

**JUDICIAL COMPENSATION AND BENEFITS
COMMISSION**

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

* * * * *

**Held at the 333 Laurier Ave. West
18th Floor, Hearing Room 3,
Ottawa, Ontario
on Friday, April 29, 2016**

**Tenu au 333, avenue Laurier ouest,
18^e étage, salle d'audience 2
Ottawa, Ontario
Le vendredi, 29 avril, 2016**

VOLUME 2

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

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(iii)

INDEX

	PAGE
--SUBMISSIONS BY FEDERAL COURT PROTHONOTARIES	209
--REPLY SUBMISSIONS BY THE CANADIAN SUPERIOR COURT JUDGES ASSOCIATION (The Judiciary)	257/287/342
--REPLY SUBMISSIONS BY THE GOVERNMENT OF CANADA	267/320
---PRESENTATION BY CANADIAN BAR ASSOCIATION	280
--REPLY SUBMISSIONS BY CANADIAN APPELLATE JUDGES	290
--PRESENTATION BY THE HONOURABLE CHIEF JUSTICE P. CRAMPTON	302
--REPLY SUBMISSIONS BY PROTHONOTARIES	333

April 29, 2016

1 **VOLUME 2**

2 ---Upon commencing at Ottawa, Ontario, on Friday, April
3 29, 2016 at 9:00 a.m.

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

5 **THE CHAIRPERSON:** Mesdames, messieurs,
6 ladies and gentlemen, good morning.

7 Margaret and Peter join me to welcome
8 you to this second day of our hearings.

9 Comme je l'ai mentionné hier, vous
10 savez que nous avons la traduction simultanée que vous
11 pouvez utiliser.

12 I think it's important to remind us
13 that if we are gathered here it's to discuss about the
14 fundamental principle for our country's democracy and
15 the judiciary system.

16 And as Canadians we are proud of our
17 judiciary system and we want to work to promote,
18 improve and develop our judiciary system.

19 So we start our discussion from that
20 principle.

21 And I want to thank you for our
22 discussions of yesterday. It was a very, very good
23 discussion, very useful for us. We have appreciated a
24 lot all these discussions and we got important
25 information for us.

April 29, 2016

1 Thank you very, very much.

2 Today I just want to underline that
3 some of you have to catch flight, train and got kind of
4 things, after two days of hearings of course, and we
5 preserve our principle of flexibility.

6 But if we can respect our schedule, I
7 think it will be something really positive for
8 everybody.

9 Thank you very much for your
10 collaboration.

11 Peter, do you want to add something?

12 **COMMISSIONER GRIFFIN:** Could I follow-
13 up on one thing we discussed yesterday, Mr. Bienvenu?

14 I am back to page 30 and 31 of your
15 Main Submission, in which you have a table comparing
16 judicial salary and total average DM-3 compensation.

17 In the homework that you very kindly
18 agreed to take on yesterday, might you add a column to
19 that which compares judicial salary for those years to
20 the Block comparator as well?

21 That's my request. Thank you.

22 **MR. BIENVENU:** It's noted.

23 May I take this opportunity to inform
24 members of the Commission that my colleague Mr. Hussain
25 unfortunately had to rush home last night because of a

April 29, 2016

1 medical emergency affecting a member of his family.
2 He's asked me to apologise and explain his absence.

3 **MR. NUSS:** Mr. Chairman, Members of
4 the Board, in the same vein, Justice Paperny and
5 Justice St-Pierre had to go back to Calgary and
6 Montreal respectively last night, and apologise for
7 their absence before the Commission Hearing.

8 **THE CHAIRPERSON:** Thank you, Mr. Nuss.
9 We are ready to start officially our
10 hearing.

11 And this morning I ask Mr. Lokan,
12 please, à vous la parole.

13 **MR. LOKAN:** Thank you, Commissioner.
14 May I first begin by thanking the
15 Commissions and the parties for accommodating my
16 schedule, both by accommodating my appearance today
17 only out of the two days, and also accommodating my
18 travel plans later in the day. I very much appreciate
19 that.

20 I also thank the Commission for the
21 generous time allocation that I have been given, and
22 really hope not to require the full hour and half, at
23 least in terms of prepared remarks; I know there will
24 be questions.

25 **--SUBMISSIONS BY FEDERAL COURT PROTHONOTARIES**

April 29, 2016

1 Prothonotary Lafrenière who is going
2 to be with us later in the day, did brief me on
3 yesterday's proceedings, and I am in a position to say
4 that the Prothonotaries adopt the submissions of the
5 Superior Court, the Judges Association and the Canadian
6 Judicial Council.

7 And in particular, I need not address
8 and have nothing further to add on the two topics of
9 the prevailing economic conditions and the statutory
10 indexing point.

11 What I will address are the following,
12 and in the following order.

13 First, because I think the Office of
14 Prothonotary may not be that well-known, I will provide
15 an overview of the Office of Prothonotary.

16 Secondly, I will address salary.

17 Thirdly, I will briefly address the
18 request for supernumerary status.

19 Fourth, the incidental allowance
20 point, again briefly.

21 And fifth and finally,
22 representational costs.

23 Now, I apologise that I was not able
24 to come prepared with a condensed book or compendium,
25 but the materials that I would like to refer to in my

April 29, 2016

1 prepared remarks are the second volume of the joint
2 book of documents, which has in it, at the back, at
3 Tabs 32 and 33, the two prior reports of special
4 advisors into remuneration for Prothonotaries.

5 So, at Tab 32 we have the report of
6 Special Advisor Adams, and Tab 33, the report of
7 Special Advisor Cunningham. I will be referring to
8 those.

9 I would also ask that you have handy
10 the joint book of documents, sorry, the book of
11 documents that was filed by the Prothonotaries. It's
12 got three tabs, and the main document in there is a
13 very recent report of Commissioner Larry Bannock in
14 Ontario, into the Case Management Masters. And that
15 one was dated, I think, November of 2015.

16 I will also make reference to the
17 Prothonotaries' Main Submissions and Reply Submissions,
18 and provide the paragraph references.

19 I think it may not be necessary to ask
20 you to turn those up, but if you have any questions
21 about the paragraphs I refer to, you may want to have
22 those handy.

23 So with that, let me begin by talking
24 a little bit about the overview of the Office. And
25 this is dealt with in the Prothonotaries' Main

April 29, 2016

1 Submissions at paragraphs 31 to 45.

2 My first observation is that
3 Prothonotaries are more or less functionally equivalent
4 to masters of the Provincial Superior Courts. The
5 Office of Master has been around for a very long time.

6 Not all of the provinces utilise
7 Masters. They are still used in British Columbia,
8 Alberta, Manitoba and Ontario.

9 And in some of the other courts,
10 provincial courts across the country, Provincial
11 Superior Courts are the country; the functions that
12 Masters perform in those provinces would be performed
13 by Provincial Court Judges.

14 Now, in terms of the number of
15 Prothonotaries, there are currently five. Two sit in
16 Toronto or are based in Toronto, and there are one each
17 in Ottawa, Montreal and Vancouver.

18 The full complement is actually six.
19 And you will see reference in the Adams Report and
20 Cunningham Report to that number, the six
21 Prothonotaries.

22 Last year, 2015, one of the Ottawa
23 positions was affected by retirement and it has not yet
24 been filled.

25 So the normal complement is two in

April 29, 2016

1 Ottawa, two in Toronto, and one each in Montreal and
2 Vancouver, but there's one vacant in Ottawa at the
3 moment.

4 The Prothonotaries within the Federal
5 Court system represent the frontline of justice. That
6 is where the probably great majority of litigants, most
7 of their interactions with the Court are with the
8 Prothonotaries.

9 Their duties are set out in some
10 detail in an agreed statement of facts to the
11 Cunningham Report.

12 So, if I can ask you to turn to, that
13 would be Tab 33 of the joint book of documents, you
14 will see that the Appendix to the Cunningham Report is
15 a fairly detailed agreed statement of facts. And that
16 runs from page 560 to 572.

17 Now, the nice thing about an agreed
18 statement of facts is that it's agreed, so there isn't
19 really any controversy about anything that is in any of
20 these paragraphs that that work has been done.

21 If I can just draw your attention to a
22 few paragraphs in that agreed statement of facts which
23 I commend to you generally.

24 Paragraph 7, points out that the
25 substantive subject areas that they Prothonotaries deal

April 29, 2016

1 with, it's a very broad and diverse, perhaps eclectic
2 range.

3 So for example, there's a significant
4 amount of administrative and constitutional law for the
5 Federal Court, the intellectual property is a very
6 large component of their work.

7 They deal with pharmaceutical issues,
8 anyone who has been exposed to litigation between
9 pharmaceutical companies, and others that it has a
10 particular complexion.

11 The deal with maritime and admiralty
12 law, First Nations, immigration, national security,
13 taxation, employment, access to information, civil and
14 contractual liability. *Charter* cases come up, class
15 actions, et cetera, et cetera.

16 They decide both procedural and
17 substantive matters and have quite a broad jurisdiction
18 except for certain powers that are reserved exclusively
19 to Judges of the Federal Court.

20 And a description of those reserved
21 powers is set out in paragraph 14.

22 So, Prothonotaries may hear any
23 motion, and a lot of the work of that Court is motions,
24 except for some that are reserved. The kinds of
25 motions that can be heard by Judges only are, for

April 29, 2016

1 example, summary judgement, contempt, injunction,
2 matters relating to liberty of a person, et cetera, et
3 cetera. But other than those, it's a broad and general
4 jurisdiction.

5 They exercise, the Prothonotaries,
6 full civil trial jurisdiction for what they call small
7 and intermediate claims, so anything up to \$50,000,
8 Prothonotaries can hear and decide the entire trial.

9 And that, just for a couple of
10 comparison points, that's double the small claims
11 jurisdiction in Ontario, and it would be half the
12 simplified procedure jurisdiction in Ontario,
13 simplified procedure of course will be Superior Court
14 Judges hearing those cases, but dealing with them in a
15 streamlined fashion.

16 They hear a very wide range of
17 motions, and those are described in paragraph 17, just
18 gives some sense of the flavour of them.

19 And a very large and important
20 component of their work is the case management
21 function.

22 They handle over 95 percent of the
23 case-managed proceedings, and this includes in
24 particular cases under the *Patented Medicines Notice of*
25 *Compliance Act and Regulations*.

April 29, 2016

1 That's set out at paragraph 22 of the
2 agreed statement of facts.

3 Those cases are particularly intensive
4 and require timely and effective intervention because
5 they're working on a statutory timetable.

6 They need to be heard and determined
7 by a Judge within a twenty-four month period, so all of
8 the process of moving those cases along and ensuring
9 that they are ready to be determined is typically done
10 by the Prothonotaries.

11 Their work is increasingly complex.

12 I mentioned a minute ago the
13 increasing prevalence of *Charter* litigation.

14 I can mention for those who are aware
15 of a case that came out last week, the *Daniels*
16 decision, on which Mr. Rupar was also Counsel in the
17 Supreme Court.

18 That took seventeen years of
19 litigation, and of course, there was about a decade of
20 that that was before Prothonotaries only, with a number
21 of fairly important substantive decisions along the
22 way. And that's issues of pure constitutional law of
23 their division of powers, just as one little example.

24 Senior members of the Bar regularly
25 and frequently appear before the Prothonotaries on

April 29, 2016

1 intellectual property cases, aboriginal cases,
2 admiralty, immigration, et cetera, et cetera.

3 And a point that is mentioned in some
4 reports is that the dignity of the office is affected
5 by the -- you try to avoid a situation in which senior
6 members of the Bar don't really respect the members of
7 the Judiciary who are hearing their cases, because the
8 signal from the way that they're treated by the
9 Government in terms of compensation is they are not
10 very important.

11 So the converse of that is that the
12 dignity of the Office when they deal with members of
13 the Bar, senior members of the Bar, requires a certain
14 level of remuneration.

15 The Prothonotaries are fully
16 integrated into the work of the Federal Court. They
17 sit on all of the relevant Court Committees. And this
18 is set out in paragraph 24.

19 And just to understand how the Federal
20 Court works, I believe that there are currently 35
21 Federal Court Judges, and there are currently a
22 complement of 6, but 5 actually sitting Prothonotaries.

23 As with many other Courts, the
24 workload has been going up, the cases have been getting
25 more complex, and they are spread quite thin.

April 29, 2016

1 The Prothonotaries, as I have
2 mentioned, are based in the major metropolitan areas,
3 but they are required to travel extensively.

4 The Federal Courts sits all across
5 Canada and they frequently have to travel to other
6 cities or other locations than the ones that I
7 mentioned, as part of their job, as an inherent part of
8 their job.

9 It's also both a bilingual and bi-
10 juridical Court.

11 Both legal systems are in play in the
12 Federal Court system, and of course, in both official
13 languages.

14 Now, if I can give a little bit of
15 background to the history of their compensation. That
16 is set out in the Main Submissions at paragraphs 46 to
17 50.

18 The Adams Commission was in 2008, and
19 the Honourable George Adams mentioned in the course of
20 his report that the Prothonotaries had had some
21 difficulty in attracting the attention of the federal
22 government.

23 Indeed, we all know that the *P.E.I.*
24 *Reference* came in 1997. It was not until 2008 that the
25 Prothonotaries were able to secure an independent

April 29, 2016

1 process that took place before former Justice Adams.

2 Prior to that their salaries had been
3 set with reference to Provincial Masters and Provincial
4 Court Judges, except that it really only happened
5 twice, once in 1985 and again in or about 2000, and in
6 between, because of the vagaries of the federal
7 compensation system in between those two reference
8 point, and then between 2000 and 2008, they had fallen
9 quite far behind.

10 That is all now past history, but just
11 because you see it referred to in those reports.

12 Now, when it came before Special
13 Advisor George Adams, he had a comprehensive hearing
14 and there was expert evidence, and heard about, at some
15 length about the duties and the history, et cetera, et
16 cetera, and he came out with a set of recommendations
17 which included that the salary of the Prothonotaries be
18 set at 80 percent of that of the Federal Court Judges.

19 And that 80 percent figure was derived
20 essentially as an average of the Masters throughout the
21 provinces that use them, and Provincial Court Judges
22 all across the country, the national average.

23 Just after that set of recommendations
24 was made, the global financial crisis occurred. And
25 you know, timing is everything.

April 29, 2016

1 I think Special Advisor Adams' report
2 came out in May of 2008, and we know that by late 2008
3 we had the Lehman Brothers collapsing. We had all the
4 difficulties on Wall Street and the international
5 financial system.

6 We had governments moving into
7 emergency deficit spending in order to prop up the
8 economy, and what accompanied that was a great deal of
9 wage restraint legislation and measures by the Federal
10 Government and by many provincial governments as well.

11 So, because of that intervening event,
12 the Federal Government declined to implement the Adams
13 recommendations.

14 The Prothonotaries, perhaps being
15 understandably frustrated by the fact that it had taken
16 so long to get their first process, and then just as
17 they had a set of recommendations, this global
18 financial crisis intervened.

19 Out of that sense of frustration did
20 bring a judicial review, and that judicial review went
21 first before Justice McKay of the Federal Court, and
22 then subsequently to the Federal Court of Appeal. It
23 was actually a retired Judge that was brought back to
24 avoid any appearance of conflict of interest.

25 The judicial review application was

April 29, 2016

1 unsuccessful.

2 The Courts, both at the Trial Division
3 and at the Court of Appeal, accepted that in the
4 extraordinary circumstances of the global financial
5 crisis, the Government was justified in not
6 implementing those recommendations.

7 However, along the way, at both levels
8 of Court, comments were made to the effect of: When
9 more normal times return, you really should place some
10 priority on fixing this anomalous situation.

11 So the next process that came along
12 was 2013, and that was the process before Special
13 Advisor Cunningham. And the Cunningham Report, the
14 Special Advisor essentially looked at all the evidence
15 again, he heard all the submissions again, but he
16 essentially adopted the recommendations of the Adams
17 Commission.

18 And in response to the Cunningham
19 Report, the Government implemented some but not all of
20 those recommendations.

21 And the one most conspicuous feature
22 that was not implemented was that the salary was not
23 set at the 80 percent that both Special Advisor Adams
24 and then Special Advisor Cunningham had recommended.

25 Instead, the Government chose the

April 29, 2016

1 figure of 76 percent of a Federal Court Judge's salary.

2 That was very helpful to the Prothonotaries in that
3 prior to that, they had been at 69 percent. So the
4 original parity with Masters and Provincial Court
5 Judges that had been set a long time ago, then it had
6 been equaled.

7 But what had happened is over the
8 intervening years, those offices had leapt quite far
9 ahead, and by the time we got to 2013, the
10 Prothonotaries were at 69 percent of the Federal Court
11 Judges' salary. The Government moved them up to 76,
12 but not all the way to 80 percent, as had been
13 recommended.

14 So, that brings me to the issue of
15 salary, my second point, and I will move into those
16 submissions.

17 If I can start with some references to
18 the Adams Report which is at Tab 32.

19 We have a little bit of demographic
20 information and the Government may well comment, and
21 it's perfectly a justified comment, that with such a
22 small group, demographics are a bit hard to rely on,
23 and I fully accept that.

24 But for what it's worth, if you look
25 at page 28 of the Adams Report, or 480 of the joint

April 29, 2016

1 book, you will find that what was recorded before the
2 Adams Commission is that the average age of appointment
3 of Prothonotaries at the time was 48.9 years. So just
4 under 49 years. And that compares to the 51 years for
5 federally appointed Judges between 1997 and 2003.

6 In terms of the Prothonotaries, the
7 only change that has occurred since then is that one of
8 the six is retired, so that may affect the average age
9 of appointment to some extent.

