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Law and Justice

Scott v. Canada and the History of the Social Covenant with Canadian Veterans

JONATHAN MINNES

Abstract: In October 2012, supported by veteran advocacy group Equitas, Canadian Forces veterans of the Afghanistan campaign filed a class action lawsuit against the Federal Government. The case, Scott v. Canada, is named after lead Plaintiff Daniel Scott. In Scott, the Plaintiffs allege that under the recently enacted Canadian Forces Members and Veterans Re-establishment and Compensation Act, commonly known as the New Veterans Charter (NVC), many veterans receive less support than under the previous Pension Act. Further, they allege that the New Veterans Charter is a contravention of the 'social covenant' between Canadian citizens, the Canadian government, and past and present Canadian military members and their families.

While the limited scope of this paper cannot determine if a legally binding social contract in fact exists, it will engage with the surrounding literature and suggest that there is a well-documented history of veterans enjoying a special relationship with the federal government and Canadian people in the form of legal and social entitlements. This paper will track the many reiterations of Prime Minister Robert Borden's speech leading up to the creation of the NVC, while illuminating a historic tension between the influences of political, economic, and social policy trends and the upholding of a unique obligation towards those who have served this country militarily.

The covenant has always been contextualised by the morality of the times. But it is not just moral; it has legal aspects as well. The reason that veterans are due special treatment is intimately tied to their legal

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status as a member of the military with exposure to unlimited liability and regulation under the military justice system.

IN OCTOBER 2012, supported by veteran advocacy group *Equitas*, Canadian Forces veterans of the Afghanistan campaign filed a class action lawsuit against the Federal Government. The case, *Scott v. Canada*, is named after lead Plaintiff Daniel Scott.¹ In *Scott*, the Plaintiffs allege that under the recently enacted *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, commonly known as the New Veterans Charter (NVC),² many veterans receive less support than under the previous *Pension Act*.³ Further, they allege that the *New Veterans Charter* is a contravention of the ‘social covenant’ between Canadian citizens, the Canadian government, and past and present Canadian military members and their families.

Veterans say this covenant was articulated by then-Prime Minister Sir Robert Borden in his speech to Canadian soldiers on the eve of the Battle of Vimy Ridge in 1917, but government lawyers reject this claim and have attempted to have the veteran’s case dismissed with a motion to strike.⁴ A motion to strike argues that even if all the facts alleged are presumed to be true, Canadian law cannot be interpreted in a way that would allow for the lawsuit to succeed. In short, it says the claim has no substance. In September 2013 the British Columbia Supreme Court rejected the government’s motion.⁵ However, government lawyers still claim that no social covenant exists. They appealed the decision of the lower Supreme Court of British Columbia to the higher British Columbia Court of Appeal. While the appeal was heard on 3 and 4 December 2014, the final decision in this case is likely many months or perhaps even years away. After settlement talks with the federal government in the spring of 2015, the lawsuit is in abeyance until after the October

¹ (Attorney General), 2013 BCSC 1651.

² Canadian Forces Members and Veterans Re-establishment and Compensation Act (S.C. 2005, c. 21).

³ Pension Act (R.S.C., 1985, c. P-6).

⁴ Kristen Everson, “Veterans Don’t Have Social Contract, Ottawa Says in Lawsuit Response,” available: <http://www.cbc.ca/1.2577053>, [accessed 24 March 2014].

⁵ *Scott v. Canada*, para 181.



Tory Miles, *Allegory of Contract*, 2016. Digital.

2015 federal election.⁶ (Note to reader: This paper was written before the fall election but as of April 2016 the lawsuit continues to be in abeyance until May 15, 2016 pursuant to the Abeyance Agreement signed on May 27, 2015).⁷

This break in the action is controversial amongst many veterans who both distrust the government and would prefer to put political pressure on them in the lead up to the fall election. On the other hand, Miller Thomson's Donald Sorochoan, the lead counsel for the six veteran Plaintiffs, suggests that the abeyance gave the Harper government and now the Justin Trudeau Liberal government, the opportunity to update veteran legislation, potentially avoiding drawn out litigation filled with government appeals at every stage. However, Sorochoan has also stated that the recent bills passed by the Harper government fell short of what is required by the covenant and the risk of renewed legal action following the election remains until the government makes good with veterans.⁸ Whether it comes through

⁶ Bethany Lindsay, "Ottawa calls off legal fight with injured veterans," available: <http://www.vancouversun.com/news/Ottawa+calls+legal+fight+with+injured+veterans/11100471/story.html>, [accessed 6 June 2015].

⁷ Abeyance Agreement, signed May 27, 2015, available: http://equitassociety.ca/Abeyance%20Agreement%20-%20Executed_May%2027.pdf, [accessed 18 April 2016].

⁸ Jon McComb, "A Win For Veterans," available: <https://soundcloud.com/cknw/a-win-for-veterans-the-jon-mccomb-show-june-2?in=cknw%2Fsets%2Fthe-jon-mccomb-show-1>, [accessed 6 June 2015].

the courts or the ballot box it appears that the *Scott* case has the potential to redefine veteran rights in Canada.

With the recent conclusion of the Afghanistan mission, the need to assist our veterans is more important than ever. Historians tell us that the process of reintegrating combatants into civilian life has always been difficult but today the problem has become much more visible and potentially more deadly.⁹ There is an epidemic of Canadian Forces suicides, the sum of which has recently surpassed the number of Canadians who lost their lives in the Afghanistan campaign.¹⁰ Ensuring that the proper support is provided to Canadian veterans is essential, yet there are historic lessons that the Harper government failed to learn. While the limited scope of this paper cannot determine if a legally binding social contract in fact exists, it will engage with the surrounding literature and suggest that there is a well-documented history of veterans enjoying a special relationship with the federal government and Canadian people in the form of legal and social entitlements. Historians like Peter Neary and Desmond

⁹ Thomas Childers, *Soldier from the war returning: the greatest generation's troubled homecoming from World War II*, (New York Houghton Mifflin Harcourt, 2009) 229; Pamela Moss and Michael J. Prince, *Weary Warriors: Power, Knowledge, and the Invisible Wounds of Soldiers*, (Berghahn Books, 2014) 201.

¹⁰ According to Department of National Defence statistics, between 2004 and 31 March 2014, 160 Canadian service members had taken their own lives, already surpassing the 138 killed in combat during the Afghanistan campaign. see National Defence and Canadian Armed Forces, "Suicide and Suicide Prevention in the Canadian Armed Forces," available: <http://www.forces.gc.ca/en/news/article.page?doc=suicide-and-suicide-prevention-in-the-canadian-armed-forces/hgq87xvu>, [accessed 24 March 2014]; see also, National Defence and Canadian Armed Forces, "Canadian Forces' Casualty Statistics (Afghanistan)," available: <http://www.forces.gc.ca/en/news/article.page?doc=canadian-forces-casualty-statistics-afghanistan/hgq87xxk>, [accessed 24 March 2014].

Morton amongst others have written important works on the subject, but much of this history is beyond the scope of this article.¹¹

This paper will track the many reiterations of Prime Minister Robert Borden's speech leading up to the creation of the NVC, while illuminating a historic tension between the influences of political, economic, and social policy trends and the upholding of a unique obligation towards those who have served this country militarily. The special treatment of veterans has always been balanced against these overarching trends which have limited the scope of the benefits, but have done so in a way that has not caused the covenant to be broken. There is no doubt that Canadian governments have let down veterans in the past, but it is this author's opinion that the Harper government was responsible for a unique form of moral failing, worthy of being considered a breach of the social covenant. They used every opportunity to cash in on the Canadian military's image while simultaneously "balancing the budget" on the backs of injured veterans. The covenant has always been contextualised by the morality of the times. But it is not just moral; it has legal aspects as well. The reason that veterans are due special treatment is intimately tied to their legal status as a member of the military with exposure to unlimited liability and regulation under the military justice system. Unlimited liability means, "completing a mission above all else including the giving of one's life."¹² This is what makes their status unique and allows for a legal argument that veterans have rights beyond what is legislated by the Canadian Parliament.

