitute an estimated 45-50% of all TBIs. Incidence varies from 37 cases per 100,000 people for military employees (57% are related to transportation) to 15 cases per 100,000 people for civilians (50% are because of falls).”

²⁸ *Ibid.*: “Alcohol is a major factor in many TBIs and often is associated with the leading causes of TBI.”

²⁹ “What Are Operational Stress Injuries?” *The invisible wounds* (2006), online: Operational Stress Injury Social Support <http://www.osiss.ca/engraph/what_e.asp?sidecat=1>.

³⁰ “Cumulative Incidence of PTSD and Other Mental Disorders: Executive Summary”, online: National Defence and the Canadian Forces <<http://forces.gc.ca/health-sante/ps/mh-sm/osi-bso/sum-som-eng.asp>>.

creation of Operational Stress Injury Clinics. Secondary illnesses caused by PTSD or TBIs can be equally problematic, if left untreated.

1.1.3 Secondary Illness

The number of combat veterans who are diagnosed with secondary problems or illnesses caused as a direct result of PTSD is significant. This psychological phenomenon is often referred to as comorbidity. Among returning Iraq and Afghanistan veterans with mental health problems, the majority had a comorbid diagnosis. More specifically, “29% had 2 and one third had 3 or more different mental health diagnosis.”³¹

Combat PTSD or OSIs are commonly associated with other mental health disorders such as: depression, insomnia, substance abuse, anxiety, panic disorder, anger management and suicidal tendencies – to name a few.³² Often, a veteran experiencing flashbacks from combat can become depressed because they are having these issues. They may have nightmares and develop insomnia. They may turn to alcohol or drugs to dull the pain of the memories and develop addictions or substance abuse problems. The reduced sleep, the addictions and depression can lead to or exacerbate anger management issues. Some of these secondary issues can also lead to conditions that cause criminal or disciplinary behavioural problems.³³ The secondary illnesses are relevant because they

³¹ Karen H. Seal et al, “Trends and Risk Factors for Mental Health Diagnoses Among Iraq and Afghanistan Veterans Using Department of Veterans Affairs Health Care, 2002-2008” (2009) 99: 9 Am J of Pub Health 1651 at 1652.

³² “Definition of Post-traumatic stress disorder” *MedicineNet.com*, online: MedicineNet, Inc. <<http://www.medterms.com/script/main/art.asp?articlekey=18779>>: “Depression, alcohol or other substance abuse, or other anxiety disorders frequently co-occur with PTSD.”

³³ See e.g. Terence T. Gorski & John M. Kelley, *Counselor's Manual for Relapse Prevention with Chemically Dependent Criminal Offenders*, (Rockville, Maryland: U.S.

can be displayed without a formal diagnosis of an OSI and mask more serious injuries related to combat. The resulting behaviours can also be mistaken for strictly disciplinary or criminal conduct, seemingly unrelated to underlying illness, and thereby solely engaging the military or civilian justice systems and related punitive or correctional philosophies. Without treatment, the likelihood of veteran recidivism increases, thereby creating a vicious cycle of increased punishment for misconduct without addressing the root problem: the OSI. The correlation between OSI and justice involvement is now well documented.

1.1.4 The Correlation with Justice

PTSD affects between a quarter and a third of combat troops. “Studies reveal that [a PTSD] diagnosis is related to perpetrating more types of violence.”³⁴ For example, Clark *et al.* suggest that “a significant proportion of Service members returning from current wars either as a result of mental health problems or as a result of their military training are at high risk for contact with the criminal justice system.”³⁵ Further,

Department of Health and Human Services, 1996) at 5: “Chemical dependency can cause a person to commit crimes. People who are chemically dependant commit crimes related to their use of alcohol or drugs (drunk driving, public drunkenness, assault, etc.), the support of their addiction (selling drugs, committing crimes to get drugs or money for drugs, etc.), and secondary consequences of drug or alcohol use (not paying child support or court fines, failing to follow through with probation requirements, etc.).”

³⁴ *Supra*, note 2.

³⁵ Sean Clark et al, “Development of Veterans Treatment Courts: Local and Legislative Initiatives” (2010) 7 *Drug Ct Rev* 171 at 174: “In summary, significant numbers of America’s veterans are involved in the nation’s justice system or are at risk for such involvement. Justice-involved veterans have been shown to have high rates of substance abuse, mental illness, homelessness, and other chronic and infectious medical diseases.”

“involvement in the criminal justice system is a strong predictor of future arrests and incarceration for people with a psychiatric disability.”³⁶

The assertions by academics that there is a correlation between OSI and justice are not merely theoretical. In a recent American study involving more than ninety thousand Marines who served from 2001 to 2007 revealed that soldiers with operational deployment who had been diagnosed with PTSD “were over 11 times more likely to engage in the most serious forms of misconduct than were combat deployed Marines without a psychiatric diagnosis.”³⁷ [Emphasis mine] This quantitative study corroborates previous military research “linking mental disorders with antisocial behavior and legal problems [...and] civilian literature indicating a strong overlap between psychiatric problems and misconduct.”³⁸ According to Seamone, the 2009 Supreme Court of the United States decision in *Porter v. McCollum*³⁹ suggests a recognized propensity of criminality and disciplinary problems for veterans by stating that there has been a “long

³⁶ David Loveland & Michael Boyle, “Inclusive Case Management as a Jail Diversion Program for People with a Serious Mental Illness: A Review of the Literature” (2007) 51 *Int'l L J Offender Therapy & Comp Criminology* 130 at 132.

³⁷ Robyn M. Highfill-McRoy et al, “Psychiatric Diagnoses and Punishments for Misconduct: The Effects of PTSD in Combat-Deployed Marines”, online: (2010) 10:88 *BMC Psychiatry* 1 at 6 <<http://www.biomedcentral.com/content/pdf/1471-244X-10-88.pdf>>.

³⁸ See also Stephanie Booth-Kewley et al, “Psychosocial Predictors of Military Misconduct”, online: (2010) 198 *J Nerv Ment Dis* 91 at 97 <<http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA515104>>. See also Claudia Baker & Cessie Alfonso, “PTSD and Criminal Behavior” *Traumatic Stress Treatment Center*, online: <<http://www.traumatic-stress-treatment.com/artptsdandcriminalbehavior.html>>: “[S]ymptoms of PTSD can incidentally lead to criminal behaviour [...] Some combat veterans also may seek to recreate the adrenaline rush experienced during combat. Feeling the need to be always “on guard” can cause veterans to misinterpret benign situations as threatening and cause them to respond with self-protective behavior. Increased baseline physiological arousal results in violent behavior that is out of proportion to the perceived threat.”

³⁹ 130 S Ct 447 (2009).

tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines.”⁴⁰

American agencies have publicly recognized the increased public safety problems associated with having untreated mentally ill veterans in the community. The United States Department of Homeland Security recently cited national security concerns associated with terrorist groups trying to recruit veterans who have developed psychological problems from combat.⁴¹

The increased risk of criminality or disciplinary issues among mentally ill veterans often results in interaction with the criminal justice system. Depending on whether the member is still serving, whether they are part way through their release process, or when, where and how an offence is committed, they may find themselves in either the military justice system or a civilian justice system. There are deficits for military members in either system. In particular, military processes lack alternative measures schemes found in the civilian justice system which may place veterans at a disadvantage when compared to civilian counterparts. Similarly, civilian processes lack the knowledge and military expertise to understand the offender’ values and to fully exploit existing treatment, support and social programs in determining sentences or

⁴⁰ *Supra*, note 2.

⁴¹ U.S. Department of Homeland Security, Office of Intelligence and Analysis, “Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment” (7 April 2009) at 7, online: <<http://www.fas.org/irp/eprint/rightwing.pdf>>: “DHS/I&A assesses that rightwing extremists will attempt to recruit and radicalize returning veterans in order to exploit their skills and knowledge derived from military training and combat. These skills and knowledge have the potential to boost the capabilities of extremists—including lone wolves or small terrorist cells—to carry out violence. The willingness of a small percentage of military personnel to join extremist groups during the 1990s because they were disgruntled, disillusioned, or suffering from the psychological effects of war is being replicated today”. [Emphasis mine]

alternative measures for military members. Currently, the approaches taken in these concurrent Canadian justice systems have stark differences for military members and veterans afflicted with OSIs.

1.2 THE CANADIAN JUSTICE PROCESSES

1.2.1 The Current Military Justice Process

In the Canadian military justice system, there are two forms of service tribunals: the summary trial and the court martial.⁴² Service tribunals have jurisdiction over regular force⁴³ members almost completely. Military tribunals also have jurisdiction over reservists⁴⁴ and civilians in limited circumstances, including for offences committed while on defence establishments, in Canadian Forces vehicles, aircraft or vessels and (regarding reservists) when in uniform.⁴⁵

1.2.1.1 The Summary Trial System

The summary trial system is administered by the unit or formation of the military Member, and is normally presided over by a Commanding Officer⁴⁶ or their delegated officer.⁴⁷ A legal advisor is often required to provide pre-charge advice to the charge

⁴² *National Defence Act*, RSC 1985, c N-5, s 2 [NDA]: “service tribunal” means a court martial or a person presiding at a summary trial.”

⁴³ *Ibid*, s 15(1): “There shall be a component of the Canadian Forces, called the regular force, that consists of officers and non-commissioned members who are enrolled for continuing, full-time military service.”

⁴⁴ *Ibid*, s 15(3): “There shall be a component of the Canadian Forces, called the reserve force, that consists of officers and non-commissioned members who are enrolled for other than continuing, full-time military service when not on active service.”

⁴⁵ *Ibid*, s 60.

⁴⁶ *Ibid*, s 163(1-1.1). See also, *Queens Regulations and Orders* 108.06. [QR&O]

⁴⁷ *Ibid*, s 163(4). See also, *ibid*. 108.10.

layer.⁴⁸ The accused is provided with a Record of Disciplinary Proceedings (RDP) which includes some basic disclosure.⁴⁹ The accused may or may not be provided with an opportunity to elect court martial.⁵⁰ Such an election would automatically entitle the member to free legal counsel regardless of their rank or income.⁵¹ Offences which do not provide an election are often referred to as the “Baby Five”⁵² and are considered minor due to their maximum sentence of a fine in the amount of 25% of their monthly basic pay.⁵³ Some of these offences include: Insubordinate Behavior⁵⁴, Quarrels and Disturbances⁵⁵, and Drunkenness.⁵⁶ Not coincidentally, these offences are often associated with veterans who have mental health disorders, particularly PTSD.⁵⁷ As

⁴⁸ *Ibid*, 107.03 & 107.11.

⁴⁹ *Ibid*, 107.09(1)(b) & 108.15.

⁵⁰ *Ibid*, 108.17.

⁵¹ *Ibid*, 101.22: “Every accused who is to be tried by court martial is entitled to: (a) be represented by legal counsel who is a barrister or advocate with standing at the bar of a province; and (b) have an adviser to assist the accused, both before and during the trial, in respect of any technical or specialized aspect of the case.” See also *ibid*, 109.04.

⁵² This terminology comes from my personal experience as a legal officer.

⁵³ *Supra*, note 46, 108.17(1).

⁵⁴ *Supra*, note 42, s 85. See also *ibid*, 103.18: “Every person who uses threatening or insulting language to, or behaves with contempt toward, a superior officer is guilty of an offence [...]”

⁵⁵ *Ibid*, s 86. See also *ibid*, 103.19: “Every person who (a) quarrels or fights with any other person who is subject to the Code of Service Discipline, or (b) uses provoking speeches or gestures toward a person so subject that tend to cause a quarrel or disturbance, is guilty of an offence [...]”

⁵⁶ *Ibid*, s 97. See also *ibid*, 103.30: “[...T]he offence of drunkenness is committed where a person, owing to the influence of alcohol or a drug (a) is unfit to be entrusted with any duty that the person is or may be required to perform; or (b) behaves in a disorderly manner or in a manner that is likely to bring discredit on Her Majesty’s service”.

⁵⁷ *Supra*, note 37 at 6: “[T]he experience of combat has also been shown to be related to both distinct PTSD symptom profiles and increased aggressive behaviour, both of which could explain the increased behavioral problems in the war-deployed cohort.” See also *supra*, note 34 at 91: “[Studies] observed a significant association between exposure to atrocities during the Vietnam war and interpersonal violence. [...] PTSD may play a role in associations between combat and misconduct [...] In a sample of Vietnam veterans, [i]nternalizers had high rates of depression and panic, whereas externalizers had high

previously indicated, combat PTSD or OSIs are often associated with substance abuse, aggression, interpersonal violence and anger management problems.⁵⁸

Once the file proceeds to summary trial, often the accused is “paraded out” in front of his unit and peers to face the Presiding Officer. This can be extremely difficult for a veteran with combat related PTSD or OSIs. According to various academics, “sometimes a PTSD reaction is so severe and pervasive that the client may have trouble attending court or participating in the legal case.”⁵⁹ During the summary trial, evidence will be called by the unit to make out the elements of the offence(s) and the accused will have an opportunity to make representations.⁶⁰ They may call upon their appointed assisting officer, who is not legally trained, in order to help them.⁶¹ The accused may request that a lawyer paid by her be allowed to ask questions; however, the Presiding Officer may refuse this request.⁶² The Presiding Officer, the Delegated Officer and the

rates of antisocial personality traits and alcohol-related problems. There were similar results in a mixed sample of veterans from Vietnam and other conflicts.” See also “Topics in Brief: Substance Abuse among the Military, Veterans, and their Families” *NIDA: National Institute on Drug Abuse* (April 2011), online: U.S. Department of Health and Human Services <<http://www.drugabuse.gov/publications/topics-in-brief/substance-abuse-among-military-veterans-their-families>>: “Alcohol abuse is the most prevalent problem and one which poses a significant health risk. A study of Army soldiers screened 3 to 4 months after returning from deployment to Iraq showed that 27 percent met criteria for alcohol abuse and were at increased risk for related harmful behaviors (e.g., drinking and driving, using illicit drugs).”

⁵⁸ *Supra*, note 32.

⁵⁹ Lyn Cobin Gullette & William R. Gullette, *Difficult Clients: Dedicated Attorney: Practical Psychology For Effective In-The-Trenches Representation* (Denver, Colorado: Bradford Publishing Company, 2005) at 122.

⁶⁰ *Supra*, note 46, 108.20.

⁶¹ *Ibid*, 108.14.

⁶² See note B to *ibid*, 108.14: “An accused person does not have the right to be represented by legal counsel at a summary trial. However, if an accused requests such representation, the officer having summary trial jurisdiction has the discretion to: (i)

Assisting Officer will have been provided with a 2-3 day course or an on-line recertification in order to perform their important disciplinary functions.⁶³ There is currently little or no legal training related to mental health screening or detection.

Still, by virtue of their military training, every CF member is trained to look for signs of combat acute stress during first aid training, which is recertified on a regular basis. The ineffectiveness of this training as a means to allow unit leadership to identify and appropriately treat all PTSD and mental health cases is highlighted in allegations of underreporting⁶⁴ and the dramatic increase in suicides by service members.⁶⁵ In fairness, PTSD, other mental health disorders associated with combat and TBIs are often referred

permit representation by legal counsel; (ii) proceed without representation by legal counsel; or (iii) apply for disposal of the charges against the accused by court martial.”

⁶³ *Ibid*, 101.09. See also Judge Advocate General, *JAG Annual Report 2009-10* (Ottawa, National Defence, 2012) at 13, online: National Defence <<http://www.forces.gc.ca/jag/publications/office-cabinet/annrep-rappann-09-10-eng.pdf>>: “3.2 Service Tribunals - Summary Trial and Court Martial”: “Military commanders who preside at summary trials must be trained and certified by the JAG as being competent in their duties as presiding officers, and must maintain that currency by re-certifying every four years [...] Note also that every four years, qualified presiding officers require re-certification, which is done online through Presiding Officer Re-certification Test (PORT).”

⁶⁴ Becky Rynor, “Veterans stepping forward for treatment of operational stress injuries”, online: (2010) 182:7 CMAJ E281

<<http://www.cmaj.ca/content/182/7/E281.full.pdf+html>>: “Boivin adds that it is likely posttraumatic stress disorder is underreported as a consequence of barriers and attitudes within both the military and general populations.[...] But many others struggle to cope with operational stress injuries on their own or refuse to admit they need help, he adds, noting that PTSD sufferers are six times more likely to have thoughts of suicide.”

⁶⁵ David Pugliese, “As soldier suicides rise, National Defence slashes suicide prevention staff” *canada.com* (2 May 2012), online: Postmedia Network Inc.

<<http://www2.canada.com/topics/news/national/story.html?id=6556357>>: “Statistics released Monday by DND show that the number of suicides among Canadian Forces personnel increased last year. Twenty soldiers died of suicide in 2011 - 19 men and one woman, the department reported. Just 12 soldiers took their lives in 2010, all of them male.”

to as hidden wounds of war⁶⁶ which are often overlooked, misdiagnosed or not well understood even by front-line family physicians.⁶⁷

If an election is provided, and the member chooses to be tried by summary trial, the accused could be sentenced to thirty days detention in the Canadian Forces Service Prison and Detention Barracks (CFSPDB) depending on their rank.⁶⁸ There is no ability

⁶⁶See e.g. Stan Alcorn, “PTSD and the Hidden Wounds of War” *Dart Center for Journalism & Trauma* (9 December 2010), online: Trustees of Columbia University in the City of New York <<http://dartcenter.org/content/ptsd-and-hidden-wounds-war>>: “Everyone has heard of PTSD, but veterans, clinicians and scientists say most people misunderstand not only the disorder, but the other ways that war affects individuals and families”. [Emphasis mine] See also Angela Mulholland, “Many military suicides likely getting missed” *CanadaAM* (4 October 2011), online: BellMedia <<http://www.ctv.ca/CTVNews/CanadaAM/20111004/suicide-military-canada-am-series-111004/>>: “We've long known of the physical toll the battlefield can exact. But in recent years, the invisible mental wounds of war have finally been getting more attention [....] The Canadian Forces say the programs are working, and emerging mental health woes are being nipped in the bud early. But there are still many who slip through the cracks [....]”

⁶⁷ See e.g. Angela Mulholland, “Brain injuries among soldiers often overlooked” *CTV.ca News* (5 July 2011), online: BellMedia <<http://www.ctv.ca/CTVNews/Afghanistan/20110630/afghanistan-kandahar-brain-injures-ptsd-110705/>>: “Dr. Donna Ouchterlony, the head of the brain injury clinic at St. Michael's worries that PTSD is being overdiagnosed in soldiers who actually have brain injuries from explosions. The problem is that many of these soldiers may not realize they have a head injury, particularly if they never experienced a blow to the head, and so they're being sent for the wrong kind of treatment.” [Emphasis mine]. See also “Post Traumatic Stress Disorder: Out of Sight, Not out of Mind” *Mood Disorders Society of Canada* (March 2012), online: <http://www.mooddisorderscanada.ca/documents/Advocacy/PTSD_Report_EN.pdf>: “Canada has approximately 76,000 family physicians. 85% of Canadians dealing with mental health problems approach their family physician first. Unfortunately, many healthcare providers, including physicians, have stigmatizing attitudes towards patients presenting with possible mental health problems including PTSD. Furthermore, physicians have not received appropriate training and education about mental health or mental illnesses.” [Emphasis mine]

⁶⁸ *Supra*, note 46, 108.24.

to impose treatment as part of a sentence, nor is there a probation system in the Canadian Forces.⁶⁹

The summary trial structure accounts for approximately 97% of all military tribunals.⁷⁰ These tribunals are not equipped to deal with complex legal arguments or matters. In fact, a Presiding Officer would be advised to refer a complex legal matter, such as the requirement for expert medical testimony, to a court martial.⁷¹

The summary trial system proper currently has insufficient systematic safeguards to ensure military members with combat mental disorders are adequately screened or diverted to treatment.⁷² Further, the accused has no legal representation, which ordinarily may canvass possible defences or mitigation associated with combat stress or related disorders. The result of a conviction at summary trial can be a criminal record,⁷³ a

⁶⁹ *Supra*, note 42, s 139.

⁷⁰ *Supra*, note 63 at 95.

⁷¹ See note C to *supra*, note 46, 108.14: “In the exercise of the discretion [regarding the right to be represented by legal counsel at a summary trial], the officer having summary trial jurisdiction should consider at least the following: [...] (ii) the complexity of the offence [...]”

⁷² *Ibid*, 108.06: “A commanding officer may try an accused person by summary trial if all of the following conditions are satisfied: [...] the commanding officer does not have reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at the time of the commission of the alleged offence.” It should be noted that provision presumes that there are adequate systematic methods to screen or detect the mental disorder.

⁷³ See e.g. *Criminal Records Act*, RSC, 1985, c C-47, ss 2(1): “service offence” has the same meaning as in subsection 2(1) of the *National Defence Act* [...] See also *supra*, note 42 ss 2(1): “‘service offence’ means an offence under this Act, the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline” [...] It is noteworthy that the term “Criminal Record” is not defined within either Act. Still, if one requires a record suspension, one must logically have a “record” to begin with. See also *Criminal Records Act*, RSC, 1985, c C-47, ss 4(1): “A person is ineligible to apply for a record suspension until the following period has elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence: (a) 10 years, in the case of an offence that is prosecuted by indictment or is a service offence for which

permanent entry on a conduct sheet and negative career implications, including delayed promotions, postings and related benefits. If the misconduct giving rise to the summary trial was the result of a mental injury from combat, this may not be fair. As will be argued, added systematic or procedural protections may reduce the likelihood of potential unfairness for offenders with hidden war wounds. The court martial system does currently provide some additional protections.

1.2.1.2 The Courts Martial System

The court martial system is an *ad hoc* system⁷⁴ in which the military service tribunal is convened by the court martial administrator following referral by the Director of Military Prosecutions (DMP).⁷⁵ This is normally prompted by the Commanding Officer referring the matter to her referral authority due to, among other things: the offence(s) charged⁷⁶, the rank of the accused⁷⁷ or the gravity of the offence and likely sentence.⁷⁸ The referral authority then asks the DMP to proceed to court martial where appropriate.⁷⁹ Once in the hands of the DMP, a prosecutor will request full disclosure from all relevant parties, including the police, unit, referral authority, legal advisor, etc.

the offender was punished by a fine of more than five thousand dollars, detention for more than six months, dismissal from Her Majesty's service, imprisonment for more than six months or a punishment that is greater than imprisonment for less than two years in the scale of punishments set out in subsection 139(1) of the *National Defence Act*; or (b) five years, in the case of an offence that is punishable on summary conviction or is a service offence other than a service offence referred to in paragraph (a). [Emphasis mine]

⁷⁴ As opposed to a permanent court structure. See e.g. Jason Samson & Mike Madden, "Entrench the Bench! Canada's Pressing Need for a Permanent Military Court" (2009) 55 *Crim LQ* 215.

⁷⁵ *Supra*, note 42, s 165.191-165.193.

⁷⁶ *Supra*, note 46, 108.07.

⁷⁷ *Supra*, note 42, s 163(1)(a). See also *ibid* 108.06.

⁷⁸ *Ibid*, s 163(1)(b). See also *ibid*.

⁷⁹ *Ibid*, 109.05(1).

Once received, she will complete a post charge review to ensure that all elements of the offences charged are founded in evidence. She will also examine any relevant defences and *Charter* applications that could impact the reasonable prospect of conviction standard.⁸⁰ This would include any issues related to fitness⁸¹ and/or a defence of mental disorder.⁸²

Simultaneously, the accused will be assigned a military defence legal officer from the Directorate of Defence Counsel Services (DDCS). This officer will request full disclosure from the prosecutor and begin to build her defence. The defence counsel will ordinarily have access to psychiatric assessments, social work evaluations and other relevant evidence in order to determine whether a defence of mental disorder⁸³, a fitness hearing⁸⁴, or a partial mental health defence to mitigate sentence is warranted. There is no formal pre-sentencing report prepared⁸⁵; however the defence may call evidence that would be akin to this information. Because the prosecution would not have access to the accused's medical file, the defence counsel is in the best position to ensure that relevant medical information is brought to the court's attention. Still, this requires the consent of the accused, which may not be forthcoming due to stigma and career implications.⁸⁶

⁸⁰ "Director of Military Prosecutions Policy Directive 003/00: Post-Charge Review" (18 March 2009), online: National Defence and the Canadian Forces, <<http://www.forces.gc.ca/jag/publications/cmpps-scpm/policy-politiques-003-eng.pdf>>.

⁸¹ *Supra*, note 42, s 198.

⁸² *Ibid*, s 202.13.

⁸³ *Ibid*.

⁸⁴ *Ibid*, s 198.

⁸⁵ Notwithstanding the absence of a formal pre-sentencing report, the Prosecutor shall provide the court with sentencing information. See *supra*, note 46, 112.51 and 111.17.

⁸⁶ See e.g. Greg Passey, "Mental health, a mounting priority in the Canadian Forces", online: (2009) 5:1 *Canadian Psychiatry Aujourd'hui* <<http://publications.cpa-apc.org/browse/documents/448>>: "The fear of discrimination, career implications, and lack of insight resulted in significant numbers of military personnel never coming

In addition to counsel, the military judge will also assess whether the accused is fit to stand trial during their interactions in court.⁸⁷ The court may also ask questions with respect to matters that touch on the accused's mental health, whether this would be related to fitness, responsibility or mitigation.

Once an accused is sentenced or acquitted, the military tribunal ceases to exist. It currently does not assume a supervisory function, like a civilian PSC.⁸⁸ Often, offenders with PTSD are sent to the CFSPDB.

1.2.1.3 Canadian Forces Service Prison and Detention Barracks

If an offender is incarcerated, they may serve part or all within the CFSPDB or a civilian prison.⁸⁹ Both prison systems offer psychological counselling; however the CFSPDB staff arguably should have more expertise in dealing with veterans suffering from combat related mental disorders.⁹⁰ Ordinarily, the CFSPDB uses military psychiatrists from CFB Edmonton to treat its inmates.

forward for assessment or treatment. Attempts to screen for Operational Stress Injuries (a military term for all mental health diagnoses related to military duty, but mainly point to PTSD and depression) were not as successful as possible because personnel would often not answer truthfully for obvious reasons.”

⁸⁷ *Supra*, note 42, s 198(2).

⁸⁸ Office of Justice Programs, “Specialized Courts” *National Institute of Justice* (2 May 2012), online: <<http://www.nij.gov/topics/courts/specialized-courts.htm>>: “The scope of criminal court research and evaluation has grown with the advent of specialized or problem-solving courts. Examples of specialized courts include drug courts, mental health courts, domestic violence courts and reentry courts. Specialized courts differ from traditional courts in that they focus on one type of offense or offender. Usually the judge plays an intensive supervisory role. Other criminal justice components (e.g., probation) and social services agencies (e.g., drug treatment) are involved and collaborate closely in case processing.” [Emphasis mine]

⁸⁹ *Supra*, note 42, s 220. See also *supra*, note 46, ch 114.

⁹⁰ The Canadian Press, “Victim's family wants soldier jailed, dismissed” *CTV News* (28 September 2009), online: BellMedia

Unfortunately, if the offender is undergoing treatment for OSIs, incarceration will result in an interruption in the continuity of care, unless the member is with an Edmonton-based unit. There is significant debate on the propriety of changing healthcare providers during OSI management and its impact on treatment progress.⁹¹

Further, the CFSPDB regime is much stricter than civilian prisons and induces stress harsher than basic training.⁹² Basic training is geared towards inducing stress to prepare for combat. For those suffering from combat induced PTSD or an OSI, incarceration at CFSPDB may be problematic and further complicate the medical condition.⁹³ Corrections studies have shown that boot camps and control or punishment

<http://www.ctv.ca/CTVNews/CTVNewsAt11/20090928/wilcox_sentence_090928/>: " 'All inmates at the Canadian Forces Service Prison and Detention Barracks are provided with professional and timely medical and mental health care,' the spokesman said in an email. [...] 'In addition to these services, all inmates also receive regular visits, twice weekly, by the base chaplain to provide for the inmates' spiritual counselling needs.'"

⁹¹ See e.g. John P. Wilson, Matthew J. Friedman, & Jacob D. Lindy, eds, *Treating Psychological Trauma and PTSD*, (New York: The Guilford Press, 2001) at 270: "It is important that psychiatrists or therapists taking the history provide an ongoing relationship. There is no place for separation of evaluation and treatment. There is no safety in telling a difficult story to one provider only to be switched to another. The therapist must be consistent throughout the treatment." [Emphasis mine]

⁹² Mary Ellen Lamb, "Prison rehabilitates soldiers gone astray" *Canadian Army* (7 August 2006), online: National Defence <<http://www.army.forces.gc.ca/land-terre/news-nouvelles/story-reportage-eng.asp?id=1190>>: "The Canadian Forces Service Prison and Detention Barracks are not like regular prisons. Prisoners do not have an easy lifestyle; they are busy performing drills, training and receiving counseling from dawn to dusk. When they first arrive, they are allowed basic rights such as eating and sleeping, but no extra privileges such as talking, interacting with fellow prisoners, smoking, watching television, reading, or making phone calls are allowed. [...] It's a very controlled military atmosphere [...] The worst behaviour usually seen is a prisoner refusing to do the work. If this happens, the prisoner is sent to solitary confinement."

⁹³ *Supra*, note 38: "[B]eing in prison requires a person to be constantly vigilant regarding the threat of violence, an individual with PTSD who is in prison can be profoundly retraumatized and his or her PTSD symptoms may be exacerbated to the point where he or she will act out with violence. [...] In fact, because prison life may retraumatize a person, a lengthy incarceration will likely seriously exacerbate PTSD symptoms and cause the person's level of functioning to deteriorate."

oriented programs do not work for the general population in reducing recidivism or criminogenic factors.⁹⁴

There are currently no diversion, alternative measures or PSC available within the military justice system that would create treatment options as opposed to incarceration. The judicial supervision required of a PSC may be difficult in an *ad hoc* court martial system that requires the convening authority to convene courts under a strict regulatory process. Still, this issue could be resolved by moving to a permanent court system.⁹⁵ Regardless, the problem is not insurmountable and a solution should be canvassed to ensure both serving and released veterans are treated fairly and equally. Currently, a veteran before the civilian justice system may have additional options, including treatment focused judicial monitoring.

1.2.2 The Released Members' Experience

A mentally ill member who is released from the Canadian Forces will no longer be subject to the *Code of Service Discipline*.⁹⁶ However, their OSI-fuelled behaviour will be still subject to the jurisdiction of the civilian courts of the province or territory in which they find themselves. Further, the legislative regime governing their conduct differs from the *NDA*.

⁹⁴ See e.g. "IPP - Criminogenic Needs" *Ohio Department of Rehabilitation and Correction* (16 March 2006), online: ohio.gov, <http://www.drc.ohio.gov/web/ipp_criminogenic.htm>.

⁹⁵ See e.g. *supra*, note 74.

⁹⁶ *Supra*, note 42, s 60.

1.2.2.1 Legislation Governing Civilian Courts

There is currently no specific civilian legislation related to defences or alternative measures for OSIs. There are general provisions provided for mental illness which cover the spectrum of no responsibility to mitigation. There are also provisions for alternative measures. A brief discussion on the options in civilian legislation is helpful to understand how veterans with OSIs are treated by civilian courts.

The law and procedures available to an accused person who has experienced a mental disorder at the time of the alleged offence are legislated in the *Criminal Code*.⁹⁷ For the most part, these provisions relate to fitness and criminal responsibility and mirror similar provisions in the *NDA*.⁹⁸ The legislation is premised on a common law rule from the famous *M'Naghten's* case⁹⁹ which has been part of our legal culture for almost 170 years.

In particular, the term mental disorder is defined in the *Criminal Code* as “a disease of the mind [and] imports the terminology used to define insanity under previous provisions of s. 16”.¹⁰⁰ Subsection 16(1) of the *Criminal Code* expressly states that “No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong”.¹⁰¹ [Emphasis mine]

⁹⁷ *Criminal Code*, RSC 1985, c C-46 s 16, 672.1-672.95.

⁹⁸ See e.g. *supra* note 42, s 2, 198, 200, 202.13, and 202.14.

⁹⁹ (1843) 10 C & F 200, 8 ER 718.

¹⁰⁰ *Supra*, note 97, s 2.

¹⁰¹ *Ibid*, s 16(1).

The *Criminal Code* also sets out in detail the administrative procedure in dealing with offenders who committed the act, but are not to be held criminally responsible or those who are not fit to stand trial. These legislative provisions may be relevant to veterans with PTSD or OSIs who are tried in the civilian system by civilian judges.

The leading civilian case on combat induced PTSD in Canada comes from a unanimous decision of the Manitoba Court of Appeal in *R. v. Borsch*.¹⁰² This was a case where a soldier who had served in Bosnia between 1991 and 1994 was diagnosed with PTSD. He reported having witnessed the rape of a young girl and having killed the aggressor during combat. He was plagued with nightmares associated with this experience and others associated with his tour of duty. He was exposed to “ethnic cleansing”, and was under constant threat of death from snipers and artillery fire. He had been divorced twice since returning from deployment and had a comorbid diagnosis which included addictions. On July 27th, 2004, he broke into a house in his neighbourhood and sexually assaulted a 13 year old girl at knife point. During the attack, he threatened to kill her. At trial, numerous experts were called, with varying positions as to whether or not the accused was in a dissociative state at the time of the offence. Ultimately, the trial judge found that he was not criminally responsible because he was in a dissociative state related to his combat induced PTSD. On appeal, the decision was overturned and a new trial was ordered because the trial judge failed to provide adequate reasons.

¹⁰²2007 MBCA 111. Leave to appeal to the Supreme Court of Canada dismissed: [2007] SCCA 580 (QL).

The Manitoba Court of Appeal found that PTSD is a mental disorder as defined in s. 2 of the *Criminal Code*.¹⁰³ Further, they found that PTSD can cause a dissociative state. They wrote that “a person committing a wrongful act while truly in a dissociative state caused by PTSD, [...] would generally not appreciate the nature and quality of the act being committed or know it was wrong”.¹⁰⁴ The Court clarified that the majority of persons suffering from PTSD would likely never enter into dissociative states; thereby suggesting it was rare – but possible.¹⁰⁵

Leave to appeal was sought to Canada’s top court; however, this was denied.¹⁰⁶ The legacy of the *Borsch* decision seems to be formal recognition that an NCR defence for combat related PTSD is possible when an accused is found to be in a dissociative state. Arguably, fitness could equally be impacted by combat induced PTSD.¹⁰⁷ The

¹⁰³ *Ibid*, para 75. See also *supra* note 97, s 2: “In this Act, [...] “mental disorder” means a disease of the mind”.

¹⁰⁴ *Ibid*, para 75.

¹⁰⁵ *Ibid*, para 95. See also *R. v. Bouchard-Lebrun* 2011 SCC 58, [2011] 3 S.C.R. 575: “Thus, criminal responsibility will not be imposed if the accused gives an excuse for his or her act that is accepted in our society, in which there is a ‘fundamental conviction that criminal responsibility is appropriate only where the actor is a discerning moral agent, capable of making choices between right and wrong’ [...] In *Ruzic* the Court recognized the existence of a principle of fundamental justice that ‘only voluntary conduct – behavior that is the product of a free will and controlled body, unhindered by external constraints – should attract the penalty and stigma of criminal liability [...]’” While *Bouchard-Lebrun* did not mention PTSD and was more pre-occupied with self-induced psychosis, some comments on the issue of criminal responsibility have application for veterans with OSIs.

¹⁰⁶ “Supreme Court of Canada: Bulletin of Proceedings” *Office of the Registrar of the Supreme Court of Canada* (4 April 2008) 517 at 522, online: <<http://scc.lexum.org/en/bulletin/2008/08-04-04.bul/08-04-04.bul.pdf>>. See also *R. v. Borsch*, 2007 SCCA 580 (QL).

¹⁰⁷ See e.g. International Criminal Tribunal for the former Yugoslavia, Press Release, CC/PIO/096-E “Erdemovic case: pre-sentencing hearing postponed” (4 July 1996), online: UN ICTY <<http://www.icty.org/sid/7330>>: “The [accused] has been found insufficiently able to stand trial at this moment because of a post-traumatic stress disorder”.

military and civilian processes with respect to fitness and NCR are almost identical.

Where the gaps between the two begin, as will be seen, is in treatment based approaches to mental illness.

The *Borsch* case highlights how inadequately-treated veterans with OSI can become caught up in civilian justice processes and how the system may deal with it. Using NCR and fitness legislation to acquit is one mechanism that may be used by Canadian justice officials. Unfortunately, this does little to address the root cause.

