Comité d'examen de la rémunération des juges militaires

Military Judges Compensation Committee

31 JANUARY 2024

Report of the Military Judges Compensation Committee

EXECUTIVE SUMMARY

The Military Judges Compensation Committee (MJCC) is established as a matter of constitutional imperative relating to the independence of the judiciary. Sections 165.33 and 165.34 of the *National Defence Act*, R.S.C. 1985, c. N-5 (*NDA*), which establish the composition of the MJCC and its mandate, were enacted to comply with the constitutional requirement for an independent advisory body to "inquire into the adequacy of remuneration of military judges" (s-s. 165.34(1) *NDA*) and advise the Government of its findings and conclusions. Pursuant to the jurisprudence of the Supreme Court of Canada, the purpose of this process is to take judicial compensation out of the political sphere and avoid unseemly conflict between Parliament and the judges. While the Supreme Court's vision was that this process would be effective, the Committee observes that this vision has unfortunately not been realized. The Government of Canada (the Government) has rejected the compensation recommendations of the last two Committees, and this raises legitimate concerns about the effectiveness of the process.

Under section 165.34 of the *NDA*, we are required to consider four statutory factors in our inquiry into the adequacy of judicial compensation: economic conditions, financial security securing judicial independence, attracting outstanding candidates, and other objective criteria the Committee considers relevant. We have done so, as we will explain in detail in the pages that follow.

For reasons that we will set out at length, our consideration of all the relevant factors leads us to share the views of two previous Committees that the military judges should receive the same remuneration as all other federally appointed judges.

The economics of remunerating four federally appointed judges around 15% more to gain parity with the other approximately 1200 federally appointed judges do not, we conclude, impair the overall economic and current financial position of the Government, and takes account of the prevailing economic conditions in Canada. The role of financial security in ensuring judicial independence favours parity, given the risk of perception that the military judges are not of the same quality or value as other federally appointed judges. The necessity of attracting the best

candidates also favours parity lest some of the best candidates for an appointment as a military judge opt instead for appointments to other branches of the federally appointed judiciary on the basis of the higher remuneration of those other posts. In short, we conclude that the same remuneration that has been considered adequate for all other federally appointed judges is also the adequate remuneration for the military judges.

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I. INTRODUCTION

A. The Constitutional Basis for the Committee's Work

Military judges are federally appointed members of a federal judiciary by an Order-in-Council who are also commissioned officers in His Majesty's Canadian Armed Forces (CAF). They devote their full-time work and attention to their service as military judges.

Parliament established the Military Judges Compensation Committee to provide independent, impartial advice to the Government on military judges' remuneration. The role of the independent MJCC is to inquire into the adequacy of the remuneration for military judges and to recommend remuneration for the period of its review – in this case, 1 September 2019 to 31 August 2023. The establishment of an independent Committee to recommend remuneration is a direct result of the decision of the Court Martial Appeal Court in *R. v Lauzon* (1998) 6 CMAR 19, which stipulated that judicial independence and depoliticization of the salary determination process must be ensured. In *Lauzon,* the court also stipulated that the remuneration must be fair and reasonable, objective, and guided by the public interest. The court followed the earlier decision of the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 SCR 3, which established that there must be an independent committee which must make a recommendation to the governing authority, and that negotiations between Government and the judges are prohibited. Most importantly, it established that the salary level of judges must not be one that risks putting a judge in a situation where they may be subject to financial manipulation.

The process for salary determination of military judges parallels the process for federally appointed judges where, pursuant to the *Judges Act*, R.S.C. 1985, c. J-1 (*Judges Act*), an independent Commission recommends appropriate remuneration to the governing authority. It is notable that the statutory language Parliament used in creating the Judicial Compensation and Benefits Commission (JCBC) is almost identical to that which establishes the MJCC.

The central task of the Committee is to "inquire into the adequacy of the remuneration of military judges" (s. 165.34 *NDA*). This focus on "adequacy" is also found in the mandate of the JCBC under the *Judges Act* which is to "inquire into the adequacy" of the salaries and other amounts

payable to other federally appointed judges. It follows that the jurisprudence about "adequacy" within the meaning of the *Judges Act* provides a useful guide to how to approach that same term in the *NDA*.

The Supreme Court of Canada jurisprudence teaches that the process by which judicial remuneration is established must be independent, effective, and objective and that the Committee's work must have a "meaningful effect" on the determination of compensation (*Bodner v. Alberta*, 2005 SCC 44). The Committee is a vehicle to help assure that these objectives are attained. With respect to the amount of remuneration, the Supreme Court of Canada has held that the mandate to determine adequate remuneration "is neither to determine the minimum remuneration nor to achieve maximal conditions." Rather, the mandate is to recommend "an appropriate level or remuneration" (*Bodner* at para. 67). This is done considering the constitutional requirement of judicial independence, including financial security, and having regard to the factors set out in the statute. Adequacy is, therefore, neither the bare minimum amount necessary to meet the constitutional requirement of financial security nor the ideal maximum amount. Adequacy must be assessed by placing remuneration somewhere between these two polls guided by the statutory factors.

B. The Statutory Scheme

When the *NDA* was amended to include sections 165.33 through 165.37 establishing the MJCC's mandate and procedure, Parliament's aspirations appeared to be both clear and efficient: every four years, the MJCC would make recommendations to the Government on military judges' salaries, focused on prevailing economic conditions, the financial security of the judiciary that ensures judicial independence, and the need to attract outstanding candidates. While the Committee's mandate was limited to recommending to Government rather than making binding decisions, the Committee's mandate and procedure as a core part of the *NDA* establishes the importance of the MJCC's role in the overall administration of the "the Canadian Forces and of all matters relating to national defence" as specified in section 4 of the *NDA* under the Minister's responsibilities.

Unfortunately, we observe that the process established by Parliament has neither been followed with vigour nor proved to be effective. This is the sixth Committee to be convened under *NDA* authority. As we will describe in more detail, the long delay in appointment of the members of the Committee and the Government's rejection of the key remuneration recommendation of the past two Committees have undermined the intended effectiveness of the process.

II. COMMITTEE'S COMPOSITION, APPOINTMENT AND CONSIDERATION PROCESS

A. Purpose and Object of the Report

The Committee is mandated by Parliament in s. 165.33 of the *NDA* to enquire into the adequacy of the remuneration of military judges in Canada. Its governing legislation specifies:

Military Judges Compensation Committee

Composition of Committee

165.33 (1) There is established a Military Judges Compensation Committee consisting of three part-time members to be appointed by the Governor in Council as follows:

(a) one person nominated by the military judges;

(b) one person nominated by the Minister; and

(c) one person, who shall act as chairperson, nominated by the members who are nominated under paragraphs (a) and (b).