While the Plaintiffs in *Scott* focus on the NVC as the reason the social covenant has been broken, the case is actually a temporal point

¹¹ Notable works on the subject include: Peter Neary, *On to Civvy Street: Canada's Rehabilitation Program for Veterans of the Second World War*, (Montreal: McGill-Queen's University Press, 2011); Peter Neary, and J. L. Granatstein, *The Veteran's Charter and Post-World War II Canada*, (Montreal: McGill-Queen's University Press, 1998); Desmond Morton, *Fight Or Pay: Soldiers' Families in the Great War*, (Vancouver: UBC Press, 2004); Desmond Morton and Glenn T. Wright, *Winning the Second Battle: Canadian Veterans and the Return to Civilian Life, 1915-1930*, (Toronto: University of Toronto Press, 1987); Walter S. Woods, *Rehabilitation (A Combined Operation)* (Ottawa: Queen's Printer 1953); James J. Rice and Michael J. Prince, *Changing Politics of Canadian Social Policy*, [Second Edition], (Toronto: University of Toronto Press, 2013); Leonard Marsh, *Report on Social Security for Canada*, (Toronto: University of Toronto Press, 1975); and Clifford Bowering, *Service: The Story of the Canadian Legion 1925-1960*, (Ottawa: Canadian Legion, 1960).

¹² Pamela Stewart, "On Broader Themes of Canadian Forces Transformation." *Canadian Military Journal* 8, no. 3, (2007), 12.

of intersection for a number of veteran issues that have caused this breach to occur. This article will focus on the interpretation of key historic social policy developments and legislation which underpin and contextualise the arguments raised in *Scott*, showing that recent developments in the treatment of modern veterans have damaged veterans' relationship with the Canadian government.

THE NEW VETERANS CHARTER

The NVC was drafted during Paul Martin's minority Liberal government. It was passed with the unanimous support of all parties on 13 May 2005. By 2005, the *Pension Act* was in desperate need of an update. However, as with any significant shift in social policy, it was understood that legislation of this type would need to be tested and could require amendments going forward. The then Liberal Minister of Veterans Affairs Albina Guarnieri acknowledged this by stating that the NVC was to be a living document in need of continued updates through consultation with the veteran community.¹³ The NVC did not come into force until 1 April 2006, following the election of Stephen Harper's minority government in January 2006. On 6 April 2006 Harper stated,

I want our troops to know that we support them. This veterans charter is one example of our government's commitment ... The Charter, the introduction of a Veterans Bill of Rights and the appointment of an ombudsman are clear examples how we begin to do the right thing for Canada's servicemen and women.¹⁴

Harper's new Minister of Veterans Affairs, Greg Thompson, stated "The New Veterans Charter is the most profound transformation of Veterans' services and benefits since the end of the Second World War."¹⁵

¹³ Veterans Affairs Canada, *The New Veterans Charter Receives Royal Assent*, available: <http://www.veterans.gc.ca/eng/news/viewrelease/326>, [accessed 29 March 2014].

¹⁴ Veterans Affairs Canada, *The Government of Canada Supports its Troops at Home and Abroad* available: <http://www.veterans.gc.ca/eng/news/viewrelease/372>, [accessed 29 March 2014].

¹⁵ Ibid.

Harper and Thompson were not incorrect. There was an opportunity to do right by veterans. The new ombudsman position had great potential and the NVC did in fact provide a profound transformation in veteran's services. However, the NVC created a stark divide amongst injured veterans. It applied to disabled members or veterans of the Canadian Forces who applied for a disability benefit on or after 1 April 2006. This effectively divided those who participated in the Afghanistan campaign temporally based on when they served. World War II veterans and Korean War veterans continue to receive benefits under the previous *Pension Act* regardless of when they make their claim. This distinction is important because there are good reasons to want the *Pension Act* benefits. In 2011, Alice Aiken and Amy Buitenhuis of Queen's University published their study entitled *Supporting Canadian Veterans with Disabilities: A Comparison of Financial Benefits*. They found that the "Pension Act provides a significant financial advantage over the New Veterans Charter (NVC) for veterans with severe disabilities."¹⁶ They also found that differences in compensation between the *Pension Act* and the NVC financially disadvantaged veterans the greatest when they lived longer, were married, had more children, had a higher disability assessment, and were released at a lower rank.¹⁷

Another reason veterans are unhappy with the NVC is the notorious lump sum disability award in lieu of long-term disability payments under the *Pension Act*. This approach is increasingly problematic for veterans who already face many challenges reintegrating to civilian society. With problems like substance abuse and other mental health issues, the added requirement of budgeting a single disability award becomes increasingly difficult.¹⁸ Furthermore, the Canadian government is also less generous than many of their closest allies including the United Kingdom, Australia, and the United States. For disabled Canadian veterans the lump sum payment maxes out at \$306,698.21 (tax free) and between 2006 and 2014 only 185 of the 45,615 veterans given the lump sum were granted the maximum

¹⁶ Alice Aiken and Amy Buitenhuis, *Supporting Canadian Veterans with Disabilities: a comparison of financial benefits*, (Defence Management Studies Program, School of Policy Studies, Queen's University, 2011), 47.

¹⁷ Aiken and Buitenhuis, 47.

¹⁸ Matt Gurney, "Screwing Veterans to Balance the Books," available: <http://fullcomment.nationalpost.com/2013/10/02/matt-gurney-screwing-veterans-to-balance-the-books/>, [accessed 29 March 2014].

amount. For Canadian veterans that are severely disabled with no chance of achieving full civilian employment, there is also an earnings-loss benefit but this is set at seventy-five percent of their previous military salary and it is taxable income. In comparison, the United Kingdom pays disabled soldiers up to three times the amount of the Canadian lump sum with a cap set at \$1,092,348 (tax free) and their earnings-loss benefit is one-hundred percent of the previous military salary and is not taxable income.¹⁹

VETERAN IDENTITY

The *Scott* lawsuit focuses on the inequality between the two pension acts and the fact that lump sum disability awards are far less than what could be obtained under a workers compensation claim or personal injury lawsuit.²⁰ However, veterans' unhappiness with the NVC cannot be separated from a number of other intersecting veteran issues that contextualise the suit. There have been important changes in veteran demographics, the ways in which veterans advocate for themselves, and the way the federal government views veterans.

The definition of veteran itself is a contested term and there are a number of class distinctions between veterans. One of the most prominent distinctions is the gap between the ever-shrinking class of 'traditional' veterans who have avoided the ills of the NVC and the younger 'modern' veterans who are now greater in number. According to Statistics Canada, as of March 2014 there were: 88,400 Second World War veterans, 9,800 Korea War Veterans, and 599,200 Canadian Forces Veterans (Regular Forces and Primary Reserves). Despite there being far more modern veterans, traditional veterans are often still used as the face for all veterans. This is not surprising given that over 650,000 Canadians served in the First World War and a further 1,000,000 Canadians and Newfoundlanders served in the Second World War.²¹ These were the last Canadian citizen

¹⁹ Gloria Galloway, "Benefits for wounded Canadian veterans do not stack up" available: <http://www.theglobeandmail.com/news/politics/benefits-for-wounded-canadian-veterans-do-not-stack-up/article23381161/>, [accessed 29 March 2014].

²⁰ *Scott v. Canada*, para 5.