In addition, the *Criminal Code* provides for alternative measures in dealing with offenders who have mental disorders or some secondary disorders related to combat. Alternative measures are defined as “measures other than judicial proceedings under this Act used to deal with a person who is eighteen years of age or over and alleged to have committed an offence”.¹⁰⁸ There is no such provision in the *NDA*. In fact, neither the words “diversion”, nor “alternative measure” exist in the *Code of Service Discipline*. This gap or omission in the justice process creates a significant disparity in how a released and serving veteran suffering from PTSD, OSI and/or TBI is dealt with. The most significant civilian alternative measures available to a mentally and emotionally injured veteran include diversion to a MHC or DTC.

¹⁰⁸ *Supra*, note 97, s 716-717. Note that the provisions cited are general provisions for alternative measures and do not specify mental disorders or veterans. Still, these provisions have been the basis for the creation of civilian mental health courts or other PSCs, which have processed veteran offenders suffering from mental disorders and OSIs.

1.2.2.2 Mental Health and Drug Treatment Courts

Civilian MHCs and DTCs are based on therapeutic principles.¹⁰⁹ The aim is to break the cycle of crime and reduce recidivism by addressing the root problem of the criminal behaviour.¹¹⁰ Reducing recidivism and instilling discipline is a primary purpose of military justice.¹¹¹

The first Canadian DTC was established in Toronto, Ontario on 1 December 1998.¹¹² “There are [now] 6 federally-funded DTC pilot sites operating in Canada: Toronto, Vancouver, Edmonton, Winnipeg, Ottawa and Regina”.¹¹³

Similarly, MHCs have also been established in various jurisdictions throughout Canada.¹¹⁴ While they have varying degrees of criteria for eligibility, the focus is the

¹⁰⁹ Natasha Bakht, “Problem Solving Courts as Agents of Change” *International Association of Drug Treatment Courts* at 2, online: *IADTC* <<http://www.iadtc.law.ecu.edu.au/pdfs/Problem%20Solving%20Courts%20Paper%20final%20ppr.pdf>>: “The dispute resolution model of problem-solving courts is founded upon the principles of therapeutic jurisprudence [....]”

¹¹⁰ *Ibid.*, at 24: “These courts exemplify the underlying principles of therapeutic jurisprudence and restorative healing in that they are intent upon dealing with the root causes of the criminal activity, offering treatment and counseling where needed in the case of both victims and accused persons.” [Emphasis mine]

¹¹¹ *The Report of the Somalia Commission of Inquiry*, vol 5 (Ottawa: Public Works and Government Services Canada, 1997), online: <<http://www.dnd.ca/somalia/vol5/v5c40be.htm>>: [T]he military justice system is also designed to promote strict discipline [....]”

¹¹² Paul Bentley, “Canada’s First Drug Treatment Court” (2000) 31 CR (5th) 257 at 260.

¹¹³ *Supra*, note 6.

¹¹⁴ See e.g. “Nova Scotia Department of Justice: Nova Scotia Mental Health Court Project” *Nova Scotia Canada* (20 March 2012), online: Province of Nova Scotia <http://www.gov.ns.ca/just/mental_health_court.asp>: “A specialized Mental Health Court, the first of its kind in Nova Scotia, will hold its first seating on November 5, 2009.” See also, “About Mental Health Court” *Mental Health Court Canada*, online: 2003 Mental Health Court Canada <<http://www.mentalhealthcourt-sj.com/home.html>>: “Mental Health Court is the name used to identify an innovative process of the Provincial Court of New Brunswick currently operating in the City of Saint John.” See also, The Canadian Press, “Manitoba creates mental health court” *CBC News* (7 June 2011), online:

same: treatment rather than proliferating cycles of incarceration.¹¹⁵ In 2010, the Standing Committee on Public Safety and National Security was concerned about “what appears to be an insufficient use of mental health courts and its impact on the provincial and federal correctional systems”.¹¹⁶ The Committee suggests that offenders with mental health problems serve more time because of the difficulty of adapting to the prison environment and are at increased risk to exhibit inappropriate or violent behaviours.¹¹⁷ The report recommends “that the federal government support the creation and funding of more [...] mental health courts to divert those with mental health needs to appropriate services”.¹¹⁸

Both DTCs and MHCs use a collaborative approach in dealing with offenders. The multi-disciplinary team consists of the judge, the prosecutor, the defence lawyer(s), social workers, mental health nurses, probation officers, psychiatrists, physicians, and other treatment providers all working together with a coordinated strategy in order to ensure the offender complies with the treatment plan, while ensuring public safety. Counsel do not act in an adversarial fashion, but rather act collaboratively in the interests

cbc.ca <<http://www.cbc.ca/news/canada/manitoba/story/2011/06/07/mb-mental-health-court-manitoba.html>>.

¹¹⁵ “Mental Health Diversion and Court Support” *Canadian Mental Health Association Ontario*, online: CMHA Ontario <<http://www.ontario.cmha.ca/justice.asp?cID=5445>>: “The objective is to secure appropriate mental health services without invoking the usual criminal justice control of trial and/or incarceration.”

¹¹⁶ House of Commons, Standing Committee on Public Safety and National Security, *Mental Health and Drug and Alcohol Addiction in the Federal Correctional System* (December 2010) (Kevin Sorenson), online: <<http://www.parl.gc.ca/content/hoc/Committee/403/SECU/Reports/RP4864852/securp04/securp04-e.pdf>>.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

of treatment, the goal being to address the root cause of criminality. The judge moves from a detached impartial role to one of an empathetic counsellor.¹¹⁹

The requirements for participation in and administration of alternative measures are set out in the *Criminal Code*.¹²⁰ Most importantly, there must be informed consent by an accused. This ordinarily requires ongoing consent for court officials to access offender medical information until they “graduate” from the program. Referral to an MHC or DTC can be made by a judge, prosecutor, probation services, police, community services official or at the request of the defence. Ordinarily, the Prosecution must consent to transfer to these courts. This allows for the Crown to weigh the public interest and safety in a given case.

Eligibility for these courts varies by jurisdiction. In Nova Scotia, for example, the Nova Scotia MHC is a voluntary based program for adults. In order to access this court, the offender must have a mental disorder and there must be a significant connection between the disorder and the offence. Further, the offender must voluntarily undergo a clinical psychiatric assessment and accept responsibility for the offence. Further, the Crown Prosecutor must consent to the offender’s access to this program.¹²¹

There are various phases that an offender must go through before being accepted and graduating the PSC programs. For example, a Nova Scotia released veteran (or anyone) who is referred to the MHC will go through four phases: the appearance, the screening, the assessment, and the program. The appearance occurs when the originating

¹¹⁹ *Supra*, note 109 at 9.

¹²⁰ *Supra*, note 97, s 717.

¹²¹ “Mental Health Court Program Overview” *Nova Scotia’s Mental Health Court Program*, online: Nova Scotia Justice <http://www.gov.ns.ca/just/global_docs/MHC_Overview-EN.pdf>.

judge is advised of potential eligibility and decides to refer to the MHC. At that point, the information notes the referral and the matter is adjourned for a couple of weeks while the accused consults with counsel. If the accused agrees, she will endorse consent and release documents in order for the MHC team to review their personal information.¹²² It should be noted that often the forms are only endorsed after a first appearance before the MHC. At this point, the collaborative team will screen the candidate for eligibility and informed consent. Further, at this stage, the prosecution can veto an eligible consenting candidate.¹²³ Should the accused be ineligible or choose not to participate, she may choose to be sentenced by the Provincial Court judge in order to expedite the process or she may choose to be referred back to the originating court. The legislated jurisdiction of the civilian judge¹²⁴ allows her to maximize efficiencies by flexibly moving from alternative measures to sentencing when appropriate, without the convening orders and related bureaucratic processes required in the military justice system.

Should an accused be eligible and provide the requisite consents, they will be assessed by MHC treatment professionals on the multi-disciplinary team in order to determine their needs. Following the assessment, an individualized treatment program is developed and implemented under the close supervision of the MHC. The frequency of appearances is tailored to the participants. The supervision of the court allows the sanctioning of participants who do not follow the treatment plan. Sanctions can include increased supervision, conditions, detention or expulsion from the program. Successful completion of the treatment intensive program would usually mean that the accused

¹²² *Ibid.*

¹²³ It is noteworthy that there is currently no Nova Scotia Public Prosecution policy on how this discretion is exercised.

¹²⁴ *Provincial Court Act*, RSNS 1989, c 238, s 7.

would have outstanding charges withdrawn.¹²⁵ This would allow the individual before the court to avoid having a criminal record, which could have otherwise further limited employment opportunities and successful reintegration into civilian society.

Studies of both the Canadian and American experience suggest that the benefits of participating in a MHC or DTC include: increased access to mental health and addictions services;¹²⁶ improved ability to function independently; reduced substance abuse,¹²⁷ decreased use of crisis intervention services¹²⁸ and improved quality of life.¹²⁹ Overall, studies suggest that there is a lower rate of recidivism.¹³⁰ These lower rates appear to be

¹²⁵ *Supra*, note 121.

¹²⁶ See e.g. Roger A. Boothroyd et al, “The Broward Mental Health Court: process, outcomes, and service utilization”, online: (2003) 26 *Int’l J L & Psychiatry* 55 at 70 <http://www.floridatac.org/files/document/MHC_Jan03_Boothroyd.pdf>: “Our findings suggest that [...] at least in comparison to a traditional misdemeanor court, the Broward County MHC enhances treatment access and involvement for a substantial number of defendants appearing before it.” [Emphasis mine]

¹²⁷ Council of State Governments Justice, “Mental Health Courts: A Primer for Policymakers and Practitioners” *Bureau of Justice Assistance* at 14, online: U.S. Department of Justice <https://www.bja.gov/publications/mhc_primer.pdf>: “Mental health court participants improved their independent functioning and decreased their substance use compared with individuals who received treatment through the traditional court process.” See also M. Cosden et al, “Evaluation of a Mental Health Treatment Court with Assertive Community Treatment,” (2003) 21 *Behav Sc & L* 415.

¹²⁸ *Ibid.* See also Mary Ann Campbell, Crystal Grass & Jeff Karabanow, “Prospective Evaluation of the Nova Scotia Mental Health Court Program: Phase I Research Proposal” (13 April 2012) [unpublished].

¹²⁹ *Ibid.*

¹³⁰ Dale E. McNeil & Renée L. Binder, “Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence”, online: (2007) 164 *Am J Psychiatry* 1395 <<http://ajp.psychiatryonline.org/article.aspx?articleid=98922>>: “These results support the effectiveness of a mental health court in reducing the involvement of persons with mental disorders in the criminal justice system. [...] Mental health court participants showed a longer time without any new charges or new charges for violent crimes compared with similar individuals who did not participate in the program. [...] Additional analyses showed that persons who graduated from the mental health court program maintained reduced recidivism after they were no longer under supervision of the court, in contrast to comparable persons who received treatment as usual.

even better for veteran offenders provided with specific combat related PTSD, OSI and TBI treatment and programs.¹³¹

In summary, a civilian, a released member or a serving member who is engaged by the civilian justice system may reap the benefits of the diversion to a mental health or drug treatment court. A similar diversionary process is not currently available in the military justice system. These courts provide substantial benefits to civilian and released veteran offenders, including treatment, rehabilitation and strategies to avoid criminal behavior and a criminal record. The benefits are further maximized when veteran-specific treatment is used. In addition, the civilian justice system also has other relevant alternative measures for civilians and released veterans suffering from PTSD, OSIs and TBIs.

¹³¹ See e.g. Robin Kemker, “Treatment Courts Help Veterans Help Themselves” *The Epoch Times* (31 March 2012), online: <<http://www.theepochtimes.com/n2/united-states/treatment-courts-help-veterans-help-themselves-213274.html>>: “The Buffalo Veterans Court program reported an initial two-year zero recidivism rate, while the national general prison three-year recidivism rates are about 65 percent. [Emphasis mine] See also, Elizabeth Evans, “Veterans treatment court saves taxpayer money, is right thing to do, officials say” *National Drug Court Resource Center*, online: <<http://www.ndcrc.org/content/veterans-treatment-court-saves-taxpayers-money>>: “So far, the recidivism rate in the state's 10 veterans treatment courts is 1 percent.” Compare John Roman, Wendy Townsend & Avinash Singh Bhati, “Recidivism Rates for Drug Court Graduates: Nationally Based Estimates, Final Report” *U.S. Department of Justice* at 2, online: Caliber Associates and the Urban Institute <<https://www.ncjrs.gov/pdffiles1/201229.pdf>>: “The study estimates that within one year after graduation, 16.4 percent of drug court graduates had been arrested and charged with a serious offense. Within two years, the percentage rises to 27.5 percent. These estimates represent the expected outcomes for those who succeed in drug court.” Compare Deborah Becker, “Mental Health Courts’ Strive To Provide Treatment Instead Of Jail Time” *90.9 wbur Boston’s News Station* (23 April 2012), online: [wbur.org](http://www.wbur.org) <<http://www.wbur.org/2012/04/23/mental-health-courts>>: “Most studies suggest a recidivism rate of between 17 and 20 percent — which is less than half of traditional court [...]” A quantitative analysis and detailed comparison of recidivism rates in the military, civilian courts and PSCs are beyond the scope of this paper. Still, the authorities suggest that VTCs and treatment based approaches reduce recidivism rates among veteran offenders.

1.2.2.3 Other Alternative Measures

Other PSC or alternative measures that may be available to civilians or released veterans in the civilian justice system include: domestic violence courts (DVC)¹³² and adult alternative measures agreements.¹³³

DVCs are PSCs that try to treat the root problem of domestic or family violence, as opposed to incarcerating offenders. “The victim wants the violence to stop but might want everything else to continue and a specialized court model can address those issues.”¹³⁴ There are currently DVCs in Manitoba, Ontario, Alberta, Yukon, Saskatchewan, New Brunswick, Newfoundland and Labrador and Nova Scotia. “Different jurisdictions have chosen different models of specialized courts. [...S]ome models allow early intervention for low-risk offenders, some use a therapeutic court option, and most prosecute severe and repeat offenders vigorously”.¹³⁵

Studies suggest that veterans diagnosed with PTSD, OSIs or TBIs are more at risk to commit domestic violence.¹³⁶ The Canadian military justice system will ordinarily

¹³² See e.g. “Alternative Measures Program”, online: Government of Saskatchewan <<http://www.cpsp.gov.sk.ca/Default.aspx?DN=c1005a11-0baa-430c-a01c-09446b7abcb5>>.

¹³³ See e.g. “Adult Alternative Measures Program”, online: Government of Alberta, <http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/AdultAlternativeMeasuresProgram.aspx>.

¹³⁴ Mary-Ellen MacIntyre, “Domestic violence court aims to stop abuse” *Herald News* (12 March 2012), online: *The Chronicle Herald.ca* <<http://thechronicleherald.ca/novascotia/72633-domestic-violence-court-aims-stop-abuse>>.

¹³⁵ “Domestic Violence Courts in Canada” (March 2009), online: Public Health Agency of Canada <<http://www.phac-aspc.gc.ca/ncfv-cnivf/EB/eb-Mar-2009-eng.php#article>>.

¹³⁶ Jessica Martin, “A growing problem for veterans – domestic violence: Treatments for PTSD and domestic violence are very different; effective collaboration needed” *Newsroom* (6 November 2008), online: Washington University in St. Louis <<http://news.wustl.edu/news/Pages/12902.aspx>>: “The increasing number of veterans with posttraumatic stress disorder (PTSD) raises the risk of domestic violence and its

refer cases of domestic violence to civilian courts, when possible, because it does not have sufficient victims' services to deal adequately with this issue. Regardless, it is important to point out that some released members who are at higher risk of committing domestic violence due to their injuries may have access to DVCs, which could specifically treat the injured offenders as opposed to incarcerate them. As previously mentioned, incarcerating these injured veterans may simply aggravate symptoms. Further, there are calls by veteran advocates to incorporate DVCs into the "Veterans Treatment Courts" (VTC) now in numerous jurisdictions within the United States.¹³⁷ Unfortunately, the civilian Canadian DVCs also currently lack the context of military service and related veterans' programs that may be beneficial in designing treatment plans for offenders and their families. Specific programs related to combat veteran treatment have demonstrated results in lower recidivism rates regardless the offence.¹³⁸

Similarly, Adult Alternative Agreements or Programs are also a diversion process available to members or veterans that find themselves before Canadian civilian justice. These are designed to "promote reparation and reconciliation. [...It] provides the opportunity for young persons/adult offenders to acknowledge what they have done and

consequences on families and children [...] Community responses to domestic violence must be adapted to respond to the increasing number of veterans with PTSD."

¹³⁷ Samantha A. Torrence, "Military wife becomes champion for Veterans with PTSD" *Digital Journal Reports* (24 March 2012), online: digitaljournal.com <<http://digitaljournal.com/article/321735>>: "Shawn wants established Veteran's Courts to include cases of Domestic Violence due to PTSD to help give caretakers a tool to keep themselves safe without forcing them to betray or harm their veterans. The Veteran's Courts would have the option of giving the veteran an ultimatum to seek treatment for PTSD or choose to go to jail. The option of seeking treatment can empower a spouse to help their veterans. Shawn said if Veteran's Courts had been established for Domestic Violence cases Justin may have received treatment years earlier and saved much heartache for her family."

¹³⁸ *Supra*, note 131.

to work at making amends, thereby avoiding a criminal record.”¹³⁹ There is no such opportunity for serving veterans in the military justice system. Ordinarily, matters such as remorse, restitution or other forms of reparation are only taken into account post-conviction at sentencing.

In the first Canadian Mental Health strategy,¹⁴⁰ one recommendation for action was increasing “the availability of programs to divert people living with mental health problems and illnesses from the corrections system, including mental health courts and other services and supports for youth and adults.”¹⁴¹ Without these programs of diversion, many mentally ill veterans will be convicted and sentenced, whether by the military or civilian justice system.

1.2.2.4 Sentencing

The sentencing regime in the civilian system is currently much more flexible in dealing with mentally ill offenders. The existing justice infrastructure provides judges the ability to impose probation to ensure appropriate conditions, monitoring and supervision. Probation allows the court to impose conditions on an offender while she is in the community.¹⁴² This permits reasonable controls over the offender in the interests of

¹³⁹ “Alternative Measures Program (Adult): Extra Judicial Sanctions Program (Youth)”, online: Government of New Brunswick <http://www2.gnb.ca/content/dam/gnb/Departments/ps-sp/pdf/Publications/AM_&_ES_Program-e.pdf>.

¹⁴⁰ Mary Bartram et al, “Changing Directions Changing Lives: The Mental Health Strategy for Canada” *Mental Health Commission of Canada* (2012), online: <<http://strategy.mentalhealthcommission.ca/pdf/strategy-text-en.pdf>>.

¹⁴¹ *Ibid*, at 38.

¹⁴² See e.g. “Correctional Services: Community Corrections: Probation” *Ontario Ministry of Community Safety & Correctional Services* (27 March 2009), online: Queens Printer for Ontario

public safety and/or rehabilitation. In addition, there is a further civilian court ability to impose an absolute discharge for some deserving offenders. Neither of these options is currently open to serving members in the military justice system. It should be noted that there is currently legislation before Parliament to provide for absolute discharges and restitution.¹⁴³ The restitution component is part of a sentence post-conviction and the absolute discharge legislation provides no authority to the military judge to order or monitor treatment.

It should also be pointed out that in order for civilian probation to be effective, there must be adequate treatment options for veterans with PTSD, OSI and/or TBI. These offenders often suffer from a comorbid diagnosis which includes addictions. According to the BC Court of Appeal, “[w]ithout treatment to back up the admonitions, such orders will often do the opposite to what is intended -- create a simple path to reoffending [...]”¹⁴⁴ The same is true for absolute or conditional discharges.

Veterans require access to mental health services tailored to their specific needs. There are currently support groups and other related services available through Veterans

<http://www.mcscs.jus.gov.on.ca/english/corr_serv/comm_corr/probation/probation.htm>: “Probation is a court disposition that authorizes the offender to remain at large in the community subject to conditions prescribed in a probation order.”

¹⁴³ Bill C-15, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess, 41st Parl, 2011, cl 62 (first reading 7 October 2011), online: Parliament of Canada

<<http://parl.gc.ca/HousePublications/Publication.aspx?Docid=5166437&file=4>>.

¹⁴⁴ “Addicts, mentally ill need help, not jail time: The B.C. Court of Appeal issued a plea to Victoria on Friday to improve treatment resources for mentally ill and addicted recidivists who are clotting up the criminal legal system” *The Vancouver Sun* (26 November 2007), online: canada.com

<<http://www.canada.com/vancouvernews/news/westcoastnews/story.html?id=1959e189-637e-462d-bf48-6ef7af0fe63c>>.

Affairs.¹⁴⁵ Civilian justice officials need to know about the treatment and community based programs available in order to craft appropriate probation orders optimally tailored to veterans. Further, civilian justice officials would benefit from knowledge of programs and interface with military and/or Veterans Affairs officials in preparing pre-sentencing reports.

Sentencing before a military tribunal is strictly governed by statute and regulations. At summary trial, the available punishments are listed in the regulations and vary depending on the Presiding Officer and other factors, including monthly pay.¹⁴⁶ At courts martial, the range of punishments is listed in the *NDA*.¹⁴⁷ Possible punishments range from dismissal with disgrace, dismissal, incarceration, reduction in rank, forfeiture of seniority, severe reprimand, reprimand, fines, or minor punishments. Minor punishments include things such as extra work and drill or confinement to barracks or ship and stoppage of leave.¹⁴⁸ The available punishments under the *Code of Service Discipline* seem to work from the premise or assumption that no offender will need to be followed with treatment or community services – something probation might assist with.¹⁴⁹ The “able-bodied assumption” is consistent with the stigma attached to disability in the military – particularly mental disability.¹⁵⁰ Despite the best efforts by military

¹⁴⁵ See e.g. “Network of Operational Stress Injury Clinics”, online: Veterans Affairs Canada <<http://www.veterans.gc.ca/eng/mental-health/support/osi-clinics-support#clinics-list>>.

¹⁴⁶ See e.g. *supra*, note 46, 108.24-108.26.

¹⁴⁷ *Supra*, note 42, s 139. See also, *ibid*, 104.02.

¹⁴⁸ *Ibid*, 104.13.

¹⁴⁹ See e.g. *supra*, note 140: “Provide appropriate mental health services, treatments and supports in the youth and adult criminal justice system, and ensure that everyone has a comprehensive discharge plan upon release into the community”. [Emphasis mine]

¹⁵⁰ See e.g. Dianne Pothier & Richard Devlin, “Introduction: Toward a Critical Theory of Dis-Citizenship” in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory*:

judges to use their sentencing toolbox to craft appropriate sentences for a growing number of OSI stricken offenders, the differences for individual veterans before civilian or military courts can be significant.

Bill C-15 is currently before the legislature. If passed, it would clearly articulate the objectives of sentencing in the military justice system. This would include rehabilitating offenders and assisting them to reintegrate into military service.¹⁵¹ Still, there are no provisions that tangibly ensure treatment for mentally ill offenders in order to address the root cause of misconduct. According to Seamone, the absence of a diversionary treatment based process within the military justice regime “undermines the stated sentencing philosophy of rehabilitation of the offender”. By contrast, the civilian justice system has taken more tangible steps to put the stated philosophies into action.

1.2.3 Comparing the Differences and its Impact

While the differences between the military justice system and the civilian system may appear minor on the surface, there remain some stark contrasts for many mentally ill offenders. As highlighted above, the most significant variance includes the absence of alternative measures within the military justice system that would allow a veteran to focus on treatment as opposed to possible incarceration.

Essays in Philosophy, Politics, Policy and Law (Vancouver: UBC Press, 2006) 1 at 13: “[I]t is the pervasive impact of ableist assumptions, institutions, and structures that disadvantage persons with disabilities.” See also “Military launches mental health awareness campaign” *CBC News* (25 June 2009), online: cbc.ca <<http://www.cbc.ca/news/canada/story/2009/06/25/military-campaign025.html>>: “Canada's chief of defence kicked off an awareness campaign Thursday to try to lessen the stigma attached to mental illness in the military and encourage troubled soldiers to come forward.”

¹⁵¹ *Supra*, note 143.

Veterans have made numerous sacrifices for the Canadian Forces, but some were seriously injured in the process. Their injuries have caused some to have behavioural problems, which are known secondary effects of the injuries.¹⁵² These behavioural problems have attracted disciplinary or criminal attention. Despite being promised that they would be taken care of if injured from recruiting through to departure,¹⁵³ they are now being prosecuted in front of their peers, demoted, reprimanded, fined and facing incarceration. The impact on trust and morale for the individual affected and close colleagues can be devastating.

More importantly, when soldiers see other veterans not being looked after as promised, this can have a negative impact on morale, efficiency, discipline and ultimately operations. As a result, the objective of swift military justice to maintain discipline, morale and efficiency can actually do the exact opposite if disabled veterans are perceived to be treated unfairly by military tribunals as opposed to their civilian counterparts. Even the perception of unfair treatment can be devastating. If a military purpose exists to justify excluding diversion and treatment based sentences, then it needs to be clearly articulated and understood, so as to avoid impact to morale.

In order to better understand the stark differences in how veteran offenders are dealt with by the military justice system and the civilian justice system and the

¹⁵² See e.g. *supra*, note 37.

¹⁵³ See e.g. House of Commons, Standing Committee on National Defence, 41st Parl, 1st Sess, No 8 (25 October 2011) (Rear-Admiral Andrew Smith), online: Parliament of Canada

<<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5194465&Language=E&Mode=1>>: “When Canadian Forces members are injured or become ill, they must have confidence that they will receive the treatment and rehabilitation services necessary to restore them to health and that the needs of their families will be met. If they cannot resume military service, they must know that the Government of Canada will support them as they make new lives for themselves.”

subsequent impact on the individuals, a few hypothetical examples are helpful to provide context to the differences highlighted above.¹⁵⁴

Corporal (Cpl) A and B live and serve in Nova Scotia. Both have been deployed to Afghanistan and were diagnosed with PTSD. Both have secondary problems and are reporting blackouts, alcohol and drug addiction, anger management issues, flashbacks to combat, insomnia and depression. Prior to their deployment, they had no criminal or disciplinary record or mental issues. Post deployment, they became increasingly agitated. They were sent on anger management courses and addictions counselling. Both began having difficulties with their relationships and became administrative burdens within the unit. Leadership began to take administrative action against the two, as required under the regulations. Cpl A was posted to the Joint Personnel Support Unit/ Integrated Personnel Support Centres (JPSU/IPSC) because he could no longer work. Cpl B was allowed to continue working because her trade was in high demand.

Cpl A began to live with his mother. He could not manage his finances due to his addictions. His wife left him and he now pays child support. Within two months he was arrested for public intoxication. While being arrested on the second occasion, he kicked out the window of the police car and was charged with wilfully damaging property. As the blackouts progressed, so did his drinking. He attempted suicide on several occasions. On one evening, while at a friend's house, he was playing a computer game and "blacked out". He was not drinking at the time. When he woke up, he was in a police cruiser. He was advised that he began yelling and screaming while brandishing a weapon. When the police came, he threatened to kill them and himself. He was charged with multiple

¹⁵⁴ These two illustrations, while fictional, contain elements of typical real life examples.

offences, including uttering death threats to a police officer. He was remanded into civilian custody and referred for a forensic psychiatric examination. He was found fit to stand trial and was released on bail with conditions. His lawyer had the matter transferred to the MHC.

Once referred to the MHC, an intake assessment was completed by a mental health nurse. He also met with a probation officer and a social worker. All worked with a prosecutor and defence lawyer in order to devise an appropriate treatment plan in order to allow Cpl A to reintegrate into society, while keeping the public and himself safe. He was compelled to appear before the mental health court judge once every two weeks for six months and monthly thereafter for an additional year. On each occasion the judge would ensure treatment was followed, behaviour was acceptable and the risk to reoffend was acceptable. Cpl A attended psychological counselling, Alcoholics Anonymous, a PTSD peer support group and maintained constant contact with members of the multi-disciplinary team. He received employment retraining and housing assistance in conjunction with Veterans Affairs and the Department of Community Services. After 18 months, he graduated the MHC. He is currently employed in another profession and has no criminal record as a result of the incident. He has not reoffended.

Cpl B also became separated from her spouse. Her finances were also in a mess due to her addiction to cocaine. She began living on the base in single quarters. One day, during a routine checkpoint stop, she was arrested by the Military Police for possession of cocaine. Administrative measures were immediately started and release was being threatened. As a result of her addictions and nightmares, she was not sleeping properly. She continuously would show up 5-50 minutes late for work over a six month period. She

was tried summarily for Absence Without Leave on five separate occasions within four months. On the last occasion, she was sentenced to 2 days detention. On release from detention, she disappeared for one month and was reportedly living on the street. Cpl B was eventually picked up by the Military Police on a Commanding Officer's Warrant.¹⁵⁵ She assaulted the arresting officers and brandished a knife saying that she wanted them to shoot her. She was held in cells pending her court martial. During the trial, the accused admitted most particulars, but ran an NCR defence.¹⁵⁶ She was convicted and sentenced to imprisonment for ninety days and dismissed from the Canadian Forces. She now has a criminal record for multiple offences and has been released into the community with very little treatment. Her condition has reportedly worsened since incarceration, during which she underwent minor punishments for non-compliance within the CFSPDB. Upon release, she returned to the street, where she continues to reoffend. She was subsequently charged with assault with a weapon and is in a provincial holding facility facing a long period of incarceration. Her victim is in critical condition.

These two examples highlight the stark outcomes that can occur between civilian and military justice systems. Having a military justice PSC would help to bridge the gap between the two approaches and ensure that veterans are treated where appropriate as opposed to being punished for problems stemming from their combat injuries. The existing systematic punishment or corrections approach in military justice fosters recidivism for traumatized veterans. While the rates of recidivism may be statistically low within the military system due to rapid administrative release measures, the veterans

¹⁵⁵ *Supra*, note 42, s 157.

¹⁵⁶ *Ibid*, s 202.13.

who are left untreated become the burden of the civilian justice system – ultimately placing public safety at risk.¹⁵⁷

Further, the civilian justice system lacks the expertise and knowledge required to deal with the unique circumstances that veterans may find themselves in. As mentioned above, existing civilian PSC multi-disciplinary teams have little knowledge of military programs that are available through the military, Veterans Affairs, or other veteran non-profit organizations. It is imperative that key civilian justice players are provided with that information along with their key contacts so that they can properly tailor treatment programs, sentences or decisions for veterans - with an adequate understanding of their problems, backgrounds and the assistance available to them. This action needs to be taken now as there are currently more and more Canadian veterans who are struggling with the mental scars of war.

¹⁵⁷ *Supra*, note 2.

CHAPTER 2 THE SCOPE OF THE PROBLEM

This chapter will develop why this issue is relevant now by describing the scope of the problem for the Canadian Forces and the current challenges in detection and prevention of activities attracting military penal consequences. In addition, it will show that there are significant numbers of veterans anticipated to be suffering from OSIs and the correlative disciplinary or criminal behavior. It will also provide some relevant recommendations on improving the current justice systems for veterans.

In particular, the first section will examine the scope of the problem for the Canadian Forces by examining the current available numbers. This section will make two main arguments: conditions common to mental disorders are more likely to be found among those who have served in the military than in the general population, and those conditions are even more common among released veterans than among serving members. The section will also examine military culture. This is relevant because the existing culture in the Canadian Forces is impeding treatment and disclosure of mental illness among veterans; thereby exacerbating the problem. Finally, the last part of the first section will discuss military detection issues. The lack of effective systematic processes to detect mental illness among traumatized veterans adds to the problem.

The second section of this chapter will examine the impact of inadequately treated veterans on civil society. In particular, it will discuss the problem as it relates to public safety. Further, it will examine increased social problems that are associated with untreated traumatized veterans. In addition, this section will examine the impact of untreated veterans on civilian courts and prisons. Also, this section will try to quantify the actual cost of traumatized veterans on Canadian society.

Finally, a brief summary of relevant recommendations that have been generated by examining the scope of the problem will be provided at the conclusion of Chapter 2. These recommendations include: better data collection, tracking and analysis for veterans; more stringent policies that address mental health discrimination within the Canadian Forces; more extensive earlier training on OSIs for all military members; more specific training for military justice participants; the provision of elections to court martial regardless of the charge for mentally injured members; specific policy direction from key military justice officials on how subordinates are to deal with circumstances where mental illness is suspected, alleged or proven; the quantification of the actual costs of mentally injured veterans; and better focused treatment options within Canadian jails and prisons tailored to veterans who need to be incarcerated. These recommendations are collateral to the primary argument for a Canadian Military Justice Alternative Measures Process as detailed in Chapter 4.

2.1 THE SCOPE OF THE PROBLEM FOR THE CF

Traumatized veterans have existed since the beginning of conflict, but the current scope of the problem is significant for the Canadian Forces. Following more than a decade of combat and support operations in Afghanistan there are more and more soldiers complaining of PTSD, OSIs or TBIs. Further, the Canadian Forces has been actively engaged in other dangerous deployments during that timeframe.¹⁵⁸ This section will detail the contemporary problem, in order to argue that immediate action is needed.

¹⁵⁸ See e.g. “Canadian Forces operations”, online: National Defence and the Canadian Forces <<http://www.forces.gc.ca/site/operations/index-eng.asp>>.

This problem (deemed a “crisis” by some)¹⁵⁹ was in play early in the Afghanistan campaign. Military officials were acutely aware of the issue, having dealt with traumatized veterans following Rwanda, Bosnia and Korea – to name but a few. Notwithstanding this knowledge, many soldiers diagnosed with PTSD were redeployed multiple times in order to fill the significant demand for their limited expertise in a war zone.¹⁶⁰ Unfortunately, this often exacerbates previous wounds and can create a more significant illness.¹⁶¹ In fairness, during an ongoing conflict there are only limited resources. When a large portion of a trained fighting force becomes wounded, the armed forces cannot keep up the operational tempo demanded of the government without more personnel. Personnel cannot simply be hired off the street in order to go into battle.¹⁶²

¹⁵⁹ See e.g. Chris Cobb, “NDP Questions Why Afghan Army Getting \$110 Million A Year From Government While Canadian Afghan War Veterans Lack Adequate Mental Health Care” *Ottawa Citizen* (23 May 2012), online:

<<http://blogs.ottawacitizen.com/2012/05/23/ndp-questions-why-afghan-army-getting-110-million-a-year-from-government-while-canadian-afghan-war-veterans-lack-adequate-mental-health-care/>>: “The federal Opposition is calling for the creation of a task force to find ways of dealing with the growing ‘crisis’ among Canadian veterans suffering from war-related mental illness. ‘There is a reluctance to treat this as a crisis,’ said NDP defence critic Jack Harris Wednesday, ‘but that’s what it is. We are trying to deal with it in a patchwork fashion and we need to find a better way.’ [Emphasis mine]

¹⁶⁰ “Canadian military redeploying soldiers with PTSD” *cbcnews* (14 June 2011), online: cbc Radio-Canada <<http://www.cbc.ca/news/canada/story/2011/06/14/ptsd-soldiers-redeploy.html>>.

¹⁶¹ *Ibid.*: “Ottawa psychologist Ken Welburn, who counts current and former soldiers among his clients, used to help soldiers redeploy after suffering from post-traumatic stress disorder, but now believes that was a mistake. ‘I think that soldiers with PTSD should not be re-deployed into a war zone,’ said Welburn, director of the Ottawa Anxiety and Trauma Clinic. ‘If you go back on another deployment it’s like going into the sun after a bad sunburn. You are going to pay for it.’”

¹⁶² See e.g. Lee Berthiaume, “Canadian army’s ‘long-term health’ at risk due to shortage in mid-level leadership” *National Post* (28 November 2011), online: <<http://news.nationalpost.com/2011/11/28/canadian-armys-long-term-health-at-risk-due-to-shortage-in-mid-level-leadership/>>: “Chief of Defence Staff Gen. Walter Natynczyk recently highlighted the importance of trained NCOs and mid-level officers. ‘I cannot go onto the street and hire a sergeant, hire a major, hire a colonel,’ he told the Commons’

Without the extensive training required of normal forces, casualties will increase. Further, actual combat experience is invaluable. The Canadian Forces was merely trying to make do with what they had. Unfortunately, this required putting people in harm's way and some soldiers getting traumatized.

Most soldiers jump at the opportunity to help Canada despite serious personal risk. Part of the reason for their willingness to do so is the belief that Canada will take care of them, and their injuries, when they return.¹⁶³ Unfortunately, statistics suggest that despite the best efforts of the government, there is a perception that a number of veterans are falling through the cracks.¹⁶⁴ The Chief of the Defence Staff (CDS) agrees that more needs to be done.¹⁶⁵ Examining the current numbers may assist in deciphering the actual scope of the problem.

defence committee on Nov. 3. "If you want a sergeant with 10 years of experience, it takes 10 years."

