

*Military Judges
Compensation Committee*



*Comité d'examen de la
rémunération des juges militaires*

REPORT ON THE COMPENSATION OF MILITARY JUDGES

SEPTEMBER 2008

REPORT OF THE MILITARY JUDGES COMPENSATION COMMITTEE

The Military Judges Compensation Committee was established in accordance with s. 165.22 of the *National Defence Act*, R.S.C. 1985 c. N-5 and s. 204.23 of the *Queen's Regulations and Orders*, P.C. 2000-1419 dated September 13, 2000.

Its purpose is "to inquire into the adequacy of the remuneration of military judges."

1. THE MANDATE

This Committee, as the two previous ones (established in 2000 and 2004), is mandated to consider in conducting its inquiry:

204.24 (3):

- a) the prevailing economic conditions in Canada, including the cost of living and the overall economic and current financial position of the federal government;
- b) the role of financial security of military judges in ensuring judicial independence;
- c) the need to attract outstanding officers as military judges; and
- d) any other objective criteria that the Commission considers relevant.

2. HEARINGS

Pursuant to subsection 204.24(1) of the *Queen's Regulations and Orders for the Canadian Forces*, P.C. 2000-1413 ("the QR&O"), the present quadrennial inquiry into the remuneration of military judges was to have commenced on September 1, 2007 and to have been completed within nine months of that date. However, the members of the Committee nominated by the Government of Canada and by the Military Judges were not appointed until December 3, 2007, and the Chair of the Committee was not appointed until January 29, 2008. Accordingly, with the consent of the Minister and of the military judges and in accordance with subsection 204.24(2) of the QR&O, the Committee postponed the commencement of its quadrennial inquiry to January 29, 2008.

Upon its nomination, the Committee established a process in consultation with counsel representing the Military Judges and the Government of Canada.

Both parties provided thorough and helpful written submissions as well as reply submissions, with extensive supporting documentation. This was followed by a bilingual hearing held in Ottawa June 10-11, 2008 with simultaneous interpretation available.

The Committee benefited from submissions on behalf of both parties of the highest calibre and quality – Me Raynold Langlois and Me Chantal Chatelain on behalf of the military judges, and Ms. Anne Turley on behalf of the Government of Canada – for which the Committee is most thankful. Counsel for both parties are to be commended.

The Committee also wishes to express its thanks for the able assistance it has received from its Executive Secretary and Counsel, Me Maxime Faille of Gowling Lafleur Henderson LLP.

In addition to receiving the written and oral submissions of the parties, the Committee reviewed and provided to the parties for comment the Report of the Honourable George Adams, Q.C. into the compensation of Federal Court prothonotaries (“the Adams Report”). The report of the third quadrennial Judicial Compensation and Benefits Commission in relation to all federally-appointed judges other than military judges, chaired by Sheila Block (“The Block Commission”), was provided to the Committee by counsel for the military judges shortly after the June 10, 2008 hearing. However, neither party asked to address any matters arising from the Block Commission report.

3. A *DE NOVO* INQUIRY

The Committee is of the view that its task is to conduct the inquiry as to the adequacy of the remuneration of the military judges, taking into consideration the four criteria set out above, *de novo*, and rejects the argument made by the government of Canada that there is a “rebuttable presumption that the amount of compensation recommended by a previous salary commission and accepted by the government was adequate to preserve and maintain a state of financial security for judges”¹ for the following reasons.

First, the mandate of the Commission specifically directs it to consider “the prevailing economic conditions in Canada” which, of course, refers to the economic conditions prevailing at this time and which may have been different under the mandate of previous Commissions.

Second, both parties have submitted that the 2000 and 2004 Reports should not be followed since the “only other criterion that was considered under [“other objective criteria”] was whether parity was required, and if so what was the appropriate comparator group. Indeed, in the last review, this factor became the dominate point of discussion and consideration, giving it a weight that is not merited when viewed from the overall mandate of the Committee and the full set of factors it is required to consider.”² This being said, in its submissions, the government of Canada agreed

¹ Submission of the Government of Canada to the Military Judges Compensation Committee, May 8, 2008 (“Submission of the Government of Canada”), at p. 5, para. 18.

