REPLY OF THE MILITARY JUDGES

IN RESPONSE TO THE SUBMISSIONS OF THE GOVERNMENT

to the

Military Judges Compensation Committee

June 4, 2012

M^e Chantal Chatelain
LANGLOIS KRONSTRÖM DESJARDINS, AVOCATS S.E.N.C.R.L.
1002, rue Sherbrooke Ouest, 28^e étage
Montréal (Québec) H3A 3L6
Téléphone : 514 282-7811
Télécopieur : 514 845-6573
chantal.chatelain@lkd.ca

TABLE OF CONTENTS

I. INTRODUCTION

1. These Reply Submissions are in response to the Submissions of the Government of Canada dated May 28, 2012.

2. The Military Judges do not intend to repeat here all of their Submissions, but will rather respond specifically to some of the Government's propositions. These Reply Submissions are also not meant to be exhaustive, and they should be considered together with both the Submissions of the Military Judges dated May 28, 2012, and the oral presentation scheduled for June 14, 2012.

3. In sum, the Military Judges enjoin the Committee to reject the analysis submitted by the Government as well as the Government's propositions regarding the salary of the Military Judges for the period from September 1, 2012, to August 31, 2015, and the severance pay provided to Military Judges.

4. The Government's propositions are ill-founded notably because of the fact that the Government's analysis fails to consider what the adequate base salary of the Military Judges should be. The Government mostly focuses on mere percentages of increase in the abstract and seeks to apply to the Military Judges a compensation review scheme which was essentially devised for its civil servants and for other intents and purposes.

5. More particularly, the Government's proposition lies on the erroneous assumption that its response to the 2008 Committee necessarily set the Military Judges salary at an adequate level and that there is no need to revisit the issue or consider the reasoned recommendations of the 2008 Committee which were rejected by the Government. In doing so, the Government is also wrongfully inviting the Committee to ignore the clear and unambiguous recent acknowledgment by the Court Martial Appeal Court of the true nature, role and status of the military judiciary as being an integral part of the Canadian judiciary.

6. Another erroneous premise on which lies the Government's proposition concerns the faulty application by the Government of the relevant constitutional requirements. By stating, notably at paragraphs 42 and 45 of its Submissions, that the purpose of this important constitutional process is merely to determine the "minimum" remuneration threshold, and that judges' salary is adequate as long as it is fixed at this "minimum" threshold, the Government is gravely distorting the process. The mandate of this Committee does not consist in determining what is the mere minimum level at which the judicial salary should be fixed, but rather consists in determining an adequate salary, taking into account all of the relevant criteria.

7. Finally, as expected, the Military Judges note that the Government invokes an excessively gloomy economic climate and seems to be overstating the impact of the current economic situation on the determination of an adequate salary for the Military Judges, all the while admitting the negligible, if not wholly insignificant, impact that the payment of the adequate salary proposed by the Military Judges would have on the public purse.

8. The Military Judges are in no way suggesting that economic factors should not be taken into account by the Committee, but they feel that the Government is giving them undue

weight in light of the financial consequences at stake and the true economic state of the nation.

9. The Military Judges therefore reiterate their Submissions and pray the Committee to acknowledge their true nature, role and status as an integral part of the Canadian judiciary and to recommend the corrective measures required to fully achieve this recognition.

10. We will address more extensively below some of the shortcomings of the Government's Submissions.

II. THE PROPOSITION RESPECTING THE SALARY OF MILITARY JUDGES

11. With respect to its proposition regarding the salary of the Military Judges, the Government is taking the exact same position taken before the Levitt Commission regarding the other federally appointed judges. In that respect, the Military Judges note that the position of the Government to increase the salary level of the other federally appointed judges based on the Industrial Aggregate Index (hereafter the "**IAI**") rate capped at a maximum of 1,5% per annum for the quadrennial period was fully considered, and rejected by the Levitt Commission[1].

