Calling the House to Order!

After 70 years of peace, its time for greater civilian control over the Canadian military criminal justice system

Michel W. Drapeau and Joshua M. Juneau

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Michel W. Drapeau and Joshua M. Juneau

“Sans critiques, il n’y a pas de progrès”

H.E. Father Miguel d’Escoto Brokmann, M.M.
President of the 63th session of the General Assembly, United Nations, 2008

ABSTRACT

1. The cornerstone of Canada’s constitutional democracy is the separation of powers between the legislative, the Executive and the Judiciary. Broadly speaking, the bicameral Legislature, which includes the House of Commons and Senate, makes law. The Executive is the branch of government responsible for administering and enforcing the laws. And the Judiciary is responsible for interpreting the laws and dispensing justice.

2. As the artisans of law the Legislature arguably wields the greatest power. If there is public demand for a policy shift, it is the Legislature
who ensure that the public interest is satisfied. This includes control over all government Departments, including the Canadian Armed Forces.

*Even when there is a necessity of military power, within the land, . . . a wise and prudent people will always have a watchful & jealous eye over it.*

**Samuel Adams,** Signer of the US Declaration of Independence.

3. Despite its oversight duty, Canada’s Legislature has arguably not made a meaningful contribution to the development of military law since 1967 resulting in the unification of Canada’s army, navy and air force. In this way – save for legislative reform in 1997 as a result of the findings of the Commission of Inquiry into the Deployment of the Canadian Airborne Regiment to Somalia – this current Parliament

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1. The *Canadian Forces Reorganization Act* was enacted on February 1, 1968 (formally know as Bill C-243 and referred to as the “*Unification Act.*”

under the leadership of Prime Minister Justin Trudeau is an absentee landlord, currently more concerned with legalizing marijuana\(^3\) than in reforming an ancient justice system which so often fails our men and women in uniform and whose compliance with the *Charter of Rights and Freedoms* is questionable.

4. Canada’s Minister of Justice is also ‘absent in office’ on the military justice file. Yet, section 4 of the *Department of Justice Act*\(^4\) gives the

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\(^3\) See the extensive legislative history of bill C-17: *An Act to amend the Contraventions Act and the Controlled Drugs and Substances Act and to make consequential amendments to other Acts*, as introduced during Canada’s 38th Parliament, 1st Session.


**Powers, duties and functions of Minister**

4. The Minister is the official legal adviser of the Governor General and the legal member of the Queen’s Privy Council for Canada and shall

(a) see that the administration of public affairs is in accordance with law;
Minister responsibility for “the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces and to advise the Crown on all matters of law referred to the Minister by the Crown.” [Our emphasis]. It also names the Minister of Justice as the official adviser of the Governor General – Canada’s Commander in Chief - and as the legal member of the Queen’s Privy Council for Canada.

5. The Minister’s attitude is one of passiveness and non-involvement in military affairs, her legislation goes out of its way to exclude application over the military. It is almost as if there were a line of demarcation between laws

(b) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;

c) advise on the legislative Acts and proceedings of each of the legislatures of the provinces, and generally advise the Crown on all matters of law referred to the Minister by the Crown; and

d) carry out such other duties as are assigned by the Governor in Council to the Minister.
intended for civil society and laws enacted for the military.

6. The corollary to this is that the military is being granted a sort of independence of decision and action within a widening sphere of competence. To the informed observer, the line between civil society and military affairs is sharp and clear as if both sides must abstain from trespassing. Consider the following two examples:

   a. In 1998, section 70 of the National Defence Act\(^5\) was suddenly amended by

\(^5\) National Defence Act, S.C. 1998, c. 35, s. 22. Clause 22 removed ‘sexual assault” offences from the list subject to the exclusive jurisdiction of the civilian criminal justice system.

Limitations with respect to Certain Offences

Offences not triable by service tribunal

70. A service tribunal shall not try any person charged with any of the following offences committed in Canada:

(a) murder;

(b) manslaughter; or

(c) an offence under any of sections 280 to 283 of the Criminal Code.
Bill C-25. Prior to this, sexual assault offenses had to be tried by a civilian court rather than service tribunal. Because of Bill C-25, sexual assault offenses committed in Canada by persons subject to the *Code of Service Discipline* can now be handled by service tribunals. As explained in an article co-authored in 2002 by a former Judge Advocate General (JAG)\(^6\) the Canadian Forces were granted jurisdiction to tried sexual assault offences for no other reasons than to speed up the trial process:

> [t]o the extent that sexual assault offences have the potential to undermine morale and unit discipline, lessen mutual trust and respect, and ultimately impair military efficiency, the Canadian Forces’ inability to deal promptly

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with such offences was considered problematic. Bill C-25 therefore removed this limitation on jurisdiction.

b. In 2015, Parliament enacted the *Canadian Victims’ Bill of Rights* which, for reasons unknown, expressly excludes from the scope of application victims of crimes prosecuted before service tribunals.\(^7\)

\(^7\) S.C. 2015, c-13, section 18(3).

**Application**

18. (1) This Act applies in respect of a victim of an offence in their interactions with the criminal justice system

(a) while the offence is investigated or prosecuted;

(b) while the offender is subject to the corrections process or the conditional release process in relation to the offence; and

(c) while the accused is, in relation to the offence, under the jurisdiction of a court or a Review Board, as those terms are defined in subsection 672.1(1) of the *Criminal Code*, if they are found not criminally responsible on account of mental disorder or unfit to stand trial.
WHAT IS MILITARY LAW?

7. In his 2002 paper titled: “United Kingdom Military Law: Autonomy, Civilianisation, Juridification,” G.R. Rubin argues that military law has undergone a long-term process of change. Previously an autonomous legal system with little civilian input at the administrative, judicial and policy-making levels, military law became subject to a consensual policy of civilianisation from the early 1960s, reflected primarily in the adoption of civilian criminal law norms by the military justice system. He adds that “more recently there has emerged the

Reporting of offence

(2) For the purpose of subsection (1), if an offence is reported to the appropriate authorities in the criminal justice system, the investigation of the offence is deemed to begin at the time of the reporting.