²¹ Veterans Affairs Canada, "General Statistics," available: <http://www.veterans.gc.ca/eng/news/general-statistics>, [accessed 1 April 2014].

soldiers to face conscription and they fought in wars that have been widely celebrated in Canadian military history.²²

Although some traditional veterans went on to continue their career in the military in later missions like Korea, they are often contrasted with Canada's 'modern' Canadian Forces veterans. These men and women never faced conscription and are generally considered career soldiers. Modern veterans are younger than their traditional counterparts with an average age of fifty-six compared to World War II veterans who on average are in their nineties and Korean veterans who on average are in their eighties. The mobilisation of modern veterans has also occurred in differing circumstances. These soldiers were not called on because of an 'official' declaration of war and some of the missions that Canadian Forces members have participated in have been unpopular with the Canadian public.²³

Class distinctions between veterans may seem artificial to outsiders but they play an important role in the way different groups interact and advocate for themselves. For instance there were Canadians labeled D-Day dodgers, who supposedly had an 'easier' time fighting up the Italian peninsula in battles like Ortona compared with those who fought in Northwest Europe.²⁴ The Royal Canadian Legion (Legion), which grew to be Canada's most influential veteran interest group following an influx of veterans from the two world wars, is now made up predominantly of civilians, often children and grandchildren of traditional veterans. While Korean veterans were reluctantly welcomed into this body to address the declining numbers of World War veterans, modern veterans have generally not been represented in its ranks or leadership in the same numbers. Instead other groups were formed to advocate for modern veterans including: The Korean War Veterans in 1973, the Canadian Association of Veterans in United Nations Peacekeeping in 1986, the Canadian Peacekeeping Veterans Association in 1991, and the Gulf War Veterans Association in 1994, amongst others. But these groups have always had a smaller membership and lacked the ability to influence

²² Norman Leach, *Passchendaele: Canada's Triumph and Tragedy on the Fields of Flanders: an Illustrated History* (Regina: Coteau Books, 2008), 40.

²³ Veterans Affairs Canada, "General Statistics," available: <http://www.veterans.gc.ca/eng/news/general-statistics>, [accessed 1 April 2014].

²⁴ Daniel G. Dancocks. *The D-Day Dodgers: The Canadians in Italy 1943-1945*, (Toronto: McClelland and Stewart Limited, 1991).

the federal government in the same way as the Legion.²⁵ This has led to an imbalance in advocacy and the now more numerous modern veterans have been subsequently excluded from benefits including long term care hospital beds and Last Post Fund benefits. They also have more limited access to the Veterans Independence Program. The Legion as well as the Army, Navy and Air Force Association and National Council of Veterans in Canada have historically advocated to protect entitlements for traditional veterans, even at the expense of modern veterans.²⁶

MILITARY SYMBOLISM

In addition to the tipping point of veteran demographics, identity, and advocacy, the *Scott* case is also contextualised by the Harper government's hypocritical use of the Canadian military and veterans. This is not to say that recent Liberal governments have been overly generous with veteran entitlements, but their political use of the military has differed. Professor Donald Gutstein explains that recent federal Liberal governments have taken a more limited stance to the military and that "[p]eacekeeping was central to Liberal identity." This was not the approach of the Harper Conservatives.²⁷ Harper took a more hawkish approach in an attempt to rekindle nationalism by drawing parallels to Canada's rich military history. This can be seen early on in Harper's reaction to Prime Minister Chretien's decision to opt for the North Atlantic Treaty Organization (NATO)-led Afghanistan mission in lieu of joining the United States-led Coalition of the Willing in Iraq. Stephen Harper, the then leader of the opposition, co-authored an open letter to Americans condemning the Canadian decision. In the article entitled "Canadians Stand By You," Harper and Stockwell Day stated, "This is a mistake. For the

²⁵ Neary, *Civvy Street*, 286.

²⁶ While the VIP benefits are available to all disabled WWII and Korea Veterans, the eligibility of disabled Canadian Forces Veterans is tied to an assessment of their disability, s. 15 *Veterans Health Care Regulations*, Reg. 90-594; see also David T. MacLeod and Harold Leduc, *A Dirty Little Skirmish* (Vernon: J. Charlton Publishing, 2015), 62.

²⁷ Donald Gutstein, *Harperism: How Stephen Harper and his think tank colleagues have transformed Canada* (Toronto: James Lorimer & Company, 2014), 229.

first time in history, the Canadian Government has not stood beside its key British and American allies in their time of need.”²⁸

Although Harper eventually admitted that his previous position on Iraq, “was absolutely an error”²⁹ his government has continued to make unprecedented use of the military as a patriotic symbol in an attempt to market the Conservative Party as the natural governing party in Canada.³⁰ Journalist Paul Adams explains that,

The Canadian nationalism of the late 1960s and the 1970s which was bound up with Medicare, tolerance at home, peacekeeping abroad and modesty almost everywhere, has yielded ground to a more muscular patriotism represented by the likes of General Hillier and Don Cherry ... The Conservatives have worked to sustain and broaden this new conservative nationalism, celebrating the War of 1812, reframing the development of the North as a military issue and even reviving the monarchist brand in Canada.³¹

Even as Canadian public support for the Afghan mission diminished, the Harper government continued saber-rattling, spending a lavish twenty-eight million dollars on the 200th anniversary of the War of 1812, meanwhile ignoring the 30th anniversary of the Liberal-created Charter of Rights and Freedoms.³² A further 4.3 million dollars was devoted to the 2014 Veterans Affairs television advertisement campaign, propagating the view that Canadian veterans are being helped with their reintegration to ‘Civvy Street.’ Both these campaigns capitalised on the image of Canadian veterans, using

²⁸ Stephen Harper and Stockwell Day, “Canadians Stand With You,” available: <http://www.wsj.com/articles/SB104881540524220000>, [accessed 1 April 2014].

Sunny Freeman, “Canada’s ‘No’ To Iraq War A Defining Moment For Prime Minister, Even 10 Years Later,” available: http://www.huffingtonpost.ca/2013/03/19/canada-iraq-war_n_2902305.html, [accessed 1 April 2014].

²⁹ The Canadian Press, “Iraq war a mistake, Harper admits,” available: <http://www.ctvnews.ca/iraq-war-a-mistake-harper-admits-1.330207>, [accessed 1 April 2014].

³⁰ Max Nemni, “Stephen Harper is a patient man on a mission: remaking Trudeau’s Canada,” available: <http://reviewcanada.ca/magazine/2014/03/the-incrementalist/>, [accessed 1 April 2014].

³¹ Paul Adams, *Power Trap: How Fear and Loathing between New Democrats and Liberals Keep Stephen Harper in Power—and what can be done about it* (Toronto: Lorimer, 2012), 16.

³² Meagan Fitzpatrick, “Conservatives draw fire for War of 1812 spending,” available: <http://www.cbc.ca/news/politics/conservatives-draw-fire-for-war-of-1812-spending-1.1265851>, [accessed 1 April 2014].

taxpayer money. Many Canadians viewed these advertisements as government self-promotion and a misuse of taxpayer money, resources which could be used to serve veterans in a more meaningful way.³³

Harper's treatment of veterans represented a great contradiction. Despite the Harper government's verbal commitments in support of veterans and their promotion and implementation of the New Veteran's Charter, the idea that this legislation was a living document fell to the wayside. It is clear that the NVC required review and consultation to ensure it was achieving the purpose it was intended to serve. Harper made superficial commitments to the veterans rather than substantial and meaningful ones. While Harper ensured that the Vimy Ridge memorial is now featured on the back of Canada's new twenty-dollar bill, he refused to dedicate more substantial financial resources to veteran pensions. Instead, Harper attempted to justify a spendthrift approach, and this sentiment was echoed by his Veterans Ombudsman Guy Parent. Parent alleged that the previous *Pension Act* inadvertently encouraged veterans to focus on the severity of their disability, to receive a larger benefit payout, rather than focusing on 'reintegration,' which is the mandate of the NVC.³⁴ This interpretation of the NVC was both in keeping with Harper's approach to veterans but also his greater economic goals. The use of lump sum payments in lieu of providing long-term care is part of a recent neo-liberal social policy approach, premised on the claim that government bureaucracies are ill-suited to provide services and that the freedom of choice and ability to outsource to the private sector is a more productive use of resources. A good example of this small-government approach is the Harper government's decision to provide a Refundable Child Tax Credit instead of a more comprehensive national childcare strategy. Similar to lump-sum veteran disability awards, the child tax credit is worth less than the actual cost of providing childcare in many instances.³⁵

Since the Conservatives came to power in 2006, Veterans Affairs Canada returned \$1.13-billion to the federal treasury. This occurred

³³ Dean Beeby, "Veterans Affairs ads that cost \$4.3M fell flat with viewers: report," available: <http://www.cbc.ca/news/politics/veterans-affairs-ads-that-cost-4-3m-fell-flat-with-viewers-report-1.2998647>, [accessed 14 April 2015].

