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February 24, 2016

Gil Rémillard, Chairperson
Margaret Bloodworth, Peter Griffin,
Members
Judicial Compensation and Benefits Commission
8th Floor
99 Metcalfe Street
Ottawa, ON K1A 1E3

Dear Mr. Chairperson, Members of the Commission:

JUDICIAL COMPENSATION AND BENEFITS COMMISSION 2016

1. Please accept this as the Submission on behalf of the Honourable B. Richard Bell, Chief Justice of the Court Martial Appeal Court of Canada (CMAC).
2. Chief Justice Bell seeks compensation and allowances equal to other Chief Justices of superior courts in Canada.
3. Counsel for Chief Justice Bell wish to make an oral presentation at the Commission's hearings in Ottawa.

THE COURT

4. In understanding the Submission by Chief Justice Bell, it would be helpful for the Commission to have the benefit of the background of the CMAC. Essentially, the CMAC is a court of criminal and constitutional appeal from the decisions of Court Martial Judges.
5. Following World War II, Canada, the United Kingdom and the United States saw the need for an independent civilian review court for persons subject to the *Code of Service Discipline* appealing from military tribunals. In 1950, amendments to the *National Defence Act (NDA)* created the Court Martial Appeal Board. This Board was chaired by a judge of the



Exchequer Court of Canada (the predecessor of the Federal Court of Appeal and of the Federal Court) or a judge of some other superior court, and was to have two or more other members who were either active or retired superior court judges or barristers of at least five years standing. At this stage, the Minister of National Defence (representing the Crown before Courts Martial) had no right of appeal.

6. In 1959, Parliament replaced the Court Martial Appeal Board with the Court Martial Appeal Court. The court was made a superior court of record and its head was designated as President. It was composed solely of superior court judges, to be designated by the Governor in Council from the Exchequer Court or from superior courts of the provinces. In 1984, the title of the head of the Court was changed to that of Chief Justice of the CMAC.
7. The disciplinary jurisdiction of the Canadian Forces is set out in Part III of the NDA. It includes all members of the Canadian Forces Regular Force anywhere in the world, members of the Reserve Forces under certain circumstances and uniquely, civilians accompanying a unit or other element of the Canadian Forces under certain circumstances. (Section 61(1) NDA)
8. The offences relating to the *Code of Service Discipline* run from purely military offences such as misconduct of commanders in the presence of the enemy to significant charges under the *Criminal Code*. The only exceptions prohibits the jurisdiction of the military to try a person for the offence of murder, manslaughter, or an offence under section 280-283 of the *Criminal Code* if committed in Canada. Other than that, the military justice system has worldwide jurisdiction. In addition, the NDA provides courts martial to have jurisdiction for any act or omission that takes place in Canada and is punishable under part VII of the NDA, the *Criminal Code* or any other act of Parliament, making it a military offence. The court also has the power to hear appeals against findings of an accused being unfit or not criminally responsible (Section 240.2 NDA), the power to mitigate, commute, remit and suspend a new punishment (Section 242 NDA), and of bail pending appeal (Section 248.2 NDA)
9. Every person subject to the *Code of Service Discipline* has the right to appeal to the CMAC with respect to the legality of the finding of guilt, the

legality of the whole or part of a sentence, etc. (Section 230 NDA).

Additionally, the Minister of National Defence has the right to appeal to the CMAC from a decision of a Court Martial as set out in section 230.1 of the NDA. Because of the nature of the military justice system and the extraterritorial application, the CMAC may sit and hear appeals at any place (section 235(1) NDA). It is to be noted that the CMAC has sat in numerous locations across Canada. An Appellant has the right to appeal directly to the Supreme Court of Canada upon a dissent on a question of law or with leave from the Supreme Court of Canada (Section 245 NDA).

10. The CMAC is a superior court of record (section 236(1) NDA). As of February 23, 2016, sixty-five judges were appointed to this court.

11. The CMAC is an active court dealing with a variety of appeals, both from the Minister of National Defence and a service member. Since the last report tabled by this Commission in May of 2012, the CMAC has rendered twenty-four decisions. Of these, four have been reviewed by the Supreme Court of Canada and two are still pending. Because of the nature of military justice and the NDA, many of the appeals are complex and deal with constitutional matters. For example, on December 21, 2015, in the cases of *R. v. Gagnon* and *R. v. Thibault*, 2015 CMAC 2, a CMAC panel chaired by Chief Justice Bell rendered a major constitutional decision concerning prosecutorial independence within the military justice system. Following the release of the decision in *Moriarity* (2015 SCC 55) by the Supreme Court of Canada, numerous appeals are scheduled to be heard. One appeal was heard on January 22, 2016, and 11 appeals (consolidated into three hearings) are scheduled to be heard on April 26 and 27, 2016. In addition to appeals, the Court deals with numerous motions on a regular basis.