National Defence Act

(3) This Act does not apply in respect of offences that are service offences, as defined in subsection 2(1) of the National Defence Act, that are investigated or proceeded with under that Act.

juridification of significant areas of military affairs in respect to discipline and certain other terms of service which hitherto have not been subject to externally imposed legal regulation. Explanations for the shifts from autonomy, through civilianisation, and then to juridification, ranging from political and social developments to new human rights and equal opportunities discourses, are offered for such changes.” He goes on to posit that over the past few years:

“[ . . . ] it has become increasingly clear that United Kingdom military law has ceased to be the narrow preserve of military lawyers and of a handful of civilian lawyers who occasionally appeared before courts martial.”

8. Every state requires a code of laws and regulations for the raising, training, equipping, maintenance, discipline, organisation and administration of its armed forces. Part of the code sanctions the maintenance of discipline in the armed forces. Another part of the code deals with the obligations and conditions of service as
well as an expansive and complex subject area known as military administrative law.

9. Before proceeding further, we need to review and define and distinguish between the various terms utilized by jurists and commentators alike when dealing with matters concerned with military law.

**DEFINITIONS**

| Military Law | The body of laws, regulations, rules and directives that have been developed to meet the needs of the military. It encompasses service in the military, the constitutional rights of service members, the military criminal justice system, and the military administrative law. It also comprises international treaties and conventions, including the Geneva Convention, rules of procedures, rules of engagement and the law of armed conflict. |
| Military Justice System | The military justice system is a generic term which covers functions such as discipline and administrative actions. |
| Military Criminal Justice System | The military criminal justice system is the primary legal enforcement tool of the armed services. It is similar to, but separate from the criminal justice system. The Code of Service Discipline of the National Defence Act is the principal body of laws that applies to members of the military and civilians |
accompanying the military. Military tribunals interpret and apply it.

The code addresses certain offenses that are unique to the military such as desertion, insubordination or absence without leave. It also incorporates all domestic federal penal statutes such as the Criminal Code of Canada. The jurisdiction of courts martial is rather broad, with only the offences of murder, manslaughter and child abduction committed in Canada being excluded.

Table 1: The Canadian Military Justice System

<table>
<thead>
<tr>
<th>TRIBUNALS</th>
<th>Military Criminal Justice System</th>
<th>Military Administrative Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court Martials</td>
<td>Summary Trials</td>
<td>Military Police</td>
</tr>
<tr>
<td>Approx. 60 trials per year</td>
<td>Approx. 800 trials per year</td>
<td>The National Investigation Service (NIS) investigates serious and sensitive matters.</td>
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<tr>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>OVERSIGHT</th>
<th>Court Martial Appeal Court</th>
<th>NO APPEAL But oversight is provided by chain of command</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>MPCC</td>
</tr>
<tr>
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</tbody>
</table>
**Oversight bodies:** The Court Martial Appeals Court (CMAC), the Federal Court of Canada, the Military Police Complaints Commission (MPCC) and the Military Grievances External Review Committee (MGERC) are all parts of civil society.

The *US Uniform Code of Military Justice*, 64 Stat. 109, 10 U.S.C. sub-chapter XKK, article 142 (b) (2)(B)(4) stipulates that to the US Court of Appeals for the Armed Forces specifies that: “A person may not be appointed as a judge of the court within seven years after retirement from active duty as a commissioned officer of a regular component of an armed force” to the US Court of Appeals for the Armed Forces. This is to ensure that the Court be ‘an independent civilian court unencumbered by ties to any of the military services”.

In Canada, no such restriction exists. Recently, a Regular Force officer in the rank of colonel serving in the Office of the Judge Advocate General was appointed to the CMAC where he heads the rules committee of the Court and is also allowed to sit on CMAC appeal panels despite his relatively recent release from the Canadian Armed Forces.

However, in a Directive to Court Martial Appeal Court Judges and Practitioners, the then Chief Justice was careful to note that “Consistently with the role of the Court as a civilian tribunal, however, it is not appropriate for judges to wear miniatures [of orders, medals, decorations] while sitting in the CMAC.”
THE SUMMARY TRIAL

10. Among advanced democracies, Canada’s military is probably the last bastion of the ancient summary trial. The ancient Summary Trials system in Canada is frozen in time, largely unchanged in 328 years.9

9 Drapeau, Michel W. and Juneau, Joshua. “Canada's Military Summary Trials are Frozen in Time” (Hill Times, February 15, 2016).

The requirement for summary proceedings was first recognized by the British Parliament with the passage of the Mutiny Act in 1689. Two centuries later, summary trials were still in existence under British military law when the Canadian Parliament passed An Act respecting the Militia and Defence of the Dominion of Canada, S.C. 1868, c. 40 [The Militia Act, 1868] to govern Canada's armed forces.

In recent years, the European Convention of Human Rights (ECHR) and various rulings on its applicability to summary trials have caused some countries, in particular the United Kingdom and Ireland, to completely overhaul the summary trials process. These judicial rulings have brought the summary trial process into compliance with the ECHR which provided that no one may be deprived of his liberty, except by a competent and impartial tribunal, and that the accused may, on a criminal charge, declare his right to a fair and public hearing by an independent and impartial tribunal as established by law.