² *Ibid.*, at p. 20, para. 70.

with the result reached by the 2004 Commission as to the salaries it set for the Military Judges.

4. MILITARY JUSTICE

Military justice is recognized in the *Canadian Charter of Rights and Freedoms* (subs. 11 (f)) and it is part and parcel of the federal justice system of Canada. The military courts are presided over by judges nominated by the Canadian government with jurisdiction to conduct courts martial, both in Canada and abroad. Their decisions are appealable to the Court Martial Appeal Court of Canada, a civilian court composed of Federal Court and Superior Court judges.

Both parties have described in considerable detail the role and functions of military judges and it is not necessary for our purposes at this stage to reproduce them. It may be more useful to refer to those in due course.

In essence, however, the principal role and functions of military judges are to preside at courts martial with specific jurisdiction, as succinctly summarized in the Military judges submission, to:

- Try any officer or non-commissioned member, without any restriction related to rank or duties;
- Try offenses of a military nature contemplated by the *Criminal Code*, whether committed in or outside Canada;
- Try any penal matter under any federal statute, whether committed in or outside Canada;
- Try a variety of persons, including civilians;
- Apply foreign law.

Each Court Martial has the same powers, rights and privileges as a superior court of criminal jurisdiction in respect of numerous matters.

Courts martial have evolved over time. Through a gradual constitutional, legislative and jurisprudential progression, the role, status, jurisdiction and functions of military judges have come to increasingly resemble those of their civilian brethren.

Thus, in *MacKay v. The Queen*,³ a majority of the Supreme Court of Canada found that the trial of a member of the Canadian Armed Forces by a Standing Court Martial did not violate the right to equality before the law and to be tried pursuant to an

³ [1980] 2 S.C.R. 370.

independent and impartial tribunal pursuant to ss. 1(b) and 2(f) the *Canadian Bill of Rights*.

In *Généreux v. The Queen*,⁴ this position was revisited by the Supreme Court in light of the adoption of the *Canadian Charter of Rights and Freedoms* and the evolving caselaw relating to judicial independence thereunder. While ruling certain aspects of the military justice system unconstitutional, the Supreme Court of Canada recognized the *sui generis* nature of courts martial and the need for a parallel system of justice as found in the *National Defence Act*. The Supreme Court ruled that military judges need not have precisely the same safeguards of judicial independence as apply to civilian judges. Accordingly, the requirement of security of tenure could be met by renewable fixed-term appointments rather than appointment for life or age of retirement.

In *Lauzon v. R.*,⁵ the Court Martial Appeal Court of Canada ruled that the then existing system of establishing the remuneration of military judges was unconstitutional, paving the way for the current mechanism by which this Committee is established.

More recently, the conclusions in *Généreux* have been challenged, and the Court Martial Appeal Court has concluded that military judges, as their civilian counterparts, must be provided security of tenure until retirement subject to removal for cause. The Court Martial Appeal Court has aptly summarized:

The evidence filed before the military judge indicates that the rationale behind *Généreux*, above, and *Lauzon*, above, no longer exists...

With the evolution of time court martial courts have become quite different from the way they were. At General Courts Martial the military judge is no longer an adviser but now performs a role akin to a judge in the civilian courts; that is even more so at Standing Courts Martial...⁶

From this analysis and considering the whole of the submissions of the parties on this issue, we conclude that Courts Martial are today *sui generis* courts under the umbrella of the Federal Judicial Courts system much more akin to other federally-appointed judges, with which they share their mode of nomination, jurisdiction and appeal process, although not all their powers, particularly in purely civilian matters and judicial review, than provincially-appointed judges.

There are presently four military judges in Canada, including the Chief Justice.

⁴ [1992] 1 S.C.R. 249.

⁵ (1998), 8 Admin. L.R. (3d) 33 (C.M.A.C.)