10 I have not done the math or asked the
11 retired Prothonotary how old she was when she was
12 appointed, but in any event, for five of the six, this
13 information is still valid.

14 It's pointed out by Special Advisor
15 Adams at page 53 of the report, at 505 of the joint
16 book, and this is encapsulating the submissions of the
17 Prothonotaries, but it was not a fact that was
18 contested by the Government at all.

19 Appointees have typically been drawn
20 from the major urban centers where there's a high
21 degree of competition for outstanding legal talent.

22 These are also the centers where
23 incomes at leading law firms are high, and particularly
24 so in some of the specialised area of the Federal
25 Court's caseload.

April 29, 2016

1 So, just to take one example, if you
2 were to look to members of the Intellectual Property
3 Bar in Toronto, that would be a fairly refined subset
4 of practising lawyers in the private practice in
5 Canada.

6 The Prothonotaries are not drawn from
7 smaller urban centers or from the rural areas really,
8 in terms of the competition to fill the spots. It's
9 Ottawa, Toronto, Montreal, Vancouver, because that's
10 where they're based.

11 Now, it should be noted and recognised
12 however, that the appointees have not been confined to
13 specialists in those areas.

14 As I mentioned when I went through the
15 fairly eclectic range of topics that the Prothonotaries
16 deal with, it's quite a range.

17 It may be admiralty one day and
18 patented medicines the next day, and an Aboriginal
19 rights case the day after. And they need to be
20 sufficiently flexible and generalists to be able to
21 cope with that.

22 And one point I believe the Government
23 has made is that well, they dispute the link with some
24 of the Provincial Masters, because they're drawn from
25 different Bars. It isn't really the case.

April 29, 2016

1 And what Special Advisor Adams records
2 is one particular instance in 1998, where there was a
3 candidate for the Office of Prothonotary who withdrew
4 in favour of a Masters' appointment in Ontario. It's
5 really a functionally similar job and the factor was
6 not so much specialisation in a particular caseload.

7 Again, the Masters of the Superior
8 Court in Ontario have to be generalists as well. They
9 deal with the full range of civil litigation. The
10 factor there was that at that time the pay for
11 Prothonotaries was very significantly under.

12 Special Advisor Adams notes and goes
13 through the historical linkage to the pay of Masters,
14 or the remuneration of Masters and Provincial Court
15 Judges. And that's at page 56 of his report, 508 of
16 the joint book.

17 And as Special Advisor Adams notes:
18 *"On the material placed before me,*
19 *I prefer the Prothonotaries'*
20 *submission that in both 1985 and*
21 *2000..."*

22 Really the two times that the
23 Government paid attention to Prothonotary remuneration
24 and looked for relevant comparators and went through
25 the exercise of setting pay, albeit it not in a

April 29, 2016

1 Commission process.

2 When the Government was setting a
3 general salary for Prothonotaries, a dominant
4 consideration was the salary paid to Masters and
5 Provincial Court Judges in other jurisdictions and not
6 to a particular tribunal category within the federal
7 system which the Government had been relying upon in
8 that litigation, in that case.

9 So as I mentioned, in the result,
10 Special Advisor Adams thought the most appropriate
11 comparator was to take, because it was a national court
12 and the Prothonotaries had been emphasising: 'Well,
13 look. We're in the most expensive urban centers, and
14 perhaps we should be looking only at British Columbia,
15 Québec and Ontario, because that's where the
16 Prothonotaries sit.'

17 Special Advisor Adams thought what
18 would be more appropriate is simply to take the
19 national average of Masters where they have them, and
20 of Provincial Court Judges.

21 And that's not a difficult calculation
22 to do, because it turns out that wherever there are
23 Masters, they are set at the equivalent salary to
24 Provincial Court Judges, so you don't really need to
25 distinguish between the two.

April 29, 2016

1 And in addition to the case management
2 that they do, they exercise the full range of
3 jurisdiction the Traditional Masters had. They hear
4 and decide a lot of motions, and it's appropriate that
5 this group, as well, be moved up to the salary of the
6 Traditional Masters and of Provincial Court Judges in
7 Ontario.

8 And that figure would actually be
9 about 92 percent of the Federal Court Judges or
10 Superior Court Judges.

11 I should mention the Bannock Report is
12 at this stage, a set of recommendations only. The
13 Ontario Government has not responded. So we don't know
14 what the final answer will be with respect to that
15 group.

16 But Commissioner Bannock in his
17 process did refer quite extensively to the Office of
18 the Prothonotaries and to the two prior reports that
19 had been done by Special Advisor Adams and Special
20 Advisor Cunningham, and I will take you to that
21 shortly.

22 Now moving from Adams, who I say his
23 recommendations were not implemented because of the
24 intervening financial crisis, to Justice Cunningham's
25 report which is at Tab 33.

April 29, 2016

1 In his review, he conducted a review
2 *ab initio* of course.

3 He had the benefit of the Adams Report
4 before him, but as he was required to do, he looked at
5 the evidence and heard the submissions of both sides,
6 and came to his own independent judgement.

7 At page 7 of his report he notes that
8 of course, "the Office requires candidates of superior
9 quality", and that he was mindful that the
10 Prothonotaries are assigned to the four largest urban
11 centers in Canada.

12 Those are unquestionably the most
13 expensive cities in which to live.

14 And that was in 2013, and I think
15 there's been a good deal of real estate bubble activity
16 in places like Vancouver and Toronto since then.

17 He analyses the salary issue starting
18 at page 21.

19 And again, the Federal Government had
20 been putting forward the theory that really, one should
21 compare the Prothonotaries to some senior tribunal
22 appointments within the federal system.

23 And what Special Advisor Cunningham
24 said is he recognised that the senior federal tribunal
25 community does have and exercise some broad

April 29, 2016

1 adjudicative power, although within given areas, and
2 they are people of high level experience and ability.
3 He had difficulty accepting that they were an
4 appropriate comparator.

5 You know, the whole theory of
6 administrative tribunals is that they are an arm of
7 Government. That's what the *Ocean Port* case says.

8 And really, the federal government is
9 free to give them as much or as little independence as
10 they wish at the end of the day, subject to *Charter*
11 considerations which in that area is not really that
12 much of a constraint, and to pay them as much or as
13 little as it wishes.

14 And although those are very important
15 functions, they are typically specialised and confined
16 to a certain area.

17 Members of the Judiciary are required
18 to be generalists and are required to be treated
19 independently, as a matter of constitutional principle.

20 Special Advisor Cunningham, like Adams
21 before him, rejected the Federal Tribunal as the most
22 appropriate comparator.

23 He notes, and this is down towards the
24 bottom of the page, that Prothonotaries are full
25 judicial officers; they have the same immunity from

April 29, 2016

1 liabilities, judges. They hold office during good
2 behaviour until age 75, like judges.

3 They exercise many of the same powers
4 and functions as Judges of the Federal Court in areas
5 of admiralty law and Intellectual Property, as well as
6 in other areas. They are called upon to make important
7 and expensive substantive decisions.

8 I believe Prothonotaries can make *in*
9 *rem* orders against chips and so on. So it's not
10 confined to the \$50,000 civil trial jurisdiction.

11 So Special Advisor Adams again found
12 that the most relevant comparators were the Provincial
13 Court Judges and Masters in the jurisdictions that use
14 them. And you find that on page 22, in the middle of
15 the page.

16 So I am reading here:

17 *"To me, a more appropriate*
18 *comparator ought to be Provincial*
19 *Masters."*

20 Although he doesn't rely on the
21 Traditional Masters in Ontario because there are so
22 few.

23 He said:

24 *"While it is true, as my*
25 *predecessor point out, that some*

April 29, 2016

1 *Masters across Canada have*
2 *benefited from the push by*
3 *Provincial Court Judges for parity*
4 *with Superior Court Judges'*
5 *salaries, the positions and the*
6 *nature of their supportive work*
7 *leads me to the conclusion that*
8 *Masters in Alberta, British*
9 *Columbia and Manitoba are a close*
10 *comparator in terms of*
11 *responsibilities undertaken. In*
12 *fact..."*

13 And this gets to a second point:

14 *"... the best comparator may very*
15 *well be the Judges of the Federal*
16 *Court."*

17 So those are the two relevant.

18 One to the Provincial Judges and
19 Masters, where there's an equivalency.

20 And then the other important
21 comparator is the work of the Federal Court Judges,
22 where there isn't an equivalency, and the
23 Prothonotaries have never said there should be an
24 equivalency in recognition of the broader jurisdiction
25 of Federal Court Judges.

April 29, 2016

1 But if you look at the importance of
2 the Prothonotaries within that system and the degree of
3 overlap, even though it is right and proper that there
4 be a differential and the Federal Court Judges be paid
5 more, at the end of the day the Special Advisor
6 recommended that 80 percent was the right figure.

7 And you see that at page 23 of the
8 report. And he takes notice of the comments that have
9 been made by Justice McKay and then the Federal Court
10 of Appeal, that it was really only the extraordinary
11 circumstances of the global financial crisis that
12 prevented the Adams recommendations from being
13 implemented five years earlier.

14 And he notes on page 24 the factor
15 that I mentioned previously. He says, this would be
16 about the fourth line down:

17 *"I also note that at 80 percent,*
18 *they will be in acceptable range of*
19 *the salaries of Provincial and*
20 *Territorial Masters in relation to*
21 *Federal Court Judges' salaries. Of*
22 *course, I am mindful as well of the*
23 *incomes of private sector lawyers*
24 *appearing regularly before*
25 *Prothonotaries, and the importance*

April 29, 2016

1 *of not allowing the disparity to*
2 *impact on the dignity of the*
3 *Office.”*

4 So there's two Commission processes
5 that have recommended 80 percent on the salary side.

6 Since 2013, Masters and Provincial
7 Court Judge salaries have only increased, and that is
8 captured in the submissions of the Prothonotaries.

9 And we have a chart and I will just
10 give you the reference at paragraph 72 of the Main
11 Submissions.

12 And just in terms of tracking that
13 average, the numbers given as of April 1, 2015 are
14 provided. And if you were to track that average, it
15 would be, I believe 83.9 percent on a national basis.

16 And if you were to take the average
17 only of Provincial Masters in the three western
18 provinces that use them, leaving aside Ontario, that
19 would be 86.2 percent, and it's those numbers which
20 gave the Prothonotaries to suggest a range that it has
21 put before you of a recommendation that their salaries
22 be increased to somewhere in the range of 83 to 86
23 percent.

24 I mentioned the report of Commissioner
25 Bannock, and that report is found in the

April 29, 2016

1 Prothonotaries' book of documents at Tab 1. And I have
2 given you already, perhaps the bottom line of that
3 report which is that Commissioner Bannock recommended
4 that the Case Management Masters be brought up to the
5 same level as the one remaining Traditional Master, and
6 the large number of Provincial Court Judges in Ontario,
7 and that that would work out to about 92 percent of the
8 Superior Court Judges salary.

9 And if I can perhaps just take you to
10 a couple of the points that are made along the way in
11 that report.

12 I do commend that entire report to
13 you. It's a very good history and with a high quality
14 of analysis. And it is the most recent report tracking
15 the history of the Office of Master and analogous
16 offices and also what has been going on with their
17 compensation across the country.

18 It also deals in some detail with the
19 logic and the reasoning for why you would compare a
20 Master with a Provincial Court Judge, even when they
21 may have different types of cases.

22 There are some provinces like Ontario;
23 for example, where Provincial Court Judges will be
24 doing exclusively either criminal or family law, what
25 Commissioner Bannock finds is it's not so much the

April 29, 2016

1 subject matter of the jurisdiction as the nature of the
2 Office and the complexity of the issues, and so on.
3 And he finds that that's a valid comparison, even where
4 there are some differences in subject matter.

5 If I could ask you to refer to pages
6 79 through 81 of that report, there is a heading and
7 about a two to three page analysis of the
8 Prothonotaries, because Commission Bannock did have the
9 advantage of having the Adams and the Cunningham
10 reports before him.

11 So just above the heading for
12 "Prothonotaries" there's a paragraph in which he
13 expresses his conclusion on Provincial Court Judges,
14 and it's worth noting that as well.

15 *"For all of the reasons discussed,*
16 *I have concluded that Traditional*
17 *Masters (by then one remaining*
18 *Ontario), Superior Court Judges,*
19 *albeit with broader jurisdiction,*
20 *and Provincial Court Judges are*
21 *excellent comparators for the*
22 *Office of Case Management Master.*
23 *As a result, their respective*
24 *levels of remuneration must carry*
25 *significant weight in my assessment*

April 29, 2016

1 of what constitute fair and
2 reasonable remuneration for its
3 Office holders."

4 He goes on to analyse Prothonotaries

5 as:

6 "Federal Prothonotaries are good
7 comparators for Case Management
8 Masters, since both Offices have
9 their origins in the same
10 historical Office of Master, which
11 had been brought over from the
12 U.K., and therefore play analogous
13 judicial role. In fact, because of
14 their similar roles, the
15 independent remuneration
16 Commissions for the Federal
17 Prothonotaries have looked to the
18 offices of various Provincial
19 Masters for guidance in their
20 reviews."

21 And I recently will not read it all
22 out, but throughout pages 80 and 81, going on to 82, a
23 detailed review is conducted of the Adams and the
24 Cunningham processes, and of the points of comparison.

25 And in particular, the second

April 29, 2016

1 paragraph of page 81 notes that:

2 *"The Federal Prothonotaries*
3 *conduct work that is not only*
4 *judicial in nature but also*
5 *essential to the efficient*
6 *management and timely disposition*
7 *of proceedings before the Federal*
8 *Court."*

9 And that's very much true of the Case
10 Management Masters in Ontario.

11 This is the same role that Case
12 Management Masters perform, as did Traditional Masters
13 before them, in Superior Court of Justice.

14 Like Case Management Masters who
15 exercise a significant subset of the powers and
16 functions of a Superior Court Judge, the Federal
17 Prothonotaries have many of the powers and functions of
18 a Federal Court Judge.

19 And at the bottom of page 82,
20 Commissioner Bannock says that he's convinced that the
21 Federal Prothonotaries occupy a position that is fully
22 comparable to the Office of Case Management Master,
23 albeit in a different Court, and therefore concludes
24 that they are a good comparator.

25 At page 100, it's reiterated in the

April 29, 2016

1 third paragraph that the Federal Prothonotaries have
2 proven to be a useful comparator. And again the
3 comparisons are set out.

4 And at page 103, this is now the final
5 concluding paragraph of the report:

6 *"The evidence of the functions in*
7 *jurisdiction of Case Management*
8 *Masters demonstrates that fair and*
9 *reasonable remuneration for these*
10 *members of the Judiciary must be at*
11 *the same level that has been*
12 *provided to Traditional Masters and*
13 *Provincial Court Judges..."*

14 Et cetera, et cetera.

15 And it's noted that this conforms with
16 the level of remuneration provided to the Federal
17 Prothonotaries, as well as Masters in the western
18 provinces.

19 And if I can perhaps give one final
20 reference in that report, I mention the analysis of the
21 Provincial Court Judges versus Case Management Masters.

22 Although they exercise different areas of
23 jurisdiction, that is captured in a couple of
24 paragraphs at page 69 of the report.

25 And it's noted, this will be the

April 29, 2016

1 second full paragraph:

2 "As has previously recognised in
3 relation to predecessor offices,
4 the legal issues that Case
5 Management Masters deal with are
6 not trifling in nature.
7 They address complex matters in
8 both civil and family law that can
9 have a profound impact on the lives
10 of individuals and the success of
11 businesses in Ontario.
12 Their lack of criminal law
13 jurisdiction is only relevant to my
14 review to the extent that it
15 demonstrates that it demonstrates
16 that Case Management Masters
17 operate within a subset of Superior
18 Court Judges' full jurisdiction.
19 It does not however invalidate the
20 comparison to either Provincial
21 Court or Superior Court Judges."

22 In the respectful submission of the
23 Prothonotaries, the comparison to Military Judges in
24 the federal system that the Federal Government wishes
25 to draw is less helpful to the Commission.

April 29, 2016

1 First of all, the Military Judges are
2 in a process, and we don't know the outcome of that
3 process, so it should not be assumed that the result of
4 that will be that they will remain at their current 76
5 percent. It may well be that that process leads to an
6 increase for them.

7 But perhaps more fundamentally, the
8 Military Judges operate within a rarefied and somewhat
9 closed system.

10 It's my understanding that it's
11 essentially the military lawyers who are the people who
12 become Military Judges rather than the general Bar, as
13 would be the case for Prothonotaries.

14 That of course by no means minimises
15 the importance of the work they do and the importance
16 of their jurisdiction, which does extend to Court
17 Martials and matters analogous to the Criminal Law.

18 They have a very important role to
19 play; it's just that it's hard. They're such a small
20 group; there's only four of them and they operate
21 within this closed system. It's a hard to draw many
22 comparisons.

23 I do note that Special Advisor Adams
24 had been somewhat wary of looking to the Ontario
25 Traditional Masters because there were only two, or

April 29, 2016

1 maybe it was one by the time he was looking, and he
2 said that's hardly a robust comparator because the
3 group is so small.

4 Well, that same logic would apply to
5 the Military Judges when it comes to the salary issue.

6 Now, I note a point of difference
7 perhaps with the Federal Government in that it's the
8 submission of the Prothonotaries that there has been
9 some difficulty in attracting outstanding candidates,
10 and this is captured in the Reply Submissions of the
11 Prothonotaries, at paragraph 19.