Since our Charter is analogous in values and terms to the ECHR, we know of only one reason why similar reforms could not have already been incorporated in Canada’s
11. Nearly 800 military members in Canada face summary trial each year. These disciplinary proceedings, which are heard by that soldier’s Commanding Officer, could lead to a sentence with ‘true penal consequences’ such as incarceration, demotion, a large fine, or a reprimand. A summary trial conviction may also result in a criminal record.¹⁰

12. Amazingly, however, there is no right to legal counsel at a summary trial even if an accused is being tried on Canadian soil nor is there a transcript of proceedings or a right of appeal. Moreover, the Commanding Officer hearing the summary trial has no legal training.¹¹


Table 2: Summary Trial systems across select global democracies

<table>
<thead>
<tr>
<th>CHARACTERISTICS</th>
<th>Canada (Canada)</th>
<th>Pakistan (Pakistan)</th>
<th>U.K. (U.K.)</th>
<th>Australia (Australia)</th>
<th>USA (USA)</th>
<th>France (France)</th>
<th>Germany (Germany)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to legal counsel</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Presiding Officer has legal training</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rules of evidence are available</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hearsay evidence admissible and reliable</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Punishments includes loss of liberty</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>BEHIND THE TIMES</th>
<th>MODERNIZED</th>
<th>REPEALED</th>
<th>AHEAD OF TIMES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>RIGHT OF APPEAL</strong></td>
<td>NO</td>
<td>NO</td>
<td>YES</td>
<td>YES</td>
</tr>
</tbody>
</table>

Summary Trials completely abolished in peace time.
Table 3: The Canadian Summary Trial System – Statistics

<table>
<thead>
<tr>
<th>SUMMARY TRIALS AT A GLANCE</th>
<th>2014 - 15</th>
<th>2015 - 16</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of summary trials</td>
<td>857</td>
<td>721</td>
</tr>
<tr>
<td>Summary trials by ranks</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Private Corpsals</td>
<td>726</td>
<td>608</td>
</tr>
<tr>
<td>Sergeants And above</td>
<td>54</td>
<td>32</td>
</tr>
<tr>
<td>Officer</td>
<td>77</td>
<td>81</td>
</tr>
<tr>
<td>Charges disposed at trial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Absence without leave</td>
<td>39%</td>
<td>41%</td>
</tr>
<tr>
<td>Conduct to the Good Order and Discipline</td>
<td>24%</td>
<td>25%</td>
</tr>
<tr>
<td>Drunkeness</td>
<td>11%</td>
<td>12%</td>
</tr>
<tr>
<td>Insubordinate behavior</td>
<td>4%</td>
<td>6%</td>
</tr>
<tr>
<td>Quarrels and disturbances</td>
<td>3%</td>
<td>3%</td>
</tr>
<tr>
<td>Findings</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Guilty</td>
<td>90%</td>
<td>88%</td>
</tr>
<tr>
<td>Not Guilty</td>
<td>6%</td>
<td>8%</td>
</tr>
<tr>
<td>Stayed etc.</td>
<td>4%</td>
<td>4%</td>
</tr>
<tr>
<td>Punishments at Summary Trial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Detention</td>
<td>2.3%</td>
<td>2.37%</td>
</tr>
<tr>
<td>Fine</td>
<td>55%</td>
<td>55%</td>
</tr>
<tr>
<td>Confinement</td>
<td>25.6%</td>
<td>26%</td>
</tr>
<tr>
<td>Reprimand</td>
<td>5%</td>
<td>5%</td>
</tr>
</tbody>
</table>

Source: JAG Annual Report, 2015-2016

13. The Summary Trial disciplinary procedure is also devoid of any rules of evidence, meaning there is no protection against the compellability of the accused as a witness and against self incrimination. There is no right to spousal privilege. Adverse inferences may be drawn
from the accused’s silence and hearsay evidence may be taken and fully relied upon.¹²

14. No other Canadian faces such a one-sided penal justice process. The Summary Trial process as practiced in Canada has been all but abolished among all of our NATO allies. However, this system is still used in Pakistan, Sri Lanka, India, Bangladesh and Nepal.

15. In 2015 Canada’s Parliament introduced Bill C-71 which was aimed at modifying the Military’s Summary Trial. However, the authenticity for such reforms is questionable, because, with the dissolution of Parliament prior to the last Federal election, the Bill died on the order paper, and nearly two years since, there is no indication that it will be re-introduced.

“INDEPENDENT” OVERSIGHT IS A FAR CRY FROM INTERNAL REVIEWS

“Those responsible for organizing and administrating Canada’s military justice system have strived, and must continue to strive, to offer a better system than merely that which cannot be constitutionally denied.”

The late Right Honorable Antonio Lamer, P.C., C.C., C.D., 2003
First Independent Review

16. As it stands, Canada’s military justice system needs comprehensive reform – a task that requires independent oversight.13

13 This is the recommendation of the Canadian Bar Association (CBA) Military Law Section in their submission titled “Court Martial Review” dated March 2017. Shown below are pertinent extracts of the CBA recommendation.

A review of the military justice system, not just of the court martial system, ought also to address issues raised by numerous commentators, such as the jurisdiction of summary trial presiding officers and the training of assisting officers. A truly comprehensive review should involve the participation of interested Canadians, academics, practitioners and service personnel. A comparative review of foreign jurisdictions would also enhance this research.

The CBA Section believed that fundamental questions underpinning discussions of military discipline and military justice must be debated in an open and public
17. Since 1998 there have been two independent reviews of Canada’s military justice system. The first review was conducted by the Right Honourable Antonio Lamer, P.C., C.C., C.D. in 2003. The second review was conducted by the Honourable Patrick J. LeSage, C.M., O. Ont., Q.C., tabled in 2012. The recommendations of the last report were mostly geared at protecting the status quo, rather than promoting significant reforms.

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forum. A joint Parliamentary committee would possess the necessary resources and competence to review these issues fully and share any findings with the Canadian public. The goal should ultimately be legislation that ensures Canada’s military justice system both supports the discipline, efficiency and morale needs of the military and ensures that justice is done in the defence of Canada.


16 In 2016, Tim Dunne, a well-known defence commentator questioned the significant role played by senior members of the JAG establishment during the course of Justice LeSage’s review by providing him not only with ‘valuable comments, recommendations and observations’ but who took up the challenge of educating him regarding the military justice system. According to Dunne, this begs the
18. In 2016, Canada’s Minister of National Defence ordered a review of the *National Defence Act*, and asked stakeholders to make submissions on how to improve their policy and governance process. A separate and parallel internal review was also launched by the Judge Advocate General on the Court Martial system. That Review is spearheaded by a senior lawyer with the Office of the Judge Advocate General.