⁶ *R. v. Dunphy* and *R. v. Parsons* [2007] CMAC 1, at paras. 19-20. See also *R. v. Lauzon* (1998), CMAC 415 and *R. v. Boivin* (1998) CMAC 410.

In common with justices of the Tax Court of Canada and the Federal Court, as well as many superior court judges, military judges must travel extensively in the performance of their duties. Unlike any other judges in Canada, they must also occasionally travel overseas to preside over courts martial in areas of Canadian deployment.

5. THE ROLE OF JUDGES IN GENERAL AND OF MILITARY JUDGES IN PARTICULAR

While dealing only with the adequacy of the Military judges' salary, as this Committee is mandated to do, one should not minimize the fundamental role all judges play in our free and democratic society as a "pillar of our entire justice system"⁷ and in maintaining the public confidence and respect for the justice system.

In this regard, it is worth quoting Justice Gonthier's opinion in the *Therrien* case, *supra* at para.108:

The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of the judiciary. Apart from the traditional role of an arbiter which settled disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the Canadian Charter, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies.

Military justice demands no less of its judges.

Nevertheless, despite the evolution of the military justice system described above, the fact remains that military judges have opted into a career of military service. While fully independent of the chain of command, they remain a part of the military, with all attendant advantages and disadvantages this brings. Their situation, therefore, remains a unique one. As the military judges indicate in their submission, "The Office of the Chief Military Judge is a unit of the Canadian Forces of which the Chief Military Judge is the commander."⁸

6. JUDICIAL INDEPENDENCE

The fundamental role of this Committee is to ensure judicial independence, the main reason for the establishment of the Compensation Committees mandated by the *Provincial Judges Reference* [1997] 3 R.C.S. 3 as an independent, effective and

⁷ *Therrien (Re)*, [2001] 2 S.C.R. 3 at para.109.

⁸ Submission on Behalf of the Military Judges, May 9, 2008, para. 51.

objective way to avoid, among other things, political interference in the assessment of the salary level of judges. It is also one of the criteria which this Committee must consider in inquiring into the adequacy of the remuneration of military judges.

Upon the integrity, wisdom and independence of the judiciary depend the free rights of men and women.

These words link the importance of an independent judiciary with the protection of the rights of all people. It is worth noting, however, that the purpose of judicial independence is not to benefit judges personally but to permit judges to better serve the public good.

The United Nations Basic Principles on the Independence of the Judiciary endorsed by the U.N. General Assembly state, in article 2:

The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

In *R. v. Beauregard*, [1986] 2 S.C.R.56, Chief Justice Dickson characterized judicial independence as “the lifeblood of constitutionalism in democratic societies”.

As essential as judicial independence is in a free and democratic society, it remains a “fragile freedom” as Tom Berger’s book’s title reminds us. The erosion, be it by reduction by inflation or other means, of one of the three core characteristics of judicial independence: security of tenure, financial security and administrative security will encroach upon judicial independence.⁹

As the Supreme Court of Canada held in the *Provincial Judges Ass’n of New Brunswick v. New Brunswick et al.*¹⁰:

The Government’s questioning and reformulation of the Commission’s mandate are inadequate. As we have already mentioned and as the Court of Appeal correctly pointed out, the Commission’s purpose is to depoliticize the remuneration process and to avoid direct confrontation between the Government and the judiciary. Therefore, the Commission’s mandate, as the Government asserts, cannot be viewed as being to protect against a reduction of judges salaries below the adequate minimum required to guarantee judicial independence. The Commission’s aim is neither to determine the minimum remuneration nor to achieve maximal conditions. Its role is to recommend an appropriate level of remuneration...

⁹ See *Valente v. The Queen*, [1985] 2 S.C.R. 673, at para. 80.

¹⁰ [2005] 2 S.C.R. 286.

This quotation answers both parties' submissions concerning minimum and maximum levels of remuneration. None has anything to do with an "adequate" level of remuneration to which we now turn.