³⁴ Office of the Veterans Ombudsman, "Improving the New Veterans Charter: The Parliamentary Review," available: <http://www.ombudsman-veterans.gc.ca/reports-rapports/reviewcharter01-examencharte01-01-2013-eng.cfm>, [accessed 5 April 2014].

³⁵ Rice and Prince, 208–209.

while Minister of Veterans Affairs Julian Fantino bragged about Canada's world-class treatment of their veterans.³⁶ Additionally, budget projections for Veterans Affairs have shown a drop of two percent between 2013–2014 and 2014–2015 fiscal years, with a further projected drop in 2015–2016. Despite the drop in overall spending, Veterans Affairs made a twenty-one percent increase to the “Canada Remembers” program from just over forty million dollars to fifty million. The Canada Remembers program is meant to honour veterans, military milestones, and encourage national pride in Canadian military history, with part of the funding devoted to the new, permanent visitor centre at the Canadian National Vimy Memorial in France.³⁷ While remembrance is important, the Harper government benefitted from the military's image while simultaneously cutting support to the very men and women they used to make their political currency.

The *Scott* case cannot easily be detached from these and other surrounding veteran issues. The NVC creates tensions between classes of veterans, which makes further advocacy difficult. The Harper government benefitted from this divide as they leveraged the patriotic symbol of the ever-shrinking class of traditional veterans while they simultaneously eroded support for the modern veterans who have a smaller, less unified voice.

THE SOCIAL CONTRACT

Although contextualised by a changing veteran landscape, the veteran Plaintiffs' argument for the ‘social-contract’ alleged in *Scott v. Canada* is historic in nature. It dates back to the First World War and is based on a speech by Prime Minister Sir Robert Borden, just prior to the famed Canadian battle of Vimy Ridge in April 1917:

You are men actually facing the enemy day and night. You are suffering greatly from fatigue, over-strain and lack of rest. The marvel of it is

³⁶ Murray Brewster, “Veterans Affairs handed back \$1.1-billion in unspent funds,” available: <http://www.theglobeandmail.com/news/politics/11-billion-in-unspent-funds-at-veterans-affairs-documents-show/article21665655/>, [accessed 6 January 2015].

³⁷ Amy Minsky, “Less money to help veterans, more to remember them,” available: <http://globalnews.ca/invisible-wounds/1255468/invisible-wounds-funding-for-veterans-programs-on-downward-trend>, [accessed 8 April 2015].

that men could undergo such a strain without breaking; but you have never yet broken; and history will appreciate that in days to come.

You men are about to enter one of the most serious engagements that ever faced the Canadian Corps. I cannot, at this moment, give any information as to where this attack will be staged, whether it be successful or not, but it is to be borne in mind that it will not be an easy success ... We feel confident that you will succeed where others failed; for you have never yet failed in anything you have set your hand to, as a Canadian corps.

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

The government and the country will consider it their first duty to see that a proper appreciation of your effort and of your courage is brought to the notice of the people at home, and it will always be our endeavor to so guide the attitude of public opinion, that the country will support the Government to prove to the returned man its just and due appreciation of the inestimable value of the services rendered to the country and Empire, and that no man, whether he goes back or remains in Flanders, will have just cause to reproach the Government for having broken faith with the men who won and the men who died.³⁸

Further, the Plaintiffs in the case also cite a section of Borden's 1917 Unionist platform under the heading appropriately titled 'Duty Towards Our Soldiers':

The men by whose sacrifice and endurance the free institutions of Canada will be preserved must be re-educated where necessary and re-established on the land or in such pursuits or vocations as they may

³⁸ There have been a number of versions of this speech cited including a shorter version in the *Scott v. Canada*, para 23. The longer version above can be found in, Veteran's Assistance Commission, *Report of the Veteran's Assistance Commission* (Ottawa: King's Printer, 1937), 27; Bowering, *Service*, 3-4; And, *House of Commons Debates*, 18th Parliament, 4th Session: Vol. 3 (May, 1939), 2449.

desire to follow. The maimed and the broken will be protected, the widow and the orphan will be helped and cherished. Duty and decency demand that those who are saving democracy shall not find democracy a house of privilege, or a school of poverty and hardship.³⁹

The Plaintiffs have used this historic context to argue for the existence of a ‘social contract,’ a promise that, “by virtue of the legal doctrine known as the ‘Honour of the Crown’, the defendant is honour bound to carry out.”⁴⁰ In doing so they would be expanding on a doctrine which has historically given rise to duties to aboriginal Canadians, but Mr. Justice Weatherill of the Supreme Court of British Columbia found that it was “conceivable that the promise to provide suitable and adequate care for the armed forces and their families meets the threshold of an overarching reconciliation of interests that engages the Honour of the Crown.”⁴¹ In addition to the Honour of the Crown, veterans have also argued that the NVC breaches the Canadian Charter of Rights and Freedoms by providing “arbitrary, sub-standard and inadequate support and compensation schemes.”⁴² They state that this has led to a violation of section 7 “in depriving the Plaintiffs and the Class with the right to life, liberty and security of the person”⁴³ and a violation of the “equality rights of the Plaintiffs and the class protected under s. 15” of the Charter.⁴⁴

On the other side of the dispute the federal government lawyers have stated that:

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

The defendant pleads that the statements made by Sir Robert Borden and the coalition government in 1917 were political speeches that

³⁹ *Scott v. Canada*, para 23; see also D. Owen Carrigan, *Canadian Party Platforms, 1867–1968* (Champaign: University of Illinois Press, 1968), 78.

⁴⁰ *Scott v. Canada*, para 24.

⁴¹ *Ibid.*, paras 30–35.

⁴² *Ibid.*, para 81.

⁴³ *Ibid.*, para 97.

⁴⁴ *Ibid.*, para 81.

reflected the policy positions of the government at the time and were never intended to create a contract or covenant.⁴⁵

The Crown also suggested that following the democratically upheld principle of Parliamentary Sovereignty it is not the place of the courts to overturn validly enacted legislation. Federal lawyer Paul Vickery suggested that, “[t]he remedy for those who believe that legislation is unjust or unfair lies in the ballot box.”⁴⁶ This argument however assumes that the NVC does not infringe upon the Canadian Constitution either by violating the Honour of the Crown Doctrine or the previously cited sections of the *Charter*. It also assumes that Borden’s words were little more than a political speech, a notion this paper seeks to disprove.

To understand the context of Borden’s promise and to gauge the validity of its use in supporting the arguments put forward in *Scott*, one must examine the government actions that followed Borden’s speech and the impact it had on veterans and Canadians in general. The Battle of Vimy Ridge and Canadian participation in the First World War have often been attributed to Canada’s evolution to full-fledged nationhood. Some ninety years after Borden, Prime Minister Stephen Harper spoke at Vimy and stated that “[e]very nation has a creation story. The First World War and the battle of Vimy Ridge are central to the story of Canada.”⁴⁷ While the patriotic utility of both these Prime Ministers’ speeches is obvious, it is hard to downplay the significance of a war that saw the creation and dissolution of Canada’s first modern army as well as a shift in the way social policy was envisioned due to this unique context. Out of a population of eight million, 600,000 served in the Canadian Expeditionary Force and 50,000 in the ranks of other allied armies. The war claimed some 60,000 dead, a further 70,000 came home with disabilities, and 30,000 were left war widows.⁴⁸

⁴⁵ Attorney General of Canada, *Crown’s Response to Civil Claim—31 January 2014* (*Scott v. Canada*) paras 100 and 103.

