

**REPLY OF THE GOVERNMENT OF CANADA**

**TO**

**THE MILITARY JUDGES COMPENSATION COMMITTEE**

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## TABLE OF CONTENTS

	<u>Page No.</u>
<b>A. Overview</b>	<b>1</b>
<b>B. Mandatory Criteria</b>	<b>2</b>
<b>a. Prevailing Economic Conditions</b>	<b>2</b>
<b>b. Financial Security</b>	<b>3</b>
<b>c. Attracting Outstanding Officers</b>	<b>4</b>
<b>d. Other Objective Criteria</b>	<b>6</b>
<b>C. The Military Judges' Proposal</b>	<b>9</b>

**A. Overview:**

1. The military judges' proposed retroactive 31 per cent salary increase<sup>1</sup> is excessive and cannot be justified in relation to any criteria that inform the standard of adequacy. Their proposal is based principally on a perception that the salary differential as between military judges and other federally appointed judges is unfair because of similarities in the nature of their work. However, this inquiry is not aimed at achieving pay equity nor is it about ensuring that salaries are adequate from the military judges' perspective. This Committee's mandate is to examine military judicial salaries and make recommendations dictated by the public interest in an independent judiciary.

2. The military judges' submissions gloss over the key difference between military judges and other federally appointed judges: only officers in the Canadian Forces are eligible for appointment to the military judiciary and the current salaries do not deter outstanding officers from applying. This is an important indicia of the adequacy of the current salaries.

3. The Government's proposal does not detract from or undermine the fundamentally important role of military judges in the military justice system. The current military judicial salaries of \$220,009.00 for the military judges and \$226,609.00 for the Chief Military Judge (plus proposed annual increases of a maximum of 1.5 per cent), which place military judges in the 100<sup>th</sup> income percentile of Canadians<sup>2</sup> and among the highest paid members of the Canadian Forces, adequately compensate them for the work that they do. Further, in contrast to the military judges' proposal, the government's proposal is reasonably substantiated in light of the mandatory adequacy criteria.

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<sup>1</sup> See Table of Military Judges' proposed salary increases, prepared by the Directorate of Pay Policy and Development, Department of National Defence, June 1, 2012 [Annex 25].

<sup>2</sup> Page 46 "Annex: Methodology, Income Classes (2008) Table" in *Tax Expenditures and Evaluations 2011*, Department of Finance (2012) [Annex 26] (full report available online: <http://www.fin.gc.ca/taxexp-depfisc/2011/taxexp11-eng.asp>) and Statistics Canada Table: Individuals by total income level, by province and territory (Canada), 2011-06-28 [Annex 27].

**B. Mandatory Criteria:**

4. Rather than focussing on the criteria that must inform this Committee’s inquiry, the military judges make a plea for salaries comparable to others in Canadian society who earn more. However, this Committee’s mandate is to assess the adequacy of military judges’ salaries in order to safeguard their independence according to specific criteria. The Committee “must make recommendations on judges’ remuneration by reference to objective criteria, not political expediencies. The goal is to present an objective and fair set of recommendations dictated by the public interest.”<sup>3</sup> The judges’ proposal cannot be supported on a proper consideration of the relevant criteria.

**a. Prevailing Economic Conditions:**

5. The “prevailing economic conditions in Canada, including the cost of living, and the overall economic and current fiscal position of the Federal Government” is one of the factors this Committee must consider in gauging the adequacy of the remuneration of military judges.<sup>4</sup>

6. Not only do the military judges misstate how the economic factor should play into the Committee’s inquiry, but they also downplay its importance.

7. Contrary to the assertion in paragraphs 88 and 98 of the military judges’ submissions, the question is not whether the current economic conditions are an impediment to the payment of an adequate salary to military judges. The prevailing economic conditions must be considered in determining what an adequate salary is in the first place. This is obvious from the plain meaning of articles 204.23 and 204.24 of the QR&O.

8. There is no denying that the global and Canadian economic situation and the financial position of the Government deteriorated significantly following the 2008 Committee’s inquiry – indeed, the military judges make no attempt to deny this fact.

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<sup>3</sup> *PEI Judges, supra*, at para 173 [JBA, Tab 17].

<sup>4</sup> QR&O, para 204.24(3) [JBA, Tab 5].