7. ADEQUACY

In the *PEI Judges Reference* [1997] 3 S.C.R. 3, the Supreme Court of Canada indicated criteria similar to those applicable to our Compensation Committee, particularly the word "adequacy". We adopt in this regard the views expressed by the Drouin Compensation Commission in 2000 at p. 23:

Part of our principal mandate under the Judges Act is to inquire into the adequacy of the salaries of the Judiciary. "Adequacy is a relational term in seeking to determine its meaning in the context of judicial salaries, several questions arise. Adequate for what purpose? Adequate in relation to who or what? Adequate over what time frame? Against the background of the constitutional principles articulated in the PEI Reference case, we have concluded that the operative meaning of "adequacy", to guide our work, requires us to determine what constitutes a fair and sufficient salary level for the judiciary taking into account the criteria set out under 26(1.1). What is required in this context is a proper judicial salary level, not a perfect one.

The criteria set out under 26 (i.i) are similar to those of this Committee.

The Criteria

A. Prevailing Economic Conditions in Canada

This criterion includes the state of the economy in general as well as the cost of living as of September 1st, 2007, the date to which the level of remuneration of the military judges dates back.

On this issue, the Military judges submit the following:

- Canada's financial situation is the strongest among all G-7 countries (2008 Budget Plan Introduction) ;
- Economic and fiscal fundamentals in Canada are "rock solid" (Economic Statemnt, p. 7) ;
- The economy has been expanding over the last 16 years and economic fundamentals remain solid : the unemployment rate is at its lowest level in 33 years and more than 400 000 jobs have been created since 2006 ;

- The financial situation of businesses and households is solid, as compared with other countries and other periods in our history ;
- The financial situation of the federal, provincial and territorial governments remains solid ;
- Inflation remains low, stable and predictable (2008 Budget Plan p. 11)

In conclusion, the Military judges affirm that :

- There are no across the board decreases in government expenditures;
- The economy remains vigorous;
- There is no substantial barrier to the government's capacity to pay;
- The Canadian economy can easily sustain the payment of an adequate salary level;
- The salary of the military judges has a negligible impact on the government budget.

For its part, the Government of Canada submits :

- In its Economic Statement of October 30, 2007, the Government has incorporated lower private sector forecasts of gross domestic product (GDP) growth of 2.4% for 2008 and 2.7% for 2009 in its fiscal projections for those years;
- Overall, there remained some downside risk to the Canadian economic outlook relating to weaker U.S. and global growth and ongoing financial uncertainty. Indeed, these downside risks have to some extent materialized. Accordingly, in its Budget Plan of February 26, 2008, growth forecasts were consequently reduced to 1.7% for 2008 and 2.4% for 2009, while the World Economic Outlook report published by the International Monetary Fund further downgrades growth projections, forecasting Canadian GDP growth of only 1.3% for 2008 and 1.9% for 2009;
- The contraction in economic growth has led the government to “[keep] spending focused and disciplined, with spending in 2007-2008 and 2008-2009 below the track set out in the Budget 2007 in relation to the overall size of the economy.”

The government states that inflation has remained low over the past four years, and is expected to remain so, with forecasts of 1.8% for 2008 and 1.9% inflation for 2009. In this regard, the wages of military judges over the past four years has significantly outpaced the rate of inflation as well as the salaries of other wage earners paid from the federal public purse, including the public service in general, General Service Officers, Senior Officers, “EX”-level federal civil servants, and superior court judges appointed pursuant to s. 96 of the *Constitution Act, 1867*.

A good starting point for our analysis is the October 30, 2007 Government Economic Statement tabled in the House of Commons by the Minister of Finance; however, we must keep in mind that the process must be based upon objective criteria and not government discretion. That statement forecasts real economic growth and the measures the government is taking to offset potential risks. Since then, the situation has evolved due to the housing and mortgage crisis in the U.S. but there is nothing in the evidence before us which indicates that the Canadian economy is presently unable to sustain an adequate level of remuneration for the military judges, taking into consideration that there are only four military judges, including the Chief Justice, whose remuneration are in issue here, as realistically pointed out by the government of Canada: “With only four military judges, the impact of any increase of any amount will have but a modest impact on the federal treasury in absolute terms.”¹¹

This, of course, should not detract us from the application of the “adequacy” criteria. The fact that increases in salary are affordable, while not devoid of relevance, does not in itself militate in favour of such increases. Rather, the state of the economy and the relative pace of economic growth or contraction may be suggestive of the appropriate relative increase or decrease in compensation of all public servants, including judges civilian and military.