Tenure and removal

(2) Each member holds office during good behaviour for a term of four years, and may be removed for cause at any time by the Governor in Council.

Reappointment

(3) A member is eligible to be reappointed for one further term.

Absence or incapacity

(4) In the event of the absence or incapacity of a member, the Governor in Council may appoint, as a substitute temporary member, a person nominated in accordance with subsection (1).

Vacancy

(5) If the office of a member becomes vacant during the member's term, the Governor in Council shall appoint a person nominated in accordance with subsection (1) to hold office for the remainder of the term.

Quorum

(6) All three members of the compensation committee together constitute a quorum.

Remuneration

(7) The members of the compensation committee shall be paid the remuneration fixed by the Governor in Council and, subject to any applicable Treasury Board directives, the reasonable travel and living expenses incurred

Comité d'examen de la rémunération des juges militaires

Constitution du comité

165.33 (1) Est constitué le comité d'examen de la rémunération des juges militaires, composé de trois membres à temps partiel nommés par le gouverneur en conseil sur le fondement des propositions suivantes :

a) un membre proposé par les juges militaires;

b) un membre proposé par le ministre;

c) un membre proposé à titre de président par les membres nommés conformément aux alinéas a) et b).

Durée du mandat et révocation

(2) Les membres sont nommés à titre inamovible pour un mandat de quatre ans, sous réserve de révocation motivée du gouverneur en conseil.

Mandat renouvelable

(3) Leur mandat est renouvelable une fois.

Remplacement

(4) En cas d'absence ou d'empêchement d'un membre, le gouverneur en conseil peut lui nommer un remplaçant suivant la procédure prévue au paragraphe (1).

Vacance à combler

(5) Le gouverneur en conseil comble toute vacance suivant la procédure prévue au paragraphe (1). Le mandat du nouveau membre prend fin à la date prévue pour la fin du mandat de l'ancien.

Quorum

(6) Le quorum est de trois membres.

Rémunération et frais

(7) Les membres ont droit à la rémunération fixée par le gouverneur en conseil et sont indemnisés, en conformité avec les instructions du Conseil du Trésor, des frais de

by them in the course of their duties while absent from their ordinary place of residence.

2013, c. 24, s. 45.

Mandate

165.34 (1) The Military Judges Compensation Committee shall inquire into the adequacy of the remuneration of military judges.

Factors to be considered

(2) In conducting its inquiry, the compensation committee shall consider

(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 the judiciary in ensuring judicial independence;

(c) the need to attract outstanding candidates to the judiciary; and

(d) any other objective criteria that the committee considers relevant.

Quadrennial inquiry

(3) The compensation committee shall commence an inquiry on September 1, 2015, and on September 1 of every fourth year after 2015, and shall submit a report containing its recommendations to the Minister within nine months after the day on which the inquiry commenced.

Postponement

(4) The compensation committee may, with the consent of the Minister and the military judges, postpone the commencement of a quadrennial inquiry.

2013, c. 24, s. 45.

déplacement et de séjour entraînés par l'accomplissement de leurs fonctions hors de leur lieu habituel de résidence.

2013, ch. 24, art. 45.

Fonctions

165.34 (1) Le comité d'examen de la rémunération des juges militaires est chargé d'examiner la question de savoir si la rémunération des juges militaires est satisfaisante.

Facteurs à prendre en considération

(2) Le comité fait son examen en tenant compte des facteurs suivants :

a) l'état de l'économie au Canada, y compris le coût de la vie, ainsi que la situation économique et financière globale de l'administration fédérale;

b) le rôle de la sécurité financière des juges militaires dans la préservation de l'indépendance judiciaire;

c) le besoin de recruter les meilleurs officiers pour la magistrature militaire;

d) tout autre facteur objectif qu'il considère comme important.

Examen quadriennal

(3) Il commence ses travaux le 1er septembre 2015 et remet un rapport faisant état de ses recommandations au ministre dans les neuf mois qui suivent. Il refait le même exercice, dans le même délai, à partir du 1er septembre tous les quatre ans par la suite.

Report

(4) Il peut, avec le consentement du ministre et des juges militaires, reporter le début de ses travaux.

2013, ch. 24, art. 45.

B. Composition of the Committee, Members and Administrative Support

The Committee was composed of one Chairperson and two Members. The Chair of the Committee was the Honourable Clément Gascon, C.C., Ad. É. The Members were the Honourable Thomas A. Cromwell, C.C., and Mr. James E. Lockyer, O.N.B., C.D., K.C. The Committee was administratively supported by Gordon S. Campbell as Executive Secretary.

C. Military Judges: Who They Are, How Many, Where They Sit and Nature of Their Work

There is a roster of four military judges appointed in Canada who sit throughout Canada and as required around the world wherever His Majesty's Canadian Armed Forces are deployed. Their

duties are established by the *NDA*. They are federally appointed judges having a specialized role, as is the case with other federally appointed judges in specialized roles such as those who have been appointed to the Tax Court of Canada. Military judges are commissioned military officers within the Canadian Armed Forces.

D. Counsel for Military Judges and Counsel for the Government

Counsel for the Military Judges were Me Michel Jolin, Me Sean Griffin, Me Catherine Martel and Me Jean-Philippe Dionne. Counsel for the Government were Me Jean-Robert Noiseux and Me Sara Gauthier. They all most ably represented their respective clients and advocated for their positions.

E. Written Submissions Received by the Committee and Expert Testimony

The Committee received voluminous well-drafted written argument and supporting documentation from both the Government and military judges. The submissions for the Government and their dates of receipt by the Committee were:

a) 2 December 2022, the "Memorandum";

b) 30 March 2023, the "CV of Yann Bernard";

c) 17 February 2023, the "Mémoire du Gouvernement";

d) 17 February 2023, the "Cahier de Documents" (Volumes 1 through 4);

e) 3 March 2023, the "Réplique";

f) 3 March 2023, the "Cahier de Documents" (Volume 5);

g) 29 March 2023, the "Cahier d'autorités"; and

h) 29 March 2023, the "Cahier de Documents" (Volume 6).

The submissions for the military judges and their dates of receipt were:

a) 13 January 2023, the "Lettre de M. André Sauvé";

b) 17 February 2023, the "Mémoire des juges militaries";

c) 17 February 2023, the “Cahier d’autorités”;

d) 17 February 2023, the “Cahier d’annexes”;

e) 3 March 2023, the “Réplique:;

f) 3 March 2023, the “Cahier d’annexes supplémentaires”; and

g) 29 May 2023, the “Documents additionels.”