Although the longer-term prognosis for the Canadian economy has improved since then, it remains fragile due to uncertainty about the global economic situation. As noted in the Government's opening submissions, both the Department of Finance and the IMF agree that, due to the weakness of the global economic situation and outlook, projections for Canada's GDP growth are modest for 2012 and 2013 and down significantly from projections for this period made in 2011.<sup>5</sup>

9. The military judges' proposal fails to account for prevailing economic conditions in Canada, and the impact those conditions have had on the remuneration of others paid from the public purse. The adequacy of the remuneration of the military judges must, pursuant to the *QR&Os* and the *National Defence Act*, take into account the fact of these past and continuing wage restraints applied to others during this period of continuing economic uncertainty.

**b. Financial Security:**

10. The Government agrees with the military judges that there is an important correlation between financial security and judicial independence.<sup>6</sup> However, the military judges have neither analysed nor demonstrated how the current level of remuneration jeopardizes judicial independence. They have not justified their proposal by reference to this factor.

11. The significant salary increases advocated by the military judges actually risk undermining the public perception of their independence instead of enhancing it. As the Supreme Court of Canada noted, salary increases are as likely to undermine judicial independence as salary reductions or freezes.<sup>7</sup> Further, measures which treat judges more favourably than others paid from the public purse may also negatively impact judicial independence:

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<sup>5</sup> Government of Canada's Submissions at paras 30-31 and [Annexes 9 and 10].

<sup>6</sup> Military Judges' Submissions at para 99.

<sup>7</sup> *PEI Judges, supra* at para 159 [JBA, Tab 17].

... if judges were spared compensation decreases affecting other public sector groups, a reasonable person might well conclude that the judges had engaged in some behind-the-scenes lobbying. The judges' exemption could be thought to be the result of secret deals, or secret commitments to favour the government.<sup>8</sup>

12. A 31 per cent salary increase for military judges would likely not be perceived by the public as fair or appropriate in the prevailing economic climate. The Government is currently restraining its spending in order to reduce the deficit. Others paid from the public purse will see limited salary increases and potential job losses over the next few years.<sup>9</sup>

**c. Attracting Outstanding Officers:**

13. The principal weakness in the military judges' submission is that it effectively ignores the fact that the pool of candidates from which military judges are drawn is limited to officers in the Canadian Forces. This is a fundamental fact that distinguishes the situation of military judges from other federally appointed judges and militates against an approach aimed at "closing the salary gap" between these two uniquely situated judiciaries. The objective evidence demonstrates not only that the vast majority of the officers eligible for appointment currently earn significantly less than military judges but that a higher percentage of the pool applies for the military judiciary than does the pool for the federal judiciary. Accordingly, the current military judicial salaries are adequate in light of the "need to attract outstanding officers as military judges."

14. The military judges contend that the pool of potential candidates for appointment to the military judiciary includes lawyers in private practice generally.<sup>10</sup> To that end, they appended a report prepared by Mr. André Sauvé which compares the remuneration of lawyers in private practice to that of military judges.<sup>11</sup> This report is of limited, if any,

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<sup>8</sup> *PEI Judges, supra* at para 158 (quoting favourably from Professor Wayne Renke, *Invoking Independence: as a Non-cut Wage Guarantee: Points of View No. 5*, Edmonton: Centre of Constitutional Studies, 1994) [JBA, Tab 17].

<sup>9</sup> Government of Canada's Submissions at paras 34-36.

<sup>10</sup> Military Judges' Submissions at paras 114-120.

<sup>11</sup> Annex J to the Military Judges' Submissions ("Sauvé Report" or "the Report"). The military judges provided no notice of their intention to rely on an expert report in these proceedings. The Government's

assistance to this Committee in considering the adequacy of the remuneration of military judges.

15. The Sauvé Report is incorrectly premised on the assumption that military judges are drawn from the general pool of lawyers in private practice.<sup>12</sup> The Report also incorrectly presumes that benchmarking is an appropriate approach to reviewing the remuneration of military judges. As discussed further below, benchmarking to any one group runs contrary to the purpose of the Committee, which is to examine the remuneration of military judges in their unique context and not to merely compare them to others. Finally, Mr. Sauvé's analysis fails to recognize the fact that lawyers in private practice do not possess the experience or the qualities sought in new military judges. They are simply not a relevant comparator group.