⁴⁶ *Scott v. Canada*, para 31.

⁴⁷ Prime Minister of Canada Stephen Harper, “Prime Minister Stephen Harper Commemorates the 90th Anniversary of the Battle of Vimy Ridge.” *Prime Minister of Canada*, available: <http://www.pm.gc.ca/eng/news/2007/04/09/prime-minister-stephen-harper-commemorates-90th-anniversary-battle-vimy-ridge>, [accessed 22 March 2014].

⁴⁸ Morton and Wright, *Winning the Second Battle*, ix.

Given the drastic impact of the war, the government made an unprecedented effort to assist veterans, drawing on innovative practices used in France and Belgium to retrain and re-employ veterans.⁴⁹ As historians Desmond Morton and Glenn Wright state, “no belligerent was as prompt in creating a single government agency to cope with the problem of re-establishing disabled soldiers,” as Canada.⁵⁰ There was an attempt to bring soldiers up to an equal footing with other nations while trying to avoid the ‘pension evils’ of overspending in the United States on Civil War Veterans, which had already cost the US federal government 4.2 billion dollars; eight times Canada’s national debt in 1914.⁵¹ One could see an expansion of the social project from Victorian notions of pulling one’s self up by one’s bootstraps to more government-organised support. These benefits represented one of the country’s earliest social programs but this support was still linked to traditional ideas of entitlement based on moral duty.⁵² A soldier was not given government assistance as a right of citizenship, but was rewarded with this support as an acknowledgement of their service defending the nation.

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

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

... We owe our defenders no less than this. We must save them from both the humiliation and the uncertainty of public charity, and give them permanent and adequate security from want, paid them not as a favour, but as a right, for it would be an unpardonable insult to a body

⁴⁹ Ibid., 44.

⁵⁰ Ibid.

⁵¹ Ibid., 45.

⁵² Rice and Prince, *Changing Politics*, 57.

of brave men if payment of a pension carried with it the faintest trace of charity or the least suspicion of patronage.⁵³

For Darling and his team, charitable giving was not good enough for Canada's heroes. This was a call for the government to provide consistent support to veterans, rather than the uncertainty and often qualified provisioning from charitable organisations like the Canadian Patriotic Fund.⁵⁴ This re-conception of welfare was in tension with Victorian ideals but veterans broke the mold because the government support was not a handout, it was earned. In 1916 a Board of Pensions Commissioners was instituted and the *Pension Act* of 1919 was the first universal income benefit in Canadian social policy.⁵⁵

The Canadian government continued to expand eligibility and increase the provision of benefits through the 1920s and 1930s, allowing for pension hearings and decisions on appeal.⁵⁶ While this provisioning was not without its shortcomings it seemed to give credence to Borden's words. The Federal Government even provided an equivalent to an old age pension to veterans but at an earlier age through the *War Veterans Allowance Act*. This support was used to aid the families of veterans who were physically exhausted and were no longer employable as a result of their strenuous military service.⁵⁷ But just as the veteran social project had begun, cracks appeared in the post-war period as the wartime necessities were displaced by the demands of politics, economics, and social policy trends. These were understandable growing pains given the unprecedented nature

⁵³ The quotation comes from a pamphlet created by Darling's team and read in the House of Commons on 19 January 1916 by Frank Oliver, Liberal Member of Parliament for Edmonton. *House of Commons Debates*, 12th Parliament, 6th Session: Vol. 1, (January, 1916) 105.

⁵⁴ Established during the Boer War it was brought back by Parliament in September 1914. The fund required many lower-class applicants to adhere to strict moral and patriotic requirements under the maternal supervision of the CPF's predominantly middle-class investigators. This was done to ensure that the money was not 'squandered' on the vices such as beer, tobacco and gambling or other more colourful indiscretions, unbecoming a 'good wife.'; Desmond Morton, "Resisting the Pension Evil: Bureaucracy, Democracy, and Canada's Board of Pension Commissioners, 1916-33," *Canadian Historical Review*, 68, no. 2 (1987) 201; see also Desmond Morton, *Fight or Pay*, 18-20.

⁵⁵ Rice and Prince, *Changing Politics*, 51-52.

⁵⁶ *Ibid.*, 52.

⁵⁷ *Ibid.*

of the war and many of these difficult lessons learned were later implemented to aid Second World War veterans with the widely celebrated Veterans Charter.⁵⁸ Unfortunately veteran policy does not always progress in this fashion and the Harper government and its bureaucracy repeated some of the same mistakes made following the First World War. These are mistakes that ought to be learned from rather than repeated.

Historian Jeff Keshen suggests that Ottawa still clung to a laissez-faire approach following the First World War, seeing their unprecedented generosity towards veterans as a wartime necessity and a deviation from their small government values. The improvements made allowed them to veil insufficient support for veterans from the public, who had come to accept the justifications of the liberal economic approach towards welfare.⁵⁹ The government used veteran institutions like the Military Hospitals Commission and the Department of Soldiers' Civil Re-establishment to counter veteran complaints while reassuring citizens that generous pensions and other benefits were being supplied. Further, Keshen states that "Canadian pension commissioners, acting on orders from their elected masters, commonly denied compensation to veterans unless their injuries were directly related to war service."⁶⁰ While the government could point to institutions that supported veterans, the procedure that allocated these resources did so in a restrictive manner much more amenable to the small government and the anti-welfare aims of the Federal Government at that time.

Historian Kellen Kurschinski discusses another problem with the government's post-war laissez-faire approach. In the 1920s veterans pushed for a *Pension Act* amendment to gain a lump sum payment equal to a ten-year pension. However, they had a lay understanding that their health was getting better over time and feared that the current pensions would be discontinued. Pension authorities also saw this as an opportunity to cut costs. The amendment proved to be a catastrophic failure and, after many veterans faced further

⁵⁸ Don Ives, "The Veterans Charter: The Compensation Principle and the Principle of Recognition for Service," in Neary and Granatstein. *The Veterans Charter*, 86.

⁵⁹ Jeff Keshen, "Getting It Right the Second Time Around: The Reintegration of Canadian Veterans of World War II," in Neary and Granatstein. *The Veterans Charter*, 62–63.

⁶⁰ Ibid., 63.

difficulties reintegrating and a deterioration of their health, regular pensions were reinstated.⁶¹

The drawbacks of the laissez-faire approach to veterans were realised too late for the Depression Era Bennett government. Bennett's eleventh hour attempt to change tack with his 'New Deal,' was too little too late and in the 1935 election the Conservatives were soundly defeated.⁶² Shortly thereafter, at the behest of the Legion the new Mackenzie King government created the Veteran's Assistance Commission to combat veteran unemployment, which sat at 35,000 in 1936.⁶³ The outcome of the commission was an increased discretion to accept applications for War Veterans Allowance⁶⁴ but it also includes an important discussion of Borden's promise, suggesting it was more than a political speech.

The Promises of the War Period:

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

[See the full text of Borden's speech beginning on Page 13 of this article]]

In these words Sir Robert, on behalf of the Government, entered into a contract every whit as binding as that between Canada and the holder of Victory Bonds. In a certain sense the contract was more solemn. The Victory Bonds were, after all, pretty much a business transaction. The

⁶¹ Kellen Kurschinski. "State, Service, and Survival: Canada's Great War Disabled, 1914-44," Unpublished PhD Thesis, McMaster University, 2014. 172-173, 280.

⁶² Neary, *Civvy Street*, 39.

⁶³ Woods, *Rehabilitation*, 4; see also Veteran's Assistance Commission, *Report*, 5-7.