12 In order to be the most effective in
13 this Office, a candidate should be somewhat familiar
14 with Federal Court practice, preferably bilingual and
15 certainly willing to travel extensively. That's a key
16 component of the job. That's in the Main Submissions,
17 paragraph 69, that those points are made.

18 And what's recorded in paragraph 18 of
19 the reply submission is that in a 2013 process in which
20 the Chief Justice was looking to, in effect, identify
21 and have a pool of potential candidates ready to be
22 appointed, there was a particular problem in Ottawa.

23 Initially, in Ottawa, it had been
24 posted as a "bilingual required", which makes sense.
25 It's the Nation's Capital, it's a bilingual Court, and

April 29, 2016

1 is available, it is not only attractive to
2 Prothonotaries, it also enables the Court to smooth out
3 its workload, and in particular deal with vacancies
4 which on the current model, every time there is a
5 vacancy, that's a sixth of the capacity of the Court.

6 It's particularly important to be able
7 to do that, given that there are many long running
8 complex cases in which the Prothonotaries exercise the
9 case management function.

10 I mentioned the *Daniels* litigation
11 about Metis and non-status Indians earlier in my
12 presentation and how that took seventeen years.

13 If you were in a position where a
14 Prothonotary is able to move from full time to
15 supernumerary status, he or she may then be able to
16 retain the case management role, rather than asking a
17 new Prothonotary to go through the learning curve on
18 the file, and that enable you to have continuity.

19 And I do note and ask you to take note
20 of this, that the Adams Report did recommend that
21 supernumerary status be made available. And that's at
22 Tab 32, page 64 of the report.

23 It is recognised by the Prothonotaries
24 that there would be details to be worked out on that,
25 and I think that the recommendation requested as set

April 29, 2016

1 out in the submission is for there to be further
2 dialogue around that.

3 I can deal, I think, with incidental
4 allowance quite quickly.

5 We note that the Federal Government
6 has agreed to an allowance of \$3,000 per year.

7 The perspective of the Prothonotaries
8 would be that it really should be at the same level as
9 the Superior Court Judges of \$5,000 per year, because
10 the needs are functionally the same.

11 And that is particularly true if the
12 Prothonotaries are asked to bear the burden of funding
13 one-third of their costs, their representational costs
14 in the Quadrennial Commission process.

15 One way in which costs can be
16 partially offset is if you have an association and used
17 the associations that are able to cover some of those
18 costs. There's really not anything more to say on that
19 subject.

20 So, let me move to the final area
21 which is the area of representational costs.

22 And again I think I can probably be
23 fairly brief on this because we did have a preliminary
24 motion and a teleconference call, and I know that the
25 members of the Commission are up on the issues of that

April 29, 2016

1 because of that previous activity.

2 But just to make perhaps the most
3 salient points.

4 The Prothonotaries are a very small
5 group and I respectfully submit that their input is not
6 just appropriate but necessary to the process.

7 Frankly, the Office of Prothonotaries
8 is not well-known or well understood.

9 And with both of the previous Special
10 Advisors, and I think in this context as well, it's
11 helpful to the process to have them attend and be able
12 to talk about what kinds of cases they do, what their
13 workload is, how they fit into the Court, et cetera, et
14 cetera.

15 The Cunningham Report deals with this
16 issue in the most depth.

17 Both Special Advisor Adams and Special
18 Advisor Cunningham did recommend that the full
19 representational costs of the Prothonotaries be
20 reimbursed.

21 And I can ask you to go back to the
22 joint book of documents, at Tab 33, that's the
23 Cunningham Report. It is at the end of the body of the
24 report, so that's page 33 to 34.

25 What happened before Special Advisor

April 29, 2016

1 Cunningham and Special Advisor Adams was that the
2 Federal Government made an *ex gratia* payment of
3 \$50,000, but in both cases that proved insufficient for
4 all the work that needed to be done, and in both cases
5 the results was that, as you know from the preliminary
6 submissions, that Prothonotaries had to cover in the
7 range of about \$5,000 each, personally, of their costs.

8 Costs were kept low by the
9 Prothonotaries themselves doing as much of the work as
10 they reasonably could. And that's noted by Special
11 Advisor Cunningham.

12 He says at page 33:

13 *"I accept that much of the work in*
14 *preparing material for this review*
15 *has been undertaken by the*
16 *Prothonotaries themselves in an*
17 *effort to limit cost. Nevertheless,*
18 *I recognise that the ex gratia*
19 *payment was intended to partially*
20 *defray their costs and not as full*
21 *indemnification. I recommend that*
22 *the Government reimburse the*
23 *Prothonotaries for all reasonable*
24 *legal fees and costs beyond \$50,000*
25 *previously advance, up to a maximum*

April 29, 2016

1 *of \$80,000 including the \$50,000."*

2 And that was on the basis of advice
3 that that was the amount that had been incurred up to
4 that time. He just wanted to make sure that there was
5 a cap.

6 I am in a position to advise in terms
7 of this round, that it is certainly not in excess of
8 that amount for the Prothonotaries.

9 Special Advisor Cunningham says he's
10 satisfied, given the amount of work that the
11 Prothonotaries have done themselves; their expenses
12 have been prudently incurred, as the Chief Justice had
13 noted:

14 *"By having to perform much of the*
15 *work themselves; there's been a*
16 *degree of disruption of the work of*
17 *the Court."*

18 It really is not ideal because of the
19 limitations on funding, to have the Prothonotaries
20 taking a large role of the preparation of materials,
21 which you know, I am sure they're working evenings and
22 weekends, but we all know that judges all work evenings
23 and weekends. And inevitably, you're going to have
24 some using up of capacity that would otherwise be
25 available to the core judicial functions.

April 29, 2016

1 Special Advisor Cunningham noted the
2 argument that had been by the Federal Government and
3 the reason for denying full costs in the Adams Report,
4 that while the Superior Court Judges receive only two-
5 thirds, he says:

6 *"While I recognise that Superior*
7 *Court Judges do not receive full*
8 *indemnification, however, there are*
9 *only 1,000 of them, and only six*
10 *Prothonotaries, now five."*

11 And he notes:

12 *"In that vein, Military Judges, a*
13 *small group, received full*
14 *indemnification in their review*
15 *process."*

16 And in the supplementary book we have
17 the Military Judges most recent report from 2012 -- and
18 I am not sure that you need to turn this up -- but I
19 could perhaps just give you the reference. That's at
20 Tab 2, page 9 of 16, and the majority of Commissioners
21 -- there was a dissent in that case observed as
22 follows:

23 *"The Military Judges have asked*
24 *that we recommend the Government*
25 *pay their costs in these*

April 29, 2016

1 *proceedings. It is our*
2 *understanding that the Government*
3 *has always paid reasonable costs*
4 *and do not consider it possible for*
5 *us to propose a particular formula*
6 *for establishing what is reasonable*
7 *in the circumstances.”.*

8 Certainly, the Prothonotaries have no
9 problem with there being a review of one kind or
10 another for reasonableness, whether it's by the
11 assessment process, as under the *Judges Act* or by any
12 other means.

13 But it does appear irrational that
14 apparently the Military Judges, a group of four, have
15 always had their costs covered, whereas as the
16 Prothonotaries, a group of six, now five, the
17 Government sticks with what appears to be a harder
18 line, saying: 'No, it's only going to be two-thirds for
19 you.'

20 And I would respectfully submit that
21 the optics of that are particularly unfortunate, given
22 that the Prothonotaries are the only group in the
23 federal system ever to have brought a judicial review
24 application, and one would hate there to be any
25 perception in the public that the Government takes a

April 29, 2016

1 harder line with Prothonotaries because they have
2 sought to exercise their rights.

3 As I did mention, Special Advisor
4 Adams also made the full costs recommendation, and I
5 will simply give you the page number for that. That's
6 at page 65 of his report.

7 Now, I have worked at academia for
8 some time, which means that I always seem to both start
9 and end a presentation exactly on the hour, and I note
10 that I have come to the end of my prepared remarks and
11 it's been exactly an hour.

12 Subject to any questions from the
13 Commissioners, those are the submissions on behalf of
14 the Prothonotaries.

15 **THE CHAIRPERSON:** Thank you, Mr.
16 Lokan.

17 Je crois que vous avez su mettre en
18 perspectives des aspects que nous devons prendre en
19 considération pour nos recommandations, et je vous en
20 remercie.

21 We will move now to the questions.

22 Margaret, do you have questions?

23 **COMMISSIONER BLOODWORTH:** Just a
24 couple of questions, Mr. Lokan.

25 First, you reject the comparison with

April 29, 2016

1 Military Judges for salary, but you accept the
2 comparison for representational costs.

3 Now, I hasten to add Government has
4 the same but opposite contradiction, I would add.

5 So how do you explain that?

6 Indeed, Adams didn't point to Military
7 Judges so much, but he did point to GCQ-6 and others as
8 comparison similar to the way in which DM-3 is a
9 comparison. Not the determinative comparator, but one
10 of the ones one should consider.

11 And I assume that's because internal
12 comparison for any compensation issue is as important
13 as external comparisons.

14 But can you help me understand the
15 contradiction in those two acceptances or non-
16 acceptance?

17 **MR. LOKAN:** I would respectfully
18 submit that it's not a contradiction.

19 In terms of the salary issue, what
20 we're looking for is, are they apples and apples.

21 And the comments that I made about the
22 closed system and the very small statistical sample,
23 really goes to whether it's an apples-to-apples
24 comparison. That's on the issue of salary.

25 When it comes to the reimbursement of

April 29, 2016

1 costs, it's a basic fairness point. It's not dependent
2 on whether the Military Judges do something very
3 different, whether they have a closed or open system,
4 the extent of their jurisdiction.

5 It's just the fact that there are four
6 of them and there are five Prothonotaries, and the
7 Government choses to fully fund one group for their
8 participation in the process, which is recognised to be
9 appropriate or perhaps even necessary, but for other,
10 takes what appears to be a harder line and says: 'Now,
11 you're going to have to bear a third of the costs
12 yourself.'

13 So when it comes to the funding of
14 costs, I say it is apples-to-apples, just because of
15 the relative size of the group, and it doesn't matter
16 whether their functions are or are not comparable, or
17 some of those other factors mentioned.

18 **COMMISSIONER BLOODWORTH:** I certainly
19 understand the issue of small groups. In fact, I have
20 raised that with regard to the DM-3s yesterday.

21 But I am suggesting that it's not
22 irrational to take into consideration compensation
23 issues, internal comparisons as well as external,
24 recognising that there are always differences in any
25 comparison one makes.

April 29, 2016

1 **MR. LOKAN:** Right. And perhaps from a
2 conceptual level, and I think this may summarise the
3 approach of many Commissions, you do look for the most
4 relevant comparators, and you recognise that there is a
5 range of comparators, and you just find some to be more
6 squarely relevant than others.

7 Special Advisor Adams actually looked
8 at a range of tribunals and he didn't reject it out of
9 hand, looking at government tribunals, but he thought
10 that the tribunals offered were, with respect, much
11 lower on the scale than the ones that should be looked
12 at.

13 He also looked at the Deputy Minister
14 classification and noted that the work of the
15 Quadrennial Commissions and the historical comparison
16 to DM-3s, and there is reference in the Adams Report to
17 the Prothonotaries perhaps looking at the DM-1.

18 But first and foremost on the
19 evidence, both Special Advisor Adams and Special
20 Advisor Cunningham found that if you look at the
21 history going back to 1985, and if you look at the
22 nature of the Officer, the most squarely relevant
23 comparison is the people who are exercising the same
24 role, the same function, which means the Masters in the
25 jurisdictions that use them.

April 29, 2016

1 **COMMISSIONER BLOODWORTH:** My final
2 question has to do with the supernumerary status.

3 I certainly understand that it would a
4 financial benefit to the Prothonotaries, and indeed
5 it's to the financial benefit of Judges. But that's
6 not my understanding why it was created.

7 It was created for the functioning of
8 the courts.

9 I am trying to understand how that
10 falls within our jurisdiction.

11 **MR. LOKAN:** You know, the Federal
12 Government has made the point that it's part of
13 attracting and retaining the most outstanding
14 candidates. So, that is one of your factors.

15 So, making a recommendation within
16 that area, I can't see why there would be a
17 jurisdictional problem, nor did Special Advisor Adams.

18 But they are interrelated issues, of
19 course. It is something attractive to the candidates or
20 to the incumbents.

21 I started my submissions on that
22 point, by saying there's a real public interest
23 dimension to that, and what's most critical is the
24 ability for the Chief Justice to be able to smooth out
25 the caseload, particularly when it leaves such a huge

April 29, 2016

1 gap when a Prothonotary retires.

2 And to be able to deal in the case of
3 growing caseload of the Court, increasingly complex
4 cases, increasingly long-running cases, to have the
5 flexibility, the tool at the Chief Justice's disposal
6 to be able to manage the workload of the Court.

7 And I understand from the written
8 submissions that the Chief Justice will be speaking
9 more on that topic this afternoon.

10 **COMMISSIONER BLOODWORTH:** Thank you.

11 **COMMISSIONER GRIFFIN:** I have no
12 questions.

13 Thank you, Mr. Lokan.

14 **THE CHAIRPERSON:** According to our
15 schedule, I think it's time for a break. We will be
16 back in fifteen minutes.

17 And thank you very much, Mr. Lokan.
18 We appreciate your remarks.

19 Thank you.

20 **--RECESSED AT 10H10 A.M.**

21 **--UPON RESUMING AT 10H30 A.M.**

22 **THE CHAIRPERSON:** I have to tell you
23 that because of our discipline, we can adjust our
24 schedule.

25 I will ask our Executive Director,

April 29, 2016

1 Louise, could you have some proposals for us?

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

4 I guess we're in an envious position
5 in a way, if we can finish a bit earlier on a Friday;
6 that would be great.

7 The difficulties I have is that the
8 Canadian Bar Association will not be here until 11, and
9 Chief Justice Crampton cannot be here until 1:30. So
10 those are set but I do have some time left.

11 So I have approached both Mr. Bienvenu
12 and Mr. Rupar who are being very agreeable.

13 Mr. Bienvenu has agreed to go ahead
14 with his Reply to Mr. Lokan now, on the understanding
15 that he will be able to come back to Justice Crampton,
16 if necessary.

17 And Mr. Rupar has agreed to respond to
18 Mr. Nuss now, and maybe to put before the Commission
19 some other assorted points of agreement that he has
20 with the other parties. And he will Reply to Mr. Lokan
21 and Chief Justice Crampton after Chief Justice
22 Crampton's presentation this afternoon.

23 Have I captured our agreement, I hope?

24 **MR. BIENvenu:** Yes, indeed you have.
25 And I am happy also if we have more time to cover other

April 29, 2016

1 points that I intended to cover.

2 One is a complement of information on
3 Mr. Griffin's question yesterday on process. I would
4 also like to seek a clarification of Mr. Griffin's
5 request this morning concerning Tables 1 and 2.

6 I would like to say a word on the
7 submissions of the parties concerning the stepdown
8 provisions, that's going to take 30 seconds. So, I am
9 happy to fill the time available so that we can all
10 leave early.

11 I am prepared to start by responding
12 to the Prothonotaries' presentation.

13 **THE CHAIRPERSON:** I understand that
14 everybody agrees.

15 Maître Bienvenu, à vous la parole.

16 **MR. BIENVENU:** Thank you very much.

17 **---REPLY SUBMISSIONS FROM THE JUDICIARY:**

18 Monsieur le Président, members of the
19 Commission, apart from commending Mr. Lokan, if I may
20 be permitted to do so, for the quality of his
21 submissions on behalf of the Federal Court
22 Prothonotaries -- and I say that in respect of both his
23 written submissions and his oral presentation today.

24 There is only one issue raised by the
25 Prothonotaries on which we think it appropriate to take

April 29, 2016

1 a position and make a submission. And that issue is
2 the issue of representational costs.

3 The Government submits in its Reply
4 Submission at paragraph 112, that the rule of Section
5 26.3 is adequate and sufficient to assist covering the
6 legal costs of the Prothonotaries for participating in
7 this process.

8 With the greatest respect, this is a
9 submission that this Commission cannot accept, and I
10 would like to explain why.

11 I mentioned yesterday in my concluding
12 remarks that the constitutional nature of this process
13 imposes special obligations on the participants in this
14 process.

15 The most basic of these obligations is
16 the obligation to participate in the process, just as
17 the Association and the Council consider it a
18 constitutional obligation for the federal Judiciary to
19 participate in this process by assisting the Commission
20 in arriving at recommendations that are just and
21 appropriate, so too are the Prothonotaries
22 constitutionally obliged to participate in the process.

23 Now, for the process to be a just
24 process there needs to be a level playing field among
25 the participants in the process.

April 29, 2016

1 The Government of Canada has very
2 significant in-house talent and financial resources to
3 devote to its participation in this process.

4 It has in the past elected to seek
5 outside Counsel to participate in this process.

6 This time around it turned to in-house
7 resources; it has significant financial resources to
8 retain outside experts.

9 And I have no doubt that the
10 Government of Canada is allocating financial resources
11 to its participation in this process responsibly.

12 But the fact remains that no one has
13 to reach to his or her back pocket to contribute to the
14 representational cost of the Government of Canada in
15 this process.

16 Taxpayers are paying 100 percent of
17 the Government's representational costs.

18 Now, that is not the position so far
19 as the Judiciary is concerned under Section 26.3,
20 because Judges have to pay, as we know, a third of
21 their representational costs.

22 Now, I will say a few words about the
23 adequacy of this formula as it applies to the federal
24 Judiciary, drawing on our experience in this Commission
25 cycle.