¹⁶³ See e.g. House of Commons, Report of the Standing Committee on National Defence, 40th Parl, 2nd Sess, "Doing Well and Doing Better: Health Services Provided to Canadian Forces Personnel With An Emphasis on Post-Traumatic Stress Disorder" (June 2009), online: cbc.ca <http://www.cbc.ca/fifth/2009-2010/broken_heroes/documents/scnd_report_june_2009.pdf>: "Within the military, effective casualty treatment and handling is a significant morale enhancer. If Canadians expect our troops to do what we ask of them, it is only fair that those troops be confident they will be taken care of, should they be injured in the course of doing their duty. Moreover, should they be killed, or injured, physically or psychologically, they must know that their family will be cared for too." [Emphasis mine]

¹⁶⁴ "Vet-centred care: Take new tack" *Herald Opinions* (1 May 2012), online: The Chronicle Herald <<http://thechronicleherald.ca/editorials/91796-vet-centred-care-take-new-tack>>: "Falling through the cracks remains far too easy for members of the Armed Forces suffering from post-traumatic stress disorder, as The Chronicle Herald's Michael Gorman illustrated last week in presenting us personal testimonies from a pair of troubled veterans."

¹⁶⁵ See e.g. Meagan Fitzpatrick, "Mental health services 'not perfect,' military says: Top military officials say progress made and more needs to be done" *CBC News* (4 May 2012), online: <<http://www.cbc.ca/news/politics/story/2012/05/04/pol-military-mental-health-services.html>>.

2.1.1 The Current Numbers

This section will make two main arguments: conditions common to mental disorders are more likely to be found among those who have served in the military than in the general population, and those conditions are even more common among released veterans than among serving members. The distinction between the two is important in determining solutions, as both are subject to different justice processes.

While examining recent statistics will be helpful in understanding the impact of veteran mental illness in the justice systems, “[t]he biggest challenge is not here and today. It’s in five years and 10 years.”¹⁶⁶ Notwithstanding this reality, it is important to determine how serious this problem is now, after more than a decade of recent conflict. Further, the existing numbers still substantiate the above arguments.

According to the Department of National Defence, more than 2,000 soldiers were injured during the 10-year Afghanistan combat mission. This figure does not incorporate “the thousands of Canadian soldiers who are suffering from [PTSD] and other psychological damage. A recent Defence study predicted as many as 13.2 per cent of the 40,000 Canadians who served in Afghanistan could be suffering from Afghanistan-related mental injuries.”¹⁶⁷ Using their own figures, this suggests that approximately 5,280 servicemen and women could be dealing with combat related mental injuries. “A recent parliamentary study estimated that almost 3,000 of the soldiers who served there can be expected to suffer from a severe form of post-traumatic stress disorder and 6,500

¹⁶⁶ Allan Woods, “Bracing for war’s hidden fallout” *TheStar.com* (13 July 2009), online: <<http://www.thestar.com/news/canada/article/665007>>.

¹⁶⁷ Lee Berthiaume, “Afghan war injury toll tops 2,000; 10-year mission by Canadian troops brings 158 deaths” *Edmonton Journal online* (2 February 2012), online: Postmedia News <[list.plcom.on.ca/pipermail/defenceweekday/.../attachment-0001.doc](mailto:plcom.on.ca/pipermail/defenceweekday/.../attachment-0001.doc)>.

will suffer from mental health issues”.¹⁶⁸ [Emphasis mine] It is noteworthy that when compared with physical injuries, the most common combat injury is mental in nature.

Another study by the Department of National Defence indicated that approximately 30% of Canadian Forces members have received specialty mental health services. Approximately 8% were diagnosed with Afghanistan-related PTSD. 5.2% of soldiers were diagnosed with “other Afghanistan-related OSI's, such as depression (2.2%), adjustment disorders (2.0%), or anxiety disorders other than PTSD (1.9%)”.¹⁶⁹

Rates of OSIs among soldiers were highest for those who deployed to Kandahar (17.1%) and to Kabul (14.5%). This is significantly higher than rates for those deployed to the Arabian Gulf (6.5%), Camp Mirage or elsewhere in Southwest Asia (3.3%).¹⁷⁰ This is consistent with a recent Canadian study suggesting a correlation between exposure to actual combat or risk and OSI prevalence. In particular, recent data suggests higher rates of PTSD among “front-line” soldiers. According to Major Paul Sedge, a military psychiatrist, “based on 792 soldiers from CFB Gagetown who experienced high levels of combat during their deployments in 2007 [...] nearly a quarter of the soldiers — 23.1% — suffered with some form of mental problem. Further, PTSD was reported in more than 20% of the cases”.¹⁷¹ This is more than double the normal rates for the

¹⁶⁸ The Canadian Press, “Number of suicides in military rises as troops return home from Afghanistan”, *The Winnipeg Free Press* (30 April 2012), online: <<http://www.winnipegfreepress.com/canada/number-of-suicides-in-military-rises-as-troops-return-home-from-afghanistan-149582255.html>>.

¹⁶⁹ *Supra*, note 30.

¹⁷⁰ *Ibid.*

¹⁷¹ Bradley Bouzane, “8% of Canadian soldiers who served between 2001 and 2008 have PTSD: study” *National Post* (16 November 2011), online: [nationalpost.com](http://news.nationalpost.com/2011/11/16/8-of-canadian-soldiers-who-served-between-2001-and-2008-have-documented-cases-of-ptsd/) <<http://news.nationalpost.com/2011/11/16/8-of-canadian-soldiers-who-served-between-2001-and-2008-have-documented-cases-of-ptsd/>>.

Canadian Forces population segment and significantly higher than the 13.2% suggested by the Department of National Defence.

Despite these figures, it is important not to correlate mental injury severity with the location of a deployment or the nature of the mission. There are too many variables that must be considered. In fact, PTSD “represents a common, if not the most prevalent, mental health problem in community studies in post-conflict areas”.¹⁷² In Rwanda, for example, in 1994 there were crimes of genocide where approximately 800,000 people were killed. Of the approximately 7.7 million people in that country, 4 million were displaced.¹⁷³ The survivors witnessed violence, corpses and other terrors associated with war. Studies of the Rwanda survivors suggest that approximately 1 in 4, “(24.8%) met symptom criteria for PTSD”.¹⁷⁴ Senator Romeo Dallaire, who led the United Nations’ mission in Rwanda, stated in a “Fifth Estate” interview that out of the dozen people that reinforced him during that mission, approximately 70% have had varying levels of PTSD. One was diagnosed 12 years after the incidents and one committed suicide 14 years after the incident. Senator Dallaire indicated that he remains vulnerable to suicidal tendencies and is currently undergoing therapy.¹⁷⁵

Similarly, in Bosnia and Herzegovina, the site of a major Canadian Forces deployment in the 1990s, there are reports that as many 1.75 million citizens may be

¹⁷² Michael Odenwald et al, “Screening for Posttraumatic Stress Disorder among Somali ex-combatants: A validation study”, online: (2007) 1:10 *Conflict and Health* 1 at 2 <<http://www.biomedcentral.com/content/pdf/1752-1505-1-10.pdf>>.

¹⁷³ Phuong N. Pham, Harvey M. Weinstein & Timothy Longman, “Trauma and PTSD Symptoms in Rwanda Implications for Attitudes Toward Justice and Reconciliation” (2004) 292:5 *JAMA* 602.

¹⁷⁴ *Ibid.*

¹⁷⁵ Lieutenant-General (Retired) Roméo Dallaire, “Broken Heroes” *The Fifth Estate* (Interview, 2 October 2009), online: cbc.ca <http://www.cbc.ca/fifth/2009-2010/broken_heroes/dallaire.html>.

suffering symptoms of PTSD. According to data, studies suggest that 30% of war veterans in Serbia and 40 % in Bosnia are afflicted with the mental disorder.¹⁷⁶ This is consistent with Canadian figures which suggest that “at least 30% of soldiers involved in combat operations risk suffering from PTSD or major depression during their lifetime”.¹⁷⁷ Similarly, in a Doctors Without Borders study on the general population of Freetown, Sierra Leone following years of civil war, “high levels of traumatic stress [were] evident, [...25% were suffering] from severe traumatic stress or even PTSD”.¹⁷⁸ The same study also demonstrated that “[d]eliberately or not, witnessing at least once event such as torture (54%), execution (41%), (attempted) amputations (32%), people being burnt in their houses (28%) and public rape (14%) often results in traumatic stress or even PTSD”.¹⁷⁹ Canadian Forces soldiers have seen many of these types of atrocities in the course of their service in many parts of the world – whether in actual combat, on peace-keeping missions or other missions.

The average PTSD rate expected of the general population is approximately 8%.¹⁸⁰ “The estimated lifetime prevalence of PTSD among American veterans [...] is

¹⁷⁶ “Study: PTSD Haunts Bosnian War Survivors” *Balkan Insight* (3 February 2010), online: <<http://www.balkaninsight.com/en/article/study-ptsd-haunts-bosnian-war-survivors>>.

¹⁷⁷ Jean-Rodrigue Paré, “Post-traumatic Stress Disorder and the Mental Health of Military Personnel and Veterans” *Parliament of Canada* (14 October 2011), online: Library of Parliament <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2011-97-e.htm>>.

¹⁷⁸ Kaz de Jong, Maureen Mulham & Saskia van der Kam, “Special Report: Report Assessing Trauma in Sierra Leone” *Medecins Sans Frontieres Doctors Without Borders* (11 January 2000), online: <<http://www.doctorswithoutborders.org/publications/article.cfm?id=1459>>.

¹⁷⁹ *Ibid.*

¹⁸⁰ “Post-traumatic stress disorder” *Encyclopedia of Mental Disorders*, online: <<http://www.minddisorders.com/Ob-Ps/Post-traumatic-stress-disorder.html>>: “The National Comorbidity Survey, a major epidemiological study conducted between 1990

30.9% for men and 26.9% for women”.¹⁸¹ Whether there are any cultural considerations to be incorporated and how to do so in diagnosis remains inconclusive.¹⁸² Still, statistics do indicate that “women are twice as likely as men to develop PTSD”.¹⁸³

In addition to the consequence of suicide and homelessness, the risk of criminogenic behavior increases with OSIs. Recent reports suggest that there has been a steady increase in inmates at the CFSPDB since 2001. In fact, statistics show that rates have doubled during the Afghanistan campaign. According to University of Alberta professor Andy Knight, "there's a link to Afghanistan, (but) I don't think you'll ever get the military to say this [...] adding the number of soldiers sent to prison could indicate difficulty adjusting to life after war”.¹⁸⁴ Similarly, University of British Columbia political science professor Michael Byers “believes the [...] mission in Afghanistan may have taken a psychological toll on some soldiers. [...] Deployment increases the opportunities and, essentially, the circumstances within which criminal activity takes place”.¹⁸⁵

and 1992, estimates that the lifetime prevalence among adult Americans is 7.8%, with women (10.4%) twice as likely as men (5%) to be diagnosed with PTSD at some point in their lives. These figures represent only a small proportion of adults who have experienced at least one traumatic event—60.7% of men and 51.2% of women respectively”.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.* See also James Phillips, “The Cultural Dimension in DSM-5: PTSD” *Psychiatric Times* (15 August 2010), online: <<http://www.psychiatrictimes.com/blog/dsm-5/content/article/10168/1635720>>: “Either way, in the area of trauma and PTSD, the DSM-5 on the horizon remains, for understandable reasons, a long way from cross-cultural adequacy”.

¹⁸³ *Supra*, note 18.

¹⁸⁴ “Rise in soldiers in prison not tied to Afghanistan: army” *canada.com* (1 April 2008), online: CanWest MediaWorks Publications Inc.

<<http://www.canada.com/edmontonjournal/news/cityplus/story.html?id=eaf2a319-78e4-41ba-8bd1-88ab550408cf>>.

¹⁸⁵ *Ibid.*

An examination of reported Canadian courts martial decisions for the year 2010¹⁸⁶ reveals that of the 65 decisions, 57 of the cases were resolved by guilty plea. Eight courts martial involved operational offences and 15 reported mental health issues with an additional 8 not being clear. Conditions and symptoms reported included: anger management in 3 cases; schizophrenia in 1; addictions in 4; post-traumatic stress in 4; depression in 1; and suicidal thoughts in 2. Of the 15 issues, 3 were found directly related to combat while 7 were unclear. Based on this data, and making the unlikely assumption that there was no under-reporting of symptoms, at least 15 of 65 or 23% of military offenders tried by court martial are dealing with a mental health issue. Further, at least 4 of 65 or 6% of offenders tried and convicted had PTSD and a little less than 5% had an OSI directly related to combat.

These numbers do suggest, at a minimum, the need for better data collection, tracking and analysis on this important issue. Arguably, this information should be provided and reviewed in the Judge Advocate General (JAG) annual report as it relates to military justice. The Department of Veterans Affairs, with assistance from Attorney Generals, should analyze the information related to civilian justice.

The above statistics demonstrate that conditions similar to mental disorders are more likely to be found among those who have served in the military than in the general population. I now turn to the second argument that those conditions are even more common among veterans than among serving members.

¹⁸⁶ “2010 Decisions”, online: National Defence and the Canadian Forces <<http://www.jmc-cmj.forces.gc.ca/dec/2010-eng.asp>>.

Academic studies have determined that there is a link between the OSIs and the number of suicides among Canadian Forces members.¹⁸⁷ “According to statistics provided by the military, 187 soldiers have committed suicide since 1996”.¹⁸⁸ It is noteworthy that this number is more than the total casualties from the Afghanistan combat mission proper.¹⁸⁹ It has been recognized that “[s]uicide is among the most common causes of death in the military [...and] the third leading cause of death in Canadian forces members over the past 25 years”.¹⁹⁰ While studies suggest that soldier suicide rates are lower than in the civilian population, “[r]esearch suggests that [...] veterans are 1.4–4 times as likely to die by suicide compared with nonveteran civilians”.¹⁹¹ [Emphasis mine] The 1.4 starting point related to a study of Norwegian peacekeepers¹⁹² and seemed inconclusive on OSI correlation to suicide. More specific studies of combat troops included a study of Vietnam era vets which showed that “PTSD veterans were more likely than the non-PTSD veterans to die from suicide (relative risk = 3.97, 95% confidence interval [CI] = 2.20-7.03)”.¹⁹³ More recently, a broader population study looking at a twelve year period found that “[v]eterans were twice as likely (adjusted

¹⁸⁷ See e.g. *supra*, note 167, “The study said the risk of suicide is a major concern with stress-related injuries”.

¹⁸⁸ *Ibid.*

¹⁸⁹ “In the line of duty: Canada's casualties” *CBC News* (31 October 2011), online: cbc.ca <<http://www.cbc.ca/news/background/afghanistan/casualties/list.html>>: “Since 2002, 158 members of the Canadian Forces have been killed serving in the Afghanistan mission.”

¹⁹⁰ Shay-Lee Belik *et al.*, “Are Canadian Soldiers More Likely to Have Suicidal Ideation and Suicide Attempts Than Canadian Civilians?”, online: (2010) 172:11 *Am J Epidemiol* 1250 <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3025631/#bib3>>.

¹⁹¹ *Ibid.*

¹⁹² S. Thoresen, L. Mehlum & B. Moller, “Suicide in peacekeepers—a cohort study of mortality from suicide in 22,275 Norwegian veterans from international peacekeeping operations”, (2003) 38:11 *Soc Psychiatry Epidemiol* 605.

¹⁹³ T.A. Bullman & H.K. Kang, “Posttraumatic stress disorder and the risk of traumatic deaths among Vietnam veterans” (1994) 182:11 *J Nerv Ment Dis* 604.

hazard ratio 2.13, 95% CI 1.14 to 3.99) [corrected] to die of suicide compared with non-veterans in the general population.”¹⁹⁴ Notwithstanding these studies, it is acknowledged that “there remains significant controversy as to whether soldiers are at increased risk for suicide compared with civilians”.¹⁹⁵

It is important to differentiate the statistical data between soldiers and veterans.¹⁹⁶ “[B]ecause the military environment and services provided by the CF differ from the civilian life of veterans and the services provided by VAC, the findings of studies for one of these groups do not lend themselves to extrapolation to the other”.¹⁹⁷ Still, in comparing both groups, “the prevalence of mental health disorders appears to be much higher among veterans than among serving members”.¹⁹⁸ This is likely exacerbated by numerous military factors, including untreated mental disorders due to perceived stigma and adverse career implications, which is discussed below.

An examination of those receiving veterans’ benefits approved after 2006 suggests that known diagnosed OSI prevalence is approximately 60%. This figure is substantially higher than previous prevalence rates for pension beneficiaries.¹⁹⁹ Further, this does not capture those veterans who have not applied for benefits despite eligibility.²⁰⁰

¹⁹⁴ M.S. Kaplan *et al.*, “Suicide among male veterans: a prospective population-based study”(2007) 61:7 *J Epidemiol Community Health* 619.

¹⁹⁵ *Supra*, note 190.

¹⁹⁶ *Supra*, note 177.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*: “Once they become veterans, only those who decide to request VAC assistance will be able to benefit from the services to which they are entitled. [...] As isolation and reluctance to seek assistance are common among those suffering from operational stress injuries, it is possible that many veterans who need specialized services do not receive

The aforementioned numbers suggest that once soldiers are released with medical pensions into the community, they are more likely to be suffering from OSIs than serving members, who some suggest already have elevated prevalence rates when compared to the civilian population. Unfortunately, it is difficult to monitor veterans with existing processes and infrastructure. “Existing databases [...] do not allow for the systematic monitoring of the state of health and occupational progress being made by those veterans who do not request VAC services”.²⁰¹ Many of these ill veterans are at increased risk of “absenteeism, unemployment, interpersonal and family problems, alcoholism and drug addiction, trouble with the law, homelessness and suicide”.²⁰² Better systematic processes to track, monitor and assist released veterans may help ensure a safer transition to civil society.

The statistics and numbers highlighted demonstrate the current scope of the problem. Still, much of the problem is fueled by the existing military culture which contributes to stigma and untreated mental disorders.

2.1.2 Military Culture

Military culture has been described as the “bedrock of military effectiveness

them. This increases health risks for them, because early intervention is the most important factor in healing. Moreover, the symptoms of operational stress injury may appear only several years after the event that gave rise to the trauma, which is often many years after the person left the CF.”

²⁰¹ *Ibid.*

²⁰² *Ibid.*

[...and] the essence of the Canadian, or any other, military”.²⁰³ Discipline and morale are equally intrinsically linked to military culture. In fact, discipline, cohesion and *esprit de corps* are essential components of military culture.²⁰⁴ Both cohesion and *esprit de corps* are major factors in the development of high morale.²⁰⁵

Unfortunately, the military culture’s attitude towards mental illness and PTSD has been one in which any injury is a weakness.²⁰⁶ Weakness is not acceptable in the military. In particular, mental illness was perceived not to be a real injury and therefore anyone purporting to have such an injury was a faker, liar, malingering or had some other negative *persona*.²⁰⁷ According to the former Ombudsman for the Canadian Forces, “[t]he symptoms (of stress injuries) are bad enough but the culture of shame and suspicion is worse [...] It is considered a badge of dishonour for soldiers to get

²⁰³ Randy Wakelam, “Book Review, *Understanding Military Culture: A Canadian Perspective* by Allan D. English”, online: (2006) 6:4 CMJ 115 at 115 <<http://www.journal.forces.gc.ca/vo6/no4/book-livre-04-eng.asp>>.

²⁰⁴ M.D. Capstick, “Defining the Culture: The Canadian Army in the 21st Century”, online: (2003) 4:1 CMJ 47 at 49 <<http://www.journal.dnd.ca/vo4/no1/doc/v4n1-p47-53-eng.pdf>>: “James Burk, a prominent academic observer of the American military, has developed a model of military culture that includes four essential elements: discipline, professional ethos, ceremony and etiquette, and cohesion and *esprit de corps*.”

²⁰⁵ *Ibid.*

²⁰⁶ Max J. Rosenthal, “Military Families Hit Pentagon On Response To PTSD And Suicide” *Politics Canada* (9 May 2012), online: The Huffington Post <http://www.huffingtonpost.com/2012/05/09/military-families-pentagon-ptsd-suicide_n_1503746.html>: “[D]espite efforts to encourage service members to seek treatment, military culture still views PTSD as a sign of weakness that could derail promising careers for soldiers.”

²⁰⁷ “Healing the Invisible Wounds of War” *News in Review* (December 2011), online: cbclearning <newsinreview.cbclearning.ca/wp-content/uploads/.../dec11ptsd.rtf>.

psychological treatment”.²⁰⁸ Either way, to admit they are suffering would result in them being cast aside professionally and socially.

This culture and negative attitude towards mental illness created stigma. Stigma is a barrier to effective diagnosis and treatment, which can lead to the exacerbation of a mental health condition. The stigma within the military follows veterans on release. “Many [civilian] employers are hesitant to hire veterans with a combat background because of perceived mental health issues [...] 46 percent of employers considered PTSD a significant obstacle to hiring employees with military experience”.²⁰⁹ This stigma has real results, with American statistics demonstrating a substantial increased rate of unemployment among male veterans ages 18 to 24 as compared to civilian counterparts.²¹⁰

In fairness, the Canadian military is not alone in struggling with stigma related to mental health. Notwithstanding strong levels of societal awareness, there continues to be stigma associated with mental illness among the overall Canadian population, particularly regarding serious cases,²¹¹ which inhibits complete acceptance.

According to the Canadian Medical Association, only half of Canadians would tell friends or co-workers that they have been diagnosed with a mental illness, which is

²⁰⁸ Canadian Press, “Soldiers face stigma dealing with stress: Marin”, *CTV News* (18 December 2002), online: BellMedia <http://www.ctv.ca/CTVNews/Specials/20021218/marin_andre021217/>.

²⁰⁹ Jeff Ousley, “Soldiers Continue to Struggle with Public Perception of PTSD” *Veterans United Network*, online: <<http://www.veteransunited.com/network/soldiers-continue-to-struggle-with-public-perception-of-ptsd/>>.

²¹⁰ *Ibid.*

²¹¹ “Mental Health Literacy in Canada: Phase One Report Mental Health Literacy Project” *CAMIMH* (May 2007), online: Canadian Alliance on Mental Illness and Mental Health <http://www.camimh.ca/files/literacy/MHL_REPORT_Phase_One.pdf>: “Stigma and discrimination toward persons with mental disorders remain somewhat problematic in Canada, although more so for serious mental illness”.

far below rates for other serious illness such as cancer or diabetes. Further, one in five Canadians indicated they did not seek treatment despite experiencing symptoms of mental illness in the last year.²¹² Also, 27% of Canadians would be fearful if they had to be around someone with a mental illness. In addition, almost two in five Canadians are uncertain if they would socialize with someone who had a mental illness. Further, more than half suggested that they would be unlikely to enter into a spousal relationship with someone who has a mental disorder. In addition, the majority of Canadians would be unlikely to hire a person suffering from a mental illness, including a lawyer, a doctor, a financial advisor or a health care worker. More importantly, nearly half of Canadians believe that people use the term mental health as an excuse for bad behavior.²¹³

The Canadian Alliance for Mental Illness and Mental Health has suggested that addressing mental health stigma and discrimination is one of the most pressing priorities for Canadian mental health officials. They call for an education strategy to increase acceptance and improve understanding. They also call for more stringent policies that address mental health discrimination to assist in expediting change.²¹⁴ I agree.

In the recent *National Mental Health Strategy* there are calls to “[f]ight stigma by including opportunities in promotion, prevention and early intervention initiatives to meet

²¹² Compare *supra*, note 209: “Yet, it’s estimated that less than half of soldiers with PTSD seek treatment.”

²¹³ “8th Annual National Report Card on Health Care” *Canadian Medical Association* (August 2008) at 4, online: <http://www.cma.ca/multimedia/CMA/Content/Images/Inside_cma/Annual_Meeting/2008/GC_Bulletin/National_Report_Card_EN.pdf>.

²¹⁴ “A Report on Mental Illnesses in Canada” (5 January 2012) at 17, online: Public Health Agency of Canada <http://www.phac-aspc.gc.ca/publicat/miic-mmacc/chap_1-eng.php>.

and talk with people living with mental health problems and illnesses”.²¹⁵ Part of the proposed action includes a 10 year program called “Opening Minds” targeting contact-based education to change behaviors.²¹⁶

The Canadian military has equally taken steps to eliminate stigma associated with OSIs. In 2009, the Canadian Forces launched a “Be the Difference” awareness program that was designed to help members “meet and overcome any mental health challenges that they may encounter – in the course of their military career, and after”.²¹⁷ This effort was also referred to as the "all right to hurt" campaign.²¹⁸

PSCs within the military and post-release that are tailored to veterans would assist in reducing stigma through institutional acceptance that treatment, as opposed to punishment, is required. By publicly punishing those who offend due to PTSD or OSIs, through incarceration or other significant modes, a public perception is perpetuated that there is increased fault and blameworthiness associated with the mental disorder and related symptoms. Conversely, a rehabilitative message to injured veterans would create a perception of less personal responsibility. This may assist in changing the military culture as the CDS hopes.

A treatment based approach to justice proceedings does not allow an accused to evade accountability. As explored in Chapter 1, the practice in PSCs is to ensure

²¹⁵ *Supra*, note 140.

²¹⁶ *Ibid*, at 33. See also “Opening Minds” *Mental Health Commission of Canada* (August 2011), online: <http://www.mentalhealthcommission.ca/SiteCollectionDocuments/Programs_province_Aug_2011.pdf>.

²¹⁷ “Be the Difference: The Canadian Forces Mental Health Awareness Campaign” (25 June 2009), online: National Defence and the Canadian Forces Mobile Version <<http://www.forces.gc.ca/site/mobil/news-nouvelles-eng.asp?id=3015>>.

²¹⁸ *Supra*, note 150.

accountability through the admission of the underlying particulars of the offences charged. Further, the explanation of clemency or treatment-based approaches in the decisions of learned judges when transferring offenders to PSCs fosters education of mental illness in the public domain. Any increased awareness should assist in reducing stigma.

While significant effort has been put into defeating stigma related to OSIs and PTSD, more is required. In my view, military policy statements require “teeth” to be effective. Some improvements may include: better safeguards on employment through accommodation, a specific offence related to OSI harassment and increased privacy safeguards.²¹⁹ Military justice can also do its part.

Obviously, stigma related to mental illness will not disappear from the military overnight. Still, it can be eliminated if there is a real willingness from the top. The military has adapted to once highly controversial cultural views related to the inclusion of women in combat²²⁰ and issues related to sexual orientation.²²¹ While there is more to be done, it is clear that much ground has been covered. According to Commodore Jung, the previous Surgeon General for the Canadian Forces, “[t]he stigma will never go away

²¹⁹ The specifics of the development of these possible improvements are beyond the scope of this paper.

²²⁰ See, e.g. “Women” *forces.ca*, online: Canadian Forces <<http://www.forces.ca/en/page/women-92>>: “The Canadian Forces has taken great strides in safeguarding the equality of women. By adopting a ‘no exclusion policy,’ it has become one of the only militaries in the world to remove all barriers to full and equal service for its women members. This means that women members have the opportunity to work any job in the Canadian Forces.”

²²¹ See e.g. Bruce Poulin, “The official integration of homosexuals in the CF” *Esprit de Corps* (June 2004), online: CBS Interactive <http://findarticles.com/p/articles/mi_6972/is_7_11/ai_n28209334/pg_2/?tag=content;col1>: “Now, some 12 years after this significant ruling, few people can contest that our Canadian Forces servicemen and women, regardless of their sexual orientation, are serving their country without restriction and with honour”.

without changing views and values about mental health and that means 'cultural change,' which takes years. It has taken us 10 years to get here, and I'd say the major progress will be in the 10 years ahead. It is so ingrained in the culture".²²² While it is clear that there is movement on the issue, all facets of military culture, including military law, must adapt with the cultural evolution and the Commander's intent. That intent is clear. The CDS has stated "I expect leaders at all levels to create a command climate that allows those who need help to get it. I also expect all CF personnel to foster a social climate of understanding, acceptance and support [...L]et's make sure we take action."²²³

If the military does not "foster a social climate of understanding, acceptance and support"²²⁴ for offenders with OSIs before service tribunals, how can anyone expect civil society to do so on behalf of their veterans? The military must lead on this issue and the JAG, the Canadian Forces Provost Marshal (CFPM), the Surgeon General of the Canadian Forces and other military leaders must be on the front lines.²²⁵ Chapter 4, below, will offer specific proposals.

One of the by-products of stigma associated with the existing military culture is

²²² "Military breaks stigma of mental illness" *The Ottawa Citizen* (19 November 2008), online: canada.com <<http://www.canada.com/ottawacitizen/news/story.html?id=6029bc44-496e-45ec-93dd-0161d09fef05>>.

²²³ General Walt Natynczyk, "Mental Health Awareness Campaign", online: National Defence and the Canadian Forces <<http://www.forces.gc.ca/site/feature-vedette/2009/06/25-eng.asp>>.

²²⁴ *Ibid.*

²²⁵ *Supra*, note 42, s 9.1-9.2: "The Judge Advocate General acts as legal adviser to the Governor General, the Minister, the Department and the Canadian Forces in matters relating to military law. [...] The Judge Advocate General has the superintendence of the administration of military justice in the Canadian Forces.

inhibited detection.²²⁶ The existing military culture compounds an already daunting task of detection in the Canadian Forces, made difficult by “hidden wounds”²²⁷ that are difficult to identify.

2.1.3 Detection Issues

Academics and practitioners agree that early detection is essential in the treatment of PTSD, OSIs and TBIs.²²⁸ Many western militaries have continually sought to develop screening or detection mechanisms in order to assess if military personnel returning from deployment are psychologically injured.²²⁹ The Canadian Forces is not alone in being unable to develop a totally effective screening mechanism that ensures early detection for members. The Royal Canadian Mounted Police are also grappling with PTSD and OSI detection and treatment.²³⁰

²²⁶ Barbara Everett, “Stigma: The Hidden Killer” *Mood Disorders Society of Canada* at 4, online <<http://www.mooddorderscanada.ca/documents/Publications/Stigma%20the%20hidden%20killer.pdf>>: “Stigma is [...] a factor that limits early detection [...]”

²²⁷ See e.g. J. Don Richardson et al, “Horror comes home: Veterans with posttraumatic stress disorder” *Canadian Family Physician*, online: The College of Family Physicians of Canada <<http://www.cfp.ca/content/56/5/430.full>>.

²²⁸ See e.g. Edna B. Foa et al, eds, *Effective Treatments for PTSD* (New York: Guilford Press, 2009) at 6: “PTSD has a better prognosis if clinical intervention is implemented early.”

²²⁹ See e.g. Paul D. Bliese et al, “Psychological Screening Validation with Soldiers Returning from Combat” in M.J. Roy, ed, *Novel Approaches to the Diagnosis and Treatment of Post-Traumatic Stress Disorder*, (Amsterdam, Netherlands: IOS Press, 2006).

²³⁰ See e.g. Elliot Ferguson, “RCMP has 'head in the sand' on PTSD” *The Kingston Whig-Standard* (15 May 2012), online: <<http://www.thewhig.com/2012/05/14/rcmp-has-head-in-the-sand-on-ptsd>>: “Passey said the RCMP needs to educate its officers from the beginning of their training to recognize OSIs and know how to intervene when a colleague, subordinate or superior officer needs help.”

The solution to increased detection includes more extensive training on OSIs from the moment of recruitment. It also includes attacking the stigma and culture of repressing mental health problems during basic training. This education process must be directed at all rank levels.²³¹ While it may take a generation to eliminate the cultural bias and discrimination, it will eventually reduce stigma, provide better coping strategies and foster earlier detection.

Without detection, mentally injured veterans can become ticking time-bombs. They may engage in criminogenic behaviors attracting the attention of the military justice system.²³² As a result, the justice systems often become tripwires for undiagnosed and inadequately treated veterans with mental illness. It is essential that military justice participants are trained to detect mental illness and identify when there is a relevant correlation to the offences charged. In a December 2010 Report of the Standing Committee on Public Safety and National Security, it was suggested that justice officials needed more training on the symptoms of mental illness, mental health problems and addictions to ensure appropriate diversion and referral.²³³ I agree.

²³¹ “Special Reports: Systemic treatment of CF members with PTSD Complainant: Christian McEachern”, online: National Defence and the Canadian Forces Ombudsman <<http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/pts-ssp/rep-rap-03-eng.asp>>: “Education is the single most important catalyst to change attitudes about PTSD in the CF. Without co-ordinated education and training programs designed to ensure all members understand what PTSD is, it will be impossible to change entrenched attitudes. Orders from above, exclusive reliance on CANFORGENs or application of the Code of Service Discipline cannot in themselves change attitudes, although I am of the view that any proven case of harassment or discrimination against those with PTSD should be dealt with harshly.” [Emphasis mine]

²³² See e.g. *supra*, note 38.

²³³ *Supra*, note 116: “The Committee also notes that Lord Bradley’s report stresses the need to implement and use diversion measures, and notes that strong partnerships are another key to success in creating pathways to treatment. [...] The Committee agrees with Lord Bradley and many witnesses that diversion is a key component of a system that

Notwithstanding this report, the military justice system currently has no diversion process and many civilian PSCs are in their infancy. How can military justice participants be trained on detection for diversion, when no diversion processes exist? The problem is not exclusive to the Canadian Forces. The United States is substantially ahead of its Canadian counterparts in civilian PSCs for veterans; however, its military justice system is under fire for lagging behind in diversion options.²³⁴ "When PTSD is acquired through service, and combat caused PTSD increases aggression, drug abuse, and violence, [...] the most basic concepts of justice require the military to effectively treat PTSD rather than punish it".²³⁵

Similarly, there is a need for justice processes that will facilitate self-identifying a mental illness in order to commence treatment. Detection through self-identification is inhibited not only by a perceived punishment or correction-based ethos, but also the stigma and administrative consequences of being mentally ill in the military. This military justice climate causes courts martial to become what Seamone calls a "problem-

respects the right of individuals to receive the healthcare services they need. In order to detect mental disorders and addiction issues and intervene as early as possible, the Committee believes it is essential to train police officers, Crown prosecutors and other participants in the criminal justice system to recognize symptoms of mental health and addiction problems and refer individuals to the appropriate community and healthcare resources. [...] Assessments of mental disorders, including addictions, followed by treatment, would also help to address the revolving-door syndrome we heard much about." [Emphasis mine]

²³⁴ See e.g. Allen G. Breed, "Officer: Military could learn from civilian courts" *chron.com* (14 May 2012), online: Hearst Communications Inc.

<<http://www.chron.com/news/article/Officer-Military-could-learn-from-civilian-courts-3553713.php>>: "Civilian courts across the country have acknowledged the fact that, after a decade of fighting in Afghanistan and Iraq, some veterans' crimes can be traced back to battle-zone trauma _ and that they shouldn't go to jail or prison for them. The same consideration should be given by the military legal system when damaged warriors come before it, say some military law authorities [...]"

²³⁵ *Ibid.*

generating court”.²³⁶ Conversely, access to diversion options like civilian PSCs facilitates treatment and detection.

In addition to education and training on detection, policy direction from key military justice officials would help reinforce the CDS’s higher intent of creating a “command climate that allows those who need help to get it [...and fostering] a social climate of understanding, acceptance and support”²³⁷ for mentally ill veterans. This would include specific policy direction from military justice leaders on how subordinates are to deal with circumstances where mental illness is suspected, alleged or proven.

Currently, there is no readily available specific policy on how to deal with suspected mentally ill offenders from the CFPM²³⁸, DMP²³⁹ and DDCS.²⁴⁰ A specific policy would enhance consistency in veteran treatment by justice officials, increase awareness, reduce stigma and foster detection. More importantly, it would ensure the Commander’s intent is communicated appropriately to front-line police officers and counsel dealing with veterans afflicted with mental illness.

Within the unique summary trial process, specific training on detection needs to be incorporated into accreditation processes for presiding and assisting officers. Specific regulations to ensure consistency of treatment may assist in improving detection by the military justice actors. Further, providing elections to court martial regardless of the

²³⁶ *Supra*, note 2, at 3: “In contrast to problem-solving courts, which target the illness underlying criminal conduct, courts-martial function as problem-generating courts [...].”

²³⁷ *Supra*, note 223.

²³⁸ “Policy and Publications”, online: National Defence and the Canadian Forces <<http://www.vcds.forces.gc.ca/cfpm-gpfc/pp-pub/index-eng.asp>>.

²³⁹ “Publications – Prosecutions”, online: National Defence and the Canadian Forces <<http://www.forces.gc.ca/jag/publications/pros-pour-eng.asp>>.