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question, with so much participation by Judge Advocate General legal staff in educating Justice LeSage, just how independent was his “independent review”?

See: http://defence.frontline.online/article/2016/2/4363-Military-Justice

17 The purpose of this comprehensive review is to conduct a legal and policy analysis of all aspects of the court martial system and, where appropriate, to develop and analyse options to enhance the effectiveness, efficiency, and legitimacy of that system. See link: http://www.forces.gc.ca/en/about-reports-pubs-military-law/court-martial-comprehensive-review.page
Table 4: The Canadian Court Martial System – Statistics

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Courts Martial by type</td>
<td>Standing</td>
<td>General</td>
</tr>
<tr>
<td>Private Corporals</td>
<td>50</td>
<td>32</td>
</tr>
<tr>
<td>Sergeants And above</td>
<td>11</td>
<td>7</td>
</tr>
<tr>
<td>Officer</td>
<td>10</td>
<td>8</td>
</tr>
<tr>
<td>Principal charges disposed at trial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conduct to the Good Order and Discipline</td>
<td>44</td>
<td>39</td>
</tr>
<tr>
<td>Absence without leave</td>
<td>19</td>
<td>15</td>
</tr>
<tr>
<td>Sexual Assault</td>
<td>19</td>
<td>4</td>
</tr>
<tr>
<td>Breach of public trust 18</td>
<td>18</td>
<td>0</td>
</tr>
<tr>
<td>Disobedience of a lawful command</td>
<td>16</td>
<td>7</td>
</tr>
<tr>
<td>Insubordinate behavior</td>
<td>14</td>
<td>7</td>
</tr>
<tr>
<td>Failure to comply with conditions</td>
<td>11</td>
<td>11</td>
</tr>
<tr>
<td>Assault</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>Findings</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Guilty</td>
<td>77%</td>
<td>87%</td>
</tr>
<tr>
<td>Not Guilty</td>
<td>17%</td>
<td>13%</td>
</tr>
<tr>
<td>Stayed etc.</td>
<td>6%</td>
<td>0%</td>
</tr>
<tr>
<td>Sentences at Court Martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dismissal</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Imprisonment</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>Detention</td>
<td>8</td>
<td>4</td>
</tr>
<tr>
<td>Reduction in rank</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Severe reprimand/Reprimand</td>
<td>31</td>
<td>23</td>
</tr>
<tr>
<td>Fine</td>
<td>29</td>
<td>32</td>
</tr>
<tr>
<td>Appeals</td>
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</tr>
<tr>
<td>Court Martial Appeal Court</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Supreme Court of Canada</td>
<td>4</td>
<td>2</td>
</tr>
</tbody>
</table>

Source: JAG Annual Report, 2015-2016

19. Though a wall-to-wall review of the *National Defence Act* is desperately required, meaningful reform can only be achieved by external review. Most surprisingly, despite assembling a team and having them conduct extensive consultations with ten (10) countries globally, at
a May 2017 conference\(^{18}\), the senior JAG Officer leading a Review into the Courts Martial system states his belief that it is possible that “the report just gets put on a shelf and becomes a reference for future folks examining and looking at options for reform of the court martial system.” Predictably then, there is no real impetus for meaningful change.\(^{19}\)

20. Procedurally, a confidential draft report on the Court Martial System has been produced and provided to the Judge Advocate General for approval. However, despite permitting broad input from all Canadians, the military lawyers will seemingly only give weight to positions and ideas penned by members of the defence establishment because, as stated by the senior JAG Officer leading a Review into the Courts Martial system at the same May 2017


conference ‘no one can understand military justice unless they have worked in it.’ This is troublesome.

21. More troublesome is that, according to Canadian Armed Forces’ defence ethics teachings, it is impermissible for a serving member to criticize the current operational framework. In the June 2016 edition of Maple Leaf Magazine, the Defence Ethics Programme published an ethical scenario concerning Albert, who sadly disagreed with his chain of command on a policy decision. The ethical dilemma is: What should Albert do?

22. After some time, the Ethics Programme released its rubric response: If you disagree with Departmental policies, a member’s only options are to shut up or resign from service. The answer and rationale provided by the ethics advisors read as follows:

“If professional servants of the state choose to undermine the governance process when they disagree with decisions, then they render the institution incapable of serving the state ... If Albert felt this issue was important enough, he had the
The option of respecting his professional obligations by resigning from the institution.”

23. The Canadian Armed Forces’ policy is seemingly, therefore, that if a member disagrees with current governance policies, his only recourse is to resign, or else he will be violating his professional oath. According to the Defence Ethics Programme, for a member to make a submission to the Review into the Courts Martial system would be to undermine the governance process itself. The member would be necessarily forced to resign. Given this reality, there is no reason to expect anything but submission to the status quo. Perhaps the senior JAG Officer leading a Review into the Courts Martial system’s prediction – that his report will merely get “put on a shelf and becomes a reference” is more truth than fiction.


21 In 2017 (retired) Justice Gilles Létourneau and Professor Michel W. Drapeau published a comprehensive text dedicated to the Modernization of the Canadian Military Criminal Justice, titled “Behind the Times.” The scope of this publication is too broad for the purpose of this paper, but it is available as an open source free download at:
PAST LIKELY TO REPEAT ITSELF

24. It is not reasonable to expect military lawyers to review and recommend substantial changes to their own policies. It will undoubtedly lead to a predictable outcome – another report of the self-aggrandized “best” justice system, with broad recommendations that will never be fully implemented unless they are in accord with and support the status quo.

25. This cynical opinion is grounded in very recent history. Consider Bill C-15: An Act to Amend the National Defence Act.\(^\text{22}\) Bill C-15 was tabled by the Conservative Government in June 2011 - more than six (6) years ago. It received Royal Assent on June 19, 2013. Despite the passage of more than four (4) years since assent, more than half of this bill has yet to be put into force,

including all provisions aimed at strengthening the archaic military justice system.