April 29, 2016

1 But it is in our submission, patently
2 clear, that the two-third one-third formula, if it is
3 considered appropriate for a group of 1,000 judges
4 cannot for logical reasons alone be considered
5 appropriate for five Federal Court Prothonotaries.

6 So, for reasons of basic fairness, we
7 submit that the Commission must make a recommendation
8 that this rule be varied insofar as the Prothonotaries
9 are concerned.

10 And perhaps I can amplify the point of
11 the necessity of having a level playing field by
12 illustrating the position in which the Judiciary finds
13 itself, having to face a party that can draw on
14 virtually unlimited resources.

15 The Commission knows that this cycle
16 has been longer and more complex than previous
17 Commission cycles.

18 You are aware that the issue
19 surrounding the Government's initial nominee has
20 detained the parties and required considerable time on
21 the part of the Judiciary to react, and I submit to you
22 that we did quite responsibly to that unexpected
23 development.

24 Then the Commission was presented
25 early in the process with the Government's request for

April 29, 2016

1 a PAI study.

2 And coming as it did at the outset of
3 the process, we had to provide context for Commission
4 members, appropriately to consider that request.

5 So, we had to file submissions that
6 were lengthy submissions, and you know, someone has to
7 pay for the preparation of these submissions.

8 And the same can be said in respect of
9 the Government's Motion to Strike paragraphs in our
10 written submission.

11 The same can also be said of the
12 Government's decision to re-litigate the filters
13 applicable to the CRA data. That has required the
14 Judiciary to retain Ms. Haydon so that the Commission
15 would benefit from an independent expert's opinion on
16 the questions raised in the Pannu Report.

17 So, we are not seeking a
18 recommendation that the general rule of Section 26.3 be
19 varied insofar as it applies to the Judiciary, but we
20 submit that it would be just and appropriate for the
21 Commission to consider recommending that at least the
22 additional resources that had to be committed to deal
23 with the extraordinary points that I have mentioned, be
24 fully reimbursed to the Judiciary, which would simply
25 put it in an equivalent position that it was as

April 29, 2016

1 compared to the previous Commission cycle.

2 So, that is what I have to say on the
3 question of the Prothonotaries presentation.

4 By way of background, and the
5 Commission has its own resources to ascertain the
6 position, but the history of the issue of
7 representational costs is the following.

8 The Drouin Commission recommended that
9 the Government should be responsible for payment of 80
10 percent of the Judiciary's total representational
11 costs.

12 That is a recommendation that the
13 Government rejected and instead the *Judges Act* was
14 amended to provide for 50 percent of funding for the
15 Judiciary's representational costs.

16 The question of representational costs
17 was raised again before the McLellan Commission, and
18 there significant resources had to be expended by the
19 parties on experts.

20 And the McLellan Commission
21 recommended that the Government pay 100 percent of the
22 Judiciary's disbursements, including expert reports,
23 and two-thirds of its legal fees, and the Government
24 rejected that recommendation and instead adopted the
25 rule that is presently in the *Judges Act*.

April 29, 2016

1 Representational costs were discussed
2 again before the Block Commission but no recommendation
3 to vary the rule of Section 26.3 was made by the Block
4 Commission, and cost was not discussed before the
5 Levitt Commission.

6 So that's on the question of costs.

7 Mr. Griffin, yesterday you asked me to
8 clarify what the Judiciary was expecting of the
9 Commission in relation to its submission on process
10 issues.

11 And there is one element of
12 information that I would like to bring to the attention
13 of the Commission in respect of the parties' position
14 on process.

15 The Commission know by now that the
16 Judiciary has always defended the position that the
17 Commission has a fundamental role as guardian of this
18 process, and that the best way to avoid litigation
19 before the courts is to build through successive
20 reports of the Commission, and the accumulated insight
21 of these reports, a better understanding of what is
22 expected of the parties as regard process.

23 Now, the point of information I wanted
24 to bring to the Commission's attention is that the
25 Government, even though it once took the position that

April 29, 2016

1 the Commission has no role as regards process, no
2 longer disputes the ability of the Government to
3 comment on process.

4 And you will find that position
5 communicated to the Commission in the Government's
6 letter of 11 March 2016, addressed to Ms. Meagher. And
7 that was a letter exchanged in the context of the
8 Government's Motion to Strike.

9 Then in the second paragraph of the
10 letter we read the following sentence:

11 *"The Government does not challenge*
12 *the Judicial Compensation and*
13 *Benefits Commission's ability to*
14 *consider process issues."*

15 The other point I mentioned was the
16 question of the stepdown provision.

17 The Government indicated at paragraphs
18 169 to 172 of its Main Submission that it will be
19 asking the Commission, is asking the Commission to
20 recommend certain amendments to the stepdown provisions
21 in Section 43.2.

22 That issue was not raised by Mr.
23 Rupar, and I just want to give the Commission our
24 position on this.

25 Section 43.2, as it stands allows

April 29, 2016

1 chief justices who have served for at least five years
2 to step down from their function as chief justice and
3 serve as a puisne judge, yet still receive an annuity
4 on retirement based on their salary as chief justice.

5 The section currently does not cover
6 senior judges of the territorial courts, nor does it
7 catch chief justices or senior judges who step down to
8 a different court, such as a chief justice who steps
9 down to become puisne judge of an Appellate Court.

10 In both cases the judge will receive
11 an annuity based on their salary as puisne judge and
12 not as chief justice.

13 So the Judiciary supports the proposed
14 amendments by the Government, but what we would ask
15 further is that the Commission recommend that any such
16 amendment be made retroactive to April 1st, 2016,
17 because as indicated in the submission of my friends on
18 behalf of the Government, there are two active Judges
19 who would benefit from this proposed amendment, and we
20 would like to ensure that they are covered by the
21 amendment.

22 Now, Mr. Griffin, you asked this
23 morning that we provide the Commission with amended
24 tables 1 and 2 from our Main Submission, and I
25 understood your request to be that you would like us to

April 29, 2016

1 add a column for judicial salaries, so that would be to
2 call them to Table 1?

3 **COMMISSIONER GRIFFIN:** What I asked
4 for was a table that showed the actual salary in
5 addition to the Block comparator and the total average
6 compensation for those historic years.

7 **MR. BIENVENU:** So, the actual salary
8 of puisne judges?

9 **COMMISSIONER GRIFFIN:** Correct. And
10 the other thing I had asked you for yesterday, which I
11 suspect is part of your request, was I simply wanted
12 the values that underlie figure 1 at Tab E of your
13 Compendium, for the green line judicial salary and the
14 Block comparator line.

15 But I wanted those simply to compare
16 it to what we had in other tables, to the extent that
17 you've computed future values for those. That's all.

18 **MR. BIENVENU:** The one last point I
19 may mention, Monsieur le Président, is on the question
20 of the Appellate differential.

21 Maître Nuss mentioned in his
22 submission yesterday that as regards that question, the
23 Association and Council have always taken a neutral
24 position.

25 I would just like to confirm that that

April 29, 2016

1 remains the position before this Commission.

2 **LE PRÉSIDENT:** Merci. Merci, Maître
3 Bienvenu.

4 Louise, maintenant?

5 **MS. MEAGHER:** Mr. Rupar, are you
6 prepared to proceed with some of your points?

7 **MR. RUPAR:** I am. What I propose to
8 say we have approximately ten minutes before 11
9 o'clock, and I am happy to get started now, but I would
10 ask maybe if I could just finish off and go a few
11 minutes past eleven, if that's acceptable?

12 **THE CHAIRPERSON:** Is that acceptable
13 for everybody?

14 --(no response)

15 **MR. RUPAR:** I can take one chunk of
16 things I was going to deal with, and then leave this
17 afternoon to deal with the reply to statements from Mr.
18 Lokan and from Chief Justice Crampton. So reduce what
19 we have to do this afternoon.

20 **THE CHAIRPERSON:** Thank you, Mr.
21 Rupar.

22 **--REPLY SUBMISSIONS BY THE GOVERNMENT OF CANADA:**

23 **MR. RUPAR:** What I would like to do is
24 start with some comments with respect to the Appellate
25 Judges' differential. And I note the informal setting

April 29, 2016

1 we have in the Commission today.

2 Mr. Nuss is beside me, so hopefully we
3 will still be friends at the end of this!

4 The difficulty structurally with
5 respect to what we heard yesterday has to do with
6 fitting it within the criteria of the legislation.

7 As we understand what we heard
8 yesterday, it's more of a hierarchal issue that the
9 Appellate Judges are discussing, and they made their
10 point with respect to the various divisions within
11 Canada, and how there are various divisions within
12 pull-up levels in a number of countries.

13 But it's the linking of that issue to
14 the statutory criteria where we seem to have a bit of a
15 gap.

16 We don't see it as certainly fitting
17 within the first issue of the economic health of Canada
18 that, to what extent it was dealt with yesterday.

19 Financial security and independence of
20 the Judiciary, we don't understand there to be much of
21 an issue that if the Appellate Judges do not get the
22 differential of three percent, and they find that their
23 independence will be somehow at stake.

24 We didn't hear any evidence, really,
25 with respect to failure to attract outstanding

April 29, 2016

1 candidates to the Appellate Judiciary because the
2 differential has not been implemented.

3 So, we're left in our submission with
4 the fourth category which is the objective category,
5 sort of the broad, open-ended one. But it has to be
6 objectively based.

7 And where we have the problem here is
8 finding the objective basis for something so subjective
9 as a hierarchical structure.

10 It seems to be more of a subjective
11 matter in our submission than it is an objective
12 matter, and we just don't see the basis for that within
13 the legislation, to allow for the differential.

14 So that's an opening statement, where
15 we see the difficulty when we have to put it within the
16 framework of the legislation.

17 But I will say, and Mr. Nuss yesterday
18 mentioned the longstanding position of the Government
19 that there should not be a differential in pay between
20 the Trial and Appellate Judges, and that position is
21 maintained.

22 We of course fully understand that the
23 roles of the Trial and Appellate Judges are different
24 in nature.

25 However, we would respectfully suggest

April 29, 2016

1 that they are not different in importance.

2 Appellate Judges of course make final
3 decisions on questions of law for the most part, in
4 their jurisdiction, subject to appeals.

5 The Supreme Court of Canada where
6 Trial Judges have primary roles to determining
7 questions of fact, determination of questions of law,
8 as well, difficult task of dealing with credibility.

9 So, much like the discussion was
10 yesterday between the DM-3 category, the judges,
11 there's a difference, a distinction between a Trial
12 Judge and an Appellate Judge. They both have equally
13 important tasks in the Judiciary and in our structure
14 of Canadian justice. We just see them as equally
15 important in that frame.

16 Let me deal with a couple of other
17 points.

18 As I mentioned, we do not understand
19 the doctrine of *stare decisis* or hierarchy to be a
20 basis for making salary differentials between Appellate
21 Judges and Trial Judges.

22 The hierarchy does not impact
23 responsibility or the independence of individual
24 judges.

25 It is our view that all judges are

April 29, 2016

1 equivalent in terms of obligation, to fairly,
2 impartially and independently decide cases. And there
3 is simply no question in our minds and in our position
4 that both the Appellate level and the Trial level do
5 this impeccably.

6 We do not wish to be seen as
7 suggesting that Trial Judges should be perceived in the
8 public to be of equal importance to the work done by
9 Appellate Judges. And there is some difficulty with a
10 differential leading to that conclusion.

11 Now, there was some discussion
12 yesterday about factors that have been raised in the
13 past that we have turned to to suggest that the
14 differential is problematic. One of them was a lack of
15 consensus among the approximately 1,100 Superior Court
16 and federally appointed Trial and Appellate Judges.

17 And I just note as an example, the
18 Trial Judges Association of Ontario has reiterated
19 their concern with this and put in written submissions,
20 as they have for the past Commissions as well.

21 I also note the letter of the
22 Honourable Justice Gordon Campbell from the Prince
23 Edward Island Supreme Court, where he sets out in
24 detail concerns that he has.

25 He mentions that there will be a

April 29, 2016

1 division, in his third paragraph, among the Judiciary
2 that could occur. So, there is that sort of evidence
3 before this Commission.

4 We do re-iterate that there is, to
5 some degree, in Ontario in particular, a movement where
6 Trial Judges do have some appellate roles. They do at
7 times sit on Appellate Courts.

8 And the fact that Trial Judges bear
9 sole responsibility for their decisions is a factor as
10 well, that comes into play when we're trying to
11 determine this issue.

12 So, to conclude, we do of course rest
13 on the submissions we made in our written material, but
14 the overriding concern is that we see both levels of
15 Judges who are federally appointed to be equally
16 important, equally important task within our judicial
17 system, and perform that to their utmost ability, and
18 do so in a manner which is in accordance with the high
19 office that they hold.

20 What I would like to do in a few
21 minutes, if I could, is just talk about some of the
22 other matters that have been raised in written
23 submissions that we have generally agreed to, and I
24 will just go through those, and then we will leave for
25 this afternoon the issue of the Prothonotaries and

April 29, 2016

1 Chief Justice Crampton's discussion with us.

2 Mr. Bienvenu talked briefly a moment
3 ago about the stepdown amendments, and as we said in
4 our written submissions, we agree in general to this
5 and we will look forward to a recommendation from the
6 Commission on that matter.

7 And I can say with respect to what Mr.
8 Bienvenu raised with retroactivities, retroactive to
9 April 1st, 2016, if the Commission makes that sort of
10 recommendation; that would be certainly taken into
11 consideration.

12 Another issue that has been raised in
13 the written submissions that I will just reaffirm on
14 the record is the removal allowance for the Labrador
15 Judge that was raised by Mr. Justice Stack, and we of
16 course will agree.

17 We generally agree with that, as well,
18 and look forward to the Commission's recommendation on
19 that matter, as we do with respect to the compensation
20 of the Chief Justice of the Court Martial Appeal Court
21 of Canada, we generally agree with those submissions,
22 and look forward to your recommendation.

23 The fourth point I will raise is the
24 submission of Mr. Justice Mandamin and his
25 representations with respect to Provincial Court Judges

April 29, 2016

1 moving to Superior Court, Federal Courts, and
2 transferability of pensions.

3 And in his very thoughtful
4 submissions, Justice talks about the need to have a
5 more seamless movement between the two.

6 He explains that the inability to
7 transfer pension credits represents a significant
8 barrier that affects indigenous provincial and
9 territorial court Judges disproportionately.

10 And it's without question that the
11 Government is certainly very keenly aware of the need
12 for full representation of all the populations of
13 Canada before the Courts, and a recruitment of
14 indigenous Judges, as well as Judges from other
15 minority populations, and we will certainly look
16 forward to working on that issue.

17 We simply raise that it's not quite a
18 simple matter of amending the Federal Act. It would be
19 provincial legislation that would be involved as well,
20 and there would be a number of factors that have to be
21 looked at in that light.

22 And I simply add on this point that
23 the Government clearly agrees that judicial annuity is
24 an intricate part of the compensation, that the
25 Commission's consideration is essential before any

April 29, 2016

1 changes can be made to it.

2 The Government will therefore consider
3 in the context of the Commission's report any
4 recommendations made to the question of federal
5 judicial annuity, any changes to the structure that may
6 be considered necessary to maintain the financial
7 security of federally appointed Judges.

8 The Government does suggest however,
9 that the need to ensure a more diverse judiciary and
10 one that specifically encourages indigenous candidates
11 to apply for appointment, may be addressed through
12 other policy means.

13 And I believe that we have now covered
14 the other matters that were raised in the submissions.

15 If I just have one minute.

16 There are a couple of matters that
17 were raised yesterday afternoon by Commissioner
18 Bloodworth.

19 I just wanted to talk about the pre-
20 appointment income, and then we will be done for this
21 part, then we will do the Prothonotary response this
22 afternoon.

23 The first point I would like to make
24 clear is that if the Commission is of the view of
25 accepting the CPI is more acceptable than IAI; that

April 29, 2016

1 would not be retroactive. That would be going forward.

2 As we know, the statutory indexing for
3 IAI took place on April 1st, and there would be no claw
4 back provisions suggested if CPI would be recommended
5 and accepted, that would be moving forward starting
6 April 1st of 2017. So there would be no issues there.

7 Now, with respect to the pre-
8 appointment income, I was asked yesterday, how is this
9 useful? And I gave a brief response.

10 I would just like to add a bit of
11 precision to that.

12 And what I would like to take you to
13 is page 92 of McLellan Report, because it's really
14 quite instructive as to what was said there. And I
15 won't ask you to necessarily drag it up if it's not
16 available to you. But in Volume 2 of the joint book of
17 documents, it's Tab 29, and where we're looking at is
18 the first main paragraph.

19 And if I could have the Commission's
20 indulgence, I would like to read about two paragraphs
21 because the McLellan Commission really encapsulates
22 where we say this should be helpful. And what they
23 said was this:

24 **COMMISSIONER GRIFFIN:** What page are
25 you at?

April 29, 2016

1 **MR. RUPAR:** I am sorry, Commissioner
2 Griffin. It's page 282 of the joint book.