²⁴⁰ “Publications - Directorate of Defence Counsel Services”, online: National Defence and the Canadian Forces <<http://www.forces.gc.ca/jag/publications/ddcs-dsad-eng.asp>>.

charge for psychologically injured members may assist in ensuring that no mentally ill veteran falls through the cracks. Failing to treat veterans while they serve only creates a bigger problem for the civilian system when they are released.²⁴¹

2.2 THE SCOPE OF THE PROBLEM FOR CIVIL SOCIETY

This section of this chapter will examine the impact of inadequately treated veterans on civil society. In particular, it will discuss the problem as it relates to public safety. Further it will examine increased social problems that are associated with untreated traumatized veterans. In addition, this section will examine the impact of untreated veterans on civilian courts and prisons. Also, this section will try to quantify the actual cost of traumatized veterans on Canadian society.

2.2.1 Public Safety

It may seem obvious to anyone that having an untreated mentally ill person with elevated risks of criminogenic behavior in the community is a serious issue that requires the attention of civilian authorities. Clearly, having these individuals untreated in the community creates risk for public safety.²⁴² The risk logically becomes even more substantial when the mentally ill offender has received advanced military training and has experience in how to kill and injure other human beings.

Often military personnel at the very basic training levels will be taught basic weapon handling and desensitization to violence. They will learn how to endure personal

²⁴¹ *Supra*, note 2, at 3: “Such practices create a class of individuals whose untreated conditions endanger public safety and the veteran as they grow worse over time.”

²⁴² *Ibid.*

sacrifice and hardship in order to accomplish missions at great personal risk and suffering. Canadian Forces members will learn escape and evasion techniques as well as camouflaging tactics. All learn how to kill the enemy efficiently while preserving their own life. At more advanced levels of training, many learn offensive and defensive tactics, advanced weapons training and increased efficient ways to inflict violence on the enemy. Further, over the course of a career, a service member will likely have multiple deployments to conflict areas. Many will have orchestrated, assisted in, been ordered to and personally committed acts of extreme violence on fellow human beings. They will have experience in the management and infliction of violence on the enemy. When all of this experience and training is combined with an untreated mental illness, the risk to public safety is exponentially increased.²⁴³

The operational tempo in recent operations has seen the increased use of reservists in front line operations.²⁴⁴ This essentially involves having a militarily trained civilian joining the military effort for a deployment, and then immediately returning back into civilian life. Unfortunately, there is little systematic monitoring to follow the soldier, sailor or air crew reservist post-deployment. Further, reservists are often from locations of great distance from major bases where specialized mental health support is provided.²⁴⁵ Both Canada and its allies report higher rates of reservist mental injury post

²⁴³ *Ibid*, at 29: “While failure to treat mentally ill offenders may very well amount to a crisis in public health, the failure to treat mentally ill combat veteran offenders amounts to far more; by virtue of military training and experience that depends on the sustained direction and outlet of rage and emotion, it constitutes a threat to public safety.”

²⁴⁴ See e.g. “Military to send more reservists to Afghanistan” *CTV News* (28 February 2007), online: Bell Media

<http://www.ctv.ca/CTVNews/TopStories/20070228/Afghanistan_reservists_070228/>.

²⁴⁵ Doug Schmidt, “Away from the big bases, Afghan war vets struggle to find support” *canada.com* (27 February 2012), online:

deployment due to reported ill-preparedness and reduced access to specialized treatment.²⁴⁶

The danger of not treating veterans with PTSD or OSIs is their propensity to commit violence. In a study of inpatient Vietnam veterans with PTSD which examined a propensity for violence as compared to non-veteran inpatient patients, it was found that PTSD inpatients engaged in more types of violent acts such as “property destruction, threats without a weapon, physical fighting, and threats with a weapon”.²⁴⁷ The study showed a correlation of increased violence with symptom severity and substance abuse.²⁴⁸ Similarly, studies have shown PTSD can cause veterans to become more aggressive in their interpersonal relationships. Contrary to urban legend, exposure to war zones does not (in and of itself) cause increased aggressive behaviors. “Rather, the primary determinant of whether one is at heightened risk for [...] violence following deployment appears to be the development of trauma-related psychopathology”.²⁴⁹

Having untreated trained military personnel with propensities toward aggression and violence in the community places the public at risk. Further, if these members are still serving, they often have access to weapons and ammunition. This increases the

<<http://www.canada.com/news/Away+from+bases+Afghan+vets+struggle+find+support/6191605/story.html>>: “While the regular forces have support networks around bases and urban centres, the offerings are leaner elsewhere, especially for reservists or those who have left the military.”

²⁴⁶ “More medical aid for reservists” *BBC News* (16 May 2006), online: BBC

<<http://news.bbc.co.uk/2/hi/health/4772231.stm>>: “It comes after a report revealed 25% of reservists who had fought in Iraq experienced a mental health disorder, compared with 19% of regular soldiers.”

²⁴⁷ Miles McFall *et al*, “Analysis of violent behavior in Vietnam combat veteran psychiatric inpatients with posttraumatic stress disorder” (1999) 12:3 *Journal of Traumatic Stress* 501.

²⁴⁸ *Ibid.*

²⁴⁹ Shelley M. Macdermid Wadsworth & David Riggs, eds, *Risk and Resilience in U.S. Military Families* (New York: Springer, 2011) at 196.

potential dangers. In addition to public safety, veteran OSIs can lead to serious social problems, including public health complications.

2.2.2 Social Problems

Military families are most in jeopardy to increased social problems as they have to deal directly and regularly with the traumatized veterans. It is not only spouses who are in peril, but children as well. OSI sufferers often experience flashbacks or re-experience traumatic events at seemingly random moments which cause a significant negative emotional response. Children begin to worry about their parents and may feel insecure about their parent's capacity to care for them. Other symptoms of PTSD include avoidance and emotional numbing. If veterans withdraw from their children, are irritable or show little or no emotion towards them, children can interpret this as not loving them. "Researchers have observed a direct relationship between each of the parent's PTSD symptoms and the children's responses. [...] These include] secondary traumatization, [...] depression and anxiety, and relational problems later in life".²⁵⁰ In addition, studies of Vietnam veterans demonstrated that "children of veterans with PTSD are at higher risk for behavioral, academic, and interpersonal problems [...] and] are at higher risk for being depressed and anxious than non-combat Vietnam era veteran's children".²⁵¹ Despite limited data collection on Canadian military family violence, there appear to have been increases within the Canadian Forces in the aftermath of multiple combat deployments to

²⁵⁰Jennifer L. Price, "Children of Veterans and Adults with PTSD" *American Academy of Experts in Traumatic Stress* (2006), online: <<http://www.aaets.org/article188.htm>>.

²⁵¹*Ibid.*

Afghanistan.²⁵² Family violence is a serious social problem²⁵³ that needs to be addressed by the Government of Canada. Military families suffer enough during deployments when they worry about whether their loved ones will return at all.²⁵⁴ If the management of mentally injured veteran offenders who commit family violence requires incarceration, the family is further adversely affected.²⁵⁵ Military families will continue to make sacrifices alone, long after the actual fighting has ceased. Medical treatment through diversion would assist in reducing the social problems for veteran families associated with veteran OSIs.

²⁵²Kerry Sudom, “Family Violence in the Canadian Forces” *National Defence*, online: <http://www.cfpsa.com/en/psp/DMFS/docs/DGPRAM/Family%20Violence/Family_Violence_CF.pdf>: “A recent MP report, which provided an overview of the domestic violence cases across the country investigated by the MP from 2005 to 2008, indicated that there was a notable increase in domestic violence incidents in 2007 and 2008 [....] However, MP reports are limited in that they contain only chargeable cases, and therefore underestimate the extent of actual physical and emotional abuse in the military population.” See also, The Canadian Press, “Kids in military families under stress, depressed: study” *CTV News* (24 March 2011), online: Bell Media <<http://www.ctv.ca/CTVNews/Health/20110324/military-kids-stress-110324/>>: “A new study says the children of parents in the military are suffering stress, isolation and depression linked to the deployment of their parents in Afghanistan.”

²⁵³“Family Violence: Department of Justice Canada Overview Paper” (May 2009) at 9, online: Department of Justice Canada <<http://www.justice.gc.ca/eng/pi/fv-vf/facts-info/fv-vf/fv-vf.pdf>>: “The results of national surveys and research have made it clear that family violence is not just an individual, private or family matter; it is a pervasive and complex societal problem in Canada.”

²⁵⁴Eric M. Flake *et al.*, “The Psychosocial Effects of Deployment on Military Children”, (2009) 30:4 *Journal of Developmental & Behavioral Pediatrics* 271.

²⁵⁵See e.g. Joyce A. Arditti, *Parental Incarceration and the Family: Psychological and Social Effects of Imprisonment on Children, Parents and Caregivers*, (New York: New York University Press, 2012) at 101: “The available research has indicated the largely negative effects of incarceration on offender parents, children, and spouses or intimate partners such that family health declines, child adjustment is compromised, poverty intensifies, and family relationships deteriorate or cease altogether [....] Parental imprisonment was connected to poor mental health in children and a trend toward antisocial behavioral outcomes for children after parental imprisonment [....]” [Emphasis mine]

The potential impact of secondary traumatization on children creates a ripple effect which can echo for a generation. This can include increased public health costs due to the psychological scarring of children and income inequality – a known social determinant of health.²⁵⁶ Further, there may be future social and economic impact via child underachievement that might not occur with timely, adequate family unit interventions.

The social consequences of not treating PTSD extend beyond the realm of the family unit. Aside from public risk related to violence, there is a serious public health issue. In particular, the comorbid nature of PTSD increases the risk that veterans will develop addictions. In fact, “[t]he co-morbidity rates of posttraumatic stress disorder (PTSD) and substance use disorders are know[n] to be substantial.”²⁵⁷ A review of the literature suggests rates of co-morbidity between PTSD and substance use disorders to range anywhere from 20% to 75%.²⁵⁸ Further, the impact and intensity of the addiction can intensify if the underlying medical condition goes untreated.²⁵⁹ Addictions are widely

²⁵⁶ “The Social Determinants of Health: Income Inequality as a Determinant of Health”, online: Public Health Agency of Canada <http://www.phac-aspc.gc.ca/ph-sp/oi-ar/02_income-eng.php>: “The relationship between socioeconomic status and health outcomes is one of the most persistent themes in the epidemiological literature. The strong and growing evidence that higher social and economic status, and small gaps in income equality are associated with better health has led most researchers to conclude that these factors are fundamental determinants of health.”

²⁵⁷ Wendi L. Woo & Harry R. Vedelago, “PTSD among Individuals Seeking Residential Treatment in a Canadian Treatment Centre for a Substance Use Disorder” online: (2012) 3:1 *Canadian J Addiction Medicine* 4 at 4, <<http://www.csam.org/files/CJAM-Vol3No1-FINAL.pdf>>.

²⁵⁸ *Ibid.*

²⁵⁹ Deborah J. Brief et al, “Web-Based Intervention for Returning Veterans with Symptoms of Posttraumatic Stress Disorder and Risky Alcohol Use”, (2011) 41:4 *J Contemporary Psychotherapy* 237: “If left untreated, PTSD symptoms and alcohol problems can become chronic and have a significant, negative impact on the lives of veterans, their families and communities.”

accepted as a significant social problem. According to the United Nations, drug abuse can perpetuate crime, destroy families, impair community health, and adversely impact economic growth through reduced productivity.²⁶⁰ Some suggest that untreated PTSD and OSIs among veterans may be a “crisis in public health”.²⁶¹ Not only can OSIs create social problems, but social problems can exacerbate OSIs, causing a vicious cycle of misery for veterans and their families.

In addition, social problems, such as substance abuse, unemployment or poor employment skills, family dysfunction, homelessness, anti-social attitudes and related behaviors are known criminogenic factors.²⁶² If crime is committed and incarceration is imposed, further social problems often occur for the veteran family unit. If the member is released or if military jurisdiction is not exercised, civilian courts will be required to deal with veteran offenders and the related social consequences.

2.2.3 Civilian Courts

Throughout history, civilian Canadian courts have had to deal with offenders suffering from combat related PTSD, TBIs and OSIs. Some cases have put OSIs forward

²⁶⁰ See e.g. “The Social Impact of Drug Abuse” *United Nations International Drug Control Programme* (1 March 1995), online: United Nations Office on Drugs and Crime <https://www.unodc.org/pdf/technical_series_1995-03-01_1.pdf>.

²⁶¹ *Supra*, note 2 at 29: “While failure to treat mentally ill offenders may very well amount to a crisis in public health [....]”. [Emphasis mine] See also Charlene Rubush, “Changes Underway at the VA May Mean Better Treatment for Thousands of Veterans with PTSD” *Win Over PTSD* (17 April 2010), online: <<http://winoverptsd.com/wp/changes-underway-at-the-va-may-mean-better-treatment-for-thousands-of-veterans-with-ptsd/#more-361>>: “The Department of Veterans Affairs has struggled to address this mental health crisis, and thousands of veterans have suffered as a result.” [Emphasis mine]

²⁶² *Supra*, note 94.

as a defence.²⁶³ Currently, serving veterans found driving impaired in Canada are generally dealt with by civilian courts – even when charged by the military police. Similarly, despite having concurrent jurisdiction, the Canadian Forces does not generally prosecute cases of domestic violence due to the absence of specialized victims’ services that civilian counterparts can offer. Both addictions and domestic violence for veterans can be indicators of an OSI.²⁶⁴ If civilian justice officials are not trained in OSI detection and appropriate veteran diversion, then veterans will simply be punished as opposed to receiving treatment. This can exacerbate the illness and create a revolving door for veterans within traditional civilian courts.²⁶⁵ This does little to facilitate the necessary safe transition of the veteran from the battlefield to garrison or back into civilian society.

In addition to *R. v. Borsch*²⁶⁶, other veterans suffering from PTSD have been brought before courts across the country to face criminal charges for behaviour consistent with OSI symptomology. Judicial treatment varies from jurisdiction to jurisdiction. While most veterans’ cases before civilian courts are unreported, an examination of some recent examples of these cases shows that civilian courts are often called upon to deal with the aftermath of traumatized service members, despite having little training on

²⁶³ See e.g. *supra*, note 102.

²⁶⁴ See e.g. “Domestic violence up in Canadian military families: Rates spike after Afghanistan missions” *cbcnews* (31 March 2011), online: [cbc.ca <http://www.cbc.ca/news/canada/new-brunswick/story/2011/03/30/canadian-forces-military-domestic-violence-post-traumatic-stress-disorder.html>](http://www.cbc.ca/news/canada/new-brunswick/story/2011/03/30/canadian-forces-military-domestic-violence-post-traumatic-stress-disorder.html): “Psychology experts believe the rise in domestic violence is directly linked to physical and emotional trauma suffered by soldiers in Afghanistan, especially post-traumatic stress disorder, or PTSD.”

²⁶⁵ Melissa Pratt, “New Courts on the Block: Specialized Criminal Courts for Veterans in the United States”, online: (2010) 15:39 *Appeal* 39 <journals.uvic.ca/index.php/appeal/article/download/5400/2314>: “While traditional courts focus on processing the cases that come before them, resulting in a revolving door syndrome, problem-solving courts focus on achieving positive outcomes for victims, defendants, and communities.”

²⁶⁶ *Supra*, note 102.

military culture, life, experiences and OSIs. The sample cases below involve actual situations of veterans who fought for their country and were psychologically injured. They demonstrate the current scope of the problem for civilian courts.

In 2011, Corporal Berube was 30 years old. His best friend, Corporal Dyer, was killed in an Afghanistan blast in 2002. He was diagnosed with PTSD in 2007. Despite undergoing treatment in Comox, a theft of his military medals in May 2010 caused him to regress. He began uttering threats and possessed a firearm that he intended to use to kill himself. Corporal Berube initially pled guilty to weapons charges in Provincial Court and was facing a possible lengthy prison term. Fortunately, British Columbia Provincial Court Judge Peter Doherty stayed the proceedings stating that incarcerating Berube, "might strike thoughtful Canadians as manifestly unjust."²⁶⁷ Ironically, despite his having received a stay and getting better treatment, the bank commenced foreclosure on his home shortly after.²⁶⁸

Conversely, Craig Turcotte, aged 39, a Canadian Forces combat officer, was incarcerated for 30 days and further sentenced to 18 months on probation by a civilian court for twice failing to comply with bail release terms to not communicate with his wife. The prosecution and the court were aware that the soldier had severe PTSD from high stress deployments in Rwanda and Afghanistan. He also had a comorbid diagnosis that created a drinking problem. Other similar charges, from separate incidences, were put through mental health diversion, but Turcotte's defence counsel agreed with a period

²⁶⁷ Jason Proctor, "B.C. judge saves Afghan war vet from prison", *cbcnews* (11 February 2011), online: Radio-Canada <<http://www.cbc.ca/news/canada/british-columbia/story/2011/02/10/bc-yan-berube-ptsd.html>>.

²⁶⁸ *Ibid.*

of incarceration. Additional charges were outstanding that included uttering threats.²⁶⁹ While this case took place only four years ago, it is clear that court officials were of the view that punishment was required in addition to treatment. This differs from Corporal Berube, who received a complete stay. It is acknowledged that domestic violence is a legislated aggravating factor,²⁷⁰ however, should an untreated veteran suffering from mental combat wounds be held to the same standard as other non-traumatized offenders? In the words of British Columbia Provincial Court Judge Peter Doherty, such a position "might strike thoughtful Canadians as manifestly unjust". It is acknowledged that spousal abuse is a horrendous unacceptable crime and many may feel that this example does not advance an argument for diversion which would be broadly accepted. Still, if NCR verdicts and subsequent treatment based approaches for combat related PTSD are possible for murder; one has to look at all crimes in a careful manner and determine if treatment is the best option. While a visceral reaction to punish may be automatic due to the nature of the offence, reflection as to eliminating the root cause is best for everyone in the long run. Education is paramount in fostering acceptance to this premise.

In another example, Jonathan Woolvett was a combat soldier who did two tours in Afghanistan totaling 13 months between 2007 and 2009. In 2009, he began experiencing "chronic night terrors, profuse sweating and recurring nightmares. In one, he is drowning

²⁶⁹ "Troubled soldier gets 30 days in jail: Judge tells man she hopes he comes to terms with counselling" *The Sun Times* (2008), online: Owen Sound Sun Times <<http://www.owensoundsuntimes.com/PrintArticle.aspx?e=904985>>.

²⁷⁰ *Supra*, note 42, s 718.2(1)(a)(ii): "A court that imposes a sentence shall also take into consideration the following principles: [...] a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, [...] evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner.

in sand. In another, he is forced to stand helpless as people around him are being killed”.²⁷¹ His sleeplessness was attributed to the deaths of friends and colleagues he deployed with, being ambushed by sustained heavy enemy fire, killing enemy insurgents, and continued exposure to atrocities. He used drugs and alcohol to deal with the symptoms of PTSD. Shortly after returning home, he was divorced. He was then later charged for threatening a woman he had been dating. The court gave him a conditional discharge. It should be noted that reports suggest that approximately “60 Petawawa soldiers are currently on probation for offences related to PTSD”²⁷² from civilian courts.

The few examples of civilian initiated prosecutions demonstrate that serving military members and veterans suffering from OSIs are being charged and convicted of criminal offences in civilian courts. Their sentences range from probation to conditional discharge to incarceration. The inconsistent approaches demonstrate that diversion is not always used. When a punishment based ethos is used to deal with mentally ill offenders, the results do not necessarily result in reduced recidivism rates. To understand the impact of this judicial approach, it is helpful to examine the veteran experience in civilian prisons.

2.2.4 Civilian Prisons

Civilian incarceration rates of Canadian veterans are not currently tracked by Corrections Canada. However, in a recent study it was suggested that approximately

²⁷¹ C. Cobb, “Military Father Kidnaps Afghan Veteran Son From CFB Petawawa To Get Him Treatment” *Ottawa Citizen* (19 May 2012), online: canada.com <<http://blogs.ottawacitizen.com/2012/05/19/military-father-kidnaps-afghan-veteran-son-from-cfb-petawawa-to-get-him-treatment/>>.

²⁷² *Ibid.*

2.8% of total inmates may be veterans. This “suggests that there may be 626 offenders who served in the Canadian military (383 in institutions and another 243 supervised in the community). Moreover, there may another 633 sentenced or remanded veterans in provincial or territorial corrections”.²⁷³ The implications for corrections based on a comparative analysis with other states and existing data suggests that “as the number of veterans in the general population grows, their presence in correctional facilities is also likely to increase—and [...] those who have been deployed overseas in recent years are at comparatively higher risk of involvement with the justice system”.²⁷⁴ It should be noted that studies suggest that deployments alone do not increase the risk of criminogenic behaviour, but rather the presence of an OSI.²⁷⁵

There is a significant gap in the collection of data regarding veterans who are incarcerated. Canada’s allies currently track with substantial detail veteran offenders who are in prisons, their crimes and illnesses.²⁷⁶ This kind of information would be of great assistance to Canada in helping medical personnel address criminogenic factors in order to reduce criminal misconduct. Further, it would assist the JAG in formulating

²⁷³ Philippe Bensimon & Rick Ruddell, “Veterans in Canadian Correctional Systems” (4 May 2011), online: Correctional Service Canada <<http://www.csc-scc.gc.ca/text/rsrch/briefs/b46/b46-eng.shtml>>.

²⁷⁴ *Ibid.*

²⁷⁵ *Supra*, note 249.

²⁷⁶ See e.g. “Responding to the Needs of Justice-Involved Combat Veterans with Service-Related Trauma and Mental Health Conditions” *CMHS National Gains Center* (August 2008), online: <http://www.gainscenter.samhsa.gov/pdfs/veterans/CVTJS_Report.pdf>. See also, “Report of the Inquiry into Former Armed Service Personnel in Prison” *The Howard League for Penal Reform*, online: [veteransinprison.org](http://www.veteransinprison.org) <<http://www.veteransinprison.org.uk/Docs/Military%20inquiry%20final%20report.pdf>>: “There are at present over 85,000 people in prison in England and Wales and estimates of the proportion of those who have previously served in the Armed Forces range between 3.5 per cent and 16.75 per cent. This means that at any one time, between some 3,000 and 14,000 prisoners may be ex-service personnel.”

appropriate military justice policy. This thesis suggests that a concerted strategy for data collection on traumatized veterans who are incarcerated in military and civilian jails and prisons is required. This should be a joint initiative between Veterans Affairs, Corrections Canada and the Department of National Defence.

Generally speaking, incarcerating offenders with mental illness has become more and more common.²⁷⁷ Unfortunately, veterans with PTSD in prison are placed at significant risk. They need to remain constantly hyper-vigilant for violence and personal harm, thereby impeding treatment. Further, veterans can become re-traumatized, causing their symptoms to be exacerbated and increasing their aggression and the risk of violence. In addition, longer periods of imprisonment can cause a veteran's functioning to deteriorate.²⁷⁸ All of this increases the risk of longer periods of imprisonment, interference with treatment and a higher likelihood of recidivism.

More significantly, veterans who require immediate treatment may not get it. According to the most recent Annual Report of the Office of the Correctional Investigator, "a significant portion of the inmate population that suffers from mental illness is 'falling through the cracks', as they do not have access to intermediate care in their penitentiary nor meet the admission criteria of [...] psychiatric treatment facilities."²⁷⁹ Further, when dealing with veteran screening for OSI, "federal corrections has limited capacity to systematically assess [...] neurological dysfunctions upon

²⁷⁷ Gary Chaimowitz, "The Criminalization of People With Mental Illness", online: (2011) 57:2 *The Canadian J Psychiatry* 1 <http://intraspec.ca/CPA_CriminalizationOfPeopleWithMentalIllness_5.12.11.pdf>.

²⁷⁸ *Supra*, note 38.

²⁷⁹ The Office of the Correctional Investigator of Canada, *Annual Report of The Office of the Correctional Investigator: 2010-2011*, (Ottawa, OCI, 2011), online: Her Majesty the Queen in Right of Canada <<http://www.oci-bec.gc.ca/rpt/pdf/annrpt/annrpt20102011-eng.pdf>>.

admission to a federal penitentiary”.²⁸⁰ This may include TBI, OSI, PTSD, addictions and increased suicidal ideations. While much of the above would apply to all offenders with mental illness, “[i]f the experiences of Canadian veterans are similar to those reported in the U.S. and U.K. research, they may have higher risks and needs than the general offender population”.²⁸¹ If Corrections Canada cannot meet offender basic mental health requirements, incarcerated veterans and those who are concerned about their well-being should be troubled. Failure to treat veterans for their hidden wounds and the corresponding increased recidivism rates are costly to society.

2.2.5 The Cost of Veteran OSIs

While there are no specific recent Canadian studies that have tabulated and projected the costs of dealing with veteran OSI, it is conceivable that the costs will be significant. An American study by the “RAND Corporation estimates the costs of the psychological and neurological injuries suffered by Iraq and Afghanistan veterans at between \$4 and \$6.2 billion, just in the first two years after combat”.²⁸²

If we use this forecast and compare the American forecasted amount to the 30,000 Canadian troops deployed to Afghanistan, the cost in the first two years post combat is between 51.4 and 80 million dollars (30,000 Canadian troops²⁸³ x \$4 and \$6.2 billion /

²⁸⁰ *Ibid*, at 10.

²⁸¹ *Supra*, note 273.

²⁸² Vanessa Williamson & Erin Mulhall, “Invisible Wounds: Psychological and Neurological Injuries Confront a New Generation of Veterans” *Iraq and Afghanistan Veterans of America* (January 2009), online: <http://iava.org/files/IAVA_invisible_wounds_0.pdf>.

²⁸³ *Supra*, note 177: “A total of approximately 30,000 Canadian service personnel were deployed to Afghanistan.”

2,333,972 US Troops²⁸⁴). Clearly, there are other factors (such as currency differences between Canada and the United States) that would impact the actual figure. Similarly, these numbers strictly cover 2 years post-combat Afghanistan. They do not incorporate veterans suffering from OSIs from other deployments such as Rwanda or Bosnia. Still, these numbers provide a simplistic approximation of some of the economic costs of veteran OSIs for Canada – until a more detailed economic analysis is undertaken.²⁸⁵

Fortunately, these costs can be mitigated with early treatment. “When the impacts of an operational stress injury are treated in a timely and appropriate manner, full remission may result in 30% to 50% of cases”.²⁸⁶ Using the figures suggested above, this could result in savings to the government of approximately 15.4-40 million dollars over a two year period. A small investment in programs like diversion for veterans would facilitate faster treatment and perhaps mitigate long term costs associated with treatment, pensions, incarceration, court costs, unemployment, and dependant health and social welfare. Further, if Canada can retain experienced soldiers, there is a training savings associated with not having to medically release injured members.

This thesis suggests that the Government of Canada truly understand and attempt to quantify the actual costs of this problem. This may help foster broader acceptance of a treatment based approach by demonstrating the actual expense and the financial benefits

²⁸⁴Luis Martinez & Amy Bingham, “U.S. Veterans: By The Numbers” *ABC News* (11 November 2011), online: <<http://abcnews.go.com/Politics/us-veterans-numbers/story?id=14928136#1>>.

²⁸⁵ This author is wary of forecasting costs in Canada based on health care costs in the United States - which has the most expensive health care system in the world. Until more research is done by countries with socialized medical systems, and which had a combat role in Afghanistan, this simplistic comparator can be used to demonstrate, if nothing else, that more Canadian economic research and analysis is required. Such an analysis is beyond the scope of this thesis.

²⁸⁶ *Supra*, note 177.

of mitigating it. Further, better focused treatment options within jails and prisons tailored to veterans who need to be incarcerated may better treat the root illness and reduce overall costs to the taxpayer. This is notwithstanding the human and ethical component of facilitating treatment for injured veterans and their families.

2.3 SUMMARY OF CHAPTER 2 RECOMMENDATIONS

Throughout Chapter 2, the scope of the problem was discussed in order to substantiate a Canadian Military Justice Alternative Measures System in Chapter 4. In addition, a number of specific recommendations were made in order to improve the current situation for traumatized veterans. These recommendations, which will form part of the overall “campaign plan” also discussed in Chapter 4, can be summarized as follows:

1. There should be better data collection, tracking and analysis as it relates to mentally injured veterans or those suffering from TBIs. This information should be provided and reviewed in the Judge Advocate General (JAG) annual report as it relates to military justice. The Department of Veterans Affairs, with assistance from Attorney Generals, should analyze the information related to civilian justice. Also, there should be a concerted strategy for data collection on traumatized veterans who are incarcerated in military and civilian jails and prisons. This should be a joint initiative between Veterans Affairs, Corrections Canada and the Department of National Defence. Understanding how and why veterans end up before justice processes may help identify criminogenic factors and improve prevention and treatment strategies;

2. There should be better systematic processes to track, monitor and assist released veterans to ensure a safer transition to civil society;
3. There should be more stringent policies that address mental health discrimination to assist in expediting change and defeating stigma among the veteran and military community. Some improvements may include: better safeguards on employment through accommodation, a specific offence related to OSI harassment and increased privacy safeguards;
4. There should be more extensive training on OSIs for military personnel from the moment of recruitment. This includes attacking the stigma and culture of repressing mental health problems during basic training. This education process must be directed to all rank levels;
5. All military justice participants should be trained to detect mental illness and to identify when there is a relevant correlation to the offence(s) charged. In particular, justice officials need more training on the symptoms of mental illness, mental health problems and addictions to ensure appropriate diversion and referral. Within the unique summary trial process, specific training on detection needs to be incorporated into accreditation processes for presiding and assisting officers;
6. There is a need to provide mentally injured members with the option to elect court martial, regardless of the charge;
7. There should be specific policy direction from military justice leaders on how subordinates are to deal with circumstances where mental illness is suspected,

alleged or proven. These policies would enhance consistency in veteran treatment by justice officials, increase awareness, reduce stigma and foster detection;

8. The Government of Canada should quantify the actual costs of mentally injured veterans. This may help foster broader acceptance of a treatment based approach by demonstrating the actual expense and the financial benefits of mitigating it;
and
9. There is a need for better focused treatment options within Canadian jails and prisons tailored to veterans who need to be incarcerated. This may better treat the root illness and reduce overall costs to the taxpayer.

CHAPTER 3 THE AMERICAN PHENOMENA: A COMPARISON

The United States continues to make substantial advancements for veterans caught up in the criminal justice system, including treatment during civilian incarceration and specialized VTCs.²⁸⁷ Examining the solutions of our American allies may be of assistance in deciding the best way for Canadians to address this serious issue.

In order to understand whether American solutions to the legal problems of traumatized veterans would be of assistance to Canada, a brief comparison of the relevant veteran OSI issues and justice processes of both countries is appropriate. The United States is used as a comparator because it is Canada's closest ally. In addition, its military and civilian justice system has similar origins, operates within a concurrent jurisdiction framework and remains somewhat analogous. Further, the most recent deployment was to the same location, Afghanistan, where troops often fought side by side with each other. Finally, as will be seen, the magnitude of the problem the U.S. faces is comparable on a per capita basis.

This chapter will examine the processes currently in place for American mentally injured veterans. In particular, it will compare those systems with Canadian ones. This comparison will be used build on existing processes in order to substantiate a proposed Canadian Military Justice Alternative Measures System in Chapter 4. It will also provide

²⁸⁷ See e.g. Robert Johnson, "So Many Military Veterans Are Going To Jail This Georgia Town Built A Vets Only Wing" *Business Insider: Military & Defence* (26 April 2012), online: Business Insider, Inc. <http://www.businessinsider.com/there-are-so-many-veterans-going-to-jail-this-georgia-town-built-them-their-own-wing-2012-4?utm_source=alerts&nr_email_referer=1>. See also Ed Pilkington, "First jail for US veterans will offer helping hand to a growing problem" *The Guardian* (6 May 2012), online: Guardian News and Media Limited, <<http://www.guardian.co.uk/world/2012/may/06/georgia-jail-for-us-veterans>>.

some specific recommendations on improving the current Canadian justice systems for veterans.

In particular, the first section will compare the magnitude of the traumatized veteran problem with our American counterparts. This section will demonstrate that the scope of the problem is comparable and similar for both countries. This similarity is relative to population differences and the number of military members found in the general population.

The second section will compare the existing military justice processes between Canada and the United States. This will highlight that while there are similarities between the Canadian and American military justice processes; there remains important differences that may require different solutions and tactics to deal with mentally injured military offenders caught up in Canadian military justice.

The third section will compare the American civilian justice processes for veterans with Canadian systems. In particular, it will review some caselaw for veterans before civilian justice processes. It will demonstrate that American courts are prepared to recognize that veterans with OSIs require treatment based sentences. Further, courts at the highest level have determined that OSIs are relevant to sentencing. Some American states have recognized the importance of treatment based options to justice processes and OSI based mitigation in their legislation.

The fourth section will examine specifically Veterans Treatment Courts. These are problem solving courts specifically designed for veterans that are currently being used in many American states.

Finally, a brief summary of relevant recommendations for Canadian justice that have been generated by comparing our justice processes with those of the United States will be summarized at the conclusion of Chapter 3. These proposals are collateral to the overarching argument for a Canadian Military Justice Alternative Measures Process detailed in Chapter 4. These collateral recommendations include: the creation of Canadian legislation which expressly considers the impact of military trauma and injuries as it relates to criminal and disciplinary processes; options for veterans to self-identify OSIs on their provincial driver's license; and options for specialized housing and treatment for veteran inmates in Canadian civilian institutions.

3.1 THE MAGNITUDE OF THE PROBLEM

In order to substantiate that existing American justice models for veterans are appropriate for Canadians, it is important to compare whether the scope of the problem is comparable.

As of 2009, there were 21.9 million American veterans living in the United States.²⁸⁸ After more than a decade of war in Iraq and Afghanistan, the United States has more than 2.3 million veterans who have deployed in the "War on Terror".²⁸⁹ "Nearly 20 percent of military service members who have returned from Iraq and Afghanistan -- 300,000 in all -- report symptoms of post-traumatic stress disorder or major depression

²⁸⁸ US Census Bureau, "Profile America: Facts for Features" *Newsroom* (27 October 2010), online:

<http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb10-ff21.html>.

²⁸⁹ *Supra*, note 284.

[...]”²⁹⁰ This percentage is consistent with Canadian figures, which suggest rates between 14.5 and 23.1% depending on where in Afghanistan service members were posted and their role.²⁹¹

“On any given day, veterans account for nine of every hundred individuals in U.S. jails and prisons [...O]n any given day approximately 9.4 percent, or 223,000, of the inmates in the country’s prisons and jails are veterans”.²⁹² It should be noted that this figure also corresponds to the percentage of veterans in the general American population. While Canadian data suggests that approximately 3% of Canadian inmates are veterans, this also mirrors the percentage of veterans in the general Canadian population.²⁹³ In other words, the magnitude of the problem regarding veterans who are incarcerated in civilian institutions is the same relative to the military members found in the general population.

American studies have noted factors at play among that state’s forces that aggravate the problem, including: long and multiple deployments, younger service members, increased exposure to combat, access to care and monitoring of reservists, the militia or National Guard.²⁹⁴ Similarly, Canadian reports have suggested that veteran OSI problems tend to increase when there are multiple close deployments.²⁹⁵ Also, increased

²⁹⁰ “One In Five Iraq And Afghanistan Veterans Suffer From PTSD Or Major Depression” *Science Daily* (17 April 2008), online: <<http://www.sciencedaily.com/releases/2008/04/080417112102.htm>>.

²⁹¹ *Supra*, note 30. See also, *supra*, note 171.

²⁹² *Supra*, note 276.

²⁹³ *Supra*, note 273.

²⁹⁴ See e.g. *supra*, note 282.

²⁹⁵ See. e.g. *supra*, note 177: “Repeated exposure to combat operations will cause this percentage to increase.”

exposure to actual combat is a factor that exacerbates conditions.²⁹⁶ In addition, Canadian reservists may “fall through the cracks” and have difficulty accessing specialized treatment.²⁹⁷ While similar factors make the problem worse, the impact on individual soldiers is equally comparable.

United States officials have also concluded that the impact of untreated OSIs on members includes: misconduct and poor discipline, unethical behavior, substance abuse, marital conflict, family violence, homelessness and suicide.²⁹⁸ Canadian officials have made similar findings.²⁹⁹

Having demonstrated that the nature and relative scope of the Canadian problem is very similar to that of the United States, it is helpful to examine how veteran offenders are treated in the American military justice system.

3.2 THE MILITARY JUSTICE PROCESS

A military member who is charged with an offence in the United States may face administrative measures from a Commander. Alternatively, they may be required to face a non-judicial punishment if the offense is minor. Such hearings conducted by the Commander are non-adversarial and the standard of reasonable doubt applies. “The service member may request an open or closed hearing, speak with an attorney about his

²⁹⁶ *Ibid*: “This risk increases for soldiers deployed in combat zones.”

²⁹⁷ See e.g. *supra*, note 245: “A career soldier and lieutenant-colonel in the reserves, Willaert said it's ‘harder to pick up on the warning signs’ among those outside the regular forces, and he adds it's ‘disappointing to hear’ that some are not finding the help they need.”