12. The Government seems content applying to the Military Judges virtually the same arguments as those drafted for the other federally appointed judges in the context of the Levitt Commission in support of its proposition of a salary increase based on a capped IAI, notwithstanding the fact that the salary of the Military Judges is far less and presently incomparable to that of the other federally appointed judges. However, in addition, at paragraph 67 of its Submissions, the Government makes the additional astonishing proposition that the 2013-2014 indexation be REDUCED by 1% to take into account the indexation already applied for 2012-2013, thereby retroactively reducing the Military Judges salary for 2012-2013.

13. Overall, according to the Government's Submissions, the salary of the Military Judges would be reduced in real terms over this quadrennial period.

14. In support of its proposition, the Government repeats on some occasions that between 2006 and 2012, the Military Judges' salary has increased by more than 16%[2], thereby implying that they have benefit from substantives increases.

15. However, the 16% figure presented by the Government respecting the increase of the Military Judges' salary over a given period of time has no meaning if not examined in its proper context.

16. As noted at paragraph 150 of the Military Judges' Submissions, relying on mere percentages of increase is irrational if the base salary from which the calculation is made is inadequate to begin with, as it is the case in this instance.

---

1 See Levitt Report, paras. 16 to 61, provided on the CD accompanying the Military Judges' Submissions.

2 See notably paragraphs 1 and 28 of the Government's Submissions. According to the Government, the cumulative increase between 2006 and 2012 would be 16,70% while the percentile increase would be 17,89%.

17. It was twice recognized by the Québec Court of Appeal that tying the determination of an adequate remuneration to mere percentages was to flout the very purpose of judicial compensation commissions and their findings[3].

18. It is appropriate here to set out at length the views of the Quebec Court of Appeal in this regard, as we could not ourselves more aptly set out the applicable principles.

19. Thus, in 2000 the Québec Court of Appeal stated the following:

> *[TRANSLATION BY D.L.R.] [48] Without deciding between the Bisson Commission and the National Assembly, we nevertheless comprehend the following from the response of the Assembly. It did not seem to disagree so much with the amount of the remuneration determined by the Bisson Commission for the year 1998 as with the fact that the determination* ***[page548]*** *would grant the judges an increase of more than 16% over their previous remuneration, whereas the Government only wanted to offer public servants an increase of 2%, and to offer the judges an increase of 4%. If that is correct, the Government was wrong to consider that the Bisson Commission was recommending an increase of more than 16% over remuneration which it found adequate. The Bisson Commission did not want to grant an increase of more than 16% over remuneration which it found adequate. It was not a priori. Rather just the opposite, the Bisson Commission noted that the Vincent Commission had previously found that, in order to be adequate, the remuneration of the judges, for the year 1988, should be $114,930, whereas the Poissant Commission had concluded that, for the year 1993, the remuneration should be $124,500. Before the Bisson Commission, the record indicated that between 1969 and 1988, judges paid by the province had seen their purchasing power decrease considerably. The Bisson Commission for its part noted that the judges' purchasing power had also decreased between 1992 and 1997. When a judge is appointed during good behaviour, it is implicit that, in the absence of very serious circumstances, his purchasing power will be protected to the same degree as that of other taxpayers and that, where necessary, this power will increase with the increase in society's wealth. The Bisson Commission was the first commission which was constitutional in nature, and it tried, not to determine a percentage increase based on the remuneration then being paid, but a remuneration which appeared to it to be adequate in 1998, regardless of what the remuneration had been before.*
>
> *[49] Pursuing this idea, it is our opinion that, even if the National Assembly could have refused, contrary to what we think, to accept the determination of the Bisson Commission based merely on the fact that it believed the increase determined was too generous, we would nonetheless be of the view that the refusal by the National Assembly was not legitimate because it was not rational. It was not rational to say that the Bisson Commission's determination could not be accepted merely because the Government did not want to grant the judges an increase of more than 4% for the year 1998. To consider this ground to be rational, one would have to first find that the remuneration on which the 4% increase was to be applied was* ***[page 549]*** *adequate, which the Government and the National Assembly did not demonstrate and the contrary of which has since been admitted by the Government. In other words, for the year 1998, the Government decided that there would be one general increase of 2% for public servants and 4% for the judges regardless of what constituted the remuneration of public servants and judges at that time. To hold that the judges were only entitled to a 4% increase for the year 1998 on the remuneration which was then being paid, and without regard to whether or not this remuneration was adequate, does not demonstrate in a rational way that the Bisson Commission's determination could not be accepted. It merely decrees a multiplier without regard to the number which is to be multiplied and without regard to the result. [our emphasis]*

---

[3] *Conférence des juges du Québec* c. *Québec (Procureure générale)*, 2000 CanLII 6948 (QCCA), para. 48-49 **[Authorities, Tab 10]** et *Procureur général du Québec et autres c. Conférence des juges du Québec et autres*, 2004 CanLII 22772 (QCCA), para. 57 **[Authorities, Tab 14]**.