B. Financial Security

In the *PEI Judges Reference*, supra, the Supreme Court of Canada identified three components of judicial financial security: the requirement of an independent, objective and effective Commission, the avoidance of negotiations between the judiciary and the executive and the requirement that salaries not fall below an acceptable minimum. We have already dealt with the first two procedural requirements.

On this issue, the government submits that the salaries of military judges have clearly not fallen below an acceptable minimum, being presently set, as recommended by the 2004 Compensation Committee at \$ 186,618.00 which the Government suggests should be increased annually “to allow for a cost of living adjustment until the next review.”¹²

The military judges, on the other hand, propose the same level of salary as that of superior court judges (presently set at \$260,000 but subject to the Quadriennial Compensation Commission recommendations, which proposes a salary of \$264,300 retroactive to April 1, 2008, with annual increases of 2% above current indexation for the next four years).

While the present salary of military judges may be sufficient, as the government asserts, to meet the constitutional requirement of ensuring judicial independence *per se*, the task of this Committee is to determine the “adequate” level of military judges’

¹¹ Submission of the Government of Canada, para. 49.

¹² *Ibid.*, para. 6.

compensation. To that end, the Committee must take into account a number of factors including the need to attract outstanding officers from their ranks and the Reserve, the role and level of responsibility of military judges, the historical background and traditions, their place in the hierarchy in the Canadian judiciary as well as other relevant objective criteria.

We have already discussed the necessity to maintain the public confidence in the independence of the judiciary and to that end the importance of ensuring its financial security. We will now move to consider other important factors.

C. The Need to Attract Outstanding Officers as Military Judges

There is no dispute that the remuneration of military judges must be such that it must attract the best candidates to apply for military judiciary and that it must reflect the nature and status of the office.

As far as the government is concerned, the present level of salary does attract first-class military judges whereas the military judges point out the low number of recommended and highly recommended candidates as well the difficulty in attracting candidates from the Reserve force. Both produced charts to illustrate their point of view.

In our view, those figures are not determinative of this issue. Salary is not the sole factor in attracting outstanding candidates to the judiciary in general neither to the military justice in particular. The high level of excellence required from military judges may be a factor to reduce the pool of available candidates particularly from the Reserve. They include the need to:

- be outstanding members of the Bar of at least 10 years standing;
- be outstanding members of the military;
- possess sound judgment;
- possess extensive knowledge of criminal law, military law and discipline offences;
- possess personal characteristics of competence, experience, honesty, integrity and social awareness upon which they are assessed.

The military judges note that only 11 individuals applied for the position of military judge in 2005 and again in 2008. Five of these candidates were “highly recommended” while three were “recommended.” The military judges go on to point out that only three members from the reserve force applied for the position in 2005 and only 2 in 2008, which, the military judges state, is indicative of ongoing difficulty in attracting candidates outside the regular force.

The government of Canada responds that the percentage of candidates rated “highly recommended” or “recommended” in fact compares favourably to the experience of the civilian side.

In our view, the evidence in relation to this criterion is essentially neutral. As with civilian judges, salary is not the sole determinant as to whether or not an individual chooses to seek judicial appointment. Nor can we conclude that the relative lack of candidacies from outside the regular force correlates to the current level of income. Other factors, include attendant, lifestyle changes, may be of equal or greater significance.

Nevertheless, there can be no doubt that the level of compensation must be such that it will not deter, but indeed encourage, outstanding officers to apply for the position.