26. Bill C-15 was the subject of more than two years of extensive consultation, including eight (8) separate meetings of the Standing Committee on National Defence, and five full meetings of the Senate Committee on Legal and Constitutional Affairs. Bill C-15 received Her Majesty’s approval as well as that of the Judge Advocate General who was directly involved in the consultation process.23

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27. For reasons unknown, Bill C-15, a very important legislation has been forgotten, and left to collect dust in the annals of Parliament. Particularly concerning is that the contents of the Bill that were ignored are specifically aimed at improving the rights of members of the Canadian Armed Forces, and strengthening the military justice system such as the scope of sentencing principles, absolute discharge,
intermittent sentences, restitution, and allowing victim impact statements.\textsuperscript{24}

28. If Bill C-15 cannot reach its full maturity after all the effort that went to its final product, and more than four years since being signed by the Governor General himself, it is predictable that any work prepared by the senior JAG Officer leading a Review into the Courts Martial system in his most recent internal review will find equal outcome – just another reference text, as he has foreshadowed.

\textsuperscript{24} These proposals are comprehensively summarized in Chapter 2 of Létourneau, Gilles (Hon), and Drapeau, Michel W. \textit{“Military Justice in Action”} (2015: Carswell. Toronto, Ontario).
CANADIAN MILITARY SELF-GOVERNANCE

According to Robert Dahl, a leading democratic theorist, one of the requirements for a democracy are “institutions for making government policies depend on votes and other expressions of preference”. While it goes without saying that in terms of democratic theory the military must be subject to the control of the elected representatives of the people who hold the supreme authority, in fact in many countries the military is granted certain de iure or de facto privileges, autonomies, reserved domains, and tutelary powers.

Ergun Özbudun

29. There is a growing shift towards the military becoming completely self-governing, and the military takes every opportunity to exclude itself from civilian society. In doing so, it acts in stark contrast to the persons that it serves.

30. Consider that victims of crimes investigated or prosecuted under military jurisdiction have been patently excluded from the recently enacted Canadian Victims Bill of Rights.\textsuperscript{25} Section 18(3)

\textsuperscript{25} Canadian Victims Bill of Rights, S.C. 2015, c. 13, s. 2.
of that law specifically excludes a victim whose assailant is tried under the *National Defence Act* from being kept apprised of their case as it advances, including victims of sexual assault or violent crimes.

**National Defence Act**

(3) This Act does not apply in respect of offences that are service offences as defined in subsection 2(1) of the *National Defence Act*.

31. Consider also that in 1998 the *National Defence Act* [NDA] was amended to confer to the military jurisdiction over the sexual assaults offences.\(^{26}\) Now any sex-based crime may be tried by and prosecuted before a Court Martial. The reason for the military doing so was their belief that they are better capable of doing so. Yet, the record shows that the problem remains endemic highlighting the military’s utter failure to cope with the situation and protect the victims

\(^{26}\) Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 25, s. 22. 1st Session, 36th Parliament.
after nearly 20 years of claiming their efficiency.

32. A review of the Defence establishment should not be left to the military to act alone. History is replete with examples of how a military, left to its own, ends in catastrophe, some of which will be chronicled below. Unfortunately, it is only when facing crisis and public pressure mounts that Parliament gets involved. Despite its vast powers and resources, it is both surprising and disappointing that Parliament rarely exercises any foresight to try and prevent catastrophe through meaningful and independent military justice reform.
EXAMPLE A: Somalia

33. Following the torture-killing of Somali teenager Shidane Arone and political pressure, a Royal Commission of Inquiry was undertaken to investigate the Deployment of the Canadian Airborne Regiment to Somalia.

34. The Final Report chronicles a litany of failures and, more significantly leadership shortcomings by the military chain of command and significant failures of the military justice system, whether in theatre or at National Defence Headquarters (NDHQ). It also revealed the existence of a climate of cover-up as well as deep moral and legal failings. The Final Report concludes as follows:

“The sorry sequence of events in Somalia was not the work of few bad apples, but the inevitable result of systematic organization and leadership failures, many occurring over long periods of time and
35. The Report made hundreds of findings and provided 160 recommendations, forty-five (45) of which dealing exclusively with the restructuration of the Military Justice System. It was only in response to this tragedy that the Legislature was compelled to introduce sweeping reforms to the *National Defence Act*, in 1998 introducing Bill C-25. Among the changes were:

a. Abolition of the death penalty;  

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28 Bill C-25 – *An Act to amend the National Defence Act and to make consequential amendments to other Acts, Statute of Canada* 1998, c. 35.

29 Capital punishment had been abolished in Canada’s *Criminal Code* on July 26, 1976. It took more than twenty (20) years to bring the military justice system in line with the common law.
b. Some strengthening of the independence of military judges relating to their appointment, powers and tenure:

- Military judges will now preside at all courts martial, not members of a court martial panel.

- The presiding military judge now determines and imposes the sentence, and could grant release pending appeal. Thus, the role of the court martial panel was made similar to that of a jury in a civilian criminal trial and the president of the panel (whose title should be changed to the "senior member" of the panel) would be more like the foreperson of a civilian jury.

- The military judges would be assigned to specific cases by the Chief Military Judge. With the concurrence of the Chief Military Judge, military judges would also be eligible to conduct boards of inquiry.
Military judges would hold office for renewable five-year terms, but could be removed for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council which would be deemed to have the powers of a court martial. Reappointment of judges would be on the recommendation of a Renewal Committee established under regulations made by the Governor in Council.

Rates and conditions of pay for the judges would be prescribed by the Treasury Board, however, their remuneration would be reviewed regularly by a Compensation Committee established under regulations made by the Governor in Council.

