

**JUDICIAL COMPENSATION AND BENEFITS
COMMISSION**

**COMMISSION D'EXAMEN DE LA RÉMUNÉRATION
DES JUGES**

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**Held at the 333 Laurier Ave. West
18th Floor, Hearing Room 3,
Ottawa, Ontario
on Thursday, April 28, 2016**

**Tenu au 333, avenue Laurier ouest,
18^e étage, salle d'audience 2
Ottawa, Ontario
Le jeudi 28 avril, 2016**

VOLUME 1

**BEFORE /DEVANT : G. Rémillard, Chairperson/Membre président
M. Bloodworth, Commissioner
P. Griffin, Commissioner**

**Steno C.A.T. Reporting Services
275 Slater, Suite 1400
Ottawa, Ontario
(613) 355-0807
stenocat@sympatico.ca**

(ii)

APPEARANCES:

P. Bienvenu)
A. Hussain)
J. Macdonald) CSCJA & CJC

C. Rugar)
K. Shannon) GOC

J. Nuss) CAJ

(iii)

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1 **VOLUME 1**

2 ---Upon commencing at Ottawa, Ontario, on Thursday,
3 April 28, 2016 at 9:00 a.m.

4 **---Me Gil RÉMILLARD (CHAIRPERSON/MEMBRE PRÉSIDENT) :**

5 **THE CHAIRPESON:** Ladies and gentlemen,
6 it's 9 o'clock and time to start our work.

7 Good morning everybody.

8 My fellow Commissioners, Margaret
9 Bloodworth and Peter Griffin and I welcome you to this
10 Public Hearing of the Fifth Judicial Compensation and
11 Benefits Commission.

12 Bienvenu à tous à cette audience
13 publique de la Cinquième Commission d'examen de la
14 rémunération des Juges.

15 Je vous prie de noter qu'il y a la
16 traduction simultanée et que nous pourrons donc
17 travailler dans les deux langues officielles du Canada.

18 Nous faisons aussi la traduction de
19 tous nos documents, et nous utilisons notre site web
20 pour les rendre publics.

21 Thank you all for having accepted the
22 invitation to join us today.

23 As you know, Section 26 of the *Judges*
24 Act mandates us to first, to inquire into the adequacy

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1 of the salaries and benefits paid to federally
2 appointed Judges and to Prothonotaries of the Federal
3 Court, and to submit a report containing our
4 recommendations to the Minister of Justice.

5 The Act sets out the factors that we
6 must consider in our deliberations and these factors
7 will guide us in our work.

8 And they are first, the prevailing
9 economic conditions in Canada, the role of financial
10 security of the Judiciary ensuring judicial
11 independence, the need to attract outstanding
12 candidates to the Judiciary, and any other objective
13 criteria that we consider relevant.

14 The Commission has invited submissions
15 from any interested parties, and transparency of the
16 process being a guiding principle, we have made all
17 substantive and procedural submissions received, as
18 well as our rulings on preliminary matters publically
19 available on our website.

20 Nous profitons de l'occasion pour vous
21 remercier pour la qualité des mémoires que nous avons
22 reçus, la documentation que nous avons reçue qui nous a
23 permis d'avoir une bonne compréhension de la situation.

24 Nous avons fait de notre mieux pour
25 permettre à tous ceux qui nous l'ont demandé, de faire

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1 des présentations et réponses à ces audiences.

2 My fellow Commissioners and I are
3 confident that we will have a fulsome record on which
4 to base our Report to the Minister.

5 We are grateful to the efforts all
6 concerned have made to advance this Inquiry in an
7 unusually short timeframe.

8 Madame Bloodworth, do you want to add
9 something to my remarks?

10 **COMMISSIONER BLOODWORTH:** Thank you,
11 Mr. Chair.

12 Bienvenu et bonjour.

13 I too am delighted to be with you this
14 morning, and I must say, having spent many hours,
15 particularly over the last week on the excellent
16 materials.

17 I thank you all for the excellent
18 material, and I am looking forward to hearing what you
19 have to add to those.

20 I did think, though, we should
21 recognise someone who wasn't able to be with us this
22 morning, and I hope, Mr. Rupar, you will convey to Ms.
23 Turley our best wishes and our hope for her speedy
24 recovery. We will be thinking of her as she's trying
25 to recover from a difficult injury.

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1 **MR. RUPAR:** I will, thank you.

2 And Ms. Turley has actually asked me
3 to pass on her thanks to everyone who has inquired and
4 touched and reached out to her about her condition.

5 She is making great progress and will
6 be back full time at work by the summer.

7 **THE CHAIRPESON:** Mr. Griffin.

8 **COMMISSIONER GRIFFIN:** Bienvenu,
9 welcome and thank you for your submissions in writing,
10 and we look forward to the next two days.

11 **THE CHAIRPESON:** You understand that
12 there is a lot of ground to cover over the next two
13 days.

14 We have distributed an agenda for
15 today and tomorrow, and we will ask Counsel to respect
16 the schedule as closely as possible, but I think we
17 should stay flexible regarding the schedule.

18 Be at ease to express what you have to
19 say, and well, you know, the frame is the frame but
20 it's the painting which is the most important.

21 So we have a schedule, but please feel
22 at ease to act as you think that you have to act.

23 Before starting, could I ask Counsel
24 to identify themselves as Louise Meagher, the Executive
25 Director of the Commission will call their names.

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1 Louise?

2 **MS. MEAGHER:** Thank you, Mr. Chairman.

3 And could I remind everyone before
4 they start speaking, to please press their mic button
5 so we can get the interpretation and for the
6 transcript, both. Thank you.

7 First I would call on Pierre Bienvenu
8 and Azim Hussain for the Canadian Superior Courts
9 Judges Association and the Canadian Judicial Council.

10 **Me BIENVENU:** Monsieur le Président,
11 bonjour.

12 Members of the Commission, it's a
13 pleasure being here.

14 I look forward to our work in the next
15 couple of days.

16 **MR. HUSSAIN:** Members of the
17 Commission, Azim Hussain. It's a pleasure to be before
18 you today.

19 **MR. BIENVENU:** I should mention that
20 we are joined by our colleague, Jamie Macdonald, also
21 from Norton Rose Fulbright.

22 Mr. Chair, I don't know if you would
23 like me to introduce to the Commission the
24 representatives of the Canadian Judicial Council and
25 the Canadian Superior Courts Judges Association.

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1 I was going to do that at the
2 beginning of my submission, but I am happy to do it
3 now.

4 I am in your hands.

5 **THE CHAIRPERSON:** Perhaps you can do
6 that right now.

7 **MR. BIENVENU:** Very well.

8 The Canadian Judicial Council is
9 represented by Mr. Justice David Jenkins of the Prince-
10 Edward-Island Court of Appeal.

11 Justice Jenkins is Chief Justice of
12 Prince-Edward-Island, and he is the Chair of the
13 Judicial Salaries and Benefits Committee of the
14 Canadian Judicial Council.

15 The Canadian Superior Courts Judges
16 Association is represented by its President, Mr.
17 Justice Marc Richard of the New-Brunswick Court of
18 Appeal; by its Secretary, Madame Justice Julie Dutil of
19 the Québec Court of Appeal.

20 By Madame Justice Lynn Leitch of the
21 Ontario Superior Court of Justice, who is a past
22 President of the Association and the current Chair of
23 the Association's Compensation Committee.

24 And also by Mr. Justice Mark McEwan of
25 the British Columbia Supreme Court, who is also a past

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1 President of the Association and who currently serves
2 on the Association's Compensation Committee.

3 And I see that just as I was
4 introducing representatives of the Association, Madame
5 Justice Susan Himel walked into the room, so I am
6 introducing myself to her at the same time as I
7 introduce her to you.

8 And Madame Justice Himel is with the
9 Ontario Court of Justice, and she currently serves as
10 the Vice-President of the Canadian Superior Courts
11 Judges Association.

12 **THE CHAIRPERSON:** Thank you.

13 **MR. BIENVENU:** Mr. Chairman, I would
14 also like to acknowledge the presence of the long
15 serving Executive Director of the Association, Mr.
16 Frank McArdle.

17 **MS. MEAGHER:** For the Government of
18 Canada, Kirk Shannon and Christopher Rupar.

19 **MR. RUPAR:** Thank you, Mr. Chair and
20 Commissioners.

21 I am accompanied today by Mr. Shannon
22 who is Counsel with our Civil Litigation section here
23 in Ottawa.

24 I am also accompanied by Adair Crosby
25 who is a Senior Counsel with the Judicial Affairs

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1 section in our Public Law group.

2 And Mr. Stephen Zaluski, who is the
3 Director of the Judicial Affairs section in our
4 department.

5 **MS. MEAGHER:** For the Canadian
6 Appellate Judges, Mr. Joseph Nuss.

7 **Me NUSS:** Bonjour, Monsieur le
8 Président, bonjour Madame la Commissaire, Monsieur le
9 Commissaire.

10 I am accompanied today with Justice
11 Marina Paperny of the Alberta Court of Appeal.

12 Et je suis également accompagné
13 aujourd'hui par Madame la Juge Marie St-Pierre de la
14 Cour d'appel du Québec.

15 **MS. MEAGHER:** That completes the list
16 of Counsel who will be appearing today.

17 Tomorrow we will be joined by Andrew
18 Lokan for the Federal Court Prothonotaries.

19 Janet Fuhrer and Hugh Wright for the
20 Canadian Bar Association, and the Chief Justice of the
21 Federal Court, Chief Justice Paul Crampton.

22 **THE CHAIRPERSON:** Thank you, Louise.
23 And thanks again to all of you for the great quality of
24 the documents, the submissions we have to, well,
25 respect, I could say, the same objective that I am sure

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1 we all share because as Canadians, we can be proud of
2 our Judiciary system.

3 And we have, of course, that first
4 objective, to promote, to improve, to make sure that we
5 can work in and preserve that Judiciary system for
6 generations and generations.

7 Thank you again.

8 Maître Bienvenu, c'est à vous la
9 parole.

10 **MR. BIENVENU:** Merci, Monsieur le
11 Président.

12 Monsieur le Président, Ms. Bloodworth,
13 Mr. Griffin, good morning.

14 I would like to start, if I may, by
15 thanking each of you on behalf of the Federal
16 Judiciary, for accepting to serve on this Commission.

17 I know that my friends Mr. Rupar and
18 Mr. Shannon and all of their colleagues from the
19 Government of Canada join me in acknowledging and
20 commending the sense of public duty and commitment to
21 judicial independence evidenced by your agreement to
22 serve on this Commission, in spite of your extremely
23 busy professional schedules.

24 **---SUBMISSIONS BY CANADIAN SUPERIOR COURTS JUDGES**
25 **ASSOCIATION AND THE CANADIAN JUDICIAL COUNCIL (THE**

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1 already covered in that material, which I assume
2 Commission members are by now familiar.

3 What I propose to do instead is to
4 address some of the key issues arising from these
5 submissions.

6 And let me begin by outlining how I
7 propose to do that in my oral argument.

8 And I refer you, in that respect, to a
9 document appearing under Tab A of the Judiciary's
10 condensed book.

11 You should have this book in front of
12 you. And you will find a document under Tab A,
13 entitled "Outline of Oral Argument", presented on
14 behalf of the Association and the Council.

15 I will begin by saying a few words
16 about the Commission's mandate, including the scope of
17 its inquiry.

18 I will then turn to my main
19 submissions which will be divided in two parts: process
20 issues and substantive issues.

21 On process, there are two main
22 headings: "Issues relating to the constitution of the
23 Commission and Issues regarding continuity and respect
24 for settled issues."

25 On substance, there is the salary

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1 recommendations sought by the Judiciary, and the
2 Government's proposal to replace the IAI with the CPI
3 for the annual salary adjustment, a proposal that the
4 Judiciary asks the Commission to reject.

5 As part of the discussion on the
6 salary recommendation being sought, I will address how
7 the two key comparators that you are invited to
8 consider, DM-3s and self-employed lawyers.

9 And I will conclude my oral
10 submissions with remarks seeking to situate the
11 specific issues confronting this Commission within the
12 broader historical context of the determination of
13 Judicial Compensation and Benefits in Canada.

14 Now, in the condensed book of
15 materials we have reproduced extracts of documents to
16 which I will refer in the course of my oral
17 presentation.

18 Most of these documents are already in
19 the record, and the extracts to which I will take you
20 are reproduced in the condensed book, for your
21 convenience only, so that you don't have to look for
22 them among the voluminous documentation that is before
23 the Commission.

24 Starting then with the Commission's
25 mandate.

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1 You've alluded to it in your Opening
2 Remarks, Mr. Chair, your mandate is to conduct an
3 inquiry into the adequacy of judicial salaries and
4 benefits payable under the *Judges Act*, applying the
5 statutory criteria set out in Section 26 of the Act.

6 We say that in applying these
7 criteria, the Commission should build on the work of
8 prior Commissions.

9 That does not mean that the Commission
10 should not conduct its own independent inquiry based on
11 the evidence placed before it and other relevant
12 prevailing circumstances.

13 Of course you must conduct your own
14 inquiry.

15 But what it does mean is that the
16 Commission ought not, as the Government and its expert,
17 Mr. Pannu would have it, embark upon its inquiry as if
18 it was working on a blank slate, having to reinvent the
19 wheel at every turn.

20 Nor should the Commission approach the
21 exercise without due consideration for the accumulated
22 wisdom and collective insights of the other
23 distinguished individuals who have, in the past, served
24 on this Commission.

25 I turn to process.

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1 There are two categories of process
2 issues that have been debated between the parties.

3 The first concerns the constitution of
4 the Commission; the second, issues of re-litigation,
5 continuity and consensus.

6 But as a preliminary observation, I
7 address the question, why is the Commission's role as
8 regards process, so important?

9 Members of the Commission, the
10 Quadrennial Commission is the only available forum to
11 discuss judicial compensation and benefits.

12 And to this proposition the Government
13 has in the past responded: 'If Judges are unhappy, they
14 can always take the Government to Court and seek
15 judicial review of the Government's action.'

16 And that of course is correct.

17 But the question is, is it advisable?

18 And is it the preferable course?

19 The Supreme Court of Canada in the
20 *Bodner* case reminded not just the Alberta Government
21 and the other parties appearing before it in that case,
22 but indeed all of those who have an involvement in any
23 judicial compensation Commission process.

24 That litigation between the Judiciary
25 and the Government about judicial compensation, and I

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1 quote the words of the Supreme Court:

2 *"... cast a dim light on all*
3 *involved."*

4 That's at paragraph 12 of *Bodner*.

5 Now against that background, there is
6 the fact that differences about the Commission process
7 are bound to arise.

8 And we say that it is within the
9 Commission's responsibility to assist in resolving
10 those differences.

11 Likewise, as regards Government
12 responses to reports of compensation Commissions.

13 The Commission process as a
14 constitutional mechanism to depoliticize judicial
15 compensation would suffer greatly in the long run, if
16 Courts came to be seen as some kind of automatic second
17 step after the Commission process itself.

18 The Block Commission considered it,
19 and I quote:

20 *"... entirely appropriate and*
21 *arguably imperative that the*
22 *Commission serve as the guardian of*
23 *the Quadrennial Commission process,*
24 *and actively safeguard these*
25 *Constitutional requirements of*

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1 that the issue of the Government's initial nominee is
2 being raised before the Commission is because the
3 Government re-asserted the appropriateness of its
4 initial nomination, even after the nominee withdrew.

5 And you will find that reassertion
6 under Tab B, in the second paragraph of a letter
7 addressed to me.

8 And it reads as follows:

9 *"While the Government remains of*
10 *the view that its initial nominee*
11 *is an eminently qualified and*
12 *appropriate nominee, further*
13 *efforts to reconcile our different*
14 *perspectives on this point would*
15 *not be productive. In any event,*
16 *our initial nominee has asked that*
17 *his name be withdraw from*
18 *consideration as the Government's*
19 *nominee and the Government respects*
20 *his decision."*

21 So it is the reassertion found in the
22 first part of that paragraph that leads us to bring the
23 issue before this Commission.

24 Now what is the legal position on
25 this?

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1 The Supreme Court said in the *PEI*
2 *Reference* that the Constitution does not require
3 members of compensation Commissions to come from
4 outside of the three branches of government, though the
5 Court added that the independence of compensation
6 Commissions would be better served if they did.

7 And you'll find that under Tab C, at
8 paragraph 171.

9 I trust that the Commission knows by
10 now that the Judiciary's objection to the Government's
11 initial nominee was not that the nominee came from the
12 Government. Indeed, he had recently retired from
13 Government.

14 Very distinguished former civil
15 servants have served on the Commission in the past,
16 such as Mr. Wayne McCutcheon. And one is serving on
17 this Commission and the Judiciary welcomes her presence
18 on the Commission.

19 The Judiciary itself nominated a
20 former Clerk of the Privy Council as its nominee to the
21 Commission, Mr. Paul Tellier, and he served on both the
22 Block and Levitt Commissions.

23 The basis for the Judiciary's
24 objection in this case was the direct involvement of
25 the nominee on behalf of the Government, in the very

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1 matter of the Quadrennial Commission.

2 The nominee in question was the Deputy
3 Minister who was instructing the legal team
4 representing the Government before the previous
5 Commission. He had led the Government's delegation at
6 the preparatory meeting.

7 His functions encompassed providing
8 advice to the Government about the Commission process,
9 including the Minister's response to the previous
10 Commission report.

11 And finally, the initial nominee had
12 represented the Government in informal discussions with
13 the Judiciary about possible reform to the Commission
14 process, as implemented in the *Judges Act*.

15 And the Judiciary contends that these
16 specifics roles by the initial nominee disqualified him
17 to serve on this Commission because of the appearance
18 of lack of independence and impartiality.

19 And we submit, and indeed we assert
20 quite emphatically that it simply cannot be right that
21 someone so directly involved with the Commission
22 process, on behalf of one of the parties, can serve as
23 a member of the Commission, even if that person is
24 retired.

25 And quite apart from the appearance of

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1 lack independence and impartiality, consider the
2 asymmetry of information that would exist among
3 Commission members if such a nominee were allowed to
4 serve.

5 I could very well ask members of the
6 Commission rhetorically, imagine what the Government's
7 reaction would have been had the Judiciary nominated on
8 this Commission retired Justice Stephen Gouge or
9 retired Justice Warren Winkler, who were among our
10 instructing Justices before the McLellan, Block and
11 Levitt Commission.

12 But I don't ask that rhetorical
13 question because two wrongs don't make a right.

14 Even if the Government were prepared
15 to accept someone who has previously played a role
16 similar to Mr. Justice Gouge or Mr. Justice Winkler, on
17 the *quid pro quo*, that the Government could itself
18 nominate someone whose appearance of independence and
19 impartiality would be similarly lacking, it would still
20 be wrong, as it would still fail to meet the
21 requirement of independence and impartiality.

22 And indeed, what it would do is
23 transform this Commission into an interest arbitration-
24 type of process where the public and the parties would
25 stand fully to benefit, not from three independent and

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1 impartial Commission members, but indeed from only one,
2 the Chair.

3 And recall that the Supreme Court
4 specified in *Bodner* that the Commission process, and I
5 quote is:

6 *"...neither adjudicative interest*
7 *arbitration nor judicial decision*
8 *making."*

9 That is at paragraph 14 of *Bodner*.

10 Now the practice of the parties until
11 the nomination of the Government's initial nominee to
12 this Commission was to nominate individuals who met the
13 requirement of independence and impartiality, as it is
14 generally understood.

15 Likewise, the understanding of past
16 Commission members has been, and I quote here from the
17 report of the McLellan Commission, that they "*owe no*
18 *allegiance to those who appointed them.*"

19 Which confirms that they conceived of
20 their role as requiring that they be and appear to be
21 independent and impartial.

22 Now I wish to repeat for this record,
23 having emphasised it in correspondence and in formal
24 submissions to this Commission, that the issue has
25 nothing to do whatsoever with the initial nominee's

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1 actual integrity, nor to his commitment to act
2 impartially.

3 Indeed, the issue of reasonable
4 apprehension of bias rarely has anything to do with the
5 person's actual integrity. The analysis is always
6 focused on the perception of the reasonable person
7 because the objective is to have a process in which
8 everyone, not just the parties, will have confidence.

9 Now, we indicated in our main
10 submission that the Judiciary is not seeking a formal
11 recommendation from the Commission, but we are seeking
12 the Commission's guidance and insight so that similar
13 disputes can be avoided in the future.

14 And let me close on this topic by
15 saying this.

16 The controversy surrounding the
17 nomination of the Government's initial nominee was most
18 unfortunate.

19 However, what would be even more
20 unfortunate would be not to seize upon the opportunity
21 to learn from it, then to clarify the position for the
22 future.

23 I turn to the next process issue which
24 concerns the late start of the Commission.

25 The Commission has seen references in

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1 our material to the parties' exchange of correspondence
2 on this topic.

3 It is self-explanatory and we refer
4 the Commission to it.

5 The Government declined to proceed
6 with the formal appointment of the Commission members
7 until after the election, with the result that the
8 statutory start date of October 1st was not respected.

9 Now, our point here is a simple one.

10 The law applies to all, including the
11 Government of Canada, and the statutory start date
12 should not simply have been disregarded.

13 And the issue is raised because, as
14 you will have noted in the submission of the Canadian
15 Bar Association, there is a regrettable pattern of non-
16 compliance by the Government with the timeframes set
17 out in the *Judges Act*.

18 Now, in our letter dated September 30,
19 2015, which forms part of the correspondence with the
20 Government, reproduced in Exhibit A to our main
21 submission, and I think it's under Tab D of the
22 condensed book, or at least one of the letters is under
23 Tab D.

24 But in that correspondence, we refer
25 to the August 2015 Privy Council's *Guidelines on the*

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1 *Conduct of Ministers, Ministers of State, Exempt Staff*
2 *and Public Servants during an Election.*

3 And those Guidelines are reproduced
4 under Tab D.

5 Now, our understanding of the
6 Guidelines is that the Government's appointment of
7 Commission members who had already been nominated by
8 the parties under the *Judges Act*, would not have a foul
9 of the so called "caretaker" convention.

10 We would say that they were
11 appointments, and I quote here from the guidelines:

12 *"... that cannot be deferred within*
13 *the meaning of the same*
14 *Guidelines."*

15 And we also say that they also fell
16 within the routine and non-controversial language of
17 the Guidelines. And we stated that position in our
18 letter of September 30, 2015.

19 Now, I note that the Government of
20 Canada never replied to that letter, such that we do
21 not know as we speak what the Government's position is
22 on this point.

23 Now, the Government has indicated in
24 its submission to the Commission that it intends to
25 deal with this in the future, because it is possible

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1 that an election will again come into conflict with the
2 statutory start date of the Commission's inquiry.

3 We look forward to being consulted
4 about how the Government proposes to deal with this
5 issue, and we look forward to the Judiciary being
6 offered to have input into the options available to
7 address that problem.

8 The second broad process issue
9 concerns what may be called "the principle of
10 continuity".

11 The Block Commission's recommendation
12 14 and the Levitt Commission's identical recommendation
13 11, are about a principle that applies irrespective of
14 the subject matter of any given recommendation, and
15 that is the principle of continuity between successive
16 Quadrennial Commissions.

17 Now, to our mind, the value of this
18 principle is so self-evident that one should not have
19 to elaborate on it.

20 All boards, all commissions, all
21 tribunals value and promote continuity by developing
22 practices that build upon past experience.

23 The doctrine of precedent is an
24 expression of the principle of continuity. And
25 continuity shapes relationships between individuals,

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1 communities, and even states.