²⁹⁸ *Supra*, note 282.

²⁹⁹ See. e.g. *supra*, note 177: “When the symptoms become chronic, there is a significant increase in the risk of a spiral in the severity of symptoms: absenteeism, unemployment, interpersonal and family problems, alcoholism and drug addiction, trouble with the law, homelessness and suicide.”

case, have someone speak on his behalf, and present witnesses who are reasonably available. The rules of evidence do not apply”.³⁰⁰

The Canadian military has administrative measures that can be imposed; however, these are not considered part of the disciplinary or criminal process. Still, the prior or likely imposition of administrative measures on an offender may be considered on sentencing by a service tribunal.

The American Commander may also choose to dispose of the offenses by court-martial. This requires “preferring” or forwarding charges to a higher authority. Once preferred, they are referred to court martial. The court martial must be convened by a convening authority, who is ordinarily “the commander of the unit to which the accused is assigned”.³⁰¹ Conversely, in Canada, the convening authority functions are performed by the Court Martial Administrator, a civilian bureaucrat.³⁰² Otherwise, the process is relatively similar to the Canadian military justice system.³⁰³

In the United States there are currently three types of courts martial with varying levels of punishments and procedures. The Canadian military had a similar structure until 2008, when legislative changes were prompted by a Court Martial Appeal Court decision ruling that the scheme was unconstitutional.³⁰⁴ Currently, there is only a Standing or

³⁰⁰ “Military Justice Overview” *U.S. Department of Defense*, online: <<http://vwac.defense.gov/military.aspx>>.

³⁰¹ R. Chuck Mason, “Military Justice: Courts-Martial, An Overview” *Congressional Research Service* (14 March 2012), online: CRS Report for Congress <<http://www.fas.org/sgp/crs/natsec/R41739.pdf>>.

³⁰² *Supra*, note 42, s 165.19-165.191.

³⁰³ See e.g. *supra*, note 46, ch 109.

³⁰⁴ *Joseph Simon Kevin Trépanier v The Queen*, 2008 CMAC 3, at para 137: “For these reasons, we will allow the appellant’s appeal in part and, as requested, declare that section 165.14, subsection 165.19(1) of the NDA and article 111.02(1) of the QR&Os

General Courts Martial.³⁰⁵ The Standing Court Martial (SCM) is presided over by military judge alone and the General Court Martial (GCM) has five panel members and a military judge.³⁰⁶ The choice of mode of trial ordinarily lies with the accused as opposed to the chain of command.³⁰⁷ Regardless of the mode of court martial in either country, the process is adversarial with counsel appearing for both the prosecution and defence.³⁰⁸ While there are semblances of a civilian criminal trial, there are procedural differences and unique rules of evidence.³⁰⁹

The appeal or review process in the United States differs somewhat from Canada. In America, the appellate process begins with a review by the convening authority. In serious cases there is an automatic review by the Department of Defence's Court of Criminal Appeals, composed of military judges. Both the convening authority and the Court of Criminal Appeals may alter the decision or sentence as long as the jeopardy to the offender does not increase. The next court in the appellate process is the Court of Appeals for the Armed Forces. It is composed of five civilian judges appointed by the President for fifteen years. This Court may only review questions of law.³¹⁰ Finally, either party “may petition the Supreme Court of the United States for a writ of certiorari from the Court of Appeals for the Armed Forces. The review by the Supreme Court is

violate section 7 and the right to a fair trial guaranteed by paragraph 11*d*) of the Charter and are of no force and effect.”

³⁰⁵ *Supra*, note 42, s 166 and 173.

³⁰⁶ *Ibid*, s 167 and 174.

³⁰⁷ *Ibid*, s 165.193.

³⁰⁸ See e.g. *supra*, note 300. See also, *supra*, note 46, ch 112.

³⁰⁹ See *ibid*. See also, Military Rules of Evidence, C.R.C., c. 1049, online: Department of Justice <http://laws-lois.justice.gc.ca/PDF/C.R.C.,_c._1049.pdf>.

³¹⁰ *Supra*, note 300.

entirely discretionary and extremely rare”.³¹¹ Conversely, the appeal process in Canada from a court martial does not involve any decision making by the accused’s chain of command. Instead, the accused or government may appeal directly to the Court Martial Appeal Court,³¹² then the Supreme Court of Canada – both composed of civilian judges.³¹³ In addition, there have been occasions where counsel has tried to use the Federal Court of Canada to deal with court martial matters, though these are unusual.³¹⁴

When dealing with mentally injured veterans who are still serving, the United States military justice system has additional early detection processes for mental illness not available in Canada. While Canadian military judges may order an assessment of fitness for trial, the Canadian chain of command or convening authority does not have this ability. In the United States, both military judges and convening authorities may request a mental health assessment. The examination is often called an RCM 706 board.³¹⁵ The board is called upon to determine: whether at the time of the alleged offence, the accused had a severe mental disease or defect; the accused’s clinical psychiatric diagnosis; whether she was unable to appreciate the nature or wrongfulness of her conduct; and whether the accused is fit for trial. This report may “lead to the case

³¹¹ *Ibid.*

³¹² *Supra*, note 42, s 230-231. See also, *supra*, note 46, 115.02-115.04.

³¹³ *Ibid*, s 245. See also, *ibid*, 115.27.

³¹⁴ See e.g. *Corporal M.A. Wilcox v Attorney General of Canada and Commander P.J. Lamont, in his capacity as a military Judge*, (14 July 2009), Halifax T-1028-09 (FC): “AND UPON assuming and not deciding that there is a serious issue to be tried, the Court is not satisfied that the Applicant has demonstrated that he will suffer irreparable harm if a stay is not granted. The Applicant, if convicted, will be able to file an appeal to the Court Martial Appeal Court (subsection 230(b) of the *NDA*) and raise the same arguments as he is raising here. The harm to the Applicant can be cured by a decision on the merits by the Court Martial Appeal Court [...] THIS COURT ORDERS that the motion for an interim stay of proceedings be dismissed.”

³¹⁵ This term comes from the rule that creates the Board, namely Rule for Court Martial 706 as contained in the Manual for Courts Martial United States.

being suspended, charges being dismissed by the convening authority, administrative separation of the accused from military service, or the charges being tried by court-martial”.³¹⁶ Regardless of the results, additional examinations may be ordered as the matter progresses through the military justice process.³¹⁷ In essence, the American convening authority, usually, the accused’s Commanding Officer, has the powers of a Canadian military judge to order an assessment of fitness and criminal responsibility.³¹⁸

The United States military justice system currently does not have a diversion process, such as a VTC. The lack of problem-solving diversion is currently receiving substantial criticism, including from within the ranks of the American Judge Advocate General’s office.³¹⁹ According to Seamone, the military justice system “undermines the stated sentencing philosophy of rehabilitation of the offender, the way it erodes the professional ethic by denying core values, and the way it defies the moral obligation to advance the interests of both the veteran and the society he will rejoin.”³²⁰ He advocates for convening authorities to implement “treatment-based suspended punitive discharges for combat traumatized offenders,”³²¹ and to divert offenders to civilian PSCs through pre-trial agreement.³²² Further, he advocates for treatment-based sentences.³²³

³¹⁶ *Supra*, note 301.

³¹⁷ *Ibid.*

³¹⁸ See e.g. *supra*, note 42 s 198 and 202.13.

³¹⁹ *Supra*, note 2, at 2-3: “While one would expect courts-martial to foster the problem-solving approach based on the active duty origin of these mental conditions, the initial legal approach resides exclusively in the domain of civilian Veterans Treatment Courts (VTCs).”

³²⁰ *Ibid.*, at 3.

³²¹ *Ibid.*

³²² *Ibid.*

³²³ *Ibid.*

Similarly, the Canadian military justice system does not have diversion or treatment based sentences beyond remanding to a psychiatric facility after a successful defence of mental disorder.³²⁴ Further, the Canadian convening authority does not have the ability to grant clemency pre or post-conviction. The referral authority, who refers from the unit to the DMP, may provide comments on disposition during referral; however they must refer for trial or direct a summary trial be held.³²⁵ Arguably, the Commanding Officer could decide not to proceed with charges,³²⁶ but he/she is not authorized to get a mental health assessment in relation to a disciplinary matter, nor impose treatment as part of a sentence.³²⁷ The CDS and Officers commanding a Command may suspend incarceration imposed by a court martial and lower ranking officials may also do so for summary trials.³²⁸ While military judges may also suspend their own sentences of incarceration,³²⁹ their ability to oversee future treatment is often perceived as limited due to the *ad hoc* nature of the military justice system.³³⁰

³²⁴ See e.g. *supra*, note 42, 202.16: “(2) No order made under subsection (1) shall direct that any psychiatric or other treatment of the accused person be carried out or direct that the accused person submit to such treatment, except that the order may include a condition regarding psychiatric or other treatment where the accused person has consented to the condition and the court martial considers the condition to be reasonable and necessary in the interests of the accused person.”

³²⁵ *Supra*, note 46, 109.05.

³²⁶ *Ibid*, 107.09 (3)(b).

³²⁷ *Her Majesty The Queen and Sergeant (Retired) Michael Kipling*, 2002 CMAC 1, para 28: “I think the parties would agree that forcible vaccination of an individual would *per se* be an infringement of the right to security [...] It is well established that a court must balance individual interests *versus* the public interest in deciding whether in the final analysis there is a denial of a right contrary to the principles of fundamental justice so as to invoke the protection of section 7.”

³²⁸ *Supra*, note 46, 114.02.

³²⁹ See e.g. *R v Master Corporal D.A. Bryson*, 2008 CM 1002.

³³⁰ *Supra*, note 74.

A recent case involving a massacre in Afghanistan has raised serious questions about the impact of PTSD on soldiers serving in operations. Army Staff Sergeant Bales has been charged with 17 counts of premeditated murder of Afghan civilians. He had reportedly sustained a brain injury in Iraq and was on his fourth tour of combat duty at the time of the alleged offence. His defence team is expected to raise undiagnosed PTSD as a related cause of the incident.³³¹ Initial reports from his lawyer suggest that Bales was “suffering from severe nightmares, flashbacks of war scenes and persistent headaches after his multiple combat tours”.³³² The handling of this case by the American military justice system is anticipated to come under intense media scrutiny. Canada has not had to deal with such a massacre in recent memory and certainly not during the War on Terror – although it is possible to conceive as there are Canadian soldiers who have done four or more tours during a short period of time, with mental health issues arising.³³³

A brief comparison demonstrates many similarities between the Canadian and American military justice processes. However, there remain important differences that

³³¹ Kari Huus, “Afghan massacre: Sgt Bales case echoes loudly for ex-soldiers on hotline for vets” *msnbc.com* (30 March 2012), online: <http://usnews.msnbc.msn.com/_news/2012/03/30/10927433-afghan-massacre-sgt-bales-case-echoes-loudly-for-ex-soldiers-on-hotline-for-vets?lite>.

³³² Carol D. Leonnig, “Staff Sgt. Robert Bales describes PTSD-like symptoms, lawyer says” *The Washington Post* (28 March 2012), online: http://www.washingtonpost.com/world/national-security/staff-sgt-robert-bales-showed-ptsd-like-symptoms-lawyer-says/2012/03/28/gIQAV3TGhS_story.html.

³³³ See e.g. Allan Woods, “Battle rages for soldiers returning home from war” *thestar.com* (7 October 2011), online: <<http://www.thestar.com/news/canada/politics/article/1066696--battle-rages-for-soldiers-returning-home-from-war>>: “But sources have told the *Toronto Star* that at least three Canadian soldiers have taken their lives in the last six weeks. At least two coincided with the 10th anniversary of the Sept. 11, 2001 attacks. One of those was the Sept. 12 death of a Kingston-based warrant officer with 23 years of service. He completed four tours of duty since 2002, including a 2009 deployment detecting and dismantling improvised explosive devices in Afghanistan with the military’s bomb squad.”

may require different solutions and tactics to deal with mentally injured military offenders caught up in Canadian military justice. Seamone's idea to use existing civilian PSCs within the civilian justice system³³⁴ is worth exploring.

3.3 THE CIVILIAN JUSTICE PROCESS

American civilian justice officials are often faced with veteran offenders who have OSIs. How they are dealt with varies from state to state and judge to judge. While many states have set up specialized VTCs, it is likely that many are diverted to other PSCs, such as DTCs, DVCs or MHCs. "The rapid expansion of specialized treatment courts is noteworthy. As of 2012, there are over 3648 problem-solving courts in the United States [...] including at least 2459 [DTCs and] 250 MHCs".³³⁵ Unfortunately, there are no statistics available to determine just how many veterans are being put through these types of civilian diversion processes. There is a similar lack of data on the Canadian experience with diversion to non-veteran PSCs.

Although diversion may be available, it is not always used when it could be due to a multitude of factors, including the experience level of the justice officials involved regarding mental illness detection and the lack of consent of the accused due to stigma or employment consequences. In those cases, and in those states without PSCs, judges and officials are often forced to craft decisions that they deem just. A review of the caselaw

³³⁴ *Supra*, note 2 at 3: "Carefully drafted pretrial agreement terms indicate how offenders can enroll in existing VTCs within the convening authority's jurisdiction."

³³⁵ *Ibid*, p 34-35.

demonstrates that unfortunately, the results are uncertain and do not always foster treatment. This is also consistent with the Canadian experience as demonstrated above.³³⁶

A brief review of some recent high profile cases highlights some similarities with Canadian justice and a similar evolution with respect to understanding the impact of OSIs on a criminal prosecution with respect to fitness, criminal responsibility and sentencing.

In October 2009, an Oregon jury found Jessie Bratcher, a former member of the National Guard that had served in Iraq, guilty of murder except for insanity related to a PTSD flashback from the war in Iraq³³⁷ (the process is akin to the Canadian “not criminally responsible” process).³³⁸ Bratcher was diagnosed with PTSD after serving 11 months in a forward operating base in Kirkuk, Iraq in 2005. “His unit patrolled villages around Kirkuk under constant threat of insurgent attacks and roadside bombs. In 2005, Bratcher watched as one of his closest friends was crushed by a Humvee during an

³³⁶ See ch 2.2.3 Civilian Courts.

³³⁷ Julie Sullivan, “Iraq veteran sentenced to state hospital in PTSD murder case” *OregonLive.com* (7 December 2009), online: <http://www.oregonlive.com/news/index.ssf/2009/12/post_34.html>.

³³⁸ See 2011 *Oregon Revised Statutes* § 161.328, online: <<http://www.oregonlaws.org/ors/161.328>>: “(1) Following the entry of a judgment pursuant to ORS 161.319 (Form of verdict on guilty except for insanity), the court shall order a person committed to a state mental hospital or other facility designated by the Oregon Health Authority if: (a) Each offense for which the person is found guilty except for insanity is a misdemeanor; and (b) The court finds that the person is affected by mental disease or defect and presents a substantial danger to others that requires commitment. (2) The total period of commitment under this section may not exceed the maximum sentence provided by statute for the crime for which the person was found guilty except for insanity. (3) If the superintendent of the state mental hospital or the director of the facility to which the person is committed determines that a person committed under this section is no longer affected by mental disease or defect or, if so affected, no longer presents a substantial danger to others that requires commitment, the superintendent or director shall file notice of that determination with the committing court. Upon filing of the notice, the superintendent or director shall discharge the person from custody.”

accident while out on patrol”.³³⁹ Shortly after, “a roadside bomb exploded near Bratcher’s Humvee at the same intersection where his friend had been killed”.³⁴⁰

The jury had heard how in the summer of 2008, Bratcher’s pregnant fiancée, Celena Davis, told him that Ceja Medina had raped her and that the baby might not have been Bratcher’s. Bratcher proceeded to put the barrel of an AK-47 in his mouth. He later cut Davis’s hair off. Two days later, Bratcher purchased a gun. After discussing what to do, the two decided to go to the police. Because it was the weekend, the police station’s door was locked. As a result, they proceeded to Ceja Medina’s home. The evidence showed that Bratcher called Ceja Medina into his front yard and shot him six times. At the time of the murder, he stated that he experienced a flashback to Iraq.³⁴¹

A forensic psychologist for the defence argued that “Bratcher’s flashback was triggered by the stress around the rape allegation”.³⁴² He had experienced other flashbacks while incarcerated and was previously diagnosed with PTSD. In sentencing the offender, the judge found Bratcher to be a danger to the community and ordered that he be placed under the lifelong supervision of the Oregon Psychiatric Security Review Board.³⁴³ “Under Oregon law, jurors could have convicted Bratcher on a reduced charge of first-degree manslaughter, if they determined that he was a sane person acting in the passion of the moment”.³⁴⁴ The “guilty except insane” decision allowed Bratcher “to

³³⁹ Melody Finnemore, “Firestorm the Horizon” *Oregon State Bar Bulletin* (April 2010), online: Oregon State Bar <<http://www.osbar.org/publications/bulletin/10apr/firestorm.html>>.

³⁴⁰ *Ibid.*

³⁴¹ Kim Murphy, “Did the war make him do it?” *Los Angeles Times* (28 November 2009), online: <<http://articles.latimes.com/2009/nov/28/nation/la-na-soldier28-2009nov28>>.

³⁴² *Supra*, note 337.

³⁴³ *Ibid.*

³⁴⁴ *Supra*, note 341.

receive psychological treatment instead of prison”.³⁴⁵ This is akin to the 2007 decision of the Manitoba Court of Appeal in *R. v. Borsch*³⁴⁶ which affirmed that PTSD can be used to support an NCR defence.

The Oregon *Bratcher* decision was on the heels of a Supreme Court of the United States unanimous decision to overturn a combat veteran’s death sentence because the defence had failed to introduce mitigating evidence of PTSD.³⁴⁷ In that case, *Porter*, a decorated veteran of the Korean War who was wounded and traumatized during heavy combat, was convicted of the murders of his former girlfriend and her lover. The highest American court stated:

[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter.³⁴⁸ [Emphasis mine]

The sentiments of the United States Supreme Court seem similar to the rationale used by Judge Peter British Columbia Provincial Court Judge Peter Doherty when he stated that incarcerating Corporal Berube, a mentally injured veteran, "might strike thoughtful Canadians as manifestly unjust".³⁴⁹ Still, the American decision binds lower courts and clearly articulates the fundamental problem for veterans and the requisite impact combat stress should have on mitigation when an OSI does not completely

³⁴⁵ *Ibid.*

³⁴⁶ *Supra*, note 102.

³⁴⁷ *Supra*, note 39.

³⁴⁸ *Ibid.*, at 455.

³⁴⁹ *Supra*, note 267.

absolve criminal responsibility, but nonetheless has some bearing on the transaction that attracted the justice system's attention.

This spirit of leniency for traumatized combat veterans has been reduced to legislation in California³⁵⁰ and Minnesota.³⁵¹ In addition, in 2010, the United States Sentencing Guidelines were revised to indicate that military related trauma can be considered relevant in sentencing. This allows judges to depart from usual sentencing guidelines "if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical

³⁵⁰ *California Penal Code*, § 1170.9, online: <<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=01001-02000&file=1170-1170.9>>: "(a) In the case of any person convicted of a criminal offense who could otherwise be sentenced to county jail or state prison and who alleges that he or she committed the offense as a result of sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military, the court shall, prior to sentencing, make a determination as to whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of that service. The court may request, through existing resources, an assessment to aid in that determination".

[Emphasis mine]

³⁵¹ *Minnesota Statutes*, § 609.115, Subd 10 (2008), online: <<https://www.revisor.leg.state.mn.us/statutes/?id=609.115&year=2008>>: "(a) When a defendant appears in court and is convicted of a crime, the court shall inquire whether the defendant is currently serving in or is a veteran of the armed forces of the United States. (b) If the defendant is currently serving in the military or is a veteran and has been diagnosed as having a mental illness by a qualified psychiatrist or clinical psychologist or physician, the court may: (1) order that the officer preparing the report under subdivision 1 consult with the United States Department of Veterans Affairs, Minnesota Department of Veterans Affairs, or another agency or person with suitable knowledge or experience, for the purpose of providing the court with information regarding treatment options available to the defendant, including federal, state, and local programming; and (2) consider the treatment recommendations of any diagnosing or treating mental health professionals together with the treatment options available to the defendant in imposing sentence". [Emphasis mine]

cases covered by the guidelines”.³⁵² No such legislation expressly considers the impact of military trauma in Canada as it relates to a criminal process. In my view, it should.

In addition to judges, other American justice officials are also taking steps either to assist traumatized veterans that come in contact with the civilian criminal justice system, or to prevent them from doing so. For example, numerous states have provided veterans with an option to self-identify that they are veterans with PTSD on their driver’s licence.³⁵³ The overall purpose is to “provide valuable information to first responders and will help the Department of Veterans’ Services notify veterans of benefits they are eligible to receive”.³⁵⁴ As a result, it is hoped that many veterans who would otherwise have been arrested and confined following ordinary traffic stops due to aggressive reactions relating to OSIs will be diverted by police to mental health centers.³⁵⁵ While other U.S. states have followed or are currently examining this initiative,³⁵⁶ no Canadian provinces have openly discussed this issue. They should.

³⁵² “2011 Federal Sentencing Guidelines Manual” *United States Sentencing Commission* (1 November 2011) at § 5h1.11, online:

<http://www.usc.gov/Guidelines/2011_Guidelines/Manual_HTML/5h1_11.htm>.

³⁵³ See e.g. Kevin Spak, “Georgia Passes Bill to Note PTSD on License” *newser* (12 May 2010), online: <<http://www.newser.com/story/88531/georgia-passes-bill-to-note-ptsd-on-license.html>>.

³⁵⁴ Glen Johnson, “Mass. Registry to offer special ‘Veteran’ designation on driver’s licenses” *Political Intelligence* (11 August 2011), online: [boston.com](http://www.boston.com/Boston/politicalintelligence/2011/11/mass-registry-offer-special-veteran-designation-driver-licenses/hCS9Ze4cwu6CakphtL6POP/story.html) <<http://www.boston.com/Boston/politicalintelligence/2011/11/mass-registry-offer-special-veteran-designation-driver-licenses/hCS9Ze4cwu6CakphtL6POP/story.html>>.

³⁵⁵ *Supra*, note 2 at 26: “Awareness of untreated veteran mental health conditions and de-escalation of their symptoms can save not only the veteran in crisis, but the lives of police officers and innocent bystanders as well. [...] The state of Georgia has gone even further, giving veterans the option of indicating diagnosed PTSD on their drivers’ licenses to avoid potential confrontations with officers during traffic stops. And, many veterans who would otherwise have been arrested and confined are being diverted by police to mental health centers in lieu of arrest.”

³⁵⁶ See e.g. “RI House to vote on veteran driver’s licenses” *boston.com* (13 January 2012), online: NY Times Co. <http://articles.boston.com/2012-01-13/news/30624646_1_specialty-license-plates-veteran-service-members>. See also, Lindsay Wise, “Texas driver’s licenses to list veteran status”, *chron.com* (30 August

American corrections officials are also attempting to better deal with the influx of mentally ill veterans that are being incarcerated. Several states have begun providing specific dorms or facilities for veterans within jails. For example, Georgia has opened a 16-inmate corrections facility near Fort Benning, a large military base. The programs are geared towards veteran treatment in order to reduce recidivism. They also partner with the multi-disciplinary team of the local VTC in order to better access reintegration services for the veteran.³⁵⁷ Similarly, the Florida Department of Corrections has also created specialized housing for veterans.³⁵⁸ According to Florida Corrections officials “[g]rouping veterans allows prisons to tailor pre-release services to their special needs, such as Post-Traumatic Stress Disorder counselling, and to familiarize inmates with military benefits and supports available to them on the outside”.³⁵⁹ Florida has created five dormitories with a capacity of approximately 400 which are located throughout the state. One facility is for female veterans.³⁶⁰ Conversely, there are currently no known similar initiatives for veterans within Corrections Canada, although Corrections officials acknowledge that more research and study is required on this issue.³⁶¹ While there are more veterans in American jails and prisons, the most recent numbers from Correction Canada officials suggest that as many as 626 inmates may be veterans. The differences in the size of the two militaries do not justify Canada’s failure to provide specialized

2011) (blog), online: <<http://blog.chron.com/armedsources/2011/08/texas-drivers-licenses-to-list-veteran-status/>>.

³⁵⁷ *Supra*, note 287.

³⁵⁸ Barbara Liston, “Florida Debuts New Prison Dorms for U.S. Veterans” *Reuters* (9 November 2011), online: <<http://www.reuters.com/article/2011/11/10/us-florida-prisons-veterans-idUSTRE7A90HA20111110>>.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

³⁶¹ *Supra*, note 273.

housing for veteran inmates with OSIs. It is far better that they be nationally based in one prison or in separate smaller dorms within regional facilities. It is acknowledged that these dorms may be smaller in size when compared to their American counterparts. Regardless, Corrections Canada and their provincial counterparts should provide this option for incarcerated veterans in civilian institutions.

A review of civilian justice processes that American veterans may face suggest that many states have made substantial advancements in promoting treatment for mentally injured vets, including police identification and diversion, government synchronized veteran tracking through licensing, specialized veteran housing for inmates that focuses on treatment, courts diverting veterans to mental hospitals or treatment programs instead of jails or prisons, and legislated mitigation and treatment options for trauma related to military service. Still, there is more to be done. Canadians seems to be needlessly lagging behind in many of these areas, particularly with respect to specialized veteran criminal justice diversion and the use of VTCs.

3.4 VETERANS TREATMENT COURTS

At last count, there were 88 VTCs in 27 states in the United States.³⁶² VTCs are specialized alternative measures mechanisms for minor offences committed by former members of the military. The purpose of the courts is to “keep those with mental health

³⁶² *Supra*, note 2 at 5. See also Captain Evan R. Seamone, “Attorney as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making Process” (2009) 202 *Mil L Rev* 144 at 160: “In January 2008, the first Veterans’ Treatment Court was established in Buffalo, New York [...] In a span of months, similar veterans’ courts began in eight other jurisdictions, including Wisconsin, Oklahoma, California and Alaska, with the prospect of thirty states planning future initiatives and federal legislation to fund such programs.”

issues out of the traditional justice system”.³⁶³ More specially, it is designed to reduce recidivism by dealing with the core criminogenic factors such as homelessness, aggression, and substance abuse.

A VTC is a problem-solving diversionary court, which is a hybrid of mental health, drug treatment, sex offender and DVC. It deals exclusively with veterans suffering from serious mental conditions, including OSIs and addictions.³⁶⁴ Like Canadian MHCs, the focus is on rehabilitation. These diversionary courts demonstrate a societal willingness and inclination to focus on treatment and rehabilitation for mentally ill offenders faced with criminal justice processes.

While there are differences between the respective State processes, the Alaskan model exemplifies contemporary American VTC programs.³⁶⁵ Essentially, the VTC receives referrals post arraignment, regardless of whether the member is in custody. In order to participate in the VTC, the accused must file a motion to determine eligibility. The VTC sits one afternoon per week. Once the VTC judge assumes carriage of the file, the accused and Veterans Services Representatives develop a treatment plan to be carried out by Veterans Services. Both the Prosecution and Defence enter into plea discussions, which can result in a modified incarceration sentence, the reduction of counts, or the dismissal of all charges. Because the program is consent-based, the offender may opt out of the process. Further, they may be removed or punished for non-compliance and placed

³⁶³ “Keeping Veterans with PTSD out of the Justice System” *National Center for PTSD* (17 August 2010), online: United States Department of Veteran Affairs <<http://www.ptsd.va.gov/public/pages/keeping-PTSD-vets-out-JS.asp>>.

³⁶⁴ “Veterans Courts” *California Courts: The Judicial Branch of California* (2012), online: Judicial Council of California <<http://www.courts.ca.gov/11181.htm>>.

³⁶⁵ Hon. Michael Daly Hawkins, “Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System” (2010) 7 *Ohio St J Crim L* 563 at 573, as quoted in Seamone, *supra*, note 1 at 188.

back in the regular justice stream. Should they remain in the system, veteran offenders plead to the offences agreed and then a court-ordered treatment plan is implemented as a condition of bail pending sentencing. During the treatment phase, the Judge acts as a mentor or coach in assisting and monitoring the progress of treatment. Once the treatment plan is completed, the veteran graduates. The case is either dismissed or the offender is sentenced to a completion sentence. The file is then closed. The Alaskan Veterans Court process closely resembles the MHC models in Canada, such as the Nova Scotia Mental Health Court.³⁶⁶ The difference is that the provincial models do not currently have specialized veteran treatment professionals or social workers with knowledge of veterans' benefits on their multi-disciplinary teams.

The use of VTCs has been endorsed by the American Bar Association and the National District Attorney's Association.³⁶⁷ Further, PSCs generally have been encouraged by the Conference of Chief Justices and the Conference of State Court Administrators.³⁶⁸ No such public endorsements regarding veterans have been put forward by Canadian counterparts, although PSCs generally are receiving support from justice officials.³⁶⁹ The support is backed by statistics indicating that reduced recidivism

³⁶⁶ *Supra*, note 121.

³⁶⁷ *Supra*, note 2 at 35.

³⁶⁸ *Ibid.*

³⁶⁹ See e.g. "Remarks of the Right Honourable Beverley McLachlin, P.C. Presented at the Empire Club of Canada Toronto, March 8, 2007" *Supreme Court of Canada*, online: <<http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>>: "Mental health courts have opened in Ontario, New Brunswick and Newfoundland. Many other jurisdictions, including British Columbia, Manitoba, Nunavut and Yukon, are in various stages of developing these courts. These courts can do much to alleviate the problems. Other problem-solving courts within the Ontario Court of Justice include drug treatment courts and *Gladue* courts, the latter dealing with aboriginal offenders. Such courts are also being used in other Canadian jurisdictions. This is just the beginning. I could go on. The point is this. In a variety of ways, throughout Canada we are adapting our criminal

can be achieved through VTCs, along with substantial overall savings to the taxpayer.³⁷⁰ These positive results would be beneficial for Canada.

3.5 SUMMARY OF CHAPTER 3 RECOMMENDATIONS

Throughout Chapter 3, Canadian and American justice processes were compared in order to substantiate and design an effective Canadian Military Justice Alternative Measures System as set out in Chapter 4. In addition, a number of specific collateral recommendations were made in order to improve the current situation for traumatized veterans. These recommendations, which will form part of the overall “campaign plan” also discussed in Chapter 4, can be summarized as follows (numbering continued from Section 2.3):

10. There should be legislation which expressly considers the impact of military trauma and injuries in Canada as it relates to a criminal process. This could include options for treatment based diversion or sentence mitigation when appropriate.
11. There should be options for veterans to self-identify mental illness where it may reduce the likelihood of aggravating the condition. This would include allowing the option to self-identify an OSI on their provincial driver’s license. This should be linked to Veteran’s Affairs, providing that department with an opportunity to offer services to injured veterans who self-identify.

law court procedures to better meet the realities of endemic social problems and better serve the public.” [Emphasis mine]

³⁷⁰ *Supra*, note 131: “The programs have not only significantly lowered recidivism rates for defendants who complete them, they also save taxpayers hundreds of thousands of dollars each year -- money that would have been spent locking up offenders, county officials said. The community as a whole also benefits because it is safer [...]”

12. There should be an option for specialized housing and treatment for veteran inmates with OSIs in Canadian civilian institutions.

CHAPTER 4 REHABILITATING JUSTICE FOR VETERANS

Having suggested that a treatment based approach for veterans reduces recidivism rates, saves public funds and treats veterans with the respect that the public thinks they deserve,³⁷¹ this thesis will, in this chapter, examine how these approaches could be implemented in Canada.³⁷² As the law and research in this area is developing, any proposed model must be flexible, adaptable and able to evolve. The approach here will be to examine a mechanism to incorporate a veteran focused PSC into the military justice system and civilian justice systems. It will also canvas other potential interventions by police, corrections personnel and counsel. This will include building partnerships in order to maximize resources, collecting data and research and increasing overall support to traumatized veterans. The “whole of governments approach” will culminate in a concerted effort to reduce recidivism among veterans primarily through treatment, which is to be supported by legislative, policy and educational initiatives. The purpose is to

³⁷¹ See e.g. “Major Canadian poll - Who'll Stop the Rain? Ode to Canada's War Veterans, Environment, and Same Sex Couples”, Robbins Sce Research, (26 May 2012), online: Robbins SCE Research Inc., <http://www.robbinssceresearch.com/polls/poll_905.html> “Question #3, Is it your “Impression” – “Perception” that the Harper Government is treating Canadian War Veterans well? Yes 31 %, No 52.5 % [...]” [Emphasis mine]. See also James Struthers, “Comfort, Security, Dignity: The Veterans Independence Program, A Policy History” (December 2004), online: Veterans Affairs Canada <http://veterans.gc.ca/pdf/pro_research/comfort-security-dignity-vip.pdf>: “Opinion polls showed that sympathy for their clients far outranked support for refugees or people on welfare. ‘It is veterans who most Canadians would like to receive more assistance.’”

³⁷² I reiterate that I am not suggesting that veterans suffering from mental disorders or trauma should get preferential treatment over their civilian counterparts, rather that they should at least receive equal treatment, except where there is an insurmountable valid military reason for preventing it.

ensure that the Canadian military justice system parallels the civilian justice system except where there is clear justification for it to deviate.³⁷³

4.1 CREATING A SERVICE TRIBUNAL

In order to substantiate the point that military justice should change by focusing on treatment for disabled veterans, it will be argued that a shift in military culture is required. Several opposing arguments to VTCs within the Canadian military justice process will need to be addressed. In my view, these counter-arguments need to be addressed prior to discussing the mechanics of any military diversion proposal, because they deal with the strategic level questions of whether any treatment based PSC is even consistent with the unique nature and purpose of military justice. In particular, any solution must be cognizant of the unique military justice requirement for expediency, the *ad hoc* nature of military tribunals and the underlying purpose of military justice to impose discipline, efficiency and morale.³⁷⁴ This section will demonstrate that military PSCs will not hurt expediency, discipline, efficiency or morale. Conversely, they will foster or enhance these military requirements.

4.1.1 Expediency

A possible argument against VTCs in military justice is that they will be inconsistent with the need for expediency. I will argue that while there is a need for expediency, VTCs are as expedient as other methods.

³⁷³ *Supra*, note 111.

³⁷⁴ *R v Généreux*, [1992] 1 SCR 259, at para 60 [Généreux].

The chain of command requires that discipline be maintained through swift justice.³⁷⁵ Parliament specifically created a statutory duty to deal with military charges “as expeditiously as the circumstances permit”.³⁷⁶ Similarly, the Supreme Court of Canada has stated that “[b]reaches of military discipline must be dealt with speedily [...]”³⁷⁷ It is noteworthy that Prime Minister Harper has stated that civilian justice must also be “effective, swift and true”³⁷⁸ and that the *Charter* requires that all justice matters be “tried in a reasonable period of time”.³⁷⁹ Further, the Supreme Court of Canada has stated regarding civilian justice that “[t]he failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures”.³⁸⁰ [Emphasis mine]

In the civilian realm, the highest court has articulated that criminal matters must proceed quickly for a number of reasons, including: community support through positive

³⁷⁵ See e.g. *House of Common Debates*, 41st Parl, 1st Sess, No 44 (4 November 2011) at 1025 (Chris Alexander): “Therefore, it is vital that our armed forces take with them a reliable justice system that is consistent with our values. When they are deployed, they are governed by the military rather than the civilian justice system. Military justice in Afghanistan, Libya and other countries where our forces are deployed must be swift and fair and reflect the values of Canada's civilian justice system and its most recent developments.” [Emphasis mine]

³⁷⁶ *Supra*, note 42, s 162: “Charges laid under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit.”

³⁷⁷ *Supra*, note 374.

³⁷⁸ Prime Minister Stephen Harper, “Speech from the Throne” *Here for All Canadians* (3 March 2010), online: Government of Canada <<http://www.speech.gc.ca/eng/media.asp?id=1388>>.

³⁷⁹ *The Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, s 11(b). See also, *Askov v R*, [1990] 2 SCR 1199: “[A]ll accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.”

³⁸⁰ *Ibid.*

perceptions of fairness; the reliability and availability of witnesses; the rapid reintegration of innocent accused parties into society; and the fostering of trust in the justice system by the community.³⁸¹

The reason for the perceived increased expediency requirement for military justice relates to the unique (and self-evident) requirements of the profession of arms. In particular, war cannot stop for an extended trial. Further, units cannot afford to lose healthy trained members to repatriation from a war zone for minor offences in order for them to prepare for the defence of a court martial. For example, the work-ups or pre-deployment training exercises for the Afghanistan combat mission lasted approximately nine months. If accused parties' positions have to be backfilled at the last minute, the forces either have to draw upon previously deployed trained members³⁸² or place soldiers into operational combat roles with little or no mission specific training. Either option places soldiers and the mission at increased risk.