20. Subsequently, in 2004, the Court reiterated the following:

> *[57] [TRANSLATION] In determining the remedial remuneration, the Bisson Commission took into account the economic and financial condition of Quebec at the time. This Court moreover remarked that the Bisson Commission had striven to determine, not a percentage increase based on the remuneration then prevailing, but a remuneration that it considered to be adequate in 1998, independently of what the remuneration had been beforehand.*

21. In addition, in order to assess the increase in salary over time, what has to be examined is not the overall percentage of increase over a chosen period of time, but the annual average increase, provided of course that the base salary is adequate to begin with, which is not the case herein. It should also be noted that any conclusions to be drawn from such averages are greatly sensitive depending on the period chosen to calculate the average.

22. In that respect, the Military Judges refer to **Annexe Q** which provides a more accurate picture of the average annual increases to the Military Judges salary for the periods of 2006 to 2011 and 2008 to 2011.

23. As can be seen from the right side of the table setting out these compounded annual average increases, on average, the salary of the Military Judges has increased annually by approximately 2,66% since the last Committee (period of 2008 to 2011). For that same period, we note that the average salary increases of the provincially and federally appointed judges was approximately 3,05%.

24. As stated in the Military Judges' Submissions, it is the salary of the Military Judges which should be aligned with the salary of the other federally appointed judges, and not merely their increases. The proposition of the Government has the effect of only applying one part of the equation.

25. Finally, at paragraph 27 of its Submissions, the Government states that the Military Judges were unaffected by the *Expenditure Restraint Act*, thereby implying that they have not made their part of the public effort in times of more difficult economic circumstances. This assumption is inaccurate considering precisely that the reasoned recommendations of the 2008 Committee were rejected by the Government based on the economic circumstances at the time and the measures provided in the *Expenditure Restraint Act*.

26. Had the recommendations of the 2008 Committee been implemented, the salary of the Military Judges would have been set at $225,000.00, as of September 1, 2007, and then indexed based on the IAI. The Military Judges salary would thus have been at **$257,533.00** as of April 1, 2012, had it not been for the rejection of the recommendation of the 2008 Committee by the Government and that figure would have been the starting point of this Committee[4]. Taking into consideration the work and recommendations of previous commissions, as the Supreme Court of Canada commands in *Bodner*[5], it would be even more so irrational to merely consider applying a percentage factor on an inadequate salary base.

---

4 See **Annexe R** which set out the projected salary of the Military Judges had the recommendation of the 2008 Committee been implemented.

5 *Bodner* c. *Alberta,* [2005] 2 S.C.R. 286, para. 14-17 **[Authorities, Tab 8]**.

III. THE PROPOSITION THAT MILITARY JUDGES CEASE ACCUMULATING SEVERANCE BENEFITS

27. With respect to the proposition that Military Judges cease accumulating severance benefits, the Military Judges note that the Government has not given any prior notice or indication of its intention to raise this issue which calls for factual, legal and actuarial analysis in order to be adequately assessed.

28. The absence of any prior notice or indication is all the more unfortunate as it is the Government which controls the process as well as the agenda. By not abiding with the timeframe provided in the legislation to appoint the Committee, the Government leaves the Military Judges with but very little time to fully consider and respond to this novel proposition, and in a situation where they are not effectively in a position to properly address this issue before this Committee.

29. As stated in the Military Judges' Submissions, the judges have only one discrete and unique opportunity to address their concerns and submissions to an independent Committee respecting their remuneration. The process should be such that they receive sufficient prior notice of any proposition to be made by the Government which requires more thorough research and analysis.