Mr. Yann Bernard was presented as an expert witness for the Government, who the Committee duly recognized as a qualified expert in his field. He is the Director of the Office of the Chief Actuary. He presented an analysis of the compensation of the Military Judges of Canada as of 2 December 2022. In his analysis, Mr. Bernard explained the results of his calculation on determining the value of compensation for the military judges compared to the other federally appointed judges of Canada.

Mr. André Sauvé is a consulting actuary and was presented as the expert for the military judges. He was likewise duly recognized by the Committee as an expert. He presented and explained his 13 January 2023 report, in which he sought to rebut several of Mr. Bernard’s findings, such as the rank available after Lieutenant-Colonel. He also calculated the value of military judges’ pension benefits and proposed some economic and demographic hypotheses. The experts especially diverged over whether total remuneration of salary and pension values resulted in military judges or other federally appointed judges being more highly remunerated.

F. In-Person Hearing

An oral in-person hearing took place in Gatineau, Quebec on the 14th and 15th of June, 2023, which proceeded in three parts:

1) the presentations of the expert witnesses Mr. Sauvé and Mr. Bernard by way of sworn *viva voce* testimony before the Committee;

2) the presentation of military judge Pelletier J. before the Committee;

3) oral argument made by counsel for the Government and the military judges.

At the end of the hearing, the Committee indicated that it would take the matter under consideration. This report is the result of the deliberations of the Committee, based upon all of the evidence and argument presented by the parties.

G. Acknowledgment of Contributions and Assistance to the Committee

The Committee wishes to thank Mr. Campbell for his skilled and dedicated assistance.

H. Effectiveness of the Committee Process

The Military Judges noted the long and unexplained delay in appointing the Committee. Their factum presented to this Commission at paras. 100-104 sets out the relevant facts:

> [translation] This Committee should have been set up shortly after 1 September 2019. Yet, it was only on 20 June 2022, after the military judges had sent a draft application for mandamus to the Federal Court, that the members of this Committee were appointed by Order in Council.
>
> The military judges do not understand and furthermore condemn the considerable time the Minister has taken in establishing this Committee, despite the clear and express terms of the NDA and the QR&O regarding the required deadlines.
>
> The legislative intent is for the Compensation Committee to operate on a permanent basis. However, the failure to respect the applicable deadlines and process has left the military judges without a formal process for determining their compensation, thereby undermining the independence of the military judiciary.
>
> That forces the Committee to engage in an essentially retroactive exercise, which affects public confidence in the independence and effectiveness of a process that is required pursuant to constitutional principles and the NDA.
>
> The military judges deplore the fact that this Committee was not set up until almost two years after all the administrative steps and documentation required by the Governor in Council for the appointment of the three Committee members had been completed…

The Committee notes that such delays are not consistent with the constitutional imperative that it be effective and converts our role into recommending remuneration retrospectively rather than prospectively. We urge the Government to appoint future Committees in a timely way so that they

may report their recommendations before the beginning of period to which they relate rather than after that period has passed.

The Government's recent consistent rejections of the MJCC's core recommendations also undermine the effectiveness of the Committee's process as envisaged by the Supreme Court of Canada. While the Government is not bound by the recommendations, consistent refusal to implement independent recommendations saps confidence in the process.

The two most recent Committees recommended parity of remuneration for the military judges with other federally appointed judges. It is instructive to consider their views.

a. 2012 MJCC Report Majority Recommend Remuneration Parity with Other Federally Appointed Judges

The 2012 MJCC Report emphasized the following at pages 12 and 14:

> It is quite stunning to realize that **only four of more than a thousand judges are singled out for much lesser remuneration if one accepts that they are indeed just as qualified as the others and paid from the same sources**.
> ...
>
> judges who would qualify for military appointments and are selected according to a similar process as members of another superior court are paid 31% more than military judges, from the same public purse … We agree that **the rationale of the government does not stand up to scrutiny**. [emphasis added]
> ...

b. 2019 Report Unanimous in Recommending Remuneration Parity with Other Federally Appointed Judges

The 2019 MJCC Report noted at pages 8 and 9:

> If the Government of Canada is fine with equal remuneration for judges working in different provinces or for specialized courts, it is difficult to understand why, as a matter of principle, it would be any different for the military Courts …

The 2019 MJCC Report concluded at pages 10 and 11:

> 1. economic conditions are not the primary factor for the Committee to consider as they are "not an obstacle to setting adequate remuneration; this was admitted by the government."
>
> 2. financial security in preserving judicial independence should not simply aspire to the absolute bare minimum: "we should not be satisfied with the minimum requirement and that it is impossible to set adequate remuneration on the basis of this standard alone."
>
> 3. for attracting outstanding candidates "When one considers appointments to the superior courts … It has already been established that many candidates will earn much more than what they earned previously. There is no need to make a distinction for military judges. Our finding on this criteria is simply to accept that an adequate salary is one that allows for reasonable and stable recruitment."
>
> 4. "military judges' salaries should be increased with a view to equating their salaries with those of those of other federally appointed judges … there is nothing to justify paying military judges less when they have equivalent training."

We note that the Government's responses to these reports were concerned that the Committees appeared to focus only one benchmark or criterion, namely parity, rather than inquiring into the adequacy of the remuneration having regard to all the statutory factors. In our deliberations, we have taken those concerns to heart and carefully and fully considered all the statutory factors in coming to our conclusions.

c Government's Consistent Acceptance of JCBC Reports Recommendations

The Government's treatment of the JCBC recommendations relating to other federally appointed judges stands in sharp contrast to that given by the Government to the previous MJCC reports. The Committee notes that the "Response of the Government of Canada to the Report of the 2021 Judicial Compensation and Benefits Commission" (11 May 2022) accepted 100% of the eight recommendations made by the Commission: "The Government will take steps to ensure the timely implementation the Commission's recommendations " This included improvements to judicial allowances such as a 50% increase in the annual "incidental allowance" (from $5,000 to $7,500). There the Commission rejected the Government's proposal for "a 10 percent limit on salary increases attributable to IAI above the salary payable as of April 1, 2020" notwithstanding an

"unusually large increase at April 1, 2021," while also rejecting "proposals put forward by ... the judiciary (i.e. 2.3 percent increases in salary in the third and fourth years of the Commission's inquiry period, in addition to indexation)."