2 We say that is a question of principle
3 in the absence of demonstrated changes, the Commission
4 should refuse to reconsider settled issues such as the
5 relevance of the DM-3 comparator, the inclusion of
6 performance pay in the remuneration of DM-3s for the
7 purpose of comparing their compensation with judicial
8 salaries.

9 And by way of a third example, which
10 filters should be used when considering CRA data
11 relating to self-employed lawyer income.

12 And I am referring here to 75th
13 percentile, \$60,000 income exclusion; 44 to 56 age
14 range, consideration of largest CMAs, et cetera.

15 From our perspective it is not open to
16 the Government to seek repeatedly to re-litigate these
17 points, still less, still less to do so relying on the
18 same arguments and the evidence of the same expert who
19 comes before this Commission for the fourth time, even
20 though these arguments have been considered and
21 rejected by successive Commissions.

22 Such a course of conduct is
23 inefficient; it is disrespectful to this Commission,
24 and it is, quite honestly, a source of frustration for
25 the other participants in this process.

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1 Of particular concern is the
2 Government's attempt to abandon the DM-3 comparator in
3 the salary-determination process, and consequently the
4 objectivity provided by the application of this
5 longstanding comparator.

6 Now, equally troubling is the
7 Government's invitation to revisit the IAI as if the
8 issue had not been canvassed by the Levitt Commission.

9 The Government asked the Levitt
10 Commission for a recommendation to cap the IAI.

11 The Commission refused and quoted from
12 various sources to demonstrate the very deep roots of
13 the IAI as a source of protection against erosion of
14 the judicial salary.

15 And now the Government is seeking to
16 attack the IAI again, but from a different angle.

17 Instead of seeking a cap, it is
18 seeking to have the IAI replaced with CPI, which
19 historically is lower than the IAI.

20 Now on the issue generally of re-
21 litigation, consider the following hypothetical
22 question.

23 The Commission has read that before
24 the Drouin Commission, the Judiciary proposed a
25 percentile for the analysis of self-employed lawyers'

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1 income that was higher than the 75th percentile.

2 The Judiciary was proposing a level at
3 the 83rd or 87th percentile.

4 While the Government's expert before
5 the Drouin Commission, Hay Management Consultants,
6 disagreed and proposed the 75th percentile. And the
7 Drouin Commission's expert agreed with that. He agreed
8 with the Government's expert.

9 Now, assume that the Judiciary had
10 continued to seek the application of the 83 or 87th
11 percentile, not just once, but before three subsequent
12 Commissions.

13 Do you think the Government would
14 simply join issue with this fresh request and debate it
15 anew, ignoring the fact that the issue has been already
16 been raised, debated, considered and resolved in its
17 favour by the Commission, in the Year 2000?

18 And even assuming that for tactical
19 reasons the Government failed to raise the point that
20 this issue had already been litigated and resolved in
21 its favour, isn't it self-evident that the Commission
22 itself would raise it?

23 On this issue of re-litigation, our
24 submission is that this Commission must be as firm as
25 the Block and Levitt Commissions have been, and say to

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1 the Government of Canada: "Enough is enough!"

2 Part of the rules of engagement in
3 this process is that due consideration must be given to
4 the work of past Commissions, and that absent
5 demonstrated changes, past findings should not be re-
6 litigated but should be incorporated into the parties'
7 submission.

8 So this is what I had to say on
9 process issues, and I am now prepared to turn to
10 substantive issues, beginning with judicial salaries
11 and then the issue of the IAI.

12 Now, it is useful to begin the
13 discussion by putting the salary question in its proper
14 historical context, and specifically, I would like to
15 remind the Commission of the evolution of judicial
16 salaries since 2004, and consider where each party
17 would want judicial salaries to be in 2019-2020, based
18 on their position before this Commission.

19 And for the purpose of this exercise,
20 I deal with salary increases alone, leaving IAI
21 adjustments aside for the time being.

22 And why do I do this?

23 I do this because annual salary
24 adjustments through the application of an index, serve
25 a fundamentally different purpose than a salary

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1 increase.

2 Annual adjustments protect judicial
3 salaries against erosion through inflation. Salary
4 increases serve to place judicial salaries at the right
5 level.

6 The last increase in judicial salaries
7 was made in December 2006, retroactive to April 1st,
8 2004.

9 And Commission members will recall
10 that on May 26th, 2006 a newly elected government
11 issued a second response to the McLellan Report, which
12 varied the response that had been given to that
13 Commission's report by the previous government, in
14 November 2004, within the timeframe contemplated in the
15 *Judges Act*.

16 In 2006, the newly elected government
17 imposed on the Judiciary, retroactive to April 1st,
18 2004, the exact salary increase that the Government had
19 proposed to the McLellan Commission.

20 So in essence, the Government impose
21 through legislation its own position before the
22 Commission, not only as if there had been no inquiry
23 and no report, but as if there had been no response to
24 that report.

25 Now, as the Commission knows, three

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1 years later in 2009, the Government issued a response
2 to the Block Commission containing a blanket refusal to
3 implement any of the Block Commission's
4 recommendations.

5 And as regards to salary, that was a
6 withdrawal from the Government's position before the
7 Block Commission, which was that a 4.9 percent salary
8 increase, inclusive of IAI, would have been an
9 appropriate salary adjustment.

10 So the situation today is that save
11 for IAI adjustments, judicial salaries have not been
12 increased since the 2006 amendments to the *Judges Act*,
13 which were retroactive to April 2004.

14 And this in spite of the findings of
15 two Commissions that an increase in salary was
16 warranted.

17 Now, if the Government's current
18 position were to be accepted by this Commission, there
19 would be no salary increase other than through annual
20 adjustments based on CPI, until the next inquiry in
21 2019-2020, which means no increase in judicial salaries
22 for a sixteen year period, from 2004 to April 1st,
23 2020.

24 And again, this would be so in spite
25 of clear evidence in the form of the compensation

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1 levels of the two key comparators that increases in
2 judicial salaries were warranted.

3 Now, I don't need to remind the
4 Commission that the salary recommendation it is called
5 upon to formulate will apply to the next four years.
6 And it will be four more years before judicial salaries
7 can be reassessed.

8 Now, the Government states in his
9 Reply Submission, at paragraph 22, that "expenditures
10 on juridical salaries are not automatically paramount
11 to all other government spending obligations."

12 I want to make clear that the
13 Judiciary is not saying that such expenditures are
14 paramount.

15 Indeed, the Judiciary has shown in the
16 past, has shown that understanding in the past.

17 And it is mentioned at paragraph 62 of
18 our Main Submission that on the same day that the
19 Government issued its response to the Block Report, the
20 Association issued a press release stating that the
21 federally appointed Judiciary recognised that the
22 Canadian economy was facing unprecedented challenges at
23 that time that called for various temporary measures.

24 Now, that being said, the Commission
25 should be wary of trying to balance the need for

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1 judicial independence within the matrix of competing
2 government priorities.

3 The Block Commission made that point
4 clear, relying on a submission by the Canadian Bar
5 Association. And it said that the Government's
6 contention, and I quote from the Block Commission
7 Report that the Government's contention that:

8 *"...the Commission must consider the*
9 *economic and social priorities of the*
10 *Government's mandate in recommending*
11 *judicial compensation would add a*
12 *constitutionally questionable*
13 *political dimension to the inquiry,*
14 *one that would not be acceptable to*
15 *the Supreme Court, which is why*
16 *Commissions must make their*
17 *recommendations on the basis of*
18 *'objective criteria, not political*
19 *expediencies.'*"

20 That's at paragraph 57 of the Block
21 Report.

22 Now, turning to the salary
23 recommendation being sought, the Judiciary is seeking
24 an increase of 2 percent retroactive to April 1st,
25 2016, and then 2 percent as of April 1st, 2017, and 1.5

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1 percent in each of 2018 and 2019, all exclusive of
2 statutory indexing based on the IAI.

3 Our submission is that it would be
4 appropriate for the Commission to make the salary
5 recommendation that is being sought by the Judiciary,
6 for the good and simple reason that it is supported by
7 the compensation levels of the two key comparators for
8 the determination of judicial salaries in this country,
9 the total compensation level of DM-3s and the income
10 levels of self-employed lawyers in Canada.

11 And our case in this respect is
12 captured in Figure 1 of our February submission, which
13 is reproduced under Tab E of our condensed book.

14 And that figure compares the salary of
15 puisne judges with the compensation of DM-3s measured
16 at three levels.

17 The maximum compensation available to
18 DM-3s, including maximum performance pay, the total
19 average compensation of DM-3s, and then the mid-point
20 of the DM-3 salary range plus half of the eligible
21 performance pay, which is the approach adopted by the
22 Block comparator that is called in the figure, the
23 Block comparator.

24 Now, I would like Members of the
25 Commission at this point to address more specifically

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1 the Government's invitation to this Commission
2 altogether to abandon the DM-3 comparator.

3 That proposal to abandon the DM-3
4 comparator contradicts past positions of the Government
5 of Canada, would break with a long established practice
6 rooted in principles, would contradict the considered
7 opinion of successive Triennial and Quadrennial
8 Commissions, and would undermine objectivity, which is
9 an overriding constitutional imperative for your
10 inquiry.

11 Now, you have in our two written
12 submissions the extensive references to the various
13 reports in connection with the DM-3s.

14 I want to focus on the last of the
15 points I just raised, which is the need for
16 objectivity.

17 The Government proposes in its
18 February Submission, and I quote:

19 *"...consideration of general trends"*

20 In the senior public service as
21 opposed to the DM-3s.

22 The Commission should be very wary of
23 this approach.

24 What exactly is the definition of
25 "senior public servants"?

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1 What are these general trends that the
2 Commission would be asked to consider?

3 The truth of the matter is that the
4 DM-3 comparator is important because it reflects what
5 the Government of Canada is prepared to pay its most
6 senior employees.

7 Its relevance as compared to the
8 private sector comparator comes precisely from the fact
9 that it reflects the salary level not of outstanding
10 individuals who have elected to work in the private
11 sector, and perhaps to seek to maximise the financial
12 reward that they can derive from their work, but of
13 outstanding individuals who have opted for public
14 service, like lawyers who accept an appointment to the
15 bench.

16 For the Government to say as it does
17 at paragraph 25 of its Reply, that the DM-3 group is
18 not a pool from which judges are drawn is a red
19 herring. That is not the point of that comparator.
20 That never was the point of that comparator.

21 The point is that the DM-3 group is an
22 anchor point, and our submission is that removing it
23 will remove a constant that creates objectivity for the
24 Commission's inquiry.

25 Now, the Government advances in its

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1 Reply Submission, the argument that DM-3s have
2 significant responsibilities. And the implication is
3 that the list of responsibilities given in that
4 submission does not apply to judges.

5 It would be erroneous, in our
6 submission, to get into a quantitative comparison.

7 Maybe the entries do have a longer
8 list of responsibilities as compared to judges, but
9 what happens when we do a qualitative comparison?

10 Do DM-3s have to make weighty
11 decisions of criminal liability with the potential loss
12 of liberty for the accused that that entails, or
13 conversely, the potential exacerbation of harm done to
14 a complainant whose aggressor is set free?

15 Do DM-3s have to make decisions on
16 custody, thought as they often are, with emotion and
17 sometimes considerations of physical safety?

18 DMs have no public accountability,
19 shielded as they are by the principle of ministerial
20 responsibility.

21 In contrast, judges' decisions are
22 scrutinised by the press and the public, without judges
23 being able to defend themselves from attack.

24 Ultimately, the question, we say, is
25 why re-invent the wheel?

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1 The Courtois Commission did not say
2 that DM-3s and judges are the same, but that the
3 positions are qualitatively similar in terms of the
4 type of person needed for those two positions.

5 I quote from the Courtois Report:

6 *"... individuals of outstanding*
7 *character and ability."*

8 "Outstanding" being the very adjective
9 that Parliament chose to use to guide the Commission in
10 its inquiry in relation to the pool of candidates from
11 which judges are to be drawn.

12 It you remove the DM-3s as the public
13 sector comparator; there is a great risk of being set
14 adrift in the comparative exercise.

15 So, I trust that the Commission will
16 have appreciated by now why we consider the DM-3
17 comparator to be so important to this process. It is
18 the thread that has provided continuity in the
19 comparative exercise in which Triennial and Quadrennial
20 Commissions have engaged, and it provides an essential
21 objective basis for the comparative exercise.

22 It you accept the Government's
23 invitation to do away with it or to water it down by
24 throwing it into the larger range of DMs and GCs, and
25 GCQs, you are going to send future Commissions on a

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1 quadrennial treasure hunt for comparators, and the
2 process will lose its rationality, and as a
3 consequence, its credibility. The process will also
4 lose its rationality.

5 The Commission would also be giving up
6 a status comparator which properly associates judicial
7 duties to high level government activity as opposed to
8 mid-level government activity.

9 So, I say, Members of the Commission,
10 that the worst thing this Commission could do on par
11 with doing away with IAI, would be to abandon the DM-3
12 comparator.

13 Now, as part of its arguments against
14 this public sector comparator, the Government refers to
15 the differences in size, tenure and form of
16 compensation as between DM-3s and judges. We have
17 addressed these in our Reply at pages 9 and 10.

18 And I only want to make a quick point
19 about the difference in tenure.

20 Not only is it a case of comparing
21 apples and oranges, since the tenure of judges has a
22 constitutional dimension that makes it unique, but it
23 is also apples and oranges since the relatively short
24 tenure of DM-3s is due to the fact that most often that
25 person has spent decades in the public service, thereby

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1 giving rise to an incentive to retire after reaching
2 that level.

3 And in contrast, a lawyer who is
4 appointed to the Bench doesn't get to count his or her
5 years at the Bar to satisfy the Rule of 80. That
6 person must start from zero upon appointment in order
7 to qualify for retirement.

8 Now, I would like to turn to the issue
9 of differences between the DM-3s and judges in the form
10 of compensation for each group.

11 The Government seeks again to argue
12 for the fifth time, that in comparing judicial salaries
13 with the compensation of DM-3s, you should take no
14 account of the variable portion of the remuneration of
15 DM-3s, namely the performance portion of their
16 remuneration.

17 And it takes that position in spite of
18 the fact that the proportion of that variable component
19 as compared to the base salary, has increased steadily
20 over the past number of years.

21 All past Commissions, starting with
22 the Drouin Commission, have rejected this position, and
23 for good reason.

24 What credibility would the comparison
25 have?

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1 Does it make any sense at all to
2 compare judicial salaries with one component only of
3 the compensation of DM-3s?

4 With due respect, it is baffling that
5 the Government would seek to defend such a position
6 once again.

7 A position that has been rejected by
8 no less than four Quadrennial Commissions, which no
9 serious compensation expert would espouse.

10 And in our Reply, we quote at
11 paragraph 39, the very strong language used by the
12 Levitt Commission to reject the Government's submission
13 that the variable portion of the compensation of DM-3s
14 should be ignored.

15 And in spite of that finding and that
16 strong language, in spite of the fact that earlier
17 Commissions had come to the very same conclusion, the
18 Government includes in its submission to this
19 Commission, at paragraphs 142 to 144, data presenting
20 the salary mid-point of DM's compensation without
21 consideration of performance pay.

22 Now, we submit that that data is of no
23 assistance whatsoever to this Commission.

24 Now, I want to address now the issue
25 of the appropriate compensation measure to look at when

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1 considering the DM-3 comparator.

2 You will have seen in our February
3 submission that the Judiciary relies on the total
4 average compensation of DM-3s to argue in favour of an
5 increase in judicial salaries.

6 And the Government criticises this
7 approach in its Reply, and I would like to respond to
8 this criticism.

9 My first point is that there is a
10 distinction to be made between the comparator and the
11 compensation measure for the purpose of that
12 comparison.

13 The comparator is the DM-3, whereas
14 the compensation measure is, for example, the mid-point
15 or the average, whether performance pay should be
16 included or not, and if so, how, and so on.

17 So, one is in no way calling into
18 question the DM-3 comparator, still less the consensus
19 about the central importance of that comparator, if one
20 makes a submission about the appropriate measure of the
21 compensation of the comparator group for the purposes
22 of comparing it with judicial salaries.

23 So, there is no basis to the
24 suggestion that we are calling into question the
25 settled issue of the relevance of the comparator by

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1 making a submission about the compensation measure.
2 That was point number one.

3 Now, point number two is the reasons
4 why the Judiciary is relying on the total average
5 compensation of DM-3s.

6 Members of the Commission will have
7 seen from Table 1, on page 30 of our February
8 submission, that starting in February 2000, there has
9 been a consistent difference between judicial salaries,
10 and the total average compensation of DM-3s and the
11 average yearly difference is 10.3 percent.

12 Now, to approach this issue, it is
13 important to consider why the mid-point was used in the
14 first place.

15 The mid-point was first used in the
16 mid-1970s, when the compensation of DM-3s had only one
17 component, salary, and at a time when the Government
18 did not publicly make available the average salary of
19 DM-3s.

20 Therefore, in all appearance, it is in
21 order to make up for this lack of information about
22 average salary that the parties and successive
23 Commissions used the concept of the mid-point.

24 So, point number one is that the mid-
25 point from the Year 1975 onward seems to have been used

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1 as a proxy for the average, since the average
2 compensation of DM-3s was not publicly disclosed.

3 Now, when at-risk pay was introduced,
4 the Commission had to decide how to take into account
5 this new but integral portion of the compensation of
6 DM-3s.

7 And as I have already indicated,
8 successive Commissions have rejected the Government's
9 submission that performance pay should be ignored. But
10 that still left the question: how do we account for
11 performance pay, how do we measure it for comparison
12 purposes? And there were two possibilities.

13 One was to use the average or to use a
14 mid-point which could be expressed by taking half of
15 the eligible or the maximum eligible at-risk.

16 The Drouin Commission opted for the
17 average of actual at risk awards. And you will find
18 that at pages 26 and 27 of its reports.

19 The Block Commission tackled the issue
20 again, and it decided that half of the maximum eligible
21 at-risk should be used, and the Commission provided
22 reasons for its decision.

23 And these reasons are found at
24 paragraph 106 of the report, and they are cited at
25 paragraph 98 of our Main Submission.

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1 And the question that the Judiciary
2 raises for this Commission's consideration is whether
3 in light of the information available about what is in
4 fact being awarded as performance pay, the Block
5 Commission's assumption in its reasons was correct.

6 Now, against the reasons of the Block
7 Commission, what we see is that the mid-point of base
8 salary range and half of eligible performance pay are
9 consistently less than the total average compensation.

10 So if the mid-point is a proxy for the
11 average, it is apparent that the proxy is not accurate.

12 And having given ourselves a number of
13 years to make this consistent observation, it seems to
14 us an appropriate time to ask: What should the
15 Commission do in light of this observation?

16 When the Government says in its Reply
17 at paragraph 16, that the Judiciary is distancing
18 itself from an issue that it had characterised as
19 "settled", we say absolutely not.

20 The consensus and the settled issues
21 are as to the relevance of DM-3s as a comparator, and
22 the necessity of including performance pay in
23 determining DM-3s compensation.

24 The question that we raise is a
25 different one. It is whether, based on the information

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1 now available, the mid-point of the salary range and
2 half of eligible performance pay are adequate proxies
3 for what DM-3s actually receive on average.

4 And to this question, as to the
5 appropriateness not of the comparator but of the
6 compensation measure, we submit that the average would
7 be preferable.

8 And we also say that it would be
9 appropriate, in any event, for the Commission to move
10 to the average because there have been, in respect of
11 that question, a demonstrated change since the mid-
12 point has been shown not to represent the actual
13 compensation paid on average to DM-3s over the years.

14 So, we have explained in our February
15 submission that the salary recommendation that we urge
16 the Commission to make will reduce the disparity
17 between judicial compensation and the total average
18 compensation of DM-3s.

19 The second key comparator is self-
20 employed lawyers in Canada.

21 And the Commission will find at Tab F
22 of our Condensed Book, revised tables 6 and 7, which
23 are taken from pages 30 and 31 of our Reply Submission.

24 And these tables show that the salary
25 of puisne judges is well under the income level of

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1 self-employed lawyers across Canada, and in the major
2 urban areas.

3 And those tables show the difference
4 between the salary of puisne judges and self-employed
5 lawyers, including when judicial salaries are grossed
6 up to take into account the value of the judicial
7 annuity.

8 I come now to discussing the filters
9 to be applied to the CRA income date of self-employed
10 lawyers.

11 The Commission knows -- I emphasised
12 it earlier in my submission -- that our primary
13 position is that as a matter of principle, the
14 Commission should refuse to reconsider these issues
15 which are settled issues.

16 And it is only alternatively, and only
17 because the Government has yet again, raised the issue
18 of their appropriateness, that I briefly explain why
19 this Commission can be confident that its predecessors
20 got it right.

21 The parameters that have been applied
22 since the Drouin Commission are the 75th percentile,
23 the age range of 44 to 56 being the range of the
24 majority of appointees, and an income exclusion of
25 self-employed lawyers earning less than \$60,000.

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1 And in addition to those filters, past
2 Commissions have considered two other factors, and
3 those are the income levels in the top ten Census
4 Metropolitan Areas, where the majority of appointees
5 are recruited, and secondly, the value of the judicial
6 annuity.

7 Whether we call these "parameters",
8 "filters" or "exclusions:", the underlying notion is
9 that there needs to be as accurate as possible, a
10 comparison between the income data for the self-
11 employed population being sampled, and the pool of
12 outstanding candidates that would be considered
13 suitable for a judicial appointment.

14 It is important to note that what we
15 are trying to do with these filters is to identify the
16 pool of outstanding candidates. And we say that the
17 Commission's analysis has to take place in the real
18 world.

19 And in the real world, so far as self-
20 employed lawyers are concerned, there is a correlation
21 between talent and income.

22 Now, let me begin by introducing to
23 you the experts who address these issues.

24 Mr. Pannu, an actuary retained by the
25 Government, is familiar to the Commission process,

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1 since this is the fourth time that he appears before
2 the Commission, having also filed reports before the
3 McLellan, Block and Levitt Commissions.

4 If you compare what he is saying now
5 with what he has said in the past, you will find that
6 he displays the virtue of general consistency, but you
7 will also find that successive Commissions have been no
8 less consistent in rejecting his approach to
9 identifying appropriate parameters for analysing CRA
10 data.

11 On behalf of the Association and the
12 Council, Ms. Sandra Haydon has given her opinion
13 regarding the application of the parameters. She is a
14 compensation specialist. And you will note from her CV
15 that she has both public sector and private sector
16 experience.

17 Regarding the valuation of the
18 judicial annuity, you have the view of Mr. Pannu, and
19 the Association and Council have filed the opinion of
20 Mr. Dean Newell, an actuary from Ontario whose CV
21 speaks for itself.

22 Now, we say that even if the
23 Commission were inclined to revisit settled issues,
24 there is no basis on looking at the material before the
25 Commission, to modify the filters applied in the past

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1 to self-employed lawyers income data.

2 And let me address first the 75th
3 percentile.

4 The Government's expert, Mr. Pannu,
5 arranges the data according to both the 65th and the
6 75th percentile. He does not actually give a reason to
7 favour one or the other.

8 So, I submit that the Commission does
9 not get much assistance on that level.

10 Before the Levitt Commission, Mr.
11 Pannu posited that the 65th percentile was for
12 exceptional individuals, while the 75th percentile was
13 for truly exceptional individuals.

14 The Levitt Commission, at paragraph 38
15 of its report, dismissed the distinction by saying that
16 no evidence was presented in support of such a
17 distinction or why it was practicable to do so.