Military judges would cease to hold office on reaching the retirement age prescribed in the regulations.
c. Clarification and limitation of the functions of the Minister of National Defence;\textsuperscript{30}

o The power to appoint military judges has been transferred from the Minister to the Governor in Council (Cabinet);

o The power that the Minister approve certain sentences has been removed;

o The power that the Minister suspend punishments of imprisonment or detention or to appoint officials to do so has been removed;

\textsuperscript{30} Prior to the amendments brought by Bill C-25, the Minister enjoyed, under the NDA, numerous powers of a quasi-judicial nature. For example, the Minister could entertain petitions for release from pre-trial custody, order courts martial or designate other persons who would have this power, suspend punishments of imprisonment or detention, approve certain sentences, review or alter convictions in the case of a summary trial, etc. As noted earlier, his power to appoint military judges has been transferred to the Governor-in-Council.
The ministerial authority to review or alter convictions in the case of summary trials has been transferred to the CDS; and

The ministerial discretion to dispense with any retrial ordered by the Court Martial Appeal Court (CMAC) or the Supreme Court of Canada has been repealed.

d. Creation of new positions within the military justice system, such as the Director of Military Prosecutions.
EXAMPLE B: The Fynes inquiry\textsuperscript{31}

36. In March 2008 Corporal Stuart Langridge – a veteran of the Bosnia and Afghanistan conflicts - committed suicide in a barrack room at Canadian Forces Base (CFB) Edmonton. He was 28 years of age.

37. What followed the death of Cpl Langridge was horrific. The military police investigation was led by inexperienced, unsupervised and untrained investigators who made careless mistakes which have left Cpl Langridge’s parents, Mr and Mrs Fynes, feeling “deceived, mislead and intentionally marginalized.” This included withholding the fact that Cpl Langridge has left a suicide note to his mother for more than 16 months after his death.

\textsuperscript{31} Military Police Complaints Commission. Final Report following a public interest hearing pursuant to subsection 250.38(1) of the \textit{National Defence Act} with respect to a complaint concerning the conduct of several military police officers. Ottawa, March 10, 2015.

38. The treatment that Mr and Mrs Fynes have suffered at the hands of the CF Administration and leadership left them deeply scarred and resulted in a very public inquiry by the Military Police Complaints Commission into thirty-two (32) allegations of wrongdoing by several Military Police members. The MPCC considered testimony from ninety-two (92) witnesses, through sixty-two (62) days, which straddled nearly six (6) calendar months. Testimony has uncovered unusual, dramatic and disturbing events both in the lead up and the aftermath of Cpl Langridge’s most unfortunate passing.
EXAMPLE C: The Deschamps Review

39. In response to media reports of widespread sexual misconduct within Canada’s military, on July 9, 2014, the Government of Canada announced that there would be an External Review on sexual misconduct in the Canadian Forces. The Review was undertaken by Madam Justice Marie Deschamps, a highly qualified and recently retired Supreme Court judge.

40. Disappointingly, the military only provided Madam Justice Deschamps with a limited mandate, and she was therefore unable to probe too deeply into the military justice system to determine whether there was disconnect between the military policies and, more importantly, the application of these policies. As reported by the Canadian Press:

“While [Deschamps] will be allowed to look into anything she thinks is relevant to help the military prevent sexual misconduct and sexual harassment,
41. On April 29, 2015, the independent Report into Sexual Assault was released concluding that sexual misconduct within the military was rampant. The findings were shocking and detailed an epidemic of sexualized behaviours and attitudes. Specifically, Madam Justice Deschamps concludes that abuse of recruits at Royal Military College of Canada (RMCC) is “endemic”. She writes that many college students she spoke with:

“reported that sexual harassment is considered a ‘passage obligé,’ and sexual assault an ever-present risk. One officer cadet joked that they do not report sexual harassment because it happens all the time.”


42. Strangely, the Military did not fully accept the findings of this Report. Instead, with great fanfare, the Chief of Defence Staff (CDS), General Jonathan Vance, initiated Operation Honour, whose stated mission is “To eliminate harmful and inappropriate sexual behaviour within the CAF.”\textsuperscript{34} So far, it has not worked.

43. The following year, General Vance commissioned a Statistics Canada survey to reevaluate the data set. What embarrassment General Vance and his commanders must have felt when this new Report showed that nearly 1,000 members of the military reported being sexually assaulted within the previous 12 months. General Vance’s Order had been directly and flauntingly violated.

44. The Statistics Canada survey further found that soldiers, sailors and aviators are far more likely than other Canadians to be violated sexually. It

also suggests that military leaders have a long way to go in their efforts to change a culture in which sexual assault is tolerated.

45. Operation Honour is ongoing, and will not be concluded until “all CAF members are able to perform their duties in an environment free of harmful and inappropriate sexual behaviour.”\(^{35}\) How this is to be measured and declared is, to say the least, most uncertain.

\(^{35}\) Ibid.
INDEPENDENT OVERSIGHT

One of the oldest problems of human governance is that of the subordination of the military to political authority; in other words, how a society should control those who possess the ultimate power of coercion or physical force. Sun Tzu and Carl von Clausewitz argued long ago that military organisations are primarily the servants of the state. Civilian control of the military is the dominant concept nowadays, and there are many definitions of civilian control.

A very concise definition by Samuel Huntington is: ‘the proper subordination of a competent, professional military to the ends of policy as determined by civilian authority’. In its fullest sense, civilian control means that all decisions regarding a country’s defence – the organisation, deployment, and use of armed forces, the setting of military priorities and requirements and the allocation of the necessary resources – are taken by a civilian leadership.