The Committee notes that the Government likewise accepted 100% of the recommendations of the Rémillard Commission in its "Response of The Government of Canada to the Report of the 2015 Judicial Compensation and Benefits Commission," even finding that "The Government agrees that it is appropriate that the Chief Justice of the Court Martial Appeal Court receive a salary equal to that of other superior court chief justices, and that the step-down provisions also be extended to that office." The Government's responses to the last two Judicial Benefits and Compensation Commissions thus stand in stark contrast to the Government's response to the last two MJCCs.

The Government noted in its response to the Sixth Judicial Compensation and Benefits Commission (Turcotte Commission) that the Commission is "a manifestation of one of the protections constructed around the constitutional principle of judicial independence, which the Supreme Court of Canada has found to be the lifeblood of constitutionalism in democratic societies and a principle that is fundamental to maintaining public confidence in the administration of justice." This is equally true for the MJCC, which is statutorily governed by precisely the same principles as direct the JCBC.

III. STATUTORY CONSTRUCTION OF GOVERNING LEGISLATION

We must address two points of interpretation in relation to our statutory mandate. The first concerns the meaning of "adequacy" of the remuneration. The English term "adequacy" - the adjective form of the noun "adequate" - in some definitions has the sense of bare minimum, but in others it does not, leading to some ambiguity in Parliament's intentions in using the English term. The *Concise Oxford Dictionary*, 8th ed. (Oxford: Clarendon Press, 1990) at p. 14 defines "adequate" as "sufficient, satisfactory" (often with the implication of being barely so). *Black's Law Dictionary*, 6th ed (St. Paul: West Publishing, 1990) at p. 39 defines "adequate" as "sufficient, commensurate, equally efficient; equal to what is required; suitable to a case or occasion; satisfactory." We find the term "satisfaisant" in French used in the French statutory text of both the *NDA* and the *Judge's Act* has a more precise and broader meaning, with an equivalency in

English of "satisfactory." See *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judge's Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44 at paras. 65-67,

R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworth, 2002), at pp. 80-81, notes:

> The basic rule governing the interpretation of bilingual legislation is known as the shared or common meaning rule. Where the two versions of bilingual legislation do not say the same thing, the meaning that is shared by both ought to be adopted unless the meaning is for some reason unacceptable ... The law is the abstract rule or provision that the legislature 'intends' to enact. The words in which the law is expressed may or may not be well chosen; they may be well chosen in one language version but not in the other. The court's job is to construct, or reconstruct, the rule relying on the meaning of both language versions ..."

Here, we find the French meaning is more precise than the English meaning, but the English meaning overlaps the French meaning. As such, they can each have a shared meaning of "satisfactory" in the context of compensation for military judges as mandated by the *NDA*, which is quite different than merely the bare minimum.

A statutory comparison of the *NDA*'s provisions in establishing the Committee and the *Judges Act* provisions in establishing the Commission is also useful, as we observe that Parliament's drafting of the *Judges Act* contains the same key English-French version issue at s-s. 26(1) as does the *NDA* at s. 165.34. Thus, what the JCBC has found to be satisfactory for the approximately 1200 other federally appointed judges is highly relevant to this Committee's determination of what will be satisfactory for four federally appointed military judges. It is helpful to apply the golden rule of modern statutory construction as endorsed numerous times by the Supreme Court of Canada, such as in *R. v. Ulybel Enterprises Ltd*., 2001 SCC 56 at paras. 28-19:

> In numerous cases, this Court has endorsed the approach to the construction of statutes set out in the following passage from Driedger's *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> This famous passage from Driedger "best encapsulates" our Court's preferred approach to statutory interpretation: *Rizzo & Rizzo Shoes Ltd. (Re)* , [1998] 1 S.C.R. 27, at paras. 21 and 23. Driedger's passage has been cited with approval by our Court on frequent occasions in many different interpretive settings which need not be mentioned here.

Here, the Committee determines that the intention of Parliament in establishing both the JCBC and MJCC was to provide for independent advisory bodies in compliance with Parliament's constitutional obligations on the remuneration that should be provided to the federal judiciary. The object of both the *NDA* and the *Judges Act* in respect of establishing a judiciary was in part to guarantee "judicial independence" as confirmed in s-s. 165.34(2)(b) of the *NDA,* where "outstanding" judges would preside, having "financial security" by way of "adequate" remuneration. We therefore find that the JCBC's findings - and the Government's responses to them - although not binding, are relevant to our work in assessing the adequacy of compensation of military judges, on the basis that Parliament's intention in establishing the scheme of both Acts was the same.

The second interpretative point concerns the third statutory criterion of attracting "outstanding candidates" in s-s. 165.34(2)(c) of the *NDA*. The statutory language in both official languages can be harmonized by giving them a common meaning of "the best" in English. We elaborate on the implications of these statutory construction findings below, in analyzing the application of the evidence to the third criterion.

IV. OVERVIEW OF 2023 PARTIES' POSITIONS

A. The Military Judges

The military judges, as summarized especially at paragraphs 8 and 204 of their factum, took the position that:

- the Government misconceives the roles of the military judges, who are in fact and law judges first who happen to also be military officers, and not the other way around;

- military judges are part of the federal justice system where there is no reason to treat the four of them any different from the other approximately 1200 federally appointed judges;
- parity of remuneration with other federally appointed judges has been recommended since 2012 by the Committee, but consistently ignored by the Government;
- there is no reason to depart from parity for military judges (see judges' brief at paras. 154-166);
- the pension plan of military judges is not relevant to the assessment of remuneration, and even if there is relevance it should not be given the value attributed to it by the Government.

The military judges have long argued, before successive remuneration committees, that their remuneration should be the same as for other federally appointed judges. They argue that their current salary is fifteen percent less. They argue strenuously that this disparity, which has been condemned by the previous committees, impinges on the independence of military judges. They maintain the disparity is not experienced by other federally appointed judges. Those judges are treated differently, from a salary point of view, and that lessens judicial independence.

The military judges argue that to ensure public confidence in the independence of the military judiciary they should be paid a salary commensurate with the other federally appointed judges. They argue that the criteria set out in section 165.34 of the *NDA* would allow for salary parity with other federally appointed judges and that the section does not prohibit "parity."

B. The Government

The Government, as summarized especially at paragraphs 1 to 3 of their factum, took the position that:

- military judges already receive satisfactory treatment;
- adequacy of remuneration should be assessed globally, taking into account particularly the value of the pension plan (paras. 140-159), workload (paras. 122-139), and a comparison with provincially appointed judges' remuneration (paras. 160 and following);
- parity with federally appointed judges is not justified, as they are governed by a different statute, their remuneration recommendations come from a different Commission, and different factors are involved.