D. Other Relevant Factors

Under this heading, the Committee is of the view that are relevant the responsibilities, the role and functions of the different actors in the judicial system as well as the place of the military justice in the hierarchy of the judiciary.

As previously mentioned, the military justice is more akin to the federal justice system of which it shares both in its nomination, territorial jurisdiction, areas of competence and appeal process while at the same time being a *sui generis* specialized court.

This being said, we are of the view that a broad inquiry into the different actors of the federal judicial system is warranted to give us the range within which the military justice inserts itself. This, of course, should not assume that parity should be the goal of that exercise. It is not.

We are grateful to both parties for having given us the necessary information to provide a range of useful comparators to help us assess the adequacy of military judges remuneration within that range.

Although not particularly necessary for our purposes, the parties have included the information concerning the salaries of provincial judges in the different Canadian provinces which, of course, are established in relation to their respective economic situation which may be different from the economic situation of the Canadian government and are also in direct relation to the roles and responsibilities of provincial courts which are also at a variance from the role and responsibilities of judges of federal nomination and jurisdiction.

NWT	\$209,246
YUKON	\$199,901
B.C.	\$202,356
ALBERTA	\$220,000
SASKATCHEWAN	\$198,900
MANITOBA	\$178,230

ONTARIO	\$227,735
QUEBEC	\$191,267
NEW BRUNSWICK	\$174,946
P.E.I.	\$196,144
N.S.	\$180,708
N.L.	\$173,591

More relevant for our purposes are the salaries of officers and high ranking officials in the military:

Colonel	\$115,440-\$129,096
Brigadier-General	\$136,608-\$147,325
Major-General	\$157,164-\$184,596
Lieutenant-General	\$195,348-\$211,500
Chief of Defence Staff	\$199,700 to \$234,000

Legal Officers:

Lieutenant-Colonel	\$128,256-\$136,296
Colonel	\$144,924-\$171,300
Brigadier-General	\$160,992-196,404
Judge Advocate General	\$260,000**

** According to the military judges, the salary of the current JAG is by contractual agreement tied to that of superior court judges. The JAG is a Governor-in Council appointment

Similarly, we have the benefit of information as to the remuneration of senior federal civil servants, at the executive, deputy minister and senior deputy minister levels, with the caveat that “although they must ultimately be paid from public monies, judges are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive”.¹³ That does not mean, however, that the salaries of military judges must be set without any regard to the remuneration levels within the senior ranks of the government or that they should be permitted to fall materially behind the remuneration available to senior individuals within the government.¹⁴

EX5 (incl. Assistant Deputy Ministers)	\$155,100-\$182,500
Deputy Minister 1	\$173,600-204,200
Deputy Minister 2	\$199,700-234,900
Deputy Minister 3	\$223,600-263,000
Deputy Minister 4	\$250,300-294,500

¹³ *PEI Judges Reference*, *supra*, at para. 143.

¹⁴ Adams Report, *supra* at p. 22.

(Excluding “at risk” compensation, with maximums of 11.5% to 32.4% of salary, and which in practice have averaged in the range of approximately 10.5%-16% at the DM3 and DM4 levels since 2004, for an estimated average total remuneration of \$292,235 for DM3s and \$332,199 for DM4s)

Although this Committee is not in any way bound by the recent reports in relation to the compensation of Federal Court prothonotaries and of all other federally-appointed judges, it is of interest to note their conclusions. The report of the Honorable George Adams, Q.C. on the salary and benefits of six prothonotaries appointed under section 12 of the *Federal Court Act* recommends their salary be set at 80% of a federal court judge salary, retroactive to April 1, 2004 (plus allowances for which we are not concerned here) amounting to approximately a salary of \$203,000.00, while as noted above, the Block Commission has recommended “that the salary of puisne judges be set at \$264,300 effective April 1, 2008.”

In summary, the salaries from the above charts vary from a range of approximately \$173,000-\$228,000 for provincial court judges (average of \$196,085), to a range of \$115,000-\$234,000 for senior military officers, to a range of \$128,000-\$260,000 for senior legal officers, to a range of \$155,000 to \$332,000 for senior civil servant, to a present salary of \$260,000 for federally-appointed superior court judges.