3 And what that Commission said was
4 this, after some preliminary background they say:

5 *"As a result, we strongly recommend*
6 *that some joint method in*
7 *conjunction with the Government and*
8 *the Association and Council be*
9 *sought to provide an appropriate*
10 *and common information statistical*
11 *base, the accuracy of which can be*
12 *made acceptable by both parties as*
13 *reliable. This information base is*
14 *particularly important with respect*
15 *to the income of self-employed*
16 *lawyers and could be expanded to*
17 *get some appreciation as to the*
18 *income levels of those lawyers who*
19 *are appointed to the Judiciary.*
20 *There are many ways in which this*
21 *might be done. A study by*
22 *independent consultant retained by*
23 *this Commission to report to the*
24 *principle parties could be*
25 *commissioned. Statistical*

April 29, 2016

1 *information could be gathered over*
2 *time from those who are appointed*
3 *to the Bench, in a way that would*
4 *preserve their anonymity and*
5 *privacy. There may be other ways.*
6 *There could be a clearing house for*
7 *information whereby some*
8 *independent authority such as the*
9 *Quadrennial Commission, could*
10 *obtain information from Judges upon*
11 *their appointment by means of which*
12 *their income for three previous*
13 *years could be ascertained and*
14 *other useful information obtained*
15 *from them with respect to their*
16 *motives and expenses incurred on*
17 *accepting their appointment.*
18 *While this information might not be*
19 *useful immediately, over a period*
20 *of the next two Quadrennial*
21 *Commissions it could be very useful*
22 *indeed having regard to the*
23 *expected turnover of Judges during*
24 *that period."*

25 Why that part is important because

April 29, 2016

1 when we look at what the Block Commission was talking
2 about, the Block Commission said that they found it
3 wouldn't necessary be useful. Not useful because it
4 wouldn't provide enough information as to whether or
5 not what was happening was that higher earning
6 candidates were declining over time.

7 But if we take the approach that
8 McLellan has suggested, we would have that information.

9 This isn't something that is going to be a one-year
10 project.

11 This is something that we suggest, as
12 McLellan has recommended, you would go over a series of
13 Commissions, and you would build a database over a
14 series of years, and then you would have the hard data,
15 the hard facts that the Block Commission said was not
16 available, and then you could see if there were
17 patterns over a period of 5, 10 or 15 years, and quite
18 frankly, adjustments can be made if certain factors
19 were to come through that information.

20 And on the other side, if it turns out
21 that the information is not helpful, then we've
22 explored it and we can move on to other areas.

23 Those will be my submissions, subject,
24 as I said yesterday, to the caveat of my colleagues
25 correcting anything that I told you, and we will come

April 29, 2016

1 back after lunch to deal with those errors and
2 omissions.

3 **THE CHAIRPERSON:** Thank you, Mr.
4 Rupar.

5 Louise?

6 **MS. MEAGHER:** Than you, Mr. Chairman.

7 I see the representatives from the Canadian Bar
8 Association are with us.

9 I don't know who wants to proceed
10 first, Ms. Fuhrer?

11 **MS. FUHRER:** I will speak now.

12 **---PRESENTATION BY CANADIAN BAR ASSOCIATION:**

13 **MS. JANET FUHRER:** Good morning, Mr.
14 Chairman and members of the Commission.

15 My name is Janet Fuhrer, and I am
16 President of the Canadian Bar Association.

17 I am here today with my colleague Hugh
18 Wright, who is Vice Chair of the CBA's Judicial
19 Compensation and Benefits Committee, and Sarah
20 MacKenzie, our staff lawyer with CBA Legislation and
21 Law Reform Committee.

22 We thank you for the opportunity to
23 address this esteemed Commission on this important
24 matter. The CBA is a professional association of
25 36,000 members. Our mandate includes seeking

April 29, 2016

1 improvements in the law and the administration of
2 justice.

3 Judicial independence is a
4 foundational, constitutional principle that benefits
5 all Canadians.

6 Our citizens rely upon the high
7 quality of our Judiciary. Its independence is crucial
8 to the administration of justice in Canada.

9 So we are here today to speak with you
10 from this perspective on the issue of judicial
11 compensation.

12 You have received our written
13 submission.

14 I would like to speak briefly about
15 some of the principles that the CBA believes should
16 guide the deliberations of this Commission.

17 My colleague Hugh Wright is here to
18 answer any questions that you may have.

19 The CBA is an objective observer.
20 We're not here on behalf of judges, the Government or
21 any other party.

22 Our sole interest is in protecting and
23 promoting judicial independence in the context of the
24 administration of justice.

25 From a practical perspective,

April 29, 2016

1 Canadians want to know that when they appear in court,
2 the judge will be impartial. Canadians must have
3 confidence that when cases are decided, judges have no
4 incentive in the outcome.

5 This means not only that judges have
6 no personal or financial interest in the case, but also
7 that they are free from concern about whether the
8 outcome of the case will please or displease the
9 government of the day, which provides their
10 compensation.

11 If judges were embroiled in pay
12 disputes with the Government, Canadians could be
13 concerned that judges might be inclined to issue
14 decisions that favour the Government.

15 This is why the independent
16 compensation commissions which serve to depoliticise
17 the determination of judges' compensation are so
18 crucial. The proper functioning of our justice system
19 also depends on a high level of judicial competence.

20 Judges' compensation and benefits must
21 be at a level to attract and retain the most qualified
22 candidates. These people tend to be senior
23 practitioners or practitioners in mid-career who
24 otherwise would be inclined to remain in their current
25 situation, whether private practice, in-house,

April 29, 2016

1 Government, et cetera.

2 In the CBA's view the appropriate
3 measure or comparator to determine the level of
4 judicial salaries is that of lawyers who are senior
5 practitioners and senior public servants who form the
6 pool from which judges tend to be selected.

7 Cost of living indexation ensures
8 sitting judges do not experience erosion in
9 compensation and encourages retention.

10 Attracting candidates for judicial
11 appointment requires judicial compensation to be
12 competitive.

13 This means recommended compensation
14 should be consistent with market conditions.

15 Compensation levels should ensure that
16 Judges and their dependants do not experience
17 significant economic disparity between pre and post
18 appointment levels.

19 And finally, the same principles of
20 judicial independence apply to Prothonotary
21 compensation.

22 Prothonotary salaries and benefits
23 must be at a level to attract the most qualified
24 candidates, be commensurate with compensation for
25 comparable judicial officers in other Courts, such as

April 29, 2016

1 Traditional Masters, and must reflect the respect with
2 which the Federal Court is regarded, although less than
3 compensation for Federal Court Judges.

4 For the Commission to conclude that
5 competing financial priorities are a rationale to
6 reduce or hold otherwise appropriate compensation for
7 judges, the Government must provide the Commission with
8 conclusive evidence of other pressing and competing
9 financial obligations of similar constitutional
10 importance to that of judicial compensation.

11 We urge the Commission when making its
12 recommendations to underline for Government the
13 importance of responding within the statutory timeframe
14 and of complying with statutory process. This applies
15 equally to the statutory deadlines for establishing the
16 Commission and delivering the Commission's report.

17 Unexplained delay erodes the
18 legitimacy of the Commission process with consequent
19 impact on judicial compensation and independence.

20 We also wish to express our support
21 for the 2012 Commission Report recommendation that the
22 Government and Judiciary discuss ways to lessen the
23 adversarial nature of the Quadrennial Commission
24 process. This could perhaps be achieved through pre-
25 hearing discussions, joint submissions, greater use of

April 29, 2016

1 Commission appointed expert, and less use of oral
2 proceedings.

3 Guidance might be found by examining
4 the process for setting judicial compensation in other
5 common-law jurisdictions, as referenced in the 2012
6 Commission report.

7 Finally, we ask the Commission to
8 emphasise in its report that the integrity of the
9 process must be maintained.

10 To that extent, governments
11 persistently fail to embrace fully the Commission's
12 recommendations on judicial compensation and benefits,
13 or politicise the process. That integrity is then
14 compromised.

15 Ultimately, judicial independence may
16 be threatened.

17 Without an impartial and independent
18 judiciary, there can be neither rule of law nor equal
19 justice for all.

20 Je vous remercie de m'avoir donné
21 l'occasion de vous faire part de mes commentaires, et
22 je vous invite à poser vos questions à Maître Wright.
23 Merci.

24 **LE PRÉSIDENT:** Merci, Madame. Louise,
25 je comprends qu'on peut passer aux questions. S'il y a

April 29, 2016

1 des questions...

2 **COMMISSIONER BLOODWORTH:** I don't have
3 any questions.

4 **THE CHAIRPERSON:** No questions. And
5 for you?

6 **COMMISSIONER GRIFFIN:** No, thank you.

7 **Me FUHRER:** Merci beaucoup.

8 **MS. MEAGHER:** I am looking at our
9 schedule and we are quite a bit ahead of time, and I
10 hate to put you on the spot, Mr. Nuss. You are the
11 only person I could see.

12 Are there any others who would like to
13 respond to the CBA?

14 I had undertaken that the Government
15 would not have to respond to the Prothonotaries until
16 Chief Justice Crampton had appeared.

17 **THE CHAIRPERSON:** I understand, Maître
18 Bienvenu, you have a suggestion?

19 **MR. BIENVENU:** I was expecting to
20 respond to the CBA's submission this afternoon, but I
21 am happy if it please the Commission, to do so right
22 now. I am in your hands.

23 **THE CHAIRPERSON:** I think it's a very
24 good idea.

25 **COMMISSIONER GRIFFIN:** If you don't

April 29, 2016

1 feel disadvantaged.

2 **MR. BIENVENU:** No. I don't feel
3 disadvantaged.

4 **--REPLY SUBMISSIONS BY THE JUDICIARY:**

5 The first thing I would like to do on
6 behalf of the Association and Council is to thank the
7 Canadian Bar Association, Ms. Fuhrer, Mr. Wright, Ms.
8 MacKenzie and the many volunteers who support the CBA
9 in its mission, for their contribution to the
10 Quadrennial Commission process.

11 This is an organisation, members of
12 the Commission, that has shown a deep and continued
13 commitment to this process, and it has over the years
14 made submissions to successive Commissions that have
15 demonstrably assisted the Commission in its work and in
16 formulating appropriate recommendations to the
17 Government.

18 As a point of information, in the
19 CBA's submission one of the concerns expressed, and it
20 was repeated this morning in the Association's oral
21 submission, is the importance to abide by the statutory
22 timeframes.

23 And there is a footnote, footnote 14
24 on page 5 that relates to the start date of the
25 Commission, which as I have recalled in my submission

April 29, 2016

1 yesterday, was not respected for reasons of which the
2 Commission are aware.

3 But in that footnote the CBA says the
4 following:

5 *"CBA trusts that this consent that*
6 *is the ability under Section 26.3*
7 *to postpone the date of*
8 *commencement of a quadrennial*
9 *inquiry with the consent of the*
10 *Minister and the Judiciary."*

11 So the CBA in this footnote
12 appropriately expresses its expectation that this
13 consent was secured. The reality is that it was not.

14 The start date was not respected in
15 spite of the Judiciary's urging that the Commission
16 Members be appointed, and I won't repeat what I said
17 about the scope of the guidelines on the conduct of
18 Minister in the context of impending election.

19 In her remarks, Ms. Fuhrer has said
20 that judicial compensation needs to be competitive. Of
21 course, the Commission knows that we support that
22 imperative. It is an imperative if we are going to be
23 able to continue to attract outstanding candidates to
24 the Judiciary.

25 And happily, over the years the

April 29, 2016

1 Commission has benefited from two comparators to ensure
2 competitiveness. One is a status comparator; that is
3 the DM-3. And because it is a status comparator that
4 has nothing to do with the pool of potential appointees
5 to the Bench, it has never been a pool of potential
6 candidates for the Bench.

7 So when the point is made in the
8 submissions of the Government that the DM-3 comparator
9 is inappropriate because it is not a pool of
10 candidates; that is misconceived, because this is a
11 status comparator. It always has been and it should
12 remain as a status comparator.

13 But competitiveness is important for
14 the source of the bulk of appointees to the Bench,
15 which is the private Bar.

16 We have mentioned how fortunate
17 Canadians are to have a Judiciary whose quality is
18 recognised internationally, well, the makeup of that
19 Judiciary is one that comes overwhelmingly from the
20 private sector, and that is why the CBA is right to
21 call the Commission's attention on the need to ensure
22 that judicial compensation is and remains competitive.

23 So, I close as I started, by thanking
24 the CBA and its volunteers for contributing to your
25 work, and that is what I have to say.

April 29, 2016

1 Thank you.

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

4 Louise?

5 **MS. MEAGHER:** Mr. Rupar, did you have
6 any reply to the CBA's presentation or response?

7 **MR. RUPAR:** I don't know. I may have
8 a quick word after lunch. We just have to consult on
9 one or two matters, but it will be very brief, if we
10 do.

11 **THE CHAIRPERSON:** Mr. Nuss, do you
12 feel comfortable if we hear you now?

13 **MR. NUSS:** I think I feel comfortable,
14 but like Mr. Rupar, maybe lunch will make me think,
15 think it over and add a word to that, but if it's suit
16 the Commission and if it's the preference of the
17 Commission that I proceed now, I will try that.

18 **COMMISSIONER GRIFFIN:** If you're
19 comfortable, if you could proceed and if something
20 comes to you over lunch that you'd like to add, I would
21 certainly think that we'd be quite prepared to hear it.

22 **MR. NUSS:** Thank you very much.

23 **---REPLY SUBMISSIONS BY THE CANADIAN APPELLATE JUDGES**

24 **MR. NUSS:** Monsieur le Président,
25 Members of the Board, what we heard in the Reply of the

April 29, 2016

1 Government basically is a reiteration of their
2 longstanding position.

3 We always maintained that Judges of
4 the Appeal Court should get the same salary as Judges
5 of the Trial Court, that the importance of their work
6 is equal.

7 While that could be a position that
8 could be maintained before the Drouin Commission and
9 before the McLellan Commission because there was no
10 recommendation or consideration on the merits of the
11 request for a differential.

12 But once the Block Commission came
13 down with a consideration of this very issue and
14 decided that there was justification for differential,
15 and the analysis of Section 26 of the *Judges Act*, and
16 once that was reiterated by the Levitt Commission, that
17 can no longer be the position of the Government,
18 because then it is doing exactly what it shouldn't be
19 doing.

20 It is coming before an independent
21 body, putting forth all its arguments, and the
22 independent body deciding no, that those arguments are
23 not valid and that the request for differential is a
24 valid one and should be accepted.

25 In the Block Commission report we have

April 29, 2016

1 a discussion of the difference.

2 No one argues that the work of Trial
3 Court Judges is not important.

4 The submissions have consistently, by
5 the Appellate Judges, stressed that work of Trial
6 Judges is important.

7 But the issue is not one of whether it
8 is important.

9 It's a question of where the greater
10 responsibilities lie. And just as the responsibilities
11 of the Supreme Court of Canada are greater than the
12 responsibilities of the Appeal Courts, so the
13 responsibilities of the Appeal Courts are greater than
14 those of the Trial Courts. And that is what merits the
15 differential.

16 That's why the movement from a Trial
17 Court to an Appeal Court is a promotion. That's why it
18 is mentioned as being an elevation, just as moving from
19 an Appeal Court to the Supreme Court of Canada is a
20 promotion and an elevation.

21 And this is set out very persuasively
22 and very thoroughly in the Block Commission Report,
23 starting at paragraph 149. And if I may, I will read
24 from that.

25 *"As discussed below, we do however*

April 29, 2016

1 *believe that there is a substantive*
2 *difference in the role and*
3 *responsibilities of the Judges who*
4 *are appointed to Appellate Courts,*
5 *and that this difference*
6 *constitutes a relevant objective*
7 *criterion within the meaning of*
8 *paragraph (d) of Section 26.1.1."*

9 Now there you have basically, a
10 determination made by a Commission after
11 representations by the parties, by the Government, by
12 the Appeal Court Judges, and I might say by what was
13 mentioned earlier in this report as 18 other
14 interveners in that process before the Block
15 Commission.

16 And further on in paragraph 150:

17 *"With the evolution in Court*
18 *structure described above came an*
19 *evolution in the role and*
20 *responsibilities of an Appellate*
21 *Court and of the Judges appointed*
22 *to it. We can now identify two*
23 *essential functions of a Court of*
24 *Appeal, correcting injustices or*
25 *errors made in the first instance*

April 29, 2016

1 *and stating the law."*

2 So this is developed in paragraph 151.

3 Further:

4 *"The Court of Appeal's primary*
5 *function is the correction of*
6 *injustice or errors made at first*
7 *instance. The focus of this role*
8 *is on the correction of errors of*
9 *law. The standard of review on a*
10 *question of law is that of*
11 *correctness. The consequence that*
12 *on questions of law an Appellate*
13 *Court is free to replace the*
14 *opinion of the trial judge with its*
15 *own."*

16 At 152, we see:

17 *"This error correcting role*
18 *discharges the Courts' obligations*
19 *with regard to the first of its*
20 *client groups, the litigants before*
21 *it. It also discharges part of the*
22 *Courts' obligations towards the*
23 *second client group, the general*
24 *public, by upholding the principle*
25 *of universality which requires*

April 29, 2016

1 *Appellate Courts to ensure that*
2 *same legal rules are applied in*
3 *similar situations."*

4 Going down towards the conclusion of
5 this part:

6 *"Courts of Appeal are therefore not*
7 *only burdened with correcting*
8 *injustices that relate to a*
9 *particular case, but of correcting*
10 *errors that arise from the*
11 *incorrect application of the law by*
12 *a Court of first instance.*
13 *Courts of Appeal not only create*
14 *the decisions which are binding on*
15 *Trial Courts, they ensure that*
16 *those decisions are consistently*
17 *and correctly applied by lower*
18 *Courts."*

19 And then we have at paragraph 153 that
20 the Courts of Appeal state the law. And there's
21 reference to the Supreme Court case of *Hausen v.*
22 *Nicholson*, where the Supreme Court states the
23 specifically important functions of the Court of Appeal
24 as distinguished from the Trial Court.