The position of the Government is that the current salary structure is adequate. The salaries of military judges are increased each year on April 1st based on the CIAI (Canada Industrial Aggregate Index), as is the case with other federally appointed judges. That provision will bring military judges' salaries to $339,183.00 for the year 2023-2024, which constitutes a 19.4% increase over the four-year period of this review. The Government also relies heavily on the assertion that military judges will benefit from their CAF pensions as military officers, which it is claimed by the government's expert witness will bring the global value of their remuneration package to $545,034.00. The Government argues these figures assure that the criteria for an increase in salary as set out in the legislation (s. 165.34 *NDA*) is fully respected and that no increase to their salary apart from this feature is necessary. The Government argues that military judges receive this salary through the existing process, and therefore there is no need to link their salary to that of other federally appointed judges. The current process is supposedly quite adequate.

The parties take a common position on the issues of CIAI and Chief Justice differential remuneration, but diverge on remuneration and the incidental allowance.

V. ANALYSIS OF THE STATUTORY FACTORS

A. The Statutory Framework for the Committee's Work

For military judges, the determination of remuneration is a process founded in the *NDA*. Section 165.34(2) of the *Act* sets out the criteria which the Committee must consider in determining the adequacy of the remuneration of military judges for the period under review.

Succinctly put, the four factors the Committee must consider are as follows:

- The Prevailing Economic Conditions in Canada;
- The Role of Financial Security;
- The Need to Attract Outstanding Candidates to the Military Judiciary;
- Other objective criteria that the committee considers relevant.

The Committee heard representations from both the Government and the military judges on each of these criteria.

a. The Prevailing Economic Conditions in Canada

i. The position and argument of the Government on economics

The Government argues that any increase in the remuneration of military judges must reflect the current economy and the financial situation of Canadians. The pandemic caused a distortion in the CIAI in 2021 when 2.9 million Canadian workers lost their employment in the spring of 2020. Most who lost their work during the pandemic occupied positions that were subject to lower remuneration rates. At the same time, inflation was projected for 2023 at 4.3% and approximately 2.9% annually until 2027.

The Government argues that throughout this period military judges' salaries benefited from an increase in the CIAI at 6.6%. Therefore, and contrary to most Canadians, the salary of military judges increased considerably during this period. The Government argues, consistent with the *PEI* case, that the reputation of the judiciary would be damaged if the public perception was that judges, including military judges, were not carrying their fair share of the burden of the economic difficulties. The Government points out that consistent with the Turcotte Commission, which set the increase for the other federally appointed judges as a function of the CIAI, military judges received the very same increase as the other federally appointed judges.

The Government argues that during the period from 2020 to 2022, there was a fall in GDP and CPI, as well as a recession and exploding budget deficits. There was also a recovery, with rising inflation and CPI, falling unemployment and high debt producing, at a minimum, uncertainty in the marketplace and in the economy. In these circumstances, the increase in the cost of living was largely offset by the increase (CIAI) in the salaries of military judges. Accordingly, the military judges have been insulated from the economic pressures through the increase in salary provided by the annual increase based on the CIAI.

The Government argues that the uncertainty in the economy, which will be experienced at least until 2027, requires caution in any determination of salary; meaning the existing formula provides a sufficient salary and the formula should be maintained. The Government argues that a salary increase to that of the other federally nominated judges is not warranted, given the present economic circumstances.

ii. The position and argument of the military judges on economics

The military judges maintain that the percentage increases brought about by the CIAI are not an increase in salary but simply a provision to ensure that military judges do not lose the value of their existing salary. They argue that the three and four-year delay in which the Government has addressed the issue of military judicial salaries is a violation of the spirit of Section 164.34 of the *NDA*. They maintain that the Act requires a prospective approach to the issue and is not one to recommend salaries retroactively. They argue that this is a blatant and unjustifiable disregard of the structure put forward in the *NDA*. The military judges point out that this exercise should have begun in September 2019. This inordinate and unacceptable delay risks impinging upon the independence of the military judiciary and is sufficient to negatively impact the confidence of the public in the efficacy of the process to recommend military judicial remuneration. In other words, the Government is not following the relevant legislation, and this disrespect of the governing legislation is therefore an impingement of judicial independence.

The military judges argue that the issue of the strength, or weakness, of the economy was discussed by the Turcotte Commission in its report of 2021. They maintain that the Turcotte Commission concluded that the state of the economy should not constitute a restrictive factor in the establishment of judicial remuneration notwithstanding the economic difficulties presented by COVID-19. They point out that the Commission stressed that temporary budget deficits have the goal to stimulate the economy. They are not structural deficits and that the legislative criteria (Sec.165.34 *NDA*) should not be interpreted as a restriction on what should be considered as a satisfactory remuneration for judges. The Turcotte Commission concluded that the state of the economy could not be a limiting factor in setting the remuneration of federally appointed judges, despite the turmoil caused by the COVID-19 pandemic.

The military judges maintain that the effects of the uncertainty of the Canadian economy are temporary. They point out that during 2019 and 2020, which forms part of this review period, the Government of Canada was indicating publicly that Canada would be the leader in economic activity amongst the G7 group of nations. The four military judges maintain that the Government cannot reasonably suggest that the requested increase in salary to parity with other federal nominated judges would seriously prejudice the state of Canadian public finances. They say that

the Government cannot credibly claim that the implementation of their proposal, for four judges, is financially harmful to the Canadian economy.

The military judges submit that the Turcotte Commission's conclusions are perfectly applicable in this matter. On the one hand, the effects of the pandemic on the Canadian economy are of a temporary nature, and on the other, the Government has presented no evidence of the adoption or implementation of a policy of general application to reduce the deficits generated during the pandemic period.

iii. Analysis of the economic factor

The prevailing economic conditions in Canada appear to have stabilized after the COVID pandemic. The 2019 Budget of the Government of Canada foresaw the strengthening of the Canadian economy through 2019 and estimated that Canada would become the leader of economic growth in 2019 and into 2020 amongst the G7 Group of Nations.

As the military judges have argued that the determination of the salary for the period of the mandate of this committee (2019 to 2023) should have been undertaken by September 2019 and completed shortly thereafter, as is required by the *NDA* and KR&Os (King's Regulations and Orders). Had that determination been completed, as it was supposed to have been, it would have fallen within the time frame set out in 2019 and 2020 precisely when Canada was projected to be a leader in economic growth amongst the world's most developed nations. That economic projection was current through to 2021 because, as was pointed out by the Turcotte Commission, the 2021 Federal Budget, which is a statement reflective of the Canadian economy, was not an austerity budget and did not impose measures to limit discretionary spending of departments and federal agencies.