18 Mr. Pannu's report before this
19 Commission has done away with that illusive
20 distinction, which is a good thing.

21 But the Commission is not further
22 assisted, since Mr. Pannu does not say why the
23 Commission should favour the 65th percentile over the
24 75th percentile.

25 In contrast, Ms. Haydon relies on her

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1 extensive experience in the area of compensation
2 analysis, to say that the 75th percentile is, and I
3 quote:

4 *"...bottom target where the goal is*
5 *the attraction of exceptional or*
6 *outstanding individuals."*

7 And what that means in practical terms
8 is that looking at the 65th percentile would not be
9 consistent with the wording of the statute, nor be in
10 line with the goal of attracting outstanding candidates
11 to the Bench.

12 Now, we say that there is indeed no
13 need to get into a battle of the experts.

14 We invite the Commission to consider
15 instead what the Government of Canada said to the
16 Drouin Commission on this point.

17 And at Tab G of our condensed book, we
18 have reproduced pages 39 and 40 of the Drouin Report.
19 And you will see there that the Government itself had
20 proposed the 75th percentile, relying on the expert
21 opinion of its expert at the time, who was with Hay
22 Management Consultants.

23 And you will see that the Commission's
24 expert, Mr. Sauvé, agreed with that position rather
25 than with the position proposed by the Association and

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1 Council at the time, which was that a higher percentile
2 should be used.

3 And the Association and Council,
4 consistent with the position the Judiciary has long
5 advocated about respect for settled issues, have since
6 adhered to the 75th percentile.

7 And the Commission knows from reading
8 our reply submission that before subsequent
9 Commissions, the Government sought to go lower than its
10 own figure, and it is again trying to do so before you.

11 I turn to the age range of 44 to 56.

12 The Government proposes to use a range
13 covering all the ages of appointees, weighted according
14 to their numbers.

15 The Association and Council for their
16 part, adhere to the 44 to 56 age range since that is
17 the range from which the majority of lawyers have been
18 appointed since 1997, and it is the range that has been
19 applied since the Drouin Commission.

20 Again, a focus on continuity.

21 Now, the benefit of using the 44 to 56
22 age range is that it captures the majority of
23 appointees.

24 Between January 1st, 1997 and March
25 31st, 2015, 73 percent of appointees were within this

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1 age range.

2 This age range goes back to the Drouin
3 Commission, and therefore it has the added advantage of
4 facilitating comparability across Commissions.

5 And that is one point that Ms. Haydon
6 observed in her opinion, and she also states that in
7 her more than twenty years' experience, in only one
8 case was there a need for a weighted model such as the
9 one used by Mr. Pannu.

10 And her view is that a weighted
11 approach generally skews the data in a manner that is
12 an inaccurate profile of the vast majority of the
13 appointment pool.

14 And you may have noted -- I say this
15 in parenthesis -- that Ms. Haydon says that if a
16 weighted approach is to be applied, it should be
17 applied within the 44 to 56 range.

18 I turn now to the low income exclusion
19 of less than \$60,000, which we submit should be
20 adjusted for inflation to \$80,000.

21 You should know that this filter makes
22 the biggest income level difference in the data
23 presented by the parties. Again, this is a filter that
24 has been accepted since the Drouin Commission.

25 The McLellan Commission adjusted it to

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1 \$60,000.

2 Drouin applied 50, McLellan adjusted
3 it to 60.

4 And again, this is a filter that Mr.
5 Pannu has always wanted removed, and he remains
6 undeterred by successive rejections of his position.

7 Now, why is this filter important?

8 The figures speak for themselves.

9 In Mr. Pannu's report at Appendix D,
10 he sets out the range from the 5th percentile to the
11 100th percentile.

12 Members of the Commission, at the
13 lowest percentile on the table, for each of the years
14 between 2010 and 2014, the income is negative.
15 Negative!

16 Mr. Pannu calls income exclusion, and
17 I quote:

18 *"An unusual approach that distorts*
19 *the results."*

20 What I submit to you is that what
21 distorts the result is the inclusion of negative
22 income.

23 In other words, lawyers whose costs
24 are greater than their gross income; that distorts the
25 data.

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1 Note that Ms. Haydon is of the view
2 that 100,000 would be a justifiable cut-off, and she
3 arrives at this by looking at the income at the 75th
4 percentile, when all income are considered, and she
5 says that 100,000 is less than half of the income at
6 the 75th percentile.

7 And her professional opinion, based on
8 her experience, is that anything less than half of the
9 amount at the 75th percentile would fall in the
10 definition of outlier.

11 By her measure, 100,000 is reasonable.

12 We have proposed 80,000 because it has
13 greater continuity with the traditional level of
14 60,000.

15 Now, in its Reply, the Government
16 questions how we arrived at the 80,000 figure, and the
17 suggestion is made that an inflation adjusted number
18 would be closer to \$75,000.

19 I would like to explain to the
20 Commission how we arrived at the \$80,000 figure.

21 We got there by taking the traditional
22 level of \$60,000 which was established by the McLellan
23 Commission in 2004, and we applied the IAI until 2015,
24 and that gave us \$79,871. And we rounded that number
25 to 80,000.

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1 Now, the Government makes the point
2 that self-employed lawyers are not, and I quote their
3 words: "wage-earners", and therefore that we should not
4 apply IAI to the low income exclusion, and that it
5 would be preferable to apply CPI.

6 We reply that it is justified to apply
7 IAI because IAI is a measure of productivity. It is an
8 index that includes legal services and that the data to
9 which that index is to be applied is professional
10 income data, not prices. It's to professional income
11 data.

12 So, we submit that the appropriate,
13 the more appropriate index to adjust the low income
14 exclusion is the IAI, not the CPI.

15 Now, we have reproduced at Tab H of
16 our Condensed Book, the table produced by Mr. Pannu, at
17 page 5 of his report, and we want to make clear to the
18 Members of the Commission, when looking at the table
19 that there is no low income exclusion, whether 60,000
20 or 80,000, in those numbers.

21 And it is that which permits Mr. Pannu
22 to assert that the judicial salary is higher than the
23 income of self-employed lawyers at the 75th percentile
24 for Canada.

25 Now, Mr. Chairman, Members of the

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1 Commission, if you are going to include negative
2 income, of course the 75th percentile of such dataset
3 is going to be brought down significantly.

4 And you see the real disparity when
5 you look at pages 30 and 31 of our Reply Submission,
6 when you find tables that apply the \$60,000 exclusion
7 and the \$80,000 exclusion when the annuity is factored
8 in.

9 Now, briefly let me address the issue
10 of the CMAs.

11 My first point is that is not a
12 filter. It is not used as a basis to exclude data.

13 CMAs are an analytical factor to
14 consider for the simple yet compelling reason that a
15 majority of appointees come from the ten largest CMAs.

16 And you will have seen in our tables
17 that we provide both the data for all of Canada and for
18 the ten largest CMAs. So, we don't exclude all of
19 Canada.

20 We simply say that the Commission
21 cannot ignore that the majority of appointees come from
22 the ten largest CMAs, and that they income of self-
23 employed lawyers in those CMAs is significantly higher
24 than the areas outside those CMAs.

25 Ms. Haydon's approach is to use

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1 geography as a guide, but not to use what she calls the
2 blunt model of a weighted approach based on the origins
3 of appointees. The blunt approach being that advocated
4 by Mr. Pannu.

5 So, what she says is that you should
6 look at the data holistically and apply judgement to
7 get a complete picture.

8 Commission Members will be happy to
9 hear that I am concluding on the question of filters.

10 The Government states in its Reply
11 Submission -- it's at paragraph 36 -- that the
12 application of the filters reduces the group in the CRA
13 data to 21 percent. You may recall that figure.

14 But note that included in that
15 percentage is the application of the CMA as a filter,
16 even though the Judiciary does not call for the
17 mechanical application of CMAs to exclude data.

18 But the bigger is this.

19 The Government presents this figure of
20 21 percent as if it is self-evidently problematic.

21 We respond by asking what exactly is
22 problematic about that?

23 If outstanding candidates are to be
24 attracted to the Bench, as the *Judges Act* requires, can
25 it not be said that reducing the entire pool of lawyers

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1 in the CRA data to 21 percent gets closer to who would
2 be considered "outstanding" among them?

3 Is the Government saying that 50
4 percent of self-employed lawyers fit within the
5 definition of "outstanding", as used in the *Judges Act*?

6 Now, we reproduced dictionary
7 definitions of the word "outstanding". It means:
8 "exceptionally good, standing out from the rest, marked
9 by superiority or distinction." And in French: "les
10 meilleurs" can be translated as the best ones.

11 Can it be seriously argued that 50
12 percent of self-employed lawyers are outstanding,
13 exceptionally good, marked by superiority, the best?

14 Does it not make more sense and is it
15 not more consistent with the language of the statute
16 that only 21 percent of the population of self-employed
17 lawyers fall into that category?

18 Now, I have to address briefly the
19 valuation of the judicial annuity. That too is not a
20 filter. It is an additional analytical factor.

21 You have Mr. Pannu's valuation; you
22 have Mr. Newell's valuation.

23 The first observation is that it is
24 the second time that Mr. Pannu seeks to include the
25 disability coverage in the annuity valuation. He did

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1 so the last time, even though he had not done so on the
2 two previous occasions.

3 Why not the first two times, why
4 before the Levitt Commission and this time around?

5 We don't know.

6 But the unmistakable pattern which is
7 picked up by Ms. Haydon, and which I draw the
8 Commission's attention to, is that in all appearance
9 each and every position adopted by the Government's
10 expert, seems designed to reduce the level of the
11 comparator, or do away with the comparator as if we
12 were engaged in a race to the bottom.

13 Mr. Newell has said in his report that
14 the decision to include disability under annuity is not
15 an actuarial decision, but a matter to be agreed
16 between the parties.

17 The *Judges Act* includes disability
18 coverage under the annuity, while dealing with other
19 insurance benefits as separately, that's an
20 administrative choice, and we find that the Chief
21 Actuary considers the disability benefit in his
22 valuation because he needs to determine the funding
23 status of the annuity.

24 You don't need to determine the
25 funding status of the annuity. That's not your remit

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1 and we do not think that disability should be included.

2 Mr. Sauvé who was the Commission's
3 expert in the previous round, was also of the view that
4 disability should not be included.

5 Now, we read, as the Commission did in
6 the Commission's Reply Submission, that Mr. Sauvé, and
7 I quote from the submission:

8 *"... revised his approach in May*
9 *2012, and valued the disability*
10 *benefit as part of the judicial*
11 *annuity."*

12 And in support of that statement, the
13 Government references page 2 of a letter by Mr. Pannu
14 dated March 21, 2016. And in that letter he says that
15 it is his understanding that Mr. Sauvé was to provide
16 an updated calculation of his 24.7 calculation, which
17 incorporated an updated disability value.

18 Now, we reached out to our friends
19 opposite, and Counsel for the Government has confirmed
20 that there is nothing in writing, from any party, to
21 confirm this understanding, and indicated that this was
22 Mr. Pannu's recollection.

23 Mr. Newell comes to the conclusion
24 that the annuity is worth 20.6 percent, and we say that
25 it is the appropriate percentage.

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1 And we add that the Commission must
2 exercise caution in mechanistically applying this
3 figure of 30.6 percent to the judicial salaries, even
4 though we have put that information before that
5 Commission in revised Table 7, at page 31 of our Reply.

6 And the reason for the caution is that
7 when comparing with the income of self-employed
8 lawyers, it is true that those lawyers normally have to
9 do their own planning for retirement.

10 But consideration must be given to the
11 fact that self-employed lawyers have access to certain
12 financial and tax planning methods that are not
13 available to judges.

14 And an example which both parties
15 recognise is prevalent is the use of professional
16 corporations and family trusts.

17 Mr. Chairman, I realize that I am
18 taking advantage of your invitation in your opening
19 remarks, to feel at ease and be flexible with the
20 venue, but I won't exaggerate in taking advantage of
21 that permission, I would like to say to you.

22 Briefly, general economic conditions.

23 We say that they do not present an
24 obstacle to the salary increase requested by the
25 Association and the Council.

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1 *responsible way.*"

2 So, we submit that a salary increase
3 is warranted based on the application of the
4 traditional key comparators, and that the prevailing
5 economic conditions do not warrant refusal to make that
6 adjustment upwards.

7 I come to an important topic.

8 The Government's request for a
9 recommendation from this Commission that the IAI
10 adjustment provided in the *Judges Act* be replaced by
11 CPI.

12 Members of Commission, from our
13 perspective this is an attack on an essential statutory
14 safeguard against erosion in the value of judicial
15 salaries through inflation.

16 The Government tried it before the
17 Levitt Commission by asking for a cap on the IAI.

18 It is now seeking to limit this
19 safeguard by replacing the IAI with an index that has
20 historically been lower than the IAI, and as the
21 evidence before you shows, an index that is ill-suited
22 to adjust judicial salaries, given that the CPI does
23 not directly reflect changes in wages.

24 The IAI adjustment is a safeguard that
25 is an essential feature of financial security.

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1 Annual IAI adjustments are the only
2 protection the Judiciary has against salary erosion
3 during the four to six-year period that elapses between
4 quadrennial judicial compensation reviews, and the
5 subsequent implementation by Parliament of a salary
6 increase recommended by the Commission, and accepted by
7 the Government.

8 I have already mentioned that IAI
9 adjustments serve a fundamentally different purpose
10 than a salary increase.

11 I want to add that the IAI is also an
12 essential protection against politicisation.

13 And that is so because it is automatic
14 and because its rate does not depend on the Government.

15 So, it is vitally important for financial security and
16 judicial independence.

17 And it has been the only measure that
18 has served to counterbalance the effects of the
19 Government's failure to fully implement the salary
20 recommendations of past Commissions.

21 The Scott Commission referred to the
22 IAI as representing nothing less than a social contract
23 between the State and the Judiciary.

24 And the question that you have to
25 answer is whether the Government has presented any

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1 evidence that would justify a breach of that contract?

2 And this concept of social contract is
3 appropriate and very important when considering the
4 unique position of the Judiciary, because as members of
5 the Commission well know, Judges are prohibited by
6 Statute from engaging in other occupation or business,
7 and rightly so.

8 But as a counterweight to this
9 prohibition, there needs to be a mechanism to ensure
10 that the salary is not eroded by inflation and is
11 increased according to the general trend of
12 productivity across the country. And the IAI is that
13 mechanism.

14 You know that the Levitt Commission
15 stated that the IAI should not be, and I quote:

16 "... *lightly tampered with.*"

17 And the Government has advanced no
18 convincing argument to revisit this issue, still less
19 to replace the IAI with the CPI.

20 The CPI is not the appropriate
21 mechanism to adjust judicial salaries, if you consider
22 the report from Professor Doug Hyatt, who is from the
23 Rothman Business School of the University of Toronto
24 that was filed on behalf of the Judiciary.

25 Mr. Hyatt is a prolific labour

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1 economist who has confirmed that CPI measures only
2 changes in the prices of a given basket of goods and
3 services, whereas adjusting judicial salaries by the
4 annual change in the IAI results in annual earnings of
5 Judges keeping pace with the annual earnings of the
6 average Canadian.

7 Now, a further point needs to be made
8 about the distinction between IAI and CPI, which
9 Parliament seems to have been alert to, and which
10 Professor Hyatt discusses in his report.

11 The *Judges Act* adjusts judicial
12 salaries based on the IAI, but the Act adjusts judicial
13 annuities based on the CPI.

14 Now why the difference?

15 IAI captures increases in inflation
16 and wages, the latter being a measure of productivity.

17 When judges are working, it makes
18 sense for IAI to be applied since they are being
19 productive.

20 When judges are retired, they do not
21 contribute to increased productivity, and therefore it
22 is logical that adjustments to their retirement income
23 should reflect changes in price only, and not increases
24 in productivity.

25 The Government has not dealt with this

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1 distinction found in *Judges Act* and other federal
2 legislation. The statutory regime we say is logical
3 and there is no reason to upset its logic.

4 Now, when it was first disclosed to
5 the Commission and the Judiciary that the Government
6 was proposing to replace IAI by CPI, it was sought to
7 be justified by the assertion that the CPI is more
8 modern.

9 The Government, as far as we can read
10 in its submission, has not sought to make that case,
11 and the evidence before the Commission is that CPI has
12 been measured for more than 100 years.

13 The more important question though,
14 leaving aside the failure to justify re-opening the
15 issue which was dealt with four years ago, is the
16 question of appropriateness.

17 And we say that there can be no
18 question that the IAI is a more appropriate index than
19 the CPI, to adjust salaries.

20 And we submit that that is why
21 Parliament chose to adjust judicial salaries with the
22 IAI, whereas annuities were adjusted using the CPI.

23 Now, the most important reason for
24 this Commission to reject the Government's proposal on
25 this subject is the track record of non-implementation

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1 of salary recommendations by the Government.

2 In and of itself, this is a sufficient
3 reason to reject the proposal of a replacement of the
4 IAI.

5 Now, before I conclude, perhaps we can
6 step back and consider the implications of this
7 Commission accepting the positions put forward by the
8 Government, and let us take them in turn.

9 DM-3s, the Government is asking you to
10 decide that 40 years of compensation
11 "Commission jurisprudence", if I can use that term
12 loosely, was wrong, and should be done away with.

13 I see that we have company.

14 That comparator has been an anchor to
15 provide objectivity to that process.

16 And very recently the Block
17 Commission, people sitting in your position provided
18 compelling, and I submit to you, quite insightful
19 reasons to preserve and apply that comparator.

20 And the Block Commission found
21 unavailing each and every one of the arguments that the
22 Government is re-iterating before you.

23 And I repeat that it would, in our
24 submission, be a huge disservice that to this process,
25 for this Commission to follow the Government on the

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1 path it is inviting you to tread.

2 And never forget, please never forget
3 that it is the Government that proposed the DM-3 as the
4 key comparator in the first place.

5 A similar point can be made on
6 filters, how long can the Government be permitted to
7 re-litigate this?

8 But I've said enough on this.

9 We submit that this Commission should
10 invite the Government to accept the findings of
11 successive Commissions on the questions of filters, and
12 do away with re-litigation which is wasteful, and I've
13 already submitted it, disrespectful to the process.

14 Monsieur le Président, Members of the
15 Commission, the process over which you are presiding is
16 an extremely important one, and you have now joined the
17 ranks of a long line of very distinguished Canadians,
18 Jurists and non-Jurists who out of commitment to public
19 service have contributed to maintaining our country's
20 cherished tradition of judicial independence.

21 The Commission knows that the
22 overriding objective of the Triennial Commission
23 process when it was first established was to
24 depoliticise the determination of judicial salaries and
25 benefits, in order to preserve judicial independence.

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1 And the Commission also knows, as it
2 is widely acknowledged, that the Triennial Commission
3 process ultimately failed. And it failed because the
4 salary recommendations of successive Commissions were
5 left unimplemented.

6 And as a result, the process lost all
7 credibility.

8 Now, the process in which we are
9 engaged is altogether different, even though it has the
10 same ultimate objective.

11 The Triennial Commission process was a
12 statutory scheme. It was created by an Act of
13 Parliament, which meant it could be undone by an Act of
14 Parliament.

15 Well, this Commission operates within
16 a framework that is provided in the *Judges Act*. It is
17 much more than a mere statutory scheme.
18 It has been elevated by the Supreme Court to the status
19 of a constitutional process, and it is governed by
20 constitutional principles.

21 And the implication is that the
22 consequences of a failure of this process would have
23 far greater implications than the consequences of the
24 failure of the statutory process that was the Triennial
25 Commission.

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1 And that bring me to advancing two
2 propositions.

3 First is that anything that undermines
4 this process should be a source of concern to you.

5 It is a source of concern to the
6 Judiciary, but it should be a concern also to the
7 Government of Canada and to all those who benefit from
8 an independent judiciary in this country, the Canadian
9 public.

10 And the second proposition is that the
11 constitutional nature of this process imposes a very
12 special obligation on the participants in this process.

13 One of respect for the process, but
14 also an obligation positively to support the process
15 during the process, in the preparation of submissions
16 and afterwards, when it comes for the Minister to
17 respond to your Report.

18 The risk, the overall most significant
19 risk is politicisation of the process, and that's why
20 we insist on the importance of anything that
21 contributes to objectivity and independence.

22 Monsieur le Président, lors de la
23 première conférence de gestion, vous avez mentionné et
24 vous l'avez répété encore ce matin, que la qualité et
25 la réputation à l'échelle internationale de la

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1 magistrature canadienne est une source de grande fierté
2 pour les Canadiens.

3 It is certainly a source of pride for
4 me as a Canadian that our Judiciary is held in such
5 high esteem, and our Government itself, on the
6 international stage, repeatedly speaks highly of the
7 Canadian Judiciary with very good reason.

8 The question that arises from some of
9 the positions adopted by the Government before this
10 Commission is whether the Government thinks that this
11 came by accident, good luck or divine intervention.

12 And the answer is that Canada has a
13 stellar Judiciary because of Canada's commitment to an
14 investment in judicial independence, the promotion of
15 the rule of law and constitutional democracy.

16 And a Judiciary that enjoys financial
17 security is an essential element of that fabric.

18 So having tested the patience of
19 Members of the Commission, I conclude by saying that it
20 falls upon your shoulders to formulate recommendations
21 that are fair, appropriate at the present time, and
22 likely to preserve and promote judicial independence in
23 Canada, and we submit that the two recommendations
24 sought by the Judiciary meet these conditions.

25 Thank you, Mr. Chair. Thank you,

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1 Members of the Commission.

2 **LE MEMBRE PRÉSIDENT:** Merci, Maître
3 Bienvenu. Thank you, Maître Bienvenu.

4 Thank you for your remarks.

5 I think your remarks are directly
6 connected with your submission.

7 It's true that you have not respected
8 the frame, but the painting is quite significant.

9 Thank you very much.

10 We will now take our break.

11 Thank you very much.

12 See you in ten minutes.

13 **--RECESSED AT 11H25 A.M.**

14 **--RESUMED AT 11H40 A.M.**

15 **THE CHAIRPESON:** Ms. Meagher, you
16 wanted to say something?

17 **MS. MEAGHER:** Yes, thank you, Mr.
18 Chairman.

19 This morning I should have recognised
20 the presence of Prothonotary Lafrenière who is here for
21 the whole day, and he will be again here tomorrow with
22 Mr. Lokan and Chief Justice Crampton.

23 **THE CHAIRPESON:** Thank you, Louise.

24 I just want to mention to you that the
25 Commission will ask its questions at the end of the

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1 day.

2 After all of your remarks, at the end
3 of the day there will be question period. I know that
4 somewhere, not very far from here they have a "question
5 period", but we will have our question period.
6 Something different, of course.

7 And now I will ask, Maître Nuss, à
8 vous la parole.

9 **Me NUSS:** Non. Je ne pense pas.

10 À moins que le Gouvernement du Canada
11 me nomme comme « leur représentant ».

12 **LE MEMBRE PRÉSIDENT:** Voyez ça comme
13 un compliment!

14 **Me NUSS:** Merci. Oui, c'est comme ça,
15 en effet.

16 **THE CHAIRPERSON:** Maître Christopher
17 Rupar et Maître Kirk Shannon, please excuse-me for my
18 mistake.

19 **MR. RUPAR:** Thank you, Mr. Chair.

20 I knew it was hard to replace Ms.
21 Turley, but I didn't know it would be that hard.

22 **MR. RUPAR:** We also welcome on behalf
23 of the Government of Canada the Members of the
24 Commission to the task you have taken.