⁶⁴ Neary, *Civvy Street*, 41-42.

contract between Canada and her men going Overseas reached beyond business into the realm of the ideal.⁶⁵

Later in the report this obligation to veterans is divided into sections entitled, ‘The Sentimental Obligation’ and ‘The Practical Obligation.’ The sentimental obligation engages with that fact that while veterans did not make their sacrifice with an expectation of a reward and would be embarrassed by being labeled as doing so, this should not persuade Canadians to forget the gravity of the sacrifice made. It is further stated that Canada was under a heavy sentimental burden as a modern state to care for veterans who are in need and could not care for themselves. The practical obligation, was deemed to be even more important and it was explained that, “Canada is not yet sufficiently wealthy to maintain a segment of her population on the idleness of relief,”⁶⁶ but should Canada become wealthy enough, “there is no justification for those being in want and misery who are unfortunate through no fault of their own.”⁶⁷

The distinguishing of sentimental and practical obligations clearly has the hallmarks of pre-war economics, especially given the commission’s economic context within the 1930s depression. It is also reminiscent of tensions posed by Parliamentary Sovereignty, which prevents governments from being fettered in their discretionary distribution of public monies. But the conceptualisation of the obligation in the commission report also seems to suggest that if the Canadian government could afford to pay, that the obligation would expand to encompass greater support for veterans. Given Canada’s status as a G8 member country with a ‘balanced budget’ in 2015, it would seem that the obligation would be greatly expanded when compared with Depression Era Canada.

Following the Veterans Assistance Commission, Borden’s speech was reiterated in Parliament and the Senate more than twenty times. It was stated at least once, in nearly every decade between March

⁶⁵ Veteran’s Assistance Commission, *Report*, 26–27.

⁶⁶ *Ibid.*, 33.

⁶⁷ *Ibid.*

1939 and February 1995.⁶⁸ Long before the *Scott* suit, it was raised in the context of debates over veteran's legislation and to raise awareness of the suffering of veterans. The Plaintiffs in *Scott* also allege that the speech has been used by the Canadian military to induce recruitment along with a promise that members and their families will be taken care of should they be injured or killed.⁶⁹

Beyond this, important federal ministers have also used the speech and verified its importance long before the political utility of the lawsuit existed. On 9 July 1980 at the second reading of Bill C-40, Liberal Minister of Veterans Affairs Daniel J. MacDonald stated,

I believe it is appropriate to quote from a speech made by prime minister Borden to Canadian troops before Vimy Ridge in 1917. ... I believe it is only correct that Canadians, particularly the younger ones, are reminded that this is not charity but a right well and nobly earned. Prime Minister Borden told those soldiers:

[see speech above]

⁶⁸ *House of Commons Debates*, 18th Parliament, 4th Session: Vol. 3 (March, 1939), 2449; *House of Commons Debates*, 18th Parliament, 4th Session: Vol. 4 (May, 1939), 4445; *House of Commons Debates*, 19th Parliament, 2nd Session: Vol. 3 (May, 1941), 3185-3186; *House of Commons Debates*, 19th Parliament, 4th Session: Vol. 5 (July, 1943), 5379; *House of Commons Debates*, 20th Parliament, 2nd Session: Vol. 3 (June, 1944), 2818; *House of Commons Debates*, 20th Parliament, 2nd Session: Vol. 3 (June, 1946), 2818; *House of Commons Debates*, 21st Parliament, 2nd Session: Vol. 2 (April, 1950), 1699; *House of Commons Debates*, 21st Parliament, 4th Session: Vol. 1 (February, 1951), 544-545; *House of Commons Debates*, 21st Parliament, 6th Session: Vol. 1 (March, 1952), 212; *House of Commons Debates*, 21st Parliament, 7th Session: Vol. 2 (January, 1953), 1128; *House of Commons Debates*, 29th Parliament, 1st Session: Vol. 3 (March, 1973), 2645; *House of Commons Debates*, 29th Parliament, 2nd Session: Vol. 1 (March, 1974), 427-428; *House of Commons Debates*, 30th Parliament, 1st Session: Vol. 1 (November, 1974), 1069; *House of Commons Debates*, 30th Parliament, 2nd Session: Vol. 1 (November, 1976), 943; *House of Commons Debates*, 32nd Parliament, 1st Session: Vol. 3 (July, 1980), 2715; *House of Commons Debates*, 32nd Parliament, 1st Session: Vol. 18 (November, 1982), 21158; *House of Commons Debates*, 32nd Parliament, 1st Session: Vol. 21 (March, 1983), 23620; *Senate Debates*, 33rd Parliament, 2nd Session: Vol. 1 (June, 1987), 1155; *Senate Debates*, 33rd Parliament, 2nd Session: Vol. 3 (March, 1988), 2788; *House of Commons Debates*, 34th Parliament, 2nd Session: Vol. 5 (March, 1991), 5461; *Senate Debates*, 35th Parliament, 1st Session: Vol. 1 (October, 1994), 899; *House of Commons Debates*, 35th Parliament, 1st Session: Vol. 8 (February, 1995), 9445.

⁶⁹ *Scott v. Canada*, para 234.

By approving this bill, we will once again be honouring that duty which has been reaffirmed many times throughout our history.⁷⁰

Later, at a speech in Ottawa's Beechwood Cemetery in September 2007, Jason Kenney stated,

In dedicating the newly-enlarged military cemetery we are keeping a promise made by Sir Robert Borden. In 1917, Sir Robert pledged that the Dominion would consider it our first duty to honour services rendered to the country and Empire.

Like all Canadians, Borden was deeply moved by the sacrifices made not only by the men who served and died in Flanders and in France under the flags of our Empire and our Dominion but also those who returned home. No one, he said will have just cause to reproach the government for having broken faith with those who fought and died for Canada.⁷¹

Borden's speech is clearly not an isolated political display. It holds real historic importance to veterans and Canadians alike. It can also be linked to important legal repercussions as well. One of the most recent uses of the speech was the 1994 Senate report entitled *Keeping Faith: into the Future*. Not only does this report have part of the speech in its title but it also includes an excerpt from the speech at the conclusion of the report and states "Prime Minister Sir Robert Borden articulated Canada's obligations to veterans when he addressed the soldiers about to take part in the Battle of Vimy Ridge in 1917."⁷² This report discussed the future direction of the Department of Veterans Affairs and it led to the introduction of Bill C-67, which established the Veterans Review and Appeal Board and amended the *Pensions Act* in 1995.⁷³ This commission was also the one that suggested Korean War veterans be grandfathered

⁷⁰ *House of Commons Debates*, 32nd Parliament, 1st Session: Vol. 3 (July, 1980), 2715.

⁷¹ CanWest News Service, "Veterans' graves to receive same care as fallen soldiers," available: http://www.canada.com/story_print.html?id=1a56dab6-g8c3-4a68-a62b-1cf8d0467eab&sponsor, [accessed on 1 March 2014].

⁷² Senate of Canada, *Keeping Faith: into the Future: Report of the Subcommittee on Veterans Affairs of the Standing Senate Committee on Social Affairs, Science and Technology* (Ottawa: Queen's Printer, 1994), 85–86.

⁷³ BILL C-67 (35/1), *An Act to establish the Veterans Review and Appeal Board, to amend the Pension Act, to make consequential amendments to other Acts and to repeal the Veterans Appeal Board Act*, 15 May 1995.

into the same benefit scheme as the World War Veterans which has subsequently allowed them to avoid being covered by the NVC.⁷⁴ The changes that grew from this committee led to a very different approach to disability claims, predominantly for modern veterans and this created new bureaucratic problems, which may not necessarily be cured even if the Plaintiffs in *Scott* are successful.