30. The Military Judges should not be put in a position where they are pressured to provide comments under limited delays and they therefore ask the Committee to postpone the consideration of this issue in order to allow them to provide an adequate and comprehensive analysis in response to this proposition.

31. Subsidiarily and without limiting in any way the foregoing, the Military Judges note that the main rationale for the Government's proposition that the Military Judges cease accumulating severance benefits is stated to be the need for financial predictability (see paragraph 69 of the Government's Submissions).

32. In that respect, considering the small number of Military Judges (only four), the continued accumulation of severance benefits could not under any scenario cause any "financial unpredictability" affecting the fiscal position of Canada or the state of the Canadian economy.

33. In addition, the 0.25% salary adjustment proposed by the Government to replace future accumulation is insufficient to adequately compensate for the loss of the Judges considering the nature of the severance pay currently provided. Simply removing the accrual of severance benefits would thus constitute an outright reduction of the Military Judges' remuneration, in addition to the reduction in real terms which would result from the salary proposition of the Government respecting the capping of the IAI.

34. The insufficiency of a mere 0.25% salary adjustment in lieu of compensation is certainly acknowledged by the Government as evidenced by the fact that negotiations with some the largest public sector unions in 2001 (which negotiation are not available to judges) have lead to an overall increase of 0.75% to take into the elimination of the accrual of severance benefits for these employees[6].

---

[6] See notably paragraph 69 of the Government's Submissions.

35. However, as evidence by the report of Mr. André Sauvé, F.S.A., F.C.I.A., attached as **Annexe S**, an increase of 0.75% would also be insufficient to compensate for the elimination of the accrual of severance benefits for Military Judges.

36. The Government has not made a case as to why the remuneration of the Military Judges should again be singled out and reduced in such a manner.

IV. THE NEED TO ATTRACT OUTSTANDING OFFICERS AS MILITARY JUDGES

37. At paragraphs 18 and 19 of its Submissions, the Government surprisingly implies that the eligibility to military judiciary is limited to the "legal officers" ("avocat militaires") in the Regular and Reserve Forces as defined in section 204.218(1) of the *CBI*. In addition, at paragraphs 60 and following of its Submissions, the Government takes the position that the sole appropriate comparator to set the Military Judges compensation should be the pool of eligible officers, all the while limiting that pool to legal officers within the Canadian Forces.

38. This is both untrue and undesirable.

39. Firstly, as indicated in the Military Judges' Submissions, at paragraph 113, there are lawyers who are officers and meet the eligibility requirements to be appointed as Military Judges who are not "legal officers" as they do not practice law within the Regular or Reserve Forces. It is simply incorrect to ignore those individuals[7].

40. Secondly, as for the civil judiciary, it is desirable that the military judiciary not be homogeneous, but that it rather be composed of judges from various background.

41. As such, the military judiciary needs to be in a position to attract outstanding candidates from all horizons and background. Determining a salary which would have the effect of limiting the attraction only of legal officers would not only be completely at odds with the eligibility criteria provided at section 165.21 of the *NDA*, but would have a deterrence effect which will affect the quality of the military judiciary.

V. THE NATURE, ROLE AND FUNCTIONS OF THE MILITARY JUDGES AS AN INTEGRAL PART OF THE CANADIAN JUDICIARY

42. At paragraph 26 of its Submissions, the Government points to some distinctions between Military Judges and other federally appointed judges.

43. However, as stated in the Military Judges' Submissions, the nature, role and functions of the Military Judges are, for all intents and purposes, akin to those of any other federally appointed judge.

44. In addition, the Government notably pleads that courts martial are statutory rather than constitutional creatures. However, this is not entirely accurate as the very existence of

---

[7] See also paragraph 108 of the Military Judges' Submissions respecting the appointment of such individuals to other courts in Canada, which demonstrates that they are within the pool of qualified candidates for appointment to the judiciary. As stated in the Military Judges' Submissions, it is important that the salary of the Military Judges be set at a level sufficient to attract those candidates.

military justice is provided for in Section 11(f) of the *Canadian Charter of Rights and Freedoms*, which contemplates a distinct system of military justice.