25 And that is at page 49 where it is

April 29, 2016

1 cited:

2 *"Thus when the primary role of*
3 *Trial Courts is to resolve*
4 *individuals disputes based on the*
5 *facts before them and set of law,*
6 *the primary role of Appellate*
7 *Courts is to delineate and refine*
8 *legal rules and ensure their*
9 *universal application."*

10 So there you have the distinction of
11 the two Courts clearly stated and the importance of the
12 Court of Appeal with respect to the responsibilities it
13 has, not only to the particular litigant before it, but
14 to the general application of the law within the
15 province, the stating of the law and the clarification
16 of any principles which are perhaps not clearly defined
17 up until that point, and also the universal application
18 of the law.

19 We should remember that when
20 references are made in the provinces for an opinion as
21 to what is the state of the law with respect to a
22 particular piece of legislation or proposed
23 legislation, it is the Appeal Court that is asked to
24 give the opinion to the Government, just like in the
25 federal system, it's the Supreme Court that gives the

April 29, 2016

1 opinion to the Government. It is not the Trial Court
2 that does that.

3 So that in this we have the rationale,
4 we have the application of the facts to Section 26 of
5 the *Judges Act* and the clear statement that here is why
6 a differential should be granted.

7 So, with great respect, this
8 repetition or this insistence: 'Well, we said it before
9 and we're saying it again, and we now say it a fifth
10 time before a Quadrennial Commission.' does not really
11 advance this Commission.

12 There has to be, as I said yesterday,
13 the continuity.

14 There has to be a respect for the
15 process of this Commission.

16 And you have a reasoned and thorough
17 analysis of the issue by a Quadcomm Commission such as
18 you have in the Block Report which is again put forward
19 in the Levitt Report, then it seems to me that that is
20 a very persuasive and compelling reason for this
21 Commission to grant the differential.

22 In the Levitt Report, you have also
23 the reference to the *Judges Act* at paragraph 65.

24 A mention was made of Mr. Campbell's
25 submission. It was basically what he repeated before

April 29, 2016

1 the Block Commission, and that was dealt with in the
2 Block Commission Report.

3 I want to mention there's a glitch
4 that came to my attention in re-reading the material in
5 the submission put forth by the Appellate Court Judges
6 and that's at the beginning.

7 Reference is made to the "Levitt
8 Commission recommendation 3". It's at the very
9 beginning in paragraph 1. It really is "recommendation
10 2."

11 When we go to the Block Commission
12 Report we see that the salary of the Appellate Judges
13 is fixed, recommendation 2.

14 And recommendation 3 fixes the
15 salaries of the other Judges.

16 It is in the Block Commission that the
17 differential for Appellate Court Judges is set out at
18 paragraph 3. So, I could ask you to kindly just note
19 that it is recommendation 2 that fixes the salaries of
20 the Judges.

21 That is my reply.

22 With great respect, again I ask that
23 the request for a differential be granted.

24 **LE MEMBRE PRÉSIDENT:** Merci, Maître
25 Nuss.

April 29, 2016

1 Peter or Margaret, do you have a
2 question?

3 **COMMISSIONER GRIFFIN:** No, thank you.

4 **THE CHAIRPERSON:** So Louise, your
5 suggestion, please?

6 **MS. MEAGHER:** We are now faced with
7 what would appear to be a two hour lunch. The lunch is
8 ready. I know it's a bit early, it's just that I don't
9 believe Chief Justice Crampton can be here until 1:30,
10 and the rest of our work depends on hearing him first.

11 **THE CHAIRPERSON:** We will respect the
12 schedule in the sense that we will be back at 1
13 o'clock.

14 **MS. MEAGHER:** 1:30.

15 **THE CHAIRPERSON:** 1:30?

16 **MS. MEAGHER:** Yes.

17 **THE CHAIRPERSON:** Okay. So, it's time
18 for our break for the lunch. Enjoy your lunch.

19 Excuse me. You have a question?

20 **MR. LOKAN:** Thank you. I am happy to
21 call Prothonotary Lafrenière to see if there is any
22 chance that he and the Chief Justice could be earlier
23 than 1:30.

24 My understanding was that that was
25 about as the earliest that they could be here, but if

April 29, 2016

1 there is any possibility of moving that up, I certainly
2 will let Ms. Meagher know.

3 **COMMISSIONER GRIFFIN:** The only
4 question is how we make sure that we keep a rope around
5 all of us so that if we are earlier, that we haven't
6 blown to the four winds.

7 Do you think we could check in at noon
8 amongst us and just see where we are and whether we've
9 had a response?

10 And then, if it really doesn't work,
11 people can be free until 1:30, if not, then we have
12 slightly different schedule. That works?

13 **MR. BIENVENU:** That works for us.

14 **COMMISSIONER GRIFFIN:** Representatives
15 check back here, at the very least at noon, and we will
16 see where we are?

17 **MR. BIENVENU:** Monsieur le Président,
18 avec votre permission.

19 May I simply provide a point of
20 information to the Commission in connection with my
21 friend Mr. Rupar's reference to the McLellan Commission
22 Report on the question of the PAI information?

23 The Commission should know that the
24 comments that were read to it by Mr. Rupar were
25 comments made *sua sponte* by the McLellan Commission,

April 29, 2016

1 without any input whatever by the parties on the
2 question of pre-appointment income and the potential
3 usefulness of that information.

4 It is not a matter that had been
5 debated and about which submissions had been made to
6 the Commission.

7 And your Commission knows that when
8 PAI information was in fact gathered and presented
9 before a Commission, the next Commission, the Block
10 Commission, it found that the information was not
11 particularly useful.

12 I just wanted to make the point that
13 this was not a matter that had been aired and been the
14 subject of submission.

15 Thank you.

16 **LE PRÉSIDENT:** Merci, Maître Bienvenu.

17 It's lunchtime.

18 **--LUNCHEON RECESS AT 11H40 A.M.**

19 **--UPON RESUMING AT 1H25 P.M.**

20 **THE CHAIRPERSON:** I think that
21 everybody is here, so we can start five minutes before
22 our official schedule.

23 It's honour and a pleasure, Chief
24 Justice Crampton, to welcome you. Please, vous avez la
25 parole.

April 29, 2016

1 **CHIEF JUSTICE CRAMPTON:** Merci
2 beaucoup, Monsieur le Président. The honour and the
3 pleasure is all mine.

4 Et j'apprécie énormément l'occasion
5 que vous m'avez accordée d'apparaître ici devant vous.

6 Je sais que vous avez adapté votre
7 processus ce matin, alors merci beaucoup. Merci
8 énormément.

9 **--PRESENTATION BY THE HONOURABLE CHIEF JUSTICE P.**

10 **CRAMPTON:**

11 On behalf of the Federal Court I would
12 like thank you for this opportunity to address one of
13 the issue raised by the Prothonotaries of our Court,
14 and that is the possibility of establishing
15 supernumerary status for the Prothonotaries,
16 supernumerary or some sort of form of part-time status,
17 and I flush that out in my submission that I hope you
18 have, dated March 11th.

19 And you will see at page 3 of that
20 submission, I briefly explain supernumerary status.

21 In a nutshell, I have got it there in
22 the first paragraph under the heading, but
23 supernumerary status allows a Judge who is eligible to
24 retire, who is otherwise eligible to retire and collect
25 two-thirds of his or her salary, to continue working at

April 29, 2016

1 least 50 percent of their time. So it's typically half
2 the workload of a full-time Judge, and to collect 100
3 percent of their salary.

4 So, instead of retiring and having the
5 public pay two-thirds of their salary and get nothing,
6 public pays one more third and gets half their time.
7 So the public is getting what those of us in the
8 business like to call 'a pretty good deal'.

9 They can pay two-thirds and get
10 nothing or they can pay another third and get at least
11 half the time.

12 A lot of people who go supernumerary,
13 as we call colloquially, they don't work the minimum.
14 They in fact more than the minimum, but the minimum is
15 half the full-time workload of a regular Judge. So if
16 you take the 6 weeks off the 52, 6 weeks of holidays,
17 that gives you 46, half of that is 23. 23 weeks would
18 be the minimum.

19 Now obviously there's writing time and
20 so you back writing time off of that, but writing time
21 is often the hardest work, so it shouldn't be
22 discounted. Anyway, I just wanted you to understand
23 what that is.

24 In the provinces, instead of
25 supernumerary status for Provincial Judges, there are

April 29, 2016

1 different formats for part-time status. It might be
2 per diem formats, et cetera. And I have described one
3 or two of them in my submission.

4 Now, the Government graciously
5 consented to an initial request that was made on my
6 behalf for an opportunity to prepare a further
7 submission to you in writing.

8 However, on reflection, it occurred to
9 me that it would be best to appear in person, primarily
10 because I thought it better not to disclose certain
11 facts, and I will explain why in a moment.

12 I thought it would be better not to
13 put those facts in writing in a submission that would
14 then appear on your website, because of the sensitivity
15 of certain information. So, I will get to that in a
16 moment.

17 Now, having reviewed the Government's
18 Reply Submission from March 29th, and obviously its
19 initial submission from February 29th, I consider it
20 important to address the suggestion that there's no
21 evidence of any difficulty in recruiting outstanding
22 candidates to the Office of Prothonotary.

23 That suggestion was maintained
24 notwithstanding my written submission to the contrary,
25 and notwithstanding that similar information was

April 29, 2016

1 communicated orally by the Court's Executive Director
2 and General Counsel to one of the Counsel for the
3 Government, at that person's request on March 17th.

4 I acknowledge that the information
5 that Ms. Henrie, the Court's Executive Director, I
6 acknowledge that the information she provided didn't
7 have some of the detail that I am going to give you
8 here today.

9 So, just to help you focus, at
10 paragraph 5 of its initial submissions from February
11 29th, the Government stated that there's no evidence of
12 any difficulty in recruiting outstanding candidates to
13 either Office, Office of Superior Court Judge or
14 Federal Court Prothonotary.

15 And this position was essentially
16 repeated at paragraph 110 of their Reply Submissions
17 where it was asserted that there is no evidence before
18 this Commission that attracting individuals to the
19 position of Prothonotary is a challenge.

20 So my purpose in coming here today is
21 to give you the evidence that appears to be missing
22 because I said the contrary in my submission dated
23 March 11th.

24 And I said in that submission that we
25 didn't attract a significant number of highly qualified

April 29, 2016

1 candidates when we held a process last fall to
2 establish a pre-cleared pool of candidates in Toronto,
3 Montreal and Vancouver, where we face pending
4 retirements.

5 And the other thing we did in that
6 process was recruit for a vacant position in Ottawa, as
7 well as was our hope to establish a pre-cleared pool in
8 that city as well, because what we're finding is it
9 takes a very long time to fill a vacancy.

10 So we thought if we have a pre-cleared
11 pool, when we have these future vacancies, and I have
12 given you some information.

13 We have two Prothonotaries who are
14 eligible to go, not just eligible but they will have
15 every incentive to retire in two years. So there's two
16 of them who will reach that status in approximately May
17 of 2018, and then there is another person who is
18 already 67.

19 So, we're facing a very real prospect
20 of not having just lost one of the five, but having to
21 lose another three of the remaining five. And we lost
22 the one whose position is vacant right now, last April.

23 It's been a full year that we've been waiting to have
24 that position filled, and it has imposed an enormous
25 burden on the Court.

April 29, 2016

1 I have literally had to take a more
2 expensive Judge, completely out of the judicial
3 rotation and focus only on managing that Prothonotary's
4 files. So very disruptive. So that's why we did what
5 we did.

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 I am going to give you a hand-up in a
23 moment, but you will see the extent to which we
24 advertised across the country last September on
25 multiple occasions, in all of the leading newspapers,

April 29, 2016

1 as well as in leading publications like *The Law Times*,
2 *The Lawyers Weekly*, *CABC Bar Talk*, and the like. You
3 will have that exhibit in a second.

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18 But to be a Prothonotary you
19 absolutely have to have been a litigator.

20 These are people who sit there and
21 have to keep some of the best litigators in the country
22 in line. These are litigators who know where the lines
23 are and how far to push them.

24 It's the Prothonotaries who are
25 keeping them in line whether it's in discovery, whether

April 29, 2016

1 it's in refusal motions, whether it's in other aspects
2 of case management.

3 As you know, many counsel pursue a
4 strategy of no holds barred in litigation, and it's up
5 to the Prothonotaries to keep things streamlined so
6 that the Court can manage its scarce public resources
7 efficiently. Prothonotaries are absolutely critical
8 for that.

9 Now, for the vacant position in Ottawa
10 we received a total of [REDACTED] applications, and this was by
11 far the highest as you can tell from the numbers I have
12 given you a moment ago. This is the exhibit that I was
13 going to hand up. And this has some additional
14 information about that process.

15 So, the Screening Committee that was
16 established to filter and triage those [REDACTED] applications
17 included my Executive Director and General Counsel, Ms.
18 Henrie, who I mentioned earlier, and Prothonotary
19 Tabib, because Prothonotary Tabib is the person who is
20 going to have to work most directly with this new
21 person.

22 So, they referred the top five
23 candidates to a final panel that consisted of
24 Prothonotary Lafrenière, the Minister then Chief of
25 Staff Kirsten Mercer and me. The three of us spent a

April 29, 2016

1 day in December interviewing these five candidates.

2 At the conclusion of our interviews we
3 unanimately agreed that there were only [REDACTED] qualified
4 candidates whose names would be put forward for
5 consideration. And this was after we dropped the
6 bilingual requirement.

7 Why would we do that?

8 Because in the first process that had
9 been held a year prior to that, we had a bilingual
10 requirement and [REDACTED].

11 And so we decided to drop it. We obviously spoke to
12 Prothonotary Tabib because she would be the person who
13 bears the brunt of that. She's bilingual, so she would
14 have to do all the Ottawa French files and then be the
15 person to back up the Prothonotary in Montreal on the
16 French side. And she agreed that if we could get
17 better candidates, she would be willing to do that.

18 And so, she did it, and we took out
19 the bilingual requirement.

20 So we had [REDACTED] candidates who were
21 qualified to do the job but not bilingual.

22

23

24

25 I think that's the language in the *Judges Act*. We

April 29, 2016

1 didn't.

2 So there's Ottawa for you.

3 I have told you what the situation was
4 for Toronto, [REDACTED]

5 [REDACTED] We have to
6 do the background checks.

7 Montreal, there were [REDACTED] and [REDACTED] in
8 Vancouver.

9 I would suggest to you, and with the
10 greatest respect to the Government that that is
11 evidence that is pretty strong evidence of difficulty
12 attracting highly qualified candidates to apply for the
13 position of Prothonotary at the Federal Court.

14 So I have explained to you and I won't
15 repeat that the critical role that the Prothonotaries
16 play in the Court, we need to have the best candidates
17 in these positions. I have explained why.

18 The pool that we try to draw from is
19 essentially the same pool as the pool that we try to
20 draw from for Judges in a sense.

21 Now, in my view, providing
22 Prothonotaries with the same ability as Judges
23 currently enjoy to elect supernumerary status, or to
24 work part-time in some other capacity after working a
25 minimum number of years, would significantly improve

April 29, 2016

1 the Court's ability to attract outstanding candidates
2 in those cities.

3 I can't do any better than to quote
4 the Government's own words in describing the rationale
5 for supernumerary status for Judges, which was at
6 paragraph 102 of its submission, starting at the third
7 sentence of paragraph 102, describing the rationale:

8 *"It was considered a cost effective*
9 *means of retaining experienced*
10 *Judges on the Court who could*
11 *contribute to the Court's workload*
12 *and provide additional flexibility*
13 *to the Chief Justice to manage the*
14 *docket. From an administrative*
15 *perspective a Judge's election to*
16 *assume supernumerary office*
17 *automatically creates a vacant*
18 *position into which a new full-time*
19 *Judge can be appointed, and in this*
20 *way the full-time complement of the*
21 *Court is maintained and the Court*
22 *benefits from the workload carried*
23 *by the supernumerary Judge."*

24 I can't do any better than that in
25 explaining it, but I did give you another quote from

April 29, 2016

1 the Minister in 1971, at page 3 of my submission, when
2 the Minister was describing to the House, I guess the
3 Standing Committee, the benefits of supernumerary
4 status.

5 Now, at paragraph 107, there's just
6 one final thing that I wanted to mention.

7 At paragraph 107 of the Government's
8 Reply Submission it suggested that the issue of
9 establishing supernumerary status or some other form of
10 part-time status for the Court's Prothonotaries, should
11 be addressed within the existing framework that we have
12 with them for determining the appropriate level of
13 public resources that should be accorded to the Court
14 to deal with workload pressure.

15 For the record, I would like to say
16 that I found that particular submission to be quite
17 surprising, to put it charitably.

18 You know, I tried quite hard and to no
19 avail to engage the relevant people at the DOJ -- and
20 that was before the current team, before the current
21 team has been in place -- but I tried to no avail to
22 engage the relevant people at the DOJ on this subject
23 over the course of the first two or three years after
24 being appointed Chief Justice.

25 And in passing, contrary to the

April 29, 2016

1 suggestion at paragraph 105 of the Government's
2 submission, that supernumerary election would not be
3 based on the needs of the Court, I suggest that the
4 needs of the Prothonotary Court are what I have first
5 and foremost in my mind, what I had first and foremost
6 in my mind in preparing my submission and what I have
7 first and foremost in my mind in appearing before you
8 today.

9 It's not Prothonotary Lafrenière,
10 whether it would be best for him personally or whether
11 it would be best for any of the other four
12 Prothonotaries. I am here to represent the needs of the
13 Court.

14 And I would be more than happy to
15 respond to any questions that any of you may have.

16 Merci.

17 **LE PRÉSIDENT:** Merci, Monsieur le Juge
18 en chef.