Major-General (ret’d) Kees Homan
Clingendael – Nethelands Institute of International Relations

46. In Canada, civil society currently exercises very little and quiet oversight over the Canadian Armed Forces. Oversight is limited to four agencies, which yield relatively little oversight power.
47. First, the military has an Ombudsman, a position created by the Minister of National Defence, not Parliament. However, this is a far cry from the parliamentary Inspector General recommended by the Somalia Commission of Inquiry in the 1990s. The recommendation was for an external body, not the current Ombudsman structure, which is an internal body and has none of the statutory powers and independence of a true parliamentary ombudsman.\(^{36}\)

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48. Second, the Military Grievances External Review Committee advertises itself as a Tribunal, but it is not. The Committee’s mandate is limited to reviewing a limited number of grievances and making non-binding recommendations to the Chief of Defence Staff on grievances from the rank and file.\

49. Third, the Military Police Complaints Commission, a Canadian federal government independent, quasi-judicial body, established by the Parliament following the Somalia Inquiry Report. It offers avenues of complaints against the military police similar to that of civilian police.\[38\]

50. Finally, the Parliamentary Budget Officer, who provides independent analysis to Canadian Parliament on the state of the nation's finances, is a third-party review body. In this capacity, it

exercises authority over many federal bodies including the Canadian Armed Forces.\textsuperscript{39}

51. The Canadian military should embrace third-party oversight as an opportunity to learn and to improve. The military, in Canada and elsewhere, must not operate as if it were a parallel government – it is accountable to government and to Canadians whom they serve. However, the military are not always welcoming of such oversight and recommendations. Consider that, of the 46 recommendations made by the Military Police Complaints Commission following the Fynes Inquiry (above), none were formally “accepted” by the Canadian Armed Forces. The (then) Chairperson, Mr Glenn Stannard, concludes his Report as follows:

- “In the limited number of instances where direct responses are given and reasons are provided for rejecting

\textsuperscript{39} The Mandate of the Parliamentary Budget Officer can be found on their website at: http://www.pbo-dpb.gc.ca/en/about#WHOWEARE. Accessed June 6, 2017.
recommendations, the reasons suggest a failure to recognize the seriousness of the deficiencies identified in the Interim Report or a failure to understand the very nature of the issues to be addressed. Many of the responses nominally accepting the recommendations, as well as the few substantive comments made about the Commission’s findings, further confirm a general failure to acknowledge or even recognize what went wrong in this case”;

• “The responses included in the Notice of Action often fail to address the issues. They avoid providing direct or clearly discernable answers. The numerous non-committal responses to both the recommendations and the findings provide no information about whether and how the issues will be addressed. Even responses directly rejecting the recommendations generally provide little information about anything the Military Police might do instead to address the issues”; and
• “On the whole, the Notice of Action provided by the Military Police leaves the Commission and the Minister of National Defence (MND), as well as the parties and the public (assuming they are eventually allowed to see the Notice of Action), largely without meaningful answers. Instead, the Commission is left with many of the same concerns expressed in the Interim Report and, in some cases, with even greater concerns.”

52. The military does not embrace independent oversight, but it should. Moreover, it should embrace civil control over its accounting, equipment, deployments and management processes and above all, its military justice system which urgently needs to be modernized.

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53. It is somewhat ironic, that the military, which is always very strong on discipline, loyalty and accountability from the rank and file - by subjecting them to regular inspections, audits, reviews, reports and assessments - winces at being subject to a modicum of accountability. This is particularly troubling because they are currently only accountable to a very restricted number of independent oversight agencies, and all the while having practically no true parliamentary oversight over its defective and unfair military justice system.
ROLE OF THE COURTS AND TRIBUNALS

54. Though there have been some changes to the military justice system through judicial challenge, the Courts and Tribunals are largely not willing or able to intervene concerning issues of military justice. There are a few examples worth noting:

- Women were only permitted aboard Naval ships and the Infantry in 1989, thanks to a decision of the Human Rights Commission forcing it upon them. The Canadian Armed Forces and Department of National Defence argued against this modernization.\(^{41}\)

- The prosecution’s right to choose the mode of trial for an accused was only abolished in 2008 by order of the Court Martial Appeal Court in R. v. Trépanier\(^{42}\); and


\(^{42}\) 2008 CMAC 3.
• Security of tenure for military judges was not recognized until 2011, by order of the Court Martial Appeal Court in *R. v. Leblanc*.\(^43\)

55. The judiciary is cautious not to interfere with what it perceives as the will of Parliament. Indeed, the separation of powers may prevent them from doing so. Disappointingly, however, when given the chance to influence the military justice regime, the Supreme Court of Canada is consistently reluctant to do so.

56. In Canada, if the breadth of a law greatly exceeds the legislative intent, those parts of the law may be struck by the court as unconstitutional. *R. v. Moriarity*\(^44\) concerned section 130(1) of the *National Defence Act* and whether or not incorporation of *Criminal Code* offences as disciplinary offences was overbroad.

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\(^43\) 2011 CMAC 2.

57. The Moriarity case was an opportunity for the Supreme Court of Canada to clarify the historical ‘nexus’ test and the required restriction for the military to assume jurisdiction over offences committed in Canada, particularly in peace time. A central question was as follows: To retain jurisdiction over criminal offences, is it necessary for military prosecutors to show a connection to the maintenance of discipline, efficiency and morale of the military?

58. The Supreme Court of Canada answered the question emphatically: There are no limits to prosecutorial discretion, and any changes to this discretion would have to be legislated. The historical ‘nexus’ test was quashed.⁴⁵

⁴⁵ On May 19, 2017, the Court Martial Appeal Court of Canada (CMAC) decided R v. Déry, 2017 CMAC 2. The decision disposes of eleven (11) cases. The majority determined that it was bound by an earlier decision of a different panel of the Court Martial Appeal Court in R. v. Royes, 2016 CMAC 1, 486 N.R. 257. Chief Justice Bell wrote concurring reasons. At the time of writing this paper, it is unknown whether Déry might be appealed to the Supreme Court of Canada, as the live issue is distinguishable from that as decided in Supreme Court of Canada.
Disappointingly, the unanimous court write as follows:

“Parliament’s objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military. That objective, for the purposes of the overbreadth analysis, should not be understood as being restricted to providing for the prosecution of offences which have a direct link to those values.”46

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CONCLUSION

“For the bulk of academics and civilian practitioners military law was [and still is] terra incognita, an autonomous realm vis-a`-vis the civilian legal system. . . . [G]iven the occasional judicial utterance in the nineteenth century suggesting that the civil courts might be prepared to accept jurisdiction over military questions in ‘exceptional’ circumstances. But somehow exceptional circumstances never seemed to arise and therefore for a period of perhaps a hundred years, from the mid-nineteenth to the mid-twentieth century, the civil courts adopted a ‘hands-off’ approach to military disputes, with the result that military law remained effectively autonomous of and immune to civilian judicial oversight.”