16. This Committee should also decline the military judges' invitation to consider this evidence as the Report is based on erroneous assumptions that call into question the Report's reliability.<sup>13</sup> If the Sauvé Report is simply intended to demonstrate that some lawyers in private practice earn more than military judges, the Government does not dispute that. However, as with the comparison to federal judges, this does not help the military judges establish that their remuneration is inadequate in view of the mandatory criteria.

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position is that the Report is irrelevant and unreliable on its face; however, should this Committee wish to consider this evidence further, the Government requests that it be afforded an opportunity to more fully consider and respond to the Report.

<sup>12</sup> Only 18 lawyers in private practice are eligible Reserve Force officers and there is no data available on their actual salary levels which would permit an analysis like the one included in Mr. Sauvé's report.

<sup>13</sup> These include the following:

- (i) The Report fails to address geographical location as a key variable in income analysis.
- (ii) The Report assumes that a \$60,000 income threshold to exclude individuals from the comparator group is appropriate without explaining that this eliminates 26% of lawyers overall (including 24% of lawyers in Census Metropolitan Areas and 31% elsewhere, where incomes tend to be lower). As the Report itself points out, experienced lawyers have many ways of reducing their net incomes for tax purposes. In addition, an individual lawyer's net income may rise and fall dramatically according to the timing of billings and expense claims.
- (iii) The Report states (at page 2) that the report prepared by Mr. Haripaul Pannu for the 2011 Judicial Compensation and Benefits Commission ("the Pannu Report") used the entire range of ages in the CRA data. While true, it fails to point out that the Pannu Report weighted age groups according to the distribution of age at appointment among judges. In fact, the Pannu Report used a weighted average 75<sup>th</sup> percentile of \$306,320 for 2010, which was considerably higher than the un-weighted 75<sup>th</sup> percentile of \$278,526.

17. With respect to the military judges' analysis of recent selection processes for military judges, there is no foundation for the military judges' assertion that the military judiciary is having difficulty attracting candidates from the Reserve Force.<sup>14</sup> In fact, more than five per cent of eligible reserve force legal officers applied in the last selection process.<sup>15</sup> This compares favourably with selection processes for the federal judiciary from 2007-2011, in which 4.2 per cent of the eligible pool applied.

18. Additionally, there are factors other than the current remuneration of military judges which may explain why Reserve Force officers may not be attracted to the military judiciary. Reserve Force officers have presumably chosen not to become regular full-time members of the Canadian Forces. This choice allows Reserve Force members to maintain civilian careers while still contributing to the Canadian military. As a military judge, an officer could not continue to perform that dual role. Military judges are full-time Regular Force members of the Canadian Forces. Further, military judges are posted to the National Capital Region. Relocation may not be an attractive option for those Reserve Force officers living outside of the region.<sup>16</sup>

**d. Other Objective Criteria:**

*Superior Court Judges:*

19. Contrary to the military judges' submission, simply benchmarking the salaries of military judges to federal judges is not appropriate as it would undermine the role of this Committee in preserving the independence of military judges. Further, it would run counter to Parliament's clear intention that military judges not be treated in an identical fashion to other judges. Military judges are not subject to the *Judges Act*. The remuneration of military judges is examined separately in recognition of their *sui generis* roles. There is no support in law or logic for the proposition that judicial independence

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<sup>14</sup> Military Judges' Submissions at para 113.

<sup>15</sup> Of 37 eligible Reserve Force officers, two applied in the 2011 selection process. This means 5.4 per cent of the pool of Reserve Force officers applied [Annexes 3 and 18].

<sup>16</sup> The Canadian Forces Offices of the Judge Advocate General confirms that 16 of the 18 Reserve Force legal officers employed in private practice and eligible for appointment as of May 2012 live outside of the National Capital Region.



requires all federally appointed judges to receive the same salary regardless of the court to which they are appointed or the pool from which they are drawn.<sup>17</sup>

20. The New Brunswick Court of Appeal commented on the proposition of linking one judicial association's salary to another's (in that case provincial court judges to federally appointed *puisne* judges). The Court of Appeal concluded that such an approach is misguided for two main reasons. First, the salaries in one context are fixed by reference to factors that have no application in the other. Second, the Court of Appeal recognized the danger that simply linking a salary recommendation to the salary of another judges association, either at parity or partial parity, would effectively eliminate the role of future commissions in recommending judicial salaries. The rationale being that the statutory considerations would thereafter be ignored:<sup>18</sup>

... future provincial commissions would have no role in fixing judicial salaries. Attention would inevitably focus on the salary recommendation of federal commissions, to the exclusion of the framework set out in the Provincial Court Act.