INSTITUTIONALISED PROBLEMS

In 2010 Canada's first Veterans Ombudsman, Pat Stogran, sent the government a report to warn them "senior bureaucrats in key agencies—Treasury Board and Privy Council Office—had grown desensitized to veterans."⁷⁵ He further alleged that senior Veterans Affairs bureaucrats had created the NVC in an effort to cut costs while Canadian "[d]eputy ministers make more on average in one year than a person who loses two legs in Afghanistan can expect to be paid out for the rest of their life."⁷⁶ A few weeks later on 13 August 2010 Stogran was removed and the Harper government suggested that this was not a result of his criticisms but rather that after three years, they simply wanted a new person with new suggestions.⁷⁷

Veterans Harold Leduc and David Macleod have echoed Stogran's criticism of the federal bureaucracy. In their book *Dirty Little Skirmish*, they discuss many of the institutionalised problems faced by veterans applying to Veterans Affairs and appealing their claims to the Veterans Review and Appeal Board (VRAB) for disability benefits.⁷⁸ These problems can be difficult to detect given that on its face the legislation involved actually contains quite complimentary language towards veterans. The problem is that these are not being followed. The *Pension Act*, which governs Veterans Affairs applications and the *Veterans Review and Appeal Board Act*, which governs the VRAB, were both constructed in an attempt to compensate for the

⁷⁴ Senate of Canada, *Keeping Faith*, 32.

⁷⁵ David Pugliese, "Embattled ombudsman Pat Stogran makes his last stand for Canada's veterans," available: <http://www.ottawacitizen.com/news/Embattled+ombudsman+Stogran+makes+last+stand+Canada+veterans/3790825/story.html>, [accessed 1 March 2014].

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ MacLeod and Leduc, *A Dirty Little Skirmish*.

unique statuses of those who serve in the Canadian military. The construction of the *Pension Act* reads,

The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependents, may be fulfilled.⁷⁹

And similarly in the *Veterans Review and Appeal Board Act* there is the statement,

... Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependents may be fulfilled ...⁸⁰

This complimentary language can be further seen with the so called ‘benefit of the doubt principle’ found in section 39,

In all proceedings under this Act, the Board shall

- (a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;
- (b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
- (c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.⁸¹

The benefit of the doubt principle dates back to 1918 when it was used by the then *Board of Pension Commissioners* to combat

⁷⁹ *Pension Act*, s 2.

⁸⁰ *Veterans Review and Appeal Board Act* (S.C. 1995, c. 18), s 3.

⁸¹ *Veterans Review and Appeal Board Act*, s 39.

problems that are still seen today.⁸² While the onus of proof lies on the claimant, the Government of Canada is the custodian of medical records and the benefit of the doubt principle in part has been implemented to counter the fact that many military records are missing or incomplete as a result of enemy action, accidents in transit or simply human error.⁸³

Harold Leduc, a former member of the VRAB, explains that part of the problem veterans face occurs when first applying to the Minister of Veterans Affairs through Veterans Affairs Canada. This two-part process previously involved a direct application to the Bureau of Pension Advocates who would help the veteran assemble evidence and build a case to show that they were entitled to a disability benefit. But this process was unpopular with traditional veterans given the time consuming nature of it and this concern was raised in the Senate Report *Keeping Faith: into the Future*⁸⁴ and subsequently changed in 1995.⁸⁵ Now veterans get a quick yes or no answer from the minister and they have to apply a second time to gain the assistance of a pension advocate.⁸⁶ Unfortunately for those having to reapply after getting a “no” from the minister this extra step provides an important barrier to veterans. As part of military culture, veterans are accustomed to a system regulated by corporal punishment, and without the assistance of a pension advocate at the first stage, they may already feel they are in a losing battle, especially given their disabled state. What may have sped up straightforward claims has now created an important barrier to those with more complicated claims.

Another institutionalised problem faced by veterans occurs when appealing Veterans Affairs decisions. This was raised in the Veterans Ombudsman Report, *Veterans’ Right to Fair Adjudication* in March 2012.⁸⁷ The report was based on research conducted by national law firm Borden Ladner Gervais LLP (BLG) and it shows that in sixty

⁸² Justice Mervyn Woods, *Report of the Committee to Survey the Organization and Work of the Canadian Pension Commission to the Honourable, the Minister of Veteran Affairs*, Volume 1, (Ottawa: Queen’s Printers, 1968), 274.

⁸³ *Ibid.*, 239.

⁸⁴ Senate of Canada, *Keeping Faith*, 60–63.

⁸⁵ MacLeod and Leduc, *A Dirty Little Skirmish*, 21.

⁸⁶ *Pension Act*, s 81(3).

⁸⁷ Greg Kerr, M.P., *Restoring Confidence in the Veterans Review and Appeal Board: Report of the Standing Committee on Veterans Affairs*. (Ottawa: Standing Committee on Veterans Affairs, 2012) 1.

percent of cases judicially reviewed by the Federal Court, the court disagreed with the findings of the VRAB and sent the case back to be reheard.⁸⁸ Additionally, there are trends, which indicate that the VRAB has failed to act according to its enabling legislation and has also failed to provide procedural fairness. BLG stated that,

The five most common errors identified by the Federal Courts were: (1.) failure to liberally construe the applicable statutory regimes; (2.) failure to accept uncontradicted evidence, including uncontradicted medical evidence; (3.) failure to give veterans the benefit of the evidentiary presumptions; (4.) failure to provide veterans with procedural fairness; and (5.) failure to accept new evidence presented by veterans.⁸⁹

From the time the board was created in 1995 to 2012, it has made more than 118,600 decisions. While 33,990 were appealed and could have been judicially reviewed, only 140 of these were reviewed at the Federal Court and eleven at the Federal Court of Appeal. It is clear that significant attrition occurs at each stage of appeal, but this should come as no shock. The estimated legal cost of these cases can range between \$15,000 and \$50,000 depending on complexity and this is compounded by the fact that the Federal Court does not have the power to substitute their own judgment with that of the board.⁹⁰ Until the 2011–2012 period, VRAB used the percentage of cases upheld by the Federal Court to indicate the fairness of the program. This percentage has seen consistent drops since 2006 with only forty-four percent of decisions upheld in 2007–2008 and down to thirty-one percent in 2010–2011.⁹¹

Despite these concerning trends, the Conservative majority report of the *House of Commons Standing Committee on Veterans Affairs* in December 2012 failed to engage with the errors in law made by the board, especially the ‘benefit of the doubt principle’

⁸⁸ Office of the Veterans Ombudsman, *Veterans’ Right to Fair Adjudication: Analysis of Federal Courts Decisions Pertaining to the Veterans Review and Appeal Board*, (Charlottetown, P.E.I: Veterans Affairs Canada, 2012) 2.

⁸⁹ *Ibid.*, 22.

⁹⁰ *Ibid.*, 12–13.

⁹¹ *Ibid.*, 13.

from section 39, which was flagged as problematic by BLG.⁹² This was further reinforced by the recent case of *Bradley v. Canada (Attorney General)*,⁹³ where Justice Phelan states that sections 3 and 39 of the act are “more than a ‘tie goes to the runner’ provision...” This is legislation designed to protect and respect the members of the Armed Forces.”⁹⁴ Phelan further stated that the Board,

... approached the claim in a bureaucratic, narrow and parsimonious manner...It is not sufficient to pay lip service to the generous reading and application of the legislation which Parliament intended, this Court has affirmed and which members of the Armed Forces deserve.⁹⁵

Phelan’s words were reflective of serious concerns about decisions made by the VRAB, in the context of a government that seemed hesitant to address them. To make matters worse, it appears that Canada’s Veterans Ombudsman Guy Parent has since been de-fanged on this issue. In February 2015, he released the *Veterans’ Right to Fair Adjudication: The Follow-Up Report*, which concluded that the “VRAB has made significant progress.”⁹⁶ But compared to the extensive research by BLG in the original report, this follow-up report relied on only four Federal Court judicial review cases that agreed with the VRAB’s original decision. One of these was actually a RCMP case and all four were selected within the dubiously small period of 1 January 2014 to 31 August 2014.⁹⁷ Unsurprisingly, only months after this period in September and October 2014, there were already judicial review cases from the Federal Court and Federal Court of Appeal, which found in favour of the veterans and urged the VRAB to reconsider their decisions.⁹⁸ With developments like these, there

⁹² Only the Liberal minority report suggested amending this principle by lowering the burden of proof to better reflected the implementing legislation and ruling by the Federal Court, Kerr, *Restoring Confidence in the Veterans Review and Appeal Board*, 33, 40–41, 44; see also, Office of the Veterans Ombudsman. *Veterans’ Right to Fair Adjudication*, 14.