³⁸¹ *Ibid*: "First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Second, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest. [...] From the point of view of the community interest, in those cases where the accused is detained in custody awaiting trial, society will benefit by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law. If the accused is released on bail and subsequently found guilty, the frustration felt by the community on seeing an unpunished wrongdoer in their midst for an extended period of time will be relieved. There are as well important practical benefits which flow from a quick resolution of the charges. There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time, but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employer; or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost. Witnesses too are concerned that their evidence be taken as quickly as possible [...]"

³⁸² This contributes to increased deployment cycles and the potential for OSIs.

Also, members in combat cannot have their minds on anything but combat.³⁸³ If a criminal or disciplinary trial is on their minds for any extended period, people are at increased risk because they are not completely focused on their roles in combat.³⁸⁴ If people fail in combat for any reason, the result is not only that people can die or be injured; but that the entire mission can fail.³⁸⁵

In addition, war zones often become crime scenes with witnesses from various states who speak different languages. It is absolutely imperative that evidence be collected quickly and that matters proceed expeditiously in military justice processes to ensure that litigators can test the evidence, track down witnesses and examine crime scenes in their original form. For example, in the case of *R. v. Wilcox*, an application was brought by the Defence to move the location of the trial to have the homicide crime scene examined by the panel members. Unfortunately, the location of the shooting, a tent in Kandahar, had been dismantled and relocated by the time the court martial got underway. As a result, the panel relied on pictures and testimony to reconstruct the scene.³⁸⁶ It is the

³⁸³ Travis L. Martin, ed, “Narrating the Past, Envisioning the Future” *The Journal of Military Experience*, online: <<http://militaryexperience.org/volume1/>>: “While you fight and suffer and struggle, you are also changing, becoming someone totally different. The harsh and violent realities of war force you to change. Emotions are an inconvenience—they distract you—making you feel and think instead of react. A distracted soldier is a dead soldier.” [Emphasis mine]

³⁸⁴ See e.g. “Improvised Explosive Devices (IEDs) / Booby Traps” *GlobalSecurity.org*, online: <<http://www.globalsecurity.org/military/intro/ied-indicators.htm>>: “Booby traps rely on an unwary or distracted soldier touching or pulling a physical object [. . .]”

³⁸⁵ See e.g. Mark Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War* (New Jersey: Transaction Publishers, 1999) at 64: “Unjustified disobedience to a superior can be catastrophic for the safety of fellow soldiers in combat. It can also cause mission failure.”

³⁸⁶ *R v Corporal M.A. Wilcox*, 2009 CM 2024, at paras 15 and 19: “[15] The applicant now seeks an order to take a view of the Entry Control Point 3; clearing bays, which on the evidence at trial to this point were located on the camp and were used to verify that weapons were clear of ammunition; tent A-1 and the adjacent tent porch and bunker; the

nature of a war zone that people and objects generally change more quickly than in civilian society.

Further, justice is perceived to be more effective if it is quick. If fellow soldiers see that committing an offence will result in an immediate correction or punishment, then it is believed to act as a deterrent to others contemplating similar behaviour. The possible offence can be as simple and disobeying a lawful command to “go over a hill” while under real threat of death due to enemy gunfire. The failure to obey by one without real immediate repercussion may cause others to weigh the risk of criminal prosecution with the risk of death. Without a “habit of obedience”, the entire unit can be destroyed. This can jeopardize the mission, which in turn may have national or international implications. The so called “habit of obedience” has been historically fostered through immediate correction, which for the most part is effective.³⁸⁷ Unfortunately, it does not contemplate mentally injured soldiers, because they should not be in combat. Maintaining an operationally-ready military force for combat was the real reason that military justice was

25-metre range; and the Tim Hortons boardwalk, all, in order that the panel may, ‘fully understand the testimony of the defence witnesses.’ [...] [19] As I have already noted, the evidence on the application establishes that since the date alleged in the charge sheet, the tent in question has been moved from its location in March of 2007. There is no evidence before me as to whether the adjacent porch and bunker remain in the place or condition that they were in at that time. There is a wealth of evidence before the panel of this court of photographs taken both inside and outside the tent in question and showing the area around the tent at or around the time of the alleged offences. This evidence is supplemented by diagrams drawn by some of the witnesses who lived in the tent at the time as well as by the investigator from the National Investigation Service. As well, there are many photographs of the gate area known as Entry Control Point 3.” [Emphasis mine]

³⁸⁷ See e.g. Colonel Michael Gibson, “Canada’s Military Justice System”, online: (2012) 12:2 *CMJ* 61 at 62 <<http://www.journal.forces.gc.ca/vol12/no2/61-gibson-eng.asp>>: “In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable.” [Emphasis mine]

designed. As a result, there is an “ableist” culture³⁸⁸ that presupposes offenders are fit and ready to fight, and that disciplinary or criminal behaviour can be corrected through punishment. Regrettably, this may be creating a disadvantage to disabled veterans by not having systematic diversion options that would facilitate treatment.

Expediency can be maintained with treatment based approaches, such as PSCs. Most PSCs will have 6-24 months of ongoing treatment before graduation.³⁸⁹ A minor summary trial is often completed within a month of two of the offence and cannot statutorily commence more than 12 months post-offence.³⁹⁰ There are legislative proposals underway to reduce that window to 6 months, although the accused could waive the limitation period in order to avoid a court martial in certain circumstances.³⁹¹ It should be noted that as long as the summary trial is commenced before the time period, the requirements of the regulations are met. Often, summary trials are commenced and adjourned until after the limitation period in order to preserve the ability to proceed in that fashion. Despite assertions by Commanders that military trials must be resolved within 6 months to enforce discipline, a recent study of courts martial delay indicated that the average litigation period of a court martial in 2007 was 19.45 months. “The average

³⁸⁸ *Supra*, note 150.

³⁸⁹ See e.g. “Problem Solving Courts” *Washington Courts* (21 May 2012), online: <http://www.courts.wa.gov/court_dir/?fa=court_dir.psc&tab=9>.

³⁹⁰ *Supra*, note 42, s 163(1.1): “A commanding officer may not try an accused person by summary trial unless the summary trial commences within one year after the day on which the service offence is alleged to have been committed.” See also *supra*, note 46, 108.06.

³⁹¹ *Supra*, note 143, cl 35: (1.1) A commanding officer may not try an accused person by summary trial unless the charge is laid within six months after the day on which the service offence is alleged to have been committed and the summary trial commences within one year after that day. (1.2) The accused person may, in accordance with regulations made by the Governor in Council, waive the application of subsection (1.1). [Emphasis mine]

from April 1 2006 to March 31, 2007 was 21 months [...] The situation has not changed over the last eight years. [...] The Court Martial system is, in fact, slower in disposing of cases than the civilian system”.³⁹² While the JAG has adopted many of the recommendations in that report,³⁹³ there are still cases litigated that involve offences that are in excess of 24 months.³⁹⁴ In that respect, if diversion to a military justice PSC happened quickly, the period from actual sentencing to VTC graduation would not likely be very different in practice. In fact, graduation periods could be faster and more expedient, as would be the public finding of responsibility at the commencement of a treatment program.

The use of PSC mechanisms would be beneficial to the military justice system because they may identify injured soldiers early, thereby reducing recidivism and increasing the overall likelihood of a full recovery.³⁹⁵ A guilty plea or admissions are entered early in PSC models, eliminating issues of trial preparation, witness attendance and other administrative resources that could be put to other military operational use. In addition, the community, including the military community, will perceive the military

³⁹² Judge Advocate General, *External Review of the Canadian Military Prosecution Service: Final Report* by Andrejs Berzins & Malcolm Lindsay (Ottawa, National Defence, 2008) at 10.

³⁹³ Judge Advocate General, *JAG Annual Report 2009-10, Annex C: Annual Report of the Director of Military Prosecutions* (Ottawa, National Defence, 2012) online: <<http://www.forces.gc.ca/jag/publications/office-cabinet/annrep-rappann-09-10/annex-c-annexe-c-eng.asp>>: “In the previous fiscal year, in response to the Bronson Report, DMP completed a comprehensive review of all CMPS policies and procedures. [...] DMP was still working to adopt some additional recommendations from the Bronson Report that had yet to be implemented by the end of the reporting period.”

³⁹⁴ See e.g. *R v Collins*, 2012 CM 4006: “Sergeant Collins forged the signature of Corporal Pelletier on the 3 October 2008 form [...] Sergeant Collins again forged the signature of Corporal Pelletier on the 28 October 2008 form [...]. A charge was laid in November 2010 and the first charge sheet was initially preferred in June 2011. The second charge sheet was preferred in January 2012.”

³⁹⁵ See e.g. *supra*, note 131.

justice process as fair by demonstrating, in a more tangible way, a balancing of the requisite sentencing objectives, including rehabilitation.³⁹⁶ Further, the community would feel safer because the root issue is being resolved as opposed to simply being put off through incarceration. This enhances the public perception of the administration of military justice to reasonably informed members of the community.

While it can be demonstrated that PSCs can be just as expedient (if not more so) as actual trials, the underlying purpose of military justice needs to be examined in order to assess their compatibility.

4.1.2 The Purpose of Military Justice and VTCs

As highlighted by the Supreme Court of Canada, “[t]he purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military”.³⁹⁷ Modern military doctrine for the Canadian Forces reiterates this finding.³⁹⁸ I will demonstrate how VTCs can be implemented into military justice without the degradation of its underlying

³⁹⁶ *Supra*, note 42, s 718: “The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: [...] (d) to assist in rehabilitating offenders; [...] and] (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community”.

³⁹⁷ *Supra*, note 374.

³⁹⁸ *Duty with Honour: The Profession of Arms in Canada* (Ottawa, Her Majesty the Queen in Right of Canada, 2009) at 16, online: National Defence <<http://www.cda.forces.gc.ca/cfpds-sppfc/english/documents/Duty-with-Honour-The-Profession-of-Arms-in-Canada-2009-e.pdf>>: “[T]he Queen’s Regulations and Orders assign NCMs specific responsibilities to ‘promote the welfare, efficiency and good discipline of all who are subordinate to the member’ and the authority to execute these responsibilities. In effect, they have been delegated the day-to-day responsibility for ensuring that subordinates are individually and collectively trained, prepared and capable of accomplishing all missions assigned to them.”

purposes of discipline, efficiency and morale. Further, in addition to actually addressing possible counter-arguments against VTCs, this section demonstrates how they are consistent with the underlying purpose of military justice.

4.1.2.1 Discipline

Throughout history discipline has been the cornerstone of military efficacy. For example, Sun Tzu indicated that “[s]oldiers must be [...] kept under control by means of iron discipline”.³⁹⁹ Canadian military doctrine states that “it is a professional responsibility to ensure that the highest standard of discipline, especially self-discipline, is maintained. [...]. Discipline and teamwork remain vital [...]”⁴⁰⁰ Discipline assists in: building cohesion, achieving objectives not possible by military skills alone, allowing compliance with the interests and goals of the military institution, facilitating immediate and willing obedience to lawful orders and strengthening individuals to cope with the demands and stresses of operations.⁴⁰¹ The *Code of Service Discipline* contained within the *NDA* sets out the military offences and the legal system required to administer discipline.

VTCs with a military justice scheme would not impair discipline. To the contrary, they are designed to treat a member’s problems so that they do not commit further offences. Eliminating aggression, addictions and hyperarousal symptoms among veterans with OSIs will foster discipline. There is a deterrent component to VTCs because offenders must be accountable for their actions in open court. They must continue to

³⁹⁹ Sun Tzu, *The Art of War*, translated by Lionel Giles (Virginia: Wilder Publications, 2008) at 88.

⁴⁰⁰ *Supra*, note 398 at 14 and 75.

⁴⁰¹ *Ibid*, at 28.

appear week after week before a judge to report their progress. Arguably, multiple appearances are more of a deterrent than simply showing up one day for sentencing.⁴⁰² Further, there is a constant threat of being removed from the program and placed back into the ordinary criminal justice system. Also, reasonably informed peers would understand that the member was ill and was being cared for by the military. In addition, they will know that her criminal behavior is equally unacceptable requiring judicially supervised treatment. Resolving the root problem publicly will foster discipline, thereby increasing efficiency.

4.1.2.2 Efficiency

The concept of military efficiency is fluid and depends on the perspective underpinning the discussion. Generally, it is understood to be the efficient use of military resources in the course of military operations. Financial statements alone cannot be used to measure military efficiency, as there are other intangibles that are engaged, such as human courage or morale.

It should be noted that under the direction of General Rick Hillier, the previous CDS, the focus was on operational effectiveness as opposed to efficiency.⁴⁰³ Military

⁴⁰² See e.g. *R v Babineau*, 2011 CM 3009: “There is also the fact that you had to face this Court Martial, which has a dissuasive effect, not only on you but also on your peers and on the persons in attendance at this Court Martial, which is made public and will surely be known at least in this region or within your unit.”

⁴⁰³ Daniel Gosselin, “Navigating the Perfect Wave: The Canadian Military Facing its Most Significant Change in 50 Years”, online: (2008) 8:4 *CMJ* 83 at 85 <<http://www.journal.forces.gc.ca/vo8/no4/gosselin-eng.asp>>: “This is where the reorganization of the 1960s differs from the transformation launched by General Hillier, who is not focused upon efficiencies, but upon operational effectiveness.” [Emphasis mine]

effectiveness and military efficiency may differ conceptually,⁴⁰⁴ but military justice is required to deliver both to Commanders.⁴⁰⁵ The mode of delivery must adapt to changing conditions on the ground, which currently have large numbers of veterans with OSIs and TBIs. As the medical science in this area advances and general stigma decreases, higher rates of diagnosis are likely.

VTCs in military justice would promote military efficiency, providing both tangible and intangible results. From a financial perspective, they reduce recidivism thereby reducing the costs of incarceration. Studies have shown that offenders with mental health problems actually serve more time because of the difficulty of adapting to the prison environment, and they are at increased risk to exhibit inappropriate or violent behaviours, often reducing parole eligibility.⁴⁰⁶ In addition, early treatment for PTSD and other OSIs results in fuller recovery, thereby reducing medical costs on the military and society post release. Further, reducing homelessness, substance abuse and unemployment also reduces social welfare costs. If the veteran can return to employment, the result is reduced pension or military benefits combined with the economic value of a member of society generating personal wealth. Further, if the veteran can be retained, the experience and training is not lost, resulting in reduced training costs for the Canadian Forces.

⁴⁰⁴ Milan Vego, “Is the Conduct of War a Business?”, online: (2010) 59:4 *JFQ* 57 at 61-62 <http://www.ndu.edu/press/lib/images/jfq-59/JFQ59_57-65_Vego.pdf>. “Efficiency is the ratio of the output to the input into any system. It deals with one's skillfulness in avoiding the wasting of time and effort. [...] In a military context, effectiveness pertains to one's ability to accomplish the assigned objective—the starting point and a single most important element of both planning and execution in the employment of one's combat forces.”

⁴⁰⁵ See e.g. C.F. Blair, “Military Efficiency and Military Justice: Peaceful Co-existence?”, (1993) 42 *UNBLJ* 237 at 237: “There is a myth that military efficiency and military justice are mutually contradictory. [...] History shows that in the field the effective fighting force is a disciplined one.”

⁴⁰⁶ *Supra*, note 116 at 24.

Studies on actual rates of return for investment in treatment courts suggest that “for every dollar invested in drug court, you will get \$2.21 back from your investment. [...] Drug courts that are treating high-risk and more serious offenders are returning \$3.36 for every dollar invested, and the best drug courts are returning \$27 for every dollar invested”.⁴⁰⁷ VTCs are hybrid PSCs, which include DTCs. These figures suggest significant savings to the overall public budget can be realized through relatively small investments. Few other investments available have demonstrated such efficiency.

In addition to the financial benefits, veterans who are diverted to VTCs are more likely to feel as though they are being looked after as opposed to being cast aside. This improves morale, not only for the affected veteran, but for those peers who see how the injured veteran is being treated. Knowing that veterans are being treated fairly and with respect will foster a willingness to obey orders despite personal risk. This allows courage to flourish. Numerous studies have found that “report[s] of low personal and unit morale and lower unit cohesion were linked to increased reports of PTSD symptoms”.⁴⁰⁸ Efforts to eliminate symptoms should result in improved unit cohesion and improved morale. Improved morale increases operational effectiveness. As a result, a move to incorporate VTCs in the Canadian military justice system would be both efficient and effective for the Canadian Forces.

⁴⁰⁷ Senate Hearings, 112th Congress, 1st Sess, No. J-112-34 (19 July 2011) “Drug and Veterans’ Treatment Courts: Seeking Cost-Effective Solutions for Protecting Public Safety and Reducing Recidivism” (Douglas B. Marlowe) at 19, online: <<http://www.gpo.gov/fdsys/pkg/CHRG-112shrg71696/pdf/CHRG-112shrg71696.pdf>>.

⁴⁰⁸ Terri L. Tanielian & Lisa J. Jaycox, eds, *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences and Services to Assist Recovery* (Santa Monica CA: RAND Corporation, 2008) at 52.

4.1.2.3 Morale

Carl von Clausewitz, a military strategist, stated “we should observe that everything depends on the skill of our subordinate officers and still more on the morale of our soldiers”.⁴⁰⁹ [Emphasis mine] Canadian military doctrine suggests that “[m]embers of the profession must ensure the care and well-being of subordinates. All leaders must understand, both professionally and personally, that this vital responsibility is the basis for fostering and maintaining an effective and cohesive force with high morale”.⁴¹⁰ [Emphasis mine]

VTCs foster morale by allowing leaders to “ensure the care and well-being of subordinates”.⁴¹¹ Their primary goal is to resolve the root problem, which is related to OSIs. By treating this problem, unit cohesion and morale improves, so as to allow the maintenance of “an effective and cohesive force with high morale” – a vital responsibility of leadership.⁴¹² Conversely, incarcerating operationally traumatized veterans destroys morale and works against military goals.

The implications of not treating veterans with mental health injuries include: lower morale, less discipline, decreased efficiency, and possible mission failures among the Canadian Forces community. Using rigid processes to deal with mentally injured veterans may make their illness worse, and in the process reduce the public’s confidence in the administration of military justice. Further, if Canadian society believes that veterans can be injured mentally and not adequately cared for on return from operations,

⁴⁰⁹ Carl von Clausewitz, *Principles of War*, translated and edited by Hans W. Gatzke (Mineola, New York: Dover Publications, Inc., 2003) at 57.

⁴¹⁰ *Supra*, note 398 at 14.

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

it will be more and more difficult to get effective volunteers to put themselves at great risk only to face further perils from their wounds when they return home. The absence of a “motivated” quality volunteer force will degrade operational efficiency. Reduced operational efficiency and potential for mission failures puts Canada and its foreign policy agenda at risk.

Having demonstrated that VTCs are consistent with the inherent purpose of military justice, three additional potential counter arguments need to be addressed, namely: portability, war and peace and the *ad hoc* nature of military justice.

4.1.3 Other Possible Counter-Arguments

4.1.3.1 Portability

A possible argument against VTCs within military justice is that they will be inconsistent with the need for portability. I will argue that while there is a need for portability in military justice, VTCs would not likely have to enter into a theatre of operations, though they could do so where necessary.

Canadian military justice is portable and is designed to function in war zones. During combat operations in Afghanistan, numerous summary trials were held in theatre. Conversely, there were very few courts martial held overseas.⁴¹³ The reason for this is the practical difficulty of bringing personnel who have not received mission-specific training into a theatre of operations, the increased logistical burdens and the overall safety issues for the court martial entourage. Further, by the time a matter reaches court martial, most

⁴¹³ See e.g. *R v Semrau*, 2010 CM 1002. See also, The Canadian Press, “Semrau court martial adjourned” *cbcnews* (7 July 2010), online: CBC Radio-Canada <<http://www.cbc.ca/news/canada/story/2010/07/07/semrau-court-martial.html>>: “Semrau's trial travelled to Afghanistan in June to hear testimony from witnesses”.

of the military witnesses and the unit have left theatre, which makes a Canadian location more optimal to achieve the aims of discipline since the trial will unfold at the unit. In a recent court martial, Lt-Col D'Auteuil, military judge, indicated that generally Courts martial will be held at the unit of the member to ensure the proceedings are available to the community affected and to ensure the deterrent effect of any sentence imposed is communicated effectively.⁴¹⁴ Also, "it has never been the practice at courts martial to hold the trial at the scene of the alleged offence. Even a cursory acquaintance with the exigencies of military operations discloses the impracticality of such a rule".⁴¹⁵ In addition to a deterrent component of holding the trial at the unit, there is an underlying efficiency element that is also considered, in terms of having the trial take place in a location that already has infrastructure to accommodate it.⁴¹⁶

A VTC would not have to enter into a theatre of operations and does not need to be operationally portable. If a member qualifies for a VTC, it is acknowledged that they require long term medical services that would make them unfit for operational duty. As a result, the VTC would take place in Canada, preferably at or near the unit so as to provide the requisite deterrent component.⁴¹⁷ Further, there would need to be multi-disciplinary teams in place. Currently IPSC/JPSU has set up regional centers for OSI treatment. This is likely where the convening of ongoing hearings should take place. From an efficiency perspective, video conferencing could be used to reduce travel costs for brief appearances. The propriety of using this technology can be assessed on a case by case

⁴¹⁴ *R v Petty Officer 1st Class J.R.G. Pelletier*, 2008 CM 3002, Application M-1.

⁴¹⁵ *Supra*, note 386, paras 9-10.

⁴¹⁶ *Ibid*, para 10: "Indeed, the American author Winthrop, in his *Military Law and Precedents*, refers to a directive of the War Department in 1895 that courts martial be held wherever the expense will be reduced to a minimum".

⁴¹⁷ *Supra*, note 414.

basis. Currently video conferencing is in place in most permanent courts martial locations, including: Halifax, Ottawa/Quebec and Victoria. This technology is already frequently used for applications and show cause hearings.⁴¹⁸

In addition, there are new provisions for the appointment of part-time reservist judges currently before Parliament.⁴¹⁹ Should it be necessary to have regionally located judges for these types of hearings to reduce costs, then reservist judges could be used if required. Based on the current caseload of the four military judges, it should be possible to incorporate a VTC into their current functions.⁴²⁰ Further, having fewer trials, which can last weeks or months, will free up judicial resources in order to supervise offenders before a military justice-type VTC.

In summary, VTCs can be domestically portable to the extent required and cost-effective,⁴²¹ which is consistent with military justice requirements. It is unlikely that it would be required in a theatre of operations; however it could be done if needed, as

⁴¹⁸ See *supra*, note 46, 112.64: “Where the prosecutor and the accused agree, and the judge so orders, the accused, the prosecutor or the judge may appear at preliminary proceedings (see article 112.03 – Preliminary Proceedings) by any means that allow the judge, the prosecutor and the accused to engage in simultaneous visual and oral communication.” See also *supra*, note 46, 112.65: “Where the prosecutor and the accused agree and the judge so orders, the evidence of a witness may be taken at any time during court martial proceedings by any means that allow the witness to testify in a location other than the courtroom and to engage in simultaneous visual and oral communication with the court, the prosecutor and the accused”.

⁴¹⁹ *Supra*, note 143, cl 2(3): “‘military judge’ includes a reserve force military judge.”

⁴²⁰ See “2012 Decisions”, online: National Defence and the Canadian Forces <<http://www.jmc-cmj.forces.gc.ca/dec/2012-eng.asp>>. Note that as of 27 May 2012, 14 cases were reported for the calendar year with many being guilty pleas. See also “Biographies”, online: National Defence and the Canadian Forces <<http://www.jmc-cmj.forces.gc.ca/bio/index-eng.asp>>. Note that there are currently four full-time military judges.

⁴²¹ *Supra*, note 407, (Hon. Sheldon Whitehouse) at 1: “Many jurisdictions, including my home State of Rhode Island, also are developing veterans’ treatment courts. Today’s hearing will closely examine these intervention and treatment courts and the role they can play as cost-effective solutions for protecting public safety and reducing recidivism”.

would any other matter requiring a military judge. Current available technologies and reservist judges could be used to reduce travel costs associated with potential increased appearances. This would be offset by the diversion of trials. These diversionary processes are beneficial, both in times of war and peace.

4.1.3.2 War and Peace

Another possible argument against VTCs is that military tribunals are not required in times of peace regardless their focus. I will argue that there is nonetheless a need for military treatment courts during times of war and peace.

Obiter comments in a recent Court Martial Appeal Court decision appear to question the logic of the landmark *Généreux* decision and the purpose of a separate system of military justice in a modern context. In *R. v. Joseph Simon Kevin Trépanier*⁴²², the Chief Judge remarked how the French military justice system does not function during peacetime. Conversely, he points out that the Canadian military justice system has expanded even when not at war. “[N]otwithstanding its derogatory nature and the right of every individual to equality before and under the law pursuant to section 15 of the Charter, its constitutional legitimacy and validity have been affirmed by the Supreme Court of Canada in *R. v. Généreux* [...]”⁴²³

The reality is that in order to instill a habit of obedience, it must be constant through war and peacetime. If military personnel do not live, prepare and train for combat conditions, they will not maintain the high-readiness and discipline that is optimal for an

⁴²² *Supra*, note 304.

⁴²³ *Ibid*, at paras 22-23: “[T]he French authorities have abolished the military courts in time of peace. They have kept them in time of war and for crimes committed abroad.”

effective fighting force. Inattention to discipline in garrison led to the disciplinary problems among Canadian Forces troops in Somalia.⁴²⁴ Further, the military justice system allows Canada to exert jurisdiction over members that commit offences on foreign soil deployed during non-combat or peace-keeping operations.⁴²⁵ Canada has an operational interest in ensuring that its military members who engage in misconduct on foreign soil are dealt with by Canadian military justice. This interest includes the maintenance of morale.⁴²⁶

⁴²⁴ *The Report of the Somalia Commission of Inquiry*, vol 10 (Ottawa: Public Works and Government Services Canada, 1997), online: <<http://www.dnd.ca/somalia/vol0/v0s12e.htm>>: “A number of factors contributed to the disciplinary problems in the CAR, specifically in 2 Commando, prior to deployment, including [...] a tendency to downplay the significance of disciplinary infractions or to cover them up entirely; and the continuing ability of CAR members to evade responsibility for disciplinary infractions. As we explore in greater detail in Chapter 19, the CAR was simply unfit to undertake a mission in the autumn of 1992, let alone a deployment to Somalia. The three incidents of October 2 and 3, 1992, indicated a significant breakdown of discipline in 2 Commando during the critical period of training and preparation for operations in Somalia. Military pyrotechnics were discharged illegally at a party in the junior ranks' mess; a car belonging to the duty NCO was set on fire; and various 2 Commando members expended illegally held pyrotechnics and ammunition during a party in Algonquin Park. The illegal possession of these pyrotechnics was the result of theft from DND and the making of false statements. A search conducted on the soldiers' premises uncovered ammunition stolen from DND, as well as 34 Confederate flags.” [Emphasis mine]

⁴²⁵ *The Report of the Somalia Commission of Inquiry*, vol 11 (Ottawa: Public Works and Government Services Canada, 1997), online: <<http://www.dnd.ca/somalia/vol1/v1c7e.htm>>: “Under the Code of Service Discipline all service offences committed outside Canada and most committed in Canada can be tried by service tribunals.” See also *supra*, note 42, s. 60.

⁴²⁶ Michael R. Gibson, “International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity”, online: (2008) 4:1 *J Int'l L & Int'l Relations* 1 at 25 <http://www.law.yale.edu/JILIR_International_Tribunals.pdf>: “It is readily apparent why the sending state should wish to have such jurisdiction over its own nationals. This permits it to exercise control over persons who have the potential to engage its state responsibility through their misconduct. It also allows it to be satisfied that its own nationals are being treated fairly. [...] t allows them to be subject to the domestic law of their national state and tried in accordance with its national procedures, rather than the

The Report of the Somalia Commission of Inquiry acknowledged France's decision, but reiterated the fundamental importance of maintaining a military justice system during peacetime.⁴²⁷ Still, the recommendations specifically pointed out that in justifying its existence, the "Canadian military justice system should [...] parallel the civilian justice system unless there is clear justification for it to differ from the civilian system".⁴²⁸ The Canadian civilian justice system is using PSCs to enhance treatment where appropriate. There is no military justification to deviate from this practice.

In fact, VTCs promote the notion that military justice should continue to operate during times of peace and war to ensure soldiers are properly diverted to treatment and returned to their units for operations when possible. Because VTCs promote and foster discipline and morale, they will efficiently enhance peacetime readiness for deployment. Further, by providing for alternative measures that parallel the civilian justice system, leaders can maintain the underlying philosophy of the restructured military justice system post-Somalia: because CF members are Canadian citizens, "[a]s a basic rule, laws and procedures governing their conduct should be the same as those for other citizens".⁴²⁹ VTCs can be implemented to meet this underlying philosophy, despite the *ad hoc* nature of military tribunals.

possibly unfamiliar law and procedures of the receiving state, as well as being subject to its punishments. [...] Second, it allows them to be tried in a court which uses their own language for its proceedings. Third, the provision of legal aid will allow them to choose to be defended by a lawyer who speaks their language and is well versed in their national law. As an ancillary benefit, the morale of the military member concerned will likely be better if he or she [...] are being tried in their own national legal system rather than that of another state."

⁴²⁷ *Supra*, note 111.

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

4.1.3.3 The *Ad Hoc* Nature of Military Justice

Another possible argument against VTCs is the *ad hoc* nature of military justice. I will argue that while the military justice system is *ad hoc* without a permanent court, VTCs or a similar PSC can be used within the existing structure, if appropriate legislative changes are made.

The Canadian military justice system is often referred to as an *ad hoc* system. The Supreme Court of Canada compared military tribunals with ordinary criminal courts and remarked that the judge advocate, military judge or panel is temporarily appointed to sit on an *ad hoc* basis – when a breach of the *Code of Service Discipline* occurs.⁴³⁰

The reality is that since 1992 there have been various decisions, reports and studies calling for a permanent court.⁴³¹ Judges, prosecutors and defence counsel have increased their respective independence based on decisions and legislative initiatives.⁴³²

⁴³⁰ *Supra*, note 374: “At the conclusion of this type of court martial, the judge advocate and members return to their usual roles within the military. For the members of the General Court Martial, this means a return to their regular duties as officers. For the judge advocate, it means a return to legal duties within the Office of the Judge Advocate General.”

⁴³¹ See e.g. Antonio Lamer, “The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35” *National Defence*, online: <http://www.forces.gc.ca/site/reports-rapports/antonio-lamer/en/report_e.pdf>: “I am recommending the creation of a permanent trial level military court, with judges appointed until retirement.” See also *supra*, note 74 at 238.

⁴³² See e.g. *Leblanc v R* 2011 CMAC 2 at para 64: “Given the fact that the issue of security of tenure for military judges has been the subject of contradictory decisions that have generated concern and uncertainty since 2005, that the Government has continued to reappoint military judges as if the declarations of unconstitutionality of five-year terms had never existed (see: the reappointment of judges Dutil and Lamont), and that no legislation has been enacted to correct this situation, I have no other choice but to declare invalid and of no force and effect subsections 165.21(2), (2.1), (3) and (4) of the Act as well as articles 101.15, 101.16 and 101.17 of the QR&O as amended by Order in Council

While the system remains *ad hoc*, it has moved towards permanency.⁴³³ Further, “[a]lthough a General Court Martial is convened on an *ad hoc* basis, it is not a ‘specific adjudicative task’. The General Court Martial is a recurring affair”.⁴³⁴ Courts martial convene to deal with a specific matter, then they conclude. Still, the matter can be adjourned multiple times and can take close to a year or longer to be completed.⁴³⁵ This is similar to what would be required for a military justice PSC or VTC.

Despite the *ad hoc* nature of military courts, a convening order could conceivably be used to deal with an injured member who needs to appear repeatedly before a military judge. The judge could simply adjourn and reconvene as required until the matter is concluded. While the mechanics of creating VTCs for military justice may be subject to debate, the “institutional hardware” exists to facilitate their creation at minimal cost. It is acknowledged that amendments to the *NDA* would be required; however, this is not insurmountable. Determining the appropriate mechanics for a Canadian style VTC should build on existing models found in both the Canadian and American civilian justice system.

P.C. 2008-0548 dated March 11, 2008. However, I would suspend the declaration of invalidity and its coming into force for a period of six months from the date of this judgment.” See also *supra*, note 143, cl 134. See also, *Security of Tenure of Military Judges Act*, S.C. 2011, c 22, s 2(3): “A military judge ceases to hold office on being released at his or her request from the Canadian Forces or on attaining the age of 60 years.”

⁴³³ *Supra*, note 74 at 217: “In more practical terms, the court martial system is already set up like a permanent court.”

⁴³⁴ *Supra*, note 374.

⁴³⁵ See e.g. *R v Corporal M.A. Wilcox*, 2009 CM 2005.

4.1.4 Building on Existing Models: A Canadian Military Justice Alternative Measures System

As previously mentioned, the *NDA* is silent on alternative measures. Despite often citing the *Criminal Code* in their decisions,⁴³⁶ military judges may be reluctant to actively incorporate the *Criminal Code* scheme for diversion.⁴³⁷ Nevertheless, in light of the Somalia Commission of Inquiry's recommendation that the "Canadian military justice system should [...] parallel the civilian justice system unless there is clear justification for it to differ from the civilian system,"⁴³⁸ it is helpful to understand the civilian diversionary regulatory scheme.

In order to use alternative measures in Canada, the *Criminal Code* requires that doing so not be inconsistent with the protection of society. PSCs balance treatment with the public interest, normally providing the prosecutor with a veto for diversion participation.⁴³⁹ In addition, Canadian alternative measures programs need to be authorized by the "Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in

⁴³⁶ See e.g. *R v Campion-Wright*, 2010 CM 1015, paras 30-31.

⁴³⁷ See e.g. *R v Corporal M.A. Wilcox*, 2009 CM 2025, para 5: "In my view, the force of this particular Military Rule of Evidence is not sufficient to simply incorporate a scheme such as that found in s. 722 of the Criminal Code for the admission of victim impact statements into proceedings at court martial." See also *supra*, note , s 179: "(1) A court martial has the same powers, rights and privileges as are vested in a superior court of criminal jurisdiction with respect to (a) the attendance, swearing and examination of witnesses; (b) the production and inspection of documents; (c) the enforcement of its orders; and (d) all other matters necessary or proper for the due exercise of its jurisdiction, including the power to punish for contempt." Counsel at courts martial have argued that s. 179 can be used to expand military justice processes or adopt civilian ones. I do not think it is appropriate for a diversion process.

⁴³⁸ *Supra*, note 111.

⁴³⁹ See e.g. *supra*, note 121: "That the Crown Attorney for the Nova Scotia Mental Health Court consents to the accused's participation."

council of a province”.⁴⁴⁰ Currently, the federal and provincial governments have authorized the use of various PSCs. American VTCs are hybrids of these courts.

It is unlikely that Canadian government officials would discriminate against veterans by barring access to specialized diversion. Further, the current Minister of National Defence (MND) has stated that he is “committed to ensure that we provide the best possible support for members with mental or physical illness or injuries [...] Our government is building on our record of caring for our ill and injured personnel”.⁴⁴¹ [Emphasis mine] Based on the statements of government officials, the political will seems to exist for a military justice PSC or VTC.

Further, all PSCs are consent based, with accused parties having been advised of the right to counsel.⁴⁴² Any proposed VTCs would need to be consent based and provide the same protections. Also, in civilian PSCs, the accused “accepts responsibility for the act or omission that forms the basis of the offence that [she] is alleged to have committed”.⁴⁴³ In addition, there needs to be a reasonable prospect of conviction.⁴⁴⁴ Should an inculpatory admission, confession or statement be made during an alternative

⁴⁴⁰ *Supra*, note 97, s 717(1)(a).

⁴⁴¹ Hon. Peter MacKay, “Statement by the Minister of National Defence on care for ill and injured military personnel” (4 May, 2012), online: National Defence and the Canadian Forces <<http://www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?id=4180>>. See also *House of Commons Debates*, 41st Parl, 1st Sess, No 127 (18 May 2012) (Hon. Peter MacKay), online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Pub=hansard&Language=E>>: “We are moving forward to hire more mental health professionals. We, in fact, have a goal of doubling the number. We are moving rapidly in that direction and will continue to support those soldiers, their families and our veterans when they need those services.”

⁴⁴² *Supra*, note 97, s 717(1)(c) and (d).

⁴⁴³ *Ibid*, s 717(1)(e).