25 And as my friend, Mr. Bienvenu, put it

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1 so well, we appreciate that you have taken on and
2 serving in this matter.

3 We also agree with Mr. Bienvenu and
4 the Judiciary that we're here to be cooperative and to
5 provide you, the Commission, with the best evidence and
6 the best knowledge you have in order to make the
7 recommendations that are required of you.

8 And knowledge and context is a theme
9 that I think we will be coming back to as I make my
10 remarks, because much of what we talk about is context.

11 Context in which the Judiciary is situated, both in
12 the private sector and with the public sector.

13 **--SUBMISSIONS BY THE GOVERNMENT OF CANADA:**

14 Now, Mr. Bienvenu has raised as
15 preliminary matters a couple of points.

16 One was with respect to the
17 appointment process, a nominee issue.

18 And on that, I have really not much
19 more to say than we've already said in our written
20 submissions to the Commission.

21 It was a preliminary matter, it was
22 fully discussed in communications with Council and with
23 the Commission, and the decision was made and we've
24 moved on.

25 And at that point in our position, is

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1 that there isn't much to add on that.

2 With respect to response of the
3 Government and how the Government deals with the
4 Commission's recommendations.

5 There is no question the Government
6 has the greatest respect for the Commission and
7 Commissions past, and for recommendations that have
8 been made.

9 The Government has been involved in
10 making changes.

11 It has met with members of the
12 Judiciary in the interim periods between Commissions,
13 to discuss matters that and the Ministers met with
14 them.

15 There have been statutory changes with
16 respect to the process.

17 For instance, the Government has
18 reduced the time for response from six months to four
19 months.

20 So, there is hearing of what these
21 concerns are and there is response.

22 The Commission process though, as the
23 Supreme Court has pointed out, is one in which the
24 Government also has responsibilities of the public
25 purse. And that is something that we, along with

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1 respect of the Commission process, must keep in the
2 balance in our responses.

3 Now, as you know, the Commission was
4 established to fulfill the constitutional requirements
5 set by the Supreme Court of Canada in the *PEI Judges*
6 *Reference Case*, to have a body interposed between the
7 Judiciary and the Executive to make recommendations
8 concerning adequacy of judicial compensation.

9 The role of the Commission is unique.

10 In fulfilling its mandate, the
11 Commission is an institutional sieve between the two
12 branches of government.

13 The Commission serves the public
14 interest, this public interest process that is designed
15 to enhance confidence of the public in the independence
16 and effectiveness of the important institution of the
17 Judiciary.

18 And on this point, we echo Mr.
19 Bienvenu's comments at the end, of the high regard that
20 the Judiciary has found, both within Canada and
21 internationally.

22 There is simply no question that we
23 have one of the best, if not top Judiciary in the
24 world.

25 The process of the Commission was laid

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1 out by the Supreme Court in order to preserve the
2 constitutional responsibilities of the Judiciary and
3 the Government in a framework of our constitutional
4 democracy.

5 Consequently, it is essential that
6 both Judiciary's' independence is preserved and
7 Parliamentary accountability for the use of public
8 funds be respected.

9 Now, as the Supreme Court in
10 *Beauregard*, an independent Judiciary is the life blood
11 of constitutionalism and democratic societies, and the
12 Government of Canada and Canadians in general, is
13 privileged to enjoy the benefits of the independent
14 Judiciary, and the Government is committed to continue
15 to uphold the three components of the constitutional
16 principal of independence: security of tenure,
17 administrative independence and financial security.

18 Now, that said, the Government is of
19 the view that the level of compensation presently
20 provided to the Judiciary, is fully adequate to meet
21 the criteria of security of tenure, financial security
22 and as well, to attract outstanding candidates.

23 Where the focus lay with respect to
24 the Commission in this process is within a spectrum
25 between what the Government of Canada has said is

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1 adequate and what the Judiciary says is adequate to
2 meet the test.

3 And when you look at the difference,
4 it's approximately \$23,000 over the course of 34 years
5 of this Commission's lifespan.

6 And I won't take you to an
7 inordinately large amount of documents in our condensed
8 book, but if I could take you to Tab 20, this is taken
9 from our initial submissions, at page 18.

10 This is just a graph. It's sets out
11 actual and forecasted salaries, compensation, from four
12 perspectives.

13 First is the Judges using CPI, the
14 second is the DM-3 mid-point and maximum average.
15 Third is using IAI, and the fourth is the total
16 average. That's the blue one which is our
17 understanding what the Judiciary is proposing.

18 And we just lay that for you as a
19 pictorial depiction of where we are between various
20 submissions.

21 Now, I do acknowledge -- Mr. Bienvenu
22 has pointed this out -- that the Judiciary is not
23 asking for what they consider to be the full gap of
24 \$40,000 between what the Government is proposing and
25 what they suggest should be the adequate compensation,

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1 it's approximately \$23,000, as I mentioned.

2 Now, I will touch on the significant
3 points raised by Mr. Bienvenu in his commentary. I
4 will talk about the overall economic status of Canada
5 at this time.

6 We will discuss the point that the
7 salary which is now provided to the Judiciary of
8 \$314,000 as of April 1st, after the statutory
9 indexation, has not fallen below an acceptable point
10 such that the independence of the Judiciary has been
11 compromised.

12 We say this particularly when you take
13 into account the judicial annuity that either Mr.
14 Newell and Mr. Pannu are both valuation at well over
15 \$100,000 range.

16 We also point to and discuss the issue
17 of the filters that have been raised by Mr. Bienvenu,
18 and the issue of the DM-3 comparator.

19 And before getting into those details,
20 I'd like to just start with a point that was raised in
21 the submissions this morning.

22 Mr. Bienvenu mentioned that when the
23 filters are used, he mentioned 21 percent figure. When
24 you apply all the filters, we have determined that that
25 21 percent of the CRA database.

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1 *how to attract outstanding*
2 *candidates."*

3 Drouin, one of the earlier Commission
4 from approximately 12 years ago, said this, at page 46.

5 *"It is not responsible to match*
6 *salary level of Judiciary to the*
7 *highest earners of the largest*
8 *urban centers."*

9 At page 36 of that same report it was
10 said:

11 *"No segment of the profession has a*
12 *monopoly on outstanding*
13 *candidates."*

14 And indeed, the recent submissions of
15 the CBA say very much the same thing at page 7 of their
16 submissions.

17 The CBA said that they recognise the
18 Commission needs data that reflects a wide cross-
19 section of the legal community.

20 So, what our point is in respect of
21 this, is outstanding candidates are not necessarily
22 tied to high earnings.

23 Adequate earnings do not necessarily
24 mean the highest earners.

25 Meeting that test does not necessarily

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1 mean giving the highest percentage that the Bar has. I
2 will turn back to that in a few moments.

3 I'd just like to start with a bit of
4 context, an historical context with respect to
5 positions in the past. And there's discussion with
6 respect to linkages between DM-3 and the salary as a
7 comparator.

8 It hasn't always been the position of
9 the Judiciary that the DM-3s are the adequate
10 comparator. In fact, if we go to the Scott Commission
11 and this I will take you to.

12 If we can turn at Tab 6 of my
13 Condensed Book, please.

14 At the top of our Condensed Book we've
15 put pagination, in the top center, and I am looking at
16 page 34 of our pagination.

17 And this is Mr. Scott testifying
18 before the Legal Affairs Committee in the late 1990's.

19 And I am at the left-hand side of page 34, the second
20 paragraph down, after Mr. Scott, if you're with me on
21 that.

22 And what Mr. Scott testified was this:

23 *"The judges did not always think*
24 *that. They did not like to be*
25 *aligned with the executive branch*

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1 *of government, so they did not like*
2 *to be swept in with other public*
3 *servants. In respect of this last*
4 *freeze, there was a lot of*
5 *criticism on the part of the*
6 *judges."*

7 And if we go over to the next page and
8 go down, page 35, to the bottom, again Mr. Scott, just
9 above Senator Joyal, where it says 'Mr. Scott':

10 *"The first group pushing for the*
11 *removal of such a linkage is the*
12 *judges. They feel that their*
13 *situation and the need to attract*
14 *the right people to the judiciary*
15 *will not be addressed by putting*
16 *them into a category with federal*
17 *public servants and that, since*
18 *they are a separate branch of*
19 *government, they should be dealt*
20 *with separately. The motives of*
21 *others is another question, but*
22 *that is a hot topic in the U.S.*
23 *now."*

24 My point here is it's a fluid matter.
25 And that's why we ask that in order to

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1 give a full appreciation of a comparator, we don't link
2 specifically to one-type civil servant.

3 We're not suggesting the DM-3s are not
4 a useful comparator.

5 We are suggesting that they should not
6 be used as a comparator in isolation.

7 Now I talked a moment ago about total
8 compensation, and Mr. Pannu in his numbers has set the
9 total compensation at approximately -- this includes
10 the IAI adjust -- sorry. Does not include the IAI
11 adjustment but includes the annuity, at approximately
12 \$421,239 per annum.

13 Mr. Newell, who is also an actuary who
14 was retained by the Judiciary, works those costs out at
15 paragraph 17 of his report, to approximately \$470,000
16 per year. So the difference between the two actuaries
17 is not significant with respect to total compensation.

18 And I just want to pause for a moment
19 to talk briefly about Mr. Newell and Ms. Haydon while
20 we're on this topic.

21 Mr. Newell's report is within a margin
22 of appreciation of that of Mr. Pannu with respect to
23 this matter.

24 As Mr. Newell points out at paragraph
25 48 of his report, the key difference between the two is

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1 that Mr. Pannu used the disability assumption and
2 valued its disability benefit as part of annuity, he
3 did not.

4 Mr. Newell at paragraph 16 said this:

5 *"It should be understood that there*
6 *are various methods that can be*
7 *used to value benefits received by*
8 *the Judges. Any calculation will*
9 *be sensitive to underlying*
10 *methodology and assumptions."*

11 I note Mr. Newell also worked on the
12 report in 2012. He says that at paragraph 41 of his
13 report.

14 So, Mr. Newell and Mr. Pannu are
15 relatively close in what they're saying. And it's not
16 unheard of, in fact it was done with the last
17 Commission, that the two should speak to each other,
18 perhaps even with a Commission expert, to sort out the
19 assumption differences that they have, and reach some
20 sort of common number.

21 And that's something that the
22 Government would certainly be willing to talk with the
23 Commission about.

24 Again, to get the Commission to the
25 number that is within full knowledge and provides a

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1 full basis for your recommendations.

2 Now, Mr. Bienvenu spoke about Ms.
3 Haydon's report, and I will just give you a couple of
4 brief comments about it.

5 We don't feel it's in the same
6 category as that of Mr. Pannu and Mr. Newell. It's a
7 more general discussion that she has.

8 She often says that she doesn't
9 disagree, or she disagrees with Mr. Pannu's
10 methodology, but it really offers nothing in return.

11 Whereas, Mr. Newell does set out
12 extensive logarithmic problems or difficulties that he
13 sees, that need to be sorted out between the two.

14 There's a couple of other points that
15 I will raise with you about Ms. Haydon's report. At
16 page 2 of her report she has disagreement with the
17 percentile used by Mr. Pannu.

18 He talks about the 50th percentile
19 perhaps as attracting suitable individuals.

20 And she says that when the goal is to
21 attract exceptional individuals, this is not the
22 methodology he would use. But that's what he said.

23 And he also footnotes at number 4 of
24 his footnote number 4 of his report, an external report
25 and third party report dealing with Coca Cola Company

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1 and the percentile they used.

2 So he has an extensive and third party
3 backup for what he is saying. We don't have the same
4 with respect from Ms. Haydon.

5 The other point which is striking
6 somewhat of Ms. Haydon's report is that she is talking
7 at page 16, of a need to have a \$100,000 cut-off, and
8 everyone else is an outlier.

9 And we know from the figures that are
10 provided earlier by Mr. Pannu, that if you have a
11 \$60,000 cut-off, you're removing approximately 30
12 percent of the CRA database from consideration of being
13 a candidate for the Judiciary.

14 If you go to \$80,000 you remove
15 approximately 38 percent.

16 And by simple extrapolation, if you go
17 to \$100,000 you're removing approximately 44 to 45
18 percent.

19 And to say that counsel or lawyers
20 make \$100,000 a year are outliers and should be removed
21 from any consideration of judicial appointment, is not
22 in line with what previous Commissions have said.

23 And that's what I brought to you
24 earlier.

25 We have to have that broad spectrum of

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1 representation in the Judiciary.

2 Now, if I can talk briefly about
3 economic conditions. And will go to Tab 5 of our
4 material. This was in our supplemental material that
5 was provided. And this was tabled in the House of
6 Commons by the Minister of Finance on March 22nd, so
7 it's very recent.

8 I'd just like to take you to a couple
9 of points.

10 The first is at page 13 of our book,
11 and it's the number and the quality of private sector
12 economic organisations that were involved in the
13 consultations. I counted 15, including BMO Capital
14 Markets, Caisse de dépôt and others.

15 And what they've come up with at the
16 bottom of that page is this.

17 *"In the February 2016 survey,*
18 *private sector economists revised*
19 *down the average outlook for real*
20 *GDP and GDP inflation for 2016*
21 *compared to the November 2015*
22 *Update."*

23 And if we go to the next page, the
24 report talks about, in the third paragraph, about the
25 effect of lower crude oil prices.

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In the next paragraph:

"As a result of these developments, nominal GDP growth in the February survey of private sector economists is expected to be 2.4 percent in 2016 (compared with expectations of 4.2 percent in the 2015 fall update)."

And then the second last paragraph on this page:

"The outlook for Consumer Price Index inflation has been revised down to 1.6 percent."

And in the final paragraph:

"The economists have again revised down their expectations for both short and long-term interest rates by about 30 basis points..."

All this to say is that as we said in our original submission and in our reply submissions, is that the economic situation remains challenging. It may not be of the reach that it was in the early 2000's, but it remains somewhat problematic in the global sense.

And "challenging" is the word that has

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1 *administration of justice. If*
2 *salaries are too low, there is*
3 *always the danger, however*
4 *speculative, that members of the*
5 *judiciary could be tempted to*
6 *adjudicate cases in a particular*
7 *way in order to secure a higher*
8 *salary from the executive or*
9 *legislature or to receive benefits*
10 *from one of the litigants."*

11 What is interesting is at 176, which
12 is right beside, the page right beside, the Court said
13 this.

14 I am starting at the second paragraph:

15 *"My starting point is that 11(d)*
16 *does not require that the reports*
17 *of the Commission be binding,*
18 *because decisions about the*
19 *allocation of public resources are*
20 *generally within the realm of the*
21 *legislature, and through it, the*
22 *executive. The expenditure of*
23 *public funds, as I said above, is*
24 *an inherently political matter."*

25 So, there is those two elements that

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1 the Commission will be balancing.

2 Now, with respect to attracting
3 outstanding candidates, I took you to early on what the
4 Block Commission said about the lack of a link between
5 the highest earner and attracting outstanding
6 candidates.

7 We should also look at who makes up
8 the Judiciary.

9 It varies back and forth, but
10 generally it's approximately a one-third, two-third
11 split between private sector and public sector
12 candidates.

13 This is found at a graph that we have
14 at Tab 17 of our book. I won't ask you to turn that
15 up. I don't think there's anything that's terribly
16 contentious about that.

17 So, what does that mean?

18 In our submission, when you look at
19 the private sector comparable or comparator, you need
20 to look beyond highest earners in the bigger centers,
21 and you have to include, as we said, the entire
22 spectrum.

23 When you look at public comparators,
24 you must look beyond the DM-3 level.

25 Yes, it should be included, but it has

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1 to be a broader spectrum of pool, because the actual
2 pool from which the public sector candidates are drawn
3 is much broader than the DM, particularly the DM-3.

4 I could be corrected, but the only DM
5 that I can recall off-hand has gone to the Judiciary in
6 recent times, it was Justice Iacobucci, approximately
7 twenty years ago.

8 So let's start by looking in a bit
9 more detail about the public sector. And this is in
10 our Main Submissions, approximately paragraph 49 to
11 paragraph 51.

12 And I will just run through this
13 rather quickly, because again it gives us the context
14 of what we're looking at, these comparators.

15 The highest government, federal
16 government rank for a lawyer is the LP-5 category, with
17 a maximum salary of \$193,000.

18 Within the management group the
19 highest salary is \$199,000, with a maximum performance
20 pay of 26 percent.

21 In the provinces, it's similar.

22 In Ontario it's Crown Counsel 4, which
23 is \$211,000, and in British Columbia it's approximately
24 \$210,000.

25 And when we look beyond that, when we

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1 look at things such as law schools and university
2 professors, the highest salaries of the two largest law
3 schools in Ontario, Osgoode and University of Toronto,
4 were \$247,000 and \$299,000.

5 And indeed, the Dean of all Ontario
6 law schools, except for University of Toronto and
7 University of Western Ontario, were below judicial
8 salaries. Those two Deans earned slightly more.

9 So when we're looking at the
10 contextual comparison for judicial salaries with
11 respect to the public sectors, with respect to who the
12 candidates are, that the Judiciary is generally drawn
13 from for the public sector, it compares in our
14 submission, quite favorably with those salaries.

15 Now, are the salaries adequate to
16 attract outstanding candidates from the public sector?

17 Now, Mr. Pannu has put together some
18 numbers with respect to this comparison, and I am
19 reading from page 5 of his report, which is found at
20 our Tab 9.

21 Perhaps we should look at that for a
22 moment.

23 And what he's done here is he's done
24 the baseline percentile rankings. This is the second
25 column down where he says 65th and 75th percentile net

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1 professional income. And you'll see the numbers there.
2 He has the 65th percentile, the 75th percentile in the
3 judicial salaries for the various years.

4 And what's interesting is that the
5 numbers for the private sector has actually gone down
6 in that interim period, and the salary of the Judiciary
7 has been indexed to increase.

8 But what is also important in our
9 submission to take is where this fits within the
10 overall context of private sector salaries for the
11 database that we have.

12 And in our submission, it fits well
13 within what would be adequate to attract candidates.

14 In 2014, we have it within the 78th
15 percentile. It's not the highest, certainly, but
16 that's not the issue. The issue is whether it's
17 adequate.

18 And we say when you look at that
19 comparison, when you have that context of what the
20 other private sector salaries are, we are within that
21 range of adequacy for attracting outstanding
22 candidates.

23 Now, the Judiciary has taken comments,
24 and Mr. Bienvenu spoke this morning about comments
25 about the filters.

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1 I'd like to turn for a few moments to
2 that issue.

3 When we applied all three filters, the
4 age filter, the Census Metropolitan, and the floor of
5 \$60,000, as was recognised this morning, we have a much
6 smaller pool from which to attract, from which to take
7 candidates.

8 And it's our submission that this is
9 not really helpful in determining whether or not this
10 is an adequate salary.

11 And the reason why we say it's not
12 helpful is because in our submission, it skews to some
13 degree the numbers that are being used. And I will
14 tell you why we say that's the issue.

15 If you look at the demographic of
16 what's been happening with Judiciary, statistically the
17 appointments have been slightly older over the past
18 number of years.

19 And as we know from the CRA data and
20 from the work of Mr. Pannu, is that there's a decline
21 in income from the private sector, after the median age
22 of appointment.

23 So, after 56, that range that has been
24 used as the focus before the ages of 44 to 56, after
25 56, there is a decline in income from the private

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1 sector.

2 And we say that if you focus only on
3 that range, for instance, of age between 44 and 56, you
4 miss these other factors.

5 You have appointments that are after
6 age 46, you have appointments before age 44, and by
7 excluding those groups you don't get the full picture
8 of the groups of candidates who are appointed to the
9 Judiciary.

10 And what this does, in our submission,
11 is that it raises the percentiles in a manner which is
12 not truly reflective of the entire spectrum of people
13 who are appointed to the Judiciary.

14 For instance, as we've mentioned in
15 our material, if you focus only on the 44 to 56 age
16 group, you exclude approximately one-third of the
17 appointments since 2004. That's a significant group.

18 If we're trying to determine whether
19 or not there is adequacy of salary and if you remove
20 one-third of the people who have been appointed, there
21 is naturally going to be some sort of change to the
22 numbers that are out at the end of the process.

23 Salary exclusions are another
24 difficulty we have with respect to the filters that are
25 being used.

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1 The results are shown in Mr. Pannu's
2 report which is at, again, Tab 9 of our material.

3 If I can take you to page 8 of what
4 his report is.

5 What he's done is he's set out here if
6 you have the 75th percentile with a \$60,000 salary
7 exclusion, and then you have the 65th percentile with
8 an \$80,000 exclusion, and then the 75th percentile with
9 an \$80,000 exclusion, and he shows how the numbers
10 move.

11 And what you end up with, for
12 instance, is the 65th percentile will be moving to the
13 75th percentile, and the 75th percentile will move to
14 the 82nd percentile by applying these filters.

15 And what that does is it gives an
16 imprecise picture of what the comparator will be for
17 the judicial salary.

18 So for instance, if the judicial
19 salary is \$300,000 and the 65th percentile without the
20 age filter is, let's say \$250,000, and then with the
21 age percent, when you add the age filter, that 65th
22 percentile moves up.

23 Then the baseline of the salary of the
24 Judiciary does not relatively change compared to the
25 65th percentile. So it does not look as adequate as it

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1 would be without the age filter.

2 And that's the problem with the age
3 filter and with the CMA filters, because it moves the
4 percentiles that are comparators in a manner which, in
5 our submission, gives a somewhat distorted view of
6 where the true comparator is.

7 Now I mentioned Ms. Haydon, and in her
8 view, the use of the \$100,000 floor as outliers, and if
9 you do use that, then you remove 45 percent of the Bar,
10 which is a significant, significant number of possible
11 candidates that are removed right off the top, and are
12 not considered to be possible outstanding candidates
13 for the Judiciary.

14 One of the concerns, of course, is
15 that there are a number of reasons why a lawyer many
16 not make a certain amount of money, and the Drouin
17 Commission dealt with this at page 39 of their report.

18 And what they said there are a number
19 of reasons for low income could be choices related to
20 files, client, that sort of thing, billing rates.

21 There may be lifestyle choices; there
22 may be childcare responsibilities, maybe issues with
23 respect to aging parents.

24 There's any number of factors that
25 would suggest why an income for a lawyer is lower in

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1 one particular year.

2 But that does not necessarily equate
3 with the fact that person is not an outstanding
4 candidate for the Judiciary.

5 Now with respect to CMAs, the process
6 is the same.

7 The filter, when you add it in, gives
8 you an artificial reading with respect to comparability
9 of the judicial compensation, judicial salary, with
10 respect to the percentile when you use the CMA.

11 Now for perspective, and this is in
12 Mr. Pannu's report again, in 2014, the judicial average
13 salary was \$300,800. That was approximately 78
14 percentile nationally. It would rank approximately
15 75th percentile when you include all CMAs, and
16 approximately the 70th percentile when you include only
17 Toronto and Calgary. So we see how that relative
18 ranking changes when you add this filter.

19 Now, we have to keep in mind also that
20 between January 1997 and March 2015, so that period
21 extensive of approximately 17 to 18 years, almost 40
22 percent of appointments were made from the private Bar,
23 outside of the top 10 CMAs.

24 So again, our suggestion and our
25 position is not that CMAs are not to be relevant; it's

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1 not that there are not useful, but they are not to be
2 used in isolation from the rest of the Bar and the rest
3 of the CRA database.

4 We have suggested, as Mr. Pannu has
5 done, along with age weighting is CMA weighting, so
6 that entire spectrum of appointees are represented in
7 the comparators with respect to whether or not the
8 present judicial salary is adequate.