CONCLUSION

The parties have both agreed that the previous Committees’ determination that the salary of military judges should not be tied directly to that of the average of provincial court judges was not an appropriate approach to or method for the determination of adequate compensation of military judges. This Committee agrees. Among other problems, this would constitute an abdication of the responsibility of this Committee to make its own determination, by linking the outcome to the conclusions of the various other judicial compensation committees in Canada. This would also entail a degree of circularity. It is up to each such judicial compensation committee to make its own assessment, rather than to predicate its conclusion on those of others. Furthermore, the salary of military judges cannot be determined in reference to any one single comparator.

The present Committee, having regard to the criteria set out in the mandate of this Committee, the evidence before us, the arguments of both parties which we have reviewed in detail, and the position of military judges within the Canadian judicial scheme, arrives at the conclusion that after consideration of all the relevant criteria and objective factors, an adequate salary for the military judges should be set at \$225,000, as of September 1, 2007.

Little evidence was submitted as to the appropriate measure of indexation to protect this salary level from inflation. Given that the Industrial Aggregate Index has been deemed to be appropriate in relation to other federally-appointed judges, and as was endorsed by the first Military Judges Compensation Committee, we would

recommend that this measure be used to adjust the salary of the military judges on an annual basis.

Our recommendations, to use the terms of the McLennan Commission (2004), “are for a level of compensation that will not deter the best and the brightest from seeking judicial office and that should ensure that the level of compensation provided to puisne judges is not so great that the office will be sought after for its monetary rewards alone. Rather, it should appeal to those highly qualified persons of maturity and judgment who seek to provide a valuable public service to their country. In other words, we are of the view that “too much” would not be in the public interest as “too little” is obviously not in the public interest.

Other Matters

a) Chief Military Judge

In its 2004 Report, the previous Committee recommended that the Chief Military Judge receive a premium of 3% in light of the additional duties incumbent on the occupant of this position. The military judges proposed that this be increased to 7%, noting that the average differential in regard to federally-appointed judges and chief justices or associate chief justices is some 10%, while the differential among provincial court judges, other than in P.E.I., is some 5-12%.

In our view, there is no basis for disturbing the proposal of the previous Committee. In this regard, the relatively small size of the military judiciary (four judges in total) is to be considered. Accordingly, we recommend that the salary of the Chief Military Judge be supplemented by an amount equal to 3% of that of the puisne military judges.

b) Discretionary Expenditures

In addition, the military judges have proposed that they be provided an allowance for certain expenses, including attendance at conferences. There was inadequate evidence presented on this issue to allow us to recommend such an allowance. During the oral hearings, the Chief Military Judge did indicate that his office is allotted a general operation budget, a portion of which is as a matter of practice dedicated to covering expenses relating to discretionary travel and continuing judicial education. He submitted that each judge should be provided an individual amount to be used in their discretion and not subject to the approval of the Chief Military Judge.

We do not agree that it is necessary for each individual judge to be allotted a distinct allowance for these purposes. Based on the limited information available, it would appear that the present budgeting is adequate to meet the needs of discretionary expenditures. There is no constitutional impediment to such a budget being managed at the discretion of the Chief Military Judge.

c) Costs

The military judges also raised the issue of the costs of their legal representation before the Committee. In this regard, they note that their numbers do not permit them to pool a significant amount of resources to dedicate to legal representation before this Committee.

Contrary to the *Judges Act*, neither the *National Defence Act* nor the *Queens Regulations & Orders* thereunder provide for compensation in relation to representation before the judicial compensation committee.

Regardless, we are of the opinion that it would be appropriate for the federal government to provide reasonable compensation for legal representation. We were advised at the hearing that an amount of \$60,000 was requested by the military judges for this purpose, and has been paid by the Government of Canada. As a matter of principle we support the decision of the government to provide an amount sufficient for legal representation before this Committee.