45. With respect to the statutory nature of military courts, even as they were in 1996, Chief Justice Strayer, writing for a unanimous Court stated the following in the matter of *Reddick* which notably addressed the concurrent jurisdiction of the military courts over civilians:

> *I respectfully disagree on the first point. The President's rationale appears to be that because provincial legislatures are given jurisdiction over "the administration of justice in the province, including the constitution, maintenance and organization of provincial courts . . . of criminal jurisdiction . . . ." it is prima facie unconstitutional for Parliament to provide for the trial of a civilian in a military tribunal for a matter which is also a Criminal Code offence. It was held by the Supreme Court in MacKay v. The Queen7 that Parliament does not encroach on head 92[14] in respect of the administration of criminal justice by the province where it is legislating under a head other than 91[27], the criminal law power. Thus it was said in MacKay8 that the National Defence Act provisions with respect to service tribunals and service prosecutors were based on head 91[7], the national defence power, and could not be taken to encroach on provincial jurisdiction under head 92[14].9 Moreover under section 101 of the Constitution Act, 1867 Parliament has jurisdiction "notwithstanding anything in this Act" (including, presumably head 92[14]) to establish "additional courts for the better Administration of the Laws of Canada". This jurisdiction supports, inter alia the establishment of the Court Martial Appeal Court and also of courts martial.* [8]

46. He then added later on:

> *I believe that the concern about "nexus" in the Bill of Rights or Charter context is now misplaced because of the decision of the Supreme Court of Canada in Généreux. That decision has confirmed the basic legitimacy of a separate system of military justice.* [9]

47. The Government also points out that the Military Judges do not have the jurisdiction to try all types of offences provided in the *Criminal Code*. It is difficult to understand the point of this observation, since no court in Canada, provincial or federal, has jurisdiction over all types of offences. In any event, the jurisdiction of the Military Judges is overarching by any standard.

48. Indeed, the only criminal offences which escape the ambit of the jurisdiction of courts martial are the offences set forth in section 70 of the *NDA* (murder, manslaughter and kidnapping, when committed in Canada). It must be noted that the courts martial nevertheless have jurisdiction over these offences if they are committed abroad. Courts martial have been and continue to be held in that regard as evidenced notably by *Semrau*[10] matter where a involving a 2nd degree murder charge for an offence allegedly committed in Afghanistan. The trial in this matter took place in Gatineau.

49. In any event, the Federal Court, the Federal Court of Appeal and the Tax Court of Canada are all statutory rather than constitutional creatures, are all considered to be inferior courts as opposed to superior courts, they all enjoy limited and specific powers and jurisdictions as provided in their constituting statutes or by necessary implication and they also do not have jurisdiction over all matters. However, notwithstanding these

---

8 *R. v. Reddick*, [1996] CMAC-393 (JJ. Strayer, Reed and Desjardins), page 7 **[Authorities, Tab 20].**

9 *R. v. Reddick*, [1996] CMAC-393 (JJ. Strayer, Reed and Desjardins), page 13 **[Authorities, Tab 20].**

10 *R. c. Semrau*, 2010 CM 1002. See all the decisions in this case at http://www.jmc-cmj.forces.gc.ca/dec/2010-fra.asp.

facts, judges appointed to these courts all enjoy the same salary and essentially the same compensation scheme as the judges of the superior courts who are constitutional in nature, while the Military Judges are singled out.

50. This situation can only be explained by the inadequate dragging of a bygone era where Military Judges and the military justice system were not yet fully recognized as an integral part of the Canadian Justice system and the Canadian judiciary.

51. We submit that the true nature, role and functions of the military justice system and its judges, as now fully acknowledged by the Canadian courts, namely in the matter of *Leblanc*[11], cannot be overlooked.

VI. THE RELEVANT CONSTITUTIONAL TEST

52. As stated in the introduction, the Government casts the nature of the present process for determining judicial compensation and the task of this Committee as merely determining *"what is an appropriate minimum salary"*[12].