9 And again, by using the entire
10 spectrum, it is our submission that you get a clearer
11 picture and a more representative picture of who has
12 been attracted to the Bar and what their salaries were
13 before they were made judges.

14 One of the issues, one of the factors
15 in our submission that has to be included is the
16 judicial annuity.

17 Now on this, as I mentioned earlier,
18 Mr. Pannu and Mr. Newell are fairly much ad idem. They
19 are a few thousand dollars off, but whichever set of
20 numbers you would use, the judicial annuity is
21 approximately \$100,000.

22 And as the Levitt Commission said at
23 paragraph 40 of its report:

24 *"The annuity is a very attractive*
25 *incentive to self-employed*

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1 *lawyers."*

2 And this reflects what the Drouin
3 Commission said at page 42 of their report.

4 *"The annuity is a significant*
5 *factor to be considered when*
6 *dealing with compensation issues."*

7 Now, based on the 2014 salary of
8 \$308,000, upon retirement the judicial annuity would be
9 \$205,733 annually.

10 And as Mr. Pannu points out in his
11 report at pages 13 and 14:

12 *"To have the same type of benefit*
13 *return, a self-employed lawyer*
14 *would roughly need to save*
15 *approximately 43 percent of annual*
16 *income to fund equivalent*
17 *benefits."*

18 So we look at total compensation as
19 one of the factors with respect to whether there is
20 adequacy of compensation in order to attract
21 outstanding candidates.

22 This is a matter that has to be taken
23 into consideration because it is something that the
24 private sector, time and time again, looked at because
25 of the fact that it is indexed annually, that it's

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1 secure and it adds approximately 33 percent to the
2 total compensation of judicial salaries.

3 The other matter that has to be taken
4 into consideration in our submission is that of the
5 supernumerary status.

6 The Supreme Court in the *Mackin* matter
7 said that:

8 *"There's an undeniable economic*
9 *benefit that is taken into account*
10 *by candidates in planning their*
11 *financial affairs."*

12 That was at paragraph 67 of that
13 decision.

14 Now supernumerary status, of course,
15 is well-earned and well-deserved. There's no issue
16 with respect to the fact that it is provided.

17 But it is another one of these factors
18 that has to be taken into account when the Commission
19 is making its determination as to whether or not
20 there's adequate compensation salary for the Judiciary,
21 under the statutory criteria.

22 One of the signs we have that this is
23 an attractive and well-deserved, well-liked benefit, is
24 that approximately 80 percent, 89 percent of those
25 Judiciary who are eligible to take supernumerary status

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1 do so.

2 So when we look at all these factors
3 combined, all those salary and benefit factors, it is
4 our submission that the total compensation as provided
5 to the Judiciary is adequate at its present level.

6 It need not be raised, aside from
7 statutory indexation in order to meet the statutory
8 requirement of adequacy of income.

9 The difference between us and Mr.
10 Bienvenu and our friends on the other side, is whether
11 or not the actuarial test has been made.

12 It is our submission that when we look
13 at these comparative factors from the private sector,
14 from the public sector, the annuity, the
15 superannuation, the difference is that there is more
16 than adequate in meeting that test. The salary more
17 than adequately meets that test.

18 Let me turn briefly now for a moment
19 of two to the DM-3 comparator.

20 We've heard this morning that this has
21 been a matter of longstanding between the various
22 Commissions, and I would just like to point out a
23 couple of points from the McLellan Report.

24 And this is at Tab 13 of our material.

25 And this is what the McLellan

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1 Commission, which is only two Commissions ago, said,
2 and I am at page 129, the last paragraph:

3 *"We have been adverted to the*
4 *precedential value of the previous*
5 *Commissions. It is proper that we*
6 *state that we did not consider*
7 *ourselves to be bound by previous*
8 *decisions, including those of the*
9 *Drouin Commission. We were, and*
10 *are, of the view that it would be*
11 *counter-productive to fix judicial*
12 *salaries as having a pre-determined*
13 *relationship to other salaries,*
14 *whether those of senior civil*
15 *servants or senior legal*
16 *practitioners. Those*
17 *considerations represent dynamics*
18 *at work in our society and they*
19 *change constantly. We believe the*
20 *approach was to consider these and*
21 *other factors in light of the most*
22 *current information and to make*
23 *recommendations accordingly. Were*
24 *it otherwise, there would be no*
25 *need to address this subject every*

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1 *four years, as contemplated by the*
2 *Judges Act.*"

3 So, it's not necessarily accurate to
4 say that every Commission has had this lockstep
5 approach of DM-3.

6 They may have come to that conclusion,
7 but as we see from McLellan, they are open to the
8 suggestion that it has to be revised on a constant
9 basis because of the changing dynamics of the factors
10 that are taken into consideration.

11 So it may be that this Commission
12 comes to the determination that the DM-3 comparator is
13 still valid and accurate in the context of all the
14 information that has been provided, but it shouldn't be
15 assumed.

16 And what we would ask the Commission
17 is to take a strong look at the DM-3 comparator to
18 determine if it really should be maintained as the sole
19 public comparator or if it should be expanded to
20 include other aspects of the civil service.

21 Now, let me touch on a couple of
22 points with respect to that.

23 We heard this morning that it's hard
24 to compare the positions between what a DM-3 does or DM
25 of any level does, and that of Judiciary. And we

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1 agree with that to a fair extent, they are apples and
2 oranges, as my friend pointed out this morning.

3 What the DMs do is significantly
4 different from what the Judiciary does, and that is why
5 in our submission, that it is such a difficult
6 proposition to accept that it is the sole comparator in
7 the public sector.

8 The DMs, of course, deal with budgets,
9 they deal with personnel issues. They have to sort out
10 policy issues with the Government, they're the public
11 face before Parliament. Just any number of things that
12 a DM does that a judge would not do, just as there are
13 any number of things that a judge does that the Deputy
14 Minister does not do.

15 They do not decide criminal matters,
16 they do not decide family matters, that is a given.
17 They are two different equally respected, equally
18 important aspects of our society.

19 But if we're doing a comparison with
20 respect, it does not fit necessarily with only the DM
21 level, and it's certainly not just the DM-3 level.

22 Has there been consensus with respect
23 to the use of DM-3?

24 In our submission there hasn't been.

25 If we go back to Mr. Scott's

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1 Commission in 1995, at page 14, and this is at Tab 11
2 of our materials, he said there was a strong case, it
3 was imprecise and inappropriate.

4 Drouin, at page 31 of their report
5 said the DM-3 was relevant but not determinative of
6 judicial salaries.

7 I just read you McLellan and their
8 approach to the matter, and even the most recent
9 Commission, that of Mr. Levitt, said that it was not
10 ideal.

11 Now, he did use it based on seniority
12 of the group and the functions of the members, but he
13 said it was not ideal.

14 So, it's not that there has been an
15 unbroken string of Commissions who have found that the
16 DM-3 comparator is the only comparator, is the baseline
17 comparator. They've had issues with it. They had
18 difficulty with it.

19 What we ask this Commission to do is
20 to take a strong look at whether or not it should be
21 continued.

22 And this morning I listened with
23 interest when my friend, Mr. Bienvenu -- I keep calling
24 Mr. Bienvenu "my friend", of course, and that's the
25 litigation approach, and I am reminded constantly that

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1 this is not litigation, that is a different -- but if
2 it doesn't offend, I will continue to slip into that
3 term every now and then.

4 Mr. Bienvenu this morning was talking
5 about the DM-3 mid-point and the move from the DM-3
6 mid-point to the DM-3 average, which the Judiciary is
7 now asking the Commission to recommend.

8 And if there was to be a consistent
9 approach from the Commissions in the past, it was that
10 it was the DM-3 mid-point. The Block Commission said
11 that, the Levitt Commission said that. So, there is a
12 movement from that on behalf of the Judiciary.

13 I would also add this.

14 In McLellan, at page 27 -- and I won't
15 take you to this -- they also mention that the
16 Judiciary was looking at possibly the DM-4 level as a
17 comparator.

18 And I note in the original submissions
19 of this Commission, in the footnotes early in their
20 submissions, the Judiciary say they do not exclude the
21 possibility of moving to the DM-4 in future
22 Commissions.

23 So, we don't have a static baseline of
24 DM-3 by either party.

25 Both parties, quite frankly, principal

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1 parties, are asking this Commission to take a look at
2 the DM-3 to determine whether or not it should be the
3 proper comparator for the public comparators.

4 I'd like to take you to one of the
5 charts that we have in our material, and this is at Tab
6 20 of our Condensed Book. This is what I took you to
7 earlier to start my submissions with.

8 And I took you to this chart earlier
9 because it showed the gap between what the Judiciary is
10 proposing and the three other salary increments, the
11 CPI, IAI and mid-point and average, which was used in
12 the last two Commissions.

13 What is interesting is that if you
14 look at the orange line, if you just use IAI indexing,
15 it will surpass the mid-point in approximately 2019, of
16 the DM level.

17 So even without any additional salary
18 increase above IAI indexing -- and I will talk about
19 IAI indexing in a few moments -- the mid-point of the
20 DM level will be surpassed by the Judiciary.

21 It could happen earlier because in the
22 last two years, at least with respect to DM salaries,
23 the increases have been 0.5 percent, whereas IAI
24 indexing has been above that.

25 So, there is an incremental increase

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1 catch-up, if you will, in surpassing by the judicial
2 salary, simply by indexing of IAI with respect to the
3 mid-point of the DM salaries.

4 One of the principal concerns that
5 we've raised in the past and we raise with this
6 Commission with respect to using the DM-3 comparator,
7 and particularly if you go to the point of using total
8 average compensation, is the significant focus on a
9 small group of public servants for determining the
10 salary of the Judiciary.

11 As we have learned and as we know from
12 this morning and from the material, the percentage of
13 the DM salary which is tied to performance pay has been
14 increasing significantly over the years.

15 So, what we have is the individual
16 performance of a handful, perhaps even two or three
17 senior deputy ministers at Level 3, making
18 determination as to what the level of salary would be
19 for all of the federally appointed judiciary, all 1,100
20 plus judges.

21 And we raise the concern of the small
22 sample size. It may be that in certain years there
23 will be a significant increase because there may be
24 significant performance by a group of deputy ministers.

25 And we just simply suggest that that

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1 may not be the most appropriate way to determine the
2 level of judicial compensation, because of the very
3 personal and very individual nature of that performance
4 and that performance pay.

5 Now, as Mr. Scott pointed out, it can
6 go the other way as well.

7 We don't know what the future will
8 hold, and if we have a period of economic difficulties
9 that require a freeze in salaries at some point in the
10 future, it may be that judicial salaries would not
11 increase as well outside of statutory indexing.

12 So the tying to the individual nature
13 of the DM is problematic in our submission because of
14 the very individual aspect that it endeavours.

15 Now, I've touched on the compatibility
16 issue, and the Levitt Report was somewhat critical of
17 the Government for focussing on job content, not what
18 the marketplace experts said the pay should be.

19 But it's hard to have a comparison if
20 you don't have the proper comparator.

21 And as I mentioned when I started this
22 section, it is our submission that we do not have the
23 proper comparator because of the very different,
24 distinct, equally important nature of the role of the
25 Deputy Minister and the Judiciary.

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1 So, it's very difficult to have that
2 compatibility and comparability when you have totally
3 different functions.

4 If the Deputy Minister's pay is tied
5 to certain performance goals with respect to budgetary
6 aspects, regulatory matters, whatever it is that he or
7 she has to deal with, that has no relation to the
8 Judiciary.

9 And indeed, it would be improper to
10 judicial independence to have judicial salaries tied to
11 some sort of performance goal or some sort of
12 performance measure. That is simply not in compliance
13 with an independent judiciary. So those are some of
14 the difficulties we see when we make those comparisons.

15 Other factors that we mention in our
16 material, of course, are security of tenure.

17 Mr. Bienvenu said 'Well, Deputy
18 Minister retire after after four years because they've
19 had a full career in the civil service and they can
20 retire and receive their pension.'

21 But it still remains the fact that the
22 Judiciary, and I say this is a healthy sign and a sign
23 that the Judiciary is thriving and doing well, is that
24 the median number of years a judge spends on the Bench
25 is over 20 years, even though they can retire at 15.

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1 For a DM-3, the average length of
2 tenure is 4.4 years.

3 And as we point out in our material in
4 our Main Submission, at pages 33 and 34, the longest
5 tenure in the longest period we've looked at, was 12
6 years, and the longest active now is 8 years.

7 So, there is a distinction between
8 longevity which makes a comparator also difficult to
9 make between what the judges do in the latter part of
10 their career and what the DM-3s do in their career, as
11 well.

12 Now, the next issue I will discuss is
13 reliability of the evidence.

14 Part of the difficulties we see in the
15 comparative process is the evidence.

16 And one of the suggestions we had
17 before the Commission was for a pre-appointment income
18 study to get actual levels of income of lawyers before
19 they are appointed to the Bench.

20 Now, the Commission dealt with that
21 request, had some concerns with timing, that sort of
22 thing, which of course, we have accepted, but we would
23 renew our request that this is something the Commission
24 should consider, because this will give us real data.

25 This will give us firm numbers and

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1 firm data that we can then, of course, use in
2 conjunction with the Judiciary to get a fuller database
3 to the Commissions in future, with respect to this very
4 important issue.

5 And there is no question we will work
6 with the Judiciary and Commission to determine whatever
7 parameters will be necessary to ensure that the
8 information is anonymous and that it's fulsome, and
9 that it covers all of the criteria that should be
10 needed for such a study.

11 And I just make the point in passing,
12 and I am not suggesting this is the mark that we should
13 be looking for, but the British, of course, have done
14 this.

15 This is at Tabs 47 or 48 of our
16 original materials.

17 And there's no question that as a
18 leading western democracy and one of the best
19 judiciaries in the world, that they were able to do
20 this and come up with numbers that were helpful in
21 their process as well.

22 So, it's not as if this is something
23 that has not been tried and not been done before. In
24 fact, they did two of them. There may be lessons to be
25 learned from that.

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1 Hand-in-hand with that would be the
2 survey of lifestyle and what attracts candidates to the
3 Judiciary.

4 I don't think there's any question
5 that salary is a component of what brings outstanding
6 candidates to the Judiciary, but necessarily, there has
7 to be other factors as well: the type of work, public
8 service, there's any number of matters which come into
9 play as well.

10 And our submission is that this would
11 be helpful in order to allow the Commission to make
12 recommendations in the future with respect to what
13 factors come into play when we are trying to attract
14 the outstanding candidates.

15 There is a salary component, we've
16 gone through that in great detail this morning, but
17 surely there are other factors as well. So, let's gain
18 the knowledge, let's get the database and let's find
19 what these other factors are.

20 So with those comments, we would renew
21 our suggestion that these would be helpful matters for
22 future Commissions to do, to look at. It would be
23 something that this Commission should look at in doing
24 during the tenure of your four-year lifespan.

25 I am cognisant of the time, Mr. Chair,

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1 and I have one more issue to deal with, which is CPI
2 versus the IAI.

3 And then, I haven't done this very
4 often, I think, in my career, but I would ask if I can
5 have a moment or two to speak with my colleagues.

6 As you know, I came on this file a bit
7 later in the process and although they tried very hard
8 to put everything they possibly could into my brain in
9 the submissions today, there may be some matters that I
10 may have missed or may have to correct.

11 So, I just want to make sure I can
12 have a moment to do that.

13 **THE CHAIRPERSON:** What we can do is to
14 stop for lunch and when we come back, you continue your
15 presentation.

16 **MR. RUPAR:** That would be fine with
17 me, if Mr. Bienvenu is acceptable.

18 **MR. BIENVENU:** We're in your hands. We
19 are in the hands of the Commission.

20 **MR. RUPAR:** Just to be clear, I am not
21 going to go over anything anew, other than I will do
22 the IAI, CPI matter, and any errors or omissions that I
23 may have made in the last hour and fifteen minutes, and
24 tidy those up so that the Commission has the correct
25 and proper information before it.

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1 **THE CHAIRPESON:** So the conclusion is
2 we stop for the break and we come back.

3 Please, may I request discipline to
4 come back for 1:30.

5 Thank you very much.

6 -- LUNCHEON RECESS 12H45 P.M.

7 -- UPON RESUMING AT 13H30 P.M.

8 **THE CHAIRPESON:** Welcome to this
9 afternoon session.

10 Monsieur Rugar, à vous la parole.

11 **MR. RUPAR:** Thank you, Mr. Chair.

12 I am happy to report I will be rather
13 brief, I think, in concluding my remarks.

14 One point of correction from what I
15 said this morning when we were speaking about the pre-
16 appointment study, I just want to make clear this is
17 not something that would be taken on by the Government.

18 It would be something that we would
19 suggest the Commission would take on as the independent
20 body, and have control over in that the parties, of
21 course, could provide submissions as to what the
22 parameters would be. But this would be under the
23 control of the Commission and would be a Commission
24 matter, not something that the Government would be
25 doing, just to enforce the independence of that point.

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1 The last substantive item that I will
2 deal with is this issue with respect to CPI versus IAI.

3 And we heard this morning from my
4 friend about the link that the Judiciary sees in the
5 IAI as a very fundamental part of their compensation.

6 And what I'd like to do is, again just
7 continuing with our theme of context and knowledge,
8 just as we say in our submissions, our main
9 submissions, around paragraphs 153 and 154, the
10 indexing was introduced in the early 1980s to enhance
11 the independence of the Judiciary to avoid the give and
12 take of a political process.

13 And the IAI was chosen as the Minister
14 of Justice at the time, basically, to avoid
15 controversy. And it was matched to what MP's were
16 receiving at the time. They were using IAI as well.

17 Now, the MPs have moved on from that.

18 They now have the average increase
19 negotiated by unions, perhaps unions with 500 workers
20 of more. And that's in Section 67.1 of the *Parliament*
21 *of Canada Act*. So, they've moved beyond that point.

22 But the real key in our point here, is
23 that, and as Mr. Bienvenu referred to the statements of
24 Mr. Scott about the social contract, the social
25 contract in our view was, I guess, the erosion of

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1 buying power.

2 And it's this erosion of buying power
3 that seems to be where the focus should be in our
4 submission.

5 Indeed, we point out in the hearings
6 of February 19th of 1981, at pages 1479 that the idea
7 was to maintain the buying power of the Judiciary.

8 And when we look at the definition of
9 what CPI is, and this is in our submissions at
10 paragraph 157 of our Main Submissions, this is from
11 Statistics Canada, and they define in the following
12 terms:

13 *"The Canadian Customer Price Index*
14 *is an indicator of the change in*
15 *consumer prices. It measures price*
16 *change by comparing through time*
17 *the cost of a fixed basket of*
18 *consumer goods and services. Since*
19 *the basket contains products of*
20 *unchanging or equivalent quality*
21 *and quantity, index reflects only*
22 *pure price change."*

23 More of a technical matter.

24 Then at 1.3, the statement says this:

25 *"The index is used for an*

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1 *assortment of different purposes by*
2 *various users. One of its most*
3 *important uses is by Government,*
4 *business and individuals to adjust*
5 *selected contractual or legislated*
6 *payments in line with inflation.*
7 *By linking a stream of future*
8 *payments to CPI, it is possible to*
9 *ensure that the purchasing power*
10 *represented by those payments is*
11 *unaffected by the average change in*
12 *consumer prices that may occur."*

13 So there's a link between the idea of
14 now erosion of purchasing power and the use of CPI not
15 just, of course, with judicial salaries but in the
16 broader spectrum of society.

17 So, we say that's why it's a fit.
18 That's why it's a better fit.

19 The IAI was for the particular purpose
20 of MPs and to ensure that there was no "political
21 wrangling" at the time, to use the words of that day.

22 But when we take a cold look at what
23 it's really meant to be doing, is to ensure there's no
24 erosion of buying power. And that's exactly what the
25 definition of CPI tells us its function is.

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1 So, it's for that purpose, for that
2 very straightforward purpose that we suggest to you
3 that CPI is a more appropriate matter to ensure that
4 indexing continues, and that there is no loss of buying
5 power by the Judiciary.

6 I understand questions will be coming
7 later, so those being are submissions at this point to
8 the Commission.

9 **THE CHAIRPERSON:** Thank you very much,
10 Mr. Rupar.

11 So we will pass to Mr. Nuss.

12 And as you have mentioned, we will ask
13 our questions after all our session of the afternoon.

14 **MR. NUSS:** Merci, Monsieur le
15 Président, Honourable Commissioners.

16 I join Mr. Bienvenu and Mr. Rupar in
17 thanking the Commissioners for accepting this mandate
18 and for agreeing to carry out this very important task
19 with respect to the administration of justice of
20 Canada, and generally a task important to all
21 Canadians.

22 I also wish to thank Ms. Meagher and
23 her staff for courteous and very helpful assistance
24 throughout this process, whenever they were called upon
25 to answer our questions.

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1 recommendation made on the merits by any of the
2 Commissions.

3 And all the Commissions, although they
4 had the request, stated for the reasons which are
5 perfectly valid that they could not deal with the
6 merits.

7 Starting with the very first occasion
8 before the Triennial Commission, chaired by Mr. Scott,
9 that request was put in in August of 1996. The
10 Commission was compelled to make its report by
11 September.

12 And the reason it was so late was that
13 one of the Judges on the Québec Court of Appeal noticed
14 the Friedman Report, which stated that it would be in
15 Canada, appropriate for Judges of Courts of Appeal to
16 get a differential, just as they got in the United
17 Kingdom and elsewhere.

18 So, that was the start of it.

19 And that Friedman Report was
20 Commissioned by the Judicial Council of Canada. So it
21 had a great deal of importance. But because of the
22 late reading of it, the request was put in.

23 I might add that the request was put
24 in by the Judges sitting in the Québec Court of Appeal.

25 Before the Drouin Commission, you have

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1 the statements made by, in the report, saying that more
2 study is required. It's a very important and
3 compelling submission we read in the report.

4 And we know that the only entity that
5 can make the request is the Government of Canada.

6 So here, the Government of Canada had
7 the statement by the Drouin Commission; 'We have a
8 compelling report, it's an important question, but we
9 want to do more studies and we'd be prepared to do it.'

10 However, the Government never made
11 that request to the Drouin Commission, and so there
12 were no further studies.

13 Before the McLellan Commission, we
14 have the statement that if the McLellan Commission was
15 drawing up the system, it would probably grant,
16 probably, grant a differential.

17 And in the very last line we read on
18 that paragraph that it asks the Government, or suggest
19 to the Government that it study bringing down
20 legislation to effect a differential. And why did it
21 do that?

22 Because it considered it had no
23 jurisdiction.

24 The essence of the McLellan Report on
25 this issue was the differential important and probably

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1 one which we would grant if we were dealing with it on
2 the merits, we cannot deal with on the merits because
3 we consider that they *Judges Act* does not allow us to
4 do that. That was the crux of that report.

5 So, coming to 2008, we had no decision
6 on the merits, on this request which had been made over
7 the years to a number of Commissions.

8 And a very detailed report was
9 submitted to the Government by the Block Commission, in
10 which it lays out the fact that this is the first time
11 that a decision will be made on the merits.

12 And indeed, there was a decision, and
13 it granted the request for a differential.

14 And not only did it grant the request
15 for the differential, it did it on the basis of a very
16 thorough and compelling and a very comprehensive
17 analysis of all the arguments that were submitted.