G.R. Rubin

59. The Legislature is meant to have ultimate responsibility for a country's strategic decision-making, including control and oversight of the military. Historically, the military have resisted such oversight, conducting internal reviews and only really responding to crisis as they arise, and in response to public outrage. The current reality is that Canada’s military operates in isolation, as a nation within a nation.

60. The process of creating civilian oversight of the military has started in part. The Court Martial
Appeals Court, the Military Police Complains Commission, the Military Grievances External Review Committee, the DND/CF Ombudsman, and the Parliamentary Budget Office are all staffed by civilians.

61. However, the need for greater civilian oversight of Canada’s military has never been clearer. Most recently Operation Honour, which was designed and run by the military for the military, has failed to bring about a counter-culture to address the harmful sexualized environment. The 2016 comprehensive survey conducted by Statistics Canada shows that the problem is both enduring and deep-seated. Yet, military leaders continue to bumble in search of solutions. As a result, millions of dollars have been spent in resources, travel, pointless surveys, wallet sized reminder cards, and call-in centers that are closed on weekends. All of which suggest that the military is unable to fix this socio-cultural problem on its own.

62. “Operation Honour” is unlikely to rank as a success in military annals. It will most likely instead be seen as yet another illustration of the
serious disconnectedness between the military and the expectations of civil society, following the same harmful trends of the Somalia Inquiry Report and the Fynes Public Interest Inquiry.

Civilian control of the military through the medium of elected representatives is one of the cornerstones of democracy. It is essential to maintaining the accountability of armed forces personnel to the people, and also provides a vital - if not in itself sufficient - prerequisite for the legitimation of military entanglements by the state both at home and abroad.

The Democratic Audit of the United Kingdom: 2012

Civilian control over the armed forces

63. Even before the incidents in Somalia involving members of the Canadian Airborne Regiment and the start of the subsequent Commission of Inquiry, questions were being raised about the fairness of the military penal justice system,

http://democracy-uk-2012.democraticauditarchive.com/civilian-control-over-the-armed-forces
especially in view of the constitutional guarantees provided by the *Canadian Charter of Rights and Freedoms*. Supreme Court as well as Court Martial Appeal Court decisions and legislative amendments between 1985 and 2016 had resulted in significant changes in Canadian military law. However, despite these changes, there are still glaring deficiencies which have yet to be addressed by Parliament. Briefly stated, a short list of these deficiencies includes:

a. **Grievance process.** In the absence of legal representation or right of association, individual members of the military necessarily rely on the statutory grievance process to redress any violation of their rights. At present, the CF leadership has downloaded its managerial grievance responsibilities to middle-level management in the result that there is little perceivable attention being paid by the generalship to the claims and complaints filed by the rank and file;

b. **Summary trial.** Until legal representation and the right of appeal is granted to the
accused, summary trials cannot be considered to meet the minimum constitutional standards for fair and equitable justice – particularly when a finding of guilt can result in imprisonment and a criminal record; true penal consequences;

c. **Military Police.** In addition to seriously lacking a minimum standard of independence from the chain of command, the military police lacks the essential credentials and organizational characteristics associated with a quality law enforcement agency;

d. **The Director of Military Prosecutions** lacks the required independence. He reports to the Judge Advocate General who is himself a member of the chain of command;

e. **Fuller respect for the Rule of Law.** The 20-year campaign by the military to gain and maintain jurisdiction over sexual assault is having a persistent corrosive impact upon its institutional image and trust level by the
citizenry. Situated within a well developed civil society, the Canadian military should voluntarily rely on established democratic institutions and values instead of military tribunals. Military prosecutions for sexual assault crimes should be repealed.

64. It is the duty of our Legislature and the Minister of Justice to be vigilant and not so cavalierly cede control of our armed forces to the military, allowing it to operate in a vacuum and in accordance with their own ethos and concepts. Former French Prime Minister Georges Clemenceau once famously quipped: “War is too important a matter to be left to the military.” Perhaps there is a conventional wisdom to this statement, and military justice, accordingly, is also to important a matter to be left to the military.
## THE AUTHORS

**MICHEL W. DRAPEAU**

Professor Michel William Drapeau retired from the Canadian Armed Forces in 1993 after accumulating 34 years of military service. He was invested as an Officer in the Order of Military Merit in 1992.

Following retirement from the Canadian military, Colonel Drapeau went on to obtain a common law as well as a civil law degree. Called to the Bar of Ontario in 2002, he specializes in military and veterans matters. Since 2009, he is an adjunct professor of law at the University of Ottawa.

He has appeared often before the House of Commons and Senate committees as an expert witness on military issues. In 2011, he presented at the International Military Law Conference on “Military Jurisdictions” in Rhodes, Greece. In 2013, he testified before the US Congressional Panel to review of the Department of Defense systems used to investigate, prosecute and adjudicate allegations of sexual assault in the military. He is a regular contributor to the Yale University, Global Military Justice Reform Blog. He is a member of the International Society for Military Law and the Law of War as well as the International Society for the Reform of Criminal law.

He is the author or co-author or numerous texts and articles on military and veterans law.
Joshua is an experienced litigator focusing on military law, public law and administrative law. He has appeared many times before the Federal Court, Federal Court of Appeal, at Courts Martial, and before many administrative tribunals. His passions are in law reform and constitutional compliance.

After being called to the Bar in 2012, Joshua acted as co-counsel on the Fynes Public interest Inquiry, which led to 46 recommendations being made to Government to improve the quality of Military policing in Canada.

Joshua has authored and co-authored many articles on topics of military law and law reform in Carswell, Hill Times, Law Times, Ontario Bar Association Sword & Scale, Esprit de Corps magazine, and Defence Watch.

Joshua currently sits as the Chief Executive Officer of the Veterans Benevolent Fund, a charity that offers scholarships to children of disabled Canadian Armed Forces Veterans, and funding directly to Veterans in times of crisis.
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