19 Est-ce que vous avez une question?

20 **COMMISSIONER BLOODWORTH:** Perhaps one
21 question, Mr. Chief Justice. And thank you for your
22 information; it's quite helpful, actually.

23 You have stressed that you feel the
24 supernumerary status would be particularly helpful in
25 attracting sufficient highly qualified candidates.

April 29, 2016

1 Is that because in your view that's
2 even more important than the salary issue at this point
3 in time?

4 And I am not suggesting salaries
5 aren't important, I am just trying to get a relative
6 ranking by you of the candidate issue.

7 **CHIEF JUSTICE CRAMPTON:** Let me just
8 talk about my own experience.

9 I was a competition lawyer at one of
10 the big firms down in Toronto, and I took over [REDACTED]
11 percent pay cut to come and work in the public
12 interest.

13 I had worked in the public interest
14 with the Government, the Competition Bureau, earlier in
15 my career, and then at the OECD, and I just decided
16 that with my last child going to university and me no
17 longer needing to be there in Toronto with them, that I
18 could go back to doing what I found to be most
19 rewarding in my career, and that was working in the
20 public interest.

21 Those are the people that we are
22 targeting.

23 Not too many people out there who are
24 going to come in from the big cities where they are all
25 making way more money than we as Judges make, most of

April 29, 2016

1 the big cities across the country, we're not going to
2 attract them unless they have that kind of idealistic
3 public interest bent.

4 And for me, an important part of the
5 equation, given that I was going to be taking this big
6 pay cut, upfront was the fact that I was going to get
7 this transition, this opportunity first of all, to work
8 after 65 and then to transition, wind down, because
9 it's really tough.

10 We all know, anybody here can -- I
11 won't say that, but a number of people here who have
12 worked in big firms can tell you that it's really tough
13 to stop on a dime, just be working flat out one day and
14 then to, you know, be cold turkey fully retired the
15 next day.

16 So, supernumerary status affords that
17 opportunity, and I have suggested a period of three
18 years, not the ten years for the supernumerary judges.

19 But that was important for me. That was a significant
20 factor for me. I can tell you my experience.

21 So, then I say if that was a
22 significant factor for me, and if you look at the
23 evidence that I have just presented to you, and we're
24 not having success right now, I think it's reasonable
25 to infer that for at least some people who haven't

April 29, 2016

1 applied so far, that that would be a significant
2 inducement, because a lot of us are not ready to retire
3 when the law firms are starting to roll people out at
4 65.

5 A lot of us still have lots to offer
6 to society and are still on the top of our game. And
7 so, I think it's reasonable to infer that if we had
8 this opportunity, we would get more applications.

9 And I submitted the reasons why I
10 thought it was entirely within your jurisdiction to
11 look at this issue and say something about it. I spoke
12 about the link to financial security and I quoted
13 *Mackin* solely in that context.

14 I recognise that *Mackin* dealt with
15 supernumerary status that already existed. *Mackin* said
16 what it said and I quoted it for you, so there's that,
17 and then the link to attracting outstanding candidates.

18 So, it's entirely within your
19 jurisdiction and mandate, I submit, to address this
20 issue and have an independent body such as yourselves
21 with the weight that gets accorded to what you have to
22 say, to say something about that because I honestly
23 think that that would help us in any discussions that
24 we have.

25 As I said, so far I haven't been very

April 29, 2016

1 successful in even walking through the door and getting
2 such discussions, but were you to say something about
3 it, I am optimistic that it would help if you think
4 that it would be in the public interest for this right
5 to elect supernumerary status or to have some other
6 part-time arrangement.

7 If you think that that would be in the
8 public interest, it would be helpful for you to say
9 that.

10 **COMMISSIONER BLOODWORTH:** Thank you,
11 Chief Justice.

12 Maybe just one more supplementary.

13 You propose three years with a renewal
14 annually, if I understood it?

15 **CHIEF JUSTICE CRAMPTON:** Yes.

16 **COMMISSIONER BLOODWORTH:** Can I just
17 ask you about the renewal?

18 Do you have any concerns about the
19 independence issue with someone who is kind of looking
20 for renewal annually?

21 **CHIEF JUSTICE CRAMPTON:** That's a fair
22 question.

23 I got the idea from one of the
24 provinces.

25 So it would be the Chief Justice and

April 29, 2016

1 the Minister, ultimately the Minister on the Chief
2 Justice's recommendation.

3 The reason the Chief Justice is in the
4 mix is if the person were not somebody that the Chief
5 Justice wanted to keep around or thought is still
6 capable of making a significant contribution, then the
7 Chief Justice could make that known and then the
8 Minister would make his or her decision.

9 It's really up to you as to whether
10 you think that's an important part of the equation.
11 Just so you know, we get consulted now.

12 The Chief Justices, as a matter of
13 courtesy when it comes to the Judicial Advisory
14 Committees, we get consulted for our input, and that's
15 the kind of thing I had in mind.

16 **COMMISSIONER BLOODWORTH:** I wasn't
17 concerned about the independence issue of the Chief
18 Justice. It was more the Prothonotaries that are
19 waiting for appointment each year.

20 But thank you very much. That was
21 very helpful.

22 **CHIEF JUSTICE CRAMPTON:** My pleasure.
23 Mon Plaisir.

24 **THE CHAIRPERSON:** Peter?

25 **COMMISSIONER GRIFFIN:** I have no

April 29, 2016

1 questions.

2 Thank you, Chief Justice.

3 **THE CHAIRPERSON:** Thank you, Mr. Chief
4 Justice for we could say that "sensitive" information.

5 You have expressed your concerns in a
6 very significant matter, I would say. And we take good
7 note of what you have said. Thank you very much.

8 **CHIEF JUSTICE CRAMPTON:** Merci
9 beaucoup encore. C'est bien apprécié.

10 **THE CHAIRPERSON:** Louise, may I ask
11 you to proceed with the schedule.

12 **MS. MEAGHER:** Are you prepared to
13 proceed, Mr. Rupar?

14 **MR. RUPAR:** Yes, I am.

15 And what I will do is I will talk
16 about the Prothonotary issue that was raised by Mr.
17 Lokan and Chief Justice right now. And then there's
18 just two other items that I will raise with you, since
19 Mr. Chair, we could paint the picture within the frame;
20 I will take the liberty of doing that very briefly.

21 **--REPLY SUBMISSIONS BY THE GOVERNMENT OF CANADA:**

22 **MR. RUPAR:** I would like to start
23 with, as I did yesterday, talking about context. And
24 when we talk about the context of the Prothonotaries,
25 Mr. Lokan in his submissions this morning took us to a

April 29, 2016

1 certain path. He didn't take us the rest of the way.
2 He didn't talk about the response of the Government to
3 various Commissions. I would like to fill that gap
4 now.

5 And what it includes, the response,
6 was a salary increase, significant salary increase that
7 I will talk about in a moment, to approximately
8 \$234,000 per year.

9 The Prothonotaries are now part of the
10 judicial annuity program as opposed to the public
11 service one that they were with before.

12 There is the representational issue of
13 two-thirds as opposed to full representational costs,
14 but that's by the statute. That's what Mr. Bienvenu
15 pointed to us this morning. That's what the Judges get
16 and that's what Prothonotaries get under the
17 legislation; that was a part of the process.

18 And there is inclusion in this process
19 which is something that was not before. So there are a
20 number of responses the Government made in response to
21 the Commissions, the Cunningham Commission, the most
22 recent one.

23 There was talk about the Military
24 Judges and why they get got full indemnity. That's on
25 a case-by-case basis. They're not part of this

April 29, 2016

1 statute, and it is not something that is governed as if
2 they were in this particular process. That's the
3 difference between the two-thirds and the full
4 indemnity. And there was an *ex gratia* payment made to
5 those Military Judges.

6 And I would just point out that *ex*
7 *gratia* payments can't be used to fill gaps in
8 legislation. So, it's not to say that an *ex gratia*
9 payment can be used to fill the two-thirds -- or the
10 one-third gap that's missing, in the submissions that
11 we heard this morning. So, I just wanted to lay out
12 that context to start with.

13 Going from there, when we look at the
14 Cunningham Report -- and Mr. Lokan took you to this
15 briefly this morning -- the suggestion there was 80
16 percent of Federal Court Judges' salary, which when we
17 look at the numbers is about \$246,000 a year.

18 What the pay is now, the salary now is
19 76 percent which, as I said, is approximately \$234,500,
20 which represents approximately the 70th percentile in
21 that CRA database we were talking about yesterday.

22 And in comparison, the 80 percent
23 would be approximately \$246,000, \$246,800. So, there's
24 about an \$11,000 gap between what the present salary is
25 and what the Cunningham Commission recommended, the

April 29, 2016

1 76th to the 80s. About \$11,000 per annum.

2 And then, as Mr. Lokan said this
3 morning, there are higher percentages that are being
4 put out of 83 and 86 percent. And just for context
5 there, 83 percent would take the salary to \$256,000 a
6 year and the 86 percent would take it to \$265,000 a
7 year.

8 So, as I mentioned yesterday with the
9 judges, we're not talking about a huge gap between the
10 ends of the spectrum. There is a gap and I am not
11 suggesting 10 to \$11,000 or \$12,000 is not significant,
12 but there is a measure of a gap that has to be kept
13 into mind.

14 Now, when we add in the judicial
15 annuity which, as I just mentioned, was added in the
16 latest response, that is worth a value, as Mr. Pannu
17 has pointed out, of approximately 36 percent.

18 And based on the salary of \$308,000
19 that we used, that would bring the Prothonotaries'
20 total compensation to approximately \$312,000 per annum,
21 which would place it in approximately the 80th
22 percentile.

23 And again this is just to situate
24 ourselves where we are in respect of the comparators
25 with the judges, comparators with the private sector.

April 29, 2016

1 Now we just heard from Chief Justice
2 about the issue of attracting candidates and some of
3 the difficulties that the Court has found. And what,
4 with respect, one of the gaps that we have here is
5 linkages between the salary that is present and what is
6 proposed by the Prothonotaries and the supernumerary
7 issue.

8 And I understand better from Chief
9 Justice's comments and from his fulsome written
10 comments, that they have gone through the process and
11 they have identified certain candidates, but they
12 weren't qualified in their view.

13 But we don't have is saying that
14 they're not qualified because -- or that qualified
15 candidates weren't coming through because of that
16 \$10,000 gap or because of the supernumerary aspects.

17 Now, we have the Chief Justice's
18 comments from a few minutes ago about his personal
19 situation, but our submission is that we would need
20 something a bit more concrete to fill that evidentiary
21 gap before this Commission could be confident in making
22 the recommendation that is sought.

23 And that's where we see the difficulty
24 with the request for the higher salary and the ability
25 or inability to attract adequate candidates.

April 29, 2016

1 And I also note that there seems to
2 be, at least with respect to the position in Ottawa,
3 some difficulty in attracting qualified candidates who
4 are bilingual, which of course is a very important
5 factor in the Nation's Capital, given the work of the
6 Court.

7 But I just point that out, that there
8 are other factors that may be at play here with respect
9 to attracting the candidates that the Court feels it
10 needs to fill those positions.

11 Mr. Lokan spent a fair amount of time
12 this morning, or some time, I should say to be fair,
13 using Masters as a comparator to the Prothonotaries.
14 And we do have some difficulty in that there are two
15 different Courts that we're dealing with. You're
16 drawing from two different pools.

17 Chief Justice told us that they seek
18 to draw Prothonotaries from basically the same pool as
19 Federal Court Judges. And the candidates for the
20 Federal Court positions do require some expertise in
21 that Court, in the specialised area of that Court. And
22 rightfully so.

23 It is a Court that deals with
24 specialised areas and administrative law, immigration,
25 admiralty, intellectual property; that is separate and

April 29, 2016

1 apart from the other federally appointed positions.

2 So, it's our submission that the more
3 proper comparator would be with the pool of candidates
4 of the Federal Court. And the Federal Court Judges are
5 where you should be looking at for comparisons in
6 respect to salary.

7 Cunningham said this and this is at
8 our condensed books at Tab 25. I won't take you to it,
9 at page 22, that the Commission found that the most
10 appropriate measure would be with the Federal Court
11 Judges. And that, of course, was commented as well in
12 the Adams Report, which is at Tab 26 of our condensed
13 book, at pages 43 and 56.

14 In fact, in Cunningham they said there
15 was a principled reason for linking their salary to the
16 Federal Court Judges.

17 So, notwithstanding what maybe some of
18 these other reports have said, at least in Cunningham,
19 it said that there was that linkage there.

20 There was discussion, of course, about
21 the Military Judges and how they are or are not
22 appropriate with respect to the base salary comparator.

23 And we'd say this, is that they are in
24 the federal judicial pool that we're talking about:
25 Federal Court Judges, Prothonotaries, Military Court

April 29, 2016

1 Judges. And as we say in our submissions there's the
2 utmost respect for the work of the Prothonotaries.

3 Anyone who has ever been in the
4 Federal Court, as I have been for a couple of decades,
5 knows the work they do, and it's very important and
6 it's not easy work.

7 And it's work that is important and
8 vital to the Court in order to have the Court properly
9 function. But there are distinctions.

10 And as we point out, one of the
11 distinctions with respect to the Military Judges is
12 that they deal with serious criminality, matters of
13 public safety and matters of liberty.

14 And as a point of principle, it is our
15 position that to have Prothonotaries paid more than the
16 Military Court Judges would not be appropriate given
17 the types of work that the two judicial officers do.

18 I won't ask you to do this, to look
19 this up.

20 If we look at Mr. Pannu's letter of
21 March the 2nd of this year, at page 4 he talks about
22 the impact of the addition of the annuity with respect
23 to overall compensation and how that ties into Masters
24 and Provincial Court Judges, and reaches the conclusion
25 that in almost all cases, that total compensation, with

April 29, 2016

1 the annuity, surpasses the total compensation that you
2 would have in those cases.

3 There is some difficulty, he admits,
4 in sorting this out because he can't get all the
5 information that he would need from Provincial Court
6 Judges and the Masters, but that's his general point
7 that he makes.

8 Next I will touch briefly on the
9 supernumerary status.

10 The very eloquent submissions of the
11 Chief Justice that you heard certainly in the context
12 of what he's trying to do with his Court, it rings
13 true. We understand what he's doing in trying to
14 manage the issues that he has in that Court.

15 However, it's important to remember
16 that the supernumerary status is fundamentally a policy
17 decision. And it's a policy decision of the Government
18 with respect to the organisation and the maintenance of
19 the Court.

20 And as I said yesterday when we looked
21 at the *P.E.I.* decision, the Supreme Court has
22 recognised that there is a function in this process for
23 public accountability, and the Government has to be
24 accountable to the public purse.

25 And the issue of adding a

April 29, 2016

1 supernumerary status does add to the overall cost of
2 administration.

3 And as I said earlier, our position is
4 that it is a policy matter that deals with the
5 administration of the Courts, and it's something that
6 is left for the Government on that point.

7 A couple of other points that were
8 raised this morning: the incidental allowance of the
9 Prothonotaries. We are of the view -- I will be
10 corrected by my colleagues here if I am wrong -- but I
11 believe the \$3,000 is what was recommended in the
12 Cunningham Report. And we are prepared, of course, to
13 go to the \$3,000.

14 And the representational cost is
15 something that I dealt with at the beginning of my
16 submission, so I won't repeat why we're of the view
17 that the two-thirds is statutory matter, and it would
18 require an amendment of the Act in order to go beyond
19 what is in the Act.

20 So, those will be our comments with
21 respect to Prothonotaries and the submissions of the
22 Chief Justice.

23 With your permission, Mr. Chair, I
24 would just like to raise two other issues for
25 consideration.

April 29, 2016

1 This morning my friend Mr. Bienvenu
2 raised for the first time, as I understood it, a
3 request to have cost of preliminary motions paid in
4 full. We hadn't heard that before and we don't
5 understand it to be in any of the written
6 representations.

7 And it's not clear if he was seeking a
8 recommendation to change the *Judges Act* or how we were
9 going to deal with that, because it's something that we
10 hadn't seen before.

11 What I can say is that once we get
12 perhaps a clarification as to what it is that the
13 Judiciary are asking for, for special dispensation or
14 *ex gratia* payments or a change to the *Judges Act*, then
15 we can get instructions and we'd have to respond to the
16 Commission in writing.

17 Because it's not a matter, as I said,
18 we had considered because we didn't know it was a
19 matter that was going to be brought up before this
20 Commission.

21 And my last point is one that's been
22 recurring over the last two days that we are of the
23 view -- we just need to clarify slightly -- and that's
24 the issue of timing of this Commission.

25 It was something we saw coming.

April 29, 2016

1 In late 2014, early 2015, we could see
2 that there was going to be a confluence of the start of
3 this Commission and a possible election date.

4 And it's my understanding that there
5 was a reach out to the Judiciary to see if there could
6 be some sort of agreement with respect to how we could
7 deal with this.

8 I understand agreement could not be
9 reached, and so the Westminster Democratic
10 Parliamentary Democracy model that we are in kicked in
11 and Parliament prorogue, and the timing was such that
12 it coincided with the start of what this Commission was
13 supposed to be under the statute.

14 And what we say is that there was
15 nothing untowards to what was going on here.

16 It was just the accumulation of what
17 was happening with respect to the statutory dates of
18 this Commission, and what was happening with the
19 proroguing of Parliament and as I say, our Westminster
20 style of Parliamentary democracy.

21 And it is certainly, as we said in our
22 written materials, something that we are going to look
23 into, and we are aware of this issue, we are aware of
24 the problems that it may have caused with timing and
25 it's something that we are looking into going forward.