As was pointed out by the military judges, the Turcotte Commission concluded in their analysis of the state of the Canadian economy in 2021, that the "state of the economy" should not be considered a restrictive factor in the determination of the remuneration of federally appointed

judges notwithstanding the challenges posed by the COVID-19 pandemic. The JCBC concluded at paras. 78-79 (footnotes omitted):

> 1. As argued by the Canadian Bar Association, section 26(1.1) "does not give dominance to any criterion. It suggests that each one must be given due weight and consideration."[49]
> 2. Given that,
>   a. the temporary fiscal deficits were meant to stimulate the economy rather than being structural deficits;
>   b. the Budget 2021 is not an austerity budget. Unlike Budget 2009, it did not "outline measures to manage expenditures, including actions to limit discretionary spending by federal departments and agencies";
>   c. the Government presented no evidence of deficit reduction policies of general application; and
>
>   d. statutory indexing was maintained by the Government following each of the Block and Levitt Commissions despite the prevailing economic conditions;[51]
>
> We are of the view that the first criterion under section 26(1.1) of the *Judges Act* should not inhibit or restrain us from making recommendations we would otherwise consider necessary to ensure the adequacy of judicial compensation.

The same would be true of the evidence presented to the MJCC in 2023. If anything, the economy has been slowly recovering since the pandemic, which was at its height in 2021 for the JCBC Turcotte Committee. Thus, for the MJCC in 2023, the first factor should not inhibit or restrain the MJCC from making recommendations we would otherwise consider necessary to ensure the adequacy of military judicial compensation. Finally, the salary increase requested by the military judges, which is parity with other federally appointed judges, cannot be credibly or reasonably said to compromise in any realistic manner Canadian public finances.

b. The Role of Financial Security

i. The position and argument of the Government on financial security

The Government accepts that financial security is an essential condition of judicial independence and is designed to ensure that judges do not succumb to interference in their decision-making process through the exercise of financial manipulation. The Government agrees with the *PEI* case

which states that public confidence in the independence of the judiciary requires salaries that ensure that judges do not become vulnerable to pressures brought about by financial manipulation. The Government agrees military judicial salaries should be maintained at a level that insulates judges from such pressures.

The Government argues that while the current salary is eighty-five percent of that paid to other federally nominated judges, the value of the pension adds another $219,835 to the annual value of the salary providing an overall value of $545,034. The Government asserts that the current value of the salary and pension of military judges is such that a reasonable well-informed person would conclude that the salary and benefits of military judges is far superior to that which would make them susceptible to bias through economic manipulation. We note that the military judges have advanced their own expert evidence which disputes the Government's pension numbers, which are based on several assumptions.

ii. The Position and Argument of the Military Judges on Financial Security

A military judge is both a federally appointed judge and an officer of the Canadian Armed Forces. The *Report of the Third Independent Review Authority to the Minister of National Defence Pursuant to subsection 273.601(1) of the* National Defence Act, *RSC 1985, c N-5* (30 April 2022) authored by the Honourable Morris J. Fish indicated that this fact could erode confidence in the independence of military judges because of the public perception of their inclusion as an officer in the CAF and their proximity to both the decision-making process inherent in the chain of command and to the Judge Advocate General's (JAG) Branch which provides prosecution and defence services to members of the CAF. The military judges argue that one factor in dispelling this perception is to equate the remuneration of military judges to that of other federally appointed judges. In other words, treat military judges equally to superior court judges.

The military judges also argue that the systematic refusal of the Government to follow the salary recommendations of "parity" found in the decisions of this Committee of 2008, 2012 and 2019 is ministerial confirmation that military judges are not equal in stature to other federally appointed judges. This, they argue, amounts to a statement from the Government that federally appointed military judges do not have the same judicial standing, status, and independence of other federally

appointed judges. They argue that members of the CAF and potentially civilians who appear before them would have the perception military judges are judges of a lesser stature. They stress that the problem of financial security and independence, taken together, is exacerbated by the refusal of the Government to accept the principal recommendations of the Military Judges Compensation Committees of 2008, 2012, 2019 with respect to remuneration.

The military judges say that the disparity between the salaries of military judges and other federally appointed judges undermines the independence of military judges. The remuneration of current military judges is fifteen percent lower than that of other federally appointed judges with no explanation given by the Government to justify the existence of this disparity. The military judges argue that they are fulfilling the same responsibilities, following the same training, attending the same conferences and workshops as their federally appointed counterparts. And yet, amongst approximately 1200 federally appointed, four military judges have been singled out to receive a lesser remuneration than their federally appointed colleagues. Finally, the military judges argue that the Committee should recommend, consistent with the committees that preceded it, that "parity" in the financial treatment of military judges as other federally appointed judges is required.

iii. Analysis of the Financial Security Factor

The Government and the military judges appear to agree on one aspect – that the current salary should not make military judges susceptible to bias through economic manipulation. The military judges stress that the eighty-five percent remuneration of other federally appointed judges is a minimum to ensure the independence of the military judiciary. But their argument goes further. Within the context of a federally appointed judiciary, no one has explained to them, or others, why military judges should be treated differently than other appointees in the federally appointed judiciary. Currently, that difference is approximately fifteen percent.

The Government asserts at para. 81 of its factum that: [translation] "The current salary … is far above the minimum level required to protect the military judiciary from political interference through economic manipulation." However, this Committee believes that the three criteria statutorily mandated by Parliament must be considered in their totality, and not in isolation from each other, or from the overall mandate of the Committee.

The Government appears to be advocating for a "bare minimum" interpretation of s. 165.34 of the *NDA*. For the reasons noted above, we have come to the conclusion that application of proper principles of statutory interpretation lead to the conclusion that Parliament in creating s. 165.34 of the *NDA* was not tasking the Committee with a bare minimum model, but rather with determining what satisfactory remuneration would be. We determine that satisfactory financial security would be parity with the remuneration of other federally appointed judges.

We agree with the submission of the military judges at paras. 117 of their factum: [translation] "Therefore, in order to meet the constitutional standard, the Committee's recommendations take on additional importance. These recommendations must be expressed in such a way as to foster the perception that military judges enjoy full judicial independence despite the fact that they belong to the CAF."