⁴⁴⁴ *Ibid*, s 717(1)(f) and (g).

measures program, it must not be used in any subsequent court proceedings.⁴⁴⁵ Where the court is satisfied that there has been total compliance with the alternative measures terms and conditions, it shall dismiss the charges.⁴⁴⁶ Also, there is discretion given to judges to dismiss charges for partial compliance.⁴⁴⁷ There are also *Criminal Code* provisions with respect to records associated with alternative measures programs.⁴⁴⁸ These processes should be followed by any military justice PSC or VTC.

In proposing the incorporation of VTCs into the United States military justice system, Seamone suggests using civilian VTCs and pre-trial agreements or chain of command clemency post-conviction as a solution without legislative amendment.⁴⁴⁹ There are currently no VTCs in Canada, so that option is not currently available. Further, existing PSCs are only developing, with many parts of Canada not having any. None have specialized military/veteran support members on their multi-disciplinary teams.

Conversely, the Canadian military justice system does have a provision for clemency similar to that suggested by Seamone.⁴⁵⁰ However, the dynamic of a multi-disciplinary team of treatment coordinated by a judge is lacking from the American proposal as it relates to convening authority clemency. The CDS and/or Officers commanding a Command do not generally have the specialized skill or time to lead *ad hoc* multi-disciplinary teams of medical, legal and social work professionals in the treatment and rehabilitation of injured members, while balancing public safety risks. While it is arguably their responsibility, it would be better to have a trained military judge

⁴⁴⁵ *Ibid*, s 717(3).

⁴⁴⁶ *Ibid*, s 717(4)(a).

⁴⁴⁷ *Ibid*, s 717(4)(b).

⁴⁴⁸ *Ibid*, s 717.1-717.4.

⁴⁴⁹ *Supra*, note 2 at 3,

⁴⁵⁰ *Supra*, note 46, 114.02.

who leads the regional multi-disciplinary teams in treatment, while constantly assessing the protection of society. Also, this should be constantly balanced by an independent military prosecutor. Suggesting the CDS should preside over these matters would be akin to having the Department of Justice Assistant Deputy Minister preside over individual DTCs. It is simply not feasible, effective, nor efficient for Canadian military justice to use the existing so called “clemency” regime as a substitute for formalized diversion.

Further, the deterrent component of a military tribunal overseeing treatment in an open public forum, with the threat to the offender of being prosecuted for failing to comply, better assists in the success of VTCs in reducing recidivism.⁴⁵¹ In addition, it is more efficient to have specialized multi-disciplinary units deal with all regional offenders, one of the enunciated purposes of military justice.⁴⁵² It is equally more efficient that military judges may simply sentence offenders who do not consent or who do not qualify for diversion once referred.

This thesis does not purport to provide the perfect solution to incorporating VTCs into military justice or Canadian civilian justice. It does attempt to provide some options to facilitate discussion in order to move in the direction of implementing processes that will foster a treatment based approach for psychologically traumatized veterans. While a permanent court would reduce the amount of legislation and regulatory framework required to create alternative measures, the absence of such a court does not inhibit an effective diversion scheme from being created.

The best way to incorporate a VTC into the military justice system is through legislative amendments. Until recently, this has proven difficult for military justice

⁴⁵¹ *Supra*, note 414. See also *supra*, note 131.

⁴⁵² *Supra*, note 374.

initiatives. Despite almost a decade of proposals by successive vigilant JAGs and their Deputies, attempts to improve the military justice system have often failed in the hands of the Parliamentarians.⁴⁵³ The current majority government has begun to address these issues.⁴⁵⁴

Attempting to incorporate VTCs in the absence of legislative amendments is not advisable. While Seamone's research and ideas are important, they are not applicable to the Canadian military justice system context due to some systemic procedural differences and societal conditions.

This thesis proposes a "Canadian Military Justice Alternative Measures" scheme that would incorporate diversion options for members suffering from OSIs. This would be provided for most charges,⁴⁵⁵ including the so called "Baby Five".⁴⁵⁶ This request for diversion would be following a reasonable period of time, where the accused has access

⁴⁵³ See e.g. Michel Rossignol, "National Defence Act: Reform of the Military Justice System" (22 January 1997), online: Public Works and Government Services <<http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/CIR/961-e.htm>> at 5: "The Government's legislative response to the recommendations made in the Lamer Report was first introduced in the House of Commons on April 27, 2006 as Bill C-7. Bill C-7 subsequently died on the Order Paper when Parliament was prorogued on September 14, 2007. A successor bill, Bill C-45, was introduced in March 2008. Bill C-45 also died on the Order Paper as the 39th Parliament was dissolved for a federal election. Bill C-41 was introduced in the House of Commons on June 16, 2010. The changes between Bill C-41 and Bill C-45 were reflective of the amendments made to the National Defence Act following the coming into force of Bill C-60 on July 18, 2008. They further respond to a number of recommendations made by the Standing Senate Committee on Legal and Constitutional Affairs following their study of the court martial system. Bill C-41 died on the Order Paper when Parliament was dissolved on March 26, 2011." [Emphasis mine]

⁴⁵⁴ See e.g. *supra*, note 143. See also *supra*, note 432.

⁴⁵⁵ In my view, this should include most offences except those that are serious in nature such as homicide, aggravated sexual assault, etc. Determining the appropriate exclusions should involve consultations with key players and canvassing current Canadian PSC structures. Such an analysis is beyond the scope of this thesis.

⁴⁵⁶ *Supra*, note 46, 108.17(1).

to legal advice.⁴⁵⁷ Normally, this would occur at the same time of the election to mode of trial, where permitted. The RDP should be amended to incorporate an annotation of this option along with some indication of consequences. Some potential consequences include an immediate repatriation if the accused is in theatre. In addition, an accused will be obliged to provide written consents to allow assessment, treatment, and information sharing with the military VTC multi-disciplinary team and the military judge.

At the time of the election where diversion is requested, the accused will be immediately referred to a multi-disciplinary team, which includes a military psychiatrist, military social worker and military mental health nurse to determine if the member has an OSI. The military psychiatrist must always agree on the report's findings, although a majority of the quorum is required. Within 14 days, the OSI Diversion Assessment Board (OSI DAB)⁴⁵⁸ will provide a psychiatric report of assessment. This can be extended to a maximum of 60 days if required. This will be similar to the American RCM 706 board report, but more limited in scope. In particular, the report will determine only the current clinical psychiatric diagnosis and whether it is related to an OSI. If an OSI exists, the OSI DAB should assess whether the medical condition is related to the behaviour that led to the offence. If so, the member would be considered eligible for diversion.

⁴⁵⁷ See e.g. *supra*, note 97, s 717(1)(d).

⁴⁵⁸ It may be that the Chain of Command would see fit to use these matters for other mental health disorders not related to combat, such as schizophrenia. Although rare, military justice has dealt with these types of issues. See e.g. *R. v. Brown*, 2010 CM 2004 at para 9: "I accept the evidence of the psychiatrists that the offender suffers from chronic paranoid schizophrenia, and, on the basis of the evidence of Dr Joshi, I find that he was suffering the symptoms of this condition to some degree at the time of the offences."

The RDP and all relevant evidence are immediately referred through the chain of command to a Regional Military Prosecutor assigned for the VTC⁴⁵⁹ within 14 days. The OSI DAB report is sent confidentially to the prosecutor in order for her to assess whether she should exercise a veto or block entry into the alternative measures scheme. She will also assess the reasonable prospect of conviction. The Prosecutor shall allow diversion if the member is eligible, unless doing so would be inconsistent with the protection of society, including the military community. A DMP policy would be developed to articulate appropriate factors to guide the Prosecutor in determining the appropriate balance. This would include the position of the Chain of Command articulated during the referral process. Any veto would need to be articulated in writing and the file sent back to the unit for re-election into the ordinary military justice stream.

If the Prosecutor does not veto, she will draft a charge sheet and request the convening of a “Treatment Standing Court Martial” (TSCM). The TSCM will then convene with the accused present. The first hearing will involve reviewing the consent forms endorsed for the OSI DAB and ensuring the requisite consent exists. The military judge will then adjourn for 14-30 days in order for the multi-disciplinary team to confirm eligibility and an appropriate treatment plan that addresses criminogenic factors. The multi-disciplinary team will individually meet with the accused person prior to the next appearance. Prior to the second appearance, the military judge will hold an informal meeting with the multi-disciplinary team to discuss their findings and proposals in a

⁴⁵⁹ See *supra*, note 130. Within the Nova Scotia Mental Health Court, there are specific lawyers assigned by the Nova Scotia Prosecution Service and Legal Aid. In my view, this reduces the potential for conflict of interest should files need to be transferred back to the usual criminal process. It also allows for increased specialized expertise which improves efficiency. Further, it fosters the team cohesion of the multi-disciplinary team.

collaborative way. They will determine an appropriate treatment plan to be implemented over a period of 6-24 months. Should the member be released in the interim, the TSCM would continue to have jurisdiction similar to existing prosecutions by virtue of the *NDA*.⁴⁶⁰

At the second appearance, the charge sheet will be read and the accused will admit the particulars. The military judge will then make a finding of “responsibility”. The summary of the OSI DAB will also be read. The accused will then consent and agree to the diversion treatment plan. I would note that the rapid finding of “responsibility” is consistent with the requirement that military justice be expedient. The process will demonstrate to fellow members of the Canadian Forces that offenders are held accountable, but also that truly injured soldiers get the treatment they need.

In the conduct of a regular court martial, a military judge should also be able to formally order diversion screening with the accused member’s consent on his own or either party’s motion. A military judge should be able to do so by “Order of Referral” to the Court Martial Administrator to convene a TSCM. In a regular trial, this would allow the first judge to simply adjourn proceedings until the diversion process is completed or redirected back. The referring military judge would ensure the appropriate consents are endorsed and the member is referred to the appropriate OSI DAB. The prosecutor will be the recipient of the OSI DAB report and determine whether it will veto the diversion.

⁴⁶⁰ *Supra*, note 42, s 60(2): “Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).”

In the proposed scheme, a defence counsel can make the request of the Prosecutor at any time before a finding of guilt is entered before a military tribunal. If the matter is convened, the Defence will make application to the military judge for an “Order of Referral” to a TSCM. If not yet convened but with the Prosecution or unit during the referral process, the member shall sign the appropriate consents and be referred to the OSI DAB. The Prosecutor will proceed as she would through requested diversion.

Once the treatment program is fully completed, the veteran will “graduate”. As a result, the charges against the member will be dismissed by the military judge. If the program is partially completed, the military judge will have the discretion to dismiss the charges, create a new treatment program or refer the matter for normal prosecution. It should be legislated that delay associated with diversion attempts do not work against the parties in any subsequent prosecutions. Failure to comply with conditions could result in ineligibility for the diversion program and the offender could be sent back into the usual prosecution track. Any charges dismissed by a military judge for completion or partial completion of a TSCM program cannot be retried by a subsequent court.⁴⁶¹

⁴⁶¹ See *contra supra*, note 97 ss 717(4): “The use of alternative measures in respect of a person alleged to have committed an offence is not a bar to proceedings against the person under this Act, but, if a charge is laid against that person in respect of that offence, (a) where the court is satisfied on a balance of probabilities that the person has totally complied with the terms and conditions of the alternative measures, the court shall dismiss the charge; and (b) where the court is satisfied on a balance of probabilities that the person has partially complied with the terms and conditions of the alternative measures, the court may dismiss the charge if, in the opinion of the court, the prosecution of the charge would be unfair, having regard to the circumstances and that person’s performance with respect to the alternative measures”. [Emphasis mine] It seems disingenuous to allow the prosecution of an offender who has complied successfully with an alternative measures agreement over a protracted period under significant supervision. In my view, this was meant to capture those offenders who begin but do not complete an agreed alternative measures program.

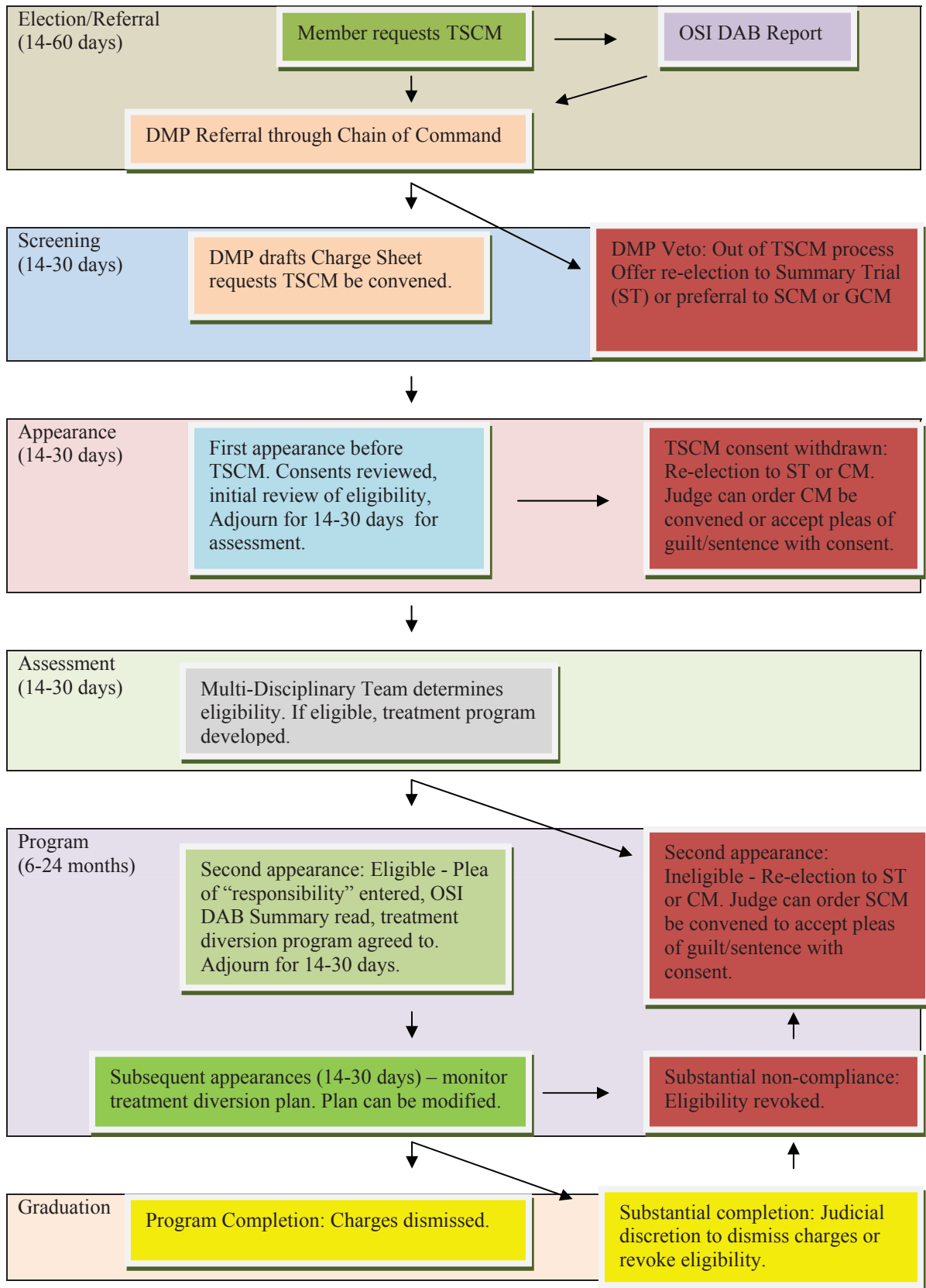
Further, the offender can consent to being found guilty and sentenced by the TSCM judge for the sake of efficiency. This would occur by the judge ordering the Court Martial Administrator to convene an SCM with himself as judge for the matter. Without consent, the matter is to be convened with a different judge with the usual election on mode of trial as appropriate.

In order to prevent abuse of the option of a diversion process, accused parties would be immediately repatriated from theatre in the event that they self-identify as having an OSI and seek diversion to a treatment court. Should it be determined that the member was faking an injury, malingering and/or made a false entry on an official document, such as the RDP, the accused would be subject to prosecution for these offences. It is hoped that the prosecution of offenders who lie about an OSI in order to be repatriated or to obtain diversion improperly would prevent abuse. Such behaviour could also become a legislated aggravating factor for sentencing in order to ensure ample deterrence for those who are not truly mentally injured and have other motives.

Military training instills the “keep it simple” principle. Further, officer training encourages the use of visual aids in order to amplify the message. The following diagram sets out the proposed TSCM process and attempts to follow both of these ideas of officership.

Figure 1 The Proposed Treatment Standing Court Martial Process

OSI DAB	Operational Stress Injury Diversion Assessment Board	TSCM	Treatment Standing Court Martial
ST	Summary Trial	CM	Court Martial
DMP	Director Military Prosecutions	SCM	Standing Court Martial



The eligibility requirements for a TSCM would parallel those of civilian courts. In particular, in order to qualify a member must consent and have an OSI or other mental disorder; and there must be a significant connection between the disorder and the offence. Further, the offender must voluntarily undergo a clinical psychiatric assessment and accept responsibility for the offence. Further, the Prosecutor must consent to the offender's access to this program.⁴⁶² Similarly, the so-called phases could be referred to as the: election/referral, screening, appearance, assessment, program and graduation.

The RDP will indicate that charges were diverted to the TSCM and the member graduated. This will not be a criminal record or an entry on a military conduct sheet. Further, should an inculpatory admission, confession or statement be made during the TSCM process, it may not be used in any subsequent court proceedings.⁴⁶³

It is essential that the military TSCM multi-disciplinary team be regionally based to allow for the ongoing treatment of veterans in the program. Existing personnel at major bases could be used for this purpose.

4.1.5 The Multi-disciplinary Team

There are currently OSI clinics that are funded by Veteran's Affairs. They are located in: Fredericton, New Brunswick; Loretteville, Quebec; Sainte-Anne-de-Bellevue, Quebec, Ottawa, Ontario; London, Ontario; Winnipeg, Manitoba; Edmonton, Alberta; Calgary, Alberta; and Vancouver, British Columbia. All of these facilities offer military personnel "clinical assessment and a variety of treatment options including individual therapies, group sessions, psycho-education sessions, [addictions services,] and other

⁴⁶² *Supra*, note 121.

⁴⁶³ *Supra*, note 97, s 717(3).

resources”⁴⁶⁴ tailored to each client’s needs. The services are delivered by clinical “teams [...] made up of psychiatrists, psychologists, social workers, mental health nurses, and other specialized clinicians who understand the experience and needs of Veterans”.⁴⁶⁵ Services extend to partners and family members.

In addition, the Canadian Forces administers seven Operational and Trauma Stress Support Centres (OTSSC) located at “Halifax, Gagetown, Valcartier, Ottawa, Petawawa, Edmonton and Esquimalt”.⁴⁶⁶ These locations coincide with where most Canadian Forces members are stationed. In addition, “[e]lements of OTSSC programs are also available at smaller bases depending upon population size and local resource availability”.⁴⁶⁷ Clinical teams at OTSSC include “psychiatrists, psychologists, social workers, mental health nurses, addictions counselors and Health Services Chaplains.” They are responsible for providing both treatment and education to clients and their families.

The composition of multi-disciplinary teams at the OSI Clinics and the OTSSC closely resemble those found on civilian PSCs. The difference is that PSCs also have representatives from probation services, a judge, a prosecutor and a defence counsel.⁴⁶⁸

⁴⁶⁴ *Supra*, note 145.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ “Operational and Trauma Stress Support Centres”, online: National Defence and the Canadian Forces <<http://www.forces.gc.ca/health-sante/ps/mh-sm/otssc-cstso/default-eng.asp>>.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ See e.g. “Frequently Asked Questions” *Nova Scotia’s Mental Health Court Program*, online: The Province of Nova Scotia <http://www.gov.ns.ca/just/global_docs/MHC_FAQ.pdf>: “The Court has a dedicated team comprised of a nurse, a social worker, a Probation Officer, a Crown Attorney, and a Legal Aid lawyer. There is also a Provincial Court Judge assigned to preside in the Mental Health Court.”

Some PSCs further incorporate police into their team model.⁴⁶⁹ Currently, the Canadian Forces has all this expertise at its disposal except those of a probation officer. A well trained social worker and military police officer could fill this void.

The proposed TSCM multi-disciplinary team would require, at a minimum, a military judge, a prosecutor, a defence counsel, a military psychiatrist, a military nurse, a military social worker and a military police officer. *Ad hoc* members could include military chaplains, psychologists, Veterans Affairs program managers and addiction counsellors as requested or required. It should be emphasized that the Canadian Forces and Veterans Affairs has these teams ready to treat veterans. TSCMs could use these existing resources.

The legislation could convene these individual team members by name such as a panel on a GCM, although formally naming them on a convening order is not required and would be impracticable.⁴⁷⁰ Ideally, the legislation would confer broad powers on military judges similar to s. 179 of the *NDA*⁴⁷¹ in order to administer the alternative measures scheme and allow flexibility for unforeseen developments.

⁴⁶⁹ See. e.g. Heino Lilles, Tracy McPhee & Sandra Bryce, “The Domestic Violence Treatment Option: A Yukon Initiative”, at 10 and 22, online: Centre for Children and Families in the Justice System, London Family Court Clinic Inc. <http://www.lfcc.on.ca/Lillies_DVTOPaper.pdf>: “The TC process uses a collaborative effort among criminal justice system participants, who traditionally see each other as adversaries, in a process mediated by the judge. TCs shift the paradigm of the court system, meaning that everyone involved, including judges, prosecutors, defence counsel, the police, treatment personnel, victim services workers and probation officers, must change their outlook and conduct if TCs are to function effectively. In short, it requires a team approach. [Emphasis mine]

⁴⁷⁰ Team members and counsel may change throughout the process as in civilian trials. Military processes must remain equally flexible; although changes can be noted on the record.

⁴⁷¹ *Supra*, note 42, s 179: “A court martial has the same powers, rights and privileges as are vested in a superior court of criminal jurisdiction with respect to (a) the attendance,

Admittedly, the proposed solution may be imperfect, incomplete and subject to debate, revision, or improvement. Still, the absence of perfection should not prevent progress. The “ninety percent solution” is sufficient as we traverse the divide of veteran OSIs and disciplinary and criminal justice.

4.1.6 The Ninety Percent Solution

The Office of the Judge Advocate General’s (OJAG) mission is to deliver “independent, operationally focused, solution oriented legal advice and services across the full spectrum of military law, and superintends the administration of military justice”.⁴⁷² [Emphasis mine] Legal solutions to deal with what is perceived to be a “crisis”⁴⁷³ for veterans and the Canadian Forces falls under the mandate of the JAG, particularly when dealing with military justice. The JAGs vision includes being “operationally focussed [...] and networked legal professionals, proudly contributing to a disciplined force and mission success in a manner that reflects Canadian values and the rule of law”.⁴⁷⁴ [Emphasis mine]

Being operationally focused necessarily means that perfection in legal advice may not be possible. The reality for the men and women in the JAG who serve as legal officers is that they sometimes have to give immediate operational advice to a Commander, with little or no time to research it. The information provided and legal

swearing and examination of witnesses; (b) the production and inspection of documents; (c) the enforcement of its orders; and (d) all other matters necessary or proper for the due exercise of its jurisdiction, including the power to punish for contempt. [Emphasis mine]

⁴⁷² “Office of the Judge Advocate General”, online: National Defence and the Canadian Forces <<http://www.forces.gc.ca/jag/index-eng.asp>>.

⁴⁷³ See e.g. *supra*, note 159.

⁴⁷⁴ *Supra*, note 472.

analysis, by the nature of the problem, are limited. For example, the decision to target a person or object along with an assessment of collateral damage may need to be given quickly.⁴⁷⁵ The OJAG continues to provide excellent support, despite significant pressures, because leadership understands that the ninety percent solution is acceptable.⁴⁷⁶ The ninety percent solution can be defined as implementing a solution despite concerns that planning or research has not been fully prepared or canvassed exhaustively.

The JAG's position on the ninety percent solution in the delivery of his mandate is consistent with modern business approaches. Academics suggest that “[p]erfectionism is a common psychological obstacle to productivity. In the perfectionist's mind, the product [...] report, etc. she is trying to produce is not quite good enough just yet. [...] The problem is that somewhere along the pursuit for 100% perfection, we face diminishing returns.”⁴⁷⁷ This is sometimes referred to as “analysis paralysis”⁴⁷⁸.

⁴⁷⁵ Michael N. Schmitt, “Precision attack and international humanitarian law”, (2005) 87:859 *Intl Rev of the Red Cross* 445 at 450, online: icrc.org <http://www.icrc.org/eng/assets/files/other/irrc_859_schmitt.pdf>: “Targets [...] may be ‘time-sensitive’. They require immediate attack ‘because they pose (or will soon pose) a danger to friendly forces or are highly lucrative, fleeting targets of opportunity’.”

⁴⁷⁶ Brigadier-General Blaise Cathcart, (Address delivered at the Office of the JAG Continuing Legal Education Conference, Ottawa, 4-6 October 2012), [unpublished].

⁴⁷⁷ See e.g., Sarah From, “Perfectionism and the 90% Solution” (9 December 2011) (blog), online: do your best work <<http://www.doyourbestwork.net/2011/12/09/perfectionism-and-the-90-solution/>>. See also Jon Acuff, “The Problem with Perfection” *The Ziglar Weekly Newsletter* (17 January 2012), online: <<http://www.ziglar.com/newsletter/?p=1419>>: “Quit perfect. It’s an unnecessary obstacle. Chase the idea of your dream being better finished at ninety percent than perfect and not pursued.” [Emphasis mine]

⁴⁷⁸ William A. Cohen, *The Art of the Strategist: 10 Essential Principles for Leading Your Company to Victory* (New York: AMACOM, 2004) at 53.

Civilian justice officials that are piloting PSCs realize that they may not have the perfect model and are constantly reviewing, studying and adapting as required.⁴⁷⁹ The Military leaders should equally courageously implement PSCs into the military justice system with the knowledge that there will be legislative amendments, evolutions, problems and analysis required in the future. Still, a ninety percent solution to PSC implementation is consistent with the JAG's mission-vision: to provide operationally focussed, agile, solution-oriented advice to a serious developing military problem, which impacts military justice.

Additionally, it attempts to parallel civilian efforts where military requirements allow, further bolstering the purpose of a separate military justice system which reflects Canadian values while instilling confidence in the JAG's leadership to superintend it.

4.2 BUILDING PARTNERSHIPS WITH CIVILIAN AGENCIES

Notwithstanding the JAG's role in military justice, the development of an effective plan to address veteran OSI issues requires civilian partnerships. Ideally, civilian PSCs that can deal with the specific needs of veterans should be developed. Building bridges between these organizations and fostering knowledge of OSI issues for veterans and military personnel before civilian justice will require the assistance of focused military leadership, which carries accountability. The military's lead expert on legal matters involving its members is the JAG.

While it is understood that the government receives various forms of legal advice from different departments regarding defence issues, only the OJAG fully appreciates the

⁴⁷⁹ See e.g. *supra*, note 128.

dynamic of how incarceration or justice generally can impact military operations. The military justice system does not prosecute all military members who are offenders.⁴⁸⁰ The reasons for not doing so may involve existing legislation, victims' services capacity, whether there are civilian co-accused, the investigating body, etc. Still, the impact on military operations is not lessened simply because civilian authorities prosecute. This was highlighted recently in a high profile civilian prosecution of a senior officer where morale was reportedly severely affected.⁴⁸¹

The OJAG must continue to network and bridge gaps with civilian agencies in the prosecution of military members so that civilian officials fully understand the impact on operations and the particular needs of military members and their families. Further, the military justice system must exercise its concurrent jurisdiction where appropriate.

The work required in creating an alternative measures scheme for serving military members equally assists released veterans. In addition, because the care of veterans, and the perception thereof, is thought to have a direct correlation to military effectiveness,⁴⁸²

⁴⁸⁰ See e.g. David Bright, Louis-Vincent D'Auteuil & Kathy Pentz, "Canada's Military-Citizens: The Intersection of Military and Civilian Laws: Concurrent Jurisdiction between Military and Civilian Justice Systems" (Address delivered at the Nova Scotia Military Law Section, Canadian Bar Association Conference, Halifax, 1 December 2011), [unpublished].

⁴⁸¹ See e.g. Don Martin, "This can't be good for morale" *National Post* (10 February 2010), online: oped.ca <<http://oped.ca/National-Post/don-martin-murder-charges-against-cfb-trenton-base-commander-a-blow-to-military-morale/>>: "It shouldn't be happening because the uniform isn't on trial, but morale is plummeting inside CFB Trenton after the base commander was charged with two murders and a pair of sexual assaults." [Emphasis mine].

⁴⁸² See e.g. Mike Haynie & Robert B. Murrett, "This Memorial Day, supporting veterans is a matter of national security" *The Christian Science Monitor* (25 May, 2012), online: <<http://www.csmonitor.com/Commentary/Opinion/2012/0525/This-Memorial-Day-supporting-veterans-is-a-matter-of-national-security>>: "The care of veterans and their families is also a national security imperative if the US is to maintain an effective all-volunteer force.[...] The National Security Strategy, which emphasizes all of the nation's

military leadership should have a mandate to assist veterans. To that end, and in order to avoid duplication, one government official should lead a “whole of governments effort”.

The primary effort now should be the creation of a military justice PSC, along with education and training. Encouragement to improve treatment within civilian prisons, data collection by Corrections Canada and prosecution agencies on veterans, and options to identify OSIs (such as on driver’s licences) are but a few other initiatives that military leaders can encourage in order to reduce criminogenic factors and behaviors related to OSIs. This networking with civilian counterparts and other justice officials is consistent with the JAG’s vision to be “networked legal professionals”.⁴⁸³ Similarly, the current mental health strategy for the Department of Veterans’ Affairs is consistent with this concept and advocates “[n]urturing collaborative partnerships with other organizations who share the goal of responding effectively to the needs of clients living with mental health conditions”.⁴⁸⁴

Partnerships, education and advocacy on behalf of veterans in tandem with civilian justice counterparts will foster the creation of mechanisms that ensure members and veterans are properly cared for when faced with civilian justice. Ideally, these mechanisms would include civilian PSCs adapted to veterans’ needs.

resources as an element of security, says that rededicating ‘ourselves to providing support and care of wounded warriors, veterans, and military families’ is fundamental to America’s defense posture. [Emphasis mine]

⁴⁸³ *Supra*, note 472.

⁴⁸⁴ “Veterans Affairs Canada Mental Health Strategy”, online: Veterans Affairs Canada <<http://www.veterans.gc.ca/eng/mental-health/health-promotion/strategy>>.

4.2.1 Civilian VTCs

Because of the lack of available data regarding the number of veterans and military members processed through civilian justice, it is impossible to conclude that the American approach of having numerous VTCs in each jurisdiction is required in Canada. Still, any civilian PSC programming approach for veterans does need to be tailored specifically to their unique needs and circumstances to maximize effectiveness.⁴⁸⁵ As a hybrid PSC, the VTC model has components of DVC, DTC and MHC, all rolled into one. Further, there are unique medical and social services available through the Canadian Forces and Veterans Affairs that require additional knowledge, expertise and partnerships not currently available to civilian PSCs.

In keeping with efficiency and effectiveness, it would be beneficial to initially use existing PSCs in civilian justice systems, but to adapt them on a case by case basis. For example, the Nova Scotia Mental Health Court pilot model is located in Dartmouth, Nova Scotia, near CFB Halifax and its lodger units.⁴⁸⁶ If it were to be referred the file of a military member or veteran, the partnerships built by the networked OJAG (as proposed above) would prompt the collaborative team to contact their partners within the Department of National Defence and Veterans Affairs. The civilian group could incorporate some military specialists on their multi-disciplinary team. On those cases, military psychologists, military social workers and Veterans Affairs personnel could work with civilians to develop more enriched programs that enable better treatment for veterans or military offenders. The partnership and collaboration in the civilian PSC

⁴⁸⁵ *Supra*, note 131.

⁴⁸⁶ Hon. Pamela S. Williams, “Problem-Solving in the Nova Scotia Mental Health Court” (2011) 30:1 *Nova Voce* 4 at 5.

would not only assist civilian justice for military members or veterans, but would foster knowledge and training by military professionals that can be used in a military justice TSCM process.

The civilian PSC would presumably have an interest in working with military officials, because doing so would open up additional community resources in order to further their aims. Many PSCs make significant efforts to identify, coordinate and facilitate “collaborative relationships with community partners in areas related to mental health, addictions, housing, vocational/educational training and other wellness-related initiatives”.⁴⁸⁷ By working with military officials on veterans’ files, these civilian PSCs would access more expertise, resources and save time and effort in doing so. This partnership is win-win and should be pursued with vigour.

Should data and research collected over time warrant specialized specific veterans courts, then these courts could be developed from this pilot initiative. Still, by working with existing PSCs and bolstering their collaborative teams with military and veteran expertise, in essence the same end can be achieved, even without the formal VTC name. Further, it maximizes efficiency.

The focus of advocacy by defence leadership should be on having these civilian-military models in every province and territory, beginning at locations with major bases. These would complement TSCMs by providing diversion options for released veterans or those injured persons over whom military authorities do not wish to exercise their jurisdiction. The existing OTSSC structure would be the best place to start because of its

⁴⁸⁷ *Ibid.*

proximity to personnel and access to the requisite collaborative professionals.⁴⁸⁸ This is not to say that outlying areas, where reservists or other retired veterans live, are any less important. To the contrary, each member is equally worthy of VTC access. The reality is that the project has to start somewhere and, as is said, the perfect is the enemy of the good.

The general public may not understand that combat or deployments can cause OSIs. They may not know that this type of injury can lead to criminogenic factors that cause veterans and military members to become involved with the law. Their knowledge may only come from television, movies or media reports, which may sensationalize risk. Both military and civilian justice leadership must address the truth “head on” and inform the public of the reality of these injuries as it relates to criminal justice. The United States has done a good job in building public support for this notion, through a wide variety of programs, services and educational efforts.⁴⁸⁹ The result has been to allow more acceptance of treatment based approaches for their nation’s veterans.⁴⁹⁰ Canada must do the same.

Civilian VTCs or *ad hoc* military-modified civilian PSC models will further military goals of increasing morale, efficiency and discipline. Because of the stigma and cultural beliefs associated with mental health in the military, education and training are essential to fostering the treatment of OSIs. Military leadership has a role to play when

⁴⁸⁸ *Supra*, note 466.

⁴⁸⁹ See e.g. United States Senate Judiciary Committee, *Hearing on Drug and Veterans Treatment Courts: Seeking Cost-Effective Solutions for Protecting Public Safety and Reducing Recidivism* (19 July 2011) (Douglas B. Marlowe) at 5: “The National Drug Court Institute (NDCI) is the preeminent source of cutting-edge training and technical assistance to the Drug Court field. [...] This past year, they launched a training [program] for Veterans Treatment Courts and have trained over 22 teams.”

⁴⁹⁰ See e.g. *supra*, note 2.

the education relates to legal processes involving military members or veterans that potentially have operational impact.

4.2.2 Education and Training

Education and training are required in order to combat the stigma of mental illness in Canada and the Canadian Forces generally.⁴⁹¹ As has been explored above, the rationale for such prioritization is self-evident. Stigma impedes OSI treatment.⁴⁹² Impeded treatment has a correlation to increased criminogenic factors.⁴⁹³ Increased criminogenic factors can impact discipline and lead to misconduct.⁴⁹⁴ Poor discipline by military personnel undermines operation effectiveness and puts missions and public safety at risk.⁴⁹⁵

Recent efforts by the military to educate veterans and military members about OSIs have been significant.⁴⁹⁶ However, little has been done to educate the public on its correlation to military justice or civilian justice generally. Similarly, military commanders and personnel should be educated in treatment court options. Beneficially, this type of learning would break cultural biases toward correction and punishment as the only solution to recidivism. Further, it would foster acceptance for TSCMs as a military justice option. In addition, it would assist in the overall goal of reducing stigma to provide greater acceptance of OSI treatment. Knowledge of the existence of these civilian

⁴⁹¹ See e.g. *supra*, note 223.

⁴⁹² *Supra*, note 208.

⁴⁹³ *Supra*, note 37.

⁴⁹⁴ *Supra*, note 2.

⁴⁹⁵ *Ibid.* See also *supra*, note 398.

⁴⁹⁶ See e.g. *supra*, note 217.

diversionary processes may increase awareness and acceptance of their use and reduce military rates of incarceration while correspondingly increasing OSI treatment.

The OJAG is in a good position to administer this education effort because of its knowledge, expertise and networked legal capacity. It already provides substantial training to various levels of leadership across the Canadian Forces. Incorporating these components of education into OJAG programs is not only efficient, but arguably is their duty.