April 29, 2016

1 And so, subject to any sur-reply,
2 which I do not foresee, those would be the submissions
3 we will have from the Government on all these matters.

4 **THE CHAIRPERSON:** Thank you, Mr.
5 Rupar.

6 You refer yourself to the context and
7 you're right, we have to refer to the context. But the
8 problem is, of course, how to define that context.

9 And all the information we can get
10 during this hearing is extremely important for us to
11 define the context.

12 Thank you very much. We appreciate
13 your presentation.

14 Louise, the next step could be?

15 **MS. MEAGHER:** I see Mr. Bienvenu
16 asking for the floor, although I did promise Mr. Lokan
17 he would not miss his plane. Are you ready?

18 **MR. BIENVENU:** Absolutely, yes.

19 **MS. MEAGHER:** Are you ready to proceed
20 then, Mr. Lokan?

21 **MR. LOKAN:** I am.

22 And I am in very good shape in terms
23 of timing. So if Mr. Bienvenu wants to go first,
24 that's no problem. Okay.

25 **--REPLY SUBMISSIONS BY PROTHONOTARIES:**

April 29, 2016

1 **MR. LOKAN:** If I can deal quickly with
2 some points by way of Reply.

3 The first arises from a question of
4 Commissioner Bloodworth who asked earlier about the
5 jurisdiction on the supernumerary matter. I submit
6 that that's very clear in Section 26.1 of the Act,
7 which says that we're to look at the adequacy of
8 salaries and other amounts payable under this Act.

9 The supernumerary provision is Section
10 28. So clearly, the scheme for paying supernumerary
11 salaries and that the 50 percent or the one-third for
12 the at least 50 percent of the work is something
13 squarely within the Act. So there can be no doubt
14 about jurisdiction.

15 And even if that were not enough,
16 Section 26.1 goes on to say: "Adequacy of Judges
17 benefits generally." So it's very broad language.

18 Having said that, the Prothonotaries
19 do acknowledge the need for dialogue around the precise
20 details of how that would work. And that, I think
21 address the point about there being policy aspects to
22 that.

23 The second point is when it comes to
24 pension.

25 You will understand from reading the

April 29, 2016

1 Special Advisor's reports of Adams and Cunningham, that
2 there was for a very long time a very unsatisfactory
3 situation with the Prothonotaries.

4 Their pensions were markedly below
5 that of any other judicial officer in the county, and
6 it is very helpful that in 2013, in response to the
7 Cunningham Report, that that situation was fixed.

8 I do want, however, to ensure that
9 Commissioners are not left with the misapprehension
10 that there is something overcompensating about the
11 current regime.

12 If you look at the Pannu Report, and I
13 am going to sidestep whatever debates there may be
14 about appropriate methodology and valuation.

15 I know that's been an issue in the
16 main part of the hearing with respect to the Judiciary,
17 but there is a little bit of information in the Pannu
18 Report on the pension arrangements for Masters in other
19 jurisdictions. It's in the condensed book at Tab 10,
20 page 108.

21 What you see is a series of columns in
22 which Mr. Pannu has compared the pensions available to
23 the Masters in the provinces that have them, with the
24 pension available to the Prothonotaries, and it very
25 much depends on the age of appointment, because as we

April 29, 2016

1 know, under the judicial annuity you reach your 66 and
2 2/3 maximum and it doesn't increase from there.

3 With the provincial schemes, a number
4 of them, it's a 3.5 percent a year accrual and you keep
5 on accruing until 20 years, and it tops out at 70
6 percent. And if you have a somewhat higher salary to
7 begin with, as some of them do, you can actually reach
8 a higher pension.

9 We know from the Adams Report, and
10 we're dealing with the same complement except for one
11 Prothonotary, that the average age of appointment of
12 Prothonotaries is 48-49. So the closest column that we
13 have in the Pannu Report is the second from the left.
14 That's appointment at age 45.

15 It's clear from that that if you
16 compare a Master in one of the western provinces with a
17 Prothonotary, you get numbers which are very much
18 within the same range.

19 Certainly if we're talking about
20 appointments later in life, then the Prothonotaries
21 would perhaps have an advantage, but that hasn't been
22 the pattern to date.

23 So, there is no pension windfall to
24 the extent that the Government was making any
25 suggestion of that kind.

April 29, 2016

1 My third point, which I think I hope
2 is a quick answer again to a concern of Commissioner
3 Bloodworth.

4 You asked were there any judicial
5 independence implications of a scheme whereby
6 supernumerary status would be renewed on the
7 recommendation of the Chief Justice.

8 The answer is no, there are not. And
9 we know because that precise point has been has been
10 litigated. The Ontario Deputy Judges Association
11 brought that matter to the Ontario Court of Appeal and
12 I will simply give the citation and the paragraph
13 number. And it says that's fine because it rests on
14 the recommendation of the Chief Justice.

15 It is not something that's left to the
16 Government to decide, whether they approve or don't
17 approve of a particular appointee and the way that
18 their decisions have been going.

19 So that is in the CanLii system 2012,
20 ONCA-437, paragraph 6.

21 So the next point is that the
22 Government suggests: 'Well, we really don't have
23 concrete that if you were to implement a supernumerary
24 program or raise the salary by say, 10 or 11,000 to
25 reach the 80 percent level or somewhat higher, to reach

April 29, 2016

1 the comparability with Provincial Court Judges and
2 Masters, whether that would make a difference to the
3 quality of the candidates.' And that's offered as a
4 reason not to do it.

5 There is a little bit of circular
6 logic there that is perhaps troubling.

7 If you never take that step, how can
8 you ever know whether it would have helped or not.

9 At a certain point you just have to
10 rely on your common sense, particularly given the
11 findings of past Special Advisors about how these are
12 people who live in big cities and these are people who
13 must come as litigators, and they're often from top
14 private firms.

15 Of course there's always going to be
16 an element of public service. People go into the
17 Judiciary to make a lot of money, but the bigger the
18 gap, the harder it is to do. So, with respect, that
19 submission should not be adopted.

20 The next point is that the Government
21 says: "Really look within the Federal Court system
22 rather than looking to Provincial Masters, Provincial
23 Court Judges, because as Special Advisor Cunningham
24 said, the most important comparator in a lot of senses,
25 the Federal Court Judges themselves with whom the

April 29, 2016

1 Prothonotaries work.

2 What I would respectfully submit is
3 that you can take a lot of comfort from the work of
4 Commissions in the provinces that have determined that
5 the appropriate ratio of Masters to Superior Court
6 Judges where you have the same pattern, Masters work
7 side-by-side with the Superior Court Judges, they
8 perform the same case management functions, they deal
9 with procedural and often substantive issues, and they
10 have determined that the ratios of more than 80
11 percent, in the 83 to 86 percent range, is appropriate.

12 So, knowing that that is a good ratio
13 that's been looked at by other Commissions and found to
14 be constitutionally appropriate and fair and
15 reasonable, you can likewise say: 'Well, that's a ratio
16 that makes sense within the Federal Court.'

17 So, we say it is not at all
18 inconsistent with that principle of internal equity to
19 be looking at the ratio of Provincial Masters to
20 Provincial Superior Court Judges.

21 That finally brings me to the issue of
22 the Military Judges.

23 And I simply point out without
24 repeating myself that the liberty of the subject
25 argument is dealt with in the Bannock Report.

April 29, 2016

1 Of course it's very important whenever
2 you have a judicial officer dealing with liberty of the
3 subject, but that is not to devalue the work of those
4 judicial officers and Judges on the civil side, who
5 also deal with very complex issues.

6 For example, a Prothonotary could deal
7 with a critical, critical substantive issue on a
8 *Charter* case that affects people across all of Canada.

9 It may not be liberty of the subject, but there's no
10 way that it is any less important than liberty of the
11 subject.

12 And you will see from the book that
13 the Prothonotaries filed that the Military Judges
14 actually had a recommendation that was that they be
15 substantially increased about the 76 percent level. And
16 the Government responded in 2012 saying: 'No. We're
17 not going to do that.' And really, there were two
18 factors that were cited.

19 One is the one I have already
20 mentioned that they are within a closed system.

21 They're drawn from the ranks of the
22 military and so the Government itself relied on the
23 fact that they were distinguishable from the general
24 population of lawyers and judges in Canada.

25 But the second was 2012 was early

April 29, 2016

1 enough in relation to the *Expenditure Restraint Act*,
2 with the federal wage restraint legislation that the
3 Government said: 'You can't be making an exception for
4 Judges when everybody else is being required to tighten
5 their belts.'

6 So that was very much a global
7 financial crisis aftermath kind of decision. We have no
8 idea, of course, what's going to happen in this round.

9 Subject to any questions, those are my
10 Reply Submissions.

11 **THE CHAIRPERSON:** Thank you, Mr.
12 Lokan.

13 I think your comments are very
14 interesting for a good understanding of that situation.

15 Thank you.

16 And I understand, Louise, that we pass
17 to...?

18 **MS. MEAGHER:** We had undertaken with
19 Mr. Nuss that he would have the lunchtime to reconsider
20 whether he had more.

21 **PROTHONOTARY LAFRENIÈRE:** Monsieur le
22 Président, est-ce qu'on pourrait être excusés?

23 On a un avion à prendre?

24 Avec votre permission, est-ce qu'on
25 peut être excusés pour quitter?

April 29, 2016

1 **THE CHAIRPERSON:** Yes, of course.

2 And thank you. Thank you for your
3 participation.

4 Monsieur le Judge en chef a été très
5 sensible à votre participation et je voudrais nous
6 excuser s'il y a eu ce petit, un moment donné, point
7 d'interrogation concernant la partie formelle de cette
8 conférence.

9 Donc, merci d'avoir finalement été
10 avec nous. On apprécie beaucoup que vous soyez avec
11 nous.

12 **LE JUGE EN CHEF CRAMPTON:** Ne vous en
13 faites pas.

14 **LA COUR:** Alors, bon voyage de retour.
15 So, Mr. Nuss?

16 **MR. NUSS:** Thank you, Mr. President.
17 I have nothing to add to what I said previously. So I
18 have completed my reply.

19 **THE CHAIRPERSON:** Thank you.

20 **MS. MEAGHER:** Mr. Bienvenu, you had
21 wanted to speak earlier, I am not sure what you wanted
22 to say.

23 **MR. BIENVENU:** I have three very brief
24 points to make rising directly from matters that were
25 raised in the submissions you have just heard, if it is

April 29, 2016

1 of interest to the Commission. It's going to take no
2 more than five minutes.

3 **THE CHAIRPERSON:** Please go ahead.

4 **--REPLY SUBMISSIONS BY THE CANADIAN SUPERIOR COURTS**
5 **JUDGES ASSOCIATION AND THE CANADIAN JUDICIAL COUNCIL**
6 **(THE JUDICIARY):**

7 **MR. BIENVENU:** The first point is to
8 draw the Commission's attention to the fact that the
9 submission of the Government that there is no evidence
10 of any difficulty in recruiting outstanding candidates
11 to the Office of Prothonotary is also made in respect
12 of Judges.

13 Chief Justice Crampton's submission
14 speaks for itself insofar as candidates to the Office
15 of Prothonotaries is concerned, and I submit that what
16 Chief Justice Crampton's experience reveals is that no
17 implications can be drawn by the Commission as to the
18 ability to recruit outstanding candidates from a mere
19 consideration of the number of applicants.

20 That I think is a very important
21 message to keep from the experience that Chief Justice
22 Crampton has shared with the Commission.

23 My second point is a reaction to my
24 friend Mr. Rupar's invitation to clarify our position
25 as to representational costs.

April 29, 2016

1 I thought I made clear, and accept his
2 invitation to clarify that we are not seeking a
3 variation of the rule of reimbursement of
4 representational costs as it applies to judges.

5 Had we wanted to seek such a
6 variation, my friend is quite right that the time to do
7 it was in our Main Submission or our Reply Submission.

8 What I have said however is and am
9 seeking to illustrate our support for the request of
10 the Prothonotaries is that participants do not control
11 this process. It is a parade that once it is in
12 motion, you have to follow.

13 And I have given examples of steps in
14 that parade, it's not the best of metaphors, I
15 apologise, that we're extraordinary this time around,
16 and those steps have caused additional costs to be
17 incurred by the Judiciary, and it as to these costs
18 that I said that a case could be made that those should
19 be treated separately from the representational costs
20 reimbursement rule in the Act.

21 My third point is a point of
22 information.

23 Mr. Rupar is correct in saying that
24 very early on, it was at the end of 2014, the
25 Government reached out to the Judiciary and floated the

April 29, 2016

1 suggestion in a very constructive way, I wish to say,
2 to defer the date of the Commission's Inquiry
3 altogether because of the impending election.

4 And that suggestion was given due
5 consideration by the Judiciary, and the proposal that
6 we made instead was to agree on the early appointment
7 of Commissions members so that the Commission itself
8 can decide what impact the election should have on its
9 inquiry.

10 We didn't want the parties to take for
11 granted how an impending election should impact the
12 work of the Commission. And you will see that
13 reflected in the correspondence attached under Tab A of
14 the Judiciary's book of exhibits.

15 You will see in Deputy Minister
16 Pentney's letter of 20 February, there's a reference to
17 our meeting, and he confirms there the parties'
18 agreement and I quote: "*Desirability of early*
19 *appointment of the members of the Commission.*"

20 I responded to that letter on behalf
21 of the Federal Judiciary on March 12th, and wanting to
22 be concrete, I acknowledge the agreement both parties
23 on the desirability of early appointment, and proposed
24 that both parties undertake to communicate to the other
25 the name of its nominee at the end of April 2015, and

April 29, 2016

1 invite them to nominate the Chairperson by the end of
2 May 2015. So that was, if you will, our proposal.

3 And the idea was then to have time for
4 you as Commission members to decide, having heard the
5 parties, what impact an election should have on the
6 timing of your inquiry.

7 In the event the Government, and I
8 certainly do not blame the team of colleagues that are
9 before you, but in the event the Government was not
10 able to communicate the name of its nominee within the
11 timeframe that we propose, it came much later, and you
12 know when that proposal was made by the exchange of
13 correspondence under Tab B, concerning the initial
14 nominee. It came on June 5, 2015.

15 And then because the nominee was who
16 it was, further delays were caused because of the
17 concern arising from the nomination. So that's the
18 background. A very constructive initial suggestion by
19 the Government counterproposal, and then an agreement
20 on the early appointment, and that did not come into
21 being.

22 So, that's sort of the complete
23 picture I wanted to give on that point.

24 And those are the only three points I
25 wanted to cover.

April 29, 2016

1 Thank you for your attention.

2 **THE CHAIRPERSON:** Thank you. Merci,
3 Monsieur Bienvenu.

4 Et Louise, on procéderait maintenant à
5 la clôture.

6 Well, it's time to conclude the public
7 hearings of the Fifth Commission. Thank you all for
8 your participation. We have appreciated your
9 presentation.

10 Margaret and Peter join me to thank
11 you.

12 I think it will be extremely useful
13 for the continuation of our work for our Report, for
14 our Recommendations.

15 What we will have to do in the next
16 few days is analyse your presentations, your
17 submissions, and make sure that we have that
18 understanding that we should have regarding these
19 recommendations according to the mandate we received
20 from the law. We should be able, probably, to respect
21 our schedule, respect the timing we are supposed to
22 respect.

23 But may I ask you, Peter, to say more
24 about that, about the work we have in front of us?

25 **COMMISSIONER GRIFFIN:** I will give you

April 29, 2016

1 the short version.

2 As the Chair has said, it's our
3 intention to try and meet the timing that we face. And
4 if we conclude that that's something that is not
5 possible, we will deal with that early as opposed later
6 in the process, but that's what ahead of us.

7 What will help us is if those who were
8 going to give us some additional information could let
9 Ms. Meagher know on Monday, what they schedule they
10 anticipate meeting with respect to that.

11 I appreciate some of it is simpler
12 than other parts, but that will help us to understand
13 what we expect to see when, and I can assure that on
14 behalf of all three of us, we've got lots to think
15 about as a result of what were terrific submissions,
16 obvious interest and participation.

17 And we come out of this part of the
18 process energized by what you've done for us. Thank
19 you.

20 **THE CHAIRPERSON:** Thank you, Peter.
21 Margaret, do you want to add
22 something?

23 **COMMISSIONER BLOODWORTH:** I will just
24 add my personal thanks for all the submissions.
25 Written submissions were excellent, but I have learned

April 29, 2016

1 a lot in the last day and three-quarters as well. And
2 I appreciate all the time and effort that obviously
3 every party around the table has put into doing that.

4 It will be immensely helpful as we
5 puzzle our way through in the next few days and weeks,
6 exactly on what we will conclude. So, my thanks.

7 **THE CHAIRPERSON:** We have to thank
8 Louise, our Executive Director.

9 Thank you very much for all that so
10 sensitive work at the end of the, I could say, last
11 morning, to prepare everything, that we can close the
12 meeting today, just in time to have a good weekend.

13 Thank you very much. It was very
14 effective work.

15 Thank you very much, Louise.

16 I just want to say thank you to Marie-
17 Ève Lamy, Counsel to Denton's. She helped me a lot to
18 prepare these hearings.

19 Thank you to you, Monsieur Bolduc, et
20 les interprètes. Merci. Thank you.

21 Have a good weekend.

22 **--WHEREUPON THE HEARING CONCLUDED AT 2H30 P.M.**

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April 29, 2016

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CERTIFIED TRUE AND CORRECT.

LE TOUT EXACT ET CONFORME.

M. Bolduc, S.O./CCR