"Judicial independence" as articulated by Parliament in s. 165.34(1)(2) *NDA* has both an objective and subjective component to it. The judiciary must not only remain independent but be perceived to be independent. The salary differential between military judges and other federally appointed judges promotes a perception of difference to the disadvantage of the perception of the independence and impartiality of the military judges. We believe that public perception of independence is especially important within a hierarchical organization like the CAF, where clearly military judges remain integral parts of the CAF, unlike other federally appointed judges.

c. The Need to Attract Outstanding Candidates to the Military Judiciary

i. The position and argument of the Government on outstanding candidates

The Government states that the current remuneration of military judges does not deter the recruitment of the best candidates for appointment to the military judiciary. Since 2005, for each of the five appointments between 7 and 10 candidates were classified as either "recommended" or "highly recommended" for appointments to the military judiciary. The Government maintains that these figures are certainly comparable or superior to those of federally appointed judges working in the civilian system. The Government maintains that the results of the processes for appointing military judges have achieved success overall.

By comparative analysis, the salary of a military judge is certainly attractive to CAF members who are regular force or reserve lawyers working in the military justice system. The comparison of military judge salaries with JAG officer salaries displays an attractive advantage to pursuing an appointment as a military judge.

Comparing the available information, the Government argues there is nothing to suggest that the remuneration of a military judge is dissuasive for applications from reserve force lawyers. The Government points out that in 2018 there were candidates from the reserve force who applied for military judicial positions. The Government indicates thirty percent of officers who applied for military judicial positions were reservists and seventy percent were members of the regular force – a proportion which has remained stable across the years. The Government maintains that while there could be other factors which may dissuade reservists from applying to be a military judge, salary would not be one of them.

ii. The position and argument of the military judges on outstanding candidates

The military judges argue that the Government has adopted an unjustifiably restrictive view of the pool of candidates for the military judiciary. The military judges stress that it is essential the best possible candidates be attracted to service in the federally appointed military judiciary. They state that remuneration is a major factor in promoting this attractiveness. They maintain the converse is also very true: low remuneration must not become an obstacle to the attraction of the best candidates. The salary must not be sufficiently low as to dissuade potential candidates from applying for a federal appointment as a military judge. This must be true for military lawyers working in the JAG Branch, as well as other officers in the regular force who may be lawyers not practicing military law as their daily responsibility, and finally for members of the reserve force who practice law in their civilian occupation. The military judges say this salary must be such that members of the CAF are attracted to the call for service as a military judge. The salary must be attractive to a broad spectrum of potential candidates including satisfying the requirements for diversity and inclusion.

The military judges say that given the salary disparity between other federally appointed judges and military judges, the best candidates are more attracted to a federal appointment in the civil judicial system than service in the military justice system. They point out that any qualified lawyer of the CAF, regular or reserve, is eligible to be a federally appointed judge in the civilian justice system. As an example, the military judges maintain that CAF reservists who practice law as their civilian occupation would be far more attracted to a superior court appointment rather than a military judicial appointment. This preference could be largely due to the discrepancy in remuneration.

The military judges argue that salary "parity" with federally appointed judges in the civil system would negate that disadvantage, thereby ensuring that for all military judicial appointments the very best candidates from the Canadian Armed Forces, and the private sector, would be assured. It might also have the added benefit of having a non-member of the Canadian Armed Forces who is a specialist in military law make an application for a military judicial position.

iii. Analysis of the outstanding candidates factor

The Government, as noted, argues that there are plenty of qualified candidates for the posts of military judges and it follows that remuneration must already be adequate: [translation] "The current remuneration of military judges has no deterrent effect on the recruitment of the best candidates for the military judiciary" (factum para. 86). But as we explained above, our statutory interpretation is that Parliament intended in drafting s. 165.34 to attract "the best" candidates, not just well- qualified candidates. The "best" means that the top candidates will not be diverted to higher-paying judicial positions elsewhere. With the current salary differential in place between military judges and all other federally appointed judges, the best candidates are likely to seek appointment to other parts of the federal judiciary.

We conclude that this criterion favours remuneration parity with other federally appointed judges.

d. Other Relevant Factors

Under s. 165.34(2)(d), the Committee "shall consider … any other objective criteria that the committee considers relevant" to its mandate to inquire into "the adequacy of the remuneration of

military judges." The military judges submitted that we ought to consider the remuneration of other federally appointed judges under the heading of other objective criteria. As part of the comparison with federally appointed judges, the Government invites us to consider the pension scheme for the military judges as compared with the annuity for other federally appointed judges. The Government also invites us to consider the increases in remuneration of others in the federal public service, the role of the military judges and their workload.

i. Pension scheme comparisons

There was disagreement between the parties over whether the Committee has the authority to consider pension/annuity provisions in its inquiry into the remuneration of military judges. We find that we do have authority to examine the adequacy of "remuneration" and should not be blind to the reality of the totality of that remuneration in making our recommendation as to its adequacy. However we do not have authority to make recommendations dealing with the pension scheme.

The Committee has considered the Government's argument that including their pensions, the remuneration of military judges is in fact more than that of other federally appointed judges. In our view, the evidence does not bear this out.

The Government has insisted during the hearings of the Committee that the salaries of military judges are $545,034 when their pensions are accounted for, according to the evidence presented by their actuary who claims they receive an additional 67.6% of their salary by way of pension benefits. It is also argued by the Government that military judge pensions have a greater value than other federal judges because they retire 14 to 16 years earlier than other judges, and that provincial judges only receive $287,136 per year and Superior Court Associate Judges $297,700 by way of annual salary.

The Committee was presented with dueling expert evidence from the military judges and the Government concerning pension comparisons. By comparison, there was no debate over what the actual salaries of military judges and other federally appointed judges are. We do not believe it necessary to choose a winner in the war of experts over pension valuations. That military judges may retire with greater pensions than other federally appointed judges may simply be a function of most military judges having devoted themselves to a career life of public service prior to being

appointed to the judiciary, rather than federal judges where a significant proportion of other federally appointed judges came from the private sector where if in private practice, they may have had not been benefitting from any pension regime, and thus be starting their pension contributions at a much later age than military judges did.

However, this ignores the fact that other federally appointed judges may have been earning much higher salaries in the private sector prior to being appointed a judge, and some might be taking pay cuts upon appointment to the bench, which would help offset their fewer pensionable years, particularly if they were setting aside significant portions of their incomes as investments for retirement. There are too many variables in pension values for there to be apt comparisons between the pension values of military judges and other federally appointed judges.