CHIEF JUSTICE BELL

12. The Honourable B. Richard Bell was born in Woodstock, New Brunswick. He joined the Royal Canadian Mounted Police in 1973 and served as a constable at various locations throughout Nova Scotia. He received a Bachelor of Laws in 1979 and a Master of Laws in 1998, both from Dalhousie University. He was called to the bar of New Brunswick in 1979, he practiced law until 2006. He was appointed Queen's Counsel in 2004. Mr. Justice Bell was appointed a judge of the Court of Queen's Bench in

New Brunswick, Trial Division, in 2006 and elevated to be a judge of the Court of Appeal of New Brunswick in 2007. He was subsequently appointed a judge of the Federal Court, Court Martial Appeal Court of Canada, and Chief Justice of the Court Martial Appeal Court of Canada on the same day, February 5, 2015. The Honourable B. Richard Bell was appointed to both courts and is performing functions on a permanent basis to both the Federal Court and the Court Martial Appeal Court of Canada. His functions as Chief Justice of the Court Martial Appeal Court of Canada are not performed on an *ad hoc* basis and accordingly, his salary should be equivalent to the salary of any other Chief Justice of a superior court in Canada.

DUTIES AS CHIEF JUSTICE OF THE CMAC

13. The Chief Justice of the CMAC is a member of the Canadian Judicial Council, in accordance with section 59(1)(d) of the *Judges Act*. As a member of the Canadian Judicial Council, the Chief Justice of the CMAC may be called upon to chair disciplinary panels concerning federally appointed judges from across Canada, sit on nominating committees, or other committees set up by the Canadian Judicial Council. On June 17, 2015, Chief Justice Bell participated in the debate and vote regarding an inquiry committee report into the conduct of a justice of the Quebec Superior Court. The Canadian Judicial Council, chaired by the Chief Justice of Canada has 38 members who are the chief justices and associate chief justices of Canada's superior courts, of senior judges of the territorial courts and the Chief Justice of the CMAC. All of them receive a salary as Chief Justice or the equivalent, except for the Chief Justice of the CMAC.
14. Further, the Chief Justice of the CMAC holds one of four positions with full voting and participatory rights and responsibilities with the Courts Administration Service under the *Courts Administration Service Act* (CAS Act). The Chief Justice of the CMAC shares this responsibility with the Chief Justices of the Federal Court of Appeal, the Federal Court and the Tax Court of Canada. All of them receive a salary as Chief Justice, except for Chief Justice of the CMAC.
15. The Chief Justice of CMAC is responsible for the judicial functions of the court, including the direction and supervision over court sittings and the



assignment of judicial duties. In particular, the Chief Justice of the CMAC as well as the Chief Justices of the Federal Court of Appeal, the Federal Court and the Tax Court of Canada, have the power to determine the sittings of their respective court, assign judges to sittings, assign cases and other judicial duties to judges, determine the sitting schedules and places of sittings for judges, determine the total annual, monthly and weekly work load of judges and prepare hearing lists and assign courtrooms (section 8 CAS Act). The CAS Act does not grant less rights and responsibilities to the Chief Justice of CMAC, rather it treats all four Chief Justices of the national courts on an equal basis.

16. The Chief Justice of the CMAC has a wide range of responsibilities under the *Court Martial Appeal Court Rules* such as the designation of judges to hear an appeal (Rule 4.1), the approval of the appointment of counsel by the Director of Defence Counsel Services (Rule 20), providing directions for service outside Canada (Rule 23), providing directions for an application to be disposed of on personal appearance of the parties (Rule 25), making orders for special dispositions (Rule 28), approving the seal of the court (Rule 38), and designating a judicial administrator (Rule 39).
17. The Chief Justice of the CMAC is charged with the responsibility to establish a Military Judges Inquiry Committee (Section 165.31 NDA). This committee is in place and is chaired by the Chief Justice. It is responsible for making inquiries and examining complaints against military judges. This is a unique obligation and responsibility not borne by other federally appointed judges.

SALARY OF THE CHIEF JUSTICE OF CMAC

18. The Chief Justice of the CMAC is paid as a Federal Court judge plus a representation allowance of \$10,000.00 as prescribed by Section 27 of the *Judges Act*. As already mentioned, the Chief Justice of CMAC is the only member of the Canadian Judicial Council who is remunerated at the rate of a judge. He is also the only Chief Justice of a court governed by the CAS Act to be remunerated at the rate of a judge. However, the functions and responsibilities of the Chief Justice of CMAC are equivalent to those of any Chief Justice of a superior court in Canada. In fact, they are more onerous given his responsibilities under both the NDA and CAS and his responsibilities to the Federal Court.



19. As raised by the Block Commission, Chief Justice Bell contends that the adequacy of judicial remuneration requires similar treatment for similarly placed judges of the various courts in Canada. As shown in these submissions, the functions and responsibilities of the Chief Justice of CMAC are equivalent to those of the other Chief Justices of superior courts in Canada. This position was also adopted by this Commission in its 2004 report when it concluded that the salary of senior Northern judges should be the same as the salary attached to the position of the chief justice of the other superior courts in Canada, as they have the same duties, responsibilities and functions as chief justices.

20. The salary attached to the position of Chief Justice of CMAC should therefore be the same as the salary attached to the position of Chief Justice of the other superior courts in Canada. There is neither valid reason nor argument for it to be otherwise. The Chief Justice of CMAC does not perform his duties and responsibilities on an *ad hoc* basis for CMAC. He acts, on a permanent basis, as a Chief Justice and performs all duties associated with this function in accordance with the NDA, the CAS Act, the *Court Martial Appeal Court Rules* and the *Judges Act*.

Yours respectfully,

BOYNECLARKE LLP

David J. Bright
DJB/sga