18 While we know why the Government did
19 not consider that recommendation, it didn't consider
20 any of the recommendations made by the Block Commission
21 because of the financial crisis, it didn't go into the
22 merits of any of them, saying that if we were in a
23 position, we would grant or we would not grant.

24 Coming before the Levitt Commission
25 four years later, there was a request that all the

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1 recommendations of the Block Commission be adopted by
2 the Levitt Commission.

3 And specifically, there was a request
4 that the differential of three percent be granted to
5 Appeal Court Judges.

6 The Government in its Reply said very
7 little about that, one or two paragraphs, not going
8 into any of the substances, not going into any of the
9 reasons set out in the Block Report as to why a
10 differential was warranted.

11 Instead, as I say, it limited itself
12 to a very laconic reply.

13 It is to be noted that no other entity
14 contested that request of a differential for three
15 percent. No judge, no institution, no other body said:
16 'Oh. Hold on a second. You're being requested to
17 grant three percent. Do not do it for the following
18 reasons.'

19 So that when we had before the Levitt
20 Commission, the report which basically said 'We agree
21 that a differential should be granted, and we set it at
22 three percent.' that was the situation until the
23 Government's response saying: 'No. We are not going to
24 follow this recommendation.'

25 And what the Government did was it

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1 repeated all the arguments that had been previously
2 presented to all the Commissions having to deal with
3 this matter, starting at Drouin Commission to McLellan
4 and to the Block Commission. And repeating and saying:
5 'Now, I am the one to judge it, so I will not grant it.
6 I will not go along with it.'

7 So, there has been a significant
8 change between then and now.

9 Before this Commission, you only have
10 the Government opposing it, plus you have Justice
11 Campbell, and you have the Superior Court Judges of
12 Ontario who reiterate what they said before the Block
13 Commission.

14 And all those matters were dealt with
15 by the Block Commission in great details.

16 So, what has changed?

17 What has changed is that since 2008,
18 there are two recommendations made by two separate
19 Commissions, which distinguished members of Canadian
20 society sat, and which recommended that the
21 differential be granted to the Appeal Court Judges.

22 In the first instance in the Block
23 Commission, in spite of some 18 submissions which
24 contested that request and which were dealt with
25 completely.

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1 So, what you have is today decisions
2 or recommendations.

3 You have, if you will, a precedence
4 and an analysis made on the issues on the merits,
5 saying why the Appellate Judges should get the
6 differential. That's one.

7 You have no Judge of the Appeal Court,
8 of any Appeal Court contesting the request presently
9 made before you. Not one.

10 You did have a Judge of an Appeal
11 Court contesting and submitting a submission before the
12 Block Commission and before the McLellan Commission,
13 but that was dealt with and it was dismissed.

14 But the fact is that today there is no
15 Judge of any Appeal Court that has filed a
16 contestation, so that the essential changes that we
17 have are, we have two instances, the two most recent
18 instances of recommendations being made.

19 I move to the Government Reply to the
20 submission before you.

21 And I submit that it really goes on a
22 faulty and incomplete reading of what occurred up until
23 now.

24 You have in paragraph 115 of what they
25 call a reply to various other submissions.

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1 And the very first line in 115 is:

2 *"The Government submits that*
3 *nothing has changed since the*
4 *Quadrennial Commission that*
5 *warrants an increase in Appellate*
6 *Judges."*

7 Well, I've just shown you.

8 I've just made the demonstration that
9 there is, there has been a fundamental change, and that
10 is a decision, an analysis and a study made by previous
11 Commissions saying that a differential should be
12 granted. And that is a fundamental change.

13 Then the Reply goes into what it
14 describes as the recommendations made by previous
15 Commissions. And I suggest that it is incomplete.

16 For instance, on the McLellan
17 Commission, it takes one paragraph but omits the
18 paragraph that deals with the Commission's view that
19 were it called upon to set up a system of salaries, it
20 would probably grant the differential.

21 It also admits the fact that the
22 report mentioned the Government should be considering
23 that with respect to future legislation.

24 In paragraph 117 we read:

25 *"The Block Commission and the*

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1 *Levitt Commission did not accept*
2 *the argument that a salary*
3 *differential between trial and*
4 *appellate judges was necessary to*
5 *ensure financial security of*
6 *appellate judges, or to attract*
7 *outstanding candidates."*

8 This, to put it bluntly and with
9 respect, is a strawman. It wasn't argued that that's
10 the reason for giving a differential.

11 And to say that it wasn't proven or
12 demonstrated is really fighting against a nonexistent
13 argument.

14 The reasons for the giving of the
15 differential is a different role, a different function
16 of the Appeal Court, and its place in the hierarchy in
17 the Canadian judicial system.

18 And it never was argued that it was
19 necessary for financial security or to attract
20 candidates to the Appeal Courts.

21 So, as you go on in this Reply, a very
22 short Reply, the Government says that it maintains its
23 longstanding position.

24 Well, that's true, except it seems to
25 me that the Government to maintain its longstanding

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1 position was required in this instance, to come forward
2 and demonstrate either that there has been a change
3 since 2008, or that what has been decided or
4 recommended in 2008 by the Block Commission and then
5 repeated by the Levitt Commission, is manifestly wrong,
6 and that it is so wrong that it should be more or less
7 set aside and decided anew. That, it did not do.

8 Nowhere in the Government's Reply do
9 we see a demonstration of why the reasoning set out in
10 the Block Commission, and it's a very lengthy
11 reasoning, as you have noted, no doubt, it is in any
12 instance wrong.

13 Every aspect of the contestation was
14 studied and was analysed, and in a very thorough and
15 with respect, convincing manner dealt with.

16 At the very end of the submission we
17 have the elements which they say should be taken into
18 account.

19 The first point is all these elements
20 were submitted before the Block Commission.

21 I don't know if in oral submissions
22 they were submitted to the Levitt Commission, but in
23 the written matters they were not submitted to the
24 Levitt Commission.

25 One could assume that if they were not

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1 submitted, that the Government at that stage going
2 before the Levitt Commission, did not rely upon them.

3 The first one is the lack of consensus
4 of approximately 1,100 trial court judges.

5 With great respect, that is not a
6 consideration to be taken into account as to whether
7 the differential is adequate or not. This is a
8 question of principle.

9 Other people may disagree with it, but
10 the question is: what is the correct principle?

11 And if it is a correct principle, then
12 whether 1,100 have other views or have differing views,
13 or different nuances is really not important.

14 You will sometimes not get consensus.

15 You certainly won't get unanimity on almost any
16 question. And this to me is not a pertinent question
17 before this Commission.

18 To the real risk of negatively
19 affecting the goodwill and collegiality among trial and
20 appellate judges, it never has been explained what that
21 means.

22 In what way, where is the
23 demonstration of the goodwill and collegiality?

24 In the period after the Block
25 Commission came down with its recommendation and when

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1 the Levitt Commission came down, there was no
2 controversy. There was no wrangling, there was no
3 uproar: 'Oh! What happened here? Block Commission
4 granted three percent. We can't go on or we won't talk
5 to you. We won't sit at the same dining table.' Or
6 what have you.

7 And let's not forget that the Levitt
8 Commission's recommendation was basically in force
9 until the Reply of the Government, some eight or nine
10 months later.

11 And again, there's nothing that has
12 come forward to show that this created any kind of
13 animosity or wrangling amongst the judges.

14 But that would be a wrong measure
15 anyway.

16 Because if in principle it's correct,
17 if other people might not agree with it, then that's a
18 fact of life. But it doesn't detract from the
19 propriety and the appropriateness of the decision.

20 The fact that trial court judges
21 sometimes perform appellate functions, that was dealt
22 with in detail by the Block Commission, that it occurs
23 so rarely that it should not be taken into account.
24 And same thing goes for number 4.

25 With respect to number 5, the fact

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1 that trial judges bear sole responsibility for
2 decisions whereas appellate court judges sit in panel
3 and thus share workload and responsibility, it's a very
4 hard one to follow.

5 What do we say about the Supreme Court
6 Judges?

7 There are nine of them that share the
8 responsibility.

9 Should their salaries be diminished,
10 should they be in any way affected negatively because
11 they share the workload among nine?

12 And is it really less work?

13 With great respect, I don't think that
14 that can at all be demonstrated.

15 The fact that three people are working
16 on a matter does not mean that any one of them is
17 working less than if they were called upon to be
18 sitting alone.

19 They are all working together and the
20 process of the rendering of a decision in Appeal
21 involves the interaction of three judges, admittedly,
22 but it is not a factor to be taken into account with
23 respect to what an adequate differential would be.

24 So, when we look at this summary, if
25 you will, at 122, with respect, what strikes us is that

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1 this is number one, a repetition of what was said on
2 previous occasions before Commissions which dealt with
3 the matter.

4 And that on the substance of it, on
5 the validity of it, that it doesn't meet the tests
6 which are required as to being in any way persuasive
7 for negating the request for a differential.

8 It should be noted that the appellate
9 judges, even after all those years, did not get exactly
10 what they wanted.

11 Going back to the Drouin Commission,
12 the conclusion was, while we're the Appellate Court
13 between the Trial Court and the Supreme Court, and
14 therefore a differential midway between the salary of a
15 Trial Court Judge and that of the Supreme Court Judge
16 would be in order.

17 We know that the Drouin Commission,
18 for reasons which it stated, did not deal with the
19 question on the merits and therefore didn't discuss
20 that.

21 But coming before the McLellan
22 Commission, the Appeal Court Judges reduced their
23 request, and the reasoning was this: It's not accurate
24 to say that the distinction or the difference between
25 the Appeal Court and the Supreme Court is equal to the

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1 difference between the Trial Court and the Appeal
2 Court.

3 The difference between the Supreme
4 Court and the Appeal Court is greater in our judicial
5 system than that which exists between the Appeal Court
6 and the Trial Court, and therefore, they ask for a
7 differential of 6.7 percent.

8 And that is approximately one-third of
9 the difference between a Trial Court Judge's salary and
10 a Supreme Court Judge's salary. I am talking about the
11 puisne level.

12 And it was considered that this was an
13 appropriate measuring of the place of the Appeal Court
14 in the hierarchy, in the Canadian judicial hierarchy in
15 comparison with the Supreme Court, and in comparison
16 with the Trial Court.

17 And that was what was presented to the
18 Block Commission, but the decision that came down or
19 the recommendation that came down was that the
20 differential was warranted and justified, but in all
21 the circumstances it would be three percent.

22 So, basically a little bit less than
23 one-half of what the Appeal Court Judges were
24 requesting.

25 But the Appeal Court Judges accepted

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1 it. They didn't dispute it. They went through the
2 system, they made the arguments and the body that had
3 to decide that, the Commission, came down with their
4 recommendation and there was no reason for the Appeal
5 Court Judges to quarrel with that or in any way try to
6 contest that.

7 I open with that reaction of the
8 Appeal Court Judges because the Government has
9 throughout acted in an opposite way, directly opposite
10 way, because the situation that we have been faced with
11 is that the Government makes its representations to an
12 independent Commission set up for the purpose of
13 deciding the adequacy of the salaries of the Judiciary.

14 It has all the opportunity to bring
15 witnesses, to present evidence, and it avails itself of
16 its right to make its representations *in extenso*. And
17 it did that before the Block Commission.

18 And yet when the recommendation comes
19 down, it puts on its hat in the framework of a response
20 and says: "The recommendation is not accepted."

21 And why is it not accepted?

22 Because one, two, three, four, five,
23 six -- basically, what I said before the Commission is
24 the reason why I am not going to accept what the
25 Commission recommends.

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1 Now, with great respect, it seems to
2 me that that is not following the process; it is not
3 following what *Bodner* tells us.

4 If the decision, or the recommendation
5 of a Commission is at the very heart of the functions
6 of the Commission, is at the very core of its *raison*
7 *d'être*, then the Government has to come up with
8 something which has to fit a standard of control like
9 manifestly absurd or unreasonable.

10 It's not a case where the Government
11 invokes a reason which is in its field of competence,
12 for instance, the financial crisis that occurred in
13 2008 and 2009.

14 One might disagree with the
15 Government's assessments, but certainly it was an area
16 which was fundamentally in the knowledge of the
17 Government, something which came up after the Block
18 Commission's report was submitted, and which was based
19 on a factual basis which existed and on compelling
20 reasons.

21 But that's far different from a
22 situation where a Commission set up to decide adequacy
23 after weighing, carefully weighing all the factors,
24 comes out with a recommendation which it was set up to
25 consider and to make.

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1 If on the very cores matters which
2 this Commission is called upon to make, the Government,
3 not only after making its representations and getting a
4 rejection, but comes back and says: 'Well, I made that.
5 I pleaded it. I lost. But I didn't really lose
6 because I am going to not follow that recommendation',
7 then the very purpose and integrity of the Commission
8 is attacked.

9 And that is the great danger which
10 occurs, in my view, when the Government took the
11 position that it took after the Levitt Report.

12 I am not quarrelling with the position
13 they took after the Block Report because it seems, in
14 my view, to come within the framework of what the
15 *Bodner* decision said.

16 But what happened after Levitt was not
17 within the framework of what was said.

18 And I suspect, and I hope I am wrong,
19 that what the Government's Reply Submission today says:
20 'Look. This is what we did before Block. This is what
21 we said. This is what we said before Levitt.'

22 And this was our response and they
23 didn't get it, and we're repeating the same thing
24 before this Commission and no matter what you do,
25 they're not going to get it. I sincerely hope that

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1 that is not the case.

2 But even if that is in their mind or
3 someone's mind, this Commission is independent. This
4 Commission owes nothing to the Government.

5 And this Commission must do what is
6 right on the basis of what is presented before it, the
7 material that is presented before it, and on the basis
8 of a principle.

9 So, with great respect, I ask you to
10 take that into consideration, and even though the
11 response of the Government, two or three pages, more
12 than, I might say, the reply to the Levitt Commission,
13 to consider on the basis of the principles which Mr.
14 Bienvenu came out with with respect to process.

15 If it's complete, if it follows the
16 line, continuity of other Commissions have done, then
17 absent compelling evidence that it's wrong, you should
18 not change it.

19 But I am prepared to go on, as I will
20 now, with what our submission is as to why it is a
21 proper recommendation and it is a proper request.

22 A word about perhaps what might be
23 considered the brevity of the submission put before
24 your Commission. And we have to look at the historical
25 context.

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1 For a number of instances, going back,
2 we can go back to the Scott Commission, but certainly
3 the Quadrennial Commission, the Drouin Commission, the
4 McLellan Commission and the Block Commission, the
5 Appeal Judges had the time to prepare in some detail
6 because the dates were set out and the request was set
7 down in more elaborate form.

8 Certainly you will see from the
9 submission made to the Block Commission, which is
10 produced as an annex to the request we're putting
11 before you, you will see the great detail and the
12 research that was carried out.

13 And the Block Commission, as we know,
14 recommended the differential.

15 Before the Levitt Commission it was
16 not necessary for the Appeal Court Judges to make a
17 separate representation, because the Association of
18 Superior Court Judges presented a submission saying all
19 the recommendations should be adopted.

20 So, coming before this Commission, we
21 are eight years later where basically Appeal Court
22 Judges have not been studying, researching the matter,
23 and when at the end of February the Superior Court
24 Judges Association announced that they were going to
25 take a neutral position, neither for nor against the

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1 question of the differential.

2 What was put together here was put
3 together, basically, in eleven days.

4 And you will understand that the type
5 of research and canvassing that went on previously
6 could not be done.

7 But the principles are the same which
8 were involved previously, and the soundness of the
9 arguments are the same.

10 So, if we come down to the submission,
11 it is basically centered on the different functions of
12 an Appeal Court as compared to a Trial Court, and its
13 different place in the hierarchy.

14 And it's trite to say the Supreme
15 Court is the highest Court, and after that, are the
16 Appeal Courts throughout the country and then come the
17 Trial Courts, and then come the Courts appointed by the
18 provincial authorities, going right down to the Justice
19 of the Peace, but there is a definite hierarchy, and
20 the hierarchy sometimes gets involved in one court,
21 having to consider the soundness of a decision of a
22 lower court.

23 Appeal Courts consider the soundness
24 of a decision by a Trial Court, not vice versa. Trial
25 Courts don't modify judgements of Appeal Courts; they

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1 don't overturn judgements of Appeal Courts. The
2 opposite is the pace.

3 So, this notion is set out in full in
4 the two latest Commission reports.

5 You'll have it in the Levitt
6 Commission Report at paragraph 64:

7 *"Appellate Judges must not only*
8 *state the law, they must also*
9 *correct legal errors made in courts*
10 *of first instance. Moreover,*
11 *Appellate decisions have a greater*
12 *sense of finality than those of*
13 *Trial decisions. These decisions*
14 *can be overturned only by the*
15 *Supreme Court of Canada, a Court*
16 *which in recent years has fewer*
17 *than 100 cases annually.*
18 *Furthermore, Appellate Court*
19 *decisions are consistently applied*
20 *by lower courts and are considered*
21 *to be more persuasive jurisprudence*
22 *than Trial Court judgements."*

23 This capsulates what was said in more
24 detail in the Block Commission Report.

25 And I beg your indulgence if I read

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1 these paragraphs which are to me crucial.

2 At paragraph 154:

3 *"The impact of Appellate work*
4 *therefore extends far beyond the*
5 *individual litigants in a*
6 *particular case. Appeal decisions*
7 *are binding not only on the parties*
8 *but on all future cases, unless the*
9 *Appeal decision is overturned at*
10 *the Supreme Court. Appeal reasons*
11 *must therefore be drafted in the*
12 *awareness that they are unlikely to*
13 *benefit from further review for*
14 *error. In addition to being binding*
15 *law within the province, the*
16 *decisions of Provincial and*
17 *Territorial Courts of Appeal have*
18 *considerable persuasive value in*
19 *other Canadian jurisdictions. This*
20 *expands the likely audience for*
21 *decisions of Courts of Appeal and*
22 *illustrates the breath of impact of*
23 *such decisions."*

24 That was paragraph 155.

25 And finally on this point, paragraph

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1 156:

2 *"The advent of the Charter as*
3 *affected the role of Courts at all*
4 *levels but is imposed on Appeal*
5 *Courts in particular, an expanded*
6 *role in the interpretation and*
7 *development of the law. When one*
8 *combines the function with the fact*
9 *that very decisions of Provincial*
10 *Courts of Appeal are appealed to*
11 *the Supreme Court of Canada, it*
12 *becomes clear that Provincial*
13 *Courts of Appeal play a central*
14 *role in the settlement and*
15 *development of the law. This*
16 *includes the role the public courts*
17 *play in hearing references on*
18 *constitutional questions, questions*
19 *which may be particularly complex*
20 *and controversial. In fact, Courts*
21 *of Appeal have been responsible for*
22 *the settling the law nationwide in*
23 *several keys areas in the past two*
24 *decades, including the question of*
25 *same sex marriage and on langue*

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1 *rights."*

2 And it's to be noted that the
3 references, the laws providing for references provide
4 for references in the provinces to the Appeal Courts,
5 not to the Trial Court, and then of course, federally
6 to the Supreme Court of Canada.

7 So this function which is in the role
8 of the Appeal Court is one which places it number 2 on
9 the hierarchy, and which warrants a differential.

10 In considering the differential, we
11 went also to other jurisdictions. It's not as if
12 something untoward is being requested. In Canada there
13 are differential at all other levels, from Magistrates
14 Court going up to the Superior Court.

15 Even on the courts themselves, you
16 have a differential between puisne judges and chief
17 justices.

18 At the inception, after Confederation,
19 there were differences; there was differentials in a
20 number of provinces which existed until 1920.

21 It was in 1920 that you had the same
22 salary given to the Trial Court Judge and to the Appeal
23 Court Judge, as far as the federal appointments are
24 concerned.

25 But in England, they had the same

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1 salary for Trial Court and Appeal Court from about the
2 mid-nineteenth century until about 1970, when they set
3 up a Commission to study the question of wages.

4 And the Commission came back with a
5 recommendation that there should be a differential
6 granted to Appellate Judges, and they put it on the
7 basis because an appointment to the Court of Appeal is
8 a promotion. It's an elevation. It's a higher
9 responsibility, and recognition should be given to that
10 higher responsibility by granting a modest increase of
11 a proportionally modest increase called a differential.

12 And so a differential was granted.

13 But in England is it was six percent
14 or so, and that has been maintained up to the present
15 day.

16 In the United States, in the federal
17 system there's a differential between Trial Court and
18 the Appeal Court and of course, between the Appeal
19 Court and Supreme Court.

20 On all State Courts in the United
21 States of America you have differential at all levels:
22 Trial Court, sometimes Intermediate Appeal Court and
23 even the final Appeal Court, or in some States this is
24 called the Supreme Court in the States, there is a
25 differential.

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1 And the same applies in other
2 jurisdictions with common-law, for instance in New
3 Zealand.

4 So, the excerpts that we recited from
5 the report of the Commission which you will find in the
6 document which is filed as an appendix to the Brief, at
7 page 13.

8 At page 19 talking about the Lord
9 Justices of Appeal.

10 They talk about:

11 *"A differential should be created*
12 *for the Lord Justices of Appeal in*
13 *relation to the puisne judges,*
14 *notwithstanding their*
15 *interchangeability, in order to*
16 *create a clear promotion step."*

17 And that was really the second step
18 with respect to the differentials in the United
19 Kingdom.

20 In Ireland they have
21 interchangeability.

22 And perhaps I ran ahead of myself,
23 because the first instance was in -- you'll find at
24 page 12 of our brief, the Lord Justices of Appeal for
25 England and Wales, a differential was granted, but

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1 they didn't deal with Ireland or Scotland. That came
2 the following year, and that was the excerpt which I
3 just read.

4 So in the result, you had a
5 differential of 7.14 percent.

6 So it's not because for over a hundred
7 years they didn't have any differential in England that
8 that prevented first, the Advisory Board and then the
9 Parliament to enact legislation which on the question
10 of principle, on the question of the appropriateness
11 and on the question of recognising the hierarchy and
12 the promotion that the differential was granted.

13 We should also remember that when
14 appointments are made to the Supreme Court of Canada,
15 they are made generally from judges who are sitting in
16 the Court of Appeal.

17 In the last forty years or so, in the
18 records that we've examined, there has been no
19 appointment from a Trial Court. There have been three
20 appointments from advocates practising in the courts,
21 but who are not sitting on any court.

22 But aside from those three, every
23 nomination has come from a judge who is sitting in a
24 Court of Appeal.

25 So there again, it is obvious that the

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1 Government has looked upon it and public looks upon it
2 as being a preparation for the Supreme Court of Canada,
3 and that the functions performed on the Appeal Court --
4 and this is the crucial part -- our functions similar
5 to those performed in the Supreme Court of Canada, and
6 are valuable in the process of determining whether a
7 person should be appointed.

8 Now, does the Government consider
9 Trial Judges and Appeal Court Judges really being the
10 same level?

11 We have a rather striking
12 demonstration, a very recent one that that is not the
13 case.

14 The Government, Parliament came down
15 with a law respecting financial disclosure, amendments
16 to the proceeds of crime, money laundering and
17 terrorist financing, maybe that's a little, at first
18 sight, remote from what we're considering, but it's not
19 remote in this sense.

20 That a number of persons were
21 considered to be politically exposed domestic persons.

22 What does that mean?

23 That means that the Government and
24 Parliament decided that these persons should come under
25 the possibility of surveillance by financial

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1 institutions with which they do business. They and
2 their families.

3 And so you have the list of persons
4 who fall into that category and starts off with the
5 Governor General. This is Bill C-31. So it's very
6 recent indeed.