⁹³ 2011 FC 309.

⁹⁴ *Bradley v. Canada*, paras 15–16.

⁹⁵ *Ibid.*, para 20.

⁹⁶ Office of the Veterans Ombudsman, *Veterans’ Right to Fair Adjudication: The Follow-Up Report*, (Charlottetown, P.E.I: Veterans Affairs Canada, 2014), 14.

⁹⁷ *Ibid.*, 4.

⁹⁸ *McAllister v. Canada (Attorney General)*, 2014 FC 991, para 56; see also *Newman v. Canada (Attorney General)*, 2014 FCA 218, para 33.

seems to be a return to the same problematic approaches that Keshen describes following the First World War. This belies what could be an even greater problem than the effect of the NVC. If injured veterans cannot gain access to support, it does not matter how good said benefits are.

So where do veterans stand in their second battle with the Canadian government and bureaucracy? The government is well aware that it is much easier to prove the moral underpinnings of a social contract than the legal entitlement. This is one of the major limitations of the Canadian legal system when attempting to use the courts as a vehicle for social change. But it is also true that members of the military occupy a unique legal status. Forces Members are exposed to unlimited liability and can be ordered by their superiors to undertake a task, which will actively put their life and bodily integrity at risk. The *Queen's Regulations and Orders* (QR&Os) are the primary form of military law in Canada other than the *National Defence Act* (NDA).⁹⁹ Article 19.015 of the QR&Os states that, "Every officer and non-commissioned member shall obey lawful commands and orders of a superior officer."¹⁰⁰ The requirement of obeying lawful orders also carries criminal liability under section 83 of the NDA.¹⁰¹ While the term 'lawful' order or command might suggest that there are restrictions put on the level of danger soldiers face, the term has generally been given a rather broad scope. In *R. v. Finta*¹⁰² the Supreme Court of Canada found that:

... Military orders can and must be obeyed unless they are manifestly unlawful. When is an order from a superior manifestly unlawful? It must be one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong ...¹⁰³

⁹⁹ National Defence and the Canadian Armed Forces, *Queen's Regulations and Orders for the Canadian Forces* (QR&Os), available: <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders/index.page>, [accessed 1 June 2014]; *National Defence Act* (R.S.C., 1985, c. N-5).

¹⁰⁰ Article 19.015 QR&Os.

¹⁰¹ *National Defence Act*, s 83.

¹⁰² 1994 Carswell Ont 61, [1994] 1 S.C.R. 701, 28 C.R. (4th) 265 (S.C.C.)

¹⁰³ *R. v. Finta*, para 239.

Once this rather low bar is passed, the order is considered lawful. The soldiers' freedom of action is then regulated by the QR&OS and NDA and there are severe repercussions for anyone who resists. For instance, any soldier found guilty of disobeying a lawful command faces the penalty for insubordination under section 83 of the NDA and may face life imprisonment as a result.¹⁰⁴ While this deprivation of freedom may seem harsh, a number of offences under the NDA once called for the death penalty until the act was amended in 1998.¹⁰⁵ And despite rigorous requirements and enhanced risk, soldiers and their families are also precluded from suing the military or the Canadian government for any death or injuries sustained during service.¹⁰⁶ Not unlike the great compromise involved in the creation of Workers Compensation Programs, soldiers agreed to forgo their right to sue in exchange for a set of rights and entitlements from the government.¹⁰⁷ In fact, Canadian Economist Morley K. Gunderson has described Workers Compensation Programs as a "social contract, between workers and employers."¹⁰⁸

This same logic is posited by the Plaintiffs in *Scott*. Canadian forces members make a unique sacrifice in exchange for a unique promise from the government and people of Canada. But, proving this is a constitutionally protected right in court may be more difficult than obtaining the same result through the ballot box. The Plaintiffs also risk creating a negative precedent, which could undermine the covenant itself. One of the obstacles in their way is *Authorson v. Canada (Attorney General)*.¹⁰⁹ In that case the Supreme Court of Canada found that the government could legislatively extinguish an accepted fiduciary duty to pay a number of Canadian veterans interest from their pension and benefit funds.¹¹⁰ There was certainly no lack of moral weight to the argument that the government should not rob veterans of the money they had a fiduciary duty to protect. At the Ontario Superior Court and at the Ontario Court of Appeal

¹⁰⁴ *National Defence Act*, s 83.

¹⁰⁵ Parliament of Canada, "*BILL C-25: An Act To Amend The National Defence Act*, (18 February 1998)" available: http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=C25&Parl=36&Ses=1, [accessed 6 March 2014].

¹⁰⁶ *Crown Liability and Proceedings Act* (R.S.C., 1985, c. C-50), s 8.

¹⁰⁷ Rice and Prince, *Changing Politics*, 48.

¹⁰⁸ Morley Gunderson and Hyatt, Douglas, eds., *Workers' Compensation: Foundations for Reform* (Toronto: University of Toronto Press, 2000), 59.

¹⁰⁹ [2003] 2 SCR 40, 2003 SCC 39.

¹¹⁰ *Authorson v. Canada (Attorney General)*, para 62.

the veterans won, which is likely why they made the fateful decision not to accept a settlement offer from the government before they lost at the Supreme Court of Canada.¹¹¹ But in the interest of protecting “duly enacted legislation unambiguously expropriating property interests,”¹¹² the Supreme Court ruled in favour of the government, establishing a strong negative precedent.¹¹³ While the facts in the *Scott* case are different, this risk still exists. However in the 2010 case *Manuge v. Canada*,¹¹⁴ there was an important step forward for veterans. They won an \$887.8 million settlement, which included a legal aid fund to help other veterans get to court for their disability claims.¹¹⁵ *Manuge* also paved the way for *Scott* by eliminating the judicial review requirement before proceeding to their class action suit against the government.¹¹⁶

Veterans come to their legal fight with important divisions among their ranks and they face important obstacles including their vulnerable state. While there are limits and risks to the legal approach utilized in *Scott v. Canada*, Canadians seem to accept that they have a moral duty to veterans and this will likely impact the current or future government’s approach to veteran legislation. While a history of special treatment towards veterans may have conflicted with the Harper government’s economic policy, shortchanging veterans was the last historic lesson the Harper government failed to learn. Borden’s words are not simply a political speech. They are a time-honoured articulation of the relationship between Canadians, their government, and those willing to make the ultimate sacrifice for their country. Upholding this social covenant requires keeping faith with all generations of veterans and ensuring that they never have to fight a second battle for the support they have earned.

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¹¹¹ Janice Tibbetts, “Veterans Offered \$780M by Feds; Lawyers Balked at Settlement: Final Edition.” *The Windsor Star*, 25 November 2003, A.1.

¹¹² *Authorson v. Canada*, 63.

¹¹³ *Ibid.*, 63.

¹¹⁴ [2010] 3 SCR 672, 2010 SCC 67.

¹¹⁵ Michael Tutton, “Veterans’ pension lawsuit settlement up to \$887.8 million,” available: http://www.thestar.com/news/canada/2013/01/09/veterans_pension_lawsuit_settlement_up_to_8878_million_lawyers.html, [accessed 10 April 2014].

¹¹⁶ *Manuge v. Canada*, paras 19 and 24.

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