53. However, contrary to the premise on which the Government bases itself, the output of the Committee's work is not to determine the minimum threshold of the Military Judges' salary, but to establish their adequate salary under the circumstances, in light of all relevant criteria. The Supreme Court of Canada stated this eloquently in *Bodner*. The Supreme Court's reasons are perfectly applicable to this instance:

> *67. 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 cannot, as the Government asserts, 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. The Government's questioning of the Commission's mandate is misguided and its assertion regarding the Commission's role is incorrect. The part of the response in which the Government questions the Commission's mandate is not legitimate. It does nothing to further the public interest and accordingly fails at the first stage of the analysis*[13]*. [our emphasis]*

54. The Government's proposition thus appears to be at odds with the teachings of the Supreme Court of Canada in this regard and, in insisting on maintaining a level of salary that is not below the minimum required in order to ensure the independence of the judiciary, the Government is clearly inviting this Committee to apply a wrong constitutional test[14].

---

11 *Leblanc c. Sa Majesté la Reine*, 2011 CACM 2 (JJ. Létourneau, Deschênes and Cournoyer**) [Authorities, Tab 12]**.

12 See *Government's* Submissions, paras. 42 and 45.

13 *Bodner* c. *Alberta,* [2005] 2 S.C.R. 286, para. 67 **[Authorities, Tab 8]**.

14 *1997 Reference,* [1997] 3 S.C.R. 3, at paras. 135 and 192 *et seq.* **[Authorites, Tab 17]**.

VII. UPDATED FIGURES

55. The Military Judges rely on the information provided by the Government at Tab 1 of its Annexes respecting the levels of salary paid to some other people as these figures update some of the figures referred to by the Military Judges in their Submissions.

56. The figures provided by the Military Judges at paragraph 124 (salaries of high ranking officers in the Canadian Forces) and paragraph 143 (salary of the Chief of Defence Staff) of their Submissions should thus respectively be replaced by the figures provided by the Government at Tab 1, pages 4 and 5 of its Annexes. However, the Military Judges stress that the Committee should also take into account the substantial performance and merit pay opportunity afforded to these individuals as part of their total cash compensation[15].

57. Notably, the Military Judges note that the salary of the Chief of Defence Staff was **$327,100.00** as of April 1, 2011.

VIII. CONCLUSION

58. We take again this opportunity to thank each member of the Committee for their participation in this important constitutional process.

59. As noted by the Supreme Court of Canada in *Beauregard*, judicial independence, including financial security, is essential because *"The rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it--rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies."* [16]

60. The Committee's mandate, which emanates from the Constitution of Canada, is also unique and aims at preserving the independence of the judiciary in depoliticizing the setting of judicial remuneration.

61. We humbly believe that this objective cannot be achieved if the outcome is simply the application to the judiciary of the measures applied by the Government to its other employees and public servants, which measures result from protracted negotiations and *quid pro quo* which are not fit for the judiciary.

62. Also, with respect, the constitutional nature of the mandate of this Committee requires it not to base its recommendations based on public opinion. On the contrary, as aptly put by the Levitt Commission, the process should take into consideration the importance of

---

[15] See Levitt Report, paras. 25 and 29, provided on the CD accompanying the Military Judges' Submissions.

[16] *Beauregard v. Canada*, [1986] 2 S.C.R. 56, para. 24 **[Authorites, Tab 21]**.

the perspective or reasonable, informed members not only of the public, but also of the judiciary[17].

63. Finally, public confidence in its judiciary will be more assured if the Government agrees with the conclusions and recommendations of the Committee and recognizes that the process of determining judicial remuneration entails constitutional requirements and imperatives that differ fundamentally from those prevailing in other situation.

All of which is respectfully submitted on behalf of the Military Judges.

[17] Levitt Report, paras. 85 to 99 and recommendation n° 8.

IX. ADDITIONAL ANNEXES

Q. Average of the annual increases to the Military Judges salary for the periods of 2006 to 2011 and 2008 to 2011

R. Salary of the Military Judges as per 2008 Committee recommendations

S. Report of Mr. André Sauvé, F.S.A., F.C.I.A., dated June 1, 2012

X. ADDITIONAL AUTHORITIES

20. *R. v. Reddick*, [1996] CMAC-393

21. *Beauregard v. Canada*, [1986] 2 S.C.R. 56