The OJAG has already taken important timely steps to educate its personnel on OSIs and their relationship to military justice.⁴⁹⁷ Further steps would be beneficial, including the creation of specific policies for dealing with accused members who are suspected or confirmed to have an OSI. In addition, should TSCMs or some other diversionary process be incorporated into military justice, specific education for key players would be necessary. In particular, military judges, defence counsel, prosecutors, and members of the multi-disciplinary team would need to be specifically instructed in PSC techniques. Sources of this training could include American VTC training resources combined with shadowing counterparts in Canadian PSCs. This further enhances the OJAG's vision to be networked legal professionals.

In addition, civilian counterparts in the Federal and Provincial justice systems need to understand the unique needs of veterans and how criminal processes impact their careers, families and operations. They require training in numerous OSI justice related issues, including: services available that would enhance their collaborative efforts at PSC program treatment; the impact of incarceration for veterans with OSIs; and the

⁴⁹⁷ *Supra*, note 476.

appropriate available treatment options provided by the military or Veterans Affairs that can be incorporated into such sentencing tools as probation orders.

As the JAG is the superintendent of military justice, he is the proper authority to ensure prisoners with OSIs sent to the CFSPDB by military service tribunals are provided with appropriate treatment. It may be that the existing programming for rehabilitation would need to be modified for severe OSI disabilities in order to meet domestic and international legal obligations.⁴⁹⁸ For example, it would not be considered lawful to punish injured offenders for not doing something they could not reasonably do. If it would be cruel to punish a prisoner for not standing at attention when their legs were lost in combat, why would it be any more acceptable to punish a veteran whose OSI injuries foster panic, violence, or “acting out”?⁴⁹⁹ It would not. The wounds not being visible does not make them any less real, but simply misunderstood. The OJAG may be able to sensitize officials in the military or civilian prisons as to the impact of OSIs on offenders that go through the military justice process. Clearly, the OJAG will need to work in concert with medical officials; however, the JAG is well-positioned to lead some of the effort, or at least advise the CDS on matters related to such an endeavour.

The Military Police and their civilian counterparts also need to be trained in dealing with OSIs and mental illness generally. Normally, these actors are at the front-line of the criminal process.⁵⁰⁰ They are also involved at various stages throughout the

⁴⁹⁸ See e.g. “Human Rights and Corrections: A Strategic Model” (December 1997), online: Correctional Service Canada <<http://www.csc-scc.gc.ca/text/pblct/rights/human/im4630-02-eng.shtml>>.

⁴⁹⁹ *Supra*, note 38.

⁵⁰⁰ *Supra*, note 140: “Finally, the police have a critical role to play in improving the response of the criminal justice system to mental health problems and illnesses. They are the gate-keepers of the criminal justice system and frequently the first on the scene when

military justice and civilian justice processes including: investigation, court testimony, diversion, enforcing orders or supervising custody. The CFPM is responsible for internal policing policy and training;⁵⁰¹ however, they must work in concert with the OJAG in ensuring that appropriate front line diversion or handling is legal and meets the purpose and underlying philosophy of military justice.

A concerted education effort and package on the issue of military and veteran mental health as it relates to criminal and disciplinary justice should be developed and implemented as soon as possible. Because the target audience involves various players

someone is experiencing a mental health crisis. That makes it essential for the police (and other front-line criminal justice and corrections workers) to have the very best education and training in how to interact with people living with mental health problems and illnesses. Most police agencies in Canada recognize the need to improve education and training in this area and are working actively to address this need.” See also, James D. Livingston et al, “Criminal Justice Diversion for Persons with Mental Disorders: A Review of Best Practices” (31 March, 2008), online: CMHA BC Division’s Mental Health Diversion Project <<http://www.cmha.bc.ca/files/DiversionBestPractices.pdf>>: “Police must stabilize the scene using deescalating techniques or trauma-informed responses appropriate for people with mental disorders. [...] It is important for police to be able to recognize behaviours, actions, and speech that are indicative of mental disorder.”

⁵⁰¹ “CF MP Gp HQ”, online: National Defence and the Canadian Forces <<http://www.vcds.forces.gc.ca/cfpm-gpfc/apm-agp/index-eng.asp>>: “The CFPM also is the Commander of the Canadian Forces Military Police Group. As the centralized MP HQ, the CF Military Police Group (CF MP Gp) HQ provides direction to all Military Police Branch members with regards to police policy and procedures, oversight on policing and security matters, professional standards, security, equipment and training [...]”

within departments⁵⁰², various departments within governments⁵⁰³, and various levels of governments,⁵⁰⁴ a “whole of governments approach” is required.

4.2.3 Whole of Governments Approach

The concept of “whole of governments approach” is one used by the military in operations and now understood by most commanders.⁵⁰⁵ In the operational peace-building setting, it has also been referred to as the 3D approach, the integrated approach and the comprehensive approach; however the contemporary military term is the “whole of government approach”.⁵⁰⁶ It has been around for more than a decade. In 2005, the MND referred to it as “bringing together military and civilian resources in a focused and coherent fashion”.⁵⁰⁷ It is widely viewed as coordinated and holistic, using a collaborative approach to achieve maximum effect.⁵⁰⁸

⁵⁰² For e.g., the Canadian Forces Provost Marshal, the Judge Advocate General, the Canadian Forces Surgeon General and Commanders in all elements within the Department of National Defence.

⁵⁰³ For e.g. the Department of National Defence, the Department of Justice, Corrections Canada, the Department of Health and the Department of Public Safety.

⁵⁰⁴ For e.g. the Government of Canada, provincial and territorial governments, and municipalities and First Nations Reserves with police forces.

⁵⁰⁵ Colonel M.P. Jorgensen, “A Strategy for Effective Peace-Building: Canada’s Whole of Government Approach in Afghanistan”, (Paper, Canadian Forces College, 2008), online: <<http://www.cfc.forces.gc.ca/259/281/280/jorgensen.pdf>>.

⁵⁰⁶ *Ibid*, at 3.

⁵⁰⁷ “Canada’s International Policy Statement: a Role of Pride and Influence in the World - Defence” (2005) at 26, online: Canadian Forces and National Defence <http://www.forces.gc.ca/admpol/downloads/Canada_Defence_2005.pdf>.

⁵⁰⁸ Lieutenant-General (Retired) Andrew Leslie, Peter Gizewski & Lieutenant-Colonel Michael Rostek, “Developing a Comprehensive Approach to Canadian Forces Operations”, online: (2008) 9:1 *CMJ* 11 at 11 <<http://www.journal.forces.gc.ca/vo9/no1/doc/04-leslie-eng.pdf>>: “Canadian Forces [...] acknowledgement of the need to practice a more coordinated and holistic approach to operations is ever more evident – and also pressing. Accordingly, DND leadership – both civilian and military – is increasingly calling for the adoption of a force that takes a

Associate Chief Judge Pamela Williams of the Nova Scotia Provincial Court, who presides over the Nova Scotia Mental Health Court, indicates that “a collaborative approach to decision making is essential. An integrated team of professionals from a variety of disciplines ensures that a holistic approach is followed”.⁵⁰⁹ [Emphasis mine] Similarly, VTCs use holistic and collaborative methods⁵¹⁰ consistent with familiar military operational models.

The use of a “whole of government approach” model is suggested because it is used and understood by military Commanders. The use of “governments” was substituted because there are multiples levels of government that need to be involved due to their administrative responsibilities of various types of courts and police forces. A so-called “campaign plan” or strategy should be written to foster understanding, debate and accountability.

“comprehensive approach” to operations. Such a force would employ diplomatic, defence, development, and commercial resources, aligned with those of numerous other agencies, coordinated through an integrated campaign plan, and then applied in areas of operations as needed. As such, the approach would entail traditional and non-traditional military activities being carried out collaboratively within a broader context known as the “Effects Based Approach to Operations” (EBAO). The result would be greater mission effectiveness”. [Emphasis mine]

⁵⁰⁹ *Supra*, note 486.

⁵¹⁰ See e.g. “Veterans Court” *The Philadelphia Courts* (2012), online: First Judicial District of Pennsylvania <<http://www.courts.phila.gov/veteranscourt/>>: “The Philadelphia Veterans Court represents the latest problem solving court initiative, in Municipal Court, addressing a holistic Treatment Court approach to dealing with justice involved Veterans. [...] This collaborative initiative between the Court, the District Attorney, the Public Defender, the Veterans Administration and numerous Veterans agencies [...]”

4.2.4 The Campaign Plan

This thesis does not purport to have the perfect blueprint or, in military terminology, “campaign plan”⁵¹¹ in order to resolve the OSI issues as they relate to disciplinary and criminal justice. Still, it will offer a starting point or framework from which justice officials can begin discussions in order to come up with a ninety percent solution⁵¹² and begin implementation.

The following diagram is a simple view of the initial focus that leaders should consider when attempting to deal with veterans suffering from OSIs. It is holistic and captures military and civilian required efforts. Responsible agencies were specifically not named as it is clear there will be debate regarding who should be responsible for various components. The OJAG should assist in a leadership capacity, but other Canadian Forces leaders must equally be accountable and assist in meeting the MND and the CDS’s higher intent “to create a command climate that allows those who need help to get it [and] foster a social climate of understanding, acceptance and support”.⁵¹³ Regardless of the specific allocation of responsibility, Figure 2 provides an outline upon which leaders can build systematic processes that further foster the appropriate treatment of our injured veterans.

Figure 2 The “OSI Justice Campaign Plan”

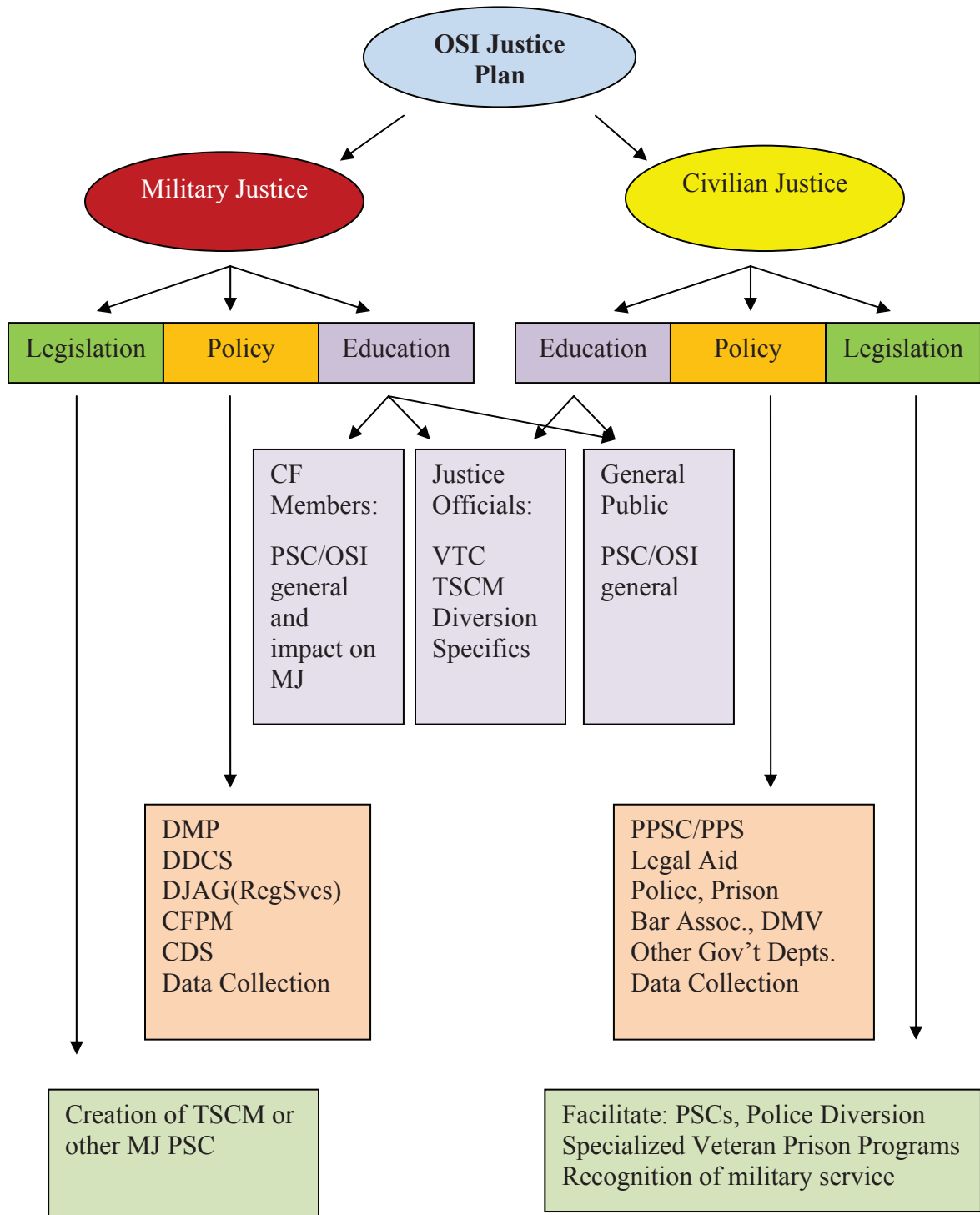
OSI	Operational Stress Injuries	VTC	Veterans Treatment Court
PPSC	Public Prosecution Service of Canada	DDCS	Director of Defence Counsel Services
PSC	Problem-Solving Court	MJ	Military Justice

⁵¹¹ See e.g. Pierre Lessard, “Campaign Design for Winning the War...and the Peace”, Small Wars Journal, at 4, online: <<http://smallwarsjournal.com/documents/lessard.pdf>> “A campaign may be defined as ‘a set of military operations planned and conducted to achieve a strategic objective within a given time and geographic area [...]’

⁵¹² *Supra*, note 477.

⁵¹³ *Supra*, note 223.

CF	Canadian Forces	TSCM	Treatment Standing Court Martial
PPS	Provincial Prosecution Services	CDS	Chief of Defence Staff
DMP	Director Military Prosecutions	DMV	Department of Motor Vehicles
CFPM	Canadian Forces Provost Marshal	DJAG (Reg Svcs)	Deputy Judge Advocate General (Regional Services)



The Campaign plan has a basic two pronged approach – military and civilian justice. Because Canadian Forces members are subject concurrently to both systems of justice domestically and because released veterans will be subject exclusively to civilian justice, both systems need to be addressed. Within each justice system, three basic areas need to be examined initially, namely: legislation, policy and education.

Assuming there is an understanding and acceptance that OSIs can cause increased criminogenic risk, misconduct and increased recidivism, legislative responsibilities include a systematic review of existing legislative processes to determine what amendments should be made to create a social climate of support and treatment for veterans with OSIs. This may include specific amendments to the *Criminal Code* or the *National Defence Act*, which could suggest that OSIs incurred on behalf of the nation or honorable military service is a recognized mitigating factor in sentencing.⁵¹⁴ It may also include modified regulatory correctional regimes at the military prison or satellite detention barracks for OSI inflicted veterans.⁵¹⁵ The possibilities to improve are countless; still the initial and most important legislative focus to meet the Commanders' higher intent for military justice should be the creation of a TSCM or similar type treatment court. While it is acknowledged that it may not be used very frequently, its very existence will foster trust and morale, thereby increasing operational efficiency and effectiveness. At a minimum, it enhances the perception that the Canadian Forces will

⁵¹⁴ While it is acknowledged that judges most often do determine that these factors are mitigating, formal recognition within legislation will foster acceptance which will assist in reducing stigma, a barrier to treatment. Some American states have formally recognized military service as relevant to sentencing in their legislative schemes. See e.g. *supra*, note 39. See also *supra*, note 352.

⁵¹⁵ See e.g. *supra*, note 94, which suggests that a boot camp style approach may not foster reducing criminogenic factors; thereby adversely impacting rehabilitation.

look after its ill and injured appropriately. On the civilian front, federal and provincial governments should consider expanding existing PSC initiatives.

Simultaneously, existing justice policies need to be reviewed and amended in order to combat OSI-related issues. In addition, new policies addressing these problems should to be created. On the military justice side, the creation of specific mental health or OSI justice policies should be created by the DMP, the DDCS, the Deputy Judge Advocate (Regional Services),⁵¹⁶ the CFPM and the CDS generally. These policies should amplify the MND and CDS's intent that the military fosters a climate of understanding, support and treatment for veterans with OSIs.

On the civilian side, both federal and provincial prosecution services should draft specific policies designed to get veterans suffering from OSIs into treatment as opposed to jails, where possible. Further, police should also have specific policies to deal with veterans inflicted with OSIs, with possible initial diversions available at the lowest levels.⁵¹⁷ In addition, Corrections Canada and their provincial counterparts should also

⁵¹⁶ The Deputy Judge Advocate (Regional Services) provides legal advice to the military police and the chain of command administering the summary trial system.

⁵¹⁷ See e.g. Uppala Chandrasekera, "Police & Mental Health: A Critical Review of Joint Police/Mental Health Collaborations in Ontario Provincial" *Provincial Human Services and Justice Coordinating Committee* (January 2011) at 28, online: <http://www.hsjcc.on.ca/Uploads/PHSJCC_Police-MH_Final_Report_January_31_2011.pdf>: "In terms of police involvement in diversion, [...] police officers have the discretion to informally divert persons from the criminal justice system when appropriate, and on a case by case basis, regardless of whether the individual has a mental illness. However, informants also noted that different methods of informal pre-charge diversion occur based on the police detachment and based on the mental health services available in the community. Informants highlighted the need to develop a standard provincial protocol for pre-charge diversion that can be used across the province." [Emphasis mine]

have specific policies about the handling and treatment of prisoners with OSIs.⁵¹⁸ Legal Aid organizations should have specific policies for dealing with OSI clients and bar societies could assist in providing support and guidelines for counsel involved with veterans in the civilian justice process. The underlying philosophy should be treatment-based to resolve the root problem associated with the behavior attracting justice officials' scrutiny.

Further, other government departments, such as the provincial Departments of Motor Vehicles (DMV), could determine programs or services that may assist veterans afflicted with OSIs in avoiding situations that could cause flare-ups.⁵¹⁹ In particular, provinces may consider allowing OSI veterans to self-identify on their driver's licence. As noted earlier, this can assist police in better understanding the person they are dealing with, avoiding unnecessary confrontation during routine traffic stops associated with the injury and facilitating early diversion to treatment at the lowest possible level. This option would also foster acceptance and reduce stigma, thereby increasing the likelihood of treatment by veterans. It would also allow government agencies to acquire current information on veterans in order to ensure the provision of available veteran benefits and services.

Currently, there is a significant deficit of data regarding veterans suffering from OSIs and their involvement in justice. The military currently does not collect data on how

⁵¹⁸ *Supra*, note 273 at ii: "High numbers of incarcerated veterans present a number of implications for correctional services. Veterans often have treatment needs for psychological injuries such as post-traumatic stress disorder (PTSD). Canadian medical researchers have recently reported that many veterans suffering from these injuries do not seek help for years and it is possible that the presence of PTSD or unresolved issues surrounding trauma may impact the offender's safe transition to the community."

⁵¹⁹ See e.g. *supra*, note 353. See also, *supra*, note 354.

many service personnel suffering from OSIs are tried and convicted by summary trial or courts martial. There is no information on how many are incarcerated at the CFSPDB and whether their remission success⁵²⁰ is lower than fellow prisoners. There are equally no statistics on recidivism rates for veterans with OSIs as compared with the rest of the Canadian Forces population. Similarly, there is a dearth of quantitative research on OSIs and criminogenic risk for Canadians. It is unclear whether there is a link between the type of OSI (PTSD, C-PTSD, major depression, addictions, etc.) and misconduct or criminal behavior. There is no database of mentally injured veterans prosecuted in civilian courts. As a result, the extent of the problem on civilian justice is unknown. Also, it remains unclear how often military police or units use pre-charge diversion for members or veterans with OSIs.

Similarly, civilian justice officials often do not collect data on veterans or military offenders caught up in their systems. Corrections Canada does not currently track the number of inmates that have military service, let alone those with OSIs, as does its American counterpart.⁵²¹ Civilian police and prosecution services also do not collect information on the impact of OSIs on the civilian court process or related diversions. Further, Veterans Affairs and the Department of Justice do not systematically track veterans' involvement with civilian justice processes.

In summary, there is inadequate and insufficient data collection processes on the issue of OSIs and Canadian justice. More information would enhance efforts to address key issues of the problem, including: reducing criminogenic factors and recidivism,

⁵²⁰ The remission scheme at the CFSPDB is based on a point system. It is focused on rehabilitation through a boot camp philosophy. See e.g. *supra*, note 46, Appendix 1.4, *Regulations for Service Prisons and Detention Barracks* at ch 5.

⁵²¹ See e.g. *supra* note 273.

fostering early treatment and recovery, and determining appropriate incarceration rehabilitation techniques. As part of the whole of governments approach, concerted policy should be implemented to require departments and governments to collect, analyze and share this information to further the common goal of assisting veterans in recovery.

The final component listed in the “campaign plan” is education. As indicated in a Special Report from the Office of the Canadian Forces Ombudsman, “[e]ducation is the single most important catalyst to change attitudes about PTSD in the CF”.⁵²² As explained at various points above, existing attitudes and culture foster stigma which is a barrier to treatment. The absence of treatment increases criminogenic factors for veterans with OSIs.

From a military perspective the focus should be three-fold. First, both Canadian Forces personnel and the general public need to be educated generally on the role OSIs play in relation to misconduct and criminogenic risk, along with how PSCs can reduce recidivism. Second, the general public needs to understand the importance of taking care of veterans in the maintenance of an effective volunteer military force and related implications on public safety. Third, the Canadian Forces also needs to commence educating military justice officials, including Military Police, Presiding Officers, Commanders, military prosecutors, military judges, and military defence counsel, on OSI identification and specific diversion options that can be implemented to foster treatment. The tools that can be used to educate include: CANFORGENS⁵²³, Defence

⁵²² *Supra*, note 231.

⁵²³ Canadian Forces General Orders. These orders are issued and provide direction on a wide variety of topics regarding military affairs, including: leave, administration, and policy.

Administrative Orders and Directives, policy, press releases or direct instructional techniques.

Similarly, civilian agencies need to develop education strategies for the general public from a civilian justice perspective. They also need to educate their justice officials on OSIs and their correlation to civilian justice and public safety. This training may be obtained from military personnel who are likely the subject matter experts. In order to avoid duplication of effort, joint training between civilian and military organizations such as police, prosecution, and corrections services on veteran specific issues would promote collaboration and foster efficiency.⁵²⁴ Similarly, should TSCMs or a similar PSC model be implemented in the military, joint training and civilian shadowing of existing PSCs would be beneficial to improve knowledge and to build relationships to further the “whole of governments approach”. Further, existing working groups on mental health provide a forum for military leaders to articulate the importance of the OSI issue to their civilian counterparts.⁵²⁵

⁵²⁴ There are currently conferences that are jointly attended by military and civilian legal practitioners, such as the Federation of Law Societies’ National Criminal Law Program, online: < <http://www.flsc.ca/en/national-criminal-law-program/> >. More specific focused training on veteran related issues is what is contemplated here, and such conferences could be used as avenues to further these ends.

⁵²⁵ See e.g. Government of Newfoundland and Labrador, News Release, “Federal/Provincial/Territorial Ministers Discuss Key Justice and Public Safety Issues Facing Canadians” (27 January 2012), online: <<http://www.releases.gov.nl.ca/releases/2012/just/0127n09.htm>>: “Ministers acknowledged that mental health issues present significant challenges for the justice system. Ministers highlighted the success of the May 2011 Mental Health and Justice Symposium in Alberta and discussed the Symposium’s recommendations. Ministers asked senior officials to further engage their health and social service counterparts in reviewing the recommendations and developing a work plan with the view of more effectively managing this at-risk population.”

There are obviously more legislative, policy and education initiatives that can be developed. The “campaign plan” needs to remain flexible, agile and adapt to new information as it becomes available. The most important component is that it be developed and that implementation begins.

Aristotle is attributed with the statement that “we make war that we may live in peace”.⁵²⁶ Veterans returning from war seek a life of peace. Some find little and are forced to live with the demons of OSIs. It is inherently unreasonable and unfair to systematically respond to combat injuries by prosecuting and incarcerating veterans who “act out” due to their illnesses. The very notion “might strike thoughtful Canadians as manifestly unjust.”⁵²⁷ A leading academic in Canadian mental health law, Professor Archie Kaiser, succinctly and correctly summarized that “[t]o incarcerate people merely because we have failed to develop appropriate supports has always been shameful [...T]his is totally unacceptable.”⁵²⁸

The pith and substance of Kaiser’s comments were echoed in the Second Independent Review of Justice Patrick LeSage which was tabled last month in Parliament. Following extended consultations, review and analysis, his sixth recommendation was that “[t]he senior ranks of the Canadian military are encouraged to do their utmost to ensure that those suffering from mental health issues are not placed in the criminal justice system by default but receive the help they need from our health care

⁵²⁶ See e.g. Charles Webel and Johan Galtung, eds., *Handbook of Peace and Conflict Studies* (New York: Routledge, 2007) at 347. See also Roberta Lynn Wodenscheck, *The Human Right to Peace: Why Such a Right Should be Recognized* (Ann Arbor, Michigan: ProQuest, 2004) at 31.

⁵²⁷ *Supra*, note 267.

⁵²⁸ *Supra*, note 5.

system.”⁵²⁹ This thesis has attempted to address these concerns while balancing the military requirements of maintaining an effective fighting force.

⁵²⁹ The Honourable Justice Patrick J. LeSage, C.M., O.Ont., Q.C., “The Second Independent Review Authority to The Honourable Peter G. MacKay Minister of National Defence” (December 2011) at 18.

CHAPTER 5 CONCLUSION

This thesis has discussed the perceived “crisis” of OSIs and its impact on serving military members, veterans and their families.⁵³⁰ In particular, it has focused on its correlation with military justice and civilian justice processes. It has suggested that alternative measures need to be created or improved for military personnel and veterans suffering from OSIs. In order to substantiate this position, this examination has reviewed the history of mental health in combat and modern understandings of the injuries, including the concept of comorbidity. It has articulated the difficulty in detecting the illness, particularly for justice officials. Further, it has compared existing processes for dealing with mentally injured veterans in the civilian and military justice system. It has also compared treatment with both United States’ justice systems. It has articulated why this issue is relevant now by describing the scope of the problem for the Canadian Forces and the current challenges in detection and prevention of activities attracting military penal consequences. It has shown that there are significant numbers of veterans anticipated to be suffering from OSIs, and that there is a correlation to disciplinary or criminal behavior.

In building upon existing civilian and foreign models and ideas, this thesis proposed a Canadian Military Justice Alternative Measures Process. It has justified its use by referring to the underlying philosophies of the military justice system, statements of key officials, and the stated purpose of military justice: discipline, morale and efficiency. It is hoped that innovative justice methods will better balance rehabilitation,

⁵³⁰ See e.g. *supra*, note 159.

public safety and the public interest by treating veterans with the respect and care that they deserve.

In addition, the proposal advocates building partnerships with civilian justice officials by using a “whole of governments” approach to deal with veterans who have or will reintegrate into civil society. It provides a blueprint or “campaign plan” upon which the Canadian Forces and others can build. It suggests three main areas of action, namely: legislative reform, policy reform, and an educational initiative for justice issues impacting veterans and military members with OSIs.

There were also specific collateral recommendations raised which form part of the overall proposed campaign plan. Some of these ideas included better data collection, tracking and analysis as it relates to mentally injured veterans or those suffering from TBIs. It was suggested that this information be provided and reviewed in the Judge Advocate General (JAG) annual report as it relates to military justice. Further, the Department of Veterans Affairs, with assistance from Attorney Generals, should analyze the information related to civilian justice. Also, there should be a concerted strategy for data collection on traumatized veterans who are incarcerated in military and civilian jails and prisons. This should be a joint initiative between Veterans Affairs, Corrections Canada and the Department of National Defence. It is hoped that understanding how and why veterans end up before justice processes may help identify criminogenic factors and improve prevention and treatment strategies.

This thesis also recommended that there be better systematic processes to track, monitor and assist released veterans. This may help ensure a safer transition to civil society. Part of this solution may be to provide options for veterans to self-identify OSIs

on their provincial driver's license. This process should be linked to Veteran's Affairs, providing that department with an opportunity to offer services to injured veterans who self-identify.

It was also suggested that more stringent policies that address mental health discrimination are required to assist in expediting change and defeating stigma among the veteran and military community. Some improvements suggested included: better safeguards on employment through accommodation, a specific offence related to OSI harassment and increased privacy safeguards.

As part of the education component, this thesis suggested that there is a need for all military justice participants to be trained to detect mental illness and to identify when there is a relevant correlation to the offence(s) charged. In particular, justice officials need more training on the symptoms of mental illness, mental health problems and addictions to ensure appropriate diversion and referral. Within the unique summary trial process, specific training on detection needs to be incorporated into accreditation processes for presiding and assisting officers.

This thesis also recommended that elections to court martial be provided to mentally injured members regardless of the charge they are facing. Further, it was suggested that there is a need for specific policy direction from military justice leaders on how subordinates are to deal with circumstances where mental illness is suspected, alleged or proven. These policies would enhance consistency in veteran treatment by justice officials, increase awareness, reduce stigma and foster detection.

This thesis also recommends that the Government of Canada attempt to quantify the actual costs of mentally injured veterans. This may help foster broader acceptance of

a treatment-based approach by demonstrating the actual expense and the financial benefits of mitigating it.

Further, it was recommended that governments provide an option for specialized housing and treatment for veteran inmates in Canadian civilian institutions. This may better treat the root illness and reduce overall costs to the taxpayer.

In addition, this thesis advocated the creation of legislation which expressly considers the impact of military trauma and injuries in Canada as it relates to criminal and disciplinary processes. This could include options for treatment based diversion or sentence mitigation when appropriate.

A reasonably informed person would know that the OJAG has been proactive and diligent in recognizing the issues identified herein, and have taken timely steps to educate its members of the arguments surrounding the problem.⁵³¹ Further, this current government has been the most legislatively proactive government in advancing military justice for some time.⁵³² In addition, the concept of PSCs is cutting edge and is only now taking hold in civilian justice.⁵³³ More importantly, the use of formalized diversion for military “correction” is only now being openly questioned⁵³⁴ and debated.⁵³⁵

⁵³¹ *Supra*, note 476.

⁵³² See e.g. *supra*, note 143 and 432.

⁵³³ See e.g. *supra*, note 109: “Beginning in the area of mental health, this approach has expanded to consider matters within criminal law such as drug abuse and domestic violence and has spread from the U.S. to many jurisdictions. Canada has not yet embraced problem solving courts to the same extent as has the U.S., although there are signs that both federal and provincial governments in Canada are keen to do so. There are currently Drug Treatment Courts (DTCs) in Toronto, Vancouver and St. John and the Canadian Department of Justice announced its plan to create three new DTCs in the next 12 months. Problem solving court processes have also arisen in Canada in cases concerning mental health, aboriginal justice and domestic violence”.

⁵³⁴ *Ibid*: “Problem solving courts have developed in response to the realization that a “one size fits all” approach to criminal justice does not work in some contexts. The adversarial

Also, military leaders truly do care about their people, including those released. The idea that a member or veteran would “fall through the cracks” saddens anyone in uniform. If it occurs during a leader’s watch, it would be deemed by most as a personal leadership failure.⁵³⁶

While all players truly have the best interests of Canadian Forces veterans at heart, they must now consider new alternatives to improve conditions and existing justice processes for them. While a proposal has been provided, it is acknowledged that improvements or other options may ultimately be preferable. Still, it is imperative that decision makers do not become bogged down in the pursuit of perfection. Instead of over-analysis, immediate actions that are adapted over time will generate progress. Using

nature of the traditional criminal justice model cannot effectively handle the complexity of certain human and social problems, where failing to deal with fundamental causes almost guarantees re-offending. As a result, initiatives have emerged which are designed to enable courts to respond more effectively to cases where complex, often overlapping, and sometimes intractable social and personal issues are involved. Specifically, courts attempt to deal holistically with cases involving these difficult socio-legal problems by implementing the principles of therapeutic jurisprudence wherein judicial case processing is partnered with treatment providers and community groups to provide follow-up and support for victims and offenders alike in order to reduce recidivism.” [Emphasis mine]

⁵³⁵ See e.g. *supra*, note 2.

⁵³⁶ See e.g. National Defence, *Leadership in the Canadian Forces: Doctrine* (Ottawa: Her Majesty the Queen in Right of Canada, 2005) at 6 and 25: “[E]ffective CF leaders at all levels [...] demonstrate concern for the well-being of their subordinates, represent their interests, and ensure they are supported and taken care of by the organization [....] The whole purpose of leadership in the CF is to achieve essential outcomes. Essential outcomes for the CF fall into the four broad categories of mission success, internal integration, member well-being and commitment, and external adaptability. Although mission success will almost always take precedence over other considerations, failure to pay sufficient attention to other dimensions of effectiveness can seriously undermine overall performance and may have secondary adverse effects on the image and reputation of the CF or on public confidence and support. CF leaders have to understand that effectiveness means paying attention to all essential outcomes. At times, this may require leaders to make trade-offs, but part of the burden of leadership involves dealing with competing values and priorities and managing the risks inherent in making decisions.” [Emphasis mine]

the ninety-percent solution concept will ensure that leaders take appropriate risks to be effective in resolving the goal of reducing OSIs among its members and veterans. In the words of General Patton, “a good plan, violently executed now, is better than a perfect plan next week [...]”⁵³⁷

The goal expressed here is consistent with the new Canadian Mental Health Strategy⁵³⁸ and the CDS’s higher intent to foster a climate of understanding and support for OSI members.⁵³⁹ Canadian Forces leaders have a responsibility, not only to meet this intent, but to advocate for and protect their people in the pursuit of operational efficiency.

The idea of systematically treating mental illness with prosecution or incarceration seems inherently unreasonable and unfair in a developed, civilized and informed nation. To impose this type of treatment upon our nation’s veterans is not only outlandish, but should shock the conscience of any reasonably informed member of the community. Many of these military members became psychologically traumatized as they sat and waited in the dirt of a foreign country, with bullets or explosions surrounding them as they watched their friends be blown up, lose limbs or expire in their arms.

In the words of the current MND, “[t]he men and women who serve and sacrifice in Canada's name need to know that their government will stand behind them and provide the benefits they need when their service is complete [...]”⁵⁴⁰ Standing behind our nations’ service members and veterans requires a multi-pronged approach. Recently, the government has made significant advancements for veterans with OSIs in numerous areas

⁵³⁷ *Supra*, note 478.

⁵³⁸ *Supra*, note 140.

⁵³⁹ *Supra*, note 223.

⁵⁴⁰ Kris Sims, “Gov’t won’t appeal veterans’ benefits ruling”, *the observer.ca* (29 May 2012) online: Sarnia Observer <<http://www.theobserver.ca/2012/05/29/govt-wont-appeal-veterans-benefits-ruling>>.

including: education,⁵⁴¹ employment,⁵⁴² medical treatment,⁵⁴³ and financial compensation.⁵⁴⁴ It is now time to look at how Canada's justice systems can help reduce injured veterans' problems, rather than adding to them. It is time to rehabilitate existing legal processes to adapt to the new conditions on the ground, by using new tactics. These tactics will include ensuring that veterans receive equal access to justice processes that are available to civilian counterparts. By implementing a treatment-based option to justice processes, it is hoped that wounded veterans will find the peace and happiness they deserve when they come home.

⁵⁴¹ See e.g. Meaghan Whelan, "SIFE Memorial launches program for Canadian Forces" *Memorial University*, online: Memorial University of Newfoundland <http://today.mun.ca/news.php?news_id=4804>: "A group of Canadian Forces members [...] participate in SIFE Memorial's Based in Business program. The program, which is a partnership with the Department of National Defence, gives medically-discharged Canadian Forces members training and mentorship as they develop business plans and put them into action. It's the first-ever program of its kind in Canada."

⁵⁴² See e.g. The Canadian Press, "Helmets to hard hats: Harper launches job program for vets" *CityNews Toronto* (7 January 2012), online: Rogers Communications <<http://www.citytv.com/toronto/citynews/news/national/article/179176--helmets-to-hard-hats-harper-launches-job-program-for-vets>>: "Helmets to Hardhats will [...] provide exclusive access for veterans to jobs and training opportunities in the construction industry. That will include disabled veterans, reservists and transitioning members of the Canadian Armed Forces. It will also offer apprenticeships in various building trades. The Helmets to Hard Hats program [...] builds on a program that has run for almost a decade in the United States [...]"

⁵⁴³ See e.g. *supra*, note 466.

⁵⁴⁴ See e.g. "Improving Service to Veterans" *Salute* (2011), online: Veterans Affairs Canada <<http://veterans.gc.ca/eng/salute/article/751>>: "As the starting point for many major improvements, last fall the Government announced increased monthly benefits for Canadian Forces Veterans and more flexible financial options for those injured in the line of duty. The changes total two billion dollars and will bring the Department another step closer to improving the quality of life of Canada's Veterans."

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