7 And it goes on with members of the
8 Senate, deputy minister, our equivalent rank,
9 ambassador, military officer with a rank of general or
10 above, president of a corporation, head of a government
11 agency, judge of an appellate court in a province, the
12 Federal Court of Appeal or the Supreme Court of Canada.

13 So there you see an illustration of
14 the difference status, the different stature of an
15 Appeal Court Judge as opposed to the Trial Court Judge.

16 And I used the word "opposed", I think
17 incorrectly.

18 I don't want to leave the impression
19 that Appeal Court Judges are opposed to Trial Court
20 Judges, but they are differently categorised, if you
21 will, and obviously exposed to pressures which Trial
22 Court Judges are not, according to this Bill C-31,
23 which was adopted by Parliament.

24 So, to say everybody is in the same
25 boat and there should be no distinctions on the salary

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1 is not a correct assessment.

2 On the exact numbers of persons
3 appointed since 1979 to the Supreme Court of Canada,
4 there were 30 appointments and 27 came from Trial
5 Courts and 3 came from private practice, the most
6 recent one from Québec.

7 I come now to the submission to the
8 Block Commission, and that is Schedule A to the
9 submission put before you.

10 Now basically, I should not be having
11 to do this.

12 In my submission, once you've had a
13 recommendation based on a full examination of the
14 issue, on not one occasion but on two occasions, if the
15 Government wants to change that, it's the Government
16 who should come forward and present you with compelling
17 evidence which would justify a modification. That has
18 not occurred here.

19 You have no demonstration, no
20 presentation of anything which would, in my respectful
21 submission, allow for a modification of what was
22 decided by the Block Commission and the Levitt
23 Commission.

24 However, from an excess of prudence, I
25 will go over what was presented to the Block

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1 Commission, and very very rapidly, I might say, and
2 submit to you that all these factors applied today,
3 have in no way been diminished, nothing has diminished
4 in the eight years before this was fully canvassed
5 which would warrant straying or differing with respect
6 to the recommendation for a Commission.

7 Some parts of it dealt with some
8 matters which have since been dropped by the
9 Government, and I won't go into those. I will just go
10 into the merits of the request.

11 So, on the question of the hierarchy,
12 as I mentioned, we know that in Canada we have this
13 hierarchy where the Supreme Court is at the top and the
14 Appellate comes next, so that what you have is an
15 historical anachronism.

16 And this is developed in the argument
17 and is dealt with in the report of the Block Commission
18 saying, whatever may have been the situation in 1920,
19 and 30 and 40, the fact is that in Canada we have
20 separate Courts of Appeal which performed separate
21 functions, and therefore we have to examine the
22 separate function to see what the places in the
23 hierarchy, and if warranted, to grant a differential.

24 Also, one should consider what happens
25 in any other endeavour, whether it be industry or

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1 whether it be Government.

2 Persons who are promoted within a
3 structure, government structure, receive a higher
4 salary. And that is throughout, I might say, the human
5 activity.

6 It would be too strong for me to say
7 this is the only example of human activity where a
8 promotion and elevation is not accompanied by an
9 increase in salary, because I haven't made the research
10 worldwide, but I might say it very well might be the
11 case, and it should not continue to be the case.

12 Before the McLellan Commission, as we
13 were arguing, one of the Commissioners, Madame
14 Chambers, during the course of discourse, said:
15 "*I think...*" And this is at page 10 of the brief to the
16 Block Commission.

17 "*I think the majority, the vast*
18 *majority of a public, of people of*
19 *Canada, are absolutely convinced*
20 *that there is a differential*
21 *remuneration between Trial Court*
22 *Judges and Appellate Court Judges.*"

23 And I think that was a correct
24 assessment.

25 I think that anybody who would be

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1 asked, knowing what the position is of the Appeal Court
2 Judge or Appellate Court, and that of a Trial Court
3 Judge, would think that there is a higher salary.

4 I've dealt with the question of what
5 happened in England.

6 I can bring you up to date on what
7 were the salaries in England and Wales, back in 2008
8 and what they are today. That's at page 14.

9 Then it was 165,900 £ (pounds) for the
10 highest Court. I am sorry, for the High Court. And
11 today it's 177. The Court of Appeal it's now 202 as
12 opposed to 188, and the Supreme Court or House of Lords
13 is 213 today as opposed to 198.

14 But the important thing is that the
15 differential, the percentages are the same.

16 Then it was 13.8 between the High
17 Court and the Appeal Court, and between the Court of
18 Appeal and the House of Lords, 19.7.

19 In the United States the salaries are
20 higher, but the differential of 6.47 is the same.

21 So, we can see the continuation of
22 what was granted in these jurisdictions, going up to
23 the present day.

24 The question of what was called
25 divisiveness, was dealt with extensively in the report

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1 of Madame Watt, because that was raised, the
2 divisiveness.

3 But I mentioned earlier, there's
4 absolutely no empirical evidence to show that there is
5 divisiveness, or that there would be any kind of
6 disturbance occasioned by the granting of the
7 differential.

8 So we come to the criteria which has
9 to be applied here, and that's in Section 26 of the
10 Act, is it necessary for an adequate salary? And it
11 was demonstrated that if the Judges in Appeal are not
12 getting what they should be getting because of their
13 functions, because of their place in the hierarchy,
14 then it's not an adequate salary, and that it should be
15 granted.

16 And it comes within that criterion,
17 and it comes also within the criteria of subparagraph
18 (d), and the other objective criteria that the
19 Commission considers relevant.

20 Before I conclude I will consult with
21 my observer friends, if the Court gives me one minute.
22 --(A short pause)

23 **MR. NUSS:** That was a wise decision on
24 my part because it was pointed out to me that I made a
25 mistake when I talked about appointments to the Supreme

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1 Court. I said it was "Trial Court".

2 Of course, the number of 30 is to the
3 Supreme Court of Canada, and 27 came from the Appeal
4 Court and not the Trial Court. The other three came
5 from practice on the street.

6 And with that, I conclude my oral
7 submission with the request that the submission by
8 Appellate Judges for a three percent differential be
9 granted.

10 Thank you.

11 **LE MEMBRE PRÉSIDENT:** Merci, Maître
12 Nuss.

13 I am sure that the question period
14 could give us some opportunity to come back on some of
15 your points.

16 I propose to take a break for a good
17 coffee, be back in maximum fifteen minutes, quarter to
18 three, with the Reply from the Judiciary.

19 See you in fifteen minutes.

20 **--RECESSED AT 2H35 P.M.**

21 **--UPON RESUMING AT 2H50 P.M.**

22 **THE CHAIRPERSON:** Maître Bienvenu, à
23 vous la parole.

24 **Me BIENVENU:** Merci. In the very
25 early days of my career, I had a case in which I was

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1 junioring for Mr. Yves Fortier who has had some
2 involvement historically in this Commission process,
3 and the other party was represented by Maître Joseph
4 Nuss.

5 And I have to say that of the many
6 opponents that I have faced, one of the ones who has
7 had the most lasting impression on me was Maître Joe
8 Nuss.

9 And I want to say that after all of
10 his years on the Court of Appeal, I've listened to him
11 today with no less admiration than I had when he was on
12 the other side, a long time ago.

13 **--REPLY SUBMISSIONS BY THE JUDICIARY:**

14 In Reply to the submission of my
15 friend, Mr. Rupar, I would like to start by the example
16 that he gave of a Government initiative that was
17 reactive to a concern raised by the Judiciary.

18 And the example was: The shortening of
19 the time period for the Minister to issue his or her
20 response to a Commission report, I might add that as
21 part of that same initiative, the Government imposed on
22 the Minister to introduce implementing legislation with
23 alacrity, after issuing the response.

24 That is true, and we have acknowledged
25 in our submission that initiative and the fact that

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1 from our perspective, this was an improvement to this
2 process.

3 Early in his remarks, Mr. Rugar said
4 that what divides the parties appearing before you as
5 to what would be an adequate judicial salary, from your
6 perspective, an adequate judicial salary recommendation
7 is \$23,000 over four years.

8 Now, this is a very prosaic way, if I
9 may put it, to look and focus on the parties'
10 respective bottom lines.

11 But I hope that I have made clear by
12 the nature and the subject matter of my submission that
13 there is a much more important and much more broader
14 point.

15 And much of the difference between the
16 parties is not about the bottom line.

17 Much of the difference between the
18 parties is how you reach that bottom line.

19 We want you not just to get to an
20 acceptable bottom line, we want you to get there based
21 on objective reasons, objective standards that the
22 Commission can articulate, that the parties can
23 appreciate, and from which the parties can be guided in
24 the future.

25 So, there is much more at stake in the

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1 differences between the parties than their respective
2 bottom lines.

3 Another point that was made on behalf
4 of the Government to which I would like to respond is
5 that not all outstanding candidates come from the pool
6 of self-employed lawyers in private practice.

7 And that is true.

8 There are candidates to be sure,
9 outstanding candidates that come from academia or from
10 the Government.

11 Now when you are looking at the
12 narrower class of outstanding self-employed lawyers,
13 you have to look at the data that concerns those
14 lawyers, not those coming from academia or the
15 Government.

16 And I submit to you that Mr. Rupar
17 himself made the point by the examples he gave in
18 trying to justify the Government's position on the
19 lower income exclusion.

20 He gave the example of individuals
21 making lifestyle choices that could result in their
22 earning less than the data associated with the top 21
23 percent.

24 In fact, it's not 21 percent, because
25 21 percent results from the application of the CMA as a

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1 filter, and I've emphasised this morning that it is not
2 a filter. I think you know what group I am referring
3 to.

4 Now there is nothing wrong, of course,
5 about individuals making lifestyle choices that result
6 in their professional income being low.

7 But the question that arises and the
8 question that faces this Commission, is who are the
9 individuals that are suitable candidates for the Bench?

10 Are individuals who make that choice,
11 individuals who would or who should put their name
12 forward for judicial appointments, are they individuals
13 sufficiently committed to their professional calling,
14 adequately to serve as a federally appointed judge?

15 I think all of the Justices present
16 here today will attest to the fact that acceding to the
17 Bench is not a lifestyle choice.

18 It is a gratifying responsibility to
19 be a judge, but it is a demanding one, and it is an
20 increasing, increasingly demanding responsibility.

21 Now, I make the same point to respond
22 to Mr. Rupar's suggestion that private sector income
23 within the 44 to 56 age group is not what you should be
24 focused on, because as a matter of fact, private sector
25 income declines after age 56.

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1 And the implication here is that it is
2 desirable for judicial candidates to come from the
3 private sector -- forgive me.

4 The implication is that it would be
5 desirable for judicial candidates to come from private
6 sector lawyers whose income is about to decline.

7 Well, like the previous group I
8 discussed, this is not, I would submit to you, how one
9 sets about to attract outstanding candidates to the
10 Bench.

11 Now, on the self-employed lawyer
12 income.

13 Mr. Rupar quoted from the Block
14 Report, and it's at Tab 14 of his Condensed Book, and
15 he read the first two sentences at paragraph 116.

16 And what he read to you was:

17 *"The issue is not how to attract*
18 *the highest earners; the issue is*
19 *how to attract outstanding*
20 *candidates."*

21 He also read:

22 *"It is important that there be a*
23 *mix of appointees from private and*
24 *public practice, from large and*
25 *small firms and from large and*

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1 *small centers.*"

2 But he didn't read the next sentence:

3 *"However, there is no certainty*
4 *that if the income spread between*
5 *lawyers in private practice and*
6 *judges were to increase markedly,*
7 *that the Government would continue*
8 *to be successful in attracting*
9 *candidates to the Bench from*
10 *amongst the senior members of the*
11 *Bar in Canada."*

12 The Government has reiterated its
13 request that the Commission undertake a PAI study, and
14 reading their submission I understand the position to
15 be that such a study should be conducted either to
16 arrive at your own recommendations, or for the benefit
17 of the next Commission.

18 Now, much has been submitted to this
19 Commission about the PAI study in the context of the
20 Government's request very early on in the process, that
21 such a study be conducted, and the Commission made a
22 ruling on that.

23 I don't want to go back on what was
24 argued at the time. You had fulsome submissions.

25 I refer to these submissions to the

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1 extent that they dealt with the potential usefulness of
2 a PAI study.

3 But I will read maybe two paragraphs
4 from our submission on this topic, dated January 29th,
5 2016.

6 The first is paragraph 3, where we
7 noted that the one Commission that was presented, not
8 with the suggestion to conduct such a study but with
9 actual data resulting from such a study having been
10 conducted, came to the conclusion that it was of no use
11 to the Commission.

12 And that Commission, as we all know,
13 was the Block Commission, and it stated at paragraph 90
14 of its report:

15 *"We do not believe that a snapshot*
16 *of appointees' salaries prior to*
17 *appointment is particularly useful*
18 *in helping to determine the*
19 *adequacy of judicial salaries.*
20 *Such a study does not tell us*
21 *whether judicial salaries deter*
22 *outstanding candidates who are in*
23 *the higher income brackets of*
24 *private practice from applying for*
25 *judicial appointment."*

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1 Then we developed a submission to
2 explain why in our view a PAI study would not be
3 helpful to you, and essence, it came down to saying
4 that a PAI study looks at the past, and your task it to
5 look at the future.

6 One point that we made I would like to
7 repeat today.

8 And that point is made at paragraph 36
9 of our submission, and I will read it, if I may.

10 *"The fallacy in the path proposed*
11 *by the Government is the fact that*
12 *once established as a comparator*
13 *(which it cannot legitimately be)*
14 *the PAI data would then be referred*
15 *to by the Government as a*
16 *conclusive indication that the*
17 *judicial salary is adequate because*
18 *a number of appointees increased*
19 *their income upon appointment,*
20 *while others accepted an*
21 *appointment even if it resulted in*
22 *a reduction in their compensation."*

23 And we concluded the paragraph by
24 saying:

25 *"This is an argument for all*

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1 *seasons. It is utterly circular.*
2 *It is of no use to the prospective*
3 *exercise that you have to make.*
4 *And coming as it does from a party*
5 *who controls the appointments, the*
6 *danger is apparent."*

7 And it is a good point for me to react
8 to my friend pointing to the fact that one-third of the
9 judicial appointments now come from the public sector,
10 but what I would like to draw to the Commission's
11 attention is that that happened during the tenure of
12 the previous Government, and the bar chart that is used
13 by the Government to illustrate the provenance of
14 judicial appointees shows that that one-third is at
15 variance with the historical pattern in the provenance
16 of candidates to the Bench.

17 I should have mentioned when talking
18 about the PAI study that since the Commission had to
19 pronounce on the suggestion to conduct such a study,
20 the Commission was provided with the expert report of
21 Ms. Sandra Haydon.

22 And we asked Ms. Haydon about the
23 usefulness to the Commission of the Government proposed
24 pre-appointment income study, and we also asked her
25 about the potential usefulness for your task of the

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1 quality of life study.

2 And she said that in her professions
3 opinion, based on her experience, neither study would
4 be of usefulness to this Commission.

5 So far as the PAI study is concerned
6 she explains that what you're engaged in is a forward
7 looking practice, whereas PAI is backward looking.

8 Now, in terms of the quality of life
9 study, she says that, and I quote her words:

10 *"It is an unheard of practice for*
11 *purposes of compensation*
12 *benchmarking..."*

13 And she explains why this is so. She
14 says:

15 *"For a number of reasons, not the*
16 *least of which would be coming to*
17 *agreement on what elements are to*
18 *be included..."*

19 And I pause here to note that nothing
20 is put forward in the Government's submission as to the
21 eventual content of that study.

22 And she adds:

23 *"And how to objectively cost and*
24 *account for the value of quality of*
25 *life indicators."*

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1 She then says this:

2 *"Through both the CRA data as well*
3 *as the salary level of DM-3, the*
4 *Commission has before it what is*
5 *arguably the best data for*
6 *benchmarking the judiciary, and*
7 *based on that, there is no need to*
8 *introduce extraneous and unreliable*
9 *data."*

10 She concludes:

11 *"Quality of life is a highly*
12 *personal experience, and as the*
13 *Government notes, intangible, and*
14 *as such should not be a*
15 *consideration in compensation*
16 *determination."*

17 Mr. Rupar commented on the differences
18 between Mr. Pannu and Mr. Newell on the question of the
19 value of the judicial annuity.

20 The key difference between the two
21 experts, that which drives the difference in the
22 percentage to which they come is the inclusion of the
23 disability benefit in the calculation.

24 For the rest, you will see that Mr.
25 Newell very carefully and I would add very

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1 professionally, tracks the difference between the 24
2 percent of Mr. Sauvé and his own percentage, which I
3 believe is 30 percent. And he explains what accounts
4 for the difference. Again, providing the Commission
5 with continuity with the work of its predecessors.

6 Now the argument was advanced by Mr.
7 Rupar that Mr. Pannu's report was based -- and I think
8 those were his words -- on "extensive third party
9 backup."

10 And the evidence offered was in the
11 form of Mr. Pannu's reference at page 5 of his report,
12 to the fact that -- and it's at footnote 4:

13 *"... the Compensation Committee of*
14 *the Coca-Cola Company benchmarks*
15 *against the 50th, 60th and 75th*
16 *percentiles of its peer groups' pay*
17 *practices to gain a better*
18 *understanding of what is*
19 *competitive."*

20 Now, I ask the Commission of what
21 conceivable relevance is it to your work to know that
22 the Compensation Committee of the Coca-Cola Company
23 benchmarks against three percentiles, if you're not
24 given any reason to prefer one or the other of these
25 three for the exercise that you are called upon to

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1 make.

2 So, I would differ with my friend Mr.
3 Rupar, that this shows that there is extensive backing
4 for Mr. Pannu's analysis.

5 Now, you were taken to page 5 of Mr.
6 Pannu's report, and your attention was drawn to the
7 fact that according to his numbers, self-employed
8 lawyer income has gone down during the period from the
9 year 2000 and 2014.

10 And that's in the middle of page 582
11 of the Condensed Book, if you look at the 75 percentile
12 column. And the same observation could have been made
13 looking at the 65th percentile column.

14 Now, in considering the reduction
15 suggested by this data, you need to look at page 3 of
16 Mr. Pannu's report, where you see that according to the
17 CRA data from which the number is generated at page 5
18 are taken, the number of lawyers between 2010 and 2014
19 has gone down from 22,000 to 18,500. I am rounding the
20 numbers here.

21 Now, we know for a fact that that is
22 not a reflection of the number of self-employed
23 lawyers. And we know that from one report that is
24 before the Commission, and that is the Federation of
25 Law Societies Report.

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1 And the explanation is given under
2 these numbers.

3 Mr. Pannu says that CRA was contacted
4 to inquire about the decrease in the number of self-
5 employed lawyers from 2010 to 2014, and was told that
6 this is a result of self-employed lawyers who have
7 structured their practice as professional corporations,
8 not necessarily law corporations.

9 And we know, Commission Members know
10 from experience that an increasing number of lawyers
11 structure their practice as professional corporations,
12 and the point that I make is that it is not self-
13 employers lawyers who for lifestyle choices or other
14 reasons, earn a very low income, that go through the
15 trouble of structuring their practice as professional
16 corporations.

17 Those who do are high earners and
18 therefore, the conclusion to be drawn is that the
19 reduction in the CRA data that you see on page 5 is to
20 an extent unknown. I make no representation about
21 this.

22 But to an extent unknown, that
23 reduction is a function of the increased prevalence of
24 lawyers structuring their practice as law corporations,
25 and therefore, it doesn't capture the income of, we

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1 would say, high earning self-employed lawyers.

2 A small point.

3 Mr. Rupar has referred to on numerous
4 occasions to Ms. Haydon's point about the fact that a
5 \$100,000 income exclusion would have been, in her
6 opinion, justifiable.

7 Then he went on, and the tenure of his
8 remarks was that Ms. Haydon, and perhaps by extension
9 the Judiciary, were proposing a \$100,000 income
10 exclusion. She is not because she appreciates the
11 value of continuity, and we are not.

12 What we have taken as a position is
13 that the historical income inclusion should be kept,
14 but simply adjusted to take into account the impact of
15 inflation.

16 Now, there was mention made of DM-4s,
17 and I want to provide background to the Commission
18 because the suggestion was made that we, at one point,
19 were suggesting that the appropriate comparator should
20 be DM-4s, and that it is not correct.

21 The issue of what to do with DM-4s
22 first arose before the McLellan Commission.

23 And at the time the DM-4 category had
24 only just recently been created.

25 And there was, I stand to be

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1 corrected, one, certainly no more than two individuals
2 who were in that category.

3 Because the historical position
4 accepted by both parties was that the DM-3 comparator
5 had been selected because the DM-3s were the most
6 senior public servants.

7 Then, with the creation of the DM-4
8 category, the question necessarily arose: What should
9 we do with this new category? Should that become the
10 benchmark as the category comprising the most senior
11 public servants?

12 And there was also uncertainty when
13 this issue first arose, as to how the situation would
14 evolve.

15 It was very recent, there was one,
16 perhaps two persons within this newly created category,
17 and we just didn't know what the future would hold.

18 So, what we said to the McLellan
19 position was that on the strength of the representation
20 by the Government that this was an exceptional category
21 into which very few and exceptional positions would be
22 included, we said that we would not seek to move the
23 most senior level comparator from the DM-3 to the DM-4,
24 but would remain with the DM-3, but we reserved our
25 position saying: "Let us see what the future holds."

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1 And in the event, as we understand it,
2 the position remained as the Government represented
3 that it would, the DM-4 remains a category in which
4 there are very, very, few individuals.

5 They are individuals assuming
6 exceptionally demanding responsibilities, and it is not
7 our position now, and it has never been our position
8 that it should be the comparator.

9 I am, by expressing agreement with Mr.
10 Rupar, when he said early on in his remarks, that we
11 have one in his words: "... top Judiciary in the world."

12 This seems to be something that all participants in
13 this process acknowledge and I won't repeat. But I
14 will refer to my earlier submission.

15 This does not come as an accident.

16 This is the result of Canada making a
17 very wise but very deliberate decision to invest in
18 developing an independent, strong Judiciary, and part
19 of that is insuring that it is adequately compensated.

20 And on this, I thank you once again
21 for your attention.

22 **LE MEMBRE PRÉSIDENT:** Merci, Maître
23 Bienvenu.

24 I understand that Mr. Rupar, you will
25 have the opportunity tomorrow to answer and make some

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1 comments, I think, at 2 o'clock.

2 **MR. RUPAR:** As I understand, I will
3 be, as the order goes, I will be responding, or the
4 Government will be responding to the Reply from the
5 Judiciary and the Prothonotaries, yes, at 1 o'clock.

6 And then there's a second Reply to the
7 Appellate Judges and the CBA, as I understand. This
8 can be split because of some scheduling difficulties
9 tomorrow.

10 **THE CHAIRPERSON:** Très bien. So, we
11 will close our first day of hearing with questions.

12 Margaret, do you want to start the
13 questions?

14 **COMMISSIONER BLOODWORTH:** Thanks, Mr.
15 Chairman.

16 Maybe I will start with you, Mr.
17 Bienvenu, since we've just heard from you, and I will
18 hope I can read my writing from this morning. So
19 excuse me if I have to puzzle it out a bit.

20 **---QUESTIONS BY THE COMMISSION MEMBERS:**

21 First point, you referred several
22 times to the IAI as protection against erosion by
23 inflation.

24 But would you not agree it's more than
25 that?

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1 That's what CPI would be, presumably.

2 It also was designed to try and mimic
3 in some way the average wage increases for Canadians.

4 **MR. BIENVENU:** Precisely.

5 The way that Mr. Hyatt puts it is that
6 it reflects not only inflation, not only price
7 inflation but also gains in productivity.