21. The Supreme Court also specifically rejected the benchmarking of judicial salaries to those of superior court judges based on the very different considerations at play in the setting of judicial salaries in the federal context.<sup>19</sup> In particular, the salaries of superior court judges are fixed having regard to the large and varied pool of candidates from a wide geographical scope from which the judges are drawn at a level which does not have a chilling effect on recruitment in the largest metropolitan areas of the country.<sup>20</sup> For this reason, the salary level of superior court judges is not directly transferable to any other judge in Canada, including the military judiciary which draws from a much smaller pool.

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<sup>17</sup> Report of the 2008 Military Judges Compensation Committee, *supra* at p. 13 [Annex 5]; see also Final Report of the 2010 British Columbia Judges Compensation Commission at p. 28 (available online: <http://www.ag.gov.bc.ca/judicial-compensation/info/2010-JCC-FinalReport.pdf>); as well as Rapport du Comité de la remunération des juges dated December 23, 2010 at p. I-16 to I-17 (available online: <http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/remjuges2011.pdf>).

<sup>18</sup> *Provincial Court Judges' Assn. of New Brunswick (C.A.)*, *supra* at para 156.

<sup>19</sup> *Provincial Court Judges' Assn. of New Brunswick (S.C.C.)*, *supra* at paras 71-72.

<sup>20</sup> *Provincial Court Judges' Assn. of New Brunswick (C.A.)*, *supra* at para 159; *Provincial Court Judges' Assn. of New Brunswick (S.C.C.)*, *supra* at para 71.

The fixing of federal judicial salaries involves the consideration of factors that have no application or relevance to the context of military judges.

22. In summary, military judges' salaries should not be benchmarked to the salaries of other federally appointed judges for the following reasons:

- a) The different factors relevant to the setting of judicial salaries in the context of military judges as mandated by the QR&Os;
- b) The distinct pool from which the judges are drawn; and,
- c) The distinct military justice system within which the military judges are situated.<sup>21</sup>

*Salaries of other public servants:*

23. The Military Judges propose that this Committee consider the salaries of other members of the military as well as senior executives of the public service.<sup>22</sup> Although this information provides context, it is of little assistance in determining whether military judges' salaries are objectively adequate. All of the salaries described in the military judges' submissions are set by Treasury Board based on considerations unique to each position and based on factors unrelated to this Committee's public interest mandate.<sup>23</sup> The fact that other public servants receive higher wages has no demonstrated impact on the independence of military judges or the attraction of officers to the Bench.

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<sup>21</sup> In its Report on the Compensation of Military Judges, April 2004 at pp. 9-10 and 15 [Annex 28], the Committee rejected the proposed comparison between military judges and superior court judges in view of the important functional distinctions between them.

<sup>22</sup> Military Judges' Submissions at paras 122-148.

<sup>23</sup> For example, the salaries of both doctors and dentists employed in the Canadian Forces are determined by consideration of a number of factors including the market for both retention and attraction purposes: Report on the Compensation of Military Judges, August 2000, at p. 13 [Annex 16].

**C. The Military Judges' Proposal:**

24. For the reasons set out above and those included in the Government's opening submissions, this Committee should not recommend the military judges' proposal. The Government's proposal analyses and considers objective evidence with respect to each of the mandatory criteria, and is justified and reasonable in the circumstances.

25. The Government does not object to the military judges' proposal that the three per cent premium for the Chief Military Judge be maintained.

26. On the issue of representation costs, it is worth noting the Government has consistently provided such funding.

All of which is respectfully submitted this 4<sup>th</sup> day of June, 2012.



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## ANNEXES – INDEX

<b>Tab No.</b>	<b>Description of Document</b>	<b>Footnote No.</b>
25.	Table of Military Judges' proposed salary increases, prepared by the Directorate of Pay Policy and Development, Department of National Defence, June 1, 2012	1
26.	Page 46 "Annex: Methodology, Income Classes (2008) Table" in <i>Tax Expenditures and Evaluations 2001</i> , Department of Finance (2012)	2
27.	Statistics Canada Table: Individuals by total income level, by province and territory (Canada), 2011-06-28	2
28.	Report on the Compensation of Military Judges, April 2004	21