It is not disputed that both military judges and other federally appointed judges benefit from significant indexed retirement schemes. Military judge pension amounts payable upon retirement could be greater than other federally appointed judges if they had contributed longer to pension schemes, but then again, they might not be. Military judges might also retire at much younger ages than other federally appointed judges. A variety of life factors can affect pension values including taking early retirement for reasons of health.

The calculations of both experts involved several assumptions to advance the arguments that either military judges including pensions were already paid more or less than other federally appointed judges. Pension values are not an obligatory factor we must consider according to our mandate from Parliament. We do not find the comparison of the pension schemes useful for several reasons:

- the retirement regimes are completely different (counting of years of service, retirement ages, accumulation of benefits);

- the value of the benefit swings wildly depending on the assumptions used in the calculations;

- some of the pension value is based on subjective factors, such as choice of retirement date or the choice to elect supernumerary status.

Thus, while we concluded that the comparative value of pension schemes is a relevant factor, the evidence presented before us does not materially assist in applying this factor in investigating the adequacy of the military judges' remuneration.

ii. Comparisons with other federally appointed judges

The Government asserts at paras. 121 of its factum: [translation] "Tying the salaries of military judges to those of federally appointed judges or provincial court judges would run counter to the mandate and requirements of the NDA." The sole authority cited for that assertion is the Committee's 2008 Report at p. 15. However, when one examines the wording the 2008 Report used, it does not support the Government's submission:

> 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 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.

Thus, the Committee was talking about avoiding abdicating its statutory responsibilities in favour of other committees, not that the remuneration of other federally appointed judges was irrelevant. As the 2008 Committee said, and we agree one and a half decades later, it falls to each Committee to come to its own conclusions, and those conclusions must be based on the evidence and consideration of all statutory factors. From the evidence presented before us, we conclude that the remuneration of military judges is less advantageous than that of other federally appointed judges. This may give rise to the impression that military judges are "second-class" judges. As we have noted above, we do not consider parity with other federally appointed judges to be a "factor" under s-s. 165.34(2)(d) of the *NDA*, rather, it is a conclusion under s-s. 165.34(1) of the *NDA*.

iii. Comparisons with provincial court judges and federally appointed associate judges

We do not believe that the remuneration of federally appointed Associate Judges is a useful comparison for determining the adequacy of the remuneration of military judges. This comparison, if anything, suggests that military judges should be compared with judicial officers who, like the Associate Judges, are not judges but rather have more limited jurisdiction and authority than judges. That would mean classing military judges effectively as judicial officers who are not full-fledged judges, which is neither legally nor factually correct. Similarly, we find the comparison of provincial court judge remuneration throughout Canada to be of limited value, given the differing economic situations of the various jurisdictions.

If one is to take provincial court judges' salaries presiding over more than 38% of Canada's population in the province of Ontario, Schedule A - Order in Council 1273/2018, "Salaries for Judges of the Ontario Court of Justice," they are already tied to 95.27% of federal Superior Court judge's salaries:

> In respect of service from April 1, 2018 to March 31, 2022, the annual salary of a provincial judge set out in subsection 1(3), following the adjustment in Section 3, shall also be increased to align with a percentage of the salary rate of judges of the Ontario Superior Court of Justice set out in Part I of the Judges Act (Canada), R.S.C., 1985, c. J-1, ("Superior Court Judge salary rate") as follows:
>
> ...
>
> From April 1, 2021 to March 31, 2022, to equal 95.27% of the Superior Court Judge salary rate for that period.

By comparison, military judges' salaries rest at 85% of federal judges' salaries, over 10 percent below provincial court judge salaries in Canada's largest province. We particularly caution against comparing the remuneration of civil servants to that of judges. While it is true that both are paid with tax dollars, judges occupy constitutionally vital positions in Canadian society which places them differently than civil servants. As the Supreme Court of Canada said in *British Columbia (Attorney General) v. Provincial Court Judge's Association of British Columbia*, 2020 SCC 20 at para. 85: "a government that does not take into account the distinctive nature of judicial office and treats judges simply as a class of civil servant will fail to engage with the principle of judicial independence."

We do not give workload significant weight as an additional factor. Workload varies tremendously among other federally appointed judges. We do not find days of sitting a useful point of comparison. For example, the Supreme Court of Canada sat for 35 days in 2020 and issued 45 decisions (Supreme Court of Canada Year in Review 2020, online: https://www.scc-csc.ca/review-revue/2020/index-eng.aspx).

VI. THE INCIDENTAL ALLOWANCE

The military judges' position at para. 203 of their factum is that considering that military judges receive certain reimbursements from the budget allocated to the Office of the Chief Military Judge, it is appropriate to grant them a lesser incidental allowance in the amount of $3,000 as compared to the $7,500 incidental allowance granted to other federally appointed judges. Whereas the Government is of the view at para. 148 of their brief that it is not necessary, nor justified, to change entirely the manner in which the operating expenses of military judges are reimbursed. Just as the Chief Military Judge may refuse to reimburse military judges for certain costs, the Government asserts that other federally appointed judges may be denied certain costs under the line directors.

This Committee finds that currently all incidental funds payable to the military judges are under the control of the Department of National Defence chain of command, whereas the military judges in order to preserve their independence require an independent guaranteed source for an incidental allowance. Therefore, this Committee agrees that fixing an annual incidental allowance of $3,000 for the military judges would be most appropriate.

VII. CONCLUSIONS AND RECOMMENDATIONS

It is the Committee's conclusion that only parity of remuneration between military judges and other federally appointed judges will comply with Parliament's direction to us to determine what adequate remuneration for military judges would be. The conclusions of this sixth Committee are based in constitutional imperatives reflected through proper statutory construction which reflect Parliament's intent in enacting s. 165.34 of the *NDA*. This Committee's conclusions are not based on a "single factor." Indeed, it is a global consideration of all the factors mandated by Parliament in s-s. 165.34(2) of the *NDA* that leads the Committee to its conclusions.

To sum up, parity of remuneration with other federally appointed judges is not just a "factor" under s-s. 165.3(2)(d), rather it is a product of the Committee's careful analysis under s-s. 165.34(2) which takes into account all factors to be considered pursuant to s-s. 165.34(2). There is nothing philosophical about our conclusions, we considered the evidence and arguments before us, applied the test established for us by Parliament, and arrived at a conclusion. This is not an exercise of attempting to compare apples to oranges, to somehow find a judicial position outside the military that most closely fits the duties of military judges, and then seize upon that remuneration as what the Committee should recommend, rather the Committee must consider all evidence, arguments and statutory direction in their totality in coming to conclusions.