8 **COMMISSIONER BLOODWORTH:** Yes. Which
9 in returns reflects on wages.

10 **MR. BIENVENU:** Exactly.

11 **COMMISSIONER BLOODWORTH:** And some of
12 the charts we have seen in both your material but also
13 in some of Mr. Rupar's, when you show the judges
14 salary, it's more of a straight line, whereas some of
15 the others fluctuate.

16 And I would suggest it's actually
17 because of the IAI increases, even at times where other
18 public sector may have been freezing, or what have you,
19 they were protected somewhat against that.

20 So am I right in concluding that if
21 all else remained the same, which never happens, if all
22 wages within the country remained the same in relation
23 to one another, we actually wouldn't need anything
24 other than IAI.

25 The other process for us is to look at

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1 when lawyers or other comparators have changed
2 differently than what the IAI or the averages.

3 **MR. BIENVENU:** Right. Well, do you
4 include in your category self-employed lawyers?

5 **COMMISSIONER BLOODWORTH:** I include
6 any benchmark we are looking at. I am trying to avoid
7 the benchmark debate. But any benchmark that we
8 collectively think is appropriate to look at in
9 relation to judges.

10 If those change differently than the
11 average for Canadian wages in general, that's what we
12 have to look at before your process, if I can put it
13 that way, because actual average wages for everyone are
14 included in the IAI.

15 **MR. BIENVENU:** That's correct. And I
16 think that point is particularly relevant for the
17 private sector comparator.

18 And I just point out that the charts
19 to which you've referred, at least the charts in both
20 parties' material, are charts that show the evolution
21 only of the public sector comparator and judicial
22 salaries.

23 You don't have, you know, on that...

24 **COMMISSIONER BLOODWORTH:** No. You're
25 correct.

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1 **MR. BIENVENU:** ... on those charts, the
2 private sector comparator.

3 Whereas the point you make is, I
4 believe, if I understand you correctly, mostly relevant
5 when comparing judicial salaries with self-employed
6 lawyers.

7 **COMMISSIONER BLOODWORTH:** Well, one of
8 the things governments can do quite easily is freeze
9 public sector wages, which they have done.

10 **MR. BIENVENU:** Right.

11 **COMMISSIONER BLOODWORTH:** And the
12 scheme we have now for judges actually protects judges
13 from that.

14 **MR. BIENVENU:** Right.

15 **COMMISSIONER BLOODWORTH:** In the sense
16 that unless they changed, went to Parliament and
17 changed the IAI, which would be much more difficult to
18 do.

19 So, it does have some protection.

20 In fact, it may actually be more
21 relevant in the public sector, given that judges are
22 part of the broader public sector.

23 **MR. BIENVENU:** Right. Which gives me
24 an opportunity, and I hope you'll forgive me if I seize
25 it, to say that the Scott Commission from which my

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1 friend has cited a number of references, came at a time
2 when there had been a freeze in the compensation of
3 public servants, including DM-3s.

4 So, this was a time where there was an
5 exceptional delta between that public sector comparator
6 and private sector income.

7 And that was the reason why Mr. Scott
8 was so concerned about the position in which the
9 Judiciary found itself, and the ability of Government
10 to attract outstanding candidates from the private
11 sector.

12 So yes, you are correct.

13 And caution should be exercised when
14 reading extracts from the evidence of Mr. Scott, and
15 when reading the report. I think it's important to be
16 aware that that was the context in which the Scott
17 Commission worked.

18 **COMMISSIONER BLOODWORTH:** Which has
19 happened, actually several times, freezes of various
20 kinds or restraint.

21 On the DM-3 comparator, the Judiciary
22 is proposing a change in the use of that comparator, to
23 move from what was used by several Commissions, it's
24 the mid-point and the mid-point of at-risk pay.

25 And you're proposing to move to total

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1 average compensation.

2 But how do you deal with the
3 inconsistency and the jumping around that is inevitable
4 with such a small group, when you do total average?

5 I mean, right now, at various times
6 I've seen six or eight. I personally know at least two
7 of them have retired, so you could get very small
8 numbers. I am not a mathematician or a statistician,
9 but one thing I do know is when you take averages of
10 very small numbers, they very easily jump all over the
11 place.

12 **MR. BIENVENU:** Right.

13 And that was part of the reasons that
14 the Block Commission offered to opt for the mid-point
15 of the at-risk component. And you'll see that in
16 reasons where I think we all know where to find them.

17 But what can be observed is that the
18 concern that such a small group, and the fact which is
19 acknowledged by everyone that performance pay is
20 intimately tied to individual performance.

21 What we're seeing when we look at the
22 actual data is that that concern, a legitimate concern,
23 is not in fact panning out. Because we have the data,
24 if you turn to Tab E, if you look at how total average
25 compensation has evolved, there isn't that -- you know,

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1 those swings that were feared by the Block Commission.

2 So, what we are saying is let's look
3 at the reasons behind the decision.

4 Number one, the mid-point is a proxy
5 for the average.

6 Number two: what should make us be
7 careful about using the average is that with such a
8 small pool the average could really show swings.

9 But we're saying that's not what the
10 evidence shows.

11 The evidence shows that both
12 assumptions are incorrect.

13 The first assumption that the mid-
14 point is a proxy for the average is demonstrably false.

15 We can see here that the average is much higher than
16 the mid-point.

17 The other assumption about the swings
18 does not appear to pan-out either.

19 **COMMISSIONER BLOODWORTH:** Well, it is
20 a bumpier line.

21 **MR. BIENVENU:** It's a bumpier line. I
22 grant that. I grant that to you.

23 **COMMISSIONER BLOODWORTH:** You also may
24 be running into the age factor of the baby boom but I
25 won't get into that at the moment, why we could see a

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1 change.

2 But a mid-point, I am not convinced
3 it's a proxy for the average.

4 Mid-point is used often in
5 compensation for a salary range as being the expected
6 level of a fully performing employee that's
7 experienced.

8 So the mid-point can mean many things
9 in compensation, and I just can't recall the Scott
10 Commission.

11 I think though, we do have a problem
12 with moving to a very small body for averages. I mean,
13 you can fix that in some ways. You could add DM2s to
14 it, as well, which would give you a bigger universe.

15 I think you have a challenge with such
16 small numbers for averages.

17 **MR. BIENVENU:** I recognise this and I
18 acknowledge that that was part of the reasons of the
19 Block Commission for choosing the mid-point.

20 I am very happy, if I may say so, to
21 see that I have communicated to the Commission the very
22 important distinction that needs to be made between the
23 DM-3 as a comparator and a compensation measure of that
24 comparator, and the fact that it is in no way calling
25 into question the comparator to discuss what should be

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1 the compensation measure of that comparator at any one
2 point.

3 **COMMISSIONER BLOODWORTH:** Two other
4 questions.

5 First, I think it was Mr. Rugar said
6 one-third of the appointments in a certain period to
7 the Judiciary over the last few years have been outside
8 the 44 to 56 age group.

9 So why wouldn't that argue that we
10 should look at a wider age group? And I move to
11 private sector lawyers.

12 Should we not be looking at the
13 comparison of the actual group from which appointments
14 are made, if we are going to have an age factor?

15 **MR. BIENVENU:** Yes. Well, we must
16 look at it, but that's not the question that arises in
17 this debate.

18 The debate is not whether you should
19 look at it, the debate is whether it is accurate and
20 best practice to widen the age group when looking at
21 the CRA data. That's the issue.

22 The issue is if you know for a fact
23 that 66 percent, I believe it is.

24 73 percent of your appointees fall
25 within the age group 44 to 56. Should you use that age

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1 group when generating data from CRA, or should you do,
2 as Mr. Pannu suggests, take a wider ratio.

3 It's not about the Commission looking
4 at candidates or salaries outside of that position;
5 it's really a question of making sense of the CRA data
6 and best practice in getting a good sense of the
7 private sector income that we are interested in.

8 And there, I invite you to compare the
9 rationale offered by the two experts, and my submission
10 is that you'll conclude that the correct way to do it
11 is Ms. Haydon's methodology, not Mr. Pannu's.

12 **COMMISSIONER BLOODWORTH:** Thank you.
13 My final question.

14 I wonder if you can help me to
15 understand and I am going to point you to both Mr.
16 Rupar's book and yours. And you both use private
17 sector income from the 75th percentile, as I understand
18 it, but they're different numbers. So I am obviously
19 missing something.

20 **MR. BIENVENU:** Okay. May I ask you
21 what page you are at?

22 **COMMISSIONER BLOODWORTH:** Under yours
23 it's Tab F, and under his it's Tab 9, which is
24 actually, I think, Mr. Pannu's report. Yes. And it's
25 page 82.

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1 And in both cases you have income from
2 private sector, 75th percentile 2010 to 2014, but
3 they're different numbers. I am looking for my
4 enlightenment.

5 What am I missing to have a 75th
6 percentile?

7 **MR. BIENVENU:** You're not missing
8 anything, he is missing a low income exclusion. That's
9 the point I made this morning.

10 **COMMISSIONER BLOODWORTH:** So the
11 difference, if I look at 2010, between 274,000 and some
12 and 403, I think I am comparing the two years, is what
13 age group you take?

14 **MR. BIENVENU:** It's both the age group
15 and the low income exclusion.

16 If you look at the top of the table in
17 our book at Tab F, let's look at the title together:
18 "Comparison of salary of Puisne Judges with net
19 professional income of self-employed lawyers at 75th
20 percentile. Net professional income greater than
21 60,000 and age group 44 to 56."

22 **COMMISSIONER BLOODWORTH:** Okay.

23 **MR. BIENVENU:** He doesn't tell you
24 that, that's why I insisted this morning on taking you
25 to his report and saying: "Be careful."

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1 The only way he's able to tell you
2 what he's telling you is because he's got no low income
3 exclusion.

4 And his age group, as colleague is
5 pointing out to me, is set out below. He goes from 44
6 to older than 64 -- I am sorry. He goes from under 44.
7 He's got a much broader range in terms of age group.

8 **COMMISSIONER BLOODWORTH:** Okay. Thank
9 you.

10 **THE CHAIRPERSON:** Peter?

11 **COMMISSIONER GRIFFIN:** Just on that
12 point, it says on that page 5, and maybe Mr. Rupar, you
13 can help me, "a further refinement can be made by
14 examining the income of self-employed lawyers by age
15 bands."

16 I didn't quite understand that there
17 were any age bands than what was shown on the table
18 above.

19 The further refinements he describes,
20 if I have it right, are things that can be done but
21 they're not reflected in that table. Do I
22 misunderstand it?

23 **MR. RUPAR:** That's correct, Mr.
24 Commissioner.

25 If I can just point out, in the next

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1 page on the next set of figures, where he takes those
2 and puts them into perspective. That's where he gets
3 his percentages from.

4 **COMMISSIONER GRIFFIN:** Right. If you
5 follow along what he's doing on subsequent tables.
6 Alright.

7 Just with respect to Mr. Pannu and Mr.
8 Newell, do they, or do you on both sides of the table,
9 leaving aside the ingredient of a third expert for the
10 moment, do they agree with each other as to why there
11 are differences between their calculation of the
12 percentage value of the annuity, other than the
13 disability inclusion or exclusion?

14 Because it would be of some value to
15 us to understand whether they're agreed on what the
16 differences are, and if that's something between
17 counsel you could sort out in the next short while for
18 us?

19 I think that would be helpful.

20 **MR. RUPAR:** Certainly on our side,
21 we'd have no difficulty having Mr. Pannu and Mr. Newell
22 discuss their differences. They seem to be
23 methodological from what we can determine.

24 And if they want to discuss matters,
25 that would be fine with us.

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1 **MR. BIENVENU:** We certainly have no
2 difficulty in the two experts meeting, but as I have
3 mentioned in my submission just now, I think the main
4 difference between two is the inclusion by Mr. Pannu of
5 the disability benefit in his calculation of the value
6 of the judicial annuity.

7 **COMMISSIONER BLOODWORTH:** But I think
8 he indicates that difference and there is still a small
9 difference.

10 **MR. BIENVENU:** There is on. Yes.

11 **COMMISSIONER BLOODWORTH:** It's about
12 two percent or under that. It would be useful to know
13 what that.

14 **MR. BIENVENU:** We certainly, if that
15 is the Commission's wish, will instruct Mr. Newell to
16 meet with Mr. Pannu and try to shed light on where they
17 differ and where they are in agreement.

18 **COMMISSIONER GRIFFIN:** Alright. The
19 next question I had was just trying to understand in a
20 tabular sense the differential between the Block
21 comparator and judicial salary.

22 Because as I look at page 30 of your
23 primary submission, Mr. Bienvenu, you set out in Table
24 1, the difference between the Block comparator and the
25 total average compensation, as I understand it, at the

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1 DM-3 level, that you seek this Commission's endorsement
2 of.

3 And I didn't see anywhere in either
4 submission a calculation of Block comparator and
5 judicial salary as it stands.

6 In other words, I can see it in Tab E
7 of your Condensed Book where you show the various
8 graphical representations, but I just wanted to
9 understand what the parties say the differential is
10 between the Block comparator and judicial salary, as it
11 would be calculated with the increases under the IAI
12 through the Quadrennial period.

13 **MR. BIENVENU:** So going forward.

14 **COMMISSIONER GRIFFIN:** Going forward.

15 **MR. BIENVENU:** Yes.

16 **COMMISSIONER GRIFFIN:** Because you
17 talk in terms between you of a \$44,000 roughly,
18 differential, what you're looking for, and does that
19 deal with the \$23,000 differential?

20 It would help us to know using the
21 Block comparator, what does differentials are.

22 **MR. BIENVENU:** Right.

23 I would like to make a point. The
24 \$23,000 does not represent the delta. It is the
25 portion of the delta by which we invite the Commission

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1 to reduce the delta.

2 **COMMISSIONER GRIFFIN:** I understood
3 the 2 to 1.5, or 1.5 as achieving that result.

4 **MR. BIENVENU:** That result. The
5 result being to reduce the delta, not to eliminate it.

6 **COMMISSIONER GRIFFIN:** Understood.

7 **MR. BIENVENU:** So essentially, what
8 you're asking for is, if we look at Tab E of our
9 Condensed Book --

10 **COMMISSIONER GRIFFIN:** That's right.
11 It's to essentially, just quantify the differential on
12 a go-forward basis, as you understand it, between
13 essentially your Block comparator line and judicial
14 salary, so we understand that delta.

15 **MR. BIENVENU:** Right. We will provide
16 you with that information.

17 **COMMISSIONER GRIFFIN:** And if you let
18 Mr. Rupar have it before you give it to us, just to
19 make sure that there's no disagreement on the raw
20 numbers.

21 **MR. BIENVENU:** Yes.

22 **MR. RUPAR:** Absolutely. We would be
23 happy to receive them.

24 There may be some issues with respect
25 to the compensation going forwards, that's a year at a

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1 time, but hopefully we will be able to work out some of
2 these differences.

3 **COMMISSIONER GRIFFIN:** Right. Don't
4 make heavy weather of it, but if we can get some sense
5 of what that looks like, that would be helpful.

6 The last thing I wanted to ask you
7 about was your process points, Mr. Bienvenu, you began
8 your submissions in part with talking about the
9 appointment process and issues that had arisen with
10 respect to the initial appointee of the Government.

11 And I had read your written
12 submissions as saying that you were not seeking a
13 recommendation from this Commission in that respect, at
14 paragraph 49, and does that remain your position?

15 **MR. BIENVENU:** It remains our position
16 that we're not seeking a recommendation.

17 But as I have expressed this morning,
18 we think it would be helpful to the parties to have
19 guidance from the Commission on this point.
20 Absolutely. Otherwise, we wouldn't have gone through
21 the trouble of displaying all of this in our submission
22 for your benefit.

23 **COMMISSIONER GRIFFIN:** Could you help
24 me with the distinction in your mind between a
25 "recommendation" and "guidance"?

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1 **MR. BIENVENU:** Yes. I will give you
2 an example.

3 You will find in the Block Report,
4 consideration given to the second response and a view
5 being expressed as to the appropriateness of this
6 second response, in the legal framework devised by the
7 *PEI Reference* and organised by the relevant provisions
8 of the *Judges Act*.

9 So there is no formal recommendation
10 associated to these reasons, but they are very helpful
11 reasons.

12 They are very thoughtful reasons and
13 we are looking for similar insight from this Commission
14 on the process points that we discussed.

15 **COMMISSIONER GRIFFIN:** And is the same
16 then true for the need to respect statutory guideline?

17 **MR. BIENVENU:** Yes, although with a
18 small difference.

19 There, there is a commitment on the
20 part of the Government to look at one aspect of
21 respecting deadlines, which is what happens when an
22 election interferes with the beginning of the
23 Commission.

24 But there is, you know, a broader
25 point about which you may hear tomorrow, when the CBA

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1 presents its submission.

2 And the broader point is that there is
3 a pattern of non-compliance with the delays that is a
4 source of concern, and you know, if the Commission
5 considers it appropriate, it could surely consider that
6 and comment on it, if thought appropriate.

7 **COMMISSIONER GRIFFIN:** The last thing
8 I wanted to ask you about was, at paragraph 50 and
9 following of your submission, you talk about the need
10 for consultation with respect to the introduction of
11 amendments to the *Judges Act*, and are you seeking a
12 recommendation in respect of that?

13 **MR. BIENVENU:** No, Mr. Griffin.

14 But we are certainly inviting the
15 Commission to consider this submission, the context in
16 which -- or the reasons for the Judiciary's decision to
17 make this submission, and it might be very helpful for
18 the Commission to comment on this.

19 **COMMISSIONER GRIFFIN:** Those are the
20 questions I had for you and for Mr. Rupar.

21 Mr. Nuss, I have one question for you.

22 As I listened to your travel log about
23 other jurisdictions and what differentials they have in
24 place for Court Appeal Judges, I heard you mention New
25 Zealand.

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1 I didn't hear you mention Australia.
2 Have you done any research with
3 respect to Australia?

4 **MR. NUSS:** I did in 2008. And quite
5 frankly. I couldn't fathom what happened in Australia.
6 One time there was a differential, and then later on
7 there wasn't.

8 And the complexity of the system
9 between the federal and the non-federal led me to a
10 cul-de-sac, where I just couldn't determine whether it
11 was or it wasn't.

12 I spoke to judges there, and so I
13 didn't deal with it. What happened since 2008, I don't
14 know.

15 **COMMISSIONER GRIFFIN:** Very good.
16 Mr. Chair, those are my questions.
17 Thank you.

18 **THE CHAIRPERSON:** I understand,
19 Margaret, that you have a question for Maître Rupar.

20 **COMMISSIONER BLOODWORTH:** Yes. I got
21 so entranced with my answers from Maître Bienvenu that
22 I forget about Maître Rupar, and I have three
23 questions.

24 On your Tab 20 in your book, you
25 forecast salaries going out, but you don't say what the

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1 assumptions are.

2 For example, you obviously forecast
3 what the IAI would be up until 2023, but it would be
4 useful to have what assumptions have you used about
5 that, what assumptions have you used about DM salaries,
6 what assumptions have you used?

7 I am not asking you to list them all
8 now, but if you could provide us with the assumptions
9 given those are forward looking?

10 It would be helpful in looking at the
11 chart.

12 **MR. RUPAR:** We will do that for
13 tomorrow, yes.

14 **MR. BIENVENU:** And if I may say so,
15 this is a point I was intending to make in relation to
16 Mr. Griffin's request, because obviously, that will
17 influence the position going forward.

18 We know what the projections of the
19 IAI are, but it's more difficult or more debatable what
20 assumptions should be made about the progression of
21 DMs' remuneration going forward.

22 **COMMISSIONER BLOODWORTH:** And
23 obviously, as with any assumptions, going forward they
24 could be wrong or right, but you have to make some
25 doing that. I am not being critical of the

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1 assumptions. I would just like to know what they are.

2 Tab 9, Mr. Pannu's report, he does, if
3 I understand correctly, in page 6 and 7, he does,
4 especially page 7, he comes up with what the 2014 75th
5 percentile, if it's age-weighted would be.

6 I wonder if you could do that if we
7 eliminated the two outliers, i.e: the under 44 and the
8 over 60; I know you could do it at each, I am not
9 asking for that.

10 But it would be interesting to me to
11 see what difference it makes if you eliminate those two
12 categories.

13 **MR. RUPAR:** We can do that. I am not
14 sure we can do that for tomorrow morning.

15 **COMMISSIONER BLOODWORTH:** That's fine.

16 I am not sure I will read it tomorrow!

17 And final two question.

18 One, MPs when they moved away from
19 IAI, did not move to CPI, as I understand from what you
20 said.

21 **MR. RUPAR:** Correct.

22 What we understand is from 67.1 of the
23 *Parliament of Canada Act*, they moved to the average of
24 settlements by private union with 500 members or more.

25 **COMMISSIONER BLOODWORTH:** Which I

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1 assume is higher than IAI?

2 **MR. RUPAR:** I wouldn't guess. I don't
3 know. I would have to look. I don't know.

4 **COMMISSIONER BLOODWORTH:** Maybe you
5 could look. But I am willing to bet it's higher, just
6 given the category.

7 And finally, can you give us one or
8 two concrete examples if a pre-appointment income study
9 was done before the next Commission, what are a couple
10 of concrete examples of what the next Commission might
11 actually do with it?

12 **MR. RUPAR:** I can give you a couple of
13 examples now, and perhaps we can give you a bit more
14 tomorrow.

15 My friend Mr. Bienvenu talks about
16 moving forward and we shouldn't be looking in the past,
17 but what we would have is we would have real numbers.
18 We would have numbers of what members of the Bar who
19 applied for and became members of the Judiciary, what
20 their actual incomes were prior to their appointment.

21 We would have it for a number of
22 years, and that would give us a pattern, not a snapshot
23 but a pattern of whether or not there are certain
24 groups over other groups that apply that aren't
25 applying if there is a disincentive, we would have real

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1 numbers.

2 Because what we have now, and this is
3 the best we've been able to come up with under the
4 present systems: we have the CRA database which
5 captures the self-employment income, but it doesn't
6 capture corporations, for instance. It doesn't capture
7 associates.

8 There's any number of categories of
9 lawyers that it doesn't capture.

10 So our submission would be that when
11 you look at the actual numbers, the actual people, you
12 would have hard data from the people who applied and
13 the people who were made judges, which would give the
14 Commission some real numbers to deal with.

15 I will talk with my colleagues and we
16 may have further in the morning, but that's generally
17 what we suggest would be happening with the pre-income
18 study, pre-appointment income study.

19 **COMMISSIONER BLOODWORTH:** Thank you.

20 **THE CHAIRPERSON:** Well, you have a very
21 good Chairman because we are just on time to close our
22 first day.

23 Merci beaucoup, Maître Bienvenu.

24 Merci, Maître Nuss, Maître Rupar, merci à vous tous.

25 Des présentations qui ont été très,

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1 très utiles.

2 Une collaboration tout à fait
3 exceptionnelle de tous, et voilà.

4 On se voit demain.

5 I think tomorrow we start our day with
6 the Prothonotaries and Mr. Lokan, you will be with us
7 for the presentation for the Prothonotaries.

8 See you tomorrow morning at 9 o'clock.

9 **--HEARING CONCLUDED AT 4H00 P.M TO RESUME ON FRIDAY**

10 **APRIL 29, 2016 AT 9:00 A.M.**

11

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13 CERTIFIED TRUE AND CORRECT.

14 LE TOUT EXACT ET CONFORME.

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18 M. Bolduc, S.O./CCR