The Hon. Guy Richard, Chair
The Hon. Claire L'Heureux-Dubé, Q.C.
The Hon. David Gruchy, Q.C.

ADDENDA:

While I am in complete agreement with my colleagues of the Military Compensation Committee as to the adequacy at this time of the recommended remuneration of the Military judges in the present Report, I wish to make an additional point.

As pointed out in the attached Report, there have been a number of changes to the role, responsibilities and status of the military judges since the 1992 Supreme Court of Canada judgment in *Généreux v. The Queen* [1992] 1R.C.S. 259 as well as its subsequent follow up in Bill C-25 and further legislative initiatives, in addition to the decisions of *R. v. Lauzon* (1998), 8 Admin. L.R. (3D) 33 (C.M.A.C.) and *R. v. Boivin* (1998) 245 N.R. 341 (C.M.A.C.) and the Report of the First Independent Review of the provisions and of the operation of Bill C-25 by former Chief Justice Lamer. I note in passing Bill C-45 to amend the *National Defence Act* which had its first reading on March 3, 2008 and deals with certain aspects of military justice.

As a consequence, “ Military Judges in Canada are now judges in every sense and they play a full role in ensuring respect for the rule of law and the protection of individual freedoms and rights” (Submission by the Military Judges to the Military Judges Compensation Committee, Dec. 15, 2003 at p. 8).

Military justice plays a vital role in our country particularly at this time of involvement of Canada in conflicts outside its borders. The quality of its judges and their total independence is of the utmost importance both for the justice it renders as well as the international reputation of the Canadian military justice.

Given that military judges are nominated by the federal government and that their jurisdiction extends to the whole of the country and even beyond, it defies logic and policy in my view that, as far as their remuneration is concerned, military judges are not considered judges of the federal court as is another specialized court, the Tax Court of Canada. The judges of those courts have an extra-provincial jurisdiction, hear matters of federal jurisdiction, travel extensively and hear cases in all provinces. This is true also of Military judges who, in addition, are empowered to, and do, conduct hearings outside Canada should the cases so require.

This difference in remuneration of military judges (which are the only ones among all federally appointed judges to be treated in such a way) as regards federal court judges may give rise to the perception that they are “second class” judges and do not deserve the same respect and consideration as federal court judges. In my view, a judge is a judge and there is absolutely no logic in distinguishing between them as far as their remuneration is concerned, given their otherwise similarities in nomination and jurisdiction. Similarly, there is no justification at a policy level to make such distinctions.

On a more pragmatic level, there would be an obvious advantage for all concerned to have one and only one quadrennial compensation committee to deal with all federally appointed judges, including the prothonotaries of the federal court which are the subject of the recent special advisory report of the Honorable George Adams.

These points have of course been made before us by the military judges. The government of Canada, for its part, has underlined the specialized nature of the military justice, its military tradition and the difference in jurisdiction between both the Tax Court and the Federal Court and the Military Court. These are valid points but, in my view, they do not touch on the logic of the system for federally appointed judges. For example, *grosso modo*, the Tax court has no jurisdiction in criminal matters and the Military court has no jurisdiction in civil matters. The inescapable conclusion is that both are specialized courts within the federal court system and it does not displace the fact that judges of both courts are nominated by the federal government to deal with federal matters with full territorial jurisdiction and whose both decisions are appealable to the Federal court, called courts martial as regards the Military court. In my view, these are the proper criteria which militate in favour of a unified federal court system and a similar remuneration for all judges of the federal court system.

CLAIRE L'HEUREUX-DUBÉ

Mme L'Heureux-Dube has kindly given me the opportunity to read her addendum to the Military Judges Compensation Committee report.

During our review of military judges' compensation it appeared to me that there are anomalies in the salaries of federal judicial appointees, which may or may not be logical.

I agree with Mme L'Heureux-Dube that the role of the Quadrennial committee appointed pursuant to the *Judges Act* R.S.C. 985 c. J-1 should be expanded to review the compensation of all federally-appointed judges and judicial officers.

DAVID R